



United States of America
Federal Trade Commission

**Marxism and Critical Legal Studies Walk into the FTC:
Deconstructing the Worldview of the Neo-Brandeisians**

Christine S. Wilson*

Commissioner, U.S. Federal Trade Commission

April 8, 2022

Remarks for the Joint Conference on Precautionary Antitrust:
The Rule of Law and Innovation Under Assault

Classical Liberal Institute at NYU School of Law and
Schumpeter Project on Competition Policy at the
Information Technology and Innovation Foundation

* The views expressed in these remarks are my own and do not reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor Adam S. Cella and my law clerk John R. Allaire for their assistance in the preparation of these remarks.

Like many of you, I have studied antitrust law and policy, and worked in the field, for decades. My perspective on antitrust is enriched by having served at the Federal Trade Commission, represented clients in private practice, and served as in-house counsel. Over the years, as one would expect, the field has evolved – enforcers have incorporated new economic learning into their analytical frameworks, courts have developed new legal precedent, and both law and economics have been applied to dynamic and evolving markets. In other words, the field is not static, and it is not meant to be, as the Supreme Court observed in *Kimble v. Marvel*.

Despite the failure of massive regulatory regimes, praise for those regimes and suggestions that similar regulations be applied to Big Tech;¹⁰

The House Judiciary Committee’s proposals that extended far beyond Big Tech – calling more generally for reinvigoration of the essential facilities doctrine, removal of the recoupment prong for predatory pricing, and so on;¹¹ and

Chair Lina Khan’s arrival at the FTC and the immediate jettisoning of traditional procedures and norms that had facilitated collegiality and bipartisanship.¹²

¹⁰ See MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 7 (2020), [hereinafter MAJORITY STAFF REPORT],

https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf at 380 (“In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in order to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce

ent va3 (ent (nty (322()vc3.9f223)7.9TJ- (ent Tc 0.664)-.)3.9With)06

And throughout this period, defenders of the bipartisan consensus approach have been labeled as more than just wrong – they are evil and corrupt.¹³ A prime example of this condemnation occurred just yesterday, at the Antitrust Section Spring Meeting of the American Bar Association. During the Chair’s Showcase, Barry Lynn, the Executive Director of Open Markets Institute and a mentor of Chair Khan’s, “rattled off a list of social ills, including outsized influence of tech companies, environmental problems and wealth inequality,” and told attendees that “[t]his all—to a great degree—yours doing. It is your doing because you conspired to use a false science, an idiot science, to blind the law to dangerous concentrations of power, to blind the citizenry to the fist of monopoly.”¹⁴ Another journalist reported that Barry Lynn “took to the stage and accused everyone in the meeting hall of working to take down American Democracy via their support of the consumer welfare standard. Lynn compared antitrust practitioners to Vladimir Putin and Xi Jinping. It was all quite something to behold.”¹⁵ I am told that Zephyr Teachout conveyed the same themes during this panel, although somewhat more diplomatically.

I have been mystified by these developments, so I began looking for explanations. And

I cannot assure you that I am going to describe the one right way to interpret these developments. I am still reading tomes of history and philosophy, trying to make sense of where we are. But today, I will share the results of my research thus far. I will tell you what I have read, and what I have seen. And I will share with you my working hypothesis: A unified worldview that draws heavily on concepts from Marxism and Critical Legal Studies is driving these developments.

In my remarks today, I will discuss a variety of concepts through the lens of Western Liberal thought, Marxism, Critical Legal Studies (“CLS”), and the Neo-Brandeisians.¹⁶ I will conclude with brief thoughts on the implications of these worldviews for innovation, the focus of today’s conference.

