NEO-BRANDEISIANISM'S DEMOCRACY PARADOX

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ABSTRACT

Neo-Brandeisians, including the current heads of the U.S. antitrust enforcement agencies, have declared contemporary antitrust a failure. Among their chief complaints is that prevailing antitrust doctrine has failed to protect democratic values because it has allowed business enterprises to amass excessive economic power. Such economic power, they assert, breeds undue political power as large firms have the resources to sway policymakers and may thereby thwart majority will. Outside the political realm, Neo-Brandeisians say, massive industrial concentration undermines effective self-governance by rendering citizens beholden as consumers, suppliers, and laborers to a small group of powerful firms. To preserve democratic values, defined both narrowly in terms of actual democratic functioning and broadly in terms of economic self-governance, Neo-Brandeisians press for a fundamental reordering of the antitrust enterprise. Key components of this reordering are (1) abandonment of antitrust's consumer welfare standard (exemplified by the U.S. Federal Trade Commission's replacement of its 2015 enforcement policy on unfair methods of competition with a multi-goaled enforcement policy) and (2) a move toward ex ante conduct rules in lieu of enforcement via adjudication under ex post standards (exemplified by the Commission's recent proposal to ban worker noncompete agreements). The combined effect of these two moves, however, would be to centralize political power, weaken democratic accountability, and reduce individual freedom. Because promotion of democratic values is Neo-Brandeisianism's reason for being, Neo-Brandeisianism is "a policy at war with itself."

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I. Introduction

"Neo-Brandeisian" antitrust scholars contend that the prevailing approach to antitrust law in the United States is deficient.[2] They say that in seeking exclusively to promote the welfare of consumers by minimizing market inefficiencies,[3] the current antitrust system ignores other societal ills

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[2] *See*, *e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUROP'N COMP'N L. & PRAC. 131 (2018). Neo-Brandeisians draw their preferred moniker from U.S. Supreme Court Justice Louis Brandeis, whose writing and speeches highlighted various non-economic ills stemming from large businesses and concentrated markets. *See generally* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1934).

[3] *See*, *e.g.*, Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986) (Posner, J.) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency.").

that result when firms amass large market shares.[4] Chief among those are harms to democracy. Excessive market concentration, Neo-Brandeisians assert, impairs democratic functioning, as large firms use their vast resources to lobby for policies that thwart majority will.[5] High market concentration also undermines economic "self-governance," Neo-Brandeisians maintain, because citizens' ability to control their lives is reduced when they are beholden as consumers, suppliers, or laborers to a small group of economically powerful entities.[6] Working within the system that now prevails, Neo-Brandeisians contend, cannot fix these problems; instead, U.S. antitrust must be fundamentally restructured.[7]

As a reform movement, Neo-Brandeisianism is hitting its stride.[8] Both the current U.S. President and his predecessor have stressed the importance of using antitrust to pursue democratic goals.[9] So have legislators across the

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[4] Khan, *supra* note 2, at 132 ("The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs—all harms that Congress intended for the antitrust laws to prevent.").

[5] *Id.* at 131 ("Dominant corporations wield outsized influence over political processes and outcomes, be it through lobbying, financing elections, staffing government, funding research, or establishing systemic importance that they can leverage.").

[6] *Id.* (echoing Brandeis's concern that "autocratic structures in the commercial sphere—such as when one or a few private corporations call all the shots—can preclude the experience of liberty, threatening democracy in our civic sphere").

[7] *See generally* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, YALE L. J. F. 960 (June 4, 2018).

[8] *See*, *e.g.*, David Dayen & Alexander Sammon, *The New Brandeis Movement Has Its Moment*, THE AMERICAN PROSPECT (July 21, 2021) (available at https://prospect.org/justice/new-brandeis-movement-has-its-moment-justice-department-antitrust-jonathan-kanter/); Greg Ip, *Antitrust's New Mission: Preserving Democracy, Not Efficiency*, WALL ST. J. (July 7, 2021) (available at https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424).

[9] *See* Daniel A. Crane, *Antitrust as an Instrument of Democracy*, 72 DUKE L. J. ONLINE 23, 23 (2022) (citing President Joe Biden's Executive Order on Promoting Competition in the American Economy § 1 (July 9, 2021) (observing that "excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers") and Editorial, *Trump's Comments Create a Lose-Lose Position for Justice*, WASH. POST (Nov. 13, 2017) (noting President Donald Trump's claim that allowing AT&T and Time Warner to merge would "destroy democracy")).

political spectrum[10] and an ideologically diverse assortment of think tanks.[11] The current President has tapped leading Neo-Brandeisians to serve on his National Economic Council[12] and to head the nation's two most important antitrust enforcement agencies: the U.S. Federal Trade Commission (FTC)[13] and the Antitrust Division of the U.S. Department of Justice (DOJ).[14]

Given the professed aims of Neo-Brandeisianism, the movement's growing prominence might appear to herald good news for democracy. It does not. In implementation, the policies Neo-Brandeisians advocate to enhance democracy tend themselves to undermine democratic values. Neo-Brandeisianism is thus "a policy at war with itself."[15]

To show why, this article proceeds as follows. Part II demonstrates that a focus on using antitrust to promote democracy, understood both narrowly in terms of actual democratic functioning and broadly in terms of economic self-governance, distinguishes Neo-Brandeisianism from other antitrust reform initiatives. Part II also shows that Neo-Brandeisianism's unique reform agenda, which calls for abrogation of antitrust's consumer welfare standard and imposition of ex ante conduct rules in place of ex post behavioral standards, follows from the movement's emphasis on democratic concerns. Strengthening democracy is thus Neo-Brandeisianism's reason for being and is essential to the movement's success.

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[10] *See* A TRUST-BUSTING AGENDA FOR THE 21ST CENTURY (available at https://www.hawley.senate.gov/senator-hawleys-trust-busting-agenda) (highlighting statement by Sen. Josh Hawley (R-MO) that "[i]f you allow corporations to amass significant economic power through market concentration, they are going to have political power, and they're going to use it"); Sen. Elizabeth Warren (D-MA), *Reigniting Competition in the American Economy*, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016) (arguing that "[c]oncentration . . . threatens our democracy" and that "[t]he larger and more economically powerful these companies get, the more resources they can bring to bear on lobbying government to change the rules to benefit exactly the companies that are doing the lobbying").

[11] *See* Crane, *supra* note 9, at 23-24 (citing calls by the progressive Open Markets Institute, the centrist Brookings Institution, and the conservative Heritage Foundation to deploy antitrust to preserve democratic values).

[12] Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021) (available at https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html?) (reporting appointment of Neo-Brandeisian Tim Wu to serve on National Economic Council as special assistant to the President for technology and competition policy).

[13] *See* Cat Zakrzewski and Tyler Pager, *Biden taps Big Tech critic Lina Khan to chair the Federal Trade Commission*, WASH. POST (June 15, 2021) (available at https://www.washingtonpost.com/technology/2021/06/15/khan-ftc-confirmation-vote/).

[14] Jacob M. Schlesinger, *The Return of the Trustbusters*, WALL ST. J. (Aug. 27, 2021) (available at https://www.wsj.com/articles/the-return-of-the-trustbusters-11630076102) (referring to Assistant Attorney General Jonathan Kanter as "another neo-Brandeisian").

[15] *Cf.* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 216 (1st ed. 1978).

Part III examines how Neo-Brandeisians' proposed reforms actually affect democratic functioning and economic autonomy. It first shows that abrogation of the consumer welfare standard threatens both the rule of law and the separation of government powers and therefore fails to further, and likely undermines, Neo-Brandeisians' goal of enhancing individual autonomy in the face of concentrated power. Part III then details how combining abrogation of the consumer welfare standard with promulgation of ex ante conduct rules—the two-part strategy the FTC is now pursuing under its Neo-Brandeisian leadership—would impair actual democratic functioning. Implemented in tandem, Neo-Brandeisianism's two main reform proposals would empower three unelected and difficult-to-remove bureaucrats to write conduct rules covering virtually all business behaviors throughout the entire economy to prevent outcomes those bureaucrats deem to be unfair. Far from enhancing individual autonomy in the face of concentrated power, such an approach would itself centralize power in a small cadre of politically unaccountable state actors.

Part IV concludes with the observation that Neo-Brandeisianism, which is all but certain to occasion significant consumer harm, offers so little countervailing benefit to democracy that the movement—despite its current popularity—should be deemed a failure.

II. Neo-Brandeisianism's *Raison D'être*

Neo-Brandeisianism is a reaction to the prevailing antitrust regime.[16] We thus begin with a brief description of how antitrust currently operates. We then consider Neo-Brandeisians' distinctive criticisms of the status quo and their unique proposals for reform. This examination demonstrates that the essence of Neo-Brandeisianism—what distinguishes it from other antitrust reform movements—is its call to use antitrust law to promote democracy, defined both narrowly and broadly.

A. The Prevailing Antitrust Regime

While the last forty years have witnessed numerous debates about particular antitrust doctrines, a near consensus has reigned among courts and commentators about what antitrust ultimately should do and how, in general, it should do it.[17] Under the prevailing view, antitrust's exclusive aim

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[16] Khan, *supra* note 2, at 131 (2018) (observing that "the 'New Brandeis School' … signals a break with the Chicago School, whose ideas set antitrust on a radically new course starting in the 1970s and 1980s and continue to underpin competition policy in the USA today").

[17] *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211 (2008) (observing that "there is widespread agreement today among courts, antitrust-enforcement agencies, and antitrust practitioners and scholars about the goals of the antitrust enterprise"); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1 (2005) (reporting that consensus has been reached on the goals of antitrust law); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 220 (2005) ("Over the last

is to prevent ill-gotten "market power,"[18] a well-known market failure resulting from a lack of competition among sellers or buyers.[19] Exercises of market power reduce market output and enable the firms exerting such power to extract more value from their transaction partners than they could if they faced vigorous competition.[20]

Given that a lack of market competition is the source of market power, antitrust targets the two situations in which market rivalry is weak or non-existent: collusion and monopoly. The federal antitrust statutes include general prohibitions on unreasonable trade-restraining agreements (e.g., collusive arrangements),[21] unreasonably exclusionary conduct that creates or threatens monopoly power,[22] and business combinations that are likely to produce monopoly or substantially lessen competition in a market.[23] Courts assess the "reasonableness" of challenged conduct according to its actual or likely effect on market output: Conduct that reduces output and thereby harms consumers is unreasonable and thus illegal; conduct that enhances

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fifteen years, a bipartisan consensus has emerged regarding the goals of antitrust enforcement."); Robert T. Pitofsky, *Antitrust at the Turn of the Twenty-first Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 583 (2002) (noting the broad "'convergence' of antitrust thinking in the United States").

[18] Hovenkamp, *supra* note 17, at 13-18; CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44 (1959) (articulating and describing the goal of antitrust policy as the "protection of competitive processes by limiting market power"). Notably, antitrust does not forbid the mere possession of market power, nor its acquisition through legitimate means such as innovation. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

[19] *See* THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS 135-45 (2018) (explaining how lack of competition produces market power, reducing social welfare).

