MERGER ANTITRUST LAW

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Tuesdays and Thursdays, 3:00-5:00 pm
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READING GUIDANCE

Class 2 (September 2): Introduction to Merger Antitrust Law: TransDigm/Takata (Unit 1)

We will continue our discussion of the TransDigm/Takata transaction. So again, please be sure to bring a copy of the *TransDigm* complaint to class.

Once we finished with the case study, we will spend the remaining class time examing how antitrust in general—and merger antitrust law in particular—has evolved since 1890, the public policy behind the consumer welfare standard as the prevailing goal of antitrust law for almost forty years, and the vigorous calls for reform of modern antitrust law and enforcement. Understanding the history of antitrust law—and how the law and enforcement practices have changed over time—is essential to the sophisticated practitioner because it helps place older precedent in context and illustrates how the law can evolve with changes in economic conditions. Moreover, in the current debates over whether antitrust law needs to be modified, the reformers often cite antitrust history to support their arguments. As you gain an understanding of this history, you will see the history the reformers often recite is not quite what happened.[1]

The common law approach to antitrust law. The federal antitrust statutes are written in broad, sweeping terms, which by themselves provide little indication of the line between lawful and unlawful conduct. In contrast to most modern statutes regulating microeconomic behavior, the Sherman, Clayton, and Federal Trade Commission Acts were not intended to provide an instant cure for the perceived competitive problems of the day. The framers of the antitrust statutes recognized that the diversity and rapidly changing nature of business conduct, if not the inadequacy of contemporary economic theory to determine the root causes of anticompetitive behavior as well as the reactions of the trusts to attempts to regulate them, made a definitive statutory cure impossible.

Instead, Congress consciously adopted a more fluid, evolutionary approach to federal competition law. Rather than specifying a rigid, detailed regulatory scheme, the draftsmen used sparse, broadly phrased language to describe the key substantive concepts in the new antitrust law—"contract, combination or conspiracy," "restraint of trade," "monopolize, or attempt to monopolize," and "unfair competition"—language that is almost unique among congressional enactments in its constitution-like quality. These concepts, terms of art drawn from the common law, were employed to empower federal courts to apply a large existing body of competition common law immediately to regulate business conduct. But the Sherman Act was written not to codify the common law once and for all as it existed in 1890. Rather, it was designed to enable

[1] Two basic rules of effective advocacy: First, never make an empirical statement unless you can prove it. If you caught making a claim you cannot support—or, even worse, a claim your opponent proves is false—you lose credibility on everything you say and unless you are credible you cannot be persuasive. Second, always know more about the facts (and the law, the procedure, the economics, and so on) than your opponents.

the courts over time through the common law process to refine the law and its application to particular courses of conduct. As Senator John Sherman (R-OH) candidly stated during the floor debate:

> I admit it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left to the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.[2]

Similarly, Senator George F. Hoar (R-MA), the floor manager for the Sherman bill after it was reported from the Judiciary Committee, observed:

> Now, the Judiciary Committee has carefully and as thoroughly as it could agreed upon what we believe will be a very efficient measure, under which one long forward step will be taken in suppressing this evil. We have affirmed [in the Judiciary Committee redraft] the old doctrine of the common law in regard to all interstate and international commercial transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty.[3]

Senator George F. Edmunds (R-VT), chairman of the Judiciary Committee, expressed a second, even more pragmatic, reason to empower the courts to develop the precise boundaries between lawful and unlawful conduct rather than look in the future to refining legislation from Congress:

> The trouble about this business [of drafting an antitrust law] is as I have seen a good many times before when we were trying to strike at great evils in a broad way and leave the details and difficulties that might arise afterwards to be repaired by legislation, as we do about all such things, that Congress has failed to make a law because the very person against whom it was intended to operate in their mischievous performances got up, as they say on the prairies, a counter-fire and added to the fuel and stimulated men to carry the law so far that it could not be executed at all.
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> That was the aspect of this thing when this subject was sent to the Committee on the Judiciary. We all felt, and the committee, I think unanimously, including my friend from Mississippi [Senator James Z. George (D-MS)], thought that if we were really earnest in wishing to strike at these evils broadly, in the first instance, as a new line of legislation, we would frame a bill that should be clearly within our constitutional power, that we should make its definition out of terms that were well known to the law already, and would leave it to the courts in the first instance to say how far it or its definitions as applicable to each particular case as it might arise.[4]

