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Paper by Eleanor M. Fox

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The Symbiosis of Democracy and Markets

-- Paper by Eleanor M. Fox[*] --

1. Introduction

1. Democracy requires markets. Markets do not require democracy. This is because markets have two functions: service to democracy (rights) and service to economic efficiency. Thus, in a society that has adopted a democratic form of government, markets do double duty. They produce the tight and virtuous fit between safeguarding civil liberties and economic liberties, on the one hand, and meeting people's needs and building the nation's economic standing in the world, on the other. A society that has a communist form of government may adopt markets because of the utilitarian work they do that cannot be done well by command-and-control: to meet people's needs and build economic standing in the world.

2. Democracy has many facets. Several are obviously sympathetic with well-functioning markets. Principal among these are voice, participation, accountability, due process, freedom to compete, and a fair shot. Democracy also includes a major negative goal likewise symbiotic with markets: it is against autocratic power and privilege and control by the few for the few. In this essay I show how competition law and policy has invoked these values over time, and I consider how it might do so in the future. I discuss, particularly, the antitrust law of the United States, and include references to the competition law of the European Union and of transitional and developing countries, and to global norms. While the account may read like a short picaresque novel, finding relevance here and there as we go along, it has an infrastructure. Democracy is not just the sum of the links we find here and there. Democracy is the major character in the play. We see this most clearly from the three inflection points that are part of my story: first, the "war" on Hitler's fascism in enacting the US merger law (1950); second, also from World War II, the European quest for peace through economics in establishing the European Economic Communities among democratic nations (1952/1957); and third, the fall of the Berlin Wall (1989) and the virtually reflexive adoption of markets along with democracy. Between the pillars, in the statutes, caselaw, and rhetoric, there is sporadic invocation of democratic values in competition law and policy, and there is skirmishing between schools and perspectives (more equity, more efficiency, more freedom from government), each claiming its own "right" perspective on democratic values; but this is all within a framework that extolls both democracy and markets and their symbiosis.[1]

3. Here are the outlines of my story: In the United States, for most of the 20th century, antitrust was the economic democracy of markets. It prohibited exclusions and coercions of the "little guy" and took a stance against economic concentration. In 1980 the tide turned; policy-makers and courts cut off the links of antitrust to political economy

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[1] I do not imply that all people in a democracy extoll markets. Indeed, a critical mass believes that, in a just society, markets are a problem. This belief may account for a brand of populism against free trade and competition.

(at least the version that had special regard for the underdog), and US antitrust was recalibrated for efficiency with a laissez faire gloss. Meanwhile, the European Union, building on the democratic moment of the end of World War II, and urgently responding to the need for peace, developed a version of competition law that bows to openness and access. A next big democratic moment again had large implications for markets and competition – the fall of the Berlin Wall at the end of 1989. It and a financial crisis in developing countries (which got aid with conditionalities from the international financial institutions) brought democracy, markets and competition to a large set of countries. The democracy/competition values have spread around the world, even to nations that adopt forms of governance other than democracy. The democracy/competition values have the potential to infuse the development of global norms. A question for the future, taking into account both the surge of nationalistic impulses and the counter-push of digitalism and new border-defying technologies: Will they, and how might they?

2. Democracy and Antitrust in America 1890-1980

> *"If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade . . . "*

4. So said Senator John Sherman to the US Congress in 1890.

5. The US Sherman Act was adopted as a charter against power and privilege which was being used by the great industrialists against farmers, entrepreneurs, and consumers. But Congress spoke in few and Delphic words and left it to the courts to interpret what Congress meant (by "restraint of trade" and "monopolization"). Over time, the Justices of the US Supreme Court disagreed about what freedom of trade means, with early Justices Edward D. White and Oliver Wendell Holmes asserting a libertarian view of freedom from government regulation and John Harlan articulating a vision of antitrust that would protect the people from economic oppression by great concentrations of power.[2] Justice Harlan said, concurring in the result to break up Rockefeller's Standard Oil Company:

> *"All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery -- fortunately, as all now feel -- but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country .... [T]o the end that the people ... might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends,*

[2] See E. Fox, Cases and Materials on US Antitrust in Global Context, 21-39 (3d ed. West 2012).

