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Interview with Professors Eleanor Fox and William Kovacic

Editor's Note: Professors Eleanor Fox and Bill Kovacic are two icons in our field, with unique perspectives on the past, current, and future state of antitrust, both here in the United States and worldwide. As this interview reveals, they are also prime examples of how leaders in our field can hold fundamentally different views on the underlying purpose and policy of antitrust laws, yet remain close friends and colleagues who can discuss these issues without the hyperbole that we sometimes see from different antitrust camps.

Certainly, Professor Fox laments the fact that, at least in our modern antitrust jurisprudence, there is little focus on outsiders' access to markets and their positive contributions to the market dynamic. As for Professor Kovacic, it is fair to say he adheres more to the "consumer welfare" school of thought, but highlights in frank terms that this concept has taken on a life of its own and is somewhat malleable in the hands of practitioners and judges. And both Professors Fox and Kovacic implicitly acknowledge a likely shift to the "right" compared to the last administration. Finally, Professor Kovacic makes the point that perhaps the longest lasting impact of the new administration will be the choice of federal judges (both at the district and circuit courts, as well as the Supreme Court), as this could have the greatest influence on antitrust jurisprudence in the years to come.

This interview was conducted for *ANTITRUST* on January 11, 2017, by Associate Editor James Keyte.



Eleanor Fox



William Kovacic

JAMES KEYTE: Thank you both again for joining us. How did you both get interested in antitrust?

ELEANOR FOX: I graduated from law school in 1961 and I started to practice in 1962. Antitrust got interested in me before I got interested in it. In my first job, I was assigned to a very big litigation—an antitrust litigation. It was *United States v. Decca Records and Music Corporation of America*. Decca Records owned Universal Pictures Studios. It was a huge conglomerate media merger case and I cut my teeth on it.

I was in the litigation department in my law firm, and antitrust was part of the litigation department. I did a huge amount of merger work and some monopoly work. Those were the days of the Wild West merger cases. There were lots of "midnight mergers"—announced in the press days before closing—and I handled a lot of preliminary injunction motions, on both sides. I also handicapped mergers for arbitrageurs. The law was sociopolitical at the time; against power and excessive business concentration. There were different rules and standards at the time but we had guidance from Supreme Court cases and practice. We knew where the lines were drawn and where the cliff was. And we were able to give pretty accurate advice as to the risks of a merger.

JAMES KEYTE: And this was even pre-*Vons*?

ELEANOR FOX: Yes, about the time of *Von's*.

So, after antitrust found me, I did find antitrust. Antitrust has been the major part of my professional life. It has been endlessly fascinating. We've moved from the time of sociopolitical antitrust, when the law was against privilege and power and for the underdog, to the revolution in the early 1980s, shifting to economic efficiency.

JAMES KEYTE: And Bill, how about yourself?

BILL KOVACIC: The main influence on my interest came from two professors who taught me at Columbia Law School. The first was Harlan Blake. Harlan was the co-author of a formative antitrust case book. "Trade regulation," as it was called, was a first-year elective in the second semester. I took the course, and in an abundance of generosity on his part (after I expressed an interest in a measure that would become known as the Hart-Scott-Rodino Antitrust Improvements Act), Professor Blake said, "I'm a close acquaintance of the staff director of the Senate subcommittee that's developing the legislation. If you don't have any plans for the summer ahead I'd be glad to write you a letter of introduction after I've read your exam."

I bet all of my chips on the antitrust exam, and it paid off. Blake wrote a letter to Howard O'Leary, who was the staff director for Senator Phil Hart's Senate Antitrust Subcommit-

tee. In my interview, O’Leary explained that the subcommittee had several demanding projects and said, “If you’re here for only a summer, it really doesn’t help us a lot.” I was about to thank him for the interview and leave, but he added: “If you’re willing to stay with us for a year, you’re on.” I got a leave of absence and spent the next year as a research assistant, working principally on the development of Hart-Scott-Rodino, which was enacted soon after I went back to school in the fall of 1976.

The other Columbia faculty member who guided me was Harvey Goldschmid. Like Blake, he was an exceedingly generous person. He supervised an independent research project for me and introduced me to Jack Kirkwood, who headed the Planning Office in the Federal Trade Commission’s Bureau of Competition. Jack had put together a university-quality faculty of researchers, including Bob Lande, Neil Averitt, and Jim Hurwitz. I joined them in 1979. Harvey’s care for me made it all possible.

So I was the very fortunate beneficiary of two academics who not only shaped my interest in competition law but also formed my view about what a good teacher does. They generously assisted me in ways they need not have done. They went out of their way to help. Blake and Goldschmid shaped my professional interests in two ways: they drew me to competition law and inspired me to be a teacher, and to teach in a certain way.

JAMES KEYTE: That’s the perfect transition to my next question. I’ll start with Bill. What were your initial or early views concerning the proper role of antitrust laws in the U.S., and has that changed over the years?

