NO. 00-5212

NO. 00-5213

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

----------X

UNITED STATES OF AMERICA,

APPELLEE,

VERSUS

MICROSOFT CORPORATION,

APPELLANT.

----------X

STATE OF NEW YORK, EX REL., ET AL.

APPELLEES,

VERSUS

MICROSOFT CORPORATION,

APPELLANT.

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF OF THE ASSOCIATION FOR OBJECTIVE LAW IN SUPPORT OF DEFENDANT MICROSOFT CORPORATION AND IN SUPPORT OF REVERSAL OF THE JUDGMENTS BELOW

Robert S. Getman, Esq.
Stephen M. Plafker, Esq.
Counsel for Amicus Curiae TAFOL
P.O. Box 8697, (212) 594-6732
New York, New York 10001

CORPORATE DISCLOSURE

Pursuant to FRAP Rules 26.1 and 28, and Circuit Rules 26.1 and 28, Amicus curiae hereby declares that it does not have any parent company or companies, and no public company or companies has any ownership interest, of 10% or greater, in it.

Amicus curiae: The Association for Objective Law (hereinafter "TAFOL")

> The Association for Objective Law is a Missouri non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code whose purpose is to advance Objectivism, the philosophy of Ayn Rand, as the basis of a proper legal system. It has no parent corporations and no stock owned by a publicly held corporation. Its officers and board of directors consist of the following persons. Each officer is a member of the Board of Directors except for Mr. Plafker.

TAFOL Board of Directors:

> Michael Conger, Kansas City, MO
> James McCrory, Albuquerque, NM
> Stephen M. Plafker, Los Angeles, CA
> Margaret D. Tagliavia, Dallas, TX

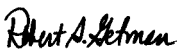
Note that TAFOL does not act as a spokesman for Objectivism and the views expressed herein are TAFOL's.

Counsel for amicus curiae: Robert S. Getman, Stephen M. Plafker

/S/ ROBERT S. GETMAN, ESQ.

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP Rule 32(a)(7)(C), and Rule 32(a) of the Circuit Rules of this Court and this Court's Orders of September 26, October 3 and 17, and December 18, 2000, I certify that this brief complies with all style and length requirements, being set in 12 point type, with all margins at least one inch, and with those sections of its content which require page numbers not exceeding 13 pages in total, and is being filed in ".pdf" file and in paper format.



/S/ ROBERT S. GETMAN, ESQ.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

* “Authorities upon which we chiefly rely are marked with asterisks”

FEDERAL STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE, AND INTRODUCTION

The Association for Objective Law ("TAFOL") is a non-profit corporation whose purpose is to advance Objectivism, the philosophy of Ayn Rand, as the basis of a proper legal system, although TAFOL does not act as a spokesman for Objectivism and the views expressed herein are TAFOL's. Objectivism's ethics is based on the virtue of selfishness, of rational self-interest. Its political consequence is the absolutism of individual rights, including the right to property necessary to implement men's right to life. It holds that each man has the right to complete control of his property so long as he does not violate another man's rights by direct physical force or the indirect force of fraud. Every man owns his own life, as the ultimate "monopolist" of the ultimate "monopoly".

Business – voluntary production and trade – is the main way that every man exercises his rights and furthers his life and values, and is the opposite of force and violation of others' rights. Antitrust's key term, "restraint of trade" is a contradiction, calling a contract – a voluntary trade – a "restraint" of trade. The wrong supposedly cured by antitrust, "economic power", is a misnomer, involving not force but its opposite, choice by "consumer" and producer alike which is free no matter how "hard" a bargain either side feels was made. And "monopoly power", an antitrust shibboleth said to be power to "control" prices and "exclude" competition, on the one hand improperly makes a legal wrong of the right to price one's own property, and on the other falsely equates production of a popular product with "forcing" competitors out of business, evading the difference between the impossibility of competition (e.g. against a government established monopoly born of force of law) and a mere lack of competitors.