"In 1896 he [Justice Harlan] was the only member of the Supreme Court who believed that segregation in railway cars was unconstitutional." http://spartacus-educational.com/USAharlanJ.htm.

regardless of the general interests and welfare, Congress passed the Anti-Trust Act of 1890 …"[3]

6. The two divergent ideologies of the freedom protected by democracy, markets and the competition laws have persisted over time, with the Holmesian thread traced to Justice Scalia,[4] and the Harlan thread traced to Justice William O. Douglas.[5]

7. Developments in the late 1930s led to a consolidation behind the humanistic, fear-of-power view. Hitler's power was growing, and Hitler was using Germany's few and gigantic corporations to implement his agenda. On April 29, 1938, President Franklin D. Roosevelt gave a "message to Congress on curbing monopolies," saying:

"Unhappy events abroad have retaught us two simple truths about the liberty of a democratic people.

The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. "

8. Within the next few years Congress established the Temporary National Economic Committee to investigate "The Causes and Consequences of Industrial Concentration," producing a long report and longer appendices, Congress held extensive hearings on the social and political dangers of concentration, the Federal Trade Commission offered various drafts of a bill to amend the Clayton Act to tighten up the merger law, and in 1948 Representative Emanuel Celler and Senator Estes Kefauver introduced a bill to check increasing concentration by mergers, whether horizontal, vertical or conglomerate. This became the Celler-Kefauver Amendment of 1950 to Section 7 of the Clayton Act, which is the US merger statute today. Introducing the bill to the House of Representative, Senator Kefauver and then Congressman Celler said:

9. *Senator Estes Kefauver*:[6]

*"I feel, gentlemen, that if our democracy is going to survive in this country we must keep competition, and we must see to it that the basic materials and resources of the country are available to any little fellow who wants to go into business." * * **

" … The evil of … [great concentration] is quite apparent. When people lose their economic freedom, they lose their political freedom."

[3] Standard Oil Co. v. United States, 221 US 1, 83-84 (1911).

[4] 540 US 398 (2004).

[5] See Fox casebook supra.

[6] Celler-Kefauver Amendment: Hearings on H. R. 988 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Congress, May 18, 1948, p 12.

10. Congressman Emanuel Celler:[7]

> *"Our greatness as a Nation rises or falls as the dignity and independence of the individual, the small-business man, the mechanic, the small shopkeeper, and so on, contracts or expands. In other words, the worth of the individual is the worth of the Nation; no more and no less. That* which strengthens the individual bolsters the Nation; that which dwarfs the individual belittles the Nation. The individual and small-business man cannot flower amidst the weeds of monopoly."[8]

11. The Supreme Court first encountered the amended Clayton Act in *Brown Shoe Co. v. FTC*[9] in 1962 and interpreted it sympathetically with the wishes of Congress to stop increases in concentration in its incipiency. In numerous other antitrust cases that followed, the courts opened market opportunities for firms without power.[10] Throughout the 1960s and into the 1970s, the courts gave little regard to economic analysis, and caselaw prohibited even small firms from adopting conduct that might have increased their economic effectiveness. As trade barriers in the world lowered, the handicap on efficiency became more visible, laying the path for embrace of Chicago School's perspective and premises when the Reagan Administration took office in 1981. The new policy makers disowned "the democracy of the market." The new chief concern was that antitrust enforcement might protect inefficient small firms, chill the competitiveness and innovation of (even) the dominant firms, and raise prices to consumers.[11] While a post-Chicago movement pushes back on Chicago's "markets always work" premises and requires evidence instead of presumptions, the dominant trend (but not the only one) in the US today takes a laissez faire posture to non-cartel conduct.[12]

12. Perhaps the most recent judicial cry for the economic democracy of antitrust is the opinion of Judge Dolores Sloviter for the court in the loyalty rebate case, *LePages v. 3M*: [13]

> *"[T]he provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists, is the equivalent in our economic sphere of the guarantees of free and unhampered elections in the political sphere. Just as democracy can thrive only in a free political system unhindered by outside forces, so also can market capitalism survive only if those with market power are kept in check. That is the goal of the antitrust laws."*

13. Far more commonly, the goal is articulated as consumer welfare or efficiency, and loyalty rebate cases are decided by efficiency principles often with a trust-the-market gloss.[14]

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[7] Id. pp 14-15.

[8] Id.

