

Editorial

The New Brandeis Movement: America's Antimonopoly Debate

Lina Khan*

Over the last two years, a growing number in America have concluded that the United States has a monopoly problem. The Obama Administration's Council of Economic Advisers linked rising market power with inequality and other ills, top Senators have called for reinvigorating competition policy, and the Democratic Party has identified antitrust enforcement as a key pillar of its economic agenda. This recognition is important because seeing and understanding the problem is the first step to addressing it. In some ways the renewed attention in the USA echoes conversations in Europe, where the antitrust community is debating whether and to what degree competition law should embody values of fairness.

In the USA, the discussion has been largely driven by the work of a small group of scholars, journalists, lawyers, and organisers. It was their research and writings that sounded the first alarms about the extreme and growing concentration in most sectors of the American economy, and first called into question the philosophy of competition policy and antitrust that has prevailed in America for the last 35 years. Sometimes called the 'New Brandeis School,' this group signals a break with the Chicago School, whose ideas set antitrust on a radically new course starting in the 1970s and 1980s and continue to underpin competition policy in the USA today.

As the name suggests, this new movement traces its intellectual roots to Justice Louis Brandeis, who served on the Supreme Court between 1916 and 1939. Brandeis was a strong proponent of America's Madisonian traditions—which aim at a democratic distribution of power and opportunity in the political economy. Early in the twentieth century, Brandeis successfully updated America's antimonopoly regime, along Madisonian lines, for the industrial era, and his philosophy held sway well into the 1970s. As the 'New Brandeis School' gains prominence—even prompting two floor speeches by Senator Orrin Hatch (a Republican from Utah)—it's worth understanding what this vision of antimonopoly does and does not represent. Below is an attempt to sketch out some of the core tenets of this school.

1) *Antimonopoly is a key tool and philosophical underpinning for structuring society on a democratic foundation.* 'What does democracy involve?' Brandeis asked in a speech in 1912. 'Not merely political and religious liberty, but industrial liberty also.' The Madisonian concept of 'self-government' hinges on the ability of citizens to control and check private concentrations of economic power. Surrendering this ability, Brandeis noted, would mean that 'there is a power in this country of a few men so great as to be supreme over the law.'

Brandeis and many of his contemporaries feared that concentration of economic power aids the concentration of political power, and that such private power can itself undermine and overwhelm public government. Dominant corporations wield outsized influence over political processes and outcomes, be it through lobbying, financing elections, staffing government, funding research, or establishing systemic importance that they can leverage. They use these strategies to win favourable policies, further entrenching their dominance.

Brandeis also believed that the structure of our markets and of our economy can determine how much real liberty individuals experience in their daily lives. Most people's day-to-day experience of power comes not from interacting with public officials, but through relationships in their economic lives—negotiating pay with an employer, for example, or wrangling the terms of business with a trading partner. Brandeis feared that autocratic structures in the commercial sphere—such as when one or a few private corporations call all the shots—can preclude the experience of liberty, threatening democracy in our civic sphere.

2) *Antimonopoly is more than antitrust.* In much the same way that the Constitution disperses power among different branches and tiers of government, antimonopoly aims to create a system of checks and balances in the commercial and economic spheres. Antitrust law is just one tool in the antimonopoly toolbox. Over the course of two centuries, Americans created a host of competition policy levers exist across government to promote

* Director of Legal Policy at the Open Markets Institute, 1440 G St. NW, Washington, DC 20005.

competition within open and fair markets. The Federal Reserve, the Department of Agriculture, the Federal Communications Commission, the Department of Transportation, the Patent and Trademark Office, the Office of the United States Trade Representative, the Department of Defense, the Securities and Exchange Commission, the General Services Administration, and many other agencies all enjoy great antimonopoly power. This is then replicated 50 times over, as every state government also enjoys a set of antimonopoly tools, as do cities, which can shape markets through offerings like municipal broadband.

3) *Antimonopoly does not mean 'big is bad.'* The New Brandeisians—like Justice Brandeis—recognise that certain industries tend naturally towards monopoly. This is especially true of networks. In such cases, the answer is not to break these firms up, but to design a system of public regulation that prevents the executives who manage this monopoly from exploiting their power. A second goal is to ensure that executives face the right incentives to provide the best service possible to everyone who relies on the monopoly to sell or to buy a particular product or service. In the past Americans have used both direct government regulation, and various forms of antimonopoly law and policy, to achieve these ends.

4) *Antimonopoly must focus on structures and processes of competition, not outcomes.* Congress originally passed antitrust laws to safeguard against excessive concentrations of private power and to protect market structures that distributed individual opportunity and prosperity. For most of the last century, enforcers of antitrust law achieved this end not by focusing on any specific outcome but by ensuring that markets were structured in ways that promoted openness and competition.

The Chicago School focus on 'consumer welfare,' by contrast, does focus antitrust law on one particular outcome—the supposed welfare of the consumer. This has warped America's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers. The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs—all harms that Congress

intended for the antitrust laws to prevent. The resulting system is so warped that enforcement efforts geared around 'consumer welfare' have, according to important recent studies, resulted in higher prices and markups, meaning that this philosophy is failing even on its own terms.

Contrary to how critics portray the New Brandeisians, this new school of thought does not promote using anti-trust law to achieve a different set of social goals—like more jobs or less inequality. Doing so would replicate a key mistake of the Chicago School: overriding a structural inquiry about process and power with one that focuses on a narrow set of outcomes. Refocusing antitrust on structures and a broader set of measures to assess market power can return the law to focusing on the competitive process.

5) *There are no such things as market 'forces.'* The Chicago School assumes that market structures emerge in large part through 'natural forces.' The New Brandeisians, by contrast, believe the political economy is structured only through law and policy. This is of vital importance, as it means that—unlike many Chicago Schoolers—Brandeisians do not recognise any form of organisation or any type of power as inevitable. Technological advances may upend existing balances in ways that facilitate consolidation, but just as government can structure the political economy to encourage innovation, it can also ensure that the fruits of innovation are not used to capture private control over markets.

It is clear that the New Brandeis School is already shaping how politicians, journalists, and the public see and discuss the concentration of market power and the decline of competition. The drumbeat is getting louder. Last summer, the Democrats' 'Better Deal' plan featured antitrust as a top priority going forward, and several candidates running for Congress in 2018 have built their campaigns around antimonopoly. To what degree this intellectual movement influences the U.S. competition regime in the coming years is an open question. But the very fact that antitrust is again at the centre of political debates shows that the New Brandeisians have already made a big mark.

doi:10.1093/jeclap/lpy020

Advance Access Publication 1 March 2018