ANTITRUST
REFORM PROJECT

ANTITRUST POLICY AS CORPORATE WELFARE

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EXECUTIVE SUMMARY

Political party reformers promised to roll back the regulatory state's excesses during the 1994 and 1996 election cycles. While broad-based reform targeting counterproductive environmental and risk regulation didn't occur, a recognition persists that regulations often go too far. However, there has never been a fundamental rethinking of antitrust regulation.

Despite the growing awareness of regulatory failure, antitrust, which purports to protect consumers by policing monopoly power, stands nearly unscathed as a model of public spirited regulation of business, an essential tool for protecting consumers from monopoly exploitation. Indeed, antitrust is usually believed essential to protecting the free enterprise system.

This benign reputation of antitrust is undeserved and harmful. Policymakers of both parties – especially those who believe antitrust promotes consumer welfare – should rethink their allegiance. Many commentators have noted that antitrust's rhetoric of protecting the public doesn't fit with its actual tendency to penalize beneficial and efficient practices. Few today defend the actual performance record of antitrust. Defenders of antitrust still tend to think that applying better economics and hiring better judges will improve antitrust policy outcomes.

Antitrust invites the special-interest exploitation of the public and successful businesses by legally facilitating the hobbling of competitors and offering the incentive of treble damage awards. There has never been an official acknowledgment that antitrust is fundamentally flawed and contrary to consumer interests. No part of antitrust law has been repealed. Today, antitrust is enjoying a higher profile in actions such as those against Wal-Mart, Microsoft, and the proposed Staples/Office Depot merger.

Advocates of free markets tend to develop a blind spot when it comes to antitrust, readily and routinely abandoning their otherwise steadfast belief that the unfettered market is the best allocator of resources. Such blindness does not apply only to antitrust, of course; market principles are often abandoned when politically expedient, as evident in the advocacy of wealth-transferring devices such as price supports for agricultural goods, big government science (e.g., the Superconducting Supercollider), the intergenerational windfall benefits of major entitlement programs, and other handouts and variants of corporate welfare.

This paper investigates how antitrust laws hobble dynamic market processes, infringes on individuals, acts as a special-interest regulation, and the role government plays as the root of monopoly. Antitrust appears to be motivated less by a desire to reduce deadweight losses or inefficiencies in the economy than to further private aims. The decades-long history of antitrust enforcement provides ample evidence that antitrust often does not advance consumer well-being, but instead furthers the aims of firms hoping to hobble more successful competitors and the career ambitions of overseers. Regulation and antitrust enforcement alike often increase the price and decrease the quantity of "monopolized" products by destroying misunderstood efficiencies. The faith that antitrust law primarily protects consumers deserves fresh, critical and comprehensive congressional scrutiny prior to the new century.

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INTRODUCTION

A REGULATORY REFORM PARADOX

Reformers of both political parties promised to roll back the regulatory state's excesses during both the 1994 and 1996 election cycles. While broad-based reform targeting counterproductive environmental and risk regulation didn't occur, a recognition persists that regulations often go too far. Despite that acknowledgment, and despite the passage of nearly two decades since the onset of significant *economic* deregulation in the transportation, communications and financial sectors, there has never been a fundamental rethinking of *antitrust* regulation.

Antitrust invites the special-interest exploitation of the public and successful businesses by legally facilitating the hobbling of competitors.

Antitrust purports to protect consumers by policing monopoly power. The Sherman Act of 1890, the foundation of modern antitrust law, outlaws "[E]very contract, combination, or conspiracy in restraint of trade," and provides that "Every person who shall monopolize, or attempt to monopolize or conspire to monopolize shall be deemed guilty of a felony." The 1914 Clayton Act created the Federal Trade Commission and added flesh to the Sherman skeleton by outlawing specific practices said to be anti-competitive under certain conditions, such as mergers, tying arrangements, exclusive dealing arrangements, and interlocking directorates.

Despite the growing awareness of regulatory failure, antitrust stands nearly unscathed as a model of public spirited regulation of business, regarded as an essential tool for protecting consumers from monopoly exploitation. Indeed, antitrust is usually believed critical to protecting the free enterprise system. Sen. Sherman was himself a Republican, the party typically associated with support of markets. Nobel economist George Stigler, widely admired by conservatives, said the law is a "public-interest law in the same sense in which I think having private property, enforcement of contracts, and suppression of crime are public-interest phenomena . . . I like the Sherman Act"[1]

This benign reputation of antitrust is undeserved and harmful. Policymakers of both parties – especially those who believe antitrust promotes

[1] "Reason Interview: George Stigler," *Reason*, January 1984, p. 46. Stigler disapproved of the Clayton Act, however, which he considered a "nuisance" and "petty."