[9] Brown Shoe Co. v. United States, 370 US 294 (1962).

[10] E.g., United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass 1953), Judge Wyzanski, aff'd, 347 US 521 (1954).

[11] See R. Pitofsky ed., How The Chicago School Overshot the Mark (2008).

[12] See Trinko, supra; Pacific Bell Telephone v. Linkline Communications, 555 US 438 (2009).

[13] LePage's, Inc. v. 3M, 324 F.3d 141, 169 (3d Cir. 2003).

[14] E.g., Cascade Health Solutions v. PeaceHealth, 515 F3d 883 (9th Cir. 2008). There is a split of the circuits. It might be observed that the efficiency principles do not take account of the fact that

14. Other democracy or equity-regarding cases have been overturned or reversed in the modern era. For example in *Silver v. New York Stock Exchange*, Silver's trading wires (his life blood of business) were cut off for reasons apparently having nothing to do with his performance, and without notice or explanation. The Supreme Court held in 1963 that in such a case, because of the deprivation of due process, this conduct was an illegal per se boycott unless justified.[15] But in 1985 in *Northwest Wholesale Stationers v. Pacific Stationery*,[16] the Supreme Court implicitly overturned *Silver* by holding that lack of due process has no place in antitrust analysis. And in *Verizon v. Trinko*, the circuit court held that the incumbent telecom company (the monopolist just before liberalization) offended the antitrust law by systematically depriving the new entrants of seamless telephone service from the local loop in an attempt to keep its customers from migrating to the recently allowed entrants; but the Supreme Court reversed, holding that the incumbent had no duty to deal and insisting that duty-to-deal obligations are normally perverse "forced sharing" that undercuts incentives of the dominant firm.[17]

15. Another line of US democracy-related cases exonerates the interest of free speech and a right to give and receive (truthful) information, which the Supreme Court upheld in lawyer advertising cases.[18] The cases tore down barriers that effectively kept providers of low-priced legal services out of the market.

16. We shall leave the ambiguous US "antitrust law of democracy" and turn abroad.

3. The European Community, the European Union

17. In 1957 in the aftermath of World War II, the original six Member States formed the European Economic Community. They had already formed the Coal and Steel Community five years before. The basis of the European Communities was peace by economics, and the economics would depend on tearing down the internal market barriers, public and private, and establishing a single market. The competition law is contained in the Treaty itself, for exercises of private power were as anathema as exercises of state power, and both had to be controlled to establish a common market. A prerequisite to admission to the now much larger European Union is Democratic government. The symbiosis of democratic and market values is reflected in the centrality of openness and access (and accountability, transparency, and freedom from privilege as well). The EU cases today embrace modern economics but have no trace of protecting libertarian-style freedom. No voice of Scalia or Holmes. But there is a strong voice for connectivity and community, as in the project for a single digital market.

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the incumbent's strategy to exclude is normally triggered by the "better idea" of the plaintiff firm, and the plaintiff's dynamic efficiency is not credited.

[15] 373 US 341(1963).

[16] 472 US 284 (1985).

[17] See Trinko, supra. Although Trinko involved sector regulation of exactly the conduct challenged as an antitrust violation, under the principles of law formulated by the Court these facts were not controlling.

[18] See Bates v. State Bar of Arizona, 433 US 350 (1977).

4. Transitional and developing countries

18. Both transitional and developing countries have come into the world's antitrust family in large numbers since the democratic moment of the fall of the Berlin Wall. As Russia and Central and Eastern Europe moved from communism to democracy, they moved from command-and-control to markets. As they moved to markets they adopted competition laws, for the various reasons of: controlling greed, incentivizing efficiency, and vying for membership in the European Union. The transitional nations added the following helpful dimension to the values of autonomy and freedom-to-compete: The nations' markets were so cluttered with state-granted privileges and state restraints that the competition legislation gave the competition authorities competence to challenge anticompetitive state and local restraints. While the European Union already did and does this task in the context of a common market, the transitional countries pioneered this function as a matter of competition law within their own nations,[19] and today, along with China, offer the possibility of this model to the world.[20]

