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At the Nexus of Antitrust & Consumer Protection

Luke Herrine

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Abstract

This Essay uses Section 5 of the Federal Trade Commission Act to examine the theoretical and practical relationship between antitrust and consumer protection law. It argues that, since roughly 1980, there has been a hegemonic "neoliberal" framework, one that has in recent years been challenged by an emerging "moral economy" framework. The neoliberal framework conceptualizes antitrust as preventing firms from conspiring to throttle output, with a focus primarily on consumers' interests in low prices, and consumer protection as making consumers informed, rational, and able to switch between competitors with relatively low cost. The moral economy framework conceptualizes both areas of law as aiming to prevent powerful players from using their power to manipulate conditions in their favor and away from a more general (though contested) notion of the public interest. Implications of each view for the application of Section 5 are explored, with attention to the case law surrounding each area of doctrine.

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INTRODUCTION

If we want to think carefully about how antitrust and consumer protection intersect, there are few better places to start than Section 5 of the Federal Trade Commission Act. Here it is: "Unfair methods of competition in or affecting

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 Assistant Professor, Alabama Law. Thanks to Sandeep Vaheesan, Sanjukta Paul, Jason Jackson, Eli Nachmany, Christopher Peterson, Marshall Steinbaum, and the editors of the *Utah Law Review*. I also benefited from discussing some of these ideas with officials at the FTC and the USDA.

commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[1]

This single sentence gives the Federal Trade Commission ("FTC") jurisdiction over both antitrust—that is, "unfair methods of competition"—and consumer protection—that is, "unfair or deceptive acts or practices"—across nearly all industries in the United States.[2] And that is to understate its reach. Areas in which the FTC lacks jurisdiction are often covered by other agencies empowered with some derivative or variation of unfair methods and/or unfair practices authority.[3] The Department of Transportation has both unfair practices and unfair methods authority over aviation.[4] The Consumer Financial Protection Bureau has an expanded unfair practices authority over consumer-facing financial institutions.[5] The United States Department of Agriculture has authority to enforce against "unfair, unjustly discriminatory, or deceptive practice[s] or device[s]" in the meatpacking industry.[6] Many states use one or both of these phrases to empower their own enforcers.[7]

Section 5 is also broad in a different sense. Through its double use of the protean and moralizing term "unfair," it applies not just to nearly every industry but to nearly every possible violation of antitrust or consumer protection law.[8] In both domains, its authorities overlap with more specific prohibitions while extending beyond them (though its enforcement powers are generally much weaker—no treble

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[1] 15 U.S.C. § 45(a)(1).

[2] Actually, that authority is technically given by Section 5(a)(2), which also names the main exceptions to the Commission's cross-industrial scope: banking, savings and loans, credit unions, common carriers, air carriers, and most of the meat industry. *See* 15 U.S.C. § 45(a)(2).

[3] This Essay does not deal at any length with the meaning of "deceptive acts or practices" except insofar as it pertains to interpreting the meaning of "unfair methods of competition" or "unfair acts or practices." To discuss the meaning of deception would require synthesizing a whole other large body of case law and secondary literature (significantly larger than the law and literature on either of the two authorities discussed here), and I do not think it would add much to the fundamental thrust of the analysis.

[4] 49 U.S.C. § 41712.

[5] 12 U.S.C. § 5531(a). "Expanded" in the sense that the CFPB's authority is over "unfair, deceptive, *or abusive* act[s] or practice[s]." *Id.* Congress added "abusive" to clarify that the CFPB should not be limited by prevailing interpretations of unfair practices authority that prevented the FTC from decisively intervening to stop the predatory practices involved in the subprime mortgage market of the early aughts. *See* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 432–35 (2021) [hereinafter Herrine, *Folklore of Unfairness*]. In my view, which I plan to defend in a later work, the best reading of the CFPA is that any practice that is abusive is also unfair but not the inverse.

[6] 7 U.S.C. §§ 192, 213.

[7] *See* NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: APPENDIX B, STATE-BY-STATE SUMMARIES OF STATE UDAP STATUTES (2009), https://filearchive.nclc.org/udap/analysis-state-summaries.pdf [https://perma.cc/YHL5-344K].

[8] The accuracy of this statement depends on what one includes in the categories of "antitrust" and "consumer protection" (and how cleanly one draws the boundaries).

damages, no criminal jurisdiction, and so on). How far each extends is uncertain. Intentionally so: in drafting both authorities, Congress discussed giving the Commission the ability to define what counts as improper—and to adjust alongside times and mores.[9]

This breadth invites theorizing. If one is looking for an "unfair method of competition" or an "unfair . . . act or practice," what should one be looking for? Answering that question requires an account of which interests each authority is protecting and a framework to determine which practices further those interests and which do not.

Since the mid-1980s, the dominant method for making sense of Section 5 draws on neoclassical economics and favors a generally hands-off approach.[10] Call this way of thinking "neoliberal." To overstate the coherence of the framework, the basic economic idea has been that antitrust and consumer protection law should attempt to work together to make markets more "competitive," thus promoting "consumer welfare."[11] Antitrust should aim at preventing firms from conspiring to throttle output (with disagreement as to whether the definition of output restriction should include benefits to the firm or not),[12] while consumer protection should aim at making consumers informed, rational, and able to switch between competitors with relatively low cost.[13] Together, the two areas of doctrine would ideally create a market in which sellers are incentivized to try their hardest to please consumers through high production at low cost (with quality trade-offs being left to consumer choice).[14] The central disagreement in each domain has been over whether market competition generally achieves something close enough to these outcomes on its own or whether markets are characterized by sufficient market failures to justify more active policing.[15] Still, all have agreed that, out of respect for the power of markets to self-correct and of bureaucrats to self-delude, the Commission should generally err on the side of non-intervention and minimal intervention, even when market failures are clear. This caution is usually reinforced by warnings about how the more ambitious—and allegedly less economically rigorous—FTC of the 1970s

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[9] *See generally* Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915) (highlighting relevant portions of legislative history leading up to "unfair methods of competition"); S. REP. NO. 74-1705, at 2 (1936) (discussing the futility of defining specific unfair practices).

[10] *See infra* Part I.

[11] *See infra* Part I.

[12] *See, e.g.*, Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

[13] My impression is that the influence of neoclassical economic theory has been weaker in consumer protection than in antitrust, both in general and at the FTC. Nevertheless, I do think neoclassical ideas have shaped how consumer protection scholars and regulators have understood their work to a sufficient degree that this characterization is fair, at least for the purpose of exposition in this context.

[14] *See infra* Part II.

[15] *See infra* Part II.

was cut down to size by other branches of government.[16] Additionally, because the division of labor has been understood to be clarified at the level of shared theory (consumer protection focusing on consumers' information and antitrust focusing on firms' competition), consumer protection and antitrust could mostly proceed separately from each other.

In the past half-decade, the neoliberal approach has been called into question, and new approaches have begun to emerge. The critical tendencies in antitrust have often been grouped together (in a manner that sometimes obscures key differences)[17] as "Neo-Brandeisianism," "Antimonopolism," or, more derisively, "hipster antitrust."[18] The reconsideration of the role of consumer protection in checking corporate power in consumer markets has been more inchoate and less frequently labeled. For ease of reference (and to emphasize commonalities), I group these tendencies together as "moral economy."

The full picture is not yet clear, but one key guiding principle for these new tendencies of thought has been that, both out of fidelity to its original purpose and to further egalitarian republican values, the Commission should be more concerned about policing abuses of power and attempts at consolidating power. Another is that (consistent with a concern for abuses of power) the Commission should not just focus on the interests of end users of goods and services ("consumers" in the usual sense of the word) but also treatment of workers and other small players in the chain of production and distribution. A third is that the Commission should be more proactive in defining appropriate conduct—undertaking more sector-wide rulemaking to set baseline norms and limit the ability of opportunistic actors to wriggle out of balancing tests.

As the Commission has begun to[19] incorporate some moral economy thinking in its approach, the lines between antitrust and consumer protection have become

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[16] *See infra* Part II.

[17] The shared tendency is to emphasize other values in antitrust in addition to (or instead of) efficiency, to focus on the dynamic nature of competition, and to argue for more aggressive antitrust enforcement. There is also a common hearkening back to the Progressive Era and its midcentury elaborations. But there are important differences among those with these tendencies. Some thinkers (of a more centrist bent) emphasize the value of competition between relatively small firms as the central purpose of antitrust: "break 'em up." Others (of a more leftist bent) are more skeptical that competition can play as large a role as the centrists would like while also worrying that competition has downsides. These thinkers think about the value of antitrust in terms of reorganizing coordination rights over economic activity in a more egalitarian way: decentralizing power where possible while also providing structures for holding accountable those responsible for coordination. As will become clear in the elaboration that follows, my own sympathy is with the latter group.

[18] *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131–32 (2018); *see generally* George Sakkopoulos, *The Program for Making America and Europe Beautiful: 'Hipster Antitrust' and US and EU Antitrust Law and Policy*, 10 MANCHESTER REV. L. CRIME & ETHICS 191 (2021).

[19] This Essay is at risk of overemphasizing recent changes. There are plenty of continuities between past and current practice, and plenty of ambiguities in the FTC's current

less bright, with some indications they may have to be redrawn. Although there is still a concern for promoting informed consumer choice and competition, there is more humility about how much consumer choice can accomplish, even amidst vigorous competition. That skepticism motivates a shared focus on the need to channel competition toward the elements of a transaction in which choice is most important—whether instrumentally (if individuals are the best judges of which goods/services will best serve their needs) or intrinsically (if the ability to choose between different varieties of a good/service is part of the value of that good/service). Separately, there is an increased focus on the way that markets shape the distribution of opportunities and the preferences that consumers form.

These considerations motivate a shift in analysis *away from* correcting for discrete market failures or maximizing a monetized measure of net social benefit and *toward* imposing substantive standards of fairness that balance the interests of different market participants according to a notion of the "public interest" that is defined via ongoing political contestation. This form of deliberation fits more comfortably in a more avowedly political—and, for its left-leaning advocates, *democratic*—vision of administrative governance (rather than one that aims for a disinterested notion of optimality). If administrative agencies like the FTC are to be empowered to impose norms of appropriate conduct on businesses based on an analysis of the interests implicated by those businesses, they must facilitate public deliberation as to what those norms should be.

Not coincidentally, those who have adopted a moral economy view have been skeptical of the received wisdom about an overambitious FTC in the 1970s—being more inclined to see the reactions of other branches as part of the process of unavoidable political contestation over particular issues rather than a repudiation of political contestation *per se*. Indeed, they have pointed out that those who reacted so dramatically to the 1970s FTC were influenced by the very neoliberal tendencies of thought that now use those reactions to justify their hegemony.

This Essay explores this shift and how it might help us conceptualize the antitrust-consumer protection nexus in both doctrinal and theoretical terms. As far as I can tell, it is the first essay to explore the interaction between the prongs of Section 5 in any depth, let alone situate them within a common theoretical framework (let alone compare two different frameworks!). So, the Essay's central aim is to clear some common ground so that debates that have often proceeded independently from each other can begin to converge. As the Essay's author has advocated in favor of the moral economy view, the Essay does not clear the ground in an entirely neutral way. It is hoped that those skeptical of the moral economy perspective will feel inspired to correct the record, thus furthering the first purpose: to explore different ways of conceptualizing the antitrust-consumer protection nexus.

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approach. I am abstracting away from these complications—which may well end up mattering more than the changes I am observing!—to emphasize some conceptual distinctions.

Part I introduces the neoliberal view, starting with unfair methods, then unfair practices, and then the nexus between them. Using the same pattern, Part II introduces critiques of the neoliberal view and the nascent moral economy alternative.

