

ISSUE BRIEF

REBOOTING AND RECALIBRATING COMPETITION POLICY:

Applying the Tradition of Louis Brandeis to the 21st Century Digital Economy,

Recapturing the Uniquely American Success of

Pragmatic, Progressive, Capitalist, Decentralized Markets

Issue Brief

- A. Continuity and Change in the Oversight of Competition
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1. INTRODUCTION AND SUMMARY

With legislation to address competition issues, especially in the digital economy, moving in Congress, this Issue Brief offers an overview of the principles that should guide that effort. First, it identifies the major themes (messages) of the overall analysis. Second, it introduces the organization of the paper in terms of the authors and publications cited. Third, it summarizes the twelve broad categories of competition issues that run throughout the analysis.

A great deal of background analysis underlies this issue brief, as shown in Table 1. Over the past year, the Consumer Federation of America has published four working papers and testified an equal number of times on these issues. Over the past two decades, CFA has published over a dozen and a half peer-reviewed paper of key competition issues. However, the new series focuses on anti-trust and regulatory issues that affect the competitiveness of the economy.

A. CONTINUITY AND CHANGE IN THE OVERSIGHT OF COMPETITION

At present, there is no doubt that change is in the air. Changes in the oversight of competition policy in America are infrequent but extremely important. Over the course of a century and a half (beginning about a quarter of a century before the passage of the Sherman Act, 1890) these policy debates have highlighted crucial questions.¹

- Are increases (or decreases) in oversight of competition necessary to control concentration in the economy?
- Who decides (federal or state legislatures or administrative agencies)?
- What specific changes are necessary?
- Who is responsible for implementation (antitrust authorities, existing regulatory agencies, new regulatory agencies, special tribunals)?

Antitrust enforcement in the 21st century has proven ineffective for addressing America's growing monopoly problem. Policymakers have responded by crafting a series of reforms that address a broad range of antitrust problems. The first column of Table 2 identifies twenty specific concerns expressed about competition policy in five categories. The second column identified over two-dozen responses to these challenges identified in the literature. The third column lists eight perspectives on the concerns and responses offered by over a dozen and a half authors.

The Biden administration staked out a position in the antitrust reform debate with his July 9th "Executive Order on Promoting Competition in the American Economy."² The Order contained 72 initiatives directing or requesting the heads of various agencies to employ their authority to remove impediments to competition in their jurisdictions. It states that "excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers." quoting the Supreme Court finding that the "unrestrained interaction of competitive forces" will yield an environment conducive to the preservation of our "democratic social and political institutions."³

¹ Table 1, Section I, From Brandeis...

² Table 2, Section V. Biden

³ Id..

TABLE 1 CFA BACKGROUND MATERIALS ON COMPETITION POLICY

I. CFA WORKING PAPERS, 2020

From Brandeis to Stiglitz Into and Beyond The 2020 Election: Brandeis Protocol and the Stiglitz Model of Pragmatic Progressive Capitalism, Pragmatic, Progressive Capitalism at Its Best: Network Neutrality: How an Entrepreneurial State Used Public Policy to Foster Experimental Entrepreneurialism and Create the Internet, August 26, 2020
Business data services: Irrational Exuberance for Deregulation: The Failure of Free Market Fundamentalism to Promote Competition or Prevent Abuse of Market Power, September 3, 2020
Big Data Platforms, A New Chokepoint in the Digital Communications Sector: Meeting New Challenges with Successful Progressive Principles, September 14, 2020

I. CFA TESTIMONY, 2020/2021

Comments of the Consumer Federation of America in Opposition to the Rulemaking, Before the Federal Communications Commission Re: Report No. 3157 Consumer & Governmental Affairs Bureau Reference Information Center Petition For Rulemaking, September 2, 2020
CFA and Public Knowledge Submit Comments on Competition and Markets Authority's New Pro-Competition Approach for Digital Markets, July 31, 2020
CFA Urges Overhaul of Antitrust Oversight to Recalibrate Regulations for a Digital Age. Letter to Antitrust Subcommittee of the House Judiciary June 24, 2021
Antitrust Applied: Examining Competition in App Stores, Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, April 21, 2021

