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ARTICLE

Thomas A. Lambert: "Neo-Brandeisianism: A Policy at War With Itself"

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Dear readers, the Network Law Review is delighted to present you with this month's guest article by Thomas A. Lambert, Wall Family Chair and Professor of Law, University of Missouri Law School. This article is based on Thomas. A. Lambert & Tate Cooper, Neo-Brandeisianism's Democracy Paradox, 49 J. Corp. L. 2 (2024)

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Abstract. "Neo-Brandeisian" scholars contend that prevailing antitrust law fails to protect democratic values. They propose (1) replacing antitrust's consumer welfare standard with a multi-goaled approach and (2) embracing ex-ante conduct rules over ex-post liability standards. In tandem, those policies undermine Neo-Brandeisianism's raison d'être: the promotion of democracy.

1. Introduction

U.S. Supreme Court Justice Louis Brandeis spoke so often of the societal harms of industrial concentration that Osmond K. Frankel titled his edited collection of Brandeis's papers The Curse of Bigness.[1] Today, "Neo-Brandeisian" scholars condemn the prevailing approach to antitrust law in the United States for ignoring Brandeis's insights. They say that in seeking exclusively to promote consumer

[1] See generally Louis D. Brandeis, The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis (Osmond K. Fraenkel ed., 1934).

welfare by minimizing inefficiencies from market power, the current antitrust system ignores other societal ills that result when firms amass large market shares.[2]

Chief among those are harms to democracy. Excessive market concentration, Neo-Brandeisians claim, impairs democratic functioning as large firms use their vast resources to lobby for policies that thwart majority will.[3] High market concentration also undermines "economic self-governance," Neo-Brandeisians add, because citizens' ability to control their lives is reduced when they are beholden as consumers, suppliers, or laborers to a small group of economically powerful entities.[4]Working within the system that now prevails, Neo-Brandeisians contend, cannot fix these problems. Instead, U.S. antitrust must be fundamentally restructured.[5]

Given the professed aims of Neo-Brandeisianism, the movement's prominence might seem to herald good news for democracy. In the implementation, however, the policies Neo-Brandeisians advocate to enhance democracy tend to undermine democratic values. To show why, this article first describes Neo-Brandeisianism's distinctive criticisms of the prevailing antitrust regime, the movement's unique proposals for reform, and how those proposals have actually been implemented by Neo-Brandeisian antitrust enforcers. It then shows how Neo-Brandeisianism, in implementation, undermines democratic functioning.

2. Neo-Brandeisianism's Distinctive Critique of the Prevailing Antitrust Regime

Neo-Brandeisians are not alone in criticizing prevailing U.S. antitrust doctrine and practice. Other commentators, particularly "Post-Chicago" scholars who have attacked Chicago School assumptions that underlie certain defendant-friendly antitrust doctrines, have called for greater antitrust intervention.[6] Like Neo-

[2] See generally Lina Khan, The New Brandeis Movement: America's Antimonopoly Debate, 9 J. Europ'n Comp'n L. & Prac. 131 (2018).

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

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

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

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

Brandeisians, those scholars maintain that prevailing doctrine places unwarranted burdens on antitrust plaintiffs and inadequately polices market power-induced harms to laborers, input suppliers, and innovation. They call for a pro-plaintiff recalibration of antitrust rules, but they typically do not question the view that antitrust's ultimate goal should be the maximization of market output (accounting for both quantity and quality).

Neo-Brandeisians, by contrast, contend that an antitrust regime focused narrowly on enhancing market output—lower prices, higher quality goods and services, greater innovation—ignores significant social harms. Most notably, Neo-Brandeisians say, an output-focused antitrust gives short shrift to democratic harms that result from outsized business enterprises. Former FTC Chair Lina Khan, for example, contends that:

"[d]ominant corporations wield outsized influence over political processes and outcomes, be it through lobbying, financing elections, staffing government, funding research, or establishing systemic importance that they can leverage. They use these strategies to win favourable policies, further entrenching their dominance."[7]

In addition to this purported harm to democratic functioning, Neo-Brandeisians maintain that allowing firms to amass market share as long as no harm to trading partners results, can produce a second "democratic" harm: It can so reduce individuals' economic liberty that self-governance is effectively undermined. Chair Khan, for example, favorably quotes a 1912 speech in which Justice Brandeis argued that democracy necessarily involves "[n]ot merely political and religious liberty, but industrial liberty also."[8] She further observes that "the Madisonian concept of 'self-government' hinges on the ability of citizens to control and check private concentrations of economic power."[9] She contends that "[m]ost people's day-to-day experience of power comes not from interacting with public officials, but through relationships in their economic lives—negotiating pay with an employer, for example, or wrangling the terms of business with a trading partner."[10] She thus echoes Justice Brandeis's fear "that autocratic structures in the commercial sphere—

Scott Morton & Herbert Hovenkamp, Horizontal Shareholding and Antitrust Policy, 127 Yale L. J. 2026 (2018).

