Antitrust or Antimarket

Antitrust laws have been with us for over a century, brought to us by the not-so-well-known Ohio Senator Roger Sherman, brother of General William Tecumseh Sherman, famous for his scorched earth policy in Civil War-torn Georgia and butchery of American plains Indians to clear land for the federally subsidized transcontinental railroads. The Sherman Antitrust Act of 1890 was intended to “protect” consumers from businesses with anticompetitive behavior. It sat dormant on the congressional shelf for over a decade until the Clayton Antitrust Act and Federal Trade Commission gave it teeth. Certain practices such as “restraint of trade”, “predatory pricing”, and “collusion” became crimes, punishable by fines or even prison time. Since the landmark case of *Standard Oil Co. of New Jersey v. United States (1911),* hundreds of suits have been brought against so-called “monopolists”, but have these really made American consumers better off? Indeed, should the government, itself being a monopoly, really have the power to criminalize voluntary interactions between consumers and entrepreneurs? Before one can decide the utility of antitrust legislation a myriad of nagging inconsistencies need to be considered.

When people hear the word monopolist, they might envision top-hatted short men with black mustaches holding bags with dollar signs on them. This is partly because of Parker Brothers, patentor of the game *Monopoly,* who themselves were involved in lawsuits over copyright infringements over the game. The forerunner of *Monopoly, The Landlord’s Game,* was created by Elizabeth Magie as early as 1902, and is an iconic symbol of the legendary “Robber Baron”. The word monopoly took on a pejorative aura and became associated with evil, rich, rent-seeking, shrewd, unscrupulous, curmudgeon, miser, and scrooge. But what does the word actually mean? According to *Black's Law Dictionary,* monopoly is derived from the Latin word *monopolium* which means "the sole power of sale", and the Greek *monopolion,* meaning, "a selling alone". Black's more modern rendition is as follows, "control or advantage obtained by one supplier or producer over the commercial market within a given region" (Black's Law Dictionary, p. 1028). Lord Coke, a seventeenth century English Whig and historian, offers this definition:

> A monopoly is an institution or allowance by the king, by his grant, commission, or otherwise… to any person or persons, bodies politic or corporate, for the sole buying, selling, making, working, or using of anything… (Quoted by Rothbard p, 668-9).

And finally, the late Murray Rothbard, former professor of economics and champion of libertarianism, explains it this way, "a grant of special privilege by the State, reserving a certain area of production to one particular individual or group" (Rothbard p. 669).

The question we will endeavor to answer in what follows, will be whether this idea of monopoly, or "sole seller", is a product of the free market or a creation of government as Rothbard and Coke suggest. Before such a conclusion can be drawn, we must first distinguish between monopoly and competition. According to neoclassical economic theory, a monopolistic firm possesses "market power", or control over its price, which allows the firm to charge a price higher than the competitive equilibrium, resulting in a restraint of trade and a restriction in supply. This loss of supply is a *social cost* to consumers because less people can partake of the good at that higher price. Rothbard argues that terms such as *social benefit, social cost, monopoly, competition, and equilibrium* are abstract, and in the tangent world, cannot be measured *quantitatively*. Instead, they are measured *qualitatively,* by the individual interpretations and value judgments of consumers. Thus, it is impossible for a firm operating in a free market to have control over its price because the sale of its product is "voluntarily agreed upon by both parties". Rothbard surmises that "any man can set any price that he wants for any quantity of a good that he sells…" but the question is "can he find any buyers at that price"? In other words, producers prefer to sell at the highest price possible and consumers prefer to buy at the lowest price possible. Adam's Smith "invisible hand" of voluntary exchange compels them to meet somewhere in the middle (Rothbard, pp. 662-63).

Rothbard's theory that it is impossible to "distinguish a monopoly price from a competitive price" can be understood *vis-à-vis* the neoclassical model of "perfect competition". In such a market all products are homogenous, there are many firms, and all consumers and producers have "perfect" information. Each unit of the homogenous good (wheat is the usual example in the textbooks) is produced at the most efficient point, where "marginal benefit" is equal to "marginal cost". It looks good on a mathematically modeled graph but can such a never-never land really exist? On the contrary, Rothbard argues that these terms are meaningless when applied to reality, and that there "can be no such thing as" perfect, or "pure competition". Indeed, perfection does not exist in this world at all, so when economists compare the real world to a utopian model, reality will always come up short. The perfectly competitive model assumes that in the long run competition becomes *static,* or fixed, but human beings never stop inventing, innovating, and transforming with new technology and ideas. And since human beings are not static or homogenous, the goods they produce cannot be either. Therefore, competition is more accurately described as being *dynamic,* constantly evolving, animated, vigorous, energetic, vital, and magnetic. As Rothbard so elegantly reflected, “competition”, is not “some sort of quantity”, but rather “a process, whereby individuals supply goods on the market without using force” (Rothbard p. 1118).

