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The Antimonopoly Presidency

ABSTRACT. In the face of mounting corporate monopoly power, the Biden Administration is pursuing reforms that would shift decisions over the terms of economic coordination and competition closer to the ambit of presidential discretion. These proposals echo the unilateral authority over antimonopoly law that the National Industrial Recovery Act (NIRA), passed in 1933 and invalidated by the Supreme Court in 1935, granted to the President. This Note probes the NIRA's implementation and aftermath to reveal how a revived antimonopoly presidency could rein in monopoly power without replicating the NIRA's two key constitutional and democratic deficiencies: (1) unconstrained delegation of policymaking authority to the Executive and (2) excessive industry influence over market governance.

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INTRODUCTION

America has a monopoly problem. And the federal government is not structured to solve it.

This was the not-so-hidden message of a July 2021 address that President Biden delivered from the White House. Flanked by recently appointed administration officials known as intellectual leaders of a growing antimonopoly reform movement, Biden signed an executive order designed to "bring[] fair competition back to the economy."[1] The President decried the trend "over the past few decades" of "less competition and more concentration" across many sectors.[2] He echoed an argument popularized by his appointees—such as Lina Khan, Chair of the Federal Trade Commission (FTC), and Tim Wu, then-Special Assistant to the President for Technology and Competition Policy—that antitrust enforcers in previous administrations had "chose[n] the wrong path" by "following the misguided philosophy of people like Robert Bork" and "pull[ing] back on enforcing laws to promote competition."[3] Consistent with research findings of numerous economists and legal scholars, Biden blamed this dominant approach to competition policy for contributing to higher prices, lower wages, fewer small businesses, and less innovation and investment.[4] In short, he declared, "I believe the experiment failed."[5]

President Biden's Executive Order on Promoting Competition in the American Economy[6] was a distinct milestone in the effort to combat monopoly power not just because it called for a change in substantive policy toward corporate consolidation. Its transformative potential also lay in its reconfiguration of the institutional structure of antimonopoly law and policy within the federal government—what this Note calls the *separation of powers in antimonopoly law*.

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1. President Joseph R. Biden, Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021, 1:48 PM EDT), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy [https://perma.cc/6Y82-Q6FD].

2. *Id.*

3. *Id.*

4. *See, e.g.*, Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, WHITE HOUSE BLOG (July 9, 2021), https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy [https://perma.cc/HRS4-SGN3] (citing economics studies); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1671-73 (2020) (citing economic and legal scholarship).

5. Biden, *supra* note 1.

6. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

This separation of powers took shape through an array of statutes, Supreme Court decisions, and agency practices and norms. It emerged as a reaction, in large part, to the National Industrial Recovery Act (NIRA), a centerpiece of the first New Deal that authorized the President to unilaterally set the rules of industrial competition and coordination by using and combining multiple Progressive Era antimonopoly tools. It served to correct—and then overcorrect—for the NIRA's significant failings.[7] And this separation of powers in antimonopoly law has substantially persisted to this day.[8]

But the post-NIRA order is no longer tenable. Faced with mounting corporate consolidation, the Biden Administration is considering—and beginning to implement—reforms that would refashion antimonopoly law's institutional structure. Three reforms are of particular concern to this Note:[9]

1) Antitrust rulemaking under the FTC's authority to prohibit "unfair methods of competition" (UMC),[10] which the agency has traditionally invoked only in adjudication and enforcement;

2) White House coordination and review of industry-by-industry agency rulemaking; and

3) Sectoral bargaining, in which government, business, and labor would jointly negotiate wages, benefits, and other terms on industry-wide bases.

While many scholars and advocates have examined these proposals' substantive policy merits,[11] this Note is the first to attend to their combined impact on

7. *See infra* Section I.C.

8. Indeed, as discussed *infra* at Section II.B, this separation of powers has remained largely unchanged despite broad trends toward greater presidential control over the administrative state over the past few decades. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (describing this trend toward greater presidential control of the administrative state).

9. Although President Biden's 2021 competition executive order alone included seventy-two substantive directives, *see infra* note 188 and accompanying text, these three proposed reforms would change not just the substance of antimonopoly policy but also, critically, its *institutional structure*: how policy decisions are made, and by whom. This structural, institutional change makes these proposed reforms transformational and explains why these reforms are the focus of this Note. The first two of these proposals have been explicitly endorsed by the Biden Administration. The third, sectoral bargaining, was generally endorsed by the Biden-Harris campaign in 2020 and has been the subject of recent proposals in Congress and at the state level, but the Biden Administration has not explicitly endorsed it or pushed for legislation to implement it since Biden took office. *See infra* Section III.C.

10. 15 U.S.C. § 45(a).

11. On proposed Federal Trade Commission (FTC) unfair methods of competition (UMC) rules, see, for example, Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, OPEN MKTS. INST. ET AL. (Mar. 20, 2019), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-

the institutional structure of antimonopoly law.[12] This Note argues that these proposals would shift decision-making over key aspects of antimonopoly law and policy closer to the ambit of the President's unilateral discretion.[13] Further, they would do so in ways that mirror the President's unprecedented authority under the NIRA, authority that Congress and the Supreme Court dismantled in the NIRA's wake. As a result, the NIRA and its aftermath hold critical yet

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Prohibit-Worker-Non-Compete-Clauses.pdf [https://perma.cc/JAA6-D59Q]; Comments of the American Bar Association Antitrust Law Section on Petition for Federal Trade Commission Rulemaking to Prohibit Worker Non-Compete Clauses, AM. BAR ASS'N (Sept. 15, 2021), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/september-2021/comments-us-91521.pdf [https://perma.cc/KUK3-3RLY]; and Herbert Hovenkamp, *Noncompete Agreements and Antitrust's Rule of Reason*, REGUL. REV. (Jan. 16, 2023), https://www.theregreview.org/2023/01/16/hovenkamp-noncompetes-and-rule-of-reason [https://perma.cc/R484-CHSG]. On competition-oriented rulemaking, see, for example, Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33 (2017), which discusses the use of non-antitrust regulatory authority to promote competition; K. Sabeel Rahman, *Rewiring Regulatory Review*, LPE BLOG (May 1, 2023), https://lpeproject.org/blog/rewiring-regulatory-review [https://perma.cc/4MEB-CVWR], which discusses substantive reforms in the Biden Administration's proposed revisions to rulemaking review, including competition-oriented reforms; and Luke Herrine, *Some Short Circuits in the Rewiring of Regulatory Review*, LPE BLOG (May 8, 2023), https://lpeproject.org/blog/some-short-circuits-in-the-rewiring-of-regulatory-review [https://perma.cc/3TND-M7VZ], which critiques some of the substantive reforms in the Biden Administration's proposed revisions to rulemaking review, including its approach to competition. On sectoral bargaining, see, for example, Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); and Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, 31 NEW LAB. F. 11, 11-13 (2022).

12. Some previous scholarship has examined the institutional structure of antitrust, including discussion of FTC rulemaking. *See, e.g.*, Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191 (2014); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020); DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011). But none discuss these three antimonopoly proposals together or in the context of the President's overarching antimonopoly authority.

13. To be clear, this Note's references to "unilateral" presidential authority are not intended to evoke or equate to the "unitary executive" theory in constitutional law, which holds that the President alone holds the entire "executive" authority under the Constitution and that Congress does not have the power to limit the President's control over the administrative state. Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 83. Rather, the revived "antimonopoly presidency" that this Note endorses relies upon institutional limits on presidential authority—and empowerment of agencies—that supporters of a strong unitary executive theory typically oppose. Indeed, this Note will argue that the Constitution *requires* certain constraints on presidential discretion in the context of broad agency delegations. *See infra* Section IV.A. The antimonopoly presidency described herein involves recentralizing significant antimonopoly authority closer to the presidency and the executive branch and away from other branches and the private sector—in other words, closer to the President's "unilateral discretion"—while retaining constitutionally and democratically valuable constraints.

underexplored lessons for this new era of antimonopoly presidential administration. This Note explores those lessons.

The NIRA authorized the President to approve "codes of fair competition" proposed by trade or industrial groups as long as such codes met a few broad substantive requirements.[14] The codes, once approved, would bind all players in the industry and were exempt from the antitrust laws.[15] While the NIRA contained little guidance as to what these codes could include, the hundreds of codes that President Roosevelt went on to approve included provisions for maximum working hours, minimum wages, minimum prices, cost standardization, requirements for open-price systems, and limitations on production, among other regulations.[16] The statute also gave the President near-complete discretion to create and structure agencies to implement the Act and to determine procedures for review, approval, implementation, and enforcement of the codes.[17]

Though the degree of unilateral authority was new, the Act's conceptual framework of industrial coordination and "fair competition" was not. This framework built upon and combined a varied set of economic policies that had developed over the previous half century to govern a newly industrialized, nationalized, and monopolized economy. These strategies represented seminal components of what this Note refers to collectively as "antimonopoly law." Antimonopoly law comprises the areas of law that set the rules for economic competition and coordination: which economic actors get to coordinate, which have to compete, and on what terms.[18] The NIRA empowered the President to choose

14. National Industrial Recovery Act, Pub. L. No. 73-67, § 3(a), 48 Stat. 195, 196 (1933).

15. *Id.* §§ 3(c), 5.

16. Ellis W. Hawley, The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence 57-61 (1966); *infra* Section I.B.

17. *See infra* Section I.B.

18. The term "antimonopoly law" includes, but is not limited to, antitrust, public-utility regulation, and labor law. *See, e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131, 131-32 (2018) (discussing antimonopoly as a broader category than just antitrust). *See generally* Antimonopoly and American Democracy (Daniel A. Crane & William J. Novak eds., 2023) (forthcoming) (collecting scholarship on the history and tradition of antimonopoly law and policy in the United States, encompassing various areas of law). Some scholars also refer to these and related areas as "market coordination," "coordination law," or "market governance." *See, e.g.*, Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378, 380, 388 (2020); Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* The Cambridge Handbook of Labor in Competition Law 72, 72 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022). To be sure, these bodies of law can serve either to constrain or to promote monopoly; they are not innately *anti*monopoly. This Note refers to them as such because of their Progressive Era origins in antimonopoly movements and their potential as essential tools for constraining monopoly power today. For further discussion of the National Industrial Recovery Act's (NIRA)'s antimonopoly roots, see *infra* Part I.

among and combine these strategies into an economy-wide whole. In this way, the NIRA is best understood as granting the President unilateral, almost uninhibited authority to organize, oversee, and calibrate the degree of coordination and competition in the economy. As preeminent historian of the NIRA Ellis Hawley put it, "Congress, in effect, had refused to formulate a definite economic policy . . . . It had simply written an enabling act, an economic charter, and had then passed the buck to the Administration."[19]

Ultimately, the Supreme Court ruled that Congress passed the buck too far. In a unanimous 1935 decision in *A.L.A. Schechter Poultry Corp. v. United States*, which united a frequently fractured Court, the Justices held the central section of the NIRA to be an unconstitutional delegation of Congress's legislative authority to the President with too few procedural or substantive restraints.[20] After the NIRA's demise, a combination of court doctrines, administrative practices, and new procedural and substantive statutes governing the burgeoning administrative state divvied up into three primary domains the powers over economic coordination and competition that the NIRA had temporarily concentrated in the President's hands:

1) Antitrust enforcement, conducted via case-by-case adjudication subject to common law-like doctrinal development by courts;

2) Industry-by-industry regulation, split across dozens of administrative agencies, many of them with at least some degree of independence from the President, and subject to the procedural constraints of the Administrative Procedure Act and other statutes; and

3) Labor law, subject to the National Labor Relations Act's policy of worksite- or firm-specific bargaining, restrictive judicial doctrines, and practices of case-by-case adjudication.