BILL KOVACIC: Both Blake and Goldschmid were strong adherents of the structuralist view set out in commentary such as Carl Kaysen’s and Donald Turner’s *Antitrust Policy* (1959) and the report of the Neal Commission, a body convened by Lyndon Johnson toward the end of his presidency. These and other works argued that the great disappointment of U.S. competition law since 1890 was its failure to deal effectively with large firms. They prescribed a robust role for government enforcement to break up concentrated sectors and proposed legislation to accomplish the same ends.

Blake and Goldschmid endorsed these views; and I embraced them as well. I was, in many respects, a disciple of theirs and had great enthusiasm for the deconcentration cases launched in the 1960s and the 1970s, such as the Justice Department’s suits against AT&T and IBM, and the FTC’s cases against Xerox, the breakfast cereal industry, and the petroleum refining industry. As a student, I saw the DOJ cases and the FTC’s shared-monopoly cases as exemplars of antitrust doing a good job on the frontier of policy making.

My view changed when I went to the FTC in 1979. My first assignments in the Bureau of Competition Planning Office were to do research on the FTC’s “no fault” monopolization proposals and to assist the team handling the petro-

leum shared monopoly case. My research project at Columbia for Harvey Goldschmid dealt with how to break up firms through litigation or deconcentration legislation, Harvey introduced me to Jack Kirkwood to consult with the Planning Office on the feasibility of splitting up large, existing enterprises. What changed for me is that I saw that carrying out these measures is a lot harder than the commentary and reports made it look. I had no sense of the institutional hurdles to doing that, and I quickly observed the limits on the capacity of public enforcement agencies, legislators, and courts to do that kind of work in an effective way—to do an accurate diagnosis of the problem and to come up with an effective cure.

In short, I woefully underestimated the institutional challenges to carrying out a major restructuring program. I lost my enthusiasm for the structural de-concentration proposals. More generally, the experience made me much more attuned to how the actual capacity of the relevant institutions determines what you can and should do.

JAMES KEYTE: And Eleanor, what were your initial views concerning the proper role of antitrust, and has that changed over the years?

ELEANOR FOX: My initial views were very much informed by what the law was, what the Supreme Court held at the time. I believed in antitrust as a bulwark against power and privilege, and for the underdog. That seemed a quite normal and natural role for antitrust.

I was very influenced by a number of both events and people I worked with along the way. I was the head of the New York City Bar antitrust committee and had very close contacts with the heads of the Senate and House committees, Senator Hart’s committee and Senator Rodino’s committee. I testified a lot on the Hill on the various bills that came up and enjoyed that policy part very much.

Another part of my life was Betty Bock. Betty was the head of research at the Conference Board and she put together an annual program, which my dear senior partner Whitney Seymour titled “The Bock Festival,” in which Betty brought together and indeed orchestrated the diverse philosophical views underlying antitrust.

The political spectrum included Walter Adams on one end (a structuralist and empiricist, whom I very much admired) and Harold Demsetz on the other. Bob Bork, Ira Milstein, Tom Leary, Fred Rowe, Louis Schwartz, Mike Scherer, and Morrie Adelman were in virtually all of these events, and Whitney often gave the keynote speech. Betty facilitated the debate on the sociopolitical and political economy underpinnings of antitrust. The “great orchestra” was a combination of academics, lawyers, economists, and business people across the spectrum, from experts very concerned about too much concentration of economic power to those very concerned that antitrust was interfering with the daily business of business.

Betty also organized small roundtables in which we vetted the issues in a smaller group. The conference and roundtables touched on the same issues and tensions that we debate and experience today—business power, government power, government intervention—which do you worry about more? When I teach my students the early antitrust cases and dwell on the policy perspectives of the first Justice Harlan and of Justice Holmes, I think of Betty.

JAMES KEYTE: Let me follow up on this topic and get right to the kind of question that’s often debated: what are both of your views on the role of “consumer welfare” as a guiding principle of antitrust? This certainly has worked its way into the cases in recent decades. Let’s start with you, Eleanor.

ELEANOR FOX: I have a particular view on that which is probably not shared by about 95 percent of the American antitrust bar. I grew up on an antitrust that was about the robustness of competition and access to markets. It wasn’t about consumer welfare, although consumers were of course a part of the picture. American antitrust took the turn to a particular economic usage of “consumer welfare” through Bill Baxter in the early 1980s, adopting Chicago school philosophy and methodology. The term meant that antitrust enforcement was inappropriate unless the conduct or transaction decreased consumer surplus and was not otherwise justified by efficiencies. This has always seemed to me to be too narrow and too static.

BILL KOVACIC: At one level I see the genius in the phrase by which Robert Bork in *The Antitrust Paradox* (1978) and other commentators changed the conversation. They moved the focus of competition away from its egalitarian roots toward doctrine and policy grounded in economic effects. They picked a brilliant label to do that. If you asked a focus group of specialists “are you for consumer welfare or against it,” I don’t know who’s going to stand up and object.

