

## LOUIS BRANDEIS: A MAN FOR THIS SEASON

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*In the early years of the 20th century, Louis Brandeis was America's most influential advocate for antitrust enforcement, but his contributions to antitrust have been much debated ever since. Given the current, prominent discussion of the future of antitrust in these economic times, this essay proposes a five-part framework to describe Brandeis's approach, which relies heavily on institutional roles and responsibilities: (1) legislators creating antitrust laws should consider broad economic and social issues, including democratic values; (2) antitrust laws should translate those broad motivations into administrable legal standards within the scope of professional obligations familiar to antitrust enforcers and the courts; (3) legal professionals vindicate the legislature's larger social and economic goals by relying on learnings from economics and the social sciences and applying the chosen legal standard to the facts in a determined and detailed manner, while avoiding day-to-day political considerations; (4) sectoral regulation should be used where justified by specific industry circumstances, such as the existence of local utility monopolies or in circumstances in which normal competitive forces cannot get the job done; and (5) competition policy, both in antitrust and sectoral regulation, is to be informed by a spirit of experimentation.*

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*“If we would guide by the light of reason, we must let our minds be bold.”<sup>1</sup>*

## INTRODUCTION

We are living in times that Louis Brandeis would have understood. He understood the danger of monopoly, even if the dominant industries of the early 20th century like steel manufacturing, no longer possess the power they once did. He understood the power of networks to thwart competition, even if those networks were made of railroad tracks not fiber-optic cable. Most of all he understood the feeling of many people that the economy is no longer working for them, limiting opportunity for economic and individual advancement.<sup>2</sup>

Imagine the scene on December 14, 1911 when the Senate Committee on Interstate Commerce met to consider the future of antitrust. The first witness introduced himself simply: “My name,” he said, “is Louis D. Brandeis; I live in Boston and I am a lawyer by

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). This statement is emblazoned on a mural in the main stairway that leads to the office of the Attorney General in the Robert F. Kennedy Justice building in Washington D.C., twinned with the most famous of Justice Holmes’ observations, “[t]he life of the law has not been logic, it has been experience.” GEORGE BIDDLE, *SOCIETY FREED THROUGH JUSTICE* (1936) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. at 311); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Paulo J.S. Pereira & Diego M. Beltran eds., 2011). See also *Department of Justice: George Biddle Fresco – Washington DC*, THE LIVING NEW DEAL, <https://livingnewdeal.org/projects/department-justice-george-biddle-fresco-washington-dc/> (last visited Oct. 15, 2017) [<https://perma.cc/QK37-B373>]. Upon Brandeis’s passing, then-Solicitor General Robert Jackson wrote an essay in which he noted the existence of this mural inscription in the Department of Justice. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 749 (2009).

2. See Jonathan Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 20, 2017), <http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today/> (“the exercise of market power may result in slowed economic growth and increasing economic inequality.”) [<https://perma.cc/FM75-J826>]; see also CARL SHAPIRO, *ANTITRUST IN A TIME OF POPULISM* 21–28 (2017) (recommending additional governmental actions to advance antitrust and competition policy).

profession.”<sup>3</sup> Brandeis, by then one of America’s fiercest advocates of stronger antitrust laws and governmental action to constrain market power, testified that day, the next, and even on Saturday, the third day.

Over these three days, Brandeis expounded themes familiar in his writings and speeches: that the American economy was beset by what he famously called “The Curse of Bigness,”<sup>4</sup> that monopolies threatened democracy and limited the scope of individual opportunity, that these businesses’ success was founded on improper actions that unfairly harmed independent competitors, and that the antitrust laws should be reformed to stop the power of the trusts.<sup>5</sup>

His critique was to the point. These powerful trusts, he said, are successful because they are monopolies: “To this monopolistic power, in the main, and not to efficiency in management, are their great profits to be ascribed.”<sup>6</sup> The impact of his advocacy between 1911 and 1914 helped propel the enactment in 1914 of both the Federal Trade Commission Act (“FTC Act”) and the Clayton Act, which established federal authority to stop unfair methods of competition and empowered federal antitrust agencies to stop transactions before they were consummated.<sup>7</sup> Both laws were animated by Brandeis’s belief that antitrust should be able to stop harm to competition in its incipiency.<sup>8</sup> Recent events, as he would soon say, had “made Americans realize the importance and the urgency of the trust problem.”<sup>9</sup> These years “were the fullest of Brandeis’s public life.”<sup>10</sup>

And as in Brandeis’s day, antitrust is now on the front-burner of American politics. For example, Barry Lynn has posited two American antitrust traditions, one encapsulated in the work of Brandeis and the other, best known as the “Chicago School,” in the work of Robert

3. *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce Before the S. Comm. On Interstate Commerce*, 62nd Cong. 1146 (1913) (Statement of Louis D. Brandeis, Esq. Attorney at Law, of Boston, Mass.) [hereinafter 1911 Hearings].

4. See LOUIS BRANDEIS, *THE CURSE OF BIGNESS* 109–111 (Osmond K. Fraenkel ed., 1934).

5. UROFSKY, *supra* note 1, at 317–19.

6. 1911 Hearings, *supra* note 3, at 1148.

7. Jeffrey Rosen, *The Curse of Bigness*, *THE ATLANTIC* (June 3, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-forgotten-wisdom-of-louis-d-brandeis/485477/> [https://perma.cc/Y4HX-ZS6F].

8. *FTC v. Gratz*, 253 U.S. 421, 432–435 (1920) (Brandeis, J., dissenting).

9. Louis D. Brandeis, *The Regulation of Competition Versus the Regulation of Monopoly*, *BRANDEIS SCH. OF LAW* (Nov. 1, 1912), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-regulation-of-competition-versus-the-regulation-of-monopoly-by-louis-d.-brandeis> [hereinafter *The Regulation of Competition Versus the Regulation of Monopoly*] [https://perma.cc/8C3R-BXLF].

10. ALPHEUS T. MASON, *BRANDEIS: A FREE MAN’S LIFE* 422 (1946) (“The years 1910 to 1915 were the fullest of Brandeis’s public life.”).

Bork,<sup>11</sup> and Lynn quite decidedly prefers the former.<sup>12</sup> Guy Rolnick has described Brandeis as “one of the most important justices and intellectuals in U.S. history,” and extolls his fight against monopolies and for antitrust.<sup>13</sup> Such advocates of more aggressive antitrust have been labeled “The New Brandeisians.”<sup>14</sup> In the world of sectoral regulation, Jeffrey Rosen believes that Brandeis would have favored the action taken in 2015 by the Federal Communications Commission (FCC) to preserve and protect net neutrality.<sup>15</sup> Yet, Brandeis has not been universally praised, even for his best known antitrust opinion.<sup>16</sup> And he has been criticized as too quick to incorporate democratic values into his antitrust thinking while failing to apply important economic concepts.<sup>17</sup>

This essay outlines the framework of progressive governance that I believe Brandeis embraced in his fight for competition. This is not to suggest that Brandeis provides us with the specific answers to competition-policy disputes in the 21st century. But his writings direct our attention to democratic values and a broader discussion about the purpose and goals of the antitrust laws. Antitrust is too important to

11. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). Barak Orbach argues that both Brandeis and Bork represent populism; Brandeis, pro-enforcement, “seeks to protect the local control of industries by small businesses and identifies business size as evil,” Bork, “anti-enforcement” populism holding “exaggerated beliefs that markets are competitive and tend to correct themselves quickly.” Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J. OF L. & BUS. 101, 108–09 (2017).

12. *Is There A Concentration Problem in America?*, STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE (Mar. 27, 2017), <https://research.chicagobooth.edu/stigler/events/single-events/march-27-2017> [<https://perma.cc/YY6Z-V7G9>]. Lynn directs the Open Markets Institute. Previously, he spent 15 years at the New America Foundation researching and writing about monopoly power. He is the author of *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2010) and *END OF THE LINE: THE RISE AND COMING FALL OF THE GLOBAL CORPORATION* (2005).

13. Guy Rolnick, *140 Years of Antitrust: Are Brandeisian Pro-Competition and Anti-Monopoly Sentiments Coming Back into the Political Discourse?*, PRO MARKET (Sept. 30, 2016), <https://promarket.org/140-years-antitrust-brandeisian-pro-competition-anti-monopoly-sentiments-coming-back-political-discourse> [<https://perma.cc/7HPB-SRGD>]. Guy Rolnick is a Clinical Associate Professor for Strategic Management at the University of Chicago Booth School of Business.

14. David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (Apr. 4, 2017), <https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies> [<https://perma.cc/T43L-JZ6V>].

15. JEFFREY ROSEN, *LOUIS D. BRANDEIS: AMERICAN PROPHET 200* (2016). Jeffrey Rosen is President and CEO of the National Constitution Center and a professor at The George Washington University Law School.

16. “Justice Brandeis’s statement of the rule of reason in Chicago Board of Trade . . . has been one of the most damaging in the annals of antitrust.” HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 336 (5th ed. 2016); See THOMAS MCCRAW, *PROPHETS OF REGULATION* 84 (1984) (“Brandeis offered regulatory solutions grounded on a set of economic assumptions that were fundamentally wrong.”); BORK, *supra* note 11, at 47 (“Brandeis was not so much a believer in competition as a believer in safety and smallness in the economic world.” “Brandeis’s sloganeering and his almost willful refusal to rethink the trust problem contributed to the institutionalization of a confused and contradictory regulatory program.”).

17. See, e.g., Barak Orbach & Grace C. Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 608 (2012) (depicting Brandeis’s phrase “the curse of bigness” as a “fear that confuses all notions of size . . . and associates bigness with a wide range of societal harms.”).

be left only to antitrust experts; Brandeis can help us incorporate a broader range of substantive and process values and learnings into the discussion of the purpose of antitrust. Moreover, Brandeis provides insight on the drafting of antitrust laws, on the role that the legal system should play, on the use of sectoral regulation, and, always, on the importance of facts and experimentation in fighting for competition.

In Brandeis's formulation of antitrust and competition law, progressive governance means, first and foremost, that the government can and should act to protect and promote competition. Brandeis's vision was as wide as the aperture that gathers in all of the social and economic considerations that a legislature may consider and as sharply-focused as the most damning cross-examination. Brandeis was like a person standing on a beach, taking in the grand view of sea and mountains in the distance, while simultaneously examining the smallest grain of sand at his feet.

