ANTITRUST

'New Right' Antitrust

After bemoaning the politicization of antitrust during the Biden administration, Trump officials are now politicizing it themselves.

BY THOMAS A. LAMBERT

Conservative antitrust is back. At least, that's what we're told by the new crop of antitrust enforcers in the second Trump administration. Today's "conservative" antitrust, however, is a far cry from yesterday's. While it may pursue ends favored by social conservatives, it retains essential features of the progressive "Neo-Brandeisian" approach embraced by antitrust enforcers in the Biden administration. It embodies "new right" thinking that is much less wary of governmental intervention in private markets than conservative—and mainstream—antitrust has been for the last 45 years.

The central claim of this article is that the enforcement philosophy of antitrust officials in the second Trump administration, while right-wing, is not really conservative. Moreover, as a policy matter, the current variant of purportedly conservative antitrust—"new right" antitrust, we'll call it—is likely to be less effective than traditional conservative, or "old right," antitrust at what nearly everyone agrees is the main—if not exclusive—goal of antitrust law: furthering the welfare of consumers.

To explain why that is so, this article first describes the genesis, development, and influence of old right antitrust and the Neo-Brandeisian response embraced by antitrust enforcers in the Biden administration. It then summarizes the central features of new right antitrust as described by leading Trump II enforcers. Finally, it explains why new right antitrust is not truly conservative and is likely to be less effective at promoting consumer welfare than was the old right (and eventually mainstream) variant.

THE RISE AND INFLUENCE OF TRADITIONAL CONSERVATIVE ANTITRUST

Enacted in the late 19th and early 20th centuries, the federal antitrust statutes contain notoriously vague language and, when read literally, dictate absurd outcomes. One of the primary provisions of the Sherman Act of 1890, for example, makes it illegal to "monopolize" a market but never defines that novel term. Another declares "[e]very contract ... in restraint of trade ... to be illegal," even though virtually every commercial contract restrains one or both of its parties from engaging in certain trades.

In light of the antitrust statutes' problematic text, courts have generally viewed them as a congressional delegation of authority to the federal judiciary to fashion quasi–common law rules addressing the two situations in which market competition tends to break down: collusion (the subject of Sherman Act Section 1) and monopoly (the subject of Sherman Act Section 2). Indeed, the Supreme Court acknowledged this understanding in its 2007 *Leegin* decision, where it remarked, "From the beginning the Court has treated the Sherman Act as a common-law statute ... [that] evolve[s] to meet the dynamics of present economic conditions."

"Old right" antitrust arose in response to some improvident antitrust rulings in the mid-20th century. Exercising their authority to craft a quasi–common law of competition, courts in that era adopted a number of bright line prohibitions—in antitrust lingo, "per se rules"—forbidding business practices that, economists showed, could often be welfare-enhancing. Courts also began weighing consumer welfare against political and social concerns like small business protection when deciding antitrust cases.

In its infamous *Brown Shoe* merger decision (1962), for example, the Supreme Court wrote:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through

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> the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

This prompted then–Yale law professor Robert Bork to observe:

> No matter how many times you read it, that passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected. (Bork, 1978, p. 206)

Under such a muddled approach, a court could allow a merger that would benefit consumers by enhancing productive efficiency (if the court followed the first three sentences in the *Brown Shoe* passage above), or it could block the merger (if it followed sentences four through seven). Such leeway naturally trickled down to the enforcement agencies, which could then articulate grounds for challenging just about any business conduct by emphasizing its adverse effects on either consumers or competitors.

With enforcers and courts free to pick and choose among antitrust's multiple (often inconsistent) goals in order to condemn or acquit virtually any business behavior, antitrust became less a body of law and more an exercise of raw political power. Bork compared it to the sheriff of a frontier town: "[H]e did not sift the evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people." Even a Supreme Court justice admitted that antitrust had become arbitrary and unprincipled. Dissenting in *Von's Grocery*—a 1966 decision that condemned a grocery store merger that generated obvious efficiencies and resulted in a merged firm with a paltry 7.5 percent market share—Justice Potter Stewart confessed, "The sole consistency that I can find is that in litigation under [Clayton Act Section] 7, the Government always wins."

In light of this unfortunate situation, scholars associated with the University of Chicago published several articles and books highlighting the inefficiency of certain judge-made antitrust rules and urging antitrust courts to eschew political and social concerns and to decide cases on the basis of a single consideration: consumer welfare. The Supreme Court began to embrace this "Chicago School" approach in the late 1970s, when it decided one case (*Sylvania*, 1977) abrogating an old per se rule in favor of an approach focused on "demonstrable economic effect"; another (*Brunswick*, 1977) reiterating that the

antitrust laws were enacted for "the protection of competition, not competitors"; and a third (*Reiter v. Sonotone*, 1979) describing the Sherman Act as a "consumer welfare prescription."

