Book Review
Redefining the Antitrust Paradigm

Jonathan B. Baker
The Antitrust Paradigm: Restoring a Competitive Economy
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Reviewed by Barak Orbach

Professor Jonathan Baker is one of the leading antitrust thinkers of our time. During the past three decades, Baker’s voice has been a prominent force in the antitrust discourse and the evolution of antitrust policies. Baker’s new book, *The Antitrust Paradigm*,¹ is an informed, thoughtful, and provocative antitrust manifesto that every antitrust thinker should read.

*The Antitrust Paradigm* calls on antitrust to address the “market power paroxysm” in America—namely, the growing prevalence of oligopolies and monopolies in the economy.² The “substantial and widening market power” in the economy, Baker writes, has produced significant social costs: economic disparities have been soaring, business dynamism has declined, the national economic growth has slowed down, and the confidence in democratic institutions has eroded. Baker recognizes that technological change contributed to market concentration in numerous industries, but places much of the blame on the Chicago School. To restore the competitive character of the U.S. economy and reverse unhealthy trends, Baker proposes to reinvigorate antitrust enforcement.

Baker’s operational recommendations focus on the relaxation of judicial premises that are excessively favorable to antitrust defendants, including “the assumptions that markets self-correct, that the harms from unwise judicial precedents outweigh those of market power, and that antitrust institutions are subject to manipulation by complaining competitors.”³ Another set of recommendations that Baker advances addresses changes in the economy that, according to Baker, require modernization of antitrust standards. The key changes that Baker discusses are increased market concentration, a growing use of algorithms to replace human decision making, and the unique characteristics of digital platforms. Additionally, Baker points out that, although antitrust applies to buying power, present enforcement standards and norms neglect problems with buying power, thereby resulting in anticompetitive effects in upstream markets, including labor markets. Baker does not spell out what standards could or should replace the existing ones, and for good reasons, I believe. Informed reforms must begin with a consensus about the problems that should be addressed. The *Antitrust Paradigm* offers an excellent overview of present problems.

The “antitrust paradigm” is Baker’s normative prescription for U.S. competition law: *a national commitment to competition policy that fosters economic growth whose benefits are shared by all Americans*, not only by monopolies, other dominant firms, and a small number of individuals. This

² *Id.* at 12–95.
³ *Id.* at 5.
The proposed paradigm encapsulates Baker’s criticism of present antitrust jurisprudence, which can be called the “Chicago paradigm.” The principal difference between Baker’s proposed paradigm and the Chicago paradigm, I believe, lies in the treatment of welfare effects. The Chicago paradigm builds on premises that markets discipline anticompetitive conduct and that antitrust enforcement tends to be cost-ineffective. Baker’s proposed paradigm prescribes a balanced analysis of welfare effects that relies on fewer premises.

The motivation behind the writing of the Antitrust Paradigm is the costly failure of the Chicago paradigm:

We now know that the Chicagoans lost their bet. Since the implementation of antitrust deregulation, market power has widened, without accompanying long-term gains in consumer welfare. Instead, economic dynamism and the rate of productivity growth have been declining. The harms from the exercise of market power have extended beyond the buyers and suppliers directly affected to include slowed economic growth and a skewed distribution of wealth. Whatever efficiency gains the Chicago-inspired changes may have achieved have not compensated for the market-power effects of the antitrust deregulation they sought.4

Baker’s proposed antitrust paradigm is insightful and, with some tweaks and clarifications, may be embraced by courts and scholars. To illustrate the potential advantages of the proposed paradigm, consider an economy in which one entity, the “benevolent monopolist,” owns all production, distribution, and retail means. Under certain assumptions about the diffusion of wealth, it can be shown that that the benevolent monopolist would optimize profit to the benefits of all members of the economy. The preference for market competition rests on the understanding that benevolent monopolists of this kind don’t exist: centrally planned economies have persistently failed to serve prosperity. In reality, the intensity of competition in the economy, or lack thereof, is a determinant of prosperity and a determinant of economic inequalities. It is, therefore, somewhat puzzling that the idea that competition policy has nothing to do with the distribution of wealth in society is part of present antitrust law. This idea is a key element of the Chicago paradigm.5 The assertion that “consumer welfare” means “total surplus” reflects this idea. The intuition underlies Baker’s proposed paradigm is that national prosperity and the distribution of wealth in society are interrelated.