Amicus' philosophy holds that proper government is the limited government established by our Founders, in which sovereign citizens retain a reservoir of rights, as our 9th Amendment held, while the government is strictly limited – subordinating might to rights. It holds that the sole function of government is to protect individual rights and that government properly does so using only objective laws, laws which "[i]n regard to derivation [are] tied to reality by man's only means of knowing reality: reason [and] [i]n regard to form have a firm, stable knowable identity",[1] so that they may tell men the

[1] H. Binswanger, "What is Objective Law", "The Intellectual Activist" v. 6 #1 (1/92) at 9.

law and the nature and cause of the accusations (to use the 6th Amendment's words) they will face if they disobey. If, as is proper, ignorance of the law is no excuse, government must make only laws which are comprehensible to citizens, or it is not a civilized government of laws and not of men.

In stark contrast, antitrust is based on the opposite premises: self-sacrificial altruism, collectivism, and non-objective law. It is modeled upon sacrifice in that it demands that some men (such as producers) must sacrifice themselves for the sake of others (such as "consumers"). It is collectivist in its view that individual rights may be overridden by the supposed interests of a collective (such as "consumers" or "society" or their overall "economic efficiency"). Further, antitrust "laws" are actually lawless, paradigms of non-objective law that not only deprive man of his right to life and property but do so by incomprehensible statutes whose ambiguities are multiplied by mountains of case-by-case precedent which no man, even with an army of lawyers, can comprehend before he acts, rather than ex post facto. Worse, in an alleged "monopolization" case such as this, they punish with draconian severity so-called monopolists who are deemed, under vague and shifting standards, to be "too successful" in free trade, depriving them of Equal Protection of the Laws. And in this divestiture case, which spawned numberless punitive triple damages cases, these "laws" are the corporate equivalent of a "cruel and unusual" capital punishment by being drawn-and-quartered plus by a death by a thousand cuts of "excessive fines", in the words of the 8th Amendment.

These grievous inherent faults of antitrust "law" have been compounded in this case by injustices in implementation, pre-trial, at trial and post-trial. Even before trial, the trial judge issued an injunction – without any request -- based on a misreading of a consent decree. Then the judge, over objections, proposed to appoint a "Special Master", who was arguably biased against Microsoft, to try the case, which imposition of a "surrogate judge" this Court compared to a "Potemkin jurisdiction [which] mocks the party's rights" – and voided the appointment. United States v. Microsoft, 147 F.3d 935, 954 (D.C. Cir. 1998). We submit that this prosecution is an unprecedented denial of due process of law in a rush to judgment – a judgment whose "fact findings" embraced virtually 100% of the Plaintiffs' assertions, after severe deprivations of vital pretrial discovery and trial preparation time which are life-

threatening in a "bet the company" case. Moreover, in this case of unparalleled complexity, the original limited charges concerning the inclusion of a browser with "Windows", were allowed to multiply and morph into a Kafkaesque trial conducted largely via written declarations by "summary witnesses". After such a trial, having accepted virtually uncritically the governments' ever changing theories, the court further deprived Microsoft of due process by rushing to a "remedy" judgment which swallowed the government's proposals without a single substantive change[2]. And thus without discovery and plenary hearings, the court imposed virtually the severest imaginable "remedy"[3], a corporate capital punishment not even asked for before or during trial. Worse, all this was presided over by a judge who gave unprecedented public interviews, perhaps violating legal ethics, putting himself in a position in which it may well be improper for him to continue to preside. Worse still, the judge admitted that Microsoft's "intransigence" in its legal defense was a key factor in imposing the harsh penalty.[4] This created a perilous new antitrust principle: the more a presumptively innocent defendant insists on his innocence and stands by his belief, the more terrible will be his punishment. If antitrust thus punishes integrity and lawful self-defense, we submit that it is Microsoft that is innocent and the law that is guilty.

