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Marxism and Critical Legal Studies Walk into the FTC: Deconstructing the Worldview of the Neo-Brandeisians

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The Rule of Law and Innovation Under Assault

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Like many of you, I have studied antitrust law and policy, and worked in the field, for decades. My perspective on antitrust is enriched by having served at the Federal Trade Commission, represented clients in private practice, and served as in-house counsel. Over the years, as one would expect, the field has evolved – enforcers have incorporated new economic learning into their analytical frameworks, courts have developed new legal precedent, and both law and economics have been applied to dynamic and evolving markets. In other words, the field is not static, and it is not meant to be, as the Supreme Court observed in *Kimble v. Marvel*.[1]

For most of my career, a broad, bipartisan consensus has existed regarding the appropriate analytical framework for antitrust enforcement. Indeed, the first speech that Tim Muris delivered as FTC Chairman discussed continuity in antitrust enforcement.[2] Serious antitrust thinkers can and do disagree about whether to focus on avoiding Type 1 or Type 2 errors.[3] Professor Steve Salop of Georgetown University Law Center, whose classes I took and for whom I worked as a research assistant, is one of the noteworthy proponents of more aggressive enforcement.[4] But make no mistake: Professor Salop would continue to ground antitrust enforcement in economic principles.[5]

But the debate began to change, and notable developments began to occur:

- Calls to abandon the consumer welfare standard;[6]

[1] Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 461 (2015) (recognizing the "dynamic potential" of the antitrust laws and the flexibility to "revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences[.]"). *See also* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (describing Supreme Court's distinctive role under antitrust statutes "in recognizing and adapting to changed circumstances and the lessons of accumulated experience.").

[2] Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity* (August 7, 2001), https://www.ftc.gov/news-events/news/speeches/antitrust-enforcement-federal-trade-commission-word-continuity.

[3] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles ("In which direction should these rules err? For a number of reasons, errors on the side of excusing questionable practices are preferable"); Alan Devin & Michael Jacobs, *Antitrust Error*, 53 WM. & MARY L. REV 75, 82 (2010), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3358&context=wmlr ("[C]ourts' aversion to Type I errors should be relaxed in the presence of lawsuits initiated by the FTC or DOJ."); *Hearings on Competition and Consumer Protection in the 21st Century, FTC Hearing #14: Roundtable with State Attorneys General, Session on Revisiting The Limits Of Antitrust* 225-321 (June 12, 2019), https://www.ftc.gov/system/files/documents/public_events/1519667/ftc_hearings_session_14_transcript_6-12-19_0.pdf (revisiting Frank H. Easterbrook's seminal paper on Type I and Type II errors in antitrust).

[4] *See, e.g.*, Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3020&context=facpub (explaining why and how vertical merger enforcement should be invigorated).

[5] *Id.* at 1979 ("Predicting whether competitive harms from foreclosure likely will occur can be aided by quantitative methodologies developed by economists over the last two decades.").

[6] Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice,* COMP. POL'Y INT'L ANTITRUST CHRONICLE, at 2 (April 2018), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf; Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition*

- The Better Deal issued by Senate Democrats, which proposed to flip the burden of proof for "the largest mergers";[7]
- The publication of Tim Wu's book, *The Curse of Bigness: Antitrust in the New Gilded Age*, which asserted that antitrust law "has lost sight of its goals" and "failed in its core mission";[8]
- Then-FTC Commissioner Rohit Chopra's repeated and vitriolic criticisms of the FTC and its staff;[9]

Standard—A New Standard for Antitrust, 86 U. CHI. L. REV. 595 (2020), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6188&context=uclrev; *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt* Before *the S. Comm. on Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 115th Cong. (2017), https://www.judiciary.senate.gov/meetings/the-consumer-welfare-standard-in-antitrust-outdated-or-a-harbor-in-a-sea-of-doubt.

[7] SENATE DEMOCRATS, A BETTER DEAL: CRACKING DOWN ON CORPORATE MONOPOLIES, at 1 (2017), https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf ("[U]nder our new standards, the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal").

[8] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 19 (2018).

[9] *See, e.g.*, Prepared Opening Statement of Commissioner Rohit Chopra, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf ("[T]he FTC has shown it is willing to be lax and forgiving."); Dissenting Statement of Commissioner Rohit Chopra Regarding Zoom Video Communications, Inc. (Nov. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf (stating that the proposed consent does not provide meaningful accountability and that the FTC is not a credible enforcement agency); Dissenting Statement of Commissioner Rohit Chopra in re Facebook, Inc. (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (characterizing $5 billion settlement containing significant injunctive relief as "inadequate" and "flimsy"); Dissenting Statement of Commissioner Rohit Chopra in the Matter of AbbVie, Inc. / Allergan plc 3 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf (characterizing staff's approach to reviewing pharmaceutical mergers as "narrow, flawed, and ineffective" while declining to provide guidance about what those reviews *should* examine); *see also* Jesse Eisinger, *New Commissioner Says FTC Should Get Tough on Companies like Facebook and Google*, PROPUBLICA (May 14, 2018), https://www.propublica.org/article/rohit-chopra-ftc-commissioner-ftc-should-get-tough-on-companies-like-facebook-and-google ("Declaring that 'the credibility of law enforcement and regulatory agencies has been undermined by the real or perceived lax treatment of repeat offenders,' newly installed Democratic Federal Trade Commissioner Rohit Chopra is calling for much more serious penalties for repeat corporate offenders."); Mary Harris, *Trust-Busting is Back: Could 'the Simone Biles of antitrust' break up Amazon?*, SLATE (Jun. 22, 2021), https://slate.com/business/2021/06/lina-khan-biden-ftc-amazon-big-tech-monopoly-antitrust.html ("There simply is lawlessness in our economy writ large, and the FTC is a big part of it, though it's not the only agency that's proved to be feckless.").

- Despite the failure of massive regulatory regimes, praise for those regimes and suggestions that similar regulations be applied to Big Tech;[10]
- The House Judiciary Committee's proposals that extended far beyond Big Tech – calling more generally for reinvigoration of the essential facilities doctrine, removal of the recoupment prong for predatory pricing, and so on;[11] and
- Chair Lina Khan's arrival at the FTC and the immediate jettisoning of traditional procedures and norms that had facilitated collegiality and bipartisanship.[12]

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[10] *See* MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 7 (2020), [hereinafter MAJORITY STAFF REPORT], https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf at 380 ("In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in order to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that '[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other.' Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest."); *id.* at 382 ("The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads."); *id.* at 383 ("Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers").

[11] *Id.* at 397-398 ("[T]he Subcommittee recommends that Congress consider revitalizing the 'essential facilities' doctrine, the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis. To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm."); *id.* at 397 ("Courts, however, have introduced a 'recoupment' requirement, necessitating that plaintiffs prove that the losses incurred through below-cost pricing subsequently were or could be recouped. Although dominant digital markets can recoup these losses through various means over the long term, recoupment is difficult for plaintiffs to prove in the short term. Since the recoupment requirement was introduced, successful predatory pricing cases have plummeted. The Subcommittee recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying, overriding the Supreme Court's decisions[.]") (citations omitted).

[12] Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021, [hereinafter Wilson July 1 Remarks] https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf ("Unfortunately, the format the Chair has chosen for this meeting omits our knowledgeable staff and precludes a dialogue among the Commissioners. A bipartisan and collaborative approach has been the hallmark of the FTC for years and would be welcome today, particularly given the importance of the matters being considered. We have arrived at the consumer welfare standard, a rulemaking process that respects objectivity and public input, and an appreciation for our limited jurisdiction for very specific reasons. Those reasons are worth discussing, but that requires a thoughtful process. And when we have chaos instead of thoughtful process, it is the American consumer who will suffer."); Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021, [hereinafter Wilson July 21 Remarks] https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf ("Each Commissioner brings varied perspectives and policy preferences to this job that enable the body to consider issues in a far more comprehensive way than any one of us would or could on his or her own. FTC staff have similarly varied perspectives, professional experiences, and comparative advantages. While we may not always agree with each other or with staff, our analysis is deeper and richer because of staff's recommendations and insights, particularly when our analyses diverge. Our agency has come under attack from a variety of quarters in recent years. In the face of these attacks, we could be proud of our robust dialogue and thorough analysis at every stage of each matter and proceeding. Crushing internal dialogue diminishes the quality of

And throughout this period, defenders of the bipartisan consensus approach have been labeled as more than just wrong – they are evil and corrupt.[13] A prime example of this condemnation occurred just yesterday, at the Antitrust Section Spring Meeting of the American Bar Association. During the Chair's Showcase, Barry Lynn, the Executive Director of Open Markets Institute and a mentor of Chair Khan's, "rattled off a list of social ills, including outsized influence of tech companies, environmental problems and wealth inequality," and told attendees that "[t]his is all—to a great degree—your doing. It is your doing because you conspired to use a false science, an idiot science, to blind the law to dangerous concentrations of power, to blind the citizenry to the fist of monopoly."[14] Another journalist reported that Barry Lynn "took to the stage and accused everyone in the meeting hall of working to take down American Democracy via their support of the consumer welfare standard. Lynn compared antitrust practitioners to Vladimir Putin and Xi Jinping. It was all quite something to behold."[15] I am told that Zephyr Teachout conveyed the same themes during this panel, although somewhat more diplomatically.

I have been mystified by these developments, so I began looking for explanations. And my research thus far has convinced me – these events are not attributable to one individual's idiosyncrasies, or another individual's toxic Twitter behavior. There is a broader pattern and, I believe, a unifying worldview.

When I was a political science major in college, I took a class called *Great Political Thinkers*. On the first day, the professor told us we were fortunate to be in his class because there were at least 100 ways to interpret Machiavelli – but he was going to teach us the one *right* way.

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our decision making and gives our detractors more ammunition. Process matters, so let's get it right."). One noteworthy example came in the form of so-called "zombie votes." Leah Nylen, *'Zombies' to the rescue: The arcane voting rule that could save Dems' antitrust agenda*, POLITICO (Nov. 8, 2021), https://www.politico.com/news/2021/11/08/voting-rule-democrats-antitrust-519767; Josh Sisco, *Staff Exits Complicate FTC Chief Lina Khan's Agenda*, THE INFORMATION (Oct. 5, 2021), https://www.theinformation.com/articles/staff-exits-complicate-ftc-chief-lina-khans-agenda?rc=9corng.

[13] Alison Griswold, *Is monopolization inevitable in the digital era?*, QUARTZ (Nov. 11, 2019), https://qz.com/1733210/matt-stoller-on-big-tech-and-monopoly-power/ (interviewing Matthew Stoller, who states, "I think the people that don't want to call them monopolies are a small club of insiders who are corrupt. The antitrust establishment is corrupt."); @matthewstoller, TWITTER, (Mar. 23, 2021 9:44AM), https://twitter.com/matthewstoller/status/1374361505915895808?s=20&t=UpcQ9UOpippIhUb8HtOPnQ ("If they had the evidence, why didn't they bring the suit? Three reasons. One, corruption. Everyone is on the take. The only former FTC Commissioner who voted on the case and does not today receive big tech money is deceased."); @matthewstoller, TWITTER, (March 18, 2020 10:32PM), https://twitter.com/matthewstoller/status/1240463931531046912?s=20&t=PZvU-YF9nfVwKViu5pypB4-RrJiiC_J2E-MftFQmjGQ ("It's evil anyone would think M&A should be a priority when we are facing economic collapse and prospect of mass deaths. The right approach is to just stop M&A during a crisis or lapse in agency capacity. Let's not invite companies to exploit the crisis and go on buying sprees.").

