Anca Daniela Chirita: "Neo-Brandeis and Antitrust: an Olive Branch for Consensus" - Network Law Review in The Future of the Neo-Brandeis Movement Symposium Thibault Schrepel and Anouk van der Veer (eds) *Network Law Review*: The complex science of markets & digital laws (July 18, 2024)

NEO-BRANDEIS AND ANTITRUST: AN OLIVE BRANCH FOR CONSENSUS

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I. INTRODUCTION

The controversy surrounding the goals of US antitrust law is one of the most polarizing debates of contemporary times. This brief contribution reconciles the most compelling arguments and counterarguments that I have encountered in US scholarship to attain much-needed consensus, which is required to advance the enforcement of US antitrust laws. While it is impossible to predict the future, especially due to the politicization of US antitrust policy, this contribution offers an olive branch to a range of divergent arguments to embrace a more inclusive remit of consumer welfare that could expand beyond the purely materialistic function of economic prosperity to carefully balance the socioeconomics of contemporaneous consumer wants and needs, especially sustainable efficiency, to enable happier consumers and their well-being.

II. CONSUMER WELFARE UNILATERALISM VERSUS PLURALISM OF ANTITRUST GOALS – MAKING THE DIFFERENCE BETWEEN CORE VALUES AND ANTITRUST GOALS

The predominant wave of criticism of the unilateral domination of consumer welfare as the sole antitrust goal since the late 1980s has triggered a reconsideration of pluralistic antitrust values. For example, challenges have been directed at the notions that industrial freedom and economic liberty are indispensable for a democratic capitalist society. Instead, there have been proposals to move beyond the corporate domination of a few[1] wealthy members of wider society and instead to nurture individual innovative entrepreneurs; otherwise, corporate monopolizations could also capture[2] – if they have not already been successful in doing so – antitrust agencies,[3] governments,[4] and other vital political institutions through intense lobbying[5] and special groups of interest.

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[1] On Louis Brandeis' understanding that only by counteracting the power of large trusts could democracy be maintained, Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. C. L. REV. 624 (2012).

[2] To prevent the "capture of the government by the rich", JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 77 (2022).

[3] Justice of the U.S. Supreme Court, Stephen Breyer, *"Justice Brandeis as a Legal Seer," Brandeis Lecture*, University of Louisville School of Law 4 (Kentucky, Feb. 16, 2004).

[4] Michael Wolfe, *Movements, Movements, and the Eroding Antitrust Consensus*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1179 (2020).

[5] THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 205 (2019).

Advocates for consumer welfare are confused by references to such antitrust *values* of individual freedom and liberty,[6] autonomy, and privacy,[7] serving both businesses and consumers to the point that they reject them as antitrust goals. Nonetheless, antitrust values are not *the* antitrust goals. Recently, Nobel Prize winner in economics, Professor Stiglitz advanced a novel understanding of freedom which relates to an economic and political system that delivers "not only on efficiency, equity, and sustainability but also on moral values."[8] For this to happen, economic freedom under antitrust law becomes an aspiration for social justice and well-being to insulate us from exploitative competition and market failure.

III. FROM ANTITRUST & DEMOCRACY TO ANTITRUST PRIORITIES AND JUDICIAL DISCRETION

Revisiting the broken link between antitrust law and constitutionalism, another discrepancy permeates the dualistic function of antitrust *law* and *policy*, which not only seeks to correct market imperfections caused by inefficient[9] industrial organizations or incompetent management, but also safeguards fundamental *constitutional* values such as democracy.[10] Individual freedom and industrial liberty[11] are preserved, which is essential for an open market-based capitalistic system to operate, in which businesses flourish and deliver to consumers. However, such a constitutional reading of antitrust policy does not change the operational goals of US antitrust laws. Coincidentally spanning the same period since the late 1970s, the prevailing view of the E.U. courts has never unambiguously

[6] For Brandeis, liberty meant "freedom from actual restraint," which gradually turned to the right to privacy (to be left alone), Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); that this right remains relevant in the digital age, Cayce Myers, *Review of Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890)*, 25 COMMUNICATION L. & POL'Y 522 (2020).

[7] For the view that smaller firms offer less privacy that do larger firms, Matthew Sipe, *Covering Prying Eyes with an Invisible Hand: Privacy, Antitrust, and the New Brandeis Movement*, 36 HARV. J. L & TECH. 389-90, 417 (2023). Thus, consumer harm is significant for larger accumulations of economic data.

[8] JOSEPH E. STIGLITZ, THE ROAD TO FREEDOM: ECONOMICS AND THE GOOD SOCIETY xvi, 216-22 (2024).

[9] For Brandeis, increasing size led to inefficiency, PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 78, 81 (1993); especially once corporations surpassed their optimal size, Manuel Wörsdörfer, *Louis D. Brandeis and the New Brandeis Movement: Parallels and Differences*, 68 ANTITRUST BULL. 445 (2023).