Later Chicago School scholars observed that because antitrust typically addresses "mixed bag" business practices that can sometimes enhance and sometimes reduce market output and social welfare, it is an inherently limited body of law. Antitrust adjudication always involves the risk of welfare-reducing mistakes (either wrongly condemning efficient behavior or wrongly acquitting market power–causing conduct), and it requires complex, and thus costly, decision-making. Moreover, those three potential downsides—false conviction error costs, false acquittal error costs, and decision costs—are intertwined: If a court tries to minimize false conviction error costs by positing a difficult-to-satisfy liability test or a capacious defense, it will raise false acquittal error costs; attempting to reduce false acquittal error costs with a stricter liability rule or a less generous defense raises the risk of false convictions; and attempting to avoid both sorts of mistakes simultaneously via a more nuanced liability rule raises the decision costs faced by business planners and adjudicators. Driving down one set of costs causes another to rise.

To address this whack-a-mole problem, "Neo-Chicago" antitrust scholars proposed a "decision-theoretic" criterion for antitrust interventions: Enforcers should advocate, and courts adopt, liability rules that "minimize the sum of error and decision costs." Such an approach *optimizes* antitrust's effectiveness when *perfection*—no errors and simple rules—is impossible. As I have argued (Lambert, 2011), the current Supreme Court has embraced this decision-theoretic framework in deciding antitrust cases. The upshot is that prevailing antitrust doctrine largely reflects the old right approach.

THE NEO-BRANDEISIAN RESPONSE

In the mid-2010s, progressive antitrust commentators began attacking the old right approach that had taken root in the federal courts. They dubbed themselves "Neo-Brandeisians" after Justice Louis Brandeis, whose writings—including an essay entitled "The Curse of Bigness"—emphasized various social harms that may result when businesses get too big and industries too concentrated. In light of those potential harms, Neo-Brandeisians argued, prevailing antitrust doctrine's exclusive focus on consumer concerns is myopic. Rejecting the "consumer welfare standard" endorsed by the Supreme Court in the 1970s, they argued that antitrust law should endeavor to deconcentrate markets in pursuit of multiple ends. Among those are worker welfare, protection of small businesses, democratic functioning, wealth equality, economic liberty, localism, and even matters like racial equity. They also argued for simplifying antitrust doctrine by adopting more per se rules and market share–based liability presumptions and by deemphasizing case-by-case economic analysis. And they urged antitrust enforcers to promulgate ex ante competition rules rather than rely on case-by-case adjudication under prevailing standards.

Following his 2020 election, President Joe Biden tapped Neo-Brandeisians Lina Khan and Jonathan Kanter to head up, respectively, the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ). Under their lead, the agencies implemented several Neo-Brandeisian ideas. They pursued more theories of liability based on harms to worker welfare (e.g., the challenge to the Kroger/Albertson's grocery store chain merger). They revised their jointly issued guidelines for assessing potential mergers, deemphasizing "economic" means of defining antitrust markets in favor of the more "vibes-based" approach approved in the much-criticized *Brown Shoe* case quoted above. The FTC abandoned its prior policy that tethered "unfair methods of competition," which the Commission has authority to police, to consumer harm, and replaced it with a policy that would allow the agency to bring competition cases in pursuit of multiple goals. And the FTC promulgated a sweeping rule declaring nearly all worker noncompete agreements to be unfair methods of competition regardless of their business justifications. In court battles, the agencies achieved mixed success, with most judicial victories turning on traditional, consumer welfare–focused antitrust analysis.

THE CONTOURS OF NEW RIGHT ANTITRUST

President Trump's 2024 election heralded a move away from Neo-Brandeisianism at the agencies and a return to "conservative" antitrust policy. But, given Trump's rejection of many of the classical liberal ideas that have undergirded American conservatism since the mid-1970s, it was unclear what this new version of conservative antitrust would entail. Recent addresses by three top federal antitrust enforcers—DOJ assistant attorney general for antitrust Gail Slater, FTC chairman Andrew Ferguson, and Republican FTC commissioner Mark Meador—have now given a sense of its contours.

Although Slater, Ferguson, and Meador spoke independently and focused on different matters, their remarks emphasized common themes. Some of those themes reflect old right thinking, while others retain aspects of Neo-Brandeisianism. Taken together and viewed in light of agency practice over the last several months, the enforcers' remarks suggest that the Trump II antitrust agencies are embracing the sort of muscular, results-oriented conservatism favored by new right thinkers who favor aggressive use of government power to promote socially conservative ideals.

