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## Anti Anti Trust\*

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### Abstract:

Antitrust law is the law of the land, safely ensconced in our legal traditions. The present paper argues not for the reform of this policy, but for its complete elimination. We do so on economic and deontological grounds.

### Keywords:

Competition, monopoly, anti trust law

### Słowa kluczowe:

Konkurencja, monopol, prawo konkurencji

### I. Introduction

It used to be a cold, dark world for consumers. Predators lurked at shopping centers, car dealerships, and coffee shops, waiting to exploit every consumer in the name of profit augmentation. Enter antitrust law. Since 1890, the commercial world has been protected from anticompetitive practices. No longer did predatory prices and exploitative vertical or horizontal mergers affect the everyday transactions of the American economy. Monopolies crumbled under the noble hand of the government, and consumers slept peacefully as the Federal Department of Justice and Federal Trade Commission kept dominant corporations in line.

Unfortunately, the former scenario is only alive in the minds of antitrust

litigators, mainstream economists and government regulators, although it is impossible to tell what really goes through their heads, if anything at all. Antitrust law, beginning with the Sherman Antitrust Act of 1890, has exemplified some of the most illogical, immoral, inefficient and uneconomic legislation ever passed Congress. What was supposedly<sup>1</sup> created to keep competition fair and consumer benefits protected has become the very opposite. Government regulators can now legally exploit businesses for their success, and inefficient companies can piggyback on the government to impede the progress of rival competitors.

In section II we consider the Microsoft case. Section III is devoted to a discussion of monopoly. We dedicate sec-

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<sup>1</sup> See Bailey, 2013; Block, McGee and Spisinger, 1999; Childs, 1971; Hughes, 1977; Kolko, 1963, 1965; Rothbard, 1989; Shaffer, 1997; Weaver, 1988; Wiebe, 1962; Weinstein, 1968 for the view that at its very inception, these types of regulations were set up not to help the consumer, but by and on the part of large corporations in their attempt to quell their smaller competitors.

tion IV to positive and negative rights. Section V is the conclusion.

## II. The Microsoft case

For a decade, Microsoft experienced this first-hand. From 1995 to 2004, antitrust regulators diverted millions of Microsoft dollars away from product development towards litigation, which, in the end, turned out to be over absolutely nothing. The early to mid-90's marked the beginning of an evolution in computer technology. Even though personal computers (PCs) were just becoming a common household item, the government seemed to know better than entrepreneurs and consumers on how to structure the market (Tucker, 2015).

Up until 1995, PCs were sold without a pre-installed web browser. If consumers wanted to go online, they had to purchase a web browser separately and download it themselves. Considering the world of PCs was still relatively new to consumers, aside from the fact computers can be confusing, it made sense to incorporate a pre-installed web browser on the PC. Microsoft took advantage of this opportunity and was the first company to offer their Windows operating system with an integrated web browser. Not only was this convenient for consumers, it was also financially attractive: Microsoft was including their web browser, Internet Explorer, for free.

Unfortunately for both Microsoft and consumers, this integration of products violated a court order from 1994. The court prohibited Microsoft from “bundling” other products with its operating system, Windows, and “forcing” consumers to purchase them. Even though Microsoft was giving Internet Explorer away for free, regulators considered this business practice an illegal “tying agree-

ment” and called the company to court (Tucker, 2015).

According to antitrust law, the appropriate perspective for analyzing tying agreements is the self-interest of consumers, and whether or not those agreements “restrain trade substantially.” Keeping this in mind, it is clear to see, in regards to the Microsoft case (Anderson, et al. 2001),<sup>2</sup> just how absurd antitrust laws have become. Potential PC buyers are no different from any other consumer. They want as much total product as they can get for the lowest cost, and Windows with free Internet Explorer is better than Windows without Internet Explorer, or Explorer at some additional cost (Armentano, 1998). Whether Internet Explorer is integrated or tied to the PC is irrelevant; consumers are clearly better off by receiving Internet Explorer for free.

