# Handcuffed By the Courts: How Judges Broke Our Monopoly Laws and What Congress Must Do to Repair Them

By Ron Knox | March 2022

Beginning in the late 1970s, a series of Supreme Court cases upended U.S. antitrust laws – laws that were once the linchpin of a comprehensive, democratic check on corporate power. These rulings gave powerful corporations free rein to capture control over markets by strongarming suppliers, kneecapping smaller competitors, and buying up rivals. This was a radical shift in policy, and it was instituted by judges, not Congress.

Today, momentum is growing in Washington, and the state level, for much stronger antitrust enforcement.[1] However, while leaders are increasingly committed to reigning in monopoly power, bad case law has limited the effectiveness of good enforcers.

This issue brief argues that Congress must take action to undo decades of pro-monopoly Supreme Court decisions, the most consequential of which are discussed below. Specifically, Congress must amend the laws to restate the intent to protect freedom from monopoly power, and to create clear, "bright-line" rules, which make the most egregious corporate behavior illegal for dominant companies. This includes clarifying that many types of monopoly conduct, including predatory pricing and exclusionary dealing, violates the law, and making clear that our merger laws should prevent acquisitions by dominant companies and vastly limit mergers that harm workers and consolidate industries. Only with these measures can we restore democracy and diversity to our economy.

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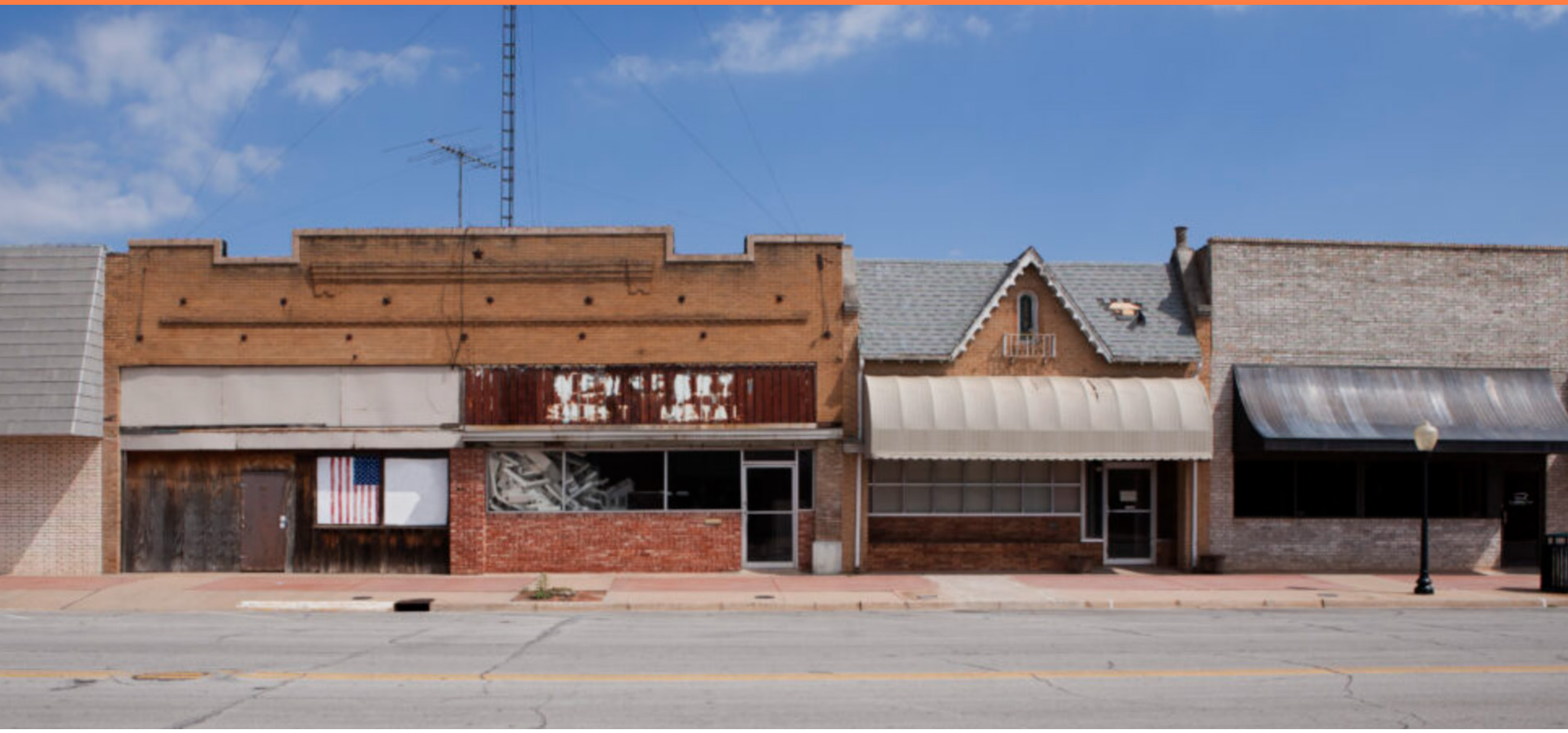

