Antitrust "Returns" with a Vengeance

by Richard M. Salsman

FIRST ENACTED MORE THAN A CENTURY AGO, the antitrust laws have been used to dismember some of America's finest companies, even to jail some of its most productive businessmen. Ayn Rand has identified these laws as "the judicial version of the doctrine of Original Sin which presumes men to be guilty with little or no chance to be proved innocent...."[1] Guilty of what? Allegedly, the businessman monopolizes production, restricts competition, or harms consumers. But the disciples of antitrust believe his real "sin" is that he is supremely successful at being selfish. He must "give something back to the community," yet shows no regard for the "public interest." Altruism and populism—the same forces behind America's recent move to the right—have served to buttress the antitrust laws, both philosophically and historically.

Critics of the right often portray Ronald Reagan as having emasculated the antitrust laws. They point to the 1982 withdrawal of the thirteen-year antitrust case against IBM, to the latitude granted "vertical" mergers (those between a company and its suppliers or distributors), and to the dismissal of most complaints about "barriers to entry" under the Reagan Administration.

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In fact, the Reagan Justice Department made only procedural changes in antitrust enforcement in some narrow areas, changes binding neither on judges nor on succeeding presidents. The Reagan administration strictly enforced laws against "price fixing," "predatory pricing," "intent to monopolize," and "horizontal mergers" (those between companies in the same industry). As before Reagan and even today, antitrust investigations averaged *two-hundred a year* in the mid-1980s. Imprisonment for antitrust violations also continued: in 1985 over a dozen executives from electrical contracting firms were jailed.[2]

The Reagan administration dropped the case against IBM primarily because during thirteen years of litigation the company had lost its large market share in computers. Still, IBM was forced to sell a major subsidiary, at a price far below its worth, to Control Data—the competitor that had brought the initial suit. Two years later, AT&T was broken up owing to its "dominant" position and to complaints from competitor MCI. The Reagan administration argued that antitrust law must apply to ensure "competition" in newly deregulated industries. Industries deregulated under President Carter became subject to antitrust under President Reagan. Thus, either companies are granted monopolies, subjected to regulation, and given antitrust exemptions (such as utilities, the post office and Amtrak) or they are "deregulated" and subjected to the injustices of antitrust law. Only the form of regulation is changed. Either way, freedom is not allowed.

Ever since the departure of Reagan's early antitrust appointees, the statists have agitated for a "return" to antitrust—with a vengeance. The Bush and Clinton administrations have granted them their wish.[3] Consider the antitrust attacks on American and other airlines, on pharmaceutical companies such as Pfizer, on Wal-Mart, and on Microsoft. Each has joined the long list of business success stories in America—and thereby has also joined the antitrust hit list.

The U.S. airline industry was substantially deregulated in the late 1970s, after years of strict government control. Since then, the output of this industry expanded enormously, whether measured by new airlines formed, passenger miles flown, or cities served. Meanwhile, "price wars" proliferated and prices plummeted. What was the airlines' reward? An antitrust suit filed by the Bush administration for "price fixing." Settled in 1994, the case alleged that the major airlines "fixed" prices through technologically advanced fare and reservation systems, created by American and United (and used by most travel agents). These airlines were forced to issue refunds and to share their reservation systems with competitors, or else divest them.

U.S. pharmaceutical companies, considered the best in the world, came under attack by the Clinton administration during its push for socialized medicine in 1993. An industry that has shown remarkably creative powers and the ability to mass-produce affordable drugs nevertheless was threatened with price controls and an antitrust suit for "price gouging" and "excess profits." After abandoning this attack Clinton launched another, targeting hospital mergers as "anti-competitive," even though they reduce medical costs.[4]

Not nationally known until the 1980s, Wal-Mart Stores grew into the largest U.S. retailer by selling in small markets, offering a wider selection of items at lower prices than did local merchants. The company created a revolution in "discount retailing," buying name-brand goods (especially pharmaceuticals) in bulk and selling them cheaply. Wal-Mart's profits soared and its founder, the late Sam Walton, became the country's wealthiest man. In 1993 the company was found guilty under antitrust law of "predatory pricing," i.e., of temporarily selling below cost to run rivals out of business and raise prices later.[5] Local pharmacies initiated the antitrust suit and received treble damage awards.

