Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Antitrust Laws and the Competitive Economy

TO THE EDITOR:

Fred L. Smith, Jr., presents a strong case for totally abolishing the antitrust laws ("Why Not Abolish Antitrust?" *Regulation*, January/February 1983) based on five contentions: (1) that, as libertarians argue, individuals should be free to do with their property as they wish; (2) that neoclassical equilibrium theory is misleading; (3) that price fixing will fail in the long run; (4) that "price-coordination" arrangements improve economic efficiency; and (5) that the antitrust laws have been used in ways that reduce efficiency. Although I sympathize with Smith's view that antitrust is another form of regulation and is therefore suspect, and although there are elements of truth in his position, I must challenge it nonetheless.

Smith argues for exempting trucking firms and their rate bureaus from antitrust laws. However, it is poor policy to exempt some industries from certain laws while demanding that others meet them. Laws should be applicable to all. Moreover, the trucking industry at the moment is not totally deregulated. Entry controls still exist, although they are weaker than in the early 1970s, and new competition is not yet strong enough to erode the monopoly profits from price fixing. Until entry is totally free, antitrust exemption will foster inefficiencies.

More fundamentally, I cannot support the abolition of all antitrust laws. Let me take up Smith's arguments, starting with the ones I agree with most. I agree with point (2), that the neoclassical theory of perfect competition is misleading when applied to antitrust, but this by itself does not justify price collusion. I also agree heartily with point (5), that these laws have often been used to suppress competition and attack successful competitors. However, these abuses have arisen not from the rule prohibiting price fixing but from the misuse of other antitrust doctrines such as unfair competition, attempting to monopolize, and "restrictive practices." If Smith wishes to abolish the prohibition on price fixing, he must show specifically how section 1 of the Sherman Act has reduced competition.

In support of point (4), that price fixing can increase efficiency, Smith cites the work of Hayek and Sowell on the role of markets in providing information about costs and values. I agree completely with my colleague Sowell on this issue. Price fixing, however, does not create information but destroys it. Cartel agreements or rate bureau tariffs are set so that most participants can cover their expenses. Unanimity is a cardinal rule in all such agreements. Low-cost carriers or firms cannot capitalize on their efficiencies through lower rates. No single buyer or seller knows overall costs; most firms do not know their own costs very well. Only through the haggling and jiggling of the market can low costs and efficient techniques be truly identified. Price agreements based on unanimity do not provide this information.

Smith argues in point (3) that cartel agreements are short-lived. The empirical evidence for this proposition is weak. Moreover, he contradicts his own argument when he cites "the survival of cartel arrangements in some open markets for long periods." Certainly the De Beers diamond cartel has lasted decades; the oil cartel has survived surprisingly well. Some railroad cartels in the nineteenth century lasted for more than a decade.

His argument for individual property rights—point (1)—is based on a view of morality that is less than unanimous in the world. He argues that people have a moral right to do anything they wish with their property. Few of the world's great religions would subscribe to this libertarian position, and postulating such a right is surely unconvincing to many.

To sum up, I would agree that all antitrust laws should be abolished except the prohibition on price fixing. This is the most procompetitive section of the Sherman Act, and the one portion that can be enforced with a minimum of discretion and a maximum of objectivity.

Thomas Gale Moore,
Hoover Institution

TO THE EDITOR:

Like many people, Fred Smith seems to be unaware of how well antitrust has worked in stimulating competition. It deserves much of the credit for the large increase in competition that has taken place during the last two decades (summarized in "Readings," *Regulation*, March/April 1983). That is why, contrary to Smith's argument, antitrust needs to be strengthened rather than abolished.

Since 1960, antitrust actions have directly raised competition in at least twenty substantial markets, from aluminum, metal cans, electrical equipment, and photographic supplies to banking, broadcasting, and automobile rentals. And the real influence of antitrust reaches much farther even than the classic federal cases that are filed and fully litigated. Most of it occurs unseen through negotiations and threats that deter mergers and other actions. The antitrust agencies often intervene in regulatory cases through informal persuasion, by threatening to go to court or through testimony at formal public hearings. Such antitrust pressure was important in pushing forward every one of the seven major instances of deregulation in the 1970s, from airlines to stockbrokers' fees. Private and state-level antitrust actions have also become an important part of the process, at the grass roots of the economy.