[7] Khan, supra note 3, at 131.

[8] Id. (quoting Louis D. Brandeis, The Regulation of Competition Versus the Regulation of Monopoly, Address to the Economic Club of New York (Nov. 1, 1912).

[9] Id.

[10] Id. See also Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 40 (2018) ("For most people, a sense of autonomy is more influenced by private forces and economic structure than by government.").

such as when one or a few private corporations call all the shots—can preclude the experience of liberty, threatening democracy in our civic sphere."[11]

The essence of the Neo-Brandeisian critique of the antitrust status quo, then, is that it fails to protect democracy, defined both narrowly as majority rule in the political arena and broadly as "self-governance" free from excessive concentrations of economic power.

3. Neo-Brandeisianism's Unique Reform Agenda

Two of Neo-Brandeisianism's reform proposals follow from its distinctive, democracy-based criticism of the prevailing antitrust regime. The first is to jettison antitrust's market output-focused consumer welfare standard. Constraining antitrust's objectives so narrowly, Neo-Brandeisians say, prevents the law from reaching behaviors and market structures that weaken democracy but do not reduce market output and thereby harm defendants' trading partners.[12]

What should replace the consumer welfare standard is a bit unclear. Neo-Brandeisians sometimes suggest that the law should not pursue any particular outcome, as when former Chair Khan writes: "Contrary to how critics portray the New Brandeisians, this new school of thought does not promote using antitrust law to achieve a different set of social goals—like more jobs or less inequality. Doing so would replicate a key mistake of the Chicago School: overriding a structural inquiry about process and power with one that focuses on a narrow set of outcomes."[13]

But market deconcentration for its own sake is not a coherent policy for the simple reason that there is no apparent stopping point: markets can always be further deconcentrated, eventually by disintegrating firms.[14] There must therefore be some telos—an ultimate aim—of a deconcentration agenda. Khan elsewhere suggests that

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[11] Khan, supra note 3, at 131. Khan elsewhere quotes with approval Justice William O. Douglas's dissenting observation that "[i]ndustrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men." Khan, supra note 6, at 968 (quoting United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting)).

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

[13] Id.

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

Neo-Brandeisians favor deconcentration to the point at which multiple laudable goals—e.g., consumer welfare, democratic functioning, protection of individual economic liberty—are simultaneously achieved to some degree. She writes, for example, that "antitrust law was structured to preserve a set of structural conditions (competition) as a way of promoting a set of outcomes and principles."[15] Those include "preventing unfair wealth transfers from consumers, producers, and workers to monopolistic firms; preserving open markets in order to ensure opportunity for entrepreneurs; and halting excessive concentrations of private power."[16] The first distinctly Neo-Brandeisian reform proposal, then, is to replace the exclusively market output-focused consumer welfare standard with a multi-goaled deconcentration agenda.

A second distinctly Neo-Brandeisian antitrust reform stems from the first. Because most of the practices antitrust regulates may be, depending on the circumstances, either output-enhancing or output-reducing, an antitrust regime focused on maximizing market output will have few bright-line prohibitions (i.e., rules of per se illegality) and will instead favor context-specific assessment of challenged practices (i.e., adjudication under a rule of reason).[17] Having rejected output maximization as antitrust's exclusive objective, Neo-Brandeisians are liberated from concern that ex-ante conduct rules will "misfire" and reduce output in particular contexts. Antitrust's democratic objectives, they reason, can almost certainly be furthered by bright-line rules that deconcentrate markets. A second uniquely Neo-Brandeisian proposal for reforming antitrust, then, is to transition from ex-post liability standards to ex-ante conduct rules.[18]

4. Neo-Brandeisianism's Reform Agenda in Implementation

Under Chair Khan's leadership, the FTC pursued both uniquely Neo-Brandeisian antitrust reforms. One of the Khan FTC's first acts was to abrogate and replace a 2015 policy directing the Commission to pursue consumer welfare and account for efficiencies when exercising its authority to police "unfair methods of competition"

[15] Khan, supra note 6, at 972 (emphasis added).

[16] Id. at 972, n.52. See also Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L. J. 710, 743-44 (2017) ("[F]ocusing on consumer welfare disregards the host of other ways that excessive concentration can harm us . . . . Protecting this range of interests requires an approach to antitrust that focuses on the neutrality of the competitive process and the openness of market structures.").

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

[18] See, e.g., Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. Chi. L. Rev. 357 (2020).