The real question is what does “consumer welfare” mean? Do competition, and competition law, advance consumer welfare, or not? One meaning of the phrase is that the fate of individual firms, by itself, ought not to be antitrust’s overriding concern. That’s a useful contribution because it forces recognition that competition does nothing if not displace and disrupt existing firms and ways of doing business. The best-known passage in Joseph Schumpeter’s *Capitalism, Socialism and Democracy* is a short chapter titled “The Process of Creative Destruction.” Here Schumpeter uses the imagery of warfare to describe how the new product, the new service, the new form of organization, the new source of supply obliterates incumbent firms. Were antitrust only concerned with the well-being of individual enterprises, it might strive to halt the competitive forces that destroy them. The term “consumer welfare” helps remind us that the welfare of consumers is the appropriate object of antitrust’s attention, and not the survival of specific firms. Competition is inherently destruc-

tive, and we accept the destruction because of the larger benefits it confers on society.

At the same time, “consumer welfare” leaves open the question of what consumers, as citizens, truly desire. The answer is that consumers have varied and often conflicting desires. The discussion about consumer perspectives arguably overlooks a source of political turmoil seen around the world today. If you ask, “Do individual citizens like competition,” their answer likely is yes if we focus solely on their experience as purchasers of goods and services. As purchasers, citizens like the possibilities that competition generates. But if you ask the same people whether they like competition in their status as employees or residents of communities that depend on the vitality of local employers, many will express doubts or say no. The same process of displacement and commercial upheaval that creates the more attractive goods and services also destroys firms and can undermine the economic foundations of the communities in which such firms reside. So what do consumers want? They want competition when they are buying goods and services, but many have an ambivalent or hostile view of competition when creative destruction shatters their employers and turns their communities upside down. This second face of competition is frightening.

JAMES KEYTE: Let me move more specifically to what we’re focusing on in this issue of *ANTITRUST* magazine—international subjects. Eleanor, in what ways has the U.S. been an exporter of antitrust laws and economics over the years, and how has that evolved in your experience?

ELEANOR FOX: The U.S. has always been an exporter of antitrust and it’s been so in a couple of different ways. One way is simply pride in what we developed. It worked for us, to limit power and remove obstacles to make markets work better and to involve people in markets on their merits. We thought that we had a very good formula and that everybody else ought to look at it; they might want to adopt it, too.

The other sense is more direct. We certainly exported antitrust just after World War II, under the Marshall Plan to Europe and, as part of the Allied occupation, to Japan. We exported antitrust in order to export economic democracy. Markets can be a force against concentrated political power. So it was in post-World War II.

We also tried to export our antitrust to Central and Eastern Europe upon the fall of the Berlin wall at the end of 1989. European officials also were trying to export their laws, and they won. One reason was that European competition law is more amenable to what the Central and Eastern European nations needed to ease themselves into markets and break the back of government power and state-owned enterprises that were obstructing the movement to markets.

JAMES KEYTE: Was that because it was more of an administrative-based approach or a code-based approach?

ELEANOR FOX: The administrative form probably helped but it wasn't the bigger point. The bigger point was: the U.S. does not have a history of statism; that's never been a major problem, but in Europe it was *the* major problem in terms of getting markets to work.

The companies were state owned or recently privatized. They were privileged through state ownership. That privilege had to be taken away. The anticompetitive acts of the state-owned companies had to be controlled in order to help the market work. EU law addresses these problems.

Of course the other point is that the countries wanted to join the European Community and they had to adopt EU law in order to join the European Community. It was a necessary condition.

While the EU model won in preference to the U.S. model, the Americans still made a huge contribution through technical assistance. Jim Rill, Janet Steiger, and their teams made a huge impact.

Did America export "American" antitrust economics? We successfully exported the idea of the importance of economic analysis, but we never exported to Europe the Chicago school premises that markets are almost always robust; except for cartels, the law should almost never intervene; when it intervenes, it messes things up. We did export that point of view successfully to Chile where the "Chicago boys" had a big impact. The Chicago boys were Chicago-trained Chilean economists.

And then there came a time, maybe 10 years ago now, when the American antitrust export lost its shine and the EU gained a stronger grip as a model for the rest of the world.

JAMES KEYTE: And Bill, I know you've been an exporter yourself in some sense. So what is your perspective over the years on the U.S. as an exporter of antitrust law and economic, either principles or guidance?

BILL KOVACIC: As Eleanor suggests, the importance of the United States as an exporter varies according to the specific aspect of competition law we're discussing. Relatively few of the 130 jurisdictions with competition laws have adopted the U.S. litigation model and its supporting institutions. The EU administrative enforcement regime is by far the world's dominant "operating system." Nearly 80 percent of the world's competition systems rely on an administrative agency that takes decisions and imposes sanctions subject to judicial review. Many countries have adopted his model to facilitate accession to the European Union. The administrative model also is more attractive to, and compatible with, the civil law regime that most of the world's countries employ. A civil law country looking for an antitrust "product" that runs best on its existing system of public administration ordinarily will select an administrative enforcement model. And yes, as a footnote, the FTC provides such a model for the United States, but litigation in the federal courts is the country's principal means for enforcement. It is not surprising that

the U.S. litigation model has not been widely copied.