1. Rule of Law

The founders of the United States grounded our country in the key tenets of classical liberalism: individual rights, consent of the governed, periodic elections, public deliberation, democracy, equality, guaranteed liberties, and branches of government that check and balance one another.¹⁷ These principles are enshrined in our Constitution and enforced by judges under the rule of law, another key tenet of classical liberalism.¹⁸ The rule of law is “a principle under which all persons, institutions, and entities are accountable to laws that are: publicly promulgated, equally enforced, independently adjudicated, and consistent with international

¹⁶ I want to acknowledge the Truth on the Market blog posts of Lazar Radic, who has made valuable observations on Marxism and competition. Lazar Radic, Political Philosophy, Competition, and Competition Law: The Road to and from Neoliberalism, Part 1, TRUTH ON THE MARKET (Nov. 21, 2022), <https://truthonthemarket.com/2021/11/23/political-philosophy-competition-and-competition-law-part-1-the-road-to-and-from-neoliberalism/>; Lazar Radic, Political Philosophy, Competition, and Competition Law: The Road to and from Neoliberalism, Part 2, TRUTH ON THE MARKET (Feb. 03, 2022), <https://truthonthemarket.com/?s=Marx&orderby=date&order=DESC>. For a comparison of liberalism to CLS

Interesting parallels exist between what Marx taught and what Critical Legal Studies scholars believe. Not all CLS scholars are Marxists, but CLS builds on many concepts employed by Marx. If you attended Georgetown University Law Center and were assigned to Section 3, you were immersed in CLS as a 1L.²⁶ Many well-known CLS scholars served as professors for Section 3, including Mark Tushnet. Professor Tushnet wrote that from a critical legal studies perspective, the rule of law is an “ideological project” that serves as an instrument of oppression by the group that happens to be in power.²⁷

In a related vein, CLS scholars challenge the concept of a value-neutral legal process. Instead, they argue that the system is built by elites who have a stake in rationalizing their dominant power positions, so they “define rights in a way that reinforces existing hierarchies of wealth and privilege.”²⁸ Or, as Georgetown Law students were taught in Section 3, law is politics, and politics is power.

Neo-Brandeisians view the law, and specifically the field of antitrust law, in the same way that Marx and CLS scholars view the rule of law. Specifically, the Neo-Brandeisians reject the belief that antitrust law is above or outside of politics.²⁹ In fact, according to Neo-

regarded only as workers and nothing more is seen in them, everything else being ignored. Further, one worker is married, another is not; one has more children than another, and so on and so forth. Thus, with an equal performance of labor, and hence an equal in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid all these defects, right, instead of being equal, would have to be unequal.”)

²⁶ GEORGETOWN UNIVERSITY LAW CENTER, CURRICULUM B (SECTION 3), <https://curriculum.law.georgetown.edu/jd/curriculum-b-section-3/>.

²⁷ Mark Tushnet, *Critical Legal Studies and the Rule of Law* (Harvard Public Law Working Paper No. 18-14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135903#:~:text=Mark%20Tushnet,-Harvard%20Law%20School&text=Describing%20critical%20legal%20studies%20as,%2C%20social%20democratic%2C%20and%20more (“From a critical legal studies perspective, this].mt

Brandeisians, markets themselves are political.³⁰ Sandeep Vaheesan of Open Markets Institute, a former colleague and co-author of Chair Khan, has written that because “the state constructs and structures markets through legal rules ... [t]he market is not a force of nature, as the law and economics ideology underpinning antitrust presumes.”³¹ Instead, he writes, the idea of markets “as a ‘spontaneous order’ is a useful construct for defenders of the status quo because it lends legitimacy to the current order.”³²

Chair Khan agrees that markets are political.³³ During an interview with Stuart Varney, she went even further, stating that “all decisions are political insofar as government agencies are bringing them.”³⁴ If you have served at the FTC or DOJ, you may reject this characterization, observing that the agencies and courts make decisions based on sound economics and legal precedent. But Matt Stoller of the American Economic Liberties 3 U R M H F W, another former colleague and staunch ally of Chair Khan, argues that “the point of economics as a discipline is to create a language and methodology for governing that hides political assumptions from the public.”³⁵ A recent piece in the *Yale Law Journal* conveyed a similar perspective:

