

The Second Edition of Judge Posner's *Antitrust Law*: A Tempered Appreciation

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In the last part of the 20th century antitrust was transformed from an internally conflicted regulatory regime into a coherent one. Whereas thirty years ago there was no consensus on the ends that antitrust law should serve, today most agree that antitrust should aim to promote long-run consumer welfare. Conflicting goals—such as protecting small producers from the competition of larger, more-efficient firms, or keeping industries unconcentrated as a means of nurturing democratic values—are no longer taken seriously as appropriate aims of antitrust.

Three scholars were instrumental in sparking this transformation: Aaron Director, Robert Bork, and Richard Posner. (Honorable mentions go to Harold Demsetz and the late Yale Brozen.) Director didn't write much, but his intrepid use of the economic way of thinking in his classes at the University of Chicago Law School taught generations of students (including Bork) that competitive forces are astonishingly robust. His outside-of-the-box (or, more precisely, outside-of-the-textbook) analyses of facts and institutions made clear two vital features of reality. First, actual methods of competition are enormously varied; they are far greater, and more creative, than those few methods depicted in textbooks. Second, competition is no fragile flower but, rather, a sturdy oak that finds sustenance in places and in ways unimaginable to professors, judges, politicians, and bureaucrats. Director's triumph was sealed with the 1978 publication of Bork's *The Antitrust Paradox*, which brilliantly applied Director's lessons to all major areas of antitrust policy.

The impact of Bork's book was enhanced by the publication, two years earlier, of a more subdued and more tightly reasoned book: Posner's *Antitrust Law: An Economic Perspective*. Though sharing Bork's dissatisfaction with the reigning antitrust jurisprudence, Posner seemed less exasperated than Bork with the policy. The tone and the careful, constructive attention to detail that infused Posner's book indicated that he didn't see antitrust law as quite the mess that Bork thought it was. Bork wrote an exposé of the foolishness that motivated so many antitrust decisions during the first three-quarters of the 20th century; Posner patiently identified the various costs and benefits that should be considered by officials aiming to use antitrust to promote competition.

Posner more than Bork carefully explained the types of economic theory and evidence that should guide the application of antitrust law. Although Bork never called for the outright repeal of antitrust legislation, his book persuaded many that a drastic shrinkage of the scope of antitrust was needed. No such radical spirit animated Posner's book. Posner endorsed (and continues, in the second edition, to endorse) significant changes in antitrust practice, such as aligning states' authority to bring antitrust suits with that of private plaintiffs. But he seems genuinely to believe in the necessity and promise of antitrust grounded in sound, Chicago economics.

The two books—Posner's and Bork's—worked in tandem. Bork convinced the reader that antitrust law had been applied in an abysmal fashion. But just as the reader despaired, Posner offered hope

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with his clear, usable, and sound guidelines to make antitrust economically more respectable. Without Bork, I doubt that the potent prescriptions offered by Posner would have been heeded as readily as they were. Without Posner, judges deciding antitrust cases likely would have continued flailing away, ungrounded in positive economics.

The importance of this change in antitrust doctrine cannot be overstated. Antitrust is vastly better than it was when Bork and Posner published the first editions of their books. And it is vastly better largely because of these two books.

So, is any great purpose served by a second edition of Posner's book? Apparently no, but actually yes. Apparently no, simply because the amount of damage now inflicted on the economy by confused antitrust doctrines is today less than in 1976. At the margin, Posner's second edition cannot do as much good as the first edition because much of the good that could be done has already been achieved by the first edition.

Actually yes, because antitrust is still a dangerous doctrine that can easily revert to being the anti-consumer swamp that it was for most of its history. To minimize the risk of this reversion requires a mind such as Posner's to reinforce the message that antitrust ought to be firmly grounded on core economic principles. For this reason alone, the second edition is welcome, particularly the new chapter on "The New Economy," in which he nicely reveals the significance of the fact that the new economy is so heavily grounded on intellectual property. As long as there is antitrust, consumers should be comforted that Judge Posner continues to devote his strong intellect to it.

