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HAYEK ON MONOPOLY AND ANTITRUST IN THE CRUCIBLE OF *UNITED STATES V. MICROSOFT*

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Abstract

Hayek took great care in his political writings over many decades to insist that he was no doctrinaire advocate of laissez faire. Of the many exceptions that he made to the ideology of limited government, his theory of monopoly and antitrust is perhaps the most perplexing. This article examines Hayek's theory of antitrust to see whether it satisfies his own standard for the "rule of law," and, furthermore, whether it provides a coherent test of the legitimacy of antitrust litigation of the type brought by the Department of Justice and the states against Microsoft.

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Introduction

Classical liberalism as a political philosophy was all but ignored in academic circles in the United States since Progressivism sounded what appeared to be its death knell in the first two decades of the twentieth century and welfare state liberalism triumphed by mid-century. Today, however, the intellectual landscape looks quite a bit more promising for the theory of free markets, individual liberty, and limited government, due in no small part to the lifelong efforts of Friedrich Hayek, along with his mentor in the "Austrian School" of economics, Ludwig von Mises, and contemporaries in the "Chicago School,"[1] most prominently Milton Friedman. In a lifetime of writing, Hayek demonstrated why socialism would fail as an economic system, through the fundamental inability of a central planner to command all knowledge, to control uncertainty and fluctuating needs and wants, and to defy the unpredictability of life. He repeatedly bemoaned the propensity of democratic societies to embrace command and coercion as the remedies for perceived social maladies, rather than freeing individuals to act on their knowledge of local conditions and allowing markets to function *relatively unhampered* by government regulation, with competition functioning as a "discovery procedure," an experimental method of solving problems and adapting to unpredictable and inevitable changes in circumstances.[2]

I say "relatively unhampered" by government regulation because, as we shall see in Part I of this essay, Hayek, far from being a doctrinaire noninterventionist, consistently argued, through writings that spanned many decades, that certain governmental functions beyond the minimal state were not only justified but necessary to the functioning of a free market system. With this understanding of Hayek as more of an empiricist when it comes to governments' proper functions than an ideologue, we will approach the central concern of this essay: Hayek's theory of monopoly and antitrust.

In both of his seminal works in political theory, *The Constitution of Liberty* and *Law, Legislation and Liberty*, Hayek endorsed as a legitimate function of the state the power to regulate monopolies and curtail industry practices in restraint of trade. Of the many functions of government that Hayek endorsed beyond the minimal state—the state that merely provides defense, laws prohibiting force and fraud, and courts to enforce them—his discussion of the proscription of monopoly is perhaps the most tangled. Does Hayek provide a theory of monopoly and a remedy of antitrust that is tenable, that leads to relatively unambiguous criteria, and that meet his criteria for the rule of law? Furthermore, does Hayek's theory

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[1] The "Chicago School" tended at mid-century to view antitrust laws as necessary to preserve a competitive market with many competing firms, as the perfect competition paradigm requires. Since then, however, many prominent followers have become skeptical of antitrust law and desire to limit its scope. Post-Hayekian "Austrian School" adherents generally oppose antitrust, viewing competition as rivalrous behavior and a discovery mechanism. Rejecting the perfect-competition paradigm, they see no role for government in policing markets for competitiveness.

[2] FRIEDRICH A. HAYEK, *Competition as a Discovery Procedure*, *in* NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 179-90 (1978).

hold up in the crucible of real-life antitrust litigation, with the featured exhibit being the plethora of antitrust litigation against Microsoft Corp.? Finally, does antitrust law, conceived in the late nineteenth century stand the test of time for the twenty-first century?

After reviewing Hayek's arguments for the insufficiency of the minimal state in Part I, Part II will explore Hayek's general view of the beneficial operations of an unfettered market, his critique of the perfect competition model, and his theory of government's proper role in controlling monopoly and contracts in restraint of trade. Part III will examine the web of antitrust litigation against Microsoft, arguably the most successful new corporate venture of the last quarter of the twentieth century, with particular focus on the federal and state litigation that nearly culminated in its dismemberment. Part IV will examine whether Hayek has provided a theory that both survives scrutiny by his own standard, the rule of law, and provides a coherent test of the legitimacy of antitrust litigation in the various cases against Microsoft. The conclusion will suggest that skepticism toward antitrust laws, especially when new technology markets are their targets, may be justified in the light of the litigation brought against Microsoft.

I. Hayek on Laissez Faire and the Minimal State

For all of his influence in reviving classical liberalism and inspiring its modern offspring, libertarianism, Hayek was not an advocate of pure laissez faire and the minimal state. He proclaimed throughout writings over many decades that strict adherence to "certain rough rules of thumb," particularly laissez faire, had done "much harm to the liberal cause."[3] Rather than a practitioner of "dogmatic laissez faire,"[4] he analogized the liberal in his early work, *The Road to Serfdom* (1944), to a "gardener who tends a plant," who through increased knowledge better understands "the conditions most favorable to its growth."[5] He urged that competition be employed as the means of coordinating human affairs, but where conditions cannot make competition effective, other means should be employed. While unfettered entry into the trades and freedom to sell and buy at mutually agreed prices and quantities are essential, measures restricting methods of production, though they impose costs, may be justified if they apply equally to all producers. Measures to prohibit poisonous substances or to stipulate conditions of their use are legitimate governmental functions. Limiting working hours and imposing sanitary regulations in factories are legitimate functions of government as well, as are building regulations.[6] Competition is fully compatible, he argued, with "an extensive system of social services," so long as that system is not so extensive that it renders

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[3] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 17 (1944). By "liberal cause" he means the classical liberal cause.

[4] *Id.* at 36.

[5] *Id.* at 18.

[6] *Id.* at 81 (stating that building regulations and factory laws may be wise or unwise, "but they do not conflict with liberal principles" so long as they are not aimed at particular people).

competition ineffective,[7] and a guaranteed minimum is one option that he entertained.[8]

Hayek faulted classical liberals for stressing the limits of government, rather than the positive role that government needs to play in the functioning of a competitive system. His list of "positive requirements" for government interventions is not trivial: the provision of institutions for money, markets, and information where these "can never be adequately provided by private enterprise";[9] the formulation and implementation of a legal system designed to make competition work as beneficially as possible, a legal system that defines property rights over specific kinds of things and delimits freedom of contract; state control of weights and measures to prevent fraud;[10] state assistance to individuals in providing against the hazards of life (including sickness, accident, and "acts of God" such as earthquakes and floods);[11] and monetary policy and public works to combat the business cycle and waves of large-scale unemployment.[12] The inventory of government functions does not end there, but extends to what we now call provision of "public goods" and prevention of "public harms," that is, instances of supposed "market failure." Thus, such public goods as roads and such public harms as deforestation, erosion from over-farming, and pollution from factories, cannot be left to the price mechanism and government may intervene.

In *The Constitution of Liberty* (1960) (henceforth *CL*), Hayek was again at pains to reiterate that invoking a general principle of noninterference to block any proposal for government intervention into economic matters is harmful and misleading, as well as being ineffective as a strategy for contesting against the opponents of free enterprise.[13] While most proposals for economic intervention are inexpedient, either because they will fail or because their costs outweigh their benefits, Hayek was loath to dismiss them out of hand, preferring to examine each in the crucible of expediency. So long as a proposed intervention coheres with the "rule of law"—i.e., that coercion of the individual by government must only follow known, certain, general laws and that the laws must apply equally to all[14]—Hayek would not peremptorily dismiss it. He was at pains to point out that, "[e]ven the most fundamental principles of a free society . . . may have to be temporarily sacrificed" to preserve liberty, war being the most likely justification.[15] Habeas corpus

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[7] *Id.* at 37.
[8] *Id.* at 120 (arguing that in wealthy countries some designated minimum of food, shelter, and clothing sufficient to secure health and the ability to work can be assured to all, although he had concerns about the dependent exercising the same liberties as the independent).
[9] *Id.* at 38.
[10] *Id.* at 81.
[11] *Id.* at 120-21 (contending that a comprehensive system of social insurance organized by the state is not incompatible with the preservation of individual liberty).
[12] *Id.* at 121. He did caution, however, that experiments in public works projects must be judiciously considered, since they might seriously restrict the competitive sphere. *Id.*
[13] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 221 (1960) [hereinafter HAYEK, CL].
[14] *Id.* at 205-10.
[15] *Id.* at 217.

might be suspended or a state of siege proclaimed. Yet, even in peacetime, the rights of individuals "may occasionally be infringed in the public interest."[16] Freedom of speech might bow to "clear and present danger,"[17] and private property may be taken by the government exercising its "right of eminent domain."[18]

To his earlier inventory of acceptable governmental functions in *The Road to Serfdom*, Hayek now added surveying, land registration, propagating statistics, and most significantly, the support "if not also the organization" of education.[19] Although government may not monopolize and exclude other private purveyors, he found "no violation of principle" in government "engaging in all sorts of activities on the same terms as the citizens," even though in most fields there is "no good reason why it should do so."[20] The "public goods" justification now condones a wider range of functions: sanitary and health services, municipal amenities, public works, encouragement of various sorts to the advancement of knowledge, measures to preserve secrecy in military preparations, and most curiously, the operation of state enterprises. The latter must be operated on the same terms as private competitors, with any subsidies provided to the government enterprise also afforded to its private rivals. While he was skeptical that, with the power of taxation, governments could adhere to this constraint of nondiscrimination, he was not willing to rule out state enterprises on principle. Again, on principle, he was unwilling to exclude general regulations of economic activity, although he thought most would be unwise because they would limit experimentation and impose costs, reducing productivity. Thus, proposals to prohibit night work or to forbid phosphorous matches, in Hayek's examples, should be tested by one criteria, cost/benefit: "[They] cannot be conclusively determined by appeal to a general principle."[21] Factory legislation of various sorts is permissible, subject to the cost/benefit test. Even occupational licensure is permissible, now, in certain circumstances.[22] Neither is private property sacrosanct, since conflicting uses of neighboring land precludes an owner from exercising "unlimited power to use or abuse his property as he likes."[23] Freedom of contract, he again cautioned, is within governments' power to define, and it is not absolute. Governments may restrict contracts for immoral purposes, or contracts in restraint of trade, or permanently binding labor contracts, as well as impose contractual obligations that may be contrary to the intentions of the contractors, for example, liability for industrial accidents irrespective of negligence.[24]

In sum, Hayek remarked, "The old formulae of laissez faire or non-intervention do not provide us with an adequate criterion for distinguishing be-

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[16] *Id.*
[17] *Id.* (internal quotation marks omitted).
[18] *Id.* Fundamental rights should only be suspended in "exceptional cases defined by rule," and eminent domain must be accompanied by full indemnification, Hayek cautioned.
[19] *Id.* at 223.
[20] *Id.*
[21] *Id.* at 225.
[22] *Id.* at 227.
[23] *Id.* at 229.
[24] *Id.* at 230.

tween what is and what is not admissible in a free system."[25] Increasing wealth and technological knowledge may bring new ways in which government "might render services to its citizens."[26] However, he was convinced that the "rule of law" provides an adequate and clear line beyond which government action is impermissible. Measures to enforce "distributive or 'social' justice" and to centrally plan economic activity fall on the wrong side of that line, since government cannot but violate the equal treatment stricture of the rule of law when it reallocates incomes or stipulates economic activity to individuals and firms.[27]

Hayek's aversion to an inflexible principle of laissez faire is repeated in *The Political Order of a Free People* (1979), the third volume of his trilogy, *Law, Legislation and Liberty* (henceforth *LLL3*),[28] the ambitious undertaking of his advanced years. On government intervention there is both retrenchment and reiteration of familiar themes from his two earlier works, as well as a few novel elements.