Some old right ideas / At least three features of the new right antitrust revealed in the enforcers' speeches resemble old right thinking. The first is a nominal commitment to some version of the consumer welfare standard. For example, Slater observes

that focusing antitrust enforcement on promoting the welfare of defendants' "trading partners" (which encompasses laborers and input suppliers and is what antitrust lawyers usually mean by "consumers") helps "ensure care and precision in using government power against private monopolies." Meador maintains that adherence to the consumer welfare standard—as long as it remains focused on actual consumer (trading partner) surplus as opposed to total surplus (i.e., that of consumers *and* producers)—will "achieve the political goals of antitrust without requiring judges to make political decisions."

New right antitrust also embraces the old right understanding that the government itself is a major source of anticompetitive trade restraints and socially harmful rent-seeking. As Slater put it, "a system of anti-competitive regulation can be co-opted by monopolies and their lobbyists, such that the state's power actually amplifies, rather than diminishes, corporate power." She reported that the DOJ has launched an "Anticompetitive Regulations Task Force" to help "identify and eliminate laws and regulations that undermine the operation of the free market and harm consumers, workers, and businesses." Ferguson, too, recently reported that the FTC has taken steps "to identify federal regulations that create anticompetitive barriers to the free American economy." Specifically, the FTC recommended deletion or modification of more than 125 federal regulations that reduce market competition.

Finally, there is the proverbial dog that didn't bark: No Trump II enforcer has expressed continued support for ex ante competition rulemaking, and the FTC recently withdrew its support for the sweeping non-compete rule that it had promulgated during the Biden administration.

Remnants of Neo-Brandeisianism / Several other features of new right antitrust retain aspects of Neo-Brandeisianism. First, despite paying lip service to some version of the consumer welfare standard, Slater and Meador suggest that antitrust enforcement should pursue multiple ends, including the protection of small competitors. Slater says antitrust should protect not only "America's forgotten consumers" and "forgotten workers," but also "the small businesses and innovators, from Little Tech, to manufacturing, to family farms, that were forgotten by our economic policies for too long." Downplaying consumer concerns, she quotes treasury secretary Scott Bessent's observation, "Access to cheap goods is not the essence of the American dream." Meador praises two notorious Supreme Court decisions—*Trans-Missouri Freight* (1897) and *Brown Shoe*—that suggested that antitrust should sometimes condemn consumer-friendly, price-reducing conduct in order to protect "small dealers and worthy men" and "small, locally owned businesses." He calls the two decisions "conservative through and through."

In a separate speech entitled "Antitrust's Populist Soul," Meador echoes the Neo-Brandeisian impulse that antitrust should combat bigness per se. Observing that "the size and power of the largest companies have ballooned to unprecedented levels," he argues that antitrust should combat the "dehumanization of economic life" that results when the issues affecting Americans "are, increasingly, decided in faraway corporate boardrooms" "on the basis of corporate bottom lines" and "with spreadsheets and earnings reports in view, not real people" (as though small businesses do not make decisions on the basis of profitability). He says that "antitrust enforcement is one of the most powerful, economy-wide tools available for addressing this problem—for helping restore dignity and freedom to working people who've felt powerless against the seismic economic forces that steer our national economy." The antitrust laws, he asserts, "exist because Congress, the president, and the American people decided, long ago, that unduly concentrated corporate power was inconsistent with American values." These remarks strongly resemble Neo-Brandeisianism.

Other remnants of Neo-Brandeisianism in new right antitrust include:

- ***Equating "private tyranny" with government coercion.*** Given that the government possesses a monopoly on the legitimate use of force, conservatives have traditionally been most leery of state power. New right antitrusters say, though, that private firms with market power are equally threatening. Meador, for example, contends, "Conservatives must reaffirm that concentrated economic power is just as dangerous as concentrated political power." Slater contends that "just as conservatives fear Tyranny.gov, they should fear Tyranny.com." Comparing technology platforms' suppression of certain user-generated content to government censorship, Ferguson queries, "What's the difference?" (Hint: The First Amendment applies to one but not the other.)
- ***Pushing to simplify antitrust analysis and reduce the influence of economists.*** Meador contends, "The right has too often fetishized economic analysis" in antitrust and that, while "[e]conomics may inform the factual and legal analyses of an antitrust question, ... it is not a system of thought that can be relied upon to dictate outcomes or set policies." Remarkably, he goes so far as to advocate "statutorily cabining the use of economic evidence" in antitrust cases. Slater echoes the call to deemphasize economic analysis in antitrust cases, observing (somewhat patronizingly), "If a farmer in Indiana or Iowa cannot make sense of our work, the fault lies with us, not with the farmer."
- ***Greater emphasis on statutory text and old, economically discredited precedents.*** Meador chides antitrust courts for "treat[ing] the antitrust laws as a virtually unbound delegation of common-law powers." He says that while the Sherman Act may have implicitly delegated authority to federal courts to craft a federal common law of

