# Assessing the Impact of the Neo-Brandeisian Movement

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# I. Introduction

For its antitrust leadership, the Biden Administration tapped adherents of the progressive Neo-Brandeisian movement. Breaking from the bipartisan consensus of the past forty years, this movement emphasizes concern with market concentration, seeks to use antitrust law to support smaller competitors and labor unions, and downplays the importance of economics and evidence of consumer harm. The Federal Trade Commission's Chair, Lina Khan, regularly equated big with bad[1] and signaled[2] an intent to use antitrust to address issues outside the bounds of consumer welfare, such as issues related to wages and unions. Instead of the consumer welfare standard, Neo-Brandeisians focused on "market realities[3]," an undefined concept that afforded them substantial discretion.

During the Biden Administration, the Neo-Brandeisians set out to reshape competition policy across the country and around the world. Through their allies in Congress, they introduced bills that would have rewritten federal antitrust law to import European concepts of "abuse of dominance" and to micromanage the way companies could compete. Through the White House, they persuaded President Biden to issue an Executive Order on Competition that called for a whole-of-government approach to exert sweeping control over the economy. Through the administrative state, they worked to transform the FTC into an unelected legislature that would exercise regulatory control across the economy, and, with the Department of Justice, challenge numerous mergers based on speculative theories, rather than evidence of consumer harm. Outside of Washington, the Neo-Brandeisians attempted to persuade numerous states to rewrite their antitrust laws and promoted international efforts, particularly in Europe, to target U.S. companies for competition scrutiny. According to one highly respected antitrust scholar and self-professed Democrat, the Biden administration "did a lot of damage to my field, antitrust, in just 4 years[4]" and "while some actions had a sound basis, the Biden administration's overall policy toward big tech ranks as one of the worst, most backward-looking, reactionary policy sets in my experience.[5]"

While it's true that the Biden Administration raised costs, injected uncertainty, wasted resources, and generally harmed American consumers and U.S. economic growth, to date, the Neo-Brandeisian effort to drive transformational change to antitrust has failed. Congress declined to rewrite the federal antitrust laws, a sweeping Executive Order produced few tangible results, and the courts invalidated the FTC's most prominent rulemaking efforts and most of the FTC and DOJ's aggressive merger theories. The consumer welfare standard survives, and the rule of reason was not replaced by bright-line rules. No state rewrote its antitrust laws and, while international competition officials continue to target U.S. companies, other countries have yet to embrace European ex-ante competition regulation, and it is increasingly clear that the Trump Administration is prepared to push back[6] against discrimination against U.S. business.

Before the Neo-Brandeisian movement burst onto the scene, there had long been a debate about whether the antitrust laws were underenforced, or whether more stringent enforcement would create an undesirable chilling effect on procompetitive behavior. This debate is welcome and there is merit to both arguments. However, the Neo-Brandeisian movement isn't merely a call for aggressive enforcement of the law, it's a rejection of the law and its limitations. The movement seeks to reshape the law not simply to promote more vigorous competition, but to allow the government to manage outcomes in the economy.

Former FTC Commissioner Christine Wilson unpacks the Neo-Brandeisian socialist goals in insightful remarks entitled *Marxism and Critical Legal Studies Walk into the FTC: Deconstructing the Worldview of the Neo-Brandeisian.*[7] Her commentary exposes the movement for its attack on basic economic freedom, and rejection of market-based, merit-based competition. Thankfully, as this paper lays out, meaningful Neo-Brandeisian accomplishments have yet to take hold, even as the movement remains vocal and policymakers on both sides of the aisle have shown tendencies to flirt with its deeply flawed ideological underpinnings.

The trend of more vigorous enforcement of antitrust laws started under the Obama Administration, with the rejection of the Bush Administration's Section 2 report and a general uptick in merger enforcement. That pattern continued under the first Trump Administration, which brought Section 2 cases, prioritized merger enforcement, and closely examined vertical mergers. Under the Biden Administration, the enforcement record is clear: where the agencies brought cases supported by the law (rather than attempt to change it), and the evidence supported the complaint, they succeeded. Post-Biden antitrust enforcers can draw lessons from this recent history. Most important, policymakers must continue to resist the Neo-Brandeisian objectives to change the law and maintain an enforcement and policy course consistent with the law and evidence of harm to consumers, rather than competitors.

# II. The Neo-Brandeisian's Failed Efforts to Rewrite the Federal Antitrust Laws

Antitrust law protects consumers[8] and the competitive process. For forty years, there has been a bipartisan consensus that antitrust enforcement remains the proven tool to deploy only where a business practice leads to higher prices, fewer choices, diminished quality, or less innovation. The Neo-Brandeisians pushed Congress to rewrite competition law to grant antitrust enforcers broad powers to manage competition in the market. Though some in Congress were at least initially sympathetic to the new movement, enduring support for this legislative agenda never materialized in the House or the Senate, and consequential legislation was never seriously considered.

## A. Bushels of Bills

In its nascency, the Neo-Brandeisian movement focused on changing the scope and purpose of antitrust law. In response to Neo-Brandeisian complaints, members of Congress introduced various bills to rewrite antitrust law to protect individual competitors by limiting the ability of large companies to compete, such as by bundling products at low prices. In an attempt to attract token bipartisan support, these bills largely took aim at the tech sector, but their underlying philosophy extended across the economy to health care, energy, and other markets.

For example, the Competition and Antitrust Law Enforcement Reform Act[9] (CALERA) and the Platform Competition and Opportunity Act (PCOA) would have imposed arbitrary merger rules by instructing courts to focus strictly on market shares and subjective evaluations as to whether an acquired company might someday compete in the same markets as the acquiring company, even if the companies did not compete at the time of the purchase. CALERA prohibited mergers meeting certain market share and market concentration thresholds unless the merging firms could establish, by a preponderance of the evidence, that their merger does not "create an appreciable risk of materially lessening competition." Under PCOA, the merging parties in certain transactions would bear the burden to prove, by clear and convincing evidence, that the acquired company did not "constitute nascent or potential competition to the covered platform." But because these bills were not confined to the tech sector, they failed to attract sufficient Republican interest. At the same time, the most progressive elements of the Neo-Brandeisian movement rejected the bills for not going far enough.

Many of these bills also would have outlawed normal, healthy competitive conduct, without any showing of an actual harm to consumers. For instance, CALERA defined exclusionary conduct as conduct that "(i) materially disadvantages 1 or more actual or potential competitors; or (ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete." These broad provisions could have stifled vigorous competition on the merits, such as price cuts that undoubtedly "disadvantage" competitors. Another bill, the Ending Platform Monopolies Act, would have prevented certain technology companies from competing in multiple related lines of business, even if those companies had no market power in those lines.

The American Innovation and Choice Online Act[10] (AICOA) garnered perhaps the most attention of any bill. Like other proposals, AICOA imposed liability on covered platforms for harming their competitors, not consumers. For instance, AICOA made it unlawful for a covered platform to "materially restrict" a business's access to interoperate with features that were available to the platform's own products, irrespective of any showing of harm to consumers, and indeed even if the new requirement would, on balance, harm consumers (e.g., if the requirement deters innovation). The bill also would have barred covered companies from using data to develop competing products, from providing consumers with information about lower-cost alternatives, and perhaps from providing certain services to consumers at no cost.

Another bill focused on app stores, which are successful because they provide consumers with convenience and seemingly infinite software choices, and developers with an outlet to reach millions of potential customers. Perhaps most importantly, app stores have created trust in the marketplace. The Open App Markets Act (OAMA), however, mandated that captured app stores allow users to install third-party apps, outside of the app store, and created a private action for developers to seek treble damages. Breaking from antitrust principles, the bill would have imposed a "duty to deal" by regulating the private contractual arrangements between app store operators and developers. As a result, the bill would have reduced investment in app store markets and potentially harmed consumers by compromising data security and privacy safeguards.

## B. How a Bill Doesn't Become a Law

Despite concerted efforts over several years, including support from many members of the Biden Administration and key legislators, none of these bills gained sufficient traction to become law. Ultimately, proponents failed to persuade their colleagues that the bills' supposed benefits outweighed their significant risks.

The primary concern with the legislative agenda proposed by the Neo-Brandeisian and their adherents was the excessively overbroad scope of their intended legislative actions. Most of the bills were written with the tech sector in mind; progressives had concerns that a handful of tech companies had simply grown "too big," while some conservatives worried that large tech companies exerted too much influence over the nation's discourse. Nevertheless, for most of the bills, their provisions would have swept in many other sectors of the economy. For instance, even though some of the bills erected artificial criteria to capture only the so-called "Big Tech" companies, the various frameworks threatened to capture companies in other sectors such as telecom and financial services, and to set a legislative precedent that future enforcers could could have easily extended to other sectors. Across the economy, companies came to realize that the bills' Neo-Brandeisian underpinnings eventually would have applied to them. Given the bills' sweep, a coalition[11] of approximately 175 chambers of commerce from around the country signed a letter that raised significant concerns about AICOA.

Beyond that, the bills simply failed to garner sufficient public support. According to a U.S. Chamber poll[12], 70% of voters opposed congressional proposals to add new antitrust regulations for technology companies, and a majority of voters were more likely to oppose candidates who support such regulations. Among small businesses, nine of ten[13] did not think that Congress should focus on technology antitrust legislation. Although certain members of Congress expressed deep frustration with the tech sector, the voting public generally liked the goods and services that the tech sector provided, often at zero or low cost, including social media, mapping, and package delivery. Even where voters found fault with specific aspects of the tech sector (as with data privacy practices and content moderation concerns), they remained unconvinced that antitrust law was the appropriate vehicle to address those issues.

As the bills languished in Congress, their detrimental secondary effects became apparent. After years of discussion (but without, incidentally, a full committee hearing), proponents failed to explain away their problematic practical effects, which included:

- **Fueling Inflation[14]**
  During a global pandemic, AICOA would have led to even higher prices[15] for consumers by barring covered companies from using data to develop less-expensive products;

- **Ending free services**
  AICOA prevented platforms from preferencing their own products and therefore could have led to the end of free shipping[16], free mapping, and other services popular among consumers;

- **Hurting small business[17]**
  By restricting integrated services, the bills would have raised costs for small business. An economic analysis[18] estimated that smaller retail businesses would have lost roughly $500 billion in sales in just the first five years of the bill's enactment;

- **Imperiling the start-up ecosystem[19]**
  The bills would have reduced investment in new startups by restricting the ability of larger companies to enter new markets, thereby denying[20] startups access to critical financing and technical expertise. Economists estimated that AICOA would have cost the U.S. economy more than $300 billion[21].