[20] *See id.*

[21] Sherman Act § 1, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). Court decisions have limited this prohibition to agreements that "unreasonably" restrain trade. *See, e..g.*, State Oil v. Kahn, 522 U.S. 3, 10 (1997) ("[T]his Court has long recognized that Congress intended to outlaw only unreasonable restraints.").

[22] Sherman Act § 2, 15 U.S.C. § 2 (forbidding monopolization and attempted monopolization of markets); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

[23] Clayton Act § 7, 15 U.S.C. § 18 (forbidding business combinations "where in any line of commerce … the effect … may be substantially to lessen competition, or to tend to create a monopoly").

market output and thereby benefits consumers is reasonable and thus antitrust-compliant.[24] A few classes of conduct are automatically deemed unreasonable without analysis into their actual effect because courts have had enough experience with the behaviors to know that they are always or almost always output-reducing.[25] Some other behaviors are suspicious enough to be presumed unreasonable but may escape condemnation if the defendant proves a countervailing procompetitive effect.[26] Most behaviors, however, are evaluated on a case-by-case basis, with courts positing conduct-specific tests for assessing reasonableness and placing the initial burden of establishing unreasonableness on the plaintiff.[27] In crafting liability tests—establishing the elements of claims or defenses and allocating proof burdens—courts should (and do) attempt to minimize the sum of (1) welfare losses from wrongfully acquitting output-reducing practices or wrongfully condemning output-enhancing practices (i.e., "error costs") and (2) the costs of administering the legal regime (i.e., "decision costs").[28]

The prevailing understanding, then, is that antitrust is an output-focused, standards-based (rather than rule-based)[29] body of federal common law in

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[24] *See* Hovenkamp, *supra* note 17, at 2-5 (describing output-focused understanding of competition).

[25] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

[26] See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (observing that "quick-look" analysis is appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"); *id.* at 775 n.12 (observing that quick-look analysis effectively requires "shifting to a defendant the burden to show empirical evidence of procompetitive effects").

[27] See State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (observing that "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market" under the rule of reason). See generally Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 80, 83 (2018).

[28] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 16 (1984) (arguing that antitrust "should be designed to minimize the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself"); Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B. C. L. REV. 871 (2011) (demonstrating that Supreme Court does craft antitrust liability rules to minimize sum of error and decision costs).

[29] Whereas a rule specifies before the actor acts exactly what behaviors are forbidden or permitted, a standard posits a somewhat amorphous behavioral directive and then assesses an act's compliance after the act has occurred. See Lambert, *supra* note 19, at 101; Daniel A.

which courts craft liability tests in light of economic learning and with an eye toward minimizing the sum of error and decision costs. Because the goal of the law is to maximize market output (which generally benefits consumers) and to protect the transaction partners of firms that might possess or gain market power (who are usually, but not always, consumers), it is conventional to describe the prevailing antitrust approach as embracing a "consumer welfare standard."[30]

B. The Distinctly Neo-Brandeisian Critique of the Prevailing Regime

Neo-Brandeisians have deemed this understanding of antitrust a failure.[31] They say the prevailing antitrust regime does not adequately protect laborers and suppliers because it exclusively values "consumer" welfare.[32] Nor does it safeguard innovation, they contend, because it focuses excessively on consumer prices in assessing consumer welfare effects.[33] This price fixation, they assert, makes the prevailing approach particularly ill-

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Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & L. L. REV. 49 (2007). "Reasonableness" is a standard.

[30] *See* Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L. J. 571, 572 (1986) (observing that "[c]ompetitive rather than monopolistic price levels; more rather than less output; innovation; minimum cost production; and the availability of free choices in the marketplace for consumers and producers alike … are often summed up in the shorthand term 'consumer welfare'"); Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement*, 94 NOTRE DAME L. REV. 583, 621 (2018) (equating market output with consumer welfare in observing that "assessing a particular antitrust problem under a consumer welfare test requires no more than an ordinal estimate of the direction of market output, whether up or down").

[31] *See*, *e.g.*, Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, YALE L. J. F. 960, 964 (June 4, 2018) ("The sweeping market power problem we confront today is a result of the current antitrust framework."); Sandeep Vaheesan, *The Twilight of Technocrats' Monopoly on Antitrust*, 127 YALE L. J. F. 980, 982 (June 4, 2018) (arguing that "consumer welfare antitrust is deficient on at least two grounds: it is inconsistent with congressional intent and embodies an incomplete understanding of corporate power").

[32] *See*, *e.g.*, Vaheesan, *supra* note 31, at 984 ("Powerful businesses are using their might to hurt Americans in myriad ways, and consumer welfare captures at most a subset of these public harms."); Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 10-12 (2015); MARSHALL STEINBAUM, ERIC HARRIS BERNSTEIN & JOHN STURM, ROOSEVELT INST., POWERLESS: HOW LAX ANTITRUST AND CONCENTRATED MARKET POWER RIG THE ECONOMY AGAINST AMERICAN WORKERS, CONSUMERS, AND COMMUNITIES 32 (2018) (arguing that the "consumer welfare paradigm ignores upstream 'monopsony'—the power a firm can wield over its suppliers, including suppliers of labor . . . .") (available at https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Powerless-201802.pdf).

[33] *See*, *e.g.*, Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO MASON L. REV. 395, 398 (2018) ("When the harm to consumers does not manifest in the form of higher prices or reduced output in the product market, the [consumer welfare] standard might generate a false negative—that is, a finding of no harm when a real harm to innovation exists.").

suited for zero-price markets like internet search and social networking, where firms like Google and Meta offer their products to consumers for free.[34] They further maintain that the prevailing approach ironically fails to protect consumers because its focus on short-term price effects can immunize structural developments, like rising market concentration, that cause long-run consumer harm.[35] And they insist that many of the conduct-specific liability tests that have emerged under the status quo approach are unduly biased in favor of antitrust defendants.[36]

All these criticisms of the prevailing antitrust regime, however, are really about its implementation, not its basic structure. Properly conceived, the consumer welfare standard reaches harms not just to end-user buyers but to all trading partners on the other side of the market from the antitrust defendant, including laborers and suppliers who are injured by monopsony power.[37] Innovation harms are fully cognizable under the prevailing regime,[38] and the federal enforcement agencies regularly pursue cases on the basis of

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[34] *See*, *e.g.*, John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 198 (2015) ("The narrow-minded focus on price competition exhibited throughout much of antitrust law's developmental history has yielded analytical frameworks suited only for use in positive-price product markets.").

[35] *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 738 (2017) ("[P]egging anticompetitive harm to high prices and/or lower output—while disregarding the market structure and competitive process that give rise to this market power—restricts intervention to the moment when a company has already acquired sufficient dominance to distort competition.").

[36] *See*, *e.g.*, TIM WU, THE UTAH STATEMENT: REVIVING ANTIMONOPOLY TRADITIONS FOR THE ERA OF BIG TECH (Nov. 18, 2019) (Neo-Brandeisian manifesto identifying ten prevailing legal doctrines that are unduly biased in favor of antitrust defendants) (available at https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7).

[37] Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L. J. 1996, 2000-01 (2018) ("[A]pplying the 'consumer welfare' standard means that a merger is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market."); *see also id.* at 2001 n.14 (observing that trading partners "may be final consumers or businesses purchasing intermediate goods" or "suppliers such as workers or farmers who are harmed by the loss of competition when two large buyers merge"); Hovenkamp, *supra* note 30, at 634-35 ("For the purpose of analyzing wage suppression agreements, the worker stands in the same position on the sell side as the consumer does on the buy side."); Todd v. Exxon, 275 F.3d 191 (2nd Cir. 2001) (denying motion to dismiss plaintiffs' claim that employer data exchange created monopsony power and harmed employees).

[38] For example, the federal enforcement agencies' Horizontal Merger Guidelines explicitly direct the agencies to consider potential innovation harms when evaluating proposed mergers. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010) (agencies may consider whether a proposed merger is "likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger").

harms to innovation.[39] The prevailing regime can address harms in zero-price markets because (1) service quality—privacy protection, etc.—is relevant to consumer welfare,[40] and (2) zero-price markets are usually two-sided, with some group on the other side of the market (usually advertisers) paying positive prices that are of obvious relevance under the consumer welfare standard.[41] And, of course, long-term harms to consumers from adverse market structures should always be part of the liability inquiry under the prevailing approach.[42] To the extent courts have crafted liability tests in an unduly pro-defendant fashion (one that fails to minimize the sum of error and decision costs), the proper response is to recalibrate the rules as the prevailing regime permits, not to restructure the regime itself.

While the aforementioned criticisms might be—indeed, have been—levied by commentators who support the prevailing regime but believe it should be implemented differently,[43] other criticisms asserted by Neo-Brandeisians

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[39] See Joshua D. Wright, *Antitrust Provides a More Reasonable Regulatory Framework Than Net Neutrality* 11 (Geo. Mason Law & Econ. Research Paper No. 17-35 2017) (available at https://papers.ssrn.com/sol3/abstractid=3020068) ("Between 2004 and 2014, the FTC challenged 164 mergers and alleged harm to innovation in 54 of them.").

[40] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890-95 (2007) (recognizing that minimum resale price maintenance may further consumer welfare, even if it results in higher consumer prices, by inducing dealer services that effectively enhance the quality of the manufacturer's offering). *See also* Makan Delrahim, U.S. Assistant Att'y Gen., Antitrust Div., *"Blind[ing] Me With Science": Antitrust, Data, and Digital Markets*, Remarks at Harvard Law School & Competition Policy International Conference on "Challenges to Antitrust in a Changing Economy" (Nov. 8, 2019) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition) ("Price is therefore only one dimension of competition, and non-price factors like innovation and quality are especially important in zero-price markets. Like other features that make a service appealing to a particular consumer, privacy is an important dimension of quality.")

[41] *See generally* David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 ISSUES IN COMPETITION LAW AND POLICY 667 (ABA Section of Antitrust Law 2008).

[42] *See* JOE KENNEDY, INFO. TECH. & INNOVATION FOUND'N, WHY THE CONSUMER WELFARE STANDARD SHOULD REMAIN THE BEDROCK OF ANTITRUST POLICY 9 (2018) (available at https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf) ("[T]he consumer welfare standard allows regulators and courts to focus on long-term changes. It just requires a sound economic analysis that shows the probability of market power at some later date.").