For the sake of argument, even if Microsoft did “tie” together Windows and Internet Explorer, the issue is whether the tying restrains trade in any relevant sense.<sup>3</sup> Trade may be restrained if the Microsoft agreement contained a clause forbidding the licensee PC maker from including “competitive” browsers or dealing with products of one of Microsoft's competitors.<sup>4</sup> Antitrust enthusiasts also

2 See also Block, 1977, 1982, 1994, 1999, 2008; Barnett, Block and Saliba, 2005, 2007

3 Monogamous marriage “restrains” trade. Each partner undertakes to refrain from certain “trades” with all others. If the logic of anti-trust were applied to this institution, it would have to be outlawed. And, why should it not be. After all, there is no relevant difference between the personal and the commercial, in general, nor between marriage and business in particular. Both are merely contractual relationships between consenting adults.

4 Microsoft placed no outside restraint on PC makers with respect to the installation of competitive products, including browsers. In any case, from a marketing perspective, these contractual restrictions are often counterproductive; consumer desire for the best product at the lowest price eventually prevails. See (Armentano 1998).

argued that trade could be restrained if Microsoft's tying agreement<sup>5</sup> (or product integration) sharply reduced the sales of competitive browsers (Armentano, 1998). Following this logic, trade would be "restrained" any time one firm does more business than another.<sup>6</sup> Another restraint on trade would occur whenever a company innovates and provides the market with a new product. In this case, that new product is a PC with an operating system that includes a web browser. Is this a restraint on trade, or, is it in fact, an expansion of trade?

These unsound arguments in the Microsoft case are troublesome.<sup>7</sup> But they are only a small piece in the overall problem that is antitrust. The notion that these highly paid individuals can attempt to implement such backwards logic is a comical nightmare. It raises the question that maybe there is another driving force behind all this, and that pure stupidity is not the only reason. As history shows, antitrust law only follows

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5 McDonalds, Burger King, Wendy's, A&W, and *each and every purveyor of hamburgers* is also guilty of "tying." Each of them "ties" its burger with its bun (this goes for other condiments, "special sauces" etc., but we have pity for the reader). That is, if you want a McDonald burger with a Burger King bun, you are plain out of luck. Neither emporium, *nor anyone else either*, sells either one of these two items without the other. If a customer desires this combination of goods, he must purchase two burgers, one from each vendor, and throw away the McDonald bun along with the Burger King beef patty. But this, surely, is intolerable! Why, the left wing environmentalists would object! Where are the anti-trust people when we really need them?

6 Armentano (1998, 1999) states that government cannot intelligently micro-manage business innovation and neither can the free market restrain trade.

7 According to Anderson, et al (2001), this case stemmed not from anything of the sort. Rather, it was payback time since the entrepreneurs in Redmond, WA had the temerity to organize a large-scale successful business without paying off the boys in Washington D.C., of *either* of the two persuasions.

the "dominant" firm, the successful one. Regulators typically only attack<sup>8</sup> those companies that are prosperous enough to possess a higher market share than competitors.

### III. Monopoly

Companies that possess dominant market share can be considered "monopolistic" by antitrust standards. In the free market, for a firm to become a monopoly, or with respect to the Austrian School view<sup>9</sup>, a "single seller," it must possess

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8 We use this word advisedly. Here are two versions of the same joke. 1. There were three prisoners in the USSR gulag; as occurs in this context, they agreed to share stories as to why they were in jail. The first said, I came to work late, and they accused me of cheating the state out of my labor services. The second said, I came to work early, and they found me guilty of brown-nosing. Whereupon the third responded, I came to work exactly on time, every single day. They accused me of owning a western wrist watch. 2. There were three prisoners found guilty of violations of US anti trust law. The first said, I charged more than everyone else, they found me guilty of profiteering and exploitation. The second averred, my fees were less than those of all other firms, they accused me of predatory price cutting and undercutting. The third responded, my prices were the same as other businesses in my industry (this is a bit difficult to understand, given the testimony of the first two prisoners, but, work with us here, this is just a joke!), and I was condemned for collusion, and cartelization. The point is, in both these cases, a legitimate law is one where if you violate it, you are guilty and punished for your crime. If you obey the law, you are innocent, and should not pay any penalty. For example, laws prohibiting murder, theft, rape, etc., are licit, since they can at least in principle distinguish between the innocent and the guilty. But, if the law logically mandates, as in both these two cases, that no matter what you do you are guilty of criminal behavior, then, by gum and by golly, it is not a proper law. It is a legal abomination. Anti trust is indeed an unwarranted "attack" on people who are necessarily innocent of any real crime whatsoever.