Brandeis believed that the answer to the economic and social problems exposed by populism was to construct institutions that could solve problems rather than indulging any populist impulse to tear down instruments of governance. When institutions and laws proved inadequate, his answer was to enact better laws and new forms of governance, such as the Clayton Act and the FTC Act, in order to achieve the democratic, social, and economic goals that he was convinced were threatened by concentrated economic power. That is, Brandeis believed economic frustration and populist impulses could best be addressed through the creative construction and use of institutions; by giving institutions the tools they need to succeed, and by calling upon lawyers and judges to apply the rule of law. Brandeis can thus be understood as expressing great confidence that appropriately-crafted antitrust and competition law and regulation would empower the legal system to achieve the social and democratic goals that he favored.<sup>18</sup>

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18. In *Associated Press v. United States*, 326 U.S. 1 (1945), decided six years after Brandeis retired, the Court affirmed a judgment that the AP had violated the Sherman Act by, for example, prohibiting its members from selling news to non-members and allowing each member to block non-member competitors from membership. In the course of his opinion, Justice Hugo Black observed that “[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .” *Id.* at 20, thus demonstrating the manner in which antitrust laws can serve broader speech interests. See also *U.S. ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 432 (1921) (Brandeis, J., dissenting) (describing a First Amendment claim as “the same nature as—indeed, it is a part of—the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations.”). Sectoral regulators like the FCC have a broader statutory responsibility than antitrust agencies to consider non-economic concerns such as diversity of speech. See Jon Sallet, *Viewpoint Diversity and the Public Interest: Considering Freedom of Expression*, FCC (May 24, 2016), <https://www.fcc.gov/document/remarks-jon-sallet-media-institute> [<https://perma.cc/95DT-LUEK>].

## I. BRANDEIS'S FRAMEWORK FOR ANTITRUST AND COMPETITION

The Brandeisian approach to competition has five parts; together they comprise the framework for progressive governance in the field of competition.<sup>19</sup> The first three parts concern antitrust specifically: the role of legislatures, the construction of legal standards, and the mechanisms of antitrust law enforcement. The fourth part focuses on the special case of sectoral regulation. The fifth and final part recognizes the importance of experimentation to the economy, government, and democracy.

First, Brandeis believed that legislators creating antitrust laws should consider broad economic and social issues. His goal was to combat trusts and monopoly, including the impact that he believed monopoly had on democracy and individual economic opportunity. (He viewed the two as very closely related.) Congress, in his view, was rightly motivated by concerns about the political power of the trusts when it enacted the antitrust laws.

Brandeis has been criticized for allowing a broad sweep of concerns, including avowedly non-economic ones, to influence his view of antitrust.<sup>20</sup> As I hope to demonstrate, such criticisms may conflate the role of the legislator, on the one hand, with the roles of law-enforcers, lawyers, or judges, on the other. It is important not to confuse Brandeis's support of the legislation in order to advance social and economic goals with the distinct manner in which he thought legal standards should be drafted or laws, once enacted, should be enforced.

Second, Brandeis's approach thus demonstrates his view that wise legislation requires legislators to translate larger social and economic concerns into a set of statutory commands designed to serve these larger social goals while operating within the scope of professional obligations familiar to antitrust enforcers and the courts. Brandeis focused on the creation of legal standards that antitrust agencies and courts could be relied upon to implement, as with the FTC Act's prohibition of unfair methods of competition and the Clayton Act's prohibition of mergers that may substantially lessen competition or tend to lead to monopoly. The laws Brandeis proposed

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19. Of course, Brandeis's contributions extended far beyond competition issues. He pioneered the law of privacy protection in the United States; see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and stands as an enduring champion of free speech, see *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (The Framers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

20. See, e.g., BORK, *supra* note 11, at 21-22 (Brandeis "brought to prominence the idea that judges in antitrust cases could forward values opposed to consumer welfare"); *id.* at 76 (describing the Brandeis-Learned Hand "approach to the Sherman Act, with its license for the judge to choose appealing or preferred objectives."). Alexander Bickel concluded that the most prominent idea attached to Brandeis's work was that "[t]he giantism of our time, discernible in almost all spheres of life, is a deeply disturbing, though a controllable, phenomenon." ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 119 (1957).

and supported did not ask a federal antitrust agency to decide whether a company was too politically powerful by, for example, counting the numbers of allies it had made in state legislatures. Rather, Brandeis favored standards that looked directly at economic (one might say industrial) outcomes, such as a firm's market share or the use by dominant firms of practices like tying or exclusive contracts. His approach, in other words, was to find enforceable legal standards that identify harmful industrial conduct in a manner that vindicates social and democratic values.

Third, Brandeis's institutional approach relied on the expertise, training, and professional responsibilities of law enforcers, lawyers, and judges to implement the chosen legal standards. These legal professionals were to apply the chosen legal standard in a manner that would vindicate the legislature's larger social and economic goals by relying on learnings from economics and the social sciences and examining the facts in a determined and detailed manner. Brandeis did not suggest that the application of the law, once formed, should incorporate day-to-day political considerations. A legislature may properly speak to the effect it believes that corporations (or any other part of the polity) have on democracy,<sup>21</sup> but antitrust enforcers should not decide on political grounds which case should proceed and which should not. This is not because Brandeis believed larger goals to be unimportant—far from it. It is, I suggest, because he lived in the shadow of the substantive due process jurisprudence typified by *Lochner v. New York*.<sup>22</sup> Brandeis believed that legislatures were authorized to cast a wide net, but that judges were not to indulge their own legislative impulses. Brandeis preferred the hard work of detailed inquiry to the easier path of unmoored theory or, as he put it himself, he favored inductive reasoning, based on facts, over what he viewed as the Lochnerian approach of reasoning “deductively from preconceived notions and precedents.”<sup>23</sup>

Thus, Brandeis believed that social and economic experiments, once enshrined in legislation, are most capably administered through the rule of law, which rests upon both common-law recognition of changing circumstances and a litigator's attention to factual detail. The right laws, in other words, would lead to the right investigations and then to the right results. As a proponent of reforming the antitrust

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21. Subject of course to constitutional limits. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010). Justice Ruth Bader Ginsburg has observed that Brandeis “would have deplored” this decision. Ruth Bader Ginsburg, *Lessons Learned from Louis D. Brandeis*, BRANDEIS NOW (Jan. 28, 2016), <http://www.brandeis.edu/now/2016/january/ginsburg-remarks.html> [<https://perma.cc/P5AS-3TGL>].

22. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding unconstitutional a state law forbidding bakers from working more than 60 hours per week or ten hours each day on the ground that the law “interferes with the right of contract between the employer and employes [sic] concerning the number of hours in which the latter may labor in the bakery of the employer.”).

23. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 124–25 (1984).

laws, he focused on the best way to protect larger anti-monopoly and democratic goals through the identification of harmful industrial conduct. As a judge he was just as relentlessly focused on the facts that would prove, or disprove, theories of competitive harm,<sup>24</sup> hewing to the common-law tradition that his fellow Justice Oliver Wendell Homes Jr. so famously embraced.<sup>25</sup>

Fourth, where competition could succeed, Brandeis thought competition was the best answer. But he was creative in thinking of ways to improve such sectoral regulation when competition could not be expected to flourish.<sup>26</sup> Brandeis clearly recognized the importance of sectoral laws regulating, for example, railroads, local telephony, and natural gas. He favored such regulation where he believed a function was inherently that of a monopoly, such as a local water company, but he also saw circumstances in which competitive industries, such as railroads, should be subject to such regulation. He actively participated in regulatory battles concerning gas companies and railroads throughout his time in private practice, culminating in his appointment as a special counsel to the Interstate Commerce Commission (ICC) shortly before he was appointed to the Supreme Court. Compared to antitrust law, sectoral regulation is narrower in scope but much more detailed and expansive within its jurisdictional limits. Indeed, when railroads sought rate increases from the ICC, Brandeis dug deep into their management practices precisely because he believed that sound regulation required such intensive scrutiny. Where applicable, Brandeis saw government regulation, as Justice Stephen Breyer has said, “as a weapon to help the ordinary citizen, worker, or consumer.”<sup>27</sup>

The distinction between antitrust law and regulation was at the heart of Brandeis’s views about the 1912 presidential election, “which turned on who spoke most directly to U.S. anxieties over the economic relationship among economic prosperity, democracy and power.”<sup>28</sup>

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24. “[J]udgment can be sound only if the facts on which it is based are both known and carefully weighed.” 1911 Hearings, *supra* note 3, at 1147.

25. In 1881 Brandeis attended a Holmes’ lecture that was included in his volume *THE COMMON LAW*. UROFSKY, *supra* note 1, at 75–76.

26. I use the term “regulation” in this essay to mean prospective, industry-wide rule making created and applied by a sectoral regulator. Under this rubric, the FCC is a regulator but neither the Antitrust Division of the Department of Justice nor the Federal Trade Commission are regulators. This is not the way that Brandeis used the term. See *The Regulation of Competition Versus the Regulation of Monopoly*, *supra* note 9; *Bd. of Trade of City of Chi. et al. v. United States*, 246 U.S. 231, 235 (1918). The Brandeisian formulation is reflected in Gerald Berk’s very important history *LOUIS BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932* (2009). I am appreciative to Professor Berk for his early encouragement of this essay and his generosity in sharing his scholarship with me. I am using this term “regulation” to mean something different than enforcement by the antitrust agencies because I think it resonates more with today’s understanding but I mean it to be purely descriptive.

27. Stephen G. Breyer, *Justice Brandeis as Legal Seer*, in *BRANDEIS AT 150: THE LOUISVILLE PERSPECTIVE*, 65 (2006).

28. BERK, *supra* note 26, at 35.



Brandeis publicly and decidedly favored Woodrow Wilson's stance of vigorous action against monopoly over Theodore Roosevelt's "New Nationalism," which Brandeis believed was far too willing to accept the existence of monopoly.<sup>29</sup> Brandeis did not, in other words, favor Big Government as the first solution to Big Monopoly. Rather, he believed that sectoral regulation should be used when justified by specific industry circumstances, such as the existence of local utility monopolies, or in circumstances in which normal competitive forces could not get the job done.<sup>30</sup>

Fifth, competition policy, both antitrust and sectoral regulation, is to be informed by a spirit of experimentation. Brandeis believed that monopolies were bad for industrial innovation, thus directly incorporating innovation into his antitrust thinking. But even more than that, Brandeis's view of progressive governance in the realm of competition policy should be understood as an embrace of experimentation, with innovation customized to further the distinct institutional and professional roles that government processes advance. Brandeis was, after all, the inventor of the "Brandeis brief."<sup>31</sup>

Brandeis's view of progressive governance meant that the government could improve itself and the lot of its people—hence his endorsement of the idea that states could be laboratories of democratic governance. Even more importantly, he viewed America itself as an experiment. This was not a unique metaphor, but it captured Brandeis's philosophy of government—that America was built on a unique set of principles, that its tools of democratic governance formed the fulcrum on which those principles could be vindicated and extended,<sup>32</sup> and that the work of seeking democratic and economic progress would never be done.

As Brandeis grew older he began to assume an almost Biblical mien; Franklin Roosevelt labeled him "Isaiah" after the ancient Hebrew prophet. That reflected the view that Brandeis saw life through a moral lens.<sup>33</sup> But not a naïve one. Brandeis also warned

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29. A few days before the 1912 election, Brandeis depicted Theodore Roosevelt as favoring the legalization of monopoly in opposition to Woodrow Wilson's view that "private monopoly in industry is never desirable, and is not inevitable." *The Regulation of Competition Versus the Regulation of Monopoly*, *supra* note 9.

30. For example, he defended, although he did not necessarily agree with, the state of Oklahoma when it concluded that ice delivery must be regulated as a utility. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). BICKEL, *supra* note 20, at 122.

