

Common sense returns to antitrust

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I. INTRODUCTION

It is an extraordinary time in antitrust. The future of American democracy is in doubt. Many people have gravitated to a strongman politics, their anger fuelled by a sense of despair and powerlessness. Unimaginable wealth has accumulated in a few hands, while average life expectancy has fallen.¹ Communities find themselves at the mercy of distant corporate interests, their local businesses and sense of self-determination long since gone. Democratic institutions are seen by many as illegitimate, and no wonder: The actions of government more often reflect the priorities of corporate executives than the needs and desires of citizens.²

Democracies are sustained by checks and balances that limit the accumulation of power. Anti-monopoly laws are thus essential to democracy's basic design: they block concentrations of economic power that can be every bit as tyrannical as a king. And so, in the mid-2010s, as the USA struggled with extreme inequality, a teetering democracy, and the rise of tech giants that possessed Godlike powers of surveillance and control, many people naturally turned their attention to antitrust. How was it that our laws to check concentrated power seemed to be doing nothing of the sort?

Propelled by a small group of advocates, this once obscure area of policy burst into the public discourse. Anti-monopolists soon began gathering converts. To the surprise of many, one of those newly minted reformers was Joe Biden. Six months into his presidency, Biden gave a momentous speech. Reflecting on 40 years of the Chicago School approach to antitrust, he declared, 'the experiment failed'.³ His appointments—of Lina Khan, Jonathan Kanter, Tim Wu, and others—reflected the depth of that conclusion.

The change in enforcement has been sweeping. Consider just 10 years ago, when Biden was vice president. In 2013, the Federal Trade Commission (FTC) voted unanimously to

¹ Robert H Shmerling, 'Why Life Expectancy in the US is Falling' (*Harvard Health Blog*, 20 October 2022) <www.health.harvard.edu/blog/why-life-expectancy-in-the-us-is-falling-2022.10.20.2835> accessed 2 April 2023.

² Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy* (The New Press 2019).

³ 'Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy' (The White House, 9 July 2021).

close an investigation of Google, despite agency staff concluding that the company had significantly harmed competition.⁴ Massive mergers sailed through, including the Penguin and Random House deal, and the merger of American Airlines and US Airways. The Robinson–Patman Act was a dead letter, even as Walmart openly brandished its power over suppliers.⁵ The FTC had abandoned its responsibility to police ‘unfair methods of competition’, a position it would codify in 2015.⁶ At times the agencies even abetted monopolies, as when the FTC deterred states from regulating pharmacy benefit managers (PBMs), who were wielding their vertical market power to hobble competitors and inflate drug costs.⁷

Today, the landscape is wholly different. The Department of Justice (DOJ) sued to break up Google. The FTC is widely expected to do the same with Amazon. Multiple monopolization cases are underway. The FTC put PBMs on notice that their practices may be illegal.⁸ The agencies are rewriting their merger guidelines, in what promises to be the most significant reorientation of policy in 40 years. The DOJ persuaded a court to block a major merger in publishing on the basis of harm to labour markets.⁹ The FTC recovered its section 5 authority and issued a proposed rule banning non-compete clauses in employment contracts. The Robinson–Patman Act is back.¹⁰

In the press and policy circles, analysis of this profound shift has focused on those leading it and for good reason. Khan and Kanter have each brought a transformative vision and execution to their work. And suffice it to say, neither belongs to the chickenshit club.¹¹ But the revolution they’re leading is also being propelled by broader changes in American thought and politics. These have gotten less attention, but offer good reason to believe that the turn away from the Chicago School and venture down a new path is likely to endure even after Khan and Kanter are no longer at the helm. The remainder of this essay explores three of these shifts, which, in different ways, have each brought a newfound common sense to antitrust.

II. CONSUMER WELFARE IDEOLOGY IS DEAD

One marker that we have made a durable break with the past is that the ideology of consumer welfare has lost its hold. (Consumer welfare is often discussed as a legal standard, though Jonathan Kanter has deemed it less of a standard and more of a ‘catch phrase’.¹² In any case, it is also an ideology that, until recently, had widespread currency in American thought.) Put simply, many people do not buy it anymore. The notion that ever larger and more consolidated corporations would deliver higher output with greater efficiency and that Americans would share in the fruits has given way to the stark reality that most people are worse off.

⁴ Brody Mullins, Rolfe Winkler and Brent Kendall, ‘Inside the US Antitrust Probe of Google’ *Wall Street Journal* (New York, 19 March 2015) A1.