‘Neoliberal’ premises undergird many fields of law and have helped authorize policies and practices that reaffirm the inequities of the current era. In particular, market efficiency, neutrality, and formal equality have rendered key kinds of

– technocrats or democratically-elected representatives in Congress – and what those goals should be. Given that antitrust law is and will be political, whatever its overarching philosophy, consumer welfare should enjoy no position of privilege on the grounds that it is ‘apolitical.’ It can and should be examined against other political interpretations.”); @sandeepvaheesan, TWITTER (March 29, 2022, 9:58 AM https://twitter.com/sandeepvaheesan/status/1508805785660317700?s=12&t=2LawJbwhjZZzMDQE_hScPw (“Considering that the law is the basis of billionaires’ power and wealth (just as it was the basis of feudal lords’ power and wealth), maybe we should use the law to claw that privilege back.”).

³⁰ Vaheesan, *Twilight of the Technocrats’ Monopoly* supranote 29, at 986 (“A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a ‘spontaneous order’ is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile. This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy.”).

power invisible ... [resulting in] a pervasive view of law that encases ‘the market’ from claims of justice and conceals it from analyses of power.³⁶

In other words, the Neo-Brandeisians reject the characterization of antitrust law as value-neutral and relatively free from political interference. Vaheesan declared starkly that “antitrust law is and will be political.”³⁷ And it follows naturally that if antitrust is not value-neutral, neither is the consumer welfare standard. Vaheesan has asserted that “[a]n antitrust enforcer anchored in consumer welfare is an antitrust enforcer anchored in anti-labor.”³⁸

So where does this leave us? The Neo-Brandeisians, drawing on refrains from Marx and Critical Legal Studies scholars, believe that antitrust enforcement is a politicized exercise that serves as a tool of oppression to reinforce existing inequities. This perspective appears to explain several aspects of the Neo-Brandeisian worldview.

If antitrust is indeed a tool of oppression, it makes sense that the Neo-Brandeisians paint those who helped shape the status quo, or who now defend it, as not just wrong, but evil and corrupt.³⁹ It does not matter if you are a Democrat or a Republican – the Neo-Brandeisians view enforcers of both parties from the last 40 years as corrupt.⁴⁰ In the same way that Neo-Brandeisians simplistically view large companies as evil and small companies as good,⁴¹ they

³⁶ Jediah Britton-Purdy, David Sing Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis* (ALE L. J. 1784) <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18006/Kapczynski%2c%20Building%20a%20Law-and-Political-Economy%20Framework-%20Beyond%20the%20Twentieth-Century%20Synthesis.pdf?sequence=1&isAllowed=y>.

³⁷ Vaheesan, *Twilight of the Technocrats’ Monopolies*, *supra*note 29, at 982. See also Wu, *supra*note 8, at 130 (“big mergers are political”) (emphasis in original).

³⁸ Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power*, IPE PROJECT (July 19, 2018) <https://ipeproject.org/blog/how-contemporary-antitrust-robs-workers-of-power/>.

³⁹ See Sisco, *supra*note 14; Miller, *supra*note 15.

⁴⁰ Vaheesan, *supra*note 38 (“Antitrust enforcers have both failed to protect workers against employer power and thwarted independent contractors’ efforts to build collective power. By accommodating capital and policing labor, antitrust has robbed workers of both exit and voice. Far from being unexpected or unintended, antitrust law’s part indifference, part hostility toward workers is another predictable result of the close nexus between big business and the community of antitrust specialists.”).