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[2] 21 Cong. Rec. 2460 (Mar. 21, 1890). *See* 21 Cong. Rec. 2456 (Mar. 21, 1890) (the Sherman bill "does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government") (remarks of Sen. Sherman); *id.* at 2461 ("This bill declares a rule of public policy in accordance with the rule of the common law.") (remarks of Sen. Sherman).

[3] 21 Cong. Rec. 3146 (Apr. 8, 1890).

[4] *Id*. at 3148. *See* George Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. Am. Rev. 801, 814 (Dec. 1911) ("After most careful and earnest consideration . . . [the Senate Judiciary Committee thought that] it was quite impracticable to include by specific description all the acts which should come within the meaning and purposes of the words 'trade' and 'commerce' or 'trust,' or the words 'restraint' or 'monopolize' . . . and that these were truly matters for judicial consideration.").

As we shall see, the courts have had a difficult enough time in attempting to fashion a sensible competition law within the broad foundations laid by the Sherman Act. Senator Edmunds was undoubtedly correct that the task could not realistically be left in the hands of Congress, and wisely Congress has, for the most part, left the antitrust laws to the courts to discern and has not attempted to fine-tune the law through legislation.[5]

As Congress intended, when statutes are vague and uninformative as they are in antitrust, it falls upon the courts to resolve the ambiguities and provide the guidance necessary for the rule of law to operate. As Justice (later Chief Justice) Harlan F. Stone once observed:

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself does not define them. In consequence of the vagueness of the language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed.[6]

The excerpt from the Baxter article (pp. 15-28) develops the common law nature of antitrust law and is an easy read. From a practical perspective, the common law approach to antitrust law invites enforcement officials, private plaintiffs, and defendants to make arguments to the courts that they should abolish or reformulate some then-existing judicially created antitrust rules or statutory interpretations or create new ones. For example, prosecutors may argue that Section 7 should be interpreted to extend the law to make unlawful some transactions that do not appear to violate the existing interpretations of the statute, while defense lawyers may argue that the interpretation of Section 7 should be limited so that a transaction apparently unlawful under the existing precedent should be found to be lawful. No other area of federal statutory law permits the courts greater flexibility to change the law without the intervention of Congress.

Merger antitrust law has evolved enormously since 1890 (slides 37-59). You do not need to study the slides in depth, but try to get a sense of how merger antitrust law has changed over time. The required reading deserves more careful attention. After sixty years of limited to no merger antitrust enforcement, things changed dramatically after World War II beginning with the

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[5] Congress, of course, always has the right to enact new antitrust legislation to change judicially created rules if it disagrees with rules or with the general direction the courts are taking. Surprisingly, perhaps, Congress has intervened to change a judicially created substantive rule or to redirect the courts on only four occasions:

> (a) in 1914 with the Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12 to 27) (supplementing the Sherman Act), and the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58) (prohibiting "unfair methods of competition" and creating the Federal Trade Commission to enforce the new offense);
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> (b) in 1936 with the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13a) (amending the price discrimination provision of the Clayton Act);
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> (c) in 1937 with the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937) (exempting resale price maintenance from the prohibitions of federal antitrust law if permitted by state law), and in subsequent repeal in 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975); and
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> (d) in 1950 with the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)) (closing certain loopholes in Section 7 of the Clayton Act).

By contrast, Congress has passed a number of statutes dealing with antitrust process and penalties and aligning the antitrust laws with the full extent of subject matter jurisdiction permitted by the Commerce Clause.