31. See *infra* notes 115–117 and accompanying text.

32. For example, Brandeis came to believe "that without political power, women would continue to be victimized [and that] . . . women needed the power to take care of themselves, and for this the vote was essential." UROFSKY, *supra* note 1, at 365. Justice Ruth Bader Ginsburg sees Brandeis's evolution on this issue as demonstrating that his "views could change when information and experience showed his initial judgment was not right." Ginsburg, *supra* note 21.

33. UROFSKY *supra* note 1, at 273. In a New York Times book review William O. Douglas said of Brandeis, "in the manner of Prophets, he had been showing [the people] the dangers

against placing “too much faith in legislation,” he believed that “progress is necessarily slow” and he warned that “[r]emedial institutions are apt to fall under the control of the enemy and become instruments of oppression.”<sup>34</sup> He was far from naïve about the manner in which judges of his day rendered judicial opinions based on “[e]arly 19th century scientific half-truths . . . .”<sup>35</sup> He exposed political shenanigans<sup>36</sup> and fought political corruption.<sup>37</sup>

But his assessment of the difficulty of reform did not deter his efforts. The following discussion aims to demonstrate that progressive governance incorporated both the goals and the means that Brandeis believed would provide the strongest tools to fight against the trusts and the monopolies of his day.

## II. THE GOALS OF ANTITRUST: THE LEGISLATIVE PERSPECTIVE

For Brandeis, antitrust would serve both social and economic goals. He saw complete harmony in critiquing the economic justification for corporate power, on terms familiar to modern antitrust analysis, while pressing the larger case for democracy and industrial liberty. Legislatures can, and should, take an expansive view.

As a starting point, Brandeis believed that values other than economics would be served by the protection of competition through antitrust, chief among them the preservation of democracy and individual initiative. This was not a subtle view. He went so far as to say that “we cannot maintain democratic conditions in America if we allow organizations to arise in our midst with the power of the [U.S.] Steel Corporation.”<sup>38</sup>

For Brandeis, democracy was more than just the ability to cast a vote; it rested on the ability of Americans to participate fully in the industrialized economy. When he described the harm from monopoly, Brandeis bemoaned the passage of the day when “nearly every American boy could look forward to becoming independent as a farmer or mechanic, in business or in professional life.”<sup>39</sup> Brandeis saw

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of monopoly and the way to economic democracy.” See William O. Douglas, *Louis Brandeis: Dangerous Because Incorruptible*, N.Y. TIMES (July 5, 1964).

34. MASON, *supra* note 10, at 585.

35. Louis D. Brandeis, *The Living Law, An Address delivered before the Chicago Bar Association*, BRANDEIS SCH. OF LAW (Jan. 3, 1916), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-21> [<https://perma.cc/TTJ3-VMXU>].

36. UROFSKY, *supra* note 1, at 254–276 (describing the Pinchot-Ballinger Affair).

37. Louis D. Brandeis, *Speech Delivered before the Public School Association on Dec. 2, 1904*, BRANDEIS SCH. OF LAW, <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/public-school-association-speech> [<https://perma.cc/XN57-SNSJ>].

38. *United States Steel Corporation: Hearings Before the House Comm. on Investigation of United States Steel Corporation*, 62nd Cong. 2862 (1912) (Statement of Mr. Louis D. Brandeis); see Mr. Justice Brandeis, *Competition and Smallness: A Dilemma Re-Examined*, 66 YALE L. J. 69 (1956).

39. UROFSKY, *supra* note 1, at 308.

this “industrial liberty” as integral to political liberty.<sup>40</sup> He held a Jeffersonian view of the world,<sup>41</sup> believing “that in a democratic society the existence of large centers of private power is dangerous to the continuing vitality of a free people.”<sup>42</sup> This was a view shaped by his times—the populist opposition to the power of the trusts in the late 19th and early 20th century and then the arrival of the Great Depression, when he warned of the “gross inequality in the distribution of wealth and income which giant corporations have fostered.”<sup>43</sup>

In 1913, after publishing a series of articles critical of large financial institutions, which he labeled “the money trust,”<sup>44</sup> Brandeis agreed to meet with a banker, Thomas Lamont, who took exception to his views. When the J.P. Morgan partner questioned Brandeis’s belief that bankers wielded dangerous power, Brandeis responded simply:

Yes, I do think it is dangerous, highly dangerous. The reason I think it is, is that it hampers the freedom of the individual. The only way we are going to work out our problems in this country is to have the individual free, not free to do unlicensed things, but free to work and to trade without the fear of some gigantic power threatening to engulf him every moment, whether that power be a monopoly in oil or in credit.<sup>45</sup>

Brandeis believed that giant corporate power stifled the “courage, the energy and the resourcefulness of small men.”<sup>46</sup> As he said in his dissenting opinion in *Liggett Co. v. Lee*, restraining monopoly power would create additional “opportunities for leadership,” which would help “Americans secure the moral and intellectual development which is essential to the maintenance of liberty.”<sup>47</sup>

From a Brandeisian viewpoint, antitrust does not reside on an island apart from society. It helps to form society. When Brandeis connected economic opportunity to democracy, whether in the early years of the 20th century or during the Great Depression, it was because he understood that a democracy could not function well if many people felt that their economic well-being was being ignored. In other words, he believed that corporate power that threatened industrial liberty threatened political liberty as well. And he said,

[Democracy] substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands

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40. *Id.* at 309.

41. ROSEN, *supra* note 15, at 8.

42. UROFSKY, *supra* note 1, at 326.

43. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 580 (1933) (Brandeis, J., dissenting).

44. These articles appeared in Harper’s Magazine and were published in 1914 as a book. See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKER’S USE IT* (1914).

45. UROFSKY, *supra* note 1, at 324.

46. *Liggett Co. v. Lee*, 288 U.S. at 580 (Brandeis J., dissenting).

47. *Id.*

continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual.<sup>48</sup>

In emphasizing the importance of democracy and industrial liberty, Brandeis did not believe he was sacrificing consumer interests for the protection of competitors.<sup>49</sup> Rather, he understood that laws could protect both at once.<sup>50</sup> The text and legislative history of the Sherman Act focus attention on the protection of small business,<sup>51</sup> and it is axiomatic that a monopoly can harm consumers through its injury of competitors.<sup>52</sup> And Brandeis offered specific examples of such tactics, most notably in his work on the La Follette-Stanley Antitrust bill of 1911.<sup>53</sup>

But Brandeis joined his larger criticism of the impact of the trusts on democracy with a very specific economic critique of monopoly. He argued that “[t]here are no natural monopolies today in the industrial world.”<sup>54</sup> Accordingly, he believed that U.S. Steel had built its monopoly power through anti-competitive acquisitions and collusion and not by creating and reaping scale efficiencies. Among the adverse effects arising from monopoly power Brandeis identified were

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48. MASON, *supra* note 10, at 585. See generally GORDON S. WOOD, FRIENDS DIVIDED: JOHN ADAMS AND THOMAS JEFFERSON 115 (2017) (describing Adams and Jefferson as believing that “[i]n republics...where authority came from below, from the people themselves, each citizen must somehow be persuaded to sacrifice his personal desires for the sake of the public good.”).

49. See MASON, *supra* note 10, at 4 (Brandeis “sought to block the trend toward bigness and monopoly as inimical to efficiency, individualism, true laissez faire, and democracy”); see generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1, 38 (2003) (Brandeis pursued economic and social goals “in tandem.”).

50. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924).

51. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897) (In applying the Sherman Act, the Court describes “small dealers and worthy men” who “might be unable to readjust themselves to their altered surroundings.”).

52. Section 1 bars “restraints of trade.” Why “trade” and not “commerce” or, even more directly, “competition”? Because Congress was drawing on common-law traditions in enacting the Sherman Act and that tradition focused on the protection of a “trade,” that is to say, a profession. The Senate Commerce Committee addressed this expressly in 1913 in a Report issued along with the 1911 Brandeis testimony. It explained that “the chief if not the only object in mind, when the antitrust law was passed, was to maintain competition as an effective regulating force in business,” but that the term “restraint of trade” had been used because “there was a common law on the subject well established and carefully elucidated in the English decisions” establishing that “both contracts and acts in restraint of trade were *injurious to the public welfare* and therefore opposed to public policy.” S. REP. NO. 62-1326, at IV-V (1913) (emphasis added). Thus, reference to competitors in the early years of antitrust should not necessarily be taken as inconsistent with a focus on consumers and competition.

53. See *infra* notes 86–89 and accompanying text; see also STRUM, *supra* note 23, at 146–55; 1911 Hearings, *supra* note 3, at 1173.

54. UROFSKY, *supra* note 1, at 105. 1911 Hearings, *supra* note 3, at 1148–19 (comparing successful and unsuccessful trusts).

monopoly profits<sup>55</sup> and lessened incentive to innovate.<sup>56</sup> Similarly, he became famous (and almost infamous) for his criticism of United Shoe Machinery Company for barring its customers, shoe manufacturers, from using any other company's shoe-manufacturing equipment.<sup>57</sup>

Brandeis also took head-on arguments that the power of trusts resulted from economic efficiency. He believed that "[t]he wastes of competition are negligible [but the] economies of monopoly are superficial and delusive,"<sup>58</sup> and was quite careful to argue that monopolies gained power through misdeed, not through greater efficiencies.<sup>59</sup> Brandeis defined efficiency to include "whether there has been an advance in the art as to the quality of the products [or] whether there has been an advance lessening the cost of the article,"<sup>60</sup> and saw little evidence that the trusts were passing along any resource savings to consumers: "The trusts have not reduced prices. So far as prices have been reduced, it has been in spite of the trusts."<sup>61</sup>

In understanding Brandeis's view of antitrust, a particular form of confusion can arise from his dissenting opinions in cases in which the Supreme Court struck down state laws limiting various forms of corporate power.<sup>62</sup> Brandeis was not in these cases asked to apply or construe federal antitrust law. Rather, in these constitutional cases, Brandeis argued that the state legislature had discretion to make policy choices, which means that these dissenting opinions should be measured against the ability of legislators to make policy, not as a blueprint for the role of an antitrust enforcer or judge assessing a claim brought under antitrust laws.<sup>63</sup>

Perhaps the best-known of these dissents is Brandeis's extensive discussion of the state law at issue in *Liggett v. Lee*. Florida had enacted a statute requiring retail stores to obtain a license and pay a licensing fee. The fee was based on the number of stores but increased when a chain of stores crossed county lines.<sup>64</sup> A number of chain stores attacked the statute as unconstitutional under the Fourteenth

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55. *The Regulation of Competition Versus the Regulation of Monopoly*, *supra* note 9 (describing the tobacco trust, "it is not their efficiency, but the fact that they control markets, that accounts for [their] huge profits.").

56. *See infra* Part VI.

57. *BERK*, *supra* note 26, at 52–57; *UROFSKY*, *supra* note 1, at 450–51 (discussing opposition to Brandeis's Supreme Court nomination because he had represented, then opposed, United Shoe Machinery Company).

58. *UROFSKY*, *supra* note 1, at 105.

59. *The Regulation of Competition Versus the Regulation of Monopoly*, *supra* note 9.

60. 1911 Hearings, *supra* note 3, at 1149.

