The State(s) of Antitrust:

How States Can Strengthen Monopoly Laws and Get Enforcement Back on Track

By Ron Knox

April 2025

Powerful corporations dominate the economy today, raising prices, suppressing wages, and hollowing our communities. Decades of misguided tolerance for corporate power by both policymakers and judges have made antitrust enforcement at the federal level difficult at best. Even when the Biden administration's antitrust enforcement agencies had recommitted to fighting against monopolies, some core anticompetitive tactics remained hard to reach under current case law. That enforcement void has allowed the size and power of dominant corporations to grow unchecked, while independent businesses, workers, farmers, and entire communities struggle.

States today can step in to overcome shortfalls in our ability to combat monopoly power — as they have many times before. Several states have proposed a fresh approach to policing corporate power, one that better matches the realities of, and widespread problems created by, today's ultra-concentrated economy while capturing the original spirit and purpose behind our antitrust laws. Those proposed reforms are a key tool that state leaders can use to ensure fairness in their economies and defend their citizens against corporate abuses.

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***The Institute for Local Self-Reliance** is a national research and advocacy organization that partners with allies across the country to build an American economy driven by local priorities, accountable to people and the planet.*

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This issue brief explains how unchecked corporate power hurts communities today; how policymakers and enforcers allowed corporate concentration to run rampant; how courts have weakened our ability to enforce state and federal antitrust laws; why states should strongly consider adopting reforms to help overcome those barriers; and how some states are already taking action.

Why Addressing Monopoly Power Should Become a Priority for State Lawmakers

The unchecked concentration of market power is disturbingly widespread, in industry after industry, and is imposing unprecedented harm. It has deprived many communities of basic services, from grocery stores to broadband to hospitals. Consumers are paying for it in steeply inflated prices, especially for groceries and medicines. It siphons tax revenues from local governments and denies people the opportunity to build their own businesses, cutting off a crucial pathway to the middle class. And it hurts workers by narrowing employment options, pushing down wages, and degrading labor standards. It has created and exacerbated economic and racial inequality, fractured communities, and weakened our democracy.

In Minnesota, Phil Hommerding says his Rochester-based drugstore, Hunt's Silver Lake Drug & Gift, is inadequately reimbursed for many of the prescription drugs it sells.[1] That's because dominant middlemen in the pharmaceutical industry — called pharmacy benefit managers (PBMs) — control how much pharmacies are reimbursed for the drugs they sell, often undercutting payments. Small drug stores can't push back out of fear of losing access to medicines. The conflicts of interest in the pharmaceutical industry are predatory and abusive, which explains in part why nearly 400 independent pharmacies in Minnesota have closed since 1996.[2]

Corporate dominance has left communities with hollowed-out Main Streets, jobs that pay poverty wages, and few ways to build a democratic, equitable economy that works for everyone.

In New York, Bill Stewart has owned Long Island Toy & Game for nearly a decade, but making a living selling toys is harder than ever. The big brand name toy companies like Mattel and Hasbro consistently stock the shelves at large chains, but have made their mandatory minimum purchases so onerous that stores like Stewart's can't buy direct. Instead, they buy from middlemen, making it impossible for Stewart to compete with the big chains on price without losing money. And, in the past, when Stewart had looked for new customers on Amazon, he was forced to pay its impossibly high fees just to have his products visible to shoppers, only to have Amazon use its unchecked buyer power to undercut him. Everywhere Stewart turns, dominant companies handcuff his ability to compete on equal footing.[3]

In Maine, Heather Spalding and the Maine Organic Farmers and Gardeners Association work with local organic farmers to bring their produce to market. Group members grow hundreds of thousands of pounds of produce to sell in Maine and beyond, but corporate dominance often obstructs their pathway into the big supermarkets with the largest customer bases, despite their frequent "buy local" pledges. The chains fix prices with massive corporate farms on the West Coast and Southwest, making it difficult at best for local farmers to compete. Everywhere they turn, small Maine farmers run into corporate roadblocks.[4]

Decades of policy and court decisions have embraced corporate bigness and allowed consolidation to accelerate out of control. Over the past two-plus decades, more than three-fourths of all US industries have become more concentrated, and the top three or four companies in each industry have tightened their grip on these sectors.[5] This consolidation has left the biggest firms in the economy with unaccountable power, allowing them to muscle out smaller competitors, hike prices for shoppers, and keep wages low.[6] Corporate dominance has left communities with hollowed-out Main Streets, jobs that pay poverty wages, and few ways to build a democratic, equitable economy that works for everyone.

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Nearly 50 years of misguided court rulings have radically narrowed the scope of federal antitrust laws, making antitrust enforcement significantly more expensive and burdensome, and in some cases, nearly impossible.

