A Free Market Is a Fair Market

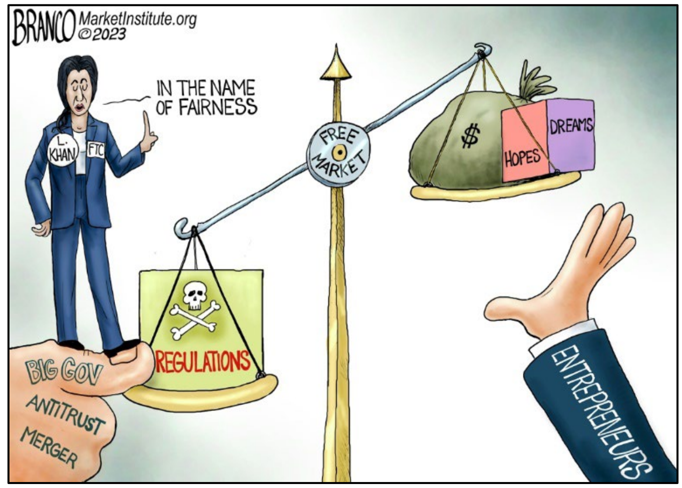
November 10, 2022, marked a significant day in American regulatory history because the Federal Trade Commission (FTC) released its "Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act." Behind this wonky title is a dramatic reinterpretation and expansion of the FTC's authority.

Khan is a leader of the neo-Brandeisian movement. Named for former Supreme Court Justice Louis Brandeis, who favored using antitrust laws to punish big business for the "crime" of being big. They also want to use antitrust to advance a variety of so-called progressive social goals taking a "holistic" approach to antitrust that "recognizes harms of anti-competitive behavior beyond those experienced by consumers."

The Courts: The Supreme Court has already ruled that, under Khan's leadership, the agency exceeded the congressionally imposed limits of its power several times including ***AMG Capital Management, LLC v. FTC***, 593 U.S. ___ (2021) and ***West Virginia v. Environmental Protection Agency***, 597 U.S. ___ (2022).

However, it is not out of the realm of possibility that the Supreme Court's conservative majority would uphold the agency's new policy. Not because they agree with it, but because Congress gave the agency authority to define what constitutes "fair" practices. Therefore, it is the job of Congress—not the courts—to set limits on how the FTC can use its mandate to stop unfair business practices.

Consumer Welfare Standard: The FTC's policy guidance does not explicitly mention the consumer welfare standard. However, displacing the consumer welfare standard that has dominated antitrust enforcement since at least the 1980s is the linchpin of the neo-Brandeisian agenda.



The consumer welfare standard posits that regulators should judge a business's actions by how they impact consumers, not by an abstract and subjective idea of "perfect competition" or "fairness" to competitors. As Judge Robert Bork antitrust law "necessarily implies a legislative decision that business units should prosper or decline, live or die according to their abilities to meet the desires of their consumers."

The consumer welfare standard began to displace the "bigness" standard during the Carter Administration and become the dominant approach to antitrust enforcement during the Reagan years. Even the liberal Clinton and Obama administrations—which favored more vigorous enforcement of antitrust than the Reagan administration—maintained the consumer welfare standard.

Attacks on the Consumer Welfare Standard: Progressives often claim is that the consumer welfare standard means that antitrust law only focuses on whether an alleged "anticompetitive" action lowers consumer prices. This distorts Bork's point, which is that antitrust law should, to the greatest extent possible, mirror the way businesses actually operate. In a free market, all businesses operate with the goal of adding value to their shareholders. As the great economist Ludwig Von Misses put it, the consumer is sovereign.

Another argument against the consumer welfare standard is that since antitrust enforcers began using it as a guide for whether to file antitrust cases, market concentration has risen thus leading to less competition. Former FTC counsel and current senior research fellow in antitrust and competition policy at the Mercatus Center, Alden Abbott, pointed out that the FTC won every litigated hospital merger case in the 21st century, until finally losing a challenge to a Philadelphia-area merger in 2021. And, Robert Kulick (of NERA Economic Consulting and the American Enterprise Institute) agrees pointing to the Herfindahl-Hirschman Index (HHI) declining significantly in manufacturing since 2002.

The real reason neo-Brandeisians dislike the consumer welfare standard is it stops them from using antitrust as a vehicle to punish business for engaging in conduct that violatea their subjective notions of fairness.

A Free-market Fairness Agenda for Antitrust: The FTC's "fairness" mandate should be used to ensure all who wish to enter a marketplace can enter and freely compete with an existing firm in order to better serve consumers. In other words, truly implementing "fairness" would lead us back to the consumer welfare standard.

An example of an "unfair" government policy is corporate welfare. For example, the International Monetary Fund and Export-Import Bank use taxpayer money to subsidize American businesses' overseas ventures, thus providing a benefit to those businesses while putting their (usually smaller) competitors at a disadvantage.

Other forms of unfairness include "too big to fail" protections and regulations whose costs are easily absorbed by large, existing firms but can crimple small businesses and discourage new entries into the market.

The FTC could shine a public spotlight on the ways in which laws and regulations benefit entrenched business at the expense of small and start-up businesses, workers, and consumers. This could even revive the left-right coalition that flourished under the Carter presidency and led the deregulation of the airline, trucking, and train industries.

Carter's deregulation agenda was supported by liberals like Ralph Nader and Sen. Ted Kennedy (with the counsel of his then-young aide progressives like Chair Kahn and even "centrists" Democrats like Minnesota Sen. Amy and future Supreme Court Justice Stephen Breyer) who understood that regulations often serve to protect larger firms against upstart competitors. In contrast, the agenda of today's Klobuchar would lead to de facto government-created and enforced cartels.

Conclusion: FTC Chair Lina Khan has seized on the agency's statutory mandate to punish "unfair" business practices to justify her expanding usage of federal antitrust laws into a grant of authority for the FTC to second-guess and block any business decision that violates the FTC's board sense of "fairness."

Instead, the FTC should spend its time and taxpayer-provided budget on identifying and repealing government policies that tilt the playing field toward certain politically favored businesses—either intentionally or as an unintended consequence of government intervention in the marketplace.

This approach would strengthen free-markets, making markets more efficient to the benefit of small business, workers, and consumers. Defenders of the free market must take advantage of this opportunity to break progressives' monopoly on defining fairness as something to be enforced by government bureaucrats themselves.