The U.S. influence as an exporter has been much greater in other dimensions of competition law. Many of the world's competition law systems have adopted substantive tests and analytical concepts developed and tested in the United States. One striking example is merger review. U.S. enforcement experience and agency guidelines—notably, the DOJ 1982 and 1984 Guidelines, and the DOJ/FTC Guidelines of 1992 and 2010—have created the modern global vocabulary of merger control and supplied the key analytical concepts for the examination of horizontal transactions.

A second important illustration involving substantive standards is the treatment of hard-core horizontal restraints. The U.S. has promoted the global adoption of a norm that regards cartels as grave antitrust offenses. No such norm existed in the 1970s when I was studying under Harvey and Harlan. Even 20 years ago, the world had not embraced an anti-cartel norm. Persistent U.S. policy advocacy and the determined application of powerful extraterritorial tools made cartel enforcement the center of what most agencies do today. Among other places, this is reflected in the speeches of the European Commissioners for Competition over the past 15 years. They have placed the prosecution of cartels at the top of the enforcement list. That is the consequence of a U.S. export. As Eleanor said, however, there are substantive areas of competition policy—notably, the treatment of vertical restraints and dominant firm conduct—in which the U.S. is not much part of the conversation today globally.

Another area of competition law in which the U.S. has had a major influence consists of implementation techniques. Premerger notification is one example. U.S. experience since 1976, with the enactment and implementation of Hart-Scott-Rodino, inspired the widespread global adoption of mandatory reporting requirements and waiting periods as procedures for merger control.

The use of leniency as a detection mechanism for the prosecution of cartels is a second example of an implementation method that many of the world's competition systems have adopted. The Anne Bingaman leniency reforms at the DOJ in the 1990s are the most significant modern enhancements in cartel detection. As refined in the past 25 years, they have transformed how anti-cartel enforcement takes place in the United States; they have had dozens of adopters around the world.

Because of its body of experience since the late 19th century, the U.S. has the largest reservoir of know-how about practical ingredients of conducting investigations and running cases—basic issues, such as determining what information to collect, how to analyze data, and how to prepare memos that set out a theory of harm and related facts. This know-how is uniquely broad and significant, and the enforcement practice of many agencies reflects what they have learned from their U.S. counterparts about how to develop cases. So those are ways in which the U.S. has been a major exporter.

JAMES KEYTE: Let me ask you both about China, specifically. Where do you see its antitrust law and policy headed in the next several years? Bill, you've been working directly on several projects involving China's antitrust system, so why don't you start?

BILL KOVACIC: Among all the jurisdictions that have had enacted competition laws since Canada established the first national law in 1889, no jurisdiction has gotten off to a more ambitious start than China. Its law is barely eight years old, and China has done things that many jurisdictions have never done, or took decades to get to. It's the most remarkable beginning of any competition system.

What's ahead for China? One is a basic reexamination of the enforcement framework. China has entrusted three institutions with enforcement: MOFCOM, NDRC, and SAIC. The Anti-monopoly Law is enforced by small units in these large conglomerate government departments. I predict that before China gets to the 20th anniversary of its Anti-monopoly law, and maybe when it reaches its 10th anniversary, China will evaluate the three institution enforcement configuration, consolidate the enforcement responsibility in a single institution that will not be part of another ministry but will be a standalone body that reports directly to the State Council.

Having experimented for a variety of reasons with the current framework, China is likely to undertake a fundamental restructuring that will put its system on a much better institutional platform. China also has embarked on an extraordinary initiative, called the Fair Competition Review Mechanism, to challenge state policies that distort competition. The FCRM mandates that all public institutions consider competition policy concerns and eliminate unnecessary restrictions on competition.

The FCRM has the potential to transform a major part of the Chinese economy. It reflects a commitment made in the recent plenums to give the market the "decisive" role in the economy and to make the rule of law a more central element of Chinese decision making. The FCRM would give competition policy an extraordinary role in shaping China's economy. The question mark is will the FCRM be implemented successfully, as it is so ambitious?

The last item is a continuing expansion in the role of the courts. China adopted private rights of action in its Anti-monopoly Law, but I don't think anyone fully expected private rights to become as important as they have been. They've been a source of exceptionally interesting jurisprudence, which in important respects that does not accept the point of view of the enforcement agencies. The courts have displayed impressive proficiency in analyzing competition issues. The Supreme People's Court has a number of judges with considerable expertise in competition law.

I think the courts have become a more and more significant player in the formulation of competition law. And, yes, indeed at some point—hard to predict when—they will actu-

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ally hear and review decisions of the competition agencies, which would also be quite a breakthrough in China.

JAMES KEYTE: That would be interesting indeed. Eleanor, what are your observations about China?

ELEANOR FOX: I agree with Bill entirely. I think China's competition and antitrust is a little miracle. When you think where China was eight years ago and that it has a communist government, but then realize that it's premier, Xi Jinping, promotes the idea that competition and markets are necessary to discipline the companies—even the state-owned enterprises that they care so much about—it is startling.

China's implementation of its antitrust law is remarkable. The Chinese enforcers and policy makers are hungry for knowledge and information about how the rest of the world implements competition policy. They're big learners and they're fast learners and I have great admiration.

