

# **Biden Antitrust: The Paradox of the New Antitrust Populism**

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*Abstract*

The Biden administration ushered in a new era of antitrust enforcement and competition policy. With the Executive Order on Promoting Competition of July 2021, together with a number of key appointments, Biden antitrust has, within only one year, disrupted the traditional bipartisan approach to antitrust theory and practice.

Catapulting the “Neo-Brandeisians” in charge of the new competition policy, Biden antitrust resurrects an antitrust populism dedicated to deconcentrating an allegedly monopolized economy for the benefit of small businesses. Consumer welfare and innovation are the inevitable collateral damages of this new policy: Biden antitrust promotes a sluggish and static form of competition at the expense of innovation. A more auspicious policy would preserve an unfettered, dynamic form of competition through disruptive innovation.

This Article assesses the fundamentals of Biden antitrust with a discussion of the underlying assumptions underpinning Biden antitrust (II) and the wide range of ensuing actions adopted (III). The Article concludes that the new antitrust populism that Biden antitrust characteristically embodies suffers a fundamental paradox: It will distort and decrease competition in the name of a competition policy disparaging disruptive innovation (IV).

## I. Introduction

The 2020 election placed antitrust at the center of the presidential campaign.<sup>2</sup> The last time antitrust was central to presidential debate hacks back to 1912<sup>3</sup> leading in 1914 to the passing of two major antitrust laws—the Federal Trade Commission Act and the Clayton Act. Would Biden’s term lead to long-lasting changes? Many have speculated that “Biden antitrust”—or the antitrust record under the Biden Administration—would be torn between President Biden’s inclination to remain a moderate democrat and the Progressives’ antitrust populism.<sup>4</sup> The populist approach to antitrust advocated by the “New Brandeis Movement” castigates all forms of market power and aims at deconcentrating the economy by populating the market with small and

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<sup>2</sup> John D. McKinnon, Ryan Tracy, “Where Trump and Biden Stand on Big Tech,” *The Wall Street Journal*, September 17, 2020. See also Herbert Hovenkamp, “The Warren Campaign Antitrust Proposals,” *Penn Regulatory Review*, March 25, 2019, <https://www.theregreview.org/2019/03/25/hovenkamp-warren-campaigns-antitrust-proposals/> (noting that “antitrust policy promises to be an important issue in the 2020 presidential election, and for good reason.”)

<sup>3</sup> Daniel A. Crane, “All I Really Need to Know About Antitrust I Learned in 1912”, 100 *Iowa Law Review*, 2025-2038 (2015) (noting that “the 1912 election had immediate consequences for competition policy, both through Wilson’s victory and through broad consensus themes that emerged from the candidates’ interactions.”); William Kolasky, “The Election of 1912: A Pivotal Moment in Antitrust History”, 25 *Antitrust*, 82-88 (2011) (emphasizing that “not surprisingly given the important role antitrust policy had played in the contest of the Republican nomination, Taft, Roosevelt, and Wilson all devoted a substantial portion of their acceptance speeches to laying out their competing antitrust programs.”)

<sup>4</sup> Daniel A. Crane, “On antitrust and big tech, Biden must return to his centrist roots”, *The Hill*, April 13, 2021, <https://thehill.com/opinion/technology/547921-on-antitrust-and-big-tech-biden-must-return-to-his-centrist-roots?rl=1> (lamenting that “Biden ties himself to neo-Brandeisianism...”). See, e.g., Aurelien Portuese, Commissioner Noah Philips, William Kovacic, “Biden Antitrust”, *Dynamic Antitrust Discussion Series*, March 16, 2021 (where Commissioner expressed the fact that he was “pessimistic about the capability of antitrust to fulfill all of the promises that many advocates have placed on it.”); Claud Marx, “Biden looks left for views on antitrust issues,” *MLex*, July 27, (2020) (pointing out that “though presumptive Democratic presidential nominee Joe Biden had a center-left record on legal issues during his Senate career, some of his party’s more liberal voice have been influencing his view on antitrust policies.”). See also Aurelien Portuese, Joshua Wright, “Antitrust Populism: Toward a Taxonomy”, 25 *Stanford Journal of Law, Business & Finance*, 1-49 (2020) (concluding that “the stakes are high. A return to antitrust populism signals a potential return to market share and conduct presumptions that protect small firms from their more efficient rivals.”)

medium-sized companies irrespective of the consumer welfare standard and of innovation considerations.<sup>5</sup>

Contrary to the expectation that Biden antitrust would somehow choose “a middle way” between antitrust populism and antitrust traditionalism, the first year of the Biden administration has unambiguously embraced antitrust populism. Most notably, President Biden issued in July 2021 an Executive Order on Competition<sup>6</sup> which generally targets large companies irrespective of their merits.<sup>7</sup>

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<sup>5</sup> Aurelien Portuese, “Populism and the Economics of Antitrust”, in Michael Oswald (Ed.) *The Palgrave Handbook of Populism* (Palgrave MacMillan: 2022):227-244.

<sup>6</sup> White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> . See also White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> . More generally, see Herbert Hovenkamp, “President Biden’s Executive Order on Competition: An Antitrust Analysis,” 64 *Arizona Law Review*, 1-34 (2022) (warning with the Executive Order that “sometimes it is tempting to look back nostalgically at the age of Brandeis and admire the protection of small firms from the incursions of chain stores and organized distribution. But that movement failed miserably—as it should have, for the simple reason that customers did not prefer it.”); Sheila Adams et al., “President Biden’s Executive Order on Promoting Competition,” *Harvard Law School Forum on Corporate Governance*, July 20, 2021, <https://corpgov.law.harvard.edu/2021/07/20/president-bidens-executive-order-on-promoting-competition/> (anticipating that “many agency actions resulting from the Competition Order will be subject to legal challenge.”); Robert D. Atkinson et al., “Reflections on President Biden’s Executive Order on Competition,” July 12, 2021, <https://itif.org/publications/2021/07/12/reflections-president-bidens-executive-order-competition> (concluding that “the executive order recycles inaccurate claims made by neo-Brandeisian opponents of big business to justify their “predistributionist” agenda. Again, the core economic problem is not related to too little competition, but to too little productivity.”); Jeffrey Miron, Pedro Braga Soares, “The Biden Executive Order and Market Power,” August 24, 2021, <https://www.cato.org/briefing-paper/biden-executive-order-market-power> (considering that “despite a few sensible proposals, the order would reduce economic efficiency and weaken competition in some areas.”); Doug Badger, “The Good, The Questionable, and the (Potentially) Ugly Health Care Policies in the Biden Competition Executive Order,” The Heritage Foundation Issue Brief, No. 5207, August 10, 2021, <https://www.heritage.org/sites/default/files/2021-08/IB5207.pdf> (considering that “there’s a lot to dislike in President Biden’s executive order...for relying too much on regulation and too little on enhancing economic freedom.”)

<sup>7</sup> Aaron Greg, “Biden takes aim at Big Business in sweeping executive order to boost competition,” July 9, 2021, <https://www.wsj.com/articles/biden-takes-aim-at-corporate-consolidation-big-business-tactics-11625832017> (noting that the order “makes the case that corporate consolidation has helped drive down wages, inflate prices of necessities like hearing aids and prescription drugs, and given consumers too few choices.”); The Economist, “Can the federal bureaucracy resuscitate market dynamism in America?”, July 17, 2021, <https://www.economist.com/united->

President Biden appointed to key offices the heroes of the “New Brandeis Movement,” created a White House Competition Council, sued major companies and unleashed a chilling effect on all mergers, called for new rulemaking authority, embraced European-style regulations, and supported numerous antitrust bills aimed at revamping antitrust principles. How could a radical movement from the Progressives –the “New Brandeis School”<sup>8</sup>–become the Democrats’ mainstream view, be endorsed by an allegedly moderate President<sup>9</sup>, and be cheered by populist Republicans?<sup>10</sup> The answer undoubtedly lies in the working of

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[states/2021/07/15/can-the-federal-bureaucracy-resuscitate-market-dynamism-in-america](https://www.wsj.com/articles/biden-takes-aim-at-corporate-consolidation-big-business-tactics-11625832017)

(questioning “whether judges are willing to accept more expansive antitrust action. So far the signs are not promising.”); Brent Rendall, Ryan Tracy, “Biden Targets Big Business in Sweeping Executive Order to Spur Competition,” *The Wall Street Journal*, July 9, 2021, <https://www.wsj.com/articles/biden-takes-aim-at-corporate-consolidation-big-business-tactics-11625832017> (noting that “the president’s move, months in the making, comes as Democrats have made competition policy and antitrust enforcement a key part of their agenda, arguing that the federal government hasn’t done enough to preserve healthy, competitive markets.”)

<sup>8</sup> On the “New Brandeis Movement,” see Lina Khan, “The New Brandeis movement: America’s antimonopoly debate,” *9 Journal of European Competition Law & Practice*, 131-132 (2018) (noting that “the very fact that antitrust is again at the center of political debates shows that the New Brandeisians have already made a big mark.”); Joseph Coniglio, “Why the ‘New Brandeis Movement’ Gets Antitrust Wrong”, *Law360.com*, April 24, (2018) (arguing that “the broader narrative that constitutes the intellectual gestalt of the [Neo-Brandeisian Movement] seems to suffer from a misunderstanding not only of the Chicago School, but also the American constitutional-republican tradition it purports to represent.”); Daniel Crane, “How Much Brandeis Do the Neo-Brandeisians Want?”, *64 The Antitrust Bulletin*, 531-539 (2019) (asking “can one seriously style herself a Brandeisian if she adopts Brandeis’s abhorrence of bigness in industry but not in government? At least some of the neo-Brandeisians seems to think so... This is surely quite selective anti-Bigness.”); Seth B. Sacher, John M. Yun, “Twelve Fallacies of the ‘Neo-Antitrust’ Movement,” *26 George Mason Law Review*, 1391 (2020) (concluding that Neo-Brandeisian proposals would “make antitrust less, rather than more, effective in its core mission, while doing little to ameliorate the other problems with which they are concerned.”); Douglas A. Melamed, “Antitrust Law and Its Critics,” *83 Antitrust Law Journal*, 269-292 (2020) (emphasizing that “while the populist critics broadly share a concern about concentrations of power, they have various and potentially conflicting objectives.”)

<sup>9</sup> Daniel A. Crane, “On antitrust and big tech, Biden must return to his centrist roots”, *The Hill*, April 13, 2021, <https://thehill.com/opinion/technology/547921-on-antitrust-and-big-tech-biden-must-return-to-his-centrist-roots?rl=1> (“Biden would be wise not to associate his administration solely with the neo-Brandeisian position....(H)e should consider including reformist centrists in his antitrust slate.”)

<sup>10</sup> Lauren Feiner, “Democrats and Republicans form odd alliances during tech antitrust debate,” *CNBC*, June 24, 2021, <https://www.cnn.com/2021/06/24/-big-tech-antitrust-debate-odd-alliances-form-and-party-fractures-show.html> (noting “strange alliances formed between Democrats and Republicans who tend to agree on little else.”); Shira Ovide, “How Klobuchar and Hawley See

politics: Presidential candidate Senator Elizabeth Warren (D-MA) personified the radical stance of populist antitrust in 2019 and was able to leverage her political power when she finally endorsed the future president Joe Biden<sup>11</sup>. Indeed, Senator Warren was directly briefed by the leaders of the Neo-Brandeis Movement when she considered launching a 2016 bid for president<sup>12</sup>:

“In early 2016, one of Warren’s advisers reached out to a Yale law student named Lina Khan...In Warren, Khan and the head of Open Markets, Barry Lynn, found a high-profile figure in Washington who was willing to listen and who could draw attention to the cause. They met for dinner...They suggest several anti-monopoly tools, including breaking up some of these giant companies.”<sup>13</sup>

“Setting the Democratic field’s hostile tone on tech”<sup>14</sup>, Senator Warren’s populist stance on antitrust, together with Senator Bernie Sanders (I-

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Things When It Comes to Technology,” *The New York Times*, May 13, 2021, <https://www.nytimes.com/2021/05/13/books/amy-klobuchar-antitrust-josh-hawley-tyranny-big-tech.html> (noting that “the senators agree that big is bad...To them, the power of tech companies is emblematic of what goes wrong when big corporations are left mostly alone to do what they want. It’s weird, really, how alike they sound.”)

<sup>11</sup> Colin Lecher, “Elizabeth Warren says she wants to break up Amazon, Google, and Facebook”, *The Verge*, March 8, 2019, <https://www.theverge.com/2019/3/8/18256032/elizabeth-warren-antitrust-google-amazon-facebook-break-up> (noting that “the proposal is the most stringent stance taken by a candidate in the presidential campaign so far.”). See also Herbert Hovenkamp, “The Warren Campaign Antitrust Proposals”, *Penn Regulatory Review*, March 25, 2019, <https://www.thereview.org/2019/03/25/hovenkamp-warren-campaigns-antitrust-proposals/> (who asks “Who gains from Senator Warren’s first proposal to keep large platform companies from selling their own merchandise? Not consumers or labor, both of whom benefit from high output and low prices. Indeed, the text of the Warren proposal is largely indifferent to output or pricing—and may even lead to lower output and higher prices.”)

<sup>12</sup> Nik DeCosta-Klipa, “Here’s why Elizabeth Warren didn’t run for president in 2016”, *Boston.com*, April 13, 2017, <https://www.boston.com/news/politics/2017/04/13/heres-why-elizabeth-warren-didnt-run-for-president-in-2016/>

<sup>13</sup>Sheelah Kohlhatkar, “How Elizabeth Warren Came Up With a Plan to Break Up Big Tech”, *The New Yorker*, August 20, 2019, <https://www.newyorker.com/business/currency/how-elizabeth-warren-came-up-with-a-plan-to-break-up-big-tech> (noting that “not long after Warren’s declaration of war on Silicon Valley, several tech executives issued public protests.”)

<sup>14</sup> Nancy Scola, “Warren’s blast at tech leave Biden in the shadows,” *Politico*, October 16, 2019, <https://www.politico.com/news/2019/10/16/elizabeth-warren-big-tech-joe-biden-049320> (noting that “The former vice president was the quietest person on stage on the question of how to handle Silicon Valley. His rivals, echoing Warren, expressed degrees of unease with (tech) companies...”)

Vt.)’s views<sup>15</sup> proved to be extremely influential in the definitive approach to antitrust by the Democratic candidate. Indeed, as Senator Warren endorsed Joe Biden<sup>16</sup>, the latter endorsed the former’s populist stance on antitrust, even though this amounted to go against the Obama era on antitrust when Joe Biden was Vice-President.<sup>17</sup> From being the “quietest” of the Democratic candidates on antitrust<sup>18</sup>, President Biden has, under the influence of Senator Warren’s and friends’ stance of populist antitrust, turned into the kind of trust-busting president that Progressives have long idealized with Theodore Roosevelt—although this venerated president among Progressives does not fit with the mystified representation of Teddy Roosevelt as a trust-buster.<sup>19</sup>

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<sup>15</sup> Cristiano Lima, “Bernie Sanders says he would ‘absolutely’ try to break up Facebook, Google, Amazon”, *Politico*, July 16, 2019, <https://www.politico.com/story/2019/07/16/bernie-sanders-facebook-google-amazon-1416786> (noting that Bernie Sanders “would appoint an attorney general ‘who would break up these huge corporations’”); Open Markets Institute, “Open Markets Applauds Senator Sanders ‘Bright Line’ Standards Antitrust Plank”, Open Markets Institute, Press Release, October 14, 2019, <https://www.openmarketsinstitute.org/publications/open-markets-applauds-senator-sanders-bright-line-standards-antitrust-plank> (noting that Barry Lynn considered that “Bernie Sanders has a simple rule If a company is too big, it should be made smaller.”)

<sup>16</sup> Emily Tewart, “Joe Biden racks up another big endorsement: Elizabeth Warren”, *Vox*, April 15, 2020, <https://www.vox.com/policy-and-politics/2020/4/15/21221946/elizabeth-warren-endorses-joe-biden-twitter-video>

<sup>17</sup> Jake Johnson, “Progressives Demand Biden Break From Obama’s “Failed Leadership’ on Antitrust”, *Commondreams*, March 23, 2021, <https://www.commondreams.org/news/2021/03/23/progressives-demand-biden-break-obamas-failed-leadership-antitrust> ; Zephyr Teachout, “A Blueprint for a Trust-Busting Biden Presidency”, December 18, 2020, <https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting> (noting that Biden had to break with the “dismal precedent set under Biden’s former boss, Barack Obama, and suspend continued and vigorous antitrust prosecutions out of fear of industry backlash...For Biden to take this path with any conviction, he’ll have to admit that Obama’s FTC and DOJ did a bad job.”) On calls for President Biden to remain coherent with his centrist stance, see Daniel A. Crane, “On antitrust and big tech, Biden must return to his centrist roots”, *The Hill*, April 13, 2021, <https://thehill.com/opinion/technology/547921-on-antitrust-and-big-tech-biden-must-return-to-his-centrist-roots?rl=1>

<sup>18</sup> Nancy Scola, “Warren’s blasts at tech leave Biden in the shadows”, *Politico*, October 16, 2019, <https://www.politico.com/news/2019/10/16/elizabeth-warren-big-tech-joe-biden-049320>

<sup>19</sup> Robert Atkinson, Michael Lind, “The Myth of the Roosevelt ‘Trustbusters’”, *The New Republic*, May 4, 2018, <https://newrepublic.com/article/148239/myth-roosevelt-trustbusters> (pointing out that “Roosevelt raged when the Supreme Court ordered the break-up of Standard Oil, in an antitrust lawsuit begun under his administration and completed under Taft..”)

