

CHRIS HOCKETT: I am grateful to the law school and the student organizations for having me here. I took antitrust here a long time ago. And it helped prepare me for what turned into a very long and satisfying and really fun career in antitrust. And I'm honored and excited to be talking to you about practicing antitrust in the age of technology.

My challenge for the day is to convince you that being an antitrust lawyer is cool. Now, if that sounds like convincing you that being in the band in high school, in other words, is cool, in other words, impossible, I want you to keep an open mind and hear me out.

And I know what I'm talking about. That's me as a 14-year-old in high school. I got so much cooler by the time I was a senior. I can't even tell you.

But as Tom said, if you follow the news, you will have noticed a whole lot of stories about antitrust, and in particular applying antitrust to our largest tech platform companies, especially Google, Apple, Amazon, and Facebook. Because of these companies' size and their reach and concerns about the growth of their economic and political power, there are antitrust theorists and some even presidential candidates who are urging changes to the antitrust laws and intensified antitrust enforcement against the platforms and even breakups.

This animosity towards tech platforms has even spawned this new word-- techlash, which last year was a finalist for the Oxford Dictionary's word of the year. The winner word was toxic, and the runner up was gaslighting. So good times, huh?

The platforms of response to antitrust critiques-- and by the way, I should note that I have represented several of the companies in these matters-- is they succeed because they're efficient and innovative. And they offer extremely valuable services to customers, some at zero or very low prices. And they've succeeded not because they've done anything wrong or were to harm competition. And they shouldn't be punished for being successful.

This debate has been one dimension of an extremely energetic and fun reexamination of the purposes, one might even say the soul, of antitrust that is going on right now. All of these developments make this an especially opportune time to explore antitrust law. And I do feel very lucky that I'll be here at the beginning of November at the law school to teach a short course on antitrust in the digital economy. And that was advertising content.

So I will start by talking about what antitrust is and what I think is special and cool about

practicing in the area. And then I'll move on to an overview of what's happening now in antitrust and tech world, which sort of reverse order of what Professor Snack bar mentioned.

And I'll offer a few thoughts about the future. I'm shooting for the talk to last about 35 minutes. And then we'll have time for questions at the end. If any of you have eaten one of those marshmallow bars in your lunch bag and you need to run around the law school, I will understand.

To quickly start with, what is antitrust? Can I ask, how many of you are taking or have taken antitrust here? So for those of you who haven't, antitrust is a weird and uniquely American word for the rules we have for how individuals and businesses can compete with each other to make money.

The rest of the world call these laws competition laws, and that makes a lot more sense. But when Congress adopted them over 100 years ago, that's what it decided to call them.

Here is the operative language of the US antitrust statutes. The Sherman Act of 1890 and the Clayton Act and FTC Act of 1914. Congress called them antitrust laws because they were passed in reaction to the formation of trusts or groups of companies that got together to raise or stabilize prices in a variety of industries.

So you have the sugar trust, the copper trust, the iron trust, and most famously the Standard Oil trust. And these trusts were run by robber barons who controlled a lot of resources, got very rich, and became very powerful politically.

Concerns about their wealth and power inspired Teddy Roosevelt to another so-called trust busters to build political campaigns against them near the turn of the century. And similar today, antitrust became a topic of widespread public debate and a hot-button issue that featured in presidential campaigns.

Now as you saw from that spare statutory language that I showed you a minute ago, what the antitrust laws actually prohibited was not spelled out in very much detail. And the statutory language hasn't changed since those laws were adopted, which brings me to the first thing that I think is really cool about antitrust-- it's a living body of law.

Congress left it to lawyers and judges and enforcers, with some help from economists, to fight about and define the content of these laws. That's one reason why we can have a vigorous

debate now over what the laws actually mean in the context of big tech over a century after their adoption.

And when they're practicing antitrust law, what this means for you is that it's not at all unusual for you to encounter gray areas of law that call for you to revisit the old cases, or think deeply about the fundamental policies and purposes that underlie the doctrine. And that is really fun work to do. And it's not something that you find in other types of practice.

The second thing is that antitrust is important, strategically important, both to clients and business, and also to the broader functioning of the economy. For you, the antitrust lawyer, that has several positive implications.

First of all, every antitrust matter that you work on, whether you're in private practice or you're in an enforcement agency, has to be understood in the context of how the particular industry or business works. That is, what the business strategy was that led to the merger or corporate conduct under investigation. Otherwise, you can't properly evaluate the competitive effects associated with it.

And because of this close coordination between the legal issues and a company's business strategy, and typically the high financial stakes in these matters, the matters usually get a lot of high level attention from executives inside the company and from senior people in the legal department. And that's good. I mean, you can't say that about every kind of legal problem that companies face. And I will say that it's interesting, if not always fun, to spend time with CEOs.

