# CPI Columns US & Canada

## **Industrial Liberty**

By Kevin Frazier | St. Thomas University College of Law



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## I. THE FORGOTTEN PUBLIC INTEREST STANDARD IMPOSED ON THE FTC

The Federal Trade Commission ("FTC" or the "Commission") does not have limitless jurisdiction.<sup>2</sup> Prior to issuing a complaint on a party alleged to have violated Section 5 of the FTC Act,3 the Commission must ask whether there is "sufficient public interest to warrant action by a public body."4 This is not a low standard. "To justify filing a complaint," per Justice Brandeis, "the public interest must be specific and substantial."5 Justice Brandeis's interpretation imposes both a substantive and quantitative requirement. courts and Most Commission itself have only focused on the latter. The public interest standard has been simplified to mean that the Commission should not resolve private disputes. Variance from the public interest standard is not surprising given years of lax interpretation and enforcement.<sup>6</sup> A full conception of the standard, however, directs the FTC to identify how the complaint furthers a specific public interest. This second aspect has been understudied and underenforced.

Restoration of the standard is essential for two reasons: first, to ensure that the FTC does not exceed its jurisdiction; and, second, to align FTC actions with industrial liberty by way of the public interest. In recent years, the FTC has adopted a "cop on the beat" approach to enforcement actions —resulting in a series of losses in court and the waste of precious agency resources. This suggests that the FTC may exceed its jurisdiction, at least to the extent its actions fail to adhere to the

public interest standard. Avoiding actions that cut against the public interest, though, is not sufficient. The FTC must solely pursue those actions that further the public interest in the context of antitrust policy. This latter requirement necessitates devising a more explicit, objective understanding of the public interest. This column contends that assessment of the public interest must turn on whether the action will increase or diminish industrial liberty.

The authors of and advocates for the Sherman Act, Clayton Act, and FTC Act placed industrial liberty at the forefront of antitrust policy. 11 The public interest in this context should be viewed through that lens. A context-specific interpretation of the public interest undergirds similar statutory mandates imposed on sectoral regulators, such as the Federal Communications Commission. A more specific conception of the public interest allows for a more objective and consistent assessment of agency action. The result is a diminished likelihood of the agency straying beyond its jurisdiction and an increased chance of the agency furthering the public interest in its specific domain.

#### I. THE FTC'S PUBLIC INTEREST STANDARD

The FTC is far from the only agency directed to further the public interest. 12 The Radio Act of 1927 directed the Federal Radio Commission to comply with a public convenience, interest, and necessity standard. 13 The Communication Act of 1934 repeated that direction.<sup>14</sup> Other examples abound.15 At least 1,200 public interest standards exist in the U.S. Code. 16 Though some regard public interest standards as "vacuous," 17 the dearth of substantive meaning may be a product of interpreters drafters. Public interest rather than standards infused with the regulatory context in which they are set forth can provide both a jurisdictional limit and compass for agency action. The Federal Energy Regulatory Commission, for one, has serially studied and updated the meaning of the public interest in its regulatory domain. 18 The Federal Communications Commission has likewise leaned into a context-specific interpretation of its public interest standard. 19 The Supreme Court has accepted and encouraged this practice. In NAACP v. FPC, the Court asserted that it has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purposes of the regulatory legislation."20

A connection to the public interest is particularly pronounced with respect to the FTC. As one commentator [bluntly] observed in 1922: "The Federal Trade Commission was obviously designed in the public interest."21 Both in spirit and in text, the public interest is a fundamental part of the FTC's mandate. What information from its reports gets made public, for instance, turns on whether such disclosure would be in the public interest.<sup>22</sup> Understanding the meaning and dictates of the public interest directive imposed on the FTC by Section 5 requires diving into the text of the FTC Act, early case law on the topic, and broader conceptions of the purpose of antitrust law.

## A. The Textual Basis for a Substantive Public Interest Requirement

The public interest requirement in Section 5 was not a congressional afterthought. The Senate's version of the FTC Act omitted this test.<sup>23</sup> The House insisted on its inclusion.<sup>24</sup> The House won.<sup>25</sup> A mandate that the Commission only file a complaint upon a determination that doing

so would be in the interest of the public made it into the enrolled version of the Act.26 The members of Congress championing this language wanted assurances that the FTC would not squander its expertise on insignificant "quarrels of competitors" that posed no detriment to the general public.<sup>27</sup> Their success in convincing their colleagues to include this language cuts against the watering down of this requirement by courts. That said, the text itself does not provide much detail as to how the Commission was to ensure enforcement actions aligned with the public interest.