[10] For Professor Fox, antitrust law is "akin to the economic democracy of markets," Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 300 (2019); as Americans "linked the success of democracy to the fight against monopolies", Daniel A. Crane & William J. Novak*, Introduction: Democracy and the American Antimonopoly Tradition, in* ANTIMONOPOLY AND AMERICAN DEMOCRACY 21 (Daniel A. Crane & William J. Novak eds., 2024); that increasing inequality undermines public trust in democracy, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 43 (2013); on the salience of antitrust for the functioning of the democratic process, Harry First, *American Express, the Rule of Reason, and the Goals of Antitrust*, 98 NEB. L. REV. 327 (2019); Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. U. L. REV. 859 (2019); Matthew Sipe, *Covering Prying Eyes with an Invisible Hand: Privacy, Antitrust, and the New Brandeis Movement*, 36 HARV. J. L & TECH. 382 (2023), remembering the "unequivocal" link between democracy and antitrust by reference to Mr. Louis D. Brandeis' statement before U.S. Congress: "We cannot maintain democratic conditions in America if we allow organizations to arise in our midst with [this] power", in United States Steel Corporation: Hearings Before the House Committee on Investigation of United States Steel Corporation, 62d Cong. 2862 (1912); Lina Khan, *Editorial – The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRACTICE 131 (2018); cf. Thibault Schrepel, *Antitrust without Romance*, 13 N.Y.U. J. L. & LIBERTY 361, 428 (2020) on antitrust law to counteract fake news undermining democracy, killer acquisitions or to protect the environment.

[11] For Brandeis, the elimination of excess size was vital for industrial liberty, PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 77(1993).

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endorsed consumer welfare as their supreme antitrust goal, unlike the U.S. Supreme Court[12]. However, more recently, the General Court made a sweeping endorsement by reference to the preservation of "plurality in a democratic society" in *Google Android*,[13] highlighting the crucial importance of consumer choice for the benefit of consumers. The Court of Justice also empowered consumer choice[14] against the corporate interests of Meta, when the Court held that its personalized sensitive data-driven services cannot be objectively justified in the public interest.[15]

With the risk of oversimplifying the constitutional dimension of antitrust law for the preservation of the democratic form of government with individual civil liberties and disambiguation of citizen-consumer rights, such recognition from the European Union also reinforces the consumer welfare paradigm in the context of digital markets. Applied to "Digital Empires,"[16] the erosion of democracy towards a digital system of monopolistic tyranny[17] in the age of fake news, widespread lack of transparency over data sharing, and algorithmic discrimination have challenged the limits of the traditional antitrust consumer welfare paradigm in the context of elections or for entertainment pursuits on social media and beyond. While antitrust law has yet to find a suitable legal avenue to address such recriminations against digital corporations,[18] especially for the exploitation[19] and algorithmic manipulation of consumer privacy under unfair competition, without causing a massive disruption[20] to the traditional antitrust consensus,[21] antitrust boundaries must be reassessed to address contemporary challenges. Specifically, it is necessary to identify a common set of antitrust priorities, antitrust urgencies, and finally, agree on what amounts to an absolute antitrust emergency.

IV. CONSISTENCY, COHERENCE, AND PREDICTABILITY VERSUS INCONSISTENT & DIVERGENT INTERPRETATIONS – FROM CONSUMER WELFARE TO WELL-BEING?

[12] Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. C. L. REV. 655 (2012) in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

[13] Google and Alphabet v. Commission (Google Android), T-604/18, ECLI:EU: T:2022:541, para 1028.

[14] Cf. rejecting consumer choice as an extension of the consumer welfare standard, Murat C. Mungan & John M. Yun, *A Reputational View of Antitrust' s Consumer Welfare Standard*, 61 HOUS. L. REV. 595 (2023).

[15] Meta Platforms Inc., and Others v Bundeskartellamt, C-252/21, ECLI:EU:C:2023:537, para 155 (7); Opinion of AG Rantos, Meta Platforms v Bundeskartellamt and Verbraucherzentrale, C-252/21, ECLI:EU:C:2022:704, para 78 (4); Anca Chirita, *Abuse of Global Platform Dominance or Competition on the Merits*, 33 LOY. CONSUMER. L. REV. 22-39 (2022).

[16] ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY 149 (2023).

[17] By analogy to the minority rule in partisan politics which empowers minorities, STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: HOW TO REVERSE AN AUTHORITARIAN TURN AND FORGE A DEMOCRACY FOR ALL 169 (2023).

[18] Emphasizing a lack of economic evidence of consumer harm caused by digital platforms, John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S. C. L. REV 356 (2020).

[19] *See* Professor Fox's advancement of deception, privacy intrusion, and exploitation, in Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 315, 318 (2019); Olivia T. Creser*, In Antitrust We Trust?: The Big Tech is Not the Problem – It's Weak Data Privacy Protections*, 73 FED. COMM. L. J. 292, 316 (2021).

[20] Maurits Dolmans & Tobias Pesch*, Should We Disrupt Antitrust Law*, 5 CLPD 83 (2019); Justin Hurwitz, *Chevron and Administrative Antitrust, Redux,* 30 GEO. MASON L. REV 999 (2023).

[21] On the crucial importance of building antitrust consensus, William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (2021).