II. OLDER PEER-REVIEWED PUBLICATIONS ADDRESSING KEY COMPETITION ISSUES

“Business Data Services after the 1996 Act: Structure, Conduct, Performance in the Core of the Digital Communications Network The Failure of Potential Competition to Prevent Abuse of Market Power,” *Telecommunications Policy Research Conference*, September, 2016.
 “Antitrust and Economic Regulation: Essential and Complementary Tools to Maximize Consumer Welfare and Freedom of Expression in the Digital Age,” *Harvard Law & Policy Review* 9-2 (2015)
 “The ICT revolution in Historical Perspective: Progressive Capitalism as a Response to Free Market Fanaticism and Marxist Complaints in the Deployment Phase of the Digital Mode of Production.” *Telecommunication Policy Research Conference Session on Innovation*, September 28, 2015.
 “The Long History and Increasing Importance of Public Service Principles For 21st Century Public Digital Communications Networks,” *Journal on Telecommunications and High Technology Law*, 2014
 “Why Growing Up is Hard to Do: Institutional Challenges for Internet Governance in the ‘‘Quarter Life Crisis of the of the Digital Revolution,’’” *Journal on Telecommunications and High Technology Law*, 2013. 11(1).
 “Structured Viral Communications: The Political Economy and Social Organization of Digital Disintermediation,” *Journal on High Telecommunications and High Technology Law*, 9:1, 2011.
 “The Central Role of Wireless in the 21st Century Communications Ecology: Adapting Spectrum and Universal Service Policy to the New Reality,” *Telecommunications Policy Research Conference*, September 2011
 “Broadband in America: A Policy of Neglect is not Benign,” in Enrico Ferro, Yogesh K. Dwivedi, J. Ramon Gil-Garcia, and Michael D. Williams, Eds., *Overcoming Digital Divides: Constructing an Equitable and Competitive Information Society*, IGI Global Press, 2009.
 “The Failure of Federal Authorities to Protect American Energy Consumers From Market Power and Other Abusive Practices,” *Loyola Consumer Law Review*, 19:4 (2007)
 “Accessing the Knowledge Commons in the Digital Information Age,” *Consumer Policy Review*, May/June 2006
 “Defining Appropriation Right in the Knowledge Commons of the Digital Information Age: Rebalancing the Role of Private Incentives and Public Circulation in Granting Intellectual Monopoly Privileges,” *Legal Battle Over Fair Use, Copyright, and Intellectual Property*, March 25, 2006
 “The Importance of Open Networks in Sustaining the Digital Revolution,” in Thomas M. Lenard and Randolph J. May (Eds.) *Net Neutrality or Neutering* (New York, Springer, 2006)
 “Too Much Deregulation or Not Enough,” *Natural Gas and Electricity*, June 2005
 “Hope And Hype Vs. Reality: The Role Of The Commercial Internet In Democratic Discourse And Prospects For Institutional Change,” *Telecommunication Policy Research Conference*, September 21, 2003
Restoring the Balance of Public Values and Private Incentives in American Capitalism, Too Much Deregulation or Not Enough, 2002
 The Digital Divide Confronts the Telecommunications Act of 1996: Economic Reality versus Public Policy,” in Benjamin M. Compaine (Ed.), *The Digital Divide: Facing a Crisis or Creating a Myth?* (Cambridge: MIT Press, 2001)
 “Open Access To The Broadband Internet: Technical And Economic Discrimination In Closed, Proprietary Networks,” *University of Colorado Law Review*, Vol. 69, Fall 2000
 “Antitrust As Consumer Protection In The New Economy: Lessons From The Microsoft Case,” *Hastings Law Journal*, 52: 4, April 2001, first presented at *Conference On Antitrust Law In The 21st Century Hasting Law School*, February 10, 2000

TABLE 2
THE CONTEMPORARY TERRAIN OF REFORM OF COMPETITION POLICY

<u>CONCERNS</u>	<u>RESPONSES</u>	<u>PERSPECTIVES</u>
<p><u>I. Lax Enforcement</u></p> <ol style="list-style-type: none"> 1. Short-term shift 2. Long-term Impacts <p><u>II. Traditional Challenges</u></p> <ol style="list-style-type: none"> 3. Cartels 4. Monopoly v. Monopolization 5. Vertical Integration 6. Leveraged conglomeration <p><u>III. Long standing issues</u></p> <ol style="list-style-type: none"> 7. Oligopolies 8. Market power 9. Tight oligopoly on steroids <p><u>IV. Magnified old abuses</u></p> <ol style="list-style-type: none"> 10. Exclusionary practices 11. Bundling & Conflict of Interest 12. IP/ Patent pools <p><u>V. New Challenges</u></p> <ol style="list-style-type: none"> 13. Structure, efficiency & abuse 14. Complex cost & harms 15. Data 16. Privacy 17. Lookback (divestitures) 18. New Practices 19. Price 20. Arbitration 	<p><u>VI. Purpose & Need for Reform</u></p> <ol style="list-style-type: none"> 21. Economics of competition 22. Political economy <p><u>VII. Recalibration</u></p> <ol style="list-style-type: none"> 23. Higher standards 24. Shift burdens 25. Higher showing for “exception” 26. Structure response is superior 27. Media Marketplace of Ideas 28. New tools <p><u>VIII. Regulation</u></p> <ol style="list-style-type: none"> 29. Multiple Jurisdiction 30. New & Expanded Regulation <p><u>IX. Measuring Value</u></p> <ol style="list-style-type: none"> 31. Defining relevant market 32. Long-Term 33. Competitors 34. Efficiency on tap, not on top 35. Welfare broadly defined 36. Inequality <p><u>X. Rebooting</u></p> <ol style="list-style-type: none"> 37. Traditional authority 38. Vigorous enforcement 39. Sympathetic courts 40. Complex/difficult legal process 41. Resources <p><u>XI. Political Action: Collective</u></p> <ol style="list-style-type: none"> 42. Transparency and voice 43. Workers 44. Consumers (class action) 45. Corporate Governance/Norms <p><u>XII. Political Action: Individual</u></p> <ol style="list-style-type: none"> 46. Private Antitrust 47. Focus on Competition 	<p><u>I. Brandeisians</u></p> <p>Brandeis</p> <p><u>II. Neo-Brandeisians</u></p> <p>Wu Khan</p> <p><u>III. Pre-Broadband Updates</u></p> <p>Adam & Brock Structure Conduct Performance</p> <p><u>IV. Golden age of Capitalism</u></p> <p>Economic Political</p> <p><u>V. Digital Platforms</u></p> <p>Stigler/ Zingales Harvard Business Review</p> <p><u>VI. Federal Practitioners</u></p> <p>Executive Order Department of Justice Federal Trade Commission</p> <p><u>VII. Other Authorities</u></p> <p>State Private</p> <p><u>VIII. Competition Policymakers:</u></p> <p><u>Recalibration Goals</u></p> <p>Experts Stiglitz/Shorenstein /UK Competition Klobuchar</p>