## B. Ongoing Struggles to Define and Enforce the Public Interest Requirement

Enforcement of the public interest standard by the FTC and reviewing courts has been far from consistent. Hallmark cases of administrative law in which the Supreme Court cabined agency power—namely, Schechter Poultry Corp. v. United States were based on other instances of agency excess.<sup>28</sup> Even when courts have directly assessed if the FTC acted in the public interest, judges have commonly turned to vacuous standards. In 1919, just a few years after passage of the FTC Act, Judge Ward of the Second Circuit interpreted Section 5 as "provid[ing] a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies..."29 A year later, he had not devised a clearer test. Instead, he opted to define the public interest in the negative—contending that it would not be found in a case involving individuals.<sup>30</sup> Other judges similarly struggled to moor the concept in any substantive considerations. A 1923 Sixth Circuit decision determined that the public interest threshold was not met

because the controversy in question did not "vitally concern the general purchasing public." <sup>31</sup>

A robust interpretation of the public interest standard has continued to evade courts. A review of decisions by courts throughout the 1930s and 1940s reveals a "distortion" of this standard under which any deceptive practice or unfair method of competition warrants a complaint by the Commission.<sup>32</sup> This distorted interpretation has carried on in modern times. State and federal courts have turned the public requirement interest into mere assessment of the nature of the parties subject to the complaint rather than as a directive to inform agency action. For example, the Supreme Judicial Court of Maine, which interprets its "Little FTC Act" in lockstep with federal interpretation of the FTC Act, regurgitated the weak form of the standard applied by a number of federal courts: "A proceeding is not in the public interest if it is merely a private controversy."33 Federal courts seem to have developed a persistent habit of simply assuming the FTC is acting in the public interest. Little case law exists in which courts bother to interpret and thoroughly apply the public interest standard. This tendency is revealed by cases like FTC v. Innovative Designs, Inc. in which consideration of whether the FTC examined the public interest is confined to a footnote and a few sentences.34

The FTC itself seems to have gotten into the habit of glossing over this requirement, despite claiming to ground its actions in the public interest.<sup>35</sup>A circular argument allows the Commission to clear the standard with ease. The Commission, per Julian O. von Kalinowski, "generally has little difficulty in meeting the [public interest]

requirement since most enforcement actions to prevent unfair acts and practices are inherently in the public interest." A recent FTC policy statement illustrated a preference for avoiding scrutiny of the standard. Though the statement purported to not address the standard, the Commission nevertheless favorably cited a Ninth Circuit opinion from 1926 in which the court left that determination up to the discretion of the Commission, absent those cases in which "the question of public interest is necessarily involved in the merits of the case[.]". More broadly, recent antitrust cases brought by the Department of Justice ("DOJ") and FTC suggest that what qualifies as the public interest in this context has been lost over time. (Though the DOJ's actions are not explicitly subject to the public interest standard identified in Section 5 of the FTC Act, they are nevertheless indicative of antitrust enforcement resources being spent in a manner unlikely to further the relevant public interest.) The DOJ's case against Visa for allegedly anti-competitive behavior in violation of the Sherman Act is a prime example of antitrust enforcers losing the proverbial thread.<sup>36</sup> In particular, there is a strong case to be made that Visa's market behaviors offer consumers a range of substantial benefits.<sup>37</sup> Professor Wang provides an overview of the case and the benefits in question:

At its core, the DOJ's case rests on the idea that payment markets feature strong network effects. Yet in such industries, incentive payments often serve a critical purpose to coordinate investments. Why would Apple invest heavily in promoting payment technology if much of the benefit accrues to other players in the system? Visa, as a central player, can drive the adoption of new technologies, which in turn benefits consumers, merchants, and issuers alike.<sup>38</sup>

This broader analysis of the effects of antitrust enforcement is exactly the sort of holistic review expected by the drafters of the relevant legislation. Yet, the DOJ and FTC seem keen to press forward on actions that may do more harm than good.