As in the past, today's companies are charged with being "anti-competitive" under a variety of pricing policies. The drug companies are said to be guilty of setting prices that are too high; Wal-Mart of setting prices that are too low; the airlines of setting prices that are too similar. Under antitrust, once a firm attains a certain level of importance it will be found guilty no matter what pricing policy it chooses. Its "sin" is that it has become successful and productive enough to influence prices.

The trustbusters claim to target cases in which firms restrict output and raise prices. In fact, the firms mentioned above tended to generate higher output at lower prices—and to profit handsomely doing so. So much for the alleged motive of defending the consumer.

That antitrust takes aim at a company's success and stature is obvious in the recent case against software giant Microsoft. With MS-DOS and Windows, Microsoft provides nearly 50% of the operating systems governing the internal operations of microcomputers. The company also holds a respectable share of the market in word processing, database, and spreadsheet programs. It produces 25% of all software sold worldwide. Twenty-five years ago the company did not even exist. Most computers were big "mainframes" housed within large firms. There were no personal computers.

Bill Gates, founder and head of Microsoft, helped change all that. He quit Harvard and devoted all his waking hours to writing computer software and selling it. He developed programs that took personal computers out of the domain of tinkerers and into widespread use; there are now 140 million personal computers worldwide. Started in 1974, Microsoft's sales today approach $4 billion and its profits exceed those of all competitors combined. Software output has skyrocketed and software prices have plummeted. At age forty, Bill Gates is now the country's richest man, worth $9 billion.

Despite Gates' enormous productivity, *Fortune* magazine wonders whether he is "the information economy's equivalent of a robber baron."[6] And the least of Microsoft's competitors has found a friendly ear among the trustbusters.

In 1990, an obscure maker of computer "mouse" devices named Z-nix, a company with $6 million in sales, sued Microsoft for monopolizing the computer software market.[7]

The Federal Trade Commission under Bush interviewed Microsoft's disgruntled competitors to build a case against the company. Many larger competitors financed the legal briefs used by the government. Some competitors complained that Microsoft impeded their software sales by announcing plans to introduce new software products. Microsoft had adopted this practice to enhance profits: potential users were allowed to pre-test software for "bugs" and invite improvements. Others' sales are "impeded" only because Microsoft's deliveries are credible and because consumers want superior products compatible with a widely-accepted standard. Microsoft was also criticized, not only for its market share in operating systems, but for its ability to obtain favorable terms from its licensees.

To avoid being broken up, in 1994 Microsoft signed a "consent decree" with the Justice Department, requiring it to separate its internal departments for operating systems and application programs, *to disclose key operating system information to competitors,* and to stop releasing software early for customer pre-testing. These sanctions are similar to those imposed in past cases such as Standard Oil (1911) and ALCOA (1945). Apart from being a rank injustice, they will undercut Microsoft's creativity and profitability. And even if Microsoft complies, it is not free. Consent decrees are no guarantee a company will be left alone; AT&T signed decrees in the years prior to its dismemberment and is still subject to the day-to-day rulings of a federal judge.

There is every sign that the attacks on Microsoft will escalate. Federal District judge Stanley Sporkin recently rejected the Microsoft decree as too lax, with no guarantee of restoring "competitive balance" to the market for operating systems. He argued that the decree does not satisfy "the public interest," the standard given specifically in the Tunney Act (1974) allowing judicial review of antitrust actions. In his ruling Sporkin complained that Microsoft "has a monopolistic position in a field that is central to this country's well-being, not only for the balance of this century, but also for the 21st century." If the decree were approved, "the message will be that Microsoft is so powerful that neither the market nor the Government is capable of dealing with all of its monopolistic practices." Thus, he concluded, Microsoft is "a potential threat to this nation's economic well-being."[8] The Justice Department has since tried to mollify Sporkin by hinting at potential future antitrust reprisals against Microsoft.

One perceptive account of the case that rejects the "robber baron" myth as well as antitrust laws argues that "until minds are changed, Bill Gates and other tycoons of America's information age are going to be sullied—and perhaps shackled—by the mistaken vision of antitrust."[9]

This "vision" says that the able must be sacrificed to mediocrities, that the most successful owe the most to the group, that achievement and pride are sins. The contradictions of antitrust stem from conservatives' attempt to seek the impossible: a defense of capitalism based on altruism. These alleged defenders of capitalism passed the antitrust laws and gave them a philosophical defense. That is why the laws are contradictory, why they are arbitrarily enforced, why conservative fingerprints are all over them, and why their injustice has continued unchanged in recent times.