Consider also the general force of antitrust precedents, by which one landmark case often affects hundreds of other companies. Many early antitrust actions still exert pressure through consent decrees. Since 1975 the advent of jail sentences and stiffer fines has reduced the degree of price fixing in probably hundreds of markets. . . .

Yet even as antitrust has been having this strong cumulative effect on competition, it has come under new criticism. Corporate groups have welcomed the end of the big IBM and cereal cases, which they say were too big, too slow, and too unrealistic.... Dropping these cases was probably an economic mistake that reflected the policy tilt of the current Reagan appointees at the agencies. Ideologies and self-interest are now threatening antitrust just as it is providing a rich harvest of rising competition.

A strong antitrust policy remains the pivot of U.S. industrial policies. It operates widely and flexibly, even though it often lacks precision and political suavity. Its presence sharply distinguishes our competitive economy from others abroad, with their habits of meshing government and industrial planning. The neoconservative attack on antitrust policies is therefore doubly unfortunate. While scoring easy debating points over a few complex cases, it has ignored the great body of sophisticated activity that antitrust really comprises. And it would have us discard much of that activity just when antitrust has helped to provide—and is needed to maintain—a much more competitive economy. . . .

William G. Shepherd,
University of Michigan

TO THE EDITOR:

Fred Smith says there is little empirical evidence that truckers have succeeded in harming consumers by fixing prices. He is simply wrong.

Under antitrust immunity and in a putative regulated environment, rate bureaus have pushed rates above the level that could be sustained in a fully competitive market subject to antitrust enforcement. Carriers can pass on wage and expense increases collusively to shippers and ultimately to consumers, which has lowered the carriers' incentive to resist those increases. The industry itself evidently believes collective ratemaking boosts its profits, since it has claimed that the process is vital to its financial integrity. Public data show that while industry output was declining in tonnage by more than 40 percent from 1978 to 1982, industry revenue was increasing under the current antitrust immunity, despite ICC rate regulation.

Smith also believes that collective ratemaking in trucking can enhance economic efficiency through "price coordination." Aside from the self-serving assertions of the rate bureaus that he passes along, there is little evidence for his claim. The fact is that collective ratemaking has resulted in astoundingly high transaction costs. After decades of price coordination, most carriers do not even know their costs and many shippers pay enormous sums to obtain accurate information on prices and service options. Moreover, an army of rate experts is needed to prepare and defend rate proposals in administrative proceedings, while legions of others are needed afterward to interpret the tariffs in order to determine the rate for a given shipment.

Regulated cartel ratemaking has contributed to low industry efficiency in other ways as well. Since most carriers have at best a faint notion of what their costs are, there is no systematic relationship between costs and rates. The resulting rate structure encourages the misallocation of freight shipments, including misallocation from more efficient to less efficient carriers. Moreover, industry studies and witnesses have repeatedly shown that labor productivity has in fact declined over the past dozen or so years, despite many opportunities for improvement. In short, the performance of trucking markets under the umbrella of antitrust immunity provides no support for Smith's case.

Larry F. Darby,
Motor Carrier Ratemaking Study Commission

TO THE EDITOR:

In a curious and coincidental way, both Fred Smith's "Why Not Abolish Antitrust?" and Frank Easterbrook's "On Not Enforcing the Law" (*Regulation,* January/February 1983) underscore the danger that policy makers will lose touch with the mainstream of our free market democracy.

After noting that Lester Thurow and other "neoliberal" economists would abolish antitrust in the name of a new national industrial and incomes policy, Smith supports the same legislative route to the ostensibly opposite goal—libertarian private enterprise. While Smith's anti-regulatory, pro-liberty goals have broad support, he does not recognize that antitrust legislation has equally broad support of a primarily political nature; it historically appears as a popular response to and check upon capital, whether or not it enhances allocative or distributive efficiency in the short term.