III.

another οf this In example phenomenon, the FTC recently issued a complaint under its consumer protection authority in Section 5 against Rytr LLC, which develops and releases generative AI tools. Some of those tools ease the process of users drafting reviews of products and services. According to a majority of FTC Commissioners, this amounts to a violation of the law because it increases the odds of generating false users or deceptive consumer reviews that businesses may deceptively tout as authentic.39 Yet, it is not clear this complaint identifies either a specific nor substantial public interest. The complaint, as noted by Commissioner Ferguson, "does not identify a single Rytrgenerated review published anywhere by anyone, much less a false review that violates Section 5."40 This action may have damaging ripple effects. Complaints against marginal players in an industry otherwise dominated by a handful of companies cut against the sort of balancing that would be inherent to a broader conception of the public interest. A more competitive AI space would foster more innovation, more opportunity, and, by extension, numerous consumers benefits. Instead, like a dog with a squirrel, the FTC seems run to after anything or anyone that can be labeled as deceptive.

Adherence to and enforcement of a substantive public interest requirement under Section 5 of the FTC Act would carry a number of benefits. It may reduce the odds of regulatory misadventures. And, perhaps more importantly, it may also direct antitrust enforcement resources toward the largest sources of oppression with respect to industrial liberty, as explored below.

## INDUSTRIAL LIBERTY AS A GUIDE TO THE PUBLIC INTEREST STANDARD

The absence of a clear definition of public interest undermines the legitimacy of the FTC and, more broadly, the rule of law. Arbitrary government action exemplifies the sort of oppression forsworn by the founders as well as every subsequent generation of Americans (albeit to varying degrees). An individual or entity striving to avoid regulatory scrutiny by the FTC currently lacks a meaningful understanding of when the Commission will deem an action as unaligned with the public interest. 41 In the same way that other agencies subject to a public interest standard have developed specific conceptions of that public interest, the FTC can tap into a wealth of information on the purposes of FTC Act to inform its definition of the public interest.<sup>42</sup>

A look back at the impetus for the creation of the FTC confirms that the public interest must mean more than merely foreclosing the FTC from addressing matters between private parties that could be resolved in court. Surely Congress would have turned to simpler language to merely prevent the Commission from concerning itself with matters pertaining to private individuals and interests. The relevant history instead shows that the movement for antitrust legislation was wrapped up in a number of considerations.

The intent of the legislators and supporters of the FTC Act went beyond shielding citizens from oppressive actions and actors. 45 Key leaders behind a series of antitrust laws sought to also empower citizens to realize their full economic potential, as characterized by the idea of industrial liberty. Senator Sherman defined industrial liberty as "the right of every man to work, labor and produce . . . on equal terms and conditions . . . . "46 He contended that modern antitrust laws should protect this common law principle.<sup>47</sup> President Wilson expressed a need to "open again the fields of competition, so that new men with brains, new men with capital, new men with energy, in their veins, may build up enterprises in America."48 Senator Reed emphasized that the FTC Act aimed to "keep the highways of opportunity unobstructed. .. so that all may have a fair chance to gain a livelihood and embark in business."49 Finally, Senator Cummins hoped that the law would shield "individual initiative" against "the power of the corporation."50 More so than concerns about excessive prices, these antitrust leaders wanted to protect industrial liberty.<sup>51</sup> Related sentiments drove Congress to pass the Clayton Act.<sup>52</sup>

Justice Brandeis himself defined the purpose of the FTC—as well as antitrust policy generally—in much more positive, substantial terms. He "believed that competition policy should encompass individuals as producers and consumers." In Justice Brandeis's conception, the public interest pertained to price, the public writ large, and the public in its specific roles such as dealer and clerk, producer and employee. He also touted industrial liberty as an "essential aspect of democracy." In defense of the Clayton Act, for example, he asserted: "You cannot have true American

citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree of industrial liberty accompanies it."<sup>56</sup> This emphasis on antitrust policy providing individuals with a meaningful opportunity to apply their skills and passions aligns with the "[m]oral and ethical values and goals [that] were paramount in Congress's minds in passing the Sherman, Clayton, and FTC Acts."<sup>57</sup>

