Four Reasons to Reject Neo-Brandeisian Critiques of the Consumer Welfare Approach to Antitrust
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Alden Abbott

In the battle of ideas, it is quite useful to be able to brandish clear and concise debating points in support of a proposition, backed by solid analysis. Toward that end, in a recent primer about antitrust law published by the Mercatus Center, I advance four reasons to reject neo-Brandeisian critiques of the consensus (at least, until very recently) consumer welfare-centric approach to antitrust enforcement. My four points, drawn from the primer (with citations deleted and hyperlinks added) are as follows:

> **First, the underlying assumptions of rising concentration and declining competition on which the neo-Brandeisian critique is largely based (and which are reflected in the introductory legislative findings of the Competition and Antitrust Law Enforcement Reform Act [of 2021, introduced by Senator Klobuchar on February 4, lack merit].** Chapter 6 of the 2020 Economic Report of the President, dealing with competition policy, summarizes research debunking those assumptions. To begin with, it shows that studies complaining that competition is in decline are fatally flawed. Studies such as one in 2016 by the Council of Economic Advisers rely on overbroad market definitions that say nothing about competition in specific markets, let alone across the entire economy. Indeed, in 2018, professor Carl Shapiro, chief DOJ antitrust economist in the Obama administration, admitted that a key summary chart in the 2016 study "is not informative regarding overall trends in concentration in well-defined relevant markets that are used by antitrust economists to assess market power, much less trends in concentration in the U.S. economy." Furthermore, as the 2020 report points out, other literature claiming that competition is in decline rests on a problematic assumption that increases in concentration (even assuming such increases exist) beget softer competition. Problems with this assumption have been understood since at least the 1970s. The most fundamental problem is that there are alternative explanations (such as exploitation of scale economies) for why a market might demonstrate both high concentration and high markups—explanations that are still consistent with procompetitive behavior by firms. (In a related vein, research by other prominent economists has exposed flaws in studies that purport to show a weakening of merger enforcement standards in recent years.) Finally, the 2020 report notes that the real solution to perceived economic problems may be less government, not more: "As historic regulatory reform across American industries has shown,

cutting government-imposed barriers to innovation leads to increased competition, strong economic growth, and a revitalized private sector."

**Second, quite apart from the flawed premises that inform the neo-Brandeisian critique, specific neo-Brandeisian reforms appear highly problematic on economic grounds**. Breakups of dominant firms or near prohibitions on dominant firm acquisitions would sacrifice major economies of scale and potential efficiencies of integration, harming consumers without offering any proof that the new market structures in reshaped industries would yield consumer or producer benefits. Furthermore, a requirement that merging parties prove a negative (that the merger will not harm competition) would limit the ability of entrepreneurs and market makers to act on information about misused or underutilized assets through the merger process. This limitation would reduce economic efficiency. After-the-fact studies indicating that a large percentage of mergers do not add wealth and do not otherwise succeed as much as projected miss this point entirely. They ignore what the world would be like if mergers were much more difficult to enter into: a world where there would be lower efficiency and dynamic economic growth because there would be less incentive to seek out market-improving opportunities.

**Third, one aspect of the neo-Brandeisian approach to antitrust policy is at odds with fundamental notions of fair notice of wrongdoing and equal treatment under neutral principles, notions that are central to the rule of law.** In particular, the neo-Brandeisian call for considering a multiplicity of new factors such as fairness, labor, and the environment when enforcing policy is troublesome. There is no neutral principle for assigning weights to such divergent interests, and (even if weights could be assigned) there are no economic tools for accurately measuring how a transaction under review would affect those interests. It follows that abandoning antitrust law's consumer-welfare standard in favor of an ill-defined multifactor approach would spawn confusion in the private sector and promote arbitrariness in enforcement decisions, undermining the transparency that is a key aspect of the rule of law. Whereas concerns other than consumer welfare may of course be validly considered in setting public policy, they are best dealt with under other statutory schemes, not under antitrust law.

**Fourth, and finally, neo-Brandeisian antitrust proposals are not a solution to widely expressed concerns that big companies in general, and large digital platforms in particular, are undermining free speech by censoring content of which they disapprove.** Antitrust law is designed to prevent businesses from creating impediments to market competition that reduce economic welfare; it is not well-suited to policing companies' determinations regarding speech. To the extent that policymakers wish to address speech censorship on large platforms, they should consider other regulatory institutions that would be better suited to the task (such as communications law), while

> keeping in mind First Amendment limitations on the ability of government to control private speech.

In light of these four points, the primer concludes that the neo-Brandeisian-inspired antitrust "reform" proposals being considered by Congress should be rejected:

> [E]fforts to totally reshape antitrust policy into a quasi-regulatory system that arbitrarily blocks and disincentivizes (1) welfare-enhancing mergers and (2) an array of actions by dominant firms are highly troubling. Such interventionist proposals ignore the lack of evidence of serious competitive problems in the American economy and appear arbitrary compared to the existing consumer-welfare-centric antitrust enforcement regime. To use a metaphor, Congress and public officials should avoid a drastic new antitrust cure for an anticompetitive disease that can be handled effectively with existing antitrust medications.

Let us hope that the serious harm associated with neo-Brandeisian legislative "deformation" (a more apt term than reformation) of the antitrust laws is given a full legislative airing before Congress acts.

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