[43] *See*, *e.g.*, C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L. J. 2048 (2018); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L. J. 1962 (2018); Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L. J. 2142 (2018); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L. J. 2078 (2018); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L. J. 1996 (2018); A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L. J . 2110 (2018); Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L. J. 2026 (2018).

strike at essential features of the existing approach. One such criticism is that the governing system fails to prevent democratic harms that may result when firms get too big and powerful.[44] FTC Chair Lina Khan contends, for example, that "[d]ominant corporations wield outsized influence over political processes and outcomes, be it through lobbying, financing elections, staffing government, funding research, or establishing systemic importance that they can leverage. They use these strategies to win favourable policies, further entrenching their dominance."[45] Because this harm can result without immediate adverse effects on consumer welfare, the prevailing antitrust regime is incapable of preventing it.[46]

In addition to the harm to democratic functioning occasioned by large firms' lobbying power—what we call harm to democracy, narrowly defined—Neo-Brandeisians maintain that allowing firms to amass market share as long as no consumer (buyer/seller) harm results can produce a second "democratic" harm: it can so reduce individuals' economic liberty that self-governance is effectively undermined. Chair Khan, for example, favorably quotes a 1912 speech in which Justice Louis Brandeis argued that democracy necessarily involves "[n]ot merely political and religious liberty, but industrial liberty also."[47] Khan further observes that "the Madisonian

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[44] This criticism echoes earlier arguments by former FTC Chair Robert Pitofsky that "it is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979). Pitofsky clarified:

> By "political values," I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.

Id.

[45] Khan, *supra* note 2, at 131. Recent research casts doubt on Khan's assertion that large firms exercise outsized political influence. *See* Nolan McCarty & Sepehn Shahshahani, *Testing Political Antitrust*, 98 NYU L. REV. ___ (forthcoming 2023) ("Our findings do not support the political antitrust movement's central hypothesis that there is an association between economic concentration and concentration of lobbying expenditure at the industry level. … Ultimately, our findings show that the political antitrust movement's claims do not rest on a solid empirical foundation in the lobbying context.").

[46] *Id.* at 132 (observing that "[t]he fixation on efficiency [to further consumer welfare] . . . has largely blinded enforcers to many of the harms caused by undue market power").

[47] *Id.* at 131 (quoting Louis D. Brandeis, *The Regulation of Competition Versus the Regulation of Monopoly*, Address to the Economic Club of New York (Nov. 1, 1912) (available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-regulation-of-competition-versus-the-regulation-of-monopoly-by-louis-d.-brandeis)).

concept of 'self-government' hinges on the ability of citizens to control and check private concentrations of economic power."[48] She contends that "[m]ost people's day-to-day experience of power comes not from interacting with public officials, but through relationships in their economic lives—negotiating pay with an employer, for example, or wrangling the terms of business with a trading partner."[49] She thus echoes Justice Brandeis's fear "that autocratic structures in the commercial sphere—such as when one or a few private corporations call all the shots—can preclude the experience of liberty, threatening democracy in our civic sphere."[50] We may refer to this sort of self-governance impairment as a harm to democracy, broadly defined.

Unlike monopsony harms to labors and suppliers, innovation reduction occasioned by market power, diminished quality in zero-price markets, and long-term consumer harm resulting from overly concentrated markets, the purported harms to democracy emphasized by Neo-Brandeisians cannot be addressed within the prevailing antitrust regime by either more aggressive enforcement or recalibration of liability tests.[51] Accordingly, the essence of the Neo-Brandeisian critique of the antitrust status quo—that which distinguishes Neo-Brandeisians from others who bemoan outcomes under the system as currently implemented—is the claim that the current system fails to protect democracy, defined both narrowly as majority rule in the political arena and broadly as "self-governance" free from excessive concentrations of power.

C. Neo-Brandeisians' Unique Agenda for Reform

As one commentator recently observed, there are four "main tenets" of the Neo-Brandeisian reform agenda: "(1) Anti-Bigness, (2) burden rebalancing, (3) effective enforcement, and (4) legal rule and standard reform."[52] As with Neo-Brandeisians' criticisms of the prevailing antitrust regime, some aspects

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[48] Khan, *supra* note 2, at 131.

[49] *Id. See also* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 40 (2018) ("For most people, a sense of autonomy is more influenced by private forces and economic structure than by government.").

[50] Khan, *supra* note 2, at 131. Khan elsewhere quotes with approval Justice William O. Douglas's dissenting observation that "[i]ndustrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men." Khan, *supra* note 731, at 968 (quoting United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting)).

[51] Khan, *supra* note 7, at 964 (observing that "[t]he sweeping market power problem we confront today is a result of the current antitrust framework" and that "[a]ddressing the full scope of the market power problem requires grappling with the fact that the core of antitrust has been warped"); *id.* at 979 (asserting that "the source of the problem is not just a lack of enforcement, but also the current philosophy of antitrust").

[52] Connor Leydecker, Note, *A Different Curse: Improving the Antitrust Debate About "Bigness,"* 18 N.Y.U. J.L. & BUS. 845, 862 (2022).

of this policy agenda enjoy support from more intervention-minded proponents of the current antitrust system. Numerous mainstream antitrust scholars agree, for example, that antitrust enforcers' budgets should be increased,[53] that the government should enforce the antitrust laws more aggressively,[54] and that courts should recalibrate certain doctrines to make it easier for antitrust plaintiffs to succeed.[55]

By contrast, two aspects of Neo-Brandeisianism—replacing the consumer welfare standard with a multi-goaled approach and implementing ex ante rules—are unique to the movement. Those reforms follow from Neo-Brandeisianism's distinctive criticism of the prevailing antitrust regime: that it fails to protect democracy, both narrowly and broadly defined.

1. Replace the Consumer Welfare Standard with a Multi-Goaled Approach that Pursues Democratic Values

The first distinctly Neo-Brandeisian reform proposal is to jettison the consumer welfare standard.[56] Focusing antitrust's objectives so narrowly,[57] Neo-Brandeisians maintain, prevents the law from reaching behaviors and market structures that weaken democracy but do not occasion reductions in market output or obvious buyer or seller harm.[58]

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[53] *See*, *e.g.*, BILL BAER, JONATHAN BAKER, MICHAEL KADES, FIONA SCOTT MORTON, NANCY L. ROSE, CARL SHAPIRO & TIM WU, RESTORING COMPETITION IN THE UNITED STATES: A VISION FOR ANTITRUST ENFORCEMENT FOR THE NEXT ADMINISTRATION AND CONGRESS 14 (Nov. 2020) ("The agencies require a significant increase in appropriations to begin the process of more effectively deterring anticompetitive conduct and mergers.").

[54] *See*, *e.g.*, *id.* at 19 ("[W]e envision a strategic enforcement agenda that is broader, more deliberate, and bolder than prior efforts."); HERBERT HOVENKAMP, HOUSE JUDICIARY INQUIRY INTO COMPETITION IN DIGITAL MARKETS STATEMENT 10 (April 20, 2020) (bemoaning that "[p]ublic enforcement is down even as the rate of supracompetitive returns is up").

[55] *See*, *e.g.*, sources cited in note 43, *supra*; Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 38-42 (Summer 2021).

[56] *See* Khan, *supra* note 2, at 132 (observing that consumer welfare standard "has warped America's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers," which has "blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs…").

[57] The consumer welfare standard calibrates conduct-specific liability tests with an eye toward maximizing market output and assesses challenged conduct according to its effect on parties on the other side of the transaction from the defendant, usually consumers. *See supra* notes 17-30 and accompanying text.

[58] *See* Khan, *supra* note 7, at 979 (contending that "the source of the problem is not just a lack of enforcement, but also the current philosophy of antitrust"; that "[r]estoring a theory of power that accords with the original values of antitrust—including a distrust of concentrated private power—is critical for reviving an enforcement regime that can fully address the concentrated market power across our political economy"; and that "[t]his would require refocusing antitrust analysis on a structural inquiry about process and power, rather than on a set of metrics focused on a narrow set of outcomes").

While they are adamant that the consumer welfare standard must go, Neo-Brandeisians are less clear on what should replace it. They sometimes suggest that the law should not pursue any particular outcome. Chair Khan, for example, writes:

> Contrary to how critics portray the New Brandeisians, this new school of thought does not promote using antitrust law to achieve a different set of social goals—like more jobs or less inequality. Doing so would replicate a key mistake of the Chicago School: overriding a structural inquiry about process and power with one that focuses on a narrow set of outcomes. Refocusing antitrust on structures and a broader set of measures to assess market power can return the law to focusing on the competitive process.[59]

Khan elsewhere argues that "one reason the present antitrust framework fails to adequately address market power is that the law pegs liability to welfare *effects* rather than to the competitive *process*."[60]

Jonathan Kanter, Deputy Attorney General for Antitrust at the U.S. Department of Justice, expressed similar sentiments in a recent speech advocating abrogation of the consumer welfare standard and calling for "competition and the competitive process [to be] our North Star."[61] Kanter went on to define competition as "rivalry" and the competitive process as "the guarantee that everyone participating in the open market—consumers, farmers, workers, or anyone else—has 'the free opportunity to select among alternative offers.'"[62] These assertions by Khan and Kanter suggest that Neo-Brandeisians favor replacement of the consumer welfare standard with an outcome-indifferent policy of market deconcentration.

But while they might prefer to avoid positing a goal or set of goals for antitrust enforcement (likely for reasons discussed below),[63] Neo-Brandeisians must ultimately contemplate some substantive objective(s) for antitrust. Market deconcentration for its own sake is not a coherent policy for the simple reason that there is no apparent stopping point. Markets can

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[59] Khan, *supra* note 2, at 132.

[60] Khan, *supra* note 7, at 971 (emphasis in original).

[61] U.S. Dep't of Justice, *Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture* (May 18, 2022) (transcript of Kanter speech) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association).

[62] *Id.* (quoting Nat'l Soc'y of Profl. Eng'rs v. United States, 435 U.S. 679, 695 (1978)).

[63] *See infra* notes 83-96 and accompanying text (discussing harms to democracy from multi-goaled antitrust regime).

always be further deconcentrated, eventually by disintegrating firms.[64] There must therefore be some *telos*—an ultimate aim—of a deconcentration agenda. One might advocate, for example, deconcentrating markets to the point at which consumer welfare is maximized, or individuals have maximum control over their own destinies, or the optimal combination of consumer welfare and protection of core democratic values and economic liberties (whatever that combination may be) is achieved.

Neo-Brandeisians appear to favor the third of these options, or something like it.[65] Their rejection of the consumer welfare standard precludes the first objective (deconcentrate to maximize consumer welfare). Their criticism of the consumer welfare standard for failing to prevent long-term consumer harm, however, implies that consumer welfare should be *a*, though not the exclusive, goal of deconcentration.[66] That rules out the second possible objective (deconcentrate to maximize self-governance). When Neo-Brandeisians advocate market deconcentration, they apparently seek to deconcentrate markets to the point at which multiple laudable goals—consumer welfare, democratic functioning, and protection of individual economic liberty—are simultaneously achieved to some degree.[67] Indeed, Chair Khan concedes as much when she writes that "antitrust law was structured to preserve a set of structural conditions (competition) as a way of promoting *a set of outcomes and principles*."[68] Those outcomes and principles include "preventing unfair wealth transfers from consumers, producers, and workers to monopolistic firms; preserving open markets in order to ensure opportunity for entrepreneurs; and halting excessive concentrations of private power."[69]

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[64] *See* Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, PRO-MARKET (May 24, 2022) (observing that perpetual deconcentration "would limit our economy to atomistic competition between sole proprietors in a way that would massively reduce our productivity and impede our economic liberty to collaborate with others in efficient ways").