In playing “monopoly games,”<sup>20</sup> President Biden rolled the dice of antitrust between a radical approach and a moderate approach: The dice have spoken and Biden antitrust is nothing but the Progressives’ agenda to endorse a populist “big is bad” stance and advocating for firms to be trimmed down so that none can ever exercise market power, even if such exercise benefit consumers and promote innovation.<sup>21</sup> This first year of Biden antitrust is a year of antitrust populism, not a year of antitrust stability.<sup>22</sup> We can characterize more fundamentally this year with three words: assumptions, actions, and disruption.

## II. An avalanche of assumptions

Breaking away from the Obama period, Biden antitrust relies on a large number of controversial assumptions underpinning the Neo-Brandeisian agenda. Several assumptions justify this efficiency-decreasing Neo-Brandeisian agenda, including the belief that market power is contradictory with competition (a), that concentration cannot generate competition (b), prices often are anticompetitive because they are either excessive or predatory (c), mergers are carried out for anticompetitive reasons (d), and the current lack of competition may lead to fascism (e). These assumptions are essential to Biden antitrust, and yet, they are rebuttable as we now demonstrate.

### *a. Market power and competition*

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<sup>20</sup> Ankush Khardori, “Biden’s Monopoly Games,” *New York Magazine*, January 23, 2022, (noting that “among many antitrust specialists, the view was already that the work of those in the progressive-reform set is standardless and intellectually incoherent, that they pursue companies and industries they hate, like the tech industry, then backfill the legal and intellectual justifications.”)

<sup>21</sup> Aurelien Portuese, “Populism and the Economics of Antitrust”, in Michael Oswald (ed.), *The Palgrave Handbook of Populism* (Switzerland: Palgrave Macmillan, 2021):227-243; Aurelien Portuese, Joshua Wright, “Antitrust Populism” Towards a Taxonomy”, 25 *Stanford Journal of Law, Business & Finance*, 131 (2020); Aurelien Portuese, “Beyond antitrust populism: Towards robust antitrust”, *Economic Affairs*, 40(2) (2020):237-258.

<sup>22</sup> William E. Kovacic, “The Roots of America’s Competition Revolution”, *ProMarket*, September 21, 2021 (distinguishing between “expansionists (who) present their program as occupying a sensible, pro-enforcement middle ground between hyperactive transformationalists (“populists”) and do-nothing (or do-little) traditionalists.”)



The first assumption is that market power reveals the lack of competition and thus should be addressed. For instance, the executive order claims that “today a small number of dominant Internet platforms used their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage.”<sup>23</sup> It is not so much abuse of market power that the executive order targets (as one would presumably think so in an attempt to reinvigorate antitrust laws): Rather, the executive order targets the mere exercise of market power by large corporations.<sup>24</sup> The benefits derived from large-scale enterprises (i.e., scale economies and exercise of market power) are no longer the source of (fierce) competition but rather the evidence of an alleged lack of competition. In that regard, the network effects of the platform business models become illustrative of unfair competition rather than the competitive goal and competitive result from entrepreneurial efforts. The executive order conveys the idea that the very competition exerted by the platform network ought to be prohibited according to Neo-Brandeisians who perceive competition from a firm exerting market power as unfair competition.<sup>25</sup>

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<sup>23</sup> White House, “Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> See also White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> (calling to fight the “rising power of large corporations in the economy.”)

<sup>24</sup> See, e.g., White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> (“the large platforms’ power gives them unfair opportunities to leg up on the small businesses that rely on them to reach customers.”)

<sup>25</sup> The Neo-Brandeisians’ desire to prohibit the competition exerted by the platform network is justified based on a “common carrier principle” borrowed from abandoned regulation of telecommunications and utilities. See, e.g., Lina M. Khan, “The Separation of Platforms and Commerce,” 119 *Columbia Law Review*, (2019):973-1098 (who call for resurrecting for platform old regulations when writing “up until around the 1970s, a basic regulatory principle held that dominant gatekeepers should not be permitted to compete with third parties for access to the gatekeeper’s facilities. Limits on business entry for network monopolies, gatekeeper intermediaries, and other businesses deemed to have outsized control over key services were a mainstay of economic regulation.”) Market power has now misguidedly become synonymous with “monopoly power,” see Amy Klobuchar, *Antitrust. Taking on Monopoly Power From the Gilded Age to the Digital Age*, (New York: Alfred A. Knopf, 2020); Lina M. Khan, “The Ideological Roots of America’s Market Power,” *The Yale Law Journal Forum*, (2018):960-979 (calling to rethink “how

The dystopian model of perfect competition<sup>26</sup>, whereby small and numerous firms charge at a marginal cost their products so that none of them can make profits and consumers have the lowest prices, remains the ideal objective of Neo-Brandeisian.<sup>27</sup> Biden antitrust relies on the romanticized idea of a perfectly competitive market where neither monopolies nor oligopolies operate in markets: unconcentrated markets are believed to be the source of prosperity.<sup>28</sup>

But, this alleged utopia is in fact a dystopia<sup>29</sup>: In such an improbable world, firms would have to ability to invest, innovate, and therefore

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economic power should be organized (decentralized and dispersed), a recognition that forms of economic power are not inevitable and instead can be restructured"); Lina M. Khan, Sandeep Vaheesan, "Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, 11 *Harvard Law & Policy Review*, (2017):235-294 (arguing that "restoring a theory of power that accords with the original values of antitrust—including a distrust of concentrate private power—is critical...");

<sup>26</sup> Compare Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: HarperPerennial, 1942 (2008):106 ("perfect competition is not only impossible but inferior and has no title to being set up as a model of ideal efficiency.") with George J. Stigler, *The Theory of Competitive Price* (New York: Macmillan, 1942):21-31 (arguing that perfect competition would produce a general competitive equilibrium optimizing the allocation of society's resources.")

<sup>27</sup> See, e.g., Lina M. Khan, "The Separation of Platforms and Commerce", 119 *Columbia Law Review*, (2019):973-1098, 980 ("rather than prohibit particular business practices, separations proscribe certain organizational structures."); Zephyr Teachout, Lina M.Khan, "Market Structure and Political Law: A Taxonomy of Power", *Duke Journal of Constitutional Law & Public Policy*, (2014):38-74, 40 ("therefore, scholars and lawmakers ought to treat a certain category of corporations (as defined by structure and size) as political organizations, and treat the rules governing those corporations as 'political rules'.")

<sup>28</sup> White House, "Executive Order on Promoting Competition in the American Economy," July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> ("what we've seen over the past few decades is less competition and more concentration that holds our economy back.") But see Carl Shapiro, "Competition and Innovation: Did Arrow Hit the Bull's Eye?", In Josh Lerner, Scott Stern (Eds.) *The Rate and Direction of Inventive Activity Revisited*, 361-404 (Chicago: University of Chicago Press):375 "the real lesson is that static measures of market structure can be poor metrics for assessing innovation competition. Framing the relationship between competition and innovation as one between product market concentration and competition is not dissimilar to the view in the 1950s and 1960s that atomistic markets were the ideal and best promise (pricing and output competition.)"

<sup>29</sup> Geoffrey Manne, Dirk Auer, "Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins", 28 *George Mason Law Review*, (2021):1279-1398

compete.<sup>30</sup> Additionally, no entrepreneurs would ever invest or create a company compelled to make no profit: Absent the entrepreneurial rents, there will not be entrepreneurs. To ignore the existential incentive of market power for entrepreneurs is, in Joseph Schumpeter's words, to have "Hamlet without the Danish prince"<sup>31</sup>: A theoretical construct intellectually seductive but practically absurd. And yet, there is a broad consensus to say that "market power is not per se anticompetitive" because, as Jerry Ellig and Daniel Lin write, "firms with market have potentially more resources to channel into discovering or implement innovations."<sup>32</sup> As the OECD reported in 2018, "it remains the case that there are potential explanations of this economy-wide evidence that are consistent with competitive innovation creating market power, rather than a lack of competition. In the next section we consider some of these explanations."<sup>33</sup> Increased competition can lead to increased market power for successful companies.

In addition, a firm possessing market power today "may have earned it through past innovation."<sup>34</sup> To remove these Schumpeterian rents is to remove any incentive to innovate and thus compete.<sup>35</sup> Furthermore, market power enables firms to compete globally by bolstering competitiveness.<sup>36</sup> Unfortunately, Biden antitrust falls into the Neo-

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<sup>30</sup> Aurelien Portuese, "Principles of Dynamic Antitrust" (ITIF Report, June 2021) ("perfect competition is the enemy of good competition. Imperfect competition is the source of innovation."); Richard B. McKenzie, Dwight R. Lee, I (Ann Arbor: University of Michigan Press, 2008);41-42 ("perfect competition as a market structure would, if ever realized, be defective, assuming any rising costs at all to the achievement of a perfect state of a market.")

<sup>31</sup> Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, 3<sup>rd</sup> Ed., (HarperPerennial, London: 1942 (2008));86.

<sup>32</sup> Jerry Ellig, Daniel Lin, "A Taxonomy of Dynamic Competition Theories", in *Dynamic Competition and Public Policy. Technology, Innovation and Antitrust Issues*, Jerry Ellig (Ed.), (Cambridge, MA: Cambridge University Press, 2001):16-44, 20.

<sup>33</sup> OECD, *Market Concentration*, DAF/COMP/WD(2018)46, April 20, (2018).

<sup>34</sup> Jerry Ellig, Daniel Lin, "A Taxonomy of Dynamic Competition Theories," in *Dynamic Competition and Public Policy. Technology, Innovation, and Antitrust Issues*, Jerry Ellig (Ed.), (Cambridge, MA: Cambridge University Press, 2001):16-44, 20.

<sup>35</sup> David Teece, "Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy" *Research Policy*, 15(6) (1986): 285-305.

<sup>36</sup> The importance of scale and the enjoyment of market power in order to compete globally has long been documented historically. For instance, Alfred Chandler writes that "the building and managing of the modern multiunit business enterprises was, then, central to the process of modernization in the Western world...Of all the new types of business organizations to be formed in the United States after 1840, none were more complex than those that integrated mass production with mass

Brandeisians' view of attacking any sort of market power.<sup>37</sup> The Biden administration writes that:

“When past presidents faced similar threats from growing corporate power, they took bold action. In the early 1900s, Teddy Roosevelt’s Administration broke up the trusts controlling the economy—Standard Oil, J.P. Morgan’s railroads, and others—giving the little guy a fighting chance.”<sup>38</sup>

Not only is this inaccurate regarding Standard Oil, but this statement reveals that the protection of the “little guy” suggests fighting any company exerting some forms of market power. Moreover, President Biden’s executive order on competition states that “This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power...”<sup>39</sup> But, since current antitrust laws already prohibit abuses of market power, the abuses referred to in the Executive Order must be of different nature than those already prohibited under current antitrust laws. In fact, the White House explained that the Executive Order “launches a whole-of-government effort to combat growing market power in the U.S. economy by seeking to ensure that markets are

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distribution...They operated on a global scale”, in Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business*, (Cambridge, MA: Harvard University Press, 1977):376.

<sup>37</sup> See, e.g., Lina Khan, Sandeep Vaheesan, “Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents”, 11 *Harvard Law & Policy Review*, (2017):235-294 (arguing at 244 that “In contrast to shareholders and executives at businesses with market power, consumers—the victims of market power—are much more likely to be representative of society at large.”). See also Robert Atkinson, “How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine”, (ITIF Report, March 2021), <https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new> (noting that Neo-Brandeisians assume that “in all cases, market power leads to a decrease in economic welfare. There is no need to evaluate each case on its merits.”)

<sup>38</sup> White House, “Fact Sheet: Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

<sup>39</sup> White House, “Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

competitive.”<sup>40</sup> The White House claims that “market-specific studies show that consolidation has led to harmful price increases, providing one of the clearest indicators of enhanced market power.”<sup>41</sup>

However, this claim is unsubstantiated and, if ever demonstrated, conflates price increase with market power, thereby ignoring cost increases, quality increases, innovative efforts, and other technological improvements justifying price increases. Price competition is crippled compared to disruptive competition (or innovation-driven competition).<sup>42</sup> Any discrepancy between marginal cost and marginal price, thus generating market power in perfect competition models, should be tackled according to the prevailing view in the Biden administration. Such policy would preclude any innovations since the ability to generate profit represent the source of innovation and competition.

*b. Concentration and competition*

The second assumption is that markets have consolidated, again illustrating the lack of competition. Indeed, the Executive Order states that “over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality.” According to Neo-Brandeisians, consolidation is synonymous with reduced competition, itself leading to stifled innovation. Both claims that consolidation has increased, and that

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<sup>40</sup> Heather Boushey, Helen Knudsen, “The Importance of Competition for the American Economy”, White House, July 9, 2021, <https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/>

<sup>41</sup> Id.

<sup>42</sup> Aurelien Portuese, Principles of Dynamic Antitrust, (ITIF Report, June 2021), <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation#:~:text=Principles%20of%20dynamic%20antitrust%20suggest,over%20vertical%20and%20conglomerate%20mergers> (“competition increasingly takes place on quality more than merely on price.”); Gregory Sidak, David Teece, “Dynamic Competition in Antitrust Law”, 5 *Journal of Competition Law & Economics* 4, (2009):581-631, 600 (“promoting dynamic competition may well mean recognizing that competitive conduct may involve holding short-run price competition in abeyance.”); Richard Gilbert, *Innovation Matters: Competition Policy for the High-Technology Economy*, (Cambridge, MA:MIT Press, 2020):13 (“For firms in the high-technology economy, it is critical that competition policy consider likely effects on innovation incentives, in addition to the traditional policy focus on conduct that may raise prices.”)

consolidation is tantamount to reduced competition prove inaccurate in light of theoretical discussion and of empirical evidence.<sup>43</sup>

First, consolidation has not increased when the latest data is analyzed. From 2002 to 2017, the American economy has consolidated by just 1 percentage (from 34 percent to 35 percent) when analyzing the share of sales accounting by the top 4 firms in industries (i.e., the C4 ratio).<sup>44</sup> Monopoly has not grown, and consolidation remains over the last few decades stagnant, contrary to the Biden Administration's claims. The Chair of the Federal Trade Commission (FTC) Lina Khan also argued that "evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate further yet."<sup>45</sup> Unfortunately, she fails to provide such evidence other than citing President Biden's Executive Order which does not provide evidence but rather states the same unsubstantiated claim. Instead, concentration has not increased, as demonstrated in the report published by NERA Consulting Group: "There is no general trend towards increasing industrial concentration in the U.S. economy from 2002 to 2017," wrote the report's authors, Robert Kulick and Andrew Card.<sup>46</sup>

Second, not only has concentration not increased, but should concentration have increased, it is necessary to underlie that concentration often proceeds from necessary corporate consolidations to

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<sup>43</sup> The theoretical rebuttal that concentration illustrates decreased competition is discussed in OECD, Market Concentration, DAF/COMP/WD(2018)46, April 20, (2018) ("in order to reach any conclusion on whether there has been a change in competitive intensity across an industry or an entire economy requires us to look beyond concentration measures, and to consider whether other imperfect indicators of competitive intensity are telling the same story.").

<sup>44</sup> Robert Atkinson, Filipe Lage de Sousa, "No, Monopoly Has Not Grown", (ITIF Report, June 2021), <https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown> (noting that "the concentration of the eight largest firms (C8) increased even less, from 44.1 to 44.7 percent.")

<sup>45</sup> Lina Khan, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement. Docket No FTC-2022-0003, January 18, 2022.

