Methodological and Normative Elements of the New Antitrust

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Given the premise of this issue, I will dispense with any table-setting regarding the current moment in U.S. antitrust debate and discussion, which spans the academic, regulatory and policy spheres. Instead, this essay focuses on articulating the central methodological and normative elements of a particular strand of this debate: the one which advocates basic changes to the existing settlement in the direction of deconcentrating economic power.[1]

Methodological or analytic elements of the new antitrust

The methodological or analytic elements of the new approach in antitrust have received less sustained attention—certainly in broader public discussion, but even in academic debate—than the normative elements. The latter are also fairly straightforward, even if there is some variation across contributors. I therefore give more attention to the analytic or methodological approach here, identifying two essential elements in particular.

First is the recognition that economic coordination is both already endemic in the economy, and prospectively necessary in any market and any economy. As a result, organizing and choosing among forms of economic coordination is a central aspect of the legal design of markets and the economy, including but not limited to the working of antitrust law. This resolves into critical and constructive work in various specific doctrinal and policy areas—from the legal treatment of horizontal coordination to the labor-antitrust intersection to vertical restraints to corporate mergers and the theory of the firm—given that many areas of antitrust law and streams of antitrust thinking insufficiently internalize and apply this recognition of the ubiquity and necessity of economic coordination.

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[1] I consider my own views and work to be aligned with this program. The adjective most commonly used for this program, both by participants and observers, is "Neo-Brandeisian." I don't object to this label, nor have I specifically adopted or endorsed it. As is evident from this essay, I believe Brandeis is an especially key figure both for thinking about our existing antitrust institutions and for thinking about economic competition more broadly, and in that sense – as well in terms of the emphasis that this program, overall, places on the normative potential of the past— the label is fitting. But other progenitors and precedents are equally important: work associated with this program looks to the economic visions birthed by various streams of the labor movement and of other social movements, for example, as well as to the work of certain economists and streams of economic thought that are not obviously associated with antitrust or anti-monopoly. And, I think, there are important forward-looking elements of the research program that are not entirely captured by Brandeis or any other progenitor.

Louis D. Brandeis' thought, among others', is an important precedent for this first recognition. Brandeis understood that competition is necessarily intertwined and conditioned by specific forms of coordination—much as the muscular and fascia systems of the body are intertwined, interacting causally at an almost limitless series of points.[2] It's well known, of course, that Brandeis was skeptical of anointing the large, dominant firm as the central engine of this economic coordination. Many of his fellow Progressives by contrast seemed to view the administrative centralization represented by the large firm as an almost-magical golden goose, expanding the pie for everyone. Brandeis, however, believed that those efficiency gains often didn't exist at all, or else really amounted to extraction—whether from firms in adjacent markets, or from the firm's own workers. He also affirmatively supported *alternative* coordination mechanisms, particularly through trade associations, labor unions, and cooperatives. This was partly because given the inevitability of coordination, forms of coordination that administratively maintain dispersed decision-making (and thus power) were preferable to those that concentrate it. It is also because Brandeis thought that true production efficiencies could often be realized through these other coordination mechanisms. For this reason, Brandeis both studied and lauded examples of productively efficient forms of looser market coordination (such as the German steel association, in comparison to the behemoth U.S. Steel) and sought to organize trade associations to engage in such activities.[3]

The second foundational analytic element of the new antitrust thinking is the recognition that competition is essentially channeled in particular directions by legal and institutional rules and practices. This means that a simple binary distinction between whether a practice is 'pro-competitive' or 'anti-competitive', or even viewing a system or market in terms of *how much* competition it possesses in quantitative terms, is insufficient. Equally important is the essential qualitative dimension or direction of the rivalry, which in turn is determined by the nature of the legal and institutional rules that have been adopted.

Again, Brandeis—along with many other key figures, such as the economist Gardiner Means after him, and the labor institutionalists before him—recognized that competition takes *qualitatively distinct* forms, about which core legal and social choices present themselves. An essential consequence of this recognition is that law *channels* competition toward certain methods and dimensions and away from others. Unfair competition law and the law of business torts do exactly this, and had long done so at

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[2] Generally speaking, Brandeis did not articulate his views in the register and at the level of abstraction of economic theory, but the implications are not very distant.

