

## THE CASE FOR REPEALING THE ANTITRUST REGULATIONS

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**FRED L. SMITH, JR.**  
**President and Founder**  
**Competitive Enterprise Institute**  
**1001 Connecticut Avenue, NW**  
**Suite 1250**  
**Washington, DC 20036**

**Voice: (202) 331-1010**  
**Fax: (202) 331-0640**  
**Email: fsmith@cei.org**

The life of a free marketeer is not always happy one. A few weeks ago, I advised a group of politicians on how best to communicate their message in a world of rational ignorance—that is to say, a world where opinions are important, but no one is listening. Last week, I spoke with leaders of the automotive and chemical industries about the need to legitimize their companies if they wished to avoid the pariah status now enjoyed by the tobacco industry. And now, I seek to persuade an audience of lawyers that we should abolish antitrust laws, which have become increasingly lucrative for the legal profession.

My remarks are organized into four sections. Part I narrates the personal odyssey that has led me to this conclusion—an odyssey, by the way, that I believe mirrors the general trend in thinking by most members of our society. Part II discusses the threat posed by antitrust regulation to innovative business practices by examining the regulation of airline computer reservations systems. Part III reviews and expands upon the arguments for repeal that I first made in my article, *Why Not Abolish Antitrust?*, which was published in 1983.<sup>1</sup> Part Four

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<sup>1</sup> See Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, REGULATION 23 (Jan./Feb. 1983).

considers what might be done to move us, if not all the way to repeal, then at least toward a more rational regulatory policy.

### **I. The Evolution of My Distaste for Antitrust**

The Competitive Enterprise Institute ("CEI") is an activist policy group. Our goal is to link intellectual activity with policy-making. We believe that ideas can indeed have consequences, but that they are far more likely to do so if they are aggressively promoted on the battlegrounds of public policy. That is CEI's mission, and in my humble opinion, we are learning to do it well.

CEI's involvement with antitrust regulation began almost at our inception in 1984. At that time, America was deregulating significant sectors of the economy—transportation, most notably, but also banking and telecommunications as well. Under the traditional economic regulatory regimes, these industries had largely escaped antitrust regulation. The trucking industry, for example, was permitted to create rate bureaus to coordinate pricing and other marketing policies. However, once antitrust regulatory laws were imposed, these long-standing practices became illegal. In fact, although the era of economic regulation was supposedly coming to a close, one form of regulation merely replaced another. CEI testified on these issues and sought to clarify the efficiency, equitable, and political arguments against antitrust regulation. It soon began publishing the *Washington Antitrust Report* ("WAR"), whose logo was a bust of that noted trustbuster, FDR, with a red bar across his chest. Our motto in those early, feisty days was "Busting the Trustbusters Since 1984!"

CEI's antitrust work reflected my own newly acquired views on antitrust. Like many of my era, I entered the realm of public policy as a knee-jerk liberal and viewed antitrust (when I thought of it at all, which was seldom) as a good thing. After all, I had grown up in the populist

state of Louisiana—“every man a king” and all that—during the heady days of the Civil Rights movement. Since I wasn’t a racist, I naturally assumed that I must be a liberal. Like most “progressive intellectuals,” I was persuaded that a world guided by the Best and the Brightest (that is, by people like myself) would naturally function far better than one in which the chaos of a laissez-faire marketplace had been unleashed upon an unsuspecting public. That view went almost unchallenged in my youth.

My own intellectual arrogance was but a reflection of the post-World War II mindset about government intervention. While government interference in the economy is, by most measures, greater today than it was then, the mood toward such intervention has changed considerably. In the 1940s, the positive role of government seemed obvious to everyone; today, however, few see the government as an obvious solution for much of anything. The arrogance of the earlier mood is captured nicely in the writings of the progressive era elite, such as that of the antitrust champion, Thurmond Arnold, author of *The Folklore of Capitalism*.<sup>2</sup> The hubris, or “fatal conceit,”<sup>3</sup> of Arnold—who later headed the antitrust division at the Department of Justice (“DOJ”)—must be read to be believed. He had no doubt that he and his contemporaries could easily improve upon the chaotic performance of an unplanned market. He saw antitrust regulation as a straightforward policy that would advance consumer interests. True, past

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<sup>2</sup> THURMOND W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1980) (1937).

<sup>3</sup> F.A. Hayek, *The Fatal Conceit: The Errors of Socialism*, in *THE COLLECTED WORKS OF F.A. HAYEK* (W.W. Bartley III ed., 1988). Charles Rowley summarized Hayek’s use of the term “fatal conceit” in a law review article last year: “[It is a] synoptic delusion, a delusion in which intellectuals assume that all relevant information is known to a single elite mind . . . and that this mind is capable of constructing from such universal knowledge the particulars of a desirable social order . . . In reality, every individual is necessarily ignorant of most of the particular facts that determine the actions of other members of human society.” See Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 *GEO. MASON L. REV.* 971, 994 (1998).

antitrust policy had been a failure, but only because intellectual misconceptions—the “folklore” of his title—had led to timid enforcement. Arnold therefore argued for aggressive antitrust regulation, and sought to implement that policy when he later headed the antitrust division.

I had grown up toward the end of that era, but my metamorphosis from a true believer to an antitrust skeptic is perhaps not unique. Like others, my liberal views faded quickly when I came to Washington. My five years at the Environmental Protection Agency acquainted me—painfully—with regulatory policy as it is, not as we would have it. Still, like most free marketeers, I viewed antitrust regulation as somehow “different.” After all, antitrust regulation was supposed to be the one interventionist policy that could prevent market forces from destabilizing the competitive process. My views were naïve but not atypical; indeed, they are still held by some.

Consider, for example, this statement quoted approvingly by Irwin Stelzer in his recent book with John H. Shenefield: "Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."<sup>4</sup> I once believed that. But my views on antitrust began to change as I confronted the grim reality of the regulatory state, and as I began reading the literature on antitrust. Robert Bork's *The Antitrust Paradox*<sup>5</sup> was particularly influential in my evolution. That book made me aware that the virtues of antitrust regulation were not so straightforward after all. Bork made it clear that antitrust blocked or hindered a vast array of pro-competitive practices. It became obvious that certain practices,

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<sup>4</sup>IRWIN STELZER & JOHN H. SHENEFIELD, *THE ANTITRUST LAWS: A PRIMER* 1 (3<sup>rd</sup> ed. 1998) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

<sup>5</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1993) (1978).

which might (or almost certainly would) enhance efficiency, had instead been demonized by the very terms used to refer to them—"exclusionary arrangements," "predatory pricing," and "pricing discrimination," to name but a few.