⁴¹ See, e.g. Prepared Opening Statement of Commissioner Rohit Chopra Before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce Hearing on “Transforming the FTC: Legislation to Modernize Consumer Protection” (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf (“Small businesses have expressed concern that the FTC gives favorable treatment to large, powerful firms, such as Big Tech and Big Pharma giants, while ignoring pleas for action to address practices harming small players. And when Big Tech companies egregiously violate our privacy and the law, the FTC has shown it is willing to be lax and forgiving. But when small businesses violate these laws, the FTC brings down the hammer on them, wiping out revenues and even shutting them down. This two-tier approach doesn’t make sense.”).

view people one-dimensionally, as evil or good. One is either a pro-monopolist or an anti-monopolist, period.⁴²

One form of attack focuses on the revolving door. On the day he was sworn in, then-FTC Commissioner Chopra published a monograph that took a far-reaching view of conflicts of interest.⁴³ Specifically, he asserted that even in the absence of direct financial interests, the enforcement decisions of government employees could be influenced by the possibility of future employment in the private sector.⁴⁴ Chair Khan expressed a similar view, writing that “the Department of Justice enforcer who aspires eventually to join J.P. Morgan may hesitate to antagonize a potential employer.”⁴⁵ In his new capacity as CFPB Director, former FTC Commissioner Chopra reiterated this view, explaining that “financial regulators a 74p

Many of you in attendance today have served in government. I ask you to reflect on whether you pulled your enforcement punches to curry favor with future employers in the private sector. I assume you would answer in the negative, and research would align with your responses.⁴⁷ In fact, for those who decide to return to the private sector, a reputation as an aggressive and capable enforcer signals knowledge and competence. Enforcers who subsequently move into private practice are well-equipped to counsel businesses on compliance with the law, given their intimate familiarity with the expectations of government agencies.

The disdain of the Neo-Brandeisians is not limited to individual practitioners. As I noted in my introduction, two people with long ties to Chair Kahn, Barry Lynn and Zephyr Teachout, indicated yesterday during the Chair's Showcase session of the Antitrust Section Spring Meeting that the ABA is viewed as part of the establishment, the so-called ruling class, that helps shape antitrust law and policy.⁴⁸ It, too, is therefore complicit in the oppression of the underdog. This view might explain why former Commissioner Chopra and Chair Khan have kept the ABA Antitrust Section at arms' length.

And of course this perspective condemns the FTC and its staff as complicit in the oppression. That might explain why former Commissioner Chopra expressed such a dim view of not just the FTC,⁴⁹ but of FTC staff. He believed they were "captured" by the industries they oversaw.⁵⁰ Indeed, while a sitting commissioner, Chopra suggested that the FTC's Inspector General review the work of staff with respect to pharmaceutical mergers.⁵¹ And he told Congress

that agency personnel's attendance at conferences and participation in panels should be viewed with suspicion.⁵²

Could this view have been the driving force behind the decision to muzzle staff? Chair

Neo-Brandeisians have undermined transparency and predictability in other ways, as well. These actions erode certainty regarding the ru

just, [so] the ruling class cannot win all the time.”⁶² Similarly, the Neo-Brandeisians ignore the fact that the FTC has delivered significant benefits to American consumers in recent decades. Instead, they declare the last 40 years to be a “failed experiment.”⁶³

2. Due Process

As I noted at the outset, classical liberalism is premised on the rights of the individual, liberty, consent of the governed and equality before the law. To protect these rights, liberalism is grounded in process. John Hart Ely wrote in *Democracy and Distrust* that “[w]hat has distinguished [the American Constitution], and indeed the United States itself, has been a process of government, not a governing ideology.”⁶⁴ Critical Legal Studies, on the other hand, views due process as preventing benevolent change.⁶⁵ Procedural rules serve as speed bumps on the road to justice. Because “procedural rules reflect political choices,” they can be tossed aside to achieve desired substantive change.⁶⁶

In their desire to remake antitrust law, the Neo-Brandeisians have embraced a similar disregard for process and norms. They know what the utopian antitrust regime looks like, and they are willing to toss aside procedural niceties to get there. For example, when new FTC leadership undertook abrupt and sweeping policy changes with little to no input from knowledgeable staff and the public and with essentially no notice to minority commissioners, I raised process concerns.⁶⁷ In response, a staffer at the American Economic Liberties Project –

p22ncerne,

raised

whose Twitter handle was @PharmaCheats – tweeted that “[v]oters barely care about the process of themselves voting in elections

“Because of the value liberals place on ~~it~~ ^{liberty}, they tend to be wary of the power concentrations that could mandate changes quickly. But Chair Khan has consolidated power in the Office of the Chair since arriving at the Commission. Changes to the FTC’s Rules of Practice regarding the rulemaking process place far more power in the Chair’s office, facilitating an agenda-driven outcome.⁷² Omnibus resolutions ensure that the Chair needs no other commissioner’s vote to authorize staff to use compulsory process in essentially all agency investigations.⁷³ Through these and other actions,⁷⁴ Chair Khan has undermined the Congressionally-mandated Commission structure.

