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Book Reviews

Promoting Competition: Klobuchar's Call to Rethink the Antitrust Law Paradox

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Amy Klobuchar's latest book emerges just as U.S. commerce reawakens from lockdowns triggered by the Covid-19 crisis, proving to be both timely and promising as a template for change. In *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age* (Victoria Wilson ed. 2021), she presents her thesis that the nation cannot continue to ignore market distortions caused by lack of fair competition rules.

Economic impact events, such as epidemics and wars, often lead to renewed calls to support the private sector, downplaying the need for regulatory safety rails. Klobuchar, the senior senator from

* Professor of Law, Arthur L. and Sandra S. Piccone Faculty Scholar, Penn State Dickinson Law. Why does a law professor who spends much of her research time on "law and aging policy" issues choose to dive into a 600-page book on antitrust law? The answer: my awareness of a deepening contraction in the related markets of housing, long-term care, and health care for seniors and my rising concern about price, quality, choice, and access. Special thanks to my student editor, Claudia Bernstein, to my pro-business friends, Jack Cumming, Dave Pearson, and Craig Whalley, for encouraging me to read carefully, to Adjunct Professor Michael Finio, Esq. for offering his wisdom from more than thirty years of experience with antitrust law, and to a wonderful, observant research assistant, J. Collin Fulton (Class of 2023).

Minnesota, warns against falling more deeply into the trap of "antitrust neglect"[1] as she sees sharp-eyed powerbrokers lurking in the wings, ready to pounce on new advantages amid the adversity. The *Wall Street Journal* reports historic numbers of U.S. business closures connected to the pandemic, including some 130,000 small businesses and another roughly 70,000 closures of specific locations for larger chains.[2] For reasons including but not limited to the impact of the Covid-19 pandemic, Senator Klobuchar makes the case that the time is ripe—indeed overripe—to reignite diversity in commerce, society, and politics:

> It's time for "We the People" to get engaged once again—to take on the systemic issues of money in politics, greed and corruption, and, yes, collusion, cartels, and the state of our nation's antitrust laws. That's one way to strive to form that more perfect Union.[3]

A book that traces the history of antitrust law in the U.S. seems, at first, to be a strange platform for an ambitious policymaker. This is not an inspirational collection of essays about noble Americans.[4] This is not the tale of a personal journey in search of identity and political mission.[5] The well-written narrative should be a welcome item on reading lists for an array of higher education courses. Individual chapters stand on their own merit, both for historical aspects and current challenges, and are useful for courses such as economics, political science, and law (such as a basic course on contract law where bargaining power is an important topic, or for more advanced subjects such as mergers and acquisitions, administrative law, or regulatory fields). Nonetheless, it must be conceded, antitrust is not typically a topic that rallies the public.

But the winds are shifting. Commercial behemoths impact the lives of more and more consumers, especially with the growth of the digital economy. One of my colleagues on the faculty at Dickinson Law, Michael Finio, teaches Antitrust Law and has a 30 plus year career in complex commercial transactions. After reading Klobuchar's book, he predicted, "It's an exciting time to be an anti-

1. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 121 (Victoria Wilson ed., 2021).

2. Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (Apr. 16, 2021, 9:43 AM), https://on.wsj.com/3hHb7fb [https://perma.cc/H7ZD-CHRZ].

3. KLOBUCHAR, *supra* note 1, at 15.

4. For an example of a politically motivated inspirational anthology, see generally JOHN F. KENNEDY, PROFILES IN COURAGE (1956).

5. *See, e.g.*, BARAK OBAMA, DREAMS FROM MY FATHER (1995) (detailing President Obama's formative years from childhood through his enrollment in Harvard Law School).

trust lawyer."[6] He continued: "That excitement stems not just from the volume of competition-scrutinizing inquiries by antitrust regulators, but also from the effort to determine how to make the century-old language of the Sherman and Clayton Acts operate effectively—if we can—in the digital age."[7] He concluded, "The present-day challenge is to keep two concepts in mind: the antitrust laws are consumer protection mandates, but early cases interpreted the laws as a mandate to protect 'competition, not competitors.'"[8]

From the first to the last page, Amy Klobuchar's clear-eyed exploration of the topic should be viewed as a quest for fairness in society at large. She is urging new definitions of economic liberty. This is not a moribund academic exercise.