[6] Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

passage of the Celler-Kefauver Act of 1950.[7] The Celler-Kefauver Act amended Section 7 to close some important technical loopholes in the original 1914 version of the statute, but the real import of the amendments was in the hostility expressed in the floor debates toward industrial consolidation. The Supreme Court picked up this hostility in its 1962 *Brown Shoe* opinion (relevant excerpts on pp. 29-32), which held that the goal of merger antitrust law was to prevent increases in industrial concentration, protect the viability of small businesses, and preserve local control of business. Post-World War II hostility to industrial concentration was primarily rooted in the very negative reaction to the support by large industrial enterprises of the Nazi Germany and Imperial Japanese regimes and a desire to maintain the U.S. economy with more atomistic (unconcentrated) markets and protect smaller, even if inefficient, firms. Although the new hostility almost certainly prohibited some efficiency-enhancing mergers, the *Brown Shoe* concerns were able to have traction for over two decades given the spectacular growth in the American economy. World War II had destroyed the industrial capacity of Europe and other parts of the world, and the U.S. economy grew as it became the primary supplier to the rest of the industrialized world.

By the early 1970s, however, economic conditions had dramatically changed. Europe and Japan had rebuilt their economies and no longer needed the U.S. to supply their needs. Moreover, with their modern efficient plants, other countries—Japan in particular—began to outcompete U.S. businesses in international markets such as automobiles and steel that had traditionally been U.S. strengths. To make matters worse, a growing influx of imported manufacturing goods from Japan threatened some American industries in the domestic market, especially in consumer electronics and to a growing extent in automobiles. At the same time, as the American economy was slowing down, the U.S. was also experiencing increasingly high inflation rates as a result of the Mideast oil shocks in 1973 and 1979 and the easy monetary policy of the late 1960s to finance the Vietnam War.[8]

During the high growth rate period of the 1950s and 1960s, the productive inefficiencies resulting from a generally restrictive antitrust law highly protective antitrust law were reduced to politically insignificant noise. But when the U.S. was losing its competitiveness, laws impeding U.S. productivity became a major concern. Interestingly, courts, resisted by the Antitrust Division and the FTC during the Nixon, Ford, Carter administrations, became the principal movers in reshaping antitrust law generally and merger antitrust law in particular to enhance the productive efficiency of firms in the American economy, even if this meant greater industrial concentration, greater permissiveness of restrictive practices that could enhance productive efficiency, and less protection for smaller, inefficient firms—just the opposite of the goals of antitrust law for the past two decades.

This story is a little different than the one typically told. The conventional wisdom is that antitrust changed in the 1970s because the "Chicago School" of antitrust economics prevailed in the ideological debate over the purpose of the antitrust laws. The Chicago School applied simple price theory techniques to test antitrust rules for their effect on efficiency. My story is that changes in macroeconomic conditions, not an ideological shift, created the impetus for antitrust reform. But the Chicago School nonetheless played a critical role since it provided an appealing and easily understood set of tools for identifying antitrust rules that impeded efficiency and an

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[7] Pub. L. No. 81-899, 64 Stat. 1125 (Dec. 29, 1950) (amending Clayton Act §§ 7, 11, 15 U.S.C. §§ 18, 21).

[8] This condition of slow growth plus high inflation became known as "stagflation."

alternative set of rules that promoted efficiency. Judges who otherwise would have at sea naturally gravitated toward the Chicago School approach as they sought to eliminate antitrust rules that impeded the efficient operation of the economy and American competitiveness at home and abroad.[9]

There are also some not-so-hidden assumptions in the Chicago School approach, namely, that the profit-making activities of firms generally (but not always) promote efficiency, markets generally (but not always) adjust rather quickly to eliminate market power, and that the social cost of overenforcement (prohibiting efficient conduct) far outweighs the social cost of underenforcement (failing to prohibit inefficient anticompetitive conduct). This led to a cautious approach to antitrust enforcement except in areas—most notably, horizontal price fixing—that everyone agreed were socially harmful, whatever their criteria.