“They prefer a more incremental approach to political change that depends on the consent of the governed.⁷⁵ But Chair Khan has undertaken sweeping policy changes without typical opportunities for public input. The Commission under Chair Khan abruptly voted 3-2 to rescind the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act.⁷⁶ Similarly, the majority voted to rescind the 1995 Policy Statement Concerning Prior Approval and Prior

The same is true for the rescission of the Vertical Merger Guidelines.⁷⁸ And public input was accepted **after** votes occurred during the first several open Commission meetings. How can the governed consent if their input is not sought?

“Liberalism is never utopian, by anyone’s definition, but always procedural, because it presupposes a society of people who profoundly agree with each other and whose interests, goals, stakes and stands cannot easi

protection sides of the FTC house.⁸³

84

While the United States is a capitalist country, it is worth noting that we have a fair amount of government intervention in the marketplace. The 2022 Index of Economic Freedom ranks the US 25th out of 177 ranked countries.⁸⁵ The study also finds that the standard of living is much higher in economically freer countries.⁸⁶

Marx viewed capitalism in an entirely different light. He taught that the capitalists, who own the means of production, oppress the masses, who ultimately will rise up and overthrow their oppressors.⁸⁷ Two related concepts play a fundamental role in this conclusion. The first concept is the labor theory of value, which teaches that the value of any commodity is measured in terms of the amount of labor embodied in it – the labor time required to produce it.⁸⁸ The second concept is that of surplus value, which is the difference between the price of a product

⁸³ Wilson, *supra*note 61, at 3 & 19-22 (“Comparing calendar year 2020 of the Trump Administration to calendar year 2021 of the Biden Administration, merger enforcement actions fell from 31 to 12 and consumer protection actions fell from 79 to 31.”).

⁸⁴ **Capitalism** BLACK'S LAW DICTIONARY (11th ed. 2019) (“An economic and political system in which businesses belong mostly to private owners and not to the government; esp., an economic system that depends on the private ownership of the means of production and on competitive forces to determine what is produced.”).

⁸⁵ 2022 INDEX OF ECONOMIC FREEDOM, THE HERITAGE FOUNDATION, <https://www.heritage.org/index/ranking>.

⁸⁶ KEY FINDINGS OF THE 2022 INDEX, THE HERITAGE FOUNDATION, https://www.heritage.org/index/pdf/2022/book/01_2022_IndexofEconomicFreedom_KEY-FINDINGS.pdf (“The standard of living, measured by incomes per capita, is much higher in economically freer countries. Economies rated ‘free’ or ‘mostly free’ in the 2022 Index enjoy incomes that on average are more than three times higher than those in other countries and almost seven times higher than the average incomes of ‘repressed’ economies.”).

⁸⁷ KARL MARX & FREDERICH ENGELS, THE COMMUNIST MANIFESTO 34 (Samuel Moore trans., Marx/Engels Selected Works, Vol. One, Progress Publishers, Moscow, 1969) (1848), <https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf> (“The Communists disdain to conceal their views and aims. They openly avow their theories and aims, they openly declare that they are the most resolute, the most consistent enemy of every existing oppressive system of society. To achieve their ends they are prepared to go through every kind of hardship, to meet with every kind of opposition, to be ridiculed and derided, to be persecuted and despised by the hypocrites, the liars, the impostors, and the hypocrites of the ruling class.”).

and the cost to produce it.⁸⁹ Marx asserted that owners of the means of production, the capitalists, unfairly appropriate this surplus value from workers.⁹⁰