My reading of Bork, along with an array of other scholars in the field, led me to wonder why all this criticism of antitrust regulation had not elicited a call for its repeal. As I continued to read, I found that even the case against "naked" price fixing—perhaps the most universally reviled business practice—was weak. Anyone who has read Bork must have noticed the strange shift in tone between his thoughtful defense of retail price maintenance and tying arrangements, on the one hand, and his rather bald assertion that "naked" price fixing is "clearly" anti-competitive, on the other hand. Of course, "naked" arrangements—presumably arrangements with no possible efficiency enhancing potential—of any sort are dubious, but why should we presume that price coordination has no efficiency gains? A world of reduced price variability results in efficiency gains such as lower search costs. Might not these efficiency gains justify price coordination, in the same way that quantity coordination is readily justified by the lower inventory costs made possible by a more stable supply system?

CEI brought this question to the forefront as we sought to fend off what we perceived as the re-regulation of the trucking industry. As noted above, one possibly pro-competitive aspect of the Interstate Commerce Commission's ("ICC") regulation was that it granted the industry immunity from the antitrust laws. Trucking firms were able to form regional "rate bureaus," arrangements whereby independent trucking firms could coordinate and share pricing information. Of course, during the ICC regulatory era, such pricing policies were enforced by the government. In this context, the anti-competitive nature of such arrangements was obvious. CEI argued, however, that in the new non-regulatory world, such coordination efforts might well

play a positive role. We noted that “list pricing” was generally understood to be a useful device in reducing buyer search cost, and suggested that rate bureaus might play a comparable role in the transportation sector. Lower search costs might be particularly useful for smaller shippers and carriers and allow them to reduce the transaction costs of arriving at reasonable rates. We noted also that larger firms, with more extensive internal flows of information and more sophisticated management strategies, would have less need for such cooperative arrangements. That is, as others have noted, the effect of such antitrust regulation was to encourage companies to merge in order to achieve efficiencies that the antitrust laws would otherwise block.<sup>6</sup>

CEI viewed cooperative price sharing arrangements, cooperative research and development (“R&D”) efforts, and standard setting arrangements not as means of reducing competition, but rather as ways of achieving efficiencies in one set of tasks that might require a different scale to achieve efficiency. We viewed such arrangements as “partial mergers.” We had been persuaded by Coase's insight that the modern corporation is an ad hoc assemblage of activities that are presumptively best handled within one command-and-control structure. Since the optimal scale at which tasks are best performed might differ from task to task, we saw the firm as a compromise between small-scale efficiency activities, such as security or janitorial services that might be handled by contract with an independent firm, and large-scale activities handled by cooperative arrangements, such as R&D and pricing. To ban partial mergers simply because they involved cooperative activities between competitors seemed arbitrary and capricious.

We at CEI were also persuaded more generally by Coase's suggestion that there was no theory by which economists might readily distinguish between competitive and anti-competitive

behavior. To Coase, after all, the firm was the realm where non-price coordination had been found superior to price coordination. Yet economists had little understanding of non-price competition. We rarely understood why price signals were more efficient for some transactions, while mandates worked better elsewhere. Nevertheless, antitrust authorities continued to rely heavily on market theory to critique non-market actions of the firm. When the efficiency gains of such a practice become obvious, the antitrust authorities are willing to accept the practice, but when they don't know, they tend to condemn it. For example, the willingness of antitrust enforcers to attack list pricing or capacity expansion plans might be tempered if a strong case could be made that such practices would actually reduce search costs or improve long-term capacity utilization. The anticipated efficiency gains that motivate innovative corporate behavior are often subtle and complex, and usually only dimly perceived even by the innovator. They are likely to be misunderstood by those outside the firm, and they are almost certain to be misunderstood by those already skeptical of markets. These important Coasian insights, received little immediate attention from anyone other than CEI.

CEI, however, believed that antitrust policy deserved the same critical appraisal that economic regulation had already received. As noted earlier, this lack of scrutiny was at least in part the result of the economists' lack of any truly coherent theory of corporate organization. Ronald Coase was almost alone in his understanding that economics should consider the whole array of voluntary arrangements, not simply price theory. The following quote from Coase acutely diagnoses the arrogance of economists who seek to assess non-market behavior by market analytic tools:

In the late nineteenth century, when economists came to be interested in problems of industrial organization, they were confronted with the problem of the trust in

the United States and the cartel in Germany. It was therefore natural that, with the development of antitrust policy in the United States, interest in the antitrust aspects of industrial organization came to dominate the subject. This had its good and its bad effects but, in my opinion, the bad by far outweigh the good. *It has . . . encouraged men to become economic statesmen—men, that is, who provide answers even when there are no answers.* This tendency has discouraged a critical questioning of the data and of the worth of the analysis, leading the many able scholars in this field to tolerate standards of evidence and analysis which, I believe, they would otherwise have rejected.<sup>7</sup>

Sadly, most scholars of the Chicago School have failed to practice the Coasian virtue of humility when faced by novel entrepreneurial practices. Most have argued that antitrust should be trimmed back to more respectable bounds, but agreed that antitrust regulation remained a policy worthy of support. Their goal was an enlightened economics-based antitrust policy to replace the irrational populist antitrust policies of the past.<sup>8</sup> Their goal was reform, not repeal.

CEI's work suggested another weakness of the Chicago School's antitrust theory—the lack of any thoughtful public choice perspective. Little attention had been paid to the risk that antitrust, with its weak theoretical underpinnings and sturdy populist appeal, might be used by firms to recoup market losses. Nor had the motivations of the bureaucrats administering these programs received sufficient attention. Although scholars of the Chicago School are generally viewed as cynical, in the antitrust field, they seemed to act as if economics were a religion that, if its tenets were strictly obeyed, would create a priestly class responsible for defining and

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<sup>7</sup> R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 66-67 (1988) (emphasis added).

<sup>8</sup> See generally *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (Edmund W. Kitch, ed., 1983).

implementing antitrust regulatory policies. Furthermore, the “fatal conceit” of all intellectuals—here, the hubris of the very talented members of the Chicago School—abounded. Lawyers might be corruptible, they thought, but certainly not our economists!

And for a while, the antitrust regulatory problem did seem to be well in hand. True, no one was willing to seek repeal or even reform of the major antitrust statutes, but what harm could such an attenuated policy possibly cause? In the heady days of the 1970s and 1980s, regulatory reform seemed a foregone conclusion. Economists were everywhere triumphant. Jim Miller actually claimed that antitrust regulation had been forever cut back to legitimate bounds. Further legislative action would be redundant, he opined, for the world had changed forever.<sup>9</sup>

We at CEI, however, had our doubts. It was true that there had been a great deal of improvement. But the arguments for banning transportation rate bureaus seemed uncomfortably similar to the arguments that had been used earlier to ban tying and exclusionary arrangements. Antitrust enforcers had also cracked down on cooperative R&D arrangements, fearing that they might in fact be a way for competitors to signal pricing plans. Moreover, state and private antitrust action had proven resistant to the new economic thinking blowing out of Chicago. Most importantly, new areas of institutional and technological change—areas that were confusing even to economists—were starting to be seen as ripe for regulation, even by dedicated Chicagoans. It is to one such new area—and to the havoc wrought by the successful attempt to regulate it—that I now turn.