[14] *See* Josh Sisco, *An Agitator Disrupts an Antitrust Garden Party*, THE INFORMATION (April 12, 2022), https://www.theinformation.com/articles/an-agitator-disrupts-an-antitrust-garden-party.

[15] Reuben Miller, *CTFN Merger Observer Weekend*, CTFN (April 9, 2022), https://ctfn.news/essentials/ctfn-merger-observer-weekend-2.

I cannot assure you that I am going to describe the one right way to interpret these developments. I am still reading tomes of history and philosophy, trying to make sense of where we are. But today, I will share the results of my research thus far. I will tell you what I have read, and what I have seen. And I will share with you my working hypothesis: A unified worldview that draws heavily on concepts from Marxism and Critical Legal Studies is driving these developments.

In my remarks today, I will discuss a variety of concepts through the lens of Western Liberal thought, Marxism, Critical Legal Studies ("CLS"), and the Neo-Brandeisians.[16] I will conclude with brief thoughts on the implications of these worldviews for innovation, the focus of today's conference.

1. Rule of Law

The founders of the United States grounded our country in the key tenets of classical liberalism: individual rights, consent of the governed, periodic elections, public deliberation, democracy, equality, guaranteed liberties, and branches of government that check and balance one another.[17] These principles are enshrined in our Constitution and enforced by judges under the rule of law, another key tenet of classical liberalism.[18] The rule of law is "a principle under which all persons, institutions, and entities are accountable to laws that are: publicly promulgated, equally enforced, independently adjudicated, and consistent with international

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[16] I want to acknowledge the *Truth on the Market* blog posts of Lazar Radic, who has made valuable observations on Marxism and competition. Lazar Radic, *Political Philosophy, Competition, and Competition Law: The Road to and from Neoliberalism, Part 1*, TRUTH ON THE MARKET (Nov. 21, 2022), https://truthonthemarket.com/2021/11/23/political-philosophy-competition-and-competition-law-part-1-the-road-to-and-from-neoliberalism/; Lazar Radic, *Political Philosophy, Competition, and Competition Law: The Road to and from Neoliberalism, Part 2*, TRUTH ON THE MARKET (Feb. 03, 2022), https://truthonthemarket.com/?s=Marx&orderby=date&order=DESC. For a comparison of liberalism to CLS theories outside of antitrust law *see* Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 814 (1999).

[17] *See generally* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[18] *See generally* U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *.id* at art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); *id* at amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *id.* at amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

human rights principles."[19] Friedrich Hayek described the rule of law as binding the government to "rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive power in given circumstances[.]"[20]

While our civics classes taught us to prize the rule of law, Marxists have a very different view. Marx characterized society in terms of its "base" and its "superstructure," akin to a foundation and the building that rests on it.[21] For Marx, the base pertained to the prevalent economic mode of production in a society.[22] The superstructure was comprised of the non-economic aspects of society, including law, politics, media, family, culture, philosophy, and so on.[23] Marx believed that the law is an integral part of the superstructure and, consequently,

> is clearly an instrument of the ruling class: it both defines and defends these rulers' claims upon resources and labor-power – it says what shall be property and what shall be crime – and it mediates class relations with a set of appropriate rules and sanctions, all of which, ultimately, confirm and consolidate existing class power. Hence, the rule of law is only another mask for the rule of a class.[24]

Or, more succinctly, Marx asserted that the rule of law "is a bourgeois notion that merely reproduces the inequality of unequal labor[.]"[25]

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[19] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, OVERVIEW - THE RULE OF LAW, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law.

[20] F.A. HAYEK, THE ROAD TO SERFDOM 112 (Bruce Caldwell ed., 2003) (1944).

[21] Karl Marx, *A Contribution to the Critique of Political Economy* (Progress Publishers ed., 1977) (1859), https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/ (preface) ("In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness.").

[22] *Id.* ("The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.").

[23] *Id.*

[24] E.P. Thompson, *The Rule of Law, in* MARXISM AND LAW 130-31 (Piers Beirne & Richard Quinney eds.) (1982).

[25] Piers Beirne & Richard Quinney, *Introduction*, MARXISM AND LAW 6 (Piers Beirne & Richard Quinney eds., (1982) ("In [Marx's] Critique of the *Gotha Programme*, Marx informs us that equal right ('the rule of law') is a bourgeois notion that merely reproduces the inequality of unequal labor; equal right is a defect that cannot be crossed until the higher phase of communism."); Karl Marx, *Critique of the Gotha Programme*, (Progress Publishers, 1970) (1875), https://www.marxists.org/archive/marx/works/1875/gotha/ (Part I) ("But one man is superior to another physically, or mentally, and supplies more labor in the same time, or can labor for a longer time; and labor, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labor. It recognizes no class differences, because everyone is only a worker like everyone else; but it tacitly recognizes unequal individual endowment, and thus productive capacity, as a natural privilege. It is, therefore, a right of inequality, in its content, like every right. Right, by its very nature, can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard insofar as they are brought under an equal point of view, are taken from one definite side only – for instance, in the present case, are

Interesting parallels exist between what Marx taught and what Critical Legal Studies scholars believe. Not all CLS scholars are Marxists, but CLS builds on many concepts employed by Marx. If you attended Georgetown University Law Center and were assigned to Section 3, you were immersed in CLS as a 1L.[26] Many well-known CLS scholars served as professors for Section 3, including Mark Tushnet. Professor Tushnet wrote that from a critical legal studies perspective, the rule of law is an "ideological project" that serves as an instrument of oppression by the group that happens to be in power. [27]

In a related vein, CLS scholars challenge the concept of a value-neutral legal process. Instead, they argue that the system is built by elites who have a stake in rationalizing their dominant power positions, so they "define rights in a way that reinforces existing hierarchies of wealth and privilege."[28] Or, as Georgetown Law students were taught in Section 3, law is politics, and politics is power.

Neo-Brandeisians view the law, and specifically the field of antitrust law, in the same way that Marx and CLS scholars view the rule of law. Specifically, the Neo-Brandeisians reject the belief that antitrust law is above or outside of politics.[29] In fact, according to Neo-

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regarded only as workers and nothing more is seen in them, everything else being ignored. Further, one worker is married, another is not; one has more children than another, and so on and so forth. Thus, with an equal performance of labor, and hence an equal in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid all these defects, right, instead of being equal, would have to be unequal.").

[26] GEORGETOWN UNIVERSITY LAW CENTER, CURRICULUM B (SECTION 3), https://curriculum.law.georgetown.edu/jd/curriculum-b-section-3/.

[27] Mark Tushnet, *Critical Legal Studies and the Rule of Law* 2 (Harvard Public Law Working Paper No. 18-14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135903#:~:text=Mark%20Tushnet,-Harvard%20Law%20School&text=Describing%20critical%20legal%20studies%20as,%2C%20social%20democratic%2C%20and%20more ("From a critical legal studies perspective, the [The World Justice Project's 2016 'Rule of Law'] Index shows that the 'rule of law' is an ideological project. Like all successful ideological projects, it identifies some things that are, in E.P. Thompson's famous words, 'unqualified human good[s].' The rule of law in this aspect guarantees that those holding power (perhaps only those holding government power) not act arbitrarily in adversely affecting the interests of others. Other aspects of the rule of law support the distinctive interests of the powerful, as indicated by the inclusion of property in the Index's list of universal principles. So, for example, supporters of this version of the rule of law invoke it against radicals who seek to replace regimes that fall within some 'acceptable' range, while mounting no such objections to similar extra-legal efforts to displace regimes outside that range (Iran in 1953, perhaps Venezuela today). What counts as 'acceptable' is, again, ideologically defined.").

[28] Robert W. Gordon, *Some Critical Theories of Law and their Critics, in* THE POLITICS OF LAW 649 (David Kairys 3RD ed., 1978) ("The systems, of course, have been largely built by elites who have thought they had some stake in rationalizing their dominant power positions, so at any given time they have tended to define rights in such a way as to reinforce existing hierarchies of wealth and privilege. Even more important, such system building has the effect of making the social world as it is come to seem natural and inevitable.").

[29] Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L. J. 980, 981-82 (2018) [hereinafter Vaheesan, *Twilight of the Technocrats' Monopoly*], http://www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust ("While the champions of consumer welfare may tout its 'apolitical' character, the goals of antitrust are unavoidably political. A market economy requires extensive state action and so cannot be purged of political judgments. Seen as a political tool, antitrust law can be interpreted to deepen existing inequalities in wealth and power, maintain existing distributional arrangements, or create a more equitable society. What it cannot be is 'apolitical.' The questions confronting us, therefore, are who should decide the goals of antitrust

Brandeisians, markets themselves are political.[30] Sandeep Vaheesan of Open Markets Institute, a former colleague and co-author of Chair Khan, has written that because "the state constructs and structures markets through legal rules … [t]he market is not a force of nature, as the law and economics ideology underpinning antitrust presumes."[31] Instead, he writes, the idea of markets "as a 'spontaneous order' is a useful construct for defenders of the status quo because it lends legitimacy to the current order."[32]

Chair Khan agrees that markets are political.[33] During an interview with Stuart Varney, she went even further, stating that "*all* decisions are political insofar as government agencies are bringing them."[34] If you have served at the FTC or DOJ, you may reject this characterization, observing that the agencies and courts make decisions based on sound economics and legal precedent. But Matt Stoller of the American Economic Liberties Project, another former colleague and staunch ally of Chair Khan, argues that "the point of economics as a discipline is to create a language and methodology for governing that hides political assumptions from the public."[35] A recent piece in the *Yale Law Journal* conveyed a similar perspective:

> 'Neoliberal' premises undergird many fields of law and have helped authorize policies and practices that reaffirm the inequities of the current era. In particular, market efficiency, neutrality, and formal equality have rendered key kinds of

– technocrats or democratically-elected representatives in Congress – and what those goals should be. Given that antitrust law is and will be political, whatever its overarching philosophy, consumer welfare should enjoy no position of privilege on the grounds that it is 'apolitical.' It can and should be examined against other political interpretations."); @sandeepvaheesan, TWITTER (March 29, 2022, 9:58 AM https://twitter.com/sandeepvaheesan/status/1508805785660317700?s=12&t=2LawJbwhjZZzMDQE_hScPw ("Considering that the law is the basis of billionaires' power and wealth (just as it was the basis of feudal lords' power and wealth), maybe we should use the law to claw that privilege back.").

[30] Vaheesan, *Twilight of the Technocrats' Monopoly*, *supra* note 29, at 986 ("A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a 'spontaneous order' is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile. This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy.").

[31] Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, THE ANTITRUST BULLETIN at 16 (2019).

[32] Vaheesan, *Twilight of the Technocrats' Monopoly*, *supra* note 29, at 986.

[33] Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. OF CONST. L. & PUB. POL'Y 37, 37 (2014), https://scholarship.law.duke.edu/djclpp/vol9/iss2/4 ("Market structure is deeply political.").

[34] Fox Business Networks, *Break Up Amazon as a Monopoly?*, YOUTUBE (June 23, 2017) [hereinafter Varney], https://youtu.be/VI_DEYqWxqs (Varney asks Lina Khan at the 2:33 mark: "To go after Amazon would be a political decision. Not a market decision. Not an economic decision. A politician would have to instigate this." Khan replies, "I think all decisions are political in so far as government agencies are bringing them.").

