THE DECLINE, FALL, AND RENEWAL OF U.S. LEADERSHIP IN ANTITRUST LAW AND POLICY

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The United States has lost its world leadership in antitrust, evidenced by its narrow conception of market power and its abuse. This essay pinpoints exactly where the U.S. has fallen behind and suggests how it can regain footing, this time not as hegemon but sharing the reins with sister jurisdictions.

I. INTRODUCTION

The United States was the pioneer in antitrust law. By and through the 1960s and most of the 1970s, it developed a law that was harsh on price-fixing, harsh on powerful firms' exclusionary practices, and harsh on mergers that consolidated power. It was admired world over as the leader in competition law and policy.

Post-World War II, U.S. antitrust was exported to Germany and Japan as the economic law of democracy. In the late 1950s, to anchor peace in Europe, six European nations formed the European Economic Community (later to grow to 28 nations and then to contract to 27), drawing from the U.S. Sherman Act as well as from the German law against restraints.

Over the next many years, scores of nations adopted competition law, taking lessons from both the U.S. and the EU. But by early in the new millennium, the bloom was off the U.S. anti-monopoly rose.

U.S. monopoly law shrank in its reach while public concerns about monopolies grew. People came to fear that very big business – epitomized by Big Tech – was taking control of their lives; that the market system works for the elites, not for "the people"; that the unbridled market facilitates growth of power; that U.S. antitrust just stands by, while Europe (and others) heed a call to action.

What are the characteristics of the U.S. law that may be responsible for its loss of hegemony? This essay will catalog them with particular regard to Section 2 of the Sherman Act, which is exemplary. Can the deficits[2] be cured and U.S. leadership regained? After cataloguing the characteristics, the essay reflects on the current winds of change and suggests a way forward.

II. SALIENT CHARACTERISTICS OF U.S. ANTITRUST LAW, WITH A FOCUS ON UNILATERAL CONDUCT

This section identifies eight characteristics which seem to have played a role in the shift of hegemony from the U.S. to the EU.

1. Limits inherent in Section 2. Section 2 of the Sherman Act has built-in limits by reason of its terminology and coverage. Section 2 of the Sherman Act prohibits "monopolization," implying a higher level of power than EU "abuse of dominance" (prohibited by EU Treaty ("TFEU") Article 102). Moreover, EU Article 102 covers exploitative conduct (such as charging excessive prices) as well as exclusionary acts, while Section 2 covers only exclusionary acts; and EU Article 102 prohibits exclusionary acts that distort competition on the merits, such as leveraging by gatekeeping platforms to secure advantages, while Section 2 prohibits only exclusionary acts that increase market power and harm consumers, typically evidenced by higher prices and lower output.[3]

Meanwhile, especially in new economy markets, we see market players bigger than nations; they appear to have significant power, which may not count as monopoly power under Sherman Act precedents, and many of the documented abuses are either exploitative or distortive of competition on the merits without lessening output. Thus, the Sherman Act has blind spots, and many dominant firm abuses fall within them. At least, it may take an army of lawyers and economists to make the long march uphill to the courts, knowing that they face a real risk of final dismissal when, many years later, they reach the Supreme Court's threshold.

2. Trivialization of Section 2. From the Reagan administration (1981) up to the inauguration of President Biden in 2021 (with some relief during the Clinton and Obama years),[4] the monopolization offense has been trivialized. The establishment antitrust community and the antitrust agencies in many administrations treated the monopoly offense as not an important one,[5] eclipsed by cartels, "the supreme evil of antitrust."[6] It is common "wisdom" in U.S. Supreme Court case law that business, when it acts unilaterally and not in combination with competitors,

2 Not all policy thinkers agree that the U.S. characteristics are deficits. Some believe that the U.S. reluctance to condemn unilateral conduct, even by a monopolist, is a hallmark of good policy; policy that contributes to an environment that incubates innovation. See e.g. Joshua D. Wright et al., *Requiem for a Paradox, The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. State L.J. 293 (2019). By that perspective, while the U.S. is not in step with interventionist jurisdictions, it is taking the high road.

3 *Verizon Communications v. Law Offices of Curtis V. Trinko* (Trinko), 540 U.S. 398, footnote 4 (2004).