[3] See generally Gerald Berk, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 (2009), 60-65.

common law. Brandeis sought to build on this legal shaping of competition by further channeling business activity and strategy away from various 'unfair methods' that were ultimately socially and economically destructive (in his view)—such as tying contracts, 'loss leader' retail pricing strategies, and more.[4]

The channeling of competition through legal and organizational choices, in this view, extend not only to methods of competition but also to its aims. As a result, coordination through administratively decentralized organizations such as trade associations—even potentially up to and including coordination on price and even output—do not necessarily *eliminate* competition, but instead channel it to particular dimensions of firms' productive activities and relations with customers, workers, and trading partners. While not every producer (or group of producers) can occupy a specific type of market niche in comparative terms, it is certainly possible in principle to channel competition at a systemic level away from some dimensions and toward others—for instance, away from competition on wages that drives wages down to subsistence levels, or away from forms or levels of extraction that are highly destructive of natural resources. In other words, firms engaged in sweatshop labor or ecological destruction do not—at least not in the absence of severe and singular real resource constraints—represent compulsory market segments. Brandeis sought to channel competition away from 'cut-throat' price competition, the "competition that kills," and toward what he viewed as more socially and economically beneficial forms.[5]

None of this, though, makes much sense from the perspective of the theory of markets that has come to dominate antitrust law and adjacent areas of policy thinking. From the marginalist perspective, the market equilibrium is defined by the joint working of the Law of Demand and the Law of Supply, represented graphically by the intersection of the supply and demand curves. The demand curve represents consumers' propensity to buy at certain prices (driven by utility maximization in the process of choosing among various bundles of goods, where utility generally rises with consumption but where the rate of increase of utility generally decreases as the consumption of any one good increases) and the supply curve represents sellers' propensity to sell at certain prices (driven by production costs, which increase with the quantity produced but at an ever-slowing rate of increase). Driven by overall utility maximization, consumers' willingness to buy also varies inversely with price, while producers' willingness to sell varies directly with prices (i.e., the laws of demand and supply, respectively).[6]

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[4] Berk, Chapter 2.

[5] Lous D. Brandeis, "Cut-Throat prices—competition that kills," Harpers Weekly (Nov 15, 1913), 573.

[6] Tracing out the precise logical connections between these differing perspectives remains a task for another day.

Even while antitrust law has come to stand for maximizing competition under the influence of this theory of markets, it is important to note that the process of competition itself is largely in the background of this picture of intersecting preferences and utility maximization under budget and resource constraints. Sellers and buyers are both assumed to be infinite (and for the model to be even roughly applicable, very numerous), and are all assumed to be 'price-takers'. That is, no one firm (or buyer) affects the market price.[7] And there is certainly no coordination on price, and by implication on any other outcome that could be translated into price terms, between market competitors. Competition is thus largely a formalized background assumption about the way that firms relate to each other, rather than a process that the theory (in the first instance) describes. As such, both 'perfect competition' and its 'distortions' are largely one-dimensional, where the nature of competition itself is concerned. It is either there or it isn't—or at best, it's a hose that may be turned up or down, corresponding to the extent of deviation from perfect competition. Institutional detail disappears, and the process of competition—including the methods chosen—disappears. It doesn't really make sense to say, in this framework, that firms are competing on one dimension rather than another.

Brandeis was not alone in taking a different view. Among the labor institutionalists of the early twentieth century, the idea of channeled competition was foregrounded given the goal of realizing and defending prevailing wage standards market- or sector-wide. Labor institutionalists emphasized that prevailing wage standards did not *eliminate* competition but instead channeled it to other, more socially and economically beneficial forms of economic rivalry. The origin of the famous idea of "taking wages out of competition," widely also understood as the conceptual foundation of the labor exemption to antitrust law, is likely the work of Sydney and Beatrice Webb.[8] But the Webbs did not understand this as a *reduction* in competition. Instead, they said explicitly: "the Common Rule [on wages and conditions] in no way abolishes competition for employment. It does not even limit the intensity of such competition … All that it does is to transfer the pressure from one element in the bargain" to another, from "the wage to the work, from price to quality."[9] The Webbs here were discussing the qualitative possibilities for competition between workers, but their points also extend to the nature of product market competition between firms that

[7] It is irrelevant that imperfect competition models have come to predominate over perfect competition: perfect competition remains the normative benchmark by reference to which any regulatory or policy implications of imperfect competition must be drawn.

[8] Bruce E. Kaufman, *Historical Insights: The Early Institutionalists on Trade Unionism and Labor Policy*, 26 J. LABOR RESEARCH 1, 15 (2005) (discussing the origins of the idea of "taking wages out of competition" in the thought of the early institutionalists, including the Webbs and John Commons).

[9] Sidney and Beatrice Webb, INDUSTRIAL DEMOCRACY (1897), 716 et seq. (discussing the "Device of the Common Rule" and its interaction with the dynamics of market competition).

employ workers.[10] Not only did the labor institutionalists and Brandeis share this conception of *channeled competition*, but they also thought about "efficiency" in similar terms, emphasizing that cut-throat competition on both wages and prices wears down resilience in human and other productive capacities, undermining longer-term productive potential.[11]

In addition to Brandeis and the labor institutionalists, another progenitor of the channeled competition view is Gardiner Means, an economist who had significant influence on U.S. economic policy in the New Deal era and beyond. Means explicitly described "canalizing rules" as a central element of understanding the structure of the economy. In the U.S. government report on "The Structure of the American Economy" at the close of the 1930's, he noted, presciently:

> The framework of laws, rules and customs which canalize human activity without dictating it are so familiar that their organizing influence is often little realized except as some sharp change is made such as the adoption of a new canalizing law or the widespread breaking of an old custom. Yet in practice they are probably as essential to the effective organizing of resources as are administration and the market mechanism.[12]

It is clear that by "canalizing rules," Means meant to include the canalization of competition itself. While this is not the place for a detailed treatment of Means' ideas, his thinking and writing merit closer study by antimonopolists. While he did not focus on antitrust as such, his focus on "administrative inflation"—emphasizing the role of pricing discretion on the part of large, dominant firms in contributing to observed price inflation—and on the significance of coordination *inside* firms generally, signals a fruitful vein of economic thought for those rethinking competition law today.

