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ARTICLE

The Long Future of the Neo-Brandeisian Movement, in Three Parts

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1. Introduction

The neo-Brandeisian movement is frequently misunderstood as a modern movement, and although there are good reasons to associate it with the profound legacy of Justice Louis Brandeis, its roots lie in ancient understandings of the relationship between power and the economy.[1] In fact, while it is often presented as providing a formidable challenge to the prevailing efficiency and consumer welfare paradigm in antitrust law, it is better understood in reverse: the 1980-2020 efficiency/consumer welfare paradigm is the outlier, representing an exception to a general, common sense understanding of the risks of private power. As I discuss in this brief essay, the current movement is both a critique and a call to reimagine and reclaim the principles that underpin our economic and democratic systems. Its impact will be profound and enduring, regardless of whether individual political candidates prevail. This is because, unlike the Chicago School and its variants, the vision of reality and power underpinning the neo-Brandeisian movement is generations old. The efficiency vision of politics is the radical exception, and while it may have powerful backers,[2] it has recently failed at its job of providing stability and low-cost quality goods–a major failure for a movement, which, unlike the Brandeisian school, claims only to be focused on consumer wellbeing, not a broad array of concerns.

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[1] Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (Columbia Glob. Reps. 2018); Barry C. Lynn, Liberty from All Masters: The New American Autocracy vs. the Will of the People (St. Martin's Press 2020); Zephyr Teachout, Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money (Macmillan+ ORM 2020).

[2] Filippo Lancieri, Eric A. Posner & Luigi Zingales, The Political Economy of the Decline of Antitrust Enforcement in the United States, Nat'l Bureau of Econ. Research, Working Paper No. 30326 (2022).

To be clear, the Borkian approach could disappear while another one (not neo-Brandeisian) could appear. In such a circumstance, the Brandeisian critique will continue to be relevant, but it is not so clear whether the Borkian approach –the exception– will survive as a serious intellectual movement. It can, of course, survive through power, and those in power, especially those wielding significant amounts of corporate power, will continue to use it and hold it up as a defense for laissez-faire. However, the Brandeisian movement's critique has been substantial and deadly, and revealed the weakness of its foundations.[3] Perhaps as importantly, reality intervened, as it is wont to do, in the form of fragile global systems during COVID and skyrocketing consumer prices in the wake of the Russian invasion of Ukraine. Both revealed that the foundational promise of Borkianism was hollow. While shocks frequently lead to some price increases, Isabela Weber has shown just how much concentration and power enabled inflation that would not have happened in a truly open competitive market—power, not shocks, dictated increased prices.[4]

The neo-Brandeisian movement represents three different elements, all of which will have a lasting impact on antimonopoly law. The first is purely negative; it is a sustained critique of the dominant efficiency/consumer welfare model. The second is positive; it represents a positive vision of what antitrust law is about, what its goals are, and how it should operate. And the third is more global; it represents a vision of where antitrust fits within the larger ideological vision of the nature of democracy.

Even if there is a change of administration in the United States, and repeated changes of regimes within Europe, each of these three frames will survive. Let us briefly address each.

2. The Neo-Brandeisian Critique

The neo-Brandeisian movement begins with a critical examination of the efficiency and consumer welfare model that has dominated antitrust law for far too long. This model, championed by the Chicago School of Economics, has reduced antitrust enforcement to a narrow focus on price and output, ignoring the broader harms inflicted by monopolistic practices.[5] It has allowed corporate giants to amass unprecedented power, squeezing out competition, stifling innovation, and undermining the democratic fabric of our society.[6] Neo-Brandeisians argue that

[3] David Dayen, Biden Administration Antitrust Guidelines Take on Corporate Mergers, The Atlantic (July 20, 2023), https://www.theatlantic.com/ideas/archive/2023/07/biden-administration-corporate-merger-antitrust-guidelines/674779/.