4 See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

5 E.g. Timothy Muris, The FTC and the Law of Monopolization, 67 Antitrust L.J. 693 (2000); Wright, *supra* note 2.

6 *Trinko*, 540 U.S. at 408.

almost always acts in the interests of consumers (after taking what it will off the top – which is "mere" exploitation); that unilateral exclusionary acts against consumer interests are very rare; and that the main effect of antitrust intervention against unilateral acts is to undercut successful firms' incentives to invent and to protect inefficient rivals from hard competition. This is sometimes called "Chicago School antitrust." Its assumptions ignore market realities. It is out of step with the world. Even though post-Chicago scholarship has tried to soften the stridence,[7] this literature has not made a dent in Supreme Court jurisprudence since 1992.[8] The Supreme Court has re-made Section 2 jurisprudence in the libertarian image, and the stance of the Court is not expected to change unless and until Congress changes it.

As a result, Section 2 of the Sherman Act makes it very hard for a plaintiff to prove that a violator has sufficient power to pass the first screen of the monopolization violation – that the firm has monopoly, just at a time when there is a widespread perception in the competition community that firms with significant strategic market power, whether or not they are monopolies or even dominant, are wreaking harm on competition. Likewise, the U.S. Section 2 jurisprudence makes it hard to prove conduct that violates the Sherman Act. Thus, Judge Boasberg dismissed (with right to replead) the Section 2 complaint in FTC v. Facebook for failure of the FTC to sufficiently plead that Facebook was a monopoly,[9] Judge Gonzalez Rogers dismissed the Section 2 complaint of Epic against Apple after trial, finding that Apple is not a monopoly,[10] and Judge Boasberg dismissed as not an antitrust violation the FTC's claim that Facebook cut off an inventive young firm (Vine) doing business on its platform because, even if Facebook is a monopoly, it has the right to choose not to deal.[11]

Outside of the U.S., demoting the unilateral conduct violation is aberrational. In much of the world, exercise of dominant power is *the* problem, often stemming from historic state ownership and state support privileging favored firms, or simply in view of non-functional markets.

3. Goals – even in the space of pro-market goals. In the United States the dominant formulation of goals of antitrust is narrow: consumer welfare in the interests of efficiency. The principal approach is: Let the market work and do not invoke antitrust unless the impugned conduct will reduce output across the whole market and prices will rise.[12] EU and most nations' goals of competition law are broader and more flexible. For example, EU competition law values undistorted market processes and making markets work better.[13] It cares about consumers but not exclusively. This flexibility is helpful to control abuses (as in conduct of Big Tech) where output restriction is not the problem.

4. Efficiency. The U.S. caselaw and policy-speakers privilege the word "efficiency." They use the word in a stylized way that assumes that great latitude for firm action, even monopolists' action, will incentivize the best innovation and best/lowest price production and delivery of products and services consumers want. This thumb-on-the-scale for incumbents has collapsed the scope of U.S. antitrust. And however narrow this approach is when applied to U.S. markets, it is particularly unfitting when applied elsewhere. For example, in countries with weak markets and economies that need to develop competition because they do not yet have it, the aspiration to achieve efficiency of their economy requires more focus on preventing exclusionary acts and easing conditions of entry facing outsiders than on safeguarding dominant firms' freedom to act.

5. Distributional concerns; abuse of a superior bargaining position or position of dependence. The Sherman Act has no room for distributional concerns, and indeed regards such concerns as perverse on grounds that their incorporation would shrink the pie and make everyone worse off. A number of jurisdictions have a more expansive conception of abuse of power. Antitrust laws of Germany, Central and Eastern European nations, Japan and many other Asian nations, and many developing countries prohibit abuse of a superior position or of economic dependence, and their laws would lose legitimacy without it.[14] Abuse of a superior position is not an element of U.S. or EU law, although EU recognizes the right of its member states to occupy this space and many have. U.S. antitrust law and rhetoric oppose it.

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7 E.g. Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy (2019); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing Rule of Reason for Exclusionary Conduct*, 168 U. Pa. L. Rev. 2107 (2020); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (summer 2021).

8 See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

9 See *FTC v. Facebook*, Inc., __ F. Supp. 3d __ (D.D.C. June 29, 2021). The FTC filed an amended complaint. The court denied Facebook's motion to dismiss the amended complaint, commenting that although now the FTC had "cleared the pleading bar," "the agency may well face a tall task down the road in proving its allegations. __ F. Supp. 3d __ (D.D.C. Jan. 11, 2022).