Rothbard also explains that market equilibrium, another metric relied upon by neoclassical economists, will never reach a “perfect” or static point. In other words, there is also no such thing as “perfectly competitive equilibrium”. According to Rothbard, markets have only a *tendency* to push toward equilibrium but can never quite reach it, like the proverbial carrot dangled in front of the rabbit, and in economic markets, new carrots and new rabbits are constantly coming into the picture. Rothbard says that equilibrium is merely a “tendency that results from competition… not a precondition” of it, and therefore it is irrational to uphold it as a “welfare ideal for the real world”. In other words, competition *per se,* is not a standard in which we can judge the concept of monopoly. Rothbard therefore concludes that in a free market, “there is no such thing as a monopoly price or a competitive price… there is only the free-market price” (Rothbard pp. 695-98).

Keeping the logic of Rothbard’s argument in mind, we must conclude that there is nothing inherently evil in monopoly *qua* monopoly. If we think in terms of labor, we can clearly illustrate the *reductio ad absurdum,* or the monopoly argument broken down to its logical conclusion. Let’s say Jones, who works in the auto industry, is a highly trained manager of a specialized assembly line, who suddenly becomes a curmudgeon and decides to stop coming to work, or to withhold his labor? His “greedy” and deliberate “restricting” of the supply of the Jones brand labor is affecting the efficiency of the firm’s production, causing a *social cost* in that less autos are produced. The firm could try to find a replacement for Jones but because all labor is not *homogenous,* it will be impossible to find his *exact* replacement. Is he not a monopolist? Does he not have “sole power” to exclusively sell his unique brand of labor?

Would any rational person agree that Jones' actions should be criminalized? Of course not, such an accusation would be absurd, the only cost that Jones' has incurred has been to himself, i.e., by the decrease in his bank accountant. The auto firm will find another manager, but his product of labor will be different than that of Jones'. In this sense are not we *all* monopolists? Do not we all possess some trait or quality that is unique only to us? Suppose a hairdresser is a great conversationalist. If she one day becomes mute and decides to *withhold* the good of her rhetoric from the enjoyment of her clients, is she not guilty of "restricting supply"? Has she not created a "shortage" in the market of interesting conversations, inadvertently swinging the pendulum to the heavy side of social cost? Yet to suggest that she, or Jones, have harmed anyone or committed a crime is the height of absurdity. But this is the very thing the Federal Trade Commission purports to do when it indicts a so-called monopolist.

The problem with antitrust laws is that they are vague and *ex post facto*. A firm has no idea when it has committed a crime until after it has been investigated. Throughout antitrust history many firms had been involved in prolonged legal battles with the FTC only to be broken up, or not broken up, years after the violation. Either way the firm still pays the hard costs of legal fees, disruption of production, and opportunity costs of capital and resources that could have gone to something productive. Consider the case of IBM, in litigation with the government from 1969 to 1983, after fourteen years, a dead judge, and copious amounts of case files, Attorney General William Baxter finally declared the case was without merit. By the time the case was dropped IBM was already losing market share to Apple and Microsoft. Crimes such as murder and theft are straight forward, everyone knows what they are before they commit them. The "crimes" of "monopoly", "predatory pricing", and "collusion", are impossible to quantitatively measure or morally define. Monopoly could be defined as anything from restricting supply, to charging too high a price, having too large a market share, or being the only seller of a good or service. Predatory pricing could be defined as charging too *low* a price, and collusion could be defined as charging the *same* price as other firms. No matter what a firm does it risks coming under scrutiny from the watchful eye of the FTC.

John D. Rockefeller of Standard Oil is perhaps the most famous “Robber Baron” of all. He fought the government in litigation for eleven years. Over eleven thousand pages of files were produced. The charge was predatory pricing. Most people take for granted that Standard Oil was just “too big” and that it needed to be broken up, but how many have actually looked into the evidence? One curious Chicago School economist, John S. McGee, did just that and published an article about it in 1958. This brave soul scoured through the voluminous files and found *no evidence,* not one single instance of predatory pricing. Here is what he concluded:

> Judging from the Record, Standard Oil did not use predatory price discrimination to drive out competing refiners, nor did its pricing practice have that effect… I am convinced that Standard did not systematically, if ever, use local price cutting in retailing, or anywhere else, to reduce competition. To do so would have been foolish…” (McGee p. 168)

The concept of “predatory pricing” from the perspective of antitrust is that one big firm will sell below cost to squeeze out competing firms. Once the rascals are shut down, the big firm raises its prices back up to monopolistic levels. According to McGee, the argument assumes the “predator” has “monopoly power, which is his war chest” for knocking down rivals. There are at least three problems with the theory of predatory pricing. First, no firm or entrepreneur wants to operate at a loss for any length of time. Second, the firm would have to repeat the process every time a new competitor enters the market, which would exhaust its resources. And third, without barriers to entry the cycle would repeat indefinitely, eventually culminating in the predator firm's insolvency.

