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Antitrust on the Rebound Essay

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ANTITRUST ON THE REBOUND

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Americans love competition. In sports. In politics. In ideas. In business. In everything. They demand it. They fight for it. In the marketplace, they know that competition guarantees the best possible product or service at the lowest possible price, and that everyone has the chance to make a better mousetrap. It is obvious to them that the more competitors there are, the more competition there is. And the more competition there is, the better the services and products and the lower the prices.

Monopolists hate competition. They suppress it. They lobby against it. They know that competition in the marketplace creates too much uncertainty—they never know what the other guy is going to do. They are frightened by the notion that profits must be earned, rather than simply taken. They are terrified that some newcomer may unseat them. It is obvious to them that the fewer competitors there are, the less uncertainty there is. And the less uncertainty there is, the less concern they have about the quality of the services, the improvement of products, or the raising of prices. Monopolists are continually attempting to regulate competition and the market by agreement with competitors or through anti-competitive practices. To a monopolist, a free market governed by supply and demand is an anathema.

This struggle between the people who demand free competition and the monopolists who seek to regulate it was supposed to be settled with the passage of the antitrust laws.[1]

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1. Sherman Act, 15 U.S.C. §§ 1 et. seq. (1998), Clayton Act, 15 U.S.C. §§ 12-27 (1998), Robinson-Patman Act, 15 U.S.C. § 13 (1998).

Not so. The law of the land never deterred monopolists from supporting any pretended theory that supposedly justified their elimination of competition.

John D. Rockefeller and his comrade in arms, J.P. Morgan, led the first attack on the antitrust laws.[2] They and the other industrial marauders were propped up by the ready-made social scientist, Herbert Spencer, who gladly supplied a social theory of "survival of the fittest" as a justification for any conduct. Scratching, kicking, biting, hitting below the belt, paying of the referee and fixing the fight were okay. For a while, John and his friends were allowed to run amuck. They set out to destroy all forms of competition. In pursuit of this objective, they engaged in well-known anti-competitive tactics. They merged when it was too inconvenient to fix prices. They shut down plants, branches, and offices. They fired "redundant" employees. They raised prices. They eliminated the need for improvements and innovation. They allowed products and services to deteriorate. They paid bribes, rebates, and kickbacks when threats were not enough. They let loose into the market pinstriped thugs to ferret out and suppress or buy actual or potential competitors. They told customers what, when, and where they would buy and at what price they would pay. They also told customers to wait in line. The police did nothing. Some of the victims went to court. They found that henchmen for the monopolists had replaced impartial judges. These judges espoused pretentious and elitist philosophies. They ruled that the anti-monopoly laws did not apply to monopolies,[3] that victims had no right to sue, and that juries were too stupid and uneducated to understand the arcane subtleties of fixing prices or running someone out of business. It was a time to go back to basics, way back.

In 1543, a Polish monk, Nicolaus Copernicus, in his book entitled *On the Revolution of the Celestial Bodies*,[4] stunned western civilization with his scientific and mathematical proof that the earth and the other planets revolve around the sun. The ancient Ptolemaic theory was suddenly wrong.

2. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Northern Securities Co., 128 F. 808 (D.C. Minn. 1904).

3. *See* United States v. Knight, 336 U.S. 505 (1949).

4. NICOLAUS COPERNICUS, ON THE REVOLUTION OF THE HEAVENLY SPHERES (Newton Abott ed. 1976)

There was a new perspective. A new way to look at things. From that time forward, every new idea that challenged deep-rooted established thought would be known as "revolutionary." And there were no ideas more "revolutionary" than those that surfaced in 1776, at the height of the Age of Enlightenment, whose motto, according to Emmanuel Kant, was "Dare to Know."

Seventeen seventy-six was a bad year for kings and monopolists. Both were indicted. The prosecutors were two great giants of the Enlightenment, Thomas Jefferson, a man for all seasons, and Adam Smith, the founding father of economics. The Bills of Particulars were called *The Declaration of Independence* and *The Wealth of Nations*.[5] The offenses were laid out in scathing detail. "Divine Right" was repudiated as fundamentally offensive. Monopoly power was rejected as repugnant, absurd, and contrary to the natural forces of the marketplace. From thence forward, the perspective would have a different vantage point. There was a new premise: all power—political, social, and economic—emanates from the people. Jefferson flatly asserted that the power of the government came from the "consent of the governed."[6] Adam Smith turned the tables on the monopolists by demonstrating that the power of the market comes from the consumers. He said,

> [c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer.[7]

It was the first authoritative declaration of the aphorism, "The customer is always right."