Retrenchment appeared in the area of monetary policy. Hayek abandoned any hope that government could control the monetary system, prompted no doubt by the galloping inflation of the 1970s, arguing now that the provision of money ought to be left to competition in the market.[29] Reiteration occurred in his refrain against the minimal state, noting but not commenting[30] on Robert Nozick's *Anarchy, State, and Utopia* (1974), the preeminent modern defense of minimalism.[31] Once again, Hayek was emphatic about his rejection of the minimal state, the state that merely limits its coercive and monopolistic activities to "the enforcement of rules of just conduct, defense, and the levying of taxes to finance its activities."[32] For services that the market cannot provide, or does not provide adequately, Hayek again fully endorsed compulsory taxation to "make the inhabitants contribute to a common fund"[33] for the provision of these "collective or public goods."[34] He offered, though, a more elaborate justification than heretofore for public goods provision by government, arguing that it is rational for individuals to accept coercion in the supply of public goods that they oppose, provided that the common pool of ser-

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[25] *Id.* at 231.
[26] *Id.*
[27] *Id.* at 231-32.
[28] Subsequent mention in the text of *Law, Legislation and Liberty* will be to this volume. The main mission of this volume was the creation of an ideal constitution for democratic societies.
[29] *Id.* at 56-60. Hayek offers a more extensive discussion of this issue in DENATIONALISATION OF MONEY (2d ed. 1978).
[30] FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY, THE POLITICAL ORDER OF A FREE PEOPLE 41 (1979) [hereinafter HAYEK, LLL3].
[31] *Id.* at xi-xii. (In his "Preface" Hayek ascribes his decision to proceed with his own arguments without first digesting Nozick's as due to his advanced age.)
[32] *Id.* at 42.
[33] *Id.* at 41. Just because government must use its coercive power to tax in order to support public services, Hayek cautions, this does not mean that it must itself provide all of these services. *Id.*
[34] *Id.* at 44. Hayek's list of acceptable government functions is familiar from the two earlier works: protection against violence, epidemics, and natural disasters; provision of amenities in cities; provision of standard measures and information of various kinds (e.g., land registers, maps, statistics, certificates of quality for some goods and services). *Id.*

vices offers them more benefit than what it costs them.[35] Likewise, he provided a more elaborate argument for permitting government to regulate land uses that create "'neighbourhood effects,'" that is, "positive and negative externalities."[36] In the area of social provision, Hayek now explicitly endorsed a "certain minimum income for everyone" within wealthy societies, as an outgrowth of his standard argument for government as insurer against misfortunes, old age, and natural disasters.[37] Other state functions are familiar also: public financing of education,[38] building regulation, pure food laws, certification of professionals, restriction on sales of dangerous goods, safety and health regulation for industry, and provision of public institutions of edification and entertainment,[39] and restrictions on the monopoly powers of labor unions[40] (a theme in *CL* as well).

There are, however, a few novel elements in Hayek's discussion of the proper spheres of government and the market. He describes the role of an "independent sector" as a third force for the provision of social services, remarking that charity by men of great fortunes initiated many of the institutions that we now consider to be general needs the provision of which has been taken over by government, for example, public education, public hospitals, libraries, museums, theaters, and parks. Government provision, he cautions, can crowd out experimentation by foundations and endowments, and curtail creativity in meeting human needs.[41] New, too, is an appreciation that local and regional units of government may be more efficient providers of what he calls the "positive" functions of government, and that such a devolution would be desirable.[42]

There is, then, a remarkable consistency, in works spanning some four decades, in Hayek's perception of the proper role of government. Ever eager to avoid the calumnies of those who would condemn him as a throwback to the nineteenth century, as an advocate of laissez faire and the minimal state, Hayek embraced a

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[35] *Id.* at 44-45.
[36] *Id.* at 43-44. Pollution of land and water are the primary concerns here.
[37] *Id.* at 54-56. He added a rather convoluted argument about why, since liberal principles should be universalizable, provision of a minimum income to everyone in the world is not possible. He argued, somewhat unconvincingly, that liberal principles may have to be confined to those societies that are liberal, and not extended to every country in the world. Since a minimum income cannot be supplied to everyone in the world, immigration must be controlled by wealthy countries, a conclusion that he was manifestly uncomfortable with as a liberal, but found acceptable under real world conditions.
[38] *Id.* at 61. New elements are an endorsement of Milton Friedman's voucher plan for public funding of choice by students and loans for higher education. *Id.*
[39] *Id.* at 62.
[40] *Id.* at 89-90. This is mainly a case of government needing to undo monopolistic powers granted to trade unions by prior legislation, though Hayek cloaked this, here, in a rather unpersuasive argument that government has a function to play in limiting groups in ways that would not be legitimate if exercised against individuals. His rationale was that group interests in controlling supply and entry can conflict with the general interest, while individuals seeking their own selfish interests are brought naturally into alignment with the general interest. *Id.* His argument that labor unions exercise powers that restrain trade, powers granted to them by prior legislation, and that they coerce members and nonmembers, is historical and more persuasive. HAYEK, CL, *supra* note 13, at 267-84.
[41] HAYEK, LLL3, *supra* note 30, at 49-50.
[42] *Id.* at 63.

fairly activist agenda for government, but one well short of the redistributivist and perpetually interventionist post-New Deal welfare state.

II. Hayek's Theory of Monopoly

Although Hayek mentions monopoly and antitrust law in passing in several of his other works,[43] his most developed theory appears in *Law, Legislation and Liberty* with key elements adumbrated in *The Constitution of Liberty.* The earlier treatment is worth brief mention not only because it prefigures his more developed argument, but because it unfolds in a different context, in the context of a discussion of coercion, whereas his later theory appears in a discussion of competition and the role of the government in markets. The earlier treatment, too, is more skeptical of government remedies for even monopolistic practices that he considered worrisome, and the number of such excesses seems much more confined than in his later work. Perhaps, in *LLL3*, where his overall project was to construct an ideal constitution, the tone of his monopoly discussion seems more hopeful that remedies can be crafted to counter what he sees as the truly harmful effects of monopoly.

In *CL*, Hayek argues that it is normally no less true in a monopolized market than in a competitive one, that a producer who refuses to deal with me except on terms of his choosing that do not appeal to me is, nevertheless, not acting coercively. He offers the example of a famous painter who refuses to paint my portrait except at an exorbitant fee; since I can easily do without this service, I have not been coerced. "So long as the services of a particular person are not crucial to my existence or the preservation of what I most value," Hayek writes, "the conditions he exacts for rendering these services cannot properly be called 'coercion.'"[44] Instances in which a monopolist could exercise true coercion are limited to those rare cases in which the monopolist controlled "an essential commodity on which people

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[43] *E.g.*, FRIEDRICH A. HAYEK, *"Free" Enterprise and Competitive Order*, *in* INDIVIDUALISM AND ECONOMIC ORDER 107-18 (1948). In this essay, Hayek is more skeptical of government's role in controlling monopolies than he was to become in his later writings, pinning on government blame for causing monopoly both with its attempts to curtail it by antitrust law and by granting patents, copyright, and trademarks that extend the concept of property in inappropriate ways, thereby creating artificial monopolies. He lambastes government attempts to legislate against cartels, monopoly, and restraints of trade, alleging that these enactments have greatly contributed to the decline of the very competition they were supposedly designed to enhance. Both legislation creating limited liability corporations and patents "greatly assisted the growth of monopoly." *Id* at 115. Discussions of Hayek's monopoly theory are scarce in recent book-length treatments of Hayek's political philosophy, although two exceptions are NORMAN P. BARRY, HAYEK'S SOCIAL AND ECONOMIC PHILOSOPHY 50-52 (1979) and JEREMY SHEARMUR, HAYEK AND AFTER: HAYEKIAN LIBERALISM AS A RESEARCH PROGRAMME 68, 74-76 (1996).

[44] HAYEK, CL, *supra* note 13, at 136. Hayek describes, more than defines, what he means by coercion, calling it nearly as troublesome a term to define as "freedom."

> Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose . . . . Coercion implies . . . that I still choose but that my mind is made someone else's tool, because the alternatives before me have been so manipulated that the conduct that the coercer wants me to choose becomes for me the least painful one. *Id*. at 133.

were completely dependent."[45] Illustrative of the rarity of such cases, is his example of an owner who owns the only spring in an oasis where people settled under the assumption that water would be available at a reasonable price, perhaps because another spring once existed that subsequently dried up. Now, the monopolist is in the position of being able to demand that the people do whatever he wishes. Control over the lives of others, making people do one's bidding, is at the core of Hayek's concern with monopoly, a concern that extends to his later discussion in *LLL3*. If this control is absent, if an owner does not control an "indispensable supply," then no coercion is involved, no matter how "unpleasant" people might find the owner's terms.[46] In the rare case when Hayek identifies a genuine concern about monopolistic coercion, his chosen remedy is modest: require the monopolist to treat all customers alike; that is, the same price must be charged to all and no other discrimination in terms may be exacted.

Another theme that will resound in *LLL3*, is that monopoly or bigness itself is not a problem, despite conventional fears to the contrary, but only barriers to entry to an industry or trade. Where monopoly does exist in most cases time will solve the problem if, when circumstances change, no artificial, man-made barriers to entry exist that will prevent others from entering the fray. The principal man-made obstacles are governmental in nature, and he looks to gradual improvements in the law of corporations, patents, and taxation to mitigate artificial advantages that government provides to certain favored enterprises.[47] He is highly skeptical of using legal means to try to circumvent "the unpleasant facts of life" that certain capacities and skills may be held by particular enterprises, which cannot be duplicated in others.[48] Attempting to use government to create conditions that mimic competition is futile. Hayek describes himself as "increasingly skeptical" of the benefits of using government against particular monopolists, due to the arbitrary nature of enforcement, citing the fear by businesses in the United States that cutting prices might trigger antitrust enforcement, a state of affairs that he finds "an absurdity."[49] Even though he discerns a strong case for prohibiting by general rules price discrimination by monopolists, he thinks governments' record in such enforcement is "so deplorable that it is astounding that anyone should still expect that giving governments discretionary powers will do anything but increase" obstacles to market entry.[50]

He further cautions that all governments that have attempted to mitigate the abuses of monopolies have ended up favoring some "good" monopolies and disfavoring "bad" ones, which only makes matters worse. Turning transitory monopolies into permanent ones is the artifice of governments. Rather than "enterprise monopoly" being an especially troublesome problem, both here and in *LLL3*,

[45] *Id.* at 136.
[46] *Id.*
[47] *Id.* at 265-66.
[48] *Id.* at 265.
[49] *Id.*
[50] *Id.* at 266.

it is government privileges and exclusions granted to labor unions that he finds genuinely problematic.[51]

Hayek's passing remarks on monopoly in *CL*, in sum, leave the distinct impression that when it came to enterprise monopoly he did not think it a serious problem. Confined to instances, rare indeed, of control over indispensable products or services that would allow their possessor to coerce others and make them do his bidding, Hayek was reluctant to entrust government with an enforcement power that would, in all likelihood and by all historical examples, cause more harm than good. Entrenching monopolies that, without interference, would be merely temporary, is all that should be expected from government.

Chapter 15 of *Law, Legislation and Liberty*, on "Government Policy and the Market," includes Hayek's most extensive discussion of monopoly and its purported antidote, antitrust law. His treatment of the topic is neither elegant nor without obfuscation and indecision, although the essential elements of his position can be identified, if not all of the details reconciled. It is, in a word, an exercise in ambivalence. This should not be particularly surprising, given our previous examination of Hayek's aversion to an inflexible rule of laissez faire and his willingness to consider circumstances and likely effects in a pragmatic assessment of proposals for government intervention.

The context of his discussion of monopoly in *LLL3* is a critique of the neoclassical economists' favored market model of "perfect competition,"[52] which portrays an ideal case "in which for each competitor the price is given, and where his interests will induce him to increase his production until the marginal costs are equal to price."[53] The problem with this artifice, as Hayek sees it, is not only that it offers an erroneous understanding of competition, but that it is used to judge the efficacy of competition in the real world. "Perfect competition" models a world that cannot exist. Only an omniscient dictator could ensure that firms efficiently utilized available resources until prices just covered marginal costs, but this standard is "wholly irrelevant" to the actual world "because it rests on a comparison, not with some other state that could be achieved by some known procedure, but with one that might have been achieved if certain facts which we cannot alter were other than they in fact are."[54]

But the main problem with the perfect competition model is that it misunderstands what competition is. The model depends on all competitors possessing the same knowledge of the market, but this, Hayek argues, is impossible. The equilibrium that the perfect competition ideal presumes depends on perfect knowledge by all participants, but competition itself, like scientific experimentation, is a discovery process. "No theory can do justice to it which starts from the assumption

[51] *Id.*

[52] This is not Hayek's first critique of the perfect competition model, but rather reprises arguments that he made as early as 1946 in a lecture at Princeton University. *See* FRIEDRICH A. HAYEK, *The Meaning of Competition, in* INDIVIDUALISM AND ECONOMIC ORDER 92-106 (U.Chic. 1980) (1948).

[53] HAYEK, LLL3, *supra* note 30, at 66.

[54] *Id.* at 67.

that the facts to be discovered are already known."[55] Competition cannot be judged by preconceptions about its ideal form, for it is a mechanism, one that allows large numbers of people to utilize their separate knowledge, skills, and opportunities to achieve results that are essentially unpredictable at the outset.

Competition as a discovery procedure, if left unfettered by government restrictions or grants of privilege to some, puts a premium on rational behavior by rewarding it, and gradually spreads rational behavior to more and more people through emulation of the successful. No other method that we know, Hayek writes, will achieve the three principal results of competition: that everything will be produced that someone knows how to produce and can sell profitably; that everything being produced is produced at least as cheaply as any non-producer could produce it; and that prices are at least as low as non-producers could have made them.[56] No central direction, he repeats his familiar argument, could do any better.

