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Book Review

Workable Antitrust Remedies

Richard A. Epstein

Antitrust Consent Decrees in Theory and Practice: Why Less Is More

AEI Press • 2007

Reviewed by William H. Page

Just over twenty years ago, Frank Easterbrook proposed renaming the Chicago School of antitrust analysis the “Workable Antitrust Policy School,” in recognition of its skepticism about “the ability of courts to make things better even with the best data.”¹ Richard Epstein’s brief study of consent decrees² is in this tradition of circumspection in antitrust matters. Epstein proposes to analyze “the role consent decrees play in the antitrust law” by examining “the factual and legal disputes that gave rise” to various decrees.³ He finds many decrees of the past century misguided in their ambition, but concludes, on the evidence of the 2002 *Microsoft* decree, that the Antitrust Division, for the moment, has learned the virtues of minimalism—that less is more. His goal in the book is to buttress this new approach against any future backsliding by providing “a better understanding of why [the recent changes] count as improvements.”⁴

Epstein begins with a theoretical overview of the legal and practical characteristics of consent decrees. He observes that, although a proposed decree is a negotiated settlement between opposing parties in litigation, the Tunney Act⁵ now requires the court in which the government’s case is pending to determine if the decree is in the public interest before entering it as a final judgment. Measured by the modern understanding of the public interest, Epstein argues, many consent decrees entered over the past century have been overly interventionist and administratively complex. They have also remained in effect too long, in part because of the 1932 *Swift* decision,⁶ which required a showing of “grievous wrong” from changed circumstances before a court could modify or terminate a decree. The lesson Epstein proposes to extract from this history is that consent decrees should be as simple as possible, requiring minimal judicial supervision, and should take account of “the strengths and weaknesses of antitrust law.”⁷

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¹ Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986).

² RICHARD A. EPSTEIN, *ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE* (2007).

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ 15 U.S.C. § 16 (2006). Epstein rightly notes a critical “tension” in the Act’s framework: “[w]hile a district judge who is completely passive has failed to discharge his responsibilities under the Tunney Act, a judge who takes over the case displaces (typically) the prosecutor, which may, in turn, raise serious separation of powers issues.” EPSTEIN, *supra* note 2, at 5. See generally Joseph G. Krauss, David J. Saylor & Logan M. Breed, *The Tunney Act: A House Still Standing*, ANTITRUST SOURCE, June 2007, <http://www.abanet.org/antitrust/at-source/07/06/Jun07-Krauss6-20f.pdf>.

⁶ *United States v. Swift & Co.*, 286 U.S. 106, 144 (1932).

⁷ EPSTEIN, *supra* note 2, at 9.

Epstein briefly surveys traditional common law and equitable remedies in private litigation, discerning in them a judicial predisposition to “maximize the freedom of the parties after the imposition of the remedy, and to minimize the judicial resources needed to keep those parties apart.”⁸ This approach reduces the need for costly ongoing supervision of the parties’ dealings. Although antitrust decrees have broader external effects, they should, he reasons, adopt a similar approach, one that is mainly focused on interdicting demonstrable violations. He maintains that this approach will be relatively easy to implement in cartel cases, where the theory supporting both liability and remedy is clear. In single-firm monopolization cases, however, the theory is less conclusive and the remedial issues correspondingly more challenging. In these latter cases, Epstein suggests, the benefits of “adventurous” decrees are likely to be lower and the costs of administration far higher.⁹

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Epstein then surveys the remedies entered in six cases over a span of half a century. In a brief preliminary discussion, Epstein endorses the view that the litigation and remedies in *Standard Oil*¹⁰ and *Alcoa*¹¹ accomplished little, because transformations in the market rendered the remedies unnecessary by the time they were imposed; he notes that the vertical divestiture required in *Paramount*¹² was ill-suited to the underlying cartel case.¹³ He examines the other three cases more closely. He cogently critiques the *Swift* decree’s prohibitions on vertical integration, which had little to do with the alleged horizontal restraints with which the meat packers were charged. Still more convincingly, he attacks the Supreme Court’s insistence, many years after entry of the decree, that these restrictions remain in effect, seemingly in order to protect firms in adjacent markets from the lower cost competition the defendants might bring if allowed to integrate. It was in this decision that the Court announced that consent decrees could not be modified except to correct a grievous wrong.¹⁴

