MERGER ANTITRUST LAW

LAWJ/G-1469-05 | Tuesdays and Thursdays, 11:10 am – 1:10 pm
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READING GUIDANCE

This unit has a large amount of material. You should focus primarily on the reading guidance and the class notes (but you can just skim the appendix). As for the reading materials, be sure to read the opening section on the goals of antitrust law (pp. 5-33). As you read the reading guidance, if you see anything of interest and have the time, read it. Otherwise, notwithstanding any different instruction below, skip it.

Class 3 (September 5): 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 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 and political norms. 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 that much of 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 comprehensive 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 uncover 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 an attempt at a definitive statutory cure unwise, if not 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

[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.

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 statutes 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 on the Sherman bill:

> 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 the Judiciary Committee reported it to the full Senate, 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]

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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

As we shall see, the courts have had difficulty fashioning a sensible competition law within the broad foundations of the Sherman Act. Nonetheless, 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.[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 at the dominant tech platforms.[7]

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

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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.").

[6] Congress, of course, always has the power to enact new antitrust legislation to change judicially created rules if it disagrees with some rule 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 its subsequent repeal in 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).
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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] The modern congressional prospects for new significant substantive antitrust legislation may have peaked in the 117th Congress (2019-2021) during the first two years of the Biden administration. In the House of Representatives, an exceptionally reform-minded Judiciary Committee reported a number of bills that would significantly change substantive antitrust law, although none of them were brought to the floor for a vote. In the Senate, a number of senators, most notably Sen. Amy Klobuchar (D-MN), introduced a major reform bills, only one of which was reported out of committee but never brought up for a floor vote. *See generally* Lexis+, *Antitrust Federal Legislation Tracker–117th Congress (2021–22)–Changes to the Antitrust Laws*.

In the current 118th Congress, the prospects of significant antitrust legislation appear considerably diminished. In the House, now controlled by Republicans, the antitrust subcommittee was tellingly renamed the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust. As its chair, Republicans appointed a Freedom Caucus who opposed antitrust legisation in the prior congress, while in June the Democrats appointed as the subcommittee's ranking member someone who not only opposed the tech antitrust bills in the last congress but voted against increasing funding to the key antitrust agencies. *See* David Dayen, *The California Gang Overturns Democrats' Antitrust Consensus*, The American Prospect (June 12, 2023); Matthew Perlman, *Democrats Tap Tech Bill Opponent For House Antitrust Role*, Law360 (June 14, 2023) (accesssible online through the law library).

> 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.[8]

The excerpt from the Baxter article (pp. 5-18) develops the common law nature of antitrust law and is an easy read, and 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 law to changes in the nation's economic conditions (slides 7-52). 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 from post-World War II 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.[9] 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.[10] 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-

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

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

[10] The reading materials contain a note on the Expediting Act, Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (1903) (pp. 23-24). This act, passed in 1903, provided that in every suit in equity brought by the government under the Sherman Act, the Interstate Commerce Act, or any similar act, whether or not the Attorney General certified the case to be of "general public importance," an appeal from the final decree of the trial court would lie only to the Supreme Court and bypass the court of appeals. So after 1903, we see no government antitrust cases in the courts of appeal. The direct appeal provision of the Expediting Act was substantially amended in 1974 by the Antitrust Procedures and Penalties Act. Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended in scattered sections of 15 U.S.C.). If you find this footnote interesting, read the note in the materials. Otherwise, you now know what you need to know about the Expediting Act

enhancing mergers, the *Brown Shoe* concerns were able to have traction for over two decades given the spectacular growth in the American economy during this time. 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.

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. 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, automobiles. At the same time, as the American economy was slowing down, the U.S. was also experiencing increasingly high inflation rates due to the Mideast oil shocks in 1973 and 1979 and the easy monetary policy of the late 1960s used to finance the Vietnam War.[11]

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 Dynamics* (1974)[12] and *GTE Sylvania* (1978)[13] 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.[14]

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

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

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

[14] 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

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 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 began in the 1980s. 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.[15] 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 to promote efficiency. One of the most influential developments in this effort was Baxter's issuance of the 1982 DOJ Merger Guidelines.[16] 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 clear evidence that a particular merger would be efficiency-*decreasing*, the Division would not challenge the merger.[17]

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. Generally, as firms and markets become more efficient, production costs fall and output increases, resulting in lower consumer prices. The difference in the two standards resides in the case where the firm keeps the cost savings from efficiency gains for itself and its shareholders and does not pass these cost savings over to customers. Under a pure efficiency (or

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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.

