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Repealing the Consumer Welfare Standard: FTC as Central Economic Planner?

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ABSTRACT

The recent repeal of the consumer welfare standard and proposals for increased rulemaking authority threaten to give the Federal Trade Commission an unprecedentedly massive ambit under which to regulate. Under Section 5 of the FTC Act, the FTC is empowered to regulate unfair methods of competition as well as unfair deceptive acts or practices that affect commerce. As of 2015, the FTC was tethered to the consumer welfare standard when regulating under Section 5. However, in July 2021, the FTC abrogated the 2015 policy statement, thereby giving itself the ability to either replace the consumer welfare standard with a broader standard or in fact replace it with no intelligible standard at all. The effect of this abrogation allows the FTC to pursue a broad set of social goals with less scrutiny from outside authorities. Furthermore, there have been recent proposals to allow the FTC to determine new methods of unfair competition under Section 6(g) of the FTC Act. The expansion of this section not only represents a usurpation of legislative authority but also hinders the ability of the FTC to regulate. The net effect of these changes would harm companies and consumers by increasing the likelihood of errant intervention, increasing rent-seeking behavior by private interests, increasing inefficiency in the economy, and making it more difficult to create successful antitrust regulation.

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I. INTRODUCTION

A. FTC as Central Economic Planner

The Federal Trade Commission (FTC), acting under Chair Lina Khan, has recently taken several steps in an effort to amass greater power in its antitrust enforcement.[1] The FTC effectively abrogated its primary limiting principle when regulating unfair methods of competition when it repealed a 2015 policy statement that bound its regulatory authority to operate in the interest of consumer welfare.[2] What is more, the FTC has recently claimed that Section 6(g) of the FTC Act allows the FTC to define unfair methods of competition as it sees fit.[3] In affording the FTC such power, the FTC would be authorized to act both arbitrarily and without transparency.[4] The net effect of these moves harms both companies and consumers by increasing the likelihood of errant intervention on the part of the FTC, incentivizing rent-seeking behaviors by private interests, and increasing overall inefficiency in the economy.[5] Moreover, acting without an intelligible standard would make it more difficult for the FTC to regulate and harder to hold the FTC accountable when it fails to regulate judiciously.[6]

B. Historical Background

To understand the recent moves taken by the FTC, one must grasp the historical foundation on which current antitrust enforcement lies. The Sherman and Clayton Anti-Trust Acts, passed in 1890 and 1914, created antitrust policies that prohibited monopolization, restraint of trade, unfair competitive tactics, and mergers that might substantively diminish competition.[7] Providing enforcement authority to these enactments, the Federal Trade Commission Act, also passed in 1914, gave power to a board of government experts to examine business conduct and prevent or reduce anticompetitive practices.[8] These policies were implemented in response

1. Jeffrey Westling, *FTC's Shifting View on Competition Policy and the Outlook for 2022*, AMERICAN ACTION FORUM (Jan. 27, 2022), https://www.americanactionforum.org/insight/ftcs-shifting-view-on-competition-policy-and-the-outlook-for-2022/; Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, 2, (U.S. Chamber of Commerce ed., 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.

2. Westling, *supra* note 1.

3. Ohlhausen & Rill, *supra* note 1.

4. Alden Abbott, *US Antitrust Laws: A Primer*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (Mar. 24, 2021), https://www.mercatus.org/publications/antitrust-policy/us-antitrust-laws-primer.

5. Abbott, *supra* note 4; Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking*, 3, (CPI Antitrust Chronicle ed., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165192.

6. Trevor Wagener, *The Curse of Tradeoffs: Neo-Brandeisians vs. Consumers*, DISCO: DISRUPTIVE COMPETITION PROJECT, (May 21, 2021), https://www.project-disco.org/competition/052121-the-curse-of-tradeoffs-neo-brandeisian-antitrust-versus-consumers/.