## **II. A Case in Point: Antitrust and the Threat to Innovation**

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<sup>9</sup> James C. Miller III, Thomas F. Walton, William E. Kovacic & Jeremy A. Rabkin, *Industrial Policy: Reindustrialization Through Competition or Coordinated Action?*, 2 YALE J. ON REG. 1, (1984).

My experience at CEI challenging the application of antitrust regulation to the computer reservation systems ("CRS") used by airlines to market their services further strengthened my growing convictions that antitrust should be repealed. The decision to regulate the CRS foreshadowed many of the problems that have arisen in more recent years with respect to Microsoft and other network systems. Like the re-regulation of trucking discussed earlier, the policy toward the CRS emerged as the airlines were being deregulated and the Civil Aeronautics Board was being abolished. The ("DOJ") and the Department of Transportation ("DOT") had become convinced that the most innovative element in airline industry—the CRS—required antitrust oversight. Few people even understood what these systems were or how they operated, much less what their impact on the marketplace was likely to be. And as Coase had warned, when economists do not understand something, they worry, and that worry led the DOJ to perceive the “essential” nature of such marketing systems as a threat to the recent creation of competition in the airline industry.

In order to appreciate the magnitude of the CRS's innovative potential, one must first understand how the CRS had developed. The airlines had gradually developed internal inventory control systems to manage sales—elaborate accounts of the number of seats available on various flights, the number that had been sold at various prices, and the number still available—that were then used with various sales strategies to market outstanding inventory. Airline seats are a very perishable commodity—once the airline takes off, no more seats can be sold—and those unfilled seats represent lost revenue. Moreover, since airlines normally operate at levels where the cost of flying one more passenger is less than the average cost of flying that seat, each seat can, in theory, be sold at a very low price. As long as marginal costs are covered, each sale helps cover the fixed cost of moving the plane from City A to City B.

In the era before deregulation, airlines found it very difficult to acquire operating rights between cities and therefore many flights were “inter-lined”—that is, a passenger would travel on several airlines from origin to destination. That meant that the airline ticketing systems and thus their CRS systems had to contain information not only on the airline operating the CRS but also on all airlines that might interline with that airline. Elaborate systems of data exchange thus developed to ensure that these constantly fluctuating inventory control systems were transferred in a timely fashion.

The airlines that had developed the most sophisticated of these systems—such as American, United, and Delta—began offering their systems to their own internal sales departments and then to independent travel agents. Travel agents saw no reason to purchase or lease more than one system, and therefore demanded that the systems be reasonably comprehensive. In effect, then, each CRS was a way of selling seats both on the host airline and on rival airlines, thus comprising the kind of competitive/cooperative arrangement that raises the ire of antitrust advocates.

When the computer age arrived, these systems could display flight availability on computer screens at remote locations. Then (and now) the capacity of any single screen was limited, so that when a travel agent requested data on flights from City A to City B for a certain day and time, some rule was necessary to determine the order in which flights would be displayed. Some decisional rules were unexceptional—direct flights preceded multi-stop flights, for example. But others proved more controversial, such as whether the host airline’s flights would appear before rival airlines, and, if so, how much “bias,” or difference in time, would be permitted.

The CRS creators, of course, sought to maximize the profitability of their systems. In effect, the CRS operated much like a supermarket manages its shelves. Some items would be given priority shelf space, others less salient space. Recall that the CRS emerged during airline deregulation, which coincided with the extremely rapid development of computer technology. The airlines were experimenting with an array of contractual relationships in which some airlines merely participated, while others were co-hosts—that is, they helped pay for the systems and for their development. Most CRS providers treated the flights of all co-host airlines as they did their own, while other airlines would receive somewhat less desirable “shelf” space.

These initial CRS services were used mostly by sophisticated travel agents, who could quickly scroll down to a customer's preferred airline. But this extra "effort" was considered discriminatory by some at the DOJ and the DOT, and hearings were held to investigate this threat to competition. Great attention was paid to the "time" required to execute only a few keystrokes, to the "complexity" of re-designing first screens by computer-proficient travel agents, and to the "barriers" placed on such practices by the host CRS provider.

At that time, United Airlines was headed by Richard Ferris. Ferris had championed United's CRS, extolling it as a way to transform United from an airline into a full-service travel company. He envisioned using the CRS to bundle air, ground, and hotel sales into one transaction cost-reducing package. Whether that dream would have worked, we'll probably never know. Ferris testified at a Senate hearing on the issue and was demolished. His plan required an extremely ambitious use of a very innovative concept, and depended on pricing and packaging strategies to encourage profitable use of the system. These strategies, in turn, would have depended on his success in negotiating agreements with car rental agencies, hotels, and other tourist services. At the hearing, he was questioned sharply about his proposals, and about

the general concept of CRS. The Senators clearly didn't understand the idea, and their sharp questioning insinuated that United (and Ferris personally) were guilty of anti-competitive, exclusionary arrangements. Ferris was a businessman, not a politician, and certainly not one skilled at arguing the case for shielding this technology from regulation. He was embarrassed by the whole episode and clearly discomfited. That disaster led him to pull back and abandon his efforts. He left United the following year.

United and the other major CRS airlines soon capitulated and signed a consent decree sharply limiting their ability to use these systems as a competitive tool. The DOT then administered rules that severely restricted the operation of development of CRS systems. These rules prescribed even minutiae such as the format and nature of the information provided on the screens. So-called "bias" was eliminated, so that no airline could receive "priority." And no information could be provided for any airline unless that same information could be supplied for all participating airlines. Not surprisingly, these restrictions considerably slowed the evolution of this once-flourishing technology.

CEI sought to intervene in all this. We were aware that CRS was the first instance of an electronic "supermarket," although these terms were not in use at the time. CRS was the prototype commercial internet marketing tool, and the technology was clearly dynamic. We considered any limitation on its potential for innovation as fundamentally misguided and potentially disastrous. Moreover, we argued that these regulations were also restricting speech—speech of an electronic nature, to be sure, where the medium for communication was supplied by a party profiting from the customers attracted by the information—but we did not see these factors as raising any real substantive problems. The commercial free speech argument had already been raised successfully against earlier charges that the Official Airline Guide's

("OAG") practice of listing the timetables of regional airlines in a separate section from those of the larger airlines constituted anti-competitive bias. The DOJ argued that the OAG was an "essential" facility and therefore restrictions on the normal freedom of the provider to determine the conditions of use were justified. The OAG challenged these rules as an attempt to regulate speech and prevailed. Of course, in a few years, the OAG "essential facility" was replaced by the CRS systems.