Executing harmful policies more efficiently *is a step backward, not progress.*

consumer welfare – should rethink their allegiance. Many commentators have noted that antitrust's rhetoric of protecting the public doesn't square with its actual tendency to penalize beneficial and efficient practices. Few today defend the actual performance record of antitrust – as opposed to their praise of its alleged goals. Defenders of antitrust still tend to think that applying better economics and hiring better judges will improve antitrust policy outcomes. Instead, policymakers need to go beyond merely questioning antitrust's record, and consider the powerful incentives created by the law. Antitrust invites the special-interest exploitation of the public and successful businesses by legally facilitating the hobbling of competitors and offering the incentive of treble damage awards. While officials in the Reagan administration in particular did seek to overhaul antitrust policy substantially, there has never been an official acknowledgment that antitrust is *fundamentally* flawed and contrary to consumer interests. No part of antitrust law has been repealed. Indeed, the Bush administration pursued a prominent antitrust lawsuit against U.S. commercial airlines for allegedly using their proprietary computer reservation systems to fix prices, and forced the airlines to share the technology. Today, antitrust is enjoying a higher profile in actions such as those against Wal-Mart, Microsoft, and the proposed Staples/Office Depot merger.

Advocates of free markets tend to develop a blind spot when it comes to antitrust, readily and routinely abandoning their belief that the unfettered market is the best allocator of resources. Such blindness does not apply only to antitrust, of course; market principles are often abandoned when politically expedient, as evident in the advocacy of wealth-transferring devices such as price supports for agricultural goods, big government science (*e.g.*, the Superconducting Supercollider), the intergenerational windfall benefits of major entitlement programs, and other handouts and variants of corporate welfare.

But for the most part, free marketers recognize the anti-market nature of such wealth redistribution, and if they don't proclaim their desire to end such programs or drastically scale them back, they at least don't excessively praise them. Antitrust law, on the other hand, enjoys nearly unblemished status as an example of responsible, moral, well-intended, and benign government intervention. Virtually no reformer proclaims a desire to abolish antitrust: David McIntosh, one of Congress's prominent deregulators, told *The Wall Street Journal*, "I think I end up siding with antitrust," though he urged that it be "circumscribed."[2] A campaigning Bob Dole told C-Span that one of the reasons he admired President Theodore Roosevelt was that he "broke up big corporations, did a lot of things to focus our party on the people rather than special interests."[3] Assuming Dole understands the crucial distinctions

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[2]Alan Murray, "Merger Wave May Put Spotlight on Antitrust," *The Wall Street Journal*, April 8, 1996, p. A1.

[3]Al Kamen, "Good Night David, Herbert and Donald," *The Washington Post,* July 19, 1996, p. A25.

between phony "entrepreneurs" that gain their monopoly through political favor or exclusive monopoly franchises rather than superior market performance, why would he applaud the forced breakup of voluntary business organizations, a politician's direct manipulation of the marketplace? Why would a defender of the free market equate bigness with badness, or with "special interest?"

To his credit, Sen. Dole was one of the few prominent legislators to defend Microsoft from Justice Department harassment in 1995, incensed at the idea that the government ought to "dictate the terms on which [a] product can be marketed and sold." "Pinch me," Dole exclaimed, "but I thought we were still in America."[4] That principled position stands in stark contrast with Dole's ill-advised comments regarding Roosevelt.

Antitrust creates an atmosphere in which the prominently successful are potential criminals, simply because they are prominent. No one can know for sure in advance *what constitutes an antitrust crime.*

Even a recent effort by conservative Republicans to abolish the Federal Trade Commission (which enforces antitrust along with the Justice Department) would not abolish the Commission's antitrust *functions*. In their plan, these functions would merely be streamlined through a transfer to the Justice Department.[5] Executing harmful policies *more efficiently* is a step backward, not progress. Clearly, even the defenders of capitalism still have much to learn about the role of the market as the ultimate protector of individual rights, and of consumers from exploitation. Unfortunately, conservatives' rejection of antitrust in the short run is probably no more likely than liberals' embrace of free market policies in general. Neither camp appreciates unfettered free-market capitalism. Regulatory reformers so far fail to comprehend fully that the fundamentally anti-competitive nature and effects of antitrust undermine the legitimacy of the entire antitrust enterprise.

ANTITRUST HOBBLES DYNAMIC MARKET PROCESSES

Antitrust law attempts to hold real-world markets to a standard defined by a set of pre-conceived, theoretical characteristics that supposedly exemplify a state of "perfect competition." These characteristics include: the presence of many buyers and sellers, perfect information, homogeneous products, and the inability of any single seller to influence price because consumers have so many options. Such a scenario bears no resemblance to the real world – nor is it even a desirable state of affairs – and it inevitably ends up punishing as anti-consumer and criminal such competitive and beneficial behaviors as aggressive marketing and advertising, bigness, aggressive price competition, and a commitment to winning. Over the decades, antitrust has punished individuals for supposedly anti-competitive conduct that has in more recent years become widely recognized as beneficial, such as vertical price restraints

[4] "Dole Criticizes U.S. Actions on Microsoft," *The New York Times*, July 31, 1995, section 1, page 35.
[5] "House Budget Committee Recommends Abolition of FTC in FY 1997 Resolution," *BNA Antitrust and Trade Regulation Report*, Vol. 70, No. 1761, May 9, 1996, p. 501.

imposed by manufacturers on downstream retailers to ensure the quality of dealer service to customers (by thwarting non-service discounting).