Furthermore, Rockefeller never had monopoly power, he never had the "sole" power of controlling the price in the oil market. On the contrary, the price of oil fell during Rockefeller's heyday from 45 cents in 1863 to 6 cents in the 1890s, just before the suit was brought against him. The reason Standard got so big was because of Rockefeller's militant efficiency and eternal optimism. He revolutionized the oil market by manufacturing scores of other goods from the byproducts of oil refining, including petroleum jelly, machine lubricants, chemical cleaners and paraffin wax. His innovations in the oil market also helped to reduce whaling, which had been the primary source of illuminating oil before the advent of refineries. Rockefeller produced the cleanest kerosene on the market because, among other things, he gave chemist Herman Frasch a $200,000 research grant to find out how to refine oil more efficiently. He "furnished loading facilities" to the railroads, employed thousands of Americans, built pipelines, opened foreign markets, and supplied quality products to consumers at affordable prices. Even Rockefeller's greatest nemesis, Ida Tarbell, was led to write in her muckraking book that his enterprise was "a marvelous example of economy" (Armentano).

Instead of predatory pricing, Rockefeller's strategy was consolidation, or the merger. He purchased close to one-hundred oil refineries from competitors. These acquisitions came at a cost. He paid handsomely for them. In fact, after people caught on that Rockefeller would buy any refinery, many were built for the sole purpose of selling to him. McGee recounts that one beneficiary stated that, "I found that the bonus I asked those people (the Standard Oil) was as much as I could make on the profits for 15 to 20 years to come" (McGee p. 148). At one point in the 1880s the Standard Oil behemoth enjoyed a 90% market share in oil industry, yet the price was falling, and output was increasing. According to Armentano, “between 1890 and 1897, Standard increased its kerosene production 74 percent, lubricating oil production 82 percent, and wax production by 84 percent”, all while acquiring other firms. Often the result of a merger is that resources move from less productive to more productive hands, allowing firms to be more competitive and efficient. The mere size, or dare we say market share, of a firm cannot be a metric for determining anticompetitive behavior. Quality is measured by the value judgements and patronage of individual consumers, not in units of large or small.

The merger movement of the early 1900s was a heated topic among trustbusters and economists. Firms formed pools, cartels, mergers, combinations, and trusts (a group of firms that appear to consolidate on legal documents), often as attempts to circumvent competition. These organizations would often “collude” to keep prices high, meaning they would make voluntary agreements to restrict supply. According to Rothbard, these arrangements were “highly evanescent and unstable”, simply because they were made up of “independent owning entities”. Cheating was too great a temptation and would often manifest in the form of secret rebates and discounts, fudging on shipping weights, and stealthily increasing output. Cartels faced internal pressure from member firms and external pressure from outside firms. Rothbard found that even managers of different branches of the same firm would fiercely compete for more sales, much to the owner’s chagrin. If a cartel was successful in raising rates for any substantial amount of time, there was nothing stopping new firms from entering the market, increasing the supply, and driving prices back down. In short, Rothbard found that cartelization to raise prices was impossible on the free market and could *only* be accomplished by government fiat or regulation. “Collusion” then, when done in free markets, is a voluntary agreement subject to cheating and competition, when done by government via price controls, it is binding and only benefits certain firms (Rothbard pp. 651-53).

Rothbard also found that there is nothing inherently troublesome about a cartel, merger, or trust. All consist of “individual producers agreeing to pool their assets into a common lot”, or “single central organization to make the decisions on production and price polices for all the owners and then to allocate the monetary gain among them”. In this sense, Rothbard concludes that “there is therefore no essential difference between a cartel and an ordinary corporation or partnership” (Rothbard p. 643). During the industrial revolution, entrepreneurs had to discover better ways to meet the demand of a ubiquitous market that was formally quarantined before railroads and telegraphs, and pooling resources was one such solution. Big business was a new concept that economists were trying to wrap their heads around. Economist Jack High explained in a 2011 article that progressive era economists had to begin to account for “large-scale production”, a new phenomenon that required an alteration in economic theory. High continues by quoting Jeremiah Jenks of Cornell University, who “emphasized that combinations could employ machinery and managerial talent, and could secure access to raw materials, better than smaller firms could. There was no presumption, as in the model of perfect competition, that an industry structure of small firms is superior to a structure of large firms”.