Tragically, the airlines did not raise the commercial free speech defense. Nor did they argue that the charges against them were akin to those raised earlier against supermarkets. After all, a supermarket owns the shelves in its store and decides where to put which brands. Moreover, the store sells its own "store" brands that compete with nationally advertised independent products. Of course, a supermarket would expect to profit by selling its own products, by selling shelf space or point-of-sale advertising, and by selling products that competed with its own lines.

The shift of these practices to the electronic world, we believed, raised no new problems. Moreover, we believed that the dynamism of this newly emerging technology would guarantee that any glitches would swiftly be corrected. We testified on the issue, met with DOJ and DOT officials, and then entered a suit challenging the resulting regulations, which we argued were in conflict with the law on commercial speech. Our interventions were ignored, and we failed to achieve standing in our suit. The court found that while CEI's representation of a travel agent fulfilled the requirement for a "willing listener," we lacked a "willing speaker," and no airline was willing to join our challenge. The reluctance of the airlines to join CEI was not surprising. The major competitive advantage of the pre-regulation CRS was that it permitted the leading airlines to slightly disadvantage their leading competitors by placing them a bit farther down on

the list of available flights. United would place American slightly farther down the list, and American would return the favor for United flights. The result, of course, was that the other airlines received slightly higher ranks than they would have otherwise. When “bias” was eliminated, United moved up on the American system and vice versa, while all other airlines moved down somewhat. The antitrust restriction on competitive use of the CRS, then, actually reduced competition. Moreover, the rules ensured that the United/American market leadership would endure fewer challenges from creative newcomers, since any changes to the system would have to undergo DOT oversight, thus making "sneak attacks" impossible.

The resulting slowdown of CRS technology damaged the competitiveness of these systems. Much of the innovative lead that these systems had enjoyed slowly eroded as the internet evolved. Today, much of the air travel business has moved to the internet (as have the airlines themselves). Not surprisingly, however, American and United view the less-regulated internet providers as threats to their competitive position, and have therefore joined in the general attack on Microsoft. Once these airlines opposed the expansion of the antitrust rules to the electronic marketing world, and now they endorse it. No one aware of public choice theory or of the strategic anti-competitive uses of regulation would find any of this surprising.

I will conclude my account of the misadventures of CRS regulation by recalling a telling exchange between myself and a proponent of CRS regulation. I argued, “Regulating the most rapidly evolving technology in the world is insane!” The proponent countered, "Okay, it may be crazy, but so what? What costs will such rules incur? What will be prevented?" I replied, "I don't know. I don't know computer technology, but, who knows, maybe someday some new airline will need publicity and will request to advertise on a CRS, say, by putting a red and white blinking ad on the screen saying something like, *New Entry Airline—Low Fares—Extra High*

*Commissions—Book Now!*” The proponent looked at me strangely and said, "Computers can't do that." I said, "I know," and gave up. And CRS still can't do that—but the internet ticket sale sites can, and do.

The fight against CRS regulation persuaded CEI and myself that antitrust regulations were particularly risky in dynamic, innovative sectors of the economy, where a new batch of economists were merrily hatching theories to explain how seemingly competitive practices might actually be non-competitive. My personal favorite among these outlandish theories was that of *predatory innovation*, in which a firm would introduce a creative new product not to gain market share or to increase profits, oh no, but rather to block a competitor.

I came to realize that the real costs of antitrust regulations are the innovations never realized, which are almost impossible to quantify. We can never know the kind of world that might have emerged had regulatory barriers not been in place. For this reason, agreements not to compete in an emerging market—one of the results of the CRS consent decree—can have especially dire consequences.

More recently, Bill Gates' refusal to capitulate in the DOJ suit has puzzled many, but one reason may well be that Gates, unlike most in his industry, recognizes all too well the transient nature of market leadership. Like Ayn Rand, he understands that the supremacy of Microsoft must be earned every day in the marketplace from consumers who are all too ready to change allegiance. The CRS saga suggests that he is right. It also demonstrates that markets are unpredictable and capable of self-policing, since no bureaucrat is likely to be as imaginative or as creative as a competitor.

To a newcomer to the antitrust field, all this was a bit confusing. With all the intellectual confusion, populist rhetoric, and rent-seeking risks associated with antitrust regulation, why did

it still enjoy immunity from the criticism and calls for repeal that other economic regulatory policies received as a matter of course? Moreover, why were so few of these problems being examined, particularly those associated with rent-seeking and dynamic efficiency? Why not simply get rid of antitrust regulation? Indeed, during the Reagan/Bush era, Ira Millstein, an out-of-fashion progressive antitrust advocate, tweaked his Chicago School colleagues. He contended that when his side was in charge, at least they had acted on their convictions.<sup>10</sup> Millstein and other advocates of antitrust had hoped to enact laws that would automatically mandate the division of a firm or corporation when it reached some critical mass. Such measures were actually proposed and, in some cases, nearly became law.<sup>11</sup> Yet, Millstein noted, when his side lost influence and the Chicago School came into power, did they seek an abolishment of the

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<sup>10</sup> Ira Millstein.

<sup>11</sup> Bork has described some of the legislation proposed during this era:

The Petroleum Industry Competition Bill, which won astonishingly wide support in the Senate in 1976, was designed to destroy vertical integration in the major oil companies by requiring that each company confine itself to one of three phases of the industry: production, transportation, or refining and marketing. There is no reason to believe that the destruction of national wealth involved in the enactment of these bills or other recent proposed legislation would be compensated by any social gain.

BORK, *supra* note 5, at 6. He then went on to note:

A few years ago, the late Senator Philip Hart . . . introduced a proposed Industrial Reorganization Act. Reflecting the current shibboleth that monopoly is everywhere, the bill would have directed antitrust attack at about 140 of the nation's largest 200 companies in seven industries. More recently, Senator Hart introduced a bill that would make it no defense in a civil monopolization action that defendant's monopoly was "due to superior product, business acumen, or historic accident," thus proposing to break up market positions based on superior efficiency.

*Id.* at 6, n.1.

antitrust rules? Far from it, he noted. Instead, they came up with the Herfindahl-Herschman Index!<sup>12</sup>

All this prompted me to write an article, *Why Not Abolish Antitrust?*, in 1983 for *Regulation* magazine, then published by the American Enterprise Institute.<sup>13</sup> I reread it before writing this article. Perhaps not surprisingly, I still agree with it. Indeed, it seems now that I was far too favorably inclined toward antitrust. In 1983, I believed that while the case for antitrust repeal was conceptually strong, the actual damage likely to be done by continued regulation was limited. I had not realized the extent to which bad laws, when left in place, can become serious threats to economic liberty and efficiency—in other words, that pruned weeds can swiftly become very healthy weeds indeed. Given the disruption to the economy currently being wrought by the antitrust laws, I believe that the case for repeal is even stronger now than it was in 1983.