<sup>46</sup> Robert Kulick, Andrew Card, "Industrial Concentration in the United States: 2002-2017", March 2022, [https://www.nera.com/content/dam/nera/publications/2022/2022.03\\_CoC%20NERA%20Report\\_FINAL.pdf](https://www.nera.com/content/dam/nera/publications/2022/2022.03_CoC%20NERA%20Report_FINAL.pdf) (who also note that "the evidence does not support the claim that rising industrial concentration is generally associate with poor economic outcomes" but rather that "increases in industrial concentration are associated with output growth, job creation, and high employee compensation.")

benefit consumers and innovation.<sup>47</sup> The OECD wrote in 2018 that “even where there is evidence to suggest an increase in concentration, in the absence of evidence on the movements of other indicators it is extremely difficult to draw any conclusion on whether there has been a change in competitive intensity or not.”<sup>48</sup> Indeed, the scale and scope economies are inherent efficiencies that enable firms to reap the benefits of distributional advantages necessary to offer low prices to consumers and invest and innovate dynamically.<sup>49</sup> This market concentration is in fact corporate rationalization as seminally explained by the historian Alfred Chandler. The modern industrial enterprise:

“permitted rationalization of facilities and personnel (that is, the concentration of production in a small number of large plants of optimal size), the consolidation or creation of nationwide sales forces, and the recruitment of a managerial hierarchy to operate and plan for the enterprise as a whole...One of the first enterprises to follow this path was John D. Rockefeller’s Standard Oil Trust, which had come into being in 1882 to achieve the same ends, seven years before the New Jersey laws formed the formation of holding companies easy.”<sup>50</sup>

But, the key adviser to President Biden on antitrust, Tim Wu, believes that “the broader goals of enforcement—should be animated by a concern that too much concentrated economic power will translate into too much political power, and thereby threaten the Constitutional structure.” This gross confusion between economic concentration to generate efficient consolidations and political concentration as dictatorship is bewildering.<sup>51</sup> Not only have markets not concentrated

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<sup>47</sup> Joshua Wright, Elyse Dorsey, Jonathan Klick, Jan Rybnicek, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust”, 51 *Arizona State Law Journal*, (2018):293-369, 318 (“an increase in concentration alone might be the result of more competition, less competition, or the product of factors completely unrelated to competition in the economy.”)

<sup>48</sup> OECD, Market Concentration, DAF/COMP/WD(2018)46, April 20, (2018)

<sup>49</sup> Philip G. Gayle, “Market Concentration and Innovation: New Empirical Evidence on the Schumpeterian Hypothesis”, *Discussion Papers in Economics*, Working Paper No 01-14, (2001) (finding that “a more concentrated industry stimulates innovation...”)

<sup>50</sup> Alfred Chandler, *Scale, and Scope. The Dynamics of Industrial Capitalism*, (Cambridge, MA: Harvard University Press, 1990):73.

<sup>51</sup> Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, (New York: Columbia Global Report, 2018):55.

over the last two decades but also, should concentration take place, these corporate consolidations often generate increased rationalization for the benefit of consumers and innovation, thus promoting and not undermining competition.

But instead of acknowledging the complex relationship between concentration and competition, the Biden administration unequivocally endorsed the Neo-Brandeisian view that the protection of small (and legacy) businesses would increase competition, thereby amounting to competition to the protection of competitors facing disruption. For instance, on January 3, 2022, when presenting his plan for “boosting competition and reducing prices in the meat-processing industry,” President Biden condemned mere oligopolistic markets and committed to defending small businesses irrespective of their efficiencies when he said: “four big corporations control more than half the markets in beef, pork, and poultry....Small, independent farmers and ranchers are being driven out of business –sometimes businesses that have been around for generations. It strikes at their dignity, their respect, and the family legacies so many of them carry for generations after generation.”<sup>52</sup>

An oligopolistic market has widely been considered as the best market structure to incentivize innovation and to ensure competition. Indeed, building on Schumpeterian insights, Keith Hylton notes that “the prospect of earning large, temporary profits generates efforts to innovate. Successful innovation leads to large profits. Take away the size of profits, and you will see less innovation, and less entry.”<sup>53</sup> In other words, a perfectly competitive market disincentivizes innovation, preventing the very competitive process. Consequently, while fighting concentration at all costs, Biden antitrust ignores the reality that

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<sup>52</sup> White House, Remarks by President Biden During a Virtual Meeting to Discuss Boosting Competition and Reducing Prices in the Meat-Processing Industry, January 3, 2022, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/03/remarks-by-president-biden-during-a-virtual-meeting-to-discuss-boosting-competition-and-reducing-prices-in-the-meat-processing-industry/>. See also White House, Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain, January 3, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>

<sup>53</sup> Keith N. Hylton, *Antitrust Law. Economic Theory & Common Law Evolution*, (Cambridge University Press, 2003):20.



concentration is inherent to the competitive process it pretends to preserve.

*c. Prices and competition*

The third assumption is that prices are too high, therefore enabling companies to profit from the alleged lack of competition.<sup>54</sup> The Biden administration has conveyed the idea that the American economy faces too high prices because of the lack of competition. For instance, the Executive Order aims to offer “lower prices” for consumers, lamenting from “price gouging” to high prices for flight options and drugs.<sup>55</sup> Before delving into the assumption that current prices reflect a lack of competition, Biden antitrust has its fundamental paradox: It decries the consumer welfare standard as a “failed experiment” over the last few decades, which focused on lower prices.<sup>56</sup> In other words, President Biden endorses the Neo-Brandeisians’ contradiction to get good riddance of a standard that ensured low prices in the name of lower prices.<sup>57</sup>

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<sup>54</sup> White House, “Remarks by President Biden on Prescription Drug Costs,” December 6, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/06/remarks-by-president-biden-on-prescription-drug-costs/> (lamenting against the prescription drug prices without acknowledging pharmaceutical innovation.) See Stephen Ezell, “Ensuring U.S. Biopharmaceutical Competitiveness,” <https://itif.org/publications/2020/07/16/ensuring-us-biopharmaceutical-competitiveness> (ITIF Report, June 2020), (“on average, of the top-25 biopharmaceutical R&D-investing companies in the study, American firms averaged an R&D intensity of 25.2. percent, Japanese firms 18.1 percent and European firms 15.5 percent.”); Joe Kennedy, “The Link Between Drug Prices and Research on the Next Generation of Cures,” (ITIF Report, September 2019), <https://itif.org/publications/2019/09/09/link-between-drug-prices-and-research-next-generation-cures> (“When countries intervene to set a cap on drug prices, as Europe did in the 1980s, research and innovation suffer. Moreover, firms are unlikely to invest in future research unless they believe doing so will be profitable.”)

<sup>55</sup> White House, “Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

<sup>56</sup> White House, “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 of letting giant corporations accumulate more and more power.... I believe the experiment failed.”)

<sup>57</sup> Alfred Chandler, *Scale and Scope. The Dynamics of Industrial Capitalism*, (Cambridge, MA: Harvard University Press, 1990):71.

This assumption is paradoxical in many respects. First, larger firms tend to charge lower prices thanks to scale economies: To endorse the populist “big-is-bad” motto of the Neo-Brandeisians proves fundamentally contradictory for the Biden administration. Alfred Chandler has historically demonstrated that the assumption that larger firms charge higher prices is untrue: Large-scale enterprises reap the benefits of scale economies, thereby competing on innovation but also on lower prices. Indeed, “increasing output and overcapacity intensified competition and drove down prices. Indeed, the resulting decline of prices in manufactured goods characterized the economies of the United States and the nations of western Europe from the mid-1870s to the end of the century.”

Today’s industrial giants follow this historically robust trend: They offer extremely competitive prices, if not zero-priced products<sup>58</sup> or even negative prices where consumers become “prosumers”<sup>59</sup> generate earnings from consumption. As the OECD notes, “in the digital economy, new zero-price markets have arisen with their own unique characteristics and vast scope: seven of the ten largest global companies provide zero-price products and services in digital markets.”<sup>60</sup> Unfortunately, the Biden administration considered with “competition enforcers—who operate based on neoclassical economics—free is a suspicious price.”<sup>61</sup> The administration’s desire to protect small

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<sup>58</sup> OECD, “Quality considerations in digital zero-price markets,” Background Note by the Secretariat, DAF/COMP(2018)14, November 28, 2018. See also Makan Delrahim, “I’m Free: Platforms and Antitrust Enforcement in the Zero-Price Economy,” *Assistant Attorney General Makan Delrahim Delivers Keynote Address at Silicon Flatirons Annual Technology Policy Conference at The University of Colorado Law School*, February 11, 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons> (noticing that “zero-price strategies have exploded in the digital economy, driven in large part by the Internet’s decreased production and distribution costs and the increase of digital platforms characterized by network effects and economies of scale.”)

<sup>59</sup> Alvin Toffler, *The Third Wave*, (New York: Morrow, 1980) (coining the term “prosumer”). See also, George Ritzer, Paul Dean, Nathan Jurgenson, “The Coming of Age of the Prosumer”, 56 *American Behavioral Scientist*, (2012):379-398; George Ritzer, “Prosumer Capitalism”, 56 *Sociological Quarterly* 2015):413-445 (arguing that “while prosumption is ubiquitous in contemporary capitalism (as it has been at all times and in all economic systems), it is its crucial importance and its centrality on the Internet, as well as its connection to the material world...”).

<sup>60</sup> OECD, “Quality considerations in digital zero-price markets”, Background Note by the Secretariat, DAF/COMP(2018)14, November 28, 2018.

<sup>61</sup> Friso Bostoan, “Online platforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products,” 35 *Computer Law & Security Review*, (2019):263-280, (arguing

businesses hardly accommodates disruptive competition on prices that benefit consumers.

Second, prominent figures of the populist view of antitrust nominated in critical positions in the Biden Administration have lamented against low prices, thereby advocating a departure from the long-standing consumer welfare standard. For instance, FTC Chair Lina Khan complained against Amazon's low prices and labeled these prices, without evidence of below-cost pricing, as "predatory prices."<sup>62</sup> This accusation ignores the fact that the Supreme Court judged that "predatory pricing" can nevertheless have welfare-increasing consequences on the economy.<sup>63</sup> Be that as it may, the Neo-Brandeisians cannot coherently have it both ways: The bigness of companies cannot be claimed to be simultaneously the source of high prices and low prices. A more reasonable account of the market realities would lead to conclude that large companies charge low prices thanks to scaling economies, but can also charge higher prices to fund research and innovation efforts—thereby departing from the textbook model of marginal prices charged at marginal costs.

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for a methodological update of competition because "it is no exaggeration to say that free is the preference price for online services—a price that finds its roots in two-sided markets theory or freemium models."). On two-sided markets, see Charles Rochet and Jean Tirole, "Platform competition in two-sided markets," 1 *Journal of the European Economic Association* 990 (2003); David S. Evans, Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*, (Boston, MA: Harvard Business Review Press, 2016) (multi-sided platforms "can make more profit by deciding to lose money on one side" depending on the tilt of the price structure.) On the antitrust implications of the zero-priced markets, see David Evans, "The Antitrust Economics of Free," 7 *Competition Policy International* 71, (2011):73-77; John Newman, "Antitrust in Zero-Price Markets: Foundations," 164 *University of Pennsylvania Law Review* 149 (2015); Michal Gal and Daniel Rubinfeld, "The Hidden Costs of Free Goods: Implications for Antitrust Enforcement," 80 *Antitrust Law Journal* 521 (2016).

<sup>62</sup> Lina M Khan, Amazon's Antitrust Paradox, *The Yale Law Journal*, (2017):710-805 (claiming that "Amazon's strategy has enabled it to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws."). Paradoxically, Neo-Brandeisians simultaneously claim that Amazon charges too low prices and too high prices, although without convincing the courts. See John D. McKinnon, "Amazon Wins Dismissal of D.C. Antitrust Lawsuit Over Pricing," *The Wall Street Journal*, March 18, 2022, <https://www.wsj.com/articles/amazon-wins-dismissal-of-d-c-antitrust-lawsuit-over-pricing-11647645389> (dismissing the case that Amazon has artificially imposed high prices on third-party vendors.)

<sup>63</sup> *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ("Without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced.")

More generally, the disruption that large-scale, technologically-savvy enterprises exert on small businesses creates excessive price competition, not low price competition. When Neo-Brandeisians lament low price competition, they, in fact lament extreme price competition. The case of Uber against legacy, small taxi drivers best illustrate the claim of insufficient price competition when in fact there is disruptive price competition enabled through technological innovation.<sup>64</sup>

*d. Mergers and competition*

The fourth assumption is that mergers are inherently bad as they consolidate markets which itself reduces competition. Neo-Brandeisians' mentor Sen. Warren (D-Mass.) introduced a bill that would ban all mergers worth more than \$5 billion, irrespective of efficiency considerations and stripping merger litigation from the appellate jurisdiction of the Supreme Court in what could probably be an unconstitutional reform proposal.<sup>65</sup> In their radical proposals, Neo-Brandeisians want to ban all large mergers<sup>66</sup>, thus undermining one of the key fundamentals of the dynamism of the capitalist society.<sup>67</sup>

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<sup>64</sup> Compare Judd Cramer, Alan B. Krueger, "Disruptive Change in the Taxi Business: The Case of Uber," 106 *American Economic Review* (2016):177-182; Ruth Berins Collier, V.B. Dubal, Christopher L. Carter, "Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States", 16 *Perspective on Politics* (2018):919-937 with Keyawna Griffith, "The Uber Loophole That Protects Surge Pricing", 26 *Virginia Journal of Social Policy & Law*, (2019):34-64 (arguing that "Uber's current surge pricing method should be illegal."); Tina Bellon, "Uber customer claims company won price-fixing suit because arbitrator was scared", *Reuters*, May 22, 2020, <https://www.reuters.com/article/us-uber-lawsuit/uber-customer-claims-company-won-price-fixing-suit-because-arbitrator-was-scared-idUSKBN22Y2ZZZ> ; Edward Moreno, "Judge upholds Uber arbitration win in price-fixing case", *The Hill*, April 8, 2020, <https://thehill.com/policy/transportation/510413-judge-upholds-uber-arbitration-win-in-price-fixing-case>

<sup>65</sup> S. 3847, 117<sup>th</sup> Cong. (2022). See also Maureen Breslin, "Warren leads bill to ban merges worth more than \$5 billion," *The Hill*, March 18, 2022, <https://thehill.com/homenews/senate/598726-warren-leads-proposed-bill-to-ban-mergers-worth-more>

<sup>66</sup> Robert H. Lande, Sandeep Vaheesan, "Ban All Big Mergers. Period." *The Atlantic*, February 25, 2021, <https://www.theatlantic.com/ideas/archive/2021/02/ban-all-big-mergers/618131/> (arguing that "A ban on megamergers would reduce the amount of money and human energy currently wasted in putting together unproductive consolidations.")

<sup>67</sup> Joseph A. Schumpeter, *Business Cycles. A Theoretical, Historical and Statistical Analysis of the Capitalist Process* (New York: McGraw-Hill Book Company, 1939); Joseph A. Schumpeter,

Indeed, President Biden argued that “too many companies have pursued corporate conduct and more aggressive mergers that have made all of us vulnerable. Against this background, our antitrust efforts cannot and will not slow down.”<sup>68</sup> However, the claim that mergers have reached an unprecedented and unexplainable level proves erroneous.<sup>69</sup> Biden antitrust put “corporate America on notice” because of anticipated aggressive merger enforcement.<sup>70</sup>

The most significant wave of mergers (in the early 1900s) has demonstrated greater efficiencies and innovations and enabled America to generate the large-scale, efficient “modern industrial enterprises,” as Alfred Chandler calls them. He adds that in the years during the merger movement from the turn of the century to the nation’s entry into World War I:

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*Capitalism, Socialism and Democracy* (New York and London: Harper & Brothers. (2nd edition 1947).

<sup>68</sup> White House, Remarks by President Biden During a Virtual Meeting to Discuss Boosting Competition and Reducing Prices in the Meat-Processing Industry, January 3, 2022, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/03/remarks-by-president-biden-during-a-virtual-meeting-to-discuss-boosting-competition-and-reducing-prices-in-the-meat-processing-industry/>

<sup>69</sup> Aurelien Portuese, Julie Carlson, “Revising Merger Guidelines While Preserving the Process of Creative Destruction,” (ITIF Comments, March 2022), <https://itif.org/publications/2022/03/16/comments-justice-department-and-ftc-regarding-merger-enforcement> (demonstrating that “the current merger wave is neither unprecedented nor sustainable: It is a well-anticipated response to an economic crisis. The pattern is well-known and unsurprising...”). The merger wave generated by the Covid-19 pandemic was largely predictable; see Chokri Kooli, Melanie Lock Son, “Impact of COVID-19 on Mergers, Acquisitions & Corporate Restructurings”, *Businesses*, (2021), <https://www.mdpi.com/2673-7116/1/2/8/pdf> (noting that “Compared to the 2008 economic downturn where there was a lack of liquidity on the markets, in 2021 we can expect the M&A market to continue on this momentum, as debt and equity financing are readily available and low-interest rates prevail across the globe.”). See also Aurelien Portuese, “Reforming Merger Reviews to Preserve Creative Destruction,” (ITIF Report, September 2021), <https://itif.org/publications/2021/09/27/reforming-merger-reviews-preserve-creative-destruction> (demonstrating that “merger enforcement actions grew steadily from 1979 to 2017, albeit with an unprecedented and sudden rise during the Clinton administration.”); Jeffrey T. Macher and John W. Mayo, “The Evolution of Merger Enforcement Intensity: What Do the Data Show?” 17 *Journal of Competition Law & Economics* (2021):708-727.