In addition, antitrust cases also provide you amazing opportunities to get paid to be curious and learn about interesting things. And I want to hover on that for a second. This is a super good thing about being a lawyer, generally. And I think people sometimes don't appreciate that enough. Getting paid to learn things is awesome. And please do count your blessings that you're about to enter into a profession where that is true.

And in antitrust, if you're like me and you enjoy learning about new industries and products and business strategies and the economic implications of those things, this is a fantastic practice area. Really an opportunity to immerse yourself in issues that are deeply complex and important and stimulating.

As far as the broader social and economic importance of the work in capitalist economies, the rules of competition, how they get interpreted and applied, have enormous consequences for

the allocation of resources, for people's jobs, for prices, innovation, all kinds of things that are really, really vital. I'll touch more on those things when we talk more about big tech. But suffice it to say that antitrust policy is really important.

Reason number 3 is that in antitrust there happens to be a very, very healthy and supportive and close knit professional community around this practice area. Years ago, I was the chair of the ABA Antitrust Section, which is the largest professional organization in the area. And 9,000 people around the world belong to it. In spite of the fact that it's the American Bar Association, it's very international.

And people in government and in the private sector work together, volunteer endless hours, do all kinds of things on task forces and conferences, knowledge sharing, to make the antitrust system work better. Not just here, but across the world. And that mindset I think makes it a rewarding community to belong to. And also you're more likely to find people who are better mentors in that ecosystem. And mentors are important.

The reference to antitrust brings me to something else about it that I really like-- and that is it's international in scope. Competition laws have been one of our most successful exports. We and Canada were the first to adopt them in the late 19th century. And now over 120 countries have antitrust laws.

This is just merger enforcement regime, but I think it may be up to 140. And many of those countries are enforcing their laws aggressively. And some of them are enforcing them more aggressively than the United States has been of late. This international dimension of practice adds to the complexity of practicing antitrust because businesses are increasingly global, and therefore obligated to comply with antitrust regimes around the world.

But it also makes practicing in the area more interesting. It's a richer experience because there are cultural and political differences that you need to take account of, as well as legal ones, in order to do your job. And to me, anyway, that's fun.

So I hope I've begun to get traction on the idea that antitrust is somewhat cool. Why is it especially cool right now? Well, as I mentioned before, there's a battle going on for the soul of antitrust. And let me expand on that a little bit more as it is important context for the discussion about antitrust and tech firms.

Excluding cases against price fixing conspiracies, the level of US antitrust enforcement has

generally been declining for the last 40 years. Let me show you a couple of charts. This is just DOJ. So there is another US agency, the FTC, and also state enforcers. But DOJ publishes its data.

And this marks the level of overall antitrust investigations initiated by the DOJ since 1970. And you don't need to be an economist to see the trend there. This one breaks it down.

And here, the red line is the one that's been highest. It's called restraint of trade. And it's probably reflecting price fixing conspiracies and criminal antitrust enforcement, which has always been pretty vigorous.

The line to pay attention to is monopoly. You see this yellow line-- that's firms that are acting on their own to hurt competition. And the number of DOJ actions and investigations in that area have been very, very small.

Why? This decline is often attributed to the influence of the Chicago School and Robert Bork. Under the Chicago School economic theory, their way of thinking was that it was wrong to invoke antitrust laws against firms just because they're big. They argued that firms attain size and scale certainly from being efficient and innovative and industrious, sometimes. And that sometimes these economies of scale and scope are the things that direct the market to reward success to the biggest firms.

So punishing their legitimate success to help smaller, less efficient rivals is the opposite of what the antitrust laws ought to do. Instead, they promoted the idea that antitrust violations should be reserved for situations where it could be shown that there was anti-competitive conduct or mergers that could harm consumers by causing lower prices, reduction of innovation, or lower quality.

As many of you know, this became known as the consumer welfare standard. And under this view, the law's proper focus is on protecting competition and not competitors. So unless there's harm to consumer welfare, we should let the market sort out the winners and losers and keep antitrust intervention to a minimum.

So starting in the 1970s and '80s, this view took increasingly firm hold of US antitrust enforcement and jurisprudence. And as noted, a lot of people say that's the reason for this decline in enforcement over time.

During that same period, we've also seen a significant increase in corporate concentration. So

here's a graph showing a measure of market concentration, which is up to a three decade high. From their height, there are less than half or about half of the number of public companies listed on the stock exchange as there were a few years ago.

And there's a correlation between increases in concentration and margins, at least Goldman Sachs thinks so, and tells its customers so. This graph shows the margins going up as concentration in the industries increase.