While the goal of a stable consumer welfare is achievable, this does not mean that its consistency, coherence,[22] and predictability[23] cannot be reoriented towards pragmatic priorities, modified to ensure greater consumer privacy and choice, or even disrupted by a climate change emergency. However, accommodating socioeconomic needs[24] should not change the core substance of antitrust law: antitrust should not be a closed economic system like mathematics, but antitrust law should also not become devoid of economics or the delegated[25] forum for constitutionalism, IP, healthcare, taxation, privacy, or environmental[26] concerns. However, we also accept that antitrust intervention[27] in every sector of the economy makes antitrust the theory of everything and puts us on a collision course with established areas of law, as mentioned above. Therefore, even if this makes us uncomfortable, antitrust markets are subject to endless special regulations. Both sides of the law must be considered if there is a conflict of laws, such as a greenwashing conspiracy,[28] erosion of economic privacy, unfair terms in life insurance, private pension[29] policy, or even broken housing[30] or rental markets. While antitrust laws can simplify economic reasoning for greater accessibility and transparency, it is difficult to imagine an antitrust case without a proper economic analysis.[31] The tendency of the European Commission's decisions has been to conduct economic and factual analyses to the detriment of legal interpretation. This debate demonstrates that there is a mismatch between economic assessment and legal interpretation, whereas some regard antitrust as the exclusive

[22] Emphasizing that the consumer welfare paradigm was called for to address previous inconsistent enforcement, Joshua D. Wright & Jennifer Cascone Fauver, *Antitrust Reform and the Nirvana Fallacy: The Case against a New Sherman Act*, 2022 COLUM. BUS. L. REV. 113 (2022).

[23] On the benefits of having a stable and coherent antitrust goal, Elyse Dorsey, Geoffrey A. Manne, Jan Rybnicek, Kristian Stout & Joshua D. Wright, Consumer Welfare & the Rule of Law: The Case against the New Populist Antitrust Movement, 47 PEPP. L. REV. 879-81 (2020).

[24] Rejecting "vague social and political" standards, Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 363 (2019); cf. Lina M. Khan, *Note, Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017); Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV 2167 (2020).

[25] That antitrust intervention has been delegated instead of offering a regulatory solution, Daniel E. Crane, *Antitrust' s Unconventional Politics*, 104 VIRGINIA L. REV. ONLINE 135 (2018).

[26] Such concerns could be incorporated as "noncompetition values", Stavros Makris, *Openness and Integrity in Antitrust*, 17 J. COMPETITION L. & ECON. 12 (2020).

[27] Its antithesis, *laissez-faire*, implying a minimum of antitrust intervention was described as an "economic and political myth" that did not prevail in Great Britain in the eighteen century, Colin G. Holmes, *Problems – Laissez-faire in Theory and Practice: Britain, 1800-1875*, 5 J. EUR. ECON. HISTORY 673, 686 (1976).

[28] On the changing nature of corporate activism if corporations are effectively discouraged from embracing greening antitrust, Paul Balmer, *Colluding to Save the World: How Antitrust Law Discourage Corporations from Taking Action on Climate Change'*, 47 ECOLOGY L. CURRENTS 220 (2020); Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L. J. 1667, 1681, 1696 (2022), emphasizing the risk of categorizing environmental cooperation as conspiracy runs against sustainability pursuits; Anca D. Chirita, Written Evidence to the CMA on Competition for Environmental Sustainability (Doctor Anca Chirita (publishing.service.gov.uk) (2022).

[29] On the social consideration of pensions and irregular employment, Alpheus Thomas Mason, *Review of The Curse of Bigness. Miscellaneous Papers of Justice Brandeis by Osmond Fraenkel, Louis Brandeis, and Clarence M. Lewis*, 35 COLUM. L. REV. 133 (1935).

[30] Beth Brodsky, *Housing Hipsters: Adapting the Spirit of Hipster Antitrust to Address Wealth Asymmetries between Corporate Residential Properties and Cost-Burdened Residents*, 26 UDC/DCSL L. REV. 29 (2023).

[31] Also critical of the Neo-Brandesian view that antitrust has focused too much on economics, Herbert Hovenkamp*, Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 84 (2019); cf. on the rejection of economic methodology, Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 295, 369 (2019); welcoming a Neo-Brandesian positive impact on labor when balancing equity for democracy, Anthony Pahnke, *Neo-Brandeisians and Marxists Unite!: Reevaluating the Nature of Power and Markets in Competition Policy*, 44 NEW POL. SCI. 376 (2022).

language of economics, which fails to distinguish between the broader values of antitrust, its inherent conflicts, and relationships with other areas of law.

V. UNDER-ENFORCEMENT PERCEPTION, REALITY OR DEFENSIVENESS? THE MYTH OF REGULATORY ENACTMENTS

The perception of U.S. under-enforcement[32] of antitrust law, which has been the root cause of a wave of defensive reactions, must be balanced against the widespread monopolization of markets in the wake of contemporary challenges; namely, rapidly increasing monopolistic concentration caused by a sustained process of industry consolidation. Relaxed waves of approvals of mergers and acquisitions have contributed to social and economic inequality.[33] Globally, the corporate giantism of freemium digital services has disrupted the data-sharing economy including search, advertising, artificial intelligence, consumer communications and, foremost, online shopping. This has involved eroding the economic privacy of online consumers in the form of their virtual and physical locations[34] as well as willingness to pay, alongside sustainable efficiency for greening antitrust law.