[35] Matt Stoller, *What is the Point of Economics,* BIG (Jan. 10, 2020) https://mattstoller.substack.com/p/what-is-the-point-of-economics?s=r.

power invisible … [resulting in] a pervasive view of law that encases 'the market' from claims of justice and conceals it from analyses of power.[36]

In other words, the Neo-Brandeisians reject the characterization of antitrust law as value-neutral and relatively free from political interference. Vaheesan declared starkly that "antitrust law is and will be political."[37] And it follows naturally that if antitrust is not value-neutral, neither is the consumer welfare standard. Vaheesan has asserted that "[a]n antitrust enforcer anchored in consumer welfare is an antitrust enforcer anchored in anti-labor."[38]

So where does this leave us? The Neo-Brandeisians, drawing on refrains from Marx and Critical Legal Studies scholars, believe that antitrust enforcement is a politicized exercise that serves as a tool of oppression to reinforce existing inequities. This perspective appears to explain several aspects of the Neo-Brandeisian worldview.

If antitrust is indeed a tool of oppression, it makes sense that the Neo-Brandeisians paint those who helped shape the status quo, or who now defend it, as not just wrong, but evil and corrupt.[39] It does not matter if you are a Democrat or a Republican – the Neo-Brandeisians view enforcers of both parties from the last 40 years as corrupt.[40] In the same way that Neo-Brandeisians simplistically view large companies as evil and small companies as good,[41] they

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[36] Jedediah Britton-Purdy, David Sing Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784 https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18006/Kapczynski%2c%20Building%20a%20Law-and-Political-Economy%20Framework-%20Beyond%20the%20Twentieth-Century%20Synthesis.pdf?sequence=1&isAllowed=y.

[37] Vaheesan, *Twilight of the Technocrats' Monopoly*, *supra* note 29, at 982. *See also* Wu, *supra* note 8, at 130 ("big mergers *are* political") (emphasis in original).

[38] Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power,* LPE PROJECT (July 19, 2018) https://lpeproject.org/blog/how-contemporary-antitrust-robs-workers-of-power/.

[39] *See* Sisco, *supra* note 14; Miller, *supra* note 15.

[40] Vaheesan, *supra* note 38 ("Antitrust enforcers have both failed to protect workers against employer power and thwarted independent contractors' efforts to build collective power. By accommodating capital and policing labor, antitrust has robbed workers of both exit and voice. Far from being unexpected or unintended, antitrust law's part indifference, part hostility toward workers is another predictable result of the close nexus between big business and the community of antitrust specialists.").

[41] *See, e.g.*, Prepared Opening Statement of Commissioner Rohit Chopra Before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection" (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf ("Small businesses have expressed concern that the FTC gives favorable treatment to large, powerful firms, such as Big Tech and Big Pharma giants, while ignoring pleas for action to address practices harming small players. And when Big Tech companies egregiously violate our privacy and the law, the FTC has shown it is willing to be lax and forgiving. But when small businesses violate these laws, the FTC brings down the hammer on them, wiping out revenues and even shutting them down. This two-tier approach doesn't make sense.").

view people one-dimensionally, as evil or good. One is either a pro-monopolist or an anti-monopolist, period.[42]

One form of attack focuses on the revolving door. On the day he was sworn in, then-FTC Commissioner Chopra published a monograph that took a far-reaching view of conflicts of interest.[43] Specifically, he asserted that even in the absence of direct financial interests, the enforcement decisions of government employees could be influenced by the possibility of future employment in the private sector.[44] Chair Khan expressed a similar view, writing that "the Department of Justice enforcer who aspires eventually to join J.P. Morgan may hesitate to antagonize a potential employer."[45] In his new capacity as CFPB Director, former FTC Commissioner Chopra reiterated this view, explaining that "financial regulators are clueless and often corrupt lawyers and economists" who are merely auditioning for future jobs in the private sector.[46]

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[42] I myself have been labeled a pro-monopolist, despite supporting countless enforcement actions (including several Sherman Act Section 2 cases). *See* @matthewstoller, TWITTER (Nov. 15, 2021 2:52PM), https://twitter.com/matthewstoller/status/1460335034045509633?s=20&t=zxELgllyrZ3GlWy8V46VgA ("Rather stunning to watch Republican @CSWilsonFTC at the FTC angrily defending the Clinton and Obama administration legacies on big tech. Straight up pro-monopoly and pro-swamp. That's how we've always done it, she says. Feels very personal."); @matthewstoller, TWITTER (Nov. 17, 2021 10:39AM), https://twitter.com/matthewstoller/status/1460996078266982403?s=20&t=0_SOV4s1qkTcBf2lX71Szg ("I can't over-state just how much @CSWilsonFTC is deflecting from her basic anti-American pro-monopoly pro-big tech posture with this cultural nonsense."); @matthewstoller, TWITTER (April 8, 2022 3:02PM), https://twitter.com/matthewstoller/status/1512506139040264209?s=20&t=5GpvX7qAb38rN--VDTr8Vw ("Meanwhile, pro-monopoly Republican FTC Commissioner @CSWilsonFTC, who voted against Trump bringing an antitrust suit against Facebook, attacks liberal populists as critical race theorist crypto-Marxists who despise the rule of law and individual rights."); @matthewstoller, TWITTER (Jan. 28, 2022 10:02AM), https://twitter.com/matthewstoller/status/1487078607445008388?s=20&t=5GpvX7qAb38rN--VDTr8Vw ("Point here is that @CSWilsonFTC is pro-merger and pro-monopoly, and she's trolling a more aggressive FTC. But Wall Street, which actually bets on mergers, is worried about higher enforcement.").

[43] ROHIT CHOPRA ET. AL, THE ROOSEVELT INSTITUTE, UNSTACKING THE DECK: A NEW AGENDA TO TAME CORRUPTION IN WASHINGTON, (May 2018), https://rooseveltinstitute.org/publications/unstacking-the-deck-agenda-tame-corruption-washington/.

[44] *Id.* at 5 ("Anti-corruption laws in the United States put a high premium on quid pro quo, but it would be a mistake to view corruption solely through these exchanges—less obvious forms of influence can also be deeply pernicious. When government officials take actions where they have a direct financial interest, they can be criminally prosecuted. But it is difficult to know—let alone prove—whether the prospect of future financial gain led to an official government action."); *id*. at 7 ("There are three primary issues and concerns with the revolving door. First, government officials' actions may be motivated by the prospect of future employment with an economic interest, rather than the public interest."); *id.* at 23 ("Government officials, especially in the executive branch, are restricted from participating in decisions that impact their present financial interests. But little has been done to ensure that their decisions aren't skewed to advance their future employment and financial interests.").

[45] Teachout & Khan, *supra* note 33.

[46] Rohit Chopra, *Reining in Repeat Offenders: 2022 Distinguished Lecture on Regulation*, University of Pennsylvania Law School (March 28, 2022), https://www.consumerfinance.gov/about-us/newsroom/reining-in-repeat-offenders-2022-distinguished-lecture-on-regulation-university-of-pennsylvania-law-school/ ("While here – and I was hardly alone on this point – I viewed financial regulators as clueless and often corrupt lawyers and economists. Government officials were often seen as auditioning for a future job in finance to exploit their inside

Many of you in attendance today have served in government. I ask you to reflect on whether you pulled your enforcement punches to curry favor with future employers in the private sector. I assume you would answer in the negative, and research would align with your responses.[47] In fact, for those who decide to return to the private sector, a reputation as an aggressive and capable enforcer signals knowledge and competence. Enforcers who subsequently move into private practice are well-equipped to counsel businesses on compliance with the law, given their intimate familiarity with the expectations of government agencies.

The disdain of the Neo-Brandeisians is not limited to individual practitioners. As I noted in my introduction, two people with long ties to Chair Kahn, Barry Lynn and Zephyr Teachout, indicated yesterday during the Chair's Showcase session of the Antitrust Section Spring Meeting that the ABA is viewed as part of the establishment, the so-called ruling class, that helps shape antitrust law and policy.[48] It, too, is therefore complicit in the oppression of the underdog. This view might explain why former Commissioner Chopra and Chair Khan have kept the ABA Antitrust Section at arms' length.

And of course this perspective condemns the FTC and its staff as complicit in the oppression. That might explain why former Commissioner Chopra expressed such a dim view of not just the FTC,[49] but of FTC staff. He believed they were "captured" by the industries they oversaw.[50] Indeed, while a sitting commissioner, Chopra suggested that the FTC's Inspector General review the work of staff with respect to pharmaceutical mergers.[51] And he told Congress

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knowledge to help dominant financial firms extract special favors and evade accountability for wrongdoing, even when they violate the law repeatedly.").

[47] *See generally* Ed deHaan, Kevin Koh, Shivaram Rajgopal & Simi Kedia, *Does the Revolving Door Affect the SEC's Enforcement Outcomes?,* AMERICAN ACCOUNTING ASSOCIATION ANNUAL MEETING (August 2012), http://pogoarchives.org/m/fo/sec-revolving-door-study-july2012.pdf (finding the intensity of enforcement efforts, proxied by the fraction of losses collected as damages, the likelihood of criminal proceedings and the likelihood of naming the CEO as a defendant, are higher when the SEC lawyer leaves to join law firms that defend clients charged by the SEC).

[48] Sisco, *supra* note 14; Miller, *supra* note 15. Barry Lynn was Chair Khan's boss at Open Markets Institute. Chair Khan worked on Zephyr Teachout's gubernatorial campaign and co-authored the article *Market Structure and Political Law: A Taxonomy of Power* with her. *See* Khan & Teachout, *supra* note 33.

[49] *See* sources cited *supra* note 9.

[50] Opening Statement of FTC Commissioner Rohit Chopra As Prepared for Delivery Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law Hearing on Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition (Oct. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1549805/chopra_-_opening_statement_at_hearing_on_online_platforms_and_market_power_part_3_10-18-19.pdf ("And all too often, the government is too captured by dominant incumbents that used their power to dictate their own preferred policies.").

[51] Statement of Commissioner Rohit Chopra Regarding the Review of the FTC's Pharmaceutical Merger Enforcement Program (May 11, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589927/statement_of_commissioner_rohit_chopra_regarding_the_review_of_the_ftcs_pharmaceutical_merger.pdf ("I hope that the agency's Inspector General will

that agency personnel's attendance at conferences and participation in panels should be viewed with suspicion.[52]

Could this view have been the driving force behind the decision to muzzle staff? Chair Khan prohibited staff from attending and speaking at conferences, despite the fact that this participation promotes transparency and certainty regarding government enforcement intentions and facilitates legal compliance.[53] Perhaps this also explains why Chair Khan, particularly during the early months of her tenure, was reluctant to seek the input of staff on policy issues[54] – a posture that would make sense if staff were viewed as part of the corrupt establishment. (I explained in my speech at the ABA Fall Forum the ways in which staff have been marginalized under new leadership,[55] causing many experienced and respected professionals to leave the agency.[56])

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conduct a programmatic review of the pharmaceutical merger enforcement program so that the public can benefit from an independent perspective on opportunities for reform.").

[52] *Transforming the FTC: Legislation to Modernize Consumer Protection Hearing on Transforming the FTC Before the House Energy and Commerce Committee Consumer Protection and Commerce Subcommittee* (Commissioner Chopra: "In addition, Congress should also determine whether existing law regarding so-called sponsored travel needs to be updated. Under existing law, senior government officials can be sponsored by non-federal sources to travel to conferences and retreats, largely attended by and indirectly paid for by those representing dominant firms, especially Big Tech. These events sometimes include closed-door panel discussions that are not open to the media or the public, giving conference organizers and their patrons a chance to gather intelligence about emerging policies and priorities. This non-public information can be exploited by investment funds that trade on this information. Small businesses and the general public can't easily access these private panel junkets and don't have the resources to organize them on their own.").