This institutional structure cabined the President's discretion to allocate and calibrate economic coordination and competition by carving out significantly greater roles for the courts, Congress, and agency officials and procedures. Though it emerged out of valid concerns, the post-NIRA framework overreacted to the NIRA's ills and limited the possibility of proactive, systematic, participatory, economy-wide competition governance.

The three current proposals noted above—FTC antitrust rulemaking, coordination and review of competition rulemaking, and sectoral bargaining—would substantially repair that overcorrection. While none of these reforms would exactly reproduce the NIRA either in structure or in substantive goals, each would reconstitute important elements of the presidential antimonopoly authority that the post-NIRA regime divided up. The key question, then, is whether these

19. HAWLEY, *supra* note 16, at 33.

20. 295 U.S. 495, 500 (1935).

powers can be recentralized without recreating the NIRA's two fundamental flaws: (1) its unconstitutional concentration of unchecked policymaking discretion in the presidency, and (2) its excessive industry influence, both of which led to poor policy outcomes. This Note argues that they can.

Part I examines the structure and implementation of the NIRA to argue that it is best understood as a delegation of maximal authority to the President to calibrate and organize economic competition and coordination in ways that built upon Progressive Era antimonopoly policies. Part II analyzes the *Schechter Poultry* decision and its aftermath, which culminated by the mid-1940s in a new and enduring separation of powers in antimonopoly policy. Part III introduces three key antimonopoly proposals that legal scholars and policymakers have begun to embrace. It argues that each would shift antimonopoly authority toward the President in ways that mirror (but do not exactly replicate) the key authorities the President briefly held under the NIRA.

Finally, Part IV applies the lessons of the NIRA to these modern proposals to show that the proposals, properly implemented, can overcome the twin constitutional and democratic challenges that doomed the NIRA. First, today's proposals—particularly FTC UMC rulemaking—already avoid the nondelegation issues that led the Supreme Court to invalidate the NIRA in *Schechter Poultry*, despite opponents' claims to the contrary.[21] Such rules would satisfy both the Court's longstanding "intelligible principle" test for legislative delegations,[22] as well as the more historically and structurally grounded nondelegation test that this Note proposes. FTC antitrust rules, as proposed to date, also should not be interpreted to violate the related "major questions doctrine" under a proper test. Second, none of the three proposals would engender the industry capture and democratic deficits of the NIRA's code-making process. In implementing the proposed policies, the Biden Administration can deploy tools of participatory administration to encourage democratic participation and enhance the countervailing power of underrepresented groups.

It may seem surprising, even alarming, that three of today's most ambitious antimonopoly proposals all strongly resemble components of the NIRA, when the NIRA is widely regarded as a legal and policy failure.[23] In fact, similarities

21. *See infra* notes 263-268 and accompanying text.

22. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) ("[W]e have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'") (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

23. On the NIRA as ineffective policy, see, for example, Michael M. Weinstein, *Some Macroeconomic Impacts of the National Industrial Recovery Act, 1933-1935*, *in* THE GREAT DEPRESSION

between the Biden Administration's new approach and the NIRA's discredited one have already been a source of conservative criticism.[24] But these similarities are neither a coincidence nor a mistake. As this Note will show, the NIRA crudely combined market-governance approaches that had developed over the previous half century in direct response to the Gilded Age, America's first crisis of private monopoly power. Today, facing a gridlocked and gerrymandered legislature, alongside a judiciary that has developed increasingly promonopoly doctrines, policymakers are rightly looking to the presidency as a key vehicle for reviving antimonopolism.[25] These realities have, in other words, put NIRA-style presidential antimonopoly policymaking back on the table. Only by learning from the NIRA's mistakes can this new effort succeed where the NIRA failed. This Note seeks to aid that learning.

I. THE NIRA AS UNFETTERED PRESIDENTIAL ANTIMONOPOLY AUTHORITY

As President Franklin Delano Roosevelt entered office in 1933, policymakers and interest groups across the political spectrum agreed that the federal government needed to play a greater role in the organization and management of the industrial economy.[26] At the time, many across the political spectrum attributed the Great Depression—then entering its fourth year—to monopoly concentration and outsized corporate power in the economy.[27] Yet these varied groups—from leftist economic planners and socialists, to liberal antitrusters, to labor union leaders, to conservative business leaders—each had different prescriptions for what that role should be. Their disagreements centered around questions of

REVISITED 262 (Karl Brunner ed., 1981); Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255, 278 (1982); and Harold L. Cole & Lee E. Ohanian, *How Government Prolonged the Depression*, WALL ST. J. (Feb. 2, 2009, 12:01 AM ET), https://www.wsj.com/articles/SB123353276749137485 [https://perma.cc/2Q8Q-D5W4].

24. *See infra* notes 263-268 and accompanying text.

25. On how gerrymandering and Senate structure and rules tilt Congress to the right, see, for example, Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 84-85 (2022). *See also* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 259 (2008) (demonstrating that senators' voting patterns are strongly related to their party affiliations, and that senators have been responsive to the ideological views of their middle- and high-income constituents). On the promonopoly turn in antitrust doctrine, see *infra* Sections II.B & III.A.

26. HAWLEY, *supra* note 16, at 12; LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE 'NEW COMPETITION,' 1890-1940, at 260-61 (2018).

27. HAWLEY, *supra* note 16, at 12.

economic competition and coordination: which economic actors should get to coordinate? When should they have to compete? In 1933, Congress was far from agreement as to how to answer these urgent market-governance questions. Instead, it passed a sweeping statute that would allow various visions of economic coordination and competition to coexist, and it charged the President and his Administration with reconciling them.[28]

This Part provides an overview of the NIRA story—its origins, implementation, and downfall. It begins with a brief introduction to the Progressive Era antimonopoly traditions that preceded and informed the NIRA. It then shows how key NIRA provisions pulled from these antimonopoly traditions and centralized them under the President's unilateral command. Finally, this Part discusses the NIRA's sweeping implementation and its two interrelated failures: (1) misuse of unfettered presidential policy discretion and (2) excessive industry influence. These failures foretold both the *Schechter Poultry* decision and the separation of powers in antimonopoly policy that followed. Understanding these failures is key to successfully reviving an antimonopoly presidency today.

A. Antimonopoly Origins

The NIRA incorporated elements of four central economic policy approaches that had developed over the previous fifty years: (1) antitrust law, (2) public utility regulation, (3) regulated competition and business associationalism, and (4) labor organizing and collective bargaining. Each of these approaches dealt centrally with questions of economic coordination and competition, and each informed the NIRA's text and implementation.

Some accounts position the NIRA as merely a license for corporate collusion.[29] The reality is more complex. In fact, the NIRA owed its roots to seminal Progressive Era market-governance tools—tools that continue to form the basis of antimonopoly law today. Where the NIRA differed was in concentrating these tools in the President's hands without sufficient constraints.

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28. *Id.* at 20.

29. *See, e.g.*, Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779, 781 (2004) ("[The NIRA] suspended antitrust law and permitted collusion in some sectors . . . ."). Commonplace perceptions of the NIRA as *promonopoly* have undoubtedly diminished the scholarly or popular attention it has received as a model for *antimonopoly* law and policy. But, as this Note shows, such neglect of the NIRA as antimonopoly law is a costly oversight. Analysis of the NIRA can and must separate the policy *tools* that the NIRA used from both (a) the substantive policy choices that were made as to how to use those tools, and (b) the structures and procedures that determined who made those choices and how.

1. *Antitrust and the Allocation of Economic Coordination Rights*

Antitrust law "decides where competition will be required and where coordination will be permitted."[30] The Sherman Antitrust Act of 1890, the first federal antitrust law, emerged out of the antimonopoly movement of the late nineteenth century. As one scholar has recently written, the farmers, laborers, and small businessmen who made up that movement aimed to (a) limit concentrated, top-down economic control, and (b) democratically disperse coordination rights, enabling smaller, less powerful economic actors to cooperate horizontally in order to better compete with large businesses.[31] In other words, antitrust law reallocated coordination rights within the economy. Decades later, a generation of antitrust scholars associated with the Chicago School championed a different interpretation of antitrust law's preferred allocation of economic coordination rights. Theirs, too, centered around a vision of who gets to coordinate, who has to compete, and on what terms.[32]

The NIRA formally suspended enforcement of the antitrust laws by exempting any industry subject to a "code of fair competition" from liability under the Sherman or Clayton Antitrust Acts when that industry acted in compliance with its code(s).[33] But the NIRA still governed economic-coordination rights within

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30. Paul, *supra* note 18, at 382.

31. *Id.* at 409; *see also* Sanjukta Paul, *Recovering the Moral Foundations of the Sherman Act*, 131 YALE L.J. 175, 198-204 (2021) (describing the heterogeneous "antimonopoly coalition" of farmers, small merchants, and workers that arose in response to the rise of corporate power in the late nineteenth century). Other scholars have provided different accounts of the original purposes of the Sherman Act and the Act's supporters, but they all make clear that reshaping the rules of economic concentration and coordination was a central concern. *See infra* note 32 (listing some of the most prominent accounts of the Sherman Act's origins and purposes).

32. The Chicago School vision, which by the 1980s became dominant in antitrust jurisprudence, posited "consumer welfare" as the legislators' primary purpose and blessed forms of vertical, top-down coordination that had previously been deemed illegal, or at least suspect. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10 (1966) ("The legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare."). Numerous scholars have since disputed Chicago's historical account. *See, e.g.*, Paul, *supra* note 31, at 227-241; Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 924 (2014); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 359 (1993); Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69-70 (1982); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2354 (2013); Daniel R. Ernst, *The New Antitrust History*, 35 N.Y. L. SCH. L. REV. 879, 882-83 (1990); Daniel Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 840-47 (2014).

33. *See infra* notes 49-54 and accompanying text.

the national economy. Therefore, it did not abandon antitrust law's central function. Rather, the law gave the President—in place of Congress, the courts, prosecutors, or private plaintiffs—unilateral antitrust authority.

2. *Public-Utility Regulation*

By the time of the NIRA's enactment in 1933, antitrust law represented just one tool in a Progressive Era toolbox to exert public, democratic control over the conduct of business.[34] At the heart of that toolbox sat public-utility regulation.[35] Public-utility regulation sought to limit the economic power of dominant firms by empowering the government, rather than private firms, to set the terms of competition and coordination in industries of significant economic and social importance.[36] Unlike antitrust, public-utility regulation targeted firms that could not easily be broken up or otherwise subjected to competitive pressures.[37] Public-utility regulations set just and reasonable prices, imposed duties to serve all comers, and required nondiscrimination (in price and access) among different consumers.[38] Such regulation originated in common-law doctrines and then began to be administered by a new crop of state and federal agencies.[39] Many public-utility-like concepts of nondiscrimination, just price, and regulated monopoly also made their way into the codes of fair competition and other licensing and regulatory mechanisms authorized by the NIRA, subject to presidential discretion.

3. *Regulated Competition and Business Associationalism*

In the 1910s and 1920s, policymakers across the political spectrum sought to build upon and modify the Sherman Act's regime of economic coordination and competition through a vision of "regulated competition."[40] Advocates of these approaches rejected both pure free-market competition on the one hand and full-scale government regulation of prices and production on the other. Instead,

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34. William J. Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 BUS. HIST. REV. 665, 673-75 (2019).

35. William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

36. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1632 (2018).

37. *Id.* at 1632-34.

38. *Id.* at 1635.