However, a more nuanced view should be adopted to alleviate public perceptions of under-enforcement. As mentioned above, there has been a fundamental fear of enforcement errors[35] caused by intervening too early to correct the perceptions of market imperfections against new challenges. If there have been hardly any new monopolization cases since the adoption of the singular antitrust goal of consumer welfare, a pledge for more inclusive antitrust before the US Courts would suffice, coupled with remedial digital regulatory enactments.[36] This would offer much-needed certainty to businesses, especially regarding data combinations[37]. While advocates of regulatory adaptation to address novel algorithmic challenges[38] are correct, given how the European Commission has dealt with abuses of digital dominance under the traditional antitrust paradigm, there is nothing to fear, as any new regulation of digital markets will have narrower applicability alongside the US Sherman Act and potentially expand the remit to capture unfair competition scenarios.

If the regulatory procedure for approving M&As is too permissive, the FTC could raise additional hurdles to capture hidden motives and implement more intrusive remedies. However, regulatory enactment seldom eradicates these monopolies. For instance, when Queen Elizabeth I was

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[32] That this amounts to unhelpful criticism due to insufficient FTC' human resources necessary for antitrust enforcement, Alison Jones & William E. Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. 248-49 (2020); cf. lax antitrust enforcement, Joshua D. Wright & Jennifer Cascone Fauver, *Antitrust Reform and the Nirvana Fallacy: The Case against a New Sherman Act*, 2022 COLUM. BUS. L. REV. 105 (2022).

[33] Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, *in* TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS 22 (Martin Guzman, ed., 2018); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 1 (2021).

[34] That such data are available from vehicles, home and portable appliances, security systems, medical devices, and digital assistants or Uber, Aziz Z. Huq, *The Public Trust in Data*, 110 GEO. L. J. 348, 351, 397 (2021).

[35] Edward D. Cavanagh, *A 2020 Agenda for Re-Invigorated Antitrust Enforcement: Four Big Ideas*, 105 CORNELL L. REV. ONLINE 59, 66 (2020); Justin Hurwitz, *AmEx and Post-Cartesian Antitrust*, 98 NEB. L. REV 388 (2019).

[36] Cf. digital regulation following the E.U. model, Yunsieg P. Kim, *A Revolution without a Cause: The Digital Markets Act and Neo-Brandeisian Antitrust*, 2023 WIS. L. REV. 1254, 1306 (2023).

[37] Recognizing this challenge, Michael J. K. M. Kinane, *Grandpa Sherman Did Not See Google Coming: Evolutions in Antitrust to Regulate Data Aggregating Firms*, 107 MINN. L. REV. 1761, 1787 (2023); on the conflicts of interest between the under-enforcement of the consumer data abuse and the lenient scrutiny of data-driven mergers, Anca D. Chirita, *Exclusionary and Exploitative Abuse of Consumer Data*, *in* MARIA IOANNIDOU & DENI MANTZARI (EDS) RESEARCH HANDBOOK ON COMPETITION LAW AND DATA PRIVACY 29 (Maria Ioannidou & Deni Mantzari, eds., forthcoming 2025) (Exclusionary and Exploitative Abuse of Consumer Data by Anca D. Chirita :: SSRN).

[38] John A. Fortin, *Algorithms and Conscious Parallelism: Why Current Antitrust Doctrine is Prepared for the Twenty-First Century Challenges Posed by Dynamic Pricing*, 23 TUL. J.TECH. & INTELL. PROP. 26, 29 (2021).

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shown the truth about Crown monopolies, it took decades for anti-monopoly regulations to be enacted in 1624[39] to preserve individual liberty and freedom, which hardly eradicated monopolies in practice. Antitrust history teaches us that the propensity of enforcement success depends on good faith, and after a while, if future generations of antitrust enforcement struggle with the original mission due to fatigue or simply bad faith, then the range of antitrust goals needs to be reassessed to reach a renewed consensus and provide a proper sense of direction towards better and swifter antitrust enforcement.

VI. THE PUBLIC INTERESTS UNDER A PLURALISTIC ANTITRUST PARADIGM VERSUS JUDICIAL DISCRETION

Advancing a pluralistic antitrust paradigm changes the consumer welfare paradigm towards the public interest[40] in competition law, considering the manifold institutional mandate of the U.S. FTC to oversee antitrust markets, consumer law, privacy, and unfair competition laws. In 1948, the U.K. Monopolies and Restrictive Practices (Inquiry and Control) Act did not make notable enforcement progress due to a perception of vague "public interest criteria,"[41] despite being informed by economic thinking such as productive and distribution efficiency, entrepreneurship, and technical improvements. Across the Atlantic, the E.U. Courts have never embraced Bork's narrow or minimalist[42] consumer welfare paradigm, opting instead for the "public interest[43] to protect against market distortions of competition, as reinforced in *Servizio Electtrico* and *European Superleague* more recently, by discarding the singular "interests of competitors or of consumers."[44]