[53] Leah Nylen, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386.

[54] Wilson July 21 Remarks, *supra* note 12 ("To reach conclusions about policy matters, the Commission should proceed in the manner that has served the agency well for decades. I benefit greatly from a process that facilitates full consultation with staff, through oral briefings and comprehensive memoranda, as well as a robust dialogue among the Commissioners. News reports have revealed that FTC staff has been muzzled externally – agency personnel are forbidden from appearing at any public events. Unfortunately, it appears that staff is being silenced internally, as well. Perhaps this is due to a view some have expressed that FTC staff is unimaginative and has failed to advance the Commission's mission effectively for decades.").

[55] Christine S. Wilson, *The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC* (Nov. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandeisian_revolution_unforced_errors_and_the_diminution.pdf.

[56] Leah Nylen, *FTC's top economist resigned amid dispute over pharma study*, POLITICO (Feb. 25, 2022), https://www.politico.com/news/2022/02/25/ftcs-top-economist-resigned-amid-dispute-over-pharma-study-00011878; Alex Wilts, *WilmerHale nabs two senior officials from FTC*, GCR (Jan. 19, 2022), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/wilmerhale-nabs-two-senior-officials-ftc; Ruiqi Chen, *Cravath Hires Federal Trade Commission Official Zach as Partner*, BLOOMBERG (Dec. 16, 2021), https://news.bloomberglaw.com/business-and-practice/cravath-hires-federal-trade-commission-official-zach-as-partner; Sara Merken, *Wilson Sonsini adds another FTC privacy pro to growing practice*, REUTERS (Jan. 10, 2022), https://www.reuters.com/legal/legalindustry/wilson-sonsini-adds-another-ftc-privacy-pro-growing-practice-2022-01-10/.

Neo-Brandeisians have undermined transparency and predictability in other ways, as well. These actions erode certainty regarding the rules of the road, a central function of the rule of law. For example, the Neo-Brandeisians at the FTC have:

- Rescinded the Section 5 policy statement and foreshadowed a more expansive enforcement agenda while failing to issue a new policy explaining this agenda;[57]
- Withdrawn support for the Vertical Merger Guidelines and characterized them as insufficiently aggressive, while declining to provide guidance on where the new lines will be drawn;[58] and
- Failed to challenge mergers within the requisite statutory timeframes and instead issued threatening warning letters as waiting periods expire.[59]

Ironically, then-Professor Wu criticized "the incredibly secretive and technical nature" of the merger review process in *The Curse of Bigness*.[60] Merger guidelines explain the antitrust agencies' analytical approach to reviewing mergers and shed light on the process. Similarly, policy statements provide guidance regarding enforcement intent with respect to other business activities. Withdrawing existing guidance and leaving a vacuum does nothing to dispel the allegedly "secretive" nature of the investigative process. Instead, these actions create the opportunity for the arbitrary exercise of government power – precisely the harm our Founding Fathers sought to avoid.

Of course, antitrust has served as a force for good in recent decades, and powerful companies have been reined in. In fact, antitrust enforcement in calendar year 2020 (under President Donald J. Trump and Chairman Joseph J. Simons) hit its highest numbers in decades.[61] But CLS scholars would dismiss these successes as a smokescreen. They believe that to maintain stability and keep the oppressed from revolting, the "law must be perceived to be approximately

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[57] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf.

[58] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (September 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf.

[59] Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

[60] Wu, *supra* note 8, at 129.

[61] Christine Wilson, *Governing is Hard: Antitrust Enforcement in the First Year of the Biden Administration* (Jan. 26, 2022), https://www.ftc.gov/system/files/documents/public_statements/1600479/governing_is_hard_antitrust_enforcement_in_the_first_year_of_the_biden_administration_0.pdf.

just, [so] the ruling class cannot win all the time."[62] Similarly, the Neo-Brandeisians ignore the fact that the FTC has delivered significant benefits to American consumers in recent decades. Instead, they declare the last 40 years to be a "failed experiment."[63]

2. Due Process

As I noted at the outset, classical liberalism is premised on the rights of the individual, liberty, consent of the governed and equality before the law. To protect these rights, liberalism is grounded in process. John Hart Ely wrote in *Democracy and Distrust* that "[w]hat has distinguished [the American Constitution], and indeed the United States itself, has been a ***process*** of government, not a governing ideology."[64] Critical Legal Studies, on the other hand, views due process as preventing benevolent change.[65] Procedural rules serve as speed bumps on the road to justice. Because "procedural rules reflect political choices," they can be tossed aside to achieve desired substantive change.[66]

In their desire to remake antitrust law, the Neo-Brandeisians have embraced a similar disregard for process and norms. They know what the utopian antitrust regime looks like, and they are willing to toss aside procedural niceties to get there. For example, when new FTC leadership undertook abrupt and sweeping policy changes with little to no input from knowledgeable staff and the public and with essentially no notice to minority commissioners, I raised process concerns.[67] In response, a staffer at the American Economic Liberties Project –

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[62] Gordon, *supra* note 28, at 646-47.

[63] Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/ ("We're now 40 years into the experiment … I believe the experiment failed.").

[64] JOHN HART ELY, DEMOCRACY AND DISTRUST 101 (1980) (emphasis added).

[65] *See* Jonathan Turley*, The Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 N.W. U. L. REV. 4, 593, 594 ("CLS' broad attack on legal discourse as 'itself a form of political domination and a barrier to progressive change…'") (citation omitted); Tushnet, *supra* note 27, at 3-4 ("The most prominent portrayal of the rule of law in canonical critical legal studies works is a relatively brief discussion by Morton Horwitz ... Horwitz wrote that the rule of law 'undoubtedly restrains power, but it also prevents power's benevolent exercise.' He agreed that it 'creates formal equality … but it promotes substantive inequality by creating a consciousness that radically separates law from politics[.]'").

[66] Martha Minow, *Politics and Procedure, in* THE POLITICS OF LAW 87 (David Kairys 3RD ed., 1978) ("Procedural rules are a kind of scaffold supporting the constant effort to build and rebuild justice. Too much attention to preserving the scaffold misses the point of the enterprise, and the scaffold can and should be moved around as needed by the larger project. The scaffold should be stable enough to stand upon while remaining capable of being dismantled and reassembled as needs change."); *id* at 92 ("Procedural rules reflect political choices[.] ... Procedural rules deserve respect regardless of their effect on the results in a particular case, but sometimes procedural rules should bend in light of substantive concerns.").

[67] Christine S. Wilson Testimony at the Hearing on Reviving Competition Part 4 21st Century Antitrust Reforms and the American Worker Before the House Judiciary Committee Subcommittee on Antitrust, Commercial and Administrative Law 14-18, https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf (providing numerous examples of FTC

whose Twitter handle was @PharmaCheats – tweeted that "[v]oters barely care about the process of themselves voting in elections. The idea that anyone gives a shit about internal FTC process is laughable. Nobody cares, thanks."[68] Chair Khan subsequently hired @PharmaCheats to serve as one of her Attorney Advisors.[69]

There are many facets of liberalism and due process that the Neo-Brandeisians have scorned through their actions and words. The following quote conveys succinctly key tenets of classical liberalism:

> Liberalism distrusts grand unifying theories and prefers to emphasize process over ends … Because of the value liberals place on liberty, they tend to be wary of the power concentrations that could mandate changes quickly. They prefer a more incremental approach to political change that depends on the consent of the governed. Liberalism is never utopian, by anyone's definition, but always procedural, because it presupposes a society of people who profoundly disagree with each other and whose interests, goals, stakes and stands cannot easily, if ever, be fully reconciled. Because of these differences, liberals know there is no such thing as a 'benevolent despot,' and that utopias almost invariably turn out to be dystopias."[70]

This description provides a useful benchmark for evaluating the actions of the FTC's current leadership.

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leadership minimizing meaningful dialogue among Commissioners, between Commissioners and staff, and between the Commission and its stakeholders); Wilson July 1 Remarks, *supra* note 12; Wilson July 21 Remarks, *supra* note 12. *See also* Letter from Commissioner Christine S. Wilson (Sept. 3, 2021) [hereinafter Wilson Letter], https://www.ftc.gov/system/files/documents/public_statements/1595693/wilson_second_request_copy_letter_thermo_fisher.pdf ("Unfortunately, I have been unable to obtain a copy of the Second Request from internal sources. As you will understand, as a Commissioner, I am obligated to exercise due oversight of Commission business. Absent receipt of the Second Request issued to your client, I cannot fulfill this role.").

[68] @PharmaCheats, TWITTER (Sept. 3, 2021, 2:24PM), https://web.archive.org/web/20210903230847/https://twitter.com/PharmaCheats/status/1433903810926235648. Like other Neo-Brandeisians, @PharmaCheats also sees businesses through the lens of good and evil, tweeting for example that "[t]here needs to be an assumption that senior Big Pharma executives will act as sociopaths at all times." @PharmaCheats, TWITTER (Aug. 20, 2021, 1:54PM), https://web.archive.org/web/20210821032359/https://twitter.com/PharmaCheats/status/1428822701909716992.

[69] Josh Cisco, *FTC's Khan Gets Several New Advisors*, THE INFORMATION (Feb 18, 2022), ("Khan and her fellow four commissioners each have four slots for attorney-advisors which are typically split between antitrust and consumer protection, the agency's two enforcement mandates. On the antitrust side Khan hired David Barclay [@PharmaCheats], formerly a legal counsel focused on the pharmaceutical sector at the American Economic Liberties Project, a progressive think tank closely aligned with Khan."); @econliberties, TWITTER (July 21, 2021), https://twitter.com/econliberties/status/1418254533445234691?s=20&t=XIMpvDUoBr3dtswp17c31g (hiring announcement identifying @pharmacheats Twitter account as David Barclay at American Economic Liberties Project).

[70] Pyle, *supra* note 16, at 814.

"Because of the value liberals place on liberty, they tend to be wary of the power concentrations that could mandate changes quickly."[71] But Chair Khan has consolidated power in the Office of the Chair since arriving at the Commission. Changes to the FTC's Rules of Practice regarding the rulemaking process place far more power in the Chair's office, facilitating an agenda-driven outcome.[72] Omnibus resolutions ensure that the Chair needs no other commissioner's vote to authorize staff to use compulsory process in essentially all agency investigations.[73] Through these and other actions,[74] Chair Khan has undermined the Congressionally-mandated Commission structure.

"They prefer a more incremental approach to political change that depends on the consent of the governed."[75] But Chair Khan has undertaken sweeping policy changes without typical opportunities for public input. The Commission under Chair Khan abruptly voted 3-2 to rescind the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.[76] Similarly, the majority voted to rescind the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases without notice and comment, even though it was subject to notice and comment when it was issued.[77]

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[71] *Id.*

[72] Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf (raising concerns about the removal of objective management of the rulemaking process and the revision of procedures that impact public participation in the rulemaking process).

[73] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Issuance of Eight Omnibus Resolutions (Sept. 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596256/p859900njpcswomnibusdissent.pdf ("We voted against these resolutions for the same reason we opposed the prior omnibus resolutions: removing Commission oversight of investigations does virtually nothing to make those investigations more effective but does mean less input and oversight from the Commission. These resolutions create less accountability and more room for mistakes, overreach, cost overruns, and even politically-motivated decision making. Congress gave the Commission, not a single commissioner or staff, the authority to bless compulsory process in its investigations, but the 15 sweeping resolutions have undone that legislative delegation of authority for essentially all antitrust investigations, and many others. Now, in all of these matters, the application of the FTC's considerable investigative power no longer requires an informed and deliberated decision by all commissioners; unilateral approval from the Chair or his or her chosen commissioner is sufficient.").