The Paradigm explores four characteristics of antitrust law:

(1) Present antitrust jurisprudence is captured by anti-enforcement convictions disguised as sound economic principles.

(2) Present economic and social conditions, including the rise of digital platforms and concentration of economic power, require reassessment of the antitrust enterprise and, at the very least, refinement of core premises and adaptation to the digital economy.

(3) Populist calls to reform antitrust suggest replacing ideological hostility to antitrust enforcement with ideological hostility to business.

(4) There are significant institutional impediments to the modernization of antitrust law, chiefly the Supreme Court’s skepticism of the virtues of antitrust enforcement.

Contemporary antitrust literature presents significant disagreements over the assessment of

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4 Id. at 2.

5 See ROBERT H. BORK, THE ANTITRUST PARADOX 90 (1978) (arguing that antitrust “has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed.”).
these characteristics but no real controversy that they are core features of antitrust law. For example, enforcement skeptics (“Skeptics”) and progressive advocates (“Brandeisians”) tend to have opposite views about the ideological capture but probably agree that it is pervasive. Skeptics believe that the capture rests on a “rigorous,” “objective,” and “evidence-based” “economic framework.” By contrast, Brandeisians believe that the capture is the source of “America’s monopoly problem.”

My criticism of the Paradigm concerns the characterization of the proposed paradigm’s two elements: (1) a national commitment to competition policy and (2) the fostering of economic growth that benefits all Americans.

A National Commitment to Competition Policy

Baker interprets the decline in antitrust’s political salience and rise of antitrust technocracy as a sort of “political bargain”—an “informal political understanding” among consumers, farmers, small businesses, and large businesses that competition policy is the “primary approach to economic regulation.” This political bargain, Baker writes, represents a national commitment to competition policy, although it “does not have clearly specified terms,” and “should be understood metaphorically, not literally.”

I believe that Baker’s proposal for a political bargain could be helpful, but am not persuaded that, in the 20th century, a metaphorical political bargain about competition policy formed in America. First, competition, not competition policy, is a defining characteristic of American capitalism. In the second and third quarters of the 20th century, during antitrust’s “fairness era,” the Supreme Court often identified a national commitment to competition policy, describing antitrust as the “Magna Carta of free enterprise” and a “charter of economic liberty.” But, for many people in America, antitrust is and has always been antithetical to economic liberty and free enterprise. This hostility to antitrust enforcement governs the Supreme Court’s antitrust jurisprudence today and governed the Court’s jurisprudence before the fairness era.

Second, in the United States, the commitment to competition is derived from an allegiance to freedom of trade. Paradoxically, the strength of this commitment is in its amorphous nature. It accommodates a diverse spectrum of convictions and preferences about freedom of trade. A dogmatic commitment to freedom from government interference (hostility to government’s oversight of markets) is on one end of this spectrum. A dogmatic commitment to fairness (hostility to big business) is on the opposite end of this spectrum. The continuum between these ends, in turn, repre-

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6 Joshua D. Wright et al., Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. ST. L.J. 293 (2019) (offering a rich set of adjectives to praise present antitrust standards and ridicule alternative standards).
9 BAKER, supra note 1, at 11, 13, 40.
resents the distribution of preferences for tradeoffs between conflicting types of freedom of trade. Baker argues that, in the 1940s, a consensus about focusing antitrust on welfare tradeoffs emerged.

Such consensus is yet to form in the United States. In the first five decades of the Sherman Act, the trustbusting narrative masked political unwillingness to enforce antitrust law. Enforcement actions, including the big trustbusting campaigns, were consistent with the narrative, not with the spirit of enforcement policies. Then, for about four decades, antitrust law and policy focused on fairness, discounting the costs of excessively intrusive enforcement policies. Thereafter, for about four decades, antitrust law and policy focused on freedom from government’s oversight of markets, premising that market institutions tend to eliminate the ability of firms to extract rent (namely, gains resulting from positional advantages). Present debates about the future of antitrust law may reshape the governing norm of tradeoffs in antitrust law.

