

# The Nation

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## Antitrust and American Democracy : Where We've Been and Why it Matters

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The opening of the Microsoft antitrust trial in Washington, DC last month is the most important blow for democracy struck in what has otherwise been a tough year for believers in rational self-government. There will be plenty to say later, when the dust has settled a bit, about *United States v. Microsoft's* effect on our daily lives. But while the courtroom maneuvering continues we can step back from the technical detail, important as that is, to put the trial in its historical and political context. It has been almost thirty years since the federal government last undertook such a significant step to rein in the misbehavior of private economic power using the antitrust laws. Antitrust has largely been in the wilderness for those decades, while – not coincidentally – we have become a much more unequal society, with a political system even more corruptly dependent on “gifts” from individual and corporate wealth to elected officials and political parties. The connection between antitrust and the defense of democracy is intimate and long-standing, but largely ignored. Our failure to remember the history has been convenient for magnates and multinationals.

It is easy to identify tangible products of the American Century that have remade our world: the automobile and the airplane, electromagnetic broadcasting, the thermonuclear demiurge, the integrated circuit, and the DNA sequencer. Slightly less conspicuous in retrospect are the changes in social technology – the institutions and practices that evolved along with

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the material culture and established its context. The securities industry, collective bargaining and labor arbitration, operations research, mass-market consumer advertising – as technology changed society, these social institutions conditioned technological development. Not least among the institutions inextricably connected to the American century of technology is antitrust law. Early experience with the vast private organizations characteristic of industrial capitalism taught Americans, long before the rest of the world, that their enormous creative potential could be misused for socially destructive self-aggrandizement. Restraining that conduct through encouragement of competition is the central philosophy of antitrust. American legal approaches to the realization of that goal have strongly influenced other industrial nations; development of what is elsewhere generally known as “competition law” on an American model is widely regarded as a necessary domestic adjustment to the demands of the global economy.

But the American relationship with antitrust is highly ironic. Having learned early the lessons of economic power and its misuse that led to antitrust legislation, Americans have recurrently proven forgetful. Contemporary discussion of antitrust policy tends to overlook the system’s central purposes. These ironies are the subject of one of our greatest unwritten books in the field of American legal history. But they are more than a good subject for a future historian; our forgetfulness of antitrust’s political past prevents us from understanding the issues that are critical to our present and future. It’s best to begin at the beginning.

Americans of the Civil War generation experienced an economic transformation of unprecedented scale. The infrastructure technologies of the railroad and the telegraph expanded the geographic reach of single organizations, enabling manufacturers to produce for a national market and manage enterprises of continental extent. The economy became an ecology of vastly larger organisms all at once, both through consolidation of existing firms and the explosive development of new industries. The new colossi possessed not only unprecedented power over prices in the market; they were also a never-failing source of political corruption, as the recurrent scandals of railroad bribery in the state and federal legislatures showed.

Society may have been stunned by the rapidity of alteration, but American politics knew what to do about it. For the prewar political landscape had been dominated by the temper we call “Jacksonian,” whose political discourse had no more central idea than anti-monopoly. Distrust of special economic privileges, and particularly of their anti-democratic political effect, was the theme of Andrew Jackson’s epic struggle with the Bank of the United States. Postwar antitrust politics thus appealed to those who felt

threatened by the consolidation of private economic power in terms taken from their own political youth. In its original setting, antitrust agitation was a form of conservative populism, seeking government intervention to maintain the traditional level of concentration of private economic power, in the interest of free economic and political competition.

Conservative populism is notoriously susceptible to co-optation in the political process, and the making of our antitrust laws was heavily tinged with cynicism. Senator Orville Platt said of the Senate that passed the Sherman Act that it wanted only "to get some bill headed 'A bill to punish trusts' with which to go to the country." Mr. Dooley paraphrased the strenuous ambiguities of Theodore Roosevelt's First Annual Message to Congress concerning the trusts as "on the one hand I would stamp them under foot, on the other hand not so fast."

But though there was cynicism behind antitrust legislation there was also political pragmatism. Legislators knew that a detailed balancing of the positive effects of consolidation against the harms of diminished competition was beyond their grasp. The general terms in which the Sherman Act expressed their will, making use of traditional phraseology expressing artfully indistinct common law rules, gave all the room possible for judicial development. The Supreme Court, accepting the Congressional invitation, took almost twenty years to work out the approach epitomized in the "rule of reason": the conclusion that Congress meant to prohibit not all restraints of trade, but only "unreasonable" attempts to create or maintain monopoly power.

What defined the line separating "unreasonable" from "reasonable" uses of massive economic power? For all the creative ambiguity and artful dodging, politicians knew that voters were clear about the political as opposed to the economic aims of antitrust. Uncertain they may have been about how to balance the benefits of size against the harms of unfair competition, but voters clearly wanted, as one distinguished historian has written, "to keep concentrated private power from destroying democratic government." However ambivalent Theodore Roosevelt was about the Sherman Act, he showed that he understood its central political value when he said of the famous *Northern Securities* case brought by his administration that "the most powerful men in this country were held to accountability before the law."

Today we have the best of reasons for interesting ourselves in the political antitrust movement of the Progressive Era. Rapid transformation of technology and social practice is again having profound economic effects at the end of the twentieth century. Information technology and the accom-

panying social institutions have again expanded the effective reach of economic organizations, leading to the phenomena we collectively call "globalization." Consolidation is occurring on an unprecedented scale, while new organizations acquire dominant interests in industries that have only recently sprung into existence.