7. *Sherman Antitrust Act*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/sherman_antitrust_act#:~:text=The%20Sherman%20Anti-trust%20Act%20of,%C2%A7%C2%A7%201%2D38; *The Clayton Antitrust Act*, History, Art & Archives, UNITED STATES HOUSE OF REPRESENTATIVES (Oct. 8, 2014), https://history.house.gov/HistoricalHighlight/Detail/15032424979#:~:text=The%20newly%20created%20Federal%20Trade,unions%20legal%20under%20federal%20law.

8. Abbott, *supra* note 4.

to growing concerns from the public over the increasing power and size of companies in the United States at the turn of the 20th century and the consequent anticompetitive effects in the marketplace.[9] Supreme Court Justice Louis Brandeis, who occupied the bench from 1916 to 1939, believed that the scale of a company could constitute a sufficient reason to regulate a company if it would prevent anticompetitive effects on smaller businesses.[10] Carrying forward this idea, from the 1940s through the 1960s, antitrust enforcement became increasingly focused on concentration within industry, and this focus led to many successful lawsuits against horizontal, vertical, and conglomerate mergers.[11] However, a shift occurred in the latter half of the 20th century when the Chicago School's economic theories rose to the forefront of antitrust policy.[12] These theories advocated for policies that augmented consumer welfare and rejected regulation on the basis of industry structure.[13] The popularization of such theories gave way to a number of landmark decisions that figured antitrust policy in the interests of consumers.[14] "In 1979, the U.S. Supreme Court proclaimed the antitrust laws to be a 'consumer welfare prescription,' and ever since, the prevailing view among courts has been that antitrust's sole end is consumer welfare. . ."[15]

In 2017, Lina Khan, then a law student at Yale, rose to prominence with the publication of her article, "Amazon's Antitrust Paradox," in the Yale Law Journal.[16] In the article, she claimed that current antitrust policy, especially the consumer welfare standard, is far too short-term in its outlook and is therefore insufficient in identifying and counteracting the anticompetitive tactics of major technology companies such as Amazon.[17] She further charged that the strategy and structure of Amazon allow for anticompetitive conduct that eludes current antitrust enforcement.[18] She argued that what is needed are policies that look at the competitive process as a whole, the structure of a company, and the structure of the underlying market in which the company resides.[19]

In 2018, she published "The New Brandeis Movement: America's Anti-Monopoly Debate" in the Journal of European Competition Law & Practice, in which she echoed a sentiment shared by Justice Brandeis, arguing that the growing number

9. *Sherman Antitrust Act*, BRITANNICA, https://www.britannica.com/event/Sherman-Antitrust-Act; *The Clayton Antitrust Act*, History, Art & Archives, UNITED STATES HOUSE OF REPRESENTATIVES (Oct. 8, 2014), https://history.house.gov/HistoricalHighlight/Detail/15032424979#:~:text=The%20newly%20created%20Federal%20Trade,unions%20legal%20under%20federal%20law.

10. Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 TOURO L. REV. 277, 300, 314 (2017), https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=2808&context=lawreview.

11. Abbott, *supra* note 4.

12. Abbott *supra* note 4.

13. *Id.*

14. *Id.*

15. Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 68 KAN. L. REV. 1097, 1109 (2020).

16. David Streitfield, *Amazon's Antitrust Antagonist has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html.

17. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 716-17 (2017), https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

18. *Id.*

19. *Id* at 717.

of monopolies in America threaten both political power and small business.[20] This set of ideas that Lina Khan, and a number of other similarly-minded scholars, champion is known as the New Brandeis School, so named for its similarity to the policies advocated for by Supreme Court Justice Louis Brandeis.[21]

The New Brandeis School's central distinguishing feature is the rejection of the consumer welfare standard.[22] It avers that the consumer welfare standard weakens antitrust enforcement by attending to short-term price effects.[23] Advocates of the school desire to replace the consumer welfare standard with a multi-factor approach, otherwise known as a public interest standard.[24] This standard would allow the FTC and courts to enforce an array of non-price effects that arise out of business conduct.[25] The multi-factor approach would incorporate factors such as income inequality, unemployment, worker mobility, wage disparities, political influence, and small business formation and growth.[26] In March 2021, President Biden appointed Lina Khan as Chair of the FTC, giving her the ability to take steps to employ many of her ideas in antitrust enforcement.[27]