ARGUMENT

After many changes to Plaintiffs' theories of liability, the charges against Microsoft came to include inter alia: that Microsoft allegedly violated §1 of the Sherman antitrust act (15 U.S.C. §1 (1994)) by "technological tying" of its internet browser software to its "Windows95" operating system software despite its belief that a prior consent decree allowed this; that Microsoft violated §2 of that act (15 U.S.C. §2 (1994)) by maintaining a "monopoly" in the "relevant market" for "Intel-Compatible PC Operating Systems" and by "attempted monopolization" of the "relevant market" for browser software; and that Microsoft violated §1 of the act by various "exclusive dealing" arrangements. We submit that

---

[2] See Microsoft Brief herein at 11, and 97 F. Supp.2d 59, 63-74 (D.D.C. 2000).

[3] Dissolution is "extreme," United States v. United Shoe Mach. Co., 247 U.S. 32, 46 (1918).

[4] E.g., G. Store, "Microsoft Judge Blames Company 'Intransigence' for Breakup", Bloomberg, Sept. 29, 2000, and 97 F. Supp.2d at 62 (remedy necessary because Microsoft won't concede).

even assuming these contested charges were true, such acts are within Microsoft's rights, and Microsoft should be found "innocent as charged". Observe that many of the accusations concern ordinary, legitimate business practices. How often are businessmen proud of obtaining an "exclusive" deal? How often do we find a second product or a free sample packaged with what we buy. The supposed evil of "tying" was that a buyer was "forced" to buy a second, unwanted product; but Microsoft's browser was included "free" and can strongly be argued to be an "integrated" "feature" rather than a separate "product" – as this Court earlier ruled. United States v. Microsoft, 147 F.3d 935 (D.C. Cir. 1998). Since we are all monopolists over what we own, when do we become "monopolists" under antitrust laws? Despite these questions, amazingly, the Sherman act is silent about "tying", "product" and "integration", and just utters a Delphic and contradictory ban on "contracts ...in restraint of trade". Nor is the key term "monopoly" defined in the act. So how do we divine antitrust violations in everyday business practices? We submit that there is no objective answer – even though there must be for the laws to be valid.

Suppose a citizen asked "what is antitrust?" Could you explain briefly, and integrate the essence or definition of "antitrust'? Judge Bork, an opposing amicus once asked a key question:

> "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in value arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[5]

But antitrust's goals are illusive, vague and contradictory, Bork concluded. And, because in any given context some things are more important than others, hierarchy is an indispensable part of objectivity. Yet as Judge Bork's book showed, antitrust law lacks a hierarchy of ends and goals as well[6]; this is unsurprising, for unclear goals cannot be put in a clear hierarchy. Hence, as Alan Greenspan wrote: "The world of antitrust is reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously." A. Greenspan, "Antitrust", reprinted in "Capitalism: The Unknown Ideal" (1966) at 56.

---

[5] R. Bork, "The Antitrust Paradox" (1978) (hereafter "Bork") at 50 (emphasis supplied). Unless otherwise indicated, hereafter, all emphasis is supplied.

[6] Judge Bork's solution, not uncommon in antitrust, that social "efficiency" is the ultimate standard, is wrong because our individual rights are – individual.

And as Justice Fortas said in the forward to a recognized treatise (which admired antitrust): "Antitrust in the United States is not, in the conventional sense, a set of laws by which men may guide their conduct. It is rather a general, sometimes conflicting, statement of articles of faith[7] and economic philosophy."[8]

Some may object that the antitrust act is "about competition". But that would run into Justice Holmes' reply that:"Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the Act. The Court below argued as if maintaining competition were the expressed object of the Act. The act says nothing about competition." Northern Securities Co. v. United States, 193 U.S. 197, 403 (1904). Even were "competition" in the act, Prof. Neale points out, "it would be found that the notion of preventing competition had to be further defined in its turn and this would raise difficult questions of degree and intention. What is the position, for example, if some types of business behavior (or structure) limit competition in one way, but increase it in another?" Neale at 13. But that question is unanswered, for the Supreme Court confessed "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another." United States v. Topco Associates, Inc, 405 U.S.596, 609 (1972).

