CATO HANDBOOK FOR CONGRESS

POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS

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38. 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;
- repeal the Hart-Scott-Rodino Act of 1976; and
- pending repeal, strip the states' authority to enforce federal antitrust laws.

Introduction

Antitrust is thought by some to be the bulwark of free enterprise. Without the continued vigilance of the Justice Department and the Federal Trade Commission, so the argument goes, large corporations would ruthlessly destroy their smaller rivals and soon raise prices and profits at consumers' expense. When megamergers grab headlines and a federal judge decides that the nation's leading software company should be dismembered, 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 overhaul 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Here are seven reasons why the federal antitrust laws should be repealed.

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 government officials and sold on terms congenial to rivals who are bent on the market leader's demise. Some advocates of the free market endorse that process, despite 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 he created. Consumers can't demand that a product be provided at a specified price or with specified features. Competitors aren't 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, government is flouting core principles of free markets and individual liberty.

No. 2: Antitrust Laws Are Fluid, Nonobjective, and Often Retroactive

Because of murky statutes and conflicting case law, companies never can be quite sure what constitutes permissible behavior. 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. When they're not accused of monopoly price gouging for charging too much, companies are accused of predatory pricing for charging too little or collusion for charging the same!

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

In real markets, sellers seek to carve out minimonopolies. Profits from market power are the engine that drives the economy. So what might happen in a utopian, perfectly competitive environment is irrelevant to the question of whether government intervention is necessary or appropriate. 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 laws could ever move. 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: 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. But government moves forward in the name of correcting market failure, apparently without considering at all the possibility of government failure. Proponents of antitrust tell us that government planners know 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 that an elite corps of 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 or the Federal Trade Commission rating the merits of various goods and services. When we permit government to make such decisions for us and allow those decisions to trump the subjective choices of consumers, we abandon any pretense of a free market. In the process, we reduce 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 variables.

No. 5: Antitrust Law Is Wielded by Business Rivals and Their Allies in the Political Arena

Instead of focusing on new and better products, disgruntled rivals 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. Soon enough, the targeted company responds in kind. Microsoft, for example, once conspicuously avoided Washington, D.C., politicking—but no longer. And America's entrepreneurial enclave, Silicon Valley, has become the home of billionaire businesspeople who use political influence to bring down their competitors. That agenda will destroy what it sets out to protect. Politicians are mostly order takers. So we'll get the kind of government we ask for—including oppressive regulation. Citizens who are troubled by huge corporations dominating private markets should be even more concerned if those same corporations decide that political clout better serves their interest—politicizing competition to advance the private interests of favored competitors.

No. 6: Barriers to Entry Are Created by Government, Not Private Businesses

Under antitrust law, the proper test for government intervention is whether barriers to entry foreclose meaningful competition. But what is a ''barrier''? When a company advertises, lowers prices, improves quality, adds features, or offers better service, it discourages rivals. But it cannot bar them. True barriers arise from government misbehavior, not private power—from special-interest legislation or a misconceived regulatory regimen that protects existing producers from competition. 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 to begin with.

No. 7: Antitrust Will Inevitably Be Used by Unprincipled Politicians as a Political Bludgeon

Too often, the executive branch has exploited the antitrust laws to force conformity by ''uncooperative'' companies. Remember that when President Nixon wanted to browbeat the three major TV networks, he used the threat of an antitrust suit to extort more favorable media coverage. On a widely publicized 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 former *New York Times* reporter David Burnham, in his 1996 book, *Abuse of Power*, shows that presidents from Kennedy through Clinton routinely demanded that the Justice Department bend the rules in pursuit of political ends.

The lesson is clear. The threat of abusive public power is far larger than the threat of private monopoly. It's time for Congress to get rid of the federal antitrust laws. Meanwhile, pending repeal of those laws, Congress must ensure that enforcement by state authorities does not duplicate federal enforcement. Government must not be given two bites at the antitrust apple, nor should defendants be exposed to double jeopardy.

Strip the States' Authority to Enforce Federal Antitrust Laws

It's time to rein in the power of state attorneys general. For most of American history they did vital, but routine and distinctly unglamorous, legal work for their states. But beginning in the 1980s, some attorneys general challenged the Reagan administration's policies in antitrust and environmental law, pursuing their own agendas through litigation. In the antitrust context, activist attorneys general have relied on their so-called *parens patriae* power to sue on behalf of state residents under federal statutes.

The Microsoft case is perhaps the most egregious example of duplicative federal and state antitrust enforcement. Nine states—relying on the same trial, the same facts, the same conclusions of law, and the same injuries to the same people—want to override a settlement between Microsoft and the federal government, supported by 41 of the 50 states. In a legal brief to a federal judge, the Justice Department offered persuasive reasons why the states should not be allowed an end run around the federal settlement.

First, "The United States is the sole enforcer of the federal antitrust laws on behalf of the American public." Second, the states' remedies would affect competition and consumers outside their borders—raising "for the very first time the prospect that a small group of states, with no particularized interests to vindicate, might somehow obtain divergent relief with wide-ranging, national economic implications." Third, "The public interest is best served when federal and state antitrust activity is complementary, not duplicative or conflicting." Fourth, the nine holdout states had "neither the authority nor the responsibility to act in the broader national interest, and the plaintiff with that authority and responsibility [that is, the United States] has taken a different course."

Still worse, continued the Justice Department, the relief sought by the nonsettling states "may harm consumers, retard competition, chill innovation, or confound compliance" with the federal settlement. Echoing the Supreme Court, the Justice Department warned that antitrust redress requires a showing of ‘‘harm to competition not competitors.’’ Remedies must be crafted for the benefit of the public, not for the private gain of politically favored rivals.

Consider the remarks of respected Judge Richard Posner of the Seventh Circuit Court of Appeals, who mediated an abortive Microsoft settlement two years ago. Posner offered these recommendations in a recent issue of the *Antitrust Law Journal:* ‘‘I would like to see, first, the states stripped of their authority to bring antitrust suits, federal or state, except . . . where the state is suing firms that are fixing the prices of goods or services that they sell to the state. . . . [States] are too subject to influence by . . . competitors. This is a particular concern when the [competitor] is a major political force in that state. A situation in which the benefits of government action are concentrated in one state and the costs in other states is a recipe for irresponsible state action.’’

Congress is constitutionally authorized to intervene whenever actual or imminent state practices threaten the free flow of commerce. Congress should use that power and revoke the *parens patriae* authority of the states to enforce federal antitrust laws. Otherwise, some states will continue to abuse their existing authority—exercising it to impose sovereignty beyond their borders and catering to the parochial interests of influential constituents.

Would constraints on state antitrust enforcement powers violate time-honored principles of federalism? Not at all. Federalism isn't simply a matter of states' rights. Nor is it exclusively about devolution of power or promoting efficient government. First and foremost, federalism is about checks and balances based on dual sovereignty. Most often, the states are a counterweight to excessive power in the hands of the federal government. Yet antitrust is an obvious case in which the federal government must curb excessive power in the hands of the states.

Conclusion

More than two centuries ago, in the *Wealth of Nations*, Adam Smith observed that ‘‘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.

DeBow, Michael. ''Restraining State Attorneys General, Curbing Government Lawsuit Abuse.'' Cato Institute Policy Analysis no. 437, May 10, 2002.

Greenspan, Alan. ''Antitrust.'' In *Capitalism: The Unknown Ideal.* Edited by Ayn Rand. New York: Signet, 1966.

Levy, Robert A. ''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.

—Prepared by Robert A. Levy