Lazar Radic has described how these concepts become interwoven with the concepts of capitalism and competition in the Marxist worldview.⁹¹ In a market economy, capitalists seek to gain an advantage over their 2r5ots seek to

consumer welfare is an antitrust enforcer anchored in anti-labor.”¹⁰¹

the Agencies announced a “temporary” and “brief” suspension of grants of early termination.¹¹⁷ Over a year later, the public has received no clarity regarding when this unwarranted and unprecedented suspension will be lifted.¹¹⁸ In May 2021, the Commission flouted a negotiated timing agreement after the parties voluntarily extended the timing several times,¹¹⁹ failed to order a divestiture in a transaction that all Commissioners had reason to believe violated the antitrust laws, and consequently left consumers unprotected.¹²⁰ In July 2021, the Commission rescinded a 1995 policy statement on prior notice and prior approval, facilitating a massive end-run around HSR filing requirements and opening the door for vindictive and wasteful enforcement.¹²¹ In subsequent months, practitioners began to report avenues of merger investigation that would not support legal challenges in court, but that do add time and expense to the merger review

¹¹⁷ Press Release, Fed. Trade Comm’n, FTC, DOJ Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

¹¹⁸ Noah J. Phillips & Christine S. Wilson, Comm’rs, Fed Trade Comm’n, Statement Regarding the Commission’s Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

¹¹⁹ Press Release, 7-Eleven, Inc., 7-Eleven, Inc. Response to FTC Commissioner Statement (May 14, 2021), <https://corp.7-eleven.com/corp-press-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement>.

¹²⁰ Statement of Comm’rs Noah Joshua Phillips and Christine S. Wilson, In re Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation, File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf.

¹²¹ Wilson July 21 Remarks, *supra*note 12; Noah J. Phillips, Comm’r, Fed Trade Comm’n, Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the 1995 Policy Statement

process.¹²² Collectively, these actions raise the costs of doing mergers and threaten to chill harmful and beneficial deals alike.¹²³

Marxist theory believes that the competitive process inevitably leads to the emergence of “an ever-decreasing number of ever more powerful capitalist overlords” “[o]ver the corpses and semi-corpses of small and middling capitalists.”¹²⁴ Given the drive to achieve greater scale and productivity, Marxists believe that “out of hoes[t] democratic progressive competition grows irrevocably harmful, parasitic, reactionary monopoly.”¹²⁵ Perhaps this worldview explains why the Neo-Brandeisians continue to advance the now-debunked narrative that concentration is increasing throughout our economy,¹²⁶ their insistence on finding a monopolist under every bed,¹²⁷ and their insistence on blaming every sub-optimal occurrence on monopolies.¹²⁸

¹²² Transcript, Fed. Trade Comm’n, Open Commission Meeting – September 15, 2021 at 26, https://www.ftc.gov/system/files/documents/public_events/1596052/transcript_open_commission_meeting_9-15-21.pdf (Darren Tucker: “As some of the Commissioners have expressed today, I do have concerns that other aspects of the FTC’s interactions with the public are becoming less transparent. In an increasing number of FTC merger investigations, agency staff have requested information regarding how the proposed transaction will affect unionization, ESG policies, or franchising. Staff have been unable to articulate how these issues relate to the agency’s mission to promote competition, leaving the outside world guessing as to the role they play in agency decision making. Adding to this concern, these types of considerations are not topics in which agency staff have expertise, and devoting time to these issues has the potential to delay agency review of transactions. To the extent that these considerations are playing the role in enforcement decisions, I hope the Commission will give serious consideration to promptly explaining their role and how to square this with decades of Supreme Court precedent, that the impact on competition is the only proper consideration in the antitrust case.”); Bryan Koenig, ‘Nontraditional Questions’ Appearing in FTC Merger Probes, *Law360* (Sept. 24, 2021), <https://www.law360.com/articles/1425218>; Ben Remaly, FTC broadens the scope of its merger probes, *CR* (Sept. 29, 2021), <https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/ftc-broadens-the-scope-of-its-merger-probes>.