The main statutory provision herein, §1 of the Sherman act, makes illegal "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade." But the Supreme Court, in a landmark case conceded "the absence of any definition of restraint of trade as used in the statute", Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63 (1911).[9] Likewise, the pro-antitrust Neale treatise is forced to conclude: "[t]hus, where antitrust is concerned, nothing less than the whole

---

[7] If antitrust is "an article of faith" we must note that faith is not reason, and that faith, a universal feature of religion, is properly exiled from politics and law by the 1st Amendment.

[8] A.D. Neale, "The Antitrust Laws of the U.S.A.: A Study of Competition Enforced by Law", The National Institute of Economic and Social Research and the Cambridge University Press (1966) (hereafter "Neale") at v. As to Neale's subtitle, as philosopher Ayn Rand succinctly observed, "The concept of free competition enforced by law is a grotesque contradiction in terms. It means: forcing people to be free at the point of a gun. It means: protecting people's freedom by the arbitrary rule of unanswerable bureaucratic edicts." A. Rand, "America's Persecuted Minority: Big Business", reprinted in "Capitalism: The Unknown Ideal" supra at 46.

[9] Chief Justice White reiterated that restraint of trade was statutorily undefined, in United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).

body of case law constitutes the definition of [the forbidden practice] 'restraint of trade'." Id. at 12. Neale also concludes: "No broad definition can really unlock the meaning of the statute", id. at 13, telling readers to study the whole case law as a first step. As Ayn Rand summarized: "No two jurists can agree on the meaning and application of these laws. No one can give an exact definition of what constitutes 'restraint of trade' or 'intent to monopolize' or any of the other, similar 'crimes.' No one can tell what the law forbids or permits one to do. The interpretation is entirely left to the courts." A. Rand, "Antitrust: the Rule of Unreason (1962), reprinted in L. Peikoff (ed.), "The Voice of Reason" (1990) at 255.

The very history of Sherman Act jurisprudence bespeaks the failed groping for standards. Concluding that the Sherman act lacked a standard, the Court decided in the Standard Oil case that: "as the contracts or acts embraced in the provision were not defined ... being broad enough to embrace every conceivable contract or combination... it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to" to judge the conduct in question. Id., 221 U.S. at 60. The "solution" was to read in the term "unreasonable" into the phrase "contracts in restraint of trade". Originally, the Supreme Court had held that "no exception or limitation [such as reasonable] can be added without placing in the act that which has been omitted by Congress."[10] But injecting the concept "reasonable" just raises more questions. As then-Judge Taft warned, to read into the statute the term "reasonable" was to "set sail on a sea of doubt", United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), aff'd 175 U.S. 211 (1899). In sum, as Prof. Neale concluded, "the so-called Rule of Reason... the guiding principle of Sherman act construction, is as difficult to define at the outset as 'restraint of trade' and for much the same reasons". Id. at 13-14.

Perhaps disoriented in sailing on this "sea of doubt", the courts sought shelter in so-called "per se" rules, which declared certain categories of conduct (e.g., "price-fixing") presumptively per se unreasonable, thus unlawful. Yet these pigeonholes are not found in the statute, raising the question of improper "judicial legislation", as many Supreme Court opinions did. Standard Oil, supra, 221 U.S. at 100; Topco Associates, supra, 405 U.S. at 611-12 (1972). Further, it is a well recognized conundrum

[10] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897).

that per se rules claim "certainty" by adding to the terms of the statute and ignoring the actual economic effects of a defendant's conduct under a statute concerned with economic competition. Yet there can be no certainty and no justice without considering all the facts of an individual's case. The Topco case, supra, illustrates this conundrum. There, a cooperative of regional markets joined to economically offer "private label" brands of quality merchandise to compete with larger supermarket chains; in so doing, exclusive distribution territories were assigned, which Topco argued were indispensable. Though the government urged that such territories were per se illegal, the trial court, hearing evidence, found practice in fact promoted competition. Wasn't this practice, proven "pro-competitive", one that "merely regulates and perhaps thereby promotes competition" rather than per se illegal, to recall Justice Brandeis' famous words defining the "rule of reason", Chicago Board of Trade, supra, 246 U.S. at 238?

