41. Antitrust

Congress should

- repeal the Sherman Act of 1890,
- repeal the Clayton Act of 1914,
- repeal the Federal Trade Commission Act of 1914,
- repeal the Robinson-Patman Act of 1936,
- repeal the Celler-Kefauver Act of 1950,
- repeal the Antitrust Procedures and Penalties Act of 1975, and
- repeal the Hart-Scott-Rodino Act of 1976.

Antitrust is thought by some to be the bulwark of free enterprise. Without the continued vigilance of the Department of Justice and the Federal Trade Commission, the argument goes, large corporations would ruthlessly destroy their smaller rivals and soon raise prices and profits at consumers' expense. When a federal judge decides that the nation's leading software company should be dismembered, and yet another megamerger grabs headlines almost daily, the importance of vigorous antitrust law enforcement seems to be obvious.

But antitrust has a dark side. The time for modest reform of antitrust policy has passed. Root-and-branch repeal of what Federal Reserve chairman Alan Greenspan a generation ago referred to as a "jumble of economic irrationality and ignorance"—and what modern scholarship has shown over and over again to be a playground of special pleaders—is called for.

Here are eight compelling reasons why the antitrust laws belong in the dustbin of history.

No. 1: Antitrust Debases the Idea of Private Property

Frequently, when government invokes the antitrust laws, it transforms a company's private property into something that effectively belongs to the public, to be designed by bureaucrats and sold on terms congenial to rivals who are bent on the market leader's demise. Some purported advocates of the free market endorse that foolishness, evidently oblivious to the destructive implications of stripping private property of its protection against confiscation. If new technology is to be declared public property, future technology will not materialize. If technology is to be proprietary, then it must not be expropriated. Once expropriation becomes the remedy of choice, the goose is unlikely to continue laying golden eggs.

The principles are these: No one other than the owner has a right to the technology it created. Consumers can't demand that a product be provided at a specified price or with specified features. Competitors are not entitled to share in the product's advantages. By demanding that one company's creation be exploited for the benefit of competitors, or even consumers, our politicians, some misguided businessmen, and not a few academics are flouting core principles of free markets and individual liberty.

No. 2: Antitrust Laws Are Fluid, Not Objective, and Often Retroactive

Because of murky statutes and conflicting case law, companies never can be quite sure what constitutes permissible behavior. Unlike most other areas of the law, in antitrust guilt can hinge entirely on motive. If a company cannot demonstrate that its actions were motivated by efficiency, conduct that is otherwise legal somehow morphs into an antitrust violation. Normal business practices—price discounts, product improvements, exclusive contracting—become violations of law. Indeed, when companies aren't being accused of monopoly price gouging for charging too much, they are accused of predatory pricing for charging too little!

No. 3: Antitrust Is Based on a Static View of the Market

Antitrust law rests on a false model of perfect competition. In real markets, sellers seek to carve out minimonopolies. Profits from market power are the engine that drives the economy. Thus, what might happen in a utopian, perfectly competitive environment is irrelevant to the question of whether government intervention is necessary or appropriate. In answering that question, the proper comparison is with the marketplace that will evolve if the antitrust laws, by punishing success, eliminate incentives for new and improved products. Markets move faster than antitrust bureaucrats could ever move.

That's especially true in today's high-tech markets. Yet regulators have suddenly discovered a new theory, "network effects," to justify their activist policies. The premise of network effects—that a customer's concern about compatibility can lock him into an inferior product—is a myth. Consumers rule, not producers. And consumers can unseat any product and any company no matter how powerful and entrenched. Just ask WordPerfect or Lotus or IBM.

No. 4: A Narrow Definition of the "Relevant Market" Can Make Any Firm a "Monopolist"

In the Microsoft case, for example, the Justice Department has stacked the deck by so constricting the market that it appears as if Microsoft has it all. The government contends that Microsoft competes only against other single-user desktop PCs that run on an Intel microchip. Thus, as economist Alan Reynolds has pointed out, Apple's market share doesn't count because Apple runs on a Motorola chip. Nor does Sun Microsystems' share count because Sun, too, isn't Intel based—except Sun's Solaris system, which isn't single user. As for Linux, which now runs more Web sites than any other server operating system, it came too late to be included in the government's complaint, so it doesn't count either. Then there are hand-held computers, subnotebooks, set-top TV boxes, and other consumer electronics products, which also aren't Intel. And finally, 15 percent of PCs are marketed "naked," without a new operating system. Reynolds estimates that Microsoft's real market share is under 70 percent. If that constitutes a monopoly, the Justice Department will soon find itself immersed in the business affairs of Quicken, AOL, and Intel—each of which has a larger share than Microsoft.

No. 5: Antitrust Remedies Are Designed by Bureaucrats Who Don't Understand How Markets Work

Economic losses from excessive regulation can do great damage to producers and consumers. Yet government moves forward in the name of correcting market failure, apparently without considering at all the possibility of government failure. Economist Thomas Sowell reminds us that the St. Louis Cardinals don't send in a pinch hitter whenever Mark McGwire strikes out. If the antitrust bureaucrats ran the team, however, McGwire might find himself riding the bench. Never mind that the pinch hitter bats .200.

Those mistakes are not cost free. Microsoft is a case in point: The cost of misguidedly dismembering Microsoft is huge. It's not just the expense of disrupting and restructuring what used to be a $600 billion corporation; it's not just the $30 billion estimated outlay for reprogramming associated with fragmentation of the Windows operating system standard. It's also the nonquantifiable cost of discouraging future companies from taking similar risks and committing similar energy and resources, knowing that the outcome could well be government control of their intellectual output. For those enormous costs, we get no benefits in return. By the time the Microsoft litigation is put to rest and court-imposed remedies take hold, the marketplace will have changed in ways that the judge and the Justice Department cannot imagine.