¹²³ And let us not forget about attempts in 2020 to suspend the HSR process entirely through enactment of a merger moratorium. See, e.g. Erik Wasson, Warren, Ocasio-Cortez Float Long-Sought Bid to Pause M&A in Crisis, *BLOOMBERG*, (Apr. 28, 2020), <https://www.bloomberg.com/news/articles/2020-04-28/warren-ocasio-cortez-propose-temporary-corporate-merger-ban>.

¹²⁴ Trotsky, *supra*note 92.

¹²⁵ *Id.*

¹²⁶ See, e.g. AMERICA’S CONCENTRATION CRISIS, OPEN MARKETS INSTITUTE (presenting concentration data). But see Michael Vita & F. David Osinski, John Kwoka’s Mergers, Merger Control, and Remedies: A Critical Review, *ANTITRUST L.J.* 361 (2018); Joshua D. Wright, “Market Concentration,” Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Gregory J. Werden & Luke M. Froeb, Don’t Panic: A Guide to Claims of Increasing Concentration, *ANTITRUST NTITRUST*

the expense of communal life.¹³⁶ This approach views property rights as negative and toxic.¹³⁷ Another CLS scholar wrote that “[p]roperty rights, in American culture, have functioned as powerful symbols of individual freedom, ... of security, ... [and] of productive efficiency, providing the incentives to labor, invest, and create.”¹³⁸ But this dominant ideology of property, he noted, downplays or obscures property’s other faces, which are “coercive and oppressive.”¹³⁹

Neo-Brandeisian beliefs parallel Marxist and CLS positions in rejecting individualism. The consumer welfare standard benefits individuals through low prices, greater choice, higher quality, and more innovation,¹⁴⁰ but like Marxists, the Neo-Brandeisians would have us subjugate the rights of the individual to the rights of favored groups. Chair Khan has already told us that all decisions are political,¹⁴¹ so we know that which groups are selected for preferential treatment will depend on which way the political winds are blowing. In fact, a new bill from Senator Elizabeth Warren previews some of those favored groups, including “workers, sellers, small and minority-owned businesses (including farms and ranches), local, rural, and low-income communities, and communities of color.”¹⁴²

6. The Invisible Hand Versus Central Planning

In a socialist society, the means of production is controlled by the state, and planning will substitute for competition as the economy’s steering mechanism.¹⁴³ Again, the parallels with the

¹³⁶ William Ewald, *Unger's Philosophy: A Critical Legal Study* 7 YALE L. J. 665, 739 (1988) (“To be sure, Unger does allow for a set of ‘immunity rights’ to personal security and to welfare entitlements. He does not, however, allow property rights, and he says that the immunity rights are to ‘impose a minimal rigidity upon the organization of society.’”).

¹³⁷ David Kairys, Introduction THE POLITICS OF LAW 48 (David Kairys 3RD ed., 1978) at 11 (“Free market mania and the tendency to commodify all things human pervade our culture and our lives, yielding in the law a new and powerful discipline, law and economics, which attempts to explain and justify it all in terms of logic, reason, and ‘science.’ We seem to have adopted as our social purpose the facilitation of greed and the consolidation of wealth and resources in as few hands as possible, which we are accomplishing quite efficiently.”).

¹³⁸ Gordon, *supra*note 28, at 651.

¹³⁹ *Id.* (“But this dominant ideology of property, by facing frontward the aspects of property that seem to promote individual freedom, security, and efficiency, downplays or obscures property’s other faces—some coercive and oppressive, others cooperative and benign. Stressing how property promotes the freedom of owners suppresses how it also enable the owner to control the lives and reduce to subjection those who need access to it.”).