### **III. Reviewing the Case Against Antitrust Regulation<sup>14</sup>**

My 1983 article made five major arguments against antitrust regulation: (1) that antitrust restricts the rights of individuals to determine with whom and under what conditions they wish to deal, (2) that antitrust theory is inadequate to determine which acts are or are not competitive, (3) that evidence is lacking that antitrust achieves any substantive consumer gains, (4) that antitrust blocks efficiency gains, and (5) that antitrust laws tend to encourage businessmen to look to government rather than the market for success.<sup>15</sup> In my earlier article, I dealt primarily with the

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<sup>12</sup> Millstein, *supra* note 8.

<sup>13</sup> See Smith, *Why Not Abolish Antitrust?*, *supra* note 1.

<sup>14</sup> This section of the paper draws heavily from my 1983 *Regulation* article, *supra* note 1.

<sup>15</sup> See *id.*

case against antitrust action in the price-fixing area. The following section articulates these arguments somewhat differently, since I am now considering the full array of antitrust rules.

### **A. Antitrust Regulation Threatens Liberty**

The rights argument holds that the actions regulated by antitrust laws are voluntary and should never be prohibited. The importance of liberty has consistently been neglected in discussions of antitrust. Should an individual not have the right to use her property as she sees fit? Why should a businessman not be free to restrain his own economic activities, either alone or in tandem with others, should he wish to do so? It is important to note that the activities prohibited under antitrust laws are invariably *peaceable*, whatever their merit under an efficiency standard. Why should they not be permissible in a free society? In Adam Smith's view, this individual rights or justice standard is at least as compelling as an efficiency standard in judging policy.<sup>16</sup> Everyone recalls Smith's famous warning on the nature of businessmen: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." But few go on to quote the following: "It is impossible indeed to prevent such meetings by any law which either could be executed, or would be consistent with liberty and justice." A concern for liberty should temper even the most fervent antitrust advocate.

Bork, too, notes that when no affirmative reason for intervention is shown, "the general preference for freedom should bar legal coercion."<sup>17</sup> Yet, despite such occasional nods towards economic freedom, the Chicago School's case for antitrust policy (particularly its opposition to price fixing) seems to rest solely on economic efficiency. Antitrust regulators act as if rights had

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<sup>16</sup> See ADAM SMITH, *THE WEALTH OF NATIONS*.

<sup>17</sup> BORK, *supra* note 4.

nothing to do with the matter. Notice that an individual is, of course, free not to produce at all; however, if he does enter the market he must do so in a way that will not restrict output. In effect, the antitrust laws act as if an individual should only be entitled to use her property in ways that maximize output. With “conservative,” “pro-business” economists taking such a view, who needs social democrats?

Antitrust threatens basic rights in other ways, too. Its unavoidable ambiguities and uncertainties lead to government arbitrariness and favoritism in enforcement. These uncertainties can also threaten the predictability necessary if citizens are to know when they are acting within the law. The distinction between anti-competitive and pro-competitive actions depends to a very large degree on the motives imputed to the firm and on the intelligence of the analysts seeking to determine whether any efficiency case exists for the contested practice. Thus, one cost of antitrust regulation is that the law becomes conditional, and conditional rights are threatened rights. This tension between antitrust regulation and economic liberty merits more attention than it has received to date.

### **B. Antitrust Cannot Distinguish Between Competitive and Anti-Competitive Practices**

One of the most telling arguments against antitrust is its inability to distinguish between competitive and anti-competitive practices. Given the complexity of the practices challenged by antitrust regulators—and even those engaged in such practices are often confused about their basic purposes—the antitrust laws inevitably create massive confusion. A businessman will often be unsure whether a particular activity might trigger an antitrust investigation. Moreover, as discussed below, this problem is exacerbated by the rent-seeking tendencies of all political systems.

As noted earlier, we lack a consistent theory that could reliably and predictably distinguish between competitive and anti-competitive behavior. One activity that might best be handled at a supra-firm level is capacity expansion; uncoordinated investments may (and, in many commodity sectors, routinely do) create massive inefficiencies. Yet coordination is suspect—if not illegal—under the antitrust laws. But if an activity would be legal had the firms merged, why should the same activity be considered illegal under partial merger arrangements?<sup>18</sup> Antitrust theory lacks the non-price coordination theory that would allow meaningful judgments in these areas.

Coase characterized the knowledge problem of antitrust in a brilliant aside in his article on industrial organization:

One important result of this preoccupation with the monopoly problem is that if an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as we are very ignorant in this field, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation is frequent.<sup>19</sup>

These confusions are most likely to occur in the frontier sectors of the economy, where innovations dominate. In other words, antitrust regulation is most likely to go awry in newer, more complex areas of the economy where confusion and disruption are high. Populist confusion and reactionary dismay—the dominant forces driving political predation—are also likely in these areas.

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<sup>18</sup> See my discussion of partial mergers.

<sup>19</sup> COASE, *supra* note 6, at 67.

The populist basis for antitrust is evidenced even by its rhetoric, which exemplifies the tendency to use language to alarm rather than to inform. Consider, for example, the terms used to condemn various business practices as anti-competitive: tying, bundling, predation, discrimination. One might think one was dealing with a catalog of Victorian perversities rather than challenged business practices. This is no accident.

That point is perhaps best glimpsed by considering Adam Smith's discussion of allegedly anti-competitive practices in *The Wealth of Nations*.<sup>20</sup> In the midst of arguing against trade protectionism, Smith pauses to discuss the costs of a different political policy—that of restricting a range of activities engaged in by corn merchants. These laws, he noted, stemmed from the general animus against middlemen, a problem dealt with by many classical liberal scholars. Smith, however, addressed two practices in particular, forestalling and engrossing, which were widely condemned. These terms are now obsolete, but they referred to activities clearly viewed as “bad” in their day—as the pejorative terminology plainly indicates. These practices involved the purchase of corn by a merchant, who then either resold it later in the same market, or later in a different market. The goal, of course, was to profit from the arbitrage resulting from the differential scarcities of the commodity over time and space. Smith noted:

“The popular fear of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former [harming the consumer]. The law which put an end to all prosecutions against witchcraft, which put it out of any man's power to gratify his own malice by accusing his neighbour of that imaginary crime, seems effectually to have put an end to

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<sup>20</sup> See SMITH, *supra* note 13.

those fears and suspicions, by taking away the great cause which encouraged and supported them.”