[74] *See, e.g.*, Wilson Letter, *supra* note 67 (requesting information that FTC leadership refused to share with minority Commissioners).

[75] Pyle, *supra* note 16, at 814.

[76] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf ("Last week, with next to no notice or public input, the majority withdrew the Commission's 2015 Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act[.]").

[77] Wilson July 21 Remarks, *supra* note 12 (offering a topping motion to seek public comment, which failed, and stating "[w]hen the Commission issued the Policy Statement in 1995, it solicited public comments. Chair Khan and

The same is true for the rescission of the Vertical Merger Guidelines.[78] And public input was accepted *after* votes occurred during the first several open Commission meetings. How can the governed consent if their input is not sought?

"Liberalism is never utopian, by anyone's definition, but always procedural, because it presupposes a society of people who profoundly disagree with each other and whose interests, goals, stakes and stands cannot easily, if ever, be fully reconciled."[79] Under Chairman Simons, Acting Chair Slaughter, and countless other FTC Chairs, the Commission certainly experienced policy disagreements. But the careful observance of traditions and norms enabled Commissioners to discuss their views with each other and with expert staff. This process occasionally changed commissioners' minds about how to vote on various matters.

A thorough process creates benefits that extend beyond the final vote; it also generates results that are more likely to withstand the test of time. In contrast, a dearth of process leads to poor results. For example, the majority's statement on rescission of the Vertical Merger Guidelines contained flawed assertions about fundamental economic principles, according to leading commentators.[80] Perhaps if the time-honored tradition of circulating draft statements in advance of votes had been observed, the minority's draft dissent would have noted those errors and the majority would have fixed them. Or, as those leading commentators noted, even seeking the input of learned staff could have prevented the issuance of a statement with flawed assertions.[81]

"Because of these differences, liberals know there is no such thing as a 'benevolent despot,' and that utopias almost invariably turn out to be dystopias."[82] Chair Khan speaks frequently of protecting workers. But in attempting to establish a utopian antitrust regime, she has alienated her very own workers – FTC staff. Under Chair Khan, morale has plummeted, and we have seen an exodus of experienced lawyers and economists. The FTC may take a generation to recover from this loss of institutional knowledge and expertise. Moreover, we have seen a significant decline in the number of enforcement matters on both the competition and consumer

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Commissioners Chopra and Slaughter previously have emphasized the importance of democratic participation in government.").

[78] Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on September 15, 2021, https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf ("Once again, we are withdrawing a sound policy based on economic analysis, agency experience, and substantial public input – unilaterally, with little notice to the public, and with no opportunity for public input.").

[79] Pyle, *supra* note 16, at 814.

[80] Carl Shapiro & Herbert Hovenkamp, *How will The FTC Evaluate Vertical Mergers*, ProMarket (Sep. 23, 2021) https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/ (describing the majority's description of EDM as "flatly incorrect as a matter of microeconomic theory" and Chair Khan's description of efficiencies as "baffling").

[81] *Id.* ("In drafting its statement, the majority appears not to have consulted with the FTC's own Bureau of Economics. As a result, we have the spectacle of a federal agency basing its policies on a demonstrably false claim that ignores relevant expertise.").

[82] Pyle, *supra* note 16, at 814.

protection sides of the FTC house.[83] Low morale and declining enforcement sound more dystopian than utopian, both for FTC staff and for consumers in America.

3. Capitalism and Free Markets

Capitalism is a system in which assets are privately owned, labor is purchased for wages, gains accrue to private owners, and prices allocate capital and labor among potential uses.[84] While the United States is a capitalist country, it is worth noting that we have a fair amount of government intervention in the marketplace. The 2022 Index of Economic Freedom ranks the US 25th out of 177 ranked countries.[85] The study also finds that the standard of living is much higher in economically freer countries.[86]

Marx viewed capitalism in an entirely different light. He taught that the capitalists, who own the means of production, oppress the masses, who ultimately will rise up and overthrow their oppressors.[87] Two related concepts play a fundamental role in this conclusion. The first concept is the labor theory of value, which teaches that the value of any commodity is measured in terms of the amount of labor embodied in it – the labor time required to produce it.[88] The second concept is that of surplus value, which is the difference between the price of a product

[83] Wilson, *supra* note 61, at 3 & 19-22 ("Comparing calendar year 2020 of the Trump Administration to calendar year 2021 of the Biden Administration, merger enforcement actions fell from 31 to 12 and consumer protection actions fell from 79 to 31.").

[84] *Capitalism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An economic and political system in which businesses belong mostly to private owners and not to the government; esp., an economic system that depends on the private ownership of the means of production and on competitive forces to determine what is produced.").

[85] 2022 INDEX OF ECONOMIC FREEDOM, THE HERITAGE FOUNDATION, https://www.heritage.org/index/ranking.

[86] KEY FINDINGS OF THE 2022 INDEX, THE HERITAGE FOUNDATION, https://www.heritage.org/index/pdf/2022/book/01_2022_IndexofEconomicFreedom_KEY-FINDINGS.pdf ("The standard of living, measured by incomes per capita, is much higher in economically freer countries. Economies rated 'free' or 'mostly free' in the 2022 Index enjoy incomes that on average are more than three times higher than those in other countries and almost seven times higher than the average incomes of 'repressed' economies.").

[87] KARL MARX & FREDERICH ENGELS, THE COMMUNIST MANIFESTO 34 (Samuel Moore trans., Marx/Engels Selected Works, Vol. One, Progress Publishers, Moscow, 1969) (1848), https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf ("The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win.").

[88] KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 29 (Samuel Moore and Edward Aveling trans., First English edition of 1887) (1867), https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf ("We see then that that which determines the magnitude of the value of any article is the amount of labour socially necessary, or the labour-time socially necessary for its production. Each individual commodity, in this connexion, is to be considered as an average sample of its class. Commodities, therefore, in which equal quantities of labour are embodied, or which can be produced in the same time, have the same value. The value of one commodity is to the value of any other, as the labour-time necessary for the production of the one is to that necessary for the production of the other. 'As values, all commodities are only definite masses of congealed labour-time.'").

and the cost to produce it.[89] Marx asserted that owners of the means of production, the capitalists, unfairly appropriate this surplus value from workers.[90]

Lazar Radic has described how these concepts become interwoven with the concepts of capitalism and competition in the Marxist worldview.[91] In a market economy, capitalists seek to gain an advantage over their rivals by driving down costs, increasing productivity, and decreasing the price of goods and services.[92] They reinvest the surplus value (wrongfully) appropriated from labor to facilitate increases in productivity and acquisitions that increase scale. In other words, competition is the engine of capitalism. And the capitalist that can lower costs, appropriate the most surplus value, and reinvest the most is both the most exploitative and the best-positioned *vis a vis* its rivals.[93] The bottom line, according to Marx, is that capitalists steal from workers to obtain scale, lower costs, cheapen commodities,[94] and beat their rivals in the market.

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[89] *Id.* at 146 ("This surplus-value is the difference between the value of the product and the value of the elements consumed in the formation of that product, in other words, of the means of production and the labour-power.").

[90] Marx & Engels, *supra* note 87, at 21 ("The essential conditions for the existence and for the sway of the bourgeois class is the formation and augmentation of capital; the condition for capital is wage-labour. Wage-labour rests exclusively on competition between the labourers. The advance of industry, whose involuntary promoter is the bourgeoisie, replaces the isolation of the labourers, due to competition, by the revolutionary combination, due to association. The development of Modern Industry, therefore, cuts from under its feet the very foundation on which the bourgeoisie produces and appropriates products. What the bourgeoisie therefore produces, above all, are its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable."); *Marx*, supra note 88, at 407("Capitalist production, therefore, of itself reproduces the separation between labour-power and the means of labour. It thereby reproduces and perpetuates the condition for exploiting the labourer. It incessantly forces him to sell his labour-power in order to live, and enables the capitalist to purchase labour-power in order that he may enrich himself. It is no longer a mere accident, that capitalist and labourer confront each other in the market as buyer and seller. It is the process itself that incessantly hurls back the labourer on to the market as a vendor of his labour-power, and that incessantly converts his own product into a means by which another man can purchase him. In reality, the labourer belongs to capital before he has sold himself to capital. His economic bondage is both brought about and concealed by the periodic sale of himself, by his change of masters, and by the oscillations in the market-price of labour-power.").

[91] Lazar Radic, *Political Philosophy, Competition, and Competition Law: The Road to and from Neoliberalism, Part 2*, TRUTH ON THE MARKET (Feb. 03, 2022), https://truthonthemarket.com/?s=Marx&orderby=date&order=DESC.

[92] Leon Trotsky, *Marxism in Our Time* (1939), https://www.marxists.org/archive/trotsky/1939/04/marxism.htm ("Relations amongst capitalists, who exploit the workers, are determined by competition, which for long endures as the mainspring of capitalist progress. Large enterprises enjoy technical, financial, organisational, economic and, last but not least, political advantages over small enterprises. The greater amount of capital, being able to exploit a greater number of workers, inevitably emerges victorious out of a contest. Such is the unalterable basis of the concentration and centralisation process of capital.").

[93] Marx & Engels, *supra* note 87, at 18 ("The lower strata of the middle class – the small tradespeople, shopkeepers, and retired tradesmen generally, the handicraftsmen and peasants – all these sink gradually into the proletariat, partly because their diminutive capital does not suffice for the scale on which Modern Industry is carried on, and is swamped in the competition with the large capitalists, partly because their specialised skill is rendered worthless by new methods of production. Thus the proletariat is recruited from all classes of the population").

[94] Marx, *supra* note 88, at 221-222 ("Hence, a fall in the value of labour-power is also brought about by an increase in the productiveness of labour, and by a corresponding cheapening of commodities in those industries which supply

CLS scholars take a similarly dim view of capitalism, competition and efficiencies. One author observed that a "free market reaches 'efficient' results only with respect to any given set of entitlements" bestowed by the existing legal regime.[95] Because that existing legal regime serves to reinforce inequities, "the notion of efficiency, while analytically useful, still speaks to the underlying question of legitimacy only at the margins, so to speak, not at the core."[96] For CLS scholars, capitalism and lawmaking are "governed by the same process of alienation."[97] In other words, for CLS scholars, "[p]roducing goods and services in the workplace and making law in legislatures and courtrooms are both forms of objectification."[98] This connection between capitalism and lawmaking is true in capitalist society, according to CLS theory, because laws are not actually made by their purported authors – the people – but instead by "by experts socialized in elite institutions and distant from the lived reality of everyday life in capitalist society."[99]

A look at the beliefs of the Neo-Brandeisians reveals many parallels. Capitalism focuses on satisfying consumer demand, and the consumer welfare standard seeks to maximize benefits for consumers. But the Neo-Brandeisians, like Marx, have sought to shift the focus from consumers to workers. In describing the goals of antitrust, Chair Khan frequently references workers and honest businesses.[100] Vaheesan has stated that "[a]n antitrust enforcer anchored in

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the instruments of labour and the raw material, that form the material elements of the constant capital required for producing the necessaries of life.").

[95] Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW 48 (David Kairys 3RD ed., 1978) ("[A] free market reaches 'efficient' results only with respect to any given set of entitlements; efficiency is necessarily a function of the distribution of legally protected entitlement, and will be modified by any modification in that distribution. Given that circularity, the notion of efficiency, while analytically useful, still speaks to the underlying question of legitimacy only at the margins, so to speak, not at the core. Perhaps symptomatic of that marginality is the crabbed, instrumental reasoning the law and economics movement presupposes. Reason's primary purpose is now defined as self-interested wealth maximization in a world of subjective value[.]").

