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BREAKING NEWS: Rand Paul Proposes to Repeal Federal Antitrust as to “Individuals”

Christopher Sagers (Cleveland-Marshall College of Law) · Wednesday, April 4th, 2012

Senator Rand Paul of Kentucky, the freshman Republican and Tea Party favorite, is only slightly more famous as the son of Representative Ron Paul than as the deliberate namesake of Ayn Rand. Last Thursday he introduced a genuine [humdinger](#).

Deploying that prowess for economic and legal analysis that may characterize many ophthalmologists, Senator Paul seems to believe the bill does no more than limit FTC jurisdiction (consider his [comments](#) to that effect to *The Hill*).

But that is quite wrong. His so-named “Anti-Trust Freedom Act of 2012” would entirely repeal federal antitrust as to any conduct by “individuals.” It provides in its entirety as follows:

The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) shall not be construed to prohibit, ban, or otherwise extend to any voluntary economic coordination, cooperation, agreement, or other association, compact, contract, or covenant entered into by or between any individual or group of individuals.

That gets pretty much all of it—all § 1 conduct, all transactions otherwise covered by Clayton § 7, and virtually all conceivable “exclusionary conduct” under Sherman § 2—so long as the defendants consist only of “individuals” or “group[s] of [them].” And plainly the limitation to “individuals” would be chaotic and unpredictable, and I think likely devastating. It would revisit the same absence of any antitrust theory of the firm that was at the heart of *American Needle*. In some sense any business firm is a “group of individuals,” and while most courts might hesitate to construe that term in a way that would eviscerate antitrust, some courts would not hesitate, and even those that would will find some cases quite ambiguous. Is not a sports league really just a “group of individuals,” for example?

It may very well be, as some press reports suggest, that Paul only has in mind protecting doctors groups and other coalitions of individual professionals or small businessmen. But I think as a practical matter, as to a very wide swath of economic activity, antitrust would be gone.

A small mystery is where this came from. Senator Paul’s evident confusion suggests he didn’t write it and perhaps has not read it. There are no co-sponsors, and there is no accompanying press

release, floor statement, or evidence by whom or for whom it was written. My guess is that it comes from someone at Cato, as *The Hill* makes reference to an apparently non-public “description” of the bill issued by Paul’s office, which appears to quote from this Cato [blog post](#). Of course, on a practical level this is essentially a stunt, since Chairmen Leahy and Kohl would give such a bill no committee time even if it weren’t introduced at the very tail end of a congressional term in a presidential election year.

Why exactly do they do these things?

Anyway, one should hardly be surprised. Here’s some disquieting [footage](#) from 1983 of Senator Paul’s father, appearing alongside economist Dominick Armentano, the two of them saying such things as that there has never been an “effective” conspiracy of any kind, that many or most monopolies are desirable, and that antitrust constitutes an unconstitutional ex post facto law. “A free market,” says Dr. Armentano, “is precisely that. It is a market free of intervention. And once you remove the regulation [i.e., antitrust], the market will be competitive.” (See 10:30 – 11:10) Representative Paul, though he appears never actually to have introduced an antitrust repealer, openly endorses repeal here. (See 11:15+)

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