61. 1911 Hearings, *supra* note 3, at 1157 (This observation is followed by a discussion of the Tobacco and Steel Trusts). *See also id.* at 1158 (discussing competition in the book-publishing industry).

62. *See, e.g., Liggett Co. v. Lee*, 288 U.S. 517, 528–32 (1933) (Brandeis, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

63. *See Breyer*, *supra* note 27, at 68–70.

64. *Id.* at 528–30. So, for example, a retailer operating between two and fifteen stores would pay \$10 annually for each store but that fee would rise to \$15 dollars if stores were located in multiple counties. *Id.* at 528.

Amendment and the Commerce Clause.<sup>65</sup> The majority struck down the state law, “unable to discover any reasonable basis for [the state’s] classification.”<sup>66</sup>

In his dissent, Brandeis recognized that the purpose of the statute was “to protect the individual, independently-owned retail stores from the competition of chain stores.”<sup>67</sup> Although he noted (correctly), that the constitutionality of the statute did not turn on its wisdom, he went to write, in language that fairly drips with passion:

Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations. . . . They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state . . . The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving ‘corporate system’ with the feudal system; and to lead other men of insight and experience to assert that this ‘master institution of civilised life’ is committing it to the rule of a plutocracy . . . Such is the Frankenstein monster which states have created by their corporation laws.<sup>68</sup>

Given these views, it is not surprising that one biographer concludes that “there is no question that he strongly supported the legislation under attack.”<sup>69</sup> Brandeis even read a version of his dissent from the bench when the ruling was announced, “something he rarely did in dissent.”<sup>70</sup>

Similarly, Brandeis dissented from the Court’s holding declaring unconstitutional an Oklahoma law requiring new ice-making companies to obtain regulatory approval to do business.<sup>71</sup> Brandeis focused on the state’s view, which in this case it is not clear that he

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65. *Id.* at 530–31.

66. *Id.* at 532.

67. *Id.* at 541.

68. *Id.* at 564–65.

69. UROFSKY, *supra* note 1, at 681. Much of Brandeis’s dissent focused on his belief that the statute could be upheld as applied to corporations because they exist only because of state laws allowing their incorporation. His dissenting opinion details the history of state laws and the conditions that they had attached to corporate organization. *Liggett Co. v. Lee*, 288 U.S. 517, 548–64 (1933).

70. UROFSKY, *supra* note 1, at 682.

71. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 276 (1932).

shared,<sup>72</sup> that utility regulation was justified by its fear that overcapacity would lead to “destructive and frequently ruinous competition,”<sup>73</sup> contrary to the public interest in ensuring a supply of ice in a time and place where refrigerators were still rare. The experiences of the Depression were daunting and limiting production capacity was one possible solution to boom and bust cycles, sound or not. Here Brandeis soared to oft-quoted rhetorical heights: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”<sup>74</sup>

To Brandeis, legislatures have great latitude to determine the appropriate circumstances of economic regulation.<sup>75</sup> But equally important, of course, are the words they use to construct the legal standard that will implement those goals.

### III. THE CREATION OF LEGAL STANDARDS: FROM BROAD GOALS TO LEGISLATIVE STANDARDS

The purposes of antitrust law can be broad; the mechanism of antitrust is legal. This is the core of Brandeis’s approach—to find enforceable legal standards that identify harmful industrial conduct in a manner that vindicates social and democratic values through the careful delineation of institutional roles.<sup>76</sup> That job was made easier because Brandeis subscribed to the view that these values were all threatened by monopoly, and thus antitrust statutes, by focusing on the practicalities of competition, could advance broader interests as well.

We have specific insight into how Brandeis believed antitrust laws should be constructed to achieve his social and economic goals because of his extensive involvement in legislative responses to the Supreme Court’s decision in 1911 upholding the government’s action against Standard Oil but, in so doing, ruling that only “unreasonable” restraints of trade were illegal under Section 1 of the Sherman Act.<sup>77</sup>

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72. BICKEL, *supra* note 20, at 122 (this state law “probably did not have [Brandeis’s] sympathy”).

73. *New State Ice Co. v. Liebmann*, 285 U.S. at 292.

74. *Id.* at 311.

75. *See also* *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 403 (1928) (Brandeis, J., dissenting from the Court’s ruling that the 14th Amendment was violated by a state tax that treated corporations differently from individuals); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 17 (1924) (dissenting from the Court’s decision to strike down as violating the 14th Amendment a Nebraska law that prescribed standards weights for loaves of bread. Brandeis argued that the Nebraska statute was designed “to protect buyers from short weights and honest bakers from unfair competition.”).

76. MASON, *supra* note 10, at 585.

77. *Standard Oil v. United States*, 221 U.S. 1, 66 (1911). In *Standard Oil*, the Supreme Court introduced the rule of reason when it concluded that Section 1 of the Sherman Act only bars contracts and other agreements that constitute an “undue restraint” of commerce. *Id.* at 59–60. *See also* *United States v. American Tobacco Company*, 221 U.S. 221 (1911) (reaffirming *Standard Oil*’s adoption of the rule of reason).

The reaction of antitrust proponents was swift. William Jennings Bryan, who had run unsuccessfully as the Democratic candidate for president three times, said: “The Trusts Have Won,”<sup>78</sup> thus reflecting the view of antitrust proponents that the rule-of-reason would give conservative courts too much discretion to decide what conduct violated the Sherman Act.<sup>79</sup> Indeed, the decision helped spark the congressional efforts to reform antitrust law that led to the enactment of the FTC Act and the Clayton Act in 1914.<sup>80</sup>

The *Standard Oil* decision was handed down on Monday, May 15, 1911. Senator Robert M. La Follette, perhaps the leading Republican progressive of his time,<sup>81</sup> sent a telegram to Brandeis the next day asking him to come to Washington, D.C. immediately in order to confer on the implications of *Standard Oil*, which Brandeis did, taking a night train from Boston on Wednesday, May 17th, and arriving on May 18th, when he quickly began work with La Follette.<sup>82</sup> Continuing his work over the next few months,<sup>83</sup> the finished product, known as the La Follette-Stanley Antitrust bill, was introduced by Senator La Follette on August 19th.<sup>84</sup> It was this bill that Brandeis supported in his December 1911 testimony.

Given Brandeis’s input—biographer Alpheus Thomas Mason describes Brandeis as the bill’s lead author<sup>85</sup>—the substantive

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78. BERK, *supra* note 26, at 36–37.

79. UROFSKY, *supra* note 1, at 317. In *Bd. of Trade of City of Chi. et al. v. United States*, 246 U.S. 231 (1918), Brandeis offered his views on how to apply the rule-of-reason correctly. See *infra* notes 122–128 and accompanying text.

80. See 1913 Senate Commerce Committee Report at XII (“in view of the rule [of reason] and its necessary effect upon the business of the country, the inherent rights of the people, and the execution of the statute it has become imperative to enact additional legislation.”). SEN. REP. NO. 62-1326, at XII (1913).

81. Senator La Follette “as much as anyone during this period embodied the progressive spirit” and he and Brandeis became personal friends. UROFSKY, *supra* note 1, at 327; see *id.* at 327–29. Brandeis and La Follette were “in complete agreement about the evils of the trusts.” STRUM, *supra* note 23, at 140.

82. LOUIS D. BRANDEIS, LETTERS OF LOUIS D. BRANDEIS, VOLUME II, 1907-1912, 435 (Melvin I. Urofsky & David W. Levy eds., 1972) (Late on May 16th, La Follette telegraphed Brandeis: “We need you to consider next important step in view of decision yesterday. Come immediately if possible.” The next day, Brandeis replied by telegraph: “Leaving Boston tonight. Due Washington Thursday afternoon.”) STRUM, *supra* note 23, at 146. UROFSKY, *supra* note 1, at 317 (describing night train).

83. Brandeis sent La Follette an initial draft on May 23, 1911 and followed up with a letter discussing specific provisions of his draft on May 26th. BRANDEIS, *supra* note 82, at 438–39, 442–43 (Letters to La Follette); LEWIS J. PAPER, BRANDEIS 169 (1983). Days before the *Standard Oil* decision, Brandeis had raised antitrust issues with Senator La Follette, objecting to the purchase of an innovative rival by an incumbent, United Shoe Machinery Company. BRANDEIS, *supra* note 82, at 428–430 (Letters to La Follette).

84. 47 CONG. REC. 4183–84 (1911).

85. BRANDEIS, *supra* note 82, at 686 (Letters to Wilson); see MASON, *supra* note 10, at 371 (describing Brandeis as the bill’s lead author). Phillip Strum describes Brandeis as having done “most of the drafting.” STRUM, *supra* note 23, at 146. Lewis Paper describes Brandeis as taking the lead in drafting. PAPER, *supra* note 83, at 169. The safe assumption is that the substantive changes proposed to the Sherman Act reflect Brandeis’s own views. See *e.g.*, BRANDEIS, *supra* note 82, at 438–39, 442–43, 453–54 (Letters to La Follette of May 23rd, May 26th, and June 13th).



amendments the La Follette-Stanley bill would have made to the Sherman Act are worth considering in detail.

Under the general rubric of detailing “unreasonable” conduct, the bill identified three categories. First, the bill described a series of actions that, in modern antitrust parlance, would be *per se* unreasonable. The bill’s targets included forms of tying and exclusive dealing, territorial division of markets and discriminatory rebates. Most broadly, this category included “the use of any unfair or oppressive methods of competition.”<sup>86</sup> Second, the bill proposed a rebuttable presumption of illegality where the parties to an agreement alleged to be unreasonable controlled more than forty percent of the relevant market share or where the supplier of an input “with a view to competition fixes an unreasonably high price,” although Senator La Follette emphasized that defendants would have the ability to rebut the presumption of unreasonableness.<sup>87</sup> Third, as to any other Sherman Act Section 1 action, the defendants would bear the burden of demonstrating that any restraint that appeared to harm competition was, in fact, reasonable.<sup>88</sup>

In his 1911 testimony, Brandeis supported the La Follette-Stanley bill, while expanding the set of practices he believed should be considered *per se* illegal:

Selling in one locality at discriminating prices in order to force out competition; selling one grade or variety at discriminating prices to force out competition; discriminating against producers who will not agree to deal with a rival; imposing terms in leases that lessees shall not buy or lease anything from

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86. 47 CONG. REC. 4183 (1911).

87. *Id.* On May 23, 1911, Brandeis proposed 33 percent as the test of market share although he was transparent in explaining that he was “not clear what percentage should be named” and then, in a letter of May 26th, he emphasized the importance of making any percentage rebuttable, in part because a conclusive percentage “would have to be reasonably high” and Brandeis feared that it would effectively create a safe harbor for smaller market shares; he also advised La Follette that the market share should be, as the final legislation provided, calculated by reference to specific geographic markets within the United States. BRANDEIS, *supra* note 82, at 438–39 (Letter to La Follette). In his December 1911 testimony, Brandeis went somewhat further, saying that he was “inclined” to believe that the forty-percent standard contained in the legislation should be conclusive. 1911 Hearings, *supra* note 3, at 1175. It may have been that Brandeis was uncertain as to the best approach, although his initial statement of May 26th seems unequivocal.