[4] Simon Kennedy, Isabella Weber Explains Why We're Rethinking the Way Inflation Works, Bloomberg (June 8, 2023), https://www.bloomberg.com/news/articles/2023-06-08/isabella-weber-explains-why-we-re-rethinking-the-way-inflation-works.

[5] See, eg, Daniel A. Crane, Technocracy and Antitrust, 86 Tex L. Rev 1159, 1160 (2008).

[6] See, eg, Majority Staff Report, Investigation of Competition in Digital Markets (2020).

antitrust law must do more than merely protect consumers from high prices. Prices and quality are always central to antitrust, including neo-Brandeisian antitrust; they are not, however, the only goals.[7] Nor is the only way to address prices through individual cases. To paraphrase Emily Dickensen, seek low prices, but seek it slant–success in circuit lies–neo-Brandeisians see how constraining power is the best way to constrain firms from exploiting information and power imbalances to hike prices. Antitrust, therefore, must address the structural imbalances that allow corporations to wield disproportionate power over our economy and politics. This critique is gaining momentum as scholars, policymakers, and the public recognize the failures of the **dominant** consumer welfare standard.[8] The movement's ability to articulate these criticisms clearly and persuasively ensures that this debate will not be easily dismissed or forgotten.

As I've written elsewhere, the Chicago/Harvard school has failed on at least seven fronts.[9] Although intended to allow for objective, case-by-case assessments, the consumer welfare standard proved unmanageable. The micro, standard-based approach has led to antitrust enforcement becoming a contest of economic simulations. This led to costly cases and fantasy numbers, as no one can reliably predict the price impacts of mergers. It has proven extremely expensive to implement:[10] Reliable proxies for consumer welfare are not only unreliable but also extremely costly to produce and assess. Antitrust enforcement involving econometric experts drives costs into the tens of millions, making the standard impractical for government budgets. It has failed as a microeconomic policy, enabling price increases after mergers, such as the T-Mobile Sprint merger, where prices for mobile services rose. Studies, like those by John Kwoka, show that mergers cleared by antitrust agencies often led to significant price increases.[11] It also failed as a macroeconomic policy—since the 1980s, markups have significantly increased, indicating rising market power and concentration.[12] A few firms are primarily

[7] My preferred analogy is marriage and sex; marriage requires intimacy, but a sex-maximizing marriage at all other costs would be pathological: plural goals represent common sense.

[8] Eric A. Posner, How Antitrust Failed Workers (2021); Jonathan B. Baker & Steven C. Salop, Antitrust, Competition Policy, and Inequality, 104 Geo. L.J. Online 1 (2015); in Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), Justice Stephen Breyer in dissent discussed the weakness in the Chicago School argument. (Breyer, J., dissenting), 915-16 (2007).

[9] Zephyr Teachout, The Death of the Consumer Welfare Standard, ProMarket (Nov. 7, 2023), https://www.promarket.org/2023/11/07/zephyr-teachout-the-death-of-the-consumer-welfare-standard/.

[10] Last year expert witness costs for mergers and antitrust at the FTC approached $40 million, see Malathi Nayak, US FTC Vows to Limit Costs for Expert Witness in Antitrust Lawsuits as Fiscal Year 2023 Spend Doubles, MLex Market Insight (July 13, 2023), https://mlexmarketinsight.com/news/insight/us-ftc-vows-to-limit-costs-for-expert-witness-in-antitrust-lawsuits-as-fiscal-year-2023-spend-doubles.

[11] John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy, MIT Press, 2014.

[12] Ricardo Marto, What Is Behind the Rise in Markups?, Econ. Synopses, No. 14, 2024, https://doi.org/10.20955/es.2024.14.

responsible for this shift, which has negatively impacted consumers and workers.[13] It failed to protect workers, leading to slower income growth compared to productivity and a decline in labor's share of GDP. Concentrated markets allowed employers to exploit workers with lower wages and degraded working conditions. As mentioned above, it allowed companies to exploit economic shocks, like COVID-19 and the Ukraine invasion, to increase prices and profits. And it has enabled increased exercise of political power.[14] Finally, it has enabled the rise of big tech authoritarianism around the world. When the enforcers waved through Google and Facebook acquisitions throughout the 2000s and 2010s, they enabled the rise of centralized, whimsical power.