Epstein’s assessment of the *ASCAP/BMI* consent decrees is more favorable. ASCAP and BMI are performing rights organizations that, among other functions, sell licenses to broadcasters and others to perform the songs in the organizations’ libraries. The 1941 consent decrees, Epstein argues, sensibly acknowledged the organizations’ efficiency advantages.¹⁵ Nevertheless, the decrees barred the organizations from including exclusivity provisions in their licenses and required the organizations to offer “per program” licenses in addition to the standard blanket licenses. The main difficulties in implementation of the decrees, according to Epstein, have stemmed from disparities in the treatment of the two organizations under separate decrees and from the complexities of determining the appropriate relationship between the prices of the program and blanket licenses. Despite these ongoing problems, he concludes that the decrees have remained appropriately “tied to the core violations to which they were directed”¹⁶ and have not hindered the efficiency of the organizations.

⁸ *Id.* at 13.

⁹ *Id.* at 14–17.

¹⁰ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

¹¹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

¹² *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹³ EPSTEIN, *supra* note 2, at 18–21.

¹⁴ *Id.* at 22–29.

¹⁵ *Id.* at 34.

¹⁶ *Id.* at 39.

Epstein next turns his attention to the decades-long *United Shoe Machinery* litigation, which focused on the exclusionary effects of United's long-term leases. This choice of subject is somewhat confusing because none of the many lawsuits the government brought against United ended in a consent decree. Perhaps anticipating this objection, Epstein suggests earlier in the book that consent decrees "operate as a close substitute for final judgments, from which they should not be distinguished analytically."¹⁷ Certainly, both consent decrees and judgments in litigated cases are final judgments with similar legal effects. But the very title of Epstein's book assumes that the distinguishing characteristics of consent decrees are sufficiently important to justify a separate study; otherwise, there would be no reason not to extend the scope of the study to countless other final judgments in government antitrust litigation.

Epstein seems to have included *United Shoe Machinery* in his study because of its connections to *Swift*. He largely endorses the early government actions challenging United's exclusive long-term leases as well as the relatively focused remedial orders that followed.¹⁸ He is far more critical of the renewed action that led to Judge Wyzanski's famous 1953 decision holding that United had monopolized the shoe machinery market by similar leasing practices.¹⁹ Judge Wyzanski limited the remedy in that case to conduct orders, sensibly rejecting the government's proposal to break up United, which had a single production facility. In doing so, he famously observed that "it takes no Solomon to see that this organism cannot be cut into three equal and viable parts."²⁰ Nevertheless, Epstein criticizes Judge Wyzanski's remedial orders for making the same mistake as the *Swift* decree by imposing strictures with little connection to the liability rulings.²¹ For example, Wyzanski capped the length of United's equipment leases at five years, even though both parties to the transaction may have preferred a longer term. He also required United to give its customers the option to buy its machines at "reasonable" prices, subject to his review. When these and other provisions failed to reduce United's market share sufficiently after ten years, the government applied for still more onerous relief, which Wyzanski rejected under *Swift*'s "grievous wrong" standard. The Supreme Court, however, reversed, instructing the district court that the *Swift* standard did not apply to efforts by the government to secure the "complete extirpation of the illegal monopoly."²² Epstein describes the "macabre"²³ denouement: United was forced to divest some of its assets, and then declined steadily until it was finally sold to a foreign firm.

Epstein devotes a full chapter to the 1982 AT&T settlement that produced the consent decree known as the "modified final judgment," or MFJ.²⁴ He first recounts the history and rationale of the decree.²⁵ AT&T encompassed the Bell System, a network of regulated monopolies of local and long-distance telephony. When technological changes allowed entry into the long-distance market, AT&T was able to use its control over the local exchange to disadvantage its long-distance

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 43–44.

¹⁹ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

²⁰ *Id.* at 348.

²¹ EPSTEIN, *supra* note 2, at 48.

²² *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251 (1968).

²³ ROBERT H. BORK, *THE ANTITRUST PARADOX* 171 (1978).