88. 47 CONG. REC. 4189 (1911). In a letter of September 19, 1911, Brandeis responded to a speech by President William Howard Taft defending the Standard Oil decision and rejecting calls to amend the Sherman Act by explaining, in part, that “experience gained by years of attempts to enforce” the Sherman Act supported shifting the burden of proof to defendants arguing that restraints were reasonable. BRANDEIS, *supra* note 82, at 495–96 (Letter to Edwin Atkins Grozier). Other portions of the proposed legislation addressed the ability of private parties to secure relief. 47 CONG. REC. 4183–84. As a general matter, Section 1 of the Sherman Act outlaws anti-competitive outcomes flowing from an agreement made by multiple actors. 15 U.S.C. § 1 (2012). Section 2 focuses on the actions of monopolies or those who attempt or conspire to create a monopoly. 15 U.S.C. § 2 (2012).

anyone else; spying on competitors, bribing methods, buying trade secrets; establishing bogus competition.”<sup>89</sup>

The La Follette-Stanley bill was not enacted, but after the election of Woodrow Wilson in 1912, Congress moved toward the passage of new antitrust laws. During the summer of 1912, Brandeis met Wilson for the first time although he “could not have known [then] that he, as much as anybody, would shape the future of Woodrow Wilson’s campaign and career.”<sup>90</sup> After Wilson’s election in 1912, Brandeis authored a series of articles in Harper’s Magazine in late 1913 and early 1914 calling for antitrust reform, focusing on investment banks.<sup>91</sup> Brandeis argued strongly for prohibiting interlocking directorates and called for an end to the “control so exercised by the investment bankers over railroads, public-service and industrial corporations, over banks, life insurance and trust companies . . .”<sup>92</sup> A few days after the publication of Brandeis’s last article, President Wilson proposed legislation that would ban interlocking directorates and establish an interstate trade commission.<sup>93</sup> Brandeis thereafter engaged in discussions with both President Wilson and members of Congress that led to passage of the final legislation.<sup>94</sup> Changing his mind, Brandeis

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89. 1911 Hearings, *supra* note 3, at 1173. Brandeis had been invited to testify over the summer, before introduction of the La Follette-Stanley bill. In a letter of June 22, 1911, Brandeis updated the chairman of the Committee, Senator Moses Clapp of Minnesota, on the status of the drafting process and concluded that “if these amendments are enacted and the Department of Justice does its duty we shall go far towards solving the question of trusts and monopolies.” BRANDEIS, *supra* note 82, at 456 (Letter to Clapp).

90. A. SCOTT BERG, WILSON 239 (2013); *see* BRANDEIS, *supra* note 82, at 660-61 & n.1 (Brandeis reported to his brother that he had been “very favorably impressed with Wilson”; the editors of this volume of letters describe Brandeis as having presented Wilson with a three-part approach “that posited first, a belief that large concentrations of political power were inimical to a free society; second, that bigness was in and of itself inefficient; and third, that the way to eliminate the trusts was to regulate competition so that artificial privilege could not lead to monopoly.”) (Letter to Alfred Brandeis); *see* MASON, *supra* note 10, at 377 (“They discussed social and industrial problems, chiefly the trust question, which promised to be the leading issue of the campaign.”); *see generally* Winerman, *supra* note 49, at 44-45 (describing Brandeis’s impact on Wilson’s thinking). During the campaign, Wilson sought Brandeis’s advice on “the actual measures by which competition can be effectively regulated” and Brandeis promptly replied with a letter of September 12, 1912 that referred back to the La Follette-Stanley bill and set out his thoughts on the key differences between Roosevelt and Wilson on the competition issue. BRANDEIS, *supra* note 82, at 685 n.1 & 686-94 (Letter to Woodrow Wilson). Brandeis gave an important speech a few days before the election on exactly this topic. *See supra* note 29.

91. As noted above, this collection of articles was published in 1914 as the volume OTHER PEOPLE’S MONEY, *supra* note 44.

92. *Id.* at 51. A prohibition on interlocking directorates was subsequently included in section 8 of the Clayton Act. *See* 15 U.S.C. § 19 (2012).

93. UROFSKY, *supra* note 1, at 386; LOUIS D. BRANDEIS, LETTERS OF LOUIS D. BRANDEIS, VOLUME III, 1913-1915, 236-37 (Melvin I. Urofsky & David W. Levy eds., 1971) (Brandeis wrote his brother that Wilson “has paved the way for about all I have asked for & some of the provisions specifically that I got into his mind at my first interview.”).

94. MASON, *supra* note 10, at 400-04; UROFSKY, *supra* note 1, at 388, 389-90, 392-93 (describing meetings with President Wilson, the Attorney General, members of Congress, and testimony before congressional committees); *see* BRANDEIS, *supra* note 93, at 247-59 (detailed letter of February 22, 1914 to the Attorney General suggesting specific provisions that should be included in antitrust legislation).

specifically counseled Wilson that it would not be feasible to draw up the kinds of specific categories of conduct featured in the La Follette-Stanley bill; rather, Brandeis came to conclude that a general standard administered by an independent commission would be the better course.<sup>95</sup> And that was the approach that Congress wrote into the FTC Act's prohibition of "unfair methods of competition"<sup>96</sup> and the Clayton's Act prohibition of transactions whose effect "may be to substantially lessen competition, or to tend to create a monopoly."<sup>97</sup>

In his dissent in *FTC v. Gratz* six years later,<sup>98</sup> Brandeis offered his view of the enactment of both laws. After the 1911 decisions in *Standard Oil* and *American Tobacco*, "[t]he conviction became general in America that [the Sherman Act] had been largely ineffective [and] there was general agreement that further legislation was desirable."<sup>99</sup> The Clayton Act was enacted, he explained, "with a view to making more effective the remedies given by the Sherman Law."<sup>100</sup> In enacting the FTC Act, Congress took two new steps. First, it empowered the Commission to act "before any act should be done or condition arise violative of the" Sherman Act in order to achieve the "prevention of diseased business conditions . . ."<sup>101</sup> Second, with reference to the prohibition on "unfair methods of competition," "[i]nstead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the commission."<sup>102</sup>

It is notable that the conduct discussed in the La Follette-Stanley bill is generally, or at least mostly, within the lexicon of current antitrust discussion, even where a proposed approach has not been adopted or, under prevailing standards, would not even be favored. Thus, the antitrust agencies have formulated a structural presumption based on market share that courts agree will satisfy the government's burden to establish a prima facie case in a merger challenge.<sup>103</sup> Merging parties have the burden of producing evidence in response to the government's prima facie case in order to demonstrate the pro-

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95. STRUM, *supra* note 23, at 215.

96. Section 5 of the FTC Act, 15 U.S.C. § 45 (2012). For a discussion of the origins of Section 5 specifically and the FTC generally, see Winerman, *supra* note 49, at 1, 3–4.

97. Section 7 of the Clayton Act, 15 U.S.C. § 18 (2012).

98. *FTC v. Gratz*, 253 U.S. 421 (1920).

99. *Id.* at 433.

100. *Id.* at 434.

101. *Id.* at 435.

102. *Id.* at 436. Brandeis went on to address the common concern that certainty was the better course, concluding that "experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship." *Id.* at 436. Additionally, "an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as, with new conditions constantly arising, novel unfair methods would be devised and developed." *Id.* at 437. The debate over certainty and flexibility in law and regulation continues today.

103. See, e.g., *United States v. Anthem*, 236 F. Supp. 171, 191 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017), *cert. denied*, 137 S. Ct. 2250 (2017); *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 18–19 (D.D.C. 2017).

competitive benefits that would likely arise from the transaction.<sup>104</sup> Similarly, in conduct cases, courts have adopted burden-shifting processes under the rule-of-reason and so-called “quick look” doctrine.<sup>105</sup> The La Follette-Stanley treatment of per se offenses is significantly broader than the current jurisprudence, but issues the bill identifies, including tying and the use of discounts and exclusive contracts, have continued to be important in contemporary litigation, especially where firms exercise the kind of market power that Brandeis may have taken as given in legislation targeting trusts. Indeed, separate from the legislation, Brandeis objected to per se treatment for resale price maintenance, a position that the Supreme Court did not endorse until 2007, and that reflected Brandeis’s support for small merchants.<sup>106</sup> Of course, the standard of “unfair methods of competition” included in Section 5 of the FTC Act bears more than a passing resemblance to the language of the La Follette-Stanley bill that prohibited “any unfair or oppressive methods of competition.” But Brandeis would have pushed further than the current law in pursuing monopoly, as his 1911 testimony makes clear.<sup>107</sup>

As the next section discusses, protection of competition informs the way that government and the judiciary should enforce the antitrust laws.

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104. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999); see also *id.* at 788 (Breyer, J., dissenting) (“In the usual Sherman Act section 1 case, the defendant bears the burden of establishing a procompetitive justification.”).

105. “Under the rule of reason the plaintiff must show power and an initial case of anticompetitive effect. The burden shifts to the defendant mainly for defenses. By contrast, the ‘quick look’ gives the plaintiff a smaller set of burdens up front and places heavier burdens on the defendant.” HOVENKAMP, *supra* note 16, at 345.

106. Brandeis supported resale price maintenance, arguing that an advantage of resale price maintenance was that it provided a way for a manufacturer to control retail prices without having to vertically integrate downstream, which would have ended the ability of independent retailers to exist. *Hearings Before the House Committee on Interstate and Foreign Commerce the Regulation of Prices*, 64th Cong., 1st Sess. 202 (1915); see *Mr. Justice Brandeis, supra* note 38, at 88–90. Brandeis’s position coincides with the Supreme Court’s conclusion in *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007), which overruled the Brandeis-era ruling in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), although his position can be seen as part of his campaign against chain stores rather than embrace of the consumer welfare standard. See LAURA PHILLIPS SAWYER, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890-1940*, 18 (Cambridge University Press 2018) (Brandeis helped to form a league that supported the use of resale price maintenance, which worked “to create trade networks strong enough to compete with the growing power of large-scale manufacturers and discount retailers” and also to convince policymakers and the public to support codes of competition); see also Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 *TOURO L. REV.* 1, 298–99 (2017) (suggesting that this is one place where Brandeis’s grasp of economics would be at least partially embraced by the Chicago School). See also Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 *TOURO L. REV.* 1, 298–99 (2017).

107. 1911 Hearings, *supra* note 3, at 1146 (discussing the La Follette bill).

## IV. THE MECHANISMS OF LAW ENFORCEMENT

From Brandeis's perspective, application of antitrust laws required both the embrace of hard-headed inquiry, spanning economics and the social sciences, and the litigator's skill of distilling crucial facts. Brandeis's work as a lawyer in private practice, his stint as special counsel to the ICC, and his time on the bench demonstrate his commitment to solving social and economic problems, examining the practical reality of economic circumstances and serving the purposes of the law with rigor and commitment.