39. Munn v. Illinois, 94 U.S. 113, 126-34 (1876); Novak, *supra* note 35, at 160-71.

40. SAWYER, *supra* note 26, at 9-16.

they opted for a form of managed competition that would "correct the imperfections in competitive markets" by promoting certain forms of government-supervised cooperation.[41]

One version of that approach, associated with Justice Brandeis and President Woodrow Wilson, sought to reinforce the Sherman Act's prescription for distributed coordination rights among smaller economic actors through a new agency, the FTC. The Federal Trade Commission Act of 1914 prohibited "unfair methods of competition."[42] It then authorized the newly formed agency to both define what that term meant and engage in investigations, data collection, and information sharing to facilitate fair competition.[43] Using this expertise, the FTC and the Department of Commerce also began facilitating agreements among private trade associations that set certain terms of trade in important industries, including the standardization of certain prices and production methods.[44] In the 1920s, this strategy of managing and standardizing competition through public oversight of private coordination took a pro-big-business turn under Commerce Secretary and then-President Herbert Hoover. Whereas Wilsonian-Brandeisian-regulated competition sought to equalize power in the economy through coordination among associations of smaller businesses and consumers, Hooverite "business associationalism" prioritized efficiency and rationalization of industry via FTC- and Department of Commerce-facilitated coordination among large corporations.[45] What they shared, however, was a vision of market governance in which private actors could coordinate more freely than under a strict "perfect competition" vision of antitrust law, as long as such coordination was done with some degree of government oversight and approval. This vision figured prominently in the structure and implementation of the NIRA, which facilitated and enshrined into law agreements among private trade associations that included workers, consumers, and businesses large and small.

4. *Labor Law and the Fight to Legalize Coordination Among Workers*

The fourth major approach to economic coordination and competition that the NIRA enabled the President to enact was a vision of labor organizing and collective bargaining. As a key part of the antimonopoly coalition that backed the Sherman Act, laborers sought government permission and support to coordinate

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41. *Id.* at 13.

42. 15 U.S.C. § 45(a) (2018).

43. SAWYER, *supra* note 26, at 140-44, 311.

44. *Id.* at 107-48.

45. *Id.* at 148-51, 194-240.

their economic power and counterbalance the power of concentrated capital.[46] Most urgently, labor leaders in the late nineteenth and early twentieth centuries fought for a legislative end to court injunctions against labor organizing and strike activity, which courts frequently condemned as illegal coordination under a probusiness interpretation of the Sherman Act.[47] In addition, key parts of the labor movement fought for a broader vision of economic coordination that would embrace "collective bargaining at the level of the industry and through legislative and administrative interventions" that set industry-wide standards.[48] Labor's goal to have a seat at the table, both in their workplace and in national economic regulation, became a central feature of the NIRA.

B. The President's Antimonopoly Authority Under the NIRA

The NIRA's text granted the President unprecedented authority to choose among, combine, and deploy Progressive Era visions of market governance with few substantive or procedural constraints.

1. The President's Broad Substantive Antimonopoly Authority Under the NIRA

Title I was the central provision of the NIRA. Section 3 of that Title authorized the President to approve "codes of fair competition" submitted by "trade or industrial associations or groups" that would then govern those groups' industries, as long as those groups were "truly representative" of the industry and did not "inequitabl[y] restrict[]" membership.[49] The Act's substantive limitations on these codes were few, and the substantive guidance that Congress did provide had clear antimonopoly roots.

Section 3 of Title I prohibited the President from approving any codes "designed to promote monopolies or to eliminate," "oppress," or "discriminate against" "small enterprises," or which permitted "monopolies or monopolistic practices."[50] Further, Section 3 authorized the President to impose conditions on his approval of the codes for the "protection of consumers, competitors,

46. Kate Andrias, *Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Desire for Greater Democracy*, *in* ANTIMONOPOLY AND AMERICAN DEMOCRACY (Daniel A. Crane & William J. Novak eds., forthcoming 2023).

47. These injunctions were particularly ironic, and misguided, given labor's central role in supporting the Sherman Act's passage. *See id.* at 5-8; Paul, *supra* note 31, at 200-04.

48. Andrias, *supra* note 46, at 4.

49. National Industrial Recovery Act, § 3(a), 48 Stat. 195, 195-200 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

50. *Id.*

employers, and others," in the "public interest," and in service of "the policy herein declared."[51]

Section 7(a) of Title I required that the codes (1) include the right of employees to organize and collectively bargain, (2) permit employees *not* to join a company union or labor organization if they chose, and (3) require employers to comply with "conditions of employment," including minimum wages and maximum hours, approved or (if an agreement could not be reached) prescribed by the President in the codes.[52] Once approved, each code became binding on the trade or industry represented by the submitting group, with any violation subject to prosecution as a misdemeanor.[53] At the same time, any action done in compliance with a code was exempt from the federal antitrust laws.[54]

These provisions gutted antitrust law's existing allocation of coordination rights and permitted the President to replace them with a new allocation. The President could authorize cooperative agreements among industry and labor that set the terms under which they would coordinate and compete, combining the probusiness approaches of the business associationalists with the industry-wide collective bargaining visions of the Progressive labor movement.[55] He could also modify those codes or impose his own, ensuring that the codes provided for labor collective-bargaining rights (which *Lochner*-era courts had often outlawed under their early interpretations of the antitrust laws). Thus, under the NIRA, the President became the sole arbiter of federal competition law.

In addition to the codes, the NIRA gave the President two other significant tools to set the rules of industrial competition and coordination. Section 4(a) authorized the President to "enter into agreements with, and to approve voluntary agreements between and among" trade associations, individual businesses, and labor organizations.[56] These were subject to the same substantive constraints as the codes, but they bound only the parties to the agreement rather than an entire industry. Section 4(b), meanwhile, authorized the President to require the licensing of all businesses in any industry and criminalize operation by nonlicensed businesses.[57] This licensing power built upon the tools of state licensing and corporate charters that formed part of the public-utility regulatory approach.[58]

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51. *Id.*

52. *Id.* § 7.

53. *Id.* §§ 3(b)-(c), 3(f).

54. *Id.* § 5.

55. *Id.* § 3(a).

56. *Id.* § 4(a).

57. *Id.* § 4(b).

58. HAWLEY, *supra* note 16, at 25, 370-71; Novak, *supra* note 35, at 149-53.

2. *The President's Broad Procedural Authority Under the NIRA*

As sparse as the NIRA's substantive constraints on the President's control over competition policy were, the Act's procedural constraints were even sparser. Section 2 authorized the President to establish agencies, appoint officers and employees, and use existing employees and volunteers "as he may find necessary" to effectuate Title I's policy.[59] Thus, unlike most regulatory statutes, the law neither specifically created a new agency nor delegated responsibilities to a specific existing agency; rather, it left this allocation of agency authority in the President's hands. Section 6 authorized the President to "prescribe rules and regulations" to ensure the trade/industry associations' "representative[ness]."[60] In addition, some of the Act's required presidential findings mandated notice and/or public hearing, but the procedures for such notice and hearing were essentially up to the President to determine.[61] In short, with few exceptions, the President was free not only to set the rules of industrial competition, but also to choose the procedures by which he would set those rules.

C. *The NIRA's Implementation: Presidential Market (Mis-)Management*

By February 1935, President Roosevelt had approved 546 codes of fair competition dictating the competitive rules and working conditions of more than 500 industries and 22 million workers.[62] The President had also entered into voluntary agreements with another 2.3 million companies or trade groups, covering 16 million workers.[63] To administer this vast new body of competition and coordination law, the President (not Congress) established the National Recovery Administration (NRA). A bare-bones agency with limited staff, resources, and structure, the NRA concentrated policymaking authority in one administrator and left large chunks of code writing, administration, and enforcement to private industry groups.[64] The result: a fast-paced, chaotic, nationwide experiment in the application and combination of market-governance tools.[65] Before long, the NRA's lack of sound procedures and sufficient administrative capacity facilitated

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59. National Industrial Recovery Act, Pub. L. No. 73-67, tit. I, § 2(a), 48 Stat. 195 (1933).

60. *Id.* § 6(b).

61. *See, e.g.*, *id.* § 4(b).

62. LEVERETT S. LYON, PAUL T. HOMAN, LEWIS L. LORWIN, GEORGE TERBORGH, CHARLES L. DEARING & LEON C. MARSHALL, THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL 29-30 (1935).

63. *Id.*

64. *See infra* Section I.C.1.

65. *See infra* Section I.C.2.

industry capture and a body of codes that raised prices, hurt consumers, and disempowered workers and small businesses.[66] Yet such a result was not preordained. Rather, it largely stemmed from the President's own policy and procedural choices. The story of the NRA is thus, fundamentally, a story of unchecked presidential control over the rules of economic competition and his decisions as to how to exercise that control. Those decisions ultimately doomed this radical experiment in presidential antimonopolism.

1. *The President's Authority in Practice*

The NRA's structure and procedures concentrated near-complete authority over market governance in the hands of the President and a small number of his appointees. Chief among these appointees was the Administrator of Industrial Recovery. President Roosevelt appointed General Hugh Johnson as Administrator and delegated to him most of the functions that Congress delegated to the President in the NIRA.[67] Formally, the Administrator reported to a supervising board, not directly to the President. However, the board lacked authority in practice, and the Administrator exercised final decision-making power over a wide array of NRA decisions.[68] Further, neither the Administrator nor any of the members of his supervising boards was subject to Senate confirmation in their NRA capacity, and only one supervising board member (the Chair of the FTC) was protected from presidential removal at will.[69] The President also created three NRA advisory boards, representing labor, consumers, and industry, respectively,[70] but these boards had little power.[71] Thus, "the Administrator exercised a control over the policies and operations of the [NRA] limited in effect only by orders from the [President], which for the most part were highly generalized."[72]

The NRA's process for approving codes of fair competition illustrates the Administrator's—and, ultimately, the President's—nearly uninhibited authority. Although the NIRA gave the President four main tools with which to coordinate and regulate industry—voluntary codes of fair competition, mandatory codes, voluntary agreements, and mandatory licensing—the President overwhelmingly

66. *See infra* Section I.C.3.

67. LYON ET AL., *supra* note 62, at 41-42.

68. CHARLES FREDERICK ROOS, NRA ECONOMIC PLANNING 56-57 (1937); LYON ET AL., *supra* note 62, at 41-42, 44.

69. *See* 15 U.S.C. § 41 (2018).

70. LYON ET AL., *supra* note 62, at 42.

71. ROOS, *supra* note 68, at 57-58.

72. LYON ET AL., *supra* note 62, at 45.

relied on voluntary codes.[73] Thus, the vast majority of codes that became law were initially proposed by industry groups, and they would go into effect only if industry agreed. Nonetheless, NRA officials often invoked the President's other authorities as a threat to extract concessions from industry groups and pressure them to agree to the President's priority policies.[74]

When a trade or industry group submitted a proposed code to the NRA, a deputy administrator, hired by and reporting to Administrator Johnson, was assigned to review the code and negotiate any changes.[75] If the deputy found any provisions of the code to violate either the minimal statutory requirements or policy precedents reflected in already-approved NRA codes, the deputy met privately with the industry group to discuss changes.[76] Once the code met minimum requirements, the deputy held a public hearing attended by him and his aides, representatives of the three advisory boards, and anyone else "who had indicated their desire to be heard."[77] The deputy administrator, the industry group, and often advisory board representatives then entered into further negotiations.[78] Throughout these negotiations, the threat of presidentially imposed mandatory codes, licensing, or government boycotts of noncompliant businesses loomed large.[79] Once the parties had agreed on a code, it was sent to the President for his signature.