Yet the Supreme Court reversed, refusing "to ramble through the wilds of economic theory", id. at 609 n. 10, even to judge economic effects against a statute supposed to be about economic competition. It explained that "The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another is one important reason we have formulated per se rules." Id. at 609. And the Court made no bones about antitrust being a departure from free enterprise, effected by judicial lawmaking that was not properly done by courts but by Congress: "There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country.... If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts.... courts are ill-equipped and ill-situated for such decision making." Id. at 611-12. So, in some cases, a defendant may face per se illegality rules, depending on the pigeonhole into which courts consign a general practice, with no consideration of the actual effects on "consumers" or "competition" he could prove at his trial. On other occasions, depending on nothing in the statute, courts prescribe trials under the "rule of reason" to somehow weigh competition without any units or standards of measure for the weighing. This crazy-quilt regime of per se and pseudo-weighing of

competition, we urge, is not law but lawlessness. Judge Bork branded antitrust "policy at war with itself", id. at 7. And to quote fully what Federal Reserve Board Chairman Greenspan had concluded:

> "The world of antitrust is reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously. It is a world in which competition is lauded as the basic axiom and guiding principle, yet 'too much' competition is condemned as 'cutthroat.' It is a world in which actions designed to limit competition are branded as criminal when taken by businessmen, yet praised as 'enlightened' when initiated by the government. It is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict -- after the fact."
>
> "In view of the confusion, contradictions, and legalistic hairsplitting which characterize the realm of antitrust, I submit that the entire antitrust system must be opened for review."

The clashes between antitrust and man's rights are legion because antitrust is arbitrary, non-objective law, in essence non-law. But Americans are proudly described as "a government of laws and not of men." As the Supreme Court unanimously explained, that principle is basic, for "[T]he Founders knew that law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised." Cooper v. Aaron, 358 U.S. 1 (1958). Yet antitrust and any non-objective law inevitably inverts this principle, creating a government of men and not laws, ripe for oppression not only by power-seekers but even via unintentional wrongs by honest judges.[11] The worst case scenario is chilling to ponder, because tyranny is not always an all or nothing affair, by coup rather than by creep.

> "It is a grave error to suppose that a dictatorship rules a nation by means of strict, rigid laws which are obeyed and enforced with rigorous, military precision. Such a rule would be evil, but almost bearable: men could endure the harshest edicts, provided these edicts were known, specific and stable; it is not the known that break's mens' spirits, but the unpredictable. A dictatorship has to be capricious; it has to rule by means of the unexpected, the incomprehensible, the wantonly irrational; ... a state of chronic uncertainty is what men are psychologically unable to bear."[12]

Hence, at its worst, in the hands of those who seek power, antitrust is the tool of legalized terrorism.

Antitrust Laws Violate A Panoply of Constitutional Protections. Antitrust Laws are constitutionally "void for vagueness". Since ancient times, when men condemned a tyrant's laws placed

---

[11] Cf. the remark of a District Judge to the government prosecutor made in objecting to the Microsoft consent decree, a remark which supported his recusal by this Court: "you don't have to have a case", United States v. Microsoft, 56 F.3d 1448, 1463 (D.C. Cir. 1995).

[12] A. Rand, "Antitrust: the Rule of Unreason (1962), in L. Peikoff (ed.), "The Voice of Reason" (1990) at 254.

atop an inaccessible pillar, men rightly demanded to know the law. If, as is proper, ignorance of the law is no excuse, then government must ensure that the laws are comprehensible to citizens. This principle is embodied in many forms in our Constitution. In one form it is expressed in the rule striking down laws as "void for vagueness", in another in the rule striking down ex post facto law. For "[a]n undefinable law is not a law, but merely a license for some men to rule others." A. Rand, "Vast Quicksands", The Objectivist Newsletter, July 1963 at 25. The Supreme Court has repeatedly and properly voided certain laws under the "void for vagueness" doctrine, among them laws forbidding "loitering" and "vagrancy". E.g., Papachristou v. Jacksonville, 405 U.S. 156 (1972)(vagrancy); Kolender v. Lawson, 461 U.S. 352 (loitering). Civil, as well as criminal statutes are stricken as vague. A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925). Recently, in Chicago v. Morales, 527 U.S. 41 (1999), the Supreme Court struck down a loitering law even though, as the Illinois Supreme Court found, "loitering" had a common, accepted meaning. Unlike fuzzy antitrust terms, these terms were explained in many case over many years – hundreds of years more than the Sherman act's age. Further, our High Court held that: "A law can be improperly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. ___, 120 S. Ct. 2480 (2000). Because antitrust is "vague" and contradictory, subjective and ad hoc, its enforcement must be "arbitrary and discriminatory". The arbitrary can only be enforced arbitrarily, and arbitrary "law" is no law. Gulf, Colo. & Sante Fe Ry. Co. v. Ellis, 165 U.S. 150, 155 (1897).