Importantly, Brandeis's rejection of the jurisprudential approach exemplified by the Supreme Court in *Lochner v. New York*<sup>108</sup> informs his approach, as well, to application of the antitrust laws.<sup>109</sup> Here, it is useful to start with Justice Holmes. Defending the right of states to enact laws protecting worker health against the *Lochner* majority, Justice Holmes most famously declared that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>110</sup> Herbert Spencer was an early advocate of Social Darwinism, which opposed social legislation that would, in its view, interfere with the survival of the fittest.<sup>111</sup> The *Lochner* Court's use of this doctrine as a basis for constitutional interpretation has been criticized as "rest[ing] on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."<sup>112</sup>

On January 3, 1916, less than a month before he was nominated to serve on the Supreme Court, Brandeis explained to the Chicago Bar Association why he believed *Lochner*-era jurisprudence was wrong and how to overcome it—with direct reference to application of the Sherman Act. After quoting both Euripides and Goethe, Brandeis leveled his main charge: dissatisfaction with administration of the law had grown because courts "applied complacently 18<sup>th</sup> Century conceptions of the liberty of the individual and of the sacredness of private property" while enshrining "[e]arly 19<sup>th</sup> Century scientific half-truths" like Social Darwinism "into a moral law" while ignoring "contemporary conceptions of social justice" and the rise of the Industrial Age, leading to a jurisprudence that "all too frequently" declared state laws to be unconstitutional.<sup>113</sup>

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108. *Lochner v. New York*, 198 U.S. 45 (1905).

109. In *Lochner*, the Supreme Court ruled unconstitutional a state law forbidding bakers from working more than sixty hours per week or ten hours each day on the ground that the law "interferes with the right of contract between the employer and employes [sic] concerning the number of hours in which the latter may labor in the bakery of the employer." *Id.* at 53.

110. *Id.* at 75.

111. Harry Burrows Action, *Herbert Spencer*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Herbert-Spencer> [<https://perma.cc/RTZ6-7NRS>].

112. *Planned Parenthood v. Casey*, 505 U.S. 833, 861–62 (1992) (plurality opinion).

113. *The Living Law*, *supra* note 35.

Brandeis's antidote was better lawyering. By 1916, of course, Brandeis had invented the "Brandeis brief" precisely as a means of distinguishing *Lochner*. His submission of that brief in *Muller v. Oregon* helped to persuade the Supreme Court to uphold a state law limiting the working hours of women.<sup>114</sup> But in his address to the Chicago Bar Association, Brandeis never even mentioned *Muller* or his role in that decision. Rather, he cited state law decisions from Illinois and New York to demonstrate that states courts could be persuaded to reverse course and uphold laws limiting working hours when they were presented with a detailed factual record that supported "reasoning from life" rather than "reasoning from abstract conception."<sup>115</sup> Brandeis explained that "no law, written or unwritten can be understood without a full knowledge of the facts out of which it arises and to which it is to be applied."<sup>116</sup>

The same form of jurisprudential error, Brandeis continued, plagued judicial application of antitrust principles as well: "Both business men and working men insist that courts lack understanding of contemporary industrial conditions" and "lack of familiarity with the facts of business results in erroneous decisions" like the Supreme Court's decision striking down resale price maintenance under the Sherman Act.<sup>117</sup>

In seeking a solid ground for judicial application of legal principles, Brandeis recognized the importance of economic analysis. Indeed, he described himself as an "economic student,"<sup>118</sup> a conclusion that has sparked disagreement.<sup>119</sup> But Brandeis's speech to the Chicago Bar Association concluded by expressly calling on lawyers and judges to study economics, along with the social sciences.<sup>120</sup> The distinction, Professor Berk emphasizes, is that Brandeis was:

uninterested in the "law and economics" approaches of his era (e.g., distinguishing naturally monopolistic from competitive sectors by abstract theories and then fitting facts to categories). Instead, he wanted to know how concrete economic processes and legal arrangements fostered liberties that made

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114. See *infra* notes 171–72 and accompanying text.

115. *The Living Law*, *supra* note 35.

116. *Id.*

117. *Id.*; see also discussion of resale price maintenance *supra* note 106.

118. CURSE OF BIGNESS, *supra* note 4, at 126–27. See also BERK, *supra* note 26, at 47 (Gerald Berk writes that Brandeis had a firm grasp of scale economies).

119. Brandeis's knowledge of economics has been questioned. See, e.g., *Mr. Justice Brandeis*, *supra* note 38, at 77; a recent article concluded that "his knowledge of economics was slim." Elzinga & Webber, *supra* note 106, at 299. But see Winerman, *supra* note 49, at 34 ("Brandeis backed his preference with economic arguments.").

120. *The Living Law*, *supra* note 35.

improvements possible or locked in power that blocked those sorts of liberties.<sup>121</sup>

Indeed, Brandeis's view of concrete economic processes and legal arrangements is at the center of his opinion in *Chicago Board of Trade v. United States*, a case whose importance derived from the very events in 1911 that had spurred that December hearing.<sup>122</sup> Writing for a unanimous Court, Brandeis rejected an antitrust enforcement action brought by the Justice Department, which alleged that a restriction on after-hours grain trading violated the Sherman Act.<sup>123</sup> *Chicago Board of Trade* concerned the manner in which the nation's chief grain market operated. Some trades on that exchange concerned sales of grain "to arrive," that is to say the sale of grain that was already on its way to Chicago or was already scheduled for shipment.<sup>124</sup> The Board adopted a "call" rule that required after-hours trading in such sales of grain to conform to the last price at which "to arrive" grain had been sold in that day's public session.<sup>125</sup> The United States filed an antitrust suit to enjoin the call rule, arguing that it fixed prices and was (although Brandeis did not use this term) a per se violation of the Sherman Act.<sup>126</sup> In his majority opinion, still within the shadow cast on antitrust law by the 1911 *Standard Oil* decision, Brandeis provided his famous articulation of the rule of reason; asking whether the challenged practice "merely regulates, and perhaps thereby promotes competition, or whether it is such as it may suppress or even destroy competition."<sup>127</sup> In today's terms, one might say that Brandeis declined the invitation to adopt a per se rule even though the conduct involved setting a price between trading sessions because he believed that the government's position failed to reflect a careful inquiry into the facts and effects on competition.<sup>128</sup>

Less celebrated, but just as important, are the reasons Brandeis gave to explain why the call rule actually served competition. Brandeis offered nine inter-related points,<sup>129</sup> but at the core they focused on the

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121. E-mail from Gerald Berk, Professor, University of Oregon to Jonathan Sallet (Oct. 31, 2017, 1:53:13 PM EDT) (on file with author).

122. *See* Bd. of Trade of City of Chi. et al. v. United States, 246 U.S. 231 (1918).

123. *Id.* at 239. Brandeis's opinion "amazed some of his reform colleagues." *See* UROFSKY, *supra* note 1, at 610.

124. The Board of Trade also dealt with grain already located in Chicago and grain that was purchased for arrival in the more distant future. 246 U.S. at 236.

125. *Id.* at 239.

126. *Id.*

127. *Id.*

128. Robert Bork makes this a particular point of attacking Brandeis's "entire omission of any suggestion that there exists any category of restraints illegal per se." BORK, *supra* note 11, at 44. This was despite the fact that Bork himself felt the need to ponder both the pro-competitive and anti-competitive impacts of the rule, the circumstances of which he labeled "certainly equivocal," if tending more towards harm than benefit. *Id.* at 42. As we have seen, Brandeis pressed Congress unsuccessfully to amend the Sherman Act to create categories of per se violations. *See supra* notes 86–89 and accompanying text.

129. Bd. of Trade of City of Chi., 246 U.S. at 240–41.

workings of an efficient, public market. Recall that the purchasers were members of the Board of Trade who were very familiar with current market conditions in Chicago, whereas the sellers were country dealers, located some distance from Chicago acting on behalf of farmers, who could be even more distant.<sup>130</sup> During the trading sessions, the country dealers and farmers had active competition working in their favor and could, therefore, rely on the efficiency of bidding to establish a competitive price.<sup>131</sup> But during after-hours private trading, how well could they determine whether a price offered to them reflected current market conditions? In practice, they could not, and here Brandeis brought the point home: “Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.”<sup>132</sup>

Brandeis emphasized that the call rule “created a public market” that “brought buyers and sellers into more direct relations” and “eliminated risks necessarily incident to a private market.”<sup>133</sup> In other words, he looked closely at the facts to conclude that the competitive benefits arose from the creation of competitive market structure that better served sellers who would otherwise stand at an information disadvantage with the buyers; an observation that can be read as recognizing the danger of buyer power in addition to seller power.<sup>134</sup> And Brandeis emphasized that “the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago.”<sup>135</sup>

Brandeis also rebuked the government when it acted to curb the activities of a trade association whose members were actively swapping current pricing information. The Department of Justice sued to stop the operation of an “Open Competition” Plan” adopted by the American Hardwood Manufacturers Association that allowed its members to freely exchange current, detailed pricing information, an approach justified as “[c]ooperative competition, not cutthroat competition.”<sup>136</sup> The majority leaned heavily on evidence that the member companies were coordinating output reductions<sup>137</sup> and that the price for lumber rose markedly,<sup>138</sup> to conclude that this was precisely a combination in restraint of trade.

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130. *Id.*

131. *Id.*

132. *Id.* at 240.

133. *Id.*

134. Buyer power has traditionally been a concern in agricultural markets in which farmers are selling their output. Carstensen, *Buyer Power and The Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PENN. J. BUS. LAW 775, 777 n.6, 778 n.10 (2012).

135. *Bd. of Trade of City of Chi.*, 246 U.S. at 240.

136. *American Column & Lumber Co. v. United States*, 257 U.S. 377, 394 (1921) (emphasis in original).

137. *Id.* at 402–05.

138. *Id.* at 409.



In dissent, Brandeis saw information as a critical tool of competition, here for sellers negotiating with better-informed buyers, and for smaller entities competing with larger ones. First, he emphasized information asymmetry: “The absence of such information in the hardwood lumber trade enables dealers in large centers more readily to secure advantage over the isolated producer.”<sup>139</sup> Second, he emphasized that, rather than favoring the “large concerns, which are able to establish their own bureaus of statistics, [to] secure an advantage over smaller concerns,”<sup>140</sup> the price and information exchange at issue was administered through a trade association whose members supplied about one-third of the market. Brandeis believed that the challenged activity “creates among producers equality of opportunity.”<sup>141</sup> In a final rhetorical flourish, he compared this joint activity to judicial approval of the steel and shoe trusts and asked whether, without the ability to engage in price and information exchange, the inevitable result would be “another huge trust . . . .”<sup>142</sup>

These opinions demonstrate that Brandeis’s emphasis on the reality of industrial economics dovetailed with his relentless pursuit of the facts and a willingness to dive deeply in order to understand not just the conduct but the context. His view of how to get at the facts is exemplified by his cross-examination of a railroad CEO, Charles Daly, during an ICC hearing to consider the railroads’ request for higher rates. Brandeis asked how Daly knew that the proposed rate would not be too high:

Daly: I know it in the same way you know the things that make you such a clever lawyer.

Brandeis: I thank you for the compliment but whatever knowledge I may have has come from the particularities today of specific facts, and so I am seeking to find out from you what the specific facts are upon which you base your judgment....I want to know, Mr. Daly, just as clearly as you can state it,

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139. *Id.* at 416.

