Book Review

A Reform Proposal for both the General Public and Antitrust Wonks

Amy Klobuchar

Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age

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Reviewed by Robert H. Lande

Senator Amy Klobuchar has proven that Justice Breyer was wrong when he suggested during an oral argument that antitrust is boring.[1] But it's highly unlikely that showing Justice Breyer's mistake was her primary motivation for writing ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE.[2] What does explain the immense amount of research, thought, analysis, and effort that went into writing this book?

As the new Chair of the Antitrust Subcommittee of the Senate Judiciary Committee, Senator Klobuchar believes the United States is having an "anti-monopoly moment," when both Republicans and Democrats recognize today's high-tech platforms are monopolies that have been engaging in anticompetitive behavior.[3] The key issue for a pragmatic activist like Senator Klobuchar is how to transform these anti-monopoly concerns into stronger antitrust enforcement. To pursue that goal, she has written a fascinating and powerful book for both antitrust specialists and the general reader.

The traditional approach of the chair of a Senate committee is to hold hearings and write a report as the basis for proposals of new legislation and increased enforcement resources. By publishing ANTITRUST, Senator Klobuchar is first undertaking to explain to Americans in an easy-to-understand but intellectually rigorous way what monopolies, mergers, and cartels have been doing to consumers and the economy, and then to offer solutions. Its challenging goal is to appeal to both antitrust cognoscenti and the general public. ANTITRUST accomplishes this task better than any other book I know. This book solidifies her place as the thoughtful and knowledgeable political leader of the anti-monopoly movement.

For all readers, ANTITRUST offers numerous stories illustrating the harmful consequences of monopolistic practices, along with 100 amusing antitrust-related political cartoons. For antitrust

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[1] During an oral argument, Justice Breyer asked whether he could patent "a great, wonderful, really original method of teaching antitrust law [that] kept 80 percent of the students awake." R. David Donoghue, Bilski: *Reading the Tea Leaves*, CHICAGO IP LITIGATION (Nov. 11, 2009), https://www.chicagoiplitigation.com/2009/11/bilski-reading-the-tea-leaves/.

[2] AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021) [hereinafter ANTITRUST].

[3] *See also* https://www.tatech.org/democrats-and-republicans-alike-are-talking-about-breaking-down-big-tech-monopolies/.

wonks like herself,[4] Senator Klobuchar has included more than 200 pages of small print endnotes, some of which are lengthy and technical, citing legal, economic, and business scholarship, as well as congressional hearings. The almost 2000 endnotes give antitrust specialists of all political stripes evidence that backs up everything she says.

In aiming to appeal to both people in the field and the general public, ANTITRUST has accomplished that difficult task spectacularly. Even before this book appeared Senator Klobuchar was the foremost public advocate of tackling big tech and other monopolies and near monopolies with a forceful but achievable approach. This book both presents her case against them and carefully and pragmatically explains her solutions to the problems they create.

ANTITRUST's introduction sets the tone for the book by telling the story of Ovation, a pharmaceutical company that purchased a drug that treats premature babies suffering from a rare heart valve defect,[5] and then secured the rights to a second drug that was in the process of being approved to treat the same condition. After the second purchase Ovation increased the price of the first drug from $74 to $1614 per treatment and priced the second drug at a similar level. The Federal Trade Commission sued to unwind the second acquisition but the courts permitted the company to keep both drugs and continue to gouge drug purchasers.[6] ANTITRUST explains this case on two levels.

For the general public, it shows how a company that acquired the only 2 pharmaceuticals that could treat a terrible medical condition was able to raise prices astronomically. It also explains to the more interested readers, often in the endnotes, the conservative judges' mistakes that allowed this outcome.[7] General readers might skip these endnotes if they just want to know the problems monopolies cause and how antitrust is supposed to prevent them. The notes show specialists how conservative judges can employ a variety of techniques to allow big business to do almost anything it wants, regardless whether this results in vastly higher consumer prices or distorted consumer choice.[8]

This is the technique ANTITRUST follows so well: use the text to tell an interesting and relatable story that illustrates why we have the antitrust laws and why they should be enforced and interpreted vigorously. Include the technical but necessary supporting intricacies in the endnotes, with enough citations to and explanations of the research and analysis in the scholarly literature to satisfy anyone who wants to delve more deeply into the issues.