In a competitive system, self-interest prompts individuals to use their knowledge to find the most economical methods of production, with the inducement that whoever finds new methods first may enjoy a temporary profit, which will last only as long as he continues to innovate and lead his industry. Out of these profits of innovation or being there first, future capital for more improvements is reaped. But, in fact, no notion of "excess profits," as some would have it, is possible since the costs of production are not something that an outsider can establish objectively, for costs too are part of the discovery process.[57] In a free society, Hayek reminds us, reaping rewards for innovation cannot be considered an offense. (This argument would, seemingly, rule out much antitrust law, at least that part of it that aims at price gouging, or for that matter, so-called "predatory" price cutting, but as we shall see, Hayek will still find a legitimate role for antitrust.)

Hayek, next, introduces an equity argument. So long as the institution of private property prevails, there is no moral justification for curtailing the power of an owner of a rare resource or the producer of a product that requires superior skill, from setting his own prices and quality of his product. A manufacturer or merchant who builds a unique organization, Hayek again analogizes to a painter who chooses to limit his output to maximize his profit. In both cases, there is no justification for interfering with "monopoly profit."[58] Yet, Hayek's position is not without ambivalence here, for he adds that the situation is "wholly different" where market power allows the monopolist to prevent others from "serving the customer better," and, in such a case,

> it is true that even the power over prices, etc. may confer upon a monopolist the power of influencing the market behaviour of others in a manner

[55] *Id.* at 68.
[56] *Id.* at 74.
[57] *Id.* at 70-71.
[58] *Id.* at 72.

> which protects him against unwelcome competition . . . . in such cases there is indeed a strong argument for preventing him from doing so.[59]

Hayek tacks back immediately, with a reminder that a monopoly or oligopoly may be a desirable result at a particular point in the competitive process, and that while this gives government no justification for preserving a monopoly, neither should it cause alarm, so long as its position results from "serving [its] customers better than anyone else, and not by preventing those who think they could do still better from trying to do so."[60] Government "privilege" that precludes others from entering the monopolist's market is objectionable, but market circumstances that advantage some but not others, are not.

Neither is it objectionable for a "big firm" to dominate its market and function as a price leader, since there is no way of determining the optimum size of a firm other than by letting the competitive process operate unhindered. An effective competitor may or may not enter the fray, but there is no way that government can improve on the situation, for the "most effective size of the individual firm is . . . one of the unknowns to be discovered by the market process . . ."[61] So bigness itself is not a problem, unless government itself creates special, artificial advantages to bigness through tax policy, the law of corporations, tariffs, industrial patents, or bureaucratic hurdles that large firms can surmount with greater facility than small firms. Such artificial advantages to bigness should be dismantled. Other government assistance to monopolies—in transport, public utilities, labor, agriculture, and finance—are likewise harmful, and should be abandoned. Hayek even wonders whether monopoly would be such a perceived "serious problem" if government had not abetted monopoly. Thus, he puts a higher premium on governments ceasing to aid monopoly by discriminatory rules that advantage bigness, than on government trying to reduce the private power of firms over the market conduct of others, although the latter he still takes to be a proper function of the law.[62] What will most effectively counter the influence of large aggregations of capital, he thinks, are other large aggregations of capital, and this entirely competitive process will be much more effective than "any supervision by government."[63]

For Hayek, there are two features of market behavior by dominant firms that do raise concerns, and I will attempt to differentiate and systematize his rather discursive passages that intertwine these two concerns:

First, and this seems to be more of a moral consideration than an economic argument, he is troubled by a monopolist's capacity to withhold services on which people are dependent. What he has in mind here is control by a monopolist over an essential product,[64] thus giving the monopolist the power to discriminate between

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[59] *Id.* at 72-73.

[60] *Id.* at 73.

[61] *Id.* at 78.

[62] *Id.* at 78, 88.

[63] *Id.* at 79.

[64] *Id.* at 83-84. Hayek declines to discuss the special case of a scarce and exhaustible resource, such as a scarce ore, finding the topic too complex for treatment here, but doubting that the monopoly would be

different customers. It is not the ability to set a price for the essential product that is his concern, but rather the capacity of the monopolist to, if it likes, set different terms for different customers. If a company were so efficient in producing ball bearings, he offers as an example, that it drove out all competitors, this would not be a problem so long as the company supplied ball bearings to all seekers on the same terms.[65]

Second, and again primarily a moral consideration, Hayek is troubled by instances in which a monopolist can prevent competition by others.[66] While a monopoly may have achieved its market dominance by being more efficient, or by controlling limited resources, or by being more innovative in its earlier years, its behavior can become problematic if it later uses its dominance to "protect and preserve [its] monopolistic position after the original cause of [its] superiority has disappeared."[67] This argument blends into the first, since one of the ways that the monopolist can perpetuate its position is through discrimination in prices and terms to various buyers. Here, discrimination is of particular concern to the extent that the monopolist can deter future competitors. Hayek gives the example of a monopolist who can cut prices in a limited territory where a newcomer is trying to compete.

There is a role for government, Hayek argues in a rather contorted passage,[68] in preventing these two types of monopolist harms, that is, (1) exercising a power to discriminate when in control of an essential good or service, and (2) perpetuating a monopoly by preventing others from entering a market and trying to serve consumers better. Hayek seemingly agonizes over what role government ought to have, since he thinks it sometimes desirable that a monopolist be allowed to discriminate by prices and terms, as in transport or public utilities where some categories of customers or geographical areas could not be served profitably unless price differentiation were permitted. Apparently, then, a clear rule is impossible, since some price discrimination is desirable. Where the monopolist can use its power to discriminate in order to coerce particular individuals or firms or where it uses its market dominance to restrict competition "in an undesirable manner, it clearly ought to be curbed by appropriate rules of conduct."[69] Hayek continues: "Though it would not be desirable to make all discrimination illegal, aimed

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harmful in such rare situations, thinking it likely that the monopolist would spread the exploitation of the resource over a longer period. This is an argument about which he had earlier expressed skepticism in *CL*.

[65] *Id.* at 81. For a real world example, he offered Sears Roebuck & Co., an exemplar of bigness that raised no concern of the abuse of power. Sears would be a good example of Hayek's general argument for competition eroding monopoly or near monopoly positions over time, given its present sorry state as more aggressive competitors like Wal-Mart, K-Mart in its day, and Target swallowed up its markets. *Id.*

[66] *Id.* at 83. Or anyone else who can prevent competition, including smaller companies in limited territories or, and this is his favorite example, labor unions, whose monopolistic power is the result of government privileges.

[67] *Id.* at 84.

[68] *Id.* at 85.

[69] *Id.*

discrimination intended to enforce a certain market conduct should clearly be prohibited."[70] Repeating "clearly" in two consecutive sentences, unfortunately, does not make Hayek's position any clearer.

Complicating Hayek's position further is his caveat that it might be better not to make such harmful behavior a punishable offense, but rather leave it to competitors to sue for damages. He doubts whether government would have the knowledge necessary to prosecute successfully. Quaintly, he writes that competitors could be encouraged to pursue such suits by the inducement of "multiple damages," when they successfully plead that they have been discriminated against and not given equal treatment where discrimination cannot be justified on grounds other than the desire to "enforce a particular market conduct."[71] Setting potential competitors as "watchdogs" over the monopolist, and encouraging lawyers to represent them with the promise of contingency fees, is Hayek's suggestion, one he favored over placing enforcement in the hands of government. From the perspective of a quarter century, this remedy seems quixotic, to say the least, especially his tender concern for encouraging an antitrust plaintiffs' bar.

Finally, Hayek proposes that all agreements in restraint of trade be declared invalid and legally unenforceable, without exception. Here, his concern is with cartels of smaller firms that collude to control the market, a concern that he finds an unsatisfactory solution to in the Sherman Antitrust Act of 1890. Prohibition under penalties leads to government discretion, which he finds distasteful, preferring a remedy that would again depend on private initiative for enforcement. Thus, customers or potential competitors could bring suit to allege that a monopolist or cartel tried to coerce them by threatening to rescind "usual services" unless they conformed to the monopolists' demands.

To summarize Hayek's argument on monopoly, an argument with equivocations galore, he finds two principal and genuine harms of monopoly that he thinks ought to be controlled by mechanisms other than the competitive market: (1) discrimination by a monopolist; and (2) prevention of competition by a monopolist. His preferred remedy is to rely on private initiative to appeal to the courts for relief, rather than government enforcement which tends to be discretionary, ill-informed, and arbitrary. Furthermore, he is troubled by contracts in restraint of trade, and he recommends that they should be unenforceable, which, he adds, poses no threat to freedom of contract, a concept that depends on definition by government.[72] However, he offers no hard and fast proscription against government antitrust enforcement, just cautionary reminders about the proclivity of governments to favor some monopolies and disfavor others, leading to arbitrary market interventions and concerns about the rule of law.

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 87. Hayek points out that gambling contracts, contracts for immoral purposes, and contracts for perpetual servitude are unenforceable, and that this does not pose a problem for freedom of contract, nor should the proscription of contracts in restraint of trade. *Id.*

III. Government, Competitors and the Microsoft Cases

It is not my purpose here to reprise all of the intricacies of the federal, state, competitor, and consumer antitrust lawsuits against Microsoft Corp. Rather, my intent is to present an overview of Microsoft's antitrust travails, just sufficient to test Hayek's theory of antitrust and to see whether it provides any guidance out of the thicket of antitrust enforcement in the new economy.

Microsoft's antitrust troubles began to take on serious overtones in 1991 when the Federal Trade Commission (FTC) investigated complaints by Microsoft's competitors that Microsoft monopolized the market for personal computer operating systems and favored its own software products and disadvantaged those of competitors.[73] In 1993, the FTC's commissioners deadlocked on filing a formal complaint and their investigation was terminated. The inquiry, however, was taken up by the Antitrust Division of the Department of Justice (DOJ), which proved to be a much more zealous and resilient adversary.[74] It is worth recalling, since computer software is so ephemeral, that in 1991 the precipitating event that Microsoft's competitors in the computer industry feared, the event that triggered their pleas to the FTC was the impending introduction of *Windows 3.0*.

In July 1994, the DOJ sued Microsoft, charging the company with *maintaining* a monopoly in its Windows operating system by employing anticompetitive terms in its licensing agreements with computer manufacturers and in its agreements with software developers.[75] The company, however, was not charged with *obtaining* a monopoly by anticompetitive means, the DOJ having concluded that Microsoft was the beneficiary of good fortune when IBM adopted Microsoft's DOS as its PC operating system, thereby causing Microsoft's operating system monop-

[73] The FTC investigation is variously dated back to 1990 and 1991. The FTC first began looking into Microsoft for possible antitrust violations in May 1990, but at that time the concern was with collaboration between IBM and Microsoft over dividing the market between OS/2, IBM's operating system, and Windows, Microsoft's system. That investigation atrophied as the relationship between the two companies turned rivalrous. In March 1991, it became public knowledge that the FTC was investigating complaints of Microsoft's competitors, and the company received formal notice the following month of an investigation into its attempts to monopolize the market for operating systems, software, etc. For a report on the FTC investigations see *Ten years hard—Microsoft's Long Antitrust Struggle,* THE REGISTER, June 19, 2000, *at* http://www.theregister.co.uk/2000/06/19/ten_years_hard_microsofts_long/.

[74] For a chronology of major antitrust litigation against Microsoft through 1999, see Robert A. Levy, *Microsoft Redux: Anatomy of a Baseless Lawsuit,* CATO POL'Y ANALYSIS No. 352, September 30, 1999, at 18-19. Updated chronologies are also available online, including *U.S. v. Microsoft Timeline,* WASH. POST, March 28, 2002, *available at* http://www.washingtonpost.com/wp-dyn/business/specials/microsofttrial/timeline/ and *Key Dates in Microsoft's Antitrust Battles,* ASSOCIATED PRESS, THE GUARDIAN, March 24, 2004, *available at* http://www.guardian.co.uk/business/story/0%2C3604%2C1176892%2C00.html. Histories also appear in various degrees of completeness in the D.C. Circuit decisions cited below.