<sup>70</sup> Nicole Goodkind, “Biden’s merger watchdogs just put corporate America on notice—50 years of allocating bigger and bigger monopolies are ending soon”, *Fortune*, January 19, 2022, <https://fortune.com/2022/01/19/bidens-merger-watchdogs-just-put-corporate-america-on-notice-50-years-of-allowing-bigger-and-bigger-monopolies-are-ending-soon/>

“the successful mergers had made their shift from a holding company of previously competing firms to an operating company that integrated volume production and distribution and took advantage of the economies of scale. At the same time, few combinations that continued to operate old, outmoded, poorly located plants or did not build new ones that were close to optimal size failed to grow and usually failed to make as satisfactory return on their invested capital.”<sup>71</sup>

Furthermore, the claim that merger enforcement has become tremendously lax is not supported by evidence revealing that merger enforcement intensity has remained relatively stable over the years.<sup>72</sup> The Biden administration incentivizes antitrust agencies to adopt a more aggressive merger policy because of an unsupported lax merger policy. Indeed, the Executive Order calls for agencies to “address the consolidation of the industry in many markets across the economy...” and encourage antitrust agencies to “review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.”<sup>73</sup>

Despite being adopted recently and being widely accepted as adequate, the antitrust agencies, therefore, have engaged in the process of revising guidelines.<sup>74</sup> The FTC unilaterally rescinded the 2020 Vertical Merger

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<sup>71</sup> Alfred Chandler, *Scale, and Scope. The Dynamics of Industrial Capitalism* (Cambridge, MA: Harvard University Press, 1990):78.

<sup>72</sup> Aurelien Portuese, “Reforming Merger Reviews to Preserve Creative Destruction,” (ITIF Report, September 27, 2021), <https://itif.org/publications/2021/09/27/reforming-merger-reviews-preserve-creative-destruction> (noting that “antitrust agencies have not fundamentally reduced merger control over the last decade, and recent studies also demonstrate that there is no under-enforcement in merger policy.”); Aurelien Portuese, Julie Carlson, “Revising Merger Guidelines While Preserving the Process of Creative Destruction,” (ITIF Comments, March 2022), [https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?\\_ga=2.40126818.1326716835.1650292819-1637076531.1642712242](https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?_ga=2.40126818.1326716835.1650292819-1637076531.1642712242)

<sup>73</sup> Section 5 of White House, “Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

<sup>74</sup> Department of Justice, Federal Trade Commission, “Vertical Merger Guidelines,” June 30, 2020, [https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-verticalmerger-guidelines/vertical\\_merger\\_guidelines\\_6-30-20.pdf](https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-verticalmerger-guidelines/vertical_merger_guidelines_6-30-20.pdf) ; Department of Justice, Federal Trade Commission, “Horizontal Merger Guidelines,” August 19, 2020, <https://www.justice.gov/atr/horizontal-merger-guidelines08192010>

Guidelines<sup>75</sup> and generated considerable legal uncertainty for mergers when it declared that firms might complete acquisitions at their own perils—thereby threatening to unwind consummated mergers subsequently. The aggressive stance on mergers assume that mergers are detrimental to the economy, that merger-specific efficiencies never materialize, and that mergers undermine innovation without propelling it. This peculiar view of mergers remains unsubstantiated, suggesting a risk of false positives in blocking pro-innovation and efficiency-enhancing mergers.

*e. Democracy and competition*

The fifth assumption is that smaller firms innovate more and represent economic democracy, therefore competition policy should attack the big and insulate the small from competitive pressures. Large companies (i.e., “monopolies” in Neo-Brandeisian parlance) allegedly threaten (economic) democracy.<sup>76</sup>

President Biden’s executive order conveys the assumption that “excessive market concentration threatens basic economic liberties, democratic accountability...”<sup>77</sup> This assumption lies at the heart of the Neo-Brandeisian claim.<sup>78</sup> Indeed, the populist fear asserts that corporate bigness irremediably leads to political corruption and

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. See, more generally, Aurelien Portuese, Julie Carlson, “Revising Merger Guidelines While Preserving the Process of Creative Destruction,” (ITIF Comments, March 2022), [https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?\\_ga=2.40126818.1326716835.1650292819-1637076531.1642712242](https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?_ga=2.40126818.1326716835.1650292819-1637076531.1642712242)

<sup>75</sup> Federal Trade Commission, “Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary,” September 15, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commissionwithdraws-vertical-merger-guidelines-commentary>

<sup>76</sup> Lina M. Khan, “The Ideological Roots of America’s Market Power Problem, 127 *The Yale Law Journal*, (2018):960-979 (claiming that “excessive consolidation could deliver fascism.”)

<sup>77</sup> White House, “Executive Order on Promoting Competition in the American Economy”, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

<sup>78</sup> Greg Ip, “Antitrust’s New Mission: Preserving Democracy, Not Efficiency”, *The Wall Street Journal*, July 7, 2021, <https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424> (“Neo-Brandeisians like FTC Chairwoman Lina Khan target concentrated economic and political power”).

fascism.<sup>79</sup> This assumption remains unsubstantiated. Instead, it represents a gross confusion between correlation and causation: Economic concentration never led to fascism, but rather fascism leads to economic concentration. Economic history demonstrates that the causation is reverse to what Neo-Brandeisians claim: Very large corporations since the Gilded Age never turned America into a fascist or totalitarian country.

Fascism in Germany and Italy led to a reorganization of small businesses into trade associations and trusts to facilitate State authoritarianism. Paradoxically, Neo-Brandeisians advocate for antitrust exemptions for small businesses and their reorganization into trade groups which precisely contribute to the rise of Big Government through socialist planning. As Alfred Chandler documents, corporations were much larger in the United States than in Germany until World War II, at a time when the Nazi regime struck down large German corporations:

“From 1890s on, the United States was the world’s leading industrial nation...By 1913 it was producing 36% of the world’s industrial output as compared with Germany’s 16% and Britain’s 14%. As a consequence there have always been a greater number of large modern industrial enterprises in the United States than in any other nation...A rough estimates indicates that before World War II only about a quarter of the 200 largest industrial enterprises in Britain and even less than a quarter in Germany....had assets greater than those of the 200<sup>th</sup> largest American firm. In addition, because many of these American firms quickly expanded abroad, they played from the start a major role in global competition, even through their managers concentrated on the home market.”

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<sup>79</sup> Tim Wu, “Be Afraid of Economic ‘Bigness.’ Be Very Afraid.” *The New York Times*, November 10, 2018, <https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html> (claiming that “in the 1930s it contributed to the rise of fascism.”); Lina Khan, “The End of Antitrust History Revisited,” 133 *Harvard Law Review*, 1655-1682 (2020) (“a striking corollary to the idea that extreme economic concentration undermines personal and political liberty is that it can also facilitate the rise of fascism.”)



In other words, America's economy was populated with the greatest number of largest firms who concentrated domestically to compete globally. Large-scale corporations pioneered the new "managerial capitalism" that enabled American firms to expand and compete globally. And contrary to the Neo-Brandeisian's false claim, the Nazi regime halted the growth of large corporations in Germany to impose a fascist control over the economy:

"Thus, by World War II, managerial capitalism has become firmly established in the United States in the industries where the modern industrial enterprises have clustered ever since. This was less evident elsewhere. In Germany families, large investors, and banks continued to play a more influential role, at least until the coming of the Nazi regime."

The Nazi regime interrupted the few large institutions capable of financing corporate growth and installed a State-control model of trusts and trade groups at the expense of the natural growth of private enterprises. The Nazi regime inherited an economy made of small companies, not large companies. Nazism flourished based on Mittelstand which represented 8 million Germans.<sup>80</sup> The Nazi party (NSDAP) was designed to protect small businesses from competition. It is unquestionable that "during the 1920s, craftsmen and small shopkeepers were greatly overrepresented among NSDAP members."<sup>81</sup> In fact, the party "called for the protection of a 'healthy-middle class' (Mittelstand) and the municipalization of large department stores."

As Nazis wanted "the protection of small and middle-sized trade businesses from competition," it is thus unsurprising that "one of the first laws that the Hitler government enacted after it acquired absolute power dealt with the cause of the retailers. The "law for the protection of the German retail trade" enacted on May 12, 1933, set out to ban the opening of any new retail shops. An additional decree ordered all

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<sup>80</sup> Heinrich August Winkler, "From Social Protectionism to National Socialism: The German Small-Business Movement in Comparative Perspective," 48 *The Journal of Modern History*, 1-18 (1976).

<sup>81</sup> Benno Nietzel, "Economic Policy, Middle-Class, Protection and the Liquidation of Jewish Businesses in Nazi Germany 1933-1939", In *National Economies: Volks-Wirtschaft. Racism and Economy in Europe between the Wars (1918-1939/45)* (Ed. Christoph Kreutzmuller, Michael Widt, Moshe Zimmermann), 108-120 (2015).

handicraft businesses that operated inside department stores to close down...Contrary to its initial promises, the Hitler government shied away from closing down existing department stores, thus leaving one of the pivotal demands of small retailers unfulfilled.”

Consequently, even though Hitler did not go as far as small independent retailers wanted regarding the assault on department stores, it appears clear that the Nazi party and then Hitler’s government relied on a strong popular basis made small businesses hoping for Nazism to insulate their businesses from the competition while closing down larger businesses.<sup>82</sup> Big business was not the root of Hitler’s rise to power, widespread xenophobia and antisemitism were.<sup>83</sup> If big business later donated money to the NSDAP, it was to obtain economic protection after failed resistance rather an ideological endorsement.<sup>84</sup>

The Neo-Brandeisian’s myth of Nazism as an opponent to small businesses and the defender of big companies cannot be further from the truth: Hitler municipalized and nationalized large businesses while overly protecting small businesses from competition. The Nazi-controlled nationalized companies because the “total mobilization”<sup>85</sup> that war required, alike the United States suspended antitrust rules

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<sup>82</sup> Frank B. Tipton, “Small Business and the Rise of Hitler: A Review Article,” 53 *The Business History Review*, 235-246 (1979) (noting that “many scholars have identified German small business as a crucial source of support for the Nazi seizure of power.”)

<sup>83</sup> See Henry A. Turner, “Big Business and the Rise of Hitler”, 75 *The American Historical Review*, 56-70 (1969).

<sup>84</sup> Daniel Crane, “Fascism and Monopoly”, 118 *Michigan Law Review*, 1315-1370 (2020) (noting for instance that “Forben initially resisted Nazification, worried about potential ill effects on its global business of becoming overly intertwined with a controversial political party. However, by the mid-1930s, the firm’s management had acceded to the reality that alliance with the Nazis was critical to the continued success of the Farben enterprise.”) Big business had to cooperate with the Nazi regime, else they would have been nationalized. Big business did not provide major financial support to the Nazis as demonstrated seminally in Michael D’Antonio, “Before the Storm: German Big Business and the Rise of the NSDAP”, *Thesis submitted to the University of Delaware, Spring 2016* (noting that “Hitler, however, was a shrewd politician, and he recognized that the most important factor in the NSDAP rise to political power was votes, not financial backing. Such support did not include industrialists, who were a small and closely guarded group, but, rather, a grassroots base of voters.”)

<sup>85</sup> Christoph Kreutmüller, “Introduction: The Eruption of Racist Fault Lines in Central European Economy 1918-1933”, in *National Economies: Volks-Wirtschaft. Racism and Economy in Europe between the Wars (1918-1939/45)* (Ed. Christoph Kreutmüller, Michael Widt, Moshe Zimmermann), 1-16 (2015).

during wartime. Again, fascism led to nationalized, large conglomerates and not the reverse. As Daniel Crane aptly notes, “The idea that concentrated economic power breeds concentrated political power has much rhetorical appeal, but documenting the relationship historically, exploring the variations and mechanisms, and prescribing the particular antidotes remains a largely incomplete project.”<sup>86</sup> The lack of causation from big businesses to fascism appears clear with benchmark models. Indeed, fascisms in Japan and in Italy further demonstrate that fascisms emerge from an economy populated with small firms, not with large firms—namely, zaibatsu in Japanese economy<sup>87</sup> and corporazioni in Italy.<sup>88</sup>

The Neo-Brandeisian reference to weaponizing fascism and Nazism to promote a misguided agenda amounts to Godwin’s law in antitrust: It is a prolonged discussion in search of thought-terminating clichés. Bigness never caused fascism. But, fascism always protected small businesses and nationalized few companies. For, it is historically evident that “the fundamental distinguishing factor in fascism is its economic program,

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<sup>86</sup> Daniel Crane, “Fascism and Monopoly,” 118 *Michigan Law Review*, 1315-1370 (2020).

<sup>87</sup> Randall K. Morck, Masao Nakamura, “A Frog in a Well Knows Nothing of the Ocean. A History of Corporate Ownership in Japan”, in *A History of Corporate Governance around the World: Family Business Groups to Professional Managers*, NBER, 367-465 (2005) (noting that “there were many family-based zaibatsu groups in many localities in Japan before World War II. The scale of their business operations and geographic coverage was much smaller than that of the major zaibatsu group such as Mitsui, Sumitomo, and Mutsubishi.”) The Japanese roots of fascism have been identified in the “small factory owners, building contractors, proprietors of retail shops, master carpenters, small landowners, independent farmers, school teachers (especially in primary schools), employees of village offices, low-grade officials, Buddhist and Shinto priests” according to Maruyama Masao, *Thought and Behavior in Modern Japanese Politics* (London: Oxford University Press, 1963):57; O. Tanin, E. Yohan, *Militarism and Fascism in Japan* (New York: International Publishers, 1934):272 (defining that Japanese fascism emerged from “the reactionary chauvinist organizations among the intermediate social strata, principally small landed proprietors and the urban petty bourgeoisie” who was “in its ideology, closer to West European fascism.”)

<sup>88</sup> Benito Mussolini made clear that the fascist society will emerge from a corporative system unified under the State: “Fascism recognizes the real needs which gave rise to socialism and trade unions, giving them due weight in the guild or corporative system in which divergent interests are coordinated and harmonised in the unity of the State.” He further admitted that “it may be objected that his program implies a return to the guilds (corporazioni). No matter! I therefore hope this assembly will accept the economic claims advanced by national syndicalism...Is it not strange that from the very first day, at Piazza San Sepolero, the word ‘guild’ (corporazione) was pronounced, a word which, as the Revolution developed, was to express one of the basic legislative and social creations of the regime?”, in Benito Mussolini, *The Doctrine of Fascism* (Firenze: Vallecchi, 1935).

which aims at rehabilitating the middle class.”<sup>89</sup> For the Biden administration to convey Neo-Brandeisians’ gross historical mistakes about the stance of Nazism and fascism on small businesses is regrettable, especially when it proves to be a major assumption stated in the first sentence of an executive order on competition. “Excessive market concentration” does not threaten “basic economic liberties, democratic accountability”: Rather, market concentration has historically proven to be a fundamental reason behind the absence of fascist government in American history as opposed to European and Japanese histories.

But, this mistake is unsurprising since Tim Wu, who helped draft the executive order, has repeatedly claimed baselessly that concentration led to fascism and that today’s economy is “ripe for dictatorship.”<sup>90</sup> Neo-Brandeisian’s assumptions and mistakes on economic history pervaded the economic order on competition and can thus only lead to unintended consequences due to incorrect analysis. Paradoxically, Neo-Brandeisians’ bias toward small businesses and advocacy for Big Government controlling the way firms compete ironically bear resemblances with the economic program of fascism.<sup>91</sup>

These assumptions inherently underpin the Neo-Brandeisian agenda supporting Biden antitrust. Contrary to professor Crane’s advice that President Biden should not tie himself to Neo-Brandeisianism<sup>92</sup>, the President has tied himself to the controversial fringe of antitrust

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<sup>89</sup> Francis Brown, “The American Road to Fascism”, 38 *Current History*, 392-398, (1933).

<sup>90</sup> See Tim Wu, “Be Afraid of Economic ‘Bigness.’ Be Very Afraid” *The New York Times*, November 10, 2018, <https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html> (assuming that “there is a direct link between concentration and the distortion of democratic process.”) But see Alec Stapp, “Tim Wu’s Bad History: Big Business and the Rise of Fascism”, *Niskanen Center*, March 11, 2019 (concluding that “Hitler’s rise to power began in September 1919. He was either ignored or actively opposed by most of the leading industrialists until after he was appointed chancellor on January 30, 1933...”).

