

HOW MUCH BRANDEIS DO THE NEO-BRANDEISIANS WANT?

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In the last two years, the self-styled neo-Brandeis movement has emerged out of virtually nowhere to claim a position at the bargaining table over antitrust reform and the future of the antitrust enterprise. Unlike the Chicago School, which spent more than two decades laying the intellectual framework for its assault on the structuralist status quo before it emerged as an influential force in the courts and among political elites, the neo-Brandeisians are just beginning to articulate their agenda on a scholarly basis even as they are already at the center of antitrust reform discussions in Washington. The simultaneity of the neo-Brandeisians' efforts to articulate their agenda on a scholarly basis with their political influence may not be an obstacle in this case, since the neo-Brandeisians seem mostly to be courting the expressly political branches of government—the President (mostly presidential candidates) and especially Congress—rather than the courts, which typically take a longer incubation period to bring on board a movement. Nonetheless, to skeptics of the movement like myself, the lack of a significant body of work articulating the movement's views creates a framing difficulty—how does one critique a movement without a canon of literature or, to date, any tangible political or judicial achievements?

The fortunate answer is that the neo-Brandeisians are not purportedly creating their movement from whole cloth, but instead are seeking to return to an antitrust school of the past—

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the one, of course, associated with Justice Louis Brandeis and his *Curse of Bigness*.¹ By styling themselves as *neo*-Brandeisians rather than simple Brandeisians, the Neo-Brandeisians have left themselves the wiggle room to take those aspects of Brandeis that they find congenial and to dismiss those superseded by the passage of time or their own finer sensibilities. Nonetheless, it seems only fair to hold the neo-Brandeisians to the core views of their patron saint. In that spirit, this essay shall review three key aspects of the original Brandeis and his immediate followers and inquire whether the neo-Brandeisians are willing to go along. They are: (1) Brandeis' abhorrence of not only big business, but also of big government, and particularly of the centralizing tendencies of President Franklin Delano Roosevelt's New Deal, which Brandeis voted sharply to curtail as a Justice of the Supreme Court; (2) the candid admission by Brandeis, or at least various of Brandeis's followers, that implementation of an anti-Bigness ideology would entail losses of productive efficiencies and hence impose costs on consumer interests; and (3) Brandeis's insistence that facts should always trump theories, wherever the facts might lead.

I. THE CURSE OF BIGNESS—IN EVERYTHING

Perhaps the most comprehensive articulation of the neo-Brandeisian agenda to date can be found in Tim Wu's eloquent monograph *The Curse of Bigness: Antitrust in the New Gilded Age*.² In chapters that cover the history of the monopolization movement, Brandeis' anti-bigness vision for a "right to live and not merely exist," Teddy Roosevelt's trustbusting "big cases," the rise and triumph of the Chicago School, and Big Tech's invidious rise to dominance, Wu

¹ Louis D. Brandeis, *A Curse of Bigness*, Harper's Wkly., Jan. 10, 1914.

² TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

presents a lively picture of the world of concentrated power that that Brandeis fought to overcome through law, and that was tragically recreated once Brandeis's influence waned. In conclusion, Wu prescribes a stern dose of Brandeisianism in the form of reinvigorated merger review, a democratic process for merger control, boldness to bring "big cases" and break up big firms, institutional processes for market investigations, and a "protection of competition" test to replace the consumer welfare standard.³

Similarly, neo-Brandeisians Zephyr Teachout and Lina Khan's paper on the politics of market structure argues that "market structure is deeply political" and presents a taxonomy of ways in which market power translates into political power.⁴ After describing three conventional categories—setting policy, regulating markets, and taxing--in which companies with market power appropriate conventionally governmental functions, Teachout and Khan propose a fourth Brandeisian category—dominance, which represents a catchall of invidious ways in which dominant companies arrogate political power to themselves.⁵ Bigness is a curse not only to consumers, but to citizens in democratic societies.