Following its introduction the book is divided into two main sections. The first discusses the origin and evolution of the antitrust movement and antitrust enforcement. After a bridge chapter on

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4 Senator Klobuchar represented MCI in its struggles with regional Bell monopolies in the wake of break-up of the AT&T monopoly, and has followed the field ever since. ANTITRUST, *supra* note 2, at 14. Senator Klobuchar explains how MCI would never have been able to compete on the merits had AT&T not been broken up. *Id.* at 141.

5 *Id.* at 4–9.

6 *Id.*

7 *Id.* ANTITRUST explains that the judges found the two drugs were in different markets because prescribing neonatologists had preferences between the two drugs since their side effects differed slightly. The judges were confused because the drugs had never competed with one another on price since Ovation owned the second drug as soon as it came onto the market. ANTITRUST argues that, even though the drugs had slightly different side effects, they were methods of treating the same condition and should have been placed in the same relevant market. *Id.* Senator Klobuchar quotes an analysis by Professor Herbert Hovenkamp explaining how "condemnation should have been an easy call" in part because the "post-merger price increase" by Ovation should have provided a "clear answer." *Id.* at 8.

8 ANTITRUST's *Ovation* case analysis was supplemented by 15 endnotes for the antitrust specialists' reading pleasure, complete with citations to the academic literature that explained the relevant market definition and quality-competition issues in more detail. *Id.* at 362–65.

"Why Antitrust Matters for Our Democracy and Our Economy," the second section addresses the modern day challenges for antitrust and Senator Klobuchar's proffered solutions.

Recounting More Than a Century of Antitrust

The first section guides readers through more than a century of antitrust history. This material will be familiar to most readers in the field but will likely interest non-specialist readers. Chapter 1, for example, starts by taking a story familiar to most Americans, clearly explaining, in a manner that would be a "page turner" if this were a novel, why the famous "no taxation without representation" Boston Tea Party was actually an anti-monopoly protest and why this story has antitrust implications for today.

In that incident Bostonians threw 342 chests of British East India Company tea into Boston harbor to protest a tea tax they had no role in creating.[9] They had been purchasing as much as 90 percent of their tea from non-British sources. But the Tea Act of 1773 gave the British East India Company a monopoly on tea trade with the American colonies, with a share of the monopoly profits to be paid to the Crown in the form of a tax on the tea.[10] When the British government tried to exclude tea from other sources, the colonists destroyed British tea in protest. The rest is history. Senator Klobuchar shows why the Tea Party was more of a story of monopoly abuse than "taxation without representation"[11] because even with representation in the English Parliament, colonists might not have blocked a tea tax that funneled lucrative monopoly profits to the Crown.

The remainder of the book's section on the history of antitrust follows a similar path. Chapter 2 sets up the story of the trusts during the Gilded Age and explains much of the evolution of modern American business.[12] Chapter 3 recounts the rise of the U.S. antitrust movement, starting with the Grangers and culminating in the Sherman Act.[13] Chapter 4 recounts how the Sherman Act was dramatically under-enforced until the advent of "the Trustbuster," President Teddy Roosevelt.[14] Chapter 4 discusses the passage of the Clayton Act and FTC Act,[15] and passes the baton to Chapter 5, which discusses the last 100 years of the rise and fall of the antitrust movement. As usual, the material of most interest to general readers—such as the story of how we came to have a baseball

[9] *Id.* at 21.

[10] *Id.* at 22.

[11] *Id.* at 21–22.

