



# **A Free Market is a Fair Market**

**Charles Sauer**

**Norm Singleton**

April, 2023

## I. 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.”<sup>1</sup> Behind this wonky title is a dramatic reinterpretation and expansion of the FTC’s authority. The agency based this expansion on a revised interpretation of Section 5 of the Federal Trade Commission Act, which tasks the agency with punishing businesses who engage in “unfair” methods of competition.



In the policy document, as well as other public speeches, FTC Chair Lina Khan cites legislative history stating members of Congress gave her agency the authority to punish “unfair” business practices because they wanted the power to outlaw practices that were not prohibited under the existing

Sherman and Clayton Antitrust Acts.<sup>2</sup> Specifically, Khan points to concerns expressed by Congress that the judiciary’s use of a “rule of reason” to adjudicate federal antitrust cases would narrow enforcement, thus allowing conduct Congress intended to outlaw, but judges and/or federal prosecutors determined was “reasonable.” In contrast, the FTC intended to have broad discretion to police business conduct based on the agency’s determination of whether the conduct at issue was “unfair.”

<sup>1</sup> Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, Commission File No. P221202 (Federal Trade Commission, Nov. 10, 2022). Online [here](#).

<sup>2</sup> Lina Kahn, Prepared remarks to Fordham Annual Conference on International Antitrust Law & Policy (Federal Trade Commission, Sept. 16, 2022). Online [here](#).

Khan's arguments were elaborated upon by fellow FTC Commissioner Alvaro Bedoya, who, when speaking before the Midwest Forum on Fair Markets,<sup>3</sup> said the FTC needed to stop judging business actions by whether they promote "efficiency" and rather focus on if the business treated their competitors, workers, and other stakeholders "fairly."

Like Khan, Bedoya claimed such an approach reflected the intent of the Congress that created the FTC.

Khan became a superstar in the progressive policy world while in law school due to her article arguing for the enhanced use of antitrust to deal with the "threat" of Amazon,<sup>4</sup> eventually becoming a leader of the neo-Brandeisian<sup>5</sup> movement. Named for former Supreme Court Justice Louis Brandeis, who favored using antitrust laws to punish big business for the "crime" of being big,<sup>6</sup> the neo-Brandeisians favor using antitrust to rein in big business, especially big tech. They also want to use antitrust to advance a variety of so-called progressive social goals. Khan has tasked the agency with taking a "holistic" approach to antitrust that "recognizes harms of anti-competitive behavior beyond those experienced by consumers."<sup>7</sup>

Khan, Bedoya, and their allies seemingly hope grounding their expansive view of antitrust in an interpretation of the statute creating the FTC will insulate their expansion of antitrust from being struck down in Court for exceeding the agency's congressionally granted authority. This is a very valid concern since recently the Supreme Court ruled that, under Khan's leadership, the agency exceeded the congressionally imposed limits of its power. This occurred in the case of ***AMG Capital Management, LLC v. FTC***, 593 U.S. \_\_\_\_ (2021).<sup>8</sup> The Court ruled that the agency

---

<sup>3</sup> Alvaro Bedoya, *Returning to Fairness*, Prepared remarks to the Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street (FTC, Sept. 22, 2022) Online [here](#).

<sup>4</sup> Lina Khan, *Amazon's Antitrust Paradox* (Yale Law Journal, Vol. 126, Feb. 6, 2017) Online [here](#).

<sup>5</sup> Trevor Wagener, *The Curse of Tradeoffs: Neo-Brandeisians vs. Consumers* (Disruptive Competition Project, May 21, 2021). Online [here](#).

<sup>6</sup> Kenneth Elzinga and Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement* (Touro Law Review, Vol. 33, Article 15, 2017). Online [here](#).

<sup>7</sup> Lauren Feiner, *FTC Chair Lina Khan Outlines New Vision for Antitrust Enforcement, Consumer Protection* (CNBC, Sept. 23, 2021). Online [here](#).

<sup>8</sup> *AMG v. FTC: US Supreme Court Severely Limits FTC's Ability to Seek Monetary Relief* (Cooley Alert, April 29, 2021) Online [here](#).

exceeded its authority under Section 13 (b) of the Federal Trade Commission Act when it sought monetary restitution for consumers allegedly defrauded by AMG.

Additionally, outside of the FTC, the Supreme Court has also moved to limit government agencies from broad interpretations of their authority. Last year the Supreme Court ruled against the Environmental Protection Agency’s “climate change” regulation in the case of *West Virginia v. Environmental Protection Agency*, 597 U.S. \_\_\_\_ (2022) on the grounds that Congress did not give the EPA authority to address climate change. Some have suggested this precedent puts the FTC expansion in the crosshairs.<sup>9</sup> 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.