[75] A chronology is provided by the D.C. Circuit in its hearing of Microsoft's appeal of the district court's determination that the company violated §1 and §2 of the Sherman Act, which culminated in the order to break up Microsoft into two separate companies, a remedy that the appeals court would reject. United States v. Microsoft Corp. 253 F. 3d 34, 47-8 (D.C. Cir. 2000). The nomenclature for the various cases, adopted here, is from this decision.

oly.[76] Avoiding trial on the substance of the DOJ's charges, Microsoft entered into a consent decree with the government. The consent decree restricted Microsoft from certain licensing practices that the DOJ considered anticompetitive, e.g. requiring PC manufacturers, as a condition of licensing Windows, to license another piece of Microsoft software. At that time, Microsoft was not expressly prohibited from "developing integrated products."[77]

In 1997, with the impending release of Windows 98 as the backdrop, the DOJ once again became perturbed by Microsoft's marketing practices and filed a civil contempt action against the company late that year, alleging that Microsoft violated one of the consent decree's provisions by bundling Internet Explorer (IE), its internet browser, with Windows and forcing PC makers to take the browser when licensing the Windows operating system. On appeal from the district court's grant of a preliminary injunction requiring Microsoft to offer an unbundled version of Windows, the D.C. Circuit Court of Appeals on June 23, 1998, stayed the preliminary injunction, ruling that the bundling did not violate the consent decree, and refrained from comment on whether bundling violated the first two sections of the Sherman Antitrust Act. Windows 98 hit the market as planned.[78]

After arguments were heard on the appeal of the preliminary injunction, but before the appeals court's ruling, the DOJ on May 18, 1998, filed another antitrust suit against Microsoft,[79] claiming that the company violated §1 and §2 of the Sherman Antitrust Act (1890). (Section 1 of the Act prohibits contracts, combinations, or conspiracies in restraint of trade or commerce,[80] while §2 outlaws monopolization or an attempt to monopolize trade or commerce.)[81] The main complaints raised by the DOJ were that Microsoft maintained a monopoly in Intel-based PC operating systems, with some 90% of new machines adopting their platform, and

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[76] This is noteworthy because, as will be discussed in Part IV, Hayek's second criterion of harm mirrors the distinction between *obtaining* and *maintaining*.

[77] The consent decree stated that:

> Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon
>
> > (i) the licensing of any other Covered Product, Operating System Software product or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products); or
> >
> > (ii) the OEM [Original Equipment Manufacturer] not licensing, purchasing, using or distributing any non-Microsoft product.

As quoted in United States v. Microsoft Corp., 147 F. 3d 935, 939 (D.C. Cir. 1998) (reversing the district court's preliminary injunction barring Microsoft from requiring PC manufacturers to license Internet Explorer along with Windows, and referring the motion for a permanent injunction to a special master).

[78] United States v. Microsoft Corp., 147 F. 3d 935 (D.C. Cir. 1998) (*Microsoft II*).

[79] United States v. Microsoft Corp., Civil Action No. 98-1232.

[80] 15 U.S.C. § 1 (2004). Section 1 states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

[81] 15 U.S.C. § 2 (2004). The relevant part of §2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.*

that PC manufacturers had "no commercially reasonable alternative" to Microsoft's operating systems. Challenging Microsoft's dominance in operating systems, the DOJ argued, were internet browsers, principally Netscape Navigator (at that time still the market leader), which could potentially serve as alternative platforms (i.e., "middleware") for software products. To counter this threat, Microsoft engaged in anticompetitive activities, including: tying IE to its Windows operating system; signing exclusionary agreements with PC manufacturers that prevented them from distributing software from Microsoft's competitors, again with Netscape Navigator being the principal target; and imposing exclusionary agreements restricting companies from providing services to Microsoft's competitors.[82] In addition to the threat from Netscape, Microsoft zealously countered Sun Microsystems' "Java" programming language, since Java could potentially provide a counter to what the DOJ saw as a barrier to entry caused by the enormous number of software programs that had been already written for the Windows platform. Non-Microsoft browsers in combination with a programming language like Java, which allows programs to run on any operating system, presented a challenge to Microsoft that, according to the DOJ, set the company on a mission to combat these competitive threats to its monopoly.

Microsoft countered with a zealous promotion of its own browser, Internet Explorer, and various schemes to supplant Netscape Navigator's then 80% dominance of the browser market with its own product, which would enjoy a tremendous advantage when tied to the Windows operating system. These anticompetitive practices, the government asserted, forestalled a desirable competitive market between Netscape's browser and Microsoft's Windows that would have "resulted in greater innovation and the development of better products at lower price."[83] The list of particulars is portrayed as unsavory: that Microsoft tried, in one meeting in 1995, to induce Netscape to divide the browser market—the much dreaded "horizontal agreement"—which Netscape (virtuously) declined;[84] that Microsoft's (perfidious)[85] Mr. Gates invested millions in developing Internet Explorer and *gave it away for free* with Windows, sometimes paying PC manufacturers for using it; that Microsoft required PC manufacturers to install IE as a condition of licensing Windows 95, an "illegal tie-in," since installing Windows was a "commercial necessity,"[86] and planned to do the same for Windows 98; that Microsoft prevented manufacturers from altering Windows' desktop screen in order to make an alternative browser more prominent than IE, thus depriving manufacturers of "the freedom to make competitive choices"[87] about how to serve their consumers' browser

[82] United States v. Microsoft Corp., Civil Action No. 98-1232, *supra* note 79. The charges are drawn from #5 of the DOJ's original complaint.
[83] *Id.* at #11.
[84] *Id.* at #14.
[85] The two parenthetical characterizations are my own, but they do convey the tone of the DOJ's complaint. Bill Gates published a rousing defense of Microsoft's right to innovate in *Compete, Don't Delete*, THE ECONOMIST, June 13, 1998, at 19.
[86] United States v. Microsoft Corp., Civil Action No. 98-1232 at #18, *supra* note 79.
[87] *Id.* at # 24-5.

needs; that Microsoft made anticompetitive agreements with all of the major internet service providers, inducing them to use IE in return for placement in Windows' "folders" that promote their service to consumers; and that Microsoft induced internet content providers not to deal with competitors' browsers by offering similar promotional advantages on Windows' desktop.

In addition to declaring these activities in violation of §§1 and 2 of the Sherman Act, the DOJ asked the district court to preliminarily and then permanently enjoin Microsoft's various ploys to preserve its operating system monopoly by linking it to its browser and competitively destroying Netscape Navigator. Further, the DOJ wanted the court to prevent Microsoft for three years from selling a version of Windows that included IE unless it also bundled the current version of Netscape Navigator along with it, and from selling Windows 98 at a single price unless PC manufacturers were compensated if they deleted IE.

Following a highly charged and much publicized bench trial in the U.S. District Court for the District of Columbia that dragged on for nearly a year with seventy-six days of hearings, and that combined the federal antitrust charges with similar allegations of state antitrust violations by nineteen states,[88] on November 5, 1999, Judge Thomas Penfield Jackson issued his first of three rulings in the two combined cases.[89] *Findings of Fact* is a massive tome largely mirroring and amplifying upon the myriad complaints lodged against the company by the DOJ. With 95% of the market worldwide for Intel-compatible PCs, and well above 80% even if Apple's operating system were included, Microsoft "enjoys monopoly power," the judge wrote, with a dominant market position protected by a "high barrier to entry," and with customers lacking a "commercially viable alternative to Windows."[90] As illustrative of the applications barrier to entry, the judge cited the failure of IBM's OS/2 Warp and Apple's Mac OS operating systems to successfully compete against Windows due to their failure to attract sufficient numbers of software designers or, in Apple's case, failure to sell enough computers to induce designers to create attractive applications for it (although he noted that 12,000 Mac applications did exist).[91] Thus, Microsoft could raise prices and act as a monopolist if it chose, because viable alternatives were not on the horizon, according to testimony by PC manufacturers.[92]

Even Microsoft's vaunted investments in innovation were viewed as anticompetitive, since they pleased consumers and made them less sensitive to Windows' price, and prolonged its monopoly into the future by "continuing to innovate aggressively."[93] In a sentence that defies exposition, the judge wrote, "While Mi-

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[88] The District of Columbia also joined the states' suit. Originally twenty states filed charges, but South Carolina eventually withdrew. The trial of the two combined antitrust suits began on October 19, 1998, and closing arguments were heard on September 21, 1999.

[89] United States v. Microsoft Corp. and State of New York, *ex rel.* Attorney General Eliot Spitzer et. al. v. Microsoft Corp., 84 F. Supp. 2d 9 (1999).

[90] *Id.* at 19.

[91] *Id.* at 22.

[92] *Id.* at 24-25.

[93] *Id.* at 26.

crosoft may not be able to stave off all potential paradigm shifts through innovation, it can thwart some and delay others by improving its own products to the greater satisfaction of consumers."[94] Indicative of monopoly, too, was Microsoft's decision to charge Windows 95 users not $49 for an upgrade, which a company memo stated was feasible, but the "revenue-maximizing" price of $89.[95] Although the judge found it impossible to determine whether Microsoft charged a monopoly price for Windows 98, even if it charged less, he wrote, that would still not prove lack of monopoly power, since the company could be underselling to inhibit potential competitors.[96]

A hefty share of the judge's 412 findings was devoted to the various complaints of Microsoft's competitors in so-called "middleware" (i.e., alternative platforms for software), prominently featuring Netscape's Navigator,[97] Sun Microsystems' Java, Intel's Native Signal Processing software, and Apple's and Real Networks' multimedia playback technologies. Microsoft's attempt in the notorious June 21, 1995, meeting to persuade Netscape to divide the market was reviewed, as well as Netscape's complaint that thereafter Microsoft withheld crucial technical information that Netscape needed to make Navigator compatible with the then new release of Windows 95. Microsoft's bundling of IE with both Windows 95 and 98 was also extensively scrutinized, with the judge accepting testimony that the browser and the operating system could be unbundled without impairing the operating system's functionality, despite Microsoft's claims to the contrary.[98] Complaints by PC manufacturers about Microsoft's licensing deals that forced them to take IE along with Windows and prevented them from removing it and promoting Navigator in Windows' boot sequence were likewise accepted, as were their remonstrations about excessive pressure from Microsoft, with companies that complied, such as Compaq, being rewarded with lower prices for Windows than other, refractory manufacturers paid.[99]

The *Findings* go on to consider AOL's tangled relationships with Microsoft, both before and after AOL acquired Netscape in November 1998, along with Microsoft's relationship with other internet service and content providers. Microsoft's behavior could only be explained, Judge Jackson wrote, by its obsession with Navigator, not by "customary economic parlance," as evidenced by Microsoft's licensing of IE to internet service providers at no cost.[100] In the final section of his opinion, the judge found that Microsoft's vendetta against Netscape Navigator harmed con-

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[94] *Id.*
[95] *Id.* at 27.
[96] *Id.*
[97] Although Netscape in the interim had been purchased by AOL for some $4.3 billion dollars in AOL stock, announced on November 24, 1998.
[98] United States v. Microsoft Corp, 84 F. Supp. 2d at 53-55.
[99] *Id.* at 67-68.
[100] *Id.* at 91-92.

sumers by hindering competition and precluding users from access to a browserless Windows.[101]

Shortly after issuing his *Findings of Fact*, damning to Microsoft, Judge Jackson took the unusual step of appointing a sitting appeals court judge to attempt to mediate a settlement.[102] Judge Richard Posner of the Seventh Circuit, author of one of the two most influential books on antitrust law in the last quarter of the twentieth century (Judge Robert Bork authored the other, but more of that later)[103] and renowned "Chicago School" law and economics scholar, spent nearly four months in mediation, after which he announced failure.[104] On April 3, 2000, Judge Jackson issued his *Conclusions of Law*[105] in which he held that "Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market . . . in violation of §2 [of the Sherman Act]. Microsoft also violated §1 of the Sherman Act by unlawfully tying its Web browser to its operating system."[106] Of the four major contentions of the federal government, the judge reluctantly declined to find in its favor in only one, stating that the facts did not support a finding that the company's marketing arrangements constituted unlawful exclusive dealings under §1, but other than that quibble, Microsoft's defeat was complete.

In the ensuing two months, the DOJ filed its remedy proposal, calling for the breakup of Microsoft into two companies, one containing the operating system as its major asset, and the other applications software, including IE. After a flurry of briefs filed by both sides, on June 7, 2000, the judge issued his *Final Judgment*,[107] embracing the DOJ's call for the breakup of Microsoft. After Microsoft's "fast track" appeal to the Supreme Court was declined,[108] the U.S. Court of Appeals for the District of Columbia weighed in.[109] On June 28, 2001, in a per curiam opinion, the court issued a stunning rebuke to Judge Jackson, criticizing him for the appearance of partiality against Microsoft, for his propensity to talk to the press as the case unfolded, and for making disparaging remarks about Microsoft, writing that "the actions of the trial judge seriously tainted the proceedings . . . and called into question the integrity of the judicial process."[110] (Notably, this was the second time that the appeals court reproved and requested the removal of a district court judge for

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[101] *Id.* at 110-12. The text presents just highlights of the judge's prodigious account of Microsoft's faults, an account spanning over one hundred pages, and this synopsis can do little more than convey the flavor of the judge's findings.

[102] Joe Wilcox, *Judge Appoints Mediator in Microsoft Antitrust Case*, CNET NEWS.COM, November 19, 1999, *at* http://news.com.com/2100-1001-233326.html?legacy=cnet.

