

## Twilight of the Lodestars: Brandeis, Chicago, Schumpeter and the Future of Competition Policy

*By Joseph V. Coniglio*



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“All becoming and growing — all that guarantees a future — involves pain.”<sup>2</sup> Something like this may be said of U.S. competition policy, which increasingly seems in flux and with much labor before it. While many have highlighted how the consumer welfare policy of decades past is now challenged by a neo-Brandeisian alternative, perhaps only very few dared to think that a dynamic theory of antitrust might itself emerge as a contender to both the Chicagoan and neo-Brandeisian paradigms for the coveted title of “lodestar” in guiding the next generation of competition policy. This article provides a backdrop for the current state of play, and considers whether the current antitrust consensus may find itself disrupted by not just a neo-Brandeisian alternative, but also a neo-Schumpeterian model for competition policy.

As to the former, the possibility of a more progressive direction for antitrust enforcement has suddenly become very real. Following last year’s lengthy Congressional report on antitrust enforcement in digital markets,<sup>3</sup> both the Senate — in the form of the Competition and Law Enforcement Reform Act (“CALERA”)<sup>4</sup> — and now the House — with five bills constituting an anti-monopoly program known as “A Stronger Online Economy: Opportunity, Innovation, Choice”<sup>5</sup> — are considering legislation that would radically transform

antitrust enforcement, particularly in digital markets. Taken with the noteworthy appointment of Lina Khan, who will Chair the Federal Trade Commission, one might easily divine from these events that antitrust law is now at an “inflection point.”<sup>6</sup>

And yet, with the recent launch of the Schumpeter Project at the Information Technology and Innovation Foundation, a prominent think tank, the latter has also come to pass. As it is described, “[t]he Schumpeterian perspective represents a new intellectual framework for practical antitrust reforms that enable the innovation economy [] to advance dynamic competition policy in which innovation is a central concern for antitrust enforcement, not a secondary consideration.”<sup>7</sup> In contrast with the Chicagoan or neo-Brandeisian models, the core insight of a Schumpeterian antitrust is said to be that “market power enables investments in the research and development that drives innovation, and that innovation in turn drives competition.”<sup>8</sup>

Of course, recognition of alternative and more dynamic paradigms that lie beyond both the neoclassical orthodoxy underlying modern antitrust and the institutionalism to which the neo-Brandeisians are successors is not a new

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<sup>2</sup> FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS X §4 (1888).

<sup>3</sup> See STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION OF DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (Comm. Print 2020).

<sup>4</sup> For a discussion, see Joseph V. Coniglio, *All Things Are Possible with Antitrust — CALERA, Capability Standards, and Looking to Europe to Reinvigorate U.S. Antitrust Enforcement*, COMPETITION POL’Y INT’L N. AM. COLUMN (Apr. 2021).

<sup>5</sup> See *House Lawmakers Release Anti-Monopoly Agenda for “A Stronger Online Economy: Opportunity, Innovation, Choice,”* OFFICE OF CONGRESSMAN DAVID CICILLINE (June 11, 2021).

<sup>6</sup> See e.g. Joseph V. Coniglio, *Why the ‘New Brandeis Movement’ Gets Antitrust Law Wrong*, LAW360 (Apr. 24, 2018).

<sup>7</sup> ITIF, *About ITIF’s Schumpeter Project: Competition Policy for the Innovation Economy*, ITIF (last visited June 20, 2021),

<https://itif.org/about-itif-schumpeter-project-competition-policy-innovation-economy>.

<sup>8</sup> *Id.*

development.<sup>9</sup> Austrian thinkers, most notably Friedrich von Hayek, without question played a crucial role in the development of the neoliberal policies that would provide the bedrock for the law and economics revolution that began to take hold in the 1970s. Moreover, commentators have already articulated in some detail how more dynamic economic theories could be deployed to craft a new competition policy.<sup>10</sup> But is now the time for the creative destruction of antitrust law?

As with any theory of law, to overcome the challenge of legal realism and avoid devolving into a primarily political affair, antitrust law must be sufficiently determinate to constitute a coherent framework for adjudicating disputes. Essential to this end is overcoming problems of both ambiguity and vagueness — that is, not only respectively knowing what antitrust law means, but how to apply it. Whereas common law standards may look backward to tradition, and civil law to more detailed rules, antitrust has managed to avoid the abyss of legal realism as a hybrid “common law statute,” whereby the courts have put forward concrete rules that serve as flesh on the bones of antitrust’s statutory standard — which is, generally speaking, the protection of competition.<sup>11</sup>

Up until now, antitrust law’s greatest triumph in this respect was the adoption of the consumer welfare standard and neoclassical economics, and specifically price theory, to solve the fundamental problem of determining when business conduct that resulted in increased market concentration—a consequence of both competition on the merits and anticompetitive behavior—was unlawful. Before the consumer

welfare standard, antitrust law had no firm answer to this question, and risked becoming an essentially political exercise haphazardly aimed at promoting democracy by preventing even *de minimis* increases in market concentration, and thus compromising its status as a rule of law, rather than of men.