So some have sounded the alarm about this and called for intensified antitrust enforcement by the US. You see lots of news stories about this from well-known people. Even *The Wall Street Journal* is publishing pieces about this, calling for more scrutiny.

So the tech firms have grown extremely rapidly, and they've grown to be extremely large. And they've emerged, as you might expect, as high profile targets for antitrust scrutiny.

And that's especially true of what's known colloquially as GAF-- Google, Amazon, Facebook, and Apple. There are a bunch of reported investigations going on at the state level and federal level, in Congress, and internationally. And there's a lot of chatter in the political system about doing something about big tech.

And that includes even presidential candidates who've obviously made the judgment that this is an issue of salience with voters. Elizabeth Warren has been the most vocal, comparing herself here to Teddy Roosevelt, and promoting the hashtag #BreakUpBigTech, which probably doesn't capture every possible nuance in the analysis.

But unlike some issues or most issues now, there is more bipartisan support for this antagonism towards big tech than in other areas. Here, we have the incredible example of Ted Cruz retweeting Elizabeth Warren when she complained about being shut down on Facebook.

So what are all the issues that are prompting this? There are some serious ones. First of all, the rapid rise in the size and scope and perceived political power of the tech platforms.

There are data privacy issues, both associated with breaches and people not knowing what's happening to their data. Misuse-- intentional misuse of their data by some bad actors.

Concerns about disruption to incumbent players or industries. We've seen newspapers get hit hard. The journalism industry, brick and mortar stores, all business models that have come under a lot of pressure from the online world.

And probably most importantly, the increasing social and political divisions in our country and elsewhere, some of which are attributed to things like fake news and other corrosive online content.

So those are some of the phenomena I think that have added a lot of energy to this debate. And we'll talk a little bit more about them and how they relate to antitrust, or don't. But there is also a companion economic movement that criticizes the traditional focus on consumer welfare.

And its origins are attributed in significant part to a very unlikely source-- a student law review note. Law review notes are not generally known to have a wide readership. I've said that as nicely as I possibly can.

But this one was different. This was January of 2017. And it was written by a Yale Law student called Lina Kahn. It's on the web, and it's been hit hundreds of thousands of times. And it's had a lot of influence.

It was expressing an antitrust theory against Amazon. And the interest it attracted in the press has brought its authors-- very young-- a lot of the popular press attention and celebrity. Here she is in the *New York Times* magazine. Here she is in *The Atlantic*.

And she has called this, and other people associated with her movement have called this, the New Brandeis movement of antitrust. Brandeis was a Supreme Court justice who was a progressive firebrand and very skeptical of big companies and their influence on our society and democracy.

So what does the New Brandeis movement have to say about the way antitrust should be, as opposed to what it is now? It's a call to-- a supposed return to populist roots of antitrust law. The claim is that antitrust law was conceived as a way to control the size and political influence of big companies, that the focus since then on consumer welfare and price theory is misplaced and much too narrow. And that the antitrust law ought to take more account of conduct and mergers that put too much stress on competitors and suppliers, even if that stress ends up producing lower prices in the short run, and other benefits for consumers.

They argue that a particular area of concern is with respect to online platforms. There are a number of concerns. Vertical concerns would be something like Amazon competing with

manufacturers who list products or offer for sale products on Amazon's site.

So if you go and shop for Duracell batteries on Amazon, you'll be exposed to Amazon basic alkaline batteries, which happen to be price a little bit less than Duracell batteries. There are concerns that that's foreclosing market opportunities for these entities that rely on Amazon for distribution services and taking unfair advantage.

The platform winner-take-all issue requires a little bit of explanation. Platforms which economists call multi-sided markets are businesses that operate by bringing together groups that want to interact with each other on the platform.

So we all know how this works in the case of Google and Facebook, it's bringing together users and advertisers. For Amazon and eBay, it's bringing together buyers and sellers. For Uber and Lyft, it's riders and drivers, et cetera.

And all of those are examples of multi-sided platforms. Multi-sided platforms can have a natural tendency toward size because of something economists called network effects. The platform becomes more valuable the more people who are on it.

So users are attracted to eBay because there are a lot of sellers there. And the sellers are attracted there because there's a lot of buyers there. So in network industries, the competition can sometimes have a winner-take-all or winner-take-most characteristic.

The progressive antitrust movement is concerned that these network effects, plus already having the platforms in possession of large data sets, may protect the platforms from new sources of competition, new entry. They also argue that platforms can tell which entrants are going to evolve and grow and ultimately become threats. And so they buy them and stop that from happening.

So not everybody is in love with this new set of theories. They've been derided as hipster, antitrust by some of their critics, saying that it's a superficial or faddish type of theory.