(UMC).[[19] The Commission's new UMC policy confirms that conduct that could usurp business from less efficient rivals or reduce employment opportunities or wages for workers may be deemed an unfair method of competition even if it enhances market efficiency and output.[20] The Statement favorably cites one enacting legislator's observation that a purpose of the FTC "is to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals."[21] It highlights another's assertion that the FTC "is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another…."[22] Observing that "[t]he FTC Act's legislative history makes it clear that Congress intended the statute to protect a broad array of market participants including workers and small businesses,"[23] the Statement quotes an enacting congressman's statement that a goal of Section 5 of the Act was "to secure labor the highest wage, the largest amount of employment under the most favorable conditions and circumstances."[24] And the Statement clarifies that offsetting efficiencies cannot by themselves justify a business practice deemed unfair to rivals or workers, noting that "[i]f parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis."[25] The FTC thus determined that Section 5's UMC ban should pursue multiple ends—consumer welfare, small business protection, employment opportunities, and high wages—and that maximizing market output ("net efficiencies") is not the objective of the UMC prohibition.

The Khan FTC also began transitioning from ex-post behavioral standards to ex-ante conduct rules. Embracing Chair Khan's hotly contested view that Section 6(g) of the FTC Act authorizes the Commission to promulgate legislative rules to prevent unfair methods of competition, a majority of commissioners voted to impose a rule banning nearly all worker non-compete agreements.[26]

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

[20] See U.S. Fed. Tr. Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) (hereinafter "2022 UMC Statement") (https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

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

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

[23] Id. at 4, footnote 18.

[24] Id. (quoting Rep. Morgan).

[25] Id. at 11.

[26] See Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3514-15 (Jan. 19, 2023) (proposing to ban all worker noncompete agreements except those executed in connection with the sale of a business).

5. Neo-Brandeisianism's Democracy Paradox

The FTC's one-two punch of embracing multiple goals for antitrust intervention and replacing ex-post adjudication with ex-ante conduct rules undermines Neo-Brandeisianism's raison d'etre: the promotion of democracy.

The U.S. Constitution creates a republican democracy by vesting "all legislative Powers herein granted" in a Congress of elected representatives.[27] Promulgation of legislative rules by unelected bureaucrats has always rested precariously within the constitutional order. Agency rulemaking has typically been justified on grounds that (1) Congress lacks expertise, relative to specialized agencies, to determine the best means of securing legislatively determined goals,[28] and (2) Congress is ultimately making the law because agencies' discretionary authority is limited in scope (as each agency possesses delegated authority over a narrow subject matter)[29] and must be constrained by an "intelligible principle" articulated by Congress.[30] Moreover, agencies typically have some indirect democratic accountability, as agency heads are politically appointed and generally serve at the pleasure of the elected President, who may remove them if they make unpopular decisions that threaten his position in office.[31] In light of these considerations, the marginal benefit of agency rulemaking is great (as agencies have expertise that elected representatives lack) and the marginal impairment of democratic values is slight (as agencies have authority over limited

[27] U. S. Const. art. I, § 1.

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

[29] See Nat'l Fed'n Ind. Bus. v. Dep't of Labor, 142 S. Ct. 661, 669 (2022) ("If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.") (Gorsuch, J., concurring) (quoting Department of Transportation v. Association of American Railroads, 575 U.S. 43, 61 (2015) (Alito, J., concurring)); Fahey v. Mallonee, 332 U.S. 245, 252 (1947) (observing that regulatory delegations at issue, unlike others deemed impermissible, "do not deal with unprecedented economic problems of varied industries" but instead "deal with a single type of enterprise").

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

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

subject matter, must abide by meaningful limits in Congress's rulemaking delegation, and are indirectly accountable to voters).

When it comes to non-consumer welfare-based UMC rulemaking by the FTC, this balance shifts. First, the marginal benefit of agency rulemaking is minuscule, if it exists at all. Apart from understanding the effects of business practices on market output and consumer welfare, the FTC has no expertise on what makes a method of competition "unfair." That is a value-laden matter for ethicists, not the FTC's economist-heavy staff. Indeed, given that Congress includes far more members, represents a greater diversity of perspectives, and is directly accountable to the citizenry, it possesses an institutional advantage over the Commission in determining what constitutes an "unfair" (unmoored from consumer welfare effects) method of competition.

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

The scope of conduct subject to the FTC's legislative rules is immense. The 2022 UMC Statement defines a "method of competition" as any conduct undertaken by a market actor where the conduct implicates competition, at least indirectly.[32] As almost all actions firms take are aimed at helping them win business from actual or potential rivals, "methods of competition" would appear to encompass virtually all business practices within every nook of the economy.