# When Monopoly Power Goes Unchecked

One of the greatest economic myths of the last four decades is that dominant corporations grew to their size and scope by competing on their merits. In fact, much of today's market concentration is a product of abusive, even illegal, tactics and mergers that corporations have used to gain dominance and eliminate competitors. This behavior once drew strict antitrust scrutiny, but it's gone largely unchecked since the courts began gutting the laws in the 1970s.[2]

Examples can be found across the economy. Walmart, which accounts for one of every four dollars that Americans spend on groceries, grew rapidly by pressuring suppliers into giving it deep discounts and special terms. Similarly, Amazon's dominance stems from a long history of engaging in predatory pricing. Bolstered by Wall Street, the tech giant has sold entire categories of goods — books, diapers, shoes — at a loss until smaller competitors, lacking the financial backing to cushion similar losses, shuttered their doors or sold to Amazon.[3]

All the while, the antitrust agencies were greenlighting mergers that directly harm small businesses, workers, and communities. Smithfield Foods took advantage of regulator indifference by buying up dozens of smaller competitors to become the country's largest pork processor. Even though pharmacy benefit managers (PBM) comprise one of the least regulated health care sectors, the Federal Trade Commission and Department of Justice have approved a spate of PBM mergers — including allowing CVS to buy Caremark, then Aetna. PBMs have used their growing market muscle to push out competitors, particularly the smaller pharmacies that research shows outperform on several healthcare measures.[4]

These tactics, and the policy decisions that allowed them, have been catastrophic for our economy and our democracy. By muscling out independent businesses, which are a key pathway to the middle class, monopolies have driven up consumer prices, driven down wages, and fueled economic inequality.[5] Monopolies have gutted our productive capacity, both in terms of jammed-up supply chains and lost innovation.[6] They have hollowed out communities across the U.S., who have relied on small businesses to provide vital services and anchor their tax base, their labor markets, and their civic life. They have exploited structural racism to extract profits and power and have disproportionately harmed communities of color, workers, and people in rural areas, which are losing opportunities to build wealth, along with their collective agency and sense of social connection.[7,8] Monopoly power has undermined our political freedom by capturing government regulators and laid us open to the rampant spread of misinformation and fascist ideology.[9] Americans are living with the consequences of monopoly rule.

# How Judges Gutted Our Antitrust Laws

The ways big, dominant companies today abuse smaller rivals and suppliers were what U.S. antitrust laws – the Sherman Act, the Clayton Act and the Federal Trade Commission Act, among others – were intended to, and for many years did, prevent. For most of the 20th century, Congress passed strong antimonopoly laws, and amended them as needed to keep up with new manifestations of monopoly power.[10] Law enforcers and judges relied on them to stop the worst monopoly abuses.

For example, dominant companies weren't allowed to unfairly sell products for less than what it cost to make them to put their rivals out of business – a practice called "predatory pricing." When powerful chain stores like A&P squeezed suppliers to crush smaller rivals, Congress passed the Robinson Patman Act to make that illegal too, protecting shoppers and small businesses alike.[11] When monopolies arose in oil, tobacco, and telephone service, we broke those companies up without trepidation.[12] Our system also stopped powerful companies from buying their rivals and from leveraging their monopoly in one industry to unfairly gain power in other, related industries.

Today, our desire to police our most powerful companies has clearly returned. A majority of Americans want action against monopolies, including breaking up and regulating the four largest tech companies.[13] Ardent critics of monopoly power now occupy both of our federal antitrust agencies, and lawsuits targeting the abuses of Google and Facebook are some of the most ambitious in our history. And President Biden issued a sweeping executive order in 2021 directing his administration to find, and work to end, concentrated corporate power throughout the economy.

