MERGER ANTITRUST LAW

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Tuesdays and Thursdays, 3:30-5:30 pm
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READING GUIDANCE

Class 3 (September 6): A Brief History of Antitrust Law

This class will explore how antitrust in general—and merger antitrust law in particular—has evolved since 1890 and review the vigorous calls today for further reform. 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, reformers often cite antitrust history to support their arguments in the current debates over whether antitrust law needs to be modified. 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 a complete cure for the perceived competitive problems of the day. The framers of the antitrust statutes recognized 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. They also recognized that they could not predict how the trusts would react to attempts to regulate them and what new prohibitions might be required. These factors 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," "attempt to monopolize," and "unfair competition"—language that is almost unique among congressional enactments in its constitution-like quality. They employed this language, terms of art drawn from the common law, 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, the framers were explicit that the law enabled courts to refine the law and its application to particular courses of conduct over time through the common law process. As Senator John Sherman (R-OH) candidly stated during the floor debate:

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[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. 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.

> 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 by 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 [criminal] 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)[4]], 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.[5]

As we shall see, the courts have had difficulty fashioning a sensible competition law within the broad foundations of 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

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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 George was one of the Senate's most vocal opponents to the original Sherman bill.

5 *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.").

part, left the antitrust laws to the courts to discern and has not attempted to fine-tune the law through legislation.[6] Today, despite the persistent efforts by a vocal group of congressional reformers, Congress does not appear likely to overhaul the antitrust laws, although there remains a prospect of some limited legislation targeted on the dominant tech platforms.

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.[7]

The excerpt from the Baxter article (pp. 5-18) develops the common law nature of antitrust law and is an easy read. The class notes offer a few additional thoughts (slides 3-6). From a practical perspective, the common law approach to antitrust law invites enforcement officials, private plaintiffs, and defendants to argue 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.

The evolution of antitrust law. Antitrust law has evolved enormously since 1890 using the common law process. The class notes trace this evolution and attempt to connect changes in the

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[6] 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.

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

law to changes in the nation's economic conditions (slides 7-45). 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.

You should pay careful attention to the evolution of antitrust law beginning in the post-World War II period to the present. It is critical to understand how we got to where we are today and if and how things might change in the future. It is also important in placing precedent in its historical context. Here is a brief synopsis:

After sixty years of limited to no merger antitrust enforcement, things changed dramatically after World War II beginning with the passage of the Celler-Kefauver Act of 1950.[8] (Slides 27-33) The Celler-Kefauver Act amended Section 7 to close some important 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 increasing industrial concentration. The Supreme Court picked up this hostility in its 1962 *Brown Shoe* opinion (relevant excerpts on pp. 19-22), 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 over business. Post-World War II hostility to industrial concentration was primarily rooted in the negative reaction to the support by large industrial enterprises of the Nazi Germany and Imperial Japanese regimes, a desire to maintain the U.S. economy with more atomistic (unconcentrated) markets, and the protection of 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 as well as much of Japan and other parts of the world, and the U.S. economy grew as it served as the primary supplier to the rest of the industrialized world. (Slides 20-21)

By the early 1970s, however, economic conditions had dramatically changed (slides 34-41). 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. strongholds. To make matters worse, a growing influx of imported manufactured 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 used to finance the Vietnam War.[9]

During the high growth period of the 1950s and 1960s, the productive inefficiencies resulting from the highly protective antitrust law of the time were reduced to politically insignificant noise. But when the U.S. began losing its international and domestic competitiveness, laws impeding U.S. productivity became a major concern. Interestingly, courts, resisted by the Antitrust Division and the FTC during the Nixon, Ford, and Carter administrations, became the principal movers in reshaping antitrust law. In particular, the Supreme Court in *General*

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

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

Dynamics (1974)[10] and *GTE Sylvania* (1978)[11] reoriented antitrust law to enhancing the productive efficiency of firms in the American economy, even if this resulted in 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 in the 1950s and 1960s.

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 economic 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 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.[12]

There are also some critical and not-so-hidden premises in the Chicago School approach that are independent of price theory:

1. The profit-making activities of firms generally (but not always) promote efficiency.
2. Markets generally (but not always) adjust rather quickly to eliminate market power.
3. 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 modern era begins in the 1980s (slides 42-45). 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 antitrust laws should promote productive and allocative efficiency in the economy.[13] As a result, the Antitrust Division, rather than opposing the courts as it did in the 1970s, became a strong force in reshaping antitrust law

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[10] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[11] Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977)

[12] 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 yields a public policy 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.

