ANTITRUST

Neo-Brandeisianism's Democracy Paradox

Though concerned with "democratic values," the new antitrust impairs actual democratic functioning.

BY THOMAS A. LAMBERT AND TATE COOPER

Supreme Court Justice Louis Brandeis spoke so often of the societal harms of corporate growth and industrial concentration that Osmond K. Frankael titled his edited collection of Brandeis's papers *The Curse of Bigness*. Today, scholars and activists calling themselves "Neo-Brandeisians" are attacking the prevailing approach to antitrust law in the United States for ignoring Brandeis's insights. They say that in seeking exclusively to promote the welfare of consumers by minimizing market inefficiencies, the current antitrust system ignores other societal ills that result when firms amass large market shares.

Chief among these ills are harms to democracy, according to Neo-Brandeisians. Excessive market concentration, they claim, impairs democratic functioning as large firms use their vast resources to lobby for policies that thwart majority will. High market concentration also undermines economic self-governance, Neo-Brandeisians add, 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. Working within the system that now prevails, Neo-Brandeisians contend, cannot fix these problems. Instead, U.S. antitrust must be fundamentally restructured.

As a reform movement, Neo-Brandeisianism is hitting its stride. Presidents Donald Trump and Joe Biden have both stressed the importance of using antitrust to pursue democratic goals. So have legislators across the ideological spectrum, from conservative U.S. Sen. Josh Hawley (R–MO) to his progressive colleague, Sen. Elizabeth Warren (D–MA). Biden has tapped leading Neo-Brandeisians to serve on his National Economic Council and to head the nation's two most important antitrust enforcement agencies, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ).

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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. To show why, we first describe Neo-Brandeisianism's distinctive criticisms of the prevailing antitrust regime and the movement's unique proposals for reform. We then consider how Neo-Brandeisianism's reforms, when implemented, undermine both democratic functioning and economic self-governance.

THE PREVAILING ANTITRUST REGIME AND THE NEO-BRANDEISIAN PROJECT

While the last 40 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. Under the prevailing view, antitrust's exclusive aim is to prevent ill-gotten "market power," a well-known market failure resulting from a lack of competition among sellers or buyers. Exercises of market power reduce market output and enable firms to extract more value from their transaction partners than they would if they faced vigorous competition.

Given that a lack of market competition is the source of market power, antitrust targets the two situations in which market rivalry is weak: collusion and monopoly. The federal antitrust statutes include general prohibitions on unreasonable trade-restraining agreements (e.g., collusive arrangements), unreasonably exclusionary conduct that creates or threatens monopoly power, and

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business combinations that are likely to produce monopoly or substantially lessen competition in a market.

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, while conduct that enhances market output and thereby benefits consumers is reasonable and thus antitrust-compliant. In crafting liability tests for specific business practices, courts attempt to minimize the sum of (1) welfare losses from wrongfully acquitting output-reducing practices or wrongfully condemning output-enhancing practices (collectively, "error costs"), and (2) the costs of administering the legal regime ("decision costs").

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

Neo-Brandeisianism's critique / Neo-Brandeisians have declared this understanding of antitrust a failure. They say the prevailing antitrust regime does not adequately protect laborers and suppliers because it exclusively values "consumer" welfare. Nor does it safeguard innovation, they contend, because it focuses excessively on consumer prices in assessing consumer welfare effects. This price fixation, they assert, makes the prevailing approach particularly ill-suited for zero-price markets like internet search and social networking, where firms like Google and Meta offer their products to consumers for free. 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. 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.

All these criticisms of the prevailing antitrust regime, however, are really about its implementation, not its basic structure. Because the term "consumer" in "consumer welfare standard" is a shorthand for "person on the other side of the transaction," the consumer welfare standard reaches harms not just to end-user buyers but to all trading partners of an antitrust defendant, including laborers and suppliers who are injured by monopsony power. Innovation harms are fully cognizable under the prevailing regime, and the federal enforcement agencies regularly pursue cases on the basis of harms to innovation. The prevailing regime

can address harms in zero-price markets because (1) service quality—privacy protection, etc.—is relevant to consumer welfare, 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. And, of course, long-term harms to consumers from adverse market structures should always be part of the liability inquiry under the prevailing approach. 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 have been levied by commentators who support the prevailing regime but believe it should be implemented differently, other criticisms asserted by Neo-Brandeisians 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. For example, the Neo-Brandeisian chair of the FTC, Lina Khan, contends:

> 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. They use these strategies to win favourable policies, further entrenching their dominance.