The channeled competition idea leads very naturally into the structure of the Federal Trade Commission Act, which is organized around the distinction between "fair" and "unfair" competition, i.e., around the channeling of competition.[13] But even aside from its influence on specific statutes and institutions, channeled competition is a useful lens for understanding the nature of competitive dynamics in actual markets.

Normative elements of the new antitrust

The key analytic elements of the new antitrust thinking help to make sense of its main normative elements. Given that both economic coordination and canalizing rules

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[10] Webbs, id., 715-39.
[11] Webbs, id., 721-23.
[12] National Resources Committee, *The Structure of the American Economy* (1939), 120.
[13] Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

are intrinsic to markets, researchers and advocates argue that antitrust law should acknowledge its own role in shaping both—and then should aim toward forms of coordination and canalizing rules that disperse power and are substantively fair, while also assessing productive efficiency claims without putting the thumb on the scale in favor of certain forms of coordination that have become conventional. Dispersing power does not just mean maintaining decentralized markets, however. It means curtailing economic domination achieved through vertical restraints and monopolization, and also (given the inevitability of coordination) permitting and indeed encouraging forms of coordination that tend to disperse power both in the sense of decision-making and income flows. Corporate mergers and acquisitions, moreover, are to be carefully scrutinized not only in terms of their effect upon market concentration but also because they too frequently tend to directly channel income and investment upwards (from laid-off workers to shareholders and executives, for instance) and from productive economic uses to shareholder payouts.[14]

The maintenance of healthy economic rivalry is also an important element of this approach. But the focus is on actually-existing rivalry, rather than on perfect competition as a normative benchmark. Moreover, because rivalry is necessarily channeled to particular ends (and to particular means) by law and by more informal institutional rules, and because it is always conditioned by economic coordination, maintaining rivalry is never the *whole* picture. On the other hand, this approach is less sympathetic to claims that would justify the lessening of rivalry on grounds of efficiency. This is because of a shared view that many efficiency claims—for enlarging the scope of firm-based coordination, or for permitting control beyond firm boundaries—are both overstated, and often mistake extraction for efficiency.[15]

However, efficiency does not disappear either within this perspective. To be sure, the focus on channeled competition and the ubiquity of coordination—including the coordination within the business firm—lessens the focus on allocative efficiency, to the extent the latter is conceptualized as a result that will naturally flow from stamping out economic coordination other than that which is contained within business firms. Productive efficiency remains important; no one wishes to waste our shared natural or human resources. But the inquiry regarding productive efficiency needs to avoid

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[14] As a sampling of more specific arguments, see, e.g., Brian Callaci et al, "Vertical Restraints and Labor Markets in Franchised Industries" (working paper, 2022); Sandeep Vaheesan, *The Morality of Monopolization Law,* 63 WILLIAM & MARY LAW REVIEW ONLINE 119 (2022); Farm Action, Comment to FTC regarding Merger Enforcement (April 21, 2022); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021).

[15] For a further discussion of the latter distinction, see Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579 (2023).

assuming its currently-conventional conclusions—that firms are efficient, and other, often 'looser' forms of coordination—are not.

Finally, the analytic focus on canalizing rules naturally supports an institutional preference for agency rule-making over judicial policy-making. Whatever the mix of normative considerations ends up being that will determine the shape of markets and the direction of competition, it is better that the balancing of those considerations be performed, wherever possible, at the level of express rules announced by an administrative agency responsive to democratic participation, rather than decided *ad hoc* and case-by-case by federal judges who (in the U.S., especially) are more insulated than any other state actors from democratic accountability. This is especially so because open-ended judicial policy-making that balances multiple normative concerns is especially vulnerable to the sort of drift that favors well-resourced litigants over under-resourced ones.[16]

Conclusion

None of the methodological or normative elements set out here are entirely new, and many are shared (at least partially) with those who believe the existing system can be repaired with more piece-meal reform. Yet, if taken together and followed to their logical conclusion, these elements may lead one to quite a different place from what is possible within the worldview of the existing system. Thus, a primary purpose of collecting these elements in a succinct form is to better identify areas of common ground as well as genuine disagreement as we proceed, hopefully, toward real reform.

[16] A perfect example of this is the development of the state law governing noncompete agreements that bind workers, which are now the subject of a rule-making by the Federal Trade Commission. Non-Compete Clause Rule, 16 CFR 910 (January 19, 2023).