I. THE NEOLIBERAL VIEW

To be a bit too tidy with historiography, the neoliberal era at the FTC began when President Ronald Reagan appointed James Miller III as Chair.[20] Miller was the first economist to run the Commission. He insisted that neoclassical economic analysis—usually of a Chicago School flavor—guide all policy decisions, which, for him, meant mostly trusting of the market's ability to self-correct.[21] Under his leadership, enforcement actions dropped in both the consumer protection and antitrust contexts, the practice of sector-wide regulation withered, and monetized cost-benefit analysis flourished.[22]

The influence of economics and the caution about overregulation lasted well beyond Miller's tenure. In antitrust, the debate was between Chicago and post-Chicago, with all agreeing on the centrality of consumer welfare. In consumer protection, the focus was on improving consumer decision-making, with disagreement centering on how much intervention might be needed to do so. Each domain largely remained separated from the other—each with its own economics to draw from, its own legal experts, and its own advocacy organizations (of course, corporate lobbyists crossed the divide).

This Part reconstructs how unfair methods and unfair practices were conceptualized under this regime, with attention to both the role of economic theory and the understanding of how doctrine set limits on the Commission's authority.

A. *Unfair Methods of Competition: Consumer Welfare*

Conveniently for us, the Commission summarized its approach to unfair methods during the neoliberal era in a 2015 "Statement of Enforcement Principles."[23] The Statement's focus was on "standalone" unfair methods, which is

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[20] Eleanor M. Fox, *Chairman Miller, the Federal Trade Commission, Economics, and* Rashomon, 50 L. & CONTEMP. PROBS. 33, 33 (1987).

[21] *Id.*; *see generally* JAMES C. MILLER III, THE ECONOMIST AS REFORMER: REVAMPING THE FTC, 1981–1985 (1989).

[22] *See generally* Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371 (1997); *see generally* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION (James Campbell Cooper ed., 2013) (providing background on Miller's tenure at the FTC).

[23] FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015) [hereinafter 2015 UMC POLICY STATEMENT], https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/F9H3-T5MS].

to say, acts that the Commission considers anticompetitive despite not violating "the antitrust laws"—common shorthand for current interpretations of the Sherman and Clayton Acts.[24] In the 2015 Statement, the Commission declared it would apply "a framework similar to the rule of reason."[25] More specifically, "an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[26] In parsing the terms "harm to competition or the competitive process," the Commission noted it would be "guided by . . . the promotion of consumer welfare," which it declared to be "the [only] public policy underlying the antitrust laws."[27]

This Statement encapsulates two assumptions—one about the purpose of antitrust and the other about the limits on the FTC. First, the notion that "consumer welfare" is the sole legitimate goal of antitrust was first defended by Robert Bork and his fellow travelers in the Chicago School.[28] As Bork used it, the "consumer welfare standard" condemned any form of business coordination that reduces what neoclassical economists call "total surplus," which they often refer to informally as "output."[29] Since, on standard neoclassical assumptions, firms presumably sell only commodities that consumers choose to buy because doing so will increase their

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] The *locus classicus* is ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978). Bork was building on decades of scholarship by earlier Chicago School scholars, both from the Neo-institutionalist and the Chicago I/O schools (with the former focusing primarily on "transaction costs" and the latter on "potential competition"). *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105 (1969); Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965). The Chicago School was not the first group of economists to analyze antitrust or to focus on the welfare of consumers, *see, e.g.*, CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959), and this earlier "Harvard School" laid much of the conceptual groundwork on which the Chicago School built, though it did not suggest a "consumer welfare standard" with the same singlemindedness (among its several distinguishing features), *see* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 132–141 (2022); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836 (2014). Earlier economists—including those that have influenced Neo-Brandeisians—did not focus primarily on consumer welfare. *See* SANJUKTA PAUL, SOLIDARITY IN THE SHADOW OF ANTITRUST (forthcoming 2024) (on file with author).

[29] *See generally* Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, 6 PENN. WHARTON PUB. POL. INITIATIVE ISSUE BRIEFS, Sept. 2018, at 1.

welfare, increasing "output"[30] is presumably good/welfare increasing. Applied to practices that might be reviewed by antitrust laws, the basic intuition is that any instance of economic coordination—a merger, a price-fixing ring, a tying clause—presents a trade-off. It can increase "pricing power"—that is, an actor's or actors' ability to resist competitive pressure to maximize output; it can increase "productive efficiency"—that is, synergies that expand joint productive capacity (and therefore potential output);[31] or it can do a mix of both. To maximize output, antitrust law should seek to encourage forms of coordination that increase productive efficiencies more than they increase pricing power.[32] And Chicago Schoolers have argued that markets generally select for such surplus-maximizing outcomes if left to themselves. Under their influence, antitrust law reduced the number of business practices considered *per se* unlawful, shifted presumptions and evidentiary standards in favor of defendants, and shifted the pattern of enforcement toward condemnation of horizontal coordination and approval of vertical coordination.[33]

The post-Chicago tradition, an updated version of the "Harvard School" of industrial organization economics, agrees on the value of promoting consumer welfare in the sense of high output and low prices but disagrees as to the specifics

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[30] I will drop the scare quotes after this mention, but I keep them here so I can note that this is a term of art of contested importance, even though it is often bandied about as if its meaning were intuitive.

[31] Since I am trying to present the view on its own terms, I am leaving aside for now whether the concept of "productive efficiency" used by Bork and others actually reflects the intuitive or important sense of productive efficiency that antitrust law (or any area of law) ought to care about or whether it is a concept so laden with neoclassical baggage about how things might look under absurdly unrealistic assumptions that it is actively misleading. Just to briefly indicate what I have in mind: In order for a trade-off between allocative and productive efficiency to be possible in the neoclassical framework, it must be possible for a merger or cartel arrangement to increase the productivity of the *whole economy*, or else the [productive] "efficiency" in question is just a rearrangement of resources that makes the business in question relatively more productive than other businesses (which will lead them to charge lower prices). And, unless there is some reason to believe that the pre-merger market was "distorted" in some way, such a rearrangement is *allocatively* inefficient, because it causes consumers to switch consumption to goods they prefer less (this is very similar to Posner identifies as the inefficiency involve in monopoly: "the monopoly price causes some consumers to substitute products that the higher price makes [relatively] more attractive," *see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 301 (1998)). Blocking such a merger/cartel would then be Pareto superior to letting it through. The trouble is that once one posits that a merger/cartel increases the overall efficiency of an economy, one acknowledges that the economy was not previously operating at full capacity, and so one cannot coherently say what Posner says in the above parenthetical, since any changes in consumption are a mix of both relative and absolute price changes and so they cannot straightforwardly be said to result in a loss in value.

[32] *See* BORK, *supra* note 28, at 107–15.

[33] *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

of what that means.[34] For one thing, post-Chicagoans argue that Bork misleadingly uses the term "consumer welfare" to refer to the concept of *total* surplus, which counts the benefits to producers (in terms of increased revenues, higher stock prices, and so on) as on a par with benefits to consumers.[35] Doing so treats productive efficiencies as beneficial even if firms do not pass cost savings (or cost-adjusted quality increases) onto consumers.[36] Post-Chicagoans argue that if we truly care about consumer welfare—and we should—then we should focus only on *consumer* surplus, as that term is defined in neoclassical welfare economics.[37] In principle, that means aiming to minimize the quality-adjusted price paid by consumers in the relevant market.[38] Since quality is difficult to measure, low prices to consumers frequently serve as the relevant proxy.[39] For another thing, post-Chicagoans have argued that Chicago Schoolers generally overestimate productive efficiencies[40] and underestimate pricing power, leading to approval of consolidations of economic power that would not even pass muster on their own framework.[41] Despite these and other differences, post-Chicagoans agree on the basic goal of antitrust and the basic theoretical framework through which that goal is articulated and measured.[42]

As used by the FTC, "consumer welfare" encompasses both neoclassical traditions and the common language through which they debate their differences. Though the legal standard was created decades before, it is through this common language that the modern "rule of reason" is articulated.[43] So, when the Statement of Enforcement Principles refers to "harm to competition or the competitive process," it refers to the effects of any given form of coordination on a firm's ability

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[34] *See, e.g.*, Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard,"* PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/ [https://perma.cc/CX8G-FP69]; Steven C. Salop & Carl Shapiro, *Jean Tirole's Nobel Prize in Economics: The Rigorous Foundations of Post-Chicago Antitrust Economics*, 29 ANTITRUST 76 (2015).

[35] Samuel & Morton, *supra* note 34.

[36] *Id.*

[37] *See, e.g.*, RUSSELL PITMAN, CONSUMER SURPLUS AS THE APPROPRIATE STANDARD FOR ANTITRUST ENFORCEMENT (2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/09/28/225696.pdf [https://perma.cc/K8NJ-X7MW]; Salop, *supra* note 12.

[38] Samuel & Morton, *supra* note 34.

[39] *See id.*

[40] Post-Chicagoans generally mean the same thing as Chicago Schoolers by this term.

[41] *See* Samuel & Morton, *supra* note 34.

[42] For a sense of how this shared vision emerged, *see* BERMAN, *supra* note 28, at 217–221. *See also* Luke Herrine, *Politics and Expertise*, PHENOMENAL WORLD (Sept. 2, 2022), https://www.phenomenalworld.org/reviews/politicizing-expertise/ [https://perma.cc/W5FF-9Y3J] (supplementing Berman's account).

[43] The rule of reason was created in *Standard Oil Co. of New Jersey. v. United States*. 221 U.S. 1 (1911). Its meaning has shifted as the theories that support antitrust have shifted. For its current consumer welfare iteration, *see* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81 (2018); *see also* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977).

to throttle output/use pricing power.[44] When the Statement refers to "cognizable efficiencies and business justifications," it refers to the synergies created by the form of coordination in question.[45] By applying the rule of reason, then, the FTC is supposed to look for business practices that reduce output on net, as proxied by price increases[46] in the relevant market.

By applying the rule of reason, though, the FTC is applying the very standard that courts use in determining whether a practice violates the Sherman or Clayton Acts (unless the practice is *per se* unlawful, a category that currently contains only price-fixing and practices like market division, tying, predatory pricing, and group boycotts when undertaken by agents with sufficient combined market power).[47] As several scholars have pointed out, using the rule of reason—or something "similar to" it—to determine what is anticompetitive *beyond* the behavior prohibited by those statutes (often referred to simply as "the antitrust laws") leaves little room for standalone unfair methods.[48] The standard seems to be: "something that is very close to a violation of the Sherman or Clayton Acts but might be hard to convince a court is bad enough to warrant treble damages."

That brings us to the second assumption of the neoliberal view of unfair methods. The FTC has kept close to the curtilage of "the antitrust laws" largely out of fear that courts will arrest FTC actions that journey beyond it. It is generally agreed that the main source of this fear is a set of three circuit court decisions in the

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[44] 2015 UMC POLICY STATEMENT, *supra* note 23.

[45] *Id.*

[46] There are several exceptions to the focus on low price. For example, the literature and doctrine on retail price maintenance has allowed for price increases on the assumption that they reflect a trade-off with quality. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (2007). Why quality should only be explicitly considered in some situations and left to consumer choice in others is left to the reader as an exercise.

[47] *See* Hovenkamp, *supra* note 43, at 83; *see also* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 668 (2017). This is setting aside whether "quick-look" is a separate category. Hovenkamp, *supra* note 43, at 121. Confusingly, in the 1970s, the FTC briefly developed a separate "rule of reason" for standalone UMCs, as follows: "unilateral business practices could violate the Act if the structure of the industry rendered it susceptible to anticompetitive price coordination, if there was substantial evidence of actual noncompetitive performance, and if there was no 'pro-competitive' justification offsetting the harmful effect of the practices." E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 135 (2d Cir. 1984). This standard is no longer in use, for reasons about to be discussed.