Through both the codes and a series of voluntary agreements – the latter of which involved even fewer procedures[80] – the President and his appointees prioritized speed over procedural formalities or substantive policy consistency. The goal was to get codes approved "by any administrative method found to be

73. *Id.* at 39.

74. *Id.* In fact, President Roosevelt advocated for the inclusion of a mandatory licensing power in the NIRA for the explicit purpose of ensuring industry compliance with voluntary codes. *See* SAWYER, *supra* note 26, at 273 n.140 (quoting Franklin D. Roosevelt, A Recommendation to the Congress to Enact the National Industrial Recovery Act to Put People to Work (May 17, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 202 (1938)) ("[T]he public interest will be served if, with the authority and under the guidance of Government, private industries are permitted to make agreements and codes insuring fair competition. However, it is necessary . . . to provide a rigorous licensing power in order to meet rare cases of non-cooperation and abuse.").

75. ROOS, *supra* note 68, at 68.

76. *Id.* at 68-69.

77. *Id.* at 69.

78. *Id.* at 72-74.

79. *Id.* at 69, 75-77.

80. LYON ET AL., *supra* note 62, at 52.

consonant with speed," and then to work out the policy kinks and public complaints later.[81]

This combination of broad presidential control and meager procedural checks rendered the NRA unique among regulatory agencies of the time. For instance, a 1935 Brookings Institution report contrasted the NRA with independent regulatory agencies like the FTC and Interstate Commerce Commission (ICC). Although the NRA had similarly expansive regulatory powers over nearly the entire industrial economy as the ICC did over certain transportation industries, "the lines of authority over NRA activities, in contrast to those of the ICC, [ran] directly to the President; and the forms of the administrative organization and procedure depend[ed] entirely upon executive discretion rather than upon legislative determination."[82] The report also noted that the President had almost complete discretion over the substance of NRA policy, as distinct from the ICC's more specific legislative delegation, and that the ICC's commissioners were Senate-confirmed and protected from presidential removal, unlike the NRA Administrator.[83] These comparisons highlight the extent to which the NIRA built upon established market-governance mechanisms (like the public-utility commission), expanded their breadth, and consolidated their authority within the President's discretion.

2. *Deploying and Mixing Antimonopoly Tools*

Through the processes outlined above, the President and his subordinates put in place a combination of antimonopoly policies that temporarily reorganized the terms of industrial competition and coordination.

From a procedural standpoint, the most prominent forebearer of the NRA's approach was 1920s-style business associationalism. This form of regulated competition, championed by then-Commerce Secretary Hoover, enabled self-regulation by trade associations made up of the largest businesses in each industry. But the NIRA went even further. The President's reliance on voluntary codes and agreements in implementing the NIRA reflected both the President's desire to see quick action and Administrator Johnson's commitment to industrial self-governance as an ideal.[84] The codes enabled the largest companies to coordinate their prices and other industry rules – a massive reallocation of economic coordination rights that departed from even the most probusiness antitrust vision.

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81. *Id.* at 46-47.

82. *Id.* at 37-38.

83. *Id.* at 35.

84. *See* HAWLEY, *supra* note 16, at 62.

However, the NRA also enacted key components of the Progressive labor movement's governance vision. Through the NRA's code approval process, labor representatives had a seat at the table to shape the regulations for that industry. In addition, the NRA established a National Labor Board (the direct predecessor of the current National Labor Relations Board) to adjudicate labor disputes.[85] The NRA also pulled from the Brandeisian vision of managed competition by giving consumers representation in the policymaking process, scrutinizing industry-made codes to ensure that they did not harm small businesses or promote monopolization, and generating competition policies administratively.[86] Finally, the NRA exercised many of the same powers as the ICC and other public utility commissions and expanded that authority across most industries, not just traditional utilities or businesses "affected with a public interest."[87]

Substantively, too, the NRA's codes and agreements enacted elements of all these market-governance visions. Through voluntary agreements, about 2.3 million businesses agreed to observe minimum wages and maximum work hours, abolish child labor, and refrain from "unnecessary price increases."[88] The first three of those requirements were key demands of the Progressive labor advocates, and the fourth invoked the kind of price regulation that both the public-utility and Brandeisian-regulated-competition movements advocated at times.[89]

Meanwhile, the prohibitions on monopolization in the codes retained a core element of the original antitrust vision of the late 1800s, at least in theory.[90] At the same time, the codes also frequently included minimum wages, maximum hours, and at least some form of price regulation—for example, minimum prices, prohibitions on sales below cost, and "open-price" systems.[91] Many of the codes reinforced these pricing provisions with provisions that standardized costs, sales practices, credit terms, premiums, and other nonprice terms of competition, as

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85. ROOS, *supra* note 68, at 79-80.

86. SAWYER, *supra* note 26, at 272-74.

87. LYON ET AL., *supra* note 62, at 33-38 (discussing differences between agencies like the Interstate Commerce Commission (ICC) and the National Recovery Administration (NRA)); Munn v. Illinois, 94 U.S. 113, 126 (1877) (designating a category of industries "affected with a public interest" that could constitutionally be regulated more extensively than other industries, a framing that informed Progressive Era reforms); *see also* Rahman, *supra* note 36, at 1638 (discussing this case).

88. ROOS, *supra* note 68, at 76.

89. HAWLEY, *supra* note 16, at 57-58.

90. In practice, as discussed *infra* Section I.C.3, the code-making process was dominated by large businesses and became, in many cases, a vehicle for collusion and monopolization rather than an impediment to it.

91. HAWLEY, *supra* note 16, at 57-59, 85.

well as limits on machine hours and productive capacity.[92] Such extensive coordination of prices, operations, and output across entire industries aligned the codes with visions of regulated competition and standardization that predominated in the 1920s.

3. *Policy Incoherence, Procedural Chaos, and Industry Capture*

This unprecedented centralization of market-governance power did not lead to coherent policy. Rather, the NRA largely implemented inconsistent and clashing policies that realized none of the antimonopoly visions of the previous era and harmed the very actors antimonopoly law had been designed to protect. The codes' pricing provisions, for instance, led prices to rise more quickly than wages, cancelling out the wage gains laborers won through the minimum-wage and collective-bargaining provisions.[93] Code provisions to promote small businesses butted up against other provisions that disadvantaged small businesses by letting each industry's dominant players set the competitive rules.[94] Campaigns to organize workplaces using the Act's new collective-bargaining rights were stymied by loose government enforcement and businesses' efforts to direct employees to company unions.[95] Meanwhile, businesses large and small complained of an overly politicized code-setting process and a disorganized multiplicity of codes that left any individual firm potentially subject to conflicting rules and reporting requirements.[96]

This incoherence mirrored the President's own ambivalence as to how to use his NIRA-granted powers to address the Depression. Roosevelt largely refrained from setting a policy vision for the agency or empowering administrators to enact a coherent vision for him.[97] Instead, Roosevelt and Johnson set up a loose structure in which various divisions and interest-group representatives set policy code by code through nonpublic, unstructured negotiation processes that lacked policy consistency, metrics, data, or evaluation.[98] Some codes were more probusiness, others were more prolabor or proconsumer; some set prices lower and

92. *Id.* at 60.

93. *Id.* at 66-67.

94. *Id.* at 80-81.

95. *Id.* at 67.

96. *Id.* at 69; ROOS, *supra* note 68, at 472.

97. HAWLEY, *supra* note 16, at 123-24.

98. *See id.* at 61-66, 78; LYON ET AL., *supra* note 62, at 292; ROOS, *supra* note 68, at 63.

wages higher, and others did the opposite.[99] Little in the way of a coherent policy approach united them.[100]

To the extent any single policy vision drove the NRA's operations, it was Administrator Johnson's view that industry should be given the authority to govern itself. Lacking contrary instruction from Congress (whose statute did not specify any agency structure, positions, responsibilities, or procedures) or the President (whose policy preferences were underdeveloped), Johnson stacked the NRA with probusiness advisers.[101] Under Johnson's leadership, the NRA gave the code committees significant autonomy to develop the code provisions they wanted, grant exemptions, exercise discretion in enforcing the code against violators, and adjudicate disputes.[102] Less than ten percent of code authorities had labor members, which were envisioned (but not required) under the Act, and only about two percent had consumer representation.[103] Meanwhile, government members on the committees had little authority.[104] As a result, critics complained that the code-making process had become captured by the largest firms at the expense of labor, consumers, and smaller businesses.[105]

In response to the growing chorus of opposition and lackluster economic results, Roosevelt instituted a series of reforms—including replacing Administrator Johnson.[106] Yet the NRA's problems of policy incoherence, procedural chaos,

99. *See, e.g.*, Roos, *supra* note 68, at 179-87 (discussing the "wide variety of code provisions pertaining to wages above the minimum" in different codes); *id.* at 298 (discussing how quantity discounts that helped entrench incumbent businesses from competition "did find their way into approved codes" in some cases despite opposition from within the NRA); *id.* at 323-42 (discussing various open-pricing requirements and "emergency" price-fixing provisions that the NRA approved for some industries but not others).

100. *Id.* at 81 ("[T]he codes had been attained through trading various labor provisions for fair trade practices and, therefore, represented a hodgepodge collection of contradictory or loosely defined economic oddities which logical minds could not embrace.").

101. Hawley, *supra* note 16, at 65-66.

102. *Id.* at 61-63.

103. *Id.* at 61. Title I, Section 7(b) of the NIRA provided that "[t]he President shall, *so far as practicable*, afford every opportunity to employers and employees in any trade or industry" to negotiate wage, hour, and other conditions of employment as part of the code-making process, but did not *require* that employees be represented. National Industrial Recovery Act, Pub. L. No. 73-67, tit. I, § 7(b), 48 Stat. 199 (1933) (emphasis added).

104. Hawley, *supra* note 16, at 61.

105. Sawyer, *supra* note 26, at 284-88 (citing criticism from Republican Senators William Borah and Gerald Nye, who held a public hearing in Congress on the threats the NIRA posed to small businesses and consumers); Hawley, *supra* note 16, at 65-85 (discussing criticisms from members of Congress, economists, consumer and labor advocates, businesses, antitrust advocates, and other agencies like the Department of Labor (DOL), Federal Trade Commission, Department of Agriculture, and NRA staff).

106. Hawley, *supra* note 16, at 97-106.

and industry influence persisted.[107] Indeed, current scholars and commentators continue to point to these problems as evidence that the NIRA was a failure.[108]

By 1935, it had become clear even to some of the law's early champions that the NIRA was plagued by two underlying evils. The first was a constitutional concern: that the NIRA constituted excessive delegation of policymaking authority from Congress to the President that was unbounded by procedural or substantive constraints. The second was a democratic concern: that the NIRA suffered from excessive industry influence, which was enabled by a high degree of presidential discretion and the poorly structured decision-making process that the President created.[109]

In February 1935, President Roosevelt called on Congress to extend the NRA for two more years, subject to modifications that would prioritize small business and prevent price controls.[110] The Senate instead approved a less-than-one-year extension with significant structural changes over the President's objections.[111] But the Senate's bill never went to the President's desk. Thirteen days after the Senate vote, the Supreme Court declared the core of the NIRA unconstitutional.[112]

II. *SCHECHTER POULTRY* AND THE SEPARATION OF POWERS IN MARKET GOVERNANCE

On May 27, 1935, the Supreme Court issued two unanimous decisions sharply curtailing the President's antimonopoly authority. In *Schechter Poultry*, the Court invalidated Section 3 of the NIRA, the section enabling the President to approve codes of fair competition.[113] In *Humphrey's Executor v. United States*, the Court invalidated the President's removal of an FTC commissioner without

107. *Id.* at 109-10.