Sources:

I. Brandeisians

- Louis Brandeis (*The Regulation of Competition Versus the Regulation of Monopoly, An address to the Economic Club of New York, 1912, Other People’s Money – and How the Bankers Use it, 1914, Business, A Profession* (Louis D. Brandeis School of Law Library, 1914)
- Joseph Stiglitz, (*The Economic Role of the State, 1989; People, Power, and Profits, People, Power, and Profits: Progressive Capitalism for an Age of Discontent, 2019; ” Phony Capitalism,” Harpers, September, 2014; War of Word, Capitalism v. Socialism, New York Times, April 20, 2018*)
- Elllis W. Hawley (*The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence, 1995*)

II. Neo-Brandeisians

- Tim Wu (*The Curse of Bigness: Antitrust in the New Gilded Age, 2018, The Utah Statement, 2019; “Parallel Exclusion,” C. Scott Hemphill, Tim Wu, Columbia Law School, 2012*)
- Lina Khan (18 *Statements* from July to December 2021; *Amazon’s Antitrust Paradox, The Separation of Platforms and Commerce, 2019; Sources of Tech Platform Power, 2018.*)

III. Updates - Pre-Broadband

- Walter Adams and James W. Brock (*The Bigness Complex: Industry, Labor, and Government in the American Economy*, 2nd Ed. 2004)
- William G. Shepherd, (*The Economics of Industrial Organization* (2nd ed., 1985, 5th ed. 2004; *Public Policies Toward Business*, Irwin, 8th ed., 1991)
- F. M. Scherer and David Ross (*Industrial Market Structure and Economic Performance*, 3rd Ed., 1990)
- Almost two dozen Nobel laureates that have conducted research on market failure over the past three decades (including Joseph Stiglitz, *Wither Socialism?*, 1994)

IV. The Golden Age of Capitalism, Fact or Fiction?

- Stephen Moore and Julian L. Simon, Cato Institute (*The Greatest Century That Ever Was: 25 Miraculous Trends of the Past 100 Years*, 1999);
- Mark Cooper, 2002, *Restoring the Balance of Public Values and Private Incentives in American Capitalism, Too Much Deregulation or Not Enough*, 2002)
- Mark Click, *Antitrust in American History: Law, Institutions and Economic Performance*, (Institute for New Economic Thinking) May 2, 2019

V. Updates - Digital Platforms

- Luigi Zingales (*A Capitalism for the People: Recapturing the Lost Genius of American Prosperity*, 2012)
- *The Subcommittee on Market Structure and Antitrust of the Stigler Center Committee on Digital Platforms* (2021)
- Harvard Business Review, *Monopolies and Tech Giants*, 2020

VI. Federal Antitrust Practitioners

- Joseph Biden (*Executive Order on Promoting Competition in the American Economy*, 2021)
- Department of Justice (Associate Attorney General Vanita Gupta Delivers Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium, 2021); Department of Justice (*Complaint in United States v. Bertelsmann Se & Co., et al.*, United States District Court For The District Of Columbia, Case 1:21-cv-02886, 2021), Federal Trade Commission (*Statements on Various Issues and Rules*, Federal Trade Commission (*Complaint in Nvidia*, 2021)

VI. Other Antitrust Practitioners

- State AGs: Phil Weiser (*Meeting the Moment*, 2021), Facebook (*New York et. al v. Facebook, United States District Court for The District Of Columbia, Civil Action No. 20-3589 (JEB)*, 2021) Google (*Attorney General of Utah, et al. v. Google, et al., Case 3:21-cv-05227*, 2021)
- Private: Epic Games v. Apple (Findings of Fact and Conclusions Of Law Proposed By Epic Games, Inc; United States District Court Northern District Of California, Oakland Division, 2021)

VII. Recalibration Goals

- Experts (*Johnathan Baker, et al., Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, 2020); Joseph Stiglitz, (*People, Power, and Profits* 2019); Shorenstein Center, Wheeler, Thomas, Phil Verveer and Gene Kimmelman, (*New Digital Realities; New Oversight Solutions, Statutes and Regulatory Models Adopted for the Industrial Era are Insufficient for the Realities of the Internet Era, The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight*, 2020), UK Competition Authority (*Online Platforms and Digital Advertising Interim Report*, 2019)
- House Judiciary Committee, Markup, June 23, 2021 H.R. 3843, the Merger Filing Fee Modernization Act of 2021; H.R. 3460, the State Antitrust Enforcement Venue Act of 2021; H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 or the ACCESS Act of 2021; H.R. 3826, the Platform Competition and Opportunity Act of 2021; H.R. 3816, the American Choice and Innovation Online Act; and H.R. 3825, the Ending Platform Monopolies Act.
- Senate Judiciary Committee, S. 2710, The Open Markets Act, August 11, 2021, S.3197 - Platform Competition and Opportunity Act of 2021, November 5, 2021; S. 2992, American Innovation and Choice Online Act, January 13, 2022.
- Amy Klobuchar (*Antitrust: Taking on Market Power from the Gilded Age to the Digital Age*,2021); S. 225, the Competition and Antitrust Law Enforcement Act, February 4, 2021,