The one period in our history in which antitrust was legislatively curtailed, if not abolished, was the New Deal, in which popular sentiment favored vastly increased and intrusive government regulation of business coupled with antitrust immunities. In the absence of a Great Depression, however, most voters do not see much difference between coercive governmental power and the threatening power of private capital. Certainly our democratic process will not long allow private capital to control government policy simply in the name of private property rights. Again and again during the past century, beginning with the original state corporation codes, the populace has insisted on policing the free enterprise system, even subjecting errant or domineering capitalists to criminal sanctions whatever economists may think. An otherwise conservative policy that does not understand antitrust's symbolic role in protecting a middle class will never retain popular support. If antitrust is abolished, we will eventually wind up with a Galbraithian "new industrial state."

The rest of Smith's argument—that businessmen and professionals do not really seek to profit from coercion, cartels, or short-term monopolies and that, even if they do, consumers and the market system are not harmed—cannot be taken seriously by those familiar with the records of antitrust trials. Smith should take more time to review the testimony of marketing vice-presidents and purchasing agents under oath in court, and the obvious market signaling economists have found in particular markets—unless, that is, he is taking a global, extended view of the players, in which the elimination of small businesses, the inhibition of potentially diverse sources of supply, and the "temporary" high price levels of gasoline, uranium, quinine, road building, and so on do not count.

Easterbrook's piece appears to be an arrogant defense of unilateral lawmaking by the executive branch, particularly the Antitrust Division—conduct that orthodox conservatives normally would abhor. But could it really be a tour de force of parody? When critics argue that Reagan antitrust chief William Baxter is defying the democratic process by attempting to abolish antitrust regulation by fiat, the "simple" answer Easterbrook offers is that Baxter is really behaving like Thomas Jefferson, who refused to enforce the un-

constitutional alien and sedition laws, or local prosecutors who use their recognized "prosecutorial discretion" in declining to prosecute drug offenses. Easterbrook thus challenges the notion that there *is* a rule of law in antitrust, or that the Justice Department is failing to carry out its Article II responsibilities when it announces that it will not prosecute broad categories of lawbreakers.

Thus he reassures his conservative readers, worried about the binding legislation and Supreme Court precedent on these matters, that lawmaking power can be safely turned over to an omniscient prosecutorial ayatollah and his cadre of Chicago-school economist mullahs. Shades of Wild Bill Douglas! The design, I suspect, is to prevent a schism between those Reagan supporters who are primarily advocates of helping big business and private capital, regardless of how the governmental process is used to do so, and others, perhaps Reagan himself, who still believe in the rule of law, the democratic process, and the limited but necessary role of government in preserving liberty.

Encore, Professor Easterbrook!

James F. Ponsoldt,
University of Georgia
School of Law

FRED L. SMITH, JR., responds:

My article was aimed at readers who were familiar with, and had generally been convinced by, the Chicago-school critique of most antitrust regulations. Shepherd's and Ponsoldt's letters remind us that the conventional wisdom still refuses to accept this critique—which shows how far we still have to go to gain acceptance of even the limited steps taken by James C. Miller III and William Baxter.

Shepherd is representative of the once-dominant structuralist school, which pronounces an industry competitive only if it has the correct statistical stigmata: low concentration ratios, high entry/exit rates, lack of "supra-normal" profits, and so forth. This school's pursuit of numerical "competition," whatever the cost to consumers, provided the intellectual base for the cereal case and the other absurdities that did so much to discredit antitrust during the 1970s. Indeed, given Shepherd's principles, it is hard to imagine a proposed break-up that he would oppose.

James Ponsoldt offers a "vox populi, vox dei" argument: the populace thinks it needs protection against the "excesses" of private capital, and antitrust is a less costly way of providing that protection than national planning or a Galbraithian "new industrial state." This begs the question twice. First, the public will demand a policy if opinion leaders convince them it is needed to avert inevitable business control of government, inherent tendencies toward monopoly, or whatever. The question is: should the opinion leaders change their tune? Second, although popular sentiment may serve as a handy pretext, the most salient political support for antitrust comes from the special interests that it benefits. Antitrust does not cure the business-government entanglement Ponsoldt rightly complains of, but exacerbates it.