⁵ Paul Ziobro and Serena Ng, ‘Wal-Mart Ratchets Up Pressure on Suppliers to Cut Prices’ *Wall Street Journal* (New York, 31 March 2015) A1.

⁶ FTC, ‘Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act’ (13 August 2015).

⁷ Stacy Mitchell and Zach Freed, ‘How the FTC Protected the Market Power of Pharmacy Benefit Managers’ (*ProMarket*, 19 February 2021) <www.promarket.org/2021/02/19/ftc-market-power-pharmacy-benefit-managers/> accessed 10 March 2023.

⁸ Federal Trade Commission, ‘Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products’ (16 June 2022).

⁹ Dan Papsun, ‘Penguin-Simon Deal Block Spotlights DOJ Antitrust Focus on Labor’ (*Bloomberg Law*, 1 November 2022) <<https://news.bloomberglaw.com/antitrust/penguin-simon-deal-block-spotlights-doj-antitrust-focus-on-labor>> accessed 22 March 2023.

¹⁰ Brendan Case, ‘Roosevelt-Era Law Gets Revival as FTC Targets Consumer Behemoths on Pricing’ (*Bloomberg*, 17 January 2023) <www.bloomberg.com/news/articles/2023-01-17/roosevelt-era-law-gets-revival-as-ftc-targets-consumer-behemoths-on-pricing> accessed 22 March 2023.

¹¹ A phrase popularized by Jesse Eisinger, *The Chickenshit Club* (Simon & Schuster 2017).

¹² Jonathan Kanter (Remarks delivered at New York City Bar Association’s Milton Handler Lecture, New York, 18 May 2022).

Consumer welfare's initial tumble came because it failed to account for people's well-being as workers, entrepreneurs, and citizens. Some of the first cracks came in the form of reporting and studies that traced many troubling economic trends—including stagnant wages, growing inequality, and declining startups—to concentration.¹³ Other work documented how small businesses in certain industries outperformed their larger rivals on price, service, innovation, and other measures and yet were losing ground because of unchecked monopoly power.¹⁴ These stories resonated with many Americans who felt the effects viscerally in lost family enterprises, growing domination and precarity at work, and the inability to afford the important things in life, including housing and education—problems that no amount of cheap goods from Walmart could solve.

More recently, the ideology of consumer welfare has crumbled on its own terms. It is hard to ignore the fact that many parts of the US economy no longer work very well. Concentration has rendered our systems for producing goods highly vulnerable; the shutdown of a single facility can leave supermarket shelves bereft of meat or formula.¹⁵ We pay inflated prices for substandard service when taking flights, subscribing to broadband, and purchasing concert tickets.¹⁶ We have no choice but to surrender our privacy to access key services. Over the last 2 years, major food conglomerates have gleefully jacked up grocery prices and logged record profits, relying on inflation as a cover story and the lack of competition to get away with it.¹⁷ And despite decades of antitrust policy predicated on maximizing output, concentration has fuelled the spread of food deserts, pharmacy deserts, broadband deserts, hospital deserts, banking deserts, and more, leaving communities without basic services.

What has become clear is that consumer welfare ideology has not safeguarded consumers so much as it has used claims about consumers to legitimize the consolidation of power. It has positioned the well-being of workers, upstream producers, and small businesses as inherently oppositional to the interests of consumers, thus justifying their exploitation by dominant firms. At the same time, it has adopted presumptions about efficiency that assert a natural alignment between the growth of large corporations and consumer interests. These intellectual moves helped validate 40 years of antitrust policy designed to deliver not more competition, but greater concentration.

Much has been written about the flaws of consumer welfare as a legal standard, but its loss of viability in the broader public discourse has come from a recognition of its role in facilitating a transfer of power and liberty from people (in all of their manifestations as workers, entrepreneurs, consumers, and citizens) to a few corporations—all while obscuring that questions of power were even in play. Its collapse is part of a broader disillusionment with neoliberalism.¹⁸

¹³ Noam Scheiber and Ben Casselman, 'Amid Mergers, Wages Lag in Heartland' *New York Times* (New York, 25 January 2018) B1; Ian Hathaway and Robert Litan, 'What's Driving the Decline in Firm Formation Rate?' (Brookings Institute, November 2014).

¹⁴ Stacy Mitchell, 'The View from the Shop—Antitrust and the Decline of America's Independent Businesses' (2016) 61(4) *The Antitrust Bulletin* 498. See also, eg, David Dayen, 'Bring Back Antitrust' *The American Prospect* (Washington, D.C., Fall 2015) 46.

¹⁵ Ron Knox, 'Monopolies in Meat' *The American Prospect* (Washington, D.C., 4 May 2020) <<https://prospect.org/economy/meat-monopolies-endanger-workers-farmers-consumers/>> accessed 4 March 2023.

¹⁶ Thomas Philippon 'The Economics and Politics of Market Concentration' *The Reporter* (National Bureau of Economic Research, December 2019) <www.nber.org/reporter/2019number4/economics-and-politics-market-concentration> accessed 20 April 2023; Christopher Cranson, 'Exploring Ticketmaster's Monopoly on the Concert Ticketing Market' *Michigan Journal of Economics* (Ann Arbor, Mich., 20 December 2022) <<https://sites.lsa.umich.edu/mje/2022/12/20/exploring-ticketmasters-monopoly-on-the-concert-ticketing-market/>> accessed 20 April 2023.

¹⁷ Isabella M Weber and Evan Wasner, 'Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?' (2023) University of Massachusetts Economics Department Working Paper.

¹⁸ Felicia Wong, 'The Post-Neoliberal World Is Already Here' *Democracy Journal* (Washington, D.C., 7 May 2020) <<https://democracyjournal.org/magazine/the-post-neoliberal-world-is-already-here/>> accessed 20 April 2023.

III. ANTI-MONOPOLY HAS A POLITICAL BASE

Another sign of the durability of the new direction in antitrust is that it has attracted a base of grassroots support. It is not only that tackling corporate power is popular, though it is. The share of Americans who believe that ‘large corporations have a positive effect on the way things are going in the country’ has fallen to fewer than one in four.¹⁹ Nearly 70 per cent say the Big Tech companies have too much power and most want them broken up.²⁰ Strikingly, these views are held by identical shares of Democrats and Republicans.

But even more significant is that antitrust reform has developed a base—a set of people who have a deep stake in change because their livelihoods are on the line. The last few years have seen a surge of advocacy by these groups. Independent grocers have spotlighted the harms of price discrimination.²¹ Musicians have pushed for a breakup of Live Nation/Ticketmaster.²² Ranchers have advocated for invigorating the Packers and Stockyards Act.²³ Small business and labour groups have called for breaking up Amazon.²⁴ The FTC’s proposed rule banning non-competes has generated over 26,000 public comments and surfaced many moving stories from nurses, hair dressers, and others who have been ensnared by these restrictions.²⁵

This base has long existed, but only in latent form. In the mid-2000s, I interviewed dozens of small retailers and manufacturers for a book about Walmart. Many brought up antitrust unprompted. Describing experiences of predatory behaviour, they would say something like, ‘I thought we had laws against this’. But by then, not only had the laws been subverted, but the agencies had also become impervious to input from ordinary people.²⁶ Enforcers operated far removed from the public, their actions guided more by economic models than the real-world experiences of market participants. The concerns of small businesses were dismissed as a matter of course, often with the vacuous refrain that antitrust is concerned with ‘competition, not competitors’.

‘Nearly all key decisions that reshaped antitrust policy were made by regulators and judges with relatively little democratic accountability,’ conclude Filippo Lancieri, Eric A Posner, and Luigi Zingales in a study of the Chicago School’s takeover of antitrust.²⁷ Sidestepping public debate was crucial to the project’s success. Big business and its allies knew that they could not win an open debate in Congress to gut the statutes, hence their clandestine approach, which included issuing new merger guidelines in 1982 that effectively rewrote the law.²⁸ This covert strategy was made easier by two developments. One was that, after decades of

¹⁹ Pew Research Center, ‘Anti-Corporate Sentiment in US is Now Widespread in Both Parties’ (17 November 2022) <www.pewresearch.org/short-reads/2022/11/17/anti-corporate-sentiment-in-u-s-is-now-widespread-in-both-parties> accessed 23 March 2023.

²⁰ Rani Molla, ‘Poll: Most Americans Want to Break Up Big Tech’ (*Vox*, 26 January 2021) <[www.vox.com/recode/22241053/antitrust-google-facebook-break-up-big-tech-monopoly](http://www.vox.com/recode/2021/01/26/22241053/antitrust-google-facebook-break-up-big-tech-monopoly)> accessed 2 April 2023.

²¹ Claire Kelloway, ‘Independent Grocers Call on Congress to Revive a Forgotten Antimonopoly Law’ (*Food & Power*, 18 March 2021) <www.foodandpower.net/latest/nga-whitepaper-rp> accessed 12 April 2023.

²² Dave Clark, ‘Industry Coalition Asks Congress to Break Up LN/Ticketmaster’ (*Ticket News*, 30 January 2023) <www.ticketnews.com/2023/01/industry-coalition-asks-congress-to-break-up-ln-ticketmaster/> accessed 12 April 2023.

²³ Lisa Held, ‘Farmers and Ranchers Head to DC to Level the Playing Field’ (*Civil Eats*, 19 July 2019) <<https://civileats.com/2019/07/19/farmers-and-ranchers-head-to-dc-to-level-the-playing-field/>> accessed 12 April 2023.

²⁴ Amrita Khalid, ‘A New Coalition of Small-Business Groups Is Urging Congress to Break Up Amazon,’ *Inc.* (New York, 8 April 2021) <www.inc.com/amrita-khalid/amazon-calls-coalition-of-small-businesses-urging-congress-to-break-it-up-misguided.html> accessed 12 April 2023.

²⁵ See FTC-2023-0007-0001 at www.regulations.gov/document/FTC-2023-0007-0001; Emily Holzknecht and Adam Westbrook, ‘The Great American Labor Trap’ *New York Times* (New York, 11 April 2023) <www.nytimes.com/video/opinion/100000008785506/ftc-noncompete-clause-rule.html> accessed 12 April 2023.

²⁶ Harry First and Spencer Weber Waller, ‘Antitrust’s Democracy Deficit’ (2013) 81 *Fordham LR* 2543.

²⁷ Filippo Lancieri, Eric A Posner and Luigi Zingales, ‘The Political Economy of the Decline of Antitrust Enforcement in the United States’ (20 March 2023) <<https://ssrn.com/abstract=4011335>> accessed 12 April 2023.

²⁸ Erik Peinert, ‘Mergers and Smoking Guns’ (*ProMarket*, 13 May 2022) <www.promarket.org/2022/05/13/mergers-and-smoking-guns/> accessed 12 April 2023.

effective enforcement, Americans had stopped paying attention to monopoly and turned to other issues.²⁹ The second was that, by the 1980s, the Democratic Party had abandoned its commitment to small business, which had been a key part of the party's coalition since the New Deal.³⁰ This left a crucial constituency without a political home from which to organize a defence of America's anti-monopoly policies.

Monopoly has now returned as a live issue, and small businesses and workers have taken centre stage. Since 2019, Congressional committees have held numerous hearings on monopoly power featuring testimony from, among others, a grocer, poultry farmer, wholesaler, pharmacist, singer-songwriter, concert promoter, app developer, warehouse worker, and delivery driver.³¹ After one electrifying hearing in 2020, when the House Judiciary Committee compelled Jeff Bezos, then CEO of Amazon, to respond to statements from small businesses that had been bullied by Amazon,³² a business owner in Michigan emailed me to say that the hearing brought tears to his eyes. 'It was so long awaited to just feel even a little bit like the playing field would become even,' he wrote.

Many of these stakeholders have a new understanding of antitrust and the potential of the agencies to rectify the market power problems they face. Lina Khan has furthered this sense of expectation and accountability by encouraging the public to lay claim to the FTC, to see it as a watchdog for 'consumers, workers, and honest businesses'.³³ In one of her most important moves, she opened commission meetings to the public and included time for comments, a sharp break from past practice when votes were taken behind closed doors and regular people were never heard from.³⁴ Similarly, Kanter has championed the idea that the agencies should use 'the language of the people' and vowed that the forthcoming merger guidelines would do so. Dispensing with technical language, he has said, will ensure that Americans can engage in 'critical discourse about how their economy is structured'.³⁵

This genie is not going back in the bottle. Strengthened antitrust has become part of the policy agenda of business groups, labour unions, consumer organizations, and more. With roots in both blue and red America, these stakeholders are one reason that efforts to discredit Khan by big business interests have thus far failed to gain much traction.³⁶ Members of Congress are hearing from grocers, pharmacists, and others in their districts who give her rave reviews. Looking ahead, this democratization of antitrust will likely help sustain the path of reform. And it could even begin to rebuild Americans' lagging faith in government by demonstrating an approach to policymaking that's responsive to people, rather than dominant corporations.

IV. THE REDISCOVERY OF THE STATUTES

Finally, it is worth reflecting on the extraordinary power of the language and legislative history of the antitrust statutes. These laws are now drawing a wider audience of lawmakers, advocates, journalists, and citizens. For those who do not remember a time before the

²⁹ Stacy Mitchell, 'The Rise and Fall of the Word "Monopoly" in American Life' *The Atlantic* (Washington, D.C., 20 June 2017) <www.theatlantic.com/business/archive/2017/06/word-monopoly-antitrust/530169/> accessed 17 March 2023.

³⁰ Stacy Mitchell and Susan R. Holmberg, 'Why the Left Should Ally With Small Business' *The Nation* (New York, 30 November 2020) 19.

³¹ See hearing records of the US Senate Judiciary Committee and the US House Judiciary Committee.

³² Hearing of the US House Judiciary Committee, 'Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google' (19 July 2020).

³³ Tweet from Khan <<https://twitter.com/linakhanFTC/status/1404841168182169602>> accessed 17 March 2023.

³⁴ Ben Brody, 'Lina Khan Wants to Hear from You' (*Protocol*, 30 July 2021).

³⁵ Jonathan Kanter, 'Antitrust Enforcement: The Road to Recovery' (Speech delivered at University of Chicago Stigler Center, Chicago, 21 April 2022).

³⁶ Emily Birnbaum, 'Critics of Biden's Antitrust Push Target FTC's Lina Khan' (*Bloomberg*, 2 March 2023) <www.bloomber.com/news/articles/2023-03-02/lina-khan-becomes-target-for-biden-antitrust-critics> accessed 20 April 2023.

Chicago School, the antitrust statutes can sound like the laws of an alternate universe. ‘Efficiency’ is absent from the text, while there is much talk of fairness. Mergers are intrinsically suspect, deemed illegal if they ‘may’ substantially lessen competition. It is striking too how much the laws and their history speak to the challenges of today. In passing the Antimerger Act in 1950, for example, Congress was deeply concerned about how concentration, and the loss of community self-determination that comes with it, can destabilize democracy.³⁷

This broader excavation of the laws is lending momentum to the new frameworks that Neo-Brandeisians are developing. These frameworks seek a more democratic approach to policy, grounded in clear rules applied to observable market structures, rather than decisions driven by opaque (and deeply flawed) economic modelling of future of price effects. They also give much greater attention to defining and policing fair competition, in light of the crucial importance of fairness in a democratic political economy. Perhaps most importantly, they dispense with the Chicago School’s fiction that markets exist independently of policy and instead embrace transparency about the policy choices being made.

Whether this new attention to the plain language of the statutes and their legislative history will change how the courts interpret antitrust law remains a key question, of course. But there is good reason to believe that it will, though it may take some time. Both agencies have vowed to bring cases aimed at reorienting the case law, and the DOJ’s defeat of the Random House and Simon and Schuster merger on labour market grounds shows how this can work. We can also expect that the forthcoming merger guidelines will shape how judges understand and apply the statutes. As Hillary Greene has shown, the 1982 guidelines had a significant impact on judges, not only in regard to mergers, but across antitrust cases.³⁸

One way or another, new thinking will almost assuredly arrive as new people increasingly enter the field, including those who go on to work at the agencies, or perhaps run for office or eventually join the bench. Reflecting on his recent visits to law schools, Jonathan Kanter offered an observation about law students that could well serve as a summation of the broader changes afoot in antitrust. Students, he noted, ‘are coming at this fresh with a degree of common sense that perhaps was missing from how we thought about these issues over the last thirty years’.³⁹

³⁷ Stacy Mitchell and Ron Knox, ‘Rolling Back Corporate Concentration’ Institute for Local Self-Reliance (Report, June 2022) <<https://cdn.ilsr.org/wp-content/uploads/2022/06/ILSR-New-Federal-Anti-Merger-Guidelines-Can-Restore-Competition.pdf>> accessed 20 April 2023.

³⁸ Hillary Greene, ‘Guideline Institutionalization’ (2006) 48 William Mary LR 771.

³⁹ Jonathan Kanter (Remarks delivered at Open Market Institute’s Renewing the Democratic Republic conference, Washington DC, 15 February 2023) <www.youtube.com/watch?v=mnVfxLQGg> accessed 20 April 2023.