Brandeis surely would have agreed with much of Wu, Khan, and Teachout's analysis, but he would not have stopped his harangue against bigness with industry. When Brandeis imagined bigness as a curse, he did not limit his indictment to big business. He also included big government, or at least a big federal government. That Brandeis was egalitarian in his

³ Wu, *supra* n. xxx at 127-45.

⁴ Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. Const. L. & Pub. Pol'y 37 (2014).

⁵ *Id.* at 38.

abhorrence of bigness in government and business is a central theme of Jeffrey Rosen's recent work on Brandeis. As Rosen writes, "Denouncing big banks as well as big government as symptoms of what he called a 'curse of bigness,' Brandeis was determined to diminish concentrated financial and federal power, which he viewed as a menace to liberty and democracy."⁶

Brandeis's crusade against bigness in government was not limited to rhetoric. As a Supreme Court Justice, Brandeis not only voted to strike down key pieces of New Deal legislation, he also served up personal warnings to the President that further aggrandizements of federal power would meet resistance at the Supreme Court. Brandeis detested the National Industrial Recovery Act ("NIRA") and the Agricultural Adjustment Administration ("AAA") because they created too much centralized power in the federal government.⁷ In January of 1935, he joined the majority in striking down the "hot oil" section of the NIRA that allowed the president to ban shipment in interstate commerce of oil that exceeded state-set production limits.⁸ On "Black Monday," May 27, 1935, Brandeis again joined the majority in three opinions striking down key elements of the New Deal concerning debt relief,⁹ the President's removal power over FTC

⁶ Jeffrey Rosen, *The Curse of Bigness*, *The Atl.*, June 3, 2016, *available at* <https://perma.cc/6QQG-GQS5>; JEFFREY ROSEN, *BRANDEIS: AMERICAN PROPHET* 1 (2016).

⁷ Rosen, *American Prophet*, *supra* n. xxx at 117.

⁸ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

⁹ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

Commissioners,¹⁰ and industry codes under the NIRA.¹¹ President Roosevelt was so purportedly so incensed with the latter decision and its limitations on the federal commerce clause power that he compared it to *Dred Scott* and warned that it would have dire consequences for the nation.¹² Unperturbed by the wrath of the President and his New Deal coalition, Brandeis conveyed the following message to the White House: “This is the end of this business of centralization, and I want you to go back and tell the President that we’re not going to let this government centralize everything. It’s come to an end.”¹³

Can one seriously style herself a Brandeisian if she adopts Brandeis’s abhorrence of bigness in industry but not in government? At least some of the neo-Brandeisians seems to think so. Senator Elizabeth Warren has wrapped herself in the mantle of Brandeis, arguing against a concentration of business power that “crushes competition” and aggrandizes monopolists.¹⁴ But

¹⁰ *Humphrey’s Executor v. U.S.*, 295 U.S. 602 (1935).

¹¹ *A.L.A. Schechter Poultry v. U.S.*, 295 U.S. 495 (1935).

¹² 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1935 205, 215-16 (Samuel I. Rosenman ed., Random House 1938)).

¹³ PETER H. IRONS, *THE NEW DEAL LAWYERS* 104 (1982).

¹⁴ Franklin Foer, *Elizabeth Warren’s Theory of Capitalism*, *The Atlantic*, Aug. 28, 2018 (interview with Senator Warren), *available at* <https://www.theatlantic.com/politics/archive/2018/08/elizabeth-warrens-theory-of-capitalism/568573/>; *Senator Elizabeth Warren News Room, Senator Elizabeth Warren Delivers Remarks on Reigniting Competition in the American Economy*, *available at*

she also supports vast expansions of the federal government, such as the Green New Deal, which calls for immense federal works projects in electricity, transportation, Internet, and housing that would dwarf the New Deal.¹⁵ This is surely quite selective anti-Bigness.