The Supreme Court’s rulings in these cases received a warm welcome from advocates of a more restrained approach to antitrust policy. Yet it is also a possibility that the FTC’s leadership push for, and recent advocacy in support of, “fairness” can also be used to justify an approach to antitrust laws that not only limits the damage Lina Khan and her allies can do to our already fragile economy, but actually enhance prosperity. This will be contingent upon how one defines fairness. For instance, there already is a superior alternative to the neo-Brandeisian approach to antitrust: the consumer welfare standard.

## II. 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.<sup>10</sup>

---

<sup>9</sup> Richard J. Pierce, Jr., *Important Changes at the Intersection of Antitrust and Administrative Law* (The Regulator Review, March 21, 2022) Online [here](#).

<sup>10</sup> Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork* (University of Chicago Journal of Law and Economics, vol. 57, August 2014) Online [here](#).

As the name suggests, the consumer welfare standard posits that regulators should judge 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, the leading proponent of the consumer welfare standard, stated in his classic work titled *The Antitrust Paradox*, 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."<sup>11</sup>

Bork was motivated to examine antitrust law because it "cannot be made rational until we are able to give a firm answer to one question: what is the point of the law—what are its goals?"<sup>12</sup>

To answer his question, Bork examined the legislative history of federal antitrust laws to understand both congressional intent and judicial history to see how courts had interpreted the laws. He also applied economic insights derived (as stated above) from the law and economics school, which taught that judges should, to the extent possible, try to interpret law in the way that best promoted economic efficiency.

Bork determined that Congress intended antitrust laws to promote economic efficiency by protecting competition in order to protect consumers. Therefore, the end goal of antitrust laws was to ensure markets serve consumers—not to ensure a "competitive market" by limiting the size of a company to ensure that company's competitors had a "fair" market share.

Bork's analysis of the legislative intent behind making naked price-fixing agreements "per se illegal" applies to all antitrust laws: "The only value that the per se rule implements is consumer welfare, since it 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."<sup>13</sup>

The consumer welfare standard began to displace the "bigness" standard during the Carter Administration and become the dominant approach to antitrust enforcement during the

---

<sup>11</sup> Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Simon & Schuster, 1978) p. 67

<sup>12</sup> Bork, p. 50

<sup>13</sup> Bork, p. 67

Reagan years.<sup>14</sup> Even the liberal Clinton and Obama administrations—which favored more vigorous enforcement of antitrust than the Reagan administration—maintained the consumer welfare standard. As Carl Shapiro, deputy director for antitrust in the Clinton Justice Department and one of President Obama’s Council of Economic Advisers, told the Senate, “I don't know any serious antitrust scholars who want to move away from the consumer welfare standard.”<sup>15</sup>

### III. Progressives’ Attacks on the Consumer Welfare Standard

The consumer welfare standard reigned as the guiding principle of antitrust law from the 1980s until the Biden Administration. However, during that time, it was not safe from criticism. Progressives never embraced the consumer welfare standard. For example, David Dayen, executive editor of the American Prospect, wrote that the consumer welfare standard replaced the idea that “bright-line rules limiting market share in a particular sector could nullify mergers or even break up companies’ into a technocratic debate among economists.”<sup>16</sup> In other words, it allowed economists to make rational arguments against punishing big business for the “crime” of being too big.

Another line of attack, presented by Bedoya in his speech at the Midwest Forum,<sup>17</sup> is that the consumer welfare standard means that antitrust law should only focus 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 Mises put it, the consumer is sovereign.<sup>18</sup>

---

<sup>14</sup> *A Brief History of the Consumer Welfare Standard* (Springboard, May 28, 2020) Online [here](#).

<sup>15</sup> David Dayen, *The Rehabilitation of Antitrust* (The American Prospect, Dec. 22, 2017) Online [here](#).

<sup>16</sup> Ibid.

<sup>17</sup> Khan, *Amazon's Antitrust Paradox*

<sup>18</sup> Robert P. Murphy, *Consumer Sovereignty: What Mises Meant* (Mises Institute, Nov. 11, 2003) Online [here](#).

Lower prices may be one way businesses seek to attract consumers, but it is hardly the only way. Product quality, customer service, ease of returning/exchanging products, and a product's longevity can all be ways for businesses to attract and keep consumers.