But even with strong enforcers at the agencies, the effects of 40 years of pro-monopoly court decisions frustrate attempts to rein in unchecked corporate power. Courts undermined the law by replacing its broad concern for the welfare of workers, small businesses, and communities, with a narrow focus on creating wealth – something called the "consumer welfare standard," even though this pro-bigness philosophy has often led to higher prices and fewer product innovations over time. Armed with this narrow philosophy of what antitrust should do, enforcers and judges undid bright-line rules against harmful conduct and big mergers that made specific conduct outright illegal, instead deciding cases under the subjective, opaque "rule-of-reason."

Under the "consumer welfare standard" a monopoly action is illegal only if it is sure to lead to higher consumer prices or less output by companies. For example, under the standard, predatory pricing is only illegal, and a monopolist is only liable for it, if there is overwhelming proof that the company eventually raised prices high enough to make back the money it lost – something that most modern, multi-product companies never have to do.

Under the "rule-of-reason" approach, judges scrapped clear rules that banned predatory behavior by dominant corporations and instead made those tactics illegal only if plaintiffs could prove they hurt consumers. The rule of reason makes antitrust enforcement much more expensive and technocratic, because judges now insist that monopolization cases require complex analysis provided by expert economists – the kind of experts powerful companies can afford to buy without limit.

The consumer welfare and rule-of-reason doctrines have erected substantial barriers to policing monopoly power and led to bad court precedents. These misguided court decisions have made it exceedingly difficult for the agencies or private parties to challenge monopoly power in court; the antitrust agencies have declined to bring many cases over the past decades because judge's decisions have made such cases prohibitively difficult and often unwinnable.[14]

The effects of harmful legal precedents can be clearly seen in recent court decisions against tech titans Facebook, Apple, and Qualcomm; Despite the vast power of these companies and claims of clear monopoly abuses, federal judges have relied on prior precedent to question or outright reject lawsuits against the companies.[15]

The judicial decisions that arose from that pro-bigness philosophy constrained our ability to use our democratically enacted laws to stop monopoly. The following contains a list of the most consequential Supreme Court decisions for our ability to stop and prevent monopoly abuses — cases that undermined the democratic intent of the laws in favor of outsized corporate power.

- **Jefferson Parish** - In a 1984 ruling, the Supreme Court upended a core abuse of monopoly power — using a monopoly over one product or service to force customers to buy another, separate product. That practice, called "tying," is an age-old monopolist tactic to unfairly spread its power to a new industry, and beginning in the early 1900s it has been patently illegal under the law. In the 1940s, the Supreme Court found that tying "serves hardly any purpose beyond the suppression of competition," and forbade it as a rule.[16] But after the Court's Jefferson Parish ruling, the antitrust agencies and others suing to stop tying schemes have an exceedingly high bar to prove a monopolist broke the law. Under that ruling and others, including the circuit court's decision in the Microsoft monopoly case, conservative judges now have the power to throw out tying cases under the "rule of reason."[17]

- **Spectrum Sports** - This ruling has prevented plaintiffs from suing monopolists for leveraging a monopoly in one market to attempt to dominate a second, related market. Before the decision, using monopoly power to unfairly gain the upper hand in an adjacent industry was a core violation of the antitrust laws. The Court's 1993 decision now sets the bar incredibly high: To prove this kind of leveraging, plaintiffs must show that dominant companies successfully monopolized the second, related market – rather than simply attempting to monopolize it, even when their chances for eventual success are high. Now, monopolists are let off the hook, even if their actions are clearly predatory and harmful to competition.[18]

- **Brooke Group** - In this decision, the Supreme Court created a test for predatory pricing that is nearly impossible to prove, based on a misunderstanding of how companies do business. Before its 1993 decision, courts relied on the facts and evidence when deciding whether a monopolist artificially priced a product below cost to harm competition. This enforcement was important to curbing monopoly abuses; scholars have shown that predatory pricing is common and effective at killing competition.[19] But in Brooke Group, the Court reflected the prescription of scholar and lawyer Robert Bork, who called predatory pricing "a phenomenon that probably does not exist."[20] As a result, decisions by judges have culled nearly all predatory pricing enforcement.