Of course, nothing says that as a general matter one must be anti-bigness as to both industry and government, or not at all. Over the course of American history, a range of attitudes toward bigness have developed. For simplicity, we may organize them in the following two-by-two matrix:

	Against big business	For big business
Against big government	Thomas Jefferson, Louis Brandeis	Ronald Reagan, Robert Bork
For big government	Franklin Roosevelt, Elizabeth Warren	Alexander Hamilton, Theodore Roosevelt

Of the four combinations shown, only the Jefferson/Brandeis qualifies as pervasively anti-bigness. The other three embrace some aspect of bigness, either in government, business, or both. One can choose to align oneself with any of these traditions, or chose some other option—it's a free country! But it is questionable whether the mantle of Brandeis should be worn by those not fitting into the first box, into the Jeffersonian tradition with which Brandeis himself so strongly associated. It was that tradition that exalted the yeoman farmer and small scale local government, while abhorring the “Monster Bank” and the bloated federal government that spawned it, that Brandeis saw as his lineage.

<https://www.warren.senate.gov/newsroom/press-releases/senator-elizabeth-warren-delivers-remarks-on-reigniting-competition-in-the-american-economy>.

¹⁵ Green New Deal Plan, <http://economicreconstruction.org/GreenNewDealPlan>.

Beyond the question of whether those in the big government/small business camp can rightly call themselves Brandeisian, there is a substantive question to engage about the relationship between scale in government and scale in business. Arguably, the anti-bigness strand in the American psyche finds its most fertile ground for political expression when bigness of one kind grows out of proportion to bigness of other kinds. The anti-bigness sentiment may be most of all one of balance: no institution or sector should grow so large as to swamp its countervailing forces. Writing in the mid-1960s, historian Richard Hofstadter observed that “Americans have always had to balance their love of bigness and efficiency against their fear of power and their regard for individualism and competition.”¹⁶ During the sixties, Hofstadter noted, Americans ranked their concerns about the bigness of big business behind their concerns about the bigness of the federal government and labor unions.¹⁷ Today, the popular resurgence of antitrust sentiment may have something to do with the continual retreat of both the federal government and organized labor influence since the 1980s, leading to a feeling that big business is increasingly unconstrained by offsetting social and political forces. See the growing calls for more antitrust enforcement to counter employer monopsony power in labor markets.¹⁸

That the strongest inclination of the anti-bigness sentiment may be a demand for checks and

¹⁶ Richard Hofstadter, *What Happened to the Antitrust Movement?*, in RICHARD HOFSTADTER, *THE PARANOID STILE IN AMERICAN POLITICS AND OTHER ESSAYS* 212-13 (1964).

¹⁷ *Id.*

¹⁸ E.g. ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS; UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 200 (2018).

balances rather than an abhorrence of bigness per se should be instructive to the neo-Brandeisians. The rising contemporary antitrust movement does not exist in isolation from other social and political currents. Arresting bigness in business today while promoting a continued growth in the federal government is not a sustainable long-run solution.

II. CANDOR ON THE COSTS OF ANTI-BIGNESS

The core of the Brandeisian critique of business power is not welfarist in the contemporary economic sense, which is to say it does not seek to quantify, and then to maximize, the welfare of society through rules of the road that optimize the allocation of social resources. Rather, it is a social critique of power that understands economic dominance as deeply corrosive to a broad set of liberal democratic values.¹⁹ That said, the neo-Brandeisians have grown up in a welfarist world where contestants over the direction of antitrust law, and legal policy more generally, are accustomed to presenting their arguments in welfarist terms. Further, the idea that antitrust law should promote consumer welfare enjoyed broad bi-partisan acceptance for a long time (although, of course, there was intense contestation over the meaning and scope of the consumer welfare standard) and grew rhetorically not only out of the Chicago School right but also the Naderian left.²⁰ It is therefore understandable that, although their real

¹⁹ See Teachout & Khan, *supra* n. xxx.