However, I think we are moving beyond labels now to consider some interesting substantive questions and responses to the New Brandeis movement. And here are some of those questions that are on the table.

So one is just a simple question of causation. Was it the way we enforced our antitrust laws that made these bad things happen? Is the growth in industry disruption or socially divisive

content due to platform monopolies, as the New Brandeisians say, or something else, like the internet? So that's not really an antitrust thing-- that's a technological evolution thing.

If you think about sources of bad content on the internet, everybody talks about breaking up Facebook or Google. They don't talk about breaking up Twitter because Twitter is small. And so the bad content on Twitter really doesn't have anything to do with whether it's big or little.

A related question is, well, OK, whatever caused it, would changing the antitrust laws or enforcing them differently fix things. I mentioned I went through that business about the network effects. People are calling for a breakup of big tech. But if there is a market dynamic that produces one winner in a particular type of market because of the platform desirability, and everybody wants to be on the same platform, then breaking up Facebook into four companies isn't going to achieve anything because they're just going to coalesce again. And there's going to be one winner.

There's another question when you think about things like data privacy. People, at least in the United States, don't seem to want data privacy. People don't care that much about data privacy. They exhibit a preference that doesn't really value it.

So if you have more competition, would that automatically produce more privacy? And privacy is expensive. And so it's not intuitively clear that smaller firms are going to be better able to provide privacy, especially if they can't subsidize themselves with advertising that's personalized according to data.

Is perhaps non-antitrust regulation a better way to tackle some of these issues? Privacy rules, campaign finance reform, transparency requirements, things like that that more directly attack the phenomena that have got people so excited.

Are there potential unintended consequences? Well, I guess embedded in all this is should we abandon the consumer welfare standard. And if we do, well, what are the potential unintended consequences?

To those of us who've been around us for a while, it rings funny in our ears to think that antitrust laws should be invoked to protect less efficient competitors. When that means that, at least in the short run, consumers are going to suffer. They're going to pay higher prices, get lower quality.

But it's not just consumers who might suffer in the unintended consequences department.

Small or medium-sized businesses rely on Amazon to carry their product and distribute and fulfill orders. Small and medium-sized businesses are on Facebook and Google, and get the benefit of targeted ads for the customers they want. And that's something that if you made that all more expensive or less available, would have significant impact.

And what if antitrust enforcement was used to respond to perceived concentrations of political power? Should the DOJ evaluate proposed mergers based on how they might affect political power? When you say that, that sounds a little scary. If they did do that, what standards would they use? And how would they be consistent across administrations?

And then last, how complicated is this to figure out? Well, the economics are hard, for one thing. Trying to figure out which small company would have turned into a big competitor, to one of the platform companies, in its nascent state is a hard thing to do. And trying to figure out whether they would have turned into what they turned into after being invested in by the platforms is a hard thing to do.

When Instagram was acquired by Facebook, it had 13 employees and no revenue. So that's the reason that it didn't send up red flags, or one of them.

So what's going to happen? Well, this is a good one. Sorry. It's factually complicated, as well as legally complicated.

So there is a consulting firm called Luma that years ago created the slide of all the ad tech in various sleeves. This is the display advertising ad tech ecosystem. There's one for mobile, there's one for search. A variety of them. And people show this slide as a way to show you how mind boggling the ecosystem is.

Well, there's more than one consulting firm in the world. And evidently how they compete is to try to do things one more step ahead. So here's a slide by another consulting firm, MarTech, that puts all of that information on one slide. So this is available in wallet size if you want to have it with you to refer to. So it's complicated.

So what are the things that are in the way of something being done about this? Well, the government tends to move pretty slowly, and especially when it's grappling with things that are as complicated as this.

And as you are learning, those of you in antitrust class, or will learn, the antitrust jurisprudence

in the United States has evolved. And what's baked in the pie right now is pretty defendant friendly. So the way that's going to happen faster is that we would need new legislation. And at least of late, Congress hasn't been very good at passing new laws.

What might happen in the future is already happening. And that is a serious conversation about the goals of antitrust and a review of what that means for big tech and tech platforms. And people are increasingly focused on regulation. That's a little bit more targeted. And to me, that seems more likely to happen than wholesale breakups or a fundamental overhaul of antitrust law.

But one thing is for sure. Amy Klobuchar may be pulling only at 3%. But in my view, at least one of her campaign goals is clearly achievable.

So I think antitrust is already cool again. And I'll just come out and say it. I think it's one of the coolest things that you can spend your time studying in law school. And it's worth a deep investigation in terms of a practice area.

So I hope you do that. I'm done. But I'm happy to take questions.

[APPLAUSE]