¹⁴⁰ See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’

Neo-Brandeisian approach are striking. Although private property may remain a reality, they seek to replace the invisible hand with heavy-handed regulation.¹⁴⁴ They characterize as successes the unwieldy regulatory frameworks that once governed railroads and airlines.¹⁴⁵ Indeed, Chair Khan has touted railroad regulations as a model for regulating large tech companies.¹⁴⁶ And they have advocated for the extensive use of rules to govern competition generally – no more case-by-case ex post enforcement, but instead an ex ante ordering of the market.¹⁴⁷ The list of rules they intend to create is breathtaking.¹⁴⁸ Ultimately, the Neo-Brandeisians would prefer that the government, rather than the private sector, orchestrate the functioning of the economy.

All of these concepts help us understand why the Neo-Brandeisians loathe the consumer welfare standard.¹⁴⁹ While increased productivity and lower prices benefit consumers, those

¹⁴⁴ Lina M. Khan, *Amazon's Antitrust Paradox* 26 *YALE L. J.* 710, 797 (2017), https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyeh.pdf (“The other is to accept dominant online platforms as natural monopolies or oligopolies, seeking to regulate their power instead. In this Section, I sketch out two models for this second approach, traditionally undertaken in the form of public utility regulations and common carrier duties. . . . Critically, a public utility regime aims at eliminating competition: it accepts the benefits of monopoly and chooses instead to limit how a monopoly may use its power.”); *id.* at 800 (“Given Amazon’s growing share of e-commerce as a whole, and the vast number of independent sellers and producers that now depend on it, applying some form of public utility regulation could make sense.”); *id.* at 803 (“If, instead, we accept dominant online platforms as natural monopolies or oligopolies, then applying elements of a public utility regime or essential facilities obligations would maintain the benefits of scale while limiting the ability of dominant platforms to abuse the power that comes with it”).

¹⁴⁵ *Id.* at 797 (“Industries that historically have been regulated as utilities include commodities (water, electric power, gas), transportation (railroads, ferries), and communications (telegraphy, telephones).”); *see also* MAJORITY S

in an endless progression towards perfection.¹⁵⁸ For Hegel, war was indispensable in achieving political progress.¹⁵⁹ Out of the crisis of war, or tumult, a better version of the State was certain to emerge victorious.¹⁶⁰ Marx too believed in the inevitable progression toward perfection, arguing that the inevitable result of capitalism was socialism, and then the utopia of communism.¹⁶¹ Critics of Marxism have noted that “[b]ecause revolutionaries are confident that the next stage of history will automatically represent progress, that any change will be for the better, they readily tear down and destroy the existing order – which historically has meant killing off anyone who resists, from rulers to peasants.”¹⁶²

Perhaps the perspectives of Rousseau, Hegel, and Marx explain why the Neo-Brandeisians do not shy away from actions that are destructive to the FTC. If one believes that tumult and destruction will lead inevitably to progress, near-term harms can be dismissed as the price of progress. And make no mistake – the Neo-Brandeisians already have imposed significant harm on the agency, and threaten even greater harm in the future.

As noted previously, then-Commissioner Chopra routinely attacked the FTC for being lax and feckless.¹⁶³ His characterizations assisted in undermining the bipartisan Congressional support that the FTC had long enjoyed.¹⁶⁴ And Chair Khan has said that agency overreach does

¹⁵⁸ WILLIAM TURNER, HISTORY OF PHILOSOPHY 579-81 (1903), <https://babel.hathitrust.org/cgi/pt?id=hvd.hnqfrc&view=1up&seq=595&q1=Greek> .

¹⁵⁹ Id. at 578 (“War, Hegel teaches, is the indispensable means of political progress.”).

¹⁶⁰ Id. (“... a crisis out of which the better state, that is the state which approaches more closely to the ideal, is certain to emerge victorious.”).

¹⁶¹ Karl Marx, Part I: Feuerbach, Opposition of the Materialist and Idealist Outlook A. Idealism and Materialism, *The Illusions of German Ideology* (THE GERMAN IDEOLOGY (written 1845-1846, published 1932), <https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm> (“Communism is for us not a state

central planning failed in the

embrace its concerns, it will be harming its own constituencies the most. As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.”).