II. REPEAL OF THE CONSUMER WELFARE STANDARD

A. Khan's Vision for the FTC

Section 5(a)(1) of the FTC Act states, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[28]

In 2015, the FTC released a policy statement codifying the consumer welfare standard and the rule of reason into their regulatory guidelines.[29] In the statement, the FTC adopted the rule of reason and the consumer welfare standard to guide their regulatory decisions.[30] The 2015 policy statement provides that any violation of the Sherman or Clayton Acts will constitute an unfair method of competition or an unfair or deceptive act in contravention of Section 5 of the FTC Act; however, it does not constrain the FTC to enforce only violations of those acts.[31] It also allows enforcement against actions that "contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton

20. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. OF EUROPEAN COMPETITION L. & PRAC. 131 (2018), https://academic.oup.com/jeclap/article/9/3/131/4915966.

21. Joseph Coniglio, *Why the 'New Brandeis Movement' Gets Antitrust Wrong*, SSRN, at 1 (Apr. 24, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166286.

22. Dorsey, *supra* note 5, at 8.

23. *Id.*

24. *Id.* at 9.

25. *Id.*

26. *Id.*

27. Russell Brandom & Makena Kelly, *Tech Antitrust Pioneer Lina Khan Will Officially Lead the FTC*, THE VERGE (Jun. 15, 2021, 12:22 PM), https://www.theverge.com/2021/6/15/22527709/lina-khan-ftc-commissioner-competition-facebook-amazon-google-apple.

28. 15 U.S.C. § 45(a)(1).

29. Donald S. Clark,, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, FTC (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

30. *Id.*

31. *Id.*

Acts."[32] The 2015 policy statement also ensured that the FTC would be tethered to the consumer welfare standard when it regulates conduct that lies beyond those acts.[33]

However, in July of 2021, the FTC, acting under Chair Lina Khan, repealed the 2015 policy statement, asserting that adherence to the consumer welfare standard "contravene[d] the text, structure, and history of Section 5" and too greatly restricts the FTC's authority.[34] The 2021 statement explained that the FTC Act was enacted by Congress "to provide an alternative institutional framework for enforcing the antitrust laws" and to create an administrative body that could provide more competent and accountable regulation than courts could provide.[35] Instead of using preexisting language from the Sherman Act or another piece of antitrust legislation, Section 5 used new language when it declared "unfair methods of competition unlawful."[36] The FTC argues that this is evidence Congress intended Section 5 to extend further than the Sherman Act.[37] On the other hand, Section 5 does not allow for a private right of action and prohibits the Commission from pursuing criminal charges for violations of the Act.[38] The FTC argues that Section 5 presents a compromise in this way by providing a limited number of remedies against infractions but granting the authority to "shape doctrine and reach conduct not otherwise prohibited by the Sherman Act."[39]

The July policy statement further charges that the 2015 statement relinquishes the Commission's primary strengths "as an administrative agency with the power to adjudicate cases, issue rules and industry guidance, and conduct detailed marketplace studies," by constraining Section 5 to the Sherman and Clayton Acts.[40] The statement asserts that the expert body of the FTC must ironically yield to non-expert judges in private actions under the Sherman Act.[41] Section 5 is also subject to a rule of reason-style framework, allowing courts to judge whether any business conduct is unreasonable.[42] Courts make this assessment by weighing the "procompetitive" effects against the "anticompetitive" effects.[43] The FTC argues that the employment of this rule "leads to soaring enforcement costs, risks inconsistent outcomes, and has been decried by judges as unadministrable or exceedingly difficult to meet."[44] Furthermore, in almost every rule of reason case in the last 45 years, the defendant has prevailed on the basis that the plaintiff was unable to show a "substantial anticompetitive effect."[45]

The FTC asserts that the 2021 statement was also necessary because the 2015 statement was "rife with internal contradictions that may effectively read the

32. *Id.*
33. *Id.*
34. FTC, *On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, at 1 (Jul. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.
35. *Id.* at 2-3.
36. *Id.* at 3.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 5.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 6.