Antitrust enforcers regard competition as some sort of quantity *rather than the* process *that it actually is – a process by which producers supply their own goods to the marketplace without using force.*

Antitrust creates an atmosphere in which the prominently successful are potential criminals, simply because they are prominent. No one can know for sure in *advance* what constitutes an antitrust crime: It largely depends upon the whims of who is in charge at the Justice Department and the Federal Trade Commission. If a company's prices are higher than everyone else's, it can be denounced as a monopolist. If everyone's prices are the same, firms can be charged with colluding. If a firm's prices are too low, that signifies cutthroat competition and predatory pricing. Just as Sam Walton, Bill Gates, IBM and Toys 'R' Us recently discovered, every prominent business enterprise is in technical violation. Keeping a low profile becomes important in a world haunted by antitrust.

Many labor under the impression – an impression that in many ways is the lifeblood of antitrust – that, without numerous firms, genuine competition cannot exist. Antitrust enforcers regard competition as some sort of *quantity* rather than the *process* that it actually is – a process by which producers supply their own goods to the marketplace without using force.[6] Competitive markets can take on many forms, and there is nothing inherently anti-competitive about the existence of only one firm**.** Competition is a dynamic process of "creative destruction," as economist Joseph Schumpeter has noted. In his view, enforcers mistakenly tend to focus on "how capitalism administers existing structures," when instead "the relevant problem is how it creates and destroys them."[7] Existing businesses are constantly being torn down by new innovations, leaving no firm secure.

*Competitive markets can take on many forms, and there is nothing inherently anti-competitive about the existence of only one firm***.**

Historically, certain practices have been universally regarded as anti-competitive and injurious to consumers. But where markets are regarded as discovery processes, there are rational justifications behind non-coercive practices even if bureaucrats have been unable to conceive of such. Alternative interpretations of several forbidden practices show how supposedly public-spirited enforcement to quash them actually transfers wealth illegitimately from some producers to others, or even from consumers to producers. The reality is that many activities deemed harmful by antitrust adherents deliver consumer benefits.

Consider briefly the potential *efficiency* justifications for the following three frowned-upon practices:[8]

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[6] Murray Rothbard, *Power and Market: Government and the Economy*, Kansas City: Sheed, Andrews and McMeel, Inc., 1970, p. 61.
[7] See Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, New York: Harper and Row Publishers, 1942.
[8] For summaries of the beneficial effects of these practices see *The Competitive Enterprise Institute's Antitrust Terrible Ten: Thinking Critically about Antitrust Policy*, by Clyde Wayne Crews Jr., forthcoming.

Mergers: By combining resources, merging companies can generate efficiencies and reduce overall production costs. The common objection to large mergers is that they will increase prices. But if competitors honestly believed a merger would *increase* prices, they would be unlikely to complain to antitrust enforcers, since they could sell more of their own lower-priced output. Mergers thus have their own built-in efficiency gauge: the opposition of competitors is a clear signal that a merger will benefit consumers through lower prices. Unfortunately, antitrust actions are largely competitor-driven.

Predatory Pricing: Low prices always benefit consumers. The fear that a "predator" will drive out all competitors and then raise price to a harmful monopoly level hasn't been realized in the real world. The main reason is that a predation campaign costs the predator more than his rivals: he must expand and sell output and bear losses to capture market share, while rivals need not bear such losses. Moreover, the "predator" simply invites new entry when he later raises price to recoup.

Collusion: Cooperation, such as by forming partnerships and corporations, is essential to modern large-scale production and often is as important as competition. Efforts to pool private resources or agree on terms may differ little from forming a still-larger corporation or forming a joint venture, but may nevertheless be pejoratively described as "collusion." Such consolidation can deliver consumer benefits by avoiding needless duplication, reducing costs, and coordinating research and development. Unwieldy combinations that fail to provide consumer benefits, such as inefficient price-fixing arrangements, motivate members of the cooperative to cheat and are always subject to competition from new rivals. The market, rather than the government, can impose the necessary discipline.

Mergers have their own built-in efficiency gauge: the opposition of competitors is a clear signal that a merger will benefit consumers through lower prices.

Despite the consumer benefits that some presumably "anti-competitive" behaviors deliver, the free market is not justified solely on its ability to deliver consumer benefits. The ethical foundation of the free market is centered on the right of sovereign individuals to form voluntary associations and to trade or not trade. Antitrust, on the other hand, casts aside basic notions of property rights and regards the voluntary offering for sale of *one's own products* not as an unquestionable right, but as a potential exercise of force against consumers.