Other economists such as E. Dana Durand, a contemporary progressive who served in various government positions during the Wilson administration, conversely believed that “efficiency does not increase proportionately with size”. But in his next breath he concedes some of what he calls the “supposed” benefits of consolidation:

1. Use… of the best methods and devices discovered in any one plant.

2. Rivalry between managers of different plants…
3. Saving in cross freights by shipping from the plant nearest to the desired destination.
4. Integration of industry—that is, the conduct of successive or related processes under a single management (Durand p. 686)

The salient points above clearly illustrate how the consolidation of firms can increase efficiency. Yet Durand, being an establishment economist, was in favor of breaking up trusts. His article is full of contradictions: on the one hand he admits that “any combination of plants, however few, can obtain the advantages specified in some degree”, and on the other hand he insists that “there is a limit beyond which the addition of plants brings no further economy”. The problem is that Durand’s “limit” cannot be quantitatively defined, and it is impossible for a federal investigatory commission to determine whether a trust is “good” or “bad”. Thus, any ruling that it makes must therefore be arbitrary and whimsical because only consumers can judge the utility of trusts, by their patronage or lack thereof. Durand concludes with an admission that “just where the limit is can be proved neither by abstract reasoning or statistical investigation” (Durand p. 687). This one statement, ironically coming from a trustbuster, obliterates the entire premise and legitimacy of antitrust laws.

Henry G. Manne, another economist, wrote an article in the sixties entitled, *Mergers and the Market for Corporate Control,* explaining how mergers serve as a check, or *regulation* on inefficient firms. He uses the example of a publicly traded company. If a new group of entrepreneurs see an opportunity to increase a firm’s production and profits, they can buy up the majority of its shares and fire its existing managers. This has been referred to as a “hostile-takeover”. But if the shares are undervalued because of what Manne calls “managerial inefficiency", the "potential return from the successful take-over and revitalization of a poorly run company can be enormous". Manne insists that such "take-over schemes provide… some assurance of competitive efficiency among corporate managers". In other words, the threat of shareholder take-over can keep CEOs and corporate managers hard-working and honest. Again, this is what is best for consumers and the overall economy. Think of it as a healthy lymphatic system in the human body. It is essentially a garbage cleanup that transports dead pathogens, white blood cells that died in battle, damaged tissues, byproducts of metabolic breakdown, protein, fats, and inflammatory products out of your body. Without healthy lymphatics we are dead, and without market self-regulation, firms can operate sub optimally. As Manne points out, the only losers are "dissatisfied shareholders" who "may suffer considerable losses", and of course the managers who lose their jobs, but the "mechanism" that is triggered by the entire process prevents "greater capital losses… by the existence of a competitive market for corporate control" (Manne p. 113). In free markets, only the inefficient players are punished at the benefit of consumers. In antitrust litigation proceedings, the efficient payers are often punished at the expense of consumers.

An example of such a case was *United States v. Alcoa* in 1945. Alcoa, the Aluminum Company of America, was accused by the government of "monopolizing" the virgin ingot aluminum market. It was true that Alcoa faced no competition in the primary ingot market, the raw material it used to create dozens of products for its customers, but that was not the fault of the firm. They were so efficient at production that no other firm wanted to risk losses by entering the market. Other than that, there were no barriers. After a District Court Judge, Francis G. Caffey, ruled that Alcoa did not have a monopoly in any of the areas it was accused, an appeal from the losing party took the case to the Supreme Court. The judge who decided the fate of the company, Justice Learned Hand (a rather unfortunate name), issued a statement in his ruling that boggles the mind. He concluded that the methods employed by Alcoa which cemented its “monopolistic” position in the aluminum market were, “superior skill, foresight, and industry”, which he denounced as “exclusionary” and illegal. He further accused them of “correctly” anticipating “increases in demand for ingot and then” doubling and redoubling “its capacity to fill that demand”. In other words, they were doing the exact opposite of what antitrust laws purport to condemn, namely, they were being competitive and highly efficient. Ultimately, Alcoa avoided being broken up, but not until it had fought a costly thirteen-year litigation battle (Armentano).