Commission's standalone Section 5 authority out of the statute altogether."[46] The statement prohibits conduct that, if allowed to be completed, would violate the Sherman or Clayton Acts.[47] However, the statement also requires the FTC to prove "'likely' anticompetitive effects under the rule of reason."[48] This effectively nullifies the FTC's duty to penalize wrongdoing before it harms consumers.[49] The 2015 Statement says that it will refrain from bringing a standalone Section 5 case in most cases where the Sherman or Clayton Acts already apply.[50] The FTC argues that this has so narrowed the field of cognizable standalone Section 5 cases that there are few, if any, possible cases that the FTC could bring for such a violation.[51] "Almost every practice that is unlawful under the rule of reason would already be subject to the Sherman or Clayton Acts and thus. . . be improper targets for standalone section 5 enforcement."[52] The statement concludes by declaring that the repeal of the 2015 Statement is only the beginning of efforts to clarify Section 5 of the Act and that the FTC will consider issuing new guidance or rules to interpret Section 5 in the ensuing months.[53]

In the wake of the repeal of the consumer welfare standard, Chair Lina Khan has provided a set of goals and priorities to guide the regulatory approach of the FTC.[54] The first principle set out is the need for a "holistic approach" where the FTC may look beyond consumer welfare and consider harms toward workers and independent businesses as well.[55] Second, she advocates for regulating structural incentives or "root causes" in lieu of mere effects of these incentives.[56]This would involve the regulation of "conflicts of interest, business models, or structural dominance" as well as firms that are profiting from this conduct.[57] She next emphasizes the need to adopt an interdisciplinary approach to better understand the practical elements of the market and firm dynamics.[58] She also stresses that the FTC be proactive in preventing problems that may arise and a need for swiftness in the approach.[59] The fifth and final principle is the democratization of the agency to provide a regulatory policy that is in touch with "real problems" Americans are facing in their lives.[60]

In the realm of her priorities, Khan desires to revise merger guidelines to provide enforcement that is both practically and theoretically sound.[61] To this end, the FTC will take a closer look at the nexus between private equity and corporations that may allow for market dominance.[62] Khan wishes to take aim at "take-it-or-

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 7.
54. Lina Khan, *Vision and Priorities of the FTC*, 1, FTC, at 1 (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.
55. *Id.* at 1-2.
56. *Id.* at 2.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 3.
62. *Id.*

leave-it contracts."[63] This would include "non-competes, repair restrictions, and exclusionary clauses."[64] Khan has also set a number of operational objectives, including applying an integrated approach to policy, deeper connection to communities in America, and widening the scope of disciplines to better inform regulation.[65]

While these policy goals are not binding, they do provide insight into Khan's plans for the future of the FTC.[66] The consumer welfare standard may be replaced by a "multi-factor assessment that weighs market openness, economic fairness, democracy; and the interests of workers, entrepreneurs, independent businesses, and consumers."[67] However, critics have alleged that the repeal of the consumer welfare standard will create an antitrust policy that hurts the economy, increases uncertainty in enforcement decisions, and makes it more difficult to regulate. They further encourage a return to the consumer welfare standard.[68]

B. The Problems with Repealing the Consumer Welfare Standard

While it is possible that the broader scope of regulation afforded by the multi-factor approach could give new life to an arguably sclerotic technology sector, it is not clear that any standard would allow for a more effective regime of regulation than the consumer welfare standard. The consumer welfare standard is considered to be transparent and easy to administer.[69] The test to determine whether a company is engaging in anticompetitive conduct is straightforward.[70] "Under a simple rule of reason test employing the consumer welfare principle, one would have to consider whether the challenged practice creates a sufficient inference of lower market-wide output and higher prices."[71] If it does, it is unlawful.[72]