Ponsoldt says he cannot take seriously my argument that "businessmen and professionals do not really seek to profit from coercion, cartels, or short-term monopolies." Let me make clear that this was not my argument. Certainly such groups seek to profit from any action they undertake—why else would they do it? I merely noted that no evidence exists that this profit seeking in fact harms anyone. The court records Ponsoldt suggests I review do show that price fixing has been tried, but also that such attempts have rarely succeeded and that, as I noted in my article, consumers often testify for the supposed evildoers. Of course I would never defend "coercion," defined to consist of the use or threat of force.

What about "small businesses, the inhibition of potentially diverse sources of supply, and the 'temporary' high price levels of gasoline, uranium, quinine, road building"? There is hardly time to linger over every one of these points, but it is worth noting that even most liberal Democrats no longer believe in trying to protect small business at the expense of the even smaller consumer through such measures as the Robinson-Patman Act. As for road building, Ponsoldt is handing me easy ammunition for my arguments: highway construction offers a perfect example of how government can run a purchasing operation without even minimal competence (not to say honesty) and then call in the antitrust enforcers to save it from the mess it helped create.

Larry Darby cannot seem to distinguish the "umbrella of antitrust immunity" from what went on underneath that umbrella: the ICC's coercive transformation of voluntary rate agreements into binding legal restrictions. At one point, he says that "truckers" have harmed consumers. At another, it is the "rate bureaus" that have pushed rates up; at yet another, it is "regulated cartel ratemaking." Darby's confusion between the rate bureaus' historic regulatory powers and the voluntary role they would play in a competitive market leads him to some odd conclusions. Note, for example, his comment that industry revenue increased under antitrust immunity from 1978 to 1982 "despite ICC rate regulation." "Despite" indeed!

Darby is quite right that under regulation carriers know little about their costs, shippers pay enormous sums to obtain price data, and experts are required to defend rate proposals. But since neither he nor I holds any brief for regulation, none of this is relevant. The only thing he says about prospective antitrust immunity is that the truckers' assertions are "self-serving," and I would remind him that not all "self-serving" assertions are wrong, even those that are made by truckers.

Thomas Gale Moore's remarks are in many ways the most frustrating because we start from such similar positions. We agree completely that the ICC retains dangerous powers to limit entry. And it is in the context of total freedom of entry that I raised the question of whether antitrust is required. But, after all, Reese Taylor has become a minority force on his own commission, and the current ICC majority is rather free-market-oriented. It is an open question whether economic freedom is better entrusted to that majority than to William Baxter, who (to judge from the American Airlines case) seems to view free speech as an impediment to antitrust enforcement.

Moore argues that it is "poor policy to exempt some industries from certain laws while demanding that others meet them." If we agree that a law is itself anticompetitive, however, would we not be better off allowing some increased competition rather than none at all? The deregulation of transportation itself began with selective exceptions to the general pattern of rate regulation in areas such as air freight. The political process is an incremental one, unlikely to reward all-or-nothing demands. Historically, Congress has disagreed with Moore on this point: it has allowed a great

(Continues on page 51)

(Continued from page 4)
many exceptions to antitrust laws, and even now is considering further exemptions for cooperative R & D ventures, various sports interests, and the brewing industry.

We also disagree on the notion that "price fixing does not create information, but destroys it." Unanimous agreement to a standard list price for similar services need not imply uniform pricing, since individual firms may maintain discounts. It just makes it easier for the shipper, especially the occasional shipper, to compare carriers and take advantage of relative efficiencies (and for carriers themselves to observe market conditions). Those agreements that bind member businesses to rigid price schedules unrelated to cost are the likeliest to founder on market forces, precisely because they throw away information.