There was never any question about the strong relationship between the economic freedom from monopolies espoused by Adam Smith and the political and social liberties enunciated by Thomas Jefferson. As proof, in December of

5. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS: A CONCORDANCE, (Fred R Glahe ed., 1976).

6. THE DECLARATION OF INDEPENDENCE, para. 2 (1776).

7. SMITH, *supra* note 5, bk. IV, ch. VIII at 179.

1787, during the height of the debates on the need to add a Bill of Rights to the Constitution, Thomas Jefferson wrote James Madison and complained about "[t]he omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, *restriction against monopolies*, . . . trials by jury in all matters of fact . . . ."[8] This was the harbinger of what would later become the unique antitrust laws of the United States.

Indeed, although "restrictions against monopolies" never became a formal part of the Bill of Rights, the antitrust laws were specifically compared to the Bill of Rights by the one Justice of the Supreme Court who was uniquely qualified to make the comparison.[9] In the Supreme Court decision, *United States v. Topco Associates, Inc.*,[10] Justice Marshall said:

> Antitrust laws in general, and the Sherman Act in particular, 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. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important section of the economy.[11]

One of the reasons why the antitrust laws are so necessary is the strong motive of monopolists to eliminate competition, contrary to the interests of society and the people. The three primary components of an economic system, the rent from land, the wages from labor, and the

8. Letter from Thomas Jefferson to James Madison (Dec. 1787) (copy on file with author).

9. Justice Thurgood Marshall, who was forced to live under the absurd "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), was the attorney who successfully argued Brown v. Board of Education, 347 U.S. 483 (1954), the landmark decision forever prohibiting segregation.

10. 405 U.S. 596 (1972).

11. United States v. Topco Assoc., Inc., 405 U.S. 596, 612 (1972).

profit from capital, are affected differently by competition in a progressive society. As Adam Smith observed:

> [T]he rate of profit does not, like rent and wages, rise with the prosperity, and fall with the declension, of the society. On the contrary, it is naturally low in rich, and high in poor countries, and it is always highest in the countries which are going fastest to ruin. The interest of this third order, therefore, has not the same connection with the general interest of the society as that of the other two.[12]

As is obvious, Smith says, "[t]he price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken . . . ."[13]

This meant that if competition existed, profits would be lower, more workers would be necessary at higher wages, and more property would be needed, such as plants, branches, and local outlets. The result of all of this for the consumer would be better products and services at lower prices. But competition meant that the manufacturer would make less profit. Smith, therefore, made it plain that the manufacturer in a competitive market would be tempted constantly to join with his competitors to eliminate competition. Smith sagaciously observed that such tempted competitors use any and every occasion to thwart competition: "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."[14] This principle was incorporated in antitrust law as a factor that a jury may consider when deciding a price-fixing case.[15]

The prohibitions of the antitrust laws "were" clear and understandable. Any attempt by competitors to artificially regulate the market was prohibited. The consumer was entitled to the best possible product or service at the lowest possible price, all as determined by competition. Thus, competitors could not fix prices.[16] Competitors could not divide markets or customers between themselves.[17]

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12. SMITH, *supra* note 5, bk. I, ch. XI at 277, 278.
13. SMITH, *supra* note 5, bk. I, ch. VII at 66.
14. SMITH, *supra* note 5, bk. I, ch. X at 144.
15. *See* C-O-Two Fire Equip. v. United States, 197 F.2d 489 (9th Cir. 1952).
16. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
17. *See* Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990); Topco Assoc. v

Competitors could not boycott or instigate a boycott of another competitor, supplier, or customer.[18] A manufacturer or producer could not condition the sale of a desirable product on the forced sale of an undesirable or unwanted product.[19] Once a manufacturer or producer sold his product and received his profit he could not dictate to the purchaser where, to whom, or at what price the purchaser could resell the product.[20] A competitor could not buy or merge with another competitor or potential competitor where the effect would be to substantially lessen competition or tend to create a monopoly.[21] A monopolist could not take anti-competitive steps to maintain or achieve the monopoly.[22]

It is common sense that each and every one of these prohibitions would, if allowed, directly interfere with free market forces and deprive the consumer of the best possible product or service at the lowest possible price. Yet monopolists, and their propagandists, will try to confound the public to justify such restrictions, falsely claiming that they act in the best interest of the people. This is not new, as Adam Smith noted:

> That it was the spirit of monopoly, which originally both invented and propagated [restraint of trade], cannot be doubted; and they who first taught it were by no means such fools as they who believed it. In every country it always is and must be the interests of the great body of the people to buy whatever they want of those who sell it cheapest. The proposition is so manifest, that it seems ridiculous to take any pains to prove it; nor could it ever have been called in question, had not the interested sophistry of merchants and manufacturers confounded the common sense of mankind. Their interest is, in this respect, directly opposite to the great body of the people.[23]

But there never is a dearth of those who jump at the opportunity to appease the monopolists with some conjured reasoning, which favors the suppression of competition or

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United States, 405 U.S. 596 (1972).