²⁰ See Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 742 (2017) (“In the wake of high inflation in the 1970s, Ralph Nader and other consumer advocates also came to support an antitrust regime centered on lower prices, according with the Chicago School's view.”); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 Duke L. J. 263, 311 (reporting that “[b]ecause the phrase “consumer welfare” shares semantic elements with the

interest is in advancing a social critique of power, the neo-Brandeisians often couch their arguments in at least partially welfarist terms.

Consider Lina Khan's recent article advocating a return to legal rules requiring the separation of platforms and commerce.²¹ Khan argues that her proposed separation rules could be justified solely in consumer welfare terms: "Even within a framework where only welfare-based harms justify regulatory interventions, the likely innovation harms stemming from platform appropriation and discrimination invite serious consideration of structural limits."²² But Khan considers conventional welfarism too limiting a standard and goes on to identify a "host of functional goals that motivated previous separations regimes, ranging from fair competition and system resiliency to media diversity and administrability."²³ Khan argues that "[t]hese concerns register in a normatively pluralistic framework: While some are cognizable in terms of welfare economics, others appeal to a broader set of democratic and institutionalist values."²⁴ Finally, she candidly admits that, in some circumstances, pursuing these "democratic and institutionalist" values comes at the expense of efficiency and consumer welfare: "In the context of business and market structure, these distinct values sometimes align--such that a separation that promotes a

Ralph Nader consumerist movement, there has been a feeling that Robert Bork, Richard Posner, and other price theorists share the Naderites' concerns for consumers," although the comparison is substantively misguided).

²¹ Lina Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019).

²² *Id.* at 981.

²³ *Id.*

²⁴ *Id.*

robust marketplace of ideas also promotes dynamic efficiency--while in other instances they are in tension."²⁵

Khan's potpourri approaches to the goals of antitrust law is certainly in line with the Brandeisian tradition. The sum of Brandeis's teaching on bigness is well-encapsulated by Justice Douglas in his *Standard Stations* dissent:²⁶

The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places. Size is allowed to become a menace to existing and putative competitors. Price control is allowed to escape the influences of the competitive market and to gravitate into the hands of the few. But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.

Douglas went on to raise, and dismiss, the potential conflict between efficiency and anti-bigness social values that Khan identified in her separation paper:

The only argument that has been seriously advanced in favor of private monopoly is that competition involves waste, while the monopoly prevents waste and leads to efficiency. This argument is essentially unsound. The wastes of competition are negligible. The economies of monopoly are superficial and delusive. The efficiency of monopoly is at the best temporary.²⁷

Douglas then supported his claim that monopolies do not generate efficiency with a quote from Brandeis in *The Curse of Bigness*:

²⁵ *Id.*

²⁶ *Standard Oil Co. v. U.S.*, 337 U.S. 293, 318-19 (1949) (Douglas, J., dissenting).

²⁷ *Id.*

‘Undoubtedly competition involves waste. What human activity does not? The wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh that waste and make it more efficient than absolutism. So it is with competition. The waste is relatively insignificant. There are wastes of competition which do not develop, but kill. These the law can and should eliminate, by regulating competition.’²⁸

For the Brandeisian Justices on the Supreme Court, it became gospel that Brandeis had shown that monopolies did not generate efficiencies, and hence that there was no social welfare cost implicated in adopting an antitrust policy hostile to bigness. The four dissenting Justices (Douglas, Black, Murphy, and Rutledge) in *U.S. v. Columbia Steel Co.*,²⁹ cited from *The Curse of Bigness* again in insisting that any efficiencies resulting from the merger were “largely illusory.”³⁰ Justice Douglas repeated this observation in his dissent in *Baltimore & O.R. Co. v. U.S.*,³¹ where he disputed the premise that a railroad merger could be justified on the grounds that it would result in improved service. In *FTC v. Procter & Gamble*, Justice Douglas finally got a majority sign off on the doctrine that efficiencies cannot justify a merger that may increase dominance,³² an issue with which antitrust law has continued to wrestle ever since.³³

²⁸ *Id.*

²⁹ 334 U.S. 495, (1948).