[103] RICHARD A. POSNER, ANTITRUST LAW (1976) (2d. 2001); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[104] *Microsoft Talks Fail*, CNN MONEY, April 1, 2000, http://money.cnn.com/2000/04/01/technology/microsoft/.

[105] United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).

[106] *Id.* at 35.

[107] United States v. Microsoft, 97 F. Supp. 2d 59 (D.D.C. 2000).

[108] Microsoft v. United States, et al., 530 U.S. 1301 (2000).

[109] United States v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir. 2001).

[110] *Id.* at 46.

the appearance of bias in hearing Microsoft litigation. The first instance, in 1995, was occasioned by a judge's behavior when he refused to accept the 1994 consent decree. See note 149.) The appeals court examined the three grounds of liability that the district court upheld: (1) that Microsoft maintained its operating system's monopoly in Intel-compatible PCs in violation of §2; (2) that it attempted to secure a monopoly in internet browsers, also in violation of §2; and (3) that it violated §1 by tying two separate products, Windows and IE. After examining what the court characterized as "the voluminous record on appeal,"[111] the court deferred to Judge Jackson on his *Findings of Fact*, despite its chagrin at his statement to a reporter that he had wanted to present the appeals court with a "fait accompli."[112]

As for Judge Jackson's *Conclusions of Law*, the outcome was quite different. Interestingly, the appeals court began its analysis with caution and equivocation, pointing out that some of the claims of anticompetitive conduct were six years old, "an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically." Conduct remedies, it cautioned, may be "unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless)." Structural remedies, too, are problematic for they challenge courts to "restore competition to a dramatically changed and constantly changing marketplace."[113] The court noted, too, the ambivalence among scholars about applying "'old economy'" §2 monopolization doctrine to "dynamic technological markets" with "network effects" that make it efficient for users to have one standard that dominates the market.[114] Despite these qualms, not pressed by Microsoft in its appeal, the court plunged on. In sum, the court vacated the district court's *Final Judgment* "in its entirety," for both technical improprieties and substantive problems—procedurally, for not holding a hearing on remedies and not sufficiently explaining how the remedy would cure the anticompetitive conduct; and substantively, because the appeals court modified or overruled each of the three bases of liability found by the district court. Further, the remedy of splitting the company into two was tainted by judicial misconduct.[115] Of the three grounds of liability identified by the district court, the appeals court found the §2 ground of attempted monopolization of the browser market unviable, remanded unlawful tying in violation of §1 for consideration under a different standard of liability, and affirmed (with revisions) only §2 liability for maintenance of a monopoly in the operating system market.[116] On remand to determine remedies, now to a new judge, the appeals court provided unusually explicit cautions: to carefully examine the conduct restrictions in the original decree to see if they were still appli-

[111] *Id.*
[112] *Id.* at 118.
[113] *Id.* at 49.
[114] *Id.*
[115] *Id.* at 117.
[116] *Id.* at 103.

cable in view of the alterations in liability; and to be skeptical of structural remedies of divestiture, usually only used to sever merged companies, not unitary entities.[117]

After more wrangling in the appeals court by the parties and another fruitless appeal to the Supreme Court by Microsoft,[118] the imbroglio landed in the lap of another district court judge, Colleen Kollar-Kotelly and, on September 6, 2001, the DOJ, now under Republican sway, stated that it would no longer seek to break up the company. Another mediator was appointed in October, and by November 2 the two sides had reached a settlement. The settlement involved restrictions on Microsoft's conduct, including making more of Windows' source code available to competitors, allowing vendors to choose which products they license from Microsoft, preventing Microsoft from retaliating against companies that adopt software other than Microsoft's, and instituting monitoring of Microsoft's behavior. While nine states agreed to the settlement, nine others and the District of Columbia declined, and continued to seek harsher penalties in court, which led to a Track I (the "New York Group") and Track II ("the "California Group") course for the two groups, with Track I undergoing a "public interest" review as mandated by the Tunney Act,[119] and Track II continuing to litigate. However, the states that continued to soldier on in the courts ended up with remedies that largely mirrored those crafted in the consent decree between Microsoft, the U.S., and the nine states, despite the Track II states' preferred remedy that Microsoft be ordered to produce a version of Windows XP stripped of IE and despite another mammoth opinion of over two hundred pages.[120]

The major remedies agreed to in the consent decree and adopted by the district court for the Track II states involve: limiting Microsoft's illegal licensing restrictions, thereby giving PC manufacturers more leeway to configure Windows; allowing them to install icons, menus, etc. on the Windows desktop from software providers other than Microsoft; permitting them to insert offers from other internet providers; and allowing the launch of non-Microsoft middleware and software. Microsoft is banned from retaliating or threatening to retaliate against vendors who support rival platform software. Also, Microsoft must make technical disclosures of communication protocols and limited disclosure of other technical information to competitors to insure that other vendors' products work with Windows. Finally, the enforcement mechanism placed the burden of monitoring the remedies on the plaintiffs, who were instructed to form a compliance committee. The committee was given "reasonable access" to Microsoft's "source code, books, ledgers, accounts, correspondence, memoranda, and other correspondence, as well as access

[117] *Id.* at 105.
[118] Microsoft Corp. v. United States, 534 U.S. 952 (2001).
[119] The consent decree was finally resolved to be in the "public interest" after having undergone several revisions. United States v. Microsoft Corp., 2002 U.S. Dist. LEXIS 22864 (D.D.C. 2002).
[120] New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002).

to Microsoft's employees" for a term of five years with the threat of two more to discourage balkiness.[121]

Although the litigants were no doubt hoping that this would be the end of the matter, the Commonwealth of Massachusetts thought otherwise, appealing the district court's remedies, an appeal that met on June 30, 2004, with manifest irritability by the D.C. Circuit and complete vindication for the district court's remedial decree. Two trade groups, the Computer and Communications Industry Association and the Software and Information Industry Association appealed as well, questioning the denial of their motion to intervene to appeal the public-interest determination by the district court. They too were denied, the appeals court confirming the finding that the consent decree between the United States and Microsoft was in the "public interest."[122] Brad Smith, Microsoft's Senior Vice President and General Counsel, expressed relief that a huge chunk of the litigation uncertainty hanging over Microsoft had been lifted, and without Microsoft having to remove code from its Windows operating system, which had been one of the DOJ's and Microsoft's competitors' major objectives.[123] IE would not have to be unbundled from Windows.

However, Microsoft's antitrust troubles are not confined to the DOJ's and the states' suits. Piggybacking on the *Findings of Fact* were well over one hundred federal suits brought by private law firms on behalf of consumers that sought compensation for "potentially hundreds of millions of licensees."[124] These class action cases were consolidated in the U.S. District Court for the District of Maryland in Baltimore, where the plaintiffs' claims were narrowed to end-user direct purchasers, and in September 2003, Microsoft settled the cases, subject to appeals, for an amount that the parties estimated at $10.5 million.[125]

In addition to these federal cases, numerous private class action suits have been filed by law firms in state courts, claiming various violations of state con-

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[121] *Id.* On the matter of compliance reviews, the Antitrust Division of the DOJ posts quarterly status reports on its website that are filed with the district court. The DOJ, the "New York Group" (comprised of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin; the "Track I" group of states), and the "California Group" (consisting of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and the District of Columbia; the "Track II" group) are involved in monitoring Microsoft's compliance with the Final Judgments. *See* Joint Status Report on Microsoft's Compliance with the Final Judgments, first filed Apr. 27, 2003. West Virginia reached a separate settlement, and is not part of the monitoring effort, and as of July 2004, Massachusetts had not joined in the compliance effort.

[122] Massachusetts *ex rel.* v. Microsoft Corp., 373 F.3d 1199, 1250 (D.C. Cir. 2004).

[123] Transcript, News Conference Regarding Ruling of U.S. Court of Appeals for the District of Columbia Circuit on Antitrust Settlement Remedies, *at* http://www.microsoft.com/presspass/exec/bradsmith/06-30AppealsRuling.asp (June 30, 2004).

[124] Press Release, Microsoft Corp., Microsoft Legal Update: Antitrust Settlement Fact Sheet, *at* http://www.microsoft.com/presspass/legal/10-28settlementFS.asp (Oct. 28, 2003) [hereinafter Microsoft Legal Update]; Press Release, Microsoft Corp., Microsoft, Multi District Litigation Plaintiffs Announce Settlement Agreement in Federal Class Action Antitrust Case, *at* http://www.microsoft.com/presspass/press/2003/sep03/09-30MDLpr.asp (Sept. 30, 2003) [hereinafter Press Release, Microsoft Corp.].

[125] *See* Press Release, Microsoft Corp., *supra* note 124.

sumer protection, unfair competition, and antitrust laws. Microsoft has been wending its way through the disposition of these suits, settling thirteen of them by July 2004[126] and winning dismissals or denials of class certification in eighteen other states.[127] The class action suits that settled followed a typical pattern.[128] Microsoft agreed to provide vouchers to class members for the purchase of hardware, software, or peripherals from any manufacturer. Fifty percent of the difference between the face value of the settlement and the amount of the vouchers issued to consumers goes to "needy" public schools as vouchers that, likewise, can be used to purchase computer products from any vendor.[129] For example, the settlement of a North Carolina class action suit brought by three law firms follows this pattern, with Microsoft agreeing to establish an $89 million fund to provide vouchers for class members and public schools.[130] In the ten settlements that had been reached by the end of October 2003, Microsoft was committed to paying out a maximum amount of $1.55 billion, including the biggest payout in California of $1.1 billion in class action suits that would reap their law firms $112.4 million in fees.[131] This time two-thirds of any unclaimed settlement funds will go to public schools in the form of Microsoft software and vouchers for purchases from other vendors. Still dissatisfied, some of Microsoft's competitors complained that this settlement privileged Microsoft in the public school market.

However, the zeal on the part of attorneys throughout the country for pursuing class action suits, purportedly in the "public interest," is not yet the end of the tale of Microsoft's antitrust misfortunes. Microsoft has also endured antitrust suits by its main competitors, some of the same companies that relentlessly implored the Antitrust Division to investigate and sue Microsoft, lobbied Congress to hold hearings into its business practices, and eagerly testified against it in court. While Judge Jackson had not yet handed down his tripartite ruling in *United States v. Microsoft*, AOL on November 24, 1998, announced its intention to acquire Netscape, an acquisition that was completed the following spring.[132] Netscape's Marc Andreesen along with Sun Microsystems' CEO Scott McNealy had been Microsoft's

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[126] Microsoft Legal Update, *supra* note 124.

[127] *Id.* In thirteen states, the cases were dismissed, in three others appeals were pending, and in another two class certification was denied. *Id.*

[128] Press releases detailing each of the class action settlements are available at Microsoft's Legal Newsroom Archive, *at* http://www.microsoft.com/presspass/legal/archive.asp.

[129] Microsoft Settles Class Action Suits, 21 CURRENT DEVELOPMENTS, Antitrust 22 (January, 2004).

[130] Microsoft and North Carolina Plaintiffs Settle North Carolina Class Action Lawsuits, *at* http://www.microsoft.com/presspass/press/2003/nov03/11-06NCSettlementPR.asp (Nov. 6, 2003).

[131] Robert A. Guth, *Microsoft Puts More Suits to Rest; Software Company Reaches Settlements with 5 States and District of Columbia*, WALL ST. J., Oct. 29, 2003, at A6; Microsoft and California Plaintiffs Settle California Class Action Lawsuits, *at* http://www.microsoft.com/presspass/press/2003/jan03/01-10CAClassActionPR.asp (Jan. 10, 2003). The Superior Court judge cut legal fees from a requested $270 million. *See Fee Slashed in Microsoft Class Action*, NAT'L. L. J., Sept. 20, 2004.