[65] *Id.* (observing that Kanter's "competition and the competitive process" test "means that antitrust law bans conduct that does not leave 'enough' competitors and choice").

[66] Khan, *supra* note 35, at 737-39 (criticizing prevailing antitrust regime for failing adequately to protect consumer welfare). *Cf.* Pitofsky, *supra* note 44, at 1051-52 (conceding that "that the major goals of antitrust relate to economic efficiency" and that "economic concerns" should be "of paramount importance," though they "should not control exclusively").

[67] *See* Khan, *supra* note 35, at 739-44 ("Antitrust Laws Promote Competition To Serve a Variety of Interests"); Vaheesan, *supra* note 31, at 982 ("The legislative histories of the antitrust laws reveal congressional solicitude not only for consumers, but also for producers, workers, businesses, and citizens.").

[68] Khan, *supra* note 7, at 972 (both emphases added).

[69] *Id.* at 972, n.52. *See also* Khan, *supra* note 35, at 743-44 ("[F]ocusing on consumer welfare disregards the host of other ways that excessive concentration can harm us . . . . Protecting this range of interests requires an approach to antitrust that focuses on the neutrality of the competitive process and the openness of market structures.").

Despite their claim of outcome-indifference, then, Neo-Brandeisians ultimately advocate replacing the consumer welfare standard with a multi-goaled approach that incorporates democratic values. As explained below, the Neo-Brandeisian leadership of the current FTC has moved in that direction by rescinding a policy that committed the Commission to make enforcement decisions on the basis of consumer welfare alone and replacing it with a policy that would permit enforcement action in the pursuit of multiple ends.[70]

2. Implement Ex Ante Rules in Lieu of Ex Post Standards

A second distinctly Neo-Brandeisian antitrust reform stems from the first. Because most of the practices antitrust regulates may be, on net, either output-enhancing or output-reducing,[71] an antitrust regime focused on maximizing market output will have few bright-line prohibitions and will instead favor context-specific assessment of challenged practices. The prevailing antitrust regime therefore limits ex ante conduct rules (i.e., rules of per se illegality) to a handful of practices that experience has shown to be "always or almost always" output-reducing.[72] It otherwise prescribes "an enquiry meet for the case" to assess the legality of challenged conduct.[73] Such an enquiry is context-specific, with elements of liability, available defenses, and proof burdens calibrated to minimize the sum of error and decision costs.[74]

Having eschewed a market-output-focused understanding of antitrust's objective—the consumer welfare standard—Neo-Brandeisians are liberated from concern that ex ante conduct rules will "misfire" and reduce output in particular contexts. And antitrust's democratic objectives, they reason, can almost certainly be furthered by bright-line conduct rules. Bans on mergers that lead to certain levels of market concentration, for example, could both prevent firms from getting so large that they have excessive political power and enhance the ability of buyers, suppliers, and laborers to select among

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[70] *See infra* notes 99-117 and accompanying text (discussing FTC's rescission of 2015 enforcement policy on unfair methods of competition and replacement with 2022 policy).

[71] *See generally*, Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 68 KAN. L. REV. 1097, 1100 (2020) (explaining how horizontal and vertical restraints of trade, exclusion-causing unilateral acts, and business mergers may have negative or positive effects on overall market output, depending on context).

[72] Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289-90 (1985) ("The decision to apply the per se rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.'" (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979) (internal quotation omitted)).

[73] Cal. Dental Ass'n v. Fed. Tr. Comm'n, 526 U.S. 756, 781 (1999).

[74] *See generally* Lambert, *supra* note 28 (demonstrating how courts craft antitrust doctrines and allocate proof burdens to minimize sum of error and decision costs).

alternative transaction partners.[75] Bright-line restrictions on exclusivity in certain vertical contracts could help assure that smaller competitors have access to essential inputs and distribution channels, furthering democracy-enhancing deconcentration.[76] Rules banning exclusive employment agreements could enhance the "industrial liberty" that Brandeis deemed an essential aspect of democracy.[77]

A second uniquely Neo-Brandeisian proposal for reforming antitrust, then, is to transition from ex post liability standards to ex ante conduct rules. Before joining the FTC, now-Chair Lina Khan teamed up with then-Commissioner Rohit Chopra to urge the Commission to engage in legislative rulemaking to prevent unfair methods of competition.[78] The Commission recently embarked on that course by issuing a Notice of Proposed Rulemaking to ban nearly all worker noncompete agreements.[79]

D. Promotion of Democratic Values as the Necessary Justification for Neo-Brandeisianism

The Neo-Brandeisian reform agenda would all but certainly injure consumers. Antitrust would transition from a regime in which doctrines are calibrated and cases decided with an eye toward maximizing market output for the benefit of consumers[80] to one in which the effect on consumer welfare

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[75] Thus, Neo-Brandeisians' proposals for bright-line merger bans. *See* Robert H. Lande & Sandeep Vaheesan, *Ban All Big Mergers. Period.*, THE ATLANTIC (Feb. 25, 2021) (available at https://www.theatlantic.com/ideas/archive/2021/02/ban-all-big-mergers/618131/).

[76] Thus, Neo-Brandeisians' proposals for rules banning certain exclusive contracts. *See* Open Markets Institute, et al., *Petition for Rulemaking to Prohibit Exclusionary Contracts* (available at https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f9ace-caa72176270b73b55a/1603981004182/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf)

[77] Thus, Neo-Brandeisians' proposal for rules banning worker non-compete agreements. *See* Open Markets Institute, et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* (available at https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf).

[78] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020). A transition from ex post standards to ex ante rules could also occur via the courts, were judges to recognize more per se prohibitions or structural presumptions of illegality. Neo-Brandeisians have urged courts in this direction. *See*, *e.g.*, Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 823 (2019) ("To limit the power of large corporations, … the courts must embrace clear rules and presumptions and reject the prevailing rule of reason approach.").

[79] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (RIN 3084, proposed Jan. 19, 2023) (to be codified at 16 C.F.R. Part 910) (hereinafter "Noncompete NPRM").

[80] *See supra* notes 17-30 and accompanying text.

is but one of several concerns and could be trumped by others.[81] Courts and agencies would be free to impose bright-line prohibitions that would likely prove inefficient in many contexts, reducing market output.[82] It strains credulity to suppose that consumers would do as well under Neo-Brandeisianism as under the prevailing regime.

Neobrandeisianism, then, can be justified only if it secures democratic gains whose social value outweighs the concomitant consumer welfare losses its policy agenda entails. Moreover, there must not be an alternative means to achieve those democratic gains with less harm to consumer welfare.

Of course, it would be impossible to perform a rigorous comparison of the marginal costs and benefits of transitioning from the prevailing antitrust regime to the approach Neo-Brandeisians advocate. Consumer welfare and democracy are incommensurable values and could not be accurately measured in any event. But given that market output would almost certainly be reduced by adopting Neo-Brandeisian policies, entailing significant consumer harm, it is important to ask whether democratic values—Neo-Brandeisianism's *raison d'être*—would be substantially furthered by the movement's policy agenda.

They would not.

III. Effects of the Neo-Brandeisian Policy Agenda on Democratic Values

While Neo-Brandeisians complain that the prevailing antitrust regime is insufficiently protective of democracy, defined both broadly as autonomy in the face of concentrated power and narrowly as majority rule in the political arena, the reform agenda they espouse itself centralizes authority over individuals and impairs democratic control over the levers of state power. We first consider the democratic implications of abrogating the consumer welfare standard. We then examine the effects on democracy of combining that move with a transition toward ex ante competition rulemaking—the current policy trajectory of the FTC under its Neo-Brandeisian leadership.

A. Abrogation of the Consumer Welfare Standard

Two features of the American system of governance—the rule of law and the separation of government powers—are typically deemed essential for preserving individual autonomy and thus furthering Neo-Brandeisians' broad conception of democracy.[83] Heeding Neo-Brandeisians' call to replace

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[81] *See supra* notes 63-69 and accompanying text.

[82] *See supra* notes 71-78 and accompanying text.

[83] On the rule of law, *see*, *e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 670 (1984) ("By enhancing the

antitrust's consumer welfare standard with a multi-goaled deconcentration agenda would weaken both of these important features of American government.

We know this from experience. In the mid-Twentieth Century, U.S. courts embraced the sort of multi-goaled deconcentration agenda Neo-Brandeisians advocate.[84] The outcome was hardly appealing from the perspective of democracy, broadly defined. First, the rule of law was impaired as courts could essentially pick and choose between antitrust's multiple goals when deciding individual cases. They sometimes pointed to consumer welfare gains as grounds for approving business conduct that enhanced a firm's productive efficiencies; other times, they pointed to antitrust's deconcentration agenda—the need to protect small businesses to ensure a sufficient number of rivals—to condemn price cuts resulting from enhanced efficiencies.[85]

In a remarkable seven-sentence passage from *Brown Shoe v. United States*,[86] the Supreme Court admitted that the prevailing antitrust regime allowed courts to elect between favoring consumers or competitors in any particular case. Having concluded that a challenged merger could boost the merged firm's productive efficiency, the Court wrote:

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individual's life-planning capacity, the rule of law expands freedom of action, secures a measure of individual liberty, and expresses respect for individual autonomy."); Joseph Raz, *The Rule of Law and Its Virtue*, in JOSEPH RAZ, THE AUTHORITY OF LAW 210, 220-22 (1979); JOHN RAWLS, A THEORY OF JUSTICE 235-43 (1971); F.A. HAYEK, THE ROAD TO SERFDOM 72-87 (1944). On separation of powers, *see*, *e.g.*, Boumediene v. Bush, 553 U.S. 723, 742 (2008) (observing that separation of powers "serves not only to make Government accountable but also to secure individual liberty"); Wellness Int'l Network v. Sharif, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) (noting that the separation of powers "promotes both liberty and accountability"); Bond v. United States, 131 S. Ct. 2355, 2365 (2011) (stating that "individuals ... are protected by the operations of separation of powers"); Bowsher v. Synar, 478 U.S. 714, 722 (1986) (observing that the separation of powers was designed to produce both "liberty" and "full, vigorous, and open debate on the great issues affecting the people").

[84] See 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. 293, 300-01 (2019) (discussing multi-goaled approach of mid-Twentieth Century antitrust).