108. *See, e.g.*, Skocpol & Finegold, *supra* note 23, at 257 ("[T]he National Recovery Administration became, over time, increasingly unwieldy, conflict-ridden, and uncertain about its basic goals and preferred means for achieving them . . . .").

109. These ills were perhaps best diagnosed by Gilbert H. Montague, an early champion of the NIRA and one of the authors of the statute and many of the codes. In early 1935, Montague publicly criticized the NRA for engaging in "arbitrary" "lawmaking by executive fiat" and called it captured by the largest corporations. He also predicted that the NRA, having done "violence to the law" through its lack of procedures, would be overturned by the Supreme Court. SAWYER, *supra* note 26, at 289-91. *See also* HAWLEY, *supra* note 16, at 114-20 (discussing criticisms of the NIRA from various advocates who had originally supported it).

110. HAWLEY, *supra* note 16, at 123-24.

111. *Id.* at 126.

112. *Id.* at 128.

113. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935).

cause and upheld the statutory removal restriction on that position.[114] This Part traces those decisions'—especially *Schechter*'s—profound and lasting impact on the institutional structure of antimonopoly law. Those decisions, alongside subsequent acts of Congress, replaced the President's unilateral authority under the NIRA with a separation-of-powers regime that sharply constrained the President's authority to allocate economic coordination rights and manage economic competition. That regime largely persists to this day.

The legal-institutional history recounted in this Part matters for two reasons. First, it reveals the NIRA's enactment as the pivotal historical moment in the institutional structure of U.S. antimonopoly law and, thus, the essential precedent for understanding today's institutional antimonopoly reforms. Second, it shows the extent to which the modern separation of powers in antimonopoly law—instigated by the Court in *Schechter Poultry* and *Humphrey's Executor* and further enshrined by Congress in the decade that followed—decentralized antimonopoly policymaking far beyond what was constitutionally necessary or democratically wise. This created an increasingly paralyzed and promonopoly status quo. Today's antimonopoly proposals should be understood as a response to that overcorrection.

A. Schechter Poultry*'s Presidential Delegation Problem*

Schechter Poultry is best known as one of only two cases in which the Supreme Court has invalidated a statute under the nondelegation doctrine. The other case, *Panama Refining Co. v. Ryan*, decided earlier the same year, struck down another section of the NIRA.[115] The NIRA is thus the paradigmatic example of a statute that violated the separation of powers by failing to "'articulate *any* policy or standard' to confine [the executive branch's] discretion."[116] Yet, *Schechter Poultry*, like *Panama Refining* before it, made clear that the NIRA's problem was not only the substantive policy discretion it gave the executive branch writ large. Rather, both the opinion's reasoning and the surrounding history demonstrate that the Act was unconstitutional on account of its excessively broad delegation to *the President* in particular, unconstrained by administrative *procedures*.

To be sure, the NIRA's lack of substantive policy guidance clearly did trouble the Court. The *Schechter* Court found that Section 3 of the NIRA lacked "any adequate definition of the subject to which the codes are to be addressed,"

114. 295 U.S. 602, 631-32 (1935).

115. 293 U.S. 388, 432-33 (1935).

116. Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (quoting Mistretta v. United States, 488 U.S. 361, 373 n.3 (1989)).

namely, "fair competition."[117] While the government argued that Section 1's Declaration of Policy provided the requisite policy standard, the Court found that this declaration's "broad range of objectives" did not meaningfully constrain the delegation.[118] Instead, the policy was so broad that it could encompass "all the varieties of laws which [the President] may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."[119] To the Court, this degree of discretion meant Congress had impermissibly "abdicate[d] or . . . transfer[red] to others the essential legislative functions with which it is thus vested" by Article I.[120]

As precedent, the Court relied heavily on *Panama Refining*. In that case, the Court found that Section 9 of the NIRA—which enabled the President to control the amount of petroleum and petroleum products transported in interstate commerce—also "declared no policy, . . . established no standard, . . . [and] laid down no rule" to constrain executive discretion.[121] Both provisions thereby lacked the "intelligible principle" required to render a delegation constitutional.[122]

Yet, much of the *Schechter* opinion dealt not with the substance of the delegation, but with its form. The Court acknowledged that it had upheld broad delegations in the past, including delegations to (a) the ICC, (b) the Federal Radio Commission, and (c) most closely related to the NIRA, to the FTC to prohibit "unfair methods of competition."[123] In those cases, though, "Congress has provided an expert body," said the Court. "That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence."[124]

By contrast, the NIRA "dispense[d] with . . . any administrative procedure of an analogous character" to that of the FTC and other regulatory commissions.[125] While the NIRA authorized the President to create administrative agencies to help implement the Act, those agencies had no required procedures that could insulate their decisions from the discretion of the President, "who may accept, modify, or reject [the agencies' recommendations and findings] as he

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117. *Schechter Poultry*, 295 U.S. at 531.

118. *Id.* at 534.

119. *Id.* at 539.

120. *Id.* at 529.

121. Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

122. *Id.*

123. *Schechter Poultry*, 295 U.S. at 533, 539-40.

124. *Id.* at 539.

125. *Id.* at 533.

pleases."[126] Accordingly, the agencies' procedures "in no way limit[ed] the authority which section 3 [of the NIRA] undert[ook] to vest in the President . . . ."[127] Meanwhile, the industry groups charged with creating voluntary codes under the NIRA were, the Court insisted, not the kind of entities to which Congress could delegate its authority.[128] Thus, the NIRA left the President with "unfettered discretion," constrained neither by procedure nor by substance, to create the law of fair competition.[129] This *procedural* problem, rather than the statute's *substantive* breadth alone, ultimately rendered the delegation unconstitutional.

Then-Professor Elena Kagan has called it "a little noted oddity of the nondelegation doctrine" that the only two successful nondelegation challenges involved delegations to the President, rather than to agency officials.[130] Indeed, neither now-Justice Kagan's plurality opinion, nor Justice Gorsuch's dissent in *Gundy*, the Court's recent major nondelegation decision, mentioned this fact. But the history surrounding *Schechter Poultry* and *Panama Refining* shows that the 1935 Court, particularly Chief Justice Hughes (who wrote both opinions), was centrally concerned with the prospect of executive authority unconstrained by administrative procedure.[131] The idea that either unrestrained administrators (controlled by the President) or industry groups could make the law represented, to Hughes and many other critics at the time, not democracy but either fascism or corporatism.[132] In fact, Hughes, a crucial swing vote on the pre-"switch in time" Court, tended to uphold federal agency actions that followed court-like adjudicatory procedures—overseen by independent commissions and subject to judicial review—while striking down actions or statutes that lacked such procedures.[133] At least one New Deal lawyer read *Schechter* to mean that

126. *Id.* at 539.

127. *Id.*

128. *Id.* at 537.

129. *Id.* at 537-38.

130. Kagan, *supra* note 8, at 2364.

131. *See* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940, at 51 (2014).

132. *Id.* at 56-57 (summarizing Hughes's perspective on the NIRA as follows: "If [NRA] administrators imposed their own codes on industry (as NIRA allowed) without much regard for statutory policy or the evidence, the NRA would be on the path to fascism. And if the administrators simply promulgated whatever the 'code authority' for an industry proposed, the NRA would be practicing a business variant of European corporatism, the delegation of public power to private bodies to govern whole industries or sectors.").

133. *Id.* at 68 ("When, as in New York's minimum wage law and the price provisions of the Guffey Act, statutes required agencies to operate within limited delegations, hold adequate hearings,

only "the Commission form of regulation" would meet the Court's standards for sweeping administrative action.[134]

In that way, *Schechter* connected directly to the day's other blockbuster opinion. *Humphrey's Executor* is the linchpin to independent agencies' constitutionality.[135] The decision upheld removal restrictions on FTC commissioners based on the "character of the commission": a "body of experts" that was nonpartisan, impartial, and served a "predominately quasi-judicial and quasi-legislative" function by "filling in and administering the details embodied by" the FTC Act's broad mandate to prevent unfair methods of competition.[136] *Schechter*, meanwhile, included an extensive comparison between the FTC's process for determining "unfair methods of competition" and the NRA's process for creating "codes of fair competition" that focused on exactly those features that *Humphrey's* highlights.[137] Taken together, the two decisions were a one-two punch against unilateral presidential authority to set the rules of economic competition. The Constitution, according to the Hughes Court, permitted broad substantive policy delegations to the executive branch that resided in an agency and were subject to administrative procedures, but prohibited those assigned to the President alone, without any procedural constraints.[138]

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and adopt appropriate findings of fact, Hughes interpreted the relevant constitutional doctrines to uphold an agency's actions. When *Panama Refining*, *Schechter*, *Butler*, and *Carter* presented him with agencies lacking in these respects, he applied those doctrines aggressively."); *see also* Carter v. Carter Coal Co., 298 U.S. 238, 318 (1936) (Hughes, C.J., concurring in part and dissenting in part) (stating that he would have held the Guffey Act, which was modeled after the NIRA, to be unconstitutional not under the Commerce Clause, as the majority did, but as an unconstitutional delegation and a violation of due process, because the Act allowed industry participants to set wages and hours "according to their own views of expediency").

134. ERNST, *supra* note 131, at 68 (internal quotations omitted).

135. Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1836 (2016).

136. Humphrey's Ex'r v. United States, 295 U.S. 602, 624-28 (1935).

137. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532-33 (1935).

138. To be clear, although the *Schechter Poultry* and *Humphrey's Executor* opinions had substantial overlaps, the fact that the FTC was an independent agency (meaning its heads could not be removed by the President at will) as opposed to an executive agency (whose heads are removable) was not the feature that made the FTC Act's "unfair methods of competition" delegation preferable to the NIRA's "fair competition" delegation in *Schechter*. Instead, the features of agency structure and procedure (e.g., a "body of experts," "findings of fact supported by adequate evidence," "judicial review") that made the FTC's broad substantive delegation constitutional in the *Schechter* Court's dicta, see *Schechter Poultry*, 295 U.S. at 532-33, were some of the same key features that made removal restrictions constitutional in *Humphrey's Executor*. Recall that the NIRA did not delegate to an executive agency—it did not delegate to an agency at all. Instead, it delegated code-making authority to the President and allowed him to create any agencies or procedures he wished in carrying out that delegation. *See supra* Section I.B.2. The distinction between executive and independent agencies was not relevant in the NIRA context. Accordingly, the *Schechter Poultry* decision does not discuss removal restrictions at all.

B. *The Post-*Schechter *Separation of Powers*

In the wake of *Schechter*, administrators and legislators reshaped the regulatory state in the Hughes Court's mold. In the ten-year period after *Schechter*, a tripartite regime emerged that divided up the powers over economic cooperation and competition—powers that the President held unilaterally under the NIRA—both within the executive branch and across the branches, the states, and the private sector. This regime has remained, with limited modifications, to the present day.

Existing literature on the institutional structure of U.S. competition policy has overwhelmingly focused on the significant role that courts play in antitrust policy through common-law-like, case-by-case legal development.[139] However, as the NIRA and its Progressive Era antecedents demonstrate,[140] antitrust law is not the only body of law that governs economic competition and coordination. Each of the areas discussed below impacts how competition and coordination are structured. And courts, Congress, administrative procedures, states, and private parties all constrain the President's authority over those policy domains. Tracing the institutional structure of these fields of antimonopoly law—from the post-NIRA 1930s to the present—is a novel contribution of this Note and is essential for understanding the constitutional, democratic, and policy implications of the Biden Administration's moves toward presidential antimonopolism today.