³⁰ *Id.* at 534, n.1 (Douglas, J., dissenting).

³¹ 386 U.S. 372, 447 (1967) (Douglas, J., dissenting).

³² 386 U.S. 568, 579 (1967) (holding that “possible efficiencies cannot be used as a defense to illegality in a section 7 merger case”).

³³ Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 Mich. L. Rev. 347 (2011).

And yet, Brandeis himself was not quite so emphatic in dismissing the possibility that an anti-bigness antitrust policy would impose costs of social welfare by suppressing certain economies of scale or scope. He acknowledged that a “unit in business may be too small to be efficient,” although “the unit may be too large to be efficient, and this is no uncommon incidence of monopoly.”³⁴ Yet more candidly, he argued that although the trusts had sometimes achieved efficiencies, “their fruits have been absorbed almost wholly by the trusts themselves” and “the community has gained substantially nothing.”³⁵ This observation presages the later debate between the consumer welfare and total welfare standards;³⁶ the important point is the admission that large scale has, in fact, produced efficiencies on at least some occasions. It follows, of course, that an anti-bigness antitrust policy will, in at least some cases, entail a loss of efficiency (even if Brandeis thought that any systemic efficiency losses would be slight).

Other Brandeisian jurists admitted even more clearly that the potential loss of efficiency was a deliberate aspect of antitrust policy. Perhaps the clearest such statement can be found in Learned Hand’s *Alcoa* opinion: “Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and *in spite of possible cost*, an organization of industry in small units which can effectively

³⁴ Louis Brandeis, *Shall We Abandon the Policy of Competition* (1934), reprinted in DANIEL A. CRANE & HERBERT HOVENKAMP, *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* 186 (2014).

³⁵ *Id.*

³⁶ See Alan J. Meese, *Reframing the (False?) Choice between Purchaser Welfare and Total Welfare*, 81 *Fordham L. Rev.* 2197 (2013).

compete with each other.”³⁷ The Supreme Court endorsed this language in *Von’s Grocery*³⁸ and *Brown Shoe*,³⁹ opinions that even post-Chicagoans generally recognize did not promote consumerist interests.⁴⁰

In the near term, the neo-Brandeisians may not have to come to grips with the possibility that their anti-Bigness crusade will entail losses of economic efficiencies, for which consumers will have to pay. There is plenty of low-hanging fruit to be picked by both post-Chicagoans, who believe that antitrust has gotten badly off track even on consumer welfare terms, and neo-Brandeisians, who want to pursue an antitrust policy much grander than consumer welfare. But, eventually, the conflicts between efficiency and anti-dominance that Brandeis weakly admitted a century ago and that Khan cautiously anticipates today will arise. That will be the moment of truth for the neo-Brandeisians: Are they prepared to stick to their guns and oppose mergers that clearly will benefit consumers but create excessive bigness? Will they pursue anti-monopolization rules that handcuff dominant firms from exploiting efficiency advantages in the name of protecting the “little guy” and promoting a level playing field? Or, will the neo-Brandeisians maintain their anti-bigness rhetoric, but slip quietly into a post-Chicago regime

³⁷ U.S. v. Alum. Co. of America, 148 F.2d 416, 429 (1945) (emphasis added).

³⁸ U.S. v. Von’s Grocery Co., 384 U.S. 270, 274 n.7 (1966).

³⁹ Brown Shoe Co. v. U.S., 370 U.S. 294, 316 n. 28 (1962).

⁴⁰ See, e.g., Richard Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 12 (Robert Pitofsky, ed., 2008) (concurring in Chicago School criticisms of *Von’s Grocery* and *Brown Shoe*).

characterized by vigorous antitrust enforcement, but on some version of the consumer welfare standard?