[85] *Id.* For example, in *Utah Pie v. Continental Baking Co.*, 386 U.S. 685, 687-89 (1967), the U.S. Supreme Court upheld a finding that competition was harmed when a large, efficient firm entered a market and underpriced its smaller but locally dominant rival. *See also id.* at 698 (describing defendant's innovative production methods). The Court did so even though the smaller rival was able to cut its own prices, increase its output, and earn continued (though smaller) profits on each sale. *Id.* at 689-90. The requisite harm to competition could exist, the Court reasoned, because "a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pitch and will be a less effective competitive force." *Id.* at 699-700. The multi-goaled antitrust regime then prevailing permitted the Court to choose its favored end, and it selected small business protection.

[86] 370 U.S. 294 (1962).

> [1] Of course, some of the results of large integrated or chain operations are beneficial to consumers. [2] Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. [3] It is competition, not competitors, which the Act protects. [4] But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. [5] Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. [6] It resolved the competing considerations in favor of decentralization. [7] We must give effect to that decision.[87]

As Robert Bork noted, "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."[88] Such an approach allowed a court to pick whether to permit a merger that benefits consumers by enhancing productive efficiency (by following sentences 1-3) or to condemn it (by following sentences 4-7). And such discretion greatly expanded the power of enforcement agencies, which could challenge just about any business conduct by emphasizing its adverse effects on either consumers (and citing sentences 1-3) or competitors (and citing sentences 4-7). The rule of law, then, devolved into the rule of powerful men, who could simply select their desired outcome and cite a goal justifying it. Bork thus compared mid-Twentieth Century antitrust to the sheriff of a frontier town: "he 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."[89]

In addition to undermining the rule of law, the embrace of a multi-goaled antitrust regime concentrated government power in enforcers by eliminating a meaningful judicial check on that power. Courts were loath to second-guess enforcers' decisions about whether to pursue antitrust's consumer welfare objective or its promotion of rivalry via the protection of small businesses, leading one U.S. Supreme Court justice to conclude: "The sole consistency that I can find is that in litigation under [Clayton Act Section] 7, the Government always wins."[90]

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[87] *Id.* at 344.

[88] Bork, *supra* note 15, at 216.

[89] *Id.* at 6.

[90] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). *Von's Grocery* condemned a grocery store merger that generated obvious efficiencies and resulted in a merged company with a paltry 7.5% market share. *Id.* at 272-79.

If the goal is to protect individual autonomy in the face of concentrated power and the interest of the majority over special interests, such a situation is distressing. When "the Government always wins," securing the favor of a small group of government officials becomes paramount. Power over individuals is not deconcentrated but is transferred to a cadre of state actors, which, unlike a private firm, may use actual force to attain its preferred objectives.[91] Antitrust enforcement thus becomes highly politicized.

Consider, for example, the antitrust lawsuit brought by the U.S. Department of Justice (DOJ) to block the merger of AT&T and Time Warner.[92] Numerous commentators have suggested that DOJ's lawsuit was an effort to punish the owner of media outlets then-President Donald Trump believed were hostile to him (chiefly CNN).[93] It was the consumer welfare standard that thwarted that effort.[94] Had Neo-Brandeisians' enforcer-friendly, multi-goaled approach been in place, DOJ's lawsuit might well have succeeded, inviting further targeting of disfavored entities. Such an outcome would hardly advance individual autonomy in the face of concentrated power.

Nor is it likely that politicizing antitrust enforcement by giving greater discretion to enforcers would further the interests of the majority over special interests. As scholars associated with the public choice branch of economics have shown, political actors are more likely to pursue options that produce concentrated benefits and diffuse costs, and they often do so even when the total costs of those options outweigh the total benefits conferred.[95] The reason is that the few benefit-recipients, who may each experience a sizable gain and

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[91] *See* Max Weber, *Politics as Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1958) (observing that government possesses a "monopoly of the legitimate use of physical force within a given territory" (emphasis omitted)).

[92] Complaint, United States v. AT&T Inc., et al., Case 1:17-cv-02511 (D.D.C. Nov. 20, 2017) (available at https://www.justice.gov/atr/case-document/file/1012916/download).

[93] *See*, *e.g.*, Andrew Ross Sorkin, *The Political Legacy of a Failed Challenge to the AT&T-Time Warner Deal*, N.Y. TIMES DEALBOOK (June 12, 2018) (https://www.nytimes.com/2018/06/12/business/dealbook/att-time-warner-legacy.html); Hadas Gold, *Report: Trump asked Gary Cohn to Block AT&T-Time Warner Merger*, CNN BUSINESS (Mar. 4, 2019) (https://www.cnn.com/2019/03/04/media/att-time-warner-trump-gary-cohn/index.html); Larry Downs, *The Government's Unraveling Antitrust Case Against AT&T-Time Warner*, FORBES (Feb. 1, 2018) (https://www.forbes.com/sites/larrydownes/2018/02/01/the-governments-unraveling-antitrust-case-against-att-time-warner/?sh=6cc0a4b51268).

[94] *See* United States v. AT&T Inc., 310 F. Supp.3d 161, 193-95 (D.D.C. 2018) (discussing that legality of merger would turn on net effects on consumers and announcing conclusion that requisite harm to consumers not established), aff'd, 916 F.3d 1029 (D.C. Cir. 2019).

[95] See generally MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5-36 (1965) (analyzing dynamics of group action and concluding that while individuals in large, diffuse groups will not attempt to achieve group goals absent coercion, members of small interest groups will often do so, leading to "a systematic tendency for 'exploitation' of the great by the small," *id.* at 29).

who typically comprise a more insular group, are more likely to lobby government officials than are the many cost-bearers, who have less individual incentive to expend resources on protecting themselves and are more difficult to organize.[96]

When an antitrust enforcement decision concerns an act that enhances the actor's efficiency but makes things harder for its rivals, the benefits of a successful challenge to that act are primarily concentrated on a small group (the rivals), while the costs—foregone efficiencies—are widely dispersed over a large group (consumers). It is thus likely that enforcers will often favor challenges even when the harm to consumers outweighs the benefit to small rivals. In the end, then, replacing the consumer welfare standard with a multi-goaled approach that seeks to promote rivalry by protecting small businesses may very well threaten, rather than strengthen, majority rule.

B. Imposition of Ex Ante Conduct Rules Unmoored from Consumer Welfare Constraints

While abrogation of the consumer welfare standard in favor of a multi-goaled deconcentration agenda would, by itself, impair democratic values, combining such a move with the second distinctive component of the Neo-Brandeisian policy agenda—imposition of ex ante conduct rules—is especially troubling from a democratic standpoint. That is the current policy trajectory of the FTC, which has formally thrown off the reins of the consumer welfare standard in its pursuit of unfair methods of competition (UMC)[97] and is now asserting authority to impose rules prohibiting business practices it deems competitively unfair.[98] Taken together, those two developments threaten to weaken democratic control of governmental restrictions on commerce without furthering democratic values in the broad sense.

1. FTC's Implementation of the Two-Pronged Neo-Brandeisian Policy Agenda

One of the first acts of the FTC under Chair Khan was to rescind the Commission's *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*.[99] Adopted on a

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[96] *See id.*; James Q. Wilson, *The Politics of Regulation* 369, in THE POLITICS OF REGULATION, James Q. Wilson, ed. (1980) ("Some small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition….").

[97] *See infra* notes 99-117 and accompanying text.

[98] *See infra* notes 118-120 and accompanying text.

[99] *See* Press Release, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021) (available at https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act).

bipartisan basis in 2015,[100] that Statement provided that in deciding whether to challenge an act or practice as an "unfair method of competition in or affecting commerce," and thus prohibited by FTC Act Section 5,[101] "the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[102] The Statement further provided that an "an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[103] The 2015 Statement thus explicitly endorsed the consumer welfare standard and, by requiring consideration of efficiencies, implicitly approved its focus on market output.

On July 1, 2021, less than three weeks after Chair Khan's appointment, the Commission voted to rescind the 2015 UMC Statement.[104] In November 2022, it adopted a new Policy Statement setting forth how it will exercise its UMC authority going forward.[105] The 2022 UMC Statement abandons the 2015 Statement's embrace of the consumer welfare standard and its market output-focused approach to identifying unfair methods of competition.

At the outset, the 2022 UMC Statement "makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect *competitive conditions*."[106] Notably, the Statement does not limit Section 5's proscription to conduct that impairs or threatens "competition." When a firm's actions allow it to lower its costs and underprice its rivals, competition is enhanced. The threatened elimination of less efficient rivals, however, may be taken to "negatively affect competitive conditions."

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[100] *See* Press Release, *FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute* (Aug. 13, 2015) (available at https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute) (observing that statement was adopted on a 4-1 vote with Republican commissioner Ohlhausen dissenting).

[101] *See* 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful.").

[102] U.S. FED. TR. COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015) (available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf).

[103] *Id.*

[104] *See* July 1, 2021 Press Release, *supra* note 99.

[105] U.S. FED. TR. COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (Nov. 10, 2022) (hereinafter "2022 UMC Statement") (https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

[106] *Id.* at 1 (emphasis added).

The remainder of the 2022 UMC Statement confirms that efficiency-enhancing conduct that could usurp business from less efficient rivals or reduce employment opportunities or wages for workers may be deemed an unfair method of competition. The Statement favorably cites one enacting legislator's observation that a purpose of the FTC "is to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals."[107] It highlights another's assertion that under the FTC Act "it is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another…."[108] Observing that "[t]he FTC Act's legislative history makes it clear that Congress intended the statute to protect a broad array of market participants including workers and small businesses,"[109] the Statement quotes an enacting congressman's statement that a goal of Section 5 was "to secure labor the highest wage, the largest amount of employment under the most favorable conditions and circumstances."[110] And the Statement clarifies that offsetting efficiencies cannot by themselves justify a business practice deemed unfair to rivals or workers, noting that "[i]f parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis."[111] Indeed, "the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[112] The FTC thus determined that Section 5's unfair methods of competition ban should pursue multiple ends—consumer welfare, small business protection, employment opportunities, high wages—and that maximizing market output ("net efficiencies") is not the objective of the UMC prohibition.

Instead of assessing conduct according to its effect on market output, the 2022 Statement posits two criteria for evaluating business behavior and provides that the stronger one is, the weaker the other may be.[113] The first criterion is whether the conduct is "facially unfair," which is assessed by considering the degree to which the conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature" or is "otherwise restrictive or exclusionary."[114] The second criterion is whether the conduct "tend[s] to negatively affect

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[107] *Id.* at 3, footnote 15 (quoting Rep. Murdock).

[108] *Id.* at 4, footnote 18 (quoting Sen. Reed).

[109] *Id.* at 4, footnote 18.

[110] *Id.* (quoting Rep. Morgan).

[111] *Id.* at 11.

[112] *Id.*

[113] *Id.* at 9 ("These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5.").

