



ANTI-ANTITRUST

Jacob A. Stein

Reviewing

EDWIN S. ROCKEFELLER, *THE ANTITRUST RELIGION:
HOW BLIND FAITH IN ANTITRUST HAS LED TO
CONFUSING AND ARBITRARY ENFORCEMENT*
(Cato Institute 2007)

BEFORE COMMENTING on Edwin S. Rockefeller's astonishing new book, *The Antitrust Religion*, I wish to declare an interest. I had my own mental file on antitrust before I read the book. It consisted of the following:

- 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. — *Adam Smith*
- Each city sets aside a place where merchants lie and deceive each other. It is called the marketplace. — *Source Unknown*
- Behind every great fortune there is a lie. — *Honoré de Balzac*

Included in my experience is what I learned in several price-fixing cases. After the co-conspirators meet and fix the price, each conspirator rushes back to his office to cut 10% off the agreed upon price to better compete with his co-conspirators.

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I also learned that price fixing is injurious to one's health. Defense counsel at sentencing invariably provides the court with lengthy medical reports asserting that the defendant's condition is such that he should be placed on probation rather than be sent to jail. Is there a case to be made that price fixing is a job related injury and therefore qualifies the CEO for worker's compensation?

Resting at the bottom of my mental file were the conversations with friends of mine whose practice is antitrust. They served in the government before entering private practice, either at the Federal Trade Commission or the Antitrust Division of the Department of Justice. They have impressive academic credentials. They do well. They like their work. Most have a sense of humor. Their conversation is peppered with words like the sanctity of competition, monopoly, the marketplace, tie-in sales, market entry, restraint of trade, economies of scale, perfect competition, and social welfare.

They casually discuss whether the big law firms are involved in price fixing. What if the managing partner of Firm A calls the managing partner of Firm B and suggests a cap on what the firms will pay a new associate? After all, the law firms' overhead is in the 65% range. Associate salaries significantly affect the hourly rates and corporate in-house counsel are rebelling. Something must be done.

They refer to the case in which the court barred colleges from agreeing on salary limits for college coaches. *Law v. National Collegiate Athletic Ass'n*.¹

Now, to Mr. Rockefeller's book. He is a lawyer who speaks with special authority on the subject of antitrust. His peers elected him chairman of the Antitrust Section of the American Bar Association. He has written books and articles on the subject.

In the book I have before me, he makes the startling confession that this antitrust business is nothing but a fiction, a thing of rags and patches. We would be better off without it. Those who take it seriously take it as a matter of faith, not law. And, as with other matters of faith, antitrust has its own vocabulary, its rituals, and its well-funded clergy.

¹ 134 F.3d 1010 (Kansas 1998).

Anti-Antitrust

In his chapter entitled “The Antitrust Community,” Mr. Rockefeller describes the rewards. He says the Antitrust Section of the American Bar Association disclosed in its June 30, 2005 report that it had reserves of \$7,320,980. During its fiscal year 2003-2004, its net revenues were more than \$900,000. The members of the Antitrust Bar attend meetings at Chateau Montebello, in Montebello, Canada; the Savoy in London; delightful resorts in California and Kiawah Island, South Carolina. The inference to be drawn from this powerful circumstantial evidence is that there is real money to be made by joining the Antitrust orthodoxy.

Antitrust, he suggests, deflects the public’s resentment against big business predators into moral and ceremonial channels by the periodic use of litigation brought by the Antitrust Division of the Department of Justice.

The key antitrust statute, the Sherman Act, was born of the political forces of the day. The language of the Act is so general that the courts redraft it case by case. They decide what restraint of trade is and what constitutes a monopoly. They dictate to the defendants what they must do, what they must sell off, and with whom they may merge. Judges have experience in getting appointed as judges, not in complicated business issues in which judges have no business meddling. This is what the House and the Senate are supposed to do by holding hearings. Adolph A. Berle, in his book *Power*,² offers this comment:

Wherever the federal courts are asked to deal with the economic organization of an industry, or with extensions of market power and cognate questions, they should refer the problem to the Federal Trade Commission for a report. In these cases, reference might be made directly by federal district courts, where antitrust proceedings are begun. After a finding of illegality, the device of using the Federal Trade Commission as a master to propose a decree could be availed of. Where the Federal Trade Commission foresees danger not dealt with by existing legislation, it should re-

² New York: Harcourt, Brace & World, Inc., 1969.

Jacob A. Stein

port to the Congress and the president, asking for legislation.

Let me conclude by conferring on Mr. Rockefeller the Thurman Arnold Award. It is dedicated to those who write a satirical book such as *The Folklore of Capitalism*,³ which exposed the faith-based myths that protect capitalism from a thoughtful critical analysis. Mr. Rockefeller performs that service on antitrust. Will the honoree please step forward

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³ Yale University Press, 1937.