I want to say a word about the charge that Chinese enforcement discriminates against Americans and others—but before I do I want to pick up another theme of Bill's. China is probably the most progressive jurisdiction in law on anticompetitive state restraints. The competition law expressly empowers the competition agencies to call out abusive restraints by provinces and all administrative bodies. These are usually restraints that privilege cronies or local champions. Although this is a very difficult area involving political and diplomatic dynamics, the Chinese competition authorities have already been successful in a number of instances.

I want to refer, as Bill did, to the Fair Competition Review. This is outstanding. There is now in place a mechanism to review all draft acts of government regarding economic activities of a market player. The review is particularly intended to catch discriminatory conditions for market entry or exit, and conditions requiring purchase of goods or services provided by the Administrator's friends. I think the rest of the world ought to learn from China.

JAMES KEYTE: Do you think China has benefited to some extent from what wasn't done in some other countries and now has a little bit of a head start?

ELEANOR FOX: Yes, that is right. Also, they are focusing on problems that are uniquely Chinese, or at least not uniquely American. Curiously, the problem of anticompetitive acts by state actors and excessively anticompetitive state measures is not usually on the teaching agendas for technical assistance. But it should be in the countries with a huge state-ownership heritage where some of the biggest barriers are state restraints. We have more to learn and adopt from China.

Shifting to the criticism: We hear a common Western complaint that China is applying its antitrust law in ways that are discriminatory and overreaching, and that it is often applying industrial policy rather than antitrust. I do think that China has applied industrial policy in a small set of high profile cases, especially involving natural resources. The Chinese competition authorities are not independent bodies and must listen to sister and higher authorities.

BILL KOVACIC: I'll just add that many Chinese competition law scholars emphasize that, on matters of process, China has a ways to go. Huang Yong, a professor at Beijing's University of International Business and Economics who is well known to the U.S. antitrust community, has said on many occasions that there is a need for what he calls greater professionalism and better process in the system—more disclosure, a fuller examination of evidence, a more rigorous testing of evidence. There's an awareness that there are many miles to go on that front.

It is important to keep in mind what the starting point was, which was no process at all. As one Chinese colleague put it in talking about the behavior of government departments, "We issue decrees, we do not issue explanations." Chinese agencies in the past have not explained what they do; they have just told people what to do.

In a way, the evolving practice of China's competition agencies provides a subtle and important template for a change of public administration throughout the country. Since 2008, the anti-monopoly agencies have moved toward revealing more information to the public about what they have done and why they have done it. That's an extraordinary change from the status quo of less than a decade ago.

ELEANOR FOX: Yes, and there is an accelerating process of cross-fertilization. We spoke of exporting antitrust before, but import/export is a stale model. Ideas get embedded through cross-fertilization. Regimes learn a lot from one another. This may have been started in the EU, I'm not sure, but when an agency has draft guidelines, it posts them on its website and invites outsiders, from jurisdictions around the world, to comment.

China does that. China publishes draft guidelines, and it gets lots of comments from the ABA Antitrust Law Section and others. There's a huge groundswell of cross-fertilization. The authorities, including the Chinese authorities, take on board ideas from all around the world.

BILL KOVACIC: Yes, those processes did not exist in China before 2008. The style of management by the State Council, the Communist Party, and the government departments was not to ask for comments about anything.

JAMES KEYTE: Let me follow up on that. While the U.S. historically has been more of an exporter of ideas, of processes, have you seen examples where the U.S. has become an importer—or a good listener—about ideas or processes in other countries that may be useful here?

BILL KOVACIC: One that stands out to me is the area Eleanor mentioned—the increased U.S. concern with public policies that distort competition. *Parker v. Brown* and its progeny created some pretty big holes in U.S. competition law that generally could not exist in Europe. The U.S. tolerates an extraordinary number of dispensations from competition. A lot of national policy in the 1970s and 1980s—notably, the deregulation of airlines, trucking, and the transport of freight by rail—sought to correct this. Since the 1950s, U.S. commentators from across the philosophical spectrum have called for increased attention to publicly imposed restraints. These include figures such as Walter Adams and Ralph Nader. In 1973, for example, one of Nader's research teams published *The Monopoly Makers*, which attacked a wide range of government restrictions on competition.

Because Chicago school advocates singled out government restraints as an area for reform, it became tagged as, in effect, a right-wing agenda element. The U.S. engagement with the rest of the world revealed a universal concern with public restraints and led the antitrust community to regard the subject as part of antitrust's mainstream. In particular, Europe's influence has made the role of the state a greater matter of concern on the U.S. antitrust agenda.

There are other areas in which I think the U.S. has been influenced, at least implicitly, by policy and practice abroad. One example is the modern U.S. federal enforcement habit of issuing closing statements more frequently when the agencies conduct major investigations but decide not to prosecute. That was exceedingly rare in the past. In the 1990s, the FTC did so once—when it decided not to oppose Boeing's acquisition of McDonnell Douglas. Over the past 15 years or so, the number of closing statements is much greater. I think that does reflect in part a European influence. On the whole I'd say it is very disappointing that there has been not more emulation. One example is the European Competition Network, through which DG Comp and the Member State competition authorities coordinate enforcement and develop common policies. We have no counterpart in the U.S. to engage the national agencies and our own states in a similarly deep and systematic collaboration. There's a lot to learn and absorb.