- **Damaging cybersecurity, national security, and consumer privacy**
  Because AICOA required U.S. companies to share sensitive data with foreign competitors[22], homeland security[23], defense[24], and intelligence experts[25] raised concerns that the bill could undermine efforts to combat cyber threats and U.S. innovation[26], to the benefit of China[27].

Moreover, as the Biden Administration went on, many in Congress, particularly Republican members, grew to distrust the antitrust agencies. Several committees[28] documented that the FTC's then-Chair, Lina Khan, had "undermined the FTC's mission through a relentless violation of legal, procedural, historical, and management norms." AICOA would have given the FTC more power[29] to decide whether a company can innovate, lower prices, or offer free shipping and other services, yet few Republicans wanted to risk the grant of even more authority to the Biden Administration's Neo-Brandeisian enforcers. Finally, the passage of time revealed that the existing antitrust laws are an effective tool to protect competition when antitrust enforcers bring lawsuits grounded in evidence and precedent. Such lawsuits, many of which are still working their way through the court system, demonstrate that the justice system remains capable of evaluating whether competitive conduct benefits consumers. As a result, instead of a sweeping rewrite of federal antitrust law, Congress enacted only a handful of relatively minor bills. For instance, the Merger Filing Fee Modernization Act increased the fees for large mergers to fund antitrust enforcement agencies and required parties to disclose information on subsidies received from certain foreign governments. The State Antitrust Enforcement Venue Act of 2022 limited the transfer and consolidation of antitrust cases brought by states in federal court.

## C. Lessons Learned

For the past four decades, antitrust law has served as a successful example of bipartisanship, with members of both parties agreeing that the law should protect the welfare of consumers, rather than particular competitors. This consensus has created a stable legal framework across congresses and presidential administrations that has allowed America's innovative economy to thrive and American consumers to benefit from quality goods and services at low prices.

During the Biden Administration, the various Neo-Brandeisian bills threatened that stability. The bills would have shifted the focus of antitrust from promoting competition to protecting competitors from competition. They would have punished some companies for competing vigorously while leaving other companies free to engage in the exact same conduct. As a consequence, these bills would have given federal agencies the power to micromanage large sectors of the economy and allowed the federal government to decide whether a company can innovate, lower prices, or offer free shipping and other services–or whether such vigorous competition violates the law.

Congress also appreciated that the existing antitrust laws have helped the United States build the most dynamic and innovative economy in world history. The dynamism and pace of change in many markets, especially digital ones, were all reasons to maintain the current high standards for intervention. Dynamic markets are very likely to adjust on their own, whereas government intervention and regulation may cement the status quo. As a bipartisan congressional commission[30] determined several years ago, "there is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features."

In sum, the Neo-Brandeisian bills failed to become law because they were radical attempts cast aside decades of successful, tested, and sound bipartisan policy.

# III. The Neo-Brandeisian Agenda Became a Political Deadweight: The Biden's Competition Executive Order

President Biden's executive order on competition–EO 14306 Promoting Competition in the American Economy[31]–served as both a manifesto for the Neo-Brandeisian movement as well as the blueprint for Bidenomics. Launched with the hope it would serve as a valuable construct to carry forth the administration's message on economic policy, it ultimately proved to be a political deadweight.

The Washington Post characterized the Competition EO as "striking in its scope and ambition" as it laid out a vision of extending government control to manage competitive outcomes across the economy. To ensure that agencies followed the letter and spirit of the executive order, a White House Competition Council was created to tick through the "to-do" list and shine a spotlight on accomplishments.

Instead of cultivating a larger economic pie, generating increased economic opportunities so that all might benefit, the executive order and the council it created were more concerned with equality of outcomes, government spending, and finding excuses to regulate. The Competition EO was also used to harness antitrust enforcement to achieve the administration's political goals.

The problem with the Competition EO was not its call for a whole-of-government approach to competition, but rather its call for government to exert sweeping control over the economy. Ultimately, its Neo-Brandeisian message will be remembered as a failure.

## A. Obsession with Fairness, Disregard for Efficiency

The word "fair" has been used to attack the sound, bipartisan consensus that has long governed antitrust. The Neo-Brandeisian movement is not interested in promoting competition, instead it's all about promoting what it thinks is fair.

The Competition EO states, "A fair, open, and competitive marketplace has long been a cornerstone of the American economy…" The drafters added the word "fair" as a qualifier to an otherwise sensible statement. By the end of the Biden Administration, the insertion of the word "fair" as a modifier to "competition" became boilerplate language commonly used in press releases to policy statements across the government.

While it is appropriate for Congress to legislate what is fair, it should not do so through a reshaping of antitrust law. Early in her tenure, Chair Khan touted[32] her ambition to have the agency become "a public body whose work shapes the distribution of power and opportunity across our economy." Fellow FTC Commissioner Alvaro Bedoya followed on in a speech entitled *Return to Fairness*[33], where he stated:

> "If efficiency is so important in antitrust, then why doesn't that word, "efficiency," appear anywhere in the antitrust statutes that Congress actually wrote and passed? If efficiency is the goal of antitrust, then why am I charged by statute with stopping unfair methods of competition, and not "inefficient" ones? We cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law. I think it is time to return to fairness."

While the word "efficiency" does not appear in the antitrust statues, neither does the word fair. Congress has never empowered antitrust enforcers to determine what is fair, or what business conduct might be alternatively more fair. Similarly, Congress did not direct antitrust enforcers to make resource allocation decisions in place of the market. Further, antitrust is not there to save companies from making bad, inefficient, or even less efficient business decisions. Market forces routinely punish such mistakes.

Instead, Congress passed the Sherman Act to guard against monopolies and attempts to monopolize. Similarly, the FTC Act directs the agency to prevent methods of competition that can be shown to be "unfair."

Determining what is "unfair" is different than deciding what is "fair." Deciding what is fair is left to elected officials. Statutes that are about fairness use the word fair in their titles, if not in the statutes' underlying text. Take the Fair Credit Reporting Act, a law that was passed making explicit judgements as to what information could be collected and relied upon to ensure credit reporting is fair and accurate. Similarly, the Fair Housing Act prohibits discrimination in housing based on race, religion, national origin, sex, disability, and familial status.

In contrast, antitrust law is about determining what is unfair. Manufacturers, distributors, and customers each have their own perspectives on what constitutes a fair price. Similarly, a firm and its competitor will have differing views on whether a particular business practice is fair. Antitrust sets a high bar and is deeply skeptical of those that seek fairness. It rejects simple harms to competitors, because aggressive competition is likely to harm a competitor to the benefit of the consumer.

As a result, antitrust is leery of cries for fair competition when the business practices being criticized create efficiencies, lower prices, and spur innovation. This is how the courts have interpreted antitrust law to differentiate an attempt to monopolize from hard fought attempts to win greater market share on the merits. Courts find business practices to be unfair where economic justifications are absent. And in a real sense, inefficiency is "unfair"–inefficiency means higher costs and ultimately higher prices. Congress has backed this approach, choosing not to inject a fairness standard into the nation's core antitrust statutes.

The Neo-Brandeisian champions, former Assistant Attorney General Kanter and FTC Chair Lina Khan, tried to make antitrust all about fairness. They justified their policy and enforcement decisions as promoting fair competition and, in the process, rejected the importance efficiency plays in our economy. The obsession with fairness was a failure as it called on government to micromanage the economy and usurp the role of the consumer to pick winners and losers in the market.

## B. Concentration Myth

The Competition EO also peddled the flawed belief that our economy has become more and more concentrated over time, driven in part by lax merger enforcement. The Competition EO espoused the view that overconcentration had led to stagnant growth, lower levels of private investment, and less innovation. Such dogma is in direct contradiction with the government's own data which shows that:

- Industrial concentration[34] has been declining rather than increasing. Concentration in the manufacturing sector and economy-wide concentration have both been declining since 2007.
- Levels of industrial concentration in the U.S. economy fluctuate over time. Higher concentration industries tend to become less concentrated while lower concentration industries tend to become more concentrated.
- Rising industrial concentration is often a sign of increasing market competition and associated with positive outcomes such as output growth, job creation, and higher employee compensation.

Further, using government data examining merger activity by sector and the impact on innovation[35], research shows that:

- R&D expenditure and patent applications increased substantially over the period studied, and this increase occurred at the same time as there was an increase in merger activity.
- On average, mergers are associated with an increase in R&D expenditure of between $9.39 billion and $14.54 billion per year in R&D intensive industries and an increase of between 1,421 and 3,045 utility patent applications per year.
- There is no empirical evidence showing that merger activity at the industry level has slowed down innovation.

If lax merger enforcement played a role in driving up concentration levels, incentives to compete would diminish, investment levels would fall, and there would be fewer innovative outputs. However, the data suggests that mergers within a given industry resulted in the entire industry needing to make increased investments in R&D to remain competitive. Concentration in a well-defined antitrust market can be an important indicator for antitrust scrutiny, but the Neo-Brandeisians' misleading efforts to use its concentration narrative as an excuse to drive their agenda and been soundly rejected by serious antitrust economists[36].

## C. Inflationary Impact

As inflation rose in response to excessive government spending and supply chain shocks that were the result of the pandemic, the Competition EO was also used to push the discredited notion that high food prices were a result of industrial concentration. What followed was a slew of administration press releases announcing actions to insert big government into the marketplace. Suddenly, the administration claimed that price gouging was rampant and widely labeled fees[37] as "junk." President Biden even made a gimmicky White House video[38] released at the time of that year's Super Bowl decrying shrinkflation–blaming companies for trying to keep prices down by putting less product in a package.

While inflation was very real, the idea that a "concentrated corporate America" was using its market power to raise prices was what the White House wanted voters to believe. Yet, no one with a basic understanding of economics believed it to be true.

Looking at the price of beef and dairy[39], President Biden's own Agriculture Department recognized that the prices were being driven by higher feed costs, increased demand, and changes in the supply chain.
The government's own data shows that concentration in the meat packing sector has remained constant for the past 25 years, yet meat prices fell in the five years before the pandemic. If, as the administration asserted, industrial consolidation was a problem, then why didn't concentration levels drive prices higher before the pandemic?

