

Market structure, private power, and consumer welfare

Brooklyn Law School | Spring 2018

Professors Ted Janger and Sabeel Rahman

Tuesdays, 1:50 – 3:45pm, Room 720M

LAST REVISED: April 20, 2018

Description:

Law facilitates and enforces private transactions, enforcing contracts, encouraging competition, requiring disclosure. How does law construct “market” and how do market dynamics influence law? How might law and public policy be reformed to address concerns like inequality and corporate power, while promoting values like economic dynamism, inclusion, and welfare? This seminar explores these themes by providing students with a deeper look at different systems of business law and economic regulation. Topics may include: antitrust, competition policy, and corporate concentration; consumer protection and consumer welfare; regulation of public utilities including recent debates over net neutrality, internet platforms, and privatization of local utilities. In addition to covering relevant legal authorities and debates, this course will also enable students to view law and public policy from a variety of perspectives including the role of administrative and regulatory institutions and processes; law and economics; critical perspectives on questions of power, justice, and inequality.

Class policies and requirements

- Attendance. Students are required to attend class regularly. As specified in the student handbook, too many absences may require you to drop the course. If you have an emergency or some complication that will affect your attendance in class, please email me or Joanne to let us know, and if need be, to set up a time to review missed material.
- Reading. You are expected to complete the assigned reading for each class prior to our meeting. Readings will be posted on BLSConnect.

Requirements. There are two options for this course.

2 credit option – requirements:

- Take-home exam – 8 hours, open book, self-scheduled
- Weekly participation in class
- Weekly submission of 1-2 short questions by email to Profs. Janger and Rahman by 5pm the night before class
- One 5-7 page “reaction paper” submitted by 5pm the night before class during Unit II (pick which class you would like to write on)

3 credit option – requirements:

- Take-home exam – 8 hours, open book, self-scheduled
- Weekly participation in class
- Weekly submission of 1-2 short questions by email to Profs. Janger and Rahman by 5pm the night before class
- One 2 page “reaction paper” submitted by 5pm the night before class during Unit II (pick which class you would like to write on)
- One long final paper, 15-20 pages, submitted by the end of exam period to count towards your upper-class writing requirement

- NOTE: students choosing this 3-credit option must confirm approval with Profs. Janger and Rahman and submit an initial topic proposal by the end of Week 2.

ADDENDUM:

- Students who have missed submitting reading questions in advance of a given week can make it up by submitting a 1-page reflection on that week’s topics.
- The longer response paper requirement has been modified: you may write your response paper on any class topic, including one that we have previously discussed. However, response papers must be submitted by the LAST DAY OF CLASSES.

Summary of Course Schedule

Jan 16 –	Class 1	
Jan 23 –	Class 2	
Jan 30 –	Class 3	Paper writers: 1-paragraph topic proposal due
Feb 6 –	Class 4	
Feb 13 –	Class 5	Paper writers: Annotated bibliography due
<i>Feb 20 –</i>	<i>NO CLASS</i>	
Feb 27 –	Class 6	Paper writers: Thesis statement and outline
<i>Mar 6 –</i>	<i>NO CLASS</i>	<i>SPRING BREAK</i>
Mar 13 –	Class 7	Paper writers: Draft of literature review due
Mar 20 –	Class 8	
Mar 27 –	Class 9	Paper writers: First draft due
Apr 3 –	Class 10	
Apr 10 –	Class 11	Paper writers: First draft returned with comments
Apr 17 –	Class 12	
Apr 24 –	Class 13	

UNIT I: The legal construction of markets

Class 1. Introduction (Jan 16)

Assignments

- Robert Bork, *The Antitrust Paradox*, introduction
- *The Case Against Monopolies* (1603)
- *Mitchel v Reynolds* (1711)
- Louis Brandeis, “Curse of Bigness”, from *Other People’s Money*. Available online at:
 - <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-viii>
- *United States v. Addyston Pipe* (1898)

Class 2. Competition, concentration, and antitrust law basics (Jan 23)

Assignments

- Sullivan / Hovenkamp casebook, Chapter 2: The economics of antitrust
- REVIEW – Bork from Week 1
- Robert Pitofsky, *The Political Content of Antitrust* (1979), pp. 1051-7
- *Northern Pacific Railway v. United States* (1958), excerpts
- *Continental TV v. GTE Sylvania* (1977)

OPTIONAL:

- Daniel Crane, “All I Really Need to Know About Antitrust I Learned in 1912”
- *United States v. Aluminum Company of America* (1945)
- *Rothery Storage & Van Co. v. Atlas Van Lines* (1986)

NB – Paper writers: please schedule time to meet with us, with the goal of having a 1-paragraph topic description by Jan 30.