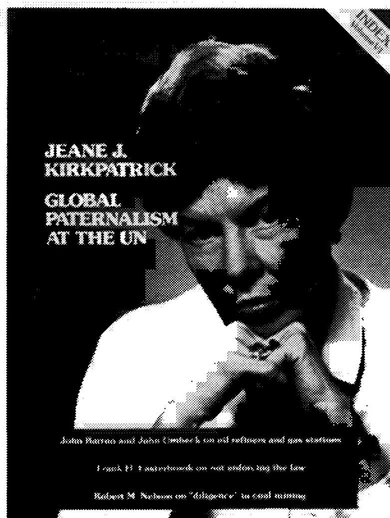
Although not many antitrust debates stray into theology in its literal sense, I would like to take issue with Moore's view that few major religions sanction libertarian values. I do not know of any major religion that requires believers to initiate force in quest of moral outcomes; indeed, free will, a central concept in most religions, implies that it is impossible to achieve virtue unless one is free to act wrongly. As a practical matter, furthermore, the conditions of economic freedom and prosperity seem to provide the best opportunity for truly civilized, and therefore moral, societies to emerge.

Advocacy Funding: The Constitutional Implications

TO THE EDITOR:

Your "Perspectives" piece, "OMB's 'Wall of Separation' against Tax-Funded Advocacy" (*Regulation*, January/February 1983), takes an astonishingly cavalier attitude toward the administration's patently unconstitutional proposal for regulating "advocacy funding." Like OMB, you argue that the balance to be struck is "between liberty and liberty," since—as you say in a puzzling ex cathedra pronouncement—"the taxpayers who wish not to subsidize advocacy have an even more legitimate liberty interest than do the grantees." You adopt this view notwithstanding your purported recognition that "the Constitution does not protect individual taxpayers from having to support federal programs they dislike."

It is plainly specious to argue that the federal government infringes upon constitutional liberties whenever it uses taxpayer money to subsidize the advocacy of ideas with which individual taxpayers do not agree. Whenever the president makes a speech, an agency official lobbies Congress, a department publishes the draft of a regulation, or the executive branch takes any other policy initiative that is unconstrained by statute, viewpoints are being funded with taxpayer money without any assurance that even a single taxpayer supports such viewpoints. This funding occurs without any executive official having to "survive" any "obstacle course the Founders built to discourage laws for which there is no general consensus." Officials may abuse this privilege by using federal money for blatant partisanship or the aggrandizement of wholly idiosyncratic points of view, but such abuses, however reprehensible, do not violate the Constitution.



Similarly, Congress's enactment of any government spending program requires some taxpayers to support a viewpoint they dislike. Again, there is no particular "obstacle course." The only effective constitutional requirements for a spending bill are majority votes in both houses of Congress and the president's signature—not any "general consensus." That is why, for example, the government funds maternal health and childbirth programs, but not abortions.

Just as the federal government may legitimately use public funds to advance a point of view, so, in particular cases, may federal grantees. Although it may be a reasonable policy position that federal funds ought not to be used to support such activity, this rule has equally reasonable exceptions. If Congress should decide, for example, that the regulatory decision making of an agency would be improved by funding the participation of groups that otherwise could not afford to speak effectively, then such funding could be defended as being in the public interest. That the viewpoint expressed by such a funded party may be in some sense "private" does not invalidate its inclusion in public policy debate as a way to serve a more general social interest for which Congress can legitimately provide the funds.

Even assuming that a policy against advocacy funding does represent the wiser use of federal resources, there is still no justification for the stark overreaching of the OMB proposal—which would, for example, preclude an employee of a grantee, a fraction of whose salary is supplied by the federal government, from using private resources to engage in lobbying, political campaigning, legal advocacy, or other politically related public relations functions. Such a sweeping ban may be easier to enforce; but given the rule's chilling effect on private advocacy, so poor a fit between the government's asserted purpose and the actual scope of its regulation cannot be defended under the First Amendment. There simply is no compelling, or even significant, social interest that justifies prohibiting so much privately funded political advocacy in order to achieve more convenient enforcement of a lobbying ban.

The one thing that can be said in favor of the OMB proposal is its surface evenhandedness. However much the proposal may have been animated by hostility toward such traditionally liberal agencies as VISTA, the Community Services Administration, and the Legal Services Corporation, the administration—in trying to silence the liberal voices—is at least willing to put the clamp on friendlier lobbyists as well. One wonders, however, amid the current enthusiasm for regulatory analysis, whether somewhere in the files of OMB there is a cost-benefit study indicating the relative impact this proposal would have on the Reagan administration's friends and foes.