Amy Klobuchar is proud of her midwestern identity, especially the deep taproot of her beloved Minnesota,[9] and she draws upon that identity to establish ground rules for a new path in antitrust enforcement. Her vivid accounts of key events, including enforcement efforts that often began in midwestern factories and farms, or county courtrooms and state legislatures, help shape her argument about the need for American "competition law," the label she prefers to "antitrust law."

The book falls roughly into thirds. The first third is a mostly linear history of antitrust law; the second third is an advocate's detailed template for future action in competition law; the last third, curiously, is almost 200 pages of law-based "short stories," in the form of mostly narrative endnotes.[10]

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6. Email from Michael A. Finio, Esq., Saul Ewing Arnstein & Lehr LLP in Harrisburg, PA to Katherine Pearson, Professor of L., Penn State Dick. L. (Aug. 8, 2021) (on file with author).

7. *Id.*

8. *Id.* (quoting Brown Shoe Co. v. United States, 170 U.S. 294, 320 (1962)); *see also* KLOBUCHAR, *supra* note 1, at 133 ("[T]he Supreme Court was using antitrust law not to protect competition but to make . . . legitimate competition illegal.").

9. Amy Klobuchar was elected to the U.S Senate for Minnesota in 2007. From February 2019 to March 2020, she was a candidate to become the Democrat's nominee for President. She currently chairs the U.S. Senate Rules Committee and is a long-time member of the Senate Judiciary Committee. For her biographical details, see *United States Senator Amy Klobuchar: Working for the People of Minnesota*, https://bit.ly/3jSseNV [https://perma.cc/UY4K-9S2R] (last visited Aug. 11, 2021).

10. Klobuchar warmly credits her husband for many contributions to the "book project," including "nearly every endnote (yes, there are a lot of them)." KLOBUCHAR, *supra* note 1, at 357.

Senator Klobuchar begins her narrative with the board game *Monopoly*. Admitting her own early affection for accumulating houses, hotels, and facsimile dollars in her bid to control the board, she explains how the game was not, contrary to legend, the brainchild of Clarence Darrow.[11] Rather, the game was patented by an Illinois woman in 1904. She reminds us that Elizabeth Magie conceived of the game, with its original title, the "Landlord's Game," as a way to "promote the ideas of Henry George, an American journalist and economist who had written a wildly popular book, *Progress and Poverty* (1879), that sold millions of copies."[12] It was intended as a lesson in the dangers of monopolies.

Klobuchar, with the skills of a seasoned lawyer (who began her practice career representing a telecom competitor[13]), uses an array of such vignettes, as well as excerpts from books, newspapers, and speeches before transitioning to analysis of individual cases and statutes. She is presenting her body of evidence that throughout the history of our country there has been a justified wariness about too much power in the hands of too few people. The Boston Tea Party, F. Scott Fitzgerald's *The Great Gatsby*, protests by "grangers" (Iowa and Minnesota farmers), strikes by miners, steel workers, cotton mill workers, and even cowboys in Texas—all are portrayed as examples of deep and widespread public sentiment against concentration of powers, whether in the hands of a single owner or when achieved through manipulative collaborations, sometimes known as "trusts."[14] Such events precede the federal passage of the 1890 Sherman Antitrust Act[15] outlawing monopolies and the 1914 Clayton Antitrust Act[16] targeting other anticompetitive conduct.[17]

She contends that with committed leadership, reforms are possible, citing Theodore Roosevelt's 8 years as president and the breakups of more than 40 monopolies, including American Tobacco Company and Dupont Chemical.[18] She credits other successful efforts to leaders whose respect for business and capitalism was com-

11. KLOBUCHAR, *supra* note 1, at 30 (explaining that "good old-fashioned sleuthing by the former *New York Times* and *Wall Street Journal* reporter Mary Pilon" debunked that myth).

12. *Id.* at 31.

13. *Id.* at 141.

14. *Id.* at 21–74.

15. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

16. Clayton Antitrust Act of 1914, Pub. L. No. 63–212, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

17. KLOBUCHAR, *supra* note 1, at 75–120.

18. *Id.* at 98.

bined with a commitment to "economic liberty and fairness."[19] She points to the breakup of AT&T, with the final plan formalized in 1983, as the "high point for modern antitrust enforcement."[20] The breakup of that national monopoly, she explains, is "widely viewed as a historical success, spurring competition and innovation, leading to even more jobs and cheaper phone service."[21]

In contrast to the early years of U.S. antitrust law, for much of the last five decades, the enforcement of laws prohibiting concentration of commercial power has been resisted with the help of influential writers, such as Robert Bork, Richard Posner, and others often described as shaping the "Chicago School" of law and economics. As Robert Bork wrote with satisfaction (and only a small squib of humility) in reviewing the impact of his own writing on antitrust policies, "The changes in antitrust have been almost entirely for the better . . . . If by no means perfect, the policy today [1993] *is* intellectually respectable, both as law and as economics."[22]

Others, including the "Harvard School" of contrasting scholars on law and economics, have challenged the premise that antitrust law enforcement is more likely to cause economic harm than prevent it.[23] With strategic use of humor and political cartoons and her self-styled realism, Amy Klobuchar—ironically herself a high-honors graduate of the University of Chicago's School of Law—steps up to the dais to respond with vigor to Bork and his followers. Her volume presents a formidable reconsideration of both the past and future of antitrust law enforcement.

Bork, in his widely cited book, *The Antitrust Paradox*, first published in 1978, condemned American antitrust law as based on premises that "were flatly inconsistent with one another, some of them leading to preservation of competition and others to its suppression."[24] To offer my own paradoxical anecdote, I have a longtime friend who owned a beloved independent bookstore on the Washington coast.

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19. *Id.* at 119.

20. *Id.* at 138. Amy Klobuchar reports the coincidental impact on her own early career as she came to be part of a private law firm team representing MCI, a "maverick" competitor seeking access to the telephone industry, and thus a beneficiary of the AT&T breakup. *Id.* at 141.

21. *Id.* at 142.

22. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF xiv (The Free Press 1993).

23. Senator Klobuchar points to Philip Areeda, Herbert Hovenkamp, Donald Turn, and Stephen Breyer as prominent examples of the Harvard School academics. KLOBUCHAR, *supra* note 1, at 135.

24. BORK, *supra* note 22, at ix.

As big box stores and discount sellers moved into the book market, he struggled to keep a stake in the game and accumulated debt. Then came Amazon in the mid-1990s, and my friend was astounded by the low prices his "neighbor" from Washington state was offering.[25] He knew how narrow the margin was from his years in bookselling. My friend, seeing personal disaster ahead, began to purchase Amazon stock and eventually that investment helped him dig himself out of his financial hole; but, when he emerged, he was no longer a bookseller, and he sold out. He welcomed Amazon, even as he was unable to compete with the behemoth that began its empire-building by using books as a loss leader.

That's an example of an antitrust paradox. One man's demise with the help of Big Business also gave that individual an opportunity to invest in the success of Big Business. Even Klobuchar's preferred label for antitrust laws—"competition law"—unintentionally plays to a core American theme, that in every "competition" there must be a winner. Consumers clearly like Amazon; but does the public understand—or care—that choices are disappearing with the convenience of, for example, the company's patent-protected one-stop "click" shopping process?

For pro-business folks who are unsympathetic to a small businessman's struggles to survive in a brick-and-mortar setting, remember that large bookstore chains[26] and even discount book sellers[27] also were clobbered not just by Big Business, but Bigger Businesses, including Amazon. Plus, we now know the book market was not Amazon's end game.[28] Klobuchar describes Amazon's purchase of an online pharmacy for $753 million in 2018 and its international expansion through its cloud platform subsidiary, Amazon Web Services.[29] Even more recently, in May 2021, Amazon announced another acquisition for its empire, Metro-Goldwyn-

25. Jeff Bezos's development of Amazon began with selling books out of his garage in Bellevue, Washington. *See, e.g.*, Tom McKay, *You Can Now Buy the House Where Jeff Bezos Started Amazon, if You Really Have to or Something*, GIZMODO (Feb. 11, 2019, 9:30 PM), https://bit.ly/3e21ZRk.