- **Trinko and LinkLine** - Together, the Court's Trinko opinion in 2003 and its LinkLine decision in 2009 unwound the broad legislative intent of the antimonopoly laws by ruling that monopolies that own essential infrastructure, such as phone lines or train tracks, have no obligation to allow smaller rivals to use it; that charging excessive prices for monopoly goods and services is legal; and that conglomerate monopolists can use predatory pricing to force rival sellers out of business. Indeed, Justice Scalia wrote in the majority opinion in Trinko that "possession of monopoly power, and the concomitant charging of monopoly prices is not only not unlawful; it is an important element of the free-market system."[21]

- **American Express** - The Supreme Court in 2018 decided that, in antitrust cases involving platform companies with two separate sets of customers, plaintiffs must show harm to both sets of customers in order to successfully sue a monopolist under the antitrust laws.[22] In the AmEx case, that meant that the credit card company was allowed to squeeze merchants and retailers with high fees, so long as AmEx card holders benefitted through the company's rewards program. The ruling makes any antitrust suit against a platform company for monopoly abuses next to impossible, regardless of the harm it causes competition, because it's rare a platform's actions would harm both sides of its business.


# What Congress Must Do To Restore Competitive Markets

Congress passed our original antimonopoly laws, and the amendments used to strengthen those laws over subsequent decades, to ensure open, fair markets, and to disburse economic power throughout industry.[23] The original laws were intended to prevent monopoly abuses like predatory pricing and other conduct that forcefully and unfairly shut smaller rivals out of an industry. Subsequent laws banned mergers that would overly concentrate an industry, and, later, regulated the kind of vertical mergers that can give one company the power to choke off small businesses' access to suppliers or the market.[24]

Indeed, Congress has frequently updated our antimonopoly laws to address problems of competition and monopoly power as they arise in the economy. The Clayton Act, which regulates mergers, and the law creating the Federal Trade Commission were passed nearly a quarter-century after the first antitrust laws. The laws were updated in the 1930s, the 1950s and again in the 1970s. The fact that we've now gone more than 40 years since updating the antitrust laws is the exception rather than the rule. As the antimonopolist Senator Estes Kefauver said in a 1958 Congressional report, lawmakers can and should update the antitrust laws from time to time to ensure "that our existing laws are adequately enforced so that the public is afforded the full protection guaranteed by the laws."[25]

Today, Congress must take fast and decisive action to update U.S. antitrust laws to address our current monopolized economy.

## Overarching Goals for Reform

In amending the antitrust laws to undo misguided court decisions and restore effective enforcement, Congress should be guided by two overarching goals:

- **Clarify the intent of the antitrust laws.** When Congress passed the original antitrust laws, and amendments to those laws over the years, they intended not only to ensure competitive consumer prices, but to safeguard the democracy and the economic liberty of small sellers, workers, and everyone else from the tyranny of monopoly. As Senator John Sherman, the namesake of the Sherman Antitrust Act, said in support of that first antimonopoly law: "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life."[26] Congress must use amendments to our antitrust laws as an opportunity to restate and clarify the intent of the antitrust laws as the means of protecting freedom from monopoly.

- **Reinstate bright-line standards when enforcing the laws.** The amendments should end rule-of-reason standards for judging conduct by dominant firms and replace them with bright-line rules. Over the past 40 years, courts have allowed lawyers and economists to skew enforcement of our antimonopoly laws, creating subjective, biased legal standards tilted in favor of monopoly power. Any new law must include bight-line rules for mergers and monopoly abuses, to both reinvigorate enforcement of the laws, and to create clear rules for companies.


## Recommended Reforms

We recommend that Congress pass legislation addressing two areas of antitrust law: abuses of dominance and mergers. Our proposals would remove the judicially created barriers that have clouded the goals of antitrust and handcuffed our efforts to police corporate power.

**To stop monopoly conduct:**

- **Establish criteria for dominance of an industry.** Any update to our antitrust laws must make clear that dominance of an industry, rather than a single-firm monopoly, should be the standard for any case involving abuses of such power. The law should make clear that enforcers can prove dominance through a company's conduct and its ability to dictate terms or prices to its customers, suppliers, or workers. Rather than relying on complicated analysis of a company's market share – an analysis that often relies on expensive, byzantine economics – the law should instruct courts to establish dominance by relying on this direct evidence of harm to industry competition.

- **Clarify requirements for proving predatory pricing.** Currently, a monopolist is only held liable for predatory pricing if there is overwhelming proof that, after driving its rivals out the industry, the company raised prices high enough to recover the money it lost, which most powerful, well-financed companies never have to do. Amazon, for example, does not need to increase the price of its Echo speakers or Kindle e-book readers, because those artificially low prices are a way Amazon lures users into its ecosystem. The antitrust laws must be updated to make clear that plaintiffs don't need to show a monopolist raised prices to recoup losses to successfully prove abusive predatory pricing. Rather, sustained below-cost pricing in an industry is sufficient to prove a predatory pricing case.