[12] Senator Klobuchar weaves into this discussion her family's own history as a way of personalizing the effects of the trusts on workers and the labor movement. She recounts how one of her grandfathers was an iron ore miner whose labor went into making some of the iron produced by the U.S. Steel Corporation, for a time the largest industrial trust and one of the largest corporations of any type in the world. *Id.* at 45–50.

[13] *Id.* at 75–77.

[14] *Id.* at 83. As both a caution and to retain the interest of generalist readers, ANTITRUST recounts how the first person to go to prison for an antitrust offense was not a robber baron, but a union leader, Eugene Debs. This happened despite his being represented by perhaps the most prominent lawyer of the period, Clarence Darrow. *Id.* at 85.

[15] *Id.* at 115.

exemption[16]—is in the text, while the material for both antitrust[17] and other types of specialists[18] is largely in the endnotes.

The end of Chapter 5 is an excellent transition to the present and future because it contains an overview of antitrust during the Trump administration. It documents that, despite filing antitrust cases against Google and Facebook during the month before the 2020 election,[19] the overall level of enforcement during this administration was very low, but the amount of malfeasance and political influence on decision making was very high.[20]

Perhaps even scarier for those who believe in vigorous antitrust enforcement,[21] the book also presents example after example of conservative judges dismissing pro-consumer cases.[22]

The Bridge

The bridge chapter steps back and discusses the effects of monopoly and anticompetitive behavior on such topics as racial disparities and income inequality,[23] noting that productivity gains in recent years have largely enriched CEOs of large corporations and their shareholders.[24] It discusses how monopoly has fueled political contributions but also helped stimulate the $15/hour minimum wage debate and the campaign to overturn *Citizens' United*.[25] While the book presents

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16 *Id.* at 127–28.

17 For example, Antitrust discusses some of the most important differences between the Harvard and Chicago schools of antitrust. *Id.* at 133–38. The book explains how Judge Bork defined the "consumer welfare" approach to antitrust in a confusing way that severely understated the harms that monopolies did to real consumers: "Bork included the owners of monopolies as consumers …." and in this way did not count the wealth transfer effects of higher monopoly prices as a theft from consumers or even as a harm. He "grossly perverted the legislative history" to do this. *Id.* at 135.

18 For example, Antitrust contains material relevant to the current debate among judges and legal scholars as to whether legislative history should play a role in the interpretation of statutes. The alternative is for the courts to follow Justice Scalia's lead and interpret statutes using "textualism" and only interpret the precise words and phrases used in the statute in the way they were used when the statute was enacted. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 18 (2012).

As Chapter 4 of Antitrust points out, Section 1 of the Sherman Act simply outlaws all "contracts . . . in restraint of trade." The legislative history of the Sherman Act makes it clear the law was not supposed to apply to labor. Antitrust, supra note 2, at 84. For example, during the Sherman Act debates, "Senator Sherman assured his fellow senators that labor unions seeking higher wages . . . would not be impacted by the legislation. As Senator Sherman emphasized, "Combinations of workingmen to promote their interests . . . to increase their pay … are not affected in the slightest degree, nor can they be included in the words or intent of the bill." Id. The courts, however, failed to heed this legislative history and subjected labor unions to the Sherman Act. Id. at 84–87. The modern reader would interpret these court decisions as examples of textualism. They also serve to reinforce the idea that conservative judges can and do undermine the populist, pro-consumer and pro-worker impetus for the antitrust laws and instead interpret the law to serve the interests of big business.

19 *Id.* at 158–59.

20 *Id.* at 158–74.

21 "The evidence continues to mount that the antitrust department of the Justice Department has become just another federal agency willing to serve as a weapon the president can wield against his enemies." *Id.* at 161. The book also tells the story of the antitrust case brought by the United States Football league against the National Football League. It tells how the owner of one of the teams, Donald Trump, "persuaded the USFL to move from a spring to a fall schedule, putting it head-to-head with the NFL." This caused the USFL to fail. *Id.* at 164–66.