26. Julie Bosman & Michael J. De La Merced, *Borders Files for Bankruptcy*, N.Y. TIMES (Feb. 16, 2011, 11:39 AM), https://nyti.ms/3CJA8Qr [https://perma.cc/XBS7-FEK9]; *see also* Amazon.com v. Barnesandnoble.com, 239 F.3d 1343, 1347 (Fed. Cir. 2001) (analyzing Amazon's claim that Barnes and Nobel's use of online shopping cart infringed Amazon's patented one-click ordering process).

27. *See, e.g.*, *In re* Nat'l Book Warehouse, Inc., Nos. 06–02227, 06–02226, 2007 WL 5595524 (Bankr. M.D. Tenn. May 23, 2007) (describing the history of discount bookseller National Book Warehouse's reduction in operations).

28. *See* KLOBUCHAR, *supra* note 1, at 256 (quoting Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 712, 716 (2017)) (explaining that existing antitrust laws cannot tackle modern antitrust challenges).

29. KLOBUCHAR, *supra* note 1, at 226.

Mayer Studios for $8.45 billion, thus gaining, in the words of the *Los Angeles Times*, "a library of more than 4,000 movies and storied franchises including 'James Bond,' 'Rocky,' and 'The Pink Panther'—in a watershed moment for the entertainment industry."[30]

Bork's hostility to most antitrust enforcement actions helped to turn "free enterprise" into a full-throated battle cry for Big Business. Klobuchar, however, sees too many bodies falling in the shadows of key battles. She casts failures to strengthen antitrust enforcement and political resistance to modernization of competition rules as both regulatory and leadership failures:

> The philosophical shift in the approach to antitrust issues reached its zenith . . . during the Reagan administration as big companies—in unprecedented fashion, all with the cover of Bork's ideology and the now-discredited theory of trickle-down economics—exerted their corporate power and the regulators more or less folded to the pressure.[31]

Klobuchar does not pretend that a new era of competition law grounded in modernized rules will be easy to achieve. If enough people read her book, it could—it should—stimulate important, vigorous debate. She points out that even Bork eventually conceded that companies could be "too big" and ended up as a member of the legal team representing Netscape Communications against Microsoft, seeking "structural relief" to create a fairer playing field on which his client could compete.[32]

Lawyers (or at least law professors) should be intrigued by Klobuchar's proposals to change specific laws by "[a]ltering existing legal standards . . . to put teeth back into the antitrust laws."[33] For example, she advocates for statutory changes to shift "the burden of proof for megamergers [to the company] and lowering the Clayton Act's standard barring mergers that 'substantially' lessen competition to ones that '*materially*' lessen competition."[34] She recommends that indirect purchasers be given express standing to challenge antitrust violations, a statutory change that would reverse a 1977 Supreme Court decision.[35] In describing these and other proposals, Senator Klobuchar frequently points to specific legislation

30. Ryan Faughnder & Wendy Lee, W*hy Amazon Buying MGM is a Watershed Moment for Hollywood and Tech*, L.A. TIMES, (May 26, 2021, 9:00 AM) https://lat.ms/3r27ox4.

31. KLOBUCHAR, *supra* note 1, at 148.

32. *Id.* at 153.

33. *Id.* at 245.

34. *Id.* at 247 (emphasis added).

35. *Id.* at 247–48 (discussing Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977)).

that she or other colleagues have already introduced, but which have been blocked in committees by Republicans.[36]

Klobuchar raises important concerns that transcend political parties, even if the illustrations she provides sometimes have Republican names attached. She warns against misusing the laws for political revenge. The author cites several examples, such as "President Trump's own highly improper meddling in antitrust decision making, including efforts to harm CNN, the cable news network with which he so often sparred."[37] An even deeper concern crosses the aisleways of politics, the need to get "dark money" out of politics.[38] At the head of that challenge is the call for decisive action to reverse the impact of cases such as *Citizens United v. Federal Election Commission*[39] and *McCutcheon v. Federal Election Commission*[40] that opened the flood gates of Big Business money to candidates.[41] Recognizing fair competitions concerns are not purely internal, she also warns that "[e]xtremely complex antitrust issues exist in the international arena,"[42] such as worries about trade secrets and domestic security breaches that may hide in cross-border deals.[43] She urges better international cooperation to address unhealthy concentrations of power while actually echoing one of President Trumps' favorite topics, the unfairness of foreign subsidies for exported products such as steel.[44]