²⁴ *United States v. AT&T*, 552 F. Supp. 131, 226–34 (D.D.C. 1982). For an interesting account of the background and negotiations leading to the settlement, see STEPHEN COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986).

²⁵ EPSTEIN, *supra* note 2, at 54–58.

rivals, like MCI. The consent decree separated the local exchanges from AT&T and grouped them into “regional Bell operating companies,” or RBOCs, which were subject to quarantines barring them from entering the long-distance market. AT&T itself was allowed to compete with MCI and others in long-distance services. The breakup/quarantine framework was the brainchild of William Baxter, the Chicago-oriented Stanford law professor who then headed the Antitrust Division. Baxter believed that a regulated local exchange monopoly, if allowed to integrate into competitive markets, would always have an incentive to use its unexploited monopoly power to disadvantage its rivals, and regulators like the FCC would be unable to control the monopolist’s depredations.

Epstein’s Chicago colleague, Richard Posner, has characterized the MFJ as arguably “the most successful antitrust structural remedy in history.”²⁶ Epstein’s assessment is decidedly more negative. Despite the worthy efforts of Baxter and Judge Harold Greene, who oversaw enforcement of the MFJ for twelve years, Epstein argues that “the decree suffered from an excess of ambition and from a lack of focus and finitude. [Greene] could not control the unruly set of forces his divestiture set in motion.”²⁷ Epstein suggests that neither Baxter nor Judge Greene recognized that competition was not possible in telephony because of the need to mandate and regulate interconnection among many firms of widely differing sizes. Consequently, the decree failed adequately to account for the enormous transaction costs in multi-tiered regulation that the breakup and subsequent enforcement would entail. It was overly optimistic, according to Epstein, to think that the breakup, by removing the local exchange companies’ incentive to discriminate in favor of AT&T, would drastically simplify the FCC’s task in regulating the terms of interconnection. Epstein also takes Judge Greene to task for invoking populist nostrums in support of the breakup alternative.

The appropriate response to AT&T’s illegal actions, Epstein argues, “would have been to facilitate new competition at the edges of the Bell System by outlawing discrete, identified contractual provisions and business practices, analogous to the limitation on exclusive-dealing provisions in the early stages of *United Shoe Machinery*.”²⁸ Instead, the government, with the court’s approval, pressed on for a breakup. As a consequence, “Judge Greene operated a de facto administrative agency to respond to a wide range of disputes.”²⁹ Epstein canvasses a series of complex disputes Judge Greene was forced to resolve until the 1996 Telecommunications Act displaced the MFJ with a system of explicitly regulatory obligations.

The final case study of the volume examines the *Microsoft* government litigation. Epstein discloses in an acknowledgments page that Microsoft provided “financial support” for the book, although it “did not review or oversee [the book’s] conclusions.”³⁰ Epstein’s conclusions with respect to the *Microsoft* litigation certainly do not reproduce Microsoft’s litigating positions. The most surprising aspect of this portion of the book, given Epstein’s analytical framework, is its almost complete endorsement of the outcome in the government case.

Epstein begins the chapter inauspiciously by suggesting that the government’s lawsuit should be treated “like a common carrier case” aimed at requiring Microsoft to “supply services to all comers on (1) reasonable and (2) nondiscriminatory terms.”³¹ Even though Epstein qualifies this

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²⁶ RICHARD A. POSNER, *ANTITRUST LAW* 111 (2d ed. 2001).

²⁷ EPSTEIN, *supra* note 2, at 58.

²⁸ *Id.* at 65.

²⁹ *Id.* at 68.

³⁰ *Id.* at xi.

³¹ *Id.* at 74.

statement by noting, first, that the case was not about setting reasonable prices and, second, that Microsoft operates in a two-sided market (marketing its operating system both to users and software developers), the common carrier analogy does not illuminate *Microsoft*.