[15] "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.

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

[17] 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.

"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 impeded competition and resulted in an increase in a product's price with no offsetting improvement in product quality would be anticompetitive and hence unlawful under the antitrust laws. The consumer welfare standard continues today to be the prevailing standard in the courts for applying the antitrust laws. The enforcement agencies, as reflected in the 2010 DOJ/FTC Horizontal Merger Guidelines reflect the consumer welfare standard (pp. 27-29), also applied the consumer welfare standard as a matter of policy until the Biden administration, and even now are forced to defer to the consumer welfare standard when they litigate in court.

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, these critics found the Chicago School's price theory too simplistic, even on price effects, in that it failed to consider 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.

Post-Chicagoans often 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 model. 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 53-59).[18]

An interesting but typically overlooked, aspect of the textbook model is that it is not applied in practice (see slide 58). Instead, the courts and the agencies focus on a more generalized notion of

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[18] 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.

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. Consequently, economists in agency investigations and litigations cannot reliably predict these effects. The upshot is that most merger antitrust analysis focuses on price and output effects, where the economic models are more accepted. 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. That said, the DOJ or FTC would readily bring a merger antitrust case based on a nonprice dimension, provided there was strong direct evidence of an anticompetitive effect. However, to date, the agencies have not brought such a case, presumably because they have not found the requisite evidence in their investigations.

The modern critiques. The consumer welfare standard has come under two fundamentally different attacks in the last several years (slides 61-63).

The *progressive critique* acknowledges efficiency and consumer welfare (broadly defined to encompass suppliers, particularly labor) as appropriate objectives, but contends that courts and antitrust enforcement agencies have not enforced antitrust law aggressively enough to promote these goals. The progressive critique has, in many respects, 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 evaluate the consumer welfare implications of a challenged practice. What distinguishes progressives in their critique is their proposal to shift the burden of proof from the plaintiff to the defendants in certain situations. In these instances, which some argue 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 64-67) 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. 35-37). I have included excerpts from Klobuchar's omnibus antitrust bill in the materials (pp. 38-63), but the appendix in the class notes contains the key points (slides 83-88). If you are running out of time, skip the excerpts from the Klobuchar bill but at least try to glance at the class notes. While these materials will give you a good sense of some of the reforms the progressives would like to make, the time for any legislative action in the near term almost certainly has passed.

The *Neo-Brandeisian antimonopoly movement* has an entirely different point of departure (slides 68-74). 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 significant economic or political power. Neo-Brandeisians could be called "Neo-*Brown Shoe*ans" 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 68-69). Tim Wu, another leading proponent, was Special Assistant to the President for Technology and Competition Policy on the National Economic Council from 2021 through early 2023 and a principal architect of the Biden administration's competition policy. Read Wu's short article on the "Utah Statement" of Neo-Brandeisian principles (see p. 64 for a link or look at pp. 65-67 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.[19] You should read with some care the excerpts from the executive order relating to antitrust (pp. 68-71).

The two speeches by Assistant Attorney General Jonathan Kanter are worth reading (pp. 72-86). They will give you a 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. 87-102) as well as her draft-but-never-introduced antitrust bill (pp. 103-26). 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. 127-29). As you will see, Warren wanted Kanter to try 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.[20]

Likewise, you should skim the excerpts from the Senate Antitrust Subcommittee majority staff report on digital markets (pp. 130-56). This document was the "bible" for antitrust reformers in the 117th Congress when drafting the antitrust bills targeting the dominant high-tech firms.

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

[20] To date, Reckitt Benckiser still owns Enfamil. Bidding interest for the business in 2022 was weak. The infant formula shortage probably suppressed interest due to the increased scrutiny of the industry by government regulators and, at the same time, increased Enfamil's earnings, making the Enfamil business less attractive to sell. *See, e.g.*, Carol Ryan, *Reckitt Is Left Holding the Baby, Happily for Now,* Wall St. J., July 27, 2022; Saabira Chaudhuri, *Enfamil Maker Reckitt Boosted by U.S. Demand for Infant Formula*, Wall St. J., July 27, 2022; *Andy Coyne, Reckitt Benckiser 'May Shelve Plan To Sell Infant-Nutrition Unit,'* JustFood.com, June 29, 2022; Ruth David & Dinesh Nair, *Reckitt's $7 Billion Formula Sale Draws Muted Interest*, BNN Bloomberg, May 27, 2022.