22 Among the cases that Antitrust persuasively argues were wrongly decided by conservative judges are *AT&T-Time Warner* and *Whole Foods. Id.* at 159, 168. *See also id.* at 239–58.

23 *Id.* at 187–96.

24 *Id.* at 187–93.

25 *Id.* at 179, 187–96.

these nontraditional antitrust topics elsewhere,[26] this chapter brings them together to show that competitive markets are an important part of virtually every part of the political underpinnings of our democracy.

The Need for Reform and the Future of Antitrust

The final section presents not only the familiar abuses of big tech,[27] but also similar conduct in other industries, including pharmaceuticals, accounting, publishing, health care, and agriculture.[28] It also explains why antitrust enforcement is likely to remain inadequate to respond to these abuses because of conservative federal judges and justices, pro-big business decisions of the federal courts,[29] inadequate enforcement resources, dark and dirty money in politics, lobbying by monopolists, media consolidation, and common stock ownership by large investment houses.[30] Although the list of horrors never seems to end, it does make the reader eager to read Senator Klobuchar's solutions.

ANTITRUST's final section presents them, in a bold list of the top 25 solutions Senator Klobuchar would like Congress or the President to enact and implement.[31] This chapter discusses other possible solutions in passing, but neither endorses nor rejects them. It also offers 10 things citizens can do to help encourage stronger antitrust enforcement.[32]

General readers can understand many of these proposals, including the appointment of more enforcement-minded judges and justices[33] and significantly increased enforcement budgets.[34] Other solutions require more explanation and additional scholarly citations, such as her argument to increase penalties on cartels substantially[35] and her calls to reward whistleblowers who turn in antitrust violators.[36] Still other reform proposals may be difficult for general readers to truly appreciate, but ANTITRUST encourages them to persist.

For example, ANTITRUST explains why Congress should enact legislation that would resuscitate the "now largely lifeless" presumption of *Philadelphia National Bank*[37] that "a merger that would give one entity a 30 percent market share [is] unlawful."[38] Although it describes the importance of this presumption and the belief by Judge Posner and other respected antitrust specialists that this presumption

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[26] For example, it shows how the antitrust movement was an important part of the Progressive movement. But the Progressive movement had many other components, and so the book puts antitrust into context by briefly discussing these other issues, including race relations, the rise of the KKK, and the founding of the NAACP. *Id.* at 112–14.

[27] *Id.* at 218–29 and 315–20.

[28] *Id.* at 218–29 and 320–24.

[29] *Id.* at 239–58.

[30] *Id.* at 258–74.

[31] The list starts on page 284.

[32] *Id.* at 348–50. In this list Senator Klobuchar urges citizens to write and call Members of Congress to demand legislation and other actions to stop the abuses of monopoly power; to report anticompetitive activity to the enforcement authorities, and to submit public comments to the enforcement agencies in important competition-related matters.

[33] *Id.* at 312–15.

[34] *Id.* at 287–93.

[35] *Id.* at 305–09. ANTITRUST points to research, including my own, showing that "the total expected costs of cartel activity . . . in civil or criminal penalties are significantly less than the sum of expected gains to cartels and individual decisionmakers" and that "increasing fines and penalties for cartel participants makes good and logical sense." *Id.* at 306.

[36] *Id.* 311–12. A section on whistleblowers cites proposals by former Republican FTC Chair William Kovacic and others that design a bounty system likely to incentivize people to turn in cartels, especially cases of price fixing by employers or business associates.

[37] *Id.* at 298.

[38] *Id.*

is justified,[39] only the antitrust wonks reading this are likely to truly appreciate how central this presumption is to effective merger enforcement.[40] Senator Klobuchar believes the presumption should be codified by amending the Clayton Act to ban mergers whose effect "may be materially to lessen competition . . . if . . . the acquisition would lead to a significant increase in market concentration in any line of commerce or in any activity affecting commerce in any section of the country."[41] This change could strengthen merger enforcement significantly by broadening the relevant markets that courts will find and will help prevent decisions like the Ovation case discussed in the book's introduction.