Putting aside interpretations of the past, Baker’s prescription for the antitrust paradigm and emphasis on political bargains are good ones. A political bargain that embraces a balanced approach to welfare tradeoffs will move antitrust forward. Antitrust thinkers who believe that sound public policies should consider welfare tradeoffs will enjoy reading the Paradigm and will find it informative and useful.

**Economic Growth That Benefits All Americans**

Entrepreneurship and innovation are the primary engines of growth in the modern economy. The decline in business dynamism in the United States, therefore, raises concerns about the health of the economy. The Paradigm summarizes and explains this concern and the complex relationship between dynamism and competition policy. Antitrust thinkers, I believe, will find Baker’s overview of the topic informative and useful. No book could review all aspects of the topic. Here, I focus on a theme that, in my view, is not developed enough in the book: the relationship between dynamism and economic inequalities. The appreciation of this theme is critically important to the implementation of Baker’s proposed antitrust paradigm.

In periods of rapid technological change, the distribution of welfare gains and losses is heavily skewed: successful entrepreneurs and their backers capture a portion of the gains and accumulate wealth, while large segments of the population experience losses arising from automation and displacement of old technologies. This pattern is often described as a “technological divide,” or “digital divide” in the context of the digital revolution. When the welfare losses are large, the productivity growth may be disappointing. Economists call this phenomenon the “productivity paradox.” It is not a coincidence that the antitrust impulse—public pressures to act against big business—appeared in periods of rapid technological change: the Second Industrial Revolution at the turn of the 19th century and the digital revolution at the turn of the 20th century.

The neglect of welfare losses associated with technological divides proved costly. First, the neglect extends misery and hardship that could be mitigated. Second, the neglect creates political capital for ideologues and opportunists who use the populist playbook. Such ideologues and populists mobilize people on one side of the technological divide (the “people” in the populist argot) to act against those on the other side of the divide (the “establishments” and the “elites”).

Competition policy could potentially mitigate the costs of technological divides, but other public policies are likely to be more effective. For example, investments in infrastructure, education, and professional training could narrow the divide, while trustbusting is more likely to disrupt the system. Similarly, antitrust enforcement does not have good tools to address the draining of manufacturing jobs in the United States caused by globalization and automation.

Concentration and market power are also problems whose neglect proved costly. Companies that drive technological divides are often associated with both concentration and market power. The distinction between problems associated with technological divides and problems associated with concentration and market power is an important one. The Paradox, I believe, pays too little attention to the significance of technological divides.

To illustrate the significance of the distinction, consider the talking points that Skeptics and Brandeisians use to explain disruptive technologies. Skeptics insist that the concerns about both sets of problems reflect “pseudo-economic demagoguery and anticorporate paranoia.” 14 Technological divides, Skeptics argue, are incidental costs of creative destruction. Under their trickle-down theories, market power and technological divides dissolve quickly, and their temporary existence incentivizes people to embrace progress. By contrast, Brandeisians bundle the problems, as well as other problems, and argue that all problems associated with concentration and market power are the direct consequence of greed and untamed power. Both approaches are too flawed to guide policies that seek to foster innovation and prosperity.

**Conclusion**

The potential significance of the Paradigm is that the book was released during what seems to be an historical inflection point in antitrust law. Baker’s analysis and views are consistent with the likely reorientation of antitrust law, I believe. Baker offers an in-depth analysis of the corrosive effects of Chicago’s erroneous premises on antitrust law, identifies several areas that require reform, and advances several policy prescriptions that intend to implement his proposed antitrust paradigm.

My observations are possibly overly academic. In this review, I summarized my understanding of Baker’s proposed antitrust paradigm, which, in essence, is a welfare tradeoff paradigm: a national commitment to competition policy that fosters economic growth whose benefits are shared by all Americans. This proposed paradigm is dynamic by nature and flexible enough to accommodate the evolving understanding of markets and economic activities. Importantly, Baker’s proposed antitrust paradigm escapes the dogmatic rigidity of ideological and populist approaches that continue to threaten the vitality of the antitrust enterprise. I believe that Baker’s proposed paradigm is brilliant in its simplicity, promising, and deserves serious consideration. ●

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14 Wright et al., supra note 6, at 295.