A focus on industrial liberty as the primary goal of the public interest in an antitrust context has carried on since that crucial period, albeit in a more fragmented fashion. Congressman Bennett, in debates pertaining to the Celler-Kefauver Antimerger Act (also known as the Clayton Act), touted the legislation as a means to "preserve the chances of the average man to make a place for himself in business . . . ."58 Antitrust officials have resurfaced this focus in recent years. In a 2017 speech titled "Economic Liberty and the Rule of Law," former Assistant Attorney General Delrahim grounded antitrust in the idea that America is a place where all can seek "improvement and excellence."59 He also cited Supreme Court case law identifying the purpose of antitrust law as a "comprehensive charter of economic liberty."60 Then-acting FTC Chair Ohlhausen shared a similar understanding of antitrust law, framing it generally around economic liberty and specifically around "help[ing] those seeking to enter and compete, and enhance consumer choice and access, innovation and quality."61

The upshot is that the public interest in the context of the FTC Act and antitrust law as a whole carries with it a positive conception of industrial liberty that must inform the FTC's regulatory agenda and shape its actions. It is true that even a

substantial narrowing of the public interest standard still leaves a lot of uncertainty as to what the standard entails. This essay is just a start to what must be a broader effort to further define whether an FTC complaint under Section 5 complies with the public interest standard. The revival of industrial liberty as the guiding principle of antitrust law can and should drastically shape this crucial regulatory space.

#### IV. CONCLUSION

This column underscores the critical yet often overlooked "public interest" standard mandated for the FTC in pursuing actions under Section 5 of the FTC Act. It argues that a genuine, substantive public interest requirement—far from a superficial criterion—imposes both qualitative and quantitative thresholds that the Commission has largely neglected over time. By tracing the historical underpinnings of antitrust legislation, particularly the vision of figures like Justice Brandeis, this work emphasizes the importance of "industrial liberty" as central to the FTC's mandate. This liberty is

not merely economic but represents the democratic principle that competition should foster opportunities for individuals and businesses alike.

Building on this foundation, this column calls for a more rigorous application of the public interest standard to limit agency overreach and enhance the FTC's regulatory legitimacy. By reinstating industrial liberty as the focal point of FTC policy, rather than individual disputes or minor infractions, this essay posits that antitrust actions will better support a competitive landscape that benefits the broader public.

Now is the time for a meaningful recalibration of the FTC's approach, rooted in a more nuanced, objective, and historically grounded understanding of the public interest, ultimately providing a blueprint for effective, purpose-driven antitrust enforcement. A cop on the beat is not necessary. What is called for is a defender and promoter of industrial liberty.

charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."); see also Peycke, supra note 2, at 24-25 (flagging "as a condition precedent to any action by the commission to prevent 'unfair methods of competition,' that such action be to the 'interest of the public.'").

<sup>&</sup>lt;sup>1</sup> Assistant Professor, St. Thomas University College of Law; Senior Research Fellow, Constitutional Studies Program at the University of Texas at Austin. <sup>2</sup> See, e.g., John D. French, The Federal Trade Commission and the Public Interest, 49 MINN. L. REV. 539, 540 (1965) (identifying the public interest standard as a limit on the FTC's jurisdiction). But see Tracy J. Peycke, The Federal Trade Commission Its Present Scope and Increasing Importance, 7 MINN. L. REV. 11, 11 (1922) ("The subject matter with which the Federal Trade Commission deals is as varied and intricate as the economics of modern business."). <sup>3</sup> 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its

<sup>&</sup>lt;sup>4</sup> Gregory Hankin, *Jurisdiction of the Federal Trade Commission*, 12 CALIF. L. REV. 179, 180 (1924); *see also* 15 U.S.C. § 45.

<sup>&</sup>lt;sup>5</sup> FTC v. Klesner, 280 U.S. 19, 28 (1929).

<sup>&</sup>lt;sup>6</sup> See French, supra note 2, at 540.

<sup>&</sup>lt;sup>7</sup> See George Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 PROC. ACAD. POL. SCI. 114, 118 (1926); cf. Thomas H. Malone, Meaning of the Term "Public Interest" in the Federal Trade Commission Act, 17 VA. L. REV. 676, 676 (1931) (observing that "[n]o subject seems too large or too small" for consideration by the FTC).

<sup>8</sup> Rublee, *supra* note 7, at 118 (contending that the public interest standard guides the Commission's discretion in whether to bring a complaint, once it has established jurisdiction).

<sup>9</sup> Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Putting the FTC Cop Back on the Beat (Nov. 28, 2017), https://www.ftc.gov/newsevents/news/speeches/putting-ftc-cop-back-beat; Callum Jones, 'She's Going to Prevail': FTC Head Lina Khan is Fighting for an Anti-monopoly America, THE GUARDIAN (Mar. 9, 2024),

https://www.theguardian.com/us-news/2024/mar/09/lina-khan-federal-trade-commission-antitrust-monopolies.