More fruitfully, Epstein examines in some detail the 1994 consent decree that ended the Antitrust Division's first Microsoft investigation, and describes how that decree's anti-tying provision led to the 1997 contempt action and, ultimately, to the famous 1998 Sherman Act case challenging Microsoft's competitive responses to Netscape's Web browser and Sun's Java technologies.³² Epstein briefly describes the district court and D.C. Circuit analyses, in the consent decree case, of whether Microsoft's Windows and operating system and its Internet Explorer browser were "integrated." He then recounts the government's theory in the 1998 case that Navigator and Java posed a "middleware threat" to Microsoft's Windows monopoly (because they might have evolved into a rival platform that would allow developers to write applications that would run on all operating systems) and that Microsoft sought to stave off the threat by a combination of contractual and design measures aimed at limiting its nascent rivals' usage share. His brief account of the D.C. Circuit's eventual resolution of these contentions is accurate, though remarkably uncritical.³³

The heart of the chapter is a discussion of remedies in the 1998 case. Epstein rightly criticizes Judge Jackson's initial breakup order as both unresponsive to the liability findings and extraordinarily costly on many counts. (Epstein suggests that the order reflected a failure to grasp the hard lessons of the AT&T experience, but its shortcomings went far beyond those of the MFJ.) Epstein also considers the possibility, in principle, of a fine or damage remedy in the case, but suggests any such award would have posed an unacceptable risk of overdeterrence, because it would be impossible to disentangle the competitive effects of Microsoft's benign and malign conduct. This is a fair point, although it is worth mentioning that these difficulties did not prevent Microsoft's rivals and customers from suing and obtaining settlements totaling well into the billions of dollars.³⁴

Epstein endorses the consent decree in the government case, Judge Kollar-Kotelly's approval of the decree, and the D.C. Circuit's affirmance. Consistent with the thesis of the book, he particularly approves the focus of the decree on enjoining acts specifically held unlawful by the D.C. Circuit.³⁵ The decree, for example, prohibits retaliation against firms that deal with Microsoft's rivals, and requires Microsoft to license Windows to computer manufacturers on nondiscriminatory terms,³⁶ while giving the manufacturers flexibility in configuring the Windows desktop and boot sequence.

Interestingly, Epstein even approves the provision of the decree that requires Microsoft to license communications protocols that allow Windows client computers to interoperate with Windows server operating systems.³⁷ This provision, according to Epstein, "only addresses the

³² *Id.* at 76–84.

³³ For a more critical discussion, see WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* chs. 4 & 5 (2007).

³⁴ *Id.* at 237–42.

³⁵ EPSTEIN, *supra* note 2, at 96–100.

³⁶ The nondiscrimination section includes a proviso that allows Microsoft to offer market development allowances. Epstein cautions that "this provision is not easy to interpret or enforce, and even with the exceptions, may block Microsoft from responding to market conditions. . . . This section will be anticompetitive if read to exclude that option." *Id.* at 97–98.

³⁷ Final Judgment § III.E, *United States v. Microsoft Corp.*, No. 98-1232 (CKK) (D.D.C. Nov. 12, 2002), available at <http://www.usdoj.gov/atr/cases/f200400/200457.htm>.

most important obstacle to open competition, namely, the inability to hook up on equal terms to Microsoft's operating system."³⁸ It is true that this provision was designed to give software developers writing programs for non-Microsoft servers the means to interoperate with Windows as well as programs running on Microsoft servers.³⁹ The difficulty with Epstein's assessment is that the provision violates the core principle that Epstein is advancing in his book: that courts should reserve injunctive relief in antitrust cases for interdiction of unlawful actions. As Judge Kollar-Kotelly⁴⁰ and the court of appeals⁴¹ recognized, this provision is not responsive to any proven violations; indeed the government's case had almost nothing to do with communications protocols or with server operating systems. The provision was explicitly designed to be "forward-looking,"⁴² to preserve the possibility that middleware threats could develop in network computing or the Internet at some point in the future.⁴³ Although well-intentioned, the provision has proven extremely difficult and costly to implement and has attracted only a few licensees, none of which poses any sort of middleware threat.⁴⁴

Epstein is correct, however, that the protocol licensing provision of the U.S. final judgment is preferable to its counterpart in the European Microsoft case. Unlike the U.S. licensing requirement, which is limited to firms legitimately seeking to improve interoperability with Windows, the European order requires Microsoft to license its "interoperability information" to "any undertaking *having an interest* in developing and distributing work group server operating system products,"⁴⁵ for any purpose related to developing those products. This broader scope unmoors the requirement from any appropriate antitrust purpose.