JAMES KEYTE: Eleanor, what are your thoughts?

ELEANOR FOX: I definitely agree with Bill. We do have a lot to learn. I think we have learned or absorbed some things from Europe that we do not always acknowledge.

There was a time at the height of Chicago school influence that antitrust got divorced from market realities. During this time many Americans argued that antitrust condemnation of exclusionary restraints was little more than a screen to protect inefficient competitors. Then there came a time when the U.S. agencies became more skeptical of exclusionary restraints as tools of monopoly power. Where did they turn for support?

All along, European law was identifying strategies used to exclude competitors and suppress competition and innovation, and their law did not seem to be protecting inefficient competitors, at least not usually. The European narrative bolstered the U.S. agencies' instinct for a more aggressive antitrust. Tom Rosch, when he was an FTC commissioner, cited European Union precedent in a number of his FTC speeches.

Also in matters of pay-for-delay, the FTC and DG Competition were mutually reinforcing in understanding the enormity of the consumer/patient harm caused by agreements between brand pharmaceuticals and their would-be generic competition whereby the brands paid the generics many millions of dollars to delay their entry.

JAMES KEYTE: Which are those countries that are emerging on the international antitrust scene that the average U.S. antitrust lawyer really hasn't given thought to or which are the hard chargers—those that are more on the scene even if they've been around?

ELEANOR FOX: We should put in that category the BRICS (Brazil, Russia, India, China, and South Africa). In a different category of more promise than action, I would add countries in Southeast Asia. Southeast Asia is increasing its antitrust profile in connection with its free trade area and customs union ASEAN. Similarly, African countries in COMESA and other free trade areas in Africa. Some of the regional free trade areas are new players on the block. They often comprise young and smaller jurisdictions that can use help from their neighbors in economies of scale and sharing of knowledge and know how. I would mention Kenya in Africa and Singapore in Southeast Asia.

JAMES KEYTE: Bill, what do you see out there with some of the countries, is it just that they are more active these days than in the past, even if they may have had some form of competition law?

BILL KOVACIC: I'm interested in the places that are building a framework that's going to last. I am less interested in sheer levels of enforcement activity and more interested in a program that builds an institution that can deliver good policy results over the long term.

My list of promising systems largely overlaps Eleanor's. Which systems do I particularly like? In Latin America, Mexico for sure, along with Brazil and Chile. There are a number of other systems that are pursuing what may prove to be a significant makeover. Some of these were competition regimes that ascended dramatically in the '90s and then fell by the wayside. One that's got a very promising possibility for renewal is Argentina.

I have Kenya on my list as well, as one of the most promising in East Africa, and I would include South Africa, to be sure. Botswana is another jurisdiction—a small country, with a relatively small agency that is doing things the right way. In Asia, Singapore by far leads the class of relatively newer institutions. By that I mean those created within the past 25 years. Another interesting country to watch is the Philippines.

Let me mention another important example of a system that is seeking to carry out a basic retooling. Ukraine established its antimonopoly law in the early 1990s, but the system nearly fell apart in the wake of the Maidan revolution and Russia's occupation of Crimea. Ukraine's competition system is being reestablished now, in part with support from with a collaboration of international organizations and individual countries. The restoration of the Antimonopoly Committee of Ukraine is being led by an absolutely first-rate team of leaders and top managers. The AMCU is an older agency that is new again, and it has to clear a lot of hurdles on its way to being effective. If the enhancement of the AMCU succeeds, it can make a huge difference in determining whether or not Ukraine is sustained as a democracy.

JAMES KEYTE: Let me switch gears a bit and ask why do we have a lot of convergence on cartels and even some of the merger processes and the like, but divergence still seems to be the state of play for monopolization and dominance. Do you see that out there and do you think it'll change?

ELEANOR FOX: The divide—and let's call it the EU-U.S. divide—on monopolization and abuse of dominance is clear and predictable. But before I talk about the divide I want to highlight the core that's converged. We tend to forget the fact that, at least if the U.S. condemns the conduct, the EU would condemn it too, and that that's a pretty important category.

After we move away from the common core, there's both an ideological question and an empirical and market reality question. The European markets do not work as well as the U.S. markets in general, and more intervention is needed to make markets work in Europe than in the United States, just as a matter of economic realities and empiricism.

The other point is ideology. In the matter of single-firm conduct, the U.S., especially as recited in the *Trinko* case, is *laissez faire*; it makes assumptions that the EU does not make. The default presumptions are very powerful. For example: if you are acting as a single firm (not in conspiracy with competitors), you're probably going to do what's best for the

market if government leaves you alone. That is because (the assumptions go) markets work well and will punish you if you try to harm competition.

JAMES KEYTE: Let me follow up. You mentioned *Trinko*, which treats monopolization in a sense as a prize that everybody wants. There was some startling language in there that monopolization is good because people will innovate to try to achieve it, as long as they don't misbehave. Do you see that as just a different view of dominance and the concerns about dominance in the EU, both in terms of philosophy and jurisprudence?