[48] *See* Vaheesan, *supra* note 47; *see also* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 942 (2010); Rudolph J. R. Peritz, *Unfair Methods of Competition Under FTC § 5: Beyond the Sherman Act and an Ex Post Model of Enforcement*, 56 ANTITRUST BULL. 823, 865–866 (2011); FED. TRADE COMM'N, WORKSHOP ON SECTION 5 OF THE FTC ACT AS A COMPETITION STATUTE 73–80 (Oct. 17, 2008) (statement of Daniel A. Crane) [hereinafter WORKSHOP ON SECTION 5 OF THE FTC ACT], https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf [https://perma.cc/5JPX-SEQW].

early 1980s that set aside Commission orders finding standalone unfair methods.[49] In 1980, in *Boise Cascade*, the Ninth Circuit found that it was improper for the Commission to charge unfair methods against manufacturers charging a standard price for freight—a form of "base point pricing"—solely on the grounds that doing so reduced the incentive to compete on price (in particular, pricing for the cost of transportation).[50] This case can be seen as a warning against prohibiting pricing practices that are not at least an arguable violation of Section 2 of the Sherman Act prohibiting contracts that restrain trade. In the same year, in *Official Airline Guides*, the Second Circuit rejected the Commission's finding that a firm that was a (literal) monopolist in the (pre-internet!) market for books listing prices of flights of all North American carriers had acted unfairly when it failed to list connecting flights from small "commuter carriers."[51] Though the publisher's action tipped the competitive balance in favor of larger "certificated carriers," the Second Circuit found no unfair action because there was no evidence that the monopolist intended to restrain competition or expand their monopoly from books listing prices for flights into the market for flights themselves.[52] This case can be seen as cautioning against imposing standards of behavior on monopolists that go beyond what courts have imposed in Sherman or Clayton cases. Four years later, in *E.I. Du Pont De Nemours & Co.*, the Second Circuit went further, finding that a group of uniform but non-collusive pricing practices could not be unfair methods merely because they made price-fixing easier.[53] More than that, the majority (over a dissent) declared that when the Commission seeks to define standalone unfair methods that "break new ground by enjoining otherwise legitimate practices," it must articulate clear principles "so that businesses will have an inkling as to what they can lawfully do."[54] And the further the Commission ventures outside the strictures of Sherman-Clayton doctrine to develop its own standards, "the closer must be [the] scrutiny upon judicial review."[55]

We will have reason to examine the findings of these cases and their relation to surrounding doctrine[56] in more detail below.[57] For now, what is important is the fact that they have long been *perceived* as a warning to the FTC not to get too creative

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[49] *See* Vaheesan, *supra* note 47, at 663; Kovacic & Winerman, *supra* note 48, at 942; Peritz *supra* note 48, at 841–50.

[50] Boise Cascade Corp. v. FTC, 637 F.2d 573, 581–82 (9th Cir. 1980).

[51] Off. Airline Guides v. FTC, 630 F.2d 920, 924–28 (2d Cir. 1980).

[52] *Id.*

[53] *E.I. Dupont*, 729 F.2d at 139 ("at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.").

[54] *Id.* at 137, 139.

[55] *Id.* at 137.

[56] As many authors have observed, the FTC has faced hostile courts for much of its existence. *See* Kovacic & Winerman, *supra* note 48, at 941–43; *see also* WORKSHOP ON SECTION 5 OF THE FTC ACT, *supra* note 48, at 204–05; Ramsi Woodcock, *The FTC Knows It When It Sees It*, TRUTH ON THE MKT. (Nov. 22, 2022), https://truthonthemarket.com/2022/11/22/the-ftc-knows-it-when-it-sees-it/ [https://perma.cc/T9WV-BFTH].

[57] *See infra* Part III.A.

with standalone unfair methods.[58] The simple narrative is: in the 1970s, the Commission tested the boundaries of what it could do with its unfair methods power, and, in the 1980s, the federal judiciary made clear that those boundaries are to be drawn relatively close to the four corners of Sherman-Clayton doctrine. It would be foolish, then, to explore that frontier any further, at least not without articulating clear limiting principles.[59]

B. Unfair Acts or Practices: Consumer Sovereignty

Neoliberal-era limits on the unfair practices authority have also been motivated by warnings about the Commission having its wrist slapped in the 1980s for going too far in the 1970s.[60] The limit-setter (wrist slapper) in this tale is Congress, not the courts. The main source of drama was "KidVid," a rulemaking begun in 1978 to determine how to regulate television advertising of sugary cereals to children.[61] Egged on by lobbyists and media companies worried about losing sponsors, Congress took a number of actions to stop KidVid, including prohibiting the Commission from using the unfair practices authority in that rulemaking in particular[62] and threatening to eliminate the unfair practices authority altogether.[63] In an effort to preserve its unfair practices authority for future use, the Commission responded to a congressional request for clarification with a "Policy Statement."[64] This document announced a three-part test, which Congress encoded into the FTC

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[58] Gus Hurwitz, *Chevron and Administrative Antitrust, Redux*, TRUTH ON THE MKT. (Apr. 29, 2022), https://truthonthemarket.com/2022/04/29/chevron-and-administrative-antitrust-redux/ [https://perma.cc/7C3D-4D2D] (referring to the FTC as "shell-shocked by its treatment in the courts").

[59] This view has been vigorously defended in recent criticisms of the FTC's updated unfair methods policy statement (discussed further below). *See FTC Rulemaking on Unfair Methods of Competition*, TRUTH ON THE MKT., https://truthonthemarket.com/symposia/ftc-rulemaking-on-unfair-methods-of-competition/ [https://perma.cc/J55K-NW8S].

[60] J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection [https://perma.cc/2BBF-NFZ7].

[61] *See* Herrine, *Folklore of Unfairness*, *supra* note 5, at 484–91, 502–14.

[62] 15 U.S.C. § 57a(h) ("The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce."). The Commission was also considering using its deceptive practices authority, although it abandoned this effort with the change of administration. Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 87 (2006).

[63] *See* Herrine, *Folklore of Unfairness*, *supra* note 5, at 508.

[64] *Id.* at 509–14; *FTC Policy Statement on Unfairness*, FED. TRADE COMM'N (Dec. 17, 1980) [hereinafter *1980 Policy Statement on Unfairness*], https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness [https://perma.cc/JA5J-C9FN].

Act in a 1994 amendment.[65] According to this "substantial injury test," the Commission can only declare a practice unfair if the practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[66]

Although its text alone would seem to grant broad discretion to the Commission, the substantial injury test is often treated as hemming in the unfair practices authority. One way it is said to do so is by imposing a norm of "consumer sovereignty" onto the Commission.[67] In this context, "consumer sovereignty" refers to the neoclassical[68] economist's idea that if goods and services are provided through the process of open competition, consumers will have the power to dictate which goods and services are provided and on what terms (given resource and technological constraints) merely by choosing between sellers. If one assumes, as neoclassical economists generally do, that each consumer knows what is best for them, then consumer sovereignty will lead to a maximization of "consumer surplus" (in the same sense discussed above) so long as consumers are well informed about their options and choose between them rationally.[69] Thus, those who favor the maximization of consumer surplus should, in addition to policing markets for anticompetitive practices, seek to ensure that consumers are rational, well-informed, and able to freely choose between products and sellers. And thus, in the words of former Director of the Bureau of Consumer Protection Howard Beales, "the primary purpose of the Commission's modern unfairness authority" is to "protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices."[70]

Put simply: from a consumer sovereignty perspective, the purpose of consumer protection is primarily to remove barriers to consumer choice.[71] One crucial barrier

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[65] Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994).

[66] 15 U.S.C. § 45(n).

[67] *See, e.g.*, Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 227 (1981); JAMES C. MILLER III, THE ECONOMIST AS REFORMER, REVAMPING THE FTC, 1981–1985, 7–8 (1989); Beales, *supra* note 60.

[68] In fact, the concept of consumer sovereignty is originally due to W.H. Hutt, who was an Austrian economist (though not an Austrian *national*—he was British). Austrian economics has a complicated relationship with the neoclassical mainstream. The details of these overlaps are not important for our purposes. What matters is only that the concept has traveled beyond the relatively narrow domain of Austrian theory. *See* Luke Herrine, *What Is Consumer Protection for?*, 34 LOY. CONSUMER L. REV. 240, 250–55, 259–61 (2022) [hereinafter Herrine, *What Is Consumer Protection for?*].

[69] *Id.*

[70] Beales, *supra* note 60, at 10.

[71] *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997) (explaining that antitrust and consumer protection law support one another and share the goal of consumer sovereignty).

is overt interference by businesses with consumers' ability to choose—by taking advantage of a situational monopoly, by imposing switching costs, or by obscuring the terms of the agreement.[72] More generally, regulators should seek to ensure that consumers have the information and cognitive tools necessary to be able to do what economists assume they are naturally inclined to do: optimize their individual welfare functions by choosing between competitive sellers.[73] Only if consumers prove resistant to interventions that make them better choosers should a regulator consider setting standards that would restrict choice in the name of maximizing welfare (and even then, interventions should be as minimal as possible). Broader notions of "public policy" should rarely be appealed to, lest they lead the Commission to replace consumers' wants and needs with its own paternalistic standards of what consumers should want.[74]

As with the consumer welfare standard, there are more conservative and more liberal versions of the consumer sovereignty norm. Conservative versions tend to be more skeptical of alleged market failures, more hopeful about the ability of a market to self-correct, and more dubious about the ability of FTC intervention to achieve its intended goals.[75] They are also more likely to treat even non-welfare-maximizing consumer choices as worthy of respect on anti-paternalist grounds.[76] Liberal versions tend to be more skeptical of the rationality of consumers, more worried about regressive distributional implications, and more optimistic about the Commission's capacity to craft an effective remedy.[77] For both, though, the general concern is with making markets work more like the neoclassical ideal, primarily by making it easier for consumers to choose between competitive sellers.[78]

The substantial injury test is said to reflect this consumer sovereignty norm in at least three ways. First and most centrally, in the words of the Policy Statement, the reasonable avoidability prong focuses on "seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making."[79] Indeed, the Policy Statement states that the Commission normally

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[72] *Id.* at 718–22.

[73] *See* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 36–43 (2012); Howard Beales, Richard Craswell, & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492–95 (1981).

[74] I discuss the theory in more detail in Herrine, *What Is Consumer Protection for?*, *supra* note 68, at 309–12.

[75] *See, e.g.*, J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2167–68 (2015).

[76] *See, e.g.*, *id.*

[77] *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 98–101 (2008); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1313–31 (2015).

[78] *But see* Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 845–75 (2019) (explaining macro-level downsides to reducing transaction costs and increasing consumer sovereignty).

[79] *1980 Policy Statement on Unfairness*, *supra* note 64.

"expect[s] the marketplace to be self-correcting," which means that consumer choice should normally be relied on to "govern the market" in the absence of "sales techniques [that] prevent consumers from effectively making their own decisions."[80] All of these phrases would seem to suggest that this prong is meant to keep the Commission focused on facilitating informed and rational consumer choice.[81] Second, the cost-benefit balancing prong might be seen to require the monetized cost-benefit analysis that economists have long recommended as a way to discipline administrative action.[82] It also builds in a free-floating skepticism about regulation insofar as costs to business will be more easily measured in monetary terms and more likely to be brought to the FTC's attention (since businesses have a strong incentive to do so) than benefits, especially benefits to marginalized groups.[83] Third, the fact that Congress instructed that "public policy considerations may not serve as a primary basis" for the determination that an act or practice is unfair might seem to caution against the Commission attempting to articulate values other than that of facilitating rational consumer choice.[84] That is, it might be seen as a caution against the sort of paternalism that a focus on consumer sovereignty is supposed to guard against.[85]

In the name of consumer sovereignty, the FTC's overall approach to unfair practices since 1980 (setting aside 1970s holdovers like the Funeral Rule and the Credit Practices Rule) has thus been to mostly focus on consumer-facing deceptive practices or practices with no obvious redeeming qualities (like lax data security or breaching contracts) and to do so on a case-by-case basis. Mistreatment of workers or other small players has been treated as outside the scope. Attempting to articulate substantive standards of fairness for a given business—let alone a whole industry—has been seen as dangerously close to doing "public policy" and thus in danger of running afoul of the post-KidVid settlement.