Along with "congressional inertia," Senator Klobuchar points to "corporate consolidation" and "conservative courts" as situated near the heart of current antitrust enforcement problems.[45] Her critique examines the five Big Tech giants: "Apple, Amazon, Alphabet (Google), Facebook and Microsoft . . . [that] now jointly make up a full 20 percent of the total value of the stock market," describing their unique positions as "monopsonists," with the power to set wages, as well as control price and terms for their sup-

36. *Cf.* John R. Ingrassia, *Antitrust Enforcers Need Merger Presumptions to Reduce Market Power?*, 11 NAT'L L. REV. 193 (Jun. 11, 2021) (discussing current congressional proposals regarding antitrust laws, including a call to shift the burden to the consolidator to prove that a merger causes no anticompetitive effect).

37. KLOBUCHAR, *supra* note 1, at 161.

38. *Id.* at 206–11.

39. Citizens United v. FEC, 558 U.S. 310 (2010).

40. McCutcheon v. FEC, 572 U.S. 185 (2014).

41. KLOBUCHAR, *supra* note 1, at 208.

42. *Id.* at 271.

43. *Id.* at 270–74.

44. *Id.* at 333–35.

45. *Id.* at 215. I admit that I'm uncomfortable with the author's focus on "conservative" personalities in the courts. It is not that I deny certain judges and certain courts have tunnel vision; rather, I am concerned that labels can mutate into a dare.

pliers.[46] She reminds us of the 2008 financial crisis. When mega-players control too much of a market, the competition itself can become segmented, with some players "too big to fail," thus scrambling for bailouts when their power-based market strategies prove to be unsound (or worse), while other players are deemed too small to survive.[47] She contrasts mega-player Facebook's acquisition of newer social media players, Instagram and WhatsApp, with its simultaneous efforts to avoid litigation over its handling of existing users' confidential information on its original platform.[48] Should we allow Facebook to acquire a hypothetical "NextApp"? Should we allow it to acquire *all* text communication apps?

In the final chapter, Senator Klobuchar turns directly to the nonacademic reader, the regular members of the public she is clearly hoping to persuade. She gives readers ten homework steps.[49] Here she attempts to rally new troops, encouraging the public to demand accountability from public officials at all levels of power and to report—complain about—anticompetitive behavior.[50] Her admonitions are often direct, such as "[f]ight for choices in tech platforms and privacy rules and for net neutrality and high-speed broadband. Fight for lower pharma prices and to ensure that there is rigorous competition in relevant markets."[51] Senator Amy Klobuchar is banking on the public:

- understanding the fair competition issues she presents;
- demanding an end to the anticompetitive behaviors she describes; and
- embracing the potential for real solutions.

She is preparing metaphorical dynamite needed to break up congressional, regulatory, and judicial logjams, and to put an end to one-sided protections for marketplace bullies.

One of my favorite anecdotes, highlighting the opacity of many areas of law, involves a 1L student who was probably trying to score a few points with the professors seated at an early breakfast roundtable. When she heard that I was teaching the basic course on Wills,

46. *Id.* at 253 (quoting Julie Young for the definition for monopsonist: "A monopsony is a market condition in which there is only one buyer, the monopsonist.").
47. *Id.* at 183, 292–93.
48. *Id.* at 159, 173–74.
49. *Id.* at 348.
50. *Id.* at 348–50.
51. *Id.* at 349.

Trusts and Estates, she explained she was very much looking forward to studying both Trusts *and* Antitrusts. Is that too much of a law professor joke to be funny? I hope not.

With that chuckle in mind, reading Senator Klobuchar's book will likely generate smiles, as well as rueful looks and furrowed brows, as she reviews the past of antitrust enforcement and its continuing paradox in the minds of the public, politicians, the courts, and the academy. Amy Klobuchar makes a rational, persuasive, and, ultimately, passionate argument that American Democracy deserves more—much more—than a succession of power brokers and demagogues.