CPI's North America Column Presents:

How the "New Brandeis Movement" Already Overshoots the Mark: Sketching an Alternative Theory for Understanding the Sherman Act as a Consumer Welfare Prescription

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For the past several decades, the antitrust laws have been expressly understood as a consumer welfare prescription. Known as the "New Brandeis Movement,"[2] an increasingly vocal group of commentators have made arguments suggesting that the Sherman Act should be enforced commensurate with social and political values. By applying contemporary insights from the "new originalism," this short article sketches a legal theory for confirming consumer welfare[3] as the Sherman Act's *raison d'etre*. The Sherman Act should be "interpreted" as an open-textured statute protecting competition from restraints of trade – be they agreements or firms with monopoly power – that satisfy a criterion of unreasonableness. In determining whether a restraint of trade is unreasonable, the Sherman Act should be "constructed" according to the consumer welfare standard set forward by the Supreme Court.[4]

A New Originalism for Old Problems with Original Intent

The "new originalism," generalized from a constitutional context, can been identified with four core premises: first, the original meaning of a legal text is fixed at the time of its enactment; second, enforcement by courts and agencies should be constrained by the text's original meaning; third, the legal text's original meaning is determined by its original public meaning, namely, the meaning that the text would have been given by competent speakers of the language at its enactment; and fourth, applying the legal text involves both the activity of "interpretation" – whereby the meaning of the legal text is discerned – and the activity of "construction" – whereby the meaning of the legal text is given legal effect through rules and standards.[5] Some originalist scholars have also noted how context can provide insight into a text's original public meaning when conventional meaning is ambiguous.[6]

In defending a social and political interpretation of the Sherman Act, proponents of the new Brandeis movement have emphasized legislative history.[7] Of course, while scholars have defended an economic welfare interpretation,[8] theories of legal interpretation that attempt to discern original intent are neither self-evident nor uncontroversial. Indeed, at least since Paul Brest's influential article,[9] it has been broadly understood that original intent theories involve the abstract and ahistorical process of contriving, and then applying, an aggregated legislative intent to circumstances that would have been in all likelihood unimaginable to the legislators themselves. As such, it is hardly unsurprising that legislative history can in practice be used as pretext for pursuing individual policy preferences.[10]

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[2] *See*, *e.g.*, David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION, Apr. 4, 2017, https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies/.

[3] In using the term "consumer welfare," I mean to leave open the question as to whether this term should be understood as total or consumer surplus.

[4] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[5] *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORD. L. REV. 453, 456-57 (2013).

[6] *See generally* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 286-93 (2016) [hereinafter *Methodology*].

[7] *See* Lina M. Khan, *Amazon's Antitrust Paradox,* 126 YALE L.J. 710, 739-41 (2017) [hereinafter *Khan*].

[8] *See*, *e.g.*, Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014) [hereinafter *Crane*]. *But see*, *e.g.*, Barack Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2256 (2013).

[9] Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

[10] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-22 (1997).

Toward a "Newer" Textualist Interpretation of the Sherman Act

Textualist analyses of the Sherman Act have found measures of consumer welfare – specifically, consumer surplus – to be its overriding goal.[11] Whereas social and political ends may well be cognizable under the lens of legislative history,[12] Professor Lande has explicitly distinguished his textualist wealth transfer interpretation from political concerns about the distribution of wealth.[13] While eschewing political goals, Professor Lande's textualist analysis nonetheless considers consumer choice, as distinct from consumer surplus, to be an additional concern of Section 1. For Section 2, Professor Lande's finds that a textualist interpretation unveils a no-fault monopoly statute.

Two qualifications can be made to Professor Lande's textualist interpretation of the Sherman Act. First, his emphasis on consumer choice in interpreting Section 1 appears not to be as much grounded in the original public meaning of a "restraint of trade," but in the premise that agreements in restraint of trade can include the restriction of non-price competition which reduces consumer choice. Even if true, such an observation would not factor heavily into a textualist analysis. Indeed, while the definition of "restraint of trade" highlighted by Professor Lande highlights a negative price effect, it does not mention consumer choice.[14]

Second, Professor Lande's interpretation of Section 2 as a no-fault monopoly statute is belied by the three definitions of "monopolize" which he himself correctly considers:

"To purchase or obtain possession of the whole of, as a commodity or goods in the market, with the view to appropriate the control or the exclusive sale of…"[15]

"To purchase or obtain possession of the whole of any commodity or goods in the market with the view of selling them at advanced prices, and of having the power of commanding prices…"[16]

"To monopolize, as defined by Webster, is 1. To purchase or obtain possession of the whole of any commodity or goods in the market, with the view of selling them at advanced prices, and having the power to command the prices."[17]

All three definitions define "monopolize" in reference to *both* monopoly power *and* the existence of additional conduct. While the *nature* of this additional conduct varies – be it either a

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[11] Robert Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice,* 81 FORDHAM L. REV. 2349 (2013) [hereinafter *Lande*].

[12] Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*: *The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 98-106 (1982).

[13] *See Lande*, at fn. 16.

[14] *Id.* at 2731 (quoting a legal treatise defining "restraint of trade" in the following terms: "[w]hat constitutes restraint of trade. It certainly is not true that every contract which reduces competition or that restraints trade is illegal…The natural result of the sale of a railroad to a rival line destroys competition and generally restrains, that is, lessens traffic by increasing rates…"). Even if consumer choice was a goal of the Sherman Act, it is perhaps therefore more correctly understood in terms of "teleological meaning," as distinct from the "communicative meaning" that determines the meaning of a legal text under a new textualist analysis. See *Methodology*, at 271.