5. Developing countries

19. We have seen exponential growth in developing countries' adoption of modern competition laws.[21] The developing countries offer one more dimension of the democracy/competition link. Especially in developing countries, huge percentages of the population are living below the poverty line. Large portions of the population have been left out and kept out of the economic mainstream, most egregiously by apartheid in South Africa and Namibia but also by governance (often corrupt) by and for the few. Developing countries face the human dimension of the historic exclusions. Many of their economies cannot become efficient without mechanisms for greater inclusiveness. The competition agencies in these countries embrace modern economic analysis; modern economic analysis fit for the countries may include particular regard for breaking down barriers and making the environment friendly to entry and success of the outsiders.[22]

20. In 2015 the United Nations promulgated the Sustainable Development Goals.[23] The SDGs recognize that nearly a billion people live in deep poverty; the children are hungry and undernourished, and millions of children of school age are out of school. The SDGs deal in the first instance with goals for providing food, medicine and education for the very poor. They also deal with empowerment of the people to help themselves. Access to markets empowers people. In competition cases of exclusionary practices,

[19] See E. Fox and Deborah Healey, When the State Harms Competition – the Role for Competition Law, 79 Antitrust L.J. 769 (2014).

[20] Some nations hold separation of powers as a higher democratic value.

[21] Many had unfair competition laws before the 1990s. Some of these contained rules against price-fixing, but many also protected firms from competition and had no concept of hard competition that should be protected.

[22] See J. Stiglitz, Towards a Broader View of Competition Policy, Chapter 1 in Competition Policy for the New Era: Insights from the BRICS Countries (2017); E. Fox, Outsider Antitrust: "Making Markets Work for People" as a Post-Millennium Development Goal, Chapter 2 in Competition Policy for the New Era, supra.

[23] http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

access to markets by entrepreneurs without power can be deemed more important than preserving incentives of dominant firms to innovate.[24]

21. The competition authorities of developing and transitional countries make a related contribution. Competition *policy* may be more important than or at least equally important as competition law *enforcement*. The agency officials have a daunting responsibility. They need to survey the territory widely and identify whatever it is that is holding back competition, entrepreneurialism, and innovation in their countries. They may need to create environments for competition. They may need to create markets. They may need to destroy state obstructions and built-in barriers.[25] They may need to lay a platform for education. They ARE the voice of competition and markets for the people and they need to do the job or identify or educate others to do it,[26] comprehensively. They have raised the profile of what the West calls competition advocacy; but to the extent that competition advocacy connotes "adjunct," it is the wrong word because the task is central.

22. All of these efforts correspond with the democratic value of giving people a fair chance, and making markets work for the people.

6. The World

23. Is there a symbiosis of competition and democratic values on world level?

24. The establishment of community, and the efforts of nations to adopt systems that work together harmoniously, are democratic values. This includes mutual access to markets and mutual respect and regard. We live in an interdependent world, and the global economy with constantly evolving new technologies has impacts around the world. Cosmopolitanism is a democratic value. So too are policies that help the people rather than policies that aggrandize the privileged powerful few, and policies that avoid imposing costs on neighbors by conduct condemned as illegal at home.

25. The new surge of nationalism runs counter to this global vision. Nationalistic policies disregard or are happy to harm those outside the nation's borders, for strategic advantage. They promote a world of double standards and tit for tat. There is room for development of global norms that would promote a sympathy of systems. The project can be advanced within the international competition institutions: OECD, ICN, and UNCTAD.

[24] See David Lewis, Thieves at the Dinner Table (2012).

[25] See Hernando de Soto, The Other Path (1989); Simon's book; Simon Roberts, ed., Competition in Africa: Insights from Key Industries (2016); J. Klaaren, S. Roberts and I. Valodian, eds., Competition Law and Economic Regulation: Addressing Market Power in Southern Africa (2017).

[26] E.g. World Bank Group, Breaking down barriers : unlocking Africa's potential through vigorous competition policy (2016), at http://documents.worldbank.org/curated/en/243171467232051787/Breaking-down-barriers-unlocking-Africas-potential-through-vigorous-competition-policy.

7. Conclusion

26. Democracy requires markets. The three inflection points from the history of democracy and the defeat of totalitarianism illustrate the inextricable connection, from democracy to markets and (albeit incompletely) from markets to democracy. Developing countries' inclusive sustainable development value fits nicely with the democratic mandate that, if markets are for democracy, then markets must work for the people.

27. The links between democracy and markets are virtuous. They deserve to be nurtured, on national, regional and world levels.