ANTITRUST IS SPECIAL-INTEREST REGULATION

If even the most reviled business practices often further consumer welfare, something else must explain antitrust activity. All regulation – whether economic regulations or health and safety rules – owe their existence to the idea that "market failure" exists and is correctable by government. But over the past few decades, much regulation, even of the health and safety variety, has been shown not to protect the public interest but to transfer wealth to politically effective groups. Tariffs and quotas protect domestic producers

The free market is not justified solely on its ability to deliver consumer benefits, but also on the right of sovereign individuals to form voluntary trade associations and to trade or not trade.

from foreign competition by forcing all Americans to pay more for the protected class of goods. Food labeling regulations restricting the use of health claims can benefit established firms with already solid reputations at the expense of unknown cash-strapped upstarts. Large firms may endorse expensive technological gadgetry to reduce environmental emissions if it places greater relative burdens on competitors; the higher costs the large firms faces can be offset by greater market share and higher price if competitors are eliminated.[9]

Because antitrust violations are potentially so broad, and because proceedings can be brought against an industry by competitors or by private citizens (in other words, interest groups), we are not remiss in calling antitrust a *form of regulation*. In that sense, standard wealth-transferring regulation and antitrust can be *substitutes* for one another. But "government failure" at designing and executing regulation or antitrust proceedings can exceed the alleged market failure that regulation is supposed to correct. Just as there are potential special-interest gains to be had from regulation detrimental to one's competitors, there are gains to be had from initiating antitrust proceedings against them. Invoking antitrust, targeted firms can be accused by jealous competitors of refusals to deal, covenants not to compete, exclusive dealing, interlocking directorates, predation, and other actions they will argue harm themselves and consumers. The academic contribution that best helps to unify such anti-consumer outcomes is the *interest group* theory of regulation. Also known as the "capture" theory in its simplest form, the theory holds that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[10] For example, trucking regulations, prior to deregulation, protected incumbents from competition by blocking the entry of competitors.

The Chicago School of economics – which has included economists such as George Stigler, Harold Demsetz and Yale Brozen – has long documented the potential social inefficiencies of regulatory and antitrust polices. The University of Chicago's research program is primarily responsible for demonstrating that a number of technically illegal practices – mergers, resale price maintenance, and others noted earlier – are in fact pro-competitive and beneficial to consumers. But the Chicago School has not repudiated antitrust fully: the "consumer welfare" standard remains the guiding principle for Chicago School scholars, who still regard outright collusion (price fixing) and large horizontal mergers as harmful to consumers and worthy of antitrust enforcer concern.[11]

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[9]See, for example, Robert Crandall, *Why is the Cost of Environmental Regulation So High?,* Center for the Study of American Business, Policy Study Number 110, February 1992.

[10]George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, 2, 1971, p. 3.

[11] For a detailed treatment of Chicago thinking on antitrust policy, see Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, New York: Basic Books,1978.

A notable extension of the interest group theory was developed by Sam Peltzman,[12] who demonstrated that the simple "producer capture" theory of regulation was by itself inadequate and that, instead, regulators, as vote maximizers, must include the preferences of consumers in their calculus as well. The regulator must balance the change in votes of producers and consumers at the margin: the optimum, vote-maximizing position occurs when an incremental increase in the votes obtained by favoring one group is exactly offset by a loss of votes from the other group. Peltzman illustrates that, because of the need to balance opposing producer and consumer interests, the outcome of a regulatory process within a pressure group environment will establish a regulated price that is below the profit-maximizing monopoly price, but above the zero-profit price that prevails for a perfectly competitive industry. The implication is that regulators have the most to gain in the polar instances where either "natural monopoly" or "perfect competition" prevails. Regulation of industries with prices already at some intermediate level provides less of a gain to the regulator.

If even the most reviled business practices often further consumer welfare, something else must explain antitrust activity.

This insight that the regulator gains votes not merely from regulating monopolies, *but from regulating competitive firms as well* has since become indispensable to most serious analyses of interest group behavior. The regulation of farming, trucking, taxicabs, hairdressing and minor legal services such as bankruptcies and wills are all examples of regulating essentially competitive markets for interest-group gain. This finding may help explain otherwise perplexing examples of antitrust action directed at obviously competitive markets, such as toys, groceries, pharmaceuticals, and office supplies – markets where prices were falling and customer options unprecedented. In order to be "efficient" in the Chicago sense, of course, regulation should be directed instead at those charging monopoly prices, never those engaged in rivalrous competition.

The Public Choice school of economics (founded by Nobel laureate James M. Buchanan) shares Chicago's skepticism toward much of antitrust policy, and has documented anti-consumer effects of decades of antitrust enforcement and of business regulation in general.[13] A central tenet of the Public Choice school also is that market failure must be compared with the likelihood of government failure – the chance that enforcement will make consumers worse off than the alleged anti-competitive behavior.

Market failure must be compared with the likelihood of government failure – the chance that enforcement will make consumers worse off than the alleged anti-competitive behavior.

Public Choice theorists, however, tend to dismiss the Chicago notion that "better people" in government – those familiar with Economics 101 and who strive vigorously to employ the consumer welfare standard – can avoid political failure and ensure that antitrust enforcement is properly conducted.

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[12] Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics*, 19, August 1976, pp. 211-40.

[13] See Robert D. Tollison, "Public Choice and Antitrust," (With Comments), *Cato Journal*, Vol. 4, No. 3, Winter 1995, pp. 905-932.