10 *Epic Games v. Apple*, __ F. Supp. 3d __ (N.D. Cal. Sept. 10, 2021).

11 *FTC v. Facebook*, *supra*, note 9.

12 See e.g. *Ohio v. American Express Co.*, 585 U.S. __ (2018).

13 See e.g. *Post Danmark II*, Case C-23/14, EU:C:2015:651, paras. 70-72; *Google LLC v. Commission*, Case T-612/17, EU:T:2021:763, appeal pending.

14 See K&L Gates Hub, The Enforcement of Abuse of Economic Dependence in the EU, 28 Jan. 2021, https://www.klgates.com/The-Enforcement-of-Abuse-of-Economic-Dependence-in-the-EU-1-28-2021, reporting on the growing trend of abuse of economic dependence laws in Europe.

6. The not-my-problem problem. U.S. antitrust law and rhetoric oppose consideration of (other) non-competition/market values. When a non-market issue is raised, the general response is either: That is not a problem (e.g. more access for SMEs), or: Antitrust is the wrong tool to solve it. Most other jurisdictions hear out the claims and may consider accommodation. Some of these issues are front and center today, as sustainability, poverty, and massive inequality are recognized as existential problems.[15]

7. Attitude. A tone (by some) of intellectual superiority towards jurisdictions that have chosen a different path[16] has not endeared the U.S. cause. Sometimes jurisdictions are in need of more learning, but sometimes they are expressing different needs based on their nation's terrain or policy choices based on a different appreciation of competitive harm; sometimes both. Nudging the world to see it the U.S. way had some success in the 1990s and '00s but may have run its course.

8. The European advantage. The EU model has certain built-in advantages (as well as disadvantages, not elaborated here), both because of incentives and because of form.

Just after the fall of the Berlin Wall in winter 1989, the Central and Eastern European nations adopted market economies and were poised to adopt competition laws. The United States competed with the EU in visiting the new democracies and trying to "sell" their model. The EU was overwhelmingly successful, of course, for most of the new democracies aspired to be members of the EU. The playing field for the U.S. was hardly level.

The 1990s were a fertile time for adoption of antitrust by other nations as well, and most adopters were more attracted to the EU model. The EU model offered apparently (not necessarily actually) clearer principles of law in view of the more explicit language of the European Treaty and the numerous guidelines and block exemptions. Moreover, greater flexibility on goals, attention to access for SMEs, control of state-conferred privilege, and the administrative system, were all welcomed. U.S. law was seen as opaque. The statutes contain so few words at such a high level of generality that they give no guidance. It takes experts to understand and advise on what the law requires. And, for civil law countries, an adjudicative system was seen as excessively litigious.

Another very different characteristic of EU law could commend it, especially in view of current market realities. Perceived abuses by new economy giants cross not only geographic but also disciplinary lines. EU provides the foundation and institutions for a holistic vision.[17] The EU competition law is linked with the law and policy of the European Union. For example, the European Union has a project for a single digital market. Obligations to complete the single market are enforced by several directorates-general in addition to the competition directorate-general. Sustainability is a value engrained in the Treaty, expressly applicable across disciplines. Privacy regulation is explicit and community-wide. Thus, the EU has a scaffolding structure while U.S. antitrust has a silo structure. While silos have some advantages,[18] scaffolds may be more congenial in an age of cross-border, cross-discipline effects.

III. CHANGE ON THE HORIZON

The first seven characteristics describe U.S. antitrust law as it is, but change is on the horizon.[19] The limits of the Sherman Act and especially Section 2 are widely acknowledged.[20] Indeed those very limits became a flashpoint for advocating change. The neo-Brandeis movement arose in the late 2010s.[21] Neo-Brandeisians wage a full-throated attack on conservative antitrust.[22] They would call power to account, break up big business, pave the way for a thriving community of small businesses, provide a level playing field for firms without power, and include

15 Some of the social problems are also market problems. For example, sustainability issues can stem from market failures, and consumers may have preferences for "green" products. The need for inclusive development in developing countries can coincide with good antitrust principles identifying exclusionary restraints.

16 U.S. officials' response to the EU decision to enjoin General Electric's acquisition of Honeywell is an example. See Eleanor Fox & Daniel Crane, Global Issues in Antitrust and Competition Law (2d ed. 2017), p. 394.