<sup>91</sup> Francis Brown, “The American Road to Fascism,” 38 *Current History*, 392-398, (1933) (noting that “awakened by its painful experiences since the World War to the evils of unrestrained competition and uncontrolled production which seems to be characteristic of the capitalistic system, the middle class has sought to escape its troubles through economic planning within a self-sufficing State.”)

<sup>92</sup> Daniel A. Crane, “On antitrust and big tech, Biden must return to his centrist roots,” *The Hill*, April 13, 2021, <https://thehill.com/opinion/technology/547921-on-antitrust-and-big-tech-biden-must-return-to-his-centrist-roots?rl=1>

radicals on the assumptions they convey.<sup>93</sup> Expectedly, Biden antitrust has adopted several initiatives that fulfill the Neo-Brandeisian agenda despite its unintended consequences.

### III. A Storm of Actions

President Biden's most visible actions on antitrust were the appointment of the most prominent figures of the Neo Brandeis Movement in critical positions in the administration. Lina Khan is Chair of the FTC<sup>94</sup>, Tim Wu advises President Biden in the White House<sup>95</sup>, and

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<sup>93</sup> On how Neo-Brandeisianism ignores Schumpeterian competition, see Richard N. Langlois, “Potential Competition as Process and Structure”, *CPI Antitrust Chronicle*, February 2022 (“As happened in the twentieth century, market segmentation would ultimately end up protecting incumbents from the genuinely new. Schumpeterian competition is not about maintaining the structure of competition. It is about destroying and replacing it. Some Neo-Brandeisians announce themselves to be protective of innovation – even, in the case of Tim Wu, of putatively Schumpeterian innovation. But they generally mean this in an exceedingly narrow sense: antitrust should be concerned with preventing existing large firms from unilaterally excluding or buying up (small, new) competitors.”)

<sup>94</sup> White House, “President Biden Announces his Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission,” March 22, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/22/president-biden-announces-his-intent-to-nominate-lina-khan-for-commissioner-of-the-federal-trade-commission/> . See also Lauren Feiner, Lina Khan, progressive tech critic, sworn in as FTC chair, *CNBC*, June 15, 2021, <https://www.cnn.com/2021/06/15/senate-confirms-lina-khan-to-become-ftc-commissioner.html> (noting that “Khan’s confirmation signals a bipartisan desire to impose more regulations on Big Tech companies like Facebook, Amazon, Alphabet and Apple.”); Leah Nylen, “Huge win for progressives as Lina Khan takes the helm, at FTC”, *Politico*, June 15, 2021, <https://www.politico.com/news/2021/06/15/khan-confirm-ftc-494609> (reporting that the “The surprise move gives progressive Democrats both the reins and a majority at the antitrust agency, spurring hopes among critics of Silicon Valley's giants for a new assertiveness from the FTC...”); Carl Zakrewski, Tyler Pager, “Biden taps Big Tech critic Lina Khan to chair the Federal Trade Commission”, *The Washington Post*, June 15, 2021, <https://www.washingtonpost.com/technology/2021/06/15/khan-ftc-confirmation-vote/> (stating that “Biden’s decision to put Khan in charge of the FTC’s agenda is the clearest sign yet that his administration will take a drastically different approach to regulating the tech giants than did President Barack Obama...”)

<sup>95</sup> White House, “White House Announces Additional Policy Staff”, March 5, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/05/white-house-announces-additional-policy-staff/> ; Ryan Tracy, “Tim Wu, Big Tech Critic, Named to National Economic Council”, *The Wall Street Journal*, March 5, 2021, <https://www.wsj.com/articles/tim-wu-big-tech-critic-named-to-national-economic-council-11614954821> ; Kate Cox, “White House signals coming antitrust push with Tim Wu appointment”, *ArsTechnica*, March 5, 2021, <https://arstechnica.com/tech-policy/2021/03/tech-critic-tim-wu-joins-biden-admin-as-tech-competition-advisor/> (arguing that “Wu's new role does not put him in a position to come leaping in

Jonathan Kanter heads the antitrust division of the Department of Justice.<sup>96</sup> All three personalities are unwavering Neo-Brandeisians who disparage the contributions of the Chicago School on antitrust and advocate for a return to the populist roots of antitrust, which aims to restructure the economy around atomistic competition made by small firms who benefit from a lenient antitrust policy. In contrast, larger firms are either broken up or subject to aggressive antitrust enforcement.

*a. The Executive Order*

President Biden's Executive Order on Competition is a notable effort to promote competition by a President. Rarely has a President adopted an Executive Order to encourage competition and address antitrust matters. One notable exception is President Obama's executive order a few months before leaving the White House, titled "Steps to increase competition and better inform consumers and workers to support continued growth of the American economy."<sup>97</sup>

However, Biden's executive order differs in its ambitions: With 72 initiatives, the order is the most ambitious and radical policy from the White House and a policy change from previous administrations that broadly accepted the bipartisan consensus upon which has elaborated modern antitrust policies.<sup>98</sup> The antitrust philosophy of the Biden

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with a metaphorical sledgehammer and start smashing up companies."); Lauren Feiner, "Big Tech critic Tim Wu joins Biden administration to work on competition policy", *CNBC*, March 5, 2021, <https://www.cnn.com/2021/03/05/big-tech-critic-tim-wu-joins-biden-administration-to-work-on-competition-policy.html> ("the hire signal the Biden administration is serious about competition policy and will likely be viewed favorably among progressives.")

<sup>96</sup> White House, "President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust", July 20, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/>

<sup>97</sup> White House, Executive Order – Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy", April 15, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>

<sup>98</sup> Zach Montague, "Biden's order includes 72 initiatives that take aim at very specific practices the White House wants changed." *The New York Times*, July 9, 2021, <https://www.nytimes.com/2021/07/09/us/politics/biden-executive-order-competition.html> . See

administration is contained in the Executive Order: Touted as a “progressive” document<sup>99</sup>, the executive order encapsulates Biden’s endorsement of the Neo-Brandeisians’ view of antitrust. Some suggest that the Executive Order “does not speak about displacing antitrust’s current economic approach...”<sup>100</sup> However, a close read of the Executive Order reveals not only that the assumptions conveyed in the Executive Order demonstrate that Neo-Brandeisians analysis has become central to the Biden administration’s stance on antitrust. More importantly, the recommendations implement “an agenda progressives call ‘predistribution’—the idea that ‘the best path forward is to deal with the underlying market forces that cause inequality in the first place.’”<sup>101</sup>

For instance, two main policy priorities of the executive order illustrate this “predistribution” agenda conveying the populist idea that “big is bad” irrespective of efficiencies. First, Section 5(c) of the executive order calls for the antitrust agencies to revise the merger guidelines to adopt a much more aggressive stance on mergers. To aggressively fight mergers would irremediably lead to slowing down the corporate consolidation rate and prevent potential innovations arising out of vertical integration. Additionally, a departure from the traditional merger enforcement policy would signal a bias toward smaller firms, preventing these firms from competing globally. American competitiveness can deplete due to the impediment to the emergence of “superstar firms.” The Neo-Brandeisian case against mergers is a predistributionist case: The idea is to prevent firms from exercising market power in the first place rather than to redistribute power and income subsequently.

The “father” of the Neo-Brandeisians – Barry Lynn—has recently described the executive order as a “revolutionary” change that would put

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also Maureen Ohlhausen, “Does the U.S. Economy Lack Competition?” 1 *The Criterion Journal on Innovation*, 47-63 (2016).

<sup>99</sup> Phil Gramm and Mike Solon, “Biden Turns Back the Progressive Clock,” *Wall St. J.* (July 14, 2021), <https://www.wsj.com/articles/biden-turns-back-the-progressive-clock-11626286594>

<sup>100</sup> Herbert Hovenkamp, “President Biden’s Executive Order On Competition: An Antitrust Analysis”, 64(2) *Arizona Law Review*, 1-35 (2022).

<sup>101</sup> Robert D. Atkinson et al., “Reflections on President Biden’s Executive Order on Competition” (ITIF Report, July 2021), <https://itif.org/sites/default/files/2021-biden-competition-executive-order.pdf>

“democracy and human liberty” at the cornerstone of the future antitrust:

“President Biden gave a revolutionary speech supporting an executive order to fight concentrated power and control in the United States. This was back in July, a revolutionary speech in which he says neoliberalism, Borkism - Robert Bork, the antitrust scholar of the late 70s and early 80s who was the father of much of neoliberal competition policy - President Biden said Borkism is a failed experiment, and the north stars for our competition policy shall be democracy and human Liberty.”<sup>102</sup>

This is no surprise: The executive order is transformative since it is predistributionist by deconcentrating the economy notably by blocking mergers. It is also transformative by focusing on promoting smallness, not consumer benefits or innovation.<sup>103</sup> The Neo-Brandeisian idea of liberty is a peculiar idea whereby there is no liberty when consumers shop from large companies: Allegedly liberty can only come from an unconcentrated economy populated with small firms. Of course, this notion of liberty ignores the considerable benefits associated with consumers being offered the most efficient and innovative products irrespective of the size of the companies, but also it conflates liberty that takes place through political institutions with liberty that does not reflect through the market mechanism.

Second, the executive order aims to weaken the rights of patent holders. It is unsurprising since Neo-Brandeisians see patent holders as monopolists who should be subject to a wrath of obligations and prohibitions rather than to the profits that patent holders can legitimately expect.<sup>104</sup> Section 5(d) of the executive order calls agencies to “avoid the potential for anticompetitive extension of market power

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<sup>102</sup> Barry Lynn, *Age of Economics*, October 9, 2021, <https://www.ageofeconomics.org/interviews/barry-c.lynn/>

<sup>103</sup> Aurelien Portuese, Julie Carlson, “Revising Merger Guidelines While Preserving the Process of Creative Destruction”, (ITIF Comments, March 2022), [https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?\\_ga=2.40126818.1326716835.1650292819-1637076531.1642712242](https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?_ga=2.40126818.1326716835.1650292819-1637076531.1642712242)

<sup>104</sup> Julie Carlson, “Comments to the DOJ on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments”, (ITIF Comments, January 2022), <https://itif.org/publications/2022/01/25/comments-doj-licensing-negotiations-and-remedies-standards-essential-patents>



beyond the scope of granted patents, and to protect standard-setting processes from abuse....” To do so, the executive order enjoins the agencies to “revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019.” This 2019 policy statement contributed to a rebalancing from the implementers’ concerns to standards-essential patents (SEP) holders’ concerns. In other words, the 2019 policy statement contributed to the much-needed strengthening of intellectual property rights by making injunctive reliefs available against unwilling licensees.<sup>105</sup>

The executive order’s stance against patent holders and in favor of implementers reveals a preference toward competition over innovation: Inventions must be made available to rivals irrespective of their good faith behaviors and irrespective of the disincentive such availability can create for innovators. The very use of market power by an innovator toward its innovation appears suspicious for Neo-Brandeisians, and such an approach is reflected in the executive order.

These two illustrations demonstrate that the executive order disparages the rationales for innovation—namely, mergers and patent protection—in the name of a more “perfect” competition. Corporate size through mergers and corporate control through patents become suspicious forms of competition: The executive order promotes a form of competition where innovations become less readily available. In other words, the executive order promotes a static state of competition rather than the most valuable form of dynamic competition pioneered by Joseph Schumpeter and widely understood as being the engine of disruptive competition.<sup>106</sup>

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<sup>105</sup> Id.

<sup>106</sup> Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, 3<sup>rd</sup> Ed., (HarperPerennial, London: 1942 (2008)):86. See also J. Gregory Sidak, David J. Teece, “Dynamic Competition in Antitrust Law”, 5(4) *Journal of Competition Law and Economics*, 581-631 (2009); Aurelien Portuese, Principles of Dynamic Antitrust, (ITIF Report, June 2021), <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation#:~:text=Principles%20of%20dynamic%20antitrust%20suggest,over%20vertical%20and%20conglomerate%20mergers> ; Douglas H. Ginsburg, Joshua D. Wright, “Dynamic Analysis and the Limits of Antitrust Institutions”, 78 *Antitrust Law Journal*, 1-21 (2012); David S. Evans, Richard

More generally, the executive order is made of six sections: (1) Policy; (2) The Statutory Basis of a Whole-of-Government Competition Policy; (3) Agency Cooperation in Oversight, Investigation and Remedies; (4) The White House Competition Council; (5) Further Agency Responsibilities; and (6) General Provisions. Each section guides both the federal government and the private sector regarding the ways the Biden administration intends to increase competition and decrease the barriers that are perceived as inhibiting competitive behavior. Section 5 (Further Agency Responsibilities of the EO) calls upon the different federal agencies to take a number of specific actions supporting the administration's stated policy objectives. Many of these action items focus on labor and employment, health care and medicine, transportation, agriculture, technology, and defense procurement. The implementation of the executive order is ensured through the creation of the White House Competition Council which reflects the executive order's whole-of-government approach to promoting competition.

*b. The White House Competition Council*

The original aspect of the executive order is to create the White House Competition Council. As part of the whole-of-government approach of the Biden administration to competition, the executive order details the 14 federal agencies that are charged with administering authorities associated with preventing anticompetitive behavior:

- (1) the Department of the Treasury;
- (2) the Department of Agriculture;
- (3) the Department of Health and Human Services (HHS);
- (4) the Department of Transportation (DOT);
- (5) the Federal Reserve System;
- (6) the Federal Trade Commission (FTC);

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Schmalensee, "Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries", 2 *Innovation Policy and the Economy*, 1-50 (2002); Keith N. Hylton, "A Unified Framework for Competition Policy and Innovation Policy", 22(2) *Texas Intellectual Property Law Journal*, (2014); Dennis W. Carlton, Robert H. Gertner, "Intellectual Property, Antitrust, and Strategic Behavior", 3 *Innovation Policy and the Economy*, 29-59 (2003); David J. Teece, "Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy", 9(1) *Journal of Law, Economics & Policy*, 97-118 (2012)

- (7) the Securities and Exchange Commission;
- (8) the Federal Deposit Insurance Corporation (FDIC);
- (9) the Federal Communications Commission (FCC);
- (10) the Federal Maritime Commission (FMC);
- (11) the Commodity Futures Trading Commission;
- (12) the Federal Energy Regulatory Commission;
- (13) the Consumer Financial Protection Bureau (CFPB), and
- (14) the Surface Transportation Board (STB).

These agencies are tasked to implement the executive order mainly through new guidelines, rulemaking activity, and the elimination of government-created barriers to competition. These agencies are represented in the White House Competition Council. Indeed, the Council comprises eight cabinet members and heads of seven independent agencies. This Council is an innovative and promising institutional forum that can best identify areas where regulations stifle competition. For instance, the area of occupational licensing represents a major venue for promoting competition in the labor markets.

The White House Competition Council catalogs the key areas of action.<sup>107</sup> First, competition in healthcare aims at “lowering prescription drug and healthcare costs for consumers.”<sup>108</sup> Second, competition in labor markets aims at “empowering works to demand dignity and respect in the workplace.”<sup>109</sup> Third, competition in finance aims at “lowering costs and increasing market transparency for consumers and businesses.”<sup>110</sup> Fourth, competition in food and agriculture portends at “lowering food prices for consumers and increasing earnings for farmers and ranchers.”<sup>111</sup> Fifth, competition in technology strives to “lower prices and better options for broadband, devices, and other services.”<sup>112</sup> Sixth, competition in transportation aims at “lowering prices for travelers and reducing shipping costs for businesses.”<sup>113</sup> Finally,

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<sup>107</sup> White House, White House Competition Council, <https://www.whitehouse.gov/competition/>

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

“stopping anticompetitive mergers” is designed to “enforcing the antitrust laws to combat monopoly power.”<sup>114</sup>

The inaugural meeting of the White House Competition Council took place on September 10, 2021.<sup>115</sup> The Council is chaired by Brian Deese, Director of the National Economic Council. The inaugural meeting was the opportunity for the Biden administration to emphasize that the executive order on competition fits within a broader agenda. Indeed, the Council Chair noted that the “President’s competition agenda is core to the Administration’s plan to Build Back Better and critical to keeping prices low for American consumers, spurring innovation, and allowing small businesses to compete on a level playing field.”<sup>116</sup> The emphasis of the executive order to promote and favor small businesses over large businesses is thus clearly stated, thereby demonstrating a bias in favor of deconcentration over innovation concerns.

The second meeting of the White House Competition Council took place on January 24, 2022.<sup>117</sup> At the second meeting, the Council comprises ten cabinet members and heads of seven independent agencies. The first Council meeting welcomed two new members –i.e., the Chair of the Securities and Exchange Commission and the Chair of the Commodity Futures Trading Commission.