[114] *Id.*

competitive conditions" by, for example, "foreclos[ing] or impair[ing] the opportunities of market participants, reduc[ing] competition between rivals, limit[ing] choice, or otherwise harm[ing] consumers."[115] Notably, this second criterion does not require that the conduct reduce market competition. A business practice that enables a firm to enhance its efficiency and better compete with its rivals—thereby enhancing market competition—would satisfy this second criterion if it usurped significant business from the actor's competitors[116] or somehow limited the choice of the actor's customers, suppliers, or rivals.[117]

The FTC has also begun implementing the second component of the Neo-Brandeisian policy agenda: a transition from ex post behavioral standards to ex ante conduct rules. Embracing Chair Khan's view that Section 6(g) of the FTC Act authorizes the Commission to promulgate legislative rules to prevent unfair methods of competition,[118] a majority of commissioners recently proposed a rule banning all worker noncompete agreements except those executed in connection with the sale of a business.[119] Outside groups have petitioned the Commission to impose similar prohibitions on certain exclusive dealing arrangements.[120]

2. Democratic Implications of the Commission's One-Two Punch

Commentators are divided over whether the FTC possesses legal authority to promulgate legislative rules to prevent unfair methods of

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[115] *Id.*

[116] *Id.* (listing "conduct that tends to foreclose or impair the opportunities of market participants" as an example of conduct that "tend[s] to negatively affect competitive conditions").

[117] *Id.* (listing "conduct that tends to … limit choice" as an example of conduct that "tend[s] to negatively affect competitive conditions").

[118] *See* Chopra & Khan, *supra* note 78, at 375-79. Section 6(g) of the FTC Act empowers the Commission "to make rules and regulations for the purpose of carrying out the provisions of this subchapter." 15 U.S.C. § 46(g). One provision of the relevant subchapter, Section 5, declares "[u]nfair methods of competition in or affecting commerce" to be unlawful. 15 U.S.C. § 45.

[119] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (RIN 3084, proposed Jan. 19, 2023) (to be codified at 16 C.F.R. Part 910). Neo-Brandeisian interest groups earlier petitioned the FTC to promulgate rules on worker non-compete agreements. *See* Open Markets Institute, et al., *Petition re Worker Non-Compete Clauses, supra* note 77.

[120] *See* Open Markets Institute, et al., *Petition re Exclusionary Contracts, supra* note 76.

competition.[121] Although we believe the Commission lacks such authority,[122] our focus here is not on what the agency is legally empowered to do. Instead, we contend that UMC rulemaking, in combination with the FTC's abandonment of the consumer welfare standard, would impair democratic values and thereby undermine Neo-Brandeisianism's reason for being.

Republican democracy is premised on the notion of a social contract in which citizens consent to be governed by representatives whom they may hold accountable.[123] The elaborate governmental structure set forth in the U.S.

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[121] *Compare, e.g.*, Chopra & Khan, *supra* note 78 (arguing for UMC rulemaking authority under § 6(g) of the FTC Act) *with* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 469, 504–07 (2002) (concluding that the FTC Act was not initially understood (or intended) to confer broad legislative rulemaking authority); *see generally* Jay B. Sykes, *The FTC's Competition Rulemaking Authority*, Congressional Research Service (Aug. 12, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10635.

[122] There are textual, historical, and doctrinal reasons to doubt this authority. First, the structure of the statute does not naturally suggest this broad authority. Section 6 of the FTC Act is devoted exclusively to investigatory powers, while section 5 details adjudication. *See* 15 U.S.C. §§ 45, 46. It seems odd that a broad rulemaking grant related to section 5's "unfair methods of competition" would be buried in a subsection of section 6 dealing with corporate classification. *Cf. AMG Cap. Mgmt. v. FTC*, 141 S. Ct. 1341, 1348 (2021) (concluding that section 13 of the FTC Act authorizes only injunctive relief and not other equitable monetary relief because the authorization for permanent injunctions is "buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief."). Further, the failure to provide for sanctions for violations of these rules suggests that the rulemaking was limited to procedural investigatory rules for the FTC itself. *See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 469, 504–05 (2002). Second, the FTC was historically understood not to enjoy UMC rulemaking authority. The FTC itself concluded: "One of the most common mistakes is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceeding before it." ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION 36 (1922); *see also* THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, THE FEDERAL TRADE COMMISSION: MONOGRAPH NO. 6 67 (1940) ("Nothing in the statutes administered by the Commission makes any provision for the promulgation of rules applicable to whole industries."). Only once in its history has the FTC relied on § 6(g) to enact UMC rules, and they were extremely limited in scope, weakly enforced, and eventually abandoned. Jay B. Sykes, *The FTC's Competition Rulemaking Authority*, Congressional Research Service (Aug. 12, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10635. Third, the argument for UMC rulemaking stands on shaky doctrinal ground. Advocates point to a 1973 D.C. Circuit opinion. *See* Chopra & Khan, *supra* note 78, at 378 n.88 (2020) (citing *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973)). *Petroleum Refiners*, however, adopted a wide-sweeping view of administrative authority. *See* 482 F.2d at 680 (referring to "[t]he need to interpret liberally broad grants of rule-making authority"). This interpretive mode stands in stark contrast to recent major questions cases that require Congress to speak clearly to delegate broad authority over important political or economic questions. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022); *see also id.* at 2619 (Gorsuch, J., concurring) (describing the major questions doctrine as a clear statement rule).

[123] James Madison, Federalist No. 10 (observing that republican democracy entails "the delegation of the government … to a small number of citizens elected by the rest"); *see generally*

Constitution reflects that understanding.[124] Article I vests "*all* legislative Powers herein granted" in a Congress of more than 500 elected representatives.[125] It then posits an intricate set of lawmaking requirements that ensures consideration of multiple perspectives from different constituencies, requires tradeoffs and compromises, and is thus calculated to eliminate the worst legislative proposals.[126] Congress's powers are limited to those enumerated and to the power to make laws that are both "necessary *and proper*" to the exercise of its enumerated powers.[127] Propriety, in turn, demands that congressional acts not infringe upon the Constitution's separation of powers, federalism principles, or guarantees of rights.[128] The Executive is required to "take Care that the Laws be *faithfully executed*,"[129] meaning that it must carry out legislative will and not exercise its own prerogative.

Promulgation of legislative rules by unelected agency bureaucrats rests somewhat precariously within this scheme. Agency rulemaking is typically justified on the grounds that (1) Congress lacks expertise, relative to specialized agencies, to determine the best means of securing legislatively determined goals,[130] and (2) Congress is ultimately making the law because agencies' discretionary authority is limited in scope (as each agency possesses delegated authority over a narrow subject matter)[131] and must be constrained

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Mike Jayne, *As Far as Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*, 21 FED. SOC'Y REV. 84, 84-85 (May 14, 2020) (available at https://fedsoc.org/commentary/publications/as-far-as-reasonably-practicable-reimagining-the-role-of-congress-in-agency-rulemaking#_ftnref6).

[124] *Id.*

[125] U.S. Const. art. I, § 1 (emphasis added).

[126] *Id.* at art. I, §§ 2, 3, 7.

[127] *Id.* at art. I, § 8 (emphasis added).

[128] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 347-48 (2002).

[129] U.S. Const. art. 2, § 3 (emphasis added).

[130] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (observing that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives" (citing Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labor, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy")). *See also* Congressional Research Service, *An Overview of Federal Regulations and the Rulemaking Process* (Mar. 19, 2021) (observing that "agencies have a significant amount of expertise and can 'fill in' technical details of programs that Congress created in statute," enabling "Congress to focus on 'big picture' issues rather than spending its time and resources debating all the technical details required to fully implement a complex public policy").

[131] *See* Nat'l Fed'n Ind. Bus. v. Dep't of Labor, 142 S. Ct. 661, 669 (2022) ("If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of

by an "intelligible principle" articulated by Congress.[132] Moreover, agencies typically have some indirect democratic accountability, as agency heads are politically appointed and often serve at the pleasure of the elected President, who may remove them if they make unpopular decisions that threaten his or her position in office.[133] In light of these considerations, the marginal benefit of agency rulemaking is great (as agencies have expertise that elected representatives lack) and the marginal impairment of democratic values is slight (as agencies have authority over limited subject matter, must abide by meaningful limits in Congress's rulemaking delegation, and are indirectly politically accountable).

When it comes to FTC's non-consumer welfare-based UMC rulemaking, this balance shifts. First, the marginal benefit of agency rulemaking is minuscule, if it exists at all. Chair Khan and former Commissioner Chopra correctly note that the FTC has "gather[ed] and develop[ed] expertise in business practices."[134] That expertise, though, relates only to the behaviors long-forbidden by the FTC Act: unfair or deceptive acts and practices (UDAP) and unfair methods of competition, which have heretofore been understood as competitive practices that reduce consumer welfare by limiting market output.[135] Relative to Congress, FTC may possess expertise on what constitutes deception (e.g., how do consumers perceive different sorts of messaging?) and what business practices injure consumers by reducing market output (i.e., what behaviors enable firms to exercise market power, and in which contexts?). But untethering "unfairness" from the consumer welfare standard, as the FTC did in transitioning from its 2015 UMC enforcement policy to its 2022 approach,[136] removes unfair methods of competition from the scope of the Commission's expertise.

Americans by bare edict rather than only with the consent of their elected representatives.") (Gorsuch, J., concurring) (quoting Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 61 (2015) (Alito, J., concurring)); Fahey v. Mallonee, 332 U.S. 245, 252 (1947) (observing that regulatory delegations at issue, unlike others deemed impermissible, "do not deal with unprecedented economic problems of varied industries" but instead "deal with a single type of enterprise").

[132] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[133] *See* Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 492-93 (2010) (observing that for executive branch agencies "[t]he buck stops with the President," so the President "must have some 'power of removing those for whom he can not continue to be responsible'") (quoting Myers v. United States, 272 U.S. 52, 117 (1926)).

[134] Chopra & Khan, *supra* note 78, at 377.

[135] In other words, the FTC's expertise lies in identifying deceptive conduct and applying the consumer welfare standard.

[136] *See supra* note 99-117 and accompanying text.

Apart from understanding the effects of business practices on market output and consumer welfare, the FTC has no expertise on what makes a method of competition "unfair." That is a value-laden matter for ethicists, not the FTC's economist-heavy staff. Indeed, given that Congress includes far more members, represents a greater diversity of perspectives, and is directly accountable to the citizenry, it possesses an institutional advantage over the Commission in determining what constitutes an "unfair" (unmoored from consumer welfare effects) method of competition.[137] As the Supreme Court recently observed, "'When an agency has no comparative expertise' in making certain policy judgments, . . . 'Congress presumably would not' task it with doing so."[138]

With respect to the other side of the balance, non-consumer welfare-based UMC rulemaking by the FTC would impair democratic functioning more severely than agency rulemaking typically does. That is because the three features that limit harm to democracy from unelected bureaucrats' legislative rulemaking—constraints on the scope of regulable behavior, a discretion-cabining intelligible principle, and regulator accountability to elected officials[139]—are uniformly weak in this context.