C. The Nexus: Consumer Welfare and Administrative Humility

For the most part, these two areas of Commission competency have developed independently. Each has its own division at the FTC: unfair methods is the bailiwick of the Bureau of Competition, and unfair practices the domain of the Bureau of

[80] *Id.*

[81] *See* Averitt, *supra* note 67, at 251, 264; Beales, *supra* note 60, at 6–7.

[82] Averitt, *supra* note 67, at 248–50; Beales, *supra* note 60, at 7. But note that the notion of Kaldor-Hicks optimality that grounds cost-benefit analysis is distinct from the notion of consumer surplus—and so it is not obvious how using CBA would guide policy toward maximal consumer surplus. *See* Mark Glick & Gabriel Lozada, *The Erroneous Foundations of Law and Economics* (Inst. for New Econ. Thinking, Working Paper No. 149, 2021), https://www.ineteconomics.org/uploads/papers/WP_149-Glick-and-Lozada.pdf [https://perma.cc/PL6L-N349].

[83] *See generally* Averitt, *supra* note 67.

[84] 15 U.S.C. § 45(n).

[85] Averitt, *supra* note 67, at 275; Beales, *supra* note 60, at 11.

Consumer Protection.[86] Each division is informed by its own communities of professionals: antitrust lawyers and I/O economists in the case of unfair methods, consumer lawyers and information/behavioral economists in the case of unfair practices. And each is governed by its own lines of doctrine. These worlds are not totally separate from each other, but the communication between them is minimal, considering that they are governed by conjoined clauses in a single-sentence designation of legal authority.

This separation of domains predated the neoliberal era of Section 5 enforcement.[87] But it has been a central aspect of the neoliberal approach. And during the neoliberal era, the division has been rationalized in a distinctive way. Both the "consumer welfare" and the "consumer sovereignty" approaches are built on neoclassical economic models that (to oversimplify) treat the value of social institutions in terms of their ability to promote "consumer welfare" and begin from the assumption that the ideal way to promote that end is "perfect competition" between sellers and perfectly informed rational choice-making on the part of consumers.[88] Since perfection is impossible, the goal becomes finding the optimal level of coordination between sellers that will allow for maximum consumer surplus and the optimal amount of information and bias-correction to facilitate consumer choice that will discipline firms to produce the maximum consumer surplus. Institutionally, prohibitions on anticompetitive practices of various sorts are analyzed as various attempts to prevent firms from coordinating to reduce "output" (allowing them to raise prices and/or reduce quality). Prohibitions on harming consumers are analyzed as various attempts to remove market failures that prevent consumers from optimizing. The first clause of Section 5 is just one example of the former, and the second clause is just one example of the latter.

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[86] On the history of this division of institutional responsibility, *see* ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 112–13 (1980).

[87] The division happened in stages over time, with a major impetus being the Naderite consumer movement pushing for an expanded focus on consumer protection starting in 1969, which also had the effect of reorganizing the agency. *See* Leah Samuel, Legislating FTC Rulemaking: Unfair Methods of Competition Rulemaking Authority After the Magnuson-Moss Warranty Act of 1975, 23–24 (2022) (unpublished manuscript) (on file with author). Harvard School antitrust had begun to build a "beachhead" at the FTC a bit earlier in the 1960s, bringing with it the first wave of efficiency-focused neoclassical I/O, setting the stage for the later turn to the consumer welfare standard. *See* BERMAN, *supra* note 28, at 85–88. By the middle of the 1970s, the Bureau of Competition was largely guided by I/O economists while the Bureau of Consumer Protection was largely guided by Nader-influenced lawyers with a vague skepticism of corporate power. *Id.* Each was largely in its own world. *Id.*

[88] This is to fudge some details. Neoclassical models generally treat the value of social institutions in terms of their ability to contribute to maximizing *social* welfare, which does not focus only on consumption, but also on how labor and leisure trade off and so on. In the spirit of Adam Smith's dictum that "[c]onsumption is the sole end and purpose of all production," however, the general approach in these domains has been to focus on consumers' interests. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 625 (Edwin Cannan ed., The Modern Library 1937).

This common intellectual framework is joined to a common uneasiness about having the FTC make judgments about the substantive fairness of an action. In both the unfair methods and the unfair practices context, this uneasiness is usually justified in terms of preventing the Commission from arbitrarily imposing its will. Thus, the uneasiness can be partially dissipated if the Commission can argue that Congress and/or the federal judiciary has paved the path it is walking—in the unfair methods context, that means hewing closely to contemporary interpretations of the Sherman and Clayton Acts; in the unfair practices context it means putting forward evidence that a "public policy" is sufficiently well entrenched. But, in both contexts, the uneasiness is not entirely explicable as a principled opposition to bureaucratic aggrandizement or anti-paternalism. It is at least in part a reflexive avoidance response to external actors: an effort to steer clear of the sorts of controversial rulemakings that caused courts and Congress to chide the Commission half a century ago. This uneasiness means refraining from proceeding with enforcement actions that might be justifiable within the shared theoretical framework but would nevertheless potentially court controversy.

II. THE (EMERGING) MORAL ECONOMY VIEW

If Reagan's appointment of Miller kicked off the neoliberal era at the FTC, President Joseph Biden's appointment of Lina Khan has called it into question.[89] At the least, it has kicked off a reconsideration of the approaches to both parts of Section 5, motivated by skepticism of the consumer welfare and consumer sovereignty frameworks. What remains to be seen is how far it will go.

Khan is a key figure in the so-called "Neo-Brandeisian" movement to reconsider the law and political economy of antitrust.[90] With the support of the FTC's two other Democratic Commissioners, she has brought those reconsiderations to the Commission.[91] Under her leadership, the Commission has also begun to

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[89] Press Release, Fed. Trade Comm'n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc [https://perma.cc/A9F2-48TM].

[90] *Cf.* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1655–58 (2020); *New Brandeis Movement*, WIKIPEDIA https://en.wikipedia.org/wiki/New_ Brandeis_movement [https://perma.cc/7AT5-4DVL] (last visited Jan. 15, 2023).

[91] Rebecca Kelly Slaughter has been a Democratic Commissioner for Khan's entire tenure (and was Acting Chair before Khan's appointment). *Rebecca Kelly Slaughter*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/commissioners-staff/rebecca-kelly-slaughter [https://perma.cc/J8HC-36YQ] (last visited Jan. 15, 2023). Rohit Chopra was a Commissioner during the first few months, before he was appointed to the Consumer Financial Protection Bureau. Lisa Rowan, *Rohit Chopra Is the New Head of the CFPB. What Does that Mean for You?*, FORBES ADVISOR (Sep. 30, 2021, 4:52 PM), https://www.forbes.com/advisor/personal-finance/rohit-chopra-cfpb-next-steps/ [https://perma.cc/4XE2-3MYD]. Alvaro Bedoya was sworn in on May 16, 2022. Press Release, Fed. Trade Comm'n, Alvaro Bedoya Sworn in as FTC Commissioner (May 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/05/alvaro-bedoya-sworn-ftc-commissioner [https://perma.cc/U45G-3TYJ].

consider reorienting consumer protection toward correcting for power imbalances and expanding unfair practices authority to protect workers who are classified as purchasers of dominant firms' services in fissured workplaces. In doing so, the Commission has been influenced by scholarship and advocacy that calls into question the value of making consumers more rational and highlights the role of corporate power in shaping the available choices.

This Part explores how matters have developed in each domain and how these changes have affected the overlap between them. I caution that Khan has only been Chair for two years, so these changes are still in process.

A. *Unfair Methods of Competition: Fair Competition*

Even before the 2015 Statement of Enforcement Principles encapsulated the longstanding consensus, some antitrust scholars had argued that the FTC had been unnecessarily and unwisely narrowing its authority to define "unfair methods of competition."[92] That view did not gain any political momentum until it was buoyed by the rise of the "Neo-Brandeisian" school of antitrust.[93] As a distinctive school, Neo-Brandeisianism began to coalesce only half a decade ago, but once it coalesced, it gained influence quickly. When President Biden took office, he appointed leading Neo-Brandeisians into several antitrust leadership positions.[94] Most important for present purposes, a majority of FTC Commissioners are at least sympathetic to some version of Neo-Brandeisianism.[95] That majority rescinded the 2015 Statement of Enforcement Principles in July 2021 and issued a new set of principles in a November 2022 Policy Statement.[96]

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[92] Kovacic & Winerman, *supra* note 48, at 929–30, 944; *FTC Rulemaking on Unfair Methods of Competition*, *supra* note 59.

[93] *New Brandeis Movement*, *supra* note 90.

[94] Yusaf H. Akbar, *Biden's Antitrust Turn: The 2021 Antitrust Executive Order and Its Implications for Firms and Their Executives*, CAL. MGMT. REV. (Oct. 4, 2021), https://cmr.berkeley.edu/2021/10/biden-s-antitrust-turn-the-2021-antitrust-executive-order-and-its-implications-for-firms-and-their-executives/ [https://perma.cc/H4AU-AQR4].

[95] Chair Khan is clearly Neo-Brandeisian if that term has any meaning. Commissioner Slaughter has demonstrated a concern for policing inequalities of power even if she has not expressed her views in enough detail to determine whether she would count as Neo-Brandeisian. Chair Bedoya's recent speech about prioritizing fairness over efficiency has Neo-Brandeisian elements. *See* Alvaro M. Bedoya, Chair, Fed. Trade Comm'n, "Returning to Fairness," Remarks at Midwest Forum on Fair Markets (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf [https://perma.cc/7HSZ-42UT].

[96] The rescission took place on July 1, 2021. *See* Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act [https://perma.cc/L89F-7Y8B]. The release of a new statement took place on November 10, 2022. Press Release, Fed. Trade

Neo-Brandeisians (and others with overlapping views) see two nested problems with the 2015 Statement and the theory it represented. The more general problem is the consumer welfare approach to antitrust that it exemplified. The more specific problem is its narrow vision of the FTC's role in defining norms for business practices.

With respect to the general problem, Neo-Brandeisians have argued both that application of the consumer welfare standard has failed on its own terms—by increasing the pricing power of dominant firms—and that the standard places a flawed and abstract concept of "output" above other values that should also motivate antitrust.[97] The main evidence of failure on its own terms is a growing number of studies that have indicated that market power, markups, and profit margins have increased during the era of consumer welfare antitrust, contributing to the dramatic increase in income and wealth inequality during this period, as well as the slowdown in productivity.[98] These statistics do not on their own imply that "consumer welfare" (or "output") has failed as a standard. Indeed, the evidence of growing pricing power has motivated post-Chicago thinkers to become increasingly vocal in advocating for more aggressive antitrust enforcement on the grounds that it will better serve "consumer welfare."[99] Still, the fact that a nominally single-minded focus on low

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Comm'n, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition [https://perma.cc/5FW3-746J]. Only Chair Khan and Commissioners Slaughter and Chopra voted in favor of the former, with Commissioner Bedoya replacing Commissioner Chopra in the latter's vote. *Id.* For both, Commissioners Wilson dissented. *Id.*

[97] *See* Vaheesan, *supra* note 47.

[98] *See* Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235–238 (2017). Key empirical studies are Jan de Loecker, Jan Eeckhout, & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020); THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (2019); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). *But see* James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* (Stigler Ctr., Working Paper No. 17, 2018), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/workingpapers/17isaggregatemarketpowerincreasing.pdf [https://perma.cc/369Q-ES9Z].