### *c. Key Nominations*

Beyond the executive order on promoting competition, Biden antitrust is characterized by the role and tremendous influence that the Neo-Brandeisians gained during President Biden’s presidency. Key nominations demonstrate such influence.

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<sup>114</sup> Id.

<sup>115</sup> White House, “Readout of the Inaugural Meeting of the White House Competition Council,” September 10, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/10/readout-of-the-inaugural-meeting-of-the-white-house-competition-council/>

<sup>116</sup> Id.

<sup>117</sup> White House, “Readout of the Second Meeting of the White House Competition Council,” January 24, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/24/readout-of-the-second-meeting-of-the-white-house-competition-council/>

First, President Biden nominated Tim Wu as competition adviser at the White House. Columbia law professor Tim Wu is best known in the antitrust community for his book *The Curse of Bigness: Antitrust in the New Gilded Age*.<sup>118</sup> Borrowing explicitly from Justice Brandeis' *Curse of Bigness* written in 1914<sup>119</sup>, Tim Wu starts his book by writing:

“We are four decades into a major political and economic experiment. What happens when the United States and other major nations weaken their laws meant to control the size of industrial giants? What is the impact of allowing unrestricted growth of concentrated private power, and abandoning most curbs on anticompetitive conduct? The answers, I think, are plain. We have managed to recreate both the economics and politics of a century ago—the first Gilded Age—and remain in grave danger of repeating more of the signature errors of the twentieth century....If we learned one thing from the Gilded Age, it should have been this: The road to fascism and dictatorship is paved with failures of economic policy to serve the needs of the general public.”<sup>120</sup>

Compare with President Biden's speech when signing the executive order on competition:

“We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And...what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents. I believe the experiment failed. We have to get back to an economy that grows from the bottom up and the middle out.”<sup>121</sup>

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<sup>118</sup> Tim Wu, *The Curse of Bigness. Antitrust in the New Gilded Age*, (New York: Columbia Global Report, 2018).

<sup>119</sup> Louis D. Brandeis, *Other People's Money – Chapter VIII A Curse of Bigness*, (New York: McClure Publication, 1914)

<sup>120</sup> Tim Wu, *The Curse of Bigness. Antitrust in the New Gilded Age*, (New York: Columbia Global Report, 2018):14.

<sup>121</sup> White House, “Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy,” Speech, 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/>

Biden antitrust therefore reflect a Neo-Brandeisian policy that Tim Wu advocates. For, Tim Wu wrote about the need to adopt “A Neo-Brandeisian Agenda”<sup>122</sup>, which revolve around six aspects:

- 1) “Merger review”: “The priority for Neo-Brandeisian antitrust is the reform of merger review,” according to Tim Wu. Calling for “broader and tougher merger standards,” Tim Wu advocated for “a higher bar for giant mergers (over \$6 billion in value)”; “a return to structural presumptions, such as per se ban on mergers that reduce the number of major firms to less than four.”<sup>123</sup> These proposals echo antitrust bills which propose a per se ban on mergers or reversed burden of proof on the merging parties.<sup>124</sup>
- 2) “Democratization of the Merger Process”: Tim Wu proposed that “industry comments on a major merger should be filed publicly, not in secret, and any interested member of the public should be encouraged to file comments.” Tim Wu disparaged the risks of “politicization” of this public participation, considering that “big mergers are political.”<sup>125</sup>
- 3) “Big Cases”: Neo-Brandeisian antitrust fits into the “trustbuster” tradition and Tim Wu suggests taking inspiration from Europe’s trustbusting record against tech platforms. He indeed wrote that “European antitrust is far from perfect, but its leadership and willingness to bring big

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<sup>122</sup> Tim Wu, *The Curse of Bigness. Antitrust in the New Gilded Age*, (New York: Columbia Global Report, 2018):127-139.

<sup>123</sup> *Id.*, 128-129.

<sup>124</sup> See, for instance, Sen. Elizabeth Warren (D-MA) bill to prohibit mergers over \$5 billion in value, S.3847, Prohibiting Anticompetitive Mergers Act of 2022, 117<sup>th</sup> Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3847?s=1&r=2> . See also Sen. Amy Klobuchar (D-MN) bills on mergers: S.225, Competition and Antitrust Law Enforcement Reform Act of 2021, 117<sup>th</sup> Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/225/text> ; S.3197, Platform Competition and Opportunity Act of 2021, 117<sup>th</sup> Cong. <https://www.congress.gov/bill/117th-congress/senate-bill/3197>

<sup>125</sup> Tim Wu, *The Curse of Bigness. Antitrust in the New Gilded Age*, (New York: Columbia Global Report, 2018):130.

cases when competition is clearly under threat should serve as a model for American enforcers and for the rest of the world.”<sup>126</sup> Recently, the General Court of the European Union annulled an antitrust fine that the European Commission imposed on Intel because of the lack of economic analysis in its fining decision.<sup>127</sup> Also, the same Court considered that Google should be treated as an essential facility, thereby opening the doors to public utility-style regulation.<sup>128</sup> Transplanting European antitrust into American antitrust as Neo-Brandeisians hope will mean less economic analysis of antitrust enforcement and a more precautionary approach to innovative companies.

- 4) “Breakups”: Supposedly, “breakups or structural remedies are, effectively, self-executing, and thereby a much cleaner way of dealing with competition problems.” Advocating for breaking up large companies, Tim Wu takes Facebook as an example: “While Facebook might not like being dissolved, and might find the new competition unwelcome, it is hard to see what the great social cost, if any, would be...The simplest way to break the power of Facebook is breaking up Facebook.” Given Tim Wu’s ignorance of the benefits for consumers and innovation of large-scale enterprises, breakups appear to generate only net benefits. However, contrary to the apparent simplicity of breakups, the reality seems less straightforward: A judge dismissed the FTC’s first complaint against Facebook because of the FTC’s inability to demonstrate the market power of

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<sup>126</sup> Id, 131.

<sup>127</sup> General Court of the European Union, The General Court annuls in part the Commission decision imposing a fine 1.06 billion euros on Intel, Press Release No 16/22, January 26, 2022, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf>

<sup>128</sup> General Court of the European Union, The General Court largely dismisses Google’s action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services, Press Release No 197/21, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf> (considering that “the general results page has characteristics akin to those of an essential facility inasmuch as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market.”)

Facebook in an artificially defined market.<sup>129</sup> Breakups are not only complicated, but they are also efficiency-decreasing.

- 5) Market investigations and Competition Rules: Tim Wu proposes “market investigations tools” to tackle “stagnant and longstanding but not particularly abusive or aggressive monopolies or duopolies.” The basic idea is that a market “dominance of at least ten years or longer” would be addressed, absent anticompetitive conduct, through “pro-competition rules instead of bringing cases.” This ex ante regulatory intervention may very well tackle innovators who enjoy first-mover advantages and who foster, rather than stifle competition. These ex-ante regulatory tools inherent to the Neo-Brandeisian agenda portray the characteristics of the precautionary principle applied to competition matters<sup>130</sup>: Innovation and disruption may inevitably be deterred due to risks of overregulation against beneficial practices.
- 6) Antitrust’s Goals: Tim Wu argues that antitrust should no longer be about the consumer welfare standard. He

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<sup>129</sup> Diane Bartz, “A judge dismissed the United States’ antitrust lawsuit against Facebook, saying the FTC failed to show that the company was a monopoly”, *BusinessInsider*, June 28, 2021, <https://www.businessinsider.com/judge-dismisses-facebook-ftc-lawsuit-instagram-break-up2021-6> ; Aurelien Portuese, “The Newly Assertive FTC Faces Its First Big Test –and It Doesn’t Look Promising”, *Innovation Files*, August 23, 2021, <https://itif.org/publications/2021/08/23/newly-assertive-ftc-faces-its-first-big-test-and-it-doesnt-look-promising> ; Aurelien Portuese, “Facebook’s Antitrust Lawsuit: The Myth of Clean Breakups”, *Innovation Files*, January 29, 2021, <https://itif.org/publications/2021/01/29/facebook-antitrust-lawsuit-myth-clean-breakups#:~:text=There%20is%20no%20such%20thing,to%20innovation%20can%20always%20occur>.

<sup>130</sup> See, for a discussion, Aurelien Portuese, “American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority,” (ITIF Report, January 2022), <https://itif.org/publications/2022/01/31/american-precautionary-antitrust-unrestrained-ftc-rulemaking-authority> ; Aurelien Portuese, “The Digital Markets Act: European Precautionary Antitrust,” (ITIF Report, May 2021), <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust> ; Aurelien Portuese, “European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust,” In Joshua Wright (Ed.) *Report on the Digital Economy*, (Global Antitrust Institute Report: George Mason University, 2020); Aurelien Portuese, “Precautionary Antitrust: A Precautionary Tale in European Competition Policy,” in Klaus Mathis (Ed.) *Law and Economics of Regulation*, (Heidelberg: Springer, 2021).



considers that “there will be a post-consumer welfare antitrust that is practicable and arguably as predictable as the consumer welfare standard.” This new standard is “the ‘protection of competition’ test” which is “focused on protection of a process, as opposed to maximization of a value.” This test allegedly “attempts to capture far more of the dynamics of the competitive process than do existing analyses, and also implicates political considerations as well.”<sup>131</sup> The risks of politicization and increased legal unpredictability loom large with such an open-textured legal standard of “the protection of competition”: Efficiency considerations would become marginalized in an analysis aiming at preserving the market structure irrespective of the lack of anticompetitive conduct. Large corporations not harming consumers may ultimately be considered to thwart “the protection of competition” and thus be subject to a populist anti-bigness antitrust policy at the expense of these firms’ innovation capabilities.

The nomination of Tim Wu to steer the White House’s competition policy demonstrates that Biden antitrust has fully endorsed the Neo-Brandeisian perspective. This is further confirmed by the nomination of the new Chair of the FTC.

Second, President Biden nominated Lina Khan as Chair of the Federal Trade Commission. An associate law professor from Columbia University, Lina Khan personifies the New Brandeis School of antitrust as she advocated for an “anti-monopoly movement.” Lina Khan acclaimed Tim Wu’s book as a necessary “prerequisite for creating the political pressure needed to reorient antitrust around the antimonopoly values it has abandoned in recent decades.”<sup>132</sup> Lina Khan embarked in Tim Wu’s agenda in considering that “rejecting a strictly welfare-based theory of antitrust, Neo-Brandeisians have an opportunity to design an

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<sup>131</sup> Tim Wu, *The Curse of Bigness. Antitrust in the New Gilded Age*, (New York: Columbia Global Report, 2018):138.

<sup>132</sup> Lina Khan, “Book Review: The End of Antitrust History Revisited”, 133 *Harvard Law Review*, 1655-1682 (2018)

antitrust regime that reflects republican values and democratizes the institutional structure of antitrust.”<sup>133</sup>

Lina Khan rose to preeminence for her article, Amazon’s Antitrust Paradox, where she accused Amazon of charging too low prices (i.e., predatory prices) and called for “breaking up” Amazon or “applying some form of public utility regulation” to the online supermarkets because that “could make sense.”<sup>134</sup> To ignore the consumer benefits generated by the companies Neo-Brandeisians purportedly target, Lina Khan and other Neo-Brandeisians have advocated for antitrust to focus on “structures and a broader set of measures to assess market power”—namely, the preservation of “market structures.” The antimonopoly movement that Lina Khan calls for is a return to controversial and economically harmful decisions that protected the viable, small, locally owned businesses...<sup>135</sup> against the disruptive competition. Now FTC Chair Lina Khan has embarked on a battle against the rule of reason (in favor of per se rules of illegality) and the consumer welfare standard more generally.<sup>136</sup>

Jonathan Kanter is perhaps less radical nominee for President Biden’s radical change on antitrust policy. An antitrust lawyer who notably sued Google and represented Microsoft<sup>137</sup>, Jonathan Kanter is the new head

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<sup>133</sup> Id, 1682.

<sup>134</sup> Lina Khan, Amazon’s Antitrust Paradox, 126 *Yale Law Journal*, 710-805 (2017):800

<sup>135</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). For a discussion on how antitrust should rather prioritize welfare over the number of competitors, see Joshua Wright, Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice”, 81 *Fordham Law Review*, 2405-2423 (2013).

<sup>136</sup> Federal Trade Commission, *Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act*, July 1, 2021, [https://www.ftc.gov/system/files/documents/public\\_statements/1591498/final\\_statement\\_of\\_chair\\_khan\\_joined\\_by\\_rc\\_and\\_rks\\_on\\_section\\_5\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf) . See also Phil Gram, Christine Wilson, “The New Progressives Fight Against Consumer Welfare, *The Wall Street Journal*, April 3, 2022, <https://www.wsj.com/articles/the-new-progressives-fight-against-consumer-welfare-deregulating-antitrust-enforcement-economy-bipartisan-11649017074>

<sup>137</sup> Jay Peters, “Google seeks recusal probe for incoming antitrust chief over Yelp and Microsoft cases”, *The Verge*, November 19, 2021, <https://www.theverge.com/2021/11/19/22792308/google-seeks-block-doj-antitrust-chief-jonathan-kanter-yelp-microsoft-cases> ; Josh Kosman, Theo Wayt, DOJ antitrust chief’s past work for Microsoft looms over \$69 B Activision deal, *New York Post*,

of the antitrust division at the Department of Justice.<sup>138</sup> The new AAG has recently demoted the current state of antitrust by stating that “when I look at the current state of antitrust law, the most charitable explanation is that we are stuck fighting the last generation’s war, with precedent that bears little or no resemblance to today or the future.”<sup>139</sup> This radical departure from current antitrust analysis echoes the Neo-Brandeisian call for a return to a state of enforcement before the “40 years experiment” that President Biden lamented when signing the executive order on competition.

These three nominations reveal not only the unprecedented role of Neo-Brandeisians in shaping antitrust policy in America, but more broadly it reveals the influence of progressives in designing the economic policy of the Biden Administration. Together with the nomination of Rohit Chopra at the Bureau<sup>140</sup>, these three nominations epitomize the unparalleled power that progressives have attained over the economic policy of President Biden. In other words, if the candidate Joe Biden won the presidential elections in 2020, it is Sen. Elizabeth Warren (and secondarily Sen. Bernie Sanders) who won the intellectual debates over economic policy among Democrats.

#### *d. Antitrust Bills*

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January 19, 2022, <https://nypost.com/2022/01/19/doj-antitrust-chiefs-past-work-for-microsoft-looms-over-69b-activision-deal/>

<sup>138</sup> White House, “President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust”, Statement, July 20, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/>. See also Reuters, “U.S. panel approves Big Tech critic to head Justice Department Antitrust Division”, *Reuters*, October 29, 2021, <https://www.reuters.com/world/us/us-panel-approves-big-tech-critic-head-justice-department-antitrust-division-2021-10-28/>

<sup>139</sup> Jonathan Kanter, “Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section”, January 24, 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>

<sup>140</sup> Aaron Gregg, “Senate confirms Rohit Chopra to lead Consumer Financial Protection Bureau,” *The Washington Post*, September 30, 2021, <https://www.washingtonpost.com/business/2021/09/30/rohit-chopra-cfpb/>. On Rohit Chopra’s track record as a Neo-Brandeisian FTC Commissioner and author, see Leah Nysten, “‘Zombies’ to the rescue: The arcane voting rule that could save Dem’s antitrust agenda,” *Politico*, August 11, 2021, <https://www.politico.com/news/2021/11/08/voting-rule-democrats-antitrust-519767> ; Rohit Chopra, Lina Khan, “The Case for ‘Unfair Methods of Competition’ Rulemaking,” 87 *The University of Chicago Law Review*, 357-379 (2020).

Biden antitrust cannot be directly linked with the Congressional activity. However, the Biden administration has recently backed a number of antitrust bills which would revolutionize the way antitrust agencies enforce competition rules. The number of antitrust bills introduced over the last two years is unprecedented.<sup>141</sup> However, the Biden administration has explicitly defended two bills specifically. Indeed, it is reported that the “Biden team came out in favor of the antitrust measures moving through both houses of Congress...”<sup>142</sup> This support specifically concerns the American Innovation and Choice Online Act (S.2992)<sup>143</sup> and the Open App Markets Act (S.2710)<sup>144</sup>—which both were passed in the Senate Judiciary Committee.

These two bills signal a radical departure from traditional antitrust laws. Indeed, both bills are only narrowly applicable to a few large online platforms, thereby leaving these platforms’ rivals outside the scope of these bills.