<sup>10</sup> Jay Ezrielev, *Why Does the FTC Continue to Pursue Losing Cases?*, PROMARKET (Aug. 11, 2023), https://www.promarket.org/2023/08/11/the-ftc-takes-another-l-why-is-the-agency-continuing-to-pursue-bad-cases.

<sup>11</sup> Antitrust law scholars have long contended that these acts should be construed together. That said, the Commission's jurisdiction is nevertheless quite large. *See, e.g.,* Peycke, *supra* note 2, at 12.

<sup>12</sup> Paul R. Verkuil, *Understanding the "Public Interest" Justification for Government Actions*, 39 ACTA JURIDICA HUNGARICA 141, 141 (1998).

- <sup>13</sup> See 47 U.S.C. §§ 81-121 (1927).
- <sup>14</sup> 47 U.S.C. § 609 (1934).
- <sup>15</sup> Jodi L. Short, *In Search of the Public Interest Standard*, 40 YALE J. REG. 759, 780-824 (2023) (analyzing different instances at the federal and state level of efforts by agency to comply with a public interest standard).
- <sup>16</sup> Id. at 765.
- <sup>17</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 n.8 (2002); *see also* Short, *supra* note 15, at 759.
- <sup>18</sup> See Short, supra note 15, at 805-06.
- <sup>19</sup> Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), https://www.brookings.edu/articles/revisiting-the-broadcast-public-interest-standard-incommunications-law-and-regulation.
- <sup>20</sup> NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976).
- <sup>21</sup> Peycke, *supra* note 2, at 14.
- <sup>22</sup> 15 U.S.C. § 46(f).
- <sup>23</sup> Malone, *supra* note 7, at 679.
- <sup>24</sup> Id.
- <sup>25</sup> Id.
- <sup>26</sup> Id.

- <sup>27</sup> 51 CONG. REC. 14930 (Sept. 10, 1914) (statement of Rep. Covington).
- <sup>28</sup> See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Verkuil, supra note 12, at 143 n.8 (explaining the basis for the Schechter Court's decision).
- <sup>29</sup> Fed. Trade Comm'n v. Gratz, 258 F. 314, 316 (2d Cir. 1919).
- <sup>30</sup> New Jersey Asbestos Co. v. Fed. Trade Comm'n, 264 F. 509, 510-11 (2d Cir. 1920).
- <sup>31</sup> L.B. Silver Co. v. Fed. Trade Comm'n, 289 F. 985, 989 (6th Cir. 1923).
- <sup>32</sup> French, *supra* note 2, at 541-42.
- <sup>33</sup> Brown v. Compass Harbor Vill. Condo. Ass'n, 229 A.3d 158, ¶ 16 (Me. 2020) (quoting Removatron Int'l Corp. v. Fed. Trade Comm'n, 884 F.2d 1489, 1495 (1st Cir. 1989)).
- <sup>34</sup> Fed. Trade Comm'n v. Innovative Designs, Inc., 2021 U.S. App. LEXIS 21710, at \*2 n. 3 (3d Cir. 2021) (interpreting the Commission's compliance with 15 U.S.C. § 53(b)).
- <sup>35</sup> See Joel Brinkley, Intel and Microsoft Face Differing Antitrust Paths, N.Y. TIMES (May 29, 1998), https://www.nytimes.com/1998/05/29/business/int el-and-microsoft-face-differing-antitrust-paths.html (sharing the FTC's reservation of a right to pursue an antitrust investigation of Intel when doing so would be in the interest of the public).
- <sup>36</sup> Press Release, DOJ, Justice Department Sues Visa for Monopolizing Debit Markets (Sept. 24, 2024), https://www.justice.gov/opa/pr/justice-departmentsues-visa-monopolizing-debit-markets.
- <sup>37</sup> Press Release, ITIF, DOJ Suit Against Visa Faces High Hurdles, Says ITIF (Sept. 24, 2024), https://itif.org/publications/2024/09/24/doj-suit-against-visa-faces-high-hurdles-says-itif.
- <sup>38</sup> Lulu Wang, *A DOJ Victory Against Visa May Not Help Merchants or Consumers*, PROMARKET (Oct. 3, 2024), https://www.promarket.org/2024/10/03/adoj-victory-against-visa-may-not-help-merchants-orconsumers.
- <sup>39</sup> The decision split 3-2 along party lines, with the Republican commissioners dissenting. In the Matter of Rytr LLC, Complaint (Sept. 25, 2024), https://www.ftc.gov/system/files/ftc\_gov/pdf/2323 052rytrcomplaint.pdf; see also In the Matter of Rytr LLC, Dissenting Statement of Commissioner Ferguson, at 1 (Sept. 25, 2024),
- https://www.ftc.gov/system/files/ftc\_gov/pdf/ferguson-rytr-statement.pdf.
- <sup>40</sup> Dissenting Statement of Commissioner Ferguson, *supra* note 40, at 2.