How Misguided Court Rulings Have Weakened Antitrust Law

More than a century ago, states created strong laws to limit corporate power. Years before the federal government enacted its first antitrust law, states used their own statutes to stop dangerous concentrations of corporate power, even revoking corporate charters when needed. These early state laws laid the groundwork for Congress to pass the Sherman Antitrust Act in 1890.

But, beginning in the 1980s, a major shift occurred in how federal antitrust enforcers and the courts interpret and enforce antitrust laws. Although in recent years federal enforcers have shown renewed determination to rein in corporate monopolies, nearly 50 years of misguided court rulings have radically narrowed the scope of federal antitrust laws, making antitrust enforcement significantly more expensive and burdensome, and in some cases, nearly impossible. Here is how that happened.

CONSUMER WELFARE STANDARD

In the mid-1970s, a new way of thinking arose that degraded our antitrust laws and accelerated the concentration of corporate power. The "consumer welfare standard" advanced the misguided notion that big corporations are inherently more efficient and will keep prices low. That philosophy became dogma among policymakers, judges, and the antitrust agencies themselves. Officials under-enforced some laws and outright ignored others, despite the intention of Congress when passing those laws. The enforcers and courts that adopted this view replaced the broad concern for the welfare of workers, small businesses, and communities, with a narrow focus on creating wealth, even though this pro-bigness philosophy has often led to higher prices, stagnant wages, far fewer small businesses in communities around the country, and diminished innovations over time. This quiet political coup ultimately defanged our desire and ability to rein in corporations for the protection of the American people.

THE "RULE-OF-REASON" LEGAL STANDARD

Armed with this pro-bigness philosophy, antitrust enforcers and judges weakened antitrust law by undoing bright-line rules that stopped big mergers and made specific kinds of behavior outright illegal. Instead, they began deciding cases under a highly subjective, opaque "rule-of-reason" approach. Judges scrapped clear rules against 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 monopoly cases now require complex analysis provided by expert economists — the kind of experts powerful companies can afford to buy without limit. This approach led to judicial decisions that handcuffed our ability to enforce the law and stop corporate abuses.

MARKET-SHARE THRESHOLDS

Courts' pro-monopoly turn toward the consumer welfare standard also exacerbated a weakness in our monopoly law that had existed for decades. In case after case, courts have defined a "monopoly" as a company with an impossibly large share of a market, making abuses of corporate power difficult to prove and betraying how outsized corporate power actually exists in industries. As early as 1911, the Supreme Court viewed a company that controlled 90 percent of an industry as a monopolist — a level of control even most dominant companies never obtain.[11] By the mid-20th century, judges had made clear that only the biggest, most powerful companies were liable for monopoly abuses.[12] For example, judges on the Fifth Circuit appeals court ruled that "monopolization is rarely found when the defendant's share of the relevant market is below 70%," while the Third Circuit has found that market power only exists at "a share significantly larger than 55%."[13]

Courts' fixation on the market share of a single company betrays the reality of industries today.

Judicial Decisions Based on "Rule-of-Reason"

The rule-of-reason legal standard led to judicial decisions that handcuffed our ability to enforce the law and stop corporate abuses. For example, for decades the Supreme Court and monopoly enforcers viewed "tying" — when a dominant company uses its control over one product or service to force customers to buy another, separate product — as a straightforward monopoly abuse.[7] But by the mid-1980s, in a case called *Jefferson Parish*, the Court threw out those decades of precedent and instead found that tying cases should be reviewed under the "rule-of-reason."[8] Monopolistic tying has been far more expensive and difficult to prove since.

Relying on rule-of-reason, in the 1980s and 90s, the Court handed down decision after decision that made it much harder, sometimes nearly impossible, to prove many types of monopoly violations. This includes predatory pricing, where a powerful firm sells a product below cost to drive its rivals out of the market, which has become rampant since the Supreme Court made it nearly impossible for antitrust enforcers to prevent it.[9] In the Court's 1993 Brooke Group decision, enforcers accusing a monopolist of predatory pricing suddenly had to prove that the monopolist not only succeeded in driving its competitors out of an industry, but that it then hiked up prices to recoup the money it lost by pricing below cost. This new burden on enforcers amounted to a declaration that predatory pricing was now essentially legal; since then, Walmart and Amazon have both been credibly accused of predatory pricing multiple times, as have other dominant corporations.