[96] *Id.*

[97] *See. e.g.*, Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 1337, 337-38 (1978), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=2731&context=mlr (leading CLS scholar Karl E. Klare discussing the connections between capitalism and lawmaking in relation to the National Labor Relations Act).

[98] *Id.* at 337.

[99] *Id* at 338.

[100] *See, e.g.*, Lina M. Khan, Memorandum to Commission Staff and Commissioners Regarding Vision and Priorities for the 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 ("First, we need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers."); Lina Khan, Remarks at the Joint Workshop of the Federal Trade Commission and the Department of Justice, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_final_139pm.pdf ("Increasingly the key question is not whether antitrust law and competition policy can or should protect workers as well as consumers, but instead precisely how they can or should do so").

consumer welfare is an antitrust enforcer anchored in anti-labor."[101] He and co-author Chair Khan embraced the concept that antitrust law is a "once-populist and progressive law against exploitation [that] has become the law for exploiters. Efficiency and power win."[102] Less than two weeks ago, he tweeted that the FTC "should treat low prices derived from exploitation of workers as an unfair method of competition."[103]

Tim Wu, now Special Assistant to the President for Technology and Competition Policy, wrote an op-ed in the New York Times in July 2020 that similarly bemoaned economies of scale and low prices. Mr. Wu demonized large flour producers for maximizing scale and driving down the price of flour through "brute efficiency."[104] He complained that this approach "limit[ed] workers' salaries and reduc[ed] the prospects for smaller or local competitors."[105] And he praised the higher-priced offerings of smaller flour companies that employ more people relative to their size.[106] This comment reveals not just a focus on workers, but also on rivals. It is common for the Neo-Brandeisians to focus on the impact of mergers and conduct on smaller rivals.[107] But this approach contravenes the established view that the antitrust laws protect competition, not competitors.[108]

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[101] Vaheesan, *supra* note 38.

[102] Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL. REV. 235, 269 (2017), https://harvardlpr.com/wp-content/uploads/sites/20/2017/02/HLP110.pdf (*quoting* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 963 (1987) (describing a stylized CLS characterization of antitrust law)).

[103] @sandeepvaheesan, TWITTER (March 28, 2021 11:19AM), https://twitter.com/sandeepvaheesan/status/1508463792086208518?s=20&t=a5YXw1tgSUKGLKFnpshdVA.

[104] Tim Wu, Opinion, *That Flour You Bought Could Be the Future of the U.S. Economy*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/opinion/us-grain-industry.html.

[105] *Id.*

[106] *Id.*

[107] Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("As President Biden noted in his Executive Order on Promoting Competition, industry consolidation and weakened competition have 'den[ied] Americans the benefits of an open economy,' with 'workers, farmers, small businesses, and consumers paying the price.'"); Prohibiting Anticompetitive Mergers Act of 2022, S. 3847, 117th Cong. § 4(b)(7)(A) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3847?s=1&r=2 ("Harms to the competitive process may include, without limitation, harms to … small or minority-owned businesses[.]"). *See also* Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law*, 1 U. C. DAVIS J. OF LAW AND POL. ECON. 28, 28 (2020) https://escholarship.org/uc/item/8cj0z1tq ("For antitrust law to redistribute power downward, a radical philosophical change is necessary. First, antitrust law should tightly restrict the consolidation of corporate property. Second, policymakers should recognize that collusion among powerless actors can represent socially desirable cooperation. Reconstructing antitrust law in this manner would transfer power in markets away from corporate executives and financial interests to workers, professionals, and small firms.").

[108] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

4. Mergers and Business Growth

Marxism correlates the size of a company with its level of productivity and, correspondingly, the magnitude of its worker exploitation.[109] The Neo-Brandeisians also believe that "big is bad," even in the absence of market power. Wu emphasized this point in *The Curse of Bigness*.[110] And in an article with Zephyr Teachout, Chair Khan detailed the harms that large corporations inflict on society.[111]

So large corporations are viewed with suspicion, and mergers that increase corporate size are viewed as detrimental. (One former colleague of Chair Khan's wrote an article titled "Mergers Ruin Everything.")[112] In addition to objections about corporate growth in a vacuum, it appears that the Neo-Brandeisians view the goals of the competitive process – increased productivity, lower costs, and lower prices – not as benefits but as harms because they flow from the exploitation of workers[113] and disadvantage rivals, as explained in the preceding section. This approach may explain why merger efficiencies are viewed as a negative by the Neo-Brandeisians,[114] and why they pushed for a moratorium on mergers in 2020.[115] This perspective may also explain why FTC Bureau of Competition Director Holly Vedova, when asked, could not identify a single positive thing about mergers during her American Bar Association Spring Meeting panel.[116]

The view of the Neo-Brandeisians that mergers are evil may explain the many process and policy shifts undertaken by the FTC since President Biden's inauguration. In February 2021,

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[109] Trotsky, *supra* note 92 ("The capitalist buys labour power in order to exploit it. It is this exploitation which is the source of inequality. …. Relations amongst capitalists, who exploit the workers, are determined by competition, which for long endures as the mainspring of capitalist progress. Large enterprises enjoy technical, financial, organisational, economic and, last but not least, political advantages over small enterprises. The greater amount of capital, being able to exploit a greater number of workers, inevitably emerges victorious out of a contest. Such is the unalterable basis of the concentration and centralisation process of capital.").

[110] Wu, *supra* note 8.

[111] Khan & Teachout, *supra* note 33.

[112] Matt Stoller, *Mergers Ruin Everything,* BIG (Feb. 24, 2022) (describing industries that have been consolidated because of lax merger review).

[113] Wu, *supra* note 8, at 73 ("The more power a firm or industry enjoys, the easier it is to prevent employees from getting too much of the returns.").

[114] *See* Shapiro & Hovenkamp, *supra* note 80 (describing Chair Khan's "baffling" treatment of efficiencies in her statement on rescinding the 2020 Vertical Merger Guidelines).

[115] Sahil Kapur, *Warren, Ocasio-Cortez propose halt to big mergers during coronavirus pandemic*, NBC NEWS (April 28, 2020), https://www.nbcnews.com/politics/politics-news/warren-ocasio-cortez-propose-halt-big-mergers-during-coronavirus-pandemic-n1193756; @matthewstoller, TWITTER, (March 18, 2020 10:32PM), https://twitter.com/matthewstoller/status/1240463931531046912?s=20&t=PZvU-YF9nfVwKViu5pypB4-RrJiiC_J2E-MftFQmjGQ ("It's evil anyone would think M&A should be a priority when we are facing economic collapse and prospect of mass deaths. The right approach is to just stop M&A during a crisis or lapse in agency capacity. Let's not invite companies to exploit the crisis and go on buying sprees.").

[116] AMERICAN BAR ASSOCIATION, 70TH ANTITRUST LAW SPRING MEETING, ANTITRUST UPDATE WITH THE FTC BUREAU DIRECTORS (April 8, 2022 8:30am-10:00am).

the Agencies announced a "temporary" and "brief" suspension of grants of early termination.[117] Over a year later, the public has received no clarity regarding when this unwarranted and unprecedented suspension will be lifted.[118] In May 2021, the Commission flouted a negotiated timing agreement after the parties voluntarily extended the timing several times,[119] failed to order a divestiture in a transaction that all Commissioners had reason to believe violated the antitrust laws, and consequently left consumers unprotected.[120] In July 2021, the Commission rescinded a 1995 policy statement on prior notice and prior approval, facilitating a massive end-run around HSR filing requirements and opening the door for vindictive and wasteful enforcement.[121] In subsequent months, practitioners began to report avenues of merger investigation that would not support legal challenges in court, but that do add time and expense to the merger review

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[117] Press Release, Fed. Trade Comm'n, FTC, DOJ Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

[118] Noah J. Phillips & Christine S. Wilson, Comm'rs, Fed Trade Comm'n, Statement Regarding the Commission's Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[119] Press Release, 7-Eleven, Inc., 7-Eleven, Inc. Response to FTC Commissioner Statement (May 14, 2021), https://corp.7-eleven.com/corp-press-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement.

[120] Statement of Comm'rs Noah Joshua Phillips and Christine S. Wilson, *In re Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation*, File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf.

[121] Wilson July 21 Remarks, *supra* note 12; Noah J. Phillips, Comm'r, Fed Trade Comm'n, Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf.

process.[122] Collectively, these actions raise the costs of doing mergers and threaten to chill harmful and beneficial deals alike. [123]

Marxist theory believes that the competitive process inevitably leads to the emergence of "an ever-decreasing number of ever more powerful capitalist overlords" "[o]ver the corpses and semi-corpses of small and middling capitalists."[124] Given the drive to achieve greater scale and productivity, Marxists believe that "out of hones[t] democratic progressive competition grows irrevocably harmful, parasitic, reactionary monopoly."[125] Perhaps this worldview explains why the Neo-Brandeisians continue to advance the now-debunked narrative that concentration is increasing throughout our economy,[126] their insistence on finding a monopolist under every bed,[127] and their insistence on blaming every sub-optimal occurrence on monopolies.[128]

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[122] Transcript, Fed. Trade Comm'n, Open Commission Meeting – September 15, 2021 at 26, https://www.ftc.gov/system/files/documents/public_events/1596052/transcript_open_commission_meeting_9-15-21.pdf (Darren Tucker: "As some of the Commissioners have expressed today, I do have concerns that other aspects of the FTC's interactions with the public are becoming less transparent. In an increasing number of FTC merger investigations, agency staff have requested information regarding how the proposed transaction will affect unionization, ESG policies, or franchising. Staff have been unable to articulate how these issues relate to the agency's mission to promote competition, leaving the outside world guessing as to the role they play in agency decision making. Adding to this concern, these types of considerations are not topics in which agency staff have expertise, and devoting time to these issues has the potential to delay agency review of transactions. To the extent that these considerations are playing the role in enforcement decisions, I hope the Commission will give serious consideration to promptly explaining their role and how to square this with decades of Supreme Court precedent, that the impact on competition is the only proper consideration in the antitrust case."); Bryan Koenig, *'Nontraditional Questions' Appearing in FTC Merger Probes*, LAW360 (Sept. 24, 2021), https://www.law360.com/articles/1425218; Ben Remaly, *FTC broadens the scope of its merger probes*, GCR (Sept. 29, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/ftc-broadens-the-scope-of-its-merger-probes.

[123] And let us not forget about attempts in 2020 to suspend the HSR process entirely through enactment of a merger moratorium. *See, e.g.*, Erik Wasson, *Warren, Ocasio-Cortez Float Long-Shot Bid to Pause M&A in Crisis*, BLOOMBERG, (Apr. 28, 2020), https://www.bloomberg.com/news/articles/2020-04-28/warren-ocasio-cortez-propose-temporary-corporate-merger-ban.

[124] Trotsky, *supra* note 92.

[125] *Id*.

[126] *See, e.g.*, AMERICA'S CONCENTRATION CRISIS, OPEN MARKETS INSTITUTE (presenting concentration data). *But see* Michael Vita & F. David Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies: *A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf; Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST (last revised Oct. 22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912 (critiquing the Council of Economic Advisers analysis).

[127] *Id. See also* Stoller, *supra* note 112 (describing industries that have been consolidated because of lax merger review).