While there were many figures in the antitrust enlightenment who woke competition policy from its dogmatic slumber, few were more important than Harold Demsetz, a Professor of Economics at UCLA. As Demsetz pointed out, the simple concentration doctrine<sup>12</sup> upon which much of antitrust enforcement had been premised, and which presumed that increases in market concentration would almost invariably lead to decreases in market performance, could not be sustained in light of a sober look at the empirical evidence.<sup>13</sup> Put simply, while there may be virtues prized by no less an economist than Adam Smith from rivalry amongst many sellers, improved economic performance, understood in neoclassical terms — lower prices, higher quantities — isn’t necessarily one of them.

While Demsetz’s analysis concerning the relation between structure and performance was transformational, much less so were his writings on the nature of competitive *conduct* and its relation to neoclassical equilibrium. Over a decade and half following his landmark empirical research, Demsetz gave a speech commemorating the 100th anniversary of the Sherman Act and posited that “[w]e do not yet possess an antitrust-relevant understanding of competition.”<sup>14</sup> As he pointed out, the forms or “dimensions” of competitive conduct are many, and encompass not just price and other types

<sup>9</sup> See Joseph V. Coniglio, *The Consumer Welfare Debate Comes to the FTC Hearings: Who’s on the Right Side of History?*, COMPETITION POL’Y INT’L N. AM. COLUMN (Nov. 2018) (linking the neo-Brandeisian approach with economic institutionalism).

<sup>10</sup> See e.g., J. Gregory Sidak & David Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMP. L. & ECON. 581 (2009).

<sup>11</sup> This does not mean that textualist interpretations of the Sherman Act are without merit. See, e.g., Joseph V. Coniglio, *How the “New Brandeis Movement” Already Overshoots the Mark*, COMPETITION POL’Y INT’L N. AM. COLUMN (OCT. 2017).

<sup>12</sup> That is, the economic doctrine which complemented a political desire to protect small businesses and gave rise to a legal regime where mergers amounting to a combined market share of less than 8 percent were found unlawful. See *United States v. Von’s Grocery Co.*, 384 U.S. 270, 272, 304 (1966).

<sup>13</sup> See Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164-84 (Harvey J. Goldschmid, et al. eds., 1974).

<sup>14</sup> Harold Demsetz, *100 Years of Antitrust: Should We Celebrate?*, Brent T. Upson Memorial Lecture, George Mason University School of Law, Law and Economics Center (1991).

of rivalry, but also innovation. For Demsetz, the task for competition policy was to properly account for each of them in formulating antitrust rules.

As Demsetz no doubt understood, this presented a related, but far more intractable problem than debunking the simple concentration doctrine: just as there can be tradeoffs between structural forms of rivalry and market performance, so too can there be tradeoffs between market performance — specifically, the dimensionality of price competition that is the focus of price theory and which features prominently in the consumer welfare analysis — and innovation competition, the major driver of long-run economic growth. Indeed, perhaps no one had seen this potential tradeoff more clearly than Schumpeter himself, whose gales of creative destruction and innovation competition were incentivized by market power in static product markets.

So understood, the core problem for competition policy is one of ambiguity: does antitrust law's *raison d'être* of protecting competition mean Smithian rivalry, neoclassical price competition, or creative destruction? Or, if all three, how do we identify the proper “mix” of competitive forms given the tradeoffs between them? For Demsetz, there was no good answer to the latter question: “If we agree that many relevant forms of competition relate inversely to each other and that no plausible method exists for converting intensities of different forms of competition into a common unit of intensity, then, it would seem, we also must agree that the Sherman Antitrust Act is logically impossible to carry out if its goal is interpreted as increasing the overall intensity of competition (or to reducing the overall intensity of monopoly).”<sup>15</sup>

On this view, a Schumpeterian competition policy should not seek to make creative

destruction the new “lodestar” of competition policy to parry the Brandeisian effort to reinstate structuralist rivalry as the “lodestar” (while also being wary of a rear guard action by technocratically-minded neoclassical thinkers to, for example, move from a partial to general equilibrium analysis as their new “lodestar”). Indeed, doing so would not only misjudge the problem, but overlook that protection of innovation has long been a feature of antitrust law, especially when evaluating unilateral conduct. As such, if the real challenge for antitrust involves harmonizing the three major and in some cases inversely-correlated dimensions of competition — Smithian rivalry, neoclassical price competition, and creative destruction — it is thus not clear what benefits a distinctively Schumpeterian competition policy will bring.