The answer, of course, is politics and according to a Washington Post[40] article, at that time, "polling experts told senior White House officials that they needed to find a new approach as public frustration over price hikes became widespread and highly damaging to Biden's popularity ... 'You need a villain or an explanation for this. If you don't provide one, voters will fill one in.'" Yet, "Senior officials at the Treasury Department, for instance, have been unsettled by the White House's attempts to blame some large corporations for inflation, skeptical of that explanation for the recent rise in prices." The conclusion being that "Unfortunately, the White House's latest response is to blame greedy businesses. Economists across the political spectrum are rightly calling out the White House for this foolishness."

Inflation was a result of supply chain shocks as the economy awakened from the pandemic, coupled with massive outlays in government spending, and pent-up consumer demand. Blaming corporate concentration as the catalyst for inflation only served to further discredit the Neo-Brandeisian movement and its Competition EO.

It was misguided enough to try to link the concentration myth to inflation, but to make matters worse the action plan the Competition EO sought to direct was itself inflationary. The Competition EO fosters the belief that "big" is bad and small businesses are inherently better than larger businesses.

Yet being stubbornly against large business requires one to reject the importance of efficiency in the market. Economists have proven that efficiency gains result in gains to productivity and increases in productivity drive economic growth. So, without efficiency, it's difficult to deliver growth. This is common sense, but as Voltaire said, "common sense is not so common."

Columbia University Law Professor Tim Wu is credited as being the lead author behind the Competition EO, and served early in the Biden Administration as its "competition czar." He is well known for his view that "big" is bad[41], and for being a founder of the Neo-Brandeisian movement. In 2020, he authored a curious New York Times piece entitled, *The Flour You Bought Could Be the Future of the US Economy*[42]. In that article he argues that the emergence of boutique flour mills is a better way to organize our economy than allowing large mills to produce the vast amounts of flour consumed annually. He writes,

> ...the business of flour was almost entirely overtaken by large, centralized operations. For many decades now, flour has been ruled by the central dogma of American business strategy: maximization of size and scale, ideally to the point of monopoly. Most of America's large national corporations are built on this model...
>
> Could more parts of the American economy be restructured along these lines, with employees as beneficiary-owners, with more people doing more work in companies operating on a more reasonable, human scale? We have, for the past few decades, put our faith in an economic model that insists that everyone will be better off if we do everything to make production as cheap as possible, keeping prices and salaries low, and make every region of the economy highly specialized.

Setting aside the reams of economic literature that speak to the importance of transitioning an economy away from being locked in the confines of an agrarian society, Professor Wu's views are incredibly inflationary. The retail price of a five-pound bag of artisan flour is more than 200% the cost of the same size bag of generic store brand flour. Making matters worse, flour is a key ingredient in what ends up on dining room tables across America. An economy reliant on small flour mills would send food costs sky high.

During the recent period of high inflation, such views clearly had little basis in reality, yet the Neo-Brandeisian movement sought to use the Competition EO to declare war on companies that had achieved economies of scale. Such a move only served to fuel, not fight, inflation. While the message Wu embedded into the Competition EO was inflationary, the missives it directed were even more so.

## D. Robinson Patman Redux

The FTC was directed via the Competition EO to revitalize the Robinson-Patman Act, a law so tortured that back in the 1970s the antitrust agencies and the courts gave up trying to find a violation that made economicsense. In theory, the Act targets price discrimination and is intended to ward off the practice of same goods being sold at different prices.

Back in 2007, the bipartisan congressional Antitrust Modernization Commission[43] recommended Congress fully repeal the statue:

> The Commission recommends that Congress finally repeal the Robinson-Patman Act (RPA). This law, enacted in 1936, appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage.

The Commission further explained that any intent to help small businesses access better pricing had failed to function in practice, and stressed that the statute's enforcement would only serve to raise prices:

> In its operation, however, the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would. As one commentator has explained, the Robinson-Patman Act 'was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices.' Moreover, the Act ironically appears increasingly to be ineffective even in protecting small businesses. Over time, many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs—and thus increase costs to consumers—but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective.

Neo-Brandeisian champions like FTC Commissioner Bedoya believe[44] that, if the Robinson-Patman Act was enforced, prices would magically drop to the lowest price point offered. In reality, if the law were to require all prices for a product or service to be made universally the same, the price offered might be at the highest price or somewhere in between the highest and lowest price previously offered.

Nevertheless, the Competition EO called for the Federal Trade Commission to step up its enforcement of Robinson-Patman at the same time inflation was running at record-setting levels. Two former FTC Commissioners warned[45] that the Neo-Brandeisian movement is:

> ...too focused on corporate size. Fetishizing outdated ideas from the 1960s and before, they propose reforms that would focus myopically on bigness, punish lower prices, and embrace the higher prices of their preferred cartels. At a time of historic inflation, these ideas are bad for all Americans, and they will hurt the poor the most.

The Competition EO's foolish views on concentration have been proven untrue and the direction it provided agencies to act was inflationary.

## E. Belief That Government Drives Growth

The Biden Competition EO initiated four years of directed attacks on large businesses across nearly every sector of the economy. While it is important to use policy to promote small business, it need not be done by attacking larger ones. Ultimately our economy needs both large and small businesses to thrive—not centralized government dictates.

Perhaps the greatest single flaw of the Neo-Brandeisian movement's Competition EO is that it presumed that "government knows best" how to grow the economy. Its sole positive contribution to tackling a government barrier was to remove the need for a prescription to buy hearing aids. Had the Competition EO been chock-full of similar efforts to remove onerous regulations, it would have appropriately leveraged a whole-of-government approach to promoting competition. Instead, the EO marshaled the forces of government to align against job creators, innovators, and investors—it was about everything but growth.

In stark contrast, the United Kingdom, under the rule of the Labour Party, recently fired[46] its lead competition regulator for being anti-growth. Charting a much different course from Biden's Competition EO, the UK Prime Minster stated, "We will make sure that every regulator in this country—especially our economic and competition regulators—takes growth as seriously as this room does."

This pro-growth-oriented view is what an executive order on competition should trumpet. Instead, the Biden Competition EO called from more government, directing 12 different federal agencies to deliver 72 growth-killing initiatives, save for its sole effort to deregulate hearing aids.

## F. Lesson Learned

In short, an obsession with fairness, a disregard for efficient markets, myths about concentration, and a policy prescription that fueled inflation and dampened growth doomed the Neo-Brandeisian vision articulated through the Competition EO was a failure. Ultimately, President Biden tried to distance himself from its political narrative. As the election approached and before President Biden withdrew, he touted[47] that in speaking with various world leaders he often heard them talk about how they "envy" the strength of the American economy. Biden's Competition EO clashed with his newfound perspective. The Neo-Brandeisian movement ironically sabotaged itself as Bidenomics and the Competition EO proved to be a political dead weight.

# IV. Neo-Brandeisian Rulemaking at the FTC: Was it Streamlining or Steamrolling?

Neo-Brandeisians embraced FTC rulemaking[48] even before Lina Khan (or for that matter, President Biden) had taken office. For the upstart movement, the appeal of regulation was irresistible: traditional antitrust law's case-by-case approach was too incremental, legislative efforts were too slow, and even small substantive policy wins would be too hard-won. In contrast, bright line rules would allow the Neo-Brandeisian movement to gain a toehold and shape economic policy with relatively quick, assertive action. At the outset, the Neo-Brandeisians offered three justifications for their attempted end-around antitrust law:

1. *"Compared to litigation, rulemaking allows more stakeholders to express their views"*

   This argument–which seemingly ignores the existence of amicus briefing and public comment on proposed mergers, let alone legislation–assumes that an FTC rulemaking record is the only suitable forum for an antitrust or consumer policy debate.

2. *"Regulation brings certainty"*

   According to Neo-Brandeisians, the traditional case-by-case approach requires businesses to infer what constitutes unfair or deceptive conduct, based on their reading of the cases that the agency brings. Rules would make the Neo-Brandeisians' expectations for businesses clear.

3. *"Litigation is too slow and expensive"*

   The argument here was that complex antitrust cases take several years to resolve, time that the Neo-Brandeisians apparently thought they did not have.

Armed with these justifications, the Neo-Brandeisian movement embarked on its attempt to dismantle traditional antitrust principles through broad regulation. The Neo-Brandeisian approach prioritized government intervention to reshape market dynamics, and ignored or diminished the well-established consumer welfare standard that has guided antitrust law for decades. Critics argued that this approach undermined economic realities and consumer interests by, e.g., granting bureaucrats broad discretion to block mergers and acquisitions based on subjective or politically-motivated criteria. By shifting focus away from fostering competition and consumer benefits, such as lower prices, better quality, and innovation, the Neo-Brandeisian view began to erode the foundations of a vibrant and competitive economy. The early rulemaking proposals sparked concerns about regulation's potential to stifle economic vitality and competitiveness in the U.S. marketplace.

Undeterred, the Neo-Brandeisians pressed forward with rulemaking. Mere days after Lina Khan's surprise installment as Chair of the FTC, the agency embarked on an aggressive regulatory and rulemaking agenda that spanned nearly four years. The agenda was shaped in large part by Neo-Brandeisian petitions for rulemaking in policy areas that had been historically (and justifiably) unregulated by the FTC, including noncompete agreements[49] and exclusive contracts[50]. And even where the FTC has limited authority to issue sector-specific rules (as with Trade Regulation Rules promulgated under Section 18 of the FTC Act, also known as "Mag-Moss Rules"), Neo-Brandeisians urged the agency to expand that authority, testing the limits of its statutory authority. Petitioners pushed the FTC to adopt sweeping regulations that would significantly alter business operations across not one, but multiple sectors. These petitions emphasized the need for prescriptive, economy-wide rules to address issues they view as systemic, such as data collection[51] or surcharges[52]. This approach reflected the Neo-Brandeisian commitment to using regulatory tools to restructure markets and curb corporate power, even at the risk of overstepping established legal boundaries.

The Khan-led FTC majority heralded this rulemaking agenda as a return to "streamlined procedures" designed to cut through "self-imposed red tape" and "signal a change in Commission practice and ambition." But while Chair Khan brought immediate change to internal agency procedures fueled by Neo-Brandeisian ambition, the practical effect and long-term legacy left by Chair Khan's "Rule-A-Palooza"[53] has had limited lasting impact.