In some cases, courts also grafted this thinking onto state law. In a prominent state case against Walmart in the 1990s, an Arkansas circuit court found that Walmart had broken the state's ban on predatory pricing by selling certain pharmaceutical drugs below cost. Soon after, however, the state's Supreme Court overturned that ruling by relying on the U.S. Supreme Court's nearly unreachable predatory pricing standard.[10]

> Companies with far lower market shares act in ways that demonstrate their power, including, for example, significantly raising prices without losing many customers. The economy today is filled with industries where a few firms share this kind of monopoly power. Consider airlines, where four companies dominate domestic travel, or the three companies that divide up our telecommunications industry, or the 70 percent of our beer market that rests in the hands of just three mega-brewers.[14] In these industries, companies move in lock-step to raise prices, lower wages, or act in other ways that expose their collective market power, despite not touching courts' "monopoly" thresholds.

These high barriers for proving monopolization, along with the courts' turn to the subjective, rule-of-reason approach to monopoly cases, have rendered many abuses of corporate power virtually legal, shielding many dominant companies from prosecution. Reforming, clarifying, and strengthening antitrust laws at the state level would help overcome many of these legal obstacles and give policymakers and enforcers the tools they need to protect workers, consumers, and independent businesses within their borders.

How State Antitrust Reform Legislation Can Get Enforcement Back on Track

At the time of this writing, both the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice are prosecuting multiple monopoly cases, merger challenges, and other enforcement actions simultaneously — these cases are bold and some have so far succeeded in court. At the behest of enforcers, courts have found that Google abused its online search monopoly and have blocked mergers in book publishing and supermarkets, among other industries. The FTC, along with state enforcers, fought and successfully blocked Kroger from buying Albertsons, in some places its only real supermarket rival. The agency is once again

Minnesota State Capitol
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States today have the opportunity to strengthen their capacity to stop dominant companies from abusing their powers.

enforcing the Robinson-Patman Act, an antitrust law that bans discriminatory pricing between retailers and their suppliers.

While these cases speak to a rejuvenation of our antimonopoly traditions, federal enforcement overall remains limited. With constrained budgets, the agencies are understandably hesitant to bring cases that, despite their merits, face extraordinary burdens before a judge. Changes in administration can also sideline antitrust or lead the agencies to pursue certain violations while ignoring others.

States are powerful actors in antitrust enforcement and can continue the democratic tradition of constraining monopoly power. State enforcers today, empowered by our federalist system, are best placed to identify dangerous business practices inside their state lines and fight against abusive corporations on behalf of their residents. Officials at the state level are better in tune with the workers, small businesses, and communities in their state and, when necessary, can more quickly adjust their laws to address ways corporations use their market power to exclude competitors as they arise. State legislation is also a source of policy innovation, often serving as a model for federal legislation.

Today, amid a growing realization that the unchecked exercise of monopoly power is causing real economic harm, states have been stepping up — sometimes on their own and sometimes in tandem with the federal government. State enforcers in Washington, Colorado, Arizona, and elsewhere have used their unique state laws to fight Amazon's monopoly abuses, landlords conspiring to raise rents, dangerous supermarket mergers, and other issues. Many states have also joined federal enforcers on important monopoly and merger challenges, including the Amazon lawsuit filed in 2023, the Justice Department's lawsuit against the Ticketmaster music monopoly, and the Kroger-Albertsons merger lawsuit, which they won in 2024.[15] Two states, Colorado and Washington, sued to block the Kroger-Albertsons on their own; a Washington state court sided with the state and agreed to block the deal as well.[16]

When states break the cycle of corporate bullying by enforcing and strengthening their antitrust laws, constituents benefit.

While states are using their antitrust laws, they should also make them stronger. As with federal enforcers, states are impeded by past court cases that sided with big businesses. Even in states with strong antimonopoly laws, those laws typically mirror federal law, and judges often apply the same pro-bigness constraints on cases brought under those state statutes. Meanwhile, some state laws put very few restrictions on monopoly abuse, harmful mergers, and other anticompetitive tactics, leaving residents and small businesses vulnerable to monopoly abuses and unchecked consolidation. In either case, states today have the opportunity to strengthen their capacity to stop dominant companies from abusing their powers.

Several states have recently passed important, targeted antimonopoly reforms that have given enforcers better tools to address anticompetitive conduct. For example:

- In Minnesota, lawmakers there approved new restrictions on hospital mergers that threaten to cut off healthcare access to residents.[17]
- Three states — New York, California, and Minnesota — have passed "right to repair" laws that break the monopoly massive electronics firms like Apple held over repairing their devices.[18]
- Colorado and Washington have both passed laws that greatly increased the fines companies face for breaking the law. Fines are deterrents, sending a clear signal to monopolists that breaking the law comes with real consequences.[19]

The push for reform continues to spread around the country, with other targeted reforms being considered in Maine, Massachusetts, Pennsylvania, and beyond.