18. *See* Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

19. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

20. *See* United States v. Schwinn & Co., 388 U.S. 365 (1967).

21. *See* Brown Shoe v United States, 370 U.S. 294 (1962).

22. *See* American Tobacco Co. v. United States, 221 U.S. 106 (1911).

23. SMITH, *supra* note 5, bk. IV, ch. III at 519.

competitors. Smith's observation on this matter is particularly revealing, and goes a long way toward understanding how reputable intellectuals can so easily espouse theories favorable to the monopolists:

> [the person] who supports every proposal for strengthening this monopoly, is sure to acquire not only the reputation of understanding trade, but great popularity and influence with an order of men whose number and wealth render them of great importance. If he opposes them, on the contrary, and still more if he has authority enough to be able to thwart them, neither the most acknowledged probity, nor the highest rank, nor the greatest public services, can protect him from the most infamous abuse and detraction, from personal insult, nor sometimes from real danger, arising from the insolent outrage of furious and disappointed monopolists.[24]

In the 1970s and 1980s, there emerged from the University founded by John D. Rockefeller, a group of theorists who decided to take up the cause of the beleaguered monopolists. The progenitor apparently was Aaron Director. He greatly influenced the thinking of both Robert Bork and Richard Posner, as they both have said. These theorists were aided in the promulgation of their views by a number of factors. First, "there were no entrenched political interests to overcome."[25] Second, according to Bork, "the socialist drive . . . moved on . . . in fields such as environmentalism."[26] And, third, the President of the 1980s did not interfere with the germination of the theories. With this "happy" consequence of no opposition and a pliable Administration, an all out attack was launched against the antitrust laws themselves, the victims of antitrust violations, and the juries. According to these writers, most of the antitrust laws should be repealed, especially those relating to monopolies! The right to sue should be limited to those who probably would not sue anyway. Prison sentences for antitrust violators should be abolished. Treble damages should be eliminated. And, to ensure that no antitrust suit would be brought by

24. Smith, *supra* note 5, bk. IV, ch. II at 494.

25. Christopher C. DeMuth, *Captain of Enerprise: On the Business of Liberty*, POL'Y REV. (1992).

26. ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1993).

some small businessman, no matter the extent of his injuries, there should be an award of attorneys' fees to winning defendants! But that is not all. Juries are too stupid and unsophisticated to determine complex antitrust cases. Moreover, the perspective must be from the monopolists point of view, not the consumers'. "Efficiency" is the goal of antitrust enforcement, and whether any small businessman who may have been extirpated root and branch was really nothing but a "free-rider" anyway.[27]

The flaws in these arguments are manifest. With regard to the elitist attack upon the jury system, little need be said. First, the right to trial by jury is a constitutional right.[28] Second, the Supreme Court has held that the jury is "an essential part of the Congressional plan making competition rather than monopoly the rule of trade."[29] Third, in this country, the people—the jury—elect the President and the Senators who nominate and confirm the Judges. Finally, there is nothing that could possibly support a view that judges are better able to determine antitrust conspiracy cases than a jury.

With regard to the argument that "efficiency" is the goal of antitrust enforcement, the argument does not outlive its statement. This is the "efficiency" of monopoly, not of competition. It is used to justify the merger of two rivals, so that the combination may eliminate what was needed when competition existed: plants, employees, and customer services. Real efficiency is the efficiency of capital following competition, not running away from it. As Smith said,

> If this capital is divided between two different grocers their competition will tend to make both of them sell cheaper, than if it were in the hands of one only; and if it were divided among twenty, the competition would be just so much the greater, and the chance of their combining together, in order to raise the price, just so much the less.[30]

There will always be those who rail against the antitrust laws and their vigorous enforcement. But in each such instance, one will find, "[i]t comes from an order of men,

27. *See id.* at 332.
28. U.S. CONST. amend. VII.
29. *See* Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).
30. SMITH, *supra* note 5, bk. II, ch. V at 383.

whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it."[31]

31. SMITH, *supra* note 5, bk. I, ch. XI at 278.

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