## A. Departure from Traditional Principles

Chair Khan's tenure was marked by a dramatic shift away from the FTC's traditional focus on consumer welfare and case-by-case enforcement. Instead, the agency pursued sweeping rulemakings and policy changes that aimed to reshape the U.S. economy. As noted above, in response to a Neo-Brandeisian petition for rulemaking, the FTC proposed banning noncompete agreements, a move that disregards decades of state-level regulation and longstanding recognition of their procompetitive benefits. This blanket approach ignored the nuanced role noncompete agreements play in protecting intellectual property, fostering innovation, and encouraging investment in workforce training.

Moreover, the FTC sought to expand its authority beyond its statutory limits. By attempting to regulate employer-employee relations and micromanage a host of other business practices, the agency effectively positioned itself as a legislative body—a role that Congress has not granted it. By doing so, the agency necessarily had to draw resources away from its core competencies and statutory mandate (i.e., investigating violations of existing law on a case-by-case basis). This overreach drew sharp criticism from legal experts, economists, and even FTC commissioners (both current and former), who argue that the agency's actions violated the Supreme Court's "Major Questions Doctrine," which requires clear congressional authorization for regulations of significant economic and political importance.

One striking example of this overreach was the Khan FTC's attempt to resurrect rulemaking that would interpret unfair methods of competition ("UMC rulemaking"). This misadventure began before Lina Khan took office; in 2020, Khan and then-Commissioner Rohit Chopra wrote an article in the University of Chicago Law Review setting out *"The Case for Unfair Methods of Competition Rulemaking."*[54] When she became Chair, Khan put her thesis to the test by announcing a rule declaring that nearly every employee noncompete agreement violated Section 5 of the FTC Act.

In finalizing the rule, the Khan-led Commission (at the time devoid of Republican members) ignored critics[55] who argued that Congress did not authorize UMC rulemaking at the FTC. A federal court later agreed and set aside the rule. As of now, that decision is on appeal, and the fate of FTC UMC rulemaking (not to mention the noncompete rule itself) is very uncertain. Agency resources devoted to drafting and defending the rule in court might have otherwise gone to case-by-case investigation of Section 5 violations, including violations in the form of actually unfair noncompete agreements. Instead, the agency has yet to adjudicate or bring to federal court a single case involving noncompete agreements. If, as the Khan majority argued, such agreements are categorically illegal, the ill-fated rulemaking attempt represents a lost opportunity of incalculable scope.

The Khan FTC attempted similar power grabs even where Congress clearly set out limited Mag-Moss rulemaking authority. With Mag-Moss, Congress granted authority to issue rules governing unfair or deceptive acts or practices, but only where the Commission can "define with specificity" what practices are unfair, and only when the rulemaking record demonstrates that those specific acts are "prevalent." Too often, Khan's FTC ignored one or both of those statutory requirements, and the resulting Mag-Moss rule suffered from the same fatal defects as the noncompete rule: it was too general, too far-reaching, or both. The "streamlined" Neo-Brandeisian Mag-Moss procedures only amplified these defects.

Under the new rulemaking process, the Neo-Brandeisians took shortcuts, abused the FTC's statutory authority, and steamrolled over critics (both within the Commission and outside the agency) who warned that the rules were not grounded in economic evidence or appropriately tailored to address specific acts or practices. Unlike more durable and successful Mag-Moss regulations (governing, e.g., fraudsters who impersonate Government officials, or a patient's right to receive a copy of their eyeglass prescription), the Mag-Moss rules that dominated the Neo-Brandeisian movement's attention were intended to broadly cover, e.g., all internet advertising, or all subscription models, across the U.S. economy.

## B. The Real Rulemaking Record: The Numbers Behind Chair Khan's "Rule-A-Palooza"

As the dust settles on Chair Khan's disruptive term, the FTC's rulemaking success/failure rate has come into sharper focus. This rulemaking record can be evaluated by revisiting the Neo-Brandeisian justifications for regulation, as set out above:

*"Rulemaking allows more stakeholders to express their views"*

To usher in the Neo-Brandeisian "Rule-a-Palooza," the FTC unilaterally revised its longstanding internal rulemaking processes. These changes (themselves made without stakeholder input) were sold to the public as "streamlining" measures, and included eliminating important safeguards – such as public feedback and cross-examination opportunities–that were previously part of the Mag-Moss rulemaking model. The revisions granted the Chair greater control over the process by allowing him or her to select a Presiding Officer for rulemaking hearings and dictate the hearing agenda and fact-finding process. This consolidation of power reduced internal transparency and oversight, enabling the FTC to expedite a Neo-Brandeisian regulatory agenda. However, the changes raised valid concerns about the lack of public participation, diminished procedural integrity, and increased the potential for politically-motivated decision-making. As a result, these "streamlining" revisions ultimately gave lie to any contention that Neo-Brandeisian regulation is preferable to case-by-case enforcement because it promotes a more public exchange of views.

*"Regulation brings certainty"*

For consumers and companies seeking certainty, the Neo-Brandeisian rulemaking record was an unqualified failure. The FTC introduced 21 rules governing competition and consumer protection conduct. The fate of fourteen of these rules (or 67%) remains uncertain, either because a court order invalidated them (as with the noncompete and CARS rules) or because they have been frozen pending review by Congress or current FTC leadership:

| Rule | Vote | Competition/ Mag-Moss Rule? | Status |
|---|---|---|---|
| CARS Rule | 3-0 | | Uncertain (invalidated) |
| Noncompete Rule | 3-2 | Competition Rule | Uncertain (invalidated) |
| Privacy Rule | 3-2 | Mag-Moss Rule | Uncertain (frozen) |
| COPPA Rule | 5-0 | | Uncertain (frozen) |
| Junk Fees Rule | 4-1 | Mag-Moss Rule | Uncertain (frozen) |
| Business Opportunity Rule | 4-0 | | Uncertain (frozen) |
| Funeral Rule | 4-0 | | Uncertain (frozen) |
| Energy Labeling Rule | 5-0 | | Uncertain (frozen) |
| Earnings Claims Rule | 3-2 | | Uncertain (frozen) |
| Negative Options Rule | 3-2 | Mag-Moss Rule | Uncertain (pending lawsuit) |
| COPPA Rule | 5-0 | | Uncertain (frozen) |
| Junk Fees Rule | 4-1 | Mag-Moss Rule | Uncertain (frozen) |
| Business Opportunity Rule | 4-0 | | Uncertain (frozen) |
| HSR Rule | 5-0 | Competition Rule | Uncertain (pending lawsuit) |

The Khan-led FTC did succeed in promulgating seven rules that provided more certainty regarding what specific conduct violates Section 5 of the FTC Act. But this subset included only narrow rules governing specific sectors where the agency established an adequate evidentiary record of violations and based the rule on clear statutory authority. As a result, the rules almost unanimously enjoyed bipartisan Commission support. In other words, the rules passed despite Neo-Brandeisian influence on the agency, not because of it:

| Rule | Vote | Competition/ Mag-Moss Rule? | Status |
|---|---|---|---|
| Health Breach Notification Rule | 3-2 | | Promulgated |
| Eyeglass Rule | 5-0 | Mag-Moss Rule | Promulgated |
| Fake Reviews Rule | 5-0 | Mag-Moss Rule | Promulgated |
| Telemarketing Sales Rule | 3-0/4-1 | | Promulgated |
| Impersonator Rule | 3-0 | Mag-Moss Rule | Promulgated |
| Safeguards Rule | 3-2/3-0 | | Promulgated |
| Made In U.S.A. Rule | 3-2 | | Promulgated |

*"Litigation is too slow and expensive"*

Neo-Brandeisians learned quickly that steamrolling over critics to impose broad regulation was not an effective strategy to avoid the time and expense of case-by-case litigation. To the contrary, the Neo-Brandeisian "Rule-a-Palooza" simply shifted agency litigation resources: rather than prosecute Section 5 violations on a case-by-case basis, the FTC devoted time and money drafting and then defending the Neo-Brandeisian regulation on a rule-by-rule basis.

Rule-a-Palooza invited significant legal challenges, with critics arguing that the agency exceeded its statutory and constitutional authority. Among other petitioners, the U.S. Chamber of Commerce filed lawsuits against rules such as the blanket ban on noncompete agreements and the Negative Option Rule, which, it argues, are arbitrary, capricious, and lack clear Congressional authorization. These lawsuits highlighted concerns that the FTC is bypassing established legal norms, ignoring due process, and attempting to regulate broad swaths of the economy without sufficient evidence of harm or statutory backing. Courts have increasingly scrutinized the FTC's actions, with some rulings already curbing its overreach, such as the rejection of its authority to enforce certain rules under the Major Questions Doctrine. Even the threat of litigation has impeded the push for Neo-Brandeisian regulation: the agency significantly pared back regulations like the HSR and Junk Fees rules to gain bipartisan internal support and, in part, to forestall further judicial scrutiny of the agency. Viewed as a whole, these cases demonstrate the growing tension between the FTC's Neo-Brandeisian regulatory ambitions and the practical and legal limits of agency authority.

Just as important, these cases represent an incalculably large lost opportunity cost. As it continued to prioritize and defend an aggressive Neo-Brandeisian rulemaking agenda, the FTC sacrificed its traditional focus on enforcement and case-by-case adjudication. With Chair Khan at the helm, the agency brought significantly fewer enforcement actions compared to previous administrations, diverting resources away from its core mission of protecting consumers and promoting competition. Predictably, this shift has led to a decline in productivity. Critics argue that this approach has distracted the agency from addressing pressing competition cases and consumer protection issues, and has only served to undermine the agency's credibility. By emphasizing Neo-Brandeisian rulemaking over enforcement, the FTC neglected its foundational responsibilities, and left consumers and businesses vulnerable to unchecked market practices.

## C. Lessons Learned

While the agency's stated goal was to address perceived issues of unfairness, deception, market concentration, and unfair competition, its actions have instead revealed a troubling pattern of overreach, resource mismanagement, and disregard for statutory authority. As then-Commissioners Noah Phillips and Christine Wilson predicted, these missteps have had grave consequences for the agency. They have contributed to undermining the agency's credibility among practitioners and in the courts. They have diverted precious agency resources away from enforcement, exposing American consumers to greater risk of fraud.