[128] *See, e.g.,* Matt Stoller, *Counterfeit Capitalism: Why a Monopolized Economy Leads to Inflation and Shortages*, BIG (Sept. 9, 2021), https://mattstoller.substack.com/p/counterfeit-capitalism-why-a-monopolized?s=r ("From railroads to plastic bags to semiconductors to ice cream, Wall Street and monopolists are creating shortages and exploiting them."); *but see* Oral Remarks of Commissioner Christine S. Wilson Open Commission Meeting on November 18, 2021,

5. The Individual Versus the Collective

John Stuart Mill asserted that "[t]he only freedom which deserves the name is that of pursuing our own good in our own way."[129] The free market is driven by the preferences of countless individuals. But in *The Social Contract*, Jean-Jacques Rousseau wrote that "[m]an is born free; and everywhere he is in chains."[130] He argued these chains include familiar institutions of society like family, religion, and class, as well as rules, customs, and traditions.[131]

George Wilhelm Friedrich Hegel and Marx viewed the state as destroying these social ties, becoming the liberator, and releasing the individual from loyalty to anything but itself. [132] By emphasizing loyalty to the state, socialism elevates the collective above the individual. [133] On a related note, Marxists view as detrimental the "creation and maintenance of individuals as economic and legal subjects, the bearers of property rights."[134] Why? Because a "right" in bourgeois legal form fragments class solidarity and dampens the desire collectively to struggle against oppression.[135] So the individual as the bearer of property rights is anathema to Marx.

Like Marx, CLS scholars also reject a focus on individualism and property rights. Leading CLS scholar Roberto Unger said traditional property rights protect social hierarchy at

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https://www.ftc.gov/system/files/documents/public_statements/1598451/cw_final_remarks_open_commission_meeting_1118.pdf ("Only by examining each level of the supply chain will we gain an accurate assessment of where the problems lie – in large part because players at all levels of the supply chain are blaming each other for the problem. … [T]here are concerns with many aspects of the global supply chain. Participants at each level of the supply chain will be able to shed light on their own unique challenges and concerns. For us to obtain a clear understanding of the supply chain issues and causes, we will need to cast a wide net.").

[129] JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS (4th ed.) (1859), https://www.econlib.org/library/Mill/mlLbty.html.

[130] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (G. D. H. Cole trans.) (1762), https://www.marxists.org/reference/subject/economics/rousseau/social-contract/ch01.htm.

[131] *Id.* ("But the social order is a sacred right which is the basis of all other rights. Nevertheless, this right does not come from nature, and must therefore be founded on conventions.").

[132] GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT (T. M. Knox trans. 1942) (1820), https://www.marxists.org/reference/archive/hegel/works/pr/philosophy-of-right.pdf ("A single person, I need hardly say, is something subordinate, and as such he must dedicate himself to the ethical whole. Hence, if the state claims life, the individual must surrender it.").

[133] QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG https://www.masurrendeddrxists.org/ebooks/mao/Quotations_from_Chairman_Mao_Tse-tung.pdf ("We must affirm anew the discipline of the Party, namely: 1. the individual is subordinate to the organization; 2. the minority is subordinate to the majority; …).

[134] Sol Picciotto, *The Theory of the State, Class Struggle and the Rule of Law, in* MARXISM AND LAW 175 (Piers Beirne & Richard Quinney eds., (1982).

[135] *Id.* ("A 'right' in bourgeois legal form does not create but fragments class solidarity.").

the expense of communal life.[136] This approach views property rights as negative and toxic.[137] Another CLS scholar wrote that "[p]roperty rights, in American culture, have functioned as powerful symbols of individual freedom, … of security, … [and] of productive efficiency, providing the incentives to labor, invest, and create."[138] But this dominant ideology of property, he noted, downplays or obscures property's other faces, which are "coercive and oppressive."[139]

Neo-Brandeisian beliefs parallel Marxist and CLS positions in rejecting individualism. The consumer welfare standard benefits individuals through low prices, greater choice, higher quality, and more innovation,[140] but like Marxists, the Neo-Brandeisians would have us subjugate the rights of the individual to the rights of favored groups. Chair Khan has already told us that all decisions are political,[141] so we know that which groups are selected for preferential treatment will depend on which way the political winds are blowing. In fact, a new bill from Senator Elizabeth Warren previews some of those favored groups, including "workers, sellers, small and minority-owned businesses (including farms and ranches), local, rural, and low-income communities, and communities of color."[142]

6. The Invisible Hand Versus Central Planning

In a socialist society, the means of production is controlled by the state, and planning will substitute for competition as the economy's steering mechanism.[143] Again, the parallels with the

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[136] William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L. J. 665, 739 (1988) ("To be sure, Unger does allow for a set of 'immunity rights' to personal security and to welfare entitlements. He does not, however, allow property rights, and he says that the immunity rights are to 'impose a minimal rigidity upon the organization of society.'").

[137] David Kairys, *Introduction*, THE POLITICS OF LAW 48 (David Kairys 3RD ed., 1978) at 11 ("Free market mania and the tendency to commodify all things human pervade our culture and our lives, yielding in the law a new and powerful discipline, law and economics, which attempts to explain and justify it all in terms of logic, reason, and 'science.' We seem to have adopted as our social purpose the facilitation of greed and the consolidation of wealth and resources in as few hands as possible, which we are accomplishing quite efficiently.").

[138] Gordon, *supra* note 28, at 651.

[139] *Id.* ("But this dominant ideology of property, by facing frontward the aspects of property that seem to promote individual freedom, security, and efficiency, downplays or obscures property's other faces—some coercive and oppressive, others cooperative and benign. Stressing how property promotes the freedom of owners suppresses how it also enable the owner to control the lives and reduce to subjection those who need access to it.").

[140] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010) (explaining that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. … When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.").

[141] Varney, *supra* note 34.

[142] Prohibiting Anticompetitive Mergers Act of 2022, S. 3847, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3847?s=1&r=2.

[143] *Socialism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A political, economic, and philosophical system that promotes government or community ownership of capital, property, and industry to equalize citizens' income, opportunities, and outcomes.").

Neo-Brandeisian approach are striking. Although private property may remain a reality, they seek to replace the invisible hand with heavy-handed regulation.[144] They characterize as successes the unwieldy regulatory frameworks that once governed railroads and airlines.[145] Indeed, Chair Khan has touted railroad regulations as a model for regulating large tech companies.[146] And they have advocated for the extensive use of rules to govern competition generally – no more case-by-case ex post enforcement, but instead an ex ante ordering of the market.[147] The list of rules they intend to create is breathtaking.[148] Ultimately, the Neo-Brandeisians would prefer that the government, rather than the private sector, orchestrate the functioning of the economy.

All of these concepts help us understand why the Neo-Brandeisians loathe the consumer welfare standard.[149] While increased productivity and lower prices benefit consumers, those

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[144] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 797 (2017), https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf ("The other is to accept dominant online platforms as natural monopolies or oligopolies, seeking to regulate their power instead. In this Section, I sketch out two models for this second approach, traditionally undertaken in the form of public utility regulations and common carrier duties. … Critically, a public utility regime aims at eliminating competition: it accepts the benefits of monopoly and chooses instead to limit how a monopoly may use its power."); *id.* at 800 ("Given Amazon's growing share of e-commerce as a whole, and the vast number of independent sellers and producers that now depend on it, applying some form of public utility regulation could make sense."); *id.* at 803 ("If, instead, we accept dominant online platforms as natural monopolies or oligopolies, then applying elements of a public utility regime or essential facilities obligations would maintain the benefits of scale while limiting the ability of dominant platforms to abuse the power that comes with it").

[145] *Id.* at 797 ("Industries that historically have been regulated as utilities include commodities (water, electric power, gas), transportation (railroads, ferries), and communications (telegraphy, telephones)."); *see also* MAJORITY STAFF REPORT, *supra* note 10. *See also* Phillip Longman & Lina Khan, *Terminal Sickness*, WASHINGTON MONTHLY (March 1, 2012), https://washingtonmonthly.com/2012/03/01/terminal-sickness/ (arguing that price declines following deregulation were a result of declines in the price of oil and that prices were declining more prior to deregulation that the ultimate decline post-deregulation).

[146] *Id.*

[147] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020), https://www.ftc.gov/system/files/documents/public_statements/1568663/rohit_chopra_and_lina_m_khan_the_case_for_unfair_methods_of_competition_rulemaking.pdf.

[148] *See* FED. TRADE COMM'N, Semiannual Regulatory Agenda (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Preamble_3084_FTC.pdf; FED. TRADE COMM'N, Statement of Regulatory Priorities (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf; FED. TRADE COMM'N, Agency Rule List - Fall 2021 Federal Trade Commission, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIS (select "Federal Trade Commission" from dropdown); *see also* Dissenting Statement of Commissioner Christine S. Wilson Annual Regulatory Plan and Semi-Annual Regulatory Agenda (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf.

[149] Vaheesan, *supra* note 31. *See also* Khan, *supra* note 144, at 803 ("In order to capture these anticompetitive concerns, we should replace the consumer welfare framework with an approach oriented around preserving a competitive process and market structure. Applying this idea involves, for example, assessing whether a company's

same things signify worker exploitation under the labor theory of value.[150] Efficiencies, productivity, declining costs, and lower prices all point to the cheapening of commodities that Marx discussed[151] – which is equivalent to the cheapening of flour that dismayed Tim Wu.[152] Neo-Brandeisians believe that consumers must sacrifice lower prices for the greater good, in whatever way the politicized process happens to define the greater good at the moment.

7. Destruction and Revolution

Marx drew on the concepts of Rousseau, who argued that society and law "bound new fetters on the poor, and gave new powers to the rich," "eternally fixed the law of property and inequality," "and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labour, slavery and wretchedness."[153] Rousseau bemoaned the existence of exchange relationships, rivalry, and competition that "inspired all men with a vile propensity to injure one another" and a "secret desire" to profit at the expense of others.[154] Like Marx after him, Rousseau envisioned the dissolution of the civilized state responsible for the moral degeneration and widespread alienation of people.[155] Destroying the existing society would enable construction of a new, ideal society. Rousseau, an important muse for the Jacobins in the French Revolution,[156] said that in the life of a state "there are periods of violence … when revolutions do to peoples what certain crises do to individuals, and when the State aflame with civil wars is, so to speak, reborn from its ashes and recovers the vigor of youth."[157]

Marx also drew on the concepts of Hegel, who believed that individuals, societies, and states pass through a series of stages during the course of history, each one better than the next,

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structure creates anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the economics of online platform markets incentivizes predatory conduct and capital markets permit it.").

[150] Marx, *supra* note 88, at 221-222 ("Hence, a fall in the value of labour-power is also brought about by an increase in the productiveness of labour, and by a corresponding cheapening of commodities in those industries which supply the instruments of labour and the raw material, that form the material elements of the constant capital required for producing the necessaries of life."); Trotsky, *supra* note 91.

[151] Marx, *supra* note 88.

[152] Wu, *supra* note 104.

[153] LUCIO COLLETTI, FROM ROUSSEAU TO LENIN 165 (1976).

[154] *Id.* at 164.

[155] *Id.* at 184-185.

[156] David Lay Williams, *Rousseau and Revolution*, NOTRE DAME PHILOSOPHICAL REVIEWS, https://ndpr.nd.edu/reviews/rousseau-and-revolution/ ("Jean-Jacques Rousseau is perhaps most famous or even infamous for two features associated with his work and its influence. Among casual readers, he is known as the muse of the Jacobins in the French Revolution. The popular image persists of Robespierre quoting passages from the Social Contract while simultaneously ordering executions.") (book review).