The scope of conduct subject to the FTC's legislative rules is immense. The 2022 UMC Statement defines a "method of competition" as any conduct undertaken by a market actor (as opposed to some preexisting market condition, such as high concentration or entry barriers) where the conduct implicates competition, at least indirectly.[140] As the vast majority of actions firms take are aimed at helping them win business from actual or potential rivals, "methods of competition" would appear to encompass virtually all business practices within every nook of the economy. Unlike most regulatory agencies, the FTC is no sectoral regulator.

The intelligible principle that theoretically constrains the FTC's UMC rules—preclude only "unfair" business practices—is all but toothless when unfairness is unmoored from market output and consumer welfare

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[137] At the time of this writing, the FTC consists of three commissioners from the same political party. *See* Emily Birnbaum, *Republican FTC Official Resigns Over Chair Lina Khan's Agenda*, BLOOMBERG (Feb. 14, 2023) (https://www.bloomberg.com/news/articles/2023-02-14/christine-wilson-republican-ftc-official-resigns-over-chair-lina-khan-s-agenda). It is hardly representative of the American citizenry.

[138] West Virginia v. EPA, 142 S. Ct. 2587, 2612-13 (2022) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)).

[139] *See supra* notes 131-133 and accompanying text.

[140] 2022 UMC Statement, *supra* note 105, at 8 ("A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition, but the relationship can be indirect.")

considerations.[141] According to the 2022 UMC Statement, whether business conduct is unfair turns on (1) whether the conduct is "facially unfair" because it is coercive, exploitative, collusive, abusive, deceptive, predatory, restrictive, or exclusionary and (2) whether the conduct would "tend to negatively affect competitive conditions" by, for example, "foreclos[ing] or impair[ing] the opportunities of market participants, reduc[ing] competition between rivals, limit[ing] choice, or otherwise harm[ing] consumers."[142]

While this approach to identifying unfairness may initially appear to constrain the FTC's discretion, consideration of the Commission's recent Notice of Proposed Rulemaking (NPRM) on worker noncompete agreements suggests that any apparent constraints are illusory. In proposing a sweeping ban on such agreements,[143] the Commission reasoned that they meet the first requirement—facial unfairness—for three independently sufficient reasons: (1) they are "exploitative" and "coercive" at the time of contracting because they are imposed in standard-form adhesion contracts by parties that have greater bargaining power than their counterparties;[144] (2) they are "exploitative and coercive at the time of the worker's potential departure from the employer" because they "force a worker to either stay in a job they want to leave or choose an alternative that likely impacts their livelihood";[145] and (3) they are "restrictive" because "[b]y their express terms, non-compete clauses restrict a worker's ability to work for a competitor of the employer."[146]

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[141] Indeed, "unfair" in this context resembles "fair competition," the principle the Supreme Court declared an impermissibly broad basis for agency rulemaking in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating provision of National Industrial Recovery Act authorizing President to approve codes of "fair competition"). While the *Schechter* Court distinguished "fair competition" from "unfair competition" on the ground that the latter had a common law meaning, *id.* at 531, *Schechter*'s reasoning counsels against the legality of broad UMC rulemaking. First, the common law meaning of "unfair competition" is limited to passing one's goods off as another's (i.e., trademark infringement). *Id.* The FTC Act expanded the common law concept by using the novel term "unfair methods of competition," but Congress created an administrative process to determine its application "as controversies arise." *Id.* at 532. Specifically, Congress required a case-by-case, quasi-judicial approach before the FTC. *Id.* at 532–33. Notably, neither use of "unfair competition" as considered by the *Schechter* Court resembles the proposed notice-and-comment UMC rules.

[142] 2022 UMC Statement, supra note 105, at 9.

[143] *See* Noncompete NPRM, *supra* note 79. The NPRM proposes to ban all worker noncompete agreements except for those executed in connection with the sale of a business. *See id.* at 3514-15.

[144] *Id.* at 3503 ("Because there is a considerable imbalance of bargaining power between workers and employers in the context of negotiating employment terms, and because employers take advantage of this imbalance of bargaining power through the use of non-compete clauses [in standard form adhesion contracts], the Commission preliminarily finds non-compete clauses are exploitative and coercive at the time of contracting.").

[145] Id. at 3504.

[146] Id. at 3500.

This reasoning would allow the Commission to condemn the vast majority of contracts. Under the logic of the first theory, any term in a standard form adhesion contract proposed by a firm with greater bargaining power than its counterparty "coerces" and "exploits" that counterparty and is facially unfair. The second theory would find facial unfairness in any contract commitment that a party later comes to regret so that enforcement of the term would be "coercive" and "exploitative." The third theory would find facial unfairness in any contract that "restricts" a party, as every executory contract does.[147] The upshot is that any adhesive, regretted, or merely unperformed contract term is "facially unfair," satisfying prong one, and is thus proscribable as long as it satisfies prong two by "limit[ing] choice" or "tend[ing] to foreclose or impair the opportunities of market participants"—as, again, *all contracts do*. The FTC's reasoning in its Noncompete NPRM would thus give it authority to ban virtually any contract term it chooses.[148]

The third feature that frequently constrains democratic harms from unelected bureaucrats' legislative rulemaking—regulators' accountability to elected officials for policy choices—is wholly missing in this context. Unlike the heads of executive branch agencies, who serve at the pleasure of the elected President,[149] FTC commissioners may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office."[150] And because such commissioners exercise executive authority, they may not be removed by Congress except via impeachment and conviction for "Treason, Bribery or other high Crimes and Misdemeanors."[151] In the end, then, no democratically accountable person or body may remove an FTC commissioner for making a policy choice that runs counter to the will of the citizenry, which means that

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[147] *See*, *e.g.*, National Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 687-88 (1978) (observing that "restraint is the very essence of every contract").

[148] In the Noncompete NPRM, the Commission sought to establish a negative impact on competitive conditions—prong 2—by pointing to empirical evidence of reduced wages and, in limited contexts, higher prices stemming from worker noncompete agreements. Noncompete NPRM, *supra* note 79, at 3501-02. But under the approach set forth in its 2022 Policy Statement, it would not have had to do so. The Statement provides that conduct that "tend[s] to negatively affect competitive conditions" includes conduct that tends to "foreclose or impair the opportunities of market participants" or "limit choice." 2022 UMC Statement, *supra* note 105, at 9.

[149] Free Enterprise Fund v. Pub. Co. Acctg. Oversight Bd., 561 U.S. 477, 492-93 (2010) (observing that Article II of U.S. Constitution requires that President retain at will removal power over executive branch officials).

[150] 15 U.S.C. § 41. *See also* Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (holding that FTC's "duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control").

[151] Bowsher v. Synar, 478 U.S. 714, 723 (1986) ("[T]he Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on 'Treason, Bribery or other high Crimes and Misdemeanors.") (citing U.S. Const. Art. II, § 4).

commissioners may undervalue majority interests when formulating and adopting rules. While there are examples of agency rulemaking in which some of the constraints on bureaucratic discretion are flimsy,[152] we are aware of no other instance of agency rulemaking that combines so vast a sphere of regulable conduct, so edentulous a principle for cabining discretion, and so politically insulated a rule-maker.[153]

Not only will UMC rulemaking unmoored from the consumer welfare standard increase discretionary rule-imposition by officials lacking democratic credentials, it will likely reduce the incidence of policymaking by officials who are actually accountable to the citizenry. Crafting competition policy is onerous and risky. The effects of business practices are difficult to assess,[154] and rules aimed at forbidding anticompetitive business behavior may unwittingly prohibit or discourage practices that enhance consumer

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[152] For example, the Federal Communications Commission (FCC), like the FTC, is an independent agency and has authority to make various wireless communication rules according to a relatively broad intelligible principle: "as public convenience, interest, or necessity requires." *See* 47 U.S.C. § 303.

[153] Agency rulemaking by the FCC, for example, combines an independent agency and a broad intelligible principle, *see id.*, but the scope of regulable conduct—wireless communications, *see* 47 U.S.C. § 303—is far more limited than "methods of competition"—a category that includes virtually all business practices in every area of the economy.

On first glance, the FTC's authority to prescribe rules "which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 57a, would appear analogous to FTC rulemaking on unfair methods of competition. Compared to UMC rulemaking, UDAP rulemaking involves a similarly vast sphere of regulable conduct (acts or practices), the same apparent standard ("unfair"), and the same lack of direct political accountability for agency heads. With UDAP rulemaking, however, Congress specified that "unfair" means detrimental to consumer welfare. *See* 15 U.S.C. § 45(n) (providing that "[t]he Commission shall have no authority under . . . section 57a of this title [conferring UDAP rulemaking authority] to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition"). Congress also constrained UDAP rulemaking by imposing a number of additional procedural requirements. *Compare* 5 U.S.C. § 553 (normal notice-and-comment rulemaking) with 15 U.S.C. § 57a (UDAP rulemaking as prescribed by Magnuson-Moss Act). *See generally* Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982–85 (2015) (summarizing procedural steps required by Magnuson-Moss Act and amendments); J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (available at https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection) (speech by former director of FTC Bureau of Consumer Protection detailing history of and reason for stringent procedural requirements on UDAP rulemaking).

[154] *See* Frank H. Easterbrook, *When Is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345 (observing that "competitive and exclusionary conduct look alike").

welfare.[155] If Congress can pawn off competition policymaking on an agency for which it is not responsible, it can avoid both the hard work of legislating and any blowback that may result if the policies implemented produce adverse consequences.

Consider policymaking in the technology sector. In recent years, Congress has investigated competition on and among technology platforms and has considered a number of measures to enhance competition in digital markets. Over the course of 15 months, the Antitrust Subcommittee of the House Judiciary Committee reviewed 1.3 million documents, held eight hearings, heard from dozens of witnesses (including the heads of Google, Apple, Amazon, and Facebook), and issued a 370-page report stating staffmembers' findings and recommending policies for Congress's consideration.[156] Bills proposed in the House and Senate incorporated a number of those recommendations.[157] Among the most prominent were rules that would (1) prohibit platform operators from "self-preferencing" their own offerings or discriminating among the offerings of business users,[158] (2) mandate that user data be transferable between platforms and that platforms be interoperable,[159] and (3) forbid platform operators from restricting the

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[155] *Cf.* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (observing that aggressive predatory pricing rules could "chill[] legitimate price-cutting").

[156] *See* SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS 1-14 (originally released Oct. 2020; published July 2022) (detailing scope of investigation and summarizing findings and recommendations) (available at https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf) (hereinafter "House Judiciary Report").

[157] See Thomas A. Lambert, *Addressing Big Tech's Market Power: A Comparative Institutional Analysis*, 75 SMU L. REV. 73, 94-111 (2022) (discussing proposed bills incorporating recommendations from House Judiciary Report, *supra* note 156).