Furthermore, the consumer welfare standard prevents arbitrary action on the part of regulators.[73] The standard requires testable claims and counterclaims as part of a competition case.[74] It always questions whether the conduct will make consumers better or worse off.[75] The consumer welfare standard may also encompass more factors than just price.[76] It allows the FTC to regulate on the basis of innovation, quality, and product variety.[77]

63. *Id.*
64. *Id.*
65. *Id.* at 3-4.
66. Jeffrey J. Amato, David E. Dahlquist & Jay R. Wexler, *FTC Chair Lina Khan Issues "Priorities" Memo*, WINSTON & STRAWN LLP (Sept. 29, 2021), https://www.winston.com/en/competition-corner/ftc-chair-lina-khan-issues-priorities-memo.html.
67. Abbott, *supra* note 4.
68. Abbott, *supra* note 4; *See* Wagener, *supra* note 6.
69. Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, FTC, at 5 (Feb. 2, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.
70. *Id.*
71. *Id.*
72. *Id.*
73. Sam Bowman, *The Consumer Welfare Standard: Bringing Objectivity to Antitrust*, THE INT'L. CTR. FOR LAW & ECONOMICS (Feb. 2021), https://laweconcenter.org/wp-content/uploads/2021/02/tldr-Consumer-Welfare-Standard.pdf.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

While the departure from the consumer welfare standard may present itself as a logical first step, given the existence of increasing corporate consolidation, the alternative standard put forth by the FTC presents tradeoffs that are not necessarily favorable. A multi-factor standard is effectively no standard at all.[78] Without any standard, the FTC has an effective carte blanche to regulate in ways that could potentially harm both consumers and businesses.[79] There is no neutral way to weigh these various factors, and, therefore, the likelihood that the regulatory power may be used arbitrarily increases.[80] It would also reduce transparency that exists under a consumer welfare standard.[81] Alternatively, it may lead to an inability to regulate and an institutionally instantiated analysis paralysis.[82]

These various standards must be assessed based on their "predictability, administrability, and credibility of enforcement decisions."[83] The multi-factor assessment would lack both predictability and credibility, and it would likely lead to unpredictable outcomes due to the inability to assign weights to the various factors.[84] It may also result in outcomes contrary to consumer interests as a decision to regulate based on competition, instead of consumer welfare, is likely to decrease consumer welfare.[85] However, the consumer welfare standard leads to predictable enforcement decisions that are easier to administer.[86] The formal approach under which it is administered and the requirement of testable claims ensure the existence of these three criteria.[87] Credibility is also easy to foster, given that enforcement decisions purportedly serve consumer welfare.[88]

Antitrust is concerned with regulating two types of behaviors: coordinated conduct and exclusionary actions.[89] Coordinated conduct may become collusive and exclusionary actions may create monopolism.[90] However, there is no fine line in determining how to regulate under an antitrust framework.[91] While coordinated conduct may be harmful, it can increase market output, and exclusionary actions can benefit consumers.[92]

Since these behaviors may be either procompetitive or anticompetitive, regulators face potentially imposing costs on consumers.[93] There are two types of costs that may result from regulating under an antitrust framework: costs from mistaken judgments and decision costs.[94] Mistaken judgments can be divided up into false convictions (Type I errors) and false acquittals (Type II errors).[95] When the regulator falsely acquits a corporation, the regulator mistakenly stays its hand against