[157] *Id.* (citing JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT).

in an endless progression towards perfection.[158] For Hegel, war was indispensable in achieving political progress.[159] Out of the crisis of war, or tumult, a better version of the State was certain to emerge victorious.[160] Marx too believed in the inevitable progression toward perfection, arguing that the inevitable result of capitalism was socialism, and then the utopia of communism.[161] Critics of Marxism have noted that "[b]ecause revolutionaries are confident that the next stage of history will automatically represent progress, that any change will be for the better, they readily tear down and destroy the existing order – which historically has meant killing off anyone who resists, from rulers to peasants."[162]

Perhaps the perspectives of Rousseau, Hegel, and Marx explain why the Neo-Brandeisians do not shy away from actions that are destructive to the FTC. If one believes that tumult and destruction will lead inevitably to progress, near-term harms can be dismissed as the price of progress. And make no mistake – the Neo-Brandeisians already have imposed significant harm on the agency, and threaten even greater harm in the future.

As noted previously, then-Commissioner Chopra routinely attacked the FTC for being lax and feckless.[163] His characterizations assisted in undermining the bipartisan Congressional support that the FTC had long enjoyed.[164] And Chair Khan has said that agency overreach does

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[158] WILLIAM TURNER, HISTORY OF PHILOSOPHY 579-81 (1903), https://babel.hathitrust.org/cgi/pt?id=hvd.hnqfrc&view=1up&seq=595&q1=Greek .

[159] *Id.* at 578 ("War, Hegel teaches, is the indispensable means of political progress.").

[160] *Id.* ("… a crisis out of which the better state, that is the state which approaches more closely to the ideal, is certain to emerge victorious.").

[161] Karl Marx, *Part I: Feuerbach, Opposition of the Materialist and Idealist Outlook A. Idealism and Materialism, The Illusions of German Ideology*, THE GERMAN IDEOLOGY (written 1845-1846, published 1932), https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm ("Communism is for us not a state of affairs which is to be established, an ideal to which reality [will] have to adjust itself. We call communism the real movement which abolishes the present state of things. The conditions of this movement result from the premises now in existence.").

[162] CHARLES COLSON & NANCY PEARCEY, HOW NOW SHALL WE LIVE 236 (1999).

[163] *See* sources cited *supra* note 9.

[164] *Compare* Dissenting Statement of Commissioner Rohit Chopra in re Facebook, Inc. (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (characterizing $5 billion settlement containing significant injunctive relief as "inadequate" and "flimsy"); *with* Letter from Senator Ricard Blumenthal and Senator Josh Hawley to Chairman Joseph Simons (May 6, 2019), https://www.blumenthal.senate.gov/imo/media/doc/5.6.19_Letter%20to%20FTC%20re%20Facebook.pdf ("We are deeply concerned that one-time penalties of any size very few years are woefully inadequate to effectively restrain Facebook.").

not appear in her top ten list of concerns.[165] But when the agency has engaged in overreach in the past, it has incurred the wrath of Congress and its appropriators.[166]

Moreover, current leadership has diminished and marginalized staff in astonishing ways, leading to a significant brain drain.[167] Countless experienced members of the FTC community, boasting both an encyclopedic knowledge of their fields and finely honed management skills, have fled.[168] This trend is both tragic and ironic: many of these employees agree with Chair Khan's desire to engage in more aggressive enforcement, and without these skilled and dedicated employees, Chair Khan will face greater difficulty in implementing her agenda.

8. Innovation

By this point, you may be wondering how my remarks are connected to the topic of innovation. So let's take a moment to consider how innovation might fare if policy makers are influenced by the views of Marxism and CLS.

Marx envisioned "the abolition of bourgeois property" and state-controlled mechanisms of production.[169] We know that command and control economies lead to the drastic misallocation of resources, creating misery and deprivation for ordinary citizens.[170] For the same reasons that

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[165] Nancy Scola, *Lina Khan Isn't Worried About Going Too Far*, INTELLIGENCER (Oct. 27, 2021), https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html ("Khan told me she worries about the 'existential stakes of underreaching' — of 'neutering the tools' available to the agency, constantly disappointing both Democrats and Republicans in Congress, and having the public forget the FTC even exists. Going too far? Doing too much? 'When identifying the top ten threats to this agency,' she said, 'that's not on the list.'").

[166] Christine S. Wilson, *Hey, I've Seen This One: Warnings for Competition Rulemaking at the FTC*, *Remarks for the Federalist Society "The Future of Rulemaking at the FTC" Event* (June 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf ("The FTC gets punished by courts and Congress when it pushes the boundaries of its authority to the detriment of consumers. For example, despite having rulemaking power since its creation in 1914, the FTC issued few rules until the 1960's. The FTC then accelerated its rulemaking, and in 1973, the D.C. Circuit affirmed that the FTC had substantive rulemaking powers. Congress stepped in only two years later, passing the Magnuson-Moss Act, which gave the FTC substantive consumer protection rulemaking power, but implemented increased procedural hurdles. The Commission continued to create rules, leading the Washington Post to label the FTC a 'national nanny' in March 1978 and leading Congress to act—again—by passing the Federal Trade Commission Improvements Act of 1980 that implemented more safeguards in the FTC's rulemaking process.").

[167] Wilson, *supra* note 55.

[168] Sisco, *supra* note 14. *See also* sources cited *supra* note 56.

[169] Marx & Engels, *supra* note 87 ("The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few.").

[170] *See, e.g.*, CONSUMPTION IN THE USSR: AN INTERNATIONAL COMPARISON: A STUDY PREPARED FOR THE USE OF THE JOINT ECONOMIC COMMITTEE, 9TH CONG. (1981), https://www.jec.senate.gov/reports/97th%20Congress/Consumption%20in%20the%20USSR%20-%20An%20International%20Comparison%20(1058).pdf ("Based on a geometric mean comparison, Soviet consumers come nearest to their American counterparts in consumption of food, beverages, and tobacco (54 percent) and soft goods (39 percent). The Soviet lag is massive (less than 20 percent of the US level) in consumer durables and household services. In terms of housing services, for example, the Soviet level is only one-seventh of that in the

central planning failed in the Soviet Union, Cuba, China, North Korea, Venezuela, and elsewhere,[171] the regulatory regimes that governed transportation industries in the United States generated lower levels of innovation and supply, and higher prices, than those same industries experienced following deregulation.[172] The Neo-Brandeisians would have us ignore this history and expand significantly the government's role in the U.S. economy.[173] But we know from history what heavy-handed regulation does to innovation.[174]

United States. In contrast, the Soviets exceed the United States in per capita consumption of alcoholic beverages (especially hard liquor) and in provision of public transportation. Education and health services, which the USSR supplies mainly without direct charge, are at about half the US level, with a considerably better showing in education (77 percent) than in health (33 percent). Over the past 20 years, the Soviets have made the most progress in 'catching up' in food, soft goods, and durables, but have retrogressed relative to the United States in housing, recreation, education, and health.").

[171] Friedrich A. Hayek, The Use of Knowledge in Society, XXXV American Economic Rev. 519, 524 (Sept. 1945), https://www.aeaweb.org/aer/top20/35.4.519-530.pdf ("This is, perhaps, also the point where I should briefly mention the fact that the sort of knowledge with which I have been concerned is knowledge of the kind which by its nature cannot enter into statistics and therefore cannot be conveyed to any central authority in statistical form. The statistics which such a central authority would have to use would have to be arrived at precisely by abstracting from minor differences between the things, by lumping together, as resources of one kind, items which differ as regards location, quality, and other particulars, in a way which may be very significant for the specific decision. It follows from this that central planning based on statistical information by its nature cannot take direct account of these circumstances of time and place and that the central planner will have to find some way or other in which the decisions depending on them can be left to the 'man on the spot.'"). *See also* Friedrich von Hayek, Prize Lecture, Lecture to the memory of Alfred Nobel (Dec. 11, 1974), https://www.nobelprize.org/prizes/economic-sciences/1974/hayek/lecture/ ("But when we are asked for quantitative evidence for the particular structure of prices and wages that would be required in order to assure a smooth continuous sale of the products and services offered, we must admit that we have no such information. We know, in other words, the general conditions in which what we call, somewhat misleadingly, an equilibrium will establish itself: but we never know what the particular prices or wages are which would exist if the market were to bring about such an equilibrium. We can merely say what the conditions are in which we can expect the market to establish prices and wages at which demand will equal supply. But we can never produce statistical information which would show how much the prevailing prices and wages deviate from those which would secure a continuous sale of the current supply of labour. Though this account of the causes of unemployment is an empirical theory, in the sense that it might be proved false, e.g. if, with a constant money supply, a general increase of wages did not lead to unemployment, it is certainly not the kind of theory which we could use to obtain specific numerical predictions concerning the rates of wages, or the distribution of labour, to be expected.").

[172] Christine S. Wilson, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech 4-13 (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biicl_6-28-19.pdf (discussing dampened innovation, high prices and low demand caused by regulation of railroads and airlines).

[173] Majority Staff Report, *supra* note 10; Khan, *supra* note 144, at 797 ("Industries that historically have been regulated as utilities include commodities (water, electric power, gas), transportation (railroads, ferries), and communications (telegraphy, telephones).").

[174] *See, e.g.*, Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. OF ANTITRUST ENFORCEMENT 10, 13-14 & 18 (2020), https://academic.oup.com/antitrust/article/8/1/10/5614371 (discussing harm to innovation from railroad and airline regulations).

CLS scholars also favor an approach that would diminish innovation. One CLS scholar wrote that "[s]tressing property as the necessary incentive to productivity suppresses the need for resources to be widely available to others" who would make productive use of them. This author provided an example pertaining to intellectual property: "insisting on making all the fruits of creative labor into 'intellectual property' disregards how making knowledge into property limits the ability of other creative people to make use of a common stock of ideas for innovations of their own."[175] Perhaps this perspective explains the heavy thumb on the scale for implementers, not innovators, that we have witnessed in this Administration.[176]

In short, perspectives that draw on Marxism and CLS, if embodied in antitrust law and policy, will undermine both the incentive and the ability to innovate and will erode the dynamism of the U.S. economy.

Conclusion

During my remarks today, I have described how Marxism, Critical Legal Studies scholars, and Neo-Brandeisians view a variety of topics. These descriptions reveal fascinating parallels in these three worldviews. For those who came to today's conference with the understanding that the so-called "antimonopoly movement" is focused only on reining in the biggest companies, I hope these parallels have disabused you of that notion. The logical outworking of these worldviews leads inescapably to the conclusion that the Neo-Brandeisians seek total control of the economy.

But don't take my word for it. Read what Chair Khan and her former colleagues, bosses, and co-authors have written. They have told you clearly how they seek to transform the field of antitrust law, our economy, and our society. And then share what you have learned with others. As Professor Herbert Hovenkamp has said, "a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets."[177] So let us start educating others about the Neo-Brandeisian goals.

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[175] Gordon, *supra* note 28, at 651-52.

[176] U.S. DEP'T OF JUST., U.S. PATENT AND TRADEMARK OFFICE, & NAT'L. INSTITUTE OF STANDARDS AND TECHNOLOGY, DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS AND REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Dec. 6, 2021), https://www.justice.gov/atr/page/file/1453471/download. *See also* SEPs, Antitrust, and the FTC Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery, ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting, https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf (October 29, 2021) ("I want to take a brief detour to address the 'holdout' problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a competition standpoint as holdup, which has the potential to exclude firms from implementing a standard.").

[177] Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, J. OF CORP. LAW 101, 130 (2019) ("Finally is the problem of transparency, which I believe will ultimately prove dispositive. The neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most. For example, to the extent that the United States Democratic Party becomes the institution to

embrace its concerns, it will be harming its own constituencies the most. As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.").