If the neo-Brandeisians do stick to their guns and pursue an antitrust policy “in spite of its possible cost” to efficiency, query whether they will gain enough political traction to maintain their seat at the table in Congress, the White House, and especially the courts. The American people may be motivated to embrace an antitrust policy promised simultaneously to protect consumer welfare many of the other values advanced by Brandeis and his contemporary acolytes—anti-Bigness, anti-dominance, democratic integrity—but it is far from clear that, even at this moment of antitrust excitement, there is much of an appetite for an antitrust policy that would raise consumer prices or impair innovation.

There is also the possibility that the neo-Brandeisians will find themselves consciously or unconsciously pursuing a strategy similar to that of which Robert Bork has long been accused—obfuscating terms in order to pursue one policy wrapped in the guise of a very different policy. Bork allegedly committed a nefarious two-step by first contorting the Sherman Act’s legislative history to produce a “consumer welfare” standard and then defining consumer welfare as solely concerned with allocative efficiency such that even wealth transfers from consumers to producers in the form of higher prices did not count as losses of consumer welfare.⁴¹ These semantic machinations were ostensibly necessary because consumer welfare was a politically palatable standard whereas allocative efficiency was not. If the Brandeisians find themselves in a similar position—favoring an anti-Bigness policy entailing losses of efficiency but realizing

⁴¹ See generally Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *Antitrust L. J.* 835 (2014).

that overtly embracing such a standard could be a political non-starter—will they do a Bork and conceal their true standard in a more palatable form of words? Or will they advance their position with forthrightness and candor and go down with their ship?

Contra to Learned Hand, the neo-Brandeisians may dispute that the choice between anti-Bigness and efficiency will ever be that stark. Perhaps it will not be. Or perhaps that very argument is the first step down the Borkian road.

III. EMPIRICISM ABOVE A PRIORI THEORY

Of all of Brandeis's many distinguished contributions to the law, none is more important than the idea that facts trump theories. It was Brandeis' brief in *Muller v. Oregon*⁴² compiling voluminous empirical evidence on the deleterious effects on women's health, safety, and morals from working excessive hours that created the archetype of the "Brandeis brief" that would contribute to importantly to *Brown v. Board of Education*⁴³ and the realist shift in law in the mid-twentieth century.⁴⁴ It was Brandeis's theories of federalism that created the idea that the states should serve as "laboratories of democracy" testing new laws and policies through experimentation, success, and failure.⁴⁵ And it was Brandeis' vision that constituted the Federal Trade Commission as a fact-gathering organization with the power to collect information from

⁴² 208 U.S. 412 (1908).

⁴³ 347 U.S. 483 (1954).

⁴⁴ MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 213-22 (2009); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. Ill. L. Rev. 59.

⁴⁵ Rosen, *supra* n. xxx at 100-45.

across the nation, inform Congress about the true functioning of markets, and collaborate with industry and civil society to improve market conditions for the good of all.⁴⁶ Brandeis was the first great American juridical empiricist; his methodological influence on American law has been unparalleled.

Of course, Brandeis made his contributions before the rise of contemporary empirical methods, which have greatly increased the complexity and sophistication of empirical studies. One consequence of this rarification of empirical claims in or concerning law is that judges and lawyers—never mind the jurors—often find themselves struggling to keep up the conflicting expert witness testimony. Whereas in Brandeis' day the lawyers were the stars of antitrust cases, that role has been largely ceded to the highly credentialed (and highly paid) economists who swoop into the antitrust agencies to present their multivariate regressions showing that the merger in question will lower (or raise) prices or that the defendant's prices were above or below average variable cost.

The paradox for the neo-Brandeisians is this: to be a genuine Brandeisian means to be an empiricist, to prefer inductive fact-based reasoning to a priori generalization or deduction. Today, antitrust empiricism is owned by an economics profession that deploys complex tools on which most lawyers are not qualified to opine and judges outcomes based on welfarist criteria. Therefore, to be a contemporary Brandeisian on empiricism is to cede the field straight back to the very economists who supposedly have been asleep at the wheel for the last forty years and are unlikely to be sympathetic on average to Brandeisian social and political ideology.