Despite the inclusive paradigm of citizens' "well-being" as consumers since *Telia Sonera* to *Servizio Elettrico*, the E.U. courts have rarely handed down judgements that amount to discretionary antitrust goals, such as greening or social antitrust pursuits. In contrast, the U.S. approach to antitrust goals, predating the consumer welfare paradigm, led to judicial discretion.[45] Therefore, when courts retain judicial discretion to balance divergent goals on a collision course, this does not necessarily mean that balancing happens unless there are extraordinary circumstances in the public interest. The latest pronouncement for business "equality of opportunity"[46] in *European Superleague*[47] demonstrates the E.U. Courts' commitment to fairness, which is essential to safeguard the traditional

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[39] HERMANN LEVY, MONOPOLIES, CARTELS, AND TRUSTS IN BRITISH INDUSTRY 46 (1927); Raymond de Roover, *Monopoly Theory Prior to Adam Smith: A Revision*, 65 Q. J. ECON. 507 (1951).

[40] Embracing a "public interest standard", Beth Brodsky, *Housing Hipsters: Adapting the Spirit of Hipster Antitrust to Address Wealth Asymmetries between Corporate Residential Properties and Cost-Burdened Residents*, 26 UDC/DCSL L. REV. 6 (2023).

[41] CD Harbury & Leo J. Raskind, *The British Approach to Monopoly Control*, 67 Q. J. ECON. 394 (1953).

[42] Reflecting on the narrow focus of consumer welfare and efficiency, Darren Bush, *Consumer Welfare Theory as an Ethical Consideration: An Essay on Hipsters, Invisible Feet, and the Science of Economics*, 63 ANTITRUST BULL. 510 (2018); on the minimalist approach to antitrust, Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1343, 1354 (2021), favoring antitrust intervention in pharmaceuticals, tech, and labor.

[43] Continental Can v. Commission, 6/72, ECLI:EU:C:1973:22, para 26; GlaxoSmithKline v. Commission, C-501/06, ECLI:EU:C:2009:610, paras 18-19; Konkurrensverket v. Telia Sonera, C-52/09, ECLI:EU:C:2011:83, para 22; Post Denmark A/S v. Konkurrenceradet (Post Denmark I), C-209/10, ECLI:EU:C:2012:172, para 20; Servizio Elettrico Nazionale and Others v. Autorità Garante della Concorrenza e del Mercato and Others, C-377/20, ECLI:EU:C:2022:379, para 41; European Superleague Company v. FIFA and UEFA, C-333/21 (21 Dec. 2023), ECLI:EU:C:2023:1011, para 124.

[44] GlaxoSmithKline, para 18; Continental Can, para 26.

[45] JONATHAN B BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019) 57-61; Douglas A. Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L. J. 275 (2020).

[46] Favoring equality of opportunity to increase productivity, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 135 (2013).

[47] European Superleague, para 133.

system of "undistorted" competition[48]. In addition, public interest considerations can be considered in the E.U. and U.K. merger control for security, defense, media plurality, and so on. However, the U.S. view[49] remains skeptical that social considerations, such as job cuts, reduced wages, and health and environmental considerations, permeate U.S. merger control. Furthermore, the statistics of overwhelming merger approvals do not confirm such fears. In contrast, there are hardly any political decisions based on labor and environmental considerations of public interest that can be detected in the vast wave of merger approvals. The current light-touch approach to merger control[50] based on economic considerations alone cannot justify the costs of running merger reviews and acts against the Robin Hood indirect welfare redistribution model. There are very few cases of blocked mergers; therefore, conditionally approved mergers cannot justify the enormous burden in terms of agency costs.

VII. MAKING THE CORRECT DECISION TO MAXIMIZE A CONSUMER WELFARE APPROACH TO ANTITRUST LAW

Those who continue to advocate for classical antitrust discard the remainder of the U.S. FTC's public mandate in favor of consumer welfare, which captures high-to-excessive pricing and conspiracies. However, those who advocate for an expansive consumer welfare ++ approach to antitrust law should consider that the public interest is in extending the goal of the process of competition law, which is not the traditionally limited goal of the U.S. Sherman Act. That is, paying careful attention to this calibration exercise implies that we can think of a more inclusive goal to capture current and future regulatory enactments, but we must deviate from the narrow confines of traditional antitrust law.

Regardless how wide[51] or narrow the remit on consumer welfare will be, it will be decided[52] by the U.S. Supreme Court in the years to come. But the final decision to broaden the horizon of antitrust law will have to consider that none of the representatives of the Brandeis movement are "hipsters"[53] and that this is a serious debate, not a battle of the egos. Finally, it was Justice Brandeis[54] who was appointed to the U.S. Supreme Court under the influence of neo-classical Marshallian economics,

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[48] See Anca D. Chiriţă, *Undistorted, (Un)fair Competition, Consumer Welfare, and the Interpretation of Article 102 TFEU*, 33 WORLD COMPETITION L. & ECON. REV. 419 (2010).

[49] Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism, and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L. J. 422 (2020).

[50] For a critical review of E.U. merger control, Anca D. Chirita, *Data-driven Mergers under EU Competition Law*, *in* THE FUTURE OF COMMERCIAL LAW: WAYS FORWARD FOR CHANGE AND REFORM 182 (Orkun Akseli & John Linarelli, eds., 2020).