The movement to reform the antitrust laws to promote efficiency accelerated significantly with the election of Ronald Reagan as president in 1980. Reagan's Antitrust Division chief, William F. Baxter, had been a Stanford professor for thirty-five years and a strong proponent of the view that the purpose of the antitrust laws should be to promote productive and allocative efficiency in the economy.[10] Now the Antitrust Division, rather than opposing the courts, became a strong force in reshaping antitrust law to promote efficiency. One of the most influential developments in this effort was Baxter's issuance of the 1982 DOJ Merger Guidelines.[11] The introduction to the 1982 guidelines made explicit that the Antitrust Division would only challenge mergers that "create or enhance 'market power' or to facilitate its exercise"—that is, mergers that were likely to impede efficiency—regardless of the merger's effect on industrial concentration, harm to small businesses, or the political power the merged firm might obtain (pp. 35-36). Moreover, Baxter's viewed the central tendency of mergers to be efficiency-*enhancing*, so in the absence of evidence that a particular merger would be efficiency-*decreasing*, the Division would not challenge the merger.[12]

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[9] An obvious but often overlooked rule in public policy-making is that decision-makers need to make decisions. A decision to do nothing is still a decision that leads to a public poly outcome. Theories that tell you why every solution to a problem will not work are not helpful. Even a questionable theory that provides solutions is better than a theory that provides no solutions. The Chicago School provided solutions to the question of how to reform antitrust rules so that they promoted rather than impeded efficiency and competitiveness.

[10] "Allocative efficiency" occurs when all gains from trade are exhausted in a market, that is, there is no trade that could be made between a seller and a buyer that would make one of them better off without making the other one worse off. (Economists call this state of affairs "Pareto optimal.") Allocative inefficiency occurs, for example, when the price of a product exceeds its marginal cost and that there are buyers willing to pay above marginal cost but unwilling to pay the seller's asking price, leaving an unexhausted gain from trade.

[11] U.S. Dep't of Justice, Merger Guidelines, 47 Fed. Reg. 28,493 (1982).

[12] This view applied to other areas of antitrust law as well, especially vertical restraints where the law at the time was very restrictive. Because the Antitrust Division could not bring cases to lose in order to change judicial precedent, Baxter developed a strong amicus brief program before the courts of appeal and the Supreme Court to argue for the reform of antitrust rules the he believe impeded efficiency. The Supreme Court accepted a number of significant antitrust cases during Baxter's tenure and for the most part adopted Baxter's positions.

By the end of the 1980s, the accepted purpose of the antitrust laws had morphed slightly from promoting efficiency in firms and markets to promoting consumer welfare. The two notions are closely related. As a general rule, as firms and markets become more efficient, production costs fall and output increases, resulting in lower prices for consumers. The difference in the two standards rests in the case where firms keep the cost savings from efficiency gains for themselves and their shareholders and do not pass these cost savings over to customers. Under a pure efficiency (or "total welfare") standard, any efficiency increases created by a practice could offset in whole or in part any of the practice's anticompetitive tendencies even if the efficiency savings were not passed on to customers. Under the consumer welfare standard, efficiency increases could offset anticompetitive tendencies only to the extent the efficiency gains were passed on to consumers. The consumer welfare standard reduces to asking whether consumers—or more directly customers—would be better off in a world with the practice than in a world where the practice was illegal. Thus, for example, a practice that increased a product's price with no offsetting improvement in product quality would be anticompetitive and hence unlawful if reachable under the antitrust laws. The 2010 DOJ/FTC Horizontal Merger Guidelines, which are the guidelines currently in effect, reflect the consumer welfare standard (pp. 37-39).

The Chicago School's approach to answering antitrust consumer welfare questions soon came under attack. These critics, known loosely as the Post-Chicago School, thought that the Chicago School's price theory approach focused too much on price and not enough on other variables that affect consumer welfare, such as product or service quality and the rate of innovation. In addition, even on questions of price effects, these critics found the Chicago School's price theory to be too simplistic in that it failed to take into account a firm's incentive to engage in strategic behavior to create or enhance its market power. Because firms do engage in strategic behavior, Post-Chicagoans believe that certain types of profit-maximizing strategic behavior can create or enhance market power and impede efficiency, that markets do not always (or even often) adjust to eliminate market power when it arises, and that the social cost of underenforcement generally outweighs the social cost of overenforcement—just the opposite of what the original Chicagoans believed. As a result, Post-Chicagoans are considerably more aggressive in using the antitrust laws to regulate conduct than Chicagoans.