- **End unnecessary barriers to proving tying.** Today, plaintiffs must prove that a dominant company successfully monopolized another product by tying it to its primary, monopolized good or service. But independent businesses suffer even when a tying scheme doesn't result in outright monopoly power. The law must be updated so that plaintiffs can prove a tying violation simply by showing a dominant company used coercion to force buyers to buy products in two distinct product markets. As with predatory pricing, tying should once again be patently illegal under the law.

- **Lower barriers to proving harmful price squeezing, price discrimination and refusals to deal.** Decades of bad court decisions have made proving some of the most common kinds of harmful monopoly conduct, including when a monopolist refuses to deal with rivals that rely on its infrastructure to reach customers and when mega-retailers demand lower prices and better terms from their suppliers (called price discrimination). The law must bring these crucial areas back into antitrust enforcement by establishing bright-line rules that end those practices.

- **Expose shared monopoly conduct to antitrust enforcement.** Crucially, the law must also be updated to address shared monopolies – markets in which a few companies comfortably share power and act in unison to harm competition. Shared monopolies dominate many American industries: mobile phones, beer, airlines, and our food supply from production to retail, among many others. Congress and the antitrust agencies tried to address this in the 1970s, but those efforts were derailed by the Reagan Administration. Current research now shows that shared monopolies do extensive harm to consumers and the economy. Congress must act to make clear that industries dominated by just a few firms can violate our monopolization laws and should be subject to the same remedies as outright monopolies, including breakup.

- **End persistent monopolization.** Over the past half-century, the courts decided to permit and even embrace monopolies as efficient and good for the economy – despite clear evidence of their vast harms. Congress must adjust the antitrust laws to make clear that persistent monopolization, in which one firm dominates an industry for five years or more, represents a dangerous concentration of power, and that regulators are able to use the antitrust laws to disperse that power regardless of a monopoly's conduct.

**To stop harmful mergers:**

- **Create structural bans on mergers and acquisitions by dominant companies.** Congress must update the Clayton Act to add clear concentration limits to the law, in line with rules the Justice Department enacted in its original 1968 merger guidance.[27] The 1968 guidance, for example, directs enforcement toward the "identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit non-competitive conduct." The guidance goes on to define highly concentrated markets, market share thresholds, and other criteria the agencies should consider when deciding whether to permit a merger. Congress should similarly establish bright-line thresholds for industrial concentration to ensure mergers that alter market structures in significant ways are considered anti-competitive.

- **Prevent mergers that give companies excessive power over workers and suppliers.** Most labor markets across the country are highly concentrated, and that concentration leads to lower wages for workers, farmers, and other producers.[28] Given this extreme concentration around the country, mergers between powerful buyers can and likely will create or increase the power to set wages and prices for the goods and services of smaller providers — like powerful meat packers low-balling ranchers and forcing producers into a kind of economic servitude. Congress must explicitly direct the antitrust agencies to consider buyer power when reviewing mergers and set limits on labor market concentration for mergers.

- **Clarify the law's prohibition of harmful vertical mergers.** Congress amended the Clayton Act in 1950 to make clear that conglomerate mergers, in which powerful sellers took over suppliers or distributors in their industries, were likely to hurt competition. But over the past 40 years, activist judges and pro-monopoly enforcers have erased that intent and created a system in which stopping a harmful vertical merger is nearly impossible.[29] Such activism persuaded the government to support drug store giant CVS's purchase of both Caremark and insurer Aetna, giving one company the power to raise prices across nearly every part of the pharmaceutical healthcare system.[30] A revised merger law should make clear that vertical mergers can and do inflict great harm on the economy, often cutting off smaller rivals from the goods or services they need to compete, and that the antitrust agencies and courts should presume that vertical mergers harm competition.

Luckily, there is today significant momentum in both chambers of Congress – as well as in state legislatures and attorneys general offices around the country – to finally address the persistent monopolization that has dogged America's economy for more than a generation. This momentum is important, and not to be taken for granted. At the time of this writing, Congress is on the verge of passing major legal changes to address the monopoly power of Big Tech monopolies. It's a crucial first step to addressing our monopolized economy.

But without the recommended legal reforms above, we risk wasting this moment, and allowing bad and often dangerous legal precedents to undermine our democratic ability to police our economy well beyond the tech sector. Only by undoing these restraints on our antitrust laws — laws intended to prevent monopoly and end outsized concentration in the economy — can we benefit from their ability to empower us as workers, entrepreneurs, and citizens by breaking monopoly's grip on our lives and livelihoods. ■

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