In fact, aside from the still contentious relation between market structure and innovation, the tensions with Schumpeter and contemporary antitrust policy are profound. Whereas the thought collective that laid the foundation for the law and economics revolution saw neoliberal corporatism as the best alternative to socialism, Schumpeter saw the former as merely the precursor to the latter, famously quipping not only that socialism could work, but that capitalism could not survive.<sup>16</sup> Further still, however, for Schumpeter innovative behavior depended crucially on an *ethic* of entrepreneurialism — what he called the “psycho-sociological superstructure” of a dynamic capitalist economy, and for which he believed corporatism was a demoralizing force.<sup>17</sup>

A Schumpeterian competition policy may thus far more resemble the neo-Brandeisian approach than the Chicago School in evaluating business conduct with an eye to “non-economic” criteria well beyond

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<sup>15</sup> Harold Demsetz, *The Intensity and Dimensionality of Competition*, in *THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES* 137, 144 (1995).

<sup>16</sup> JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 61 (1944) (“Can capitalism survive? No. I do not think that it can.”).

<sup>17</sup> For a discussion, see Joseph V. Coniglio, *Economizing the Totalitarian Temptation: A Risk Averse Liberal Realism for Political Economy and Competition Policy in a Post-Neoliberal Society*, 58 *SANTA CLARA L. REV.* 703, 728-732 (2020). The Weberian notion about capitalism’s “Iron Cage,” which was a motivation of the ordoliberal variant of neoliberalism, is analogous to Schumpeter’s view.

neoclassical analyses. In an attempt to account for Schumpeter's broader insights, a Schumpeterian antitrust may therefore introduce a new vagueness problem into antitrust by replacing what is currently seen as an empirical methodology focused on positive economics with something more akin to "methodological individualism," a technique which Schumpeter himself pioneered and is typical of Austrian approaches.<sup>18</sup> For this reason, creative destruction of modern antitrust through a Schumpeterian turn may prove to be at best a pyrrhic victory for American political economy that creates more uncertainty at a time when the need for clarity in antitrust rules could not be overstated.

To be sure, there is still no general theory that can properly account for the various dimensions of competition in the sort of systematic way that could ground truly sound and comprehensive antitrust reform.<sup>19</sup> In other words, Smithian rivalry, neoclassical equilibrium, and creative destruction remain somewhat incommensurable goods within a broader antitrust rule regime. For this reason, the sensible option for policymakers may be to better calibrate the relation between Smithian rivalry, neoclassical price competition, and creative destruction as *comparable* modes of competition with an ordering reflected in clear

and coherent antitrust rules.<sup>20</sup> Indeed, at a very high level, prioritizing Smithian rivalry in merger review, creative destruction when analyzing unilateral conduct,<sup>21</sup> and neoclassical price competition in dealing with cartels is a relatively accurate understanding of both antitrust law today, as well as several mergers-focused reform programs.

In his classic *Politics*, Aristotle saw the wisdom of studying not just the ideal constitution — shall we say again, the "lodestar" — but also that which is second-best and invariably much more practical under the circumstances, and which itself took the form of a "mixture" between yet another trinity: rule by one, rule by the few, and rule by the many.<sup>22</sup> In the present antitrust moment, with radical proposals for reform in both houses of Congress and a neo-Brandeisian Chair of the FTC, the competition policy community would do well to follow Aristotle's example. Rather than crown any one dimensionality of competition as the new lodestar and king, antitrust reform should focus on harmonizing the three major competitive dimensionalities of Smithian rivalry, neoclassical price competition, and Schumpeterian creative destruction within a newly polished but mixed antitrust rule regime that preserves its status as a rule of law and avoids the pitfalls of politicization.

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<sup>18</sup> Joseph Schumpeter, *On the Concept of Social Value*, 23 Q. J. ECON. 213 (1909).

<sup>19</sup> See Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have An Antitrust-Relevant Theory of Competition Now?*, in REGULATING INNOVATION: COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY 240-41 (2011).

<sup>20</sup> For a discussion of commensurability and comparability in antitrust goals, see Joseph V. Coniglio, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Aug. 2017).

<sup>21</sup> For a critique of the proposed reforms of the neo-Brandeisians and other progressives in the area of predatory pricing, see Timothy J. Muris & Joseph V. Coniglio, *What Brooke Group Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 35 (November 2020).

<sup>22</sup> ARISTOTLE, POLITICS 1265b33-1266a5, 1293b21-1294b40, 1309b18-1310a1.