[15] This definition was read aloud by Senator Edmund. 21 CONG. REC. 3153 (1890).

[16] This definition is from an 1828 Webster's Dictionary. 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[17] This definition is from an 1889 legal treatise, which appears to reference the 1828 Webster definition. SANFORD MOON GREEN, CRIME: NATURE, CAUSES, TREATMENT, AND PREVENTS 308 (1889) (emphasis omitted).

"view to appropriate the control or the exclusive sale" or a "view of selling [] at advanced prices" – all three definitions of "monopolize" include the existence of *some* bad conduct in addition to monopoly power. A textualist theory of interpretation can also examine context to dispel any ambiguity lending credence to a no-fault interpretation of "monopolize." As Justice Scalia has detailed, a textualist interpretation of the phrase "restraint of trade" does not condemn all combinations, contracts, and conspiracies, but only those which have a "particular economic consequence" that make them unreasonable.[18] Likewise, the existence of monopoly power – which, like an agreement, is also *prima facie* restraint of trade – need not be seen as illegal in and of itself, but only in reference to some further unreasonable conduct.

Section 2, therefore, need not be interpreted as a no-fault monopoly statute, but instead as requiring a showing of some additional bad conduct that makes monopoly power unreasonable – such as, for example, a specific anticompetitive intent[19] – to determine whether a monopolization has occurred *even if* the criterion for determining whether the unilateral conduct is unreasonable remains unspecified. A textualist theory of interpretation which understands the Sherman Act as prohibiting unreasonable concerted and unilateral restraints is thus consistent with its recognition as a common law or "open-textured" statute, [20] and not one which necessarily embodies any social and political values.

Construction and Consumer Welfare

Whereas the activity of interpretation is a descriptive inquiry that, on our theory, seeks to uncover the Sherman Act's original public meaning, the activity of construction presupposes a normative basis for how judges should give legal effect to the Sherman Act's underdetermined principle of unreasonableness. Sherman Act construction should not involve philosophical exercises in social or political theory in light of the difficulties associated with formulating objective enforcement standards. The introduction of social and political content into antitrust law should be a decision made not by courts, but by legislative bodies.

Consider the suggestion that antitrust doctrine be reoriented to a competitive process standard that is "inextricably linked" to market structure as a vehicle to promote "the distribution of ownership and control."[21] In premising Sherman Act enforcement upon a prior structural theory of distributive justice, such a standard would beg the question not only *whether* distributive ends should be reflected in antitrust enforcement, but also *which* of the many theories of distributive justice should be applied. Furthermore, even if a particular conception of distributive justice could be sufficiently defended, courts and businesses might often find themselves at an understandable loss when determining at just what level of market concentration a successful competitor – having once been urged to compete – *can* be turned upon when he wins. While paying semantic homage to the "competitive process," such an approach would empower regulation of market *outcomes* – even if

[18] Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731-32 (1988).
[19] *See United States v. Standard Oil*, 221 U.S. 1 (1911) (making an unreasonable specific intent inferable by conduct a predicate of monopolization offenses).
[20] *See* Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI ANTITRUST CHRONICLE (October 2017).
[21] *Khan*, at 745.

at the level of structure, and not performance – similar in kind to that contemplated by a no-fault monopoly offense.

Rather than have courts divine answers to abstract questions about distributive justice, the proper theory for determining whether an agreement or monopolistic conduct is unreasonable should be based upon concrete legal precedent.[22] This approach allows courts to avoid the difficulties associated with specifying defensible and objective standards for implementing abstract social or political theories about the good life or justice. To be sure, the legal framework for determining the unreasonableness of monopolistic conduct – even if exploitative conduct is *per se* reasonable[23] – has not been constant across the Sherman Act's history. However, modern antitrust law has made consumer welfare the defining standard for evaluating business conduct.[24] As such, a theory of construction rooted in legal precedent affirms consumer welfare as the basis for forming the rules used to evaluate the legality of business practices under the Sherman Act.

Conclusion

The new Brandeis movement's claim that the Sherman Act should be interpreted as a charter for social and political market interventions appears to rely upon an original intentions theory of legal interpretation that exalts legislative history. This type of original intent approach has been roundly criticized, and modern textualist theories have emerged as notable, if not also superior, alternatives. Rather than highlight the importance of consumer choice, or contemplate Section 2 as a no-fault monopoly statute, a contemporary textualist theory of interpretation can understand the Sherman Act as protecting competition by eliminating unreasonable restraints of trade and monopolistic abuses. To develop concrete rules and standards, courts should not look to adjudicate the merits of abstract social or political theories, but construct the Sherman Act commensurate with its *raison d'etre* as handed down by Supreme Court precedent – consumer welfare.

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[22] This is not to suggest that a precedential theory of Sherman Act construction should not reflect a concern about distributive justice in the form of constructing consumer welfare in terms of consumer rather than total surplus. Rather, it is to counsel against constructing the Sherman Act using non-economic theories of the good unsupported by legal precedent.

[23] Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

[24] As Professor Crane then noted, *Reiter*'s endorsement of the Sherman Act as a consumer welfare proscription had been quoted 29 times in federal antitrust decisions. See *Crane*, at 847.