Book Review
Free the Market: Pushing Back on the Chicago School

Gary L. Reback

Free the Market! Why Only Government Can Keep the Marketplace Competitive

Penguin ▪ 2009

Reviewed by Renata Hesse

Gary Reback's first book has as its principal goal the refocusing of governmental antitrust enforcement in high-technology markets so that it better recognizes the unique nature of technology markets and, in particular, the role that network effects can play in those markets. It is an often entertaining romp through Reback's many and varied experiences representing high-technology clients before the government and in private litigation

The timing for a book that favorably views governmental intervention in markets could not have been better. We are faced with one of the most substantial economic downturns since the Great Depression, and there are calls for more and better regulation of the economy throughout Washington. The ABA Antitrust Section has sponsored two substantial panels (one at this year's Spring Meeting) on whether competition law or policy had any role in causing the crisis or should have a role in fixing it. For the first time in years (at least in the United States), people are talking about whether the concept of "too big to fail" should be revived. Reback's book, which is meant to serve as a kind of rallying cry for reducing the influence of the Chicago School on industrial organization economics and government enforcement decisions, fits perfectly into these current events. In Reback's view, the Chicago School gets it wrong because the rules and tests that it seeks to apply have their genesis in "old economy" markets where, unlike in the world of software, there is a marginal cost associated with producing each additional unit of output.

The book is ambitious. It starts with a history of the Standard Oil trusts that led to the enactment of the Sherman Act in 1890 and works its way up to 2008 by way of a series of stories about cases in which Reback played a substantial role. There is a lot of ground covered, and Reback occasionally digresses from his vignettes to touch on larger issues, such as the relationship between antitrust and intellectual property and an explication of the history of the Merger Guidelines. But the core of the book remains, first and foremost, Reback's often-engaging war stories about some very significant cases in the world of antitrust and high-tech. The book thus provides an animated and very personal window into Reback's thinking on how competition enforcement can and should play a role in making our markets—particularly high-tech ones—function better. Reback, who has represented Silicon Valley companies in antitrust and intellectual property matters for decades, is well positioned to offer his opinions on these issues and does so through the vehicle of an interesting narrative.

The first two sections of the book piece together what Reback views as some "foundational" elements of the eventual "takeover" of government antitrust enforcement philosophy by the Chicago School. He spends several pages on the work of economist Oliver Williamson when he

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was a "Special Economic Assistant" to then-Assistant Attorney General Donald Turner, crediting an economic evaluation performed by Williamson while he was at the Antitrust Division with "play[ing] a part in transforming antitrust doctrine."[1] According to Reback, Williamson's work, which demonstrated in two narrow cases (perfect competition and monopoly in a newspaper market) that very small reductions in costs can offset very large accumulations of market power in terms of the effect on overall consumer welfare, paved the way for the Chicago School.

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Using Williamson's work as a transition element, Reback moves quickly from a period that he describes as largely consisting of battles between the Executive Branch and Congress on just exactly how and to what degree antitrust laws should be enforced (and what the legislation should even say) into the period that he identifies as the time when the Chicago School "came to Washington" (with President Reagan's Assistant Attorney General for Antitrust, William F. Baxter). Reback was a student of Baxter's at Stanford Law School, and clearly admired him. His last vignette involving Baxter, however, describes a lonely scene: Reback trying to bring Baxter around to advocating for a sweeping investigation into Microsoft's early conduct based on game theory economics and Baxter (in Reback's view) simply not getting that game theory had a proper role to play in government enforcement policy. I found it a kind of depressing story. Reback ends up accusing Baxter of refusing to see how game theory better describes the economics of high-technology markets simply because he cannot bring himself to deviate from positions he had taken as Assistant Attorney General, and then drives off in the rain after simply shaking Baxter's hand.

The description of the period where Baxter ran the Antitrust Division weaves some economic theory and some brief stories about significant cases on which Reback did not work (e.g., IBM and AT&T) together with Reback's experiences on several cases, including his early work for Apple. In an interesting twist, he takes a detour during this part of the book to describe how the Silicon Valley (and thus the tech boom more generally) was really one of the largest government works projects of the last fifty years. It is an interesting idea, and one that Reback periodically comes back to in the book: that the tech industry and those who advocate for mild government intervention in it should, as Reback says, "note the Valley's pedigree."[2] That said, it is also a little bit of a non sequitur, but one for which I want to forgive Reback since it allows him to introduce an interesting bit of information to the story.

Reback does a nice job using the cases in which he was involved to illustrate particular points—whether legal, economic, or, in many cases, political—that he wants to make. He uses, for example, an early case involving Apple and one of its distributors (*O.S.C. Corp. v. Apple*)[3] as a vehicle to talk about vertical resale price maintenance and the current political and economic arguments around whether such conduct should be per se illegal or judged under the rule of reason standard. *Lotus v. Borland*[4] is the vehicle through which Reback explores the intersection of antitrust and intellectual property.

The many iterations of *Microsoft*[5] function almost as a catch-all for Reback's fundamental point regarding how the influence of the Chicago School rendered the government too slow to recognize and, ultimately, too ineffective to deal with Microsoft's conduct before it had its anticompeti-

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[1] Gary L. Reback, Free the Market! Why Only Government Can Keep the Marketplace Competitive 28–29 (2009).

[2] Reback, *supra* note 1, at 59.

[3] O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464 (9th Cir. 1986).

[4] Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807 (1st Cir. 1995).