Notably the Order was framed with language drawn from the work of Tim Wu, a member of the National Economic Council as a Special Assistant to the President for Technology and Competition Policy. These reforms are each informed by the “Neo-Brandeisian” school of antitrust, which takes its name and principles from Progressive Era lawyer and Supreme Court Justice Louis Brandeis.⁴ Because the Order is far from a complete reform, this issue brief and the series of analyses presents a review of the current state of competition policy. Resurrecting an antitrust framework based on Louis Brandeis’ vision for the American economy is an important first step for competition policy reform that can be thought of as a “reboot” of antitrust law.

However, the reboot may not be able to restore competition to U.S. markets without a second step – a “recalibration” – that provides agencies with the tools to apply those principles. In fact, major changes in antitrust authority that go well beyond the Executive Order are being considered in both houses of Congress. Members of the House Judiciary Subcommittee on Antitrust introduced a package of bipartisan antitrust bills targeting the digital sector.⁵ On the Senate side, Senator Amy Klobuchar, Chair of the Chairwoman of the Subcommittee on Competition Policy, Antitrust, and Consumer Rights, of the Senate Judiciary Committee, has introduced and co-sponsored three bills with bipartisan support that would make antitrust reforms affecting the digital economy.⁶ Klobuchar has also written a lengthy text on antitrust.⁷

The Issue Brief makes the case for a careful reform of competition policy that includes both administrative rebooting of existing authority by antitrust and regulatory agencies and legislative recalibration of competition law. The former, administrative rebooting, in which agencies aggressively enforce procompetitive policies that embody the values expressed in the underlying laws as the agency understands them) is an important first step, The later, legislative recalibration in which Congress amends competition law, may be necessary to overcome or speed the reversal of decades of lax enforcement that has created unsound precedents based on erroneous economic assumptions.

Therefore, the challenge is to embrace and get back to those principles, while updating them to deal with the new, digital economy. At a similar moment of economic disruption and concentration during the Second Industrial Revolution, Congress responded with the Sherman Act (antitrust) and the Interstate Commerce Act (regulation).⁸ These statutes were continuously improved by Congress and played a crucial role in restoring competition to the American economy. Ultimately, they laid the foundation for the “Golden Age of Capitalism” in the U.S, in the quarter century after World War II.⁹

The sources reviewed strongly agree that the success of American Capitalism was, in significant part, a result of vigorous enforcement of the unique commitment to decentralized, competitive markets.¹⁰ They note that the vigorous approach to competition policy came to an end with the ascendance of the Chicago School approach to law and economics that can best be

⁴ Table 2, Section II, Wu

⁵ Table 2, Section VII, House.

⁶ Table 2, Section VII, Senate

⁷ Table 2, Section VIII, Klobuchar

⁸ Table 1, Section 1, From Brandeis and Pragmatic, Progressive

⁹ Table 2 Section IV, Economic

¹⁰ Table 2, Section III, Shepherd

described as based on a theory of “ersatz (Stiglitz),¹¹ crony (Zingales)¹² capitalism” that dominated antitrust and regulation, especially in the courts, for forty years (1980-2020). This history suggest that new legislation can help address the problem of market power in our own time and that what is needed is a return to a fairly recent period of law and practice. In fact, many of the analyses point to the *Microsoft* case at the beginning of this century (2002) as a potentially crucial turning point where successful competition policy could have been restored.¹³ Unfortunately, the opportunity was lost with another two decades of inaction. In other words, the precedent on which vigorous enforcement rests its claim is only twenty-years old.

B. MAJOR THEMES

This Issue Brief and series examines a broad range of suggested changes in competition policy that have been made in the current debate. Both administrative rebooting and legislative recalibration must be on the table because it is unclear how far either can go. Administrative rebooting may be constrained by existing precedent for years or decades, no matter how “unsound” that precedent is. The legislative recalibration may be limited by what the Congress will do to change key parameters of antitrust and regulatory practice.

It is important to note two critically important facts about this approach to returning competition policy to its critical role

- the two approaches are not mutually exclusive, and
- both administrative rebooting and significant legislative recalibration can remain within the tradition and framework for competition policy in the U.S.

A vigorous and sustained effort to reboot competition policy that reverses bad precedent in the context of antitrust and regulatory proceedings could succeed more quickly than anticipated for several reasons.

(1) It seeks to reverse a fairly recent change (at most 40-year old) in precedent. In fact, the *Microsoft* case, only 20-years old, rejects the claims made in the name of the precedent and could provide the basis for reversing it.

(2) The precedent is widely seen as based on bad, unsound economics, a theory of “ersatz crony capitalism.” The criticism is pervasive in the economic and antitrust literatures.

(3) The track record of behavior based on the erroneous theory and the unsound precedent to which it gave rise is abysmal; they simply and demonstrably did not deliver on their promises.