[51] On balancing multiple interests, Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 2023 UTAH L. REV. 886 (2023).

[52] That some judges place greater weight on purposes or the underpinning values of a constitutional provision, Justice Stephen Breyer, THE AUTHORITY *OF THE* COURT *AND THE* PERIL *OF* POLITICS 34, 65 (2021).

[53] For such connotations, George Sakkopoulos, *The Program for Making America and Europe Beautiful: "Hipster Antitrust" and US and EU Antitrust Law and Policy*, 10 MANCHESTER REV. L. CRIME & ETHICS 191 (2021); Angela Daly, *Beyond 'Hipster Antitrust': A Critical Perspective on the European Commission's Google Decision*, 1 EUR. COMPETITION & REG. L. REV. 191 (2017); cf. "hipster" connotations, Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Antitrust law*, 52 CONN. L. REV. 208 (2020); Mark Glick & Darren Bush, *Breaking up Consumer Welfare's Antitrust Policy Monopoly*, 56 SUFFOLK U. L. REV 204, 265 (2023).

[54] On Brandeis' moral commitment to personal responsibility and individuality as vital for democracy, Richard P. Adelstein, *"Islands of Conscious Power": Louis D. Brandeis, and the Modern Corporation*, 63 BUS. HISTORY REV. 619 (1989); Katherine A. Helm, *Louis Brandeis's Arc of Moral Justice*, 33 TOURO L. REV. 157 (2017).

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which informed the view that monopolies will inevitably need to be broken up[55] to "promote the interests of consumers"[56] beyond greedy monopolistic pursuits. For Justice Brandeis, all economic activity was a "social process."[57] Bork followed an economic approach to antitrust law,[58] which has also been heavily contested for excluding producers instead of social or total welfare,[59] to articulate the consumer welfare paradigm[60] in a populist fashion to resonate with widely defined consumers. However, in 1978, Bork did not have to fight climate change among the antitrust generation.[61] Therefore, Bork cannot be blamed for the subsequent contemporary twist in antitrust pledges; most certainly, Bork would have joined the prevailing public sentiment to advance a proper antitrust goal by finding ways to reflect consumers' current needs.

VIII. WHY ANTITRUST IS THE MODERN ROBIN HOOD OF INDIRECT WELFARE REDISTRIBUTION

Although antitrust rules have not been enacted[62] to reduce inequalities[63] of socio-economic conditions, before the enactment of the Sherman Act, there were socio-economic inequalities of opportunity and wealth that antitrust law as a modern Robin Hood has still been indirectly able to successfully reduce. This has especially applied to corporate oligopolistic or monopolistic welfare, via the route of vigorous enforcement of antitrust law by levying substantial fines that redistributed funds to the public budget. However, the Robin-Hood function of antitrust law does not work well for citizen consumers if there is under-enforcement, which explains the widespread criticism of increased inequality. If the ratio of successful monopolization cases fails to materialize an indirect redistribution of wealth, antitrust enforcement has a public trust problem and faces tougher public scrutiny. Rejecting an antitrust fairness pledge for smaller businesses, such as agrarian populism[64] for farmers and grocers, cannot do justice for consumers because individual farmers have inferior bargaining

[55] ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 346 (1890); similar to Marshall, Brandeis considered that "whatever the business or organization there is a point where it would become too large for efficient and economic management, just as there is a point where it would be too small to be an efficient instrument," Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 TOURO L. REV 290, 299 (2017); similar to Marshall who likened industrial concentration to a "huge monster" that "abused its power," A. Marshall, *Principles of Economics* 9 (2013), Brandeis likened it to "the Frankenstein monster" in "The Curse of Bigness", see PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 141 (1984).

[56] MARSHALL 405.

[57] GERARD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 66 (2009).

[58] ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 47 (2021).

[59] Seth B. Sacher & John M. Yun, *Twelve Fallacies of the Neo-Antitrust Movement*, 26 GEO. MASON L. REV. 1504 (2019).

[60] Rejecting the Consumer Welfare Standard, Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?,* 30 GEO. MASON L. REV. 938 (2023).

[61] U.K. Competition Appeal Tribunal, Judge Simon Holmes, *Preface: How Sustainability Can Be Taken into Account in Every Area of Competition Law*, *in* COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY 13 (Simon Holmes, Dirk Middleschulte & Martinj Snoep, eds., 2021).

[62] Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 67 (1982).

[63] Seth B. Sacher & John M. Yun, *Twelve Fallacies of the Neo-Antitrust Movement*, 26 GEO. MASON L. REV. 1517, 1522 (2019), rejecting income inequality and global warming; cf. Elyse Dorsey, *Income Inequality, Job Polarization, and the Redistributive Power of Antitrust*, 29 GEO. MASON L. REV 1062 (2022) on the historical connection between antitrust enforcement and income inequality; on the existence of significant economic evidence that increased market power has eroded worker welfare, Lauren Sillman, *Antitrust for Consumers and Workers: A Framework for Labor Market Analysis in Merger Review*, 30 KAN. J. L. & PUB. POL'Y 81 (2020).