The first antitrust law in the U.S., the Sherman Act (1890), was pushed by conservatives. Its sponsor, Republican Senator Sherman of Ohio, despaired of income inequality and concentrations of capital. He conceded that big business did lower prices, but complained that "this saving of cost goes to the pockets of the producer."[10] He warned that "the popular mind is agitated with problems that may disturb the social order," and insisted that Congress must heed popular fears "or be ready for the socialist, the communist, and the nihilist."[11] Sherman and his fellow conservatives could not defend capitalism on its proper base of rational self-interest and man's rights. They embraced populism, which holds the "popular will" as the standard of the good. Uniting altruism, majority rule, and the labor theory of value, populism says business exists to serve the "public interest" and businessmen are parasitical "robber barons."

Antitrust theory stems partly from the conservatives' unwillingness to identify capitalism's essential nature as the only social system protecting man's right to live rationally and selfishly. Instead, conservatives define capitalism as the system of competition. Thus they observe any lessening of competition as an open invitation to socialism. They defend socialist-style laws, such as antitrust, so as to "pre-empt" socialism.

Conservatives do worse than merely hold that "competition" is the essence of capitalism. They hold to a "pure and perfect" model of capitalist competition. According to this view, each industry should comprise numerous producers and potential entrants must have equal and costless access to it. Each producer must be devoid of any power to influence price or his negligible market share. All products and services must be indistinguishable, so there is no need for advertising. Profits are minimal, as no company or product stands out. Everyone has "perfect information" about markets. There is to be intense "competition" but if anyone is actually *seen* competing or indeed *winning* a competition, that is evidence of "market failure," necessitating government intervention to "fix" the offending defect.

This theory of markets, made explicit in the 1920s, enlarged the scope of antitrust, transforming it from a weapon to be used on a single seller into one to be used on industries consisting of many sellers. Monopoly was simply redefined to mean any large market share held by an industry's leading firms. That

is the standard used today. In other cases a company is defined as a single seller simply by narrowly defining its market. By such arbitrariness, the antitrust hit list is expanded.

There has never been a factual counterpart to the "perfect competition" theory of markets in the whole history of capitalism. Yet it forms the base of antitrust law.[12] Any market that falls short of this platonic ideal (and all must) is a threat to "competition" deserving of censure under antitrust. As John Ridpath has observed, altruism is the reason why:

> The altruist ideal of unrewarded service to others motivated the acceptance of the perfect competition model and its use as a standard of antitrust. The root reason why lawyers, economists, politicians, and businessmen accepted this model and hold it as a virtually unchallengeable standard is that the conduct it depicts *is* perfect according to the altruist morality. The model appeals to altruists because it describes a world in which everyone is acting to best serve the interest of the consuming public—a world in which goods are automatically distributed in such a manner that no one receives any selfish gain "at the expense" of others, and in which everyone participates in a process that gives the most satisfaction equally to all. This is the moral meaning of the standard used by modern antitrust. Businessmen are being persecuted for not being sufficiently identity-less, passive, altruistic servants of consumers.[13]

Capitalism brings active competitions which many companies actually *win*. Altruism, in contrast, sides with the losers, with the mediocrities of the business world, and puts the force of antitrust law on their side. (Over ninety percent of all antitrust cases are filed by private litigants—by envious competitors resentful of the victors.) Altruism is the morality that inspires economists to dream up such unreal models of how a capitalist system should work, a testament to the fact that economic theories rest, ultimately, on basic philosophic premises. As M. Northrup Buechner has explained:

> For about the last one hundred years, economic thought has rested on the following logical chain: selfishness is evil; capitalism is based on selfishness; therefore capitalism is evil *and must have evil results.* The rational purpose of economics is to identify, interpret, and explain the results of a free economy's operation. Altruism assured economists in advance that those results were evil. The consequence has been . . . a blizzard of bizarre theories and constructs. . . .[14]

Not the liberals but the conservative economists—those associated with the "Chicago school" of economics—have been the ones most responsible for the "perfect competition" model and antitrust doctrine. Frank Knight, a founder of the Chicago school and Christian philosopher, first spelled out the "ideal" of perfect competition in 1921.[15] He secured a lasting role for antitrust by grounding it philosophically—in altruism. Knight believed the ethical standard for judging competition was "social justice," based on a "Christian conception of goodness" which is "the antithesis of competitive." According to Knight, the only justification for a competitive system is that the most productive men are encouraged "to make the greatest possible addition to the total social dividend."[16] Laws must preserve those who lose in what he derisively called "the game" of business.