(4) Because the precedent had such a chilling effect on competition policy and the agencies were headed by individuals who were not inclined to engage in vigorous, pro-competitive enforcement, the precedents were infrequently challenged.

This analysis supports rebooting and recalibration of competition policy by offering a historical perspective, beginning with *Brandies* and ending with *Klobuchar*. It also shows that contemporary economic perspectives support the same conclusions. The convergence of these many detailed works makes a strong case for change that remains within the global parameters of U.S. antitrust policy.

¹¹ Table 2, Section I, Stiglitz,

¹² Table 2, Section V, Zingales

¹³ Table 1, Section II, Antitrust as Consumer Protection

Moreover, while the “new” digital sector rightly receives a great deal of attention, reforms must extend beyond the challenges posed by digital technologies. President Biden has recognized this need with an Executive Order that calls for 72 actions by the relevant antitrust and regulatory agencies to reboot vigorous enforcement of competition policy. The vast majority of the Executive Order involves actions that affect traditional sectors of the economy.

These themes combine to deliver another, extremely important message. The reinvigoration of antitrust does not require a “radical” abandonment of antitrust principles. On the contrary, abandonment of those principles was the radical change made after a century of sound principles. However, it would be a huge mistake to move too far in the opposite and abandon sound principles in an effort to correct the problem. The mistake would be to abandon the were remarkably successful principles that in producing economic growth that was broadly shared over a quarter century. Regulated competition¹⁴ provided the guardrails and guidance that led the capitalist economy to the greatest quarter century ever.

C. ORGANIZATION OF THE SERIES

I: Brandeisians

The first perspective in Table 2 shows the subset of progressive policies identified in the Brandeis Protocol that most directly affect the antitrust issues and concerns identified in this analysis. In CFA’s earlier analysis, we developed a concept called the Brandeis Protocol for progressive policy, which was composed of 100 policies that he advocated. We argued that the Brandeis Protocol was virtually identical to Joseph Stiglitz’ model of a progressive political economy. It also adds the focus of antitrust in the New Deal. With the famous “Brandeis Brief” consisting of two pages of legal analysis and 100 pages of sociological data, Brandeis was the first practitioner of law and political economy. In a later paper, we showed that the protocol is applicable to several recent studies of antitrust in the digital economy.¹⁵ The purpose of introducing it is here is to show the comprehensive and long standing nature of Brandeis’ thought. Linking it to Stiglitz shows it remains relevant to contemporary policy.

II. Neo-Brandeisians

In the second perspective we identify the issues that are discussed in two works by Tim Wu. Wu uses ten different words to describe the reform of antitrust activity that is necessary. The two summary words that we use (reboot and recalibrate) are not on his list. Wu’s turn to Brandeis for inspiration, reminds us that the law and political economy perspective in the U.S. stretched back to the very beginning of antitrust and regulation. Wu’s discussion invokes almost all of the 48 specific issues in Table 2.

We complete the second perspective with a discussion of Lina Khan, another neo-Brandeisian who agrees with Wu’s analysis, but here we use her law review articles that address key issues in contemporary antitrust and regulatory reforms.¹⁶ We discuss Khan’s lengthy law

¹⁴ As Brandeis advocated, Table 1, Section I, From Brandeis,

¹⁵ Table 2, Section VIII. Experts

¹⁶ Table 2, Section II, Khan

review articles which attack the erroneous precedent of recent competition policy (both antitrust and regulation). In Kahn’s view, “predatory actions” (to use Shepherd’s term) have been misinterpreted and excused by the unduly narrow focus of “ersatz, crony capitalism” on short term predatory pricing. Issues, like quality, choice and innovation and long-term strategies, like predatory investment, should have been considered in evaluating the competitive impact of dominant firm conduct. Khan argues that the surest approach to control market power and conflict of interests, structural separations, should be back on the table.

III: Updates Before Broadband

Next we turn to two updates of analyses that identify the weaknesses of the theory of “ersatz, crony capitalism.” Adams and Brock are shown to be very much in the Brandeisian tradition, with direct quotes from Brandies and their discussion of the *Bigness Complex*.¹⁷ Their policy recommendations are highlighted, particularly those dealing with oligopolies and tacit collusion (a topic also raised by Wu in an earlier paper).¹⁸

In the fourth perspective, we discuss, and resurrect the structure-conduct-performance paradigm (SCP). We do so because, although some neo-Brandeisians have attacked it, it is the correct paradigm to support the rebooting and recalibration of antitrust. While it is certainly true that we need to recover the important role of political considerations in antitrust, economics is important too. The reform of antitrust needs an economic model, one that explains market performance as a function of structure and conduct, influenced by underlying fundamentals. Above all, SCP was the economic paradigm that drove the second (late) New Deal and produced the “Golden Age of Capitalism.”

At worst, practitioners of SCP were wrong for the right reasons.¹⁹ They had the right models and understood the key role of antitrust, but they wrote at a moment when it was difficult to see, understand and predict, how thoroughly the theory of “ersatz, crony capitalism” would undermine the successful competitive structure and excuse pervasively anticompetitive conduct. At best, they were right on the big issues and uncertain on others for the right reasons.²⁰

This discussion concludes with an examination of market imperfections and failures from almost two dozen Nobel Laureates in economics (all awarded after the publication of the 3rd edition of the Scherer book). These Nobel laureates in economics lay to rest any possibility that the theory of “ersatz, crony capitalism” has any validity whatsoever. Stiglitz is among them,²¹ and his discussion of market imperfections is compared to Shepherd’s.²²

An extremely important aspect of this discussion market imperfections is that, while these laureates in economics are highly critical of free market fundamentalism and market imperfections, none of them “gives up” the capitalist approach. The goal is to identify the failures of the market and how to best address them with policy.