competition, later enacted statutes like the Clayton and Celler–Kefauver Acts are more specific and should be strictly construed. He calls the FTC's decision to suspend enforcement of the Robinson–Patman Act, which the DOJ found to increase consumer prices by precluding selective discounts, "lawless" (an irony, given the Trump administration's repeated refusal to enforce enacted laws with which it disagrees). Slater, too, contends that "antitrust agencies should enforce the laws passed by Congress, not the laws they wish Congress had passed." She further stresses the importance of adhering to precedents "both old and new," and she observes, "Innovations in economic theory … do not render older precedent a dead letter."

- ***Downplaying concerns about false convictions and resulting error costs.*** Old right antitrust's decision-theoretic criterion urged enforcers to be careful when going after "mixed bag" practices like deep discounts and exclusive dealing lest they unwittingly forbid or chill output-enhancing instances of the behavior at issue. New right antitrust worries little about overenforcement. This is implicit in Slater's insistence that old right antitrust enforcers "underenforced our century-old antitrust laws for several decades." Meador makes the point explicitly, asserting that "a conservative approach to antitrust law that seeks to follow congressional guidance will be more concerned with avoiding Type II errors [i.e., false acquittals] than Type I errors [i.e., false convictions]," even though "modern economics may insist that Type I errors are more costly than Type II errors, and therefore to be more carefully avoided."

Synthesis / Taken together, these remnants of Neo-Brandeisianism increase the discretionary authority of new right antitrust enforcers. Expanding antitrust's focus to include the concerns of parties other than trading partners gives enforcers cover to bring all sorts of novel actions because they can always find some protected group to intervene on behalf of. Pretending that businesses' dictating their terms of dealing is "private tyranny" tantamount to governmental coercion creates a narrative of urgency and builds popular support for antitrust interventions. Deemphasizing economic analysis in favor of simple rules makes it easier for enforcers to win the cases they bring. So does putting greater emphasis on statutory text like Clayton Act Section 7 (which forbids mergers where the effect "*may* be substantially to lessen competition") and on old, highly interventionist and widely criticized precedents like *Brown Shoe* (cited more than a dozen times in the Biden enforcers' revised merger guidelines, which Ferguson has remarkably declined to revisit). And, of course, downplaying concerns about erroneously deterring procompetitive arrangements frees enforcers to, in Meador's words, "move fast and break things up."

This expanded discretionary authority, then, enables what is likely to be the most distinctive feature of new right antitrust: *using antitrust enforcement authority to procure private commitments that advance conservative causes, even when the law does not require the agreed-upon behavior*.

Extracting deals by threatening to exercise discretionary authority is a hallmark of President Trump's governing style, as evidenced by his use of emergency tariff power. His appointees have followed suit. The Federal Communications Commission (FCC), for example, conditioned approval of the Skydance–Paramount merger on the merged firm's commitment to eliminate diversity, equity, and inclusion programs and to subject news network CBS to monitoring for political bias. More recently, FCC chairman Brendan Carr issued a thinly veiled threat to impose restrictions on broadcast network ABC if it did not suspend talk show host Jimmy Kimmel after he made remarks that Carr (and presumably Trump) found objectionable. "We can do this the easy way or the hard way," Carr told right-wing podcaster Benny Johnson. "These companies can find ways to change conduct to take action on Kimmel or, you know, there's going to be extra work for the FCC ahead."

Carr's threats, which temporarily succeeded, represent an about-face from the position he took following revelations that the Biden administration had pressured Facebook to algorithmically suppress an incriminating news article about a laptop computer belonging to President Biden's son, Hunter. Carr then remarked (correctly):

> This is very concerning. The government does not evade the First Amendment's restraints on censoring political speech by jawboning a company into suppressing it—rather, that conduct runs headlong into those constitutional restrictions, as Supreme Court law makes clear.

Carr made those remarks as a minority commissioner lacking the ability to force the FCC's hand. Once he attained such power, constitutional niceties fell by the wayside.