States are also looking at broader legislation that would reinstate the principles and legal standards crucial to robust antitrust enforcement. New York's 21st Century Antitrust Act, for example, has served as a lodestar for monopoly reform bills that both clearly define what constitutes market dominance and detail which kinds of corporate conduct are anticompetitive and violate the law.[20] Rather than leaving judges to decide between competing economic models and weighing whether so-called "efficiencies" — as argued by corporate lawyers and economists — make otherwise illegal conduct ok, the bill makes clear that some acts by a dominant company always or usually break the law. Those kinds of bright-line rules make it easier for companies to abide by the law, easier for plaintiffs to sue if they've been harmed, and easier for judges to recognize when dominant companies have broken the law. By reforming state antitrust laws, policymakers can ensure their states have the power to address real harms in the economy.

What Would Change If State Antitrust Reforms Were Enacted?

No one likes getting bullied — not by a person, and not by a corporation. But for many decades, powerful firms have bullied their rivals, their suppliers, their workers, and their customers with little fear that anyone would step in to stop them. Everything costs more, our paychecks are smaller, and starting a business in industries where a few powerful companies dominate is shatteringly difficult.

It's no surprise, then, that fighting monopoly power is broadly popular in America today. Nearly 70 percent of Americans in battleground states support laws that restrict monopolies, including majorities across the political spectrum, according to a recent poll.[21] It is becoming increasingly understood that antitrust enforcement is a clear solution to people's struggles.

When states break the cycle of corporate bullying by enforcing and strengthening their antitrust laws, constituents benefit. By stopping powerful chains from squeezing their suppliers and smaller rivals, state officials could foster new, bedrock businesses, injecting the kind of competition that prevents food deserts, keeps predatory dollar stores at bay, raises wages for workers, and creates lower prices and more choices for shoppers.[22] By passing laws that stop Amazon from abusing and controlling the businesses that have been forced to rely on the company's monopoly, state officials would help more small online shopkeepers stay in business and find new paths to market, and help improve wages and working conditions for delivery drivers. Strong state-level monopoly enforcement that reins in the abuses of meatpacking, seed, and crop processing monopolies would help farmers and ranchers earn a fair price for the crops they grow and the animals they raise. The benefits of enforcing and strengthening state antitrust laws touch every part of the economy — and every aspect of people's lives. ■

Strong state-level monopoly enforcement that reins in the abuses of meatpacking, seed, and crop processing monopolies would help farmers and ranchers earn a fair price for the crops they grow and the animals they raise.

For more on antitrust and monopoly power, check out these ILSR resources:

State Antitrust Resource Hub

Handcuffed by the Courts

Fighting Monopoly Power

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Notes

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4. “MOFGA Testimony In Support Of LD 1815 - An Act to Protect Maine’s Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers,” January 9, 2024.
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6. Bruno Pellegrino, “Product Differentiation and Oligopoly: a Network Approach,” *WRDS Research Paper*, 2019; Ioana Marinescu, “Could Increasing Market Power Among Firms be Hurting Workers’ Wages?” Econofact, April 22, 2018.
7. Standard Oil Co. of New Jersey v. United States, 337 U.S. 293 (1949). The Court found that tying “serves hardly any purpose beyond the suppression of competition.”
8. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).
9. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
10. Norman Hawker, “Wal-Mart and the Divergence of State and Federal Predatory Pricing Law,” *Journal of Public Policy and Marketing 15*, no. 1 (1996): 142-143.
11. U.S. v. Standard Oil Co. of New Jersey, 221 U.S. 1 (1911).
12. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). As Judge Hand said in U.S. v. Aluminum Co. of America, while a company with a 90 percent share of a market is certainly a monopolist, it was “doubtful whether sixty or sixty-four percent would be enough.
13. Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984); United States v. Dentsply Int’l, Inc., 399 F.3d 181, 187 (3d Cir. 2005).
14. “Airline Domestic Market Share December 2023 - November 2024,” U.S. Department of Transportation, Bureau of Transportation Statistics, accessed March 2025 from https://www.transtats.bts.gov/; “Cell Phone Providers,” Open Markets Institute (2018), accessed March 2025 from https://concentrationcrisis.openmarketsinstitute.org/industry/cell-phone-providers/ (noting that Sprint and T-Mobile have now merged); Jan Conway, “Major Beer Vendor Market Share in the United States from 2022 to 2023,” *Statista*, December 13, 2024.
15. The FTC’s Amazon lawsuit was joined by 17 state attorneys general; 29 states and Washington, D.C. joined the Ticketmaster lawsuit; and attorneys general from 14 states and the District of Columbia joined the FTC’s Kroger/Albertsons merger challenge.
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17. Cathy Wurzer and Gracie Stockton, “Minnesota’s New Health System Merger Law: Key Questions, Answered,” *MPR News*, July 13, 2023.
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