Because this harm can result without immediate adverse effects on consumer welfare, the prevailing antitrust regime is incapable of preventing it.

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 harm to trading partners results can produce a second "democratic" harm: it can so reduce individuals' economic liberty that self-governance is effectively undermined.

Khan, for example, favorably quotes a 1912 speech in which Brandeis argued that democracy necessarily involves "not merely political and religious liberty, but industrial liberty also." She further observes that "the Madisonian concept of 'self-government' hinges on the ability of citizens to control and check private concentrations of economic power." She contends, "Most 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." She thus echoes 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." We may refer to this sort of self-governance impairment as a harm to democracy, broadly defined.

Unlike the traditional consumer welfare concerns of antitrust (including monopsony harms to labor 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. 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.

Neo-Brandeisians' unique reform agenda / Two of Neo-Brandeisianism's reform proposals are unique to the movement and follow from its distinctive criticism of the prevailing antitrust regime. The first such proposal is to jettison the consumer welfare standard. Focusing antitrust's objectives so narrowly, Neo-Brandeisians maintain, prevents the law from reaching behaviors and market structures that weaken democracy but do not reduce market output or harm defendants' trading partners.

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. 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.

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*."

Neo-Brandeisian Jonathan Kanter, head of DOJ's Antitrust Division, 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." Kanter defined 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.'" Khan and Kanter thus suggest that Neo-Brandeisians favor replacing the consumer welfare standard with an *outcome-indifferent* policy of market deconcentration.

But 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 always be further deconcentrated, eventually by disintegrating firms. 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. 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. When Neo-Brandeisians advocate market deconcentration, then, 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. Indeed, 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*." 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."

A second distinctly Neo-Brandeisian antitrust reform stems from the first. Because most of the practices antitrust regulates may be either output-enhancing or output-reducing depending on the circumstances, an antitrust regime focused on maximizing market output will have few bright-line prohibitions and will instead favor context-specific assessment of challenged practices. 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. Antitrust's democratic objectives, they reason, can almost certainly be furthered by bright-line conduct rules. 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, Khan advocated such a move.

THE DEMOCRATIC EFFECTS OF NEO-BRANDEISIANISM

In recent months, the FTC has begun to implement the Neo-Brandeisian policy agenda by formally throwing off the reins of the consumer welfare standard and attempting to impose ex ante conduct rules. The result has hardly been a gain for democracy.

Two-pronged agenda / One of the first acts of the FTC under Khan was to rescind the Commission's *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*. Adopted on a bipartisan basis in 2015, that statement provided that in deciding whether to challenge an act or practice as an "unfair method of competition" (UMC) and thus prohibited by FTC Act Section 5, "the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare." 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." The 2015 statement thus explicitly endorsed the consumer welfare standard and, by requiring consideration of efficiencies, implicitly approved its focus on market output.

In July 2021, less than three weeks after Khan's appointment, the FTC voted to rescind the 2015 UMC statement. In November 2022, it adopted a new policy statement setting forth how it will exercise its UMC authority going forward. 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*." Notably, the statement does not limit Section 5's proscription to conduct that impairs or threatens "competition." This is significant: when a firm's actions allow it to lower its costs and underprice its rivals, competition is enhanced, but the threatened elimination of less efficient rivals may be taken to "negatively affect competitive conditions."

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." 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." Observing that "the 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," 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." And the statement clarifies that offsetting efficiencies cannot by themselves justify a business practice deemed unfair to rivals or workers, noting that "if 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." 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, adding that the stronger one is, the weaker the other may be. 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."

The second criterion is whether the conduct "tend[s] 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." 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 or somehow limited the choice of the actor's customers, suppliers, or rivals.