[99] *E.g.*, Jonathan B. Baker, Jonathan Sallet, & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 YALE L. J. 1916, 1918–20 (2018). *See also* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960 (2018), https://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem [https://perma.cc/HA4K-23MP] (responding to Baker, Sallet, & Morton's *Unlocking Antitrust Enforcement* piece previously cited from a Neo-Brandeisian perspective); Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J.F. 980 (2018), https://www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust [https://perma.cc/F5MF-KETG] (responding in like fashion).

consumer prices has led to increased markups has been argued to provide reason for skepticism of the standard itself.[100]

A deeper disagreement is with the focus on "output" (whether as "consumer surplus" or "total surplus") and with the neoclassical economic framework used to parse that concept.[101] As a matter of implementation, Lina Khan has argued that looking for price and output effects treats market power as a static rather than dynamic phenomenon and, in practice, "delay[s] intervention until market power is being actively exercised . . . largely ignoring whether and how it is being acquired."[102] At a conceptual level, John Newman has argued that increased output is not necessarily consumer-welfare enhancing (as neoclassical economists use that term) and may even be consumer-welfare reducing, which makes a focus on output in the name of "consumer welfare" problematic.[103] Even more deeply, Sanjukta Paul has argued that notions of "consumer welfare," "competition," and "efficiency" that are applied in neoclassical conceptualizations of antitrust form an interlocking set of conceptual equivocations that distract attention from the questions they purport to answer.[104] Others have raised other objections, including to deeper aspects of the theoretical framework that we do not have space to discuss here.[105]

Neo-Brandeisians have also argued that prioritizing consumer interests is bad policy and bad law. On the law, ample evidence testifies to the fact that the major

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[100] I am leaving aside deeper questions about whether higher mark-ups or reduced productivity should be seen as evidence of "market power" or whether that concept is even a coherent guide to antitrust policy once one adopts a heterodox view of how market competition works. *See generally* FREDERIC S. LEE, POST KEYNESIAN PRICE THEORY (1999). An alternative framework has not yet been articulated in sufficient robustness to be able to be summarized quickly here. *But see* Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 72 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022). The internal critique will have to suffice.

[101] For a parsing of some of the key theoretical issues, see Mark Glick, An Economic Defense of Multiple Antitrust Goals: Reversing Income Inequality and Promoting Political Democracy (Inst. for New Econ. Thinking, Working Paper No. 181, 2022), https://www.ineteconomics.org/uploads/papers/WP_181-Glick-Antitrust-Goals.pdf [https://perma.cc/3MVC-ULVU]; *see also* Frederic S. Lee & Steve Keen, *The Incoherent Emperor: A Heterodox Critique of Neoclassical Microeconomic Theory*, 62 REV. SOC. ECON. 169 (2004).

[102] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737–38 (2017).

[103] John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563 (2022).

[104] Paul, *supra* note 33, at 415–25; Sanjukta Paul, *On Firms*, U. CHI. L. REV. (forthcoming 2023) (manuscript at 18–23).

[105] *See* Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455 (2018) (arguing that the consumer welfare standard was theoretically flawed and not rigorous from the start); P.W.S. ANDREWS, ON COMPETITION IN ECONOMIC THEORY (1964) (critiquing the monopolistic competition and imperfect competition frameworks and developing an alternative); Tankus & Herrine, *supra* note 100.

antitrust statutes were not passed with the interests of consumers solely—or even primarily—in mind.[106] The coalitions that passed these laws were concerned, first and foremost, with preventing the consolidation of economic power. Though they were somewhat concerned with the consequences of power on consumer prices, they were at least as focused on the consequences for workers and small producers, on the political and social consequences of industrial oligarchy, and on the consequences for smaller and poorer communities who are less profitable to serve.[107] It does violence to legislative purpose, Neo-Brandeisians point out, to focus primarily on consumer-facing prices.[108] They also argue that an updated version of anti-oligarchy is worthy of embrace on its own terms.[109] Pointing to the increased inequality, deprivation alienation, and political instability brought on by offshoring, disinvestment, de-unionization, fissured workplaces, and other efforts to concentrate power and income upward while pushing risk and liability downward, they point out that failing to account for the broader impact of concentrated control is both unjust and unwise.[110]

As an alternative to consumer welfare, Neo-Brandeisians argue for a form of antitrust that seeks to disperse power, distribute opportunity, promote fair treatment, and channel competition toward labor-saving and quality-improving (rather than output-maximizing) innovation.[111] This is, of course, a pluralistic orientation. It

[106] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 203–06 (2021); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 180–217 (2022); Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*, 64 ANTITRUST BULL. 295, 295–96 (2019); *see also* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1205–09 (2021).

[107] *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 42–44 (2018).

[108] *See generally id.*

[109] There is also a separate thread of recent scholarship that supports including workers' interests in antitrust analysis but does so using modified versions of the same neoclassical models that have guided consumer welfare antitrust. *See, e.g.*, Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381, 381–83 (2019); Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537–49 (2018). Promoters of the consumer welfare standard have argued that this adjustment is appropriate so long as it continues to center output as the normative north star of antitrust. *See* Herbert Hovenkamp, *Worker Welfare and Antitrust*, U. CHI. L. REV. (forthcoming 2023).

[110] *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235–37 (2017); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C.L. REV. 551, 559–62 (2012). *But see* Ramsi A. Woodcock, The Progressive Case Against Progressive Antimonopolism (June 11, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864585 [https://perma.cc/CD8H-EJEK] (suggesting that inequality will persist even in perfectly competitive markets and the real solution is taxation, not antitrust measures).

[111] Khan & Vaheesan, *supra* note 110, at 275–94; Glick, *supra* note 106, at 314; Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1081–82 (2019).

cannot be reduced to a maximizing (or minimizing) function that can theoretically be applied across contexts, so long as one can find good enough data. Instead, it requires reasoning about priorities and setting rules that balance them appropriately. Which is not to say it requires a regime of case-by-case balancing. Contrariwise, Neo-Brandeisians have generally favored more *per se* rules in the name of improving clarity, channeling competition away from socially undesirable conduct, and reducing the ability of powerful actors to impose litigation costs on those challenging their conduct, among other reasons.[112]

In addition to taking issue with the consumer welfare standard embraced by the 2015 Policy Statement, Neo-Brandeisians also object to the Statement's embrace of the rule of reason and the close hewing to the curtilage of "the antitrust laws" that implies. They (and others) point out that the Congress that created the FTC (and the Clayton Act) was doing so precisely to avoid letting federal courts determine the bounds of antitrust law through that recently created balancing test.[113] The idea was to create a body of experts who could determine which competitive practices were most likely to lead to consolidation and abuse of power and to experiment with devising an evolving body of rules to channel competition in a different direction.[114] Neo-Brandeisians argue for recovering and updating this vision (even as they do not entirely agree on what that implies).

Although the Supreme Court initially fought back by insisting that it had primary authority to interpret Section 5, the Court relented during the New Deal.[115] Since then, it has consistently deferred to the Commission's interpretations of the unfair methods authority. It has done so whether the Commission has aimed to stop *incipient* violations of other antitrust laws, whether it has aimed to police the *spirit* of those laws, and even when it has articulated norms for business competition that go *beyond their spirit*.[116] That leaves plenty of room for the Commission to

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[112] *Cf.* Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. ONLINE 119, 136–39 (2022); Vaheesan, *supra* note 47, at 689.

[113] *See* Vaheesan, *supra* note 47, at 657–63; Peritz, *supra* note 48, at 828–29; Averitt, *supra* note 67, at 232.

[114] Averitt, *supra* note 67, at 229; GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, 90–114 (2009). *But see* Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835 (2016) (arguing that the FTC never lived up to the Progressives' vision for it).

[115] The initial case claiming that Courts were to define unfair methods was *FTC v. Gratz* 253 U.S. 421, 427 (1920). The clear New-Deal-era turn away from *Gratz* occurred over a series of cases, the most decisive of which were *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 314 (1934) and *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948). The express overruling of *Gratz* (citing a line of cases that had already basically done the work) was *FTC v. Brown Shoe Co.* 384 U.S. 316, 320–22 (1966).

[116] *See generally* Averitt, *supra* note 67. The broadest decisions are the most recently decided. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

experiment, and it is not just Neo-Brandeisians who have argued that it is time to roam beyond the Sherman Act's curtilage.[117]

As for those circuit court cases in the 1980s, several scholars have argued that their limits have been exaggerated. Setting aside the fact that they were circuit court—and not Supreme Court—rulings (and in only two circuits!), none of them denied the breadth of the Commission's authority.[118] Instead, each of them faulted the Commission for failing to meet its own internal standards or provide clear guidance.[119] Additionally, these enforcement actions took place during a moment in which the general feeling among legal elites was that the Commission needed reining in.[120] For these and similar reasons (and notwithstanding the possibility of an ideologically opposed court creating new hostile doctrines),[121] it is not just Neo-Brandeisians who argue that existing doctrine gives the FTC room to roam as it investigates how to create rules to undermine industrial oligarchy.

The 2022 Policy Statement reflects and builds on these arguments. After reviewing the legislative history, the Statement re-commits the Commission to Congress's original "balance" in which the Commission can "proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts," but with softer enforcement mechanisms (no criminal liability, no treble damages, no private right of action) and with "limited . . . preclusive effects . . . in private antitrust cases."[122] It points out that reviewing courts have (since the 1930s) consistently supported this vision, including even the circuits that ruled against the Commission's application of it in three cases in the 1980s.[123] And it characterizes those cases as turning on the lack of evidence of (in the courts' words) "oppressive" or "anti-competitive conduct" rather than a failure to apply the rule of reason.[124]

Although the Statement does not directly critique or reject the consumer welfare standard, its description of what constitutes an unfair method of competition draws from Neo-Brandeisian thinking. It defines "unfair" much as it was understood in 1914: as "conduct [that] goes beyond competition on the merits."[125]

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[117] *See, e.g.*, Kovacic & Winerman, *supra* note 48, at 930–40; Peritz, *supra* note 48, at 868–71.

[118] *See* Pertiz, *supra* note 48, at 829.

[119] *Id.* at 842–49.

[120] *Id.* at 841–46.

[121] This is my obligatory reference to the "major questions doctrine" that is now required of every law review article discussing anything that touches on contemporary administrative law. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022); Nat'l Federation of Indep. Bus. v. DOL, 142 S. Ct. 661 (2022).

[122] FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, at 5 (Nov. 10, 2022) [hereinafter 2022 POLICY STATEMENT], https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf [https://perma.cc/LH58-M3DY].

[123] *Id.* at 7–8.

[124] *Id.* at 2–3, n.7, 11.

[125] *Id.* at 8.

In determining whether competition is "on the merits" or unfair, the Commission commits to considering "two key criteria."[126] First, it asks whether conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory . . . involve[s] the use of economic power of a similar nature" or is "otherwise restrictive or exclusionary."[127] The focus on "collusive" and "restrictive or exclusionary" conduct bespeaks concern that economic actors might acquire or maintain power (in the form of customers or control) through means that do not reflect genuine improvements in quality or cost effectiveness. The other factors seem targeted at conduct that takes unfair advantage of any power once acquired, whether legitimately or otherwise.

Second, the Commission asks whether "the conduct . . . tend[s] to negatively affect competitive conditions," leading to negative consequences.[128] The Commission is concerned not just with negative consequences for consumers (related to price or otherwise) but also with harm to workers or other "market participants" denied a fair chance at winning customers. And by focusing on conduct that reduces potential for productivity-enhancing innovation, limits choice, and increases barriers to entry, the Commission commits to a dynamic vision of competition rather than optimizing "output" at any given point in time.[129]

These two criteria "are weighed according to a sliding scale."[130] The more clearly oppressive the conduct, the less need for contextualizing the conditions of the market. Conversely, the more dominant the defendant, the less overtly oppressive the conduct need be to cause a worry about exclusionary effects. This approach allows for targeting abuses of power—deceptive, abusive, predatory, or exploitative conduct—regardless of the market share of the perpetrator. Indeed, it would seem to render all unfair practices also unfair methods of competition—a topic further addressed below. The sliding-scale approach also allows for the Commission to attend to differences between collusive or exclusionary conduct by relatively disempowered market actors seeking to fight back against more powerful upstream market actors (like rideshare drivers or jockeys working as independent

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[126] *Id.* at 9.