Bedoya claims the focus on lower prices shows that the consumer welfare standard is actually not about pleasing consumers, rather meeting some theoretical notion of "efficiency." Bedoya shares a heartbreaking story about a family who could not obtain cancer medicine for their child because their insurance company's Pharmaceutical Benefit Manger (PBM) decided it was more "efficient" for the family to wait two weeks to get the medicine in the mail. Now—even if the family saved a few dollars by waiting for the postman to deliver their child's cancer medicine—can any decent person claim making them wait enhances the family's welfare? The anecdote does not illustrate a flaw in the consumer welfare standard. Conversely, it emphasizes the intrinsic flaw in governmental policies that have put insurance agents, businesses who provide health benefits, and the government itself the center of the healthcare system in place of the individual patient.

The main 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. The problem with these arguments is they are factually incorrect. Former FTC counsel and current senior research fellow in antitrust and competition policy at the Mercatus Center, Alden Abbott, examined this claim in his article "The Consumer Welfare Standard and Antitrust Enforcement: A Response" published in the Promarket blog:<sup>19</sup>

Let's examine some facts that contradict the oft-repeated "competition has declined" story. Based on a detailed literature review, Chapter 6 of the 2020 Economic Report of the President concluded that "the argument that the U.S. economy is suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions.

---

<sup>19</sup> Alden Abbott, *The Consumer Welfare Standard and Antitrust Enforcement: A Response* (ProMarket, March 14, 2022) Online [here](#).

Furthermore, recent quantitative research by Robert Kulick (of NERA Economic Consulting and the American Enterprise Institute) is consistent with and supplements the 2020 Economic Report's findings. In presenting his research at the January 26 Mercatus Antitrust Forum, Kulick stressed that "[t]here is no general trend towards increasing industrial concentration in the U.S. economy from 2002 to 2017." In particular, industrial concentration has been declining since 2007; the Herfindahl-Hirschman Index (HHI) has declined significantly in manufacturing since 2002; and the Four-firm concentration ratio economy-wide in 2017 was approximately the same as in 2002. Even in industries where concentration may have risen, Kulick writes, "the evidence does not support claims that concentration is persistent or harmful." In that regard, Kulick's research finds that higher-concentration industries tend to become less concentrated while lower-concentration industries tend to become more concentrated over time; increases in industrial concentration are associated with economic growth and job creation particularly for high growth industries; and rising industrial concentration may be driven by increasing market competition.

Abbott also demolishes the claim that the rise of the consumer welfare standard has meant a decline in enforcement of antitrust laws:<sup>20</sup>

In recent decades the antitrust enforcement agencies, the FTC, and the Justice Department, have enjoyed a good deal of success in challenging mergers and other forms of anticompetitive behavior in courts and through effective settlements by consent agreement. For example, the FTC won every litigated hospital merger case in the 21<sup>st</sup> century, until finally losing a challenge to a Philadelphia-area merger in 2021. With regard to consent agreements, between 1994 and 2020, the FTC challenged sixty-seven pharmaceutical mergers, deciding in all but one instance to settle subject to divestitures. Evidence shows that these divestitures have been successful in maintaining pre-merger levels of competition in the market.

---

<sup>20</sup> Ibid.



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—like becoming too big—that violate their subjective notions of fairness. In contrast, Chair Khan’s “holistic” approach empowers the government to harass businesses that are efficiently serving consumers.

#### **IV. Is the Consumer Welfare Standard Fair?**

Neither the statute creating the FTC or the agency’s policy statements define what is, and is not, “fair.” The reason is not just that a hard and fast definition of fairness would limit the FTC’s ability to use fairness standard to reshape the economy, but because fairness is a subjective concept. Therefore, what conduct is, and is not, unfair depends on how regulators or Congress define “fairness.”

Khan and her allies are unapologetically progressive. Like most progressives they tend to view any market not regulated by themselves as inherently unfair. Those looking for proof of Khan’s extreme leftism need look no further than her 2021 speech at the left-wing Law and Policy Conference in 2021.<sup>21</sup> Khan proclaimed that the free market was dead and lamented the failure of the US government to intervene more in the economy to shape economic outcomes.<sup>22</sup> These comments are not just to the left of Sen. Bernie Sanders but suggest Khan is unaware of the suffering inflicted on people by governments who dramatically intervene to shape economic outcomes.

Contrary to the progressive definition of fairness is the definition of fairness as defined by philosophical supporters of the free-market, thus rooted in classical (as opposed to modern) liberalism. Their definition of fairness is a system where everyone has the freedom to start and grow a business by offering goods and services that best meet the needs and wants of consumers. Supporters of the marketplace think it is unfair for government to punish businesses by limiting growth or subjecting them to governmental control. Further, such interventions are unfair to consumers who have chosen to spend their money with the

---

<sup>21</sup> Allum Bokhari, *FTC Commissioners Lina Khan, Rebecca Slaughter Pander to Far Left at Marxist-Linked Conference* (Breitbart, July 27, 2022) Online [here](#).