140. *Id.* Brandeis was careful to dismiss the concerns over output limitation and to observe that “[t]here was at no time uniformity in prices.” *Id.* at 417. His reading of the record on output reduction can be questioned but the larger point is that Brandeis was prepared to uphold collective action in these circumstances as he understood them.

141. *Id.* at 418.

142. *Id.* at 418–19. It is important to recognize that in other antitrust opinions, Brandeis dissented when he thought the majority was not fully vindicating the intent and language of the antitrust laws. *See also* *FTC v. Western Meat Co.*, 272 U.S. 554, 563 (1926) (Brandeis, J., dissenting in part) (contesting the majority’s reading of the FTC’s ability to obtain divestiture under Section 7 of the Clayton Act.); *FTC v. Gratz*, 253 U.S. 421, 429 (1920) (Brandeis, J., dissenting) (objecting to the dismissal of an FTC action alleging tying by a firm that Brandeis believed had been shown to be dominant).

whether you can give a single reason based on anything more than your arbitrary judgment, as you have expressed it.”

Daly: None whatever.<sup>143</sup>

As a Supreme Court Justice, Brandeis “liked to remind people that he had been a practicing lawyer for thirty-seven years before going on the Court, and he had learned that the accuracy of his facts could be a more powerful argument than the logic of his law.”<sup>144</sup> As a judge reviewing Sherman Act cases he did not indulge in large theories of political power; rather, he used a microscope to peer into the fine grain of fact-patterns. In *American Column & Lumber* he wrote that: “Facts only can be safely relied upon to teach us whether a trade practice is consistent with the general welfare.”<sup>145</sup> Perhaps because he had seen the merger boom that evaded the Sherman Act and led to the passage of the Clayton and FTC Acts, he focused on incentives for creating monopoly as a critical economic outcome to be avoided, favoring collective action in circumstances in which the alternative would have been to incentivize vertical integration<sup>146</sup> and horizontal combination.<sup>147</sup> And along the way he demonstrated very careful understanding of not just the conduct, but the context, in which antitrust was to be applied, as with his discussion of information asymmetry.

The emphasis on facts, informed by economics and the social sciences, in pursuit of the application of an established legal standard differentiates the role of the lawyer, enforcer, and judge from that of the legislator.

## V. WHEN MORE IS NEEDED: COMPETITION & SECTORAL REGULATION

In the world of competition law, Brandeis applauded “the introduction of two governmental devices designed to protect the rights and opportunities of the individual.”<sup>148</sup> One was, of course, antitrust. The second was the creation of “[c]ommissions to regulate public utilities.”<sup>149</sup>

Brandeis always preferred competition to regulated monopoly, but he recognized that there were times when sectoral regulation was needed, as, for example with local gas, water, and telephone

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143. MASON, *supra* note 10, at 318–19.

144. UROFSKY, *supra* note 1, at 488.

145. *American Column*, 257 U.S. at 414 (Brandeis, J., dissenting).

146. *See supra* note 106 (discussion of resale price maintenance).

147. *American Column*, 257 U.S. at 417–18 (Brandeis J., dissenting) (cooperation between smaller firms with a collective market share of 30% would be preferable to a reading of the Sherman Act that would incentivize horizontal combination).

148. BICKEL, *supra* note 20, at 146 (discussing an unpublished Brandeis opinion in *Stratton v. St. Louis Southwestern Ry.*, 282 U.S. 10 (1930)).

149. *Id.*

monopolies. He viewed such instances as “exceptional”<sup>150</sup> but obviously important. For example, Brandeis understood price-setting as a tool to be used only in the context of specific industries where such government involvement was necessary. Brandeis believed there to be a “radical difference between attempts to fix rates for transportation and similar public services and fixing prices for industrial services.”<sup>151</sup>

Brandeis also recognized the importance of sectoral regulation where regulated entities were not monopolies. He supported “effective regulation of railroads as well as of other public-service corporations, whether they be monopolies or competitive concerns,”<sup>152</sup> but he vehemently argued that such sectoral regulation should work to preserve and create competition, not, as in the Theodore Roosevelt view that he opposed in 1912, simply to acquiesce in the existence of non-competitive markets.<sup>153</sup> His reasoning was quite straightforward; Brandeis believed regulatory outcomes could not duplicate the advantages of competitive pressure on companies.<sup>154</sup> For example, in opposing a request by railroads that the ICC approve higher rates in 1910, Brandeis argued just this point: “It would be a most serious danger to the country to establish the principle that if, according to present conditions, they need more money they raise rates instead of doing what in every competitive business it is necessary to do, namely to consider whether you can not make more money by reducing your cost.”<sup>155</sup> Thus, Brandeis emphasized the need to demonstrate that regulation was required to serve “[t]he welfare of the community.”<sup>156</sup> He also took comfort from his observation that that regulated industries such as railroads were uniform and stable in ways that industrial sectors were not—yet another nod to the importance of industrial innovation.<sup>157</sup>

Some of Brandeis’s most notable fights for competition came in the context of sectoral regulation. He fought a twenty-year battle

150. *The New Haven – An Unregulated Monopoly*, in LOUIS D. BRANDEIS, *BUSINESS – A PROFESSION* 282 (1914). See BERK, *supra* note 26, at 47–48 (“In 1903, he began a three-decade involvement with public utility regulation, where he learned about natural monopoly.”).

151. CURSE OF BIGNESS, *supra* note 4, at 122. See Elzinga & Webber, *supra* note 106, at 288 (“Brandeis deserves applause for not structuring the FTC as a regulator of prices and a gatekeeper for firms entering or exiting manufacturing, wholesaling, and retailing sectors of the economy.”).

152. BUSINESS – A PROFESSION, *supra* note 150, at 282.

153. *The Regulation of Competition Versus the Regulation of Monopoly*, *supra* note 9 (“The Democratic [Woodrow Wilson’s] position, on the other hand, is that private monopoly in industry is never permissible; it is never desirable, and is not inevitable; competition can be reserved, and where it is suppressed, can be restored.”).

154. BUSINESS – A PROFESSION, *supra* note 150, at 288. (“Regulation may prevent positive abuses, like discriminations, or rebating or excessive rates . . . Regulation cannot supply initiative or energy. Regulation cannot infuse into railroad executives the will to please the people.”).

155. MASON, *supra* note 10, at 325.

156. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 284 (1932) (Brandeis, J., dissenting).

157. MASON, *supra* note 10, at 122–23.

against the merger of New England railroads,<sup>158</sup> objecting specifically to the cross-ownership of other means of transportation, such as steamship lines, that he believed would otherwise compete against the railroads.<sup>159</sup> He fought off an attempted railroad rate increase in 1911, and he subsequently served as special counsel to the Interstate Commerce Committee in a rate proceeding where he surprised some railroad opponents by agreeing that some rates were, in fact, too low — another testament to his desire for factual analysis.<sup>160</sup>

Brandeis used his understanding of the economics of business to suggest solutions, as well. He believed that governmental action could employ scientific methods to achieve his social and economic goals.<sup>161</sup> For example, he famously asserted that railroads seeking a rate increase from the ICC could, by better management, lower their costs \$1 million per day; when the railroads challenged him to meet to explain how, he promptly accepted and they retreated.<sup>162</sup>

Brandeis's endorsement of sectoral regulation where he thought it was warranted did not blind him to a significant danger that the regulated could capture the regulators. He recognized that regulators might be "in collusion with the very interests they had been charged to oversee."<sup>163</sup> This approach helps to explain Brandeis's emphasis on creating legal standards—for antitrust and sectoral regulation—that he hoped would leave day-to-day politics behind and permit application of the methods of fact-finding and legal reasoning that he believed would "make them efficient instruments of justice."<sup>164</sup> More broadly, his embrace of sectoral regulation demonstrated that he understood legislatures to have a toolkit to achieve social and economic outcomes and this toolkit included broadly-applicable antitrust laws alongside more narrowly tailored (and more exacting) sectoral regulation.

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158. UROFSKY, *supra* note 1, at 190–200, 277–87 (discussing acquisition of Boston & Maine Railroad by the New York, New Haven & Hartford Railroad Company, which Brandeis viewed as an attempt by J.P. Morgan & Company to create a railroad monopoly).

159. BUSINESS—A PROFESSION, *supra* note 150, at 301 ("The New Haven has robbed New England of the benefit both of water [transportation] competition and of trolley competition.").

160. UROFSKY, *supra* note 1, at 295–97.

161. See FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911), <http://www.gutenberg.org/cache/epub/6435/pg6435-images.html> (The concept of scientific management was made famous by Frederick Taylor in his 1911 monograph, which espoused methods of improving industrial productivity. Brandeis read scientific-management literature and believed that scientific management could increase both efficiency and industrial democracy.) [<https://perma.cc/N5R2-J3CV>]. See also UROFSKY, *supra* note 1, at 240–43.

162. MASON *supra* note 10, at 328–29.

163. UROFSKY, *supra* note 1, at 141.

164. *The Living Law*, *supra* note 35.

## VI. EXPERIMENTATION

The connective tissue that unites Brandeis's view of legislative action, the creation and enforcement of antitrust law, and the use of sectoral regulation is the willingness to experiment. We are well-acquainted with Brandeis's invocation of the "laboratories of the states" but his reliance on experimentation, what we might today call innovation, runs much deeper than that well-known aphorism.

First, Brandeis understood the importance of industrial innovation. Criticizing trusts, he concluded that a "huge organization is too clumsy to take up the development of a new idea."<sup>165</sup> For example, lack of innovation informed an important part of his criticism of U.S. Steel. He believed that the United States lagged Germany in adopting innovative approaches to steel manufacture because the U.S. monopoly was insulated from the push-and-pull of competition: "With the market closely controlled and profits certain by following standard methods, those who control our trusts do not want the bother of developing anything new."<sup>166</sup> Industrial innovation was so important that he believed it deserved governmental support of the kind that had been given to American agriculture in the 19th Century.<sup>167</sup>

Second, experimentation was, for Brandeis, just as important for government. In 1922, Brandeis wrote a letter to the Federal Council of Churches in America in which he stated what his biographer Alpheus Thomas Mason calls "his creed in essence" and which states, in part:

Seek for betterment within the broad lines of existing institutions. Do so by attacking evil *in situ* and proceed from the individual to the general. Remember that progress is necessarily slow; that remedies are necessarily tentative; that because of varying conditions there must be much and constant enquiry into facts. . . . and much experimentation.<sup>168</sup>

This is a call to arms based on institutions and individual opportunity. And the words Brandeis chose: "progress," "tentative," "enquiry," and "experimentation," reflected his pursuit of "betterment" in each arena that he touched. These were the means of innovation supporting his view "that reforms could make a

165. *The Regulation of Competition Versus the Regulation of Monopoly*, *supra* note 9.

166. CURSE OF BIGNESS, *supra* note 4, at 118. Here Brandeis can be seen anticipating the debate over the relationship between market structure and innovation. See Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361 (Josh Lerner & Scott Stern eds., 2012). See generally OTHER PEOPLE'S MONEY, *supra* note 44, at 102–03.

167. 1911 Hearings, *supra* note 3, at 1169; UROFSKY, *supra* note 1, at 385 ("The government should also aid business as it did agriculture, establishing industrial experiment stations and bureaus of research, which could disseminate important information such as scientific management.").