This Section briefly outlines (a) how the President's powers over economic competition and cooperation (i.e., over antimonopoly law) were divided up after their NIRA apex, and (b) what powers remained in the President's hands.[141] This Section is not meant to be a comprehensive account of all the laws, rules, and norms that constrain the President in these areas. Rather, it points to key constraints that delimit the President's authority and that have been the subject of recent institutional antimonopoly reform proposals.

At the outset, it is helpful to conceptualize the types of legal and institutional features that serve to centralize or decentralize presidential authority. We can think of the laws, doctrines, procedures, and norms discussed in this Section as existing along four axes of centralization or decentralization: (1) horizontal, (2) vertical, (3) procedural, and (4) substantive. *Horizontal decentralization* refers to mechanisms that disperse authority away from the President to other parts of

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139. *See, e.g.*, Khan, *supra* note 4, at 1677-81; Paul, *supra* note 18, at 401-09.

140. *See supra* Section I.A.

141. In doing so, this Note also complicates the conventional view that the New Deal greatly expanded the power of the President. At least in the realm of antimonopoly and market governance, this Section demonstrates that the backlash to the NIRA and the reverberations of *Schechter Poultry* served to cabin the President's powers to unilaterally fulfill any of the Progressive Era visions that had momentarily been given life under the NIRA.

the federal government, including to administrative agencies, Congress, and the judiciary. *Vertical decentralization* refers to the dispersion of decision-making authority away from the federal government and toward states and private parties. *Procedural decentralization* occurs when procedures constrain executive decision-making authority. *Substantive decentralization*, by contrast, occurs when policy-making authority gets parceled out into separate legal domains. Where the NIRA brought together antitrust, industry regulation, and labor law under one umbrella, post-NIRA reforms decentralized the substance of competition law into separate legal categories, regulatory schemes, and agency jurisdictions. Substantive decentralization thereby interacts with the other forms of decentralization discussed above: by parceling out policy in separate agencies or domains, it can (a) increase the number of procedural constraints that apply and (b) increase, both horizontally and vertically, the number of other decision makers who get to weigh in.[142]

Together, these four forms of decentralization have limited the President's authority to dictate a coherent, comprehensive competition policy in the decades since the NIRA fell. This Section charts that decentralization across antitrust law, industry regulation, and labor law.

1. *Antitrust Enforcement*

After the NIRA, antitrust reverted back to and built upon its pre-NRA institutional model: policing economic coordination through case-by-case enforcement and adjudication, subject to common law-like doctrinal development and private enforcement suits.

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142. This conceptualization of dimensions of centralization is similar to other frameworks in administrative law and public administration literature but is modified to serve the particular features of antimonopoly law as the focus of analysis. For instance, scholars of public administration have long written about centralization and decentralization of government functions – often in relation to allocations of authority between national and subnational governments. *See, e.g.*, F. Pieter Wagenaar & Mark R. Rutgers, *Symposium: Caught Between Polis and Empire: On Centralization and Decentralization in Public Administration Theory*, 26 ADMIN. THEORY & PRAXIS 509, 509-19 (2004) (discussing the history and uses of the concepts of centralization and decentralization in public administration scholarship). Administrative law scholars have also analyzed forms of centralization and decentralization within and across agencies of the federal administrative state and state agencies. *See, e.g.*, Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 39-61 (2014) (providing a typology of centralization and decentralization in federal and state regulation and citing other frameworks); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1255-56, 1267-72, 1286-88, 1297-1302 (2017) (analyzing centralization of administrative functions within the White House). These and other sources use various terms to define types of centralization and decentralization. This Note uses the four dimensions discussed here because they best reflect the kinds of decentralization that occurred in U.S. antimonopoly law.

The federal courts provide the most meaningful horizontal and substantive constraint on the President's antitrust authority in the post-*Schechter* regime. Scholars and judges have long treated the Sherman Act as a "standardless delegation" from Congress to courts.[143] Judge Frank Easterbrook, for instance, called the Act a "blank check" for courts to create substantive antitrust rules through common-law methods.[144] The NIRA temporarily eliminated the courts' role in antitrust policy by suspending the antitrust laws and developing competition rules administratively. After *Schechter*, the courts regained their primacy as the antitrust laws went back into effect and congressional efforts to expand the FTC's purview failed.[145] This decentralization to courts has allowed antitrust policy to swing wildly in the decades since, despite the lack of any significant changes to the underlying statutes.[146] While some view this arrangement as a success,[147] and others as a profound problem,[148] it is difficult to deny that the courts, not the President or even Congress, drive antitrust law today.

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143. Khan, *supra* note 4, at 1679 (citing Andrew S. Oldham, *Sherman's March (In)to the Sea*, 74 TENN. L. REV. 319, 324 (2007)); *see also* Oldham, *supra*, at 324, 346 (describing courts' interpretation of the Sherman Act as a "common-law monstrosity" that allows them to "make standardless policy judgments").

144. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986); *see also* Khan, *supra* note 4, at 1678-80 (describing and criticizing this institutional structure). Notably, courts' outsized role in creating antitrust policy from the bench was a key motivation for Congress to pass the Clayton Act and FTC Act in 1914. Yet, these laws gave the FTC a limited purview and left the Sherman Act largely untouched. The fundamental pattern of antitrust-as-delegation-to-courts remained. *See* Paul, *supra* note 31, at 227; *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, 658 (2017) (explaining that the FTC Act "was meant to be narrower in some respects than the other two principle antitrust statutes – and broader in others" and that the FTC Act layered on top of the Sherman Act's regime).

145. *See* HAWLEY, *supra* note 16, at 371-72, 420-40.

146. *See* Khan, *supra* note 4, at 1679.

147. *See, e.g.*, William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 669-71 (1981) ("An adaptive approach to antitrust law is necessary both because of the diversity and rapidly changing nature of the business conduct to be scrutinized, and because of the continuing progress of economic theory in explaining why firms pursue certain strategies and the competitive consequences of their behavior . . . . The common-law approach to antitrust law, if it has not served us well, has served us better than would the available alternatives.").

148. *See, e.g.*, Oldham, *supra* note 143, at 324 ("[F]ederal courts have unjustifiably interpreted – read: rewritten – the Sherman Act to codify the common law principle that judges can make substantive antitrust rules."); Khan, *supra* note 4, at 1679 (arguing that "an antitrust system where legal rules are devised exclusively by Article III judges who approach antitrust as a domain of 'law made by judges as they see fit' bears signs of democratic illegitimacy" and that highly technical antitrust litigation with the input of many experts and interested parties as amici has "adopted a key feature of administrative rulemaking, even while foregoing its procedural safeguards and informational benefits").

Meanwhile, antitrust's private right of action vertically decentralizes presidential authority. The antitrust laws have included, since 1890, private rights of action for individuals or businesses harmed by violations, including treble damages and attorney's fees.[149] The NIRA, in suspending the antitrust laws, also suspended this private right of action.[150] But, beginning in the 1940s, private antitrust suits began to play a significant role in overall antitrust enforcement.[151] Though enforcers have often portrayed private antitrust litigation as "complementary" to DOJ and FTC enforcement,[152] the private right of action limits the President and his appointees' ability to exercise complete enforcement discretion over the antitrust laws.[153] In simpler terms, this means antitrust suits can be brought against companies or combinations that the federal government has chosen, for whatever reason, not to sue. And these suits, like federal enforcement suits, position courts as the primary doctrinal decider. Suits by state attorneys general, who can also sue to enforce both federal and state antitrust laws, also vertically decentralize antitrust enforcement discretion out of the President's hands.[154]

To be sure, the President retains some policymaking authority in the contemporary institutionalization of antitrust law, such as through the appointment of enforcers, influence over agency operations,[155] and these agencies' use of

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149. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210.

150. *See* § 5, 48 Stat. 195.

151. *See* Everette MacIntyre, Comm'r, Fed. Trade Comm'n, The Role of the Private Litigant in Antitrust Enforcement 1 (Jan. 18, 1962) (noting that only 175 private federal antitrust suits were filed between 1890 and 1940 and only 13 resulted in a judgment, whereas 3,311 antitrust suits were filed between 1942 and 1961); *Civil Antitrust Litigation Continues to Decline*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 20, 2019), https://trac.syr.edu/tracreports/civil/563 [https://perma.cc/M3PW-VGYQ] (noting that nearly 1,400 civil antitrust suits were filed in FY 2008, with the vast majority filed by private plaintiffs).

152. *See, e.g.*, Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Public and Private Antitrust Enforcement in the United States (Feb. 11, 2014), https://www.justice.gov/atr/file/517756/download [https://perma.cc/ZFG8-G4WS]).

153. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95 (2013).

154. *See, e.g.*, Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 677 (2003).

155. *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 784-812 (2013).

(judicially unreviewable[156]) enforcement discretion and enforcement guidelines.[157] Still, the President's antitrust authority is a shell of Progressive Era visions and the brief NIRA reality.

2. *Industry-by-Industry Regulatory Agencies*

After the NIRA, Congress also created new expert agencies and empowered existing independent commissions to set the rules of competition in certain key industries. While the President retained meaningful regulatory authority over many industries, that authority became subject to more stringent and uniform administrative procedures and their attendant judicial review.

One key decentralizing feature of the post-NIRA regulatory state is its substantive fragmentation. Where the NIRA authorized the President to set the rules of competition across the industrial economy, the regulatory apparatus that developed in its wake extended only to certain industries.[158] Scholars have referred to the resulting panoply of agencies as "industry-specific NIRAs"[159] and "little NRAs."[160] Contemporary critics, including many antitrust advocates, saw

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156. *See* Heckler v. Chaney, 470 U.S. 821, 835 (1984) (holding that agency decisions to not undertake enforcement proceedings are "committed to agency discretion by law" and therefore generally not subject to judicial review under the Administrative Procedure Act).

157. *See, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010). In general, enforcement guidelines may be subject to judicial review and the other procedural requirements of APA informal rulemaking depending on the degree to which they purport to bind, and actually bind, agency enforcement officials in the use of their discretion. *See* General Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995). However, to date at least, the agencies' antitrust guidelines have not been found to be subject to these requirements. *See* Richard J. Pierce, Jr., *Important Changes at the Intersection of Antitrust and Administrative Law*, REGUL. REV. (Mar. 21, 2022), https://www.theregreview.org/2022/03/21/pierce-important-changes-at-the-intersection-antitrust-administrative-law [https://perma.cc/Q4X9-XWR2]. A particularly instructive example of the use of these tools is the Reagan Administration, which used agency and judicial appointments alongside enforcement guidelines to shift antitrust enforcement policy and law toward the President's substantive views. *See* Tim Wu, *The President's Role in Antitrust Policy*, 11 J. ANTITRUST ENF'T 300, 302-03 (2023). At the same time, as Professor Wu argues, the Reagan Administration helped to shift authority "away from the President and Congress and toward agency experts" and judges by "insisting . . . that antitrust should be a technocratic matter" rather than one subject to politics. *Id.* at 302.

158. Specifically, it extended to industries that had qualities of "natural monopolies," those that imposed significant market externalities, and those whose incumbents had enough political clout to win legislation entrenching their incumbency from rivals. *See* HAWLEY, *supra* note 16, at 146.

159. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 607 (2007).