Antitrust is unconstitutional Ex Post Facto law. Ex Post Facto law is such an evil that it was twice prohibited in the original Constitution, as against federal and state governments alike. "No ... ex post facto law shall be passed" by Congress (Art. I §9), and "No State shall... pass any... ex post facto law or law impairing the Obligation of Contracts", (Art. I §10)[13] Our Supreme Court in Calder v. Bull, 3

[13] Nor is dicta in Nash v. United States, 229 U.S. 373 (1913), focused on mens rea and not actus reus, a bar to our argument; the antitrust laws have grown significantly more vague and infirm in the ninety years since Nash was decided. The States' antitrust laws also offend the Contract Clause, putting arbitrary prohibitions in the way of freely agreed contracts between citizens; in fact, by imposing 50 not necessarily consistent non-objective laws, the state statutes impede the

U.S. 386, 390 (1798) construed "ex post facto" to apply to criminal and penal statutes, but construed "penal" broadly, as involving any "pain or penalties", id. The antitrust laws should thus be banned by virtue of their criminal dimension and their ruinous treble-damages liability provisions, that are punitive damage provisions, penal in nature. Moreover, one essential basis of Calder is that the other constitutional provisions amply protected against deprivations of individual rights by retrospective civil law. Carmell v. Texas, 529 U.S. 513, 519 (2000). Finally, many Justices in Calder took it for granted that retrospective laws improperly impair the obligation of contracts, as we argue, or that such laws would be a "taking" for which just compensation is due, as we also argue.

Antitrust Offends the 6th Amendment. Unknowable laws such as antitrust offend the 6th Amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation", id. Undefined, ad hoc antitrust "law", "clarified" only via a vast number of cases, with rules subject to sudden change, cannot explain to an accused the nature and cause of an accusation. Because the Sherman act is both criminal and civil, this Constitutional guarantee must be honored, we submit, not only for its spirit but as part of Due Process of Law.

Antitrust offends Due Process of Law. The upshot of these grievous faults in antitrust "law" is the denial of Due Process of Law under the 5th and 14th Amendments and "takings" without just compensation barred by the 5th Amendment, whether one interprets due process as "substantive" or "procedural".[14] Where there is no "law", there can be no Due Process of Law.

Antitrust "Judicial Lawmaking" violates the Constitutions' Separation of Powers rule. Inserting

---

free flow of interstate commerce envisioned by Art. I §8 of the Constitution. Moreover, Sherman act §6 authorizes massive forfeiture of goods, surely a "taking"; the Supreme Court recently reemphasized that economic regulation can constitute a taking. Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998) quoting Calder: "'It is against all reason and Justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A. and gives it to B'". And Calder reminded that punishment pursuant to ex post facto law was by nature "cruel and unjust", reinforcing our argument that antitrust is the corporate equivalent of a "cruel and unusual" punishment under the 8th Amendment. See Carmell v. Texas, 529 U.S. 513 (2000).