Public Choice doesn't unquestioningly accept the premise that antitrust's primary role is one of consumer protection: rather, antitrust tends to be viewed as a tool of special interests to erect barriers to entry against their more successful competitors. In fact, some theorists even speculate that antitrust owes its origins to a granting of wealth transfers on behalf of special interests. Thomas DiLorenzo presents a powerful case that there never was a "golden age" of antitrust and consumer protection: instead, the Sherman Act was a "blatantly protectionist act designed to shield smaller and less efficient businesses from their larger competitors." DiLorenzo argues that, during the late-19th century's period of supposedly abusive trusts, output, rather than being restricted, was growing rapidly, and prices were declining rather than rising.[14]

An unstated premise of anti-trust enforcement is the assumption that government officials are different in kind from the individuals competing in the private marketplace.

An unstated premise of antitrust enforcement is the assumption that government officials are different in kind from the individuals competing in the private marketplace. While traditional antitrust agrees with Adam Smith that self-interest rules in the marketplace, it incorrectly assumes that legislators and bureaucrats lack capacity for self-serving strategic behavior, heed only the public interest, and would thus never tilt antitrust enforcement to favor, say, a firm or industry in a particular congressional district. Antitrust's defenders never explain how and why government officials happen to be so altruistic. But as Prof. Buchanan argues, the theorist cannot have it both ways: "The burden of proof must rest on the discoverer of market failure as he demonstrates that the behavioral shift into a nonmarket setting involves a dramatic widening of personal horizons."[15]

Most legislation and most regulations transfer wealth. Part of the Public Choice research program examines public policy by modeling legislators as brokers in wealth transfers. If man pursues his self-interest in private affairs, why assume man is not also selfish when he becomes a bureaucrat or legislator? Empirical testing of the latter proposition generates sometimes troubling data that lead Public Choice theorists to conclude that antitrust is in fact primarily a tool by which inefficient producers hobble their more efficient rivals in the courtroom rather than confront them head-on in the marketplace. Antitrust may embody today's least-obvious form of "corporate welfare," in that antitrust invites a transfer from those who produced wealth to those who didn't. Important questions to ask regarding a business practice or transaction that is challenged on antitrust grounds are: Who testified? Who filed suit: consumers or merely competitors? What did they have to gain? What was the state of the economy and of the industry? And most importantly, *whose wealth is increased by antitrust enforcement?*

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[14] Thomas J. DiLorenzo, "The Antitrust Economists' Paradox," *Austrian Economics Newsletter*, The Ludwig von Mises Institute, Summer 1991.
[15] James Buchanan, "Toward Analysis of Closed Behavioral Systems," in James M. Buchanan and Robert D. Tollison, ed., *Theory of Public Choice*, Ann Arbor: University of Michigan Press, 1972, p. 22.

The Public Choice approach compares enforcement outcomes with what are recognized as the core features of excessive market power. Because monopoly, by definition, raises prices and decreases output, successful antitrust enforcement should lead to lower prices and greater output. Public Choice theorists look at the facts to see if antitrust does what it sets out to do. If antitrust enforcement *itself* leads to higher prices or shrinks output, that intervention is clearly failing by misallocating resources and harming consumers.

Substantial effort has been devoted to determining the reasonableness and conformity with economic theory of antitrust target selection. Ideally, the brunt of Federal Trade Commission and Justice Department enforcement efforts should be directed at those industries or firms in which excessive market power, gauged in some reasonable way, is highest. But evidence indicates that antitrust is a smokescreen for private gain. Antitrust, the supposed consumer-protection law, may cause consumers to lose as a rule, rather than occasionally.

Antitrust Targets the Merely Prominent Rather Than the Inefficient: Where monopoly exists, there must, by definition, exist a markup of price over marginal cost. (Where market power is absent – or in economic jargon, where there exists "perfect competition" – price *equals* marginal cost.) Yet statistical studies have found that the selection of defendants in antitrust cases cannot be justified on the grounds that their prosecution would heighten efficiency.[16]

An important question regarding an antitrust challenge to a business practice is, "whose wealth is increased by antitrust enforcement?"

A study by Long, Schramm and Tollison examined the impact on casebringing activity in various industries of welfare loss measures and the underlying variables that standard theory suggests accompany monopoly power (such as concentration and excess profitability).[17] If enforcement were targeted appropriately, casebringing activity should be higher the greater the welfare loss. But these variables were found to have only a minor role in explaining casebringing activity. Instead, the variable that strongly correlated with casebringing activity in several iterations of the model was: *industry sales*. In other words, an industry was more likely to be an antitrust target merely for being big. Who might benefit from a policy of targeting mere bigness rather than genuine inefficiency in an industry? Small competitors, of course, but antitrust enforcement lawyers in pursuit of promotions or lucrative post-government-employment positions may also benefit from the visibility of reeling in the biggest fish.

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[16] See Richard Posner, "A Statistical Study of Antitrust Law Enforcement," *Journal of Law and Economics,* October 1970, pp. 365-419.