17 See Pierre Larouche & Alexandre de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, 12 J. Eur. Competition Law & Practice 542 (2021), point I.A (the architecture of the EU connects the internal market regimes; they are "components of a coherent whole").

18 Purity of analysis, focus; less room for playing political favorites.

19 See William Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (summer 2021).

20 See e.g. C. Paul Rogers III, The Incredible Shrinking Antitrust Law and the Antitrust Gap, 52 U. Louisville L. Rev. 67 (2013).

21 See e.g. Lina Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017).

22 See Kovacic, *supra* note 19.

as targets of the antitrust crusade a variety of social harms attributed to big business power and influence. All who listened to campaign addresses by 2020 Democratic Presidential candidates Elizabeth Warren and Bernie Sanders heard the concerns of neo-Brandeisians well articulated.

Antitrust had at last returned to popular discourse. Joe Biden won the Presidential election and put prominent neo-Brandeisians into key government positions. He issued an Executive Order requiring that competition and fair distribution of wealth and opportunity be given sway across all agencies. He handed the reins of the Federal Trade Commission to Lina Khan, chairperson, with the implicit charge to transform antitrust. Meanwhile, even before the 2020 elections, Congress held hearings, memorialized the findings, and introduced bills, many bipartisan, to facilitate aggressive antitrust enforcement on subjects ranging from mergers, exclusionary practices, Big Tech platforms' self-preferencing, interoperability and data portability, access to platforms and to data, and antitrust standards in general.

Will neo-Brandeisian antitrust cure the U.S. deficiencies and restore U.S. antitrust leadership in the world? These are complicated questions. There is some concern, powered by one interpretation, that the neo-Brandeisian school goes wide of the mark and gives too little respect to markets and consumer-serving qualities of business strategies. This may be an unfounded fear for there is much reform to be done within a paradigm that unleashes markets and respects consumer interests, and the large preponderance of the Biden antitrust agencies' initiatives thus far fit this category.[23] The new heads of the U.S. antitrust agencies are likely to have congenial consultations with antitrust officials of the world likewise concerned with new forms of power and their control, but, absent dramatic legislation that fundamentally changes the direction of the U.S. law, the traction of their policies is uncertain.

IV. A WAY FORWARD

Reflection on the identified characteristics of U.S. antitrust suggests a diagnosis and way forward. As background, there are two salient points. First, the U.S. may have been the hegemon when U.S. antitrust was the only significant competition law in the world and when all other jurisdictions were neophytes, but as soon as the EU and other jurisdictions became well-grounded in antitrust, it was time for the U.S. to move over and share the space. Second, antitrust problems are increasingly cross-national and global, and the antitrust domain is increasingly confronted with existential social dilemmas as to which business power and even the antitrust laws[24] are considered part of the problem. There is need for community-wide thinking; for dialogue on a global conception of antitrust, how it does and should contain market power and its abuses, and how it fits into the political economy ecosystem.

The U.S. is out of step with the world in its appreciation of what is unilateral power that should be controlled by antitrust, and what is an abuse of that power. The U.S. is also lagging behind in the world conversation on social values (e.g. sustainability, inequality, fairness) and how to absorb them into or coordinate them with antitrust analysis. This second difference is less critical than the first because concepts of power and abuse are at the core of antitrust. Nonetheless, nudging the U.S. antitrust community to listen, engage, and contribute to the conversation (beyond the Biden administration, which does contribute) is an important task.

U.S. leadership can be restored, but not in terms of a sole leader. The U.S. can be rehabilitated as a co-leader. This implies common understanding and more than one model. Germany, the Netherlands, the UK, Australia, South Korea, and South Africa, in their separate ways, can offer models that incorporate particular social values (environment, poverty, inequality, SMEs, inclusion). The EU, as a common market, can advance leadership on cross-border, cross-discipline, holistic solutions. The United States can extoll virtues of market-only antitrust, if it chooses, and continue to share expertise in cartel prosecution and horizontal merger analysis. But co-leadership would be facilitated by much more harmony at the core of antitrust analysis.