[132] *America Online, Inc. to Acquire Netscape Communications in Stock Transaction Valued at $4.2 Billion*, America Online, Inc. Company Press Release, *at* http://wp.netscape.com/newsref/pr/newsrelease707.html (Nov. 24, 1998).

main tormentors. Not long after that, on January 10, 2000, America Online announced that it would merge with Time Warner, Inc., forming a super-conglomerate of old and new media with market capitalization at the time of the announcement of $350 billion.[133] Unsurprisingly, this announcement triggered an antitrust investigation by the Federal Trade Commission, since it would combine the largest internet service provider with an old media conglomerate serving 20% of the nation's cable households. After scrutinizing the deal for anticompetitive effects, the FTC approved it in December 2000, but with conditions that addressed the FTC's concerns about the merger's effects on competition in residential broadband. The consent order required the merged company to carry three or more non-affiliated internet service providers on its cable service, to not interfere with content that they transmit, and to make AOL's DSL service available in all markets at the same price whether affiliated cable broadband service is available or not.[134]

Yet, undeterred by its own brush with antitrust inquiry by the FTC, the new AOL Time Warner, on behalf of Netscape, sued Microsoft on January 22, 2002, relying on Judge Jackson's *Findings of Fact,* and rehearsing Netscape's now familiar complaints against Microsoft's tactics in marketing IE. AOL Time Warner sought to force Microsoft to sell a version of Windows with IE disgorged and to collect treble damages. It is difficult to cavil with Microsoft's spokesman's comment that, "AOL Time Warner has been using the political and legal system to compete against Microsoft for years . . . . This is just the next tactic . . . ."[135] By May 30, 2003, the case had settled with Microsoft agreeing to pay $750 million, with AOL Time Warner garnering a seven-year licensing agreement that permits it to use Internet Explorer on AOL for free, and with the two sides promising to make their instant messaging services compatible.[136] In the wake of this settlement, RealNetwork, another of Microsoft's adversaries in the antitrust wars, was reportedly concerned about its own agreement with AOL, worrying that its RealPlayer, which competes with Microsoft's Windows Media Player, might be shunned now that AOL was cooperating with Microsoft.[137]

As one would expect, AOL Time Warner was not alone in pursuing private litigation against Microsoft. Persistent nemesis Sun Microsystems also proved unrelenting. After having battled Microsoft in the courts since 1997 over various con-

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[133] *That's AOL Folks*, CNN Money, *at* http://money.cnn.com/2000/01/10/deals/aol_warner/ (Jan. 10, 2000).

[134] The conditions are more complicated; details are available at Press Release, Federal Trade Commission, FTC Approves AOL/Time Warner Merger with Conditions, *at* http://www.ftc.gov/opa/2000/12/aol.htm (Dec. 14, 2000).

[135] *AOL's Netscape Sues Microsoft*, CNET NEWS.COM, *at* http://news.com.com/2100-1001-820227.html (Jan. 22, 2002).

[136] *Microsoft to Pay AOL $750 Million*, CNN MONEY, *at* http://money.cnn.com/2003/05/ 29/technology/microsoft/index.htm (May 30, 2003); Press Release, Microsoft Corp., AOL Time Warner and Microsoft Agree to Collaborate on Digital Media Initiatives and Settle Pending Litigation, *at* http://www.microsoft.com/presspass/press/2003/May03/05-29MSAOLSettlementPR.asp (May 29, 2003).

[137] *Microsoft to pay AOL $750 Million*, *supra* note 136.

tractual complaints relating to Java,[138] in March of 2002 Sun filed a federal antitrust suit against Microsoft. Sun contended that Microsoft should be prevented from using its Windows monopoly to move into new markets that might cut into Sun's sales of servers that use its Java programming language. Microsoft's ".Net" software was the object of Sun's greatest concern.[139] As with the AOL Time Warner suit, Microsoft decided to kiss and make up, agreeing to collaborate on a broad range of technology issues, but first handing over $700 million to Sun to make the antitrust suit go away and another $900 million to dispose of Sun's patent complaints.[140]

Not to be left out of the feeding frenzy, other of Microsoft's inveterate antitrust adversaries filed suits of their own, including the aforementioned RealNetwork, which accused Microsoft of using its monopoly position to hobble Real's audio and video players.[141] Two other companies also filed private suits: Be. Inc., which settled in June, 2003, and Burst.com, which filed in June of 2002 and is still pending.

But the story does not end here, either. Microsoft has been pursued for antitrust violations both in the European Union and in Japan, again with the willful cooperating and urging of Microsoft's competitors, who lodged familiar complaints about bundling of IE with Windows, and sometimes at the prompting of the Antitrust Division, desirous of exerting pressure on Microsoft through its international business.[142] On March 24, 2004, the European Commission ruled that Microsoft abused its Windows monopoly and fined the company 497.2 million euros as well as ordering it to reveal more of its software code and limiting its bundling of its software into Windows XP. Microsoft is appealing the ruling, particularly chagrined by the restrictions on the integration of its software.[143] Not to be outdone, Japan's Fair Trade Commission weighed in on July 13, 2004, finding Microsoft in

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[138] A hyperlinked listing of the legal wrangles between the two companies dating back to 1996 is available at Legal Newsroom Archive, *supra* note 128.

[139] Lee Gomes & Nicholas Kulish, *Sun Fights Microsoft in Court Yet Again*, WALL ST. J., Mar. 11, 2002, at B5.

[140] Microsoft and Sun Microsystems Enter Broad Cooperation Agreement; Settle Outstanding Litigation, *at* http://www.microsoft.com/presspass/press/2004/apr04/04-02SunAgreementPR.asp (Apr. 2, 2002).

[141] Nick Wingfield & Robert A. Guth, *Microsoft is Sued by Real Networks; Antitrust Filing Charges Titan with Moves to Limit the Digital-Media Market*, WALL ST. J., Dec. 19, 2003, at A3.

[142] Robert A. Levy, *Beyond the Browser Wars: Antitrust as Vendetta*, CATO INST., *at* http://www.cato.org/cgi-bin/scripts/printtech.cgi/dailys/8-17-98.html (Aug. 17, 1998). Levy recounts a July 14, 1998, letter written by three Republican senators to Attorney General Reno, expressing concern that officials of the Antitrust Division might have encouraged officials in Japan, Brazil, and Israel to launch antitrust investigations of Microsoft in order to put more pressure on the company's worldwide operations. They cited a visit by the division's then head, Joel Klein, to Japan and the subsequent raid by the Japanese Fair Trade Commission of the company's offices, seeking documents on its competition with Netscape.

[143] *Dates Set for Microsoft Oral Hearings*, ITTOOLBOX, *at* http://eai.ittoolbox.com/news/dispnews.asp?i=118573&t=7 (July, 27 2004); Paul Geitner, *Microsoft Gets First Meeting with Judge*, BIZREPORT, *at* http://www.bizreport.com/news/7718/ (July 26, 2004).

violation of its Antimonopoly Act for provisions in its licensing agreement with PC manufacturers that unduly restrict their business decisions.[144]

In the spirit of the old adage, "those who live by the sword, die by the sword," Oracle, one of Microsoft's most zealous adversaries in the DOJ's antitrust case, became embroiled in its own antitrust problems with the Antitrust Division in its quest to acquire PeopleSoft, an acquisition that the DOJ tried to prevent in court.[145] (This should have come as no surprise, since Intel, another one of Microsoft's adversaries, had already fallen under antitrust investigation in 1999, by the FTC.)

The list is prodigious of Microsoft's competitors, customers, and partners (some at various times all three) who sided with the DOJ in its antitrust suit against the company—Netscape, Sun Microsystems, Intel, Apple, IBM, Gateway, Novell, Oracle, Packard Bell, Micron, Hewlett Packard, Interactive-TV, Palm, AOL Time Warner. Some were clearly failed competitors. Others feared that they soon would be, as Microsoft aggressively invaded their niches. Still others envisioned more favorable contractual terms from a hobbled Microsoft. From such motives, one of the most miraculous success stories of this business era, or of any business era for that matter, became an irresistible target for competitors, for federal and state bureaucrats, and for lawyers looking for the main chance of class action suits. Not only did the company's own country turn on Microsoft's success, but the United States government's antitrust victory and the officials who secured it prompted similar inquests around the world. Microsoft's trove of some $60 billion in retained earnings to hedge against legal uncertainties was just too tempting a target to pass up. But with a large measure of the company's financial peril from antitrust litigation lifted when the D.C. Circuit rejected Massachusetts' appeal of the *Final Judgment* on June 30, 2004, the company, a mere three weeks later, announced a huge one-time dividend payout to its shareholders, a payout of over $32 billion.[146]

IV. Hayek's Theory of Monopoly in the Crucible of *Microsoft*

Had Hayek, who died in 1992, lived to see this phantasmagoria of Microsoft litigation, it is doubtful that his inchoate theory of monopoly and antitrust would have remained unaffected. Another eminent free market economist and fellow Nobel Prize winner, Milton Friedman, the doyen of the "Chicago School" and Hayek's former colleague at the University of Chicago, was driven by the excesses of recent antitrust enforcement to alter his view and argue for the complete abandonment of antitrust law, on the grounds that government intervention does more

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[144] Microsoft Corporation's Response to the Japanese Fair Trade Commission's Recommendation, *at* http://www.microsoft.com/presspass/press/2004/Jul04/07-26JFTCResponsePR.asp (Jul. 26, 2004).

[145] *See generally* Press release, Oracle, Oracle to Challenge Department of Justice Lawsuit, *at* http://www.oracle.com/corporate/press/2936060.html (July 27, 2004); Press Release, Oracle, U.S. Court Clears Oracle to Move Forward with Acquisition of PeopleSoft, *at* http://www.oracle.com/peoplesoft/index .html (last visited Sept. 20, 2004); Edward L. Hudgins, *Intel's Sell Out*, CATO INST., *at* http://www.cato.org/dailys/03_26_99.html (Mar. 26, 1999).

[146] Jonathan Krim, *Microsoft Announces Payouts to Investors: First Step Valued at $32 Billion*, WASH. POST, July 21, 2004, at A1.

harm than good, especially in fast moving technology markets. In 1999, he uttered this admonition to the computer industry: "[Y]ou will rue the day when you called in the government. From now on the computer industry, which has been fortunate in that it has been relatively free of government intrusion, will experience a continuous increase in government regulation."[147] (Oracle, now, could attest to the accuracy of this prophecy, while Intel had already experienced the phenomenon that Friedman identified.) But this is not to conjecture that Hayek would have followed suit, although many of his successors in the "Austrian School" have long argued that antitrust laws should be jettisoned in favor of permitting the market to function as a corrective to whatever temporary monopoly positions might emerge,[148] while even "Chicago School" types have become more critical of antitrust over the years.

Leaving such counterfactual speculation aside, let us begin with the Hayek of *The Constitution of Liberty*—call him Hayek I. Conjecture about this Hayek's theoretical confrontation with the Microsoft litigation can be made with a higher degree of confidence than with the later Hayek of *Law, Legislation, and Liberty*—henceforth Hayek II. Hayek I would likely have recoiled at the pursuit of Microsoft by federal, state, and foreign governments, probably been chastened by the private antitrust suits of Microsoft's competitors, and would no doubt have been appalled by the over one hundred class action antitrust suits brought by law firms, supposedly on behalf of Microsoft's victimized consumers. Hayek I was much more skeptical than Hayek II of government's ability to mitigate the abuses of monopoly, cautioning that in most cases where government intervenes it ends up favoring "good" monopolies and disfavoring "bad" ones, and turning transitory monopolies into permanent ones. It is not too much of a leap, to envision that he would have been horrified by the spectacle of two district court judges having to be rebuked and removed by the D.C. Circuit from the Microsoft cases for displaying a public animus against Microsoft.[149] Similarly, Hayek I would have recoiled at the spectacle of the DOJ's overt favoritism toward Microsoft's competitors, and its scornful treatment of the company's explanations and behavior. One expects, also, that Hayek I would have been aghast at Judge Jackson's remedy of dismembering Microsoft into two separate companies, a remedy that went leagues beyond Hayek I's endorsement of an anti-price-discrimination rule.

Yet there is more to Hayek I's argument on monopoly than his cautionary remarks that government enforcement of antitrust laws have historically done more harm than good, for he did see some problems with "enterprise monopolies," al-

[147] Milton Friedman, *The Business Community's Suicidal Impulse*, CATO POL'Y REP., Mar.-Apr. 1999, at 6.
[148] DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (2d ed. 1990). For a comment of his on the Microsoft case, *see* Dominick T. Armentano, *The Feds Want to Write Your Software*, TECHKNOWLEDGE, *at* http://www.cato.org/cgi-bin/scripts/printtech.cgi/tech/tk/010806-tk.html (Aug. 6, 2001).
[149] Judge Sporkin was rebuked by the D.C. Circuit, United States v. Microsoft Corp., 56 F. 3d 1448, 1464-65 (D.C. Circuit, 1995) (*Microsoft I)*, while Judge Jackson was later reproached for judicial misconduct, United States v. Microsoft, 253 F. 3d at 107-17 (*Microsoft III)*.

though he tended to minimize them. Since coercion is the backdrop of his discussion in *CL*, he confines his concerns on the behavior of a monopolist to those instances in which a monopolist can coerce the behavior of others, and this can happen only when an enterprise controls a good or service that is "an essential commodity on which people [are] completely dependent,"[150] as with an owner of an oasis in a desert. Thus, the painter who refuses to deal with me except on his terms, in contrast, is not acting coercively toward me. Control over the lives of others, making them do one's bidding is what Hayek I finds truly problematic, because it is coercive. Hayek I's favored remedy is an antidiscrimination rule that insists that the monopolist charge the same price and terms to all, but he is highly skeptical of government enforcement of such a rule since it would involve government exercising discretionary power, which governments have historically used to erect rather than remove barriers to entry to an industry or trade. When Hayek I writes of barriers to entry, it is clear that he has in mind barriers erected by government, rather than by an enterprise itself, since he thinks that an enterprise, no matter how big and even one with a monopoly position, will find in relatively short order that its monopolistic position has been undermined by competition, once it ceases to innovate.