<sup>22</sup> Tom Hebert, *Republicans Should See Through Klobuchar's Big Government FTC Bill* (Washington Examiner, July 29, 2022) Online [here](#).

business, the company's workers, and any parties affected by the government's interference with the market.

## **V. A Free-market Fairness Agenda for Antitrust**

Khan's suggestion that the FTC's mandate to ensure the neo-Brandeisian version of fairness in competition is incompatible with a consumer welfare standard. In fact, the very idea of the neo-Brandeisians is to redirect the antitrust policy away from ensuring a fair market for consumers and instead trying to ensure the marketplace mirrors an abstract and political motivated idea of competition. Instead, 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 this type of unfair policies restricting market entry is occupational licensing.<sup>23</sup> Occupational licensing requirements impose barriers to entry on many would-be entrepreneurs, thus limiting consumer choices and raising prices. These requirements tend to especially impact lower-income Americans who are denied the opportunity to pursue the American Dream by starting their own business. The justification for occupational licensing is to protect consumers. However, many of the occupations that require a license, such as those for hair stylists,<sup>24</sup> limit competition, opportunity, and prosperity.

The damage inflicted by occupational licensing was examined by the FTC itself in its 2017 report "Options to Enhance License Portability."<sup>25</sup> The report not only detailed the numerous flaws with occupational licensing, including damaging the ability of lower-income Americans by making it impossible for them to start their own business in fields such as hair care. The paper also proposes an alternative way to government licensing: private certification similar to Underwriters Laboratory.

---

<sup>23</sup> For more details on the problems with occupational licensing see [occupationallicensing.com](http://occupationallicensing.com)

<sup>24</sup> *Cosmetology*, (Institute for Justice, June 2021) Online [here](#).

<sup>25</sup> *Economic Liberty* (Federal Trade Commission, Sept. 24, 2018) Online [here](#).

Another example of a “unfair” government policy is corporate welfare. For example, the International Monetary Fund<sup>26</sup> and Export-Import Bank<sup>27</sup> 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”<sup>28</sup> protections and regulations whose costs are easily absorbed by large, existing firms but can crumple small businesses and discourage new entries into the market.<sup>29</sup>

Empowering the FTC to unilaterally overturn these laws and regulations may give the FTC more power than an agency should have—even one devoted to advancing a truly fair, and thus free, market economy by eliminating cronyisms from the system. However, instead of allowing the FTC to become a libertarian version of Khan’s progressive dream of an FTC empowered to shape economic outcomes, the agency could at least identify areas where federal, state, or local governments policies promote monopolies or give politically connected business an advantage over their competitors, either intentionally or as an unintended consequence. They could also evaluate proposed laws and regulations to see if they promote competition or promote consolidation, as well as work with federal and state legislators on implementing the agency’s recommendations.

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.<sup>30</sup>

---

<sup>26</sup> Ron Paul, *Oppose Foreign Ops Appropriations Conference Report* (Dear Colleague Congressional Letter, Nov. 3, 1997) Online [here](#).

<sup>27</sup> Norm Singleton, *Ron Paul Classic: Close Down the Export-Import Bank* (Campaign for Liberty, April 24, 2014) Online [here](#).

<sup>28</sup> Paul Kupiec, *Dodd-Frank Doesn’t End “Too Big To Fail”* (The Hill, July 30, 2014) Online [here](#).

<sup>29</sup> Annie Pilon, *Look What These 25 Regulations Are Doing to Small Businesses*, (Small Business Trends, Feb. 1, 2017) Online [here](#).

<sup>30</sup> Norman Singleton, *Jimmy Carter, the Great Deregulator* (The Libertarian Institute, Feb. 11, 2022) Online [here](#).

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)<sup>31</sup> 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.

## **VI. 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.”

Khan’s definition of fairness is rooted in the progressive view that any business decision that offends government officials, even if the action is perfectly legal, should be prohibited by government bureaucrats.

But, market “fairness” is when businesses can compete free of government restrictions or government policies—such as corporate subsidies or regulations—that favor their competitors. Utilizing this definition of fairness means that government should not intervene in private business decisions.

Rather, 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 and weaken cronyism, thus making markets more efficient to the benefit of small business, workers, and consumers. The losers are the crony capitalists and bureaucrats who benefit from the current system. Defenders of the free

---

<sup>31</sup> Ibid.

market must take advantage of this opportunity to break progressives' monopoly on defining fairness as something to be enforced by government bureaucrats themselves.

Instead, we must illustrate that real fairness is a truly—and inherently—free market.