Moreover, the FTC's internal operations suffered under Khan's guidance. Surveys[56] revealed plummeting staff morale, with nearly 30% of employees expressing a lack of confidence in the agency's leadership. Procedural irregularities such as the use of "zombie votes[57]," elimination of staff reports, and expanded control by the Chair over the rulemaking process were perceived by many within the agency not as "streamlining," but "steamrolling", and further highlighted the agency's dysfunction. These issues have not only eroded trust within the FTC, but have also raised serious questions about its ability to execute its mission effectively. Indeed, one likely lasting legacy of Rule-A-Palooza will be increased scrutiny of the agency from Congress and the courts. And the agency's ill-advised foray into competition rulemaking dealt a final, likely fatal, blow to the notion that the agency ever had the authority to regulate in that space.

Additionally, the agency's focus on ideological rulemaking has come at the expense of its core enforcement responsibilities. Data shows that the FTC has brought fewer cases under Chair Khan's leadership, even as it has pursued legally questionable initiatives. This misallocation of resources has left businesses and consumers vulnerable to genuine consumer protection and antitrust violations while the agency chased politically motivated goals.

# V. The Neo-Brandeisian's Failure to Reshape Merger Law

Post-election, one can begin to evaluate the Biden Administration's impact on merger policy and enforcement. Of course, a complete assessment will take time, as a few lawsuits continue to work through the system, but the pertinent questions are already apparent. Did the FTC and DOJ persuade courts to adopt the Neo-Brandeisian theories that generally view mergers as an evil that promotes economic concentration, that sought to supplant the consumer welfare standard with an ambiguous focus on "market realities," and that treated settlements with hostility? Did their cases help consumers and the country's economic dynamism? And perhaps above all, what sort of lasting imprint, if any, did the agencies leave? One can conclude that, by most measures, the Biden Administration's merger record should be considered a failure. The agencies needlessly raised the costs of routine mergers by pausing "early terminations" and sending pre-consummation warning letters in connection with deals that it could not fully investigate within the Hart-Scott-Rodino (HSR) timelines. Despite this supposedly more aggressive posture, overall enforcement fell, settlements declined, and the agencies fared worse in court than their predecessors. Even in their handful of victories, courts declined to adopt the agencies' aggressive Neo-Brandeisian theories, and one can question whether these challenges ultimately benefited consumers—or the country. Moreover, while the agencies revised the merger guidelines and HSR premerger notification form, the more adventurous aspects of the guidelines have not been cited by the courts and the form faces litigation. In these and other instances, the agencies regularly exceeded their statutory authority. As a result, the Biden Administration's long-term merger "legacy," as it were, could prove nearly non-existent.

## A. The Biden Administration's Failed Merger Record

Despite all the sound and fury from the agencies' leadership, by many measures, antitrust enforcement actually fell under the Biden Administration[58] and the agencies failed to persuade the courts to adopt Neo-Brandeisian theories in an effort to reshape the law.

### 1. Reduced Enforcement

As a percentage of clearances, second requests and merger challenges fell to levels well below both the Obama and Trump administrations. Early in the term, a minority commissioner pointed out that the FTC's productivity had plummeted[59] under the then-new regime; for instance, from calendar year 2020 to 2021, merger enforcement actions fell from 31 to 12.

At the FTC, reduced merger enforcement likely reflected, in part, a misallocation of resources to multiple rulemaking and broad guidance documents. The FTC committed[60] to rulemakings because "the case-by-case approach to promoting competition, while necessary, has proved insufficient, leaving behind a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches." One commissioner[61] countered that the FTC's "anti-growth scheme involves regulation after regulation that exceed our legal authority and would recast the FTC as a mini-Congress."

### 2. Court Losses and Pyrrhic "Victories"

When the Biden Administration did bring enforcement actions, they were less successful than most administrations. According to a study[62], the Biden agencies' win rate fell well below the historical average. During its first three years, their win rate on injunctions was "about 55%, the second lowest of all administrations from 1993-2023, and below the all-administration average of about 62%." Even more significantly, the agencies failed to persuade the courts to adopt aggressive Neo-Brandeisian theories regarding the supposed evils of mergers and acquisitions. The agencies lost numerous high-profile cases, but even when they prevailed, they typically did so on narrow grounds, such as traditional concerns relating to horizonal overlaps:

| Transaction | Agency (FTC Vote) | Horizontal/ Vertical | Outcome | Did the court adopt a Neo-Brandeisian Theory? Other Material Impact on Antitrust Law and Policy |
|---|---|---|---|---|
| Illumina-Grail | FTC (4-0) | Vertical | Abandoned (Timing) Partially Blocked | No. While the court recognized the possibility that vertical transactions could foreclose rivals, the court also ordered the FTC to consider potential behavioral remedies. |
| Penguin Random House-Simon & Schuster | DOJ | Horizontal | Blocked in District Court | No. Recognized that existing antitrust concepts encompass the market for publishing rights to anticipated top-selling books. |
| U.S. Sugar Corp.-Imperial Sugar | DOJ | Horizontal | Closed–DOJ Loss in District Court & Appeal | No. The court rejected DOJ's attempt to define the market narrowly. |
| Nvidia-Arm | FTC (4-0) | Vertical | Abandoned | No court decision and thus no precedent. Early in the Biden Administration, the complaint deterred the parties from proceeding with this vertical merger in the chip space–a questionable outcome for consumers and the nation's competitiveness. |
| Lockheed Martin-Aerojet | FTC (4-0) | Vertical | Abandoned | No court decision and thus no precedent. Early in the Biden Administration, the complaint deterred the parties from proceeding with this vertical merger in the national defense space–a questionable outcome for consumers and the nation's competitiveness. |
| UnitedHealth Group-Change Healthcare | DOJ | Largely Vertical | Closed–DOJ Loss in District Court | No. The court rejected DOJ's request to ignore proposed divestures. |
| Booz-Allen-Everwatch | DOJ | Horizontal | Closed–DOJ Loss in District Court | No. The court rejected DOJ's request to ignore proposed divestures. |
| Meta-Within | FTC (3-2) | Vertical | Closed FTC Lost in District Court | No. A signature loss for the Neo-Brandeisians. |
| Tractor Supply/ Orscheln Farm & Home | FTC (5-0) | Horizontal | Closed–Settlement | No. The FTC accepted divestures, a traditional remedy in horizontal mergers. |
| Microsoft-Activision | FTC (3-1) | Vertical | Closed–FTC Lost in District Court (appeal pending) | No. A signature loss for the Neo-Brandeisians. |
| JetBlue-Spirit | DOJ | Horizontal | Blocked in District Court, abandoned on appeal | No. The court blocked a horizontal deal based on traditional theories, albeit with a curious reason of reason analysis that recognized the deal's benefits. |
| ICE/Black Knight | FTC (4-0) | Horizontal | Closed–Settlement | No. The FTC accepted divestures, a traditional remedy in horizontal mergers |
| Amgen-Horizon | FTC (3-0) | Vertical | Closed–Settlement | No. The FTC accepted a behavioral remedy, similar to the one offered but rejected in Illumina. |
| IQVIA-Propel Media | FTC (3-0) | Vertical | Abandoned, after District Court PI | Little impact as the court's decision rested on an ultra-narrow market definition. |
| Quantum/EQT | FTC (3-0) | Clayton Section 8 | Closed–Settlement | No. The FTC accepted behavioral remedies to resolve this matter, which had horizontal elements. |
| Albertson-Kroger | FTC (3-0) | Horizontal | Blocked in District Court | No. The court blocked a horizontal deal based on traditional theories but did not address the agency's novel labor union arguments. |
| Tapestry-Capri | FTC (5-0) | Horizontal | Blocked in District Court | No. The court blocked a horizontal deal based on traditional theories but did not address the agency's novel labor arguments. |
| Sealy-Mattress Firm | FTC (5-0) | Vertical | Closed–FTC Loss in District Court | No. A high-profile loss for the agencies. |

As noted in the table, some of the most significant losses include *Meta-Within*[63] (virtual reality), *Microsoft-Activision*[64] (cloud gaming), *Booz Allen Hamilton-EverWatch* (cybersecurity), UnitedHealth Group-Change Healthcare (insurance reimbursement), and *U.S. Sugar Corp.-Imperial Sugar*. In *Meta-Within*, the FTC's political leadership overruled[65] staff recommendations to permit the deal. Even when the agencies received a favorable decision, such as in *Kroger-Albertsons*[66] (groceries), or in *Tapestry-Capri* (fashion) the courts relied on traditional antitrust theories, such as those related to horizontal mergers, rather than novel theories, such as those related to a loss of competition for labor.

In other instances, the DOJ or FTC tried to spin the outcomes as Neo-Brandeisian wins. DOJ claimed that blocking the Penguin Random House-Simon & Schuster merger was a win for "workers" and labor markets. Yet, in this case authors are self-employed businesses in the supply chain that feeds publishing houses and antitrust has long been well equipped to deal with input markets. The press release[67] claiming victory for "workers" was pure spin. Likewise, with *Meta-Within* and *Illumina-Grail*, the FTC suggested the court recognized foreclosure at incipiency or that downstream foreclosure were viable theories of harm. These court decisions did not break any new antitrust ground as both are theories acceptable within traditional antitrust. The problem for the Neo-Brandeisian movement was the FTC lacked evidence to support its claim in *Meta-Within* and the court endorsed the potential that a behavioral remedy can hold to address concerns in *Illumina-Grail*.

In each of these cases, the FTC wrongly suggested they had accomplished something new[68] and different[69] with lasting impact on the law. Perhaps the most interesting case was DOJ's successful effort to block the *JetBlue-Spirit* merger. In that case, the judge made a questionable weighing of the evidence[70] to conclude harm to the consumer, which if the case had been appealed it might have been overturned. Sometimes courts get it wrong and from a policy standpoint, the judge applied a rule of reason analysis and did find harm within the confines of the consumer welfare standard. Hardly novel. Plus, it's hard to champion any merger case as a win when one of the merging parties declares bankruptcy after the transaction is blocked.

### 3. Phantom Deterrence and Vanishing Settlements

With at best a lackluster litigation record, the Biden Administration's antitrust agencies often touted their success outside the courtroom in deterring supposedly anticompetitive transactions and settling others. Here again, the numbers tell a different story. After the Biden Administration's early days in which merging parties abandoned some high-profile transactions, including *Nvidia-Arm* Limited and *Lockheed-Aerojet*, there is little statistical reason to believe that the Biden administration deterred mergers and acquisitions at a higher rate than their predecessors. From 2017-2019, under the first Trump Administration, HSR filings averaged[71] a bit more than 2000 annually. Merger activity dropped dramatically during the COVID pandemic and rebounded in 2021-2022 to record levels, well over 3000 filings. In 2023, HSR filings returned to more normal historical levels. Anecdotally, companies became more willing to take deals to court as they saw the agencies repeatedly lose cases.