9 For an Austrian critique of neoclassical monopoly theory, see Anderson, et. al. (2001), Armentano (1989, 1991, 1998, 1999), Armstrong (1982), Barnett, Block and Saliba (2005, 2007), Block

significant skills in serving the needs of consumers. The imposition of antitrust regulations on these successful firms is a form of legal discrimination that punishes and attempts to inhibit what every business aims to do: maximize profits through consumer service (Tucker, 1998, 80).

Not only do antitrust regulations impede the main goals of businesses, this legislation is based upon a skewed definition and model of “monopoly.” By definition, monopoly (in the sense of single seller) is an enterprise that is the only provider of a good or service. In the absence of government intervention, a single seller is free to set any price it chooses and will usually set the price that yields the largest possible profit, combined with a restriction of output. If a single seller is in fact profitable, other firms will enter the market to capture some of the profits. After more competitors enter the market, the price set by the single seller will decrease (Stigler, 2008). How, then, in the free market, is it conceivably possible for a monopoly to exist in the long run?

But this is highly problematic. If there were all there were to monopoly, we would *all* be monopolists.<sup>10</sup> Every person is unique. We are all different, even if only slightly. Thus, there cannot be any real competition, since we are all “single sellers.” As we write, the Wimbledon Tennis Championship is taking place. Yes, all the tennis players have a forehand, a backhand, and a serve. But they are all different, subtly to non aficionados, not so subtly to the cognoscenti.

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(1977, 1982, 1994), Boudreaux and DiLorenzo (1992, 1997), Costea, 2003, DiLorenzo and High (1988), Henderson, 2013; High (1984-1985), McChesney (1991), Rothbard (2004), Shugart (1987), Smith (1983), Tucker (1998A, 1998B)

10 Well, virtually all of us.

There is only one Federer, one Murray, one Djokovic (Nadal was beaten in the first round, but there is only one of him, too). Of course, they can also substitute for one another. No one is irreplaceable. In a dozen years or so, all of the present champions will be retired in any case. But a similar analysis applies to firms as well. Sailboats can substitute for cars, pizza for burgers, education for bicycles. And, also sailboats for education, cars for pizza (enough of them) and bicycles for burgers. No one good, either, is irreplaceable in the consumer’s budget.<sup>11</sup>

The textbook monopolist misallocates resources because it is assumed that there are no close substitutes and because there can be no market entry. Obviously, if there can be no competition in the market, it is easy to see how the single seller can charge a higher price (Armentano, 1989, 65). Antitrust regulators, with the help of funded economic scientists, base their judgments on this model. As Tucker (1998, 77) explains:

“Here is where the economic scientists come in. Economists approach the subject of monopoly from the standpoint of equilibrium-based models purporting to describe an ideal competitive setting. Those models are in turn used as a benchmark against which particular industrial configuration is measured. They use graphs and equations, with inputs related to market sizes, price, costs, demand elasticities, and much more. They would appear to demonstrate the existence or nonexistence of monopolies as a matter of pure empirical information backed by a rigorous model of an idealized competitive structure.”

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11 And the same applies to supposedly intractable cases such as oases in the desert. Their water can be substituted for transportation out of the desert.

The problem with this method is that equilibrium-based models are constructed on the assumption of a “perfect”<sup>12</sup> market, where uncertainty and access to new technologies are held constant. Market competition and innovation is strictly concerned with the ever-changing market place, therefore these models of an idealized competitive structure should not be utilized in determining “monopolistic” behavior. If antitrust litigators would understand competition as a process of discovery and adjustment under conditions of uncertainty – not as a static equilibrium condition – product differentiation, advertising, and price reductions can easily be reconciled with increasing market efficiency, and not evil, “monopolistic” behavior (Armentano, 1989, 66).