¹⁷ Table 2, Section III, Adams and Brock.

¹⁸ Table 2, Section I, Parallel Exclusion)

¹⁹ Table 2, Section III, Scherer and Ross

²⁰ Table 2, Section III, Shepherd

²¹ Table 2, Section III, Stiglitz

²² Id., Shepherd.

IV. The Golden Age of Capitalism

The central premise of the analyses to this point, aspirational in Brandeis and his work, but confirmed in the analysis and opinions of Stiglitz, Zingales, Adams and Brock, Shepherd and reiterated by all the authors cited later, is that the American approach to antitrust and regulation produced a competitive economy. It provided the necessary guardrails and guidance to foster an economic structure and induce economic conduct that led to outcomes that were vastly superior to the alternative. This analyses answers the question, “does this period really deserve the adulation in the label “Golden Age of Capitalism.” It shows that it does, so the premise is correct. It uses the approach founded by Brandeis in his “brief” – a wealth of long-term data to test the simple claim of superiority.

We begin the evaluation of the claim of superior performance of progressive capitalism by examining 25 trends used by the Cato Institute to claim “The Greatest Century That Ever Was: 25 Miraculous Trends of the Past 100 Years.”²³ We show that the title of the paper is wrong. It was not a century of remarkable success, but a much shorter period. The progressive policies of the fifty years in the middle of the century made the difference, particularly the quarter century after the foundation had been laid in the New Deal and the end of World War II. During the other periods, dominated by conservative, *laissez faire*, Neoliberal policies, performance was much worse. The data is reinforced by additional graphic presentations for the impacts that Cato missed and an econometric model based on the analysis of rates..

Thus, the contrast we have drawn between antitrust and regulation committed to pragmatic, progressive, decentralized markets (i.e., the unique American approach to capitalism), and the “ersatz, crony capitalism” of the conservative alternatives may be a little overdrawn, but not much. The difference between the two is so clear and large, and so bound up in the highly politicized and erroneous debate about “socialism,” this strong statement is necessary.²⁴

All of the above analysis focuses on economic issues, but there is also a political aspect to competition policies that the progressive advocates invoke, which is much more “qualitative.” Since decentralized markets are a key contributor to democracy, highly concentrated markets are anathema to a democratic polity. To underscore the link between economic oligopoly and political oligarchy, we use the welfare economics discussion of the structure conduct performance paradigm to explain how the policies pursued by “unchecked” dominant firms promotes their interests at the expense of the public interest and the economy.

V: Digital Platforms

Advancing chronologically, we turn to the digital economy. The broad impact of the emergence of a digital economy is examined from the point of view of competition policy based on the work of the Stigler Center that included papers on antitrust, media, privacy and politics. Because Louis Zingales co-authored the introduction to the full report, we include his book here as well. We show there are strong similarities in a collection of articles excerpted in a book from the Harvard Business Review.

²³ Table 2, Section IV, Moore and Simon

²⁴ Table 2, Section IV

Perhaps the most telling insight from the previous analyses is that, although there are unique features of the digital economy that make it challenging for competition policy, there never was a case in which the “dominance” of digital firms was purely a function of those “new” characteristics. In every case, dominance emerged from abusive practices, which were litigated in the Microsoft case, and identified in the other empirical analyses, most explicitly Khan. Bad acts and actors were at least as much to blame as underlying economic characteristics. A return to an approach that eliminates or controls these bad acts is in order.

VI: Federal Antitrust Practitioners

In a sense, that is exactly what the antitrust practitioners have set out to do. We first explore Biden’s Executive Order. While the order “only” asks agencies to use their existing powers to promote competition, the implementation is so vigorous compared to the extreme inactivity of the recent past that it approaches “recalibration.” Many of the actions will have to overcome recent precedent through administrative action. In some cases, the order does identify the need for legislation or establish processes by which the need for legislation would be demonstrated. Thus, the aspiration is specific and broad, what it will accomplish remains to be seen.

We elaborate on the executive branch rebooting from two perspectives. One perspective is the Department of Justice. Obviously, the Department of Justice is one of the agencies expected to implement the Biden Administration’s Executive Order, but it can do much more. The FTC can take even more action, given its rulemaking authority. Both agencies have decided to bring a “big case” (to use Wu’s term) – DOJ challenging a 5-to-4 horizontal merger, the FTC challenging a purely vertical merger.

VII. Other Authorities

Other institutions have the authority to enforce competition policy. State attorneys general have authority to enforce federal and state antitrust and competition law. This discussion is based on three sources. First is a broad speech given by the Colorado Attorney General, Phil Weiser. While the speech makes general points, it also uses successful individual state action to make its case. This is followed up with an analysis of the “complaints” section of two cases filed by over two dozen state AGs against Google and Facebook.