Smith goes on to suggest that eliminating laws against domestic free trade would be equally salutary in the commercial field. Let me suggest that these same sentiments apply to the antitrust regulatory laws. Confusion about the nature of markets, together with a lack of understanding about many business practices, make mistakes in the antitrust field all too likely. This tendency toward error strongly supports rethinking the antitrust laws.

Hayek’s views on the dispersion of knowledge in modern society—his realization that modern economies are based on institutional inter-dependency than on centralized knowledge—also argues this point. Moreover, the tendency of antitrust authorities to treat what they do not understand as inherently suspect becomes increasingly dangerous as the economy evolves, and as the innovation frontier becomes correspondingly larger. But an economy can only expand if it finds some way to use a greater fraction of this specialized and dispersed knowledge. Any one person—even an antitrust agency—will be less and less able to assimilate and comprehend all this knowledge. Therefore, antitrust mistakes are likely to increase as the economy becomes more diverse and specialized. Primitive societies might craft antitrust rules that would do minimal harm, but the likelihood that only minimal damage will be suffered decreases as the society evolves. The gap between what everybody, and thus the regulator, may be expected to know and the knowledge that will be available (often in an inarticulate manner) to creative entrepreneurs pushing forward on the technological/institutional frontier is increasing. Thus, the errors associated with the “fatal conceit” of intellectuals, who act as if they will know competition when they see it, can only increase.

### **C. Antitrust Chills Dynamic Entrepreneurship**

The entrepreneur seeks unexpected and undeveloped opportunities for extraordinary earnings. By doing so, he thrusts society toward greater efficiency. Yet, most economic modeling focuses on static equilibrium analysis. Whatever the value of that model for tutorial purposes, it provides little insight into the methods and practices used in the real world to seek such equilibrium. Such practices include product differentiation, price competition, advertising and other sales techniques, variation in the size and profitability of firms, technological innovation, and aggressive efforts to increase market share. Yet ironically, when such equilibrating practices show up in a market, the logic of the “perfect competition” model identifies them as “elements of monopoly.”<sup>21</sup>

In a truly competitive economy, all firms have some degree of “control” over their prices, and all seek to maximize profits by restricting output to some degree. Any “profit” that may result should be not be viewed as social waste, but rather as the dynamic incentive needed to move the economy toward more efficient production technologies and a closer match to consumer preferences. As Schumpeter explains in *Monopolistic Practices*:

[E]nterprise would, in most cases, be impossible if it were not known from the outset that exceptionally favorable situations are likely to arise which exploited by price, quality and quantity manipulations will produce profits adequate to tide over exceptionally unfavorable situations provided these are similarly managed. Again, this requires strategy that, in the short run, is often restrictive. In the majority of successful cases, this strategy just manages to serve its purpose. In some cases, however, it is so successful as to yield profits far above what is

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<sup>21</sup> See SMITH, *supra* note 11.

necessary in order to induce the corresponding investment. These cases then provide the baits that lure capital on untried trails.<sup>22</sup>

A finding that prices exceed marginal cost may indicate nothing more than that the market is not in equilibrium; in most sectors we would be very surprised if it were. In fact, these temporary high profit and restricted output levels increase competitiveness. As Schumpeter noted, “There is not more of a paradox in this than there is in saying that motorcars are traveling faster than they otherwise would because they are provided with brakes.”<sup>23</sup>

There is little likelihood that an outsider would understand these transitory profitable opportunities. Often, not even the innovator, driven by intuition as to “what works” and “what is profitable,” will have any better understanding. As the economy becomes more complex and these transitory opportunities become more specialized, the prospects for such outsider wisdom begin to disappear rapidly. As a result, the chance that dynamic entrepreneurial activities will be viewed as criminal can and will chill the discovery process. Unfortunately, any slowdown in the critical discovery process penalizes us all.

Yet, nothing is more likely to excite the regulators at the DOJ or the FTC than the emergence of new economic theories that justify intervention in rapidly evolving sectors of the economy. After all, as Adam Smith has made clear, it is precisely these areas where public confusion is likely to be greatest, irate displaced producers are most active, and newcomers will most lack power.<sup>24</sup> And where, perhaps most importantly, antitrust enforcement “solutions”—such as the CRS consent decree discussed earlier—sharply limit innovative, competitive practices.

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<sup>22</sup> SCHUMPETER, MONOPOLISTIC PRACTICES.

<sup>23</sup> *Id.*

The anti-innovation bias of antitrust is often overlooked because most commentators focus only on technological innovation—the intellectual property world of patents and copyright, where monopolies are legal. Populist sentiments are not so easily aroused in this area, and so antitrust tends to attack institutional innovations instead. Distrust of middlemen is widespread, and institutional innovations are easily misunderstood—recall Adam Smith’s discussion of engrossing and forestalling.

Moreover, the most substantial wealth-creating activities of recent times have been institutional rather than technological. The successes of Walmart, the office supply superstores, and even Microsoft can be attributed in large part to the ability of these companies to find new ways of reducing the costs of buyer and seller finding each other, negotiating a “contract,” and reaching an agreement. Sam Walton devised a slightly different way to market basic goods in rural locations—an area largely neglected by more established firms. Office superstores, too, realized that the marketing innovations that had revolutionized retail sales elsewhere had never been applied in the office supply sector. Microsoft, for its part, created an electronic supermarket that offers consumers a vast array of minor software products. While “staples” such as spread sheets and word processing software would have been purchased even in the absence of Microsoft—just as consumers still buy milk and bread in mom-and-pop stores—specialty software products would never have broken into the pre-Microsoft market. Still, in many ways, antitrust policy has changed little from the days of *Alcoa*<sup>25</sup> when a superior firm was penalized because it proved more able than its competitors to reach consumers with new products at reasonable prices. That is certainly the “crime” of Microsoft.

#### **D. Antitrust Impedes Efficient, Diverse Marketplaces**

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<sup>24</sup> See my discussion of Smith.

One of the most persistent arguments in favor of political controls over technological and institutional change is that regulation protects diversity by impeding the replacement of small shops, however inefficient, with blandly uniform but highly efficient superstores. Market critics seem certain that capitalism destroys a diverse world of small entrepreneurs and replaces it with the dull uniformity of bland mass consumption. A wonderful world of diverse bakers and brewers is transformed into the conformist marketplace of Wonder Bread and Budweiser Beer.