[17] Long, Schramm and Tollison "The Economic Determinants of Antitrust Activity," *Journal of Law and Economics,* Vol. 16, October 1973, pp. 351-364.

Newer studies, incorporating far more disaggregated data and including variables that appear to provide ample opportunity for "public interest" explanations for antitrust regulation to manifest themselves, still conclude that antitrust enforcement efforts are not being driven by efficiency considerations.[18]

Regulators Protect the Interests of Firms in Congressional Overseers' Districts: The fact that Congress responds to interest group pressures surprises no one. But might not regulators, such as the Federal Trade Commission – which receives its budget allocation from those congressional overseers – in turn be swayed by the preferences of their interest-group-influenced congressional appropriators and overseers? As Richard Posner noted, "the welfare of [the legislator's] constituents may depend disproportionately on a few key industries. The promotion of the industries becomes one of his most important duties as a representative of the district."[19]

"As we inquire into the individual items in which progress was most conspicuous, the trail leads to a shocking suspicion that big business may have had more to do with creating that standard of life than with keeping it down."

In that light, Faith, Leavens and Tollison examined Federal Trade Commission case-bringing activity "in order to see if there is bias in the results of this process in favor of firms that operate in the jurisdictions of members of congressional committees that have important budgetary and oversight powers with respect to the FTC."[20] Cases were found to be dismissed more often in districts represented by a member with oversight authority. While this doesn't address what drives the *failure* to dismiss cases, the authors reasonably conclude that "representation on certain committees is apparently valuable in antitrust proceedings . . . [R]epresentation matters in determining policy outcomes."[21]

Another study of Federal Trade Commission activity by Barry Weingast and Mark Moran found "significant and important influences by the relevant congressional subcommittees."[22] It is vital, of course, that Congress, as our elected representatives, bear accountability for agency actions good or bad – but these studies drive home the fact that one ought not imagine that antitrust is applied impartially.

Prosecuting Attorneys Have Personal Interests at Stake: The "public interest" being protected by antitrust may often be that of the antitrust enforcer, particularly the lawyers who have reputations at stake, or individuals who otherwise invest in litigating. One study based on interviews with

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[18] Gerald Miller, William F. Shughart and Robert D. Tollison, "Antitrust Policy and Industry Performance," manuscript, Center for the Study of Public Choice, 1990.
[19] Richard Posner, "The Federal Trade Commission," 39 *University of Chicago Law Review*, 1969, p. 83.
[20] Roger L. Faith, Donald R. Leavens and Robert D. Tollison, "Antitrust Pork Barrel," *Journal of Law and Economics*, Vol. XXV, October 1982, pp. 330-331.
[21] Ibid. p. 342.
[22] Barry R. Weingast and Mark J. Moran, "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission," *Journal of Political Economy*. 91:5, 1983, pp. 765-800.

Federal Trade Commission lawyers and economists finds lawyers most interested in pursuing cases that can be resolved quickly in order to gain valuable trial experience useful elsewhere. Economists, who are generally longer-term employees of the agency, tend to favor more extended proceedings against industry.[23] The incentives of antitrust attorneys lend credibility to findings that industries with greater "visibility" (such as high sales) tend to be prosecuted. Clearly, if efficiency were truly a goal, the temptation to target an industry or firm that was already competitive would be resisted.

Coercive monopoly power does not emerge from the transitory outcomes of the voluntary exchanges that comprise the marketplace.

The above analyses of selfish motivations are not exhaustive, but they conform with another study finding that a significant effect of ongoing enforcement of the Robinson-Patman Act – which outlawed price discrimination – has been to transfer wealth from large chain stores to the more expensive "mom-and-pops."[24] The fact that consumers benefit from falling prices and expanding output can often take a back seat to ambitious exploitation of antitrust law.

The notion that antitrust can be abused for private gain was prominently borne out recently in the cases of Wal-Mart and Microsoft, two competitive firms who continue to offer lower prices, newer products and better deals for consumers. While customers have complained relatively little about these firms, *competitors* most certainly have. When Wal-Mart was found guilty in 1993 of predatory pricing, the suits were initiated – not by consumers – but by local pharmacies whose prices were being undercut. In complaints against Microsoft, hypocrisy was especially apparent. Prior to the launch of Windows 95, America Online (AOL) argued that Microsoft should not be allowed to feature its own Microsoft Network service – a direct competitor to AOL – on the Windows desktop in the form of a clickable icon, because that would constitute unfair competition. Microsoft's "monopoly" in desktop operating systems would supposedly allow it to leverage that dominance into a new monopoly in online services, critics charged. As it turned out, the Microsoft Network flopped, and Microsoft cut a deal to offer AOL itself as part of Windows. The AOL icon appears right there on the Windows desktop – only now AOL isn't complaining.

GOVERNMENT: THE ROOT OF MONOPOLY

The idea that consumers are threatened by private firms that have achieved dominance through internal growth and rivalrous competition undergirds antitrust. Yet often, as in the case of mass availability of

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[23] See R. A. Katzman, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy*, Cambridge, Mass.: MIT Press, 1980; Carolyn Weaver, *The Decision to Prosecute: Organization and Public Policy in the Antitrust Division*, Cambridge, Mass.: MIT Press, 1977; Kenneth G. Elzinga and William Breit, *The Antitrust Penalties: A Study in Law and Economics,* New Haven: Yale University Press, 1976.