Another important source of enforcement of competition policy is private actions. Private antitrust is seen as an important contributor to competition policy that has been stifled by the precedents that favor dominant firms. It alleges violations of both federal and state law. Here we briefly review a private antitrust case brought against Apple. The litany of anticompetitive practices that Epic Game documents identify parallel the abuses in which Microsoft engaged and for which it was found liable for anticompetitive conduct.

VIII: Competition Policymakers: Recalibration Goals

Our support (hope) that rebooting antitrust can reverse unsound precedent (*stare decisis*) recognizes that overcoming unsound precedent is a difficult challenge. Therefore, the Issue Brief concludes with two presentations of aspirations (calls for) legislative changes. The first set of

recommendations are taken from the testimony of antitrust experts and practitioners and leading institutions that have presented evidence-based calls for change. Many of these experts were involved in the Stigler report discussed above.

The second set of recommendations is taken from a book by Amy Klobuchar. Her top 25 policy recommendations contain a mix of rebooting and recalibration. Concluding the analysis with a discussion of Klobuchar's book serves several purposes beyond the fact that she is an important policymaker. Her approach returns us to the central themes of the issue brief and the overall series. Klobuchar grounds her analysis in a detailed accounting of the origins of antitrust, beginning a quarter of a century before the passage of the Sherman Act (1890). Her analysis launches from the basic principles of antitrust, as outlined in their first three-quarter of a century.

However, in the second half of the book she shifts to the contemporary concerns and responses, focusing on the importance of the contemporary challenges to antitrust. Klobuchar identifies the key parameters for effective competition policy (Chapter 7: We The People: Why Antitrust Matters for Our Democracy and Economy), she identifies the unique characteristics of the digital economy that challenge competition policy (Chapter 8: Modern-Day Antitrust Challenges: Corporate Consolidation, Congressional Inertia, and the Conservative Courts), before moving onto proposals to reinvigorate antitrust (Chapter 9: The Path Forward: The Solutions to America's Monopoly Problem).

In this approach, Klobuchar may be a lot closer to what Brandeis actually did in the quarter century of his leadership on the national policy stage, than the way the Neo-Brandeisians interpret what he meant. The key principles to guide reform that appear in a straight line from Brandeis to Klobuchar and almost all the analysts in between include the following elements.

1. Regulated competition (Brandeis' term) is very much a capitalist undertaking with the goal of restoring and promoting a decentralized market economy.
2. Efficiency is important (as Brandeis emphasized in this support for scientific management), because it yields economic progress for all involved in the production process.
3. But, significant progress occurs only if economic market power is not abused and political power does not multiply the advantage of dominant firms, their owners and highly skilled labor. Competition is the disciplining force, but it is not likely to occur or endure on its own.
4. The pragmatic, progressive capitalist solution strikes a balance between innovation and entrepreneurship, on the one hand, and the guardrails and guidance of antitrust and regulation, on the other.
5. The key constraints require checks and balances to prevent the creation of artificial barriers to entry and abuse of economic and political power [horizontally (across the branches of government), vertically (across the levels of government (i.e., federalism), and internally (through industrial democracy within productive enterprises)].

A great deal of "unsound" precedent must be overcome, and that is where legislation may be necessary to recalibrate the practice of competition policy, but the practitioners of competition policy (federal and state antitrust and regulatory agencies, and private actors) have moved swiftly to challenge those erroneous precedents. Moreover, it is possible to rebalance competition

policy without abandoning the fundamental principles that served the U.S. economy well. The rebalancing that enjoys widespread support among the analyses reviewed includes

- shifting burdens of proof,
- adopting narrow definitions of relevant markets, adopting broad definitions of harm,
- focusing on competition and inequality,
- resurrecting structural solutions,
- putting efficiency and consumer welfare in its proper, long-term place by including quality, consumer choice, and innovation, and
- directing courts to place competition at the center of antitrust policy, stop giving dominant firms the “benefit or the doubt,” and treat anticompetitive conducts as the serious threat to consumer interests that it is.

D. SUMMARY OF THE MAJOR CONCERNS AND PROPOSED RESPONSES

Dominant firms in every sector, especially digital communications, will offer the economic theory of “ersatz, crony capitalism” and the unsound precedents based on Chicago law and economics in their defense. We spend no time on their arguments for the simple reason that they have been thoroughly refuted and rejected in the economics and antitrust literatures. Above all, the dramatic success of the traditional American approach to promoting decentralized competitive markets has been in sharp contrast to the failure of the more recent alternative, makes the rebuttal complete and total.

The immediate challenge is to restore the traditional approach to its proper place with administrative rebooting and seek additional support (recalibration) where it is necessary. This assures a balanced approach that can avoid the mistake of thinking that congress can pick winners by putting its thumb on the scale in favor of some entities, that are likely to prove to be inferior to the outcome of rigorous competition. While there are many nuances in the thousands of pages of analysis, complaints, and recommendation reviewed, it is possible to extract common theme that define the need for and direction in which competition policy should go.

I. Lax Enforcement: The radical narrowing of antitrust under the theory of “ersatz, crony capitalism” has had two harmful effects on competition policy. In the short-term, it “froze” antitrust, allowing a merger wave across all sectors and virtually ending efforts to litigate abusive conduct. In the long-term, it shifted the focus of antitrust away from structure and promotion of the competitive process, establishing precedents that are difficult to overcome, precedents that favor immediate, short-term price effects at the expense of measures of quality, choice, and innovation.