[127] *Id.* In light of Commissioner Wilson's dissenting complaint that the Commission adopts a "list of adjectives," *see* FED. TRADE COMM'N, CHRISTINE S. WILSON, COMM'R, COMM'N FILE NO. P221202, DISSENTING STATEMENT REGARDING THE "POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT," at 6 (Nov. 10, 2022), it seems worth noting that this list of adjectives is largely derived from a list of the sorts of conduct Section 5 reaches put forward by the Second Circuit in exactly the case that is widely cited as setting limits to unfair methods doctrine. *See* E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 140 (2d Cir. 1984).

[128] 2022 POLICY STATEMENT, *supra* note 122, at 9.

[129] *Id.* at 10.

[130] *Id.* at 9.

contractors)[131] and similar conduct from more powerful actors seeking to maintain or deepen their advantage.[132]

We do not yet know what exactly the new standards will look like in practice, but we have at least three indicators. One is the list of historical examples that the Commission provides at the end of its new Policy Statement. Among the standalone violations listed are parallel exclusionary conduct (even without proof of collusion), de facto tying by use of market pressure (even if not through a contract), a dominant firm buying out a potential competitor (even if it did not result in monopolization in the short term), and the use of idiosyncratic product specifications to prevent entry.[133] Another indicator of future directions is the FTC's 2022 Policy Statement on Enforcement Related to Gig Work, which, among other things, raises the possibility that noncompete clauses and clauses that prevent gig workers from moving between platforms might be standalone unfair methods.[134] We will return to the details of this Statement below. The third is the Notice of Proposed Rulemaking released on January 5, 2023 (during the revision process of this Essay), which proposes a ban on all noncompete clauses.[135] This announcement marks the beginning of the first-ever rulemaking under the FTC's unfair methods authority.[136]

B. Unfair Acts or Practices: Fair Treatment

There has not been a holistic rethinking of consumer protection analogous to the Neo-Brandeisian school. Nor has there been an insurgent consumerist movement like that of the 1960s and '70s.[137] And no policy statement updating the unfair practices authority is on the visible horizon.

But there has been a small resurgence in movements attempting to take on the power of corporations—especially Big Tech—to shape our lives through their consumer-facing practices. Among the specific objects of concern have been the massive surveillance architectures that follow, predict, and analyze our every move, the increasingly sophisticated methods to extract resources from vulnerable

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[131] *See* Sandeep Vaheesan, *How 37 Puerto Rican Jockeys Created an Opening for Gig Worker Unionizing*, NEW REPUBLIC (May 2, 2022), https://newrepublic.com/article/166253/gig-worker-labor-rights-antitrust [https://perma.cc/4PLP-2M97].

[132] On this distinction, see Paul, *supra* note 33, at 380–82.

[133] 2022 POLICY STATEMENT, *supra* note 122, at 13–15.

[134] FED. TRADE COMM'N, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 10–12 (Sep. 15, 2022), [hereinafter FTC GIG WORK POLICY], https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf [https://perma.cc/J5P8-CMWK].

[135] *Non-compete Clause Rulemaking*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/4NB8-ENMN] (proposing to add a new subchapter J, consisting of part 910, to be added to chapter I in title 16 of the CFR that would prohibit employers from entering into a noncompete clause with a worker).

[136] The controversy over whether the FTC has such rulemaking authority goes well beyond our scope here. *Cf.* Samuel, *supra* note 87.

[137] *See* Herrine, *Folklore of Unfairness*, *supra* note 5, at 477–91.

consumers, and the proliferation of techniques for avoiding accountability for, well, anything.[138] The FTC, as the default regulator of the tech sector's consumer-facing practices, has become the default agency for fielding these concerns.[139]

There has also been growing concern, advocacy, and organization around corporate strategies to offload risk, including shifting risk onto workers and using legal techniques like franchising, independent contracting, and less-than-full-time scheduling to create a "fissured workplace."[140] Several of these techniques effectively construct workers and downstream businesses as consumers who enter into contracts to access firms' products and/or to connect them to customers.[141] These practices are the core business strategy of the "gig economy." One potential technique for holding these firms to account even as they weasel out of other regulatory requirements might be to lean into their own classifications and breathe life into the more flexible areas of consumer law.[142]

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[138] *See, e.g.*, Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. 1, 48–49 (2021) (discussing futility of consumers resisting invasions of their privacy); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 228–31 (2019) (describing avoidance of accountability); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 1 (2018) (defining "technological redlining" as the process by which "algorithmically driven software" worsens "social inequality," especially for racial minorities); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 2 (2016) ("Many of these [mathematical] models encoded human prejudice, misunderstanding, and bias into the software systems that increasingly managed our lives."); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311 (2015); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014).

[139] *See generally* Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. 439 (2020); CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION: PRIVACY LAW AND POLICY (2016); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

[140] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (discussing the changing employment landscape as employers aim to reduce costs and liability).

[141] *See* Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, U. CHI. L. REV. (forthcoming 2022) (discussing the implications of the legal battle over worker classification in the gig economy); Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 J.L. & POL. ECON. 397 (2021) (analyzing the anticompetitive effects of some franchise agreements and the need for both antitrust and labor regulation to mitigate the problem).

[142] In its original form, UDAP was not explicitly limited to practices that affected consumers (applying to any "act[] or practice in or affecting commerce"). 15 U.S.C. §

Scholars and advocates of these turns of mind have recently turned to the Commission's unfair practices authority as a potential tool.[143] And the Commission has begun to wield it.[144] Through a series of enforcement actions, mostly in the auto sales market, the Commission has begun to establish the unfair practices authority as a tool for policing discrimination in situations that fall through the cracks of our piecemeal antidiscrimination regime.[145] Through enforcement and rulemaking it has

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45(a)(1). However, the 1994 amendments that encoded the substantial injury test into law prevents the Commission from finding an unfair practice "unless the act or practice causes or is likely to cause substantial injury *to consumers*." 15 U.S.C. § 45(n) (emphasis added). Additionally, the Congress that drafted the original UDAP authority was doing so with consumers (and primarily with advertising) in mind.

[143] *See* Peterson & Steinbaum, *supra* note 141, at 26–29; Andrew D. Selbst & Solon Barocas, *Unfair Artificial Intelligence: How FTC Intervention Can Overcome the Limitations of Antidiscrimination Law*, 171 U. PA. L. REV. 1 (forthcoming 2023) (arguing that the "FTC's flexible authority to regulate 'unfair and deceptive acts and practices' offers several distinct advantages over traditional discrimination law when applied to artificial intelligence."); Hirsch, *supra* note 139; Lauren E. Willis, *Deception by Design*, 34 HARV. J. L. & TECH. 115 (2020).

[144] *See* Christa Bieker & Christopher Leach, *The FTC Thinks B2B 'Customers' Are 'Consumers,'* BLOOMBERG L. (Oct. 3, 2022, 2:00 AM), https://news.bloomberglaw.com/us-law-week/the-ftc-thinks-b2b-customers-are-consumers [https://perma.cc/8VKH-TA9U] (explaining that the "FTC's [unfair and deceptive practices] enforcement is largely principles-based, so companies in the [business-to-business] space should look at compliance principles to avoid regulatory scrutiny").

[145] *See* Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42,012 (Jul. 13, 2022), https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14214.pdf [https://perma.cc/L9VR-CNZV]; Stipulated Order, F.T.C. v. Liberty Chevrolet, 1:20-cv-03945-PAE (S.D.N.Y. May 22, 2020), https://www.ftc.gov/system/files/documents/cases/bronx_honda_stipulated_final_order_liberty_chevrolet.pdf [https://perma.cc/J2QE-ZYTH]; Stipulated Order, F.T.C. v. N. Am. Auto. Servs., 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/6-1%20Stipulated%20Order.pdf [https://perma.cc/Z9M2-WCF2]; Stipulated Order, F.T.C. v. Passport Auto. Grp., Inc., 8:22-cv-02670 (D. Md. Oct. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Order%20As%20Filed.pdf [https://perma.cc/6B2W-JJG7]; *see also* Off. of the Chair, U.S. Fed. Trade Commn'n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Napleton Automotive Group (Mar. 31, 2022) [hereinafter Kahn & Slaughter Statement], https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf [https://perma.cc/94YN-QFQX]; Rebecca Kelly Slaughter, Janice Kopec & Mohamad Batal, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, 23 YALE J.L. & TECH. 1 (2021); Off. of Commn'r Rohit Chopra, U.S. Fed. Trade Comm'n, Statement of Comm'r Rohit Chopra in the Matter of Liberty Chevrolet (May 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576002/bronx_honda_final_rchopra_bronx_honda_statement.pdf [https://perma.cc/H936-5GM2].

initiated a crackdown on so-called "junk fees" and on dark patterns.[146] More dramatically, August 2022, the Commission released a broad advance notice of proposed rulemaking on "commercial surveillance."[147] The Commercial Surveillance ANPRM asks for comment on many reform possibilities, including creating requirements for data security, restricting the uses for which information can be collected, kept, and used, developing standards to minimize the probability of algorithmic discrimination, simplifying disclosures that companies have to make about data collection, and imposing performance-based standards that would reduce the mental health risks that social media presents to young people.[148] Although it does not say so explicitly, the only authority the Commission could appeal to in developing nearly all of these standards would be the unfair practices authority.

And in September 2022, the FTC released the aforementioned Gig Work Policy Statement.[149] The Gig Work Policy Statement indicates an intention to use unfair practices authority (among others) to target lopsided fees, opaque algorithmic governance, restrictions on worker mobility, noncompete clauses in contracts, and, more generally, abuses of power.[150]

The version of "unfair practices" implied by these efforts goes beyond—and at times contradicts—the consumer sovereignty version. The Commission is much less concerned with making consumer choice work better by increasing information or correcting for biases.[151] Instead, they are concerned with policing firm conduct precisely because of the limited power of consumer choice to impose discipline on firms, whether in competitive or concentrated markets.

This tension was explicitly acknowledged in a September 2022 speech by Sam Levine, Director of the Bureau of Consumer Protection, to Bureau Européen des

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[146] Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67,413 (Nov. 8, 2022), https://www.govinfo.gov/content/pkg/FR-2022-11-08/pdf/2022-24326.pdf [https://perma.cc/LX5C-QM39]; Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. at 42,012; Enforcement Policy Statement Regarding Negative Option Marketing, 86 Fed. Reg. 60,822 (Nov. 4, 2021), https://www.govinfo.gov/content/pkg/FR-2021-11-04/pdf/2021-24094.pdf [https://perma.cc/7VCT-JF3C].

[147] Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51,273 (Aug. 22, 2022), https://www.govinfo.gov/content/pkg/FR-2022-08-22/pdf/2022-17752.pdf [https://perma.cc/ZR47-Y9F8].

[148] *Id.* at 51,281–85.

[149] FTC GIG WORK POLICY, *supra* note 134.

[150] *Id.* at 7–12.

[151] *Compare* Decision and Order, *In re* Flo Health, Inc., No. C-4747 (F.T.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/192_3133_flo_health_decision_and_order.pdf [https://perma.cc/XTM3-DNE9] (requiring a fertility-tracking app that shared user data without users' consent to *disclose* situations in which it will share data) *with* Proposed Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, U.S. v. GoodRx Holdings, Inc., No. 3:23-cv-460 (N.D. Cal. Feb. 1, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/goodrx_stipulated_order_for_permanent_injunction_civil_penalty_judgment_and_other_relief.pdf [https://perma.cc/6NH2-8HGQ] (proposing to require a health app that shared use data without users' consent to *not share data* for advertising purposes and to appoint a third-party monitor to audit privacy practices).