[24] See Ryan Amacher, Richard Higgins, William Shughart II and Robert Tollison, "The Behavior of Regulatory Activity Over the Business Cycle: An Empirical Test," *Economic Inquiry*, 1985, pp. 7-19.

computers and automobiles, consumers owe the very availability of their myriad choices to the supposed monopolist. For example, the sophisticated software and computing power made available at under $2,000 by today's supposed monopolies would have cost the average person tens of thousands of dollars 20 years ago. As Joseph Schumpeter notes, "[A]s we go into details and inquire into the individual items in which progress was most conspicuous, the trail leads precisely to the doors of large concerns and a shocking suspicion dawns upon us that big business may have had more to do with creating that standard of life than with keeping it down."[25] No matter the size of a private firm, market conditions do not remain frozen. By assuming that the economic pie and market share can become fixed, antitrust takes little account of the dynamic nature of the market and the importance of that dynamism to consumers.

Leaving aside the libertarian argument that any firm has a natural right to "restrain trade" in the goods that it created and owns, the notion that firms can become coercive monopolies depends upon a fundamental misunderstanding of the nature of a fluctuating market economy. Joseph Schumpeter's calling the market process one of "creative destruction" remains the best formulation. Firms struggle to "keep on their feet, on ground that is slipping away from under them," he argues. In such an environment, behavior characterized as monopolistic may merely indicate efforts to remain efficient and survive. One need merely consider the many seemingly impervious institutions, such as mainframe computing, that have been toppled by unexpected competition.

So while bigness among private firms is not a legitimate cause for concern, *coercive* monopoly power – the type that should set off alarm bells – *does* exist and should be eliminated. But coercive monopoly power does not emerge from the transitory outcomes of the voluntary exchanges that comprise the marketplace. Coercive monopoly power derives from governmental restriction of entry, from the outlawing of competitors. AT&T formerly enjoyed such protection from competition in some of its services. Breaking up what is a government-granted monopoly in the first place, such as exclusive franchises for electric power and the Postal Service monopoly on first-class mail, always makes sense. But ending such special treatment in no way makes a case for targeting private firms that happen to be large.

Coercive monopoly power derives from governmental restriction of entry, from the outlawing of competitors.

The equivocation between power achieved by success in the free market with power bestowed and maintained by government favor should end. A real "antitrust law" worthy of the name would be one that eliminated genuine government-granted monopoly power, such as tariffs, quotas, licensing restrictions and exclusive franchises. The antitrust laws unfortunately lend themselves to the creation of artificial monopoly power at the urging of

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[25]Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, New York: Harper and Row, Publishers, 1942, p. 82.

special interests. Coercive monopoly should be recognized as the corporate welfare that it actually is, rather than an attribute of the free marketplace.

ANTITRUST VIOLATES INDIVIDUAL RIGHTS

Apart from the recognition that antitrust actually interferes with practices that are pro-consumer – the opposite of its stated goal – and apart from the fact that antitrust is often abused by those who employ it as a means of wealth transfer, antitrust violates core principles of individual rights.

Antitrust cannot be employed without violating the property rights of the targeted firms. Antitrust assumes consumers have a "right" to the firm's output that supersedes the right of the firm to restrict or limit the sale of its own output. The "restraint of trade" disparaged by antitrust is really nothing more than a refusal to sell one's *own property*.

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Americans ought to agree that a firm has a right not to sell its own products. That right is a derivative of the fact that no one may justly be compelled to produce products in the first place. There is no legitimate consumer right to the property of any firm, unless, of course, a voluntary exchange has been agreed to. A corollary of the right not to part with one's own property is that a producer has a moral right to charge whatever the market will bear for his own goods, just as a consumer has a right not to purchase those goods at all. Antitrust is rooted in the statist notion that business has "no right in principle to dispose of its property as it sees fit, but only a conditional freedom so long as it helps maximize some social utility function. That is to say, no business is entitled to its property if that property can be redeployed so as to expand output."[26] Antitrust is essentially and unavoidably tyrannical – a prominent example of the government of men rather than the rule of law.

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THE ROAD TO REPEAL

Antitrust appears to be motivated less by a desire to reduce deadweight losses or inefficiencies in the economy than to further private aims. The decades-long history of antitrust enforcement provides ample evidence that antitrust often does not advance consumer well-being, but instead furthers the aims of firms hoping to hobble more successful competitors and the career ambitions of overseers. Regulation and antitrust enforcement alike often increase the price and decrease the quantity of "monopolized" products by destroying misunderstood efficiencies. The faith that antitrust law primarily protects consumers deserves fresh, critical and comprehensive congressional scrutiny prior to the new century. A few things Congress might do initially:

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[26] Fred L. Smith, Jr., "Why Not Abolish Antitrust?" *Regulation*, January/February 1983, p. 25.