168. MASON, *supra* note 10, at 585.

difference.<sup>169</sup> Brandeis's view of the importance of experimentation was an important aspect of the Progressive Era belief that scientific analysis and experimentation would advance competition policy.<sup>170</sup>

As a lawyer, Brandeis himself invented "a brief that changed the court of American legal history,"<sup>171</sup> the so-called "Brandeis brief" filed in *Muller v. Oregon* to provide an empirical basis allowing the Supreme Court to slip out of the noose of its earlier ruling in *Lochner v. New York*, which had invalidated a state law limiting the working hours of bakers. Brandeis's submission contained scant mention of the law but over a hundred pages of factual material, including medical research, expert reports from U.S. and foreign authorities, and legislation adopted in the United States and Europe to support the view that women would be harmed by working more than ten hours a day.<sup>172</sup> Brandeis's approach was novel, but when the Supreme Court unanimously agreed with him, it pointed directly to Brandeis's "copious collection" of materials<sup>173</sup> and "by praising Brandeis's presentation, it declared publicly that it was ready to be persuaded by compilations of social facts."<sup>174</sup> As a former Attorney General has said, "his briefs set emerging public policy throughout the Progressive Era."<sup>175</sup>

Similarly, as a justice, Brandeis relied on law review articles at a time when other Justices found their use "unacceptable."<sup>176</sup> And Brandeis did not even limit himself to legal publications. In his *Liggett v. Lee* dissent, for example, he relied on a variety of social science writings and governmental reports.<sup>177</sup> One Brandeis biographer sees in the use of such materials "another of Brandeis's contributions to sociological jurisprudence and to the modernizing of judicial and legal processes."<sup>178</sup>

Notably, Brandeis looked for ways to create regulation that would incent beneficial conduct. For example, in 1905-06 he became heavily involved in regulatory oversight of the Boston Consolidated Gas Company and backed a plan to institute a new "sliding-scale" plan that would allow the gas company to increase its profits and raise its dividend by lowering its costs, but only if it also reduced its price to customers.<sup>179</sup> It was an immediate success, which one Brandeis biographer describes as "boldness and creativity seem[ing] to produce

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169. UROFSKY, *supra* note 1, at 569.

170. BERK, *supra* note 26, at 41.

171. STRUM, *supra* note 23, at 114.

172. UROFSKY, *supra* note 1, at 216-17.

173. *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

174. STRUM, *supra* note 23, at 122.

175. *Address of Attorney General Dick Thornburgh*, 3 (Oct. 2, 1990) <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-02-90.pdf> [<https://perma.cc/SM4L-BP2K>].

176. STRUM, *supra* note 23, at 364.

177. *See, e.g.*, *Liggett v. Lee*, 288 U.S. at 566-67 nn.52-57, 578 n.67.

178. STRUM, *supra* note 23, at 364.

179. UROFSKY, *supra* note 1, at 48.

what Brandeis wanted, a solution fair to all concerned."<sup>180</sup> Brandeis advocated use of the sliding-scale approach in railroad regulation as well, which he thought would provide the economic incentive for railroads to improve.<sup>181</sup>

He embraced the forward-looking antitrust standards of the Clayton and FTC Acts because he understood that new economic conditions would likely bring "novel unfair methods" of competition.<sup>182</sup> Perhaps not surprisingly, Brandeis described the creation of the FTC as "a new experiment on old lines," by which he meant that the establishment of the FTC reflected knowledge gleaned from the earlier efforts of the Interstate Commerce Commission and the Bureau of Corporations.<sup>183</sup>

Third, although governmental experimentation was at the heart of his endorsement of the laboratories of the states,<sup>184</sup> his embrace of experimentation in government ran much deeper. Indeed, it was central to his understanding of America as a democracy. In 1919, Oliver Wendell Holmes authored his famous dissent regarding application of the First Amendment in *Abrams v. United States*, in which he said:

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment."<sup>185</sup>

Upon reviewing Holmes' opinion, Brandeis sent him a private note saying, "I join you heartily & gratefully."<sup>186</sup> If Holmes is more Eeyore and Brandeis a bit more Tigger about the prospects for reform, here, as so often, they joined to embrace experimentation as central to American democracy. For Brandeis, as for Holmes, democracy itself was an experiment of the first order.<sup>187</sup> In his dissent in *New State Ice*, Brandeis provided the broad perspective central to his vision of American democracy:

[A]dvances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying."

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180. *Id.* at 149. The sliding-scale plan for gas regulation did not, however, last long; it was doomed when during World War I the cost of coal sharply increased. *Id.* at 152.

181. *BERK*, *supra* note 26, at 69.

182. *See* *FTC v. Gratz*, 253 U.S. at 434 (Brandeis, J., dissenting).

183. *Id.* at 434 (Brandeis, J., dissenting). The Bureau of Corporations was created in 1902 as part of the Department of Commerce. *See* *Winerman*, *supra* note 49, at 17–18.

184. *See supra* notes 71–74 and accompanying text.

185. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

186. *UROFSKY*, *supra* note 1, at 553.

187. *BERK*, *supra* note 26, at 45 (quoting Louis Brandeis, Fourth of July Oration at Faneuil Hall in Boston (1915)).

The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields, experimentation has, for two centuries, been not only free, but encouraged . . . There must be power in the States and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.<sup>188</sup>

## CONCLUSION

In 1930, the historian Charles Beard wrote that “even though the year 2000 may be far from the picture which Mr. Brandeis has idealized in his mind, we may be sure that the realistic, fact-burdened method which he has employed in all of his thinking about legal and economic affairs will have an increasing influence on coming generations of students, lawyers, and judges.”<sup>189</sup> This statement has not, it’s fair to say, come to pass in the manner the author imagined. But I believe that we can be certain that, understanding the times in which we live, Brandeis would encourage us to consider deeply and creatively the manner in which antitrust laws, institutional structures, including sectoral regulation, and professional responsibilities can better further the cause of competition.

And we see just such a process underway. In a 2016 speech, Renata Hesse, then-acting Assistant Attorney General of the Antitrust Division, examined the trajectory of antitrust economics and law and explained the importance of economic fairness in antitrust enforcement:

[C]ompetition is fair because it gives a chance to the small business owner to succeed in her business venture, because it delivers lower prices to consumers, and because it drives the innovation that improves products, business processes, and more. Competition among employers to attract workers is fair because it yields higher wages, better benefits, and safer working conditions. In general, competition is fair because it distributes these rewards broadly to participants in the economy. But when companies harm competition – choking off competition or agreeing with rivals not to compete – they infect the economy with unfairness by accumulating power that the few can wield at the expense of the broader American public.<sup>190</sup>

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188. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-12 (1932).

189. Charles A. Beard, *Foreword to ALFRED LIEF, THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS*, at xxi (1930).

190. Renata Hesse, *And Never The Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement*, DEP’T OF JUST. (Sept. 20, 2016), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening> [<https://perma.cc/8VC8-W6J4>].



The work of improving antitrust enforcement continues. For example, in the fall of 2017, a series of antitrust scholars, including many veterans of the federal antitrust agencies, gathered to offer specific suggestions on how to improve antitrust enforcement, unveiling a series of papers that has been published in a special symposium of the Yale Law Journal.<sup>191</sup> In a broad-ranging speech later in the year, Senator Elizabeth Warren emphasized the importance of examining vertical mergers, prosecuting no-poaching agreements and ensuring that sectoral agencies like the FCC use their power to advance competition.<sup>192</sup>

Also in 2017, Senator Amy Klobuchar introduced her “Consolidation Prevention and Competition Promotion Act of 2017,” in which she proposed to amend the Clayton Act. Among her changes would be to declare a merger presumptively illegal if it would lead “to a significant increase in market concentration,”<sup>193</sup> an approach that resembles the market-share presumption included in the 1911 La Follette-Stanley bill.<sup>194</sup> In fact, the Klobuchar bill is Brandeisian in its essential structure: based on broad societal and political concerns, including fears of aggregated corporate political power;<sup>195</sup> translating those concerns into administrable legal standards, such as the substitution of the term “material” for “substantial” in Section 7 of the Clayton Act; and seeking to expand knowledge about the impact of past governmental actions and new forms of corporate conduct, for example, through merger retrospectives and the creation of a competition advocate at the FTC.<sup>196</sup>

A familiar question in today’s discussion of Brandeis’s ideas is to ask what antitrust jurisprudence would look like if his views had been applied over the last century. That is an unanswerable counter-factual, but Brandeis’s writings suggest that antitrust would have been more concerned with bringing antitrust actions against monopolies, examining buyer power and testing the limits of the per se prohibition against price fixing when the challenged conduct could be traced to a substantial pro-competitive justification. None of these considerations

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191. See, e.g., Symposium, *Unlocking the Promise of Antitrust Enforcement*, 127 YALE L.J. 1742 (2018) <https://www.yalelawjournal.org/collection/unlocking-antitrust-enforcement> [<https://perma.cc/CU95-4JF8>].

192. Elizabeth Warren, *Three Ways to Remake the American Economy for All*, THE GUARDIAN (Dec. 6, 2017), <https://www.theguardian.com/commentisfree/2017/dec/06/elizabeth-warren-monopolies-american-economy> [<https://perma.cc/7DE5-PYEB>].

193. Consolidation Prevention and Competition Promotion Act, S. 1812, 115<sup>th</sup> Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1812/text> [<https://perma.cc/DL3P-4WRN>].

194. See *supra* notes 86–89 and accompanying text.

195. The bill’s findings include traditional antitrust concerns as well as the conclusion that “undue market concentration also contributes to the consolidation of political power, undermining the health of democracy in the United States.”

196. The Competition Advocate would, inter alia, periodically report on market concentration and the success of merger remedies obtained by the DOJ and the FTC.

is wholly absent from current doctrine,<sup>197</sup> but Brandeis likely would have given them more weight. His judicial opinions reflect his emphasis on the facts and the context in which conduct arose. In assessing competitive benefits, he kept in mind the experience that had led to the enactment of the Clayton Act, when he argued that the most likely alternative to this form of cooperation would be to incentivize more mergers.

How would he have decided particular cases arising today? We cannot be certain. But we can be confident that he would have told us to use our abilities to the maximum in order that we might reason and, in so doing, be bold.

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197. For a recent complaint charging unlawful maintenance of a monopoly, see *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK, 2017 WL 2774406 (N.D. Cal. Feb. 1, 2017). For recent discussions of buyer power, see C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 *YALE L.J.* 1742, 2078 (2018); Jonathan Sallet, *Buyer Power in Recent Merger Reviews*, *Antitrust*, Fall 2017. For decisions that trace the border between price-fixing and pro-competitive combinations, compare *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694–95 (1978) with *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). Brandeis would likely have also disfavored the decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) in which the Supreme Court held that violation of a communication-law regulation did not separately state a violation of the Sherman Act. During the drafting of the La Follette-Stanley bill, Brandeis took the position that Congress should legislate railroad conduct adjudged illegal under the Interstate Commerce Act to be conclusively unreasonable under the Sherman Act. BRANDEIS, *supra* note 82, at 438-39 (May 23rd, 1911 letter to La Follette).