How can we get the U.S. back in step with the world in appreciating power and abuse? The answer involves a background insight, which is especially applicable to common law countries. Antitrust law formation – in the shadow of very general proscriptive language – best evolves case-by-case, fitting the law to the facts. The problem in the U.S. is: the Supreme Court has crafted a reactionary law. This will not change without legislation because the Supreme Court's ideological balance will not change – at least not for the duration of many of our lifetimes, in view of the absence of judicial term limits. It is hard to mandate the needed change by legislation without interfering with the common law fact/

23 The FTC's withdrawal of the 2015 policy statement confining FTC enforcement to a narrow consumer welfare standard [July 1, 2021] fits this category. The FTC Act's prohibition of unfair methods of competition should surely reach farther than Sherman Act consumer welfare. The current paradigm – Do not intervene unless output or aggregate consumer surplus is lessened -- is outmoded and indeed not applied except by the most conservative wing of the antitrust community of lawyers and economists who would never have voted for an antitrust statute beyond a law against cartels. "Consumer welfare" can be applied more copiously, but the words have a lot of baggage as well as ambiguity and they do suggest a narrower interpretation than, for example, making markets work for the people.

24 For example, do antitrust rules and principles sometimes stand in the way of progressive agreements to rid the atmosphere of greenhouse gasses?

law process.[25] There is, however, a promising way – legislative repeal of the major Supreme Court path-changing decisions since 1993. This means repeal of *Trinko*,[26] *linkLine*,[27] *Brooke Group*,[28] *Ohio v. American Express*,[29] and *California Dental Association*,[30] and explicit return to the line of *Kodak ITS*,[31] *Aspen Skiing*,[32] and related opinions[33] which together comprise a coherent narrative of power and its abuse.

As a needed supplement: Much abusive conduct by dominant firms (in particular, Big Tech/Big Data) is well documented but doubtfully prohibited by the current toothless Sherman Act Section 2.[34] Application of the restored, realistic jurisprudence would condemn most of these abuses, but litigation to catch up with reform of the law will take too long. Recognizing the problem of inordinately slow case-by-case adjudication, as well as shortfalls in coverage of traditional antitrust, several jurisdictions have developed lists of conduct by the Big Tech platforms that should not be tolerated, and they are introducing ex ante prohibitions side-by-side ex post antitrust enforcement.[35] The U.S. should take a page from the playbooks of the EU[36] and the UK,[37] and modify the lists and standards as necessary to allow justifications as necessary to respect different business models; and the FTC should do rulemaking with a view to proscribing the designated offensive conduct.[38] Congress would need to legislate to confirm the FTC's antitrust rulemaking power and to grant it the power to penalize.

These changes will bring the U.S. back into step with the world at the core of antitrust and allow the U.S. to retake reins, albeit this time jointly with co-equal sister jurisdictions.

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25 See all pending antitrust bills, including Senator Klobuchar's omnibus bill, The Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Congress (2021-22). The drafters struggle to find language to proscribe a new standard.

26 *Supra* note 5.

27 *Pacific Bell Telephone Co. v. linkLine Communications*, 556 U.S. 438 (2009).

28 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

29 *Supra* note 12.

30 *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

31 *Supra* note 8.

32 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

33 E.g. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), aff'd, 347 U.S. 521 (1954). To return to the narrative before the Court's sharp turn to the right, and to anchor the law, the legislature should embed the dissenting opinion of Justice Breyer joined by Justices Ginsburg, Sotomayor and Kagan in *Ohio v. American Express*, and the dissenting and concurring opinion of Justice Breyer joined by Justices Stevens, Kennedy and Ginsburg in *California Dental Association*. With repeal of *Trinko*, the legislature should embed the opinion of the Second Circuit Court of Appeals, 294 F.3d 307 (2d Cir. 2002), which the Supreme Court reversed.

34 See Eleanor Fox, Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide, 98 Neb. L. Rev. 297 (2019-2020).

35 See Larouche & de Streel, *supra* note 17.

36 See Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15.12.2020, COM(2020) 842 final, Articles 5 and 6, subject to amendments pending adoption.

37 See UK Digital Markets Unit, https://www.gov.uk/government/collections/digital-markets-unit.

38 Proscriptions would shift the burden of proof of harm and allow justifications in appropriate cases. See Eleanor Fox and Harry First, We Need Rules to Rein in Big Tech, CPI Antitrust Chronicle October 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724595. Compare the UK's bespoke treatment of platforms and their conduct within the new Digital Markets Unit of the Competition and Markets Authority.

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