Were Hayek I to examine the panoply of Microsoft investigations and litigation, from the FTC's initial venture in 1990 to today, he, in all likelihood, would discern in Microsoft not an "oasis" but a "painter." Microsoft's success in dominating the market for operating systems, its aggressive contracting relationships with PC manufacturers, internet and content providers, and suppliers, designed to perpetuate that dominance, and its bundling of IE with Windows to combat the threat to its operating system from Netscape's browser, would likely be viewed as the acts of a crafty, aggressive, and vigilant competitor. Microsoft's competitors that beseeched government to fight in courtrooms battles that they could not win in the marketplace, would likely be greeted by Hayek I with a quote from Adam Smith about businessmen being the least reliable advocates of the free market, and the most eager to enlist government support to beleaguer their competitors.[151]

I doubt whether Hayek I would have viewed Microsoft's behavior as anything other than within its rights, since Bill Gates and his software designers created out of their minds the operating system, middleware, and software at the heart of the various antitrust grievances. (This leaves aside the patent complaints over the years by Apple, Sun, and others that certain Microsoft products emulated their own, since both Hayek I and II were skeptical of patents, copyrights, and all government grants of exclusivity in intellectual property.) Did Microsoft control an

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[150] HAYEK, CL, *supra* note 13, at 136.

[151] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 264 (Roy H. Campbell & Andrew S. Skinner eds., Clarendon Press 1976) (1776):

> The interest of the dealers, however, in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public. To widen the market, and to narrow the competition, is always the interest of the dealers . . . . The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution . . . .

"essential commodity on which people were completely dependent,"[152] Hayek I's criterion for determining whether a monopolist can exercise coercion? It is unlikely that Hayek I would have concluded in the affirmative, since, unlike the single oasis owner in the desert, Microsoft controlled a product—its Windows operating system in all of its various iterations—that people had never even heard of before Microsoft introduced its first version in 1985. That largely as a result of the success of Windows 1.0 and each of its successors, the personal computer became ubiquitous throughout the world, and a product upon which billions of people have grown to depend, Hayek I might have argued, does not transform Bill Gates's Microsoft from a "painter" into an "oasis" owner. Computer code is not water. We can live without Windows, as mankind did throughout the history of the species until Mr. Gates and his company invented it. Even conceding the DOJ's factual complaints—Microsoft's tough contractual terms with partners, suppliers, and manufacturers, its refusal to have its Windows desktop altered, its arm-twisting of PC manufacturers to prevent them from installing a competing browser, etc.—would not have altered Hayek I's conclusion. Since all of the companies that complained about Microsoft's contracting practices were free to do business elsewhere, to innovate or to otherwise circumvent or surmount Microsoft, or not to do business at all, Microsoft had no coercive power over them. Microsoft's dominance in the PC world made the first two alternatives difficult, as its competitors testified in court, but that would not have persuaded Hayek I that government should intervene to protect them from competition. Wouldn't he have argued that Microsoft exercised such vigilance in promoting its products, retaining its market share, and moving into competitors' markets precisely because its dominance was constantly being challenged by new innovations?

Hayek I would have been confident that if Microsoft ceased to innovate competitors would appear from diverse and unpredictable directions to challenge its dominance, and its monopoly position would be eroded, sooner or later. Hayek I might even have commented on the irony of finding IBM among Microsoft's tormentors, since IBM itself had been the object of a thirteen-year antitrust investigation and lawsuit by the DOJ, in which it was similarly charged with "bundling" and "leveraging" its monopoly position. IBM's ordeal ended only in 1982, when the Reagan Administration, influenced no doubt by the "Chicago School's" milder doctrine of antitrust, dropped the suit.[153] While IBM was to mainframe computers in the 1970s what Microsoft was to operating systems in the 1990s, IBM's subsequent fate in the marketplace might have served Hayek I well as a cautionary tale of how a once dominant firm, when mainframes were king of the computer uni-

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[152] HAYEK, CL, *supra* note 13, at 136.

[153] *But see* Franklin M. Fisher, *The* IBM *and* Microsoft *Cases: What's the Difference*, 90 AM. ECON. REV. 180, 183 (2000). Fisher, who characterizes himself as having been the chief economics witness for IBM and the chief economics witness for the United States in *United States v. Microsoft*, argues that the facts differed enough that he really did not switch sides. He contends that IBM did not have a monopoly to protect, while Microsoft did and took illegitimate actions to protect that monopoly.

verse, would fall upon hard times when newer, more innovative, and more aggressive firms led a computing revolution.

As the latest wrinkle on Microsoft's victory in the "browser wars," Hayek I might point to a recent news report in the *Wall Street Journal* about the effect on Internet Explorer's market share after a group of Russian hackers in June 2004 launched a nefarious worm that infected computers using IE around the world, launching spam and swiping credit card numbers. "Download.ject" took advantage of two low-level vulnerabilities in IE that Microsoft had not thought significant enough to fix immediately, preferring to wait until August for a major Windows XP upgrade. Millions of computer users reacted by dropping the virus prone IE and downloading a free, open-source browser, Firefox, developed by the Mozilla Foundation, a non-profit spin-off from Time Warner run by programmers who originally had worked on Netscape's Navigator. Although IE's market share of 95.48% in June declined only to 93.48% in August, this was the first decline monitored by WebSideStory Inc., a tracking service, and most of the decline was a result of people switching to Mozilla's browser.[154] Microsoft's very dominance may end up being its greatest vulnerability, since hackers focus on its products, rather than the tiny base of alternative operating systems and browsers, and the Department of Homeland Security has recommended that PC users switch to browsers that are less tempting targets. These developments have focused Microsoft's attention back on IE. Changes in the market and in circumstances may do more to undermine Microsoft's dominance than all of the antitrust enforcement efforts of the DOJ and the states. Of course, it is too early to tell how innovation by new challengers will affect Microsoft over the next few years, let alone several decades, but IBM's much-reduced status is a warning.

Now, Hayek II might say of this Mozilla challenge that competition is a discovery process, and that middleware competitors and PC users are discovering that the increased number and virulence of computer viruses on Windows-based systems using Internet Explorer is a major inconvenience and that seeking alternatives may become a necessity. Viable competitors may be just around the corner. But we must be cautious about attributing arguments to Hayek II, since he presents a more complex and convoluted picture of monopoly and antitrust in *LLL3* than that offered by his younger self. In general, Hayek II is more inclined to emphasize problems with certain behavior of monopolists, and is both less consistent and less vehement in his cautions about invoking government to remedy the perceived problems.

As we saw in Part II, after recounting Hayek II's tortured arguments on monopoly and antitrust, there were two genuine harms that concerned him, although his account was quite muddled and intertwined the two. These two harms are (1) the ability of a monopolist to control the behavior of others by threats of exclusion or discriminatory terms because the monopolist controls a good or service

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[154] Robert A. Guth & David Bank, *Tech's Unlikely Comebacks: Mozilla Nips at Microsoft in Market for Web Browsers by Promising Fewer Glitches,* WALL ST. J., August 30, 2004, at B1.

upon which the others are dependent, and (2) the prevention of competition by a monopolist that uses its position to protect and preserve its monopoly after the original cause of its superiority has disappeared. In harm one, Hayek II, like Hayek I, is concerned about preventing owners of "essential products" from using their monopoly positions to control the behavior of others by dictating terms to them, when they have no alternatives. The example that he offers is of a company that controls the entire market for ball bearings. He is also troubled by the ability of the monopolist to discriminate between customers, setting different terms for different people or companies. His concern in harm two is with a monopolist's attempts to preserve its monopoly, which may have originally resulted from its greater efficiency or superior products, by discouraging competition, and here again, discrimination in price and terms are possible stratagems. Thus, the kernel of harm one is coercing others through discriminatory terms, and of harm two is preventing others from trying to serve consumers better. Prohibiting both types of harms, he concludes after some hesitancy, are legitimate aims of the law. He is, we will recall, ambivalent about the enforcement mechanism, cautioning that it might be better to just permit private lawsuits, giving competitors the role of "watchdogs" over monopolists, rather than having the government act as prosecutor. However, he certainly offers no outright proscription of the latter, remarking that "aimed discrimination" to effect harm one or harm two should be against the law.

What, then, would Hayek II make of the Antitrust Division's complaints against Microsoft as they unfolded from 1994 through the conclusion of its 1998 suit? The two harms that Hayek identified and considered genuine formed the lynchpin of the Antitrust Division's original complaint against Microsoft in 1994 as well as the specific concerns that accrued over the years of subsequent litigation. For Hayek II's harm one, the harm of trying to control the behavior of others by employing discriminatory terms and prices, a major part of the government's case was that Microsoft did precisely that: favoring some PC manufacturers with more favorable terms, those that went along with its dictates to banish Netscape Navigator, while penalizing others who had dealings with Netscape, and behaving in similar fashion to internet and content providers.

Here, unlike Hayek I, it is not just possession of a rare and vital resource (i.e., an oasis) that is of concern in harm one, but an "essential product." It is significant that the example Hayek II gives is of ball bearings, certainly a product important to industry and modern life, but not a life-and-death product. In this sense, ball bearings are not much different from Windows: a convenience of modern life that people have grown dependent on. Thus, if Microsoft as the Windows monopolist sets discriminatory prices and terms in order to control the behavior of others—precisely what the DOJ charged—Hayek II will be, likewise, perturbed.

Hayek II's harm two, preventing others from serving the market better, is at the heart of the Antitrust Division's complaints, along with Microsoft's schemes for crushing Navigator and supplanting it by IE, "bundling" IE with Windows, trying to induce Netscape into a "horizontal agreement" to divide the platform landscape, giving IE away free with Windows and restricting PC manufacturers from altering the Windows desktop to feature Navigator rather than IE, and numerous other machinations. Microsoft was charged with §2 Sherman Act violations for *maintaining* an operating system monopoly, not for *obtaining* that monopoly, by anticompetitive means. One can easily see this charge framed in Hayek II's terms for harm two. He could view Microsoft's actions as those of a company that originally secured market dominance through innovation, but then tried to perpetuate that position by thwarting would-be challengers by trying to prevent them from competing, through licensing and other practices that froze out competitors. Thus, if we look just at the DOJ's charges, without considering Microsoft's factual refutations or justifications, Hayek II might think that the DOJ had a prima facie case. Hayek II, in other words, would have grounds for genuine concern, and he would not have precluded the 1994 suit that started the antitrust snowball rolling.

Thus, if we take Hayek II at his word, however hedged in caveats that word may be, it is apparent, at the very least, that he provides no inflexible barrier to antitrust enforcement of the *United States v. Microsoft* ilk. Recollecting Hayek's condemnations of laissez faire fetishism, repeated in numerous writings over decades (and recounted in Part I), this conclusion should not be terribly surprising, although it does give one pause about the advisability of flexible rules over inflexible principles. As with the more skeptical Hayek I, however, one hastens to add that there is some likelihood, difficult to quantify, that even Hayek II would have reconsidered his opening for government antitrust enforcement if he had lived to see the onslaught of litigation that Microsoft faced in the wake of the DOJ's antitrust victory, including lawsuits by competitors and class action suits by, dare one say it, predatory law firms eager to capitalize on Microsoft's legal troubles by looking out for the "public interest." Would Hayek II see Microsoft's competitors as undermining free markets by repairing to government to thwart an overly adroit competitor, see the law firms as parasites draining Microsoft of the profits of its ingenuity, and rethink his position, and perhaps embrace Hayek I's more skeptical position toward government attempts to curb monopoly? Maybe, since even as Hayek II his argument for a legitimate role for government in antitrust enforcement was couched hesitantly and hedged by the suggestion that private lawsuits would be preferable. Had Hayek II witnessed the piling on of Microsoft's competitors—first as lobbyists for government antitrust intervention, then as witnesses, and after victory, as instigators of more litigation in their private capacities—one might hazard the guess that here too Hayek II would have engaged in some reconsideration of his enthusiasm for competitors as "watchdogs" over monopolists.