There is, of course, an element of truth in this argument. The history of many commodities does testify to massive changes in industrial organization as some entrepreneurial genius finds a new way of meeting an old need—sometimes by technological creativity, but more often by institutional creativity. That process often requires standardization. It may mean a more efficient production process (Henry Ford’s creation of the assembly line), a more efficient distribution system (Amazon.com), a standardization of quality (over-the-counter medications), or a reduction in risk (the creation product brands that allow small products to enjoy the same guarantees as the commodity products). In each of these cases, a product that is costly either in production, distribution, or selection becomes less costly. The rapid drop in price creates a major shift to the new firm. Undoubtedly, many smaller firms lose business and disappear. Whatever advantage in terms of quality that small firms may possess is soon outweighed by the vast price reductions made possible by the innovation. As a result, we often find a massive increase in the overall consumption of a product with the simultaneous displacement of many earlier producers. We witness a shift from the diverse—albeit inefficient—to the standard—albeit efficient—market process. Schumpeter found this process

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<sup>25</sup>United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

especially painful, as his highly descriptive term, the “destructive creativity of the market,”<sup>26</sup> makes clear. Others, as well, consider this shift to be very destructive. How, they ask, does society profit by moving from the inefficient but diverse to the efficient but homogeneous? What values are lost when we sacrifice diversity?

Ending the analysis at this stage, however, fails to do justice to the dynamic creativity that characterizes a voluntary society. People want both variety and efficiency. They want both the security made possible by branding and the selection made possible by diversity. One soon finds that innovative efficiencies, and the wealth released by their implementation, are also used to introduce new efficiencies, and diversity soon reappears. Wonder Bread gives way, in part, to Pepperidge Farm, while Budweiser gives way to Samuel Adams. The modern supermarket sells many plain-vanilla products (not everyone is a gourmet, especially about every product), but it also makes possible incredibly narrow niche products such as Bordeaux Cookies and Diet Caffeine-Free Cherry Coke.

Over time, a creative marketplace may thus be viewed as following an hourglass pattern. It starts from a broad base of inefficient diversity and narrows to a (monopolistic?) core of efficient uniformity before spreading out again to a world of efficient diversity. Some will find this process disturbing. They will recall the “best” aspects of the first stage, the worst of the second, and will then accept without thought the integrative success of the latter stage. In the process, however, the critics of the market will have their day, creating a vague belief that somehow one could have skipped the middle phase, and that each small baker or brewery could somehow have been transformed into the efficient producers of the final stage. The anti-market intellectual is not bothered by the fact that no one can envision how such massive changes might

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<sup>26</sup> *Id.*

have occurred. The regulatory planner can always join the initial and final stages with a straight line. Of course, this nostalgic view of traditional production practices is often highly unrealistic. The creative peaks of most traditional systems are few and available to only a handful. Many traditional systems were also subject to both low quality and high prices. This is a fact that most intellectuals ignore.

### **E. Antitrust Regulation Ignores the Wisdom of Public Choice Theory**

Few businessmen enjoy losing—and antitrust regulations encourage such individuals to turn to government. Many will see their reversals not as unfortunate, nor as deserved, but rather as the result of immoral, and perhaps criminal, anti-competitive practices. Moreover, as such charges are typically brought by older, more established firms against newer, disruptive upstarts, there will always be political leaders eager to lend their voice to such charges.

As Bork and others have shown, antitrust has often protected inefficient producers. In much the same way that truckers file ICC complaints against rate discounters, these producers will invoke government help to squelch their low-cost competition. From July 1976 to July 1977, private parties filed 1600 antitrust suits in federal courts. The government filed only 78. Antitrust encourages firms to win their competitive fights by relying on Washington lawyers and lobbyists rather than on engineers, scientists, and computer experts.

William Breit and Kenneth Elzinga, two commentators who are relatively sympathetic to antitrust, have nonetheless observed that antitrust “affords inducements to customers to behave perversely in hopes of collecting greater damages.”<sup>27</sup> Part of the problem is that buyers “can view the antitrust laws as a type of insurance policy against ‘poor purchasing’ and will at the

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<sup>27</sup> William Breit & Kenneth Elzinga.

minimum reduce their precautionary purchasing efforts.”<sup>28</sup> Breit and Elzinga cite a 1951 case in which an Arkansas canner refused to accept a shipment of cans because of a minor dispute over freight pricing.<sup>29</sup> The canner then sued the can maker for triple damages “for losses incurred partly because the canning company had no cans.”<sup>30</sup> Since 1951, Breit and Elzinga add, it has become much harder for defendants to escape by citing this sort of “antitrust entrapment,” which further encourages customers to try to strike it rich in the treble-damage sweepstakes.<sup>31</sup>

Although Schumpeter did not oppose all antitrust regulation, he recognized the risks that antitrust policy might well be abused by self-interested parties. He feared that such tendencies might limit the flexibility of industry to organize its own “advances” and “retreats.”<sup>32</sup> Schumpeter noted that regulators were all too likely to be buffeted by the pressures of the political process: “Rational as distinguished from vindictive regulation by public authority turns out to be an extremely delicate problem which not every government agency, particularly when in full cry against business, can be trusted to solve.”<sup>33</sup> Populist pressures dominate political processes. Even those who believe that antitrust might have value will concede that such gains might not be realized in practice. Too often, the ability to await further analysis is difficult because the public—or more accurately, a vocal interest group claiming to represent the public—dominates the policy-making process. Not surprisingly, antitrust authorities thus tend to view all

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<sup>28</sup> *Id.*

<sup>29</sup> *See Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (D. Ark. 1949).

<sup>30</sup> *See id.* at 487.

<sup>31</sup> BREIT AND ELZINGA, *supra* note 26.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

price reductions as good and all price increases as bad. Many problems are created by this situation, not the least of which is that firms may be loathe to lower rates, fearing that they will be prevented from raising them if it later proves necessary.

This fear is not illusory, as the recent antitrust action blocking the merger of Staples and Office Depot demonstrates. Staples launched the office supply superstore movement and expanded rapidly. Each new community served benefited greatly. The success of Staples soon attracted two other firms—Office Max and Office Depot—into the market. The office superstore was clearly a frontier industry, and conditions were chaotic and murky. Since capacity expansion plans could not readily be coordinated in this environment, two or even three stores would sometimes be built in the same geographic area, leading to greater price decreases than would have resulted from a single store. Of course, with more competitors, there was also reduced profitability. Reduced profits not only created incentives to merge, but also slowed the availability of retained capital to expand into areas not yet served, as the risk premium on retained earnings likely was less than that available in the market. Consumers in communities not yet served by such stores suffered from this slowdown in expansion, even though consumers in the over-served areas benefited.

Had there been but one superstore, there would have been no problem; the extra stores would not have been built. However, the existence of several firms made it more difficult for the antitrust authorities to permit the mergers, as conflicting results would be achieved. Mergers would not only result in higher prices locally—although prices would still be less than those in communities lacking any superstore—but would also allow more retained earnings, thus

permitting faster expansion of superstores into communities not yet served, and resulting in higher prices. Was consumer welfare truly well served in this case?