If they continue to embrace the new right antitrust philosophy revealed in their leaders' speeches, the antitrust enforcement agencies are likely to follow Carr's lead. Indeed, the FTC recently approved a merger of two large advertising agencies on the condition that the merged company (1) not direct advertising dollars on the basis of publishers' viewpoints, and (2) accept all advertisers as customers, regardless of their viewpoint. The point of those conditions was to increase advertising revenue for publishers of right-wing content. The FTC thus used its merger authority to secure a conservative objective by "agreement," when the First Amendment would have precluded mandating the agreed-upon behavior. We should expect more of this sort of conduct, which University of Missouri law professor Ryan Snyder has dubbed a "non-enforcement trade," from our new right antitrust enforcers.

ASSESSING NEW RIGHT ANTITRUST

New right antitrust may well succeed in achieving conservative objectives like increased outlets and funding for right-wing viewpoints and greater restrictions on gender-altering medical interventions (an objective Ferguson vowed to pursue when campaigning for FTC chair). It fails, though, to "conserve" values that people on the political right have traditionally cherished. It rejects conservatism's traditional preference for private ordering over public control, with multiple enforcers equating private refusals-to-deal with government coercion and Meador going so far as to criticize the heretofore conservative notion of "permissionless innovation." By increasing enforcers' discretionary authority, it reduces predictability for business planners and encourages jawboning to procure behavioral commitments the law does not mandate. It thereby undermines what may be traditional conservatism's most treasured value: the rule of law.

Consider, for example, the FTC's ongoing investigation into "big tech censorship" of conservative viewpoints. In its 2024 decision, *Moody v. Netchoice*, the Supreme Court sent back to the lower courts two facial challenges to Florida and Texas laws restricting social media platforms' moderation of user-generated content. In doing so, it instructed the lower courts on two matters. First, it clarified that technology platforms' content moderation decisions are protected by the First Amendment. Second, it explained that the government cannot survive a First Amendment challenge to restrictions on content moderation by arguing that the restrictions better balance the mix of speech on a platform. During a "Big-Tech Censorship Forum" hosted by the DOJ on April 3, 2025, Ferguson conceded that the FTC aims to wrest control from, in his words, "truly terrifying Silicon Valley elites" who have "truly horrifying and terrifying views." Under *Moody v. Netchoice*, that admission would seem to doom any Commission challenge to technology platforms' content moderation choices. But the threat of even a meritless FTC action may push technology platforms to alter their content moderation practices in a way the Commission prefers.

Ironically for a self-proclaimed free speech champion like Ferguson, the FTC's tactics resemble the governmental jawboning that the Supreme Court unanimously condemned in its 2024 decision in *National Rifle Association v. Vullo*. Like Carr, Ferguson himself criticized such jawboning when discussing *Murthy v. Missouri*, the case challenging the Biden administration's pressuring of social media platforms to suppress certain COVID-related content. But, like Carr, Ferguson changed his tune once he took the reins of power.

Not only does new right antitrust insufficiently conserve the rule of law, it is also, from conservatives' standpoint, short-sighted. By expanding enforcers' discretionary authority and weakening norms against bringing far-fetched actions to extract commitments the law does not mandate, new right antitrust enforcers are forging a sword that will eventually be used against those holding their views.

This term, the Supreme Court will reconsider its holding in *Humphrey's Executor v. United States*, the 1935 decision that upheld statutory restrictions on the president's ability to remove, for mere policy disagreements, the heads of bipartisan, multi-member commissions. Most observers expect the Court to overrule *Humphrey's Executor*. The likely result will be that agencies like the FCC and FTC more stridently pursue the policy agenda of the sitting president. The next time a progressive Democrat occupies the White House, antitrust enforcers are sure to aggressively pursue his or her agenda lest they be fired. At that point, the enhanced discretionary authority wrought by new right thinking will prove a significant liability for conservatives.

Finally, new right antitrust is likely to be less effective than the older variant at what everyone agrees is antitrust's primary, if not exclusive, task: promoting consumer welfare. By minimizing the role of economic analysis, reinvigorating anti-consumer precedents, and downplaying concerns about chilling innovation and efficient business practices, new right antitrust enforcement is likely to leave consumers worse off than they would be under a regime that harnessed the best economic learning to push antitrust's common law development toward doctrines that maximize market output by minimizing the sum of error and decision costs.

Having spent four years bemoaning the politicization of antitrust by the Neo-Brandeisian enforcers in the Biden administration, conservatives should not now cement its politicization by embracing new right antitrust. To conserve the rule of law, avoid paving the way for future antitrust abuses in a progressive presidential administration, and ensure that antitrust optimally promotes consumer welfare, conservatives should resist the seductions of new right thinking and once again embrace the economically informed, decision-theoretic approach favored by traditional conservatives, antitrust moderates, and the Roberts Court itself. *R*

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