The only rational definition of “monopoly” is based on a government grant of privilege. In the olden days, the king would give the salt<sup>13</sup> monopoly to Duke X, the candle monopoly to Count Y, and the cloth monopoly to Baron Z. This meant that it was illegal for anyone else to compete with the monopolist. Modern day equivalents of this phenomenon are the U.S. Post Office and taxi medallion companies in numerous cities, which are at present fighting a battle for Uber car services, which have been declared illegal in many jurisdictions (Fagin, 2015; Rapiere, 2015; Schelling, 2012).

Single seller behavior, in the real business world (a realm ignored by antitrust regulators), can occur in two instances. First, a small town may have only one drug store, and only have need for one such supplier (Stigler, 2008). Second, a single seller can arise when

a business provides a service for the first time. For example, a jewelry store opens its doors in a small town, and for the time being, is the only provider of jewelry. Both examples of the existence of a single seller do not imply the presence of exploitation of the consumer, and should not require regulatory action. The only thing demonstrated by the sole drug store is that, for whatever reason, economic conditions have temporarily dictated that one seller is necessary to achieve market efficiency in that town. Regarding the jewelry store, other such emporia are always free to enter the market, especially if the lone jewelry store is charging prices that are “too high,” much like the monopolistic model signifies. In either instance, government regulation is not necessary (Tucker, 1998, 76–77). The consumer is better off in both aspects, because having the option of going to one drug store or one jewelry store is better than having no option at all, and if those stores are charging “too high” prices, it will only attract other firms to enter the market. Furthermore, if the existence of a single seller does create an evil “monopoly” in the eyes of regulators, there would be no way entrepreneurs could enter the market. There would be no innovation, no new products, and no benefits to consumers (Tucker, 1998, 76).

We mean these examples as reductions ad absurdum. For the single grocer or jewelry store in a small town fits all of the criteria used by regulators for their “attacks” on private enterprise that becomes too successful, except for large size.

Even before the first antitrust act was passed in 1890, classical economists believed that monopolies could only exist if the government intervened and utilized inhibitory regulations to exclude rivals.<sup>14</sup>

<sup>12</sup> For a critique, see Barnett, Block and Saliba, 2005,

<sup>13</sup> The movie “Ghandi” depicts this Indian leader’s attempt to override the salt monopoly.

<sup>14</sup> These views were expressed from classical



Today, the only monopolies that exist are those that rely on governmental policy. Some examples include the agricultural sector, cable television companies, public utilities, taxicabs, and the post office (Stigler, 2008)<sup>15</sup>. Without government regulations, other firms would enter the market, and charge a lower price than the former singer seller, resulting in an increase of consumer benefits. In short, competition will freely adjust the price as long as there are no *legal* barriers to entry.

The “Barriers to Entry” theory, according to antitrust doctrine, says that firms in concentrated markets erected economic “barriers” (such as product differentiation) that unfairly deterred the entry of rivals and allowed dominant firms to exercise “monopoly power” (Armentano, 1989 61). The Barriers to Entry theory is yet another prime example of the illogic of antitrust law. According to this legislation, dominant firms are prohibited from performing efficient market strategies. Product differentiation, advertising, and price alterations are all evil and malicious business behaviors that are prohibited, so long as the enacting firm is dominant.<sup>16</sup> If antitrust laws were created to protect competition, why are these market practices prohib-

ited? Antitrust law, then, requires that dominant firms abstain from innovating unless all firms can do so, and equally. Dominant firms cannot advertise unless everyone can advertise at the same cost, and dominant firms cannot provide special services to specific customers unless smaller rivals are able to employ “comparable competitive actions” (Armentano, 1989, 68). These prohibitions are a blatant attack on successful business firms and in no way benefit consumers. Armentano explains (1989, 68), according to antitrust law, what must be done by dominant firms:

“The most appropriate policy from this perspective – but the worst policy for consumers – would be one where a dominant firm reduced its outputs, raised its prices, and refused to innovate. Such a policy would severely punish consumers, but it would not “threaten” any smaller rival; no smaller competitor would ever feel that it was under attack from the dominant firm. In fact, the more inefficient the dominant firm became, the better it would be from this perspective.”