ELEANOR FOX: Yes, I do. The EU jurisprudence never conceptualizes achieving dominance as a prize to be won on merits, but as a privilege that comes with responsibilities. But of course—and here is where empirics intertwine with philosophy—dominance of European firms was traditionally not won but conferred.

Other perspectives common in Europe are also a mix of facts and philosophy. Markets have not worked well. That means dominant firms may have a lot of power, including incentives to keep out competitors. This can mean more trust in government (antitrust) than in dominant firms.

JAMES KEYTE: Bill, what are your thoughts on that subject?

BILL KOVACIC: Let me start with a more prosaic explanation, though it's not the only one. Forty years ago, the U.S. antitrust world turned. In 1977, the Supreme Court issued its decisions in *Brunswick* and *Sylvania*. In those decisions and in its later jurisprudence, the Supreme Court's revealed apprehension about how private rights of action function in the U.S.

All of the abuse of dominance jurisprudence in the United States since 1973 has been set in the context of private cases. *Otter Tail* in 1973 was the last time the Supreme Court saw the U.S. government agencies as plaintiffs standing before it. The government has appeared as amicus curiae in various Sherman Act Section 2 cases since 1973, but *Otter Tail* was the last time the government had its own case before the Court. So every Supreme Court Section 2 decision since 1973, and that's a long time, has come in the context of a private case. Time and time again, the Court's Section 2 decisions have referred to the possible overreaching of the U.S. system of private rights. The *Trinko* majority expressed anxiety about the use of private actions, and the same was true in *Matsushita*, which dealt with a conspiracy to monopolize. The apprehension about private rights is a recurring theme in the Court's antitrust jurisprudence. I'm not suggesting that the Courts perceptions that private rights over-deter are validated by strong empirical evidence. What is clear is that the Supreme Court believes they do. The same concern appears in *Twombly* and other decisions outside the single-firm conduct area.

To counteract perceived overreaching by the private rights regimes, the Court has altered substantive standards. In cases such as *Brooke Group*, the Court has made it harder for the plaintiff to establish liability. Were it not for this concern with private actions, I think U.S. jurisprudence would look more like Europe's abuse of dominance jurisprudence than it does today.

The other factor I'll mention is one that Eleanor pointed to: dramatically different perceptions about the market. Many European commentators have expressed dismay, bewilderment, or disappointment that Europe is not the same thriving source of new companies as the U.S., especially in the tech sector. Why does Europe lag behind the U.S.? One reason is that the market conditions that are conducive to new firm development and growth are much stronger in the United States than they are in Europe, where you have more rigidities that impede new business development, more difficulties in raising capital, and, in many countries, less appetite for risk.

If you tell an entrepreneur in the United States that you're going to fail, the answer will be "sure, and the next step will be a success." Business failure in many European countries is a source of serious stigma and disapproval. So, in Europe generally, the markets feature less dynamism, less regeneration, less resiliency. If you are in an environment where those limiting conditions prevail, you pay a lot more attention to the disappearance of an individual enterprise than you would otherwise. In the U.S., by contrast, those conditions are much more conducive to the development and entry and expansion of new firms.

When I take this collection of considerations together, I don't see the EU-U.S. divergence on dominant firm conduct issues changing any time soon.

JAMES KEYTE: Another aspect of divergence is that there is skepticism in the Member States and in the EU about whether concentration, even monopoly, leads to better innovation or whether more players in a marketplace leads to better innovation—there seems to be a distinct difference of views on that. Any thoughts on that?

ELEANOR FOX: I agree entirely with Bill that the Supreme Court is very concerned about private actions. However, I think that is only one important reason why the Court cut back Section 2 of the Sherman Act. In my own view, the majority, at least, have an independent ideology that supports more freedom for business firms.

It will be interesting to watch Europe, which now has private action vehicles in all of the Member States. If they should become robust, would Europe also then have compunctions like the U.S. does, causing shrinkage of their public enforcement? I don't think so.

There is a diversity of view even in the U.S. about what kind of market structure is most conducive to innovation. There's the old Schumpeter versus Arrow debate. I really

don't think it is going to be resolved because resolution depends upon data we cannot get.

Even experts seem to have an intuition either that the economy is better off if we ease conditions of entry for outsiders or that it is better off if we give more space and profit opportunities to insiders.

JAMES KEYTE: Any follow up on that, Bill?

BILL KOVACIC: A crucial basis for the philosophical differences is a different perception about the resilience of the market. There also is a continuing debate about whether competition, or the lure of super-competitive profits, provides the strongest incentive to improve performance. There are lots of competing assertions about what empirical study can say about that.

A key difference, again, in the U.S., is the question of how long positions of dominance are going to last. A condition that shapes U.S. policy is the view that the U.S. market process is somewhat more conducive to new entry and expansion by other firms so that the periods of dominance will not be durable. What role competition law plays in ensuring that dominance is not durable is a separate, interesting question.