Class 3. Consumer Protection (Jan 30)

Assignments

- Block-Lieb & Janger, *Myth of the Rational Borrower*, 84 *Tex. L. Rev.* 1481 (2005), Part III
- Bar-Gill and Warren, *Making Credit Safer*, 157 *U. Penn. L. Rev.* 1 (2008), excerpts
- *Williams v. Walker Thomas*, excerpts
- *Quicken Loans v. Brown* (2012), excerpts.

Class 4. Public utility and infrastructure (Feb 6)

Assignments

Origins of the public utility idea

- *Shepard v. The Milwaukee Gas Light Co.*, 6 Wis. 539 (1858), excerpts
- *Munn v. Illinois*, 94 U.S. 113 (1877), excerpts
- *New State Ice v. Liebmann*, 285 U.S. 262 (1932), excerpts
- Bruce Wyman, *The Law of Public Callings as a Solution to the Trust Problem*, 17 Harv. L. Rev. 156 (1903)

Public utility's fall—and rise?

- Horace Gray, *The Passing of the Public Utility Concept* (1940)
- William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. Rev. 1614 (2014), pp. 1635-58
- Rahman, *Private Power, Public Values: Regulating Social Infrastructure in a Changing Economy*, *Cardozo L. Rev.*, forthcoming, Parts I-II

OPTIONAL:

- William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation, in Corporations and American Democracy* (Naomi R. Lamoreaux & William J. Novak eds. 2017)

UNIT II: Case studies and current debates

NB: The topics and readings for these sessions are subject to change and will be updated over the course of the semester.

Class 5. Technology and private power I: Technology infrastructure (Feb 13)

Assignments

- Larry Lessig, “The Code in Law, and the Law in Code” (2000)
- FCC Open Internet Order (2015), excerpts
- Ajit Pai, Open Internet Order, dissent (2015), excerpt
- In Matter of City of Wilson and Electric Power Board of Chattanooga, FCC (2015), excerpt
- Lina Khan, Amazon’s Antitrust Paradox, 126 *Yale L. J.* 710 (2017), pp. 746-756, 768-783, 790-802
- Stucke and Ezrachi, “Looking Up In the Data-Driven Economy” (2017)

Class 6. Technology and private power II: Information platforms (Feb 27)

Assignments

- Zeynep Tufekci, Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency, 12 *J. on High Tech L.* 203 (2015)
- Tim Wu, Blind Spot: The Attention Economy and the Law (2016)
- Jonathan Taplin, Is It Time to Break up Google? *New York Times*, April 22, 2017, available online here: <https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html?mcubz=3&r=0>
- Frank Pasquale, “Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines,” University of Chicago Legal Forum (2008), Part III
- Jack Balkin, “Free Speech in an Algorithmic Society,” pp. 26-39, 42-48, 58-64

OPTIONAL:

- Zeynep Tufekci, We're building an artificial intelligence-powered dystopia, one click at a time, TED Talk, September 2017. Online here: https://www.ted.com/talks/zeynep_tufekci_we_re_building_a_dystopia_just_to_make_people_click_on_ads/transcript
- ProPublica, Breaking the Black Box – especially Episode 1 (Facebook), Episode 2 (prices): <https://www.propublica.org/article/breaking-the-black-box-what-facebook-knows-about-you>

Class 7. Technology and Private Power III: Big Data, AI, and regulatory challenges (March 13)

- Frank Pasquale, *Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, 2015), Chapter 2, pp. 19-58
- Jack Balkin, The Three Laws of Robotics in the Age of Big Data (2017), pp. 1-7, 17-45
- Paul Ohm and Blake Reid, Regulating Software When Everything Has Software, 84 *Geo. Wash. L. Rev.* 1672 (2016)
- Van Loo, Rise of the Digital Regulator, 66 *Duke L. J.* 1267 (2017), EXCEPT Part III

Class 8. Too-big-to-fail finance (March 20)

Assignments

- Adam Levitin, The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay, 127 *Harv. L. Rev.* 1991 (2014) at 2037-68
- Michael Barr, The Financial Crisis and the Path of Reform, 29 *Yale J. Reg.* 91 (2012)
- Macey and Holdcroft, Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation, 120 *Yale L. J.* 1368 (2011), pp. 1385-96
- Morgan Ricks, Simpler Financial Regulation.