Peter M. Shane,
University of Iowa
College of Law

THE EDITORS respond:

We cited Justice Hugo Black's view that the First Amendment bans even "one single penny" of advocacy funding. Shane seems to find Black's rule "plainly specious" because it is now broken so often, in letter and spirit, by the executive branch.

Yes, presidents and cabinet officers are free to lobby Congress or mobilize pressure groups, just as they are personally free to involve themselves in controversies of other sorts—by campaigning for senatorial candidates or leading religious movements, for example. The question here is whether it is improper for them to spend program funds by the million to further these personal efforts. In many cases Congress has decreed its impropriety: Title 18, section 1913 of the U.S. Code flatly prohibits executive agencies from lobbying with appropriated moneys.

We agree with Shane that executive officials find it very easy to spend discretionary funds on other sorts of advocacy—but that is an argument for, not against, our position. There is no need to resolve the quibble over whether the process by which a bill becomes law is an "obstacle course"; if it is a simple process, all the less reason for an executive official to short-circuit it by spending money on one side of a controversy that Congress has not yet acted on.

And any misgivings about elected officials' advocacy apply triply to grantee advocacy. Elected officials are directly accountable to the voters; the federal bureaucracy (which is covered by such laws as the Hatch Act, as well as section 1913) less so; and grantees least of all. Even assuming that the civil servants who administer the grant do not sympathize with the grantees' illicit lobbying, they find it hard to enforce anti-advocacy rules after the fact, especially since grantees frequently enjoy due process rights that can amount in practice to a presumption of grant renewal. Grantees very often retain their funding even after their original sponsors have been repudiated at the polls.

Shane's only stated reason for considering the regulations unconstitutional is their "overreaching" and "poor fit," which suggests that he agrees with us that prudent balancing is needed at the margin. Such balancing would be made easier if OMB's opponents were willing to admit that advocacy funding raises serious questions of ethical governance. ■

Spectrum Fees vs. Spectrum Liberation

(Continued from page 25)

functions serve as a handy excuse for restricting competitors: the NAB argues against deregulating direct broadcast satellites and for requiring cable to carry local TV stations (the "must carry" rule) on the grounds that these rules help ensure public service broadcasts. Indeed, the NAB has actively opposed every effort by the FCC to undo these rules. What it seems to want is not a property right in an unregulated competitive market, but something like a feudal land grant, held under strict conditions and not to be transferred to just anyone that happens along.

New competition should be a highly attractive alternative for those, like Representative Wirth, who believe television is not sufficiently competitive now. It is the broadcasters who are the real roadblocks to reform. After all, they have little to lose if Congress fails to act. Their license tenure is already fairly secure. Of the last 14,000 licenses to come up for renewal, less than 100 were put up for evidentiary hearings. Only two stations have lost their licenses in the past forty years through petitions to deny, and not many more through comparative renewal. Add to this the recent law extending license terms and a recent court case that gave incumbent licensees a "renewal expectancy," and what is left of the broadcasters' motive to change the system?

Senator Robert Packwood, whose crusade for First Amendment rights for electronic media has been foundering on broadcaster apathy, has been moved to comment, "I sometimes wonder deep down if broadcasters really, really want out from under the content doctrines." A few months ago the influential trade journal *Broadcasting* asserted that "a growing faction in the industry appear to be having second thoughts about pursuing further deregulation at all. Their reasoning: that the game isn't worth the candle; that the benefits of further bargains would be far exceeded by the price extracted by Congress."

Perhaps the real lesson of the fee-vs.-deregulation struggle is that it represents a tremendous failure of the imagination on the part of all concerned. The revolution in telecommunications technology demands an equally comprehensive reform of the premises of regulation. Yet the spectrum fee proposals try to avoid the necessity of making radical alterations by striking a bargain among the established players. Broadcasters would get more freedom without being subject to the discipline of a full market. Public stations would get a cozy subsidy. Congress would get extra revenue (depending on the size of the fee). In short, everyone would get a quid pro quo except consumers—who want and deserve added diversity. All very neat for the established powers, but it hardly deserves the name of deregulation, or the support of neutral observers. ■