In addition to jettisoning the consumer welfare standard in favor of a multi-goaled approach to identifying unfair methods of competition, the FTC has begun implementing the second component of the Neo-Brandeisian policy agenda: a transition from ex post behavioral standards to ex ante conduct rules. Embracing Khan's hotly contested view that Section 6(g) of the Federal Trade Commission Act authorizes the Commission to promulgate legislative rules to prevent unfair methods of competition, a majority of commissioners recently proposed a rule banning nearly all worker noncompete agreements. Outside groups have petitioned the Commission to impose similar prohibitions on certain exclusive dealing arrangements.

Democratic implications / UMC rulemaking by the FTC, in combination with the Commission's abandonment of the consumer welfare standard, implements the distinctly Neo-Brandeisian policy agenda. It also impairs democratic values and thereby undermines 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. The elaborate governmental structure set forth in the U.S. Constitution reflects that understanding. Article I vests "*all* legislative Powers herein granted" in a Congress of more than 500 elected representatives. 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. 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. Propriety, in turn, demands that congressional acts not infringe upon the Constitution's separation of powers, federalism principles, or guarantees of rights. The Executive is required to "take Care that the Laws be *faithfully executed*," meaning that it must carry out legislative will and not exercise its own prerogative.

Promulgation of legislative rules by unelected agency bureaucrats rests 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, 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) and must be constrained by an "intelligible principle" articulated by Congress. 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. 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).

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When it comes to the 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. Khan and former FTC commissioner Rohit Chopra correctly note that the FTC has "gather[ed] and develop[ed] expertise in business practices." That expertise, though, relates only to the behaviors long forbidden by the FTC Act: unfair or deceptive acts and practices and unfair methods of competition, which have heretofore been understood as competitive practices that reduce consumer welfare by limiting market output. Relative to Congress, the 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, removes unfair methods of competition from the scope of the Commission's special expertise.

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.

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—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. As almost all 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.

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 considerations. 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."

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, the Commission reasoned that the agreements meet the first requirement—facial unfairness—for three independently sufficient reasons:

- 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.
- 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."
- They are "restrictive" because "by their express terms, non-compete clauses restrict a worker's ability to work for a competitor of the employer."

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. 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.

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, FTC commissioners may be removed by the president only "for inefficiency, neglect of duty, or malfeasance in office." 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." 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 commissioners need not pursue 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, 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.

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, and rules aimed at forbidding anticompetitive business behavior may unwittingly prohibit or discourage practices that enhance consumer welfare.

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.

Take 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 staff members' findings and recommending policies for Congress's consideration. Bills proposed in the House and Senate incorporated a number of those recommendations. Among the most prominent were rules that would (1) prohibit platform operators from "self-preferencing" their own offerings, (2) mandate that user data be transferable between platforms and that platforms be interoperable, and (3) forbid platform operators from restricting the "sideloading" of apps. 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. It amended the bills to address members' concerns. To date, none of the bills have been enacted, but several are still under consideration.

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, 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. 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 process or via the rarely invoked Congressional Review Act. It could also withhold agency funding in order to punish commissioners who impose rules counter to the will of the majority. But it seems certain that governmental restraints on commerce would be subject to *less* democratic control if three competition rule makers 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 further democracy in the broader sense by enhancing individual autonomy in the face of concentrated economic power. 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. They might assert that bright-line prohibitions on restrictive employment agreements (e.g., covenants not to compete) could promote worker freedom. 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.

But these assertions ignore other autonomy concerns. A ban on large company mergers precludes entrepreneurs who start businesses that complement large firms' offerings from selling their businesses to the companies that value them the most. Prohibiting such an exit option reduces the autonomy of innovators and their financiers and likely impedes innovation. 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. 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 or, in the case of distributors, the extra brand-specific promotion that results when a dealer carries only one brand of a product. 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.

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 democracy is Neo-Brandeisianism's raison d'être, the movement is ultimately—to borrow a phrase from Robert Bork—"a policy at war with itself." R

READINGS

■ "The New Brandeis Movement: America's Antimonopoly Debate," by Lina Kahn. *Journal of European Competition Law and Practice* 9(3): 131–132 (2018).