Friedrich Hayek, who spent nearly a decade at Chicago and shares the school's premises, defended antitrust similarly and on the claim that private property is often "an undesirable and harmful privilege." "When I speak of 'Free Enterprise' and 'Competitive Order,'" he once wrote, "the two names do not necessarily designate the same system, *and it is the system described by the second which we want.*"[17] According to Hayek, "it may be a good thing if the monopolist is treated as a sort of whipping boy of economic policy."[18]

Milton Friedman also embraces perfect competition as an ideal and writes that "the participant in a competitive market . . . is hardly visible as a separate entity." Does this describe Bill Gates? Any businessman who *is* "visible" is virtually a monopolist, Friedman says, and as such, "it is easy to argue that he should discharge his power . . . to further socially desirable ends."[19] Friedman knows that "widespread application of such a doctrine would destroy a free society," so he suggests that the antitrust laws should only be enforced selectively (i.e., arbitrarily, since all successful businessmen under capitalism are "visible" in some way).

Some conservative economists and legal scholars in the 1970s and 1980s criticized zealous enforcement of the antitrust laws, but did so strictly from altruist premises. The "law and economics" movement, a blend of legal positivism and Chicago school theories of competition, did not advocate the repeal of antitrust laws but noticed they were commonly enforced against innovative companies expanding output and lowering prices. This pattern was obvious. But the movement explicitly denied an objective, private property justification for business. Instead, utilitarian cost-benefit analyses were promoted to weigh the ideals of "competition" and "consumer welfare."[20] Antitrust had become a "paradox" because it was preventing business from being the true public servant it was meant to be.[21] Meanwhile, the "public choice" school of economics, led by conservatives such as James Buchanan, complained that the selfish greed of mediocre competitors and job-promoting politicians was subverting an otherwise honorable antitrust system.[22] "Self-interest," not altruism, remained the root problem. By embracing altruism and the tribal premise that business exists to serve society, these schools could only advise procedural, not substantive, changes in antitrust.

Antitrust policy under President Reagan relied specifically on arguments

from these two schools.[23] Even where enforcement was relaxed, the goal was to achieve "social efficiencies," or enhance "consumer welfare," or promote the "public interest," or deflect the "selfish" appeals of disgruntled competitors. Leniency was urged elsewhere in order to boost "U.S. competitiveness."[24] Not a single antitrust law was repealed or even amended under Reagan.

The antitrust laws are an obscene mockery of justice characteristic of a dictatorship. They embody non-objective law that is arbitrarily enforced. The Reagan administration challenged none of the philosophical fundamentals underlying antitrust. Enforcement was carried out by a slightly more "benevolent" dictatorship—but it was a dictatorship all the same. It ended when the liberals, recognizing that altruism's proper political counterpart is statism, returned to apply antitrust laws with a vengeance. That has been the pattern of enforcement through most of this century. The conservatives want altruism and capitalism. The liberals want altruism and statism. Either way, altruism sets the terms of policy. Antitrust has returned to the headlines, but philosophically it has never left us.

Today's conservatives, those who stand behind a "Contract with America," are primarily altruists and populists. They want to scale back the welfare state, but only because it has been shown to hurt the poor. They want tax cuts, as long as they bring in more government revenue, and then only for "working Americans," not for business or the wealthy. They are silent about the antitrust laws, about the persecution of men such as Sam Walton and Bill Gates. They may have a contract with America, but they let stand the perpetual contract that is out on the heads of American business. When capitalism's true philosophical bodyguards influence policy, the antitrust laws will be *abolished*—not simply softened or "reformed." Only then will the U.S. Justice Department dispense true justice to American business.

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