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Hold Hearings: Congress should hold hearings examining both the fundamental premises and real-world effects of antitrust. Such hearings should seek to distinguish between politically procured power versus power gained through voluntary dealings in the marketplace. Hearings should also examine the concept of the right of a producer to his own property, and require those who support antitrust to explain why producers do not own their output. Hearings also should explore when and how enforcement may induce rent-seeking costs that exceed the future social losses prevented by eliminating an alleged monopoly. Hearings would also be a proper forum to begin considering eliminating the *per se* criminality that applies to certain targeted practices such as price fixing.

End Government-Created Monopoly: Congress should acknowledge the extent to which government coercion and prohibition of competition is the source of monopoly power in the economy. Examples include the Postal Service, public schools, the exclusive franchises enjoyed by electric power utilities, and so on. Along the way, Congress will be forced to reexamine the rationale for outlawing practices in the private sector that are somehow acceptable when carried out by government. For example, price fixing supposedly is a bad thing, yet it is sometimes the sole function of government enterprises, such as the former Interstate Commerce Commission, the agricultural marketing service and utility regulators. Firms attempting to inefficiently fix prices in the private sector can be overthrown by rivals. But no such recourse exists against government price-fixing.

In the regulatory arena, the ultimate reform would hold Congress accountable to the public for regulatory costs by requiring its approval of significant agency rulings.

Create Performance-Based Standards for Enforcers: Between now and the repeal of antitrust, Congress should penalize the Justice Department and the Federal Trade Commission – perhaps through budget reductions – when either fails to target "monopolies" serially in terms of the extent of public "harm" caused. In other words, enforcers must demonstrate to Congress that price has risen and quantity declined or will decline before taking action, and demonstrate after antitrust action that consumers are better off in measurable ways. This interim strategy will both expose the fact that the presumed monopoly losses to society caused by private firms are non-existent and put a brake on the career ambition at the enforcement agencies that comes at the expense of consumers.

Prohibit Competitor Suits: Presumptions should change such that antitrust plaintiffs who are competitors of the firm against which they hope to see antitrust action taken are viewed with the utmost suspicion and prevented from suing. A concrete initial proposal would be one to deny standing to direct competitors of a price cutter.[27]

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[27] See Donald J. Boudreaux and Andrew N. Kleit, *Cleaning Hands in Predation Cases: A Modest Proposal to Improve Predatory-Pricing Suits*, Washington, D.C,: Competitive Enterprise Institute, October 1996; Donald J. Boudreaux and Andrew N. Kleit, *How the Market Self-Polices Against Predatory Pricing*, Washington, D.C.: Competitive Enterprise Institute, June 1996.

Maximize Congressional Accountability: In the regulatory arena broadly construed, the ultimate reform would entail holding Congress directly accountable to the public for regulatory costs by requiring it to vote its approval (in an expedited manner) of significant agency rulings. Similarly, Congress should be accountable for the basic thrust of antitrust policy. For example, any process in which the Justice Department or the Federal Trade Commission are laying down general rules that provide guidance for the future, such as consent decrees and merger guidelines, should afford an opportunity for Congress to say "No."

CONCLUSION

Antitrust is too entrenched as a policy to secure an immediate repeal, although doing so must be the ultimate aim of any incremental reform. Achieving such repeal should be a reasonable goal for early in the next century. Policymakers should anticipate and bring into being a 21st century free of the hypocrisy of antitrust pork. Congress should implement policies that expose the wealth-redistribution and anti-consumer nature of antitrust. While re-examining antitrust, Congress should prevent the expansion of antitrust action based upon newfangled theories of anti-competitive behavior that have cropped up to take the place of those practices now recognized as beneficial to consumers, such as predatory (low) pricing. One such theory urges reinvigorated enforcement based upon notions of "non-price predation" – efforts to outdo rivals by lowering their profits through altering one's product quality and advertising intensity.[28] But a vibrant marketplace depends on such rivalry and, indeed, is defined by it.

It is hoped that policymakers will come to recognize that government cannot protect the public from monopoly power, because it is the source *of such power.*

Antitrust enforcement has shown a profound inability to recognize when antitrust-triggering actions are likely to benefit consumers, and when enforcement actions merely transfer wealth to special interests. The result of such policymaking has been the fining and imprisonment of individuals whose behavior not only harmed no one, but made them better off. It is to be hoped that policymakers will come to recognize once and for all that government cannot protect the public from monopoly power, because it is the *source* of such power. If reformers are sincere in protecting the public and free markets, coercive monopoly power can come to be appreciated not as an attribute of the free market, but rather as the corporate welfare bestowed by the government that it actually is.

[28] See Steven C. Salop and David T. Scheffman, "Raising Rivals' Costs," *AEA Papers and Proceedings*, Vol., 73, No. 2, May 1983, pp. 267-271. For a response, see Donald J. Boudreaux, "Turning Back the Antitrust Clock: Nonprice Predation in Theory and Practice," *Regulation*, Fall 1990, p. 45-52.

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