II. Traditional Challenges: Every type of behavior that was a concern for competition policy when the Interstate Commerce Act (1887, regulating railroads) and the Sherman Act (1890 targeting cartels, monopolization) were enacted remain a concern today. In fact, Congress sought to deal with problems of vertical integration and conglomeration later (in the Clayton and Federal Trade Commission Acts and a half century later in the Cellar-Kefauver Act.) After four decades of inaction and the growth of a new (digital) economy (1980 – 2020), these concerns

have grown dramatically because of the immense economic and political power of big data platforms

III. Long Standing Issues: Although Congress continually tries to improve competition policy, key issues escape the power of the antitrust and regulatory authorities. Oligopolies and their abuse of market power were concerns that competition policy did not reach. These issues remain pressing across all sectors, with particular importance in the digital communications sector, where a “tight oligopoly on steroids” magnifies market power.

IV. Magnified Old Abuses: Conflict of interests that arise from vertical integration and conglomeration have long been a problem that competition policy has only partially addressed. In the digital age, with much more powerful gatekeepers being reinforced by a massive merger wave, and the ability of data platforms to exploit huge quantities of information to undermine competition and harm consumers, concerns are magnified. The problems are numerous and powerful, including foreclosure through gatekeeping, leveraging through vertical integration and conglomeration, and exploitation of data used to lock-in consumers and undermine potential competitors) have suffocated competition and consumer choice.

V. New Challenges: While the digital sector is different, typified by very large economies of scale and scope on the supply and demand sides, that is not a justification for the dominant position gained by a handful of companies and their abuse of market power. The dominant firms did not rely on their economic advantages to gain dominance, they used anticompetitive practices to undermine competition. The ability to gather and analyze huge quantities of data and surveil potential competitors has been exploited to lock-in consumers and undermine competition. The exploitation of data for anticompetitive purposes raises a fundamental problem, disregard for consumer privacy and the inability of consumers to make effective choices about how their personal data is gathered and used (an issue raised by Brandeis). The expansion of “old” and addition of “new” anticompetitive, anti-consumer practices by dominant platforms to control potential competitors and consumers alike have become urgent problems. Khan’s detailed analysis of the predatory behavior of dominant platforms presents a detailed description of the problem.

VI. Purpose, Need and Thrust of Reform: Economic policy, which strives to achieve progress through dynamic, decentralized competitive markets, is the foundation of a political economy. While not losing sight of this goal, the broad political and economic goals of competition policy should be restored. Above all, competition policy should focus on the control of political power by preventing excessive concentration and abuse of economic power to promote the competitive process that ensures long-term consumer welfare.

VII. Recalibration: To promote decentralized competitive markets, all of the analysts reviewed argue that competition policy must establish lower thresholds for scrutiny and higher thresholds for exceptions, while the burden should be shifted to the companies to show that their mergers and conduct are not anticompetitive. The tools available to antitrust authorities and regulators should be expanded, particularly to deal with conflicts of interest. In a networked society dominated by digital technology, access to the core network is essential. Instances where conflicts of interest are too profound to be effectively regulated should result in structural separations or bans. Two unique areas of concern must also be addressed, both of which have

been deeply affected by dominant digital platforms, the mass media and the absence of regulation of data collection and use.

VIII. New and Expanded Regulation: Multiple jurisdictions of antitrust and regulation is necessary and has long been at the heart of competition policy because antitrust is not well-suited to oversee behavioral remedies. Where behavioral remedies are necessary, a sector specific regulator has taken on the task of oversight. The resulting jurisdictions have been successfully applied to communications networks for over a century. However, the update must also make it clear that the regulatory authority has the obligation to promote competition where it is possible, rather than entrench dominance. Measures should also be taken to prevent agency capture and ensure that oversight does not become a “governmental” obstacle to competition. An important focus of the digital authority should be to create a mechanism for effective consumer sovereignty with respect to the gathering and use of data. The design of the consumer choice regime should reflect and address the full range of behavioral challenges that have been exploited by dominant big data platforms.

IX. Measuring Value: Wherever the threshold of oversight is set, a key challenge is definition, e.g., defining relevant markets rigorously and narrowly to make the thresholds more effective, and defining suspect behaviors broadly to cover the problems of oligopoly, behavioral manipulation, and data exploitation. A return to traditional values that focus on long term structure and competitive process, with efficiency placed in its important, but subservient role are all necessary. A broad definition of consumer welfare, including concern about inequality were key values in the development and implementation of competition policy over the first three quarters of a century.

X. Rebooting: Rebooting antitrust is a crucial part of any effort to reinvigorate competition policy. Vigorous enforcement of traditional values exercised by agencies with adequate resources is essential to promoting competition. Courts that are sympathetic to this traditional interpretation are just as important. Overcoming the barrier of a complex legal process driven by bad precedent is difficult, to say the least.

XI. Collective Action: Mobilizing groups affected adversely by the “deep freeze” on antitrust is an important step toward building the necessary political will to change competition policy. This should include workers and consumers. A change in corporate governance to empower shareholder and these groups is also a way to influence decision of corporations, but it requires intense exposure to public opinion. .

XII. Individual Actions: The private right of- action against the abuse of market power and a political movement focused on competition policy can change the environment in which large corporations’ function.