For instance, the S.2992 bill singles out “online platforms” with a market capitalization higher than \$550 billion, leaving multi-billion-

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<sup>141</sup> See, for instance, Aurelien Portuese, “The House’s Antitrust Legislative Package. An Innovation Perspective”, (ITIF Report, August 2021), <https://itif.org/publications/2021/08/02/houses-antitrust-legislative-package-innovation-perspective> (citing the American Innovation and Choice Online Act (H.R. 3816), the Platform Competition and Opportunity Act (H.R. 3826), the Ending Platform Monopolies Act (H.R. 3825), the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act (H.R. 3849), the Merger Filing Fee Modernization Act (H.R. 3843), and the State Antitrust Enforcement Venue Act of 2021 (H.R. 3460)). More generally, see ITIF, “Schumpeterian Takes on Pending Antitrust Bills”, <https://itif.org/schumpeterian-takes-pending-antitrust-bills>

<sup>142</sup> Brendan Bordelon, “Under pressure, Biden backs antitrust push”, *Politico*, February 4, 2022, <https://www.politico.com/newsletters/morning-tech/2022/02/04/under-pressure-biden-backs-antitrust-push-00005579>

<sup>143</sup> S.2992, American Innovation and Choice Online Act, 117<sup>th</sup> Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/2992> See Aurelien Portuese, “Open Letter to Sens. Durbin, Grassley, Klobuchar, and Lee Regarding the American Innovation and Choice Online Act (S.2992)”, January 19, 2022, <https://itif.org/publications/2022/01/19/open-letter-sens-durbin-grassley-klobuchar-lee-regarding-s2992>

<sup>144</sup> S.2710, Open App Markets Act, 117<sup>th</sup> Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/2710> See Aurelien Portuese, “Open Letter to the Senate Judiciary Committee Regarding the ‘Open App Markets Act’ (S.2710)”, January 24, 2022, <https://itif.org/publications/2022/01/24/open-letter-senate-judiciary-committee-regarding-open-app-markets-act>

dollar rivals (domestic or foreign) free to engage in the very conduct that these bills prohibit.<sup>145</sup> Among other criteria, this size threshold creates a two-level playing field, thereby creating unfair competition, not fairer competition.

The S.2710 bill singles out “app stores” with more than 50 million U.S. users. Again, smaller app stores remain outside the remits of the bill, thereby arbitrarily creating an uneven playing field for competition to take place.

Moreover, the business practices prohibited in these bills often are pro-efficiency and pro-innovation: They proceed from competitive constraints rather than subvert the competitive process. For example, the common business practice of self-preferencing enables companies to compete against incumbent on prices, quality, and product differentiation, thereby providing consumers with greater choice, lower prices, and better quality products.<sup>146</sup> For these bills to prohibit self-preferencing, it amounts to prohibiting one of the key tenets of the competitive process—i.e., competition through innovation, imitation, and differentiation.<sup>147</sup>

Additionally, Biden antitrust means the support to one of the most controversial and radical antitrust piece of legislation: the European Union’s Digital Markets Act.<sup>148</sup> This Act designed to harm large U.S.

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<sup>145</sup> Aurelien Portuese, “How Congress Got It Wrong on Tech Industry Competition”, *Inside Sources*, February 16, 2022, <https://insidesources.com/how-congress-got-it-wrong-on-tech-industry-competition/>; Aurelien Portuese, “Is Congress Committed to Making American Consumers’ Lives Costlier?” *WLF Legal Pulse*, January 12, 2022, [https://www.wlf.org/wp-content/uploads/2022/01/011122Portuese\\_LP.pdf](https://www.wlf.org/wp-content/uploads/2022/01/011122Portuese_LP.pdf)

<sup>146</sup> Aurelien Portuese, “‘Please, Help Yourself’: Toward a Taxonomy of Self-Preferencing, (ITIF Report, October 2021), <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing>

<sup>147</sup> *Id.*

<sup>148</sup> For an analysis of the Digital Markets Act, see Aurelien Portuese, “The Digital Markets Act: European Precautionary Antitrust”, (ITIF Report, Mars 2021), <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>; Aurelien Portuese, “The DMA and the EU’s French Presidency: The Road to Precaution and Tensions”, *Competition Forum*, No 0029, (2021), <https://competition-forum.com/wp-content/uploads/2021/12/art.-n%C2%B00029.pdf>; Aurelien Portuese, “The Digital Markets Act: Precaution over Innovation,” (Epicenter, June 2021), <http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf>

tech platforms<sup>149</sup> with a range of prohibitions and obligations represents a source of inspirations for Neo-Brandeisians.<sup>150</sup> But, the Secretary of Commerce voiced considerable concerns about the clear protectionist bias of the Digital Markets Act against U.S. tech companies. Indeed, Gina Raimondo expressed the harm to innovation, consumers and to U.S. entrepreneurship this future legislation will inevitably have.<sup>151</sup> Expressing U.S. interests, Gina Raimondo cautioned the EU against this protectionist regulation.<sup>152</sup> However, Neo-Brandeisians quickly corrected this departure from Neo-Brandisian doxa.

Indeed, Sen. Warren pressured the Biden Administration to endorse the Digital Markets Act<sup>153</sup>, however targeted against U.S. tech companies this regulation can be, and to express support for the Digital Markets Act.<sup>154</sup> This is precisely what happened: The Biden administration,

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<sup>149</sup> Aurelien Portuese, “Reigning in Digital Gatekeepers– a Bad Idea”, *CEPA*, September 23, 2021, <https://cepa.org/lassoing-digital-gatekeepers-a-bad-idea/>; Aurelien Portuese, “The EU must make (digital) peace, not war, with the United States, *NewEurope*, June 10, 2021, <https://www.neweurope.eu/article/the-eu-must-make-digital-peace-not-war-with-the-united-states/>

<sup>150</sup> Ryan Browne, “EU targets U.S. tech giants with a new rulebook aimed at curbing their dominance”, *CNBC*, March 25, 2021, <https://www.cnn.com/2022/03/25/digital-markets-act-eu-targets-big-tech-with-sweeping-new-antitrust-rules.html>; Maksim Belitski et al., “Misfire: How the Digital Markets Act Will Unwillingly Hurt European Small Businesses,” (Catalyst Research, June 2021), <https://datacatalyst.org/wp-content/uploads/2021/08/CR-DMA-Working-Group-Report-62221-2.pdf>; Meredith Broadbent, “implication of the Digital Markets Act for Transatlantic Cooperation,” September 15, 2021, <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>

<sup>151</sup> See oral statement by Gina Raimondo, <https://twitter.com/ProgressChamber/status/1468647693182550024?s=20&t=LBJbQJkI9fdxwSCkCbwQ>

<sup>152</sup> Margaret Harding McGill, Ashley Gold, “The Biden administration’s tightrope act on tech”, *Axios*, December 9, 2021, <https://www.axios.com/biden-raimondo-vestager-big-tech-europe-6d9df23c-9e1f-41cf-a5af-51ecd1b5f990.html>; See also Aurelien Portuese, Biden Administration Rightly Speaks Out on Europe’s DMA”, *Innovation Files*, December 13, 2021, <https://itif.org/publications/2021/12/13/biden-administration-rightly-speaks-out-europes-dma>

<sup>153</sup> Sen. Warren (D-MA), Letter to the Honorable Gina Raimondo, March 4, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.03.04%20Letter%20to%20Secretary%20Raimondo%20regarding%20failure%20to%20repond%20to%20previous%20antitrust%20letter.pdf>. See also, Amanda Kaufman, “‘This is wrong’: Warren criticizes Raimondo’s response to EU efforts to regulate US technology companies”, *The Boston Globe*, December 9, 2021, <https://www.bostonglobe.com/2021/12/09/nation/this-is-wrong-warren-criticizes-raimondos-response-eu-efforts-regulate-us-technology-companies/>

<sup>154</sup> Cristiano Lima, “Biden’s Commerce chief is under fire from Warren, progressives for defending U.S. tech giants”, *The Washington Post*, December 15, 2021, <https://www.washingtonpost.com/politics/2021/12/15/bidens-commerce-chief-is-under-fire->

dominated by Neo-Brandeisian philosophy, came out to voice support for the Digital Markets Act.<sup>155</sup> This piece of precautionary antitrust detrimental to American innovation and competitiveness ultimately finds support from the Biden administration itself. The Brussels effect has reached its apex.

Consequently, Biden antitrust is an active support for radical antitrust bills and a controversial piece of EU legislation aimed at harming American innovation and competitiveness. The Neo-Brandeisian's admiration for the European competition approach entered U.S. antitrust through the Biden administration.

*e. Activities and Reports*

The Biden administration's activity on antitrust and competition more generally is characterized by a wide range of activities and reports, pursuant to the executive order on competition. Unsurprisingly, the new FTC has engaged in the largest number of initiatives in the most radical way. After having discussed this aggressively activist FTC, we shall outline the different agencies and departments activities in pursuing the objectives laid down in the executive order on competition.

The FTC rescinded on July 1, 2021 a bipartisan statement issued during the Obama presidency, in 2015, regarding the necessary boundaries in pursuing "unfair methods of competition."<sup>156</sup> The statement stated that

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[warren-progressives-defending-us-tech-giants/](https://www.politico.com/newsletters/morning-tech/2022/03/04/warren-ups-pressure-on-commerce-over-eu-antitrust-00014115) ; Brendan Bordelon, "Warren ups pressure on Commerce over EU antitrust", Politico, March 14, 2022, <https://www.politico.com/newsletters/morning-tech/2022/03/04/warren-ups-pressure-on-commerce-over-eu-antitrust-00014115>

<sup>155</sup> Leah Nylén, Samuel Stolton, "U.S. slow to respond to EU's landmark tech regulation", Politico, March 25, 2022, <https://www.politico.com/news/2022/03/25/us-eu-digital-markets-act-00020551>

<sup>156</sup> Federal Trade Commission, "Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, July 1, 2021, [https://www.ftc.gov/system/files/documents/public\\_statements/1591498/final\\_statement\\_of\\_chair\\_khan\\_joined\\_by\\_rc\\_and\\_rks\\_on\\_section\\_5\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf) See also Commissioner Noah Joshua Phillips, "Remarks Regarding the Commission's Withdrawal of the Section 5 Policy Statement", July 1, 2021, [https://www.ftc.gov/system/files/documents/public\\_statements/1591578/phillips\\_remarks\\_regarding\\_withdrawal\\_of\\_section\\_5\\_policy\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf) ; Commissioner Christine S. Wilson,

traditional antitrust laws (Sherman Act and the Clayton Act) are to be preferred in order to tackle unfair methods of competition and that a rule of reason applies to assessing the unfair methods of competition. The new FTC Chair considered that this bipartisan statement was all wrong: the Neo-Brandeisian FTC writes that “the 2015 Statement contravenes the text, structure, and history of Section 5...” These allegations are dubious and themselves contravene the very history and text of Section 5.<sup>157</sup> But, what is most important is perhaps the fact that the new FTC disparage the rule of reason and the consumer welfare standard to impose blanket prohibitions with per se rules of illegality designed to protect rivals, workers, and an unlimited range of public interest considerations. However, this increased legal uncertainty is not a defect but rather the legal policy of the new FTC.

Indeed, the new FTC has dramatically increased the legal uncertainty when it signaled that merging firms may close their deals but “at their own perils”<sup>158</sup>—namely, the FTC is now keen to unwind consummated mergers.<sup>159</sup> The regulatory threats and legal uncertainty surrounding acquisition deals have never been as high. Nevertheless, such uncertainty is, again, not a defect but rather the virtue, according to Neo-Brandeisians, of a more aggressive antitrust enforcement. But, as uncertainty deters innovation, and as innovation fosters competition in the marketplace, the uncertainty that the Neo-Brandeisian FTC generates will irremediably decrease the ability of firms to compete through mergers. To prevent firms from competing through external

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“*Dissenting Statement of Commissioner Christine S. Wilson*,” July 1, 2021, See also Aurelien Portuese, “American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority,” (ITIF Report, January 2022), <https://itif.org/publications/2022/01/31/american-precautionary-antitrust-unrestrained-ftp-rulemaking-authority>

<sup>157</sup> Aurelien Portuese, “American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority”, (ITIF Report, January 2022), <https://itif.org/publications/2022/01/31/american-precautionary-antitrust-unrestrained-ftp-rulemaking-authority>

<sup>158</sup> Federal Trade Commission, “Adjusting merger review to deal with the surge in merger filings”, August 3, 2021, <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (“Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk.”). See also Lauren Feiner, “FTC struggles to keep up with merger filings, tells some businesses to merger at own risk”, *CNBC*, August 3, 2021, <https://www.cnn.com/2021/08/03/ftc-tells-some-businesses-to-merge-at-own-risk.html>

<sup>159</sup> On the detrimental aspects of unwinding consummated mergers, see Timothy J. Muris, Jonathan E. Nuechterlein, “First Principles for Review of Long-Consummated Mergers”, 5 *The Criterion Journal on Innovation*, 29-48 (2020).



growth (i.e., mergers and acquisitions) leave firms with the only alternative to compete via internal growth (i.e., sales increase). But, internal growth is often lengthy instead of the disruptive nature of external growth. In other words, the FTC implicitly encourages incremental competition through internal growth as opposed to disruptive competition through external growth. The collateral damages are consumers who may enjoy innovations at a slower pace, companies which may experience slower productivity gains, and ultimately American competitiveness which may degrade given the unrestrained growth of rival powers.

The new FTC has embarked on a Neo-Brandeisian revolution that has not gone unnoticed and uncontroversial.<sup>160</sup> The new FTC requested staff members not to speak publicly.<sup>161</sup> Also, the FTC's priorities for 2022 primarily involve engaging in rulemaking activity for "unfair methods of competition," under the executive order on competition.<sup>162</sup> Indeed, the new FTC leadership writes:

"Over the coming year, the commission will also explore whether rules defining certain "unfair methods of competition" prohibited by section 5 of the FTC Act would promote competition and provide greater clarity to the market. A recent Executive Order encouraged the Commission to consider competition rulemakings relating to non-compete clauses, surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in

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<sup>160</sup> Brent Kendall, "Lina Khan Sees Turbulent Start as Head of Federal Trade Commission," *The Wall Street Journal*, November 16, 2021, <https://www.wsj.com/articles/lina-khan-sees-turbulent-start-as-head-of-federal-trade-commission-11637073000> ; Leah Nylén, Alex Thompson, Max Tani, "Trouble in Khan's corner," *Politico*, April 5, 2022, <https://www.politico.com/newsletters/west-wing-playbook/2022/04/05/trouble-inside-the-kingdom-of-khan-00023056> ; Nancy Scola, "Lina Khan Isn't Worried About Going Too Far," *Intelligencer*, October 27, 2021, <https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html> ; Leah Nylén, "Lina Khan's big tech crackdown is drawing blowback. It may succeed anyway", *Politico*, September 29, 2021, <https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581>

<sup>161</sup> Leah Nylén, Betsy Woodruff Swan, "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> ; Joshua Wright, "Lina Khan is Icarus at the FTC", *The Wall Street Journal*, July 13, 2021, <https://www.wsj.com/articles/lina-khan-ftc-monopoly-big-tech-11626108008>

<sup>162</sup> Federal Trade Commission, "Statement of Regulatory Priorities", December 10, 2021, [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FT\\_C.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FT_C.pdf)

online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition. The Commission will explore the benefits and costs of these and other competition rulemaking ideas.”<sup>163</sup>

Although the FTC is likely to lack the authority to engage in substantive UMC rulemaking<sup>164</sup>, and although the likely economic costs associated with the false positives of substantive UMC rulemaking, it is predicted that the new Chair will nevertheless pursue such rulemaking authority.

Also, the FTC has unilaterally rescinded the 2020 Vertical Merger Guidelines<sup>165</sup>, without coordination with the DOJ’s antitrust division, on the premise that these guidelines incorrectly accounted for efficiency defenses and were no longer in line with “market realities.” Such radical and unilateral withdrawal justified on specious claims generated considerable surprise and disappointment, including by leading antitrust scholars.<sup>166</sup> For instance, professors Shapiro and Hovenkamp argued that this unilateral withdrawal illustrates the fact that “we have the spectacle of a federal agency basing its policies on a demonstrably false claim that ignores relevant expertise.”<sup>167</sup> The authors lament that “if the FTC does not understand that basic point about how our economy operates, they are likely to cause real harm.”<sup>168</sup>

The DOJ’s antitrust division and the FTC have now launched a revision of the merger guidelines, both horizontal and vertical.<sup>169</sup> This

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<sup>163</sup> Id. 2.

<sup>164</sup> Aurelien Portuese, “American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority”, (ITIF Report, January 2022), <https://itif.org/publications/2022/01/31/american-precautionary-antitrust-unrestrained-ftc-rulemaking-authority>

<sup>165</sup> Federal Trade Commission, “Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary”, September 15, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>

<sup>166</sup> Carl Shapiro, Herbert Hovenkamp, “How Will the FTC Evaluate Vertical Mergers?” *ProMarket*, September 23, 2021, <https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>

<sup>167</sup> Id.