78. Abbott, *supra* note 4.
79. *Id.*
80. *Id.*
81. *Id.*
82. Wagener, *supra* note 6.
83. Wilson, *supra* note 69, at 10.
84. *Id.*
85. *Id.* at 11.
86. *Id.* at 5.
87. *See* Wilson, *supra* note 69, at 5; *See* Bowman *supra* note 73.
88. *See* Wilson, *supra* note 69, at 5.
89. Lambert, *supra* note 15, at 1100.
90. *Id.*
91. *Id.* at 1100-01.
92. *Id.* at 1100.
93. *Id.* at 1100-01.
94. *Id.* at 1101.
95. *Id.*

anticompetitive conduct.[96] This results in higher prices for consumers, along with reduced quality of products.[97] When a regulator falsely convicts a corporation, the regulator mistakenly punishes procompetitive conduct, which decreases market output and also causes consumers to suffer.[98] Decision costs result from "deciding whether contemplated or actual conduct is forbidden or permitted" and are imposed on business planners, litigating parties, and adjudicators.[99] Judge Easterbrook, in his article *The Limits of Antitrust,* argued that policies should be created such that they "minimize the sum of error and decision costs."[100] This allows regulators to minimize costs while still creating as much benefit as possible.[101]

When determining whether to regulate or not, the FTC must consider whether succeeding on an enforcement action will impose greater losses than a market failure will. Under Easterbrook's approach, "[l]osses from improvident interventions are Type I (false conviction) error costs that must be balanced against the losses from allowing market power to persist (Type II error costs)."[102] Regulation is likely to create losses when the issue is too complicated for a centralized administration to handle, and agencies are given broad authority over the allocation of resources.[103] Furthermore, breaking up highly integrated yet multi-faceted technology platforms without creating consumer harm presents itself as a highly difficult task.[104] To make things worse, the grant of this excess of authority also opens the door to manipulation by special interests.[105]

"[A]n increase in the vagueness of the standard increases incentives for rent-seeking activity."[106] The repeal of the consumer welfare standard would purportedly allow the FTC to accomplish its broad social objectives by loosening the constraints on the FTC's regulatory action and employing this multi-factor approach.[107] However, public choice economics and historical evidence suggest that the paradoxical effect of this broadening of authority would be an increase in corporate control rather than less.[108] Public choice economics is an economic theory that suggests government actors are susceptible to incentives in the same way that non-government actors are susceptible to such incentives.[109] The historical record, viewed under the lens of this theory, demonstrates that "the consumer welfare standard reduced incentives for rent-seeking and brought the rule of law to antitrust."[110]

This broadening of authority for the FTC effectively opens the door to increasing rent-seeking behavior by companies.[111] "Economic rents, or returns in excess of a firm's opportunity cost, refer to those rents artificially created and awarded

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1101-02.
101. *Id.* at 1102.
102. *Id.* at 1126.
103. *Id.* at 1126-27.
104. *Id.* at 1129.
105. *Id.* at 1127.
106. Dorsey, *supra* note 5, at 2.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 2.

through government action."[112] The availability of these rents incentivizes companies to seek them, oftentimes through lobbying, campaign donations, or complaints to regulatory authorities of a competitor's illicit behavior.[113] When this rent-seeking behavior is successful in the erection of regulatory or legislative barriers, it results in welfare losses similar to those seen in cartels or price-fixing scenarios.[114] Private interests can extract these rents because "the costs are diffused across numerous consumers who individually lack the incentive to organize and protect themselves."[115]

Even if the rent-seeking scheme fails, costs are still imposed by allowing companies to direct resources away from productive uses that would increase overall welfare, such as innovating or finding ways to lower prices.[116] As a result, those resources migrate toward uses that simply transfer welfare, such as lobbying for protective legislation or influencing regulators.[117] The non-productive behavior is effectively incentivized because granting the FTC "broader discretion over the creation and distribution of rents" will increase the expected return of that behavior.[118]

By substituting the consumer welfare standard for a multi-factor approach, private interests have an increased number of avenues by which they can rent-seek.[119] Thus, the FTC is effectively less accountable to the public, which allows the "agency to internalize the costs of poor decision-making."[120] The opacity and arbitrariness of such an approach makes it easier for the FTC to explain any resulting outcome and harder for the FTC to be held accountable by a court or the public.[121] It thereby accords less certainty to regulatory outcomes and increases rent-seeking behavior.[122] Moreover, a broad, multi-factor approach would increase the scope of cognizable antitrust actions, allowing companies to further engage in rent-seeking behavior.[123]