Unfortunately, there are no committee reports accompanying these bills. Lina Khan was a principal author and the staff report is almost pure Neo-Brandeisian. However, you should read the remarks by Senator Mike Lee (R-UT) in the Congressional Record when he introduced Tougher Enforcement Against Monopolists Act (TEAM Act) (pp. 159-60 and slide 90) in the 117th Congress. 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 68-72). While this reflects my current understanding of the movement, it is still very much a work in progress.

Finally, read the overview of the 2023 Draft Merger Guidelines to get a sense of how progressive and Neo-Brandeisian views are influencing the latest revision of the guidelines (pp. 30-33).

An application of sorts: Repeal of the 2015 FTC Statement Policy Statement.[21] 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."[22] 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*."[23]

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 Democratic commissioners.[24] On July 1, 2021, in one of their first actions after obtaining a majority, the three Democratic commissioners voted over the dissent of the two Republican commissioners to repeal the 2015 policy statement. The legal community widely read the repeal as signaling the majority's rejection of consumer welfare as the goal of antitrust law. Notably, the Commission did not immediately replace the 2015 policy statement with a new one explaining how the

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[21] IMPORTANT: 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, including the promulgation of legislative competition rules. The readings will give you some important background if you have the time to invest.

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

[23] *Id*. (emphasis added).

[24] The Federal Trade Commission is a collegial body of five commissioners appointed by the president and confirmed by the Senate. 15 U.S.C. § 41. Three commissioners constitute a quorum, 16 C.F.R. § 4.14, and the Commission may take action upon the affirmative vote of a majority of commissioners in a quorum. *See* FTC v. Flotill Prods., Inc., 389 U.S. 179 (1967); FTC v. Quincy Bioscience Holding Co., Inc., 389 F. Supp. 3d 211, 216 (S.D.N.Y. 2019). No more than three of the commissioners may be members of the same political party. 15 U.S.C. § 41. The term of a commission is seven years, except that (as typically the case) a commissioner who is appointed to fill a vacancy only serves the unexpired portion of the term of the commissioner she replaces. *Id*. A commissioner whose term has expired may continue to serve until a successor has been appointed and confirmed. *Id*.

majority would apply Section 5 in the future 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. 162-64). Then read the FTC's 2021 press release on the repeal of the policy statement, the statement of the Democratic commissioners explaining the reasons they voted for repeal, and the dissenting statements of the two Republican commissioners (pp. 165-81). These are all quick reads and worth investing 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. 182 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 is a worthwhile investment.

The Commission released a revised Section 5 policy statement on November 10, 2022.[25] I have included it in the reading materials (pp. 184-99), but you can skip it. The new policy does not limit Section 5's application to conduct that violates "the letter or the spirit" of the Sherman or Clayton Acts but is much more encompassing. The key passage of the 2022 policy statement follows:

> There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.
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> These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5. In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.[26]

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[25] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

[26] *Id.* § 3.2.

If you can get to it, skim Commissioner Wilson's detailed critique of the 2022 policy statement (pp. 200-19).[27] It is worth noting that despite the Commission's vote over two years ago to repeal the 2015 policy statement and its issuance of a new policy statement seven months ago, the Commission has yet to take any enforcement action outside the reach of the 2015 policy statement. Even so, the conventional wisdom remains that Chair Khan would like to expand the Commission's competition enforcement authority by bringing cases under Section 5 that are neither in the "letter" nor the "spirit" of the Sherman or Clayton Act.

Apart from enforcement actions, however, the Commission did invoke the expanded notions of the 2022 policy statement in its Notice of Proposed Rule-Making ("NPRM") that would make essentially all noncompetition agreements ("noncompetes") binding workers to be an "unfair method of competition" (UMC) in violation of Section 5.[28] Since at least 1711 in *Mitchell v. Reynolds*,[29] Anglo-American law has held noncompetition covenants lawful and enforceable if they are reasonable in scope, geographic coverage, and duration to protect a legitimate business interest of the employer. The idea is that such restraints promote the efficient operation of the market.[30] If promulgated, the FTC's proposed rule would abrogate this rule in the United States, make employee noncompetes per se unlawful, and preempt contrary state law.[31] The proposed rule reflects a Neo-Brandeisian interest in securing the economic freedom of choice for workers regardless of any adverse efficiency consequences.