[14] With respect to this constitutional provision or others which apply in principle and in spirit, but may not apply under current law, we submit that the cumulative effect of violations can add up to an actual violation of the Due Process of law guarantees. The presumption should be in favor of rights and against any violation of them, as mandated by the 9th Amendment.

the term "unreasonable" into the Sherman act was rightly declared improper "judicial legislation" by Justice Harlan. Standard Oil, supra, 221 U.S. at 100 (dissent). By the same logic, judicially creating per se violations is improper. "'Judicial construction' is thus one method of exercising arbitrary power." A. Rand, "Thought Control", The Ayn Rand Letter, V. II #26 (9/24/73) at 2. Separation of Powers, key to our Republican form of government, is inevitably destroyed by non-objective law whose gravitational pull breeds improper "judicial legislation"[15] by the non-legislative, unelected branch. Yet as Founder James Madison stated: "No political truth is of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty", and "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The Federalist #47 (Earle ed.) 313-15. The Massachusetts Bill of Rights rightly held: "the judicial [department] shall never exercise the legislative and executive powers", Art. XX (1780).

Antitrust Steals the Equal Protection of the Laws from Businessmen. Antitrust is aimed at businessmen, subjecting them to unequal treatment in the conduct of the rightful pursuit of a lawful occupation, in the words of the Privileges and Immunities Clause.[16] In practice, defendant's "share" of a "relevant market" is examined, as if the total "pie" was static and competitors were entitled to some "share" that is somehow "theirs". Microsoft's "market share" is just a result of its producing and trading its own property. Why a "share"is to be looked to, or whether asking what is the "relevant" market fallaciously begs the question, is never answered. Indeed, it may be the dirty secret of antitrust that convincing a judge what market "definition" is "relevant" wins a case: one picks an area in which defendant has a large "share" by some measure. And since "relevant market" thus determined cannot be

---

[15] See, e.g., Miller v. French, 530 U.S. 628 (2000)(Separation of Powers prevents one branch from encroaching on the central prerogatives of another); United States v. Nat'l Treasury Employees' Union, 513 U.S. 454 (1995) (Courts' obligation to avoid judicial legislation). "Liberty is always at stake when one or more of the branches seek to transgress the separartionof powers." Clinton v. City of New York, 524 U.S. 417, 450 (1998)(Kennedy, J., concurring).

[16] Saenz v. Roe, 526 U.S. 489 and 521 (dissent) (1999). A clause embracing the right to travel, a fortiori should protect the right to work in a lawful occupation, to property, and to life.

known before a trial[17], a "monopolist" cannot know he is one, or when he must act differently, except ex post facto? What this boils down to is that Microsoft is held to be "too successful" and after the unknowable moment when it became "too successful" it strove for further success, not renunciation and self-sacrifice.[18] If you doubt that antitrust is anti-ability, anti-success law, see what it has condemned:

> "It was not inevitable that it [ALCOA] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel." United States v. Alcoa, 148 F.2d 416, 431 (2d Cir. 1945).

Ayn Rand concluded: "[There is only one] meaning and purpose these laws could have, whether their authors intended it or not: the penalizing of ability for being ability, the penalizing of success for being success, and the sacrifice of productive genius to the demands of envious mediocrity." A. Rand, "America's Persecuted Minority: Big Business", in "Capitalism: The Unknown Ideal" at 57 (1966). John Adams wrote: "the rich are people as well as the poor; that they have rights as well as others; that they have as clear and as sacred a right to their large property as others have to theirs which is smaller; that oppression to them is as possible and as wicked as to others.".[19] So too for the able and successful..

Antitrust Offends our Republican Form of Government and the 9th Amendment. Our 9th Amendment testifies to the principle of Republican, limited government, that we are free and retain rights, with only strictly limited exceptions.[20] As our Declaration of Independence unforgettably put it:

---

[17] Not only would a businessman not know what economists, lawyers and judges would later use as a market definition, but knowing his "share" also requires knowing the competitors' information, which information cannot be known for sure inasmuch as competitors are unlikely to reveal it, or if they do, sharing it may be an antitrust violation in itself. United States v. Container Corp. of America, 393 U.S. 333 (169).

[18] Attempted monopolization liability wrongly rests on such basis, on a finding of no evidence that Microsoft didn't try to avoid "overkill", 97 F. Supp.2d at 62. And because exclusive dealing liability depends on "market power", whether Microsoft has been "too successful" in a given area, that claim too deprives Microsoft of Equal Protection of the Laws.