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But *should* antitrust continue? On this question I part company with Posner. Based on my understanding of competition, as well as on the fallibility (and the unavoidable political nature) of government enforcement of antitrust statutes, I believe that consumers would be better served if all such legislation were repealed and if antitrust enforcers found other jobs. In the second edition of *Antitrust Law*, Posner acknowledges that a minority of scholars endorses outright repeal, but he dismisses their arguments summarily.

Posner first says that, as a practical matter, repeal isn't going to happen. This claim may be a sound prediction for the next few decades. But it is not an intellectually respectable argument against the case for repeal. Political prospects ought not deflect scholars from going where their reasoning and the empirical evidence take them. Many seemingly permanent policies have been undone, arguably because of the intellectual efforts of scholars unafraid to write for the ages. Adam Smith endorsed free trade in the face of the seemingly invincible forces of mercantilism; Ludwig von Mises and F. A. Hayek attacked the very foundations of socialism when enthusiasm for central planning was at a fever pitch and socialization of industry was sweeping Europe. Milton Friedman and Martin Anderson, among others, patiently argued for outright abolition of the military draft when it seemed entrenched.

Posner's second reason for dismissing the case for repeal is more respectable: He believes that the benefits of economics-guided antitrust outweigh the costs. Certainly, antitrust informed by Posnerian reasoning is better than antitrust was before Posner arrived on the scene. But Posner wrongly concludes that the benefits so clearly exceed the costs that we can reject the case for repeal.

One important objection to antitrust policy is that enforcement authorities lack sufficient knowledge to consistently promote competition. Posner plays down this argument by claiming that "economics is an improving discipline" (p. x). I'm not convinced. Economists certainly publish more articles featuring more rigorous mathematical and econometric techniques, but it is difficult to make an empirical case that our understanding of the relevant area of economics, competition, has improved

much over the past three or four decades. For example, the fact that a game theorist builds a model showing that the first firm that enters an industry can price its product strategically to prevent entry says surprisingly little about reality. How likely is such an outcome? The evidence, in my view, is that most of the theoretical possibilities that have been discovered recently are highly unlikely to appear in the real world. (For evidence that these theories lack empirical value, see John R. Lott, *Are Predatory Commitments Credible?* 1999; and Stanley J. Liebowitz & Stephen E. Margolis, *Winners, Losers, and Microsoft*, 1999.) Adding to the stock of clever theoretical possibilities is not necessarily an improvement in economic understanding.

Still, economic understanding *has* improved. Nearly all improvements in our understanding involve the discovery that private arrangements reliably overcome problems (real and imaginary) that the blackboard theorist and the government official believe can be solved only by government intervention. Such is the nature of the significant improvements promoted by Director that characterize most of what is distinct about the Chicago school. This understanding counsels in favor of repealing antitrust.

Almost all of the original bases for antitrust intervention have been shattered by sound economics. Price-cutting is no longer an obvious means of monopolizing; bigness is no longer believed to be inevitable, inevitably harmful, or perpetual; and the myriad contracting arrangements devised by actual market participants are increasingly understood to enhance competition despite having been ignored by authors of textbooks. The advances that have occurred in economic theorizing are generally abstruse demonstrations of theoretical *possibilities*. Only when these theories have been supported by solid empirical findings should they serve as the basis for policy, particularly in light of the overwhelming evidence demonstrating the robustness of competition. The most important developments in economics tend to show that unregulated markets are likely to remain competitive—and that regulation is likely to be used in antisocial ways.