Nonetheless, antitrust advocates assert that government planners can tell us which products should be withdrawn from the market, no matter what consumers actually prefer. The problem with that argument is that it leads directly to paternalism, to the idea than an elite corps of government experts knows our interests better than we do—and can regulate our affairs to satisfy those interests better than the market does. The real issue is, not whether one product is better than another, but who gets to decide—consumers declaring their preferences by purchases in the market or specialists at the Justice Department rating the merits of various goods and services. When we permit government to make such decisions for us, and we allow those decisions to trump the subjective choices of consumers, we abandon any pretense of a free market. In the process, we will have reduced consumer choice to a formalistic appraisal centering on technical features alone, notwithstanding that products are also desired for quality, price, service, convenience, and a host of other subjective and intangible reasons.

No. 6: Antitrust Law Is Wielded by Business Rivals and Their Allies in the Political Arena

The Microsoft case provides strong evidence that antitrust enforcement has been co-opted by rent-seeking competitors. Why do you suppose that many of Microsoft's arch-rivals are pushing for divestiture? It's certainly not that breaking up Microsoft will transform the software industry into one that is more competitive and efficient. Yes, that's what the proponents of dismemberment would have you believe, but that's not what they really want to see happen. Quite the contrary, Microsoft's rivals will be happiest with an industry led by a disabled, less-efficient, and less-innovative company. Market share will then be up for grabs—not because competitors have become more creative but because the government will have neutered the market leader.

Instead of focusing on new and better products, disgruntled competitors will try to exploit the law—consorting with members of Congress, their staffers, antitrust officials, and the best lobbying and public relations firms that money can buy. Even companies, like Microsoft, that were originally reluctant to play the political card have beefed up their Washington, D.C., offices. They too will become successful at currying favor with the politicians. Concerned citizens who are troubled by huge corporations' dominating private markets should be even more fearful if those same corporations decide that political clout better serves their interest. We must not allow antitrust to be used as an anti-competitive subsidy to prop up unsuccessful and less-successful firms. Nor should competition be politicized to advance the private, parochial interests of favored competitors.

No. 7: Barriers to Entry Are Created by Government, Not Private Businesses

Under antitrust law, the proper litmus test for government intervention in private markets is whether barriers to entry foreclose meaningful competition. But what is a "barrier"? To be sure, when a company advertises, lowers prices, improves quality, adds features, or offers better service, it may discourage rivals. But it cannot bar them. True barriers arise not from private power but from government misbehavior—special-interest legislation or a misconceived regulatory regimen that protects existing producers from potential competition. Likewise, when government grants exclusive licenses to cable, electric, and telephone companies, monopolies are born and nurtured at public expense. When Congress decrees targeted tax benefits, subsidies, insurance guarantees, and loans or enacts tariffs and quotas to protect domestic companies from foreign rivals, that creates the same anti-competitive environment that the antitrust laws were meant to foreclose. The obvious answer—which has little to do with antitrust—is for government to stop creating those barriers.

No. 8: Antitrust Will Inevitably Be Used by Unprincipled Politicians as a Political Bludgeon

Too often, the executive branch has exploited the antitrust laws to force recalcitrant companies to conform. Remember that President Nixon, when he wanted to browbeat the three major TV networks, used the threat of an antitrust suit to extort more favorable media coverage. On a recently released tape, Nixon told his aide, Chuck Colson: "Our gain is more important than the economic gain. We don't give a goddamn about the economic gain. Our game here is solely political. . . . As far as screwing the networks, I'm very glad to do it." If Nixon were the only culprit, that would be bad enough. But in his 1996 book, *Abuse of Power*, former *New York Times* reporter David Burnham establishes that presidents from Kennedy through Clinton routinely demanded that the Justice Department bend the rules in pursuit of political ends.

Exhibit A is before us at the moment. Following the agreement by Smith & Wesson to cave in to the extortionate demands of city mayors, state attorneys general, and the Clinton administration, several gun makers denounced the so-called settlement. That triggered an announcement by Connecticut's attorney general, New York's attorney general, and Housing and Urban Development secretary Andrew Cuomo that they would consider an antitrust suit against the disobedient manufacturers. If antitrust litigation follows, it will supposedly be based on a boycott of Smith & Wesson products organized by its rivals. Astonishingly, Connecticut attorney general Richard Blumenthal—also a major player in the Microsoft suit—has issued subpoenas for documents, despite conceding that he has no solid evidence other than a postsettlement industry meeting and criticism of Smith & Wesson by other gun makers. New York attorney general Eliot Spitzer pulled no punches. The goal, he gloated, is to "squeeze [gun] manufacturers like a pincers."

Conclusion

More than two centuries ago, in the *Wealth of Nations*, Adam Smith observed, "People of the same trade seldom meet together . . . but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." Coming from the father of laissez faire, that warning has been cited ad nauseam by antitrust proponents to justify all manner of interventionist mischief. Those same proponents, whether carelessly or deviously, rarely mention Smith's next sentence: "It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice."

Antitrust is bad law, bad economics, and bad public policy. It deserves an ignominious burial—sooner rather than later.

Suggested Readings

Armentano, Dominick T. *Antitrust and Monopoly: Anatomy of a Policy Failure.* New York: Wiley, 1982.

DiLorenzo, Thomas J. "The Origins of Antitrust: An Interest-Group Perspective." *International Review of Law and Economics*. 5 (June 1985).

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———. "Microsoft Redux: Anatomy of a Baseless Lawsuit." Cato Institute Policy Analysis no. 352, September 30, 1999.

Shughart, William F. II. "The Government's War on Mergers: The Fatal Conceit of Antitrust Policy." Cato Institute Policy Analysis no. 323, October 22, 1998.

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