But the proposed rule also shows the hurdles Neo-Brandesians face in bending the law to their perspective. In my opinion, the rule is unlikely to withstand judicial review in its current form.

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[27] *See* Christine Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022).

[28] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3499 n.230, 3535 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910). The rule defines noncompete clauses as any "contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." *Id*. at 3535.

[29] 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

[30] The early cases, of course, did not phrase the justification for the rule in terms of efficiency, but a reading of these cases from *Mitchel v. Reyonds* forward makes clear that economic efficiency was the goal. In *Mitchel*, for example, Mitchel had leased a bakehouse from Reynolds in a parish of London for five years, and Reynolds agreed that if he worked anywhere in that parish as a baker during that time he would pay the plaintiff £50 and posted a bond to secure his promise. When Mitchel sued Reynolds to collect on the bond for breach of his covenant, Reynolds, in defense, pleaded that since he had served his apprenticeship as a baker and had been admitted to the guild, no private person could lawfully prevent him from working at that trade and that he should not be required to pay the £50. Chief Justice Parker disagreed and ordered that the debt on the bond to be paid. To Parker, the covenant not to compete was reasonable and therefore enforceable as a matter of contract law, since it restricted the business opportunities of the covenantor no more than necessary to achieve the legitimate business objective of ensuring that Mitchel obtained the benefit of his bargain in purchasing the bakehouse. On the other hand, Parker opined, if the restraint had prohibited Reynolds from competing throughout England, the restraint would have been unlawful since it reached beyond areas in which Mitchel had a legitimate need for protection.

[31] *See* Non-Compete Clause Rule, 88 Fed. Reg. at 3536, § 910.4 (proposed) (stating that the rule will "supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent" with he rule). As the NPRM notes, only three states prohibit noncompetes generally, so the proposed rule if promulgated would abrogate the law in whole or in part in 47 states. *See id*. at 3494.

Even assuming the Commission has the authority to promulgate some substantive UMC rules,[32] modern courts have limited "unfair methods of competition" to conduct that runs afoul of the letter or the spirit of the antitrust laws and have reversed Commission decisions that go beyond this limitation.[33]

Perhaps even more fundamentally, the proposed rule is likely to run afoul of the "major questions" doctrine. 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" to promulgate the rule in question.[34] The idea is that "Congress . . .

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[32] There is a vigorous debate over whether the Commission has any power to promulgate substantive UMC rules. For the affirmative argument, see Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020). They rely, as does the proposed rule, on the language of Section 6(g) of the FTC Act, which 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). This view has some judicial support. 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).

Opponents respond that Section 6(g) was taken from the original House bill, which would have created only an investigative tribunal with no enforcement powers and which would give the Commission procedural but not substantive rule-making authority. The conference committee adopted the language of the House bill and joined it with the original Senate bill, which would empower the Commission to enforce the law but contained no substantive rule-making authority. The practice of conference committees is not to add substance to the bills not committed by either house, and statements made by conferees confirmed that the conference never intended, and indeed actively resisted, giving the FTC substantive rule-making authority. See 51 Cong. Rec. 12916 (1914) (statement of Sen. Cummins); *id*. at 14932 (statement of Sen. Walsh); *id*. (statement of Rep. Covington). Notably, the record suggests that no member of Congress offered the opposing position. *See* Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. Bar. J. 548, 551 (1964). Moreover, throughout the history of the FTC Act, FTC officials have rejected the idea that the Commission has the authority to promulgate substantive UMC rules.

Moreover, opponents of the proposed rule argue that the regulation in issue in *Petroleum Refiners* involved what the law today calls an "unfair or deceptive acts or practice" (UDAP) designed for consumer protection, not "unfair method of competition" designed to protect competition, so that the broad phrasing in the opinion is dicta at best. In response to *Petroleum Refiners*, Congress the next year amended Section 5 to distinguish between UMC and UDAP, explicitly authorize the Commission to promulgate substantive UDAP rules, and provide a detailed procedure for the Commission to use in creating these rules. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat 2183, 2193-98 (1975) (codified as amended at 15 U.S.C. § 57a). Opponents argue it would be nonsensical for Congress to enact the Magnuson-Moss Act to govern the Commission's substantive UDAP rulemaking powers but remain completely silent on the Commission's substantive UMC rulemaking powers if, in fact, the Commission had such powers.