But sadly, the conservative jurists Senator Klobuchar describes so ably throughout ANTITRUST[42] might well misinterpret such new language as "may be materially to lessen competition" the same way they misinterpret the current statutory language, resulting in little change in merger enforcement. Are conservative jurists more likely to defer to a policy they disagree with if it is recently articulated by Congress? ANTITRUST is optimistic, but I have doubts.

Senator Klobuchar also considers, without endorsing, no-fault monopolization[43] and various ways of addressing horizontal shareholding[44] and conglomerate mergers.[45] Perhaps she did not include them in her wish list because she believes they would be very unlikely to be enacted. Although it is uncertain she will succeed in enacting and implementing all 25 of her suggested reform proposals, each seems at least possible.

ANTITRUST clearly cements Senator Klobuchar's place as the creative and substantively expert leader of the progressive but pragmatic wing of the anti-monopoly movement. She is the political planner and visionary who offers specific cures for anticompetitive abuses and backs them up by empirical and theoretical research. Her book is an inspirational landmark for all those seeking attainable antitrust initiatives to protect consumers and the economy from monopoly abuses. What remains to be seen is whether this book is enough to help turn an anti-monopoly moment into an era of anti-monopoly reform. ●

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[39] *Id.* at 299–300.

[40] *Id.* at 538, third endnote.

[41] *Id.* at 299.

[42] *See, e.g.*, the citations in notes 7, 14, 18, 22, and 29.

[43] ANTITRUST provides a brief history of no-fault monopolization. *Id.* at 332. Senator Klobuchar does not endorse this doctrine but, interestingly, provides none of its possible drawbacks and instead quotes a source for some of its advantages: "The no-fault approach . . . assumes that monopoly power itself is objectionable, suggesting that some questionable behavior rather than economic efficiency is fundamental to it, and determining that its social, political, and economic effect on the nation can only be detrimental." *Id.* at 553, seventh endnote.

[44] ANTITRUST provides an in-depth analysis of research by Professor Einer Elhauge and others concerning the competitive issues that arise when huge investment houses, including BlackRock, Fidelity, Vanguard, and State Street, each own significant shares of competing companies. ANTITRUST explains how this common ownership can lessen these competitors' incentives to compete vigorously, and instead can incentivize them to act for their common good and thereby disadvantage consumers. *Id.* at 259–62, 326–31. This material presents general proposals for desirable new legislation, suggesting that the details should be worked out later. *Id.* at 330–31.

[45] *Id.* at 331–33. A conglomerate merger involves corporations that neither compete directly with one another or buy or sell from one another. ANTITRUST points out that from 2015–2019 there were 78 mergers where both firms had more than $10 billion in assets, yet only 3 were successfully blocked by the U.S. antitrust laws. Senator Klobuchar writes: "The sheer size of a company gives it power—economic power, political power, and the power to potentially co-opt regulatory agencies." *Id.* at 332. Accordingly, she believes conglomerate mergers should be scrutinized very carefully. Moreover, in 2021 Senator Klobuchar and four co-sponsors introduced a comprehensive bill to enhance antitrust enforcement that would, among many other things, incorporate absolute corporate size into merger analysis for the first time. The Competition and Antitrust Enforcement Act of 2021, S. 225, 117th Cong. 2st Session (2021), https://www.congress.gov/bill/117th-congress/senate-bill/225?q=%7B%22search%22%3A%5B%22Competition+and+Antitrust+Law+Enforcement+Reform+Act%22%5D%7D&r=1&s=1. This bill would mandate, for the first time, a more skeptical review of any acquisition of $5 billion or more, or of any acquisition exceeding $50 million by a firm with assets exceeding $100 billion. For these transactions, the legislation would switch the burden of proof and require that the merging firms prove that the acquisition will not be reasonably likely to lessen competition or tend to create a monopoly. *Id.* at Section 4(b)(5)(B)