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

tive effect. There is much to be said about *Microsoft*, and Reback spends a great deal of time on the case. He provides many interesting factual details about the development of the Netscape story, along with descriptions of the work that he and his colleagues did over the course of several years to bring the story to light. Reback effectively makes *Microsoft* the centerpiece of the book in two fundamental but different ways. First, it is not only a case that virtually everyone knows, but also one where Reback has a tremendous inside track. He uses his detailed factual knowledge to his advantage to spin out his fundamental theme—software markets are different and the application of industrial organization economics to software markets without accounting for those differences will yield incorrect results.[6] Second, he uses the ultimate outcome of the government's case as a stepping stone to the section of the book on *Oracle*,[7] arguing that Oracle was potentially emboldened to test the government's resolve with its hostile takeover of PeopleSoft when it saw the "laughable" (Reback's word) remedy that was ultimately imposed on Microsoft: "Two years later, [Larry] Ellison would show the leaders of the Bush administration's Antitrust Division that the failure to enforce the law has consequences that markets can't correct."[8]

Interestingly, the section of the book on mergers is the least coherent in terms of its relationship to Reback's basic thesis. Reback's discussion of the two large software mergers that he describes in detail—Thomson's acquisition of West and Oracle's acquisition of PeopleSoft—is his least persuasive discussion of the cases that he covers. He clearly believes that the Chicago School has had a deleterious impact on merger enforcement, but Thomson/West and Oracle/PeopleSoft in the end are not particularly good vehicles for making his point. This is principally because neither case seems to fit with his underlying theme regarding the constraining effect that the Chicago School has had on antitrust enforcement.

Reback devotes a large number of pages to the Thomson/West merger (he represented a complainant, Lexis/Nexis) and is sharply critical of the government's analysis and performance both in evaluating the transaction and in advocating a settlement during the Tunney Act process.[9] It is nevertheless hard to identify the precise doctrinal argument that Reback has with the government's handling of the matter, other than that he believes that the Antitrust Division defined the markets far too narrowly. Perhaps it is simply that he views the Division's arguably somewhat rigid application of the Baxter-refined Merger Guidelines that resulted in the definition of these narrow markets as evidence of the success that Baxter had in imbuing government enforcement with the Chicago School's way of thinking. But, if that is the point, Reback never makes it very clearly and instead begins and ends the story about the merger by making reference to the campaign contributions made by West before the Division's review of the merger. The implication is clear: The Division's analysis of the Thomson/West merger was bought by political contributions. Even if true, while it is obviously not how the Department should evaluate mergers, it does not seem to have very much to do with the influence of the Chicago School.

Oracle is an even bigger puzzle in this respect. I know from talking with Reback that he (at least initially) intended part of the book to be about the challenges that government lawyers face in litigation. Reback and I spoke at length about *Oracle*, since it was a case with which I was deeply

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[6] In Reback's view, one of the most significant differences in software markets is that they are susceptible to tipping (that is, they can move quickly towards a single standard) and thus can be subject to monopolization fairly early in their development. Tipping thus increases the risk associated with delaying intervention. Reback, *supra* note 1, at 170.

[7] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[8] REBACK, *supra* note 1, at 252.

[9] Reback uses the Thomson/West Tunney Act proceeding as the introduction to a brief digression on the history of the Tunney Act.

involved when I worked at the Antitrust Division. While Reback's recounting of the events from the case is largely accurate (although he left out my favorite story from the day that Larry Ellison testified), I had hoped for a more optimistic narrative to come out of the chapters on the case. It was a painful loss for those of us who worked on the case, particularly given the tone of Judge Walker's opinion, the details of which Reback describes in the book. But many both inside and outside the Antitrust Division believe the decision was legally incorrect, and I have rarely heard someone say that they believe the case the Division put on was somehow theoretically or factually deficient. That is, I have not heard a particular criticism leveled at the Division relating to the *Oracle* case that the Division somehow relied too much on the Chicago School in its analysis. And, to be fair, Reback doesn't make this claim either. So, while it is a natural case for Reback to spend some time on, given his extensive involvement on behalf of PeopleSoft, it does not in the end seem to fit very well into the overall narrative of the book.

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Reback closes by covering his experiences with the Division during the Tunney Act proceedings on the SBC/AT&T and Verizon/MCI mergers. For me, it was during this part of the book that Reback's view of the role that politics plays in government antitrust enforcement really stood out. Having been a career Antitrust Division lawyer for almost ten years, with almost half of that time as a Section Chief, I certainly recognize that representatives of different political parties have different enforcement policies and those differences can play a role in the work of the Division. But I was nevertheless surprised at just how political Reback believes the process became. By the end of the book, it seems that most or all of the high profile enforcement decisions that were made by the Antitrust Division after the *Oracle* decision—and even some before it, like Thomson/West—were political decisions. And by that Reback does not mean just that the Bush administration political appointees who ran the Antitrust Division were too tied to the Chicago School way of thinking. He seems to mean, instead, that pure political pressure (including editorials from the *Wall Street Journal*) dictated many of the results. It is a difficult point of view to refute, since there is much that those of us who worked on some of the matters that he references cannot say, but, as someone who was responsible for making enforcement recommendations during the Bush administration, I can say that I do not share Reback's perspective on this issue. Suffice it to say that the factors that go into decisions on whether to take an enforcement action on behalf of American consumers are numerous and varied and the career lawyers in the Antitrust Division who are responsible for recommending cases rarely have politics on their minds.

Free the Market is an enjoyable and entertaining read, especially for those of us who like a little inside baseball. Reback does a nice job of getting behind the scenes in some of the biggest antitrust matters of the last two decades (particularly in the tech space) and provides the reader—in colorful and lively writing—with his perspective on what has gone wrong and right with antitrust during this period. You might not always agree with the stories that Reback tells or the perspective that he adds, but they are interesting and provide an opportunity for all of us to get a fresh—and uniquely "Reback"—perspective on some of these very important cases. ●