As a general rule, Post-Chicagoans use more complex models than the original Chicagoans, but courts have accepted many of the Post-Chicagoan analytical results. To the courts, the question is not ideological but rather which economic tools are likely to best inform the consumer welfare analysis.

The consumer welfare standard: Textbook edition. We will spend much of the course examining rules that derive from the consumer welfare perspective. For that reason, the slides on the "textbook" edition of the public policy behind the consumer welfare standard are important (slides 60-65). If you have not encountered demand curve diagrams, do not worry about it. We will go over these slides in some detail in class.[13]

Division's amicus briefs appeared for the most part to have substantial In the interest of full disclosure, I was a special assistant and later one of three deputy assistant attorneys general to Baxter in the Antitrust Division. One of my responsibilities was to run the amicus brief program.

[13] Better yet, if you are not familiar with the concepts of demand curves, consumer surplus, or deadweight loss, take a look at the following short YouTube videos: Marginal Revolution University, The Demand Curve; Marginal Revolution University, A Deeper Look at the Demand Curve; and Marginal Revolution University, What Is

An interesting but typically overlooked, aspect of the textbook edition is that it is not applied in practice (see slide 65). Instead, the courts and the agencies focus on a more generalized notion of whether customers are worse off with the merger than without it. In practice, courts find a merger anticompetitive if the merger is reasonably likely to:

1. reduce market output,
2. increase prices to some or all customers with no price decrease to any customers (unless output expands, usually because of a product or service quality increase),
3. increases price for some customers but decreases it for others, but where the wealth transferred to producers from the price increase is greater than the wealth transferred to customers from the price decrease,
4. reduces product or service quality in the market as a whole, or
5. reduces the rate of innovation.

As we will see later in the course, the economic tools for predicting the effects of a merger on product or service quality or the rate of innovation are not well developed, most merger antitrust analysis focuses on price and output effects. While complaints often include allegations of anticompetitive harm due to reduced quality or lower innovation rates, these allegations almost always supplement much stronger theories on price or output effects.

The modern critiques.[14] The consumer welfare standard has come under two fundamentally different attacks in the last several years (slide 67).

The *progressive critique* accepts efficiency and consumer welfare (broadly defined to include suppliers, especially labor) as appropriate goals but argues that the courts and antitrust enforcement agencies have failed to apply antitrust law sufficiently aggressively to advance these goals. In many ways, the progressive critique has merged with the Post-Chicago critique. Progressives look to market outcomes—equilibrium variables such as price, output, product and service quality, and the rate of technological innovation—to make judgments about consumer welfare implications of a challenged practice. What sets progressives apart in their critique is their view that they would shift the burden of proof away from the plaintiff to the defendants in specific situations. In these cases, which some believe should include acquisitions by extremely large companies, the defendant would bear the burden of persuasion that the challenged conduct was not anticompetitive.

Read the class notes (slides 68-69) for an introduction to the progressive critique and then dip into the reading for some primary source materials. Senator Amy Klobuchar's remarks in the Congressional Record introducing her original antitrust bill in 2018 is a quick read and a good place to start (pp. 41-43). I have included excerpts from Klobuchar's current and considerably

Deadweight Loss? In general, when you run into an economics concept you do not understand, you should look for an explanation on the Internet.

[14] IMPORTANT: If you think you are going to be pressed for time, focus on the class notes in this section (slides 67-81) and return to look at the primary source matrials after you have finished reading everything else. I really want you to have time to look at the materials and watch the video on the repeal of the 2015 FTC Policy Statement (see below).

expanded) version of the bill in the materials (pp. 44-69), but the class notes contain the key points (slides 70-74).

The *Neo-Brandeisian antimonopoly movement* has an entirely different point of departure. Neo-Brandeisians reject the idea that antitrust should assess the legality of a practice by looking out market outcomes. Rather, they believe that the purpose of the antitrust laws should be to protect the competitive process, which in turn requires markets in which multiple firms compete. Neo-Brandeisians could be called "Neo-Brown Shoeans," since the Neo-Brandeisian approach largely echoes the objectives set out by the Supreme Court in *Brown Shoe* (re-read pp. 29-32 or at least look again at the congressional concerns on slide 53). Neo-Brandeisians take a harsh view of extremely large firms (especially in the tech sector) and believe in breaking them up. They also would enforce a very restrictive merger antitrust policy to prevent firms from gaining large size or dominance in their markets through mergers and acquisitions.