Regardless of who is in power, the Brandeisian revelation of the failure of the consumer welfare school cannot be unseen. While it is almost impossible to conceive of a Donald Trump administration embracing neo-Brandeisians, the critique is now embedded in substantial wings of the intellectual and political left and right and will persevere.

3. A Positive Vision for Antitrust Law

The neo-Brandeisian movement also offers a compelling and affirmative vision of what antitrust law should be: a tool to promote fair competition, prevent market concentration, and ensure that economic power is distributed broadly rather than concentrated in the hands of a few. This vision is about creating a more just and equitable economy where small businesses can thrive, workers are treated with dignity, and consumers have real choices.

The positive vision is intuitive–no one wants to be dominated by another, and most people, as workers and consumers, know the experience of domination. It is intuitive that economic power often translates into political influence, allowing these corporations to shape laws, regulations, and policies in their favor. It is also easy for people to see how corporate concentration often leads to the erosion of local businesses and economies. As local businesses have been driven out by large corporations, communities lose their economic independence and social cohesion, weakening the foundations of democratic participation–and leading to a wide swath of human experience that economic experts can't persuade away. It is intuitive that without competition, corporations can engage in exploitative practices, reduce product quality, and limit consumer choice, all of which harm the public interest. And when a few corporations control critical aspects of life, such as access to

[13] Jan De Loecker & Jan Eeckhout, Global Market Power, NBER Working Paper No. 24768 (2018).
[14] Patrick Holder, Haaris Mateen, Haris Tabakovic & Anya Schiffrin, Political Power and Market Power: Evidence from Mergers, CEPR (May 16, 2022), https://cepr.org/voxeu/columns/political-power-and-market-power-evidence-mergers.

information, employment, and essential goods and services, individuals' autonomy and liberty are compromised–and they feel it.

The Chicago/Harvard school tried to avoid all questions of politics and power, but people understand the risk of corruption and regulatory capture in environments where corporate concentration is prevalent. Large corporations often have the resources to lobby government officials, fund political campaigns, and influence regulatory agencies. Moreover, the neo-Brandeisian approach, in fact, because of its focus on perversions caused by politics, is far easier to understand and requires clearer rules.[15]

To be clear, one of the biggest reasons it will last is because the last four years have seen how powerful the movement can be in solving real problems. Jonathan Kanter, as chief Antitrust enforcer, Lina Khan, as Chair of the Federal Trade Commission, and Tim Wu, within the White House, have all been pragmatic, grounded, and reality-based. While their work signals a transformative shift in how we understand and enforce antitrust law, the shift on the ground literally comes down to taking the written laws seriously, enforcing them, and treating law like law, instead of a set of suggestions.

The FTC just recently came out with a major report on price hiking by pharmacy benefit managers, and launched an investigation into bribery and kickbacks in the shadowy world of insulin and cancer drugs. It has cracked down on deceptive junk fees. It has sued Adobe and Executives for hiding fees,[16] successfully blocked a major acquisition effort by Illumina,[17] won a big lawsuit against TurboTax maker Intuit for pitching "free" tax filings that weren't free, and barred an oil executive from serving on Exxon's board after price fixing revelations.[18] It finalized a rule against exploitative non-compete agreements.[19] That's on top of rules regarding tighter merger review, successfully challenging several mergers, and changing merger practices across the board.

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[15] Zephyr Teachout, Democracy and Law in the New American Antitrust, 11 J. Antitrust Enf't 278 (2023).

[16] David McCabe & Lauren Hirsch, F.T.C.'s Khan Blocks Illumina Deal in One of Her Biggest Antitrust Tests, N.Y. Times (Dec. 18, 2023), https://www.nytimes.com/2023/12/18/business/dealbook/lina-khan-ftc-illumina-antitrust.html.

[17] The biotech company Illumina said on Sunday that it would divest Grail, see Adam Satariano, Illumina to Sell Cancer Detector Business Amid Regulatory Pressure, N.Y. Times (Dec. 17, 2023), https://www.nytimes.com/2023/12/17/business/media/illumina-cancer-detector-sale.html.

[18] Lorenzo Arvanitis, F.T.C. to Approve Major Exxon Deal but Exclude Key Executive, Politico (May 1, 2024), https://www.politico.com/news/2024/05/01/ftc-to-approve-major-exxon-deal-but-exclude-key-executive-00155515.

[19] Press Release, Fed. Trade Comm'n, F.T.C. Announces Rule Banning Noncompetes (Apr. 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

While the most significant intuition of the neo-Brandeisian movement–and the thing that cannot go away–is its insistence that antitrust law is integral to democracy itself, the way it looks in practice is just effective law enforcement. Ironically, the more you care about democracy, the more you just enforce the law and don't allow power to accumulate.

Yes, when a few corporations control vast swaths of the economy, they also gain outsized influence over political processes, media, and public discourse. This concentration of power threatens the very foundation of our democratic society. But no, the way to enforce that is not through using democratic principles in individual cases–in fact, the Brandeisians are more committed to clear, bright-line rules and less uncertainty about the law.

This perspective has found resonance across ideological divides. Conservative politicians like Ken Buck, Josh Hawley, and J.D. Vance have engaged with neo-Brandeisian ideas, recognizing that corporate monopolies are as much a threat to conservative values as they are to progressive ones. In the Supreme Court and within the Federalist Society, unusual alliances are forming around the need to check corporate power and its risks to democracy.[20] This broad appeal enhances the movement's durability and impact.

To the prior point, the neo-Brandeisian movement's cross-ideological engagement is one of its greatest strengths. The movement draws support from across the political spectrum. Both Democrats and Republicans are increasingly recognizing the dangers of excessive corporate concentration and the need for robust antitrust enforcement. This bipartisan interest increases the likelihood that neo-Brandeisian principles will continue to influence policy, regardless of which party is in power. (To be clear, the consumer welfare consensus was also cross-ideological, excluding lonely populists from both parties but definitely covering a broad spectrum of support).

Even if future administrations attempt to roll back these reforms, the neo-Brandeisian framework will remain a vital part of the discourse. The movement's arguments are taking root in law schools, think tanks, and the media, ensuring that these ideas will continue to be debated and developed. The intellectual groundwork laid by the neo-Brandeisian movement makes it difficult for any administration to ignore its principles entirely.

While Barry Lynn was almost alone carrying the banner of neo-Brandeisianism in the aughts, there now has been a flowering of scholars and legal experts who are

[20] Zephyr Teachout, Texas's Social-Media Law Is Dangerous. Striking It Down Could Be Worse, The Atlantic (Feb. 20, 2024), https://www.theatlantic.com/ideas/archive/2024/02/social-media-netchoice-texas-supreme-court/677494/.

delving deeply into neo-Brandeisian ideas, producing a robust body of research that challenges the consumer welfare standard and proposes alternatives. This academic interest helps to legitimize and propagate the movement's principles, ensuring that they are considered seriously in policy discussions. In law schools, "antitrust is cool again," and meetings with Chair Khan at top law schools are banner events with lines going down the hallways.

Investigative reporting has also turned heavily towards the harms of corporate concentration and the benefits of competitive markets, which educates the public and builds support for neo-Brandeisian reforms. As these ideas have gained more visibility and acceptance, they exert greater pressure on policymakers to adopt and implement them and shift the language and lens through which the public understands the harms they experience.

In short, the neo-Brandeisian movement is a significant and lasting force in antitrust law because it represents human experience over generations.

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