Class 9. Consumer contracts (March 27)

Assignments

- Margaret Radin, *Boilerplate* pages x-xvii, 1-18, 19-32;
 - Optional: pp. 32-51
- CFPB, Arbitration Study, Executive Summary, pp. 1-18
- ALI, Draft Restatement of Consumer Contracts pp. 1-8, 18, 34-47, 68, 81-91 (including section 6).
- Levitin, et al, Independent Review of ALI Consumer Contract Restatement.
- *CJ Fertilizer* case and notes

Class 10. Financialization and horizontal shareholding (April 3)

Assignments

- Einer Elhauge, Horizontal Shareholding, pp. 1267-71; 1273-8; 1281-93; 1299-1304
- Rana Foroohar, Makers and Takers, Chapters 5 and 11
- REVIEW: Brandeis, Other People's Money, and discussion of investor power from Class 1.

OPTIONAL

- Brandeis, "Our Financial Oligarchy", from *Other People's Money*, Chapter 1
 - <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-i>
- Brandeis, "Interlocking Directorates", from *Other People's Money*, Chapter 3
 - <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-iii>

Class 11. Market concentration and labor (April 10)

Assignments

- Vaheesan, Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages, pp. 7-18, 39-51
- Naidu, Posner, Weyl, Antitrust Remedies for Labor Market Power, pp. 1-25, 43-46
- Marinescu and Hovenkamp, Anticompetitive Mergers in Labor Markets, pp. 1-32

OPTIONAL:

- Marshall Steinbaum, Monopsony takes center stage, ProMarket Blog, January 2018:
 - <https://promarket.org/monopsony-takes-center-stage/>
- Naidu et al, pp. 27-46

Class 12. Healthcare and concentration (April 17)

**** Special guest lecturer: Professor Frank Pasquale**

Bio online here:

<https://www.law.umaryland.edu/faculty/profiles/faculty.html?facultyid=984>

Assignments

- Neeraj Sood, et al, “Follow the Money: The Flow of Funds in The Pharmaceutical Distribution System,” Health Affairs, June 13, 2017. Available online at: <https://www.healthaffairs.org/doi/10.1377/hblog20170613.060557/full/>
- David Dayen, “Abusing Drugs: A PBM Runs Amok,” January 23, 2018
- Joanna Shepherd, “The Prescription for Rising Drug Prices: Competition or Price Controls?” 27 Health Matrix 315 (2017)
- Christian DeRoo, “Pay to Play: The Impact of Group Purchasing Organizations on Drug Shortages,” 3. Am. U. Bus. L. Rev. 227 (2014)
- Robinson, Purchasing Medical Innovation, pp. 41-78
- Frank Pasquale, “The Hidden Costs of Health Care Cost-Cutting,” 77 Law & Contemp. Prob. 171 (2014)

OPTIONAL:

- Nicholas Bagley, “Medicine as a Public Calling,” 114 Mich. L. Rev. 57 (2015), Part I and III
- Scott Hemphill and Nancy Rose, “Mergers that Harm Sellers,” 127 Yale L. J., forthcoming, pp. 1-23

Class 13. Conclusion: An Antitrust revival? (April 24)

Assignments

- Elizabeth Warren, “Reigniting Competition in the American Economy,” June 2016
- Crane, “Antitrust’s Unconventional Politics,” Virginia Law Review online, March 2018

OPTIONAL:

- Lina Khan, “The New Brandeis Movement: America’s Anti-monopoly Debate,” Journal of European Competition Law and Practice 9:3 (2018)
- The Economist, “Too much of a good thing,” March 2016