Epstein also defends the approach of the *Microsoft* consent decree against Herbert Hovenkamp's critique in his recent book, *The Antitrust Enterprise*.⁴⁶ Hovenkamp characterizes the *Microsoft* remedy as "too little, too late"⁴⁷ because, among other things, it fails to address all of Microsoft's illegal conduct, particularly "commingling" browser and operating system code.⁴⁸ Epstein, however, endorses Judge Kollar-Kotelly's reasoning in rejecting any code-removal requirement: requiring Microsoft to permit computer manufacturers and end users to remove the visible means of access to the browser was sufficient to address the anticompetitive conse-

³⁸ EPSTEIN, *supra* note 2, at 98.

³⁹ *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 189–90 (D.D.C. 2002).

⁴⁰ *Id.* at 190 (recognizing that "this aspect of the remedy plainly exceeds the scope of liability").

⁴¹ *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1223 (D.C. Cir. 2004) (recognizing "the difficulties inherent in crafting a forward-looking provision concerning a type of business conduct as to which there has not been a violation of the law").

⁴² *Microsoft*, 231 F. Supp. 2d at 190.

⁴³ *Id.* at 192 (reasoning that "given the rapid pace of change in the software industry," without the provision, "it is quite possible that the core of the decree would prove prematurely obsolete").

⁴⁴ See generally William H. Page & Seldon J. Childers, *Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement*, 14 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2008). The working paper version of this article is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978815.

⁴⁵ Case COMP/C-3/37.792, *Microsoft*, Commission Decision of 24 Mar 2004, Art. 5(a), available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

⁴⁶ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 297–302 (2006).

⁴⁷ *Id.* at 300.

⁴⁸ *Id.* at 298–99.

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quences of integrating the browser and the operating system. Moreover, code removal would have harmed consumers by undermining the integrity of Microsoft's platform.⁴⁹

Hovenkamp also argues that the success of the decree should be judged, not by whether Microsoft had complied with its terms, but by whether the the market has actually become "workably competitive."⁵⁰ Epstein responds that the decree will be successful if it removes illegal impediments to competition. The government never proved that Microsoft's illegal actions prevented the emergence of a significant rival platform; Microsoft's benign and neutral actions in a market characterized by network effects could well have produced the same result. Thus, it would be inappropriate to mandate an "ideal distribution of market shares" as an antitrust remedy.⁵¹ As the experience of *United Shoe Machinery* and *AT&T* shows, Epstein argues, a "more draconian"⁵² decree would likely have been counterproductive.

In a brief concluding chapter, Epstein summarizes the lessons of his study. First, firms should abandon contractual exclusionary terms and rely on their products' characteristics for their market success. Second, decrees should be limited to interdicting illegal actions. Third, antitrust relief should not be superimposed on an existing regulatory structure that addresses the same monopolistic practices. Fourth, antitrust remedies should be limited in duration, and rely more on innovation and entry than government mandates in restoring competition. Finally, in antitrust remedies, "it is always more expensive [in transaction costs and in hindering competition] to do more than it is to do less."⁵³

Epstein's study is an interesting and idiosyncratic analysis of antitrust remedies—primarily, though not exclusively, consent decrees—in government enforcement actions at various stages of antitrust history. In his analysis, he is suspicious of antitrust enforcement generally, but not to the point of denying that some single-firm conduct can be sufficiently anticompetitive to warrant government intervention. Where intervention occurs, however, he argues that it should be limited to enjoining the demonstrably anticompetitive conduct because government lacks the wisdom and administrative competence to achieve the positive goal of creating competitive conditions. Epstein is right that U.S. enforcement officials, at the federal level, have largely accepted these principles. Nevertheless, the book will be valuable, both for the fine texture of its analyses and observations, and as a cautionary tale for antitrust enforcers worldwide. ●

⁴⁹ EPSTEIN, *supra* note 2, at 104–05.

⁵⁰ HOVENKAMP, *supra* note 46, at 300.

⁵¹ EPSTEIN, *supra* note 2, at 104–05.

⁵² *Id.* at 105.

⁵³ *Id.* at 115.