The agencies also had less of an impact in settling matters outside of court. Historically, settlements had been used regularly to resolve competitive concerns with transactions, but early on, the agencies announced their reluctance to settle cases. As a result, their influence plummeted. During the Biden Administration's entirety, the agencies negotiated a grand total of 27 consents, compared to an average of 76.2 in prior modern administrations. According to one analysis[72], "the Biden Administration did not influence half as many deals as the Obama or Trump Administrations and far fewer than the Bush Administration."

Even when they could claim a victory, one can question whether those cases actually benefited consumers—or the nation's economic competitiveness. For example, after DOJ successfully blocked its proposed airline merger, Spirit Airlines filed for bankruptcy. As the Wall Street Journal[73] pointed out, DOJ's leadership "never lets economic reality interfere with [its] anti-business crusades ... passengers can look forward to fewer choices and higher prices."

On balance, the evidence shows that most mergers are procompetitive[74], and that holds especially true for vertical mergers. The Neo-Brandeisian movement pushed the agencies to be openly hostile toward mergers, targeting vertical mergers that would improve U.S. competitiveness[75]. The list is long: *Nvidia-Arm* Limited, *Lockheed-Aerojet*, *Meta-Within*, *Illumina-Grail*[76], and *Microsoft-Activision*. These are all vertical mergers that, if consummated, would have improved the global position of U.S. companies in various markets, including chip design, rocket motors for missiles, the metaverse, cancer treatments, and the gaming industry.

To be clear, the agencies should examine mergers. Antitrust law protects consumers, not the merging companies nor their competitors, and in the U.S., unlike some other countries, our laws do not and should not give preferential treatment aimed at promoting "national champions." Nevertheless, the agencies' aggressive merger reviews, often grounded in speculative theories and anti-merger dogma rather than evidence of consumer harm, often undermined our national interest in globally competitive markets. Merger review became a tool to attack companies and to engineer bureaucratic hurdles to economic freedom, progress, and growth.

### 4. Overly Aggressive Regulations and Guidance

In addition to failed enforcement efforts, the agencies revised both the merger guidelines and the HSR premerger notification form in ways that ignored precedent and statutory constraints. Although neither document has been in place long enough to evaluate its impact in a meaningful manner (no court, to date, has relied on the controversial portions of the 2023 merger guidelines), the agencies wrote them in ways that likely will limit their usefulness.

Passed on a partisan vote, the new merger guidelines[77] seek to rewrite decades of antitrust policy by declaring structural presumptions against mergers that increase market concentration and by downplaying the possibility of merger efficiencies. They rely on outdated cases[78] and economic ideas while ignoring recent court decisions that reject the agencies' theories. They also give the agencies tremendous discretion to pick winners and losers, dictate market structures, and play to favored constituencies. To date, it appears that no court has cited the guidelines for any of its more aggressive principles. The guidelines' value lay in their reflection of the current state of the law, precedent, and economics, rather than their endorsement of an ideological point of view. As a former commissioner explained, "Guidelines that depart from this tradition will lack credibility and soon fade."[79]

The revised HSR form likely faces a similar fate. As the Chamber has explained[80], the form demands far more information than necessary and appropriate for the agencies to initially evaluate a proposed merger, including information about officers and directors, a narrative response describing "all strategic rationales for the transaction," and additional data about related entities and minority holders with some modifications. The FTC itself estimated that the new form will more than quadruple the requisite time and expense, even as the vast majority of deals require only cursory review. The new form already faces a lawsuit and quite possibly congressional review. Without broad support from stakeholders, the new form, like the guidelines, likely will undergo significant revisions.

The agencies also sought to promote its Neo-Brandeisian agenda via other agencies. The FTC, DOJ, Department of Labor, and National Labor Relations Board signed a memorandum of understanding[81] to facilitate cooperation "to ensure that mergers between employers do not threaten harm to competition for workers." At one point, the FTC entered into a new Memorandum of Understanding with the Department of Labor[82] to "bolster the FTC's efforts to protect workers by promoting competitive U.S. labor markets and putting an end to unfair, deceptive, and other unlawful acts and practices, as well as unfair methods of competition, that harm workers." Neither the FTC nor DOJ ever explained how they would review a merger where the interests of consumers and workers might come into tension and, at least to public appearances, this exercise never produced anything concrete.never produced anything concrete.

### 5. Don't Trust the Process

Finally, the agencies also interfered with the merger review process in ways that exceeded their statutory authority and broke historical norms. As noted above, both agencies disfavored merger settlements, a policy that limited their ability to negotiate tailored relief and likely led to unnecessary litigation. For instance, the agencies "temporarily" suspended[83] grants of early termination for mergers that raised no competitive concerns, a policy that forced agency staff to waste time. The FTC sent pre-consummation warning letters[84] in connection with deals that it could not fully investigate within the HSR timelines; this move "defie[d][85] the will of Congress by undermining the premerger notification program." Moreover, as part of consent decrees, the FTC required companies to seek prior approval[86] for new mergers for ten years, a posture that dramatically expanded the agency's ability to dictate private conduct in ways not contemplated by Congress. All of this, while noisy and intended to drive uncertainty in the merger process, has not proven consequential.

## B. Lessons Learned

The Neo-Brandeisian efforts led by Chair Khan and AAG Kanter contain important lessons for current and future policymakers.

First, the agencies should seek to maintain the bipartisan consensus[87] on antitrust policy, one that had largely held fast during the past forty years and one that has enabled the U.S. economy to become the most dynamic in the world. To the extent that policymakers want to change course, they should seek broad support for those changes from stakeholders and from across the aisle. Such an approach preserves stability, predictability, and certainty in the law.

On these metrics, the Biden Administration failed badly. The agencies lost most of their significant merger challenges and, even when they prevailed in litigation, they failed to persuade courts to adopt Neo-Brandeisian theories. The agencies also failed to garner support from the broader antitrust community. A practitioners survey[88] found that "Both agencies are perceived as less transparent, less fair, and more combative in their interactions with merging parties." Two-thirds of practitioners (66%) responded that the FTC's current merger enforcement practices degrade efficiency and harm competition and innovation.

Second, the agencies should follow the evidence and the data. As explained in a prior section, early in his administration, President Biden issued an Executive Order[89] on Competition that rested on the belief that the private sector, including labor markets, had become overconcentrated and that the economy therefore lacked sufficient competition. Even though the evidence and data demolished these assumptions, the agencies continued to rely on them for their policy agenda, a willful error that likely contributed to poor enforcement decisions and the guidelines' focus on concentration and labor.

The data refuted the agencies' concentration narrative. For example, in an exhaustive analysis[90] of all available census data from the past two decades, economists found that since 2002, U.S. economic concentration has remained flat. In fact, since 2007 in both the manufacturing sector and the broader economy, the economy actually became less concentrated. Moreover, rising concentration often correlates with the underlying economic processes that drive growth: higher levels of sales, employment, and compensation

The data also undermined the agencies' labor beliefs. Chair Khan stated[91] that "a lack of competition in labor markets highlights deep asymmetries in power between firms and their workers and explains how these asymmetries can enable firms to disfavor and disempower workers, including through lowering wages, reducing benefits, and perpetuating precarious or exploitative working conditions."

To the contrary, another study[92] found that labor markets are and have been flush with competition during the past half century.

Written by the U.S. Department of Labor's former Chief Economist, the study found that America's labor markets are flexible, with high rates of employee turnover, high rates of firm expansion and contraction, regular movement of workers between states, and an average of twelve jobs held over an individual's career. Using public data from the Bureau of Labor Statistics, the study also finds that inequality has not been increasing and that Americans' income has in fact been rising over time. In part for these reasons, the study cautioned that "if the FTC continues down this regulatory path, the workers the agency claims to protect will suffer the greatest harm. The application of antitrust law to the labor market is unprecedented and, perhaps more importantly, antithetical to the well-being of workers."

Third, the agencies should build on statute and precedent, rather than seek to cast it aside or cherry-pick snippets of dicta from decades-old cases. As two former commissioners explained[93], "Merger enforcement should be administrable, predictable, and credible. Merger guidelines advance those goals when they reflect judicial precedent, incorporate sound developments in economic analysis, and accurately describe how the antitrust agencies assess mergers." By working to maintain the bipartisan consensus on antitrust law, following the data and evidence, and respecting and building on precedent, policymakers can enforce the law while also moving it in a positive direction.

At the start of her tenure, Chair Khan touted[94] her ambition to have the FTC become "a public body whose work shapes the distribution of power and opportunity across our economy." By this measure, and many others, the Biden Administration's antitrust agencies failed to implement a lasting Neo-Brandeisian agenda.

# VI. Neo-Brandeisian's Failure to Change State Law

During the past four years, Neo-Brandeisians not only attempted to change the law in Washington, D.C., they also fanned out across the country to enact progressive policies in state capitols. From California to New York and from Maine to Minnesota, legislators pushed for bills that would have undermined merger review at the national level and imported European competition concepts into America's antitrust regime. In fact, the bills introduced at the state level were arguably far more radical than the legislative attempts that were made at the federal level.

Uniformly, the Neo-Brandeisians failed to persuade any state to enact progressive antitrust legislation or to break from the time-tested federal principle that antitrust law protects consumers, rather than particular competitors. In most cases, progressive antitrust bills, including "abuse of dominance" proposals[95], garnered such little support that they died in committee. In general, the bills failed because savvy legislators realized that they were being sold snake oil. Neo-Brandeisian proposals would have damaged any state's economy by turning it into a national outlier, harming its business climate, and raising prices for consumers as the proposals would have placed wide swaths of the state's economy, including small businesses, at risk of amorphous and expansive antitrust liability.

## A. State Antitrust Laws

The state and federal governments share overlapping antitrust jurisdiction. Mirroring the federal statutes, the states[96] tend to prohibit anticompetitive conduct in broad terms and to adhere to federal concepts such as the consumer welfare standard. Some states also prohibit certain conduct in specific industries and a few states require premerger notification to state authorities of certain health care mergers. These state laws generally operate in tandem with federal law without federal preemption.

During the past few years, Neo-Brandeisians tried and failed to persuade several states to revise their antitrust laws.. The states targeted included: New Jersey, New York, Pennsylvania, Maine, and Minnesota.