<sup>41</sup> See Verkuil, supra note 12, at 142 (providing an example of how a regulated entity may struggle to comport with the Commission's definition of the public interest).

<sup>42</sup> See NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) ("This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.").

<sup>43</sup> *Cf.* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.").

<sup>44</sup> See RICHARD HOFSTADER, THE AGE OF REFORM 227 (1995) ("The Progressive case against business organization was not confined to economic considerations, nor even to the more tangible sphere of economic morals.").

<sup>45</sup> But see Thomas J. Horton, Rediscovering Antitrust's Lost Values, 16 U.N.H. L. REV. 179, 189-90 (2018) (flagging the difficulty of identifying consensus views of antitrust laws from legislative histories).

<sup>46</sup> 21 CONG. REC. 2457 (Mar. 21, 1890) (statement of Sen. Sherman), *reprinted in* EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 116 (1978).

<sup>48</sup> DORIS KEARNS GOODWIN, BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM 730 (2013). <sup>49</sup> 51 CONG. REC. 13231 (Aug. 4, 1914) (statement of Sen. Reed).

<sup>50</sup> 51 CONG. REC. 12742 (July 25, 1914) (statement of Sen. Cummins).

<sup>51</sup> Horton, *supra* note 46, at 236; *see also* Jonathan Barker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2177 (2013) ("[T]he Sherman Act was understood then as protecting natural rights to economic liberty, security of property, and the process of free and competitive exchange from artificial interference by private actors . . . ."). <sup>52</sup> *See* 51 CONG. REC. 9086 (May 22, 1914) (statement of Rep. Kelly) (sharing intent to prevent large enterprises from achieving "industrial

domination."); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 578 (1986) (listing several goals for passage of the Clayton Act, including "to preserve diversity, to decentralize power for social and political reasons, and probably, but less explicitly, to prevent exploitation of consumers.").

Marc Winerman, The Origins of the FTC:
 Concentration, Cooperation, Control, and
 Competition, 71 ANTITRUST L.J. 1, 35 (2003).
 Louis Brandeis, Big Business and Industrial Liberty (1912), reprinted in LOUIS BRANDEIS, THE CURSE OF BIGNESS 38 (1934).

<sup>55</sup> Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism's Democracy Paradox*, 49 J. CORP. L. 347, 360 (2024).

<sup>56</sup> A Resolution Directing the Committee on Interstate Commerce to Investigate and Report Desireable Changes in the Laws Regulating and Controlling Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearings on S. Res. 98 before the Sen. Comm. on Interstate Commerce, Vol. 1, 62d Cong. 1155 (1911).

<sup>57</sup> Horton, *supra* note 46, at 236.

<sup>58</sup> 95 CONG. REC. 11506 (Aug. 15, 1949) (statement of Rep. Bennett); *see also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 776-79 (2019) (providing an overview of congressional goals in passing the Clayton Act).

<sup>59</sup> Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Just., International Antitrust Policy: Economic Liberty and the Rule of Law, at 4 (Oct. 27, 2017),

https://www.justice.gov/opa/speech/file/1007231/d I (quoting *David McCullough*, HARV. BUS. REV. (Jan.-Feb. 2013), https://hbr.org/2013/01/david-mccullough).

<sup>60</sup> Id. at 5 (quoting Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958)).

<sup>61</sup> Maureen Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Remarks at George Mason Law Review's 20th Annual Antitrust Symposium: Advancing Economic Liberty, at 9 (Feb. 23, 2017), https://www.ftc.gov/system/files/documents/public \_statements/1098513/ohlhausen\_-

\_advancing\_economic\_liberty\_2-23-17.pdf.