<sup>168</sup> Id.

<sup>169</sup> Federal Trade Commission, “Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers,” Press Release, January 18, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers> . See Aurelien Portuese, Julie

coordinated effort is to be preferred, although the underlying assumptions for such revision remain questionable.<sup>170</sup>

More generally, pursuant to the executive order on competition, agencies and departments have engaged in several activities, including:

- Competition in Healthcare. The Department of Health and Human Services announced reforms of nursing homes<sup>171</sup>, aimed at improving the affordability and accessibility of hearing aids<sup>172</sup>, wants to lower prescription drug prices<sup>173</sup>, aims at forcing hospital to increase price transparency<sup>174</sup>, wants to import lower-priced drugs from Canada<sup>175</sup>, and has engaged in reforming the patent system for prescription drugs<sup>176</sup>;
- Competition in Labor Markets. The Treasury Department, together with the Department of Justice, Department of Labor and the Federal Trade Commission, have issued a report on

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Carlson, “Revising Merger Guidelines While Preserving the Process of Creative Destruction,” (ITIF Comments, March 2022), [https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?\\_ga=2.245197893.1326716835.1650292819-1637076531.1642712242](https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?_ga=2.245197893.1326716835.1650292819-1637076531.1642712242)

<sup>170</sup> Aurelien Portuese, Julie Carlson, “Revising Merger Guidelines While Preserving the Process of Creative Destruction”, (ITIF Comments, March 2022), [https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?\\_ga=2.245197893.1326716835.1650292819-1637076531.1642712242](https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf?_ga=2.245197893.1326716835.1650292819-1637076531.1642712242)

<sup>171</sup> White House, “Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation’s Nursing Homes”, February 28, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>

<sup>172</sup> Federal Drug Administration, “FDA Issues Landmark Proposal to Improve Access to Hearing Aid Technology for Millions of Americans”, October 19, 2021, <https://www.fda.gov/news-events/press-announcements/fda-issues-landmark-proposal-improve-access-hearing-aid-technology-millions-americans>

<sup>173</sup> Office of the Assistant Secretary For Planning and Evaluation, “Comprehensive Plan for Addressing High Drug Prices: A Report in Response to the Executive Order on Competition in the American Economy”, September 9, 2021, <https://aspe.hhs.gov/reports/comprehensive-plan-addressing-high-drug-prices>

<sup>174</sup> Health and Human Services, “CMS Proposes Rules to Increase Price Transparency, Access to Care, Safety & Health Equity”, July 19, 2021, <https://www.hhs.gov/about/news/2021/07/19/cms-proposes-role-to-increase-price-transparency-access-to-care-health-equity.html>

<sup>175</sup> Federal Drug Administration, “Importation of Drugs Originally Intended for Foreign Markets”, <https://www.fda.gov/about-fda/reports/importation-drugs-originally-intended-foreign-markets>

<sup>176</sup> Janet Woodcock, “Letter to Mr. Andrew Hirshfeld”, September 10, 2021, <https://www.fda.gov/media/152086/download>

competition in labor markets<sup>177</sup>, the Department of Justice and the Department of Labor want to promote competitive labor markets<sup>178</sup>, and finally the Department of Justice and the Federal Trade Commission organized a public workshop on competition in the labor markets<sup>179</sup>;

- Competition in Finance. The Consumer Financial Protection Bureau has taken action to halt prepaid card providers “siphoning government benefits”<sup>180</sup>, aims to “save American billions in junk fees”<sup>181</sup> and helps “people re-enter society after incarceration”<sup>182</sup>; the Securities and Exchange Commission has proposed to enhance private fund investor protection<sup>183</sup>;
- Competition in Food and Agriculture. The Department of Agriculture supported the meat and poultry processing options<sup>184</sup>, promoted American-made fertilizers<sup>185</sup>; the Treasury released a

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<sup>177</sup> U.S. Department of the Treasury, “The State of Labor Market Competition”, March 7, 2022, <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>

<sup>178</sup> Department of Justice, “Departments of Justice and Labor Strengthen Partnership to Protect Workers”, March 10, 2022, <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers>

<sup>179</sup> Department of Justice, “Department of Justice Antitrust Division and Federal Trade Commission to Hold Workshop on Promoting Competition in Labor Markets”, October 27, 2021, <https://www.justice.gov/opa/pr/departments-justice-antitrust-division-and-federal-trade-commission-hold-workshop-promoting>

<sup>180</sup> CFPB, “CFPB Takes Action to Halt Prepaid Card Providers Siphoning Government Benefits”, Press Release, February 15, 2022, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-halt-prepaid-card-providers-siphoning-government-benefits/>

<sup>181</sup> CFPB, “Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees”, January 26, 2022, <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/>

<sup>182</sup> CFPB, “CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-Enter Society After Incarceration”, October 19, 2021, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/>

<sup>183</sup> U.S. Securities and Exchange Commission, “SEC Proposes to Enhance Private Fund Investor Protection”, Press Release, February 9, 2022, <https://www.sec.gov/news/press-release/2022-19>

<sup>184</sup> USDA, “USDA Commits \$215 Million to Enhance the American Food Supply Chain”, Release No. 0051.22, February 24, 2022, <https://www.usda.gov/media/press-releases/2022/02/24/usda-commits-215-million-enhance-american-food-supply-chain>

<sup>185</sup> USDA, “USDA Announces Plans for \$250 Million Investment to Support Innovative American-made Fertilizer to give US Farmers more choices in the Marketplace”, Release No. 0060.22, March

competition report for the alcohol market<sup>186</sup>; the Department of Justice and the Department of Agriculture created a tool for farmers and ranchers to report anticompetitive practices<sup>187</sup>; the Biden administration articulated a plan to increase competition in the meat and poultry supply chain<sup>188</sup>; the Department of Agriculture launches loan guarantee program<sup>189</sup>, made investments in the meat and poultry processing capacity<sup>190</sup>, enhanced price transparency<sup>191</sup>, and will propose new rules to enforce the Packers and Stockyards Act<sup>192</sup>;

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11, 2022, <https://www.usda.gov/media/press-releases/2022/03/11/usda-announces-plans-250-million-investment-support-innovative>

<sup>186</sup> Department of the Treasury, “Treasury Releases Competition Report for Alcohol Market, Recommends Boosting Opportunity for Small Businesses”, February 9, 2022, <https://home.treasury.gov/news/press-releases/jy0591>

<sup>187</sup> Department of Justice, “Justice Department and U.S. Department of Agriculture Launch Online Tool Allowing Farmers, Ranchers to Report Anticompetitive Practices”, February 3, 2022, <https://www.justice.gov/opa/pr/justice-department-and-us-department-agriculture-launch-online-tool-allowing-farmers-ranchers>

<sup>188</sup> White House, “Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain”, January 3, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>

<sup>189</sup> USDA, “USDA Launches Loan Guarantee Program to Create More Market Opportunities, Promote Competition and Strengthen America’s Food Supply Chain”, Release No. 0268.21, December 9, 2021, <https://www.usda.gov/media/press-releases/2021/12/09/usda-launches-loan-guarantee-program-create-more-market>

<sup>190</sup> USDA, “USDA Announces \$500 Million for Expanded Meat & Poultry Processing Capacity as Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System”, Release No. 0154.21, July 9, 2021, <https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing>

<sup>191</sup> USDA, “new USDA Market News Reports to Enhance Price Transparency in Cattle Markets”, August 5, 2021, <https://www.ams.usda.gov/press-release/new-usda-market-news-reports-enhance-price-transparency-cattle-markets>; USDA, “USDA Announces Efforts to Promote Transparency in Products of the USA Labeling”, Release No. 0151.21, July 1, 2021, <https://www.usda.gov/media/press-releases/2021/07/01/usda-announces-efforts-promote-transparency-product-usa-labeling>

<sup>192</sup> USDA, “USDA to Begin Work to Strengthen Enforcement of the Packers and Stockyards Act”, Release No. 0130.21, June 11, 2021, <https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act>

- Competition in Technology. The Federal Communications Commission intends to increase broadband competition<sup>193</sup>, increase price transparency<sup>194</sup> and sought comments to access broadband<sup>195</sup>, the Patent Office implemented the trademark modernization act<sup>196</sup> and launched the National Council for Expanding American Innovation (NCEAI)<sup>197</sup>, the Federal Trade Commission ramped up law enforcement against illegal repair restrictions<sup>198</sup>, the Department of Justice sought comments on draft policy statement on licensing negotiations and remedies for standards-essential patents subject to F/RAND Commitments<sup>199</sup>;
- Competition in Transportation. The Department of Transportation provided funds to promote competition in airport terminals<sup>200</sup> and acted against unfair and deceptive practices for aviation consumers<sup>201</sup>; the Federal Maritime Commission and the Justice Department strengthened their partnership to promote

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<sup>193</sup> FCC, “FCC Acts to Increase Broadband Competition in Apartment Buildings”, February 15, 2022, <https://www.fcc.gov/document/fcc-acts-increase-broadband-competition-apartment-buildings-0>

<sup>194</sup> FCC, “FCC Acts to empower broadband consumers through transparency”, January 27, 2022, <https://www.fcc.gov/document/fcc-acts-empower-broadband-consumers-through-transparency-0>

<sup>195</sup> FCC, “FCC Seeks Comments on Competitive Access to Broadband in Apartment and Office Buildings”, September 7, 2021, <https://docs.fcc.gov/public/attachments/DOC-375513A1.pdf>

<sup>196</sup> USPTO, “USPTO Implements the Trademark modernization Act”, November 17, 2021, <https://www.uspto.gov/about-us/news-updates/uspto-implements-trademark-modernization-act>

<sup>197</sup> USPTO, “USPTO launches National Council for Expanding American Innovation (NCEAI)”, September 14, 2020, <https://www.uspto.gov/about-us/news-updates/uspto-launches-national-council-expanding-american-innovation-nceai>

<sup>198</sup> Federal Trade Commission, “FTC to Ramp Up Law Enforcement Against Illegal Repair Restrictions”, July 21, 2021, <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions>

<sup>199</sup> Department of Justice, “Public Comments Welcome on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments”, December 6, 2021, <https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards>

<sup>200</sup> Federal Aviation Administration, “Application Process Opens for Bipartisan Infrastructure Law Funds to Build Safe, Sustainable and Accessible Airport Terminals”, February 22, 2022, <https://www.faa.gov/newsroom/application-process-opens-bipartisan-infrastructure-law-funds-build-safe-sustainable-and>

<sup>201</sup> USDOT, “USDOT Announces Rule to Help Department Move More Swiftly to Protect Aviation Consumers from Unfair and Deceptive Practices”, January 24, 2022, <https://www.transportation.gov/briefing-room/usdot-announces-rule-help-department-move-more-swiftly-protect-aviation-consumers>

fair competition in the shipping industry<sup>202</sup>, launched an ocean carriers audit program<sup>203</sup>, provided guidance on complaints process<sup>204</sup>, launched an inquiry into eight ocean carriers' surcharge fees<sup>205</sup>, and approved a new demurrage and detention rule<sup>206</sup> as well as a refunding fees rule<sup>207</sup>; the Department of Transportation published a report on its work to for airline companies to provide timely refunds<sup>208</sup> and intends to increase access at Newark for lower cost carriers<sup>209</sup>; the Federal Trade Commission announced that it would fight anticompetitive practices on oil and gas markets<sup>210</sup>;

- Merger Policy. The Department of Defense published a report on consolidation in the defense sector<sup>211</sup>; the Federal Trade

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<sup>202</sup> Department of Justice, “Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry”, February 28, 2022, <https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership>

<sup>203</sup> Federal Maritime Commission, “FMC Establishes Ocean Carriers Audit Program”, July 20, 2021, <https://www.fmc.gov/fmc-establishes-ocean-carriers-audit-program/>

<sup>204</sup> Federal Maritime Commission, “FMC Policy Statements Provide Guidance on Complaints Process”, December 28, 2021, <https://www.fmc.gov/fmc-policy-statements-provide-guidance-on-complaints-process/>

<sup>205</sup> Federal Maritime Commission, “Commission Questions Shipping Lines About Surcharges”, August 4, 2021, <https://www.fmc.gov/commission-questions-shipping-lines-about-surcharges/>

<sup>206</sup> Federal Maritime Commission, “Commission Invites Comments on Benefits of New Demurrage & Detention Rule”, February 4, 2022, <https://www.fmc.gov/commission-invites-comments-on-benefits-of-new-demurrage-detention-rule/>

<sup>207</sup> USDOT, “Notice of Proposed Rulemaking (NPRM) – Refunding Fees for Delayed Checked Bags and Ancillary Services that Are Not Provided”, July 21, 2021, <https://www.transportation.gov/individuals/aviation-consumer-protection/notice-proposed-rulemaking-nprm-refunding-fees-delayed>

<sup>208</sup> USDOT, “USDOT Details Efforts to Secure Refunds for American Families for Flights Cancelled Due to COVID-19 Pandemic”, September 10, 2021, <https://www.transportation.gov/briefing-room/usdot-details-efforts-secure-refunds-american-families-flights-cancelled-due-covid-19>

<sup>209</sup> USDOT, “U.S. Department of Transportation Finalizes Procedures to Increase Access at Newark for Lower Cost Carriers”, February 25, 2022, <https://www.transportation.gov/briefing-room/us-department-transportation-finalizes-procedures-increase-access-newark-lower-cost>

<sup>210</sup> Federal Trade Commission, “Letter to Honorable Brian Deese”, August 25, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf>

<sup>211</sup> U.S. Department of Defense, “State of Competition in the Defense Industrial Base”, February 15, 2022, <https://www.defense.gov/News/Releases/Release/Article/2934955/state-of-competition-in-the-defense-industrial-base/>

Commission and the Justice Department started the revision process of the merger guidelines<sup>212</sup> and sought comments on bank merger competitive analysis<sup>213</sup>.

#### **IV. Conclusion**

Biden antitrust is characterized by a wealth of actions justified based on misguided assumptions. We discussed the dubious assumptions that Neo-Brandeisians achieved to convey within the Biden Administration. To be sure, a number of actions outlined above are beneficial to competition and innovation<sup>214</sup>—mostly because they remove government-created barriers to competition. However, key proposals are detrimental to generating further innovation and growth in the name of competition.

Biden antitrust is the revival of an antitrust populism that was co-existential with the adoption of the Sherman Act more than a century ago. The antitrust and competition policy of the Biden administration relies on a large number of flawed assumptions that Neo-Brandeisians have successfully disseminated over the last few years. Signaling a radical departure from economic analysis of antitrust laws and disapproving the legal and economic knowledge accumulated over the last few decades on antitrust enforcement, the competition policy adopted by the Biden administration is, generally, detrimental to disruptive competition—namely, unfettered competition through radical innovation. Indeed, the promotion of competition by the Biden administration rests on the promotion of small businesses with incremental, modest forms of competition while preserving a deconcentrated market structure. This renewed antitrust populism disparages disruptive innovation enabled by large businesses: It favors incremental competition by smaller (and sometimes less efficient)

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<sup>212</sup> Department of Justice, “Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers”, January 18, 2022, <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>

<sup>213</sup> Department of Justice, “Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis”, December 17, 2021, <https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis>

<sup>214</sup> Robert D. Atkinson, et al. “Reflections on President Biden’s Executive Order on Competition”, (ITIF Report, July 2021), <https://itif.org/publications/2021/07/12/reflections-president-bidens-executive-order-competition>



businesses. But, it is radical innovation that generates the dynamic competition that benefits consumers, improves American competitiveness<sup>215</sup>, and, more fundamentally best embraces the vital dynamics of capitalism.

Contrary to the new antitrust populism inherent to Biden antitrust, federal antitrust agencies and courts are well-advised to approach innovation and competition more dynamically<sup>216</sup>: Competition for the next innovation, competition through large-scale enterprises enabling the commercialization of innovation, and competition for opening new markets are essential features of the competitive process that the Neo-Brandeisians shaping Biden antitrust unfortunately overlook at the expense of consumer benefits and the dynamism of the capitalist society. Antitrust agencies should instead focus on the most egregious practices (i.e., cartels and collusive practices) rather than engaging in policies promoting competition at the expense of innovation, consumer welfare, and overall competitiveness.

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<sup>215</sup> Robert D. Atkinson, “Antitrust Can Hurt U.S. Competitiveness”, *The Wall Street Journal*, July 5, 2021, <https://www.wsj.com/articles/antitrust-can-hurt-u-s-competitiveness-11625520340>

<sup>216</sup> Aurelien Portuese, “Principles of Dynamic Antitrust: Competing Through Innovation”, (ITIF Report, June 2021), <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation>