

Antitrust and Political Economy

The theoretical foundations of antitrust law are contested. In the 1970s, legal scholars and economists at the University of Chicago attempted to use economic principles to reduce government intervention in markets and reduce the level of antitrust enforcement. That movement was very successful in the United States and greatly impacted judges and jurisprudence.

But advancements in legal and economic theory long ago led most antitrust academics to abandon the conclusions (less enforcement is better) of the Chicago School. Modern economics can explain and measure a far broader set of competition problems than in the past. Today, many argue the need for well-founded enforcement to tackle a range of competition problems that have grown up in the last decades. Neoliberal approaches have nonetheless stayed alive in policy and judicial circles, often propped up by the firms that stand to gain from keeping their market power.

More recently, political economists and critical legal theorists have started to reexamine the theoretical foundations of antitrust. These approaches emphasize the political nature of antitrust law and build on a broader literature in comparative political economy and economic history. This work features a few core themes:

- 1) Questions of private power and freedom from private coercion are fundamental to antitrust and market regulation.
- 2) Legal institutions construct markets through a political process. These institutions shape market competition in ways that favor certain groups. Legal structures are often more important determinants of market structures than economic forces.
- 3) Economic approaches pay insufficient attention to the normative foundations of markets.
- 4) Markets rely on a balance between cooperation and competition. Institutions can structure cooperation and competition in different ways, with different distributional implications.
- 5) Insufficient attention to the distributional implications of market activity can threaten democracy and social cohesion.

Reading

Required Reading

Lina Khan, *The New Brandeis Movement: American's Antimonopoly Debate*, 9 J. EURO. COMPETITION L. & PRAC. (2018).

Jonathan Baker, *Finding Common Ground Among Antitrust Reformers* (2022).

Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2020)

Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2019)

[Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051 \(1979\)](#)

Background Reading

J Kirkwood and R Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers not Increasing Efficiency' (2008) 84 Notre Dame L. Rev 191

Louis B. Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979),

Lina Khan, The Ideological Roots of America's Market Power Problem, 127 Yale Law Journal Forum 960 (June 4, 2018)

Carl Shapiro, Antitrust in a Time of Populism, Int'l J. indus. Org. (2018).

Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551, 563–64 (2012).

Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, Harvard Law and Policy Review 11 (2017)