⁴⁶ GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 95-100 (2009).

What are the alternatives for the neo-Brandeisians? One is to scuttle Brandeis's empiricism and proceed instead with a set of a priori rules or principles designed to reduce market dominance and create a level playing field, as the European Union largely did during its "form based" years, before its more recent turn to "effects based" economics.⁴⁷ That carries the distinctive disadvantages of simultaneously disregarding the most Brandeisian aspect of Brandeis and appropriating a formalistic mode of legal reasoning that eventually became too formal for even the formalistic Europeans. The other is to prise antitrust empiricism away from the economists or to appropriate modes of empiricism—such as qualitative empiricism—that do not have as their outputs dollars and cents. In that case, the rising cohort of Brandeisians will need to master a set of empirical skills as robust as any associated with the economics profession today.

Another implication of a commitment to induction and empiricism rather than a prior formal reasoning is the willingness to shift course when the facts so dictate. Critics of the Chicago School frequently note that the Chicagoans initially embarked on a needed course correction based on empirical observations about the excesses of antitrust law, but eventually settled into a set of rigid ideological dogmas at odds with the mounting evidence that their overly

⁴⁷ Daniel A. Crane, *Formalism and Functionalism in the Antitrust Treatment of Loyalty Rebates: A Comparative Perspective*, 81 *Antitrust L. J.* 209, 210-14 (2016); Pierre Larouche, *The European Microsoft Case at the Crossroads of Competition Policy: Comment on Ahlborn and Evans*, 75 *Antitrust L. J.* 933, 962 (2009).

laissez faire approach was jeopardizing market competitiveness.⁴⁸ Are the neo-Brandeisians committed to eschewing a similar course by genuinely following the facts wherever they lead? If it turns out that vertical integration between dominant platforms and marketplace participants does not, in fact, jeopardize democratic and social values but instead promotes market participation and pluralism by a wide variety of social actors, will the neo-Brandeisians concede that “fair is fair” and back off antitrust enforcement against vertical mergers? If the evidence shows that Google, Facebook, and Amazon are not nearly as dominant as they might seem because entry barriers are actually quite low and nascent firms with a realistic chance to innovate and compete are a dime a dozen, will the neo-Brandeisians take off their boxing gloves and shake hands with Sundar Pichai, Mark Zuckerberg, and Jeff Bezos? In other words, are the neo-Brandeisians genuinely open to fact-based, empirical antitrust, regardless of its outcomes?

The answer may well be “of course we are, with the caveat that we are likely to interpret the empirical outcomes differently than you do.” Fair enough. For now, it is enough to ask that, in the spirit of Brandeis himself, the neo-Brandeisians show a bona fide willingness to prioritize facts over theories.

⁴⁸ See Robert Pitkofsky, *Introduction: Setting the Stage*, in *How Chicago Overshot the Mark*, *supra* n. xxx at 5 (describing Chicago School’s turn from empirical correction to rigid doctrinalism); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936, 957 (1987) (describing Chicago School as “wag[ing] ideological warfare, assaulting antitrust itself”); Thomas M. Melsheimer, *Economics and Ideology: Antitrust in the 1980s*, 42 Stan. L. Rev. 1319, 1335 (1990) (complaining of “Chicago’s hostile ideological baggage”).

CONCLUSION

Congratulations to the neo-Brandeisians! A small cadre of committed scholars and activists have succeeded in fundamentally changing the terms of the antitrust debate in a very short period of time. It remains to be seen, of course, whether they will be able to move from a seat at the table to regime change. I offer no prediction. What I have offered instead is a set of questions, neither friendly nor hostile, about the relationship of this current movement to its original patron. Hopefully, the answers to these questions will help to clarify the direction and appeal of the budding neo-Brandisian movement.