If performance and preference by a dominant firm are considered “barriers”, there is no reason why any company should attempt to become successful.

In the case of Microsoft, incorporating Internet Explorer into their Windows operating system erected a “barrier” for new entrants, and created a “predatory” scenario for current competitors. Netscape, the leading provider of web browsers in 1995, felt they were unable to compete with Microsoft’s innovative decision. Instead of changing their current business practices, Netscape ran to the government and begged for help, a prime example of how regulatory processes can be captured by inefficient

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economists between roughly 1776-1850 (Stigler, 1971), which is very interesting considering Congress did not pass the first antitrust act until 1890.

15 This was true in early 1990s, which Stigler addressed in his paper. As of 2017, the “post office market” is more competitive. We owe this point to a referee of This Journal.

16 “Dominant” according to what criterion? Herfindahl indices are often used, along with four and eight firm concentration ratios. But these are all arbitrary and capricious, because they depend, crucially, upon the definition of the industry. If that is defined as anything anyone can purchase, these numbers will be exceedingly low. If narrowly defined, then, high enough to trigger investigations, that is, “attacks.”

firms, which use it as a means of beating their competitors (Tucker, 1998, 78). Stigler (1971, 3–5) discussed regulatory capture:

“Regulation may be actively sought by an industry, or it may be thrust upon it... Regulation is acquired by the industry and is designed and operated primarily for its benefit...every industry or occupation that has enough political power to utilize the state will seek to control entry. In addition, the regulatory policy will often be so fashioned as to retard the rate of growth of new firms.”

Even though Netscape had the government support, their browser soon failed and was replaced by others with more innovative technology. It can be argued, however, that the regulation of Microsoft cleared an easier path for emerging rivals to gain a piece of the market. Mozilla Firefox attracted the more tech savvy computer consumers, while Apple was in the process of designing their own browser, Safari (Tucker, 2015).

The regulation of Microsoft is just another sad case of governmental attacks on market winners and a prime example of regulators claiming to predict the future of the market better than entrepreneurs and consumers.<sup>17</sup> Twenty years after the initial case, the very reason litigators brought Microsoft into the courtroom is now the norm in terms of

17 This is sometimes characterized as “picking winners.” The problem is not, so much that governments so often fail in this regard, e.g., Solyndra. It is that they pay no automatic penalty for failure, and thus can continue ad nauseam. In sharp contrast, private investors, too, attempt to determine which firms will be successful, and which not. The only difference is that they do it with their own skin in the game, and when they fail, they are less able to continue in the future. This market process of profit and loss has been explained very well by Hazlitt, 1946.

computer operating systems and browsers. Apple’s operating system includes their own browser, Safari, while Google Chrome utilizes its downloadable applications to keep a solid market share. The web browser that the all-knowing government prosecuted in the first place is a defunct piece of technology that Microsoft recently announced will no longer be produced (Tucker, 2015).

#### IV. Positive and negative rights

As surprising as it may sound, considering government officials are presumed to come standard with halos above their heads, antitrust regulations are completely immoral and a violation of human rights. While the majority of regulators claim anticompetitive practices are unethical, the opposite is true. A right is generally defined as an individual’s entitlement to something or to do something. This can be divided into negative and positive rights. The former implies that others may not interfere with certain individual actions.<sup>18</sup> The latter, that others are obligated to provide resources such that individual rights can be pursued more effectively (Armantano, 1991, 74).<sup>19</sup>

Under the definition of negative rights, individuals own property and have a right to use it without interference by others. In essence, a business owner can charge any price, produce any output, make any agreement, and refuse to deal with anyone for any reason. It is his property after all, he owns it. All trades of property should be vol-

18 i.e., a negative right to free speech would mean that the person should be free to write anything that he wishes employing his own resources in an attempt to get his ideas published

19 i.e., an individual who wishes to exercise his right to free speech should be supported or aided in his pursuit, and imposes moral duties on others to participate

untary, and each owner must consent to have his property employed in a particular manner (Armentano, 1991, 75).<sup>20</sup> While business owners have a right to their own property, consumers also have the same rights with theirs. Therefore, according to negative rights, price fixing, price discriminating, merging, etc., are all voluntary activities and therefore do not violate negative rights. Antitrust laws, however, interfere with these voluntary actions and therefore are unethical from the negative rights perspective (Armentano 1991, 76).

Positive rights, on the other hand, imply that others in society have a duty to provide the holder of a right with whatever he needs to achieve that entitlement. If consumers, for example, have a positive right to “competitively” priced products, then it would be legitimate to enforce the antitrust laws against price fixing.<sup>21</sup> If potential sellers have a positive right to enter markets and compete, then it would be justified to subsidize the sellers and or penalize the existing companies (Armentano, 1991, 77). Under positive rights, consumers have a duty to be treated equally therefore price fixing, or any other “anticompetitive” practice should be illegal. The problem with positive rights, however, is that they cannot be applied evenly across the board. If a firm creates low prices for consumers,

the positive rights of potential rivals who could be excluded from the market are violated. Under positive rights, there is no limit to the obligations imposed on others. If less efficient firms have a positive right to more market share, then more efficient firms should be handicapped by the government (Armentano, 1991, 77).

## V. Conclusion

Not only are antitrust laws illogical, immoral, and unethical, it can also be argued that they are in violation of the American Constitution. Under Article 1, Sections 9 and 10 of the United States Constitution, Congress is prohibited from passing *ex post facto* laws. Antitrust laws, according to renowned Austrian economist, Murray N. Rothbard, antitrust law is a form of *ex post facto* ruling (Rothbard, 1970, 71–72):

“The law in the United States is couched in vague, indefinable terms, permitting the Administration and the courts to omit defining in advance what is a “monopolistic” crime and what is not...the antitrust laws thrive on deliberate vagueness and *ex post facto* rulings. No businessman knows when he has committed a crime and when he has not, and he will never know until the government, perhaps another shift in its own criteria of crime, swoops down upon him and prosecutes.”<sup>22</sup>

Rothbard’s point makes the case clear for the repeal of antitrust: is there anything more detrimental to business, and in turn, more harmful for the

20 In the free society, no one would be compelled or prohibited from engaging in any act (apart from negative rights violations, such as murder or theft or rape). Nowadays, we are headed in the direction where, seemingly, all acts are either compelled or forbidden.

21 The authors of the present paper now offer to all and sundry a pencil they own together. Price, \$1 billion. Anyone want to take advantage of this rare opportunity? Were anyone foolish enough to engage in this commercial activity with us, we would earn vast profits. If the logic of antitrust were followed in our case, we would be victimized by a lawsuit by the government.

22 Another way of looking at this is that he has *always* committed a crime, given that higher, lower and the same prices can all be characterized as law breaking. See fn. 8, supra.



consumer, than being indicted for illegal business practices that cannot be brought to light until after they are committed?

Even before the first antitrust act was passed in 1890, economists noticed the illogical result of government regulation. The term “monopoly” is only possible with government intervention. Anticompetitive practices, with the exceptions of fraud, are make-believe business violations utilized by antitrust regulators to control the market and expand their pockets. Living proof lies in the demise of Internet Explorer, the innovative move by Microsoft that brought them into the courtroom. Antitrust “geniuses” were wrong in predicting the future outcome of Microsoft, but now, 20 years later, their blatant mistake goes unnoticed. The precise business practice of integrated browsers in computer operating systems is now the norm in the technological industry, but no antitrust officials will ever be held accountable for their mistake. Antitrust is illogical, immoral, unethical, and repeal of this “anticompetitive” legislation is vital, not only to the American entrepreneur, but to the consumer and economy as a whole.

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