### 1. Welcome to New York

New York's antitrust law, the Donnelly Act, generally mirrors the federal antitrust statutes. State bills, however, would have replaced this Act with a law modeled after Europe's antitrust laws, both removing the consumer as the law's touchstone and making New York the only state in the Union to abandon consumer-centric antitrust law. Most critically, the proposed legislation would have prohibited "abuse" of a "dominant position" and created a new state-level notification requirement for mergers and acquisitions.

Led by the Business Council of New York State, the private sector pointed out numerous problems with the bills.  For instance, the proposed "abuse of dominance" standard would have applied to any company within New York that through hard-fought competition earned a prominent market share in its local market, which could have included hospitals, resorts, outlet stores, and waste management companies–not just "big" businesses. Further, the legislation would have prohibited companies from offering procompetitive justifications as evidence to defend against claims of harm.

The bills would have created enormous compliance costs for businesses and, with New York as a national outlier, left businesses with little guidance as to what conduct was permissible, such as ordinary practices like exclusive contracts. As a result, the proposal would have invited endless class action litigation against businesses across the state.

Plus, while apparently not a major factor in New York's deliberations, a state law change could have dramatically affected the national competition landscape. Not only would local business be impacted, but most major companies operate in New York, and would have become subject to expansive state antitrust liability for conduct that was procompetitive and legal under federal law and in every other state.

Similarly, the Maine State Chamber of Commerce explained that abuse of dominance proposals in that state could have turned virtually any small business into a "dominant" business. As one small business owner pointed out[97],

> In Maine, which is a very rural state, there are countless businesses such as ours that, practically speaking, are among the few that provide important products or services in their local communities. These examples are nearly endless and include local convenience stores, grocers, plumbers, hair stylists, insurance providers, masons, gas stations and craft breweries.
>
> Yet, if [Maine's abuse of dominance bill] becomes law, my business and many others could be deemed to have a 'dominant position' in the local labor market, and therefore, we can be sued by the government or any person in the state claiming direct or indirect damages.

Such a bill "would be catastrophic for the small business community." Virtually any small business could become subject to onerous rules and burdensome litigation from anyone—competitor, worker, or agency—that disapproves of that business's operations, regardless of the benefits enjoyed by the consumer. Fortunately, the bills in New York, Maine, and other states all died in their respective legislatures. Yet, with new legislative sessions underway, similar legislation continues to be introduced.

### 2. Failures to Launch

In general, the Neo-Brandeisian state bills continue to fail because they purported to address an ill-defined problem, harm consumers, capture far too many businesses, and endanger each state's business climate by threatening to turn the state into a national outlier.

In the United States and in every state, antitrust law[98] relies on competitive forces to police the market for the benefit of consumers—not particular companies. Antitrust law does not and should not seek to pick winners and losers, dictate the number of companies that should compete in a market, or punish successful companies for their achievements. For four decades, the federal government, all 50 states, and U.S. courts have adopted the fact-based and economically grounded consumer welfare standard as the touchstone of antitrust law across the economy.

Neo-Brandeisian "abuse of dominance" proposals[99] threaten to turn antitrust law on its head. This standard punishes firms that achieve a certain degree of success by placing upon them special burdens that limit their ability to compete, merely because they have captured a large share of a market. Instead of helping consumers, antitrust law would become a tool for particular companies to lobby the government, or go to court, to punish their competitors or to seek more favorable terms for themselves.

The state antitrust bills, to date, have failed because state legislators realize that these proposals carry no clear benefits, only substantial risks–principally causing damage to the state's overall business climate. Existing antitrust laws already allow the state to combat practices that harm consumers and reduce competition, such as price fixing, collusion, and merger to monopoly. And state Attorneys General have in recent years, like efforts at the national level, stepped up enforcement efforts. Those efforts, where consistent with the law, are likely to be sufficient to appropriately promote competition.

## B. States Continue to Wrestle with Antitrust

Even today some states, particularly California[100], continue to toy with Neo-Brandeisian concepts. In early 2025, at the direction of the state legislature, the California Law Review Commission[101] (CLRC) staff floated a broad recommendation to make significant changes to the state's antitrust laws. For instance, the CLRC recommended a new law that incorporates elements of abuse of dominance and CALERA's lower "appreciable risk" standard for challenging a merger. If such amendments were to become law, California could turn merger clearance into a 50-state nightmare and give the California AG largely unchecked authority to punish success on the merits labeling pro-competitive business conduct an "abuse of dominance".

The past few years contain valuable lessons for policymakers in California and elsewhere. For example, a state should never seek to lose focus on the consumer within its antitrust statutes. Shifting focus from what benefits the consumer, to what is good for individual competitors, ignores the consumer's interests in price, quality, and innovation. Unfortunately, abuse of dominance proposals do exactly that, by seeking to protect favored competitors instead of the principle of vigorous competition.

Every state already has well-established tools to combat anticompetitive conduct, which have proven adaptable and robust over time. If legislators desire a different outcome from a specific market, than narrow legislation designed to achieve that outcome should be the focus of any legislative debate. Regulating market outcomes is not what broad antitrust statutes are designed to accomplish.

Moreover, state policymakers should recognize that state antitrust policy works most effectively in concert with other states and federal policy. Across the country, states recognized the significant risks of breaking from the national and bipartisan antitrust consensus. In contrast, states can promote sound antitrust policies when they collaborate to build on existing antitrust principles.

For example, the Uniform Law Commission recently drafted the Uniform Antitrust Pre-Merger Notification Act, a model bill that creates a simple, non-burdensome mechanism for a state attorney general (AG) to receive access to Hart-Scott-Rodino (HSR) filings at the same time as the federal agencies, and subject to the same confidentiality obligations. Under the uniform act, covered entities must provide their HSR filing to the AG contemporaneously with their federal filing. The material filed with the AG is subject to essentially the same confidentiality protections as applicable to the federal agencies, except that an AG that receives HSR materials may share them with any other AG whose state has also adopted this act. The anticipated effect is to facilitate early information sharing and coordination among state AGs and the federal agencies. An excellent example of cross-state collaboration that builds upon the existing federal framework, the act will balance the needs of state enforcers for information with the burdens and risks to filers.

Finally, policymakers should consider that, as a historical matter, states can best enforce antitrust law by focusing on local issues and acting either as a force multiplier or as a check on federal antitrust enforcers, as appropriate. As compared to the federal agencies, states have limited antitrust resources and expertise, including economists and econometricians. As a result, the most significant state enforcement actions are almost always brought in coalition with other states, and often the federal agencies. In 1983, the National Association of Attorneys General formed its Multistate Antitrust Task Force, which is now the main mechanism for coordinating multistate antitrust litigation.

In the past, state attorneys general have played a role in many significant antitrust cases, with mixed results. According to a study[102], states can effectively supplement federal resources and serve as a check on overly aggressive federal enforcement, but they usually fail when they act more aggressively than the federal agencies. Keeping in mind this history, the states can best contribute to robust antitrust enforcement by assisting the DOJ and FTC through their own expertise, manpower, credibility, and knowledge of local conditions. For instance, states may have unique interests in cases involving allegations of local price fixing or knowledge about how alleged anticompetitive behavior uniquely affects local markets. At the same time, the states can serve as effective checks on the federal agencies when those agencies stray from precedent and principle.

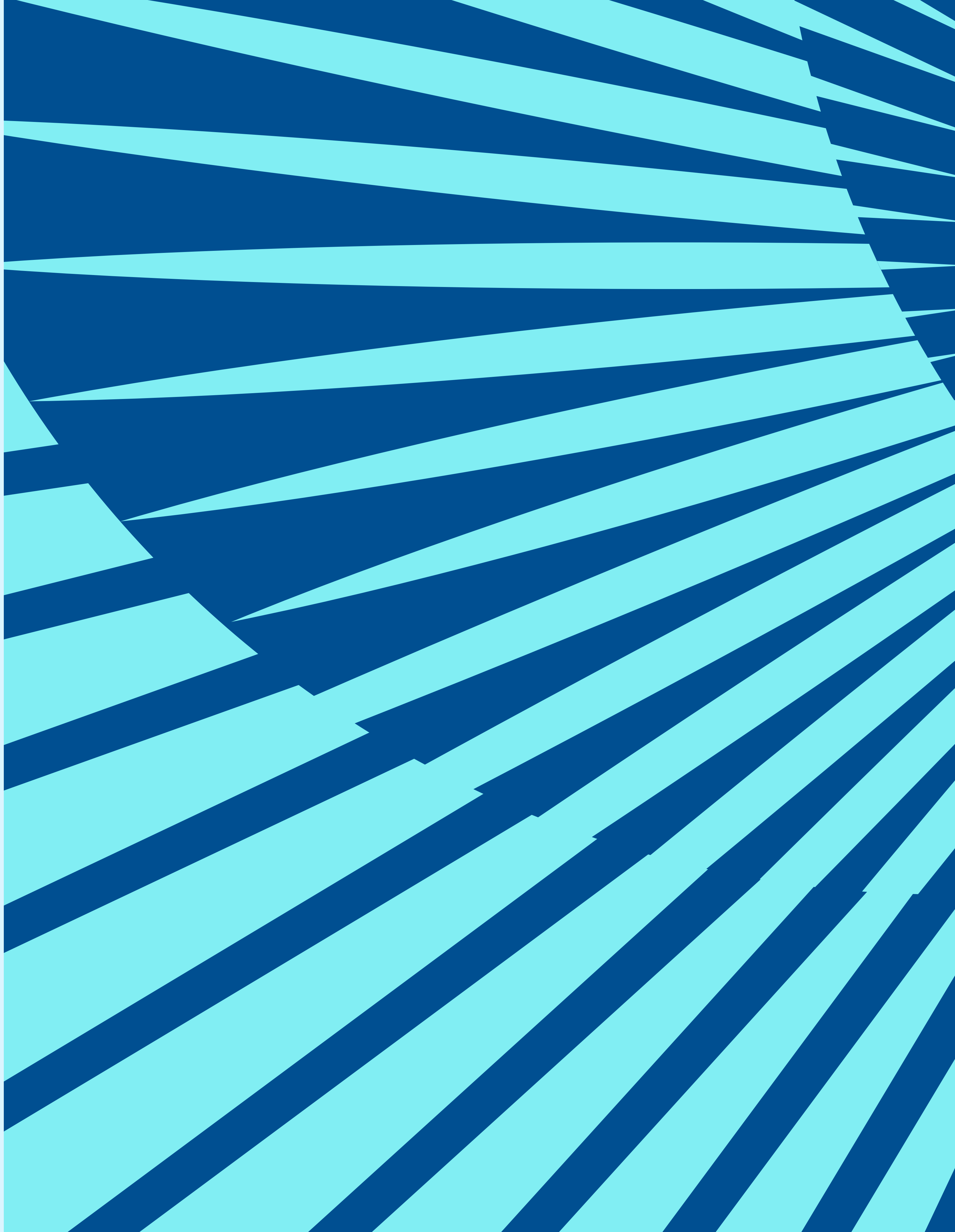
In sum, by working with other state and federal policymakers to build on the bipartisan consensus on antitrust law, following the data and evidence, states can contribute to the effective enforcement of antitrust law while also moving it in a positive direction.