As we have seen, there is no clear rationale for federal judges and commissions to determine when a firm is a “monopoly” and is harming consumers. Neither is there a definitive metric for assessing whether a firm is restricting supply, charging too much, charging too little, or in “collusion” with other firms. When Dominick Armentano wrote his book, *Antitrust and Monopoly* in 1982, he studied fifty-five of the most famous cases in antitrust history and came to a startling conclusion: not one of the firms was guilty of monopoly or anticompetitive behavior. Every judicial ruling was the result of arbitrary fancies that were not based in morality, justice, law, or reality. In this sense antitrust law is paternalistic, it elevates the government to a supposed “morally superior” position over its citizens, as if it is somehow composed of perfectly just angels who possess perfect knowledge in every industry in the economy. In reality just the opposite is true, such laws give politicians and power elites more opportunity for corruption and ill-gotten gain. The real winners in antitrust legislation are not the American public, they are the lawyers, judges, and politicians who profit at the expense of the firm under scrutiny. As well as the less efficient competitors who rejoice as they see their betters monetarily punished or broken up.

So, to come back to our original question, is there such a thing as a monopoly in a free market? The answer is yes and no. Yes, in the sense that we are *all* monopolists possessing some trait or skill unique only to us, and no in the sense of a firm having sole power and market control over a good's price in the long run. If a firm is the first to offer a new technology or good, the "monopoly" position they enjoy can only be temporary as other firms will enter the market, increase the supply, and drive down the price. Ironically, it is only the government that can prolong a firm's monopoly position by granting patents or other special privileges. In fact, there are several ways that government creates monopolistic privilege and quasi-monopolies in markets that would not exist otherwise: (1) compulsory cartels such as the Federal Reserve (a group of private banking institutions granted a monopoly over the nation's money supply and interest rates); (2) license laws that require the licensee to pay a fee or meet a certain criteria; (3) patents that grant an individual or firm intellectual property and protection from competition for a period of twenty years; (4) tariffs (taxes on imports) that "protect" domestic firms from foreign firms resulting in less competition; (5) minimum wage laws and compulsory unionism that grant some laborers privilege over others and result in increased unemployment; and (6) public franchises such as utility companies that are granted legal monopolies in towns and cities. All these interventions imposed by government accomplish the very thing that antitrust laws are touted to prevent, i.e., they restrict supply, allow the privileged firms to charge higher prices and run less efficiently, and give consumers less choices.

One last thing to consider is that by very definition, government *is* monopoly, forbidding competition in public sector services such as police, courts, national defense, mail, roads, and infrastructure. Are we so naïve as to believe that the State's exemption from competition can result in the same efficiency that we see in private markets? Should we lambast the "greed" of "Robber Barons" who provide us with goods and services that enhance our lives while turning a blind eye to the favoritism and corruption that transpires in legislative, executive, and judicial halls? Indeed, Lord Coke's original definition of monopoly has been turned on its head, subverted by a new philosophy that depicts the free-market entrepreneur as the proverbial top-hatted miser, indiscreetly slinging his money bags around while the hapless government steps in to save the consumer. Not so, the king is still the king.

We conclude by quoting Mrs. Isabel Paterson, who, in her book, *The God of the Machine,* cogently articulates the moral and practical problems of antitrust:

> Government cannot "restore competition" or "ensure" it. Government is monopoly; and all it can do is to impose restrictions which may issue in monopoly when they go so far as to require permission for the individual to engage in production. This is the essence of the Society of Status. The reversion to status law in the antitrust legislation went unnoticed. Probably the politicians did not know exactly what they had done; but they knew what they wanted. They had secured a law under which it was impossible for the citizen to know beforehand what constituted a crime, and which therefore made all productive effort liable to prosecution if not certain conviction (Paterson pp. 176-77).

What Mrs. Paterson means by "Society of Status" is a system of law that was coined by Sir Henry Maine, a 19th century British Whig, jurist, and historian. He theorized that there were two types of law: Society of Contract and Society of Status. The former is the Jeffersonian ideal that rights are *inalienable,* meaning they exist independent of society and the State. The latter is the idea that there are no rights or privileges outside of what the State grants to its subjects.

Under such a draconian system the State becomes quasi-divine, taking on a mystical aura, and demanding unquestionable obedience and sacrifice. Being the “originator” of rights, it can retract them as quickly as it dispenses them. The individual is absorbed into the metaphysical blob called “society” and is sacrificed by the State to serve its own ends. Antitrust laws do indeed represent a “reversion to status law”, as Mrs. Paterson has stated. Any action a firm or individual undertakes to maximize profits and serve consumer demand can be treated as a crime. With the passing of the Sherman Act and its subsequent additions, laissez-faire has been effectually destroyed, supplanted by the absolute rule of a monolithic State, ever ready to pounce on the hapless entrepreneur, fragmenting his enterprise and dividing the spoils.

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