Unions de Consommateurs, the biggest European consumer association.[152] Levine critically reexamined two of the assumptions of the 1980 Policy Statement: that markets generally self-correct and that consumers can largely protect themselves if given the right information. With respect to the former, he pointed to the 1980s savings and loan and 2008 financial crises as evidence of how markets can self-sabotage even, or especially, once "let free" from regulation.[153] (He might have also pointed to, say, the blackouts caused by energy deregulation, the ballooning of predatory for-profit colleges when "competition" was supposed to discipline them, and the collapse of crypto markets).[154] With respect to the latter, Levine examines several aspects of our increasingly internet-mediated economy. He argues that the failure of notice-and-consent to facilitate anything like meaningful consumer choice is damning evidence of the shortcomings of seeking to make informed choice the pivot of market discipline.[155] And things are getting worse because of the increasing sophistication of firms' ability to sort consumers based on characteristics that are largely beyond their control (including how they are like or unlike others) and the increasing ability of firms to manipulate consumers' choices without changing their information (through "dark patterns").[156]

These observations build on literature that has applications beyond the specific context of Big Tech.[157] The failure of notice-and-consent is just one example of the policy regimes that have run into intractable difficulties due to the incorrect assumptions about human decision-making that come with the consumer sovereignty ideal.[158] A large body of empirical evidence speaks to the limits of

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[152] *See* Samuel Levine, Consumer Protect. Dir., Fed. Trade Comm'n, "To Empower, Not to Weaken: Rethinking Consumer Protection in the Digital Age," Remarks for BEUC: The European Consumer Organisation (Sept. 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/S.LevineBEUCspeech9272022FINAL.pdf [https://perma.cc/KYC9-Y6JE].

[153] *Id.* at 3.

[154] *See* William Boyd, *Pricing Power: Market Governance and the Texas Blackouts*, LPE PROJECT (Mar. 11, 2021) (discussing the blackouts in Texas following the freeze of 2021 and their relation to energy market governance); A.J. ANGULO, DIPLOMA MILLS: HOW FOR-PROFIT COLLEGES STIFFED STUDENTS, TAXPAYERS, AND THE AMERICAN DREAM (2016) (discussing the history of for-profit colleges, their frauds, and the rhetoric surrounding them); Press Release, FTC, FTC Targets False Claims by For-Profit Colleges, (Oct. 6, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-targets-false-claims-profit-colleges [https://perma.cc/FP2Q-VRE3]; Rohan Goswami & MacKenzie Sigalos, *How Sam Bankman-Fried Swindled $8 Billion in Customer Money, According to Federal Prosecutors*, CNBC (Dec. 19, 2022, 2:06 PM), https://www.cnbc.com/2022/12/18/how-sam-bankman-fried-ran-8-billion-fraud-government-prosecutors.html [https://perma.cc/ET3V-JEQY] (covering the Bankman-Fried cryptocurrency fraud allegations).

[155] *See* Levine, *supra* note 152, at 5–6 (explaining that "[e]ven if notices were perfectly understandable . . . they may – and often do – simply inform consumers that the company collects anything and everything it can, and can do with it whatever it wants.").

[156] *Id.* at 8–12.

[157] The following discussion is largely a condensation of arguments made in Herrine, *What Is Consumer Protection for?, supra* note 68.

[158] *See* Solove, *supra* note 138, at 4.

humans' information processing capacities.[159] These limits make correcting for limited information by adding more information somewhere between impossible and perverse.[160]

A different sort of problem for consumer sovereignty is that even well-informed consumers only have so much power to choose—most parts of any transaction must simply be taken as given at the individual level. Especially resistant to any given consumer's control are social customs that shape how a consumer is treated (whether due to attractiveness, race, geographic location, etc.)[161] and, relatedly, network effects that structure which possibilities are available (which language a contract is in, which dispute resolution system governs the relevant transaction, which type of charger phones tend to come with, whether one can find anything useful on the portions of the internet that do not surveil ones every move).[162] But even aspects of a transaction that can sometimes be the subject of negotiation or choice, such as quality-price trade-offs, are not always on the table and never to the same degree for all consumers.[163] Social structure and social location are not—cannot be—dissolved by market competition.[164]

What is more, the consumer sovereignty framework has little to say about how to regulate the behavior of firms with some market power, except perhaps: "get rid of that market power." The trouble is that even if getting rid of market power (or getting rid of switching costs or preventing manipulation of consumer preferences) were the first best option,[165] that still leaves the question of what to do when that proves intractable for some reason (or arguably undesirable, as in industries with high fixed costs or large economies of scale/scope). Should firms simply be allowed to exploit their position? Or should consumer protection accept the limits of consumer choice and regulate transactions with power in mind?

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[159] *See generally* EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS (2018).

[160] Herrine, *What Is Consumer Protection for?*, *supra* 68, at 18–19.

[161] *See generally* NOBLE, *supra* note 138; FREDERICK F. WHERRY, THE CULTURE OF MARKETS (2012).

[162] *See generally* DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (2008).

[163] *See* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 653 (2021).

[164] Again, for an elaboration of these arguments, see Herrine, *What Is Consumer Protection for?*, *supra* note 68, at 25–30.

[165] We might question whether that would be true, whether on grounds of productive efficiencies generated by economics of scale and scope, innovations facilitated by concentrations of capital, the benefit of market stabilization, or something else. *See* ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 21–27 (1994); Flavio Delbono & Luca Lambertini, *Innovation and Product Market Concentration: Schumpeter, Arrow, and the Inverted U-Shape Curve*, 74 OXFORD ECON. PAPERS 297, 309 (2020); Tankus & Herrine, *supra* note 100, at 94–95.

These and related considerations motivate a more capacious approach to unfair practices. This approach, which we might tentatively call "moral economy,"[166] attends to the various ways that consumers can be vulnerable and the various ways that businesses can take advantage of those vulnerabilities. Doing so requires reasoning in terms of the overlapping and conflicting interests that consumers have, including those that have to do with the market as a whole: norms about privacy, what counts as fair treatment for differently situated consumers, customization versus standardization, and so on. Since these interests cannot simply be read from (actual or idealized) consumer choice, they require articulation through the process of politics. Commissioners must, in Learned Hand's words, "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[167] Or, with a bit less kumbaya: Commissioners must take direction from Congress as to which interests to protect, use their judgment as to how far to go beyond explicit grants of authority, and be held to account through administrative, legislative, and (at the margin) judicial means.

A moral economy approach is consistent with the substantial injury test, even if it involves a departure from some of the specifics of the 1980 Policy Statement and a reinterpretation of the three prongs.[168] The most important difference is a broader sense of which injuries are "reasonably avoidable." At a descriptive level, a moral economy approach would recommend accounting for network effects, systemic inequalities, reputational dynamics, information overload, and other unavoidably social aspects of consumer markets in addition to information asymmetries and cognitive shortcomings in arriving at a judgment about whether a consumer could have avoided any given harm. But the effort would not be to find the "true" decision that a consumer would make in some sort of undistorted market. Rather, a moral economy approach would proceed from the recognition that avoidability is a matter of degree, and the relevant normative question is whether the consumers exposed to the injury in question *ought to be* expected to (whether it is *reasonable to expect them to*) avoid it.[169] It is certainly well within any consumer's capacity to call a magazine's customer service line to cancel a subscription (thus avoiding the harm of the loss of income that comes with an automatic renewal)—but is it *reasonable* to expect consumers to pick up the phone and listen to Muzak for half an hour before responding to survey questions and arguing with an underpaid employee if they could also be given other easier options? Answering that question requires reasoning in terms of which (and whose) interests to prioritize, not just whether a consumer could have acted differently.

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[166] As I suggest in Herrine, *What Is Consumer Protection for?*, *supra* note 68, at 31–52.

[167] FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

[168] I plan to explore these differences in detail in forthcoming work.

[169] For a discussion on the unavoidable morality of defining injury, see Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 98 (1995).

At the "countervailing benefits" prong, a moral economy approach would be less sympathetic to attempts to commensurate costs and benefits in terms of net willingness to pay.[170] One reason for that has to do with what Andrew Selbst and Solon Barocas call "scoping."[171] Scoping asks about the breadth of potential costs and benefits to weigh against each other: should the question be whether consumers are better off with the whole contract or better off with a given term, other things equal? A moral economy approach is inclined to answer the scoping question in terms of the interest being protected rather than in terms of a net welfare calculation. If one's goal is preventing racialized unfairness, for example, protecting a relatively small subset of Black consumers from being given worse terms may well be worth it, even if it increases burdens on consumers overall.[172] Or if one's goal is to make working conditions for Uber drivers more humane by, say, requiring bathroom breaks,[173] one will be inclined to discount any resulting reductions in convenience for consumers.

Nothing in current law prevents the Commission from thinking about the substantial injury test in this way. In the thin case law that there is, courts have been quite deferential to the Commission, and certainly, there is no established principle that the Commission must think in terms of consumer sovereignty.[174] Nor does the 1980 Policy Statement impose any concrete limits. The phrases about deferring to consumer choice and presuming that markets self-correct do not actually announce standards—more like general dispositions. The language is too vague to impose any restrictions. In any case, the Commission could amend guidance as needed.[175]

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[170] *See generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

[171] Selbst & Barocas, *supra* note 143, at 47–52.

[172] *See* Kahn & Slaughter Statement, *supra* note 145, at 3–4 ("We do not believe that any potential price reductions produced by the discrimination and enjoyed by other auto purchasers should constitute a 'countervailing benefit' under the statute. More generally, this matter highlights an important issue, regarding what constitutes a 'countervailing benefit.' Any purported benefit that can be achieved without engaging in the conduct causing substantial injury is not countervailing, and does not overcome the costs associated with discrimination.").

[173] *Cf.* Jaspreet Singh Kalra, *Why Are Uber Drivers Urinating in Cups and Disposable Bottles?*, GOTHAM GRIND (Oct. 22, 2019), https://medium.com/the-gotham-grind/why-are-uber-drivers-urinating-in-cups-and-disposable-bottles-844ce1841b44 [https://perma.cc/QWL8-CVZS] (explaining that Uber drivers are not required to take bathroom breaks, and if they do they can lose bonuses).

[174] *E.g.*, FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015); FTC v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010); FTC v. Accusearch, Inc. 570 F.3d 1187 (10th Cir. 2009); Pennsylvania Funeral Dir. Ass'n, Inc. v. FTC, 41 F.3d 81 (3d Cir. 1994); Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354 (11th Cir. 1988); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 979 n.27 (D.C. Cir. 1985); Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

[175] Here is not the place for this analysis, but, on first blush, it seems to me that at least the parts of the Policy Statement that do not articulate the three-part test are not binding. *See* Cath. Health Initiatives v. Sebelius, 617 F.3d 490, 494 (D.C. Cir. 2010).

Aside from the influence of the consumer sovereignty vision, the main reason that the Commission has not ventured into more ambitious policy via the unfairness authority is the traumatic memory of Congress's response to KidVid. But, as with the circuit court cases that allegedly limited the unfair methods authority, to those (like me, I confess) in favor of abandoning the neoliberal approach, the importance of this ordeal has been exaggerated. KidVid was a perfect storm: it was a regulatory proceeding piled on top of fourteen other regulatory proceedings, each of which annoyed a different business constituency; it took place just as the political winds shifted against regulation; and it angered the previously supportive media, who depended on advertising revenue. Most importantly, KidVid was the target of an unprecedently well-funded and sophisticated lobbying campaign from a newly unified business lobby.[176] And the anger at KidVid was not really about the use of the unfairness authority in particular: the Commission was also considering, and prevented from using its deceptiveness authority.[177] The Commission has no reason to expect such a strong response each time it tries to do anything the least bit ambitious with its unfairness authority.[178]

This is not to say that there is not likely to be strenuous opposition to regulations that impose substantial costs on business, nor is it to deny that this opposition would lead to at least some congressional discontent. But there is discontent in some corners of Congress at nearly everything nowadays. And the existence of controversy about issues of great importance is not the definitive reason to avoid taking them on, so long as the FTC is otherwise justified to do so.

C. The Nexus: Fair Dealing

Each of these rethinkings of the meaning of unfairness has mostly proceeded independently from the other. More generally, antitrust and consumer protection remain mostly isolated from each other. But we do have some traces to go on in sketching what a more integrated unfair methods–unfair practices nexus might look like under a moral economy regime. Drawing them together helps to illustrate what the rethinkings of antitrust and consumer protection have in common and how they might interact.