[13] "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 (the incremental cost of producing an additional unit of output). When this occurs, there are buyers willing to pay prices above the cost of production but not as high as the seller's asking price. This an unexhausted gain from trade is an allocative inefficiency.

to promote efficiency. One of the most influential developments in this effort was Baxter's issuance of the 1982 DOJ Merger Guidelines.[14] 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. 25-26). Moreover, Baxter 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.[15]

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 consumer prices. 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, producer profits and consumer surplus are added. If an increase in productive efficiency gives the firm market power and allows it to increase prices, the efficiency increases total welfare if the increase in producer profits outweighs the decrease in consumer surplus. Under the consumer welfare standard, efficiency increases can offset anticompetitive tendencies only to the extent the efficiency gains are 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 under the antitrust laws. The 2010 DOJ/FTC Horizontal Merger Guidelines, which are the guidelines currently in effect, reflect the consumer welfare standard (pp. 27-29).

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

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

[15] 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. 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.

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, a quick review of the slides on the "textbook" edition of the public policy behind the consumer welfare standard is in order (slides 46-51).[16]

An interesting but typically overlooked, aspect of the textbook edition is that it is not applied in practice (see slide 50). 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.[17] The consumer welfare standard has come under two fundamentally different attacks in the last several years (slides 53-55).

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

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[16] One again, if you are not yet comfortable 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 Deadweight Loss? In general, when you run into an economics concept you do not understand, you should look for an explanation on the Internet.

[17] IMPORTANT: If you think you are going to be pressed for time, focus on the class notes in this section (slides 52-69) and return to look at the primary source materials after you have finished reading everything else.

service quality, and the rate of technological innovation—to make judgments about the consumer welfare implications of a challenged practice. What sets progressives apart in their critique is their proposal to 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 56-59) 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. 31-33). I have included excerpts from Klobuchar's current (and considerably expanded) version of the bill in the materials (pp. 34-59), but the class notes contain the key points (slides 71-76). If you are running out of time, I would skip the Klobuchar materials. While they will give you a good sense of some of the reforms the progressives would like to make, the time for any legislative action on them in this Congress has passed.

The *Neo-Brandeisian antimonopoly movement* has an entirely different point of departure (slides 60-65). Neo-Brandeisians reject the idea that antitrust should assess the legality of a practice by looking at market outcomes as do consumer welfare traditionists and progressives. Rather, they believe that the antitrust laws should protect the competitive process, which in turn requires markets where multiple firms compete and no single firm has any significant economic or political power. 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* (recall pp. 19-22). 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. 60 for a link) and the associated class notes (slides 60-61). 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. 60 for a link or at least look at pp. 61-63 if 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.[18] You should read with some care the excerpts from the executive order relating to antitrust (pp. 64-67).

The two speeches by Assistant Attorney General Jonathan Kanter are worth a careful read (pp. 68-82). They will give you a very good idea of where Kanter is trying to take the Antitrust Division.

Senator Elizabeth Warren, a leading advocate of antitrust reform, also subscribes to some Neo-Brandeisian views. If you are running out of time, you can skip most of this material. Otherwise, skim Warren's two antitrust speeches (pp. 83-98) as well as her draft-but-never-introduced

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

antitrust bill (pp. 84-107). But be sure to read Warren's short letter to Kanter on the pending sale of Enfamil by Reckitt Benckiser Group PLC to Clayton Dubilier & Rice (pp. 123-25). As you will see, Warren would like Kanter to attempt to block the deal not because of any traditional theory of anticompetitive harm but rather because CDR is a private equity firm that Warren and her colleagues believe cannot be trusted with a business as important as infant formula.