One final point on rent-seeking point may help explain the strange adherence of economists to antitrust regulation: it is the one field where economic experts can earn (almost) as much as lawyers. Self-interest is a powerful motivating force, and may do much to explain why so little emphasis has been placed on antitrust reform, and why even less has been devoted to arguing for repeal.

#### **F. Antitrust Misdirects Entrepreneurial Talents**

Perhaps nothing could exemplify more starkly the waste produced by antitrust regulation than an experience I had last year. I, along with a handful of other policy types, met with Bill Gates for lunch. Most of us had written about the antitrust lawsuit against Microsoft and sympathized with the company's plight. We expected discussion at lunch to center on the problems of communicating the errors in the DOJ's action against Microsoft to the public. Instead, we found ourselves listening to Gates discuss the problems with modern antitrust regulatory policy, a field in which he had obviously been doing much research. The vagueness of the Sherman Act and the destructive nature of the decision in *Alcoa*<sup>34</sup> horrified him. We, however, were more shocked by the fact that one of the most creative individuals in America had been diverted from modernizing the software industry and had instead become a policy wonk. Can anything be more costly than to cause a unique individual like Bill Gates to spend his time reading antitrust law?

The impact on the company as a whole has been equally pernicious. Key officials now spend their time in Washington, D.C. rather than in Washington State. They focus on the

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<sup>34</sup> United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

intricacies of court challenges and regulatory powers rather than on the impact of the internet on future software needs. They meet with committee staff rather than customers. Antitrust distracts entrepreneurial energy—a scarce commodity in any society—into bureaucratic second-guessing. That cost has never been measured and is a major factor that must be weighed when considering whether to repeal antitrust regulations.

#### **IV. What Are the Steps to Reform?**

One of the most important lessons to learn from the last two decades is that changes in policy based only on changes in personnel are ephemeral. The failure of the Reagan and Bush administrations to challenge legislatively the scope and scale of antitrust regulatory powers meant that as soon as the people changed, so too did the policy. This experience teaches us yet again that a pruned weed is a healthy weed. If we want to change policy, we must be willing to undertake the long and painful process of making clear precisely why the repeal of antitrust is critical. We must take advantage of any opportunity we receive to advocate this change in policy.

This necessity is especially pressing today, when we are witnessing a newly invigorated antitrust establishment moving against railroads and airlines, fields that we had once thought safely outside the regulatory regime. Older skeptics have been replaced by bright young economists who are convinced that their advice is critical. They merrily invent new theories of market failure, all the while explaining the risks of predatory innovation, path dependency, and the inherent anti-competitive nature of economic networks. The priestly class is not about to give up its prerogative so easily.

The striking similarities between *Alcoa* and the *Microsoft* case should give us all pause. In both cases, an incredibly aggressive company has repeatedly reached the new market frontier

before its competitors in a sector that is innovative, output expanding, and price declining. Neither sector is well understood by the general public. The means of transforming aluminum ingots into final products was as strange then as the process of linking hardware and software is today.

The past also suggests another precedent. There are risks that a “compromise” solution may cripple the future of Microsoft and possibly the industry. Reflect again on the CRS case discussed earlier. That antitrust challenge was ended by a consent decree. As noted earlier, Richard Ferris of United Airlines, then the major defender of airline CRS practices, sought to explain his actions to a skeptical Senate committee headed by Senator Kassebaum (R-KS). He failed, and United junked its plans to provide the first “internet” service of integrated air, land, and hotel packages.

*What, then, can be done to prevent antitrust from destroying the potential of similarly lucrative and innovative business solutions in the future? As an initial observation, all reform is incremental, and there are many plausible first steps. For instance, we could eliminate all *per se* illegal categories and allow the rule of reason to prevail, even in so-called “naked” price-fixing cases. Let us find out whether the logic of the law can ignore the value of price stability. Laws could also insist that market definitions consider the larger field in which the sector operates, both geographically and economically. Swimming pools, for example, may well compete with trips to Rome; movies may compete with opera tickets. The rules currently in force could be modified so that firms standing to benefit from the enforcement of an antitrust action would not be permitted to file suit against the other firm. A certain skepticism about “civic” virtue is essential in such economic realms. Finally, the economic frontier could be placed entirely off-limits to antitrust laws. There is no way to understand fully the changes wrought by*

entrepreneurs until these innovations have been integrated into the larger economy. Therefore, all novel practices should be considered legal until and unless a preponderance of evidence suggests otherwise.

Since it is obvious that government can restrict competition, even if private actors cannot, the most logical application of the antitrust regulatory rules would be against government-sponsored cartels. Arguably that is the purpose of the Commerce Clause, but since the Constitution is no longer in vogue, antitrust laws might play a positive role here. Agricultural marketing orders, import quotas, and restrictions on the number of taxi cab and other operating licenses demonstrate the magnitude of the problem.

Of course, government regulatory policies almost always entail an anti-competitive element. FDA rules, for example, impose major cost and time penalties on medical technology; those delays can best be absorbed by large, diverse firms. Such firms are large enough to create the specialized staff needed to negotiate the regulatory maze, and they possess the assets needed to ride out the lengthy approval processes. Small, entry-level firms are far less likely to succeed in this environment and thus competition is muted. Antitrust action against the array of local, state, and regulatory anti-competitive policies would at least inform the policy debate. Unfortunately, the effort to do exactly that during the Reagan years was immediately shot down.

### **Conclusion**

Since my own personal odyssey as a staunch opponent of antitrust began with the work of Robert Bork, it seems appropriate to conclude by recalling his admonitions about the importance of antitrust reform. The stakes are indeed high, as Bork emphasized: "Antitrust goes to the heart of capitalist ideology, and since the law's fate will have much to do with the fate of

that ideology, one may be forgiven for thinking that the outcome of the debate is of more than legal interest.”<sup>35</sup>

Bork also expressed his dismay at what he considered the irresponsibility of modern antitrust regulatory policy: “[M]odern antitrust has so decayed that the policy is no longer intellectually respectable. Some of it is not respectable as law; more of it is not respectable as economics; and . . . a great deal of antitrust is not even respectable as politics.”<sup>36</sup> To remedy that dangerous deficiency, Bork articulated an array of cogent justifications for a wide range of practices questioned by conventional antitrust theory—small horizontal mergers, vertical and conglomerate mergers, vertical price maintenance and market division agreements, tying arrangements, exclusive dealings and requirements contracts, “predatory” price cutting and price “discrimination.” All of these practices, Bork showed, can enhance the competitive process and have instead been foolishly discouraged by antitrust regulation in the past. Bork sounded the call for reform over twenty years ago. Although it is long past time to heed his warning and repeal antitrust regulation, we may still have time enough to begin.

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<sup>35</sup> BORK, *supra* note 5, at 425.

<sup>36</sup> BORK, *supra* note 4, at 418.