## C. Lessons Learned

For more than a century, the various state antitrust laws have worked in concert with the federal antitrust laws, with similar language and standards that focus on the welfare of consumers, rather than particular competitors. This consensus has created a stable and predictable legal framework across the nation that has allowed American consumers to benefit from the free flow of goods and services, whatever the political dynamics of their home states.

The various Neo-Brandeisian bills threatened that stability at the state level. The bills would have shifted the focus of antitrust from promoting competition to protecting competitors from competition. They would have placed at risk many small companies, particularly in rural areas, for competing vigorously and gaining market share.

Both individually and collectively, state policymakers have wisely avoided succumbing to the siren song of Neo-Brandeisian proposals. Every state's existing antitrust law, particularly in combination with the state's ability to enforce federal law, more than suffices to protect competition and consumers in that state. The state-level Neo-Brandeisian proposals, however, would make the states that adopted them a national outlier and likely reduce investment in that state, to the detriment of the state's small businesses, overall business climate, and consumers.



# VII. Neo-Brandeisian's International Impact – Undermining U.S. National Interest Can Never Be Labeled a Success

The Neo-Brandeisian movement did its level best to be disruptive through the Competition Executive Order, legislation before Congress and in statehouse, various cases before the courts, and inept attempts at regulation. In the end, little progress was made to show for the enormous effort that was expended to reshape the law. However, the Neo-Brandeisian agenda has always been more naturally aligned with efforts abroad, where foreign jurisdictions have long been predisposed to similar views that the movement sought to cultivate within the United States.

Internationally, antitrust law is new in comparison to the more than a century of experience found within the United States. In other countries, antitrust law also often takes on a more regulatory approach that favors government intervention. This has been aided by countries being slow to adopt rigorous economic analysis to guide their interventions.

For many decades, the United States worked to encourage countries to stand up market-oriented antitrust laws and to provide technical assistance and share lessons learned with foreign agencies. These efforts appropriately served as a check on overly zealous enforcement by foreign agencies. The United States at various times has called out questionable investigations in foreign jurisdiction or pushed back when the use of antitrust law advanced the industrial policy objectives of American trading partners.

However, FTC Chair Lina Khan and DOJ Antitrust Division head Johnathan Kanter began a concerted effort to undermine any effort to mold antitrust laws around the world to more closely confer with the United States. In its place, Khan and Kanter worked to actively encourage foreign jurisdictions to explore their Neo-Brandeisian instincts.

International gatherings of antitrust officials saw conference agendas voicing frustrations that competition laws needed to be overhauled and that agencies needed new enforcement powers. A common focus of attention became American "big tech" firms. The DOJ and the FTC went so far as to send staff[103] to Europe to help implement the Digital Markets Act (DMA), an ex-ante competition law that targets American tech companies. The DMA is a law like[104] legislation that the Neo-Brandeisian movement failed to get Congress to adopt. And while Khan and Kanter worked to embrace the law in Europe, the rest of the Biden Administration was simultaneously expressing its concern[105] with the DMA and its level of discrimination against U.S companies. Congress was similarly not amused[106].

## A. International Cooperation & Enforcement

Khan and Kanter not only sought to steer policy conversations and encourage countries around the world to alter their laws, but they also worked to closely coordinate enforcement decisions in a highly questionable manner. There is no compelling need for collusive like coordination. The antitrust legal standards that must be met under the law differ from country to country. Further, the competitive landscape varies widely from country to country and U.S. law requires that harm to competition must be found within a properly defined market. No court recognizes a market definition that extends beyond a country's border. Despite the jurisdiction-specific nature of antitrust enforcement, unprecedented levels of cooperation were made to thwart mergers.

The FTC was caught having unexplainable conversations[107] with the European agencies regarding the *Illumina-Grail* transaction, a transaction that the European Commission had no legal right to examine. Ultimately because of the games that were played, the transaction was never successfully blocked by the law, but instead the deal ran out of time. Similarly unsavory games appear to have been played with the *Microsoft-Activision* transaction, which successfully closed, and Amazon's proposed acquisition of iRobot, that was ultimately abandoned. A Congressional investigation[108] into such collusive conduct failed to produce a logical explanation that defends the FTC's outreach to European agencies in *Illumina-Grail*. As for the other transactions and the degree to which behind the scenes cooperation efforts were made, the FTC has repeatedly refused to comply with freedom of information requests even after losing the lawsuit that exposed the unexplainable cooperation regarding *Illumina-Grail*.

## B. Upending Long-Standing Trade Practices

FTC Chair Khan and AAG Kanter recruited an ally in USTR Ambassador Katherine Tai to work to upend long-standing trade practices. In June 2023, Ambassador Tai was the keynote at a program organized by the Neo-Brandeisian hot-bed, Open Markets Institute entitled *The Next World System: Can US Trade Policy Make Us More Secure, Democratic, and Prosperous?*[109] Ambassador Tai used the opportunity to announce her allegiance to Khan and Kanter by pledging to work with them to align trade policy with the agencies' views on competition policy.

However, before the FTC-DOJ-USTR alliance became publicly known, earlier that spring, it was discovered[110] that both FTC Chair Khan and AAG Kanter had written a letter[111] to Ambassador Tai looking to undermine the procedural fairness best practices found in the competition chapter[112] of U.S. free trade agreements. Chair Khan was forced to acknowledge[113] the existence of the letter in an oversight hearing, and AAG Kanter was confronted with the letter[114] in an oversight hearing that fall. In both instances, Chair Khan of AAG Kanter refused to offer any explanation for their policy views and defend their attack on the trade text that had been previously acceptable to both agencies and ratified by Congress under the U.S.-Mexico-Canada (USMCA) agreement.

The letter, which the agencies spent months trying to keep secret, proffers that the competition chapter would somehow interfere with the agencies' ability to enforce the antitrust laws. Such a view is patently false as the obligations found in the competition chapter were carefully crafted by previous DOJ and FTC leadership to ensure they did not create any such burden.

Many antitrust agencies around the world have operated as black boxes and the due process commitments in the competition chapter were forged from international best practices to ultimately enhance the credibility of an antitrust agency's investigation. It should never be viewed as a hinderance to afford the target of an investigation legal counsel or to extend legal privilege protections. Likewise, a target should know the evidence collected against it, the theory of harm the antitrust agency is advancing against it, be given the opportunity to offer exculpatory evidence, and to cross-examine witnesses. Yet these exact provisions are what Khan and Kanter actively opposed. For the first time ever, U.S. law enforcement agencies were opposing basic protections grounded in the U.S. Constitution.

But the Neo-Brandeisian opposition to trade commitment went beyond the competition chapter. Khan and Kanter's disdain for "big tech" caused them to reach outside of their competency and object to provisions in digital trade[115] chapters. On October 24, 2023, USTR announced that it was withdrawing U.S. support for several digital trade provisions[116] important to the WTO e-commerce negotiations. The move came as a surprise to many inside the Biden Administration and a blame game started with all fingers pointing[117] at the Antitrust Division of the Department of Justice. Bipartisan backlash on the Hill was swift, as the key committees were also left in the dark about USTR's plans.

The digital trade provisions under attack included an endorsement of cross-border data flows, the protection of source code, and a commitment to not discriminate. One Neo-Brandeisian activist, a member of the American Economic Liberties Project's Rethink Trade Program, baselessly argued that such provisions interfere with privacy regulations, the need to regulate artificial intelligence (AI), and the ability to crack down on "big tech" in general.

The trade obligations being advanced by the United States at the WTO were based on the USCMA digital trade text that Congress approved. Congress was comfortable with the USMCA text, as it explicitly provides for carveouts for privacy and national security in relationship to data flows, and source code can be turned over to the government as part of an investigation. Moreover, there are other exemptions that are part of trade agreements that overarchingly safeguard the government's ability to regulate to protect legitimate interests. In short, governments are free to regulate. What trade agreements have long done is prevent governments from arbitrarily regulating against foreign companies–requiring that regulation not be discriminatory.

Non-discrimination is a potential rub for Europe's DMA, which imposes ex-ante competition regulation, currently only applied against foreign companies. The DMA is coveted by FTC Chair Khan and AAG Kanter as their preferred approach to manage competition in the marketplace. Suddenly, it became clear that trade policy needed to align with their agenda, and Ambassador Tai was pleased to oblige and let Europe, and other countries pursue similar polices against American companies.

Ultimately, the White House had to step in, and it started a more structured review of policy plans regarding digital trade provisions. That review was never concluded and the changes to the competition chapter were never relied upon. Lots of time, effort, and energy was spent to rewrite trade obligations, but in the end, the USMCA text remains intact.

## C. Lessons Learned

In sum, internationally, there is no doubt that the Neo-Brandeisian movement has been disruptive. Today, more than a dozen countries are considering DMA like competition regulation. It can also claim *Illumina-Grail* and Amazon-iRobot among its "successes". However, these successes are perverse as they were rogue actions that only serve to undermine U.S. national interest.

Europe is struggling to implement the DMA and it's far from certain that it will produce desirable competition outcomes. Countries considering ex-ante approaches to competition are also leery and beginning to deviate from Europe's model to avoid the visible pitfalls with law. Likewise, while Khan and Kanter were able to stall the further advancement of competition and digital trade provisions in trade agreements, they failed to advance the Neo-Brandeisian attempts to rewrite trade law.

Unfortunately, the misadventures of the last four years have served to undermine U.S. leadership, blunt U.S. competitiveness[118], and give key geo-political competitors like China an opportunity to expand their influence around the world. Particularly at a time when foreign competitors are seeking to seize the mantle of global economic and technological leadership, U.S. policymakers, and state policymakers, should ensure that its legal and regulatory framework continues to encourage investment and innovation.

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