[64] RICHARD N. LANGLOIS, THE CORPORATION AND THE TWENTIETH CENTURY: THE HISTORY OF AMERICAN BUSINESS ENTERPRISE 40 (2023).

power compared to large oligopolistic supermarkets. To reconcile this position, issues of unequal[65] bargaining positions could be addressed under the remission of unfair competition laws.

Only vigorous antitrust enforcement can indirectly curb welfare inequality, but this does not make antitrust enforcement pursue a populist[66] agenda. Antitrust must deal with the root cause of inequality, namely, any unlawful means to achieve unparalleled wealth,[67] such as anticompetitive behaviors, a relaxed merger procedure, and even acquisitions. In addition, commentators[68] raised the duplication of efforts between the FTC and the DOJ as contributing to antitrust under-enforcement, especially in the process of appointment to the DOJ.

IX. TOWARDS A MAXIMALIST APPROACH TO SUSTAINABLE ANTITRUST EFFICIENCY

The historical method of interpretation based on the legislative intent[69] of the US Congress found no supportive mention of efficiency as an antitrust goal; however, in the EU, its social market-based[70] system of capitalistic competition[71] must efficiently allocate available resources.[72] When antitrust project efficiency is the goal of industrial organizations[73] and businesses, additional connotations of sustainable efficiency[74] emerge in environmental economics.[75] However, this latest

[65] This aligns with Brandeis' concern about unequal power for labor employed by large firms, Arthur Robert Burns, *Review of The Curse of Bigness; Miscellaneous Papers of Louis D. Brandeis by Osmond K. Fraenkel, Clarence M. Lewis and Louis D. Brandeis*, 83 U. PA. L. REV 818 (1935); Philip Cullis, *The Limits of Progressivism: Louis Brandeis, Democracy and the Corporation*, 30 J. AMERICAN STUDIES 383, 389, 393-94, 404 (1996) on Brandeis' concerns about social impact rather than efficiency, taking the legal redress of fighting unfair methods of competition due to the "immoral" nature of monopolistic firms. However, despite challenging unethical business practices, such progressive antitrust enforcement did not do much to break up existing trusts or prevent mergers; for the same view that in the mid-twentieth century, there was no vigorous antitrust enforcement, Brian R. Cheffins, *Perspectives: History and Turning the Antitrust Page*, 95 BUS. HISTORY REV. 821 (2021); cf. Brandeis disregarded efficiency in favor of growing inequality and privacy concerns, John O. Mcginnis, *The Rotten Roots of Neo-Brandesian Antitrust*, L. & LIBERTY FORUM at 8 (June 10, 2020).

[66] Cf. Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism, and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L. J. 409 (2020).

[67] Anca D. Chirita, *Data-Driven Unfair Competition in Digital Markets*, 29 BOSTON U. J. SCI. & TECH. L. 11 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4289040) (2024).

[68] John O. McGinnis & Linda Sun, *Unifying Antitrust Enforcement for the Digital Age*, 78 WASH. & LEE L. REV. 314, 329, 331, 355 (2021).

[69] Kenneth G. Elzinga, *Goals of Antitrust: Other than Competition and Efficiency, What Else Counts*, U. PA L. REV. 1191 (1977).

[70] On the progressive pursuit of a "social democratic state" in the U.S., WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 1, 184-217 (2022).

[71] Anca D. Chirita, *Competition Policy's Social Paradox Are We Losing Sight of the Wood for the Trees*, 3 EUR. COMPETITION J. 367 (2018).

[72] Anca D. Chiriţă, *A Legal-Historical Review of the EU Competition Rules*, 63 I.C.L.Q. 287 (2014).

[73] However, scholars argued that "antitrust would stop being law if it were simply a branch of applied microeconomics dependent on empirical analysis," Stavros Makris, *Openness and Integrity in Antitrust*, 17 J. COMPETITION L. & ECON. 15 (2020); Oles Andriychuck, *Dialectical Antitrust: An Alternative Insight into the Methodology of EC Competition Law Analysis in a Period of Economic Downturn*, 31 EUR. COMPETITION L. REV. 155, 163 (2010).

[74] This requires a limit on the environmental burden, including carbon emissions, MIKE BERNERS-LEE, THERE IS NO PLANET B 249 (2021); on systemic risks to long-term sustainability for businesses arising from climate change, Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L. J. 1653 (2022).

[75] Explaining the relationship between well-being and sustainability "as a vicious circle whereby humans destroy the very foundation of their own well-being," ÉLOI LAURENT, THE NEW ENVIRONMENTAL ECONOMICS: SUSTAINABILITY AND JUSTICE 111 (2020).

development does not substantially change the consumer welfare paradigm if we ask businesses to deliver at the lowest possible price[76] while maintaining high-quality sustainable products and services to consumers. Otherwise, consumer harm through a reduction in such standards would lead to inefficiency and impact the overall well-being[77] of consumers. Fierce or toxic competition, in which there is overall market saturation,[78] could also negatively impact businesses at a higher risk of unfair competition from powerful rivals. The value of fair competition is also used to calibrate the intensity of competition to an acceptable level for all businesses, regardless of their size.