Lina Khan, now the Chair of the Federal Trade Commission, is one of the leading Neo-Brandeisians. Read with some care her two-page article on the principles of the Neo-Brandeisian antimonopoly movement (see p. 70 for a link) and the associated class notes (slides 75-76). Tim Wu, another leading proponent, is now Special Assistant to the President for Technology and Competition Policy on the National Economic Council. Read Wu's short article on the "Utah Statement" of Neo-Brandeisian principles (see p. 70 for a link or at least pp. 71-73 if for some reason you cannot access the link). Wu is also the principal author of Executive Order No. 14036, which provides for a "whole of government" approach to enhancing competition in the American economy.[15] You should read with some care the excerpts from the executive order relating to antitrust (pp. 74-77). Senator Elizabeth Warren, a leading advocate of antitrust reform, also subscribes to some Neo-Brandeisian views, and you read Warren's two antitrust speeches (pp. 78-93) and skim her draft-but-never-introduced antitrust bill (pp. 94-117). Likewise, you should skim the excerpts from the Senate Antitrust Subcommittee majority staff report on digital markets (pp. 118-43). Lina Hahn was a principal author and the report is almost pure Neo-Brandeisian. Finally, read Senator Mike Lee's remarks in the Congressional Record in connection with the introduction of his Tougher Enforcement Against Monopolists Act (TEAM Act) (pp. 144-45). The Lee bill, which is also Neo-Brandeisian in approach, is notable because Lee is one of the most conservative Republican senators on economic matters.

With this background, read my attempt to deconstruct the Neo-Brandeisian antimonopoly movement in the class notes (slides 77-81). While this reflects my current understanding of the movement, it is still very much a work in progress.

An application of sorts: Repeal of the 2015 FTC Statement Policy Statement. Section 5 of the FTC Act prohibits "unfair methods of competition." Unfair methods of competition include all violations of the Sherman and Clayton Acts, but there is an open question of how much further Section 5 reaches. Congress did not provide any meaningful guidance.

In 2015, the Commission adopted a policy statement that "Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to

[15] Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021) (issued July 9, 2021)

mature or complete, could violate the Sherman or Clayton Act."[16] The 2015 statement further provided that "the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[17]

Following the confirmation of Lina Khan as an FTC commissioner and her appointment hours later as FTC chair, the Commission had a majority of three Neo-Brandeisian, Democrat commissioners. On July 1, 2021, in one of their first actions after obtaining a majority, the three Democrat commissioners voted over the dissent of the two Republican commissioners to repeal the 2015 policy statement. Notably, the Commission did not adopt a new policy statement explaining how the majority would apply Section 5 going forward.

Read the 2015 policy statement and the Commission's statement upon its adoption (pp. 147-49). Then read the FTC's 2021 press release on the repeal of the policy statement, the statement of the Democrat commissioners explaining the reasons they voted for repeal, and the dissenting statements of the two Republican commissioners (pp. 150-66). These are all quick reads and well worth the investment of time to see the wide divide between the commissioners and the new direction the Neo-Brandeisian majority would like to take the Commission. The vote itself was taken in the first open meeting the Commission has held in more than twenty years. There is no better way to get a feel for the tensions within the Commission today than to watch the introduction to the meeting and the portion relating to the repeal of the 2015 policy statement (see p. 167 for a link). Understanding this tension is critical for practitioners. I strongly recommend you watch these portions of the video.

The homework assignment. There is a homework alignment for this class, which you may find in a separate document on Canvas or AppliedAntitrust.com. The submission of this homework is not necessary. Mandatory submissions start with the assignment for next Tuesday. That said, you will get much more out of Thursday's class if you write up your answer to the homework assignment, even if you do not submit it to me.

If you have any questions or comments, send me an e-mail. I look forward to seeing you in class on Thursday.

Dale Collins

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16 Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act (Aug. 13, 2015).

17 *Id*.