Finally, opponents acknowledge that, before the noncompete NPRM, the Commission had issued one substantive UMC rule in its 109-year history. *See* Discriminatory Practice in Men's and Boy's Tailored Clothing Industry, 32 Fed. Reg. 15584 (Nov. 9, 1967) (codified at 16 C.F.R. pt. 412), *repealed*, 59 Fed. Reg. 8527 (Feb. 23, 1994). But, they argue, the Tailored Clothing Rule only established a rebuttable presumption of anticompetitiveness for advertising payments and promotional allowances under the Robinson-Patman Act, was never tested in court, and was ultimately repealed.

[33] *See* Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980); E.I. du Pont de Nemours & Co. v. FTC (Ethyl), 729 F.2d. 128, 135-36 (2d Cir. 1984),

[34] 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

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."[35] 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 major questions analysis. Moreover, the proposed rule has the "vast economic and political significance" the major questions doctrine requires. Economically, the FTC, in its NPRM, estimates that around 30 million U.S. workers, representing approximately 20% of the American workforce, are bound by contracts with noncompete clauses.[36] The NPRM also projects that the proposed rule would require nearly three million small businesses to modify their employment contracts at a cost of between $944 million and $1.67 billion[37] and result in an increase in wages across the labor force totaling between $250 and $296 billion per year.[38] Politically, the proposed rule would "'work [a]round' the legislative process"[39] at both the federal and state levels. Congress has rejected proposals to modify the reasonableness standard for determining the legality of noncompete covenants.[40] And, as already noted, the proposed rule, if promulgated, would override state legislatures and courts in 47 states. It is hard to see how the proposed rule would survive attack under the major questions doctrine.[41]

Commissioner Wilson's resignation op-ed. Finally, your introduction to antitrust history and agency politics would not be complete without reading Commissioner Christine Wilson's op-ed announcing her resignation from the Commission. Read both Wilson's op-ed and her resignation letter to President Biden (both linked). Christine Wilson, *Why I'm Resigning as an FTC Commissioner*, Wall St. J., Feb. 14, 2023; Letter from Comm'r Christine Wilson to Pres. Joseph R. Biden, Jr. (Mar. 2, 2023) (follow the links). Commissioner Wilson, at the time the FTC's only Republican commissioner, resigned on March 31, 2023, leaving only the three Democratic commissioners on the Commission. Not surprisingly, given today's politics, the House Committee on Oversight and Accountability under Chairman James Comer (R-KY) has opened

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because of "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted"). *See generally* Daniel J. Sheffner, Cong. Res. Serv., IF12077, The Major Questions Doctrine (Apr. 6, 2022).

[35] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001).

[36] Noncompete Clause rule, 88 Fed. Reg. at 3485.

[37] *Id*. at 3531-32.

[38] *Id*. at 3523.

[39] *See* West Virginia v. EPA, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (second alteration in original) (quoting NFIB v. OSHA, 142 S. Ct. at 668 (Gorsuch, J., concurring)).

[40] For example, the Workforce Mobility Act has been introduced and died with action in committee every year from 2018 to 2021. *See* H.R. 5631 and S. 2782, 115th Cong. (2018); S. 2614, 116th Cong. (2019); H.R. 5710, 116th Cong. (2020); H.R. 1367 and S. 483, 117th Cong. (2021). It also has been introduced in the current 118th Congress, where it remains in committee. *See* S. 220, 118th Cong. (2023). The Freedom to Compete Act, which also was not reported out of committee, would have amended the Fair Labor Standards Act to render all existing noncompete clauses void and prohibit employers from entering into new ones. *See* S. 2375, 117th Cong. § 2 (2021). The bill has been reintroduced in the 118th Congress, where it remains in committee. *See* S. 379, 118th Cong. § 2 (2023).

[41] Commissioner Christine S. Wilson, in her dissent to the issuance of the NPRM, spotted many of these issues. *See* Christine Wilson, Comm'r, Fed. Trade Comm'n, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule* (Jan. 5, 2023).

an investigation into the substance of Wilson's allegations against Khan.[42] You should also read the letter from Comer to the three remaining members of the Commission seeking documents and information as part of this investigation. *See* Letter from Chairman James Comer to FTC Chair Lina M. Khan and Comm'rs Rebecca K. Slaughter and Alvaro Bedoya (June 1, 2023) (follow link). The letter provides a good compendium of the criticisms leveled at the FTC, especially in the area of mergers.

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

[42] *See* Press Release, H. Comm. on Oversight and Accountability, Comer Probes Federal Trade Commission Chair Khan's Abuses of Power (June 1, 2023).