The first trace is the history of Section 5. As originally conceived, unfair practices was an application of unfair methods. From 1914 to 1938, Section 5 only prohibited unfair methods of competition, and the Commission was understood entirely as an antitrust agency.[179] For various reasons, the early Commission found itself using its Section 5 authority to prohibit consumer fraud and other forms of

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[176] *See generally* Herrine, *Folklore of Unfairness, supra* note 5 (providing analysis on KidVid).

[177] *Id.*

[178] I make this historical case at greater length in Herrine, *Folklore of Unfairness, supra* note 5.

[179] *See id.* at 462–72.

(what was understood as) immoral conduct toward consumers.[180] The main focus was on deceptive conduct, though conduct that took advantage of vulnerabilities, especially of children, was also condemned.[181] The FTC often justified this approach on the grounds that a firm that gains business through immoral conduct—that is, an *unfair practice*—harms competition by forcing other businesses to act immorally to stay competitive (creating a race to the bottom) and by making consumers less discerning and/or less trusting, which shrinks the market and/or forces firms to waste resources distancing themselves from the immoral conduct.[182] More abstractly, gaining competitive advantages by mistreating consumers is not competition on the merits.

Congress created the unfair practices authority because some courts found that the Commission could only enforce against the mistreatment of consumers if it could provide evidence that this mistreatment also harmed competitors.[183] This requirement began to fade with the progressive turn of the courts,[184] but the Commission, covering its bases, brought the problem to Congress's attention.[185]

[180] *See id.* at 462–64; Richard S. Tedlow, *From Competitor to Consumer: The Changing Focus of Federal Regulation of Advertising, 1914–1938*, 55 BUS. HIST. REV. 35, 53 (1981).

[181] The most prominent such case was *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 313 (1934).

[182] FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934) ("Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous."); FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922). *But see* FTC v. Gratz, 253 U.S. 421, 427 (1920) (referring to unfair methods of competition as applying to practices "opposed to good morals because [they were] characterized by deception, bad faith, fraud or oppression . . . ." without reference to competitive effects); Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919) ("The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived.").

[183] The key case is *FTC v. Raladam Co.*, 283 U.S. 643 (1931). Notice that this line of reasoning would seem to go against the modern dictum that antitrust law is concerned with protecting "competition not competitors." *See* Pawel Popiel, *Protecting 'Competition, not Competitors': Antitrust Discourse and the AT&T-Time Warner Merger*, CRIT. DISCOURSE STUD. (July 21, 2022), https://doi.org/10.1080/17405904.2022.2102515 [https://perma.cc/AH96-DJRW].

[184] *E.g.*, Electro Thermal Co. v. FTC, 91 F.2d 477, 480 (9th Cir. 1937); FTC v. Army & Navy Trading Co., 88 F.2d 776, 778–79 (D.C. Cir. 1937); E. Griffiths Hughes, Inc. v. FTC, 77 F.2d 886, 888 (2d Cir. 1935); Pep Boys – Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 160–61 (3d Cir. 1941).

[185] *See* SEN. REP. NO. 74-46 (1935). I have become less sure about the motives of then-Chair Ewin Davis as I have researched the legislative history further. In particular, I have become increasingly suspicious that Davis did not actually think the FTC needed UDAP authority to serve its consumer protection function but asked for the authority as part of a strategic move to prevent the FDA from gaining power over advertising. Here is not the place for discussion of the record, but one key bit of evidence is the fact that Davis himself said that *Raladam* was not much of an obstacle when it served the purpose of undermining the need for further advertising authority and then shifted to emphasizing the problems with

Congress quickly and by overwhelming majority clarified that the Commission should be concerned with harm to consumers, whether or not it could prove harm to competitors. It did so by adding "unfair or deceptive acts or practices" to Section 5.[186]

We can uncover a (relatively) simple logic here, as follows. To gain a competitive advantage by manipulating the competitive process rather than competing on the merits is to compete unfairly. There are many ways to gain competitive advantage, some of which involve consumer-facing conduct (which can be more or less broadly defined) and some of which do not. Through the unfair methods authority, the Commission defines which of these practices are unfair, whether to consumers or not. When the Commission determines that a method manipulates the competitive process by treating consumers unfairly, it makes a judgment about which consumer-facing conduct is legitimate in addition to a judgment about whether that conduct interferes with legitimate competition. To quote the first prong of the 2022 Policy Statement, the FTC asks whether the conduct is "exploitative . . . abusive, deceptive, [or] predatory."[187] It thus determines whether a given act is an unfair (or deceptive) practice en route to determining whether it is an unfair method. But treating consumers unfairly is also wrong simply because of the harm to consumers (broadly conceived), regardless of how the behavior affects the balance of power in a market. The unfair (or deceptive) practices authority exists to allow the Commission to define which consumer-facing conduct crosses that line without having to determine whether it also improperly manipulates the competitive process. These authorities can be used separately or in tandem, depending on the nature of the problem the FTC seeks to address.

Returning to the Gig Work Policy Statement will help to make things more concrete. Rather than merely naming several practices that may present problems on their own, the Commission examines the industry as a whole and articulates three causes for concern that can be remediated through the strategic use of multiple tools: (1) gig platforms' use of creative contracting and entity structures to give them maximal control over gig workers while taking minimal responsibility for their costs or wellbeing; (2) platforms' use of algorithms and restrictive contracts to undermine workers' ability to bargain for different conditions; and (3) market power, facilitated

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Raladam in service of advocating that, if there is to be new advertising authority, it should go to the FTC. *See* Statement by Honorable Ewin L. Davis, Chairman, of Fed. Trade Comm'n, on Proposed Food and Drug Legislation to Sub-Committee of House Interstate and Foreign Commerce Committee, at 4–6 (Aug. 10, 1935), https://www.ftc.gov/system/files/documents/public_statements/673861/19350810_davis_proposed_food_and_drug_regulation.pdf [https://perma.cc/W66H-U528] (downplaying the significance of *Raladam* while advocating for transferring jurisdiction over drug advertising from the FDA to the FTC); SEN. REP. NO. 75-221, pt. IX, at 231–32, 285–86 (1937) (showing Senator Coffee criticizing Davis for changing his position about the significance of *Raladam* and accusing him of being corrupt).

[186] *See* Herrine, *Folklore of Unfairness, supra* note 5, at 471.

[187] *Supra* note 110, at 8.

by network effects, that prevents workers from exercising power through exit.[188] The Commission then states its intention to address these concerns by using a combination of unfair methods and unfair practices authorities (for present purposes, I include deceptive practices in the category of unfair practices).[189] As mentioned above, the Policy Statement classifies obfuscation about pay, opaque gig-assignment algorithms, arbitrary and impossible assignments, and a number of one-sided contract terms—including noncompete clauses—as potentially unfair practices because of the harms they inflict on workers (as consumers of the platforms services).[190] As also mentioned above, the Statement notes that noncompete clauses might present a standalone unfair methods problem because they interfere with competition over workers—gaining competitive advantage by manipulating the competitive process rather than offering better terms of work.[191] Finally, it classifies wage-fixing, no-poaching agreements, predatory pricing, and several other practices as unfair methods within the curtilage (or under the roof) of the Sherman Act.[192]

The Commission's overall goal is to make working conditions fairer in the gig work industry (which might also make the quality of the service better—though that is not the focus). In doing so, it is attempting to countervail gig platforms' power to set conditions in a way that benefit executives and investors at the expense of others. To achieve this goal, the Commission invokes its unfair practices authority to target lopsided aspects of the relationship between gig platforms and their worker-consumers. It invokes its unfair methods authority to target efforts by gig platforms to prevent competition that would undermine their own power over these worker-consumers. It invokes both authorities in the case of noncompete clauses that simultaneously harm worker-consumers and interfere with competition that might allow those worker-consumers to bargain for better terms.[193]

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[188] FTC GIG WORK POLICY, *supra* note 134, at 4–6.

[189] *Id.* at 8–9.

[190] *Id.* at 7–13.

[191] *Id.* at 11–13.

[192] *Id.* at 14–15.

[193] Another example is the junk fees initiative. Enforcement against junk fees has largely been using unfair *practices* authority, *see supra* note 146 and accompanying text, and usually with a focus on preventing harm to consumers. But White House has also justified the initiative in terms of its effect on competition—raising "switching costs" that make it harder for new entrants, for example. *See* Brian Deese, Neale Mahoney & Tim Wu, *The President's Initiative on Junk Fees and Related Pricing Practices*, WHITE HOUSE (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/ [https://perma.cc/CX7J-Q2KK]. One article the White House refers to discusses how "exploitative innovation" can lead firms to compete on extracting more money from consumers by hiding costs rather than improving products. *See* Paul Heidhues, Botond Köszegi & Takeshi Murooka, *Exploitative Innovation*, 8 AM J. ECON: MICROECONOMICS 1 (2016). Although the framework for this Essay is neoclassical, it provides one way of thinking about how competition can lead to harmful outcomes and thus must be channeled toward beneficial outcomes—that is, how *unfair practices* and *unfair competition* are intertwined.

In this particular case, the overall focus is not on attempting to ensure that free choice between competitive firms shapes as much of a transaction as possible. Rather, the focus is on preventing powerful firms from manipulating the market in their favor at the expense of the (relatively disempowered) workers in the market. Through a combination of authorities, the Commission seeks to set standards that channel business conduct away from advantage-taking and power-preservation—*unfair* conduct—and toward competing over cost-effectiveness and quality while respecting the rights and recognized interests of less powerful market participants. It promotes competition not on its own terms, but in order to expand worker freedom and undermine platforms' attempts to limit it without sufficient justification.

CONCLUSION

There is much more to say about the FTC's change in direction, the heated debate it has generated, and where it might lead. But the point here is not (primarily) to dig in on familiar debates in antitrust and consumer protection but to push the discussion toward the less-trodden territory of their intersection. The least controversial point of this Essay is that we need much more discourse across the antitrust–consumer protection divide. The tracks of each have become too deeply etched. Explicitly thinking about how they connect will surely motivate a deeper understanding of each.

More substantively, I have tried to demonstrate that the shape of the antitrust-consumer protection nexus is not fixed—rather, it depends on one's theoretical perspective. A neoclassical framework (which is part of the neoliberal framework)[194] thinks in terms of a market perfected by frictionless competition and fully informed consumer choice, while a moral economy framework thinks in terms of reducing power asymmetries in markets full of frictions populated with consumers lacking information. This Essay has highlighted some of the similarities and differences between them, but it only sketches the bare outlines.

In particular, the moral economy framework remains underdeveloped. That is, in part, a matter of the limits of space and of the author's analytic ability, but it is also because the framework itself has only recently come into view. And, unlike the neoliberal vision, it was not elaborated over decades in the academy before being tested—elaboration and testing are taking place simultaneously, in conversation with each other. Indeed, this Essay is part of the process of theoretical elaboration of what has been going on in recent years. There are many directions moral economy (or something like it) could yet go.

Some historical perspective can help drive this point home. Brandeis's original vision for the FTC—a vision that many of the early Commissioners shared, even if they were hamstrung by hostile courts and underfunding from Congress—was an agency that could develop codes of fair conduct, standards of cost accounting, and

[194] Not all neoclassical thinkers are neoliberal, nor are all neoliberals neoclassical. I mean only to suggest that the neoclassical framework for thinking about markets has been a centerpiece of the neoliberal era at the FTC.

terms of information and resource sharing across almost every sector of the economy.[195] In doing so, the FTC would be undermining some of the advantages of dominant firms and replacing their ability to set terms for the market with a more public and democratic process. It would be balancing the interests of multiple constituencies in a process without a clear divide between antitrust and consumer protection. Here is a very different vision of how antitrust and consumer protection can interact. Though it is a part of the FTC's institutional history—not simply a theoretical writing from some forgotten political economist—we hardly have the conceptual resources to make sense of it. Exploring whether it is a good or a bad vision would require much more attention to the antitrust-consumer protection nexus and to the theories we apply in evaluating how it should work.

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[195] BERK, *supra* note 114, at 90–114. LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1980–1940 (2018).