It remains a stark and interesting difference to compare the leading firms in the stock markets in the United States with the leading firms listed on the exchanges in Europe over the past 40 years. In the U.S. listings, you see a lot more change at the top. By contrast, there's more stability among the leading firms listed on the exchanges in Europe and, again, nothing to match the size and vitality of the tech market in the U.S. To be sure, there are pockets of technological dynamism in Europe, but nothing to match what's taking place in North America. The formative conditions in the two jurisdictions make a big difference.

ELEANOR FOX: Of course, durability of market power is important. You might say if power is fleeting we don't want to worry about it. But there's another point here which is: Do we care about the entrepreneur who has been squeezed out of the market for non-legitimate reasons? Think of Microsoft, doing all it could to set back Netscape/Java language, which threatened to destroy its power. Don't we care about the victim even if we could predict that Microsoft would lose its shine in a couple of years? Don't we want to condemn the abusive act?

JAMES KEYTE: Yes, and I guess the hard subject is when it's innovation itself that squeezes out the small person rather than some exclusionary behavior within that market.

ELEANOR FOX: Oh, that's a different story. If innovation itself causes harm to competition, that is not antitrust harm and the conduct is not an abuse. I think that the experts are on the same side.

[C]onvergence isn't everything, and countries have different economies and politics. They need laws that fit their terrain; they need to root their own law. Their law will not grow well unless it is sensitive to the soil on which it grows. So I think it's wrong headed to think we must converge. The real benefit of the project of convergence is—you're nudging law towards a better state.

—ELEANOR FOX

JAMES KEYTE: Let me return again, but at a more general level, to the ever-present topic of convergence. Always a good thing? Eleanor?

ELEANOR FOX: In my view there are some good reasons for convergence, but there are also reasons not to favor "hard" convergence. The good reason for convergence is: When you have 130 laws, business is just more efficient, it saves a lot of money, by uniformity. Convergence enhances predictability as well.

Also, the *process* of convergence is extremely useful for totally different reasons. It forces all of the players to come together and say, How do you do this? What do you think about it? It provides the forum in which the policy makers can assess benchmarks, think about best practices, glean commonalities, and make the law better.

However, convergence isn't everything, and countries have different economies and politics. They need laws that fit their terrain; they need to root their own law. Their law will not grow well unless it is sensitive to the soil on which it grows. So I think it's wrong headed to think we must converge. The real benefit of the project of convergence is—you're nudging law towards a better state.

JAMES KEYTE: Bill, what are your thoughts about when convergence is important and if there circumstances where it actually may be counterproductive?

BILL KOVACIC: There is a tension between achieving standardization that increases predictability, simplifies compliance, and reduces the cost of administering competition systems, on the one hand, and preserving possibilities for innovation, on the other. The modern history of leniency illustrates the benefits of decentralized experimentation. Leniency gained wide adoption because the U.S. tested major reforms in the 1990s, and other countries followed along. If we had waited to set a universal standard—waited until all jurisdictions agreed that leniency was a good idea before launching the experiment, we'd still be waiting. Leniency gained acceptance because one jurisdiction (the U.S.) tried it

out and showed potential adopters that it worked.

I would offer one question about convergence and it's related to what happens in the new administration. The only way that you promote the conversation that Eleanor was talking about is by making a large investment in international organizations and international cooperation. Those organizations have taken a rhetorical beating in what might be called the "Brexit era," where various political figures and commentators have criticized international entanglements, doubted the benefits of organizations such as the OECD, the United Nations, and mocked the "elites" who cherish these institutions. A concern I would have about convergence, about cooperation and discussion and in internationalism is that, if you don't trust those institutions and you regard the people who participate in them with great suspicion, and you cutting way back on spending for international cooperation, then the U.S. loses influence because it is not part of the conversation.

JAMES KEYTE: Reading the tea leaves, what do you think we may see from the next administration?

ELEANOR FOX: If there is a "normal" Republican/Democrat divide, that is not what we will see at play. But there are signs indicating what we should be on guard against: (1) trading off competition for jobs, (2) preferring American firms, and (3) relaxing processes and transparency in antitrust decision making.

BILL KOVACIC: I have a confident prediction about one development. The big prize in the November election with respect to the economic regulatory state was the ability to pick federal judges. By the end of Barack Obama's presidency, there's a rough balance on the federal courts between the number of judges chosen by Ronald Reagan and the two Bush presidencies on one hand, and the judges picked by Bill Clinton and Barack Obama and Jimmy Carter on the other hand. The balance is almost 50/50 on a number of key courts, such as the U.S. Court of Appeals for the District of Columbia. The party of the president who makes appointments is not a perfect proxy for how judges will vote in economic regulation cases, but it's a fairly reliable predictor.

In the last eight years, compared to the choices made by his Republican predecessors since 1980, President Obama appointed a larger number of judges with a greater taste for government regulation. In many instances, the Obama appointees replaced judges who had a greater skepticism about regulation. The Obama appointments, coupled with the judges selected by Bill Clinton, were creating a judiciary more receptive to efforts by antitrust agencies to push the fences of doctrine outward. If Hillary Clinton had gained the presidency, she likely would have reinforced that trend. The antitrust agencies, and private plaintiffs, could have enjoyed a greater prospect of success in cases that push the frontiers. With Donald Trump in the White House, that's not going to happen. ■