[19] J. Adams, "Defence of the Constitutions of Government of the United States" (1787).

[20] For this basic reason, and under the 9th Amendment, the presumption against "facial" invalidity of a statute is an inversion. As the Supreme Court recently noted in Saenz v. Roe, 526 U.S. 489

"to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Non-objective antitrust law throws a cloud over each citizen's reservoir of rights, denying and disparaging them in violation of the 9th Amendment.

CONCLUSION

Article 2d of the New Hampshire Constitution declared that "All men have certain natural, essential, and inherent rights – among which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and in a word, of seeking and obtaining happiness." Ayn Rand explained the underlying philosophy:

> "[M]an has to work and produce in order to support his life. He has to support his life by his own effort and by the guidance of his own mind. If he cannot dispose of the product of his effort, he cannot dispose of his effort; if he cannot dispose of his effort, he cannot dispose of his life. Without property rights, no other rights can be practiced.....The right to life is the source of all rights – and the right to property is their only implementation. Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life. The man who produces while others dispose of his product, is a slave."
>
> ....
>
> Is man a sovereign individual who owns his own person, his mind, his life, his work and its products – or is he the property of the tribe (the state, the society, the collective) that may dispose of him in any way it pleases, that may dictate his convictions, prescribe the course of his life, control his work and expropriate its products? Does man have the right to exist for his own sake – or is he born in bondage, as an indentured servant who must keep buying his life by serving the tribe but can never acquire it free and clear?"

A. Rand, "What is Capitalism?", in"Capitalism: The Unknown Ideal" supra at 10-11. Americans have known the answer since our Declaration of Independence, and since slaves were freed. These are the principles to which America should return. In the face of these vital rights, and the fundamental constitutional infirmities of the antitrust regime, this Court should not sanction the destruction of the world's most successful company (in market capitalization) under the false banner of that paradigm of non-objective law, that judicial and political rationalization, that arbitrary anti-rights, anti-ability and anti-success regime bearing the misnomer antitrust "law". We respectfully urge reversal.

Dated: December 25, 2000

Respectfully Submitted, Robert S. Getman, Esq. /S/,
Stephen M. Plafker, Esq., Counsel for TAFOL

(1999), the structure of legislative power and the bill of rights limit the power to legislate. Government properly bears the burden of justifying the constitutionality of its laws.

CERTIFICATE OF SERVICE

I HEREBY AFFIRM AND CERTIFY that on December 26, 2000, I served the accompanying AMICUS CURIAE BRIEF SUPPORTING DEFENDANT AND REVERSAL by the fax and mail, addressed to:

John L. Warden, Esq
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Counsel for Appellant Microsoft Corporation

Donald M. Falk, Esq.
Mayer, Brown & Platt
1909 K. Street, N.W.
Washington, D.C. 20006
Counsel for Amici CCIA and SSIA

Andrea Limmer, Esq.
United States Department of Justice
Antitrust Division, Appellate, Room 10526
601 D Street, N.W.
Washington, D.C., 20530;

Richard L. Schwartz, Esq.
N.Y.S. Attorney General's Office
Antitrust Bureau
120 Broadway
New York, New York 10271

Robert H. Bork, Esq.
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for Amicus ProComp

Louis R. Cohen, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
Counsel for Amici ACT, CompTIA

Laura Bennett Peterson
700 New Hampshire Avenue, N.W., 520
Washington, D.C. 20037
Amicus Curiae

Carl Lundgren
5035 So. 25th Street
Arlington, VA 22206-1057
Amicus Curiae

Lee A. Hollaar
50 S. Central Campus Dr., 3190 Merrill Bldg.
Salt Lake City, UT 84112
Amicus Curiae

Center for the Moral Defense of Capitalism
10900 Heatherwood Dr.
Spotsylvania, VA 22553-1668
Amicus Curiae

Ms. Limmer and Mr. Schwartz averred that they had the authority to consent to service upon them of this MOTION on behalf of all Appellees, Federal and States and did so consent.

Robert S. Getman, Esq. /S/