160. Ellis W. Hawley, *The Discovery and Study of a "Corporate Liberalism,"* 52 BUS. HIST. REV. 309, 318 (1978).

this regulatory proliferation as allowing more and more industries to "depart from competitive standards" into a form of "public-sponsored cartelization" that would protect incumbents and exclude competitors.[161] Indeed, these regulatory regimes usually included either explicit or implicit exemptions from the antitrust laws.[162] Yet this industry-by-industry regulatory approach survived because, unlike the NIRA, it decentralized regulation outside of one agency and, in many cases, into multi-member commissions protected by removal restrictions.[163] This dramatically dispersed the President's ability to coordinate markets, both substantively and procedurally. And while future regulatory (and deregulatory) reforms in the latter half of the twentieth century tended to move industry regulation toward executive agencies,[164] the dispersion of authority across sector- or issue-specific agencies persisted.

Further, perhaps the most significant constraint on the President's market governance authority came in the form of administrative procedures. Even after the NIRA's invalidation, many regulatory statutes continued to delegate broad substantive policy discretion to the executive branch, at least within the bounds of sector-specific regulation. In the ten years after the NIRA fell, Congress instead constrained the unilateral market governance authority of the President through procedure. Though statutes, common law, and agencies' self-imposed procedures constrained administrative action long before the New Deal,[165] Congress in the mid-1930s pushed transsubstantive legislation to codify and

161. HAWLEY, *supra* note 16, at 219, 226.

162. *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 341 ("One consequence of regulation is a reduced role for the antitrust laws. When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside. A corollary is that as an industry undergoes deregulation, or removal from the regulatory process, antitrust re-enters as the residual regulator. Since our fundamental criterion for determining antitrust immunity in regulated industries is the extent of unsupervised private discretionary conduct, the natural result of deregulation is an increased role for the antitrust laws.").

163. In fact, left-liberals in the New Deal Congress attempted to replace the NIRA with an independent regulatory body, the Industrial Expansion Administration, that would create an "industrial expansion plan" setting the key terms of economic production across the economy—a "NIRA 2.0," but with more procedure, more independence from the President, and less business influence. That proposal failed, however, thanks to the memory of the NIRA's ineffective effort to regulate across the entire economy. *See* HAWLEY, *supra* note 16, at 177-84.

164. *See, e.g.*, ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (shifting the remaining responsibilities of the ICC (an independent agency) to the Department of Transportation (an executive agency)).

165. *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (documenting the history of administrative agencies and administrative law in the United States's first 100 years).

systemize administrative procedure and thereby prevent "administrative absolutism."[166] Roosevelt opposed Congress's initial attempts at comprehensive administrative procedure laws.[167] And indeed, anti-New Deal business interests formed a significant part of the constituency for these reforms.[168] In 1946, Congress unanimously passed the Administrative Procedure Act (APA) as a compromise among proregulatory and antiregulatory interests.[169]

The APA decentralized executive policy discretion in limited but important ways. It dispersed adjudicative authority horizontally, away from the White House and toward formalized agency adjudicators;[170] created procedural decentralization through new transsubstantive administrative procedures;[171] and subjected most agency decisions to a baseline requirement of judicial review.[172] As the APA's New Deal opponents predicted,[173] judicial review in particular has often served to limit presidential policy discretion to set the rules of market governance.[174] Even today's "presidential" regulatory state remains subject to an

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166. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. ABA 331, 342 (1938).

167. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 349 (2019).

168. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1562-64 (1996).

169. *See id.* at 1674-75; Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 573 (2021).

170. *See, e.g.*, 5 U.S.C. §§ 556-57 (2018) (imposing minimum requirements for agency adjudications, including formal court-like procedures and limited ex parte contacts, including with the White House).

171. *See, e.g.*, *id.* § 554 (mandating public notice and comment for most rulemakings); *id.* § 706(2)(A) (subjecting all agency decisions to requirements of reasoned (non-"arbitrary and capricious") decision making). These and other APA rules imposed a "separation of functions" within agencies that cordoned off whole segments of agency decision making from direct presidential influence and advanced a vision of impartial agency expertise. Kovacs, *supra* note 169, at 598-99.

172. *See* 5 U.S.C. § 702 (2018).

173. Bagley, *supra* note 167, at 349 (arguing that Progressives and New Dealers, including the APA's opponents, "understood—more clearly than we do now—that strict procedural rules and vigorous judicial oversight could be mobilized to frustrate their efforts to curb market exploitation, protect workers, and press for a fairer distribution of resources").

174. Courts' doctrine of "hard look" review, for example, reads the APA's arbitrary-and-capricious standard to require that agencies consider and publicly address counterarguments and plausible alternatives, and that their justifications be based on a sufficient degree of evidentiary or scientific certainty. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983). The Supreme Court has also interpreted this standard to forbid agency policy decisions based solely on the President's policy priorities. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019). Commentators have argued that this form of review has helped to slow down and "ossify" agency rulemaking, shifting business regulation to more reactive and deferential forms. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *From Command and Control to* intricate executive branch organization chart,[175] significant administrative procedures, and judicial doctrines that, together, decentralize the President's authority to set the rules of competition through industry regulation relative to the NIRA and its Progressive Era predecessors.

3. *Labor Law*

Like antitrust law and industry regulation, labor law also exited the ambit of unilateral presidential discretion after *Schechter Poultry*. After the NIRA fell, Congress retained many of the Act's protections for labor organizing and collective bargaining. But it placed them within an agency adjudicatory procedure, confined organizing and bargaining to the worksite or firm rather than the entire industry, and, here too, created a greater role for judicial review.

Recall that the NIRA's code-making and voluntary agreement processes placed the President and his direct appointees at the bargaining table with labor and industry.[176] By contrast, the National Labor Relations Act (NLRA), which passed less than two months after the NIRA fell, almost entirely limited collective bargaining to the level of the individual worksite and firm. It also took government out of the bargaining equation.[177]

Under the NLRA, workers (mostly) cannot collectively bargain with their employer unless a majority of workers at their worksite vote to have a particular

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Collaboration and Deference: The Transformation of Auto Safety Regulation, 34 YALE J. ON REGUL. 167, 170-71 (2017). Further, the APA's expansive judicial remedies, as courts have interpreted them, allow a single district court to vacate an agency action nationwide. 5 U.S.C. §§ 704, 706(2) (2018). On the problems associated with courts' expansive interpretation of APA remedies, see, for example, *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 2-3 (2020) (statement of Nicholas Bagley, Professor, University of Michigan Law School), https://www.judiciary.senate.gov/imo/media/doc/Bagley%20Testimony.pdf [https://perma.cc/VE5U-9KYC]. When paired with private rights of action and expanded state standing, APA judicial review constrains, along multiple dimensions – substantive, procedural, horizontal, and vertical – the President's unilateral discretion to set the rules of market governance. On the role of state suits to challenge agency action, see, for example, Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism,"* 105 CALIF. L. REV. 1739, 1740-50 (2017); and Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1893-1925 (2019). *See also* Cristina M. Rodríguez, *The Supreme Court 2020 Term, Foreword: Regime Change*, 135 HARV. L. REV. 1, 106 (2021) (discussing how judicial review has contributed to the "hyperproceduralization of agency action," which "makes policy change slower and therefore limits the reach of a new administration").

175. *See* Kagan, *supra* note 8, at 2246-50.

176. *See* Andrias, *supra* note 11, at 15 n.53.

177. *Id.* at 15-16.

union bargaining unit represent them.[178] In those elections, and in the mandated bargaining that follows a union win, the government—via the National Labor Relations Board (NLRB), an independent agency—plays the role of neutral arbiter rather than a champion for any substantive outcome.[179] Further, the Taft-Hartley Act of 1947 and a series of court decisions limited the ability of workers to strike, gave businesses new rights to oppose and undermine union campaigns, and solidified the NLRB's neutral stance.[180]

No longer could the President unilaterally implement his (and workers') preference for higher wages and shorter hours by convening workers and employers across an entire industry and hanging the threat of mandated codes over their heads to exact prolabor concessions. Instead, the President moved three degrees away from the bargaining table. First, the President was separated horizontally by an independent agency: the NLRB. Second, she was substantively separated by the requirement of NLRA neutrality as to the outcome of business-labor relations and disputes. Third, she was vertically separated by the need for workers to either win a union election or engage in strike activities that courts, business, and Congress all worked to constrain—and to do so at each worksite, rather than industry-wide.[181]

Within the division of powers in labor law sketched above, the NLRB's statutory, self-imposed, and court-imposed procedures further constrain the President's ability to promote (or undermine) labor coordination. The NLRA not only protected employees' right to organize and engage in concerted activities; it also banned certain "unfair labor practice[s]" and delegated to the NLRB the authority to enforce against those practices.[182] Like many of the post-NIRA agencies established to regulate specific industries—and unlike the NRA—the

178. 29 U.S.C. § 159 (2018).

179. *Id.*

180. *See* Andrias, *supra* note 11, at 18-20.

181. The one, relatively brief detour on this path from NIRA-style sectoral bargaining to today's labor-law regime was the period from 1938 to 1949, when the Fair Labor Standards Act (FLSA) authorized the DOL to convene industry committees from labor, business, and government to set industry-specific minimum wages. *See* Fair Labor Standards Act of 1938, Pub. L. 75-718, 52 Stat. 1060 (1938). These FLSA committees were inspired in part by the NIRA but improved in key ways on the NIRA's faults. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 659-60 (2019). Yet ultimately, as part of the same backlash to labor rights and the New Deal that inspired the Taft-Hartley Act—and consistent with the administrative processes codified in the APA—Congress repealed the authority for nationwide industry committees in 1949 and limited the DOL's authority to standard APA rulemaking and adjudication. *Id.* at 686-88, 708-09.

182. National Labor Relations Act, ch. 372, §§ 3, 8(a), 10, 49 Stat. 449, 451-53 (1935).

NLRB is led by a multiheaded, removal-protected commission.[183] And like those agencies, final NLRB actions are subject to judicial review.[184] Yet the procedural constraints on the NLRB extend beyond that of many other agencies. For instance, the Board lacks the ability to enforce its own adjudicated orders and instead must petition a federal court to enforce them.[185] This pushes the NLRB into court for every case it adjudicates. The Supreme Court has, historically, given less deference to NLRB interpretations of its statute than it has to other agencies.[186] This has left the President with few tools to unilaterally enhance or reduce the rights of workers to coordinate in response to changing economic realities.[187]

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This Section merely skims the surface of the many constraints that the modern regulatory state, court doctrines, and Congress place on the President's authority to dictate the rules of market competition and coordination. It is intended to show that the modern, decentralized separation of powers in antimonopoly law took shape in the wake of, and often in direct response to, the NIRA. Together, these forms of decentralization have created numerous veto points in the process of governing economic competition and coordination and hindered the possibility of coherent, effective antimonopoly policy. In the face of today's monopolized economy, gridlocked legislature, and procorporate judiciary, antimonopoly reformers seek to reverse key excesses of this post-NIRA separation of powers while retaining its meritorious components. Part III explores three key proposals for doing so.

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183. *Id.* § 3. The Taft-Hartley Act slightly altered this structure by creating a separate General Counsel position, removable at will, that took over the Board's former prosecutorial functions. *See* 29 U.S.C. § 153(d) (2018).

184. National Labor Relations Act, ch. 372, § 10(f), 49 Stat. at 455.

185. *Id.* § 10(e), 49 Stat. at 454-55.

186. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1560-65 (2002). Further, heightened judicial scrutiny has driven the NLRB to favor policymaking by adjudication rather than rulemaking, even as many other agencies shifted toward rulemaking in the 1970s. *See generally* United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973) (interpreting expansively agencies' discretion to choose between rulemaking and adjudication). Rather than promulgate rules to further define unfair labor practices, the NLRB has continued to prefer adjudication as a means of trying to disguise legal interpretations as factual findings (for which the Board gets greater judicial deference, at least in theory) and thereby make policy shifts less obvious. *See, e.g.*, Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 414-19 (1995).