The intelligible principle that theoretically constrains the FTC's UMC rules—precluding only "unfair" business practices—is all but toothless when unfairness is unmoored from market output and consumer welfare considerations. According to the 2022 UMC Statement, whether business conduct is unfair turns on (1) whether the conduct is "facially unfair" because it is coercive, exploitative, collusive, abusive, deceptive, predatory, restrictive, or exclusionary and (2) whether the conduct would "tend to negatively affect competitive conditions" by, for example, "foreclos[ing] or

[32] 2022 UMC Statement, supra note 21, at 8 ("A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition, but the relationship can be indirect.").

impair[ing] the opportunities of market participants, reduc[ing] competition between rivals, limit[ing] choice, or otherwise harm[ing] consumers."[33]

While this approach to identifying unfairness may initially appear to constrain the FTC's discretion, consideration of the Commission's Notice of Proposed Rulemaking (NPRM) on worker noncompete agreements suggests that any apparent constraints are illusory. In proposing a sweeping ban on such agreements, the Commission reasoned that they meet the first requirement—facial unfairness—for three independently sufficient reasons: (1) they are "exploitative" and "coercive" at the time of contracting because they are imposed in standard-form adhesion contracts by parties that have greater bargaining power than their counterparties;[34] (2) they are "exploitative and coercive at the time of the worker's potential departure from the employer" because they "force a worker to either stay in a job they want to leave or choose an alternative that likely impacts their livelihood";[35] and (3) they are "restrictive" because "[b]y their express terms, non-compete clauses restrict a worker's ability to work for a competitor of the employer."[36]

This reasoning would allow the Commission to condemn the vast majority of contracts. Under the logic of the first theory, any term in a standard form adhesion contract proposed by a firm with greater bargaining power than its counterparty "coerces" and "exploits" that counterparty and is facially unfair. The second theory would find facial unfairness in any contract commitment that a party later comes to regret so that enforcement of the term would be "coercive" and "exploitative." The third theory would find facial unfairness in any contract that "restricts" a party—as every executory contract does.[37] The upshot is that any adhesive, regretted, or merely unperformed contract term is "facially unfair," satisfying prong one, and is thus proscribable as long as it satisfies prong two by "limit[ing] choice" or "tend[ing] to foreclose or impair the opportunities of market participants"[38]—as, again, all contracts do. The FTC's reasoning in its Noncompete NPRM would thus give it authority to ban virtually any contract term it chooses.

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[33] Id. at 9.

[34] Non-Compete Clause Rule, supra note 27, at 3503 ("Because there is a considerable imbalance of bargaining power between workers and employers in the context of negotiating employment terms, and because employers take advantage of this imbalance of bargaining power through the use of non-compete clauses [in standard form adhesion contracts], the Commission preliminarily finds non-compete clauses are exploitative and coercive at the time of contracting.").

[35] Id. at 3504.

[36] Id. at 3500

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

[38] See supra note 34 and accompanying text.

The third feature that frequently constrains democratic harms from unelected bureaucrats' legislative rulemaking—regulators' accountability to elected officials for policy choices—is wholly missing in this context. Unlike the heads of executive branch agencies, who serve at the pleasure of the elected President, FTC commissioners (at least under currently governing Supreme Court precedent, which President Trump is now testing) may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office."[39] And because such commissioners exercise executive authority, they may not be removed by Congress except via impeachment and conviction for "Treason, Bribery or other high Crimes and Misdemeanors."[40] In the end, then, no democratically accountable person or body may remove an FTC commissioner for making a policy choice that runs counter to the will of the citizenry, which means that commissioners need not pursue majority interests when formulating and adopting rules.

While there are examples of agency rulemaking in which some of the constraints on bureaucratic discretion are flimsy, it is difficult to identify any other instance of agency rulemaking that combines so vast a sphere of regulable conduct, so edentulous a principle for cabining discretion, and so politically insulated a rule-maker.

Not only will UMC rulemaking unmoored from the consumer welfare standard increase discretionary rule imposition by officials lacking democratic credentials, it will likely reduce the incidence of policymaking by officials who are actually accountable to the citizenry. Crafting competition policy is onerous and risky. The effects of business practices are difficult to assess, and rules aimed at forbidding anticompetitive business behavior may unwittingly prohibit or discourage practices that enhance consumer welfare. If Congress can pawn off competition policymaking on an agency for which it is not responsible, it can avoid both the hard work of legislating and any blowback that may result if the policies implemented produce adverse consequences. Why, then, would it make hard policy choices, as republican democracy demands and the U.S. Constitution prescribes?

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[39] 15 U.S.C. § 41; Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (holding that FTC's "duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control"). President Trump recently set up a challenge to Humphrey's Executor by firing, without cause, two Democratic FTC commissioners. See David McCabe & Cecelia Kang, Trump Fires Democrats on Federal Trade Commission, N.Y. Times (Mar. 18, 2025).

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

When implemented in tandem, then, Neo-Brandeisianism's two central policies—abrogation of the consumer welfare standard and imposition of ex-ante conduct rules—impair actual democratic functioning. Given that the promotion of democracy is Neo-Brandeisianism's very reason for being, the movement is ultimately "a policy at war with itself."

Thomas A. Lambert