The extensive and costly nature of antitrust actions incentivizes companies to accuse their competitors of committing antitrust infractions.[124] "Antitrust cases and investigations can drag on for years; entail the collecting, processing, and production of millions of documents; and involve tremendous attorneys' fees."[125] Antitrust suits have the ability to cause companies to divert tremendous amounts of resources for years.[126] Furthermore, if a company is charged with an infraction, its damages may be trebled.[127] The effect of such a policy would harm the competitor of any company bringing the suit, eventually reducing the overall pool of competitors.[128]

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112. *Id.* at 3.
113. *Id.* at 3-4.
114. *Id.* at 4.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 4-5.
123. *Id.* at 10.
124. *Id.* at 7.
125. *Id.*
126. *Id.* at 7.
127. *Id.*
128. *Id.*

The solution to rent-seeking is the establishment of the rule of law. When agencies are subject to clear rules and held accountable to another body, the potential for rent-seeking is reduced. Furthermore, the benefit is reflexive in nature. These policies not only keep companies from engaging in rent-seeking but also cause agencies to remain transparent and abstain from "manipulat[ing] outcomes to respond to rent-seeking incentives."[129] Antitrust enforcement functions at its best when there "is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes."[130]

It is also important to note the U.S. has implemented policies similar to those advocated by neo-brandeisians in the past.[131] Prior to the adoption of the consumer welfare standard, antitrust law was focused on broad social goals, "such as preventing bigness and preserving 'small dealers and worthy men.'"[132] History has also shown such policies were ineffective and opposed to consumer interests.[133] Now there is widespread agreement among both sides of the political aisle that the consumer welfare standard improved antitrust law.[134] "It offer[ed] an economically-grounded framework for analyzing enforcement actions, and clear criteria the agencies (and private plaintiffs) must demonstrate to prove an antitrust violation."[135] This stymied rent-seeking and thereby allowed for consistency in antitrust adjudication.[136]

III. THE FTC'S RULEMAKING AUTHORITY AND SECTION 6(G)

While the FTC has historically held an important role in the U.S. economy and among administrative agencies, recent proposals have suggested the possibility of turning the FTC into a quasi-legislative organ.[137] This transformation would allow the FTC to define what constitutes unfair methods of competition for the purpose of expanding the FTC's ambit of enforcement authority.[138] Such an expansion would represent a usurpation of congressional authority and would "distract the agency from its core mission of case-by-case expert application of the FTC Act through administrative adjudication."[139]

Section 6(g) of the FTC Act states the FTC has the power to "[f]rom time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[140] The FTC is being increasingly pressured to use Section 6(g) of the FTC Act as authority to define unfair methods of competition.[141] However, Section 18 of the FTC already provides this ability to

129. *Id.*
130. *Id.*
131. *Id.* at 5.
132. *Id.*
133. *Id.* at 7.
134. *Id.*
135. *Id.*
136. *Id.*
137. Ohlhausen *supra* note 1, at 2.
138. *Id.*
139. *Id.*
140. 15 U.S.C. § 46(g).
141. *See* 15 U.S.C. § 46(g); Ohlhausen, *supra* note 1, at 5.

the FTC.[142] If Section 6(g) also gives the FTC this authority, then Section 18 is relegated to mere surplusage, a result that was likely not intended by the legislature.