[158] *See* American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2(a) (2021) (precluding operator of a covered platform from "(1) advantag[ing] the covered platform operator's own products, services, or lines of business over those of another business user; (2) exclud[ing] or disadvantag[ing] the products, services, or lines of business of another business user relative to the covered platform's own products, services, or lines of business; or (3) discriminat[ing] among similarly situated business users"); *id.* § 2(b)(7) (making it unlawful "in connection with any user interfaces, including search or ranking functionality offered by the covered platform, [to] treat the covered platform operator's own products, services, or lines of business more favorably than those of another business user"); American Innovation and Choice Online Act, S. 2992, 117th Cong. § 2(a)(1) (2021) (making it unlawful for a person operating a covered platform to "unfairly preference the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform").

[159] *See* Augmenting Compatibility and Competition by Enabling Service Switching Act, H.R. 3849, 117th Cong. §§ 3-4 (2021) (providing for data-portability and platform interoperability mandates).

"sideloading" of digital applications (apps).[160] Congress held hearings and mark-up sessions during which it explored concerns that the proposed rules might preclude integrated offerings that consumers value, increase security risks, or produce other adverse consequences.[161] It amended the bills to address members' concerns.[162] To date, none of the bills has been enacted, but several are still in the works.

None of this tedious but valuable work by officials who must answer to the citizenry would be necessary under the approach the FTC is pursuing. Freed from the need to establish consumer harm, the Commission could invoke its easily satisfied two-pronged test to establish the "unfairness" of platform self-preferencing and discrimination, restrictions on user data transferability or platform interoperability, and side-loading bans. The Commission could then use notice and comment rulemaking to forbid those practices. If the Commission's rules generated adverse consequences for consumers, Congress could disclaim responsibility. The commissioners themselves might draw the public's ire, but their jobs would not be at risk. It seems likely, then, that the prospect of non-consumer welfare-based UMC rulemaking would spur Congress to abdicate its responsibility for crafting competition policy in digital markets—and in other contexts—and leave matters to the FTC. Proponents of UMC rulemaking may well view this as a feature rather than a bug as it would likely lead to more, and more quickly implemented, competition rules.[163] Those rules, though, would have less democratic legitimacy than would actual legislation by elected policymakers.

None of this is to say that there would be no democratic constraints on non-consumer welfare-based UMC rulemaking by the FTC. Congress could override the Commission's rules, either through the normal legislative

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[160] *See* Open App Markets Act, S. 2710, 117th Cong. § 3(d)(2) (2022) (requiring that a covered platform operator allow users to "install third-party apps or app stores through means other than its app store").

[161] *See* Rachel Lerman, *Big Tech antitrust bills pass first major hurdle in House even as opposition grows*, WASH. POST (June 24, 2021); Cat Zakrzewski and Gerrit De Vynck, *Senate advances antitrust legislation, despite reservations from California Democrats*, WASH. POST (Jan. 20, 2022); Lauren Feiner, *Senate committee advances bill targeting Google and Apple's app store profitability*, CNBC (Feb. 3, 2022) (available at https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html).

[162] *See*, *e.g.*, Gopal Ratnam, *Senate Judiciary approves bill cracking down on tech monopolies*, ROLL CALL (Jan. 20, 2022) (discussing amendments to American Innovation and Choice Online Act) (available at https://rollcall.com/2022/01/20/senate-judiciary-approves-bill-cracking-down-on-tech-monopolies/).

[163] Neo-Brandeisian Tim Wu, for example, recently gave a speech urging listeners not to rely on Congress for policy achievements. Josh Sisco, *Biden's former antitrust guru issues a warning*, POLITICO (Mar. 7, 2023) (available at https://www.politico.com/news/2023/03/07/wu-doj-antitrust-ftc-00085760). Puzzlingly asserting that "Congress at this point is possibly the least democratic branch of the United States government," Wu stated: "I think it's very important not to just have it focused on, you know, did Congress pass new legislation." *Id.*

process or via the rarely invoked Congressional Review Act.[164] It could also withhold agency funding in order to punish commissioners who impose rules counter to the will of the majority.[165] But it seems certain that governmental restraints on commerce would be subject to *less* democratic control if three competition rulemakers who are neither elected nor removable by elected officials were empowered to secure the outcomes they deem to be fair by writing prospective rules governing virtually all transactions throughout the entire economy.

Neo-Brandeisians might downplay these concerns about actual democratic functioning—democracy in the narrow sense—by retorting that the conduct rules they contemplate would nevertheless enhance individual autonomy in the face of concentrated economic power and thereby further democracy in the broader sense. They may contend, for example, that automatic bans on mergers involving giant companies could ensure that consumers, suppliers, and laborers have more options for dealing.[166] They might assert that bright-line prohibitions on restrictive employment agreements (e.g., covenants not to compete) could promote worker freedom.[167] They may argue that rules forbidding large firms from entering exclusive supply or distribution contracts could ensure that smaller rivals of those firms have ready access to inputs and sales outlets, expanding the number of small businesses that sell products, buy supplies, and hire workers.[168]

But these assertions ignore other autonomy concerns. A ban on large company mergers precludes entrepreneurs who start businesses that provide complements to large firms' offerings from selling their businesses to the

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[164] 5 U.S.C. § 801, et seq. The Congressional Review Act "requires agencies to report on their rulemaking activities to Congress and provides Congress with a special set of procedures under which to consider legislation to overturn those rules." CONGRESSIONAL RESEARCH SERVICE, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS i (Summary) (Nov. 12, 2021) (available at https://sgp.fas.org/crs/misc/R43992.pdf). Since its enactment in 1996, the Congressional Review Act has been used to overturn only 20 rules. *Id.*

[165] CONGRESSIONAL RESEARCH SERVICE, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 14 (May 12, 2021) (available at https://sgp.fas.org/crs/misc/R45442.pdf) ("Congress exercises virtually plenary control over agency funding. This power to determine agency appropriations can be used to control agency priorities, prohibit agency action by denying funds for a specific action, or force agency action by either explicitly appropriating funds for a program or activity or withholding agency funding until Congress's wishes are complied with.").

[166] *See* Lande & Vaheesan, *supra* note 75; 117th Cong., 2d Sess., S. ____, PROHIBITING ANTICOMPETITIVE MERGERS ACT OF 2022 (available at https://www.warren.senate.gov/imo/media/doc/SIL22464.pdf).

[167] *See* Open Markets Institute, et al., *Petition re Worker Non-Compete Clauses*, *supra* note 77.

[168] *See* Open Markets Institute, et al., *Petition re Exclusionary Contracts*, *supra* note 76.

companies who value them the most.[169] Prohibiting such an exit option reduces the autonomy of innovators and their financiers and likely impedes innovation.[170] A ban on restrictive employment agreements prevents employees from securing benefits—e.g., enhanced training or higher wages—by guaranteeing that they will not take their employer-provided skills or firm secrets to a rival.[171] Forbidding exclusive supply and distributorship contracts prevents small suppliers and distributors from selling something of value—their loyalty—to firms that may especially need, and be willing to pay a premium for, a guaranteed source of supply or demand[172] or, in the case of distributors, the extra brand-specific promotion that results when a dealer carries only one brand of a product.[173] The Neo-Brandeisian policy agenda does not safeguard the "autonomy" of these individuals and firms from "concentrated power." It merely subjugates them to a different authority—one that, unlike a private business, has the right to use force to achieve its desired objectives.[174]

When implemented in tandem, then, Neo-Brandeisianism's two central policies—abrogation of the consumer welfare standard and imposition of ex ante conduct rules—impair actual democratic functioning and do not appear to further broadly defined democratic values by enhancing individual autonomy in the face of concentrated power. Given that the promotion of

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[169] *Cf.* Elizabeth Nolan Brown, *Meta Can't Buy V.R. Fitness Company, Must Make Its Own Competing App, Says FTC*, REASON (July 28, 2022) (observing that "[t]he creators of Supernatural have been spending a lot of time on developing this program, and presumably they want it to get to a lot of people" and that acquisition by Meta would "allow[] the creators of Supernatural to share their expertise and vision with many more people than they would otherwise").

[170] *See* Geoffrey A. Manne, Samuel Bowman, & Dirk Auer, *Technology Mergers and the Market for Corporate Control*, 86 MO. L. REV. 1047, 1066-69 (2021) (explaining how merger bans eliminate exit option for venture capitalists, thereby reducing investment in innovation).

[171] *See* Alan J. Meese, *Don't Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 679-704 (2022) (discussing potential benefits of worker noncompete agreements); Camila Ringeling, et al., *Noncompete Clauses Used in Employment Contracts: Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University*, Geo. Mason L. & Econ. Res. Paper No. 20-04 (Feb. 7, 2021) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374) (same).

[172] *See*, *e.g.*, Standard Oil Co. of Calif. v. United States, 337 U.S. 293, 306-07 (1949) (explaining how exclusive dealing arrangements can benefit both buyers and sellers by providing a reliable source of demand or supply).

[173] *See* Benjamin Klein & Andres V. Lerner, *Procompetitive Justifications for Exclusive Dealing: Preventing Free-Riding and Creating Incentives for Undivided Dealer Loyalty*, U.S. Dep't of Justice (draft Nov. 12, 2006) (available at https://www.justice.gov/sites/default/files/atr/legacy/2006/12/05/219980.pdf) (explaining that exclusive dealing may be used to prevent free-riding in certain cases, such as the standard case where dealers use promotional assets supplied by the manufacturer to sell rival products).

[174] *See* Weber, *supra* note 91.

democracy is the movement's *raison d'être*, Neo-Brandeisianism is ultimately "a policy at war with itself."[175]

IV. Conclusion

Redirecting antitrust enforcement and adjudication away from consumer welfare and toward other ends is all but certain to leave consumers worse off than they are under the status quo. Neo-Brandeisians, who concede that consumer welfare is *an* important goal of antitrust, justify this harm on the ground that the broad deconcentration agenda they favor will further democratic values both narrowly (by constraining the political power of the largest firms) and broadly (by protecting smaller businesses and thereby ensuring that consumers, suppliers, and laborers have greater choice in the economic sphere). Enhancement of democracy, then, is Neo-Brandeisianism's reason for being and is essential to its success.

In implementation, however, Neo-Brandeisianism undermines the very democratic values it exists to further. Abrogation of the consumer welfare standard concentrates discretionary power in enforcers and encourages countermajoritarian decisions that produce concentrated benefits for a few but widely dispersed costs for the many. Adding in Neo-Brandeisianism's other distinctive policy proposal—imposition of ex ante conduct rules—creates an especially troubling situation. Under its Neo-Brandeisian leadership, the FTC has embarked on that course by rejecting consumer welfare limitations on its power to pursue unfair methods of competition and initiating UMC rulemaking. Continuing that trajectory will result in a situation in which Congress retreats and three unelected and difficult-to-remove bureaucrats impose prospective rules governing all business transactions, throughout the entire economy, to prevent outcomes they believe to be unfair. That would hardly constitute a win for either democratic functioning or individual autonomy in the face of concentrated power. And given that only a "big win" for democracy could justify the harm Neo-Brandeisianism is likely to cause consumers, the movement—despite its growing prominence—must ultimately be deemed a failure.

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[175] *Cf.* Bork, *supra* note 15.