Also, it is difficult to imagine that Hayek II, who shared Hayek I's insistence on the importance of the "rule of law," would be satisfied by the indeterminacy of antitrust enforcement, not just in general over the years, but in particular with *United States v. Microsoft* and its excrescences. The "rule of law" means that people must be governed by known laws that apply equally to all, so Hayek consistently maintained. Does the DOJ's pursuit of Microsoft over the years seem to remotely approach this standard, or does it smack more of a vendetta? Did the courts, Hayek's favored institution for the evolution of the law, acquit themselves much better? In answer to the first question, Hayek II might note the shifting allegations over the years, the DOJ's attempts to involve other countries to put additional pressure on Microsoft at key points in the legal struggle, and the often contemptuous public statements about the company by DOJ officials. In answer to the second, Hayek II might be chagrined at the appearance of partiality and the "judicial misconduct" that prompted the D.C. Circuit to twice remove judges, each the key decisionmaker at the center of the Antitrust Division's two lawsuits against the company. Hayek II, also, might be nonplussed by the often voluminous opinions of the district court judges that heard the 1998 case at different stages, and see them as a tortured attempt at micromanagement by the courts, with those subject to the law unable to know beforehand whether and how the law would be applied to them—until all the appeals had been exhausted. "Rule of law" means law that does not aim at particular persons but only the general case, as Hayek always maintained. Hayek II would be distressed, no doubt, about judges who thought it their role to deliberate on the minutest of corporate decisions, in excruciating detail, and then insist on continuing 5-year oversight by the court.

Since Hayek II's two harm principles permit the DOJ to pursue its enforcement against Microsoft, and that pursuit fails the "rule of law" test, especially when all the additional litigation by other parties is thrown in the hopper, the two harm principles fail to provide a tenable theory of antitrust that leads to unambiguous criteria.

Would all of these considerations have added up to Hayek's reconsideration of his monopoly theory and his rejection of antitrust law in any form? As with other free market theorists of monopoly who shun inflexible principle and find laissez faire simplistic, one can never know for sure how Hayek, had he lived, would have responded to the Microsoft litigation. Take as a case in point the odd and unanticipated venture of Judge Robert Bork through the Microsoft saga. Author in 1978 of *The Antitrust Paradox: A Policy at War with Itself*, one of the two most influential books on antitrust in the modern era (as previously noted), Judge Bork was importuned by both Microsoft and Netscape to join forces with them in anticipation of the DOJ's and the states' filing of their suits in May 1998. Microsoft held out a not unreasonable hope of hiring the judge, based on its fair reading of his seminal work, which contained passages such as the following:

> The thesis of this book has been that modern antitrust has so decayed that the policy is no longer intellectually respectable. Some of it is not respectable as law; more of it is not respectable as economics; and now I wish to suggest that, because it pretends to one objective while frequently accomplishing its opposite, and because it too often forwards trends dangerous to our form of government and society, a great deal of antitrust is not even respectable as politics.[155]

Much to Microsoft's chagrin, Judge Bork signed on to Netscape's cause, after initially telling the company that it was unlikely that his views on antitrust

[155] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 418 (1978).

would mesh with their interests. After examining the charges against Microsoft, though, he decided that his initial reaction was erroneous, that indeed Microsoft's behavior fell over the line of legal acceptability under even his truncated view of the purview of legitimate antitrust enforcement. From then on, he became a zealous, and well-remunerated, advocate of Netscape's mission and one of Microsoft's most feared adversaries. Indeed, on April 20, 1998, on the eve of the D.C. Circuit's hearing on Microsoft's appeal of Judge Jackson's December 11, 1997 preliminary injunction against the company's practice of insisting that PC makers install IE along with Windows, an appeal that Microsoft would win, Judge Bork and former Senator Bob Dole announced their participation in ProComp, the Project to Promote Competition and Innovation in the Digital Age. ProComp is a lobbying effort by Netscape Oracle, Sun Microsystems, Corel, the Software Publishers Association, and the Computer and Communications Industry Association, among others, to lobby for stronger antitrust enforcement against Microsoft.[156] In an appearance on "Face the Nation," Judge Bork, explaining why he joined forces with Microsoft's adversaries, remarked that, "Only a knee-jerk conservative would say that there's never a case for antitrust . . . . Now a monopolization case ought to be a rare thing. This is one of those rare cases."[157] In subsequent interviews and op-eds, he expounded his theory of how Microsoft offended antitrust:

> [O]ne may not use a monopoly to engage in predatory tactics to maintain that monopoly. You can get a monopoly lawfully, but you may not keep it by predatory tactics. Here, the predatory tactics include, at least, the bundling of Microsoft's browser with their operating system with the explicit intention of driving Netscape's browser from the market.[158]

As the trial of *United States v. Microsoft* unfolded in Judge Jackson's courtroom, Judge Bork, despite earlier statements that he did not think Microsoft should be broken up, became a zealous advocate for doing just that, arguing that the company should be divided into three parts.[159] He remained a feared Microsoft foe to the bitter end, representing the Computer & Communications Industry Association (CCIA) and the Software and Information Industry Association (SIIA), in their last-

[156] Dan Goodin and Jeff Pelline, *Dole, Bork Battle Microsoft,* CNET NEWS.COM, Apr. 20, 1998, *at* http://news.com.com/2100-1001-210343.html?legacy=cnet&st.ne.fd.mdh.

[157] *Robert Bork: Antitrust Case Strong Against Microsoft,* CNN, Apr. 26, 1998, *at* http://www.cnn.com/TECH/computing/9804/26/ms.bork/ (noting that Judge Bork did not support breaking up Microsoft, a position that he would later change).

[158] Paul Schindler, *Q&A: Judge Bork Calls Microsoft Case Nonsense*, TECHWEB, Oct. 27, 1998, *at* http://www.techweb.com/wire/story/TWB19981016S0020.

[159] *Judge Bork: Break Up Microsoft*, WIRED, January 15, 1999, *at* http://www.wired.com/news/politics/0%2C1283%2C17374%2C00.html. Oddly, he reportedly found a suggestion that a sufficient remedy would be for Microsoft to stop price discrimination and practice "transparent pricing," objectionable, on the grounds that it would require continuous government monitoring, while a breakup would not.

ditch appeal of the 2002 *Final Judgment*.[160] Judge Bork considered the resolution of *United States v. Microsoft* inadequate because it left Microsoft free to continue mingling IE code with Windows code.

Judge Bork's position on the Microsoft case may be something of an anomaly among "Chicago School" scholars, who grew more skeptical of antitrust over the years, and Hayek's followers in the "Austrian School" have been highly critical of antitrust.[161] Therefore, it is difficult to project, as I argued in this Part, how Hayek himself would have altered his monopolization theory from *LLL3* had he experienced the litigation onslaught against Microsoft. Yet what we did see was that his aversion to the inflexible principle of laissez faire left him in no position to rule out Microsoft antitrust litigation as intrinsically objectionable. Rather, he identified two harms that he thought deserved legal condemnation: the ability of a monopolist to control the behavior of others by threats of exclusion or discriminatory terms, and the prevention of competition by a monopolist who uses its position to prevent others from serving the interests of consumers better. Both of these concerns figured prominently in the DOJ's 1998 case against Microsoft, and thus Hayek's position, as he articulated it in its most developed theoretical form in *LLL3* presents no real barrier to litigation of this sort. Neither does it propound a clear "rule of law" standard for when a company has crossed the line from legitimate market dominance to antitrust offender. This very indecisiveness makes Hayek's antitrust theory susceptible to arbitrary enforcement and subjective judgments, precisely what his "rule of law" concept precludes. Thus, to the first two questions posed in the Introduction—does Hayek provide a tenable, coherent theory of antitrust that meets the "rule of law" test, and does his theory survive the crucible of *Microsoft*—the answers must be "no." As we turn, now, to consider the third question—does antitrust itself withstand the challenge of the twenty-first century, particularly the new, high-tech marketplace—our conclusion will be skeptical but provisional.

Conclusion

Antitrust enthusiasts and Microsoft's many detractors may be energized by Microsoft's litigation nightmares, but it is difficult to see how the government's investigation of the company's practices, dating back to 1990, and the complex and costly litigation that ensued, combined with all of the other lawsuits that proliferated in the wake of the DOJ's victory, could be seen as a benefit to consumers.

[160] Judge Bork earlier filed an amicus brief on behalf of the nineteen states in February 2000 when Judge Jackson was considering his *Conclusions of Law* and joined in drafting an amicus for America Online, Inc. et al. when the case reached the D.C. Circuit in February 2001.

[161] I characterize Judge Bork as a "'Chicago School' scholar" because he comes from the "law and economics" movement that was influenced by economists of that school. Yale Brozen is a good example of a "Chicago School" economist who became disenchanted with antitrust. *See* YALE BROZEN, CONCENTRATION, MERGERS AND PUBLIC POLICY (1982); Yale Brozen, *Foreward to* DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE xii-xiii (2d ed. 1990). Another case in point is George Stigler, who went from an advocate of breaking up U.S. Steel Corporation in the 1950s to a skeptic about most antitrust law by the 1970s.

Benefiting consumers by preventing markets from becoming noncompetitive is the supposed justification of antitrust law. For most PC users, integration is beneficial, since their main interest lies in having a computer that works, preferably like a toaster: the simpler the better. Yet the crux of the DOJ's enforcement efforts was precisely the opposite: to compel Microsoft to disaggregate, initially by demanding an unbundled Windows and later by calling for the unbundling of Microsoft Corp. itself. Microsoft was undoubtedly an aggressive competitor, but it seems doubtful that any amount of aggression would have succeeded in burying Netscape Navigator had not Internet Explorer, bundled with the Windows operating system, worked better for ordinary PC users.[162] Microsoft, as even the government conceded, never prevented PC manufacturers or consumers from installing Navigator. As time went on, and IE improved, fewer of them did.

The cost of all of the antitrust litigation against Microsoft is staggering, considering not only the direct costs to the litigants, but also the "opportunity costs" in foregone innovation as Microsoft's beleaguered and often distracted executives fought for its very survival,[163] and Microsoft's competitors looked to government regulators to salvage their products instead of putting all of their energies into finding ways to successfully compete against Microsoft. It is difficult to see any "public interest" having been served by all of the human capital expended on this effort, by judges, lawyers, government officials, lobbyists, legislators, and employees of the embattled companies.

That Hayek, one of the principal resuscitators of classical liberalism, presented no insuperable barrier to litigation of this type in his later theory of monopoly, but rather some encouragement, is the somewhat surprising finding of Part IV, but only surprising if one does not take seriously Hayek's repeated insistence that he was no doctrinaire opponent of government intervention in the marketplace, a stance catalogued in Part I. In Part II, we saw how the earlier Hayek of *The Constitution of Liberty* was much more skeptical of government antitrust enforcement than the later Hayek of *Law, Legislation, and Liberty*. The account of antitrust litigation, both governmental and private, against Microsoft, reviewed in Part III, would have confirmed the earlier Hayek's suspicions that government antitrust enforcement would likely lead to playing favorites among competitors and, in general, be useless in preventing any market distortions caused by the temporary monopoly position of a particular firm. Of the mature Hayek, one can be less certain of his reaction to the Microsoft ordeal, since he did perceive real harms that he thought antitrust law, in some form, perhaps relying on private litigation, should address, primarily for reasons of equity, i.e., preventing the monopolist from dictating terms to

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[162] *See, e.g.*, STEPHEN E. MARGOLIS & STAN LIEBOWITZ, WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY (1999) (arguing that, where Microsoft's products dominated, that domination was secured by producing products that served consumers' needs better than the alternatives, and where Microsoft's products were inferior, such as its online service and its financial software, no such dominance occurred).

[163] Rebecca Buckman, *The Microsoft Settlement: Antitrust Litigation Takes Toll on Microsoft*, WALL ST. J., Nov. 5, 2001, at A14.

people and from treating its customers in discriminatory ways when they had no feasible alternatives.

Although the focus of this essay has been on Hayek's theory of monopoly and antitrust and not on examining competing theories or propounding an alternative theory, examining Hayek in the light of the Microsoft litigation does leave one with a distinct theoretical inclination. That inclination is that it is unlikely that some middle position on antitrust, one that allows for government enforcement but of a more limited scope than at present, would have much chance of preventing future litigation sink holes like the Microsoft venture. At least provisionally, then, the "end it, don't mend it" position on antitrust law of post-Hayekian "Austrian School" thinkers seems particularly attractive. Especially in the lightning-quick, high-tech, information economy of the twenty-first century, the Sherman Act[164] of the tail end of the nineteenth century will increasingly seem like a blunt instrument indeed.

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[164] Work by economic historians casts doubt on the utility of antitrust enforcement even in its early, trust-busting years, arguing that trust-busting may have actually deflated rather than enhanced business activity. *See* George Bittlingmayer, *Antitrust and Business Activity: The First Quarter Century,* 70 BUS. HIST. REV. 363 (1996); *see also* Thomas J. DiLorenzo & Jack C. High, *Antitrust and Competition, Historically Considered*, 26 ECON. INQUIRY 423 (1988) (arguing that up to the 1920s economists lent no support to antitrust, believing that competition was a rivalrous process and that antitrust would stifle competition); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. LAW & ECON. 73 (1985) (arguing from a law and economics perspective that antitrust law was a protectionist venture designed to protect inefficient businesses).

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