The FTC is given a few discrete grants of authority by Congress to make rules to challenge unfair methods of competition.[143] Under the FTC's Part III adjudication authority, the FTC challenges a purported "unfair method of competition" by first voting on whether to file a complaint regarding the actions.[144] The matter may be immediately settled under a consent order; however, if it is not, FTC lawyers act as prosecutors and engage in litigation.[145] Complaint counsel—the FTC prosecutors—and the respondents engage in discovery, make pretrial motions, and argue before an administrative law judge.[146] After the judge renders a judgment, either side has the opportunity to appeal to the Commission, which would review the findings *de novo*.[147]

The FTC may engage in "informal rulemaking" subject to the Administrative Procedure Act ("APA") requirements in 5 U.S.C. § 553.[148] These requirements include "adequate public notice of the proposed rule and a meaningful opportunity to comment on the proposed rule."[149] The notice requirement or informal rulemaking is intended to "afford interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[150]

A notice of proposed rulemaking ("NPRM") is created to meet this end, which requires "(1) the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[151] The comment requirement is intended to give the general public the ability to have input in the rulemaking process.[152] After receiving input from the general public, the agency is then required to create a statement of basis and purpose. Such a statement provides justification for the final rule adopted by the FTC that addresses any significant comments the FTC believes would affect the final rule.[153] If the final rule differs from the proposed rule, it must be a "reasonably foreseeable 'logical outgrowth' of the original proposed rule."[154] The FTC is then required to publish the final rule and general statement of the basis and purpose 30 days before the rule's effective date.[155]

The targeted notice-and-comment requirements are the default standard for rulemaking for the FTC; however, these rules are displaced when Congress necessitates a stricter standard.[156] The FTC's consumer protection rulemaking is subject to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of

142. 15 U.S.C. § 57(a).
143. Ohlhausen *supra* note 1, at 2.
144. *Id.* at 3.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 5.
149. *Id.*
150. *Id.* at 6.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 5.

1975.[157] While the Magnuson-Moss rulemaking requirements differ substantially from NPRM requirements, both forms of rulemaking exist as clear grants of authority from Congress to the FTC.[158] The grant provides detailed procedural guidance or guidance on rulemaking topics and goals in Magnuson-Moss cases or detailed guidance on rulemaking topics and goals in targeted notice-and-comment cases.[159]

If allowed to engage in rulemaking against unfair methods of competition under Section 6(g) of the FTC Act, the FTC would be "bounded neither by meticulous procedural requirements nor by a specific Congressional mandate."[160] It would use targeted notice-and-comment rulemaking to "directly regulate business conduct across the economy with relatively few of the procedural protections that Congress felt necessary for FTC's trade regulation rules in the consumer protection context."[161] Furthermore, this move would disrupt the FTC's role "as an expert case-by-case adjudicator of competition issues."[162] In alleviating itself from the various checks and balances found in typical, congressionally granted powers of rulemaking, it would become easy for the FTC to achieve its desired outcomes while circumventing any form of neutral arbiter.[163]

Most antitrust law requires "highly detailed, case-specific determinations" by fact-finders to determine violations.[164] This requirement helps to protect and enhance consumer welfare.[165] A form of legislative rulemaking of the type proposed here would not only disrupt but displace this process with bright-line rules that would function as quasi-*per se* prohibitions.[166] "By sacrificing the precision of case-by-case adjudication, rulemaking advocates are also losing one of the best tools we have to account for 'market dynamics, new sources of competition, and consumer preferences.'"[167]

IV. CONCLUSION

The New Brandeis School's ideas have seen a meteoric rise to the forefront of antitrust policy in the past several years. The popularity of such ideas is understandable in an age where technology companies command a massive scale, and an ever-greater portion of people's lives resides online. However, the FTC's abrogation of the consumer welfare standard creates the ability to bring actions against companies arbitrarily and with minimal oversight. The ability to specify new unfair methods of competition under Section 6(g) likewise would confer an unprecedented ability to alter legislative enactments. If seen to its logical conclusion, the FTC threatens to become a central economic planner, a remedy that would necessarily be worse than the disease.

157. *Id.*
158. *Id.*at 9.
159. *Id.*
160. *Id.*
161. *Id.* at 10.
162. *Id.*
163. *Id.*
164. *Id.* at 16.
165. *Id.*
166. *Id.*
167. *Id.* at 17.