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Posner appears unconcerned about the potential for antitrust to be used for anticompetitive, rent-seeking purposes. He finds the evidence for this point to be inconclusive. In contrast, as I read the record, two important facts loom. First, antitrust has been, in large part, a weapon for rent-seekers to wield against their entrepreneurial rivals. (For the most comprehensive collection of this evidence, see Fred S. McChesney & William F. Shughart, eds., *The Causes and Consequences of Antitrust*, 1995.) This fact remains, regardless of the motives or level of economic understanding of the politicians who enacted antitrust statutes. Second, Aaron Director's instincts were sound: competition is robust and generally takes place regardless of private attempts to squelch it. These two facts convince me that the costs of antitrust likely outweigh its benefits.

I challenge Judge Posner and others who continue to believe that antitrust serves a useful, pro-consumer function to point to unambiguous instances of monopolization, by a private firm (or firms) unaided by government-enforced barriers to entry, that harmed consumers.

Instances of collusion among rivals might be cited—for example, some railroad cartels of the 1870s and 1880s. But even such least-objectionable antitrust targets are not justified by a great deal of evidence showing that, absent antitrust enforcement, collusion would be serious problem. (Even the railroads felt the need to press for the formation of the Interstate Commerce Commission to enlist government in the cause of railroad cartelization.)

My challenge is especially relevant for all areas of antitrust apart from collusion among rivals, because a great deal of antitrust doctrine and theory amounts to a search for the unicorn of sustainable market power. Is there a single merger that was permitted that experience shows to have created a monopolist that harmed consumers for any length of time? Is there an instance of predatory pricing that was never legally challenged—or that was challenged unsuccessfully—that suc-

ceeded in winning for the price-cutter long-standing monopoly power? Is there an example of contracting between a firm and its downstream customers or upstream suppliers that has succeeded in creating genuine monopoly power?

To be sure, people can disagree on the meaning of “length of time” and “monopoly power.” But I can think of no instance in which failure to apply antitrust sanctions against such firms or practices resulted in anything that I (or a consensus of economists) would call monopoly power. I can think of many instances in which the dynamic forces of entrepreneurial competition wiped out the large market shares, or reduced to insignificance any fleeting monopoly power, that apparently invincible firms once enjoyed. Recall Detroit’s Big Four automakers—and A&P—and IBM—and even J.D. Rockefeller’s Standard Oil Company which, contrary to popular myth, lost its market share principally because of competition from rivals rather than because of the antitrust attack it suffered.

The evidence compels me to conclude that antitrust is unnecessary.

Two responses to my conclusion might be made. First, perhaps antitrust enforcers have let no potential problem slip through their net; every potentially serious problem was challenged either by private plaintiffs or by government. Massive amounts of evidence show, however, that antitrust enforcers are far from perfect in distinguishing plausible from implausible sources of monopoly power. The only realistic way that antitrust enforcers could have ensured against committing Type II errors (missing monopoly power when it does exist) would have entailed committing plenty of Type I errors (finding monopoly power when none exists)—and, thus, frequently punishing firms for competing. Such punishment is a sizable wrench to chuck into the machinery of the competitive market process.

Second, perhaps the abuses of private monopolies never materialize and, hence, never become part of the visible evidence because the very possibility of antitrust enforcement assures that they never, or only seldom, occur. Perhaps. But in light of antitrust’s long record of abuse and ignorance, it’s fair to ask for at least *some* hard evidence that markets require antitrust intervention to remain competitive. (To demonstrate the costs of monopoly, should it occur, is not to demonstrate that monopoly is a significant problem in reality.)

Despite the impression that the reader likely gets from reading Judge Posner’s book and almost all other books on antitrust—the evidence that markets are prone to monopolization is extraordinarily weak, whereas the evidence that antitrust is used to hamstring competitive rivals is powerful.

So long as antitrust law exists, it should be tempered by sound economics. Judge Posner continues to be among the most articulate and indefatigable champions of keeping antitrust so tempered. At the end of the day, however, he is too timid in using his razor-sharp economic instincts to critically explore antitrust’s foundations. If he were to overcome this timidity, I’m confident that the third edition of his book would exhibit greater skepticism of antitrust and a correspondingly greater appreciation of the robustness of competitive forces. ●