Likewise, you should skim the excerpts from the Senate Antitrust Subcommittee majority staff report on digital markets (pp. 126-51). This document is the major support to the antitrust bills pending in Congress that are targeted at the dominant high tech firms (there are no committee reports accompanying these bills). Lina Khan was a principal author and the staff 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. 152-53). 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 62-65). 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.[19] 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 mature or complete, could violate the Sherman or Clayton Act."[20] 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*."[21]

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-appointed commissioners. On July 1, 2021, in one of their first actions after obtaining a majority, the three Democrat-appointed commissioners voted over the dissent of the two Republican-appointed commissioners to repeal the 2015 policy statement. This was widely read as the majority's rejection of consumer welfare as the goal of antitrust law. Notably, the Commission did not adopt a new policy statement explaining how the majority would apply Section 5 going forward or what goals it would pursue if not consumer welfare.

If you have the time and the interest, read the 2015 policy statement and the Commission's statement upon its adoption (pp. 155-59). Then read the FTC's 2021 press release on the repeal

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19 You may regard the readings in this section as optional (but be sure to read the rest of this guidance memo). If you plan on practicing in antitrust, however, I encourage you to read them. The FTC's use of Section 5 could be radically different than in the past and may include the promulgation of legislative competition rules. The readings will give you some important background.

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

21 *Id*. (emphasis added).

of the policy statement, the statement of the Democrat-appointed commissioners explaining the reasons they voted for repeal, and the dissenting statements of the two Republican-appointed commissioners (pp. 160-76). 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. 177 for a link). Understanding this tension is critical for practitioners. If you are interested in practicing before the FTC, watching these portions of the video would be a very worthwhile investment.

It is notable that although the Commission voted over a year ago to repeal the 2015 policy statement, it has yet to issue a new policy statement or take any action contrary to the 2015 policy statement. Perhaps this was because the Commission was equally divided between Democrat and Republican appointees for the seven months between October 2021 and May 2022.[22] In any event, the conventional wisdom is that Chair Khan would like to expand Commission's competition enforcement authority by bringing cases under Section 5 that the Sherman or Clayton Acts could not reach today under existing judicial precedent and that would be inconsistent with the 2015 policy statement. There is also a widespread view that Khan would like the Commission to promulgate substantive rules making specific types of conduct "unfair methods of competition."[23] We will keep an eye on the FTC during the semester to see any developments emerge on this front.

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22 Commissioner Robit Chopra, a Democrat appointee, left the Commission on October 8, 2021, to become director of the Consumer Financial Protection Bureau. Alvaro Bedoya, his replacement, was not confirmed by the Senate until May 11, 2022. Bedoya was sworn in as an FTC commissioner on May 16, 2022, restoring a Democrat-appointed majority on the Commission. Bedoya's specialty is privacy and he has little if any experience in antitrust. It remains to be seen to what extent Bedoya will support the Neo-Brandeisian views of the other two Democrat-appointed commissioners.

23 *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020). Section 6(g) of the FTC Act authorizes the Commission, without elaboration, to "make rules and regulations for the purpose of carrying out the provisions of this subchapter." 15 U.S.C. § 46(g). In 1973, the D.C. Court of Appeals indicated that Section 6(g) empowered the FTC to promulgate binding substantive rules and enforce these rules against contrary conduct as "unfair methods of competition" in violation of Section 5. Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

Notwithstanding *Petroleum Refiners*, in my view it is unlikely that any rule-making under Section 5 that departs from the letter or spirit of the Sherman or Clayton Acts as interpreted in precedent would withstand judicial review. In several recent cases, a majority of the Supreme Court has applied the "major questions" doctrine to strike down administrative rules. The major questions doctrine holds that when a rule has "vast 'economic and political significance,'" the agency cannot rely on a broad but undefined delegation of rule-making power but rather must have "clear congressional authorization" for to promulgate the rule in question. Util. Air Regul. Grp. (UARG) v. EPA, 573 U.S. 302, 324 (2014); *accord* W. Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, at *13 (U.S. Feb. 28, 2022) (No. 20-1530) (observing that the major questions doctrine took hold because of "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted"). The idea is that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001). *See generally* Daniel J. Sheffner, Cong. Res. Serv., IF12077, The Major Questions Doctrine (Apr. 6, 2022).

Assuming that Section 6(g) authorizes substantive and not just procedural rule-making, it is precisely the type of undefined delegation of rule-making power that provides the point of departure for the major questions analysis. It

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the Commission promulgates an economically significant rule under Section 6(g) that departs from traditional law and has a major effect on the economy, then this Supreme Court is likely to strike it down.