X. LABOR'S WEAKER BARGAINING POWER UNDER ANTITRUST AND UNFAIR COMPETITION LAWS

Finally, although in *Binon*[79] and *van der Woude*,[80] the Advocate General of the CJEU reminded us of the "importance of a free and autonomous press in a democracy" and "a system of industrial democracy" protecting the collective rights of workers, antitrust law cannot substitute collective trade unions' action to protect wages, equal pay, and boost bargaining[81] power. However, economic dependencies and unequal bargaining power can be considered monopolistic and unfair terms. However, this does not mean that antitrust can take on every case in which there is unequal bargaining power outside oligopolistic and monopolistic positions. Such issues could again arise under the remit of unfair competition. This is not to say that there is no merit in intervening against monopolistic corporations that pay extremely low wages. The novel consumer welfare paradigm that incorporates sustainability could set much higher sustainable efficiency standards for businesses by choosing not to purchase products or services if they are delivered to consumers while compromising quality, the environment, and the exploitation of human labor as a workforce, including not paying decent wages, using child labor, and undermining collective bargaining.

XI. SUSTAINABLE EFFICIENCY FOR HAPPIER CONSUMERS AND THEIR WELL-BEING

The Neo-Brandeis movement captures the core tenets of sustainable efficiency for happy consumers and their well-being.[82] It is a noble, not a populist,[83] goal and deserves attention as the U.S. Supreme Court would need to adjust the traditional consumer welfare paradigm to be more inclusive. As Nobel Prize winner in economics, Professor Stiglitz[84] argued:

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[76] Otherwise, dismissing this efficiency standard will harm consumers, Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 94 (2019); supporting other non-price considerations such as quality and innovation under the consumer welfare standard, Douglas, H. Ginsburg, *Balancing Unquantified Harms and Benefits in Antitrust Cases under the Consumer Welfare Standard*, 2019 COLUM. BUS. L. REV. 827 (2019).

[77] For the view that safeguarding consumer well-being could become a key proxy for consumer welfare, Stavros Makris, *Openness and Integrity in Antitrust*, 17 J. COMPETITION L. & ECON. 55 (2020).

[78] For Brandeis, this amounted to cycles of overproduction and destructive competition or "competition that kills," Chase Foster & Kathleen Thelen, *Brandeis in Brussels? Bureaucratic discretion, social learning, and the development of regulated competition in the European Union*, 17 REGULATION & GOVERNANCE 7 (2023).

[79] Opinion of AG Sir Gordon Slynn, Binon v. AMP, C-243/83, ECLI:EU:C:1985:66, para 4.

[80] Opinion of AG Fennelly, van der Woude, C-222/98, ECLI:EU:C:2000:226, para 17.

[81] Cf. Brandeis' view to bolster the bargaining power of union laborers under the rule of reason, Laura Phillips-Sawyer, *Restructuring American Antitrust Law: Institutional Economics and the Antitrust Labor Immunity, 1890-1940s*, U. CHICAGO L. REV. 685, 700 (2023).

[82] Although more inclusive, well-being is not intended to capture medical conditions; cf. Gregory Day, *Antitrust, Attention, and the Mental Health Crisis*, 106 MINN. L. REV. 1957 (2022) with emphasis on the health risks of free digital markets.

[83] Cf. Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J. L. BUS. & FIN. 159, 163, 175, 180 (2020), rejecting socio-political antitrust goals.

[84] JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 43 (2013).

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"The focus of businesspeople is, of course, not to enhance societal well-being broadly understood, or even to make markets more competitive, their objective is simply to make markets work *for them*, to make them more profitable."

Therefore, the ambition to achieve social well-being should be antitrust law's aspirational goal, as much as businesses strive for efficiency for their own corporate profits. This does not mean that all sudden antitrust laws should take on plentiful monopolization cases where there is only social or environmental harm and without any serious consumer harm due to anticompetitive conduct. Although unequal bargaining leading to depressed labor wages is a significant issue, it still needs to be considered alongside traditional antitrust concerns.

The thorny issue of implementing more drastic remedies[85] beyond behavioral ones should not be rejected. Even one single successful antitrust case could successfully restore competition.

XII. CONCLUSION

Regardless of what the U.S. Supreme Court will decide in the future, it will offer much needed clarity for this antitrust debate. It is hoped that the U.S. FTC and the DOJ will prosecute many new antitrust cases that could test the new limits and expand antitrust law to carefully consider – beyond materialistic prosperity – the socio-economic realities of modern antitrust law and the current needs of consumers as individuals and their fundamental rights and freedoms. The latter would include economic choice, privacy, and autonomy for higher quality and environmental standards of welfare and well-being. However, it is clear that antitrust should make consumers happy and that it does not only include classical notions of price and output in the antitrust equation.

[85] Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 2009, 2018 (2020), on corporate lobby against breakups; cf. Franceso Ducci, *Randomization as an Antitrust Remedy*, 20 BERKELEY BUS. L. J. 222 (2023); against structural remedies, Darren Bush, *President Trump's Antitrust Division: An Essay on the Same Old, Same Old*, 70 MERCER L. REV 677 (2019).