Private power is again seeking its inevitable political concomitants. Increasingly disgusted, citizens of this democracy find themselves confronting a political system less responsive to voters and more responsive to those euphemistically described as "campaign contributors." It is no surprise to hear a presidential candidate declare that "the government of the United States at present is a foster-child of the special interests." It is only slightly more surprising that the speaker was Woodrow Wilson, who also proclaimed during the campaign of 1912 that "if monopoly persists, monopoly will always sit at the helm of government. ... If there are men in this country big enough to own the government of the United States, they are going to own it."

We need to remember the political legacy of the antitrust movement because it teaches the value of competitive solutions to problems of over-concentrated power. Contemporary academic writing about antitrust tends to ignore this aspect of our history, pretending that "consumer welfare" – defined almost exclusively in terms of product price and quality – is the primary goal that competition serves. The effect is to make antitrust law an administrative system for dealing with minor market failures, by preventing supermarket chains, toy megastores or office supply retailers from gaining local leverage over prices. Thus reined in, antitrust is a subject for technicians. The public loses interest, and greets with skepticism or even hostility the idea that larger political reform can be pursued by wise employment of governmental muscle on behalf of a competitive economy.

When antitrust law is assumed to seek only consumer welfare in the market for particular goods or services, it is a deceptively simple step, for example, to the conclusion that antitrust has no appropriate application to the question who owns our media of broadcast communication. After all, consumers have more "choice" all the time. In addition to the two networks owned by manufacturers of nuclear power equipment, they can also get their television news from Disney, Time Warner, or Rupert Murdoch.

Fifty years ago it was uncontroversial for the federal government to bring dozens of lawsuits reshaping the structure of the motion picture industry in order to prevent a few production studios from also controlling film distribution and exhibition. The movies were a powerful influence on American society and politics, and their complete control by a small num-

ber of firms had obvious consequences beyond the price of tickets. Today, after twenty years in which the political classes have uniformly treated antitrust as a technical subject for economics Ph.D.s and high-priced lawyer-lobbyists, the present administration has been hotly criticized for its tentative steps to regulate the conduct of Microsoft in relation to the evolution of the World Wide Web. But the Web and what follows it are far more important in shaping our political future than the movie business ever was. Who owns it, or whether it can be owned at all, are questions that cannot be left exclusively to those professors and trade association lobbyists who think antitrust is about retail price maintenance in the stereo business or the purchasing policies of toy retailers.

Of course, politically engaged antitrust enforcement is hardly an all-sufficient tool for managing the challenges of the new political economy. In areas of concentrated economic power with major social consequences, antitrust is only one aspect of a pro-competitive government response. The 1996 Telecommunications Act was intended to encourage competition in all areas of the information economy. Or so the Congressmen said. But it is already clear that competition in some sectors, such as local telephone service, has been substantially blocked while other sectors, such as radio, have been qualitatively impoverished by statutorily-encouraged consolidation. Litigation is one of the methods by which the federal government should press for the completion of the move to a fully competitive telecommunications market. But the principle animating antitrust, that economic competition protects political freedom, is not only expressed by suing to destroy economic power that has grown too large. Legislation to encourage competition is at least as important, just as regulating occupational safety is as important as suing employers who kill their employees. Fundamental restructuring of our electronic media, so that a favored few no longer receive exclusive rights to the public airwaves in return for insubstantial promises of "public service," is long overdue in the new technological environment, though it is hard to imagine such progress while the Speaker of the House remains the man who wanted to accept a \$4.3 million "book advance" from Rupert Murdoch.

Similarly, antitrust enforcement in other areas is complemented by pro-competitive legislation. Encouragement of the "free software" movement in the copyright system could bring competition to the highly concentrated market for personal computer operating systems even more effectively than suing Microsoft. As senior citizens suddenly coping with the Medicare HMO crisis are learning, legislation will be necessary to break the influence

of a few health insurance businesses over our national policy for taking care of our parents and ourselves.

The cost of failing to maintain competition can be very great. Only partisan rancor and the idiosyncratic opposition of a single conservative Senator prevented the 105th Congress from passing this month a financial consolidation bill that would have allowed banks, insurance companies and stockbrokers to merge into conglomerates for the first time since the Great Depression. Americans who, during the S&L crisis of the 1980s, deplored the large number of American banks and praised the highly anticompetitive concentration of the Japanese banking industry are now aware of their mistake, though I haven't noticed many of them actually confessing error. As the Japanese financial system collapses, threatening to take the world economy with it, the political influence of Japanese bankers continues to delay implementation of the necessary measures. If a global depression occurs, it will be largely the result of inadequate competition in the Japanese financial sector. Yet the 106th Congress will no doubt commence in January with the reintroduction by legislators gorged on "campaign contributions" from the banks and brokerages of legislation to permit similar levels of concentration in our system.

What antitrust does for us cannot be discussed intelligently if "the economy" is perceived as a domain separate from "politics." The American Century has been about explosive technical innovation transforming human life. It has also been about maintaining a balance between economic liberty and democratic control over our destiny as a society. The underlying message of the antitrust philosophy is that democratic government defends itself by encouraging economic competition and destroying private power before it grows too large for the electorate to control. The alternative is government of the oligarchs, by the oligarchs and for the oligarchs. If that occurs, democratic self-government will indeed perish from the earth.