187. *See* Estlund, *supra* note 186, at 1530-31.

III. ANTIMONOPOLY PRESIDENTIAL ADMINISTRATION FOR THE TWENTY-FIRST CENTURY

President Biden's Executive Order on Promoting Competition in the American Economy, E.O. 14,036, listed seventy-two directives and recommendations for how executive branch agencies should use their existing statutory authorities to better combat corporate monopoly power and promote "fair competition."[188] These agencies included both the traditional antitrust enforcement agencies (DOJ and FTC), as well as an alphabet soup of regulatory bodies, from the Federal Communications Commission (FCC) to the Department of Health and Human Services. The directives encompassed policies related to labor markets, not just product markets (the traditional focus of antitrust). And they relied on a variety of tools, including enforcement priorities, agency rulemaking, and coordinated rulemaking review. In short, the White House launched a "[w]hole-of-[g]overnment [c]ompetition [p]olicy,"[189] with the President at the helm.

The executive order's approach illustrates the influence of a growing chorus of scholars and advocates who have championed more comprehensive strategies to combat corporate monopoly power that go beyond antitrust enforcement alone. As Chair Khan wrote a few years before her appointment, "Antitrust law is just one tool in the antimonopoly toolbox. Over the course of two centuries, Americans created a host of competition policy levers . . . across government to promote competition within open and fair markets."[190] In reformers' view, these levers are sorely needed: over seventy-five percent of U.S. industries have become more concentrated since the late 1990s,[191] and studies have linked this

188. *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy [https://perma.cc/8A4Y-86GE]; Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36990 (July 14, 2021).

189. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36989 (July 14, 2021).

190. Khan, *supra* note 18, at 131-32.

191. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 698 (2019).

concentration to higher prices,[192] less innovation,[193] and lower wages,[194] among other harms.[195] President Biden's competition executive order and related proposals seek to respond to these harms by reviving and more effectively leveraging the antimonopoly tools that Khan mentions—tools that reached their apex in the Progressive and New Deal Eras.

This Part briefly summarizes three of these proposals and illustrates their relationship to the NIRA and the Progressive Era ideas that came before it. Each would centralize authority over setting the rules of economic competition and coordination closer to the White House, relative to the post-NIRA status quo. Indeed, some of these proposals' champions, and detractors, explicitly point to the NIRA as precedent. For that reason, they are best understood as a response to the excesses of the decentralized regime outlined in Part II above. Yet these proposals also depart from the NIRA in important ways. Each currently sits on the Biden Administration's agenda, at least to some degree, though none is guaranteed to come to fruition. This Part and Part IV argue that successfully implementing these proposals, and defending them against legal challenges, requires understanding their relationship to the NIRA—and how they can replicate the NIRA's successes without succumbing to its failures.

A. *Antitrust Policy Through FTC Rulemaking*

1. *The Proposal*

Among its seventy-two specific policies, the President's competition executive order calls on the FTC to consider promulgating rules to "address persistent and recurrent practices that inhibit competition" and "unfairly limit worker mobility."[196] The order names a non-exhaustive list of areas in which it particularly encourages the FTC to regulate, including non-compete clauses in worker contracts, unfair data collection and surveillance, unfair conduct or agreements in the prescription drug industry, and unfair competition in digital markets. As

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192. *See, e.g.*, Orley C. Ashenfelter, Daniel Hosken & Matthew C. Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers* 19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19939, 2014), https://www.nber.org/system/files/working_papers/w19939/w19939.pdf [https://perma.cc/7G9F-ZQDL].

193. *See, e.g.*, Thomas J. Holmes, David K. Levine & James A. Schmitz Jr., *Monopoly and the Incentive to Innovate When Adoption Involves Switchover Disruptions*, 4 AM. ECON. J. 1, 1 (2012).

194. *See, e.g.*, José A. Azar, Steven T. Berry & Ioana Marinescu, *Estimating Labor Market Power* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30365, 2022), https://www.nber.org/system/files/working_papers/w30365/w30365.pdf [https://perma.cc/A426-Q8DU].

195. *See* Boushey & Knudsen, *supra* note 4; Khan, *supra* note 4.

196. Exec. Order No. 14,036, § 5(f)-(g), 86 Fed. Reg. 36987, 36992 (July 14, 2021).

authority for this rulemaking, the order points to "the FTC's statutory rulemaking authority under the Federal Trade Commission Act."[197] In keeping with this order, the FTC recently issued a Notice of Proposed Rulemaking for a rule banning all noncompete clauses in employment contracts.[198]

Such rulemaking would effect a profound shift in the federal government's approach to antitrust policy. Recall that courts and scholars have long interpreted the broad, terse text of the federal antitrust laws as a "blank check" for courts to create substantive antitrust rules through common-law methods.[199] The FTC, which Congress created in 1914 as an expert agency to define and police "unfair methods of competition,"[200] has for most of its history confined its approach to case-by-case adjudication and court enforcement, rather than rulemaking.[201] The other federal antitrust enforcer, the Department of Justice, has no substantive antitrust rulemaking authority and can enforce the antitrust laws only through lawsuits. This "judicial supremacy" in antitrust policy not only undermines Congress's vision in creating the FTC,[202] it has also enabled antitrust law to dramatically shift—in a relatively short period of time and with little change in the underlying statutes—in favor of the Chicago School's view of corporate monopolies and against enforcers and private plaintiffs, through both substantive doctrine and procedural rules.[203]

Numerous studies have found this promonopoly shift in antitrust law, enacted by the courts, to have contributed to today's levels of corporate consolidation and attendant harms to prices, wages, innovation, and inequality.[204] At the same time, antitrust's case-by-case enforcement has generated an ever-shifting

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197. *Id.* § 5(g).

198. Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/EA8H-MBXA].

199. *See* Oldham, *supra* note 143, at 368; Easterbrook, *supra* note 144, at 1702.

200. Federal Trade Commission Act, 15 U.S.C. § 45(a) (2018).

201. *See* Chopra & Khan, *supra* note 12, at 359. Only once in its history has the FTC explicitly promulgated a rule under its "unfair methods of competition" authority, as opposed to its authority to police "unfair and deceptive acts and practices." *Id.* at 369 n.54.

202. *Id.* at 363-66, 375-79; *see also* Vaheesan, *supra* note 144, at 663-73 (arguing that the FTC's 2015 Statement of Enforcement Principles, which stated that Section 5 would track judicial interpretations of the Sherman and Clayton Acts where applicable, "fails to reflect Congress' vision in establishing the Commission").

203. *See* Paul, *supra* note 31, 233-47 (2021); Paul, *supra* note 18, at 384-87, 409-13; TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 102-18 (2018).

204. *See, e.g.*, Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

set of rules that market participants struggle to navigate.[205] And it has arguably failed most glaringly in the context of technology and digital markets: years-long enforcement suits fail to keep up with the pace of technological and market change, and antitrust doctrine does not adequately account for tech monopolies' non-price harms to innovation, privacy, workers, and the competitive process.[206] Further, even some who generally support the current contours of antitrust doctrine acknowledge that the doctrine is often "too complicated for generalist judges."[207]

In response, reformers have called for the FTC to exercise its latent UMC rulemaking power to outlaw, *ex ante*, conduct that the FTC considers an unfair method of competition. Chair Khan and current Director of the Consumer Financial Protection Bureau (CFPB) Rohit Chopra have been among the most prominent advocates for this approach in recent years.[208] Chopra and Khan call this proposal an "institutional shift" away from the courts and toward more transparent, consistent, democratic policymaking via the executive branch.[209] President Biden's Executive Order 14,036 endorsed this shift.

To be sure, some argue that the FTC does not have substantive rulemaking authority with respect to unfair methods of competition under the FTC Act.[210] Nonetheless, the FTC's Biden-appointed majority is moving forward to exercise its asserted authority.[211]

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205. *See* Chopra & Khan, *supra* note 12, at 359-60.

206. *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017) (arguing that the "consumer welfare" model of antitrust law, which measures competition primarily through price and output, "underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive," especially in the context of online platforms like Amazon).

207. Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 1 (2011).

208. Other scholarly literature advocating for competition rulemaking includes C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629 (2009); Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247 (2011); Vaheesan, *supra* note 202; and Justin Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209 (2014).

209. Chopra & Khan, *supra* note 12, at 357.

210. *See, e.g.*, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*,*"* AM. BAR ASS'N ANTITRUST L. SECTION 54 (Apr. 24, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf [https://perma.cc/VD3V-9BLN]. *But see* Nat'l Petrol. Refiners Ass'n v. FTC, 482 F.2d 672, 677 (D.C. Cir. 1973) (holding that the FTC does have substantive competition rulemaking authority).

211. *See supra* note 198 and accompanying text.

2. *How This Proposal Reconstitutes NIRA-Like Presidential Antimonopoly Authority*

Shifting even some antitrust policymaking away from court adjudication and toward proactive FTC rulemaking, as Biden's FTC has begun to do, would meaningfully increase the President's authority over the rules of competition and coordination by reducing both the horizontal and vertical decentralization of the post-*Schechter* settlement. As under the NIRA, the President's appointees are once again identifying categories of practices, either in individual sectors or across the economy, that violate notions of "fair competition." Crucially, as with the NIRA codes, what counts as fair/unfair competition in FTC rulemaking is not limited to the conduct currently permitted or outlawed by courts' interpretations of the Sherman and Clayton Acts.[212] Instead, FTC rules can ban conduct that courts have interpreted the antitrust laws to permit. This horizontally recentralizes antitrust policymaking authority away from the judiciary and back toward the executive branch, within the purview of presidential appointees and subject to a degree of White House Office of Management and Budget (OMB) oversight.[213] In addition, some scholars (including Chair Khan) contend that courts should grant *Chevron* deference to the FTC's reasonable interpretations of its UMC authority, given the ambiguity of the FTC Act's statutory language, at least under current (though vulnerable) precedent.[214] Further, unlike the Sherman and Clayton Acts but like the NIRA, FTC Act Section 5 is not subject to a private right of action. Thus, federal enforcers will have exclusive discretion to bring suits for violations of the FTC's UMC rules—vertically recentralizing some antitrust enforcement authority.[215]

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212. *See* Lina M. Khan, Rohit Chopra & Rebecca Kelly Slaughter, *Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, U.S. FED. TRADE COMM'N 2-4 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [https://perma.cc/YBU5-UVK9].

213. The fact that the FTC is an independent agency, rather than an executive agency, reduces, but does not preclude, presidential influence. As discussed *infra*, the President and the White House exercise meaningful influence over independent agencies through appointments, OMB oversight, and other forms of influence. *See infra* Section IV.A. As just one example, the sitting President gets to choose which commissioner will serve as chair. *See* 15 U.S.C. § 41 (2018). Certainly, that influence exceeds the President's influence over the decision making of Article III courts.

214. *See, e.g.*, Hurwitz, *supra* note 208, at 247-62; Chopra & Khan, *supra* note 12, at 375. The Supreme Court recently granted certiorari on the question of whether *Chevron* should be overturned, or at least narrowed, and will hear the case in its October 2023 term. *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023).

215. *See* Chopra & Khan, *supra* note 12, at 373.

At the same time, FTC UMC rulemaking as proposed differs from the NIRA "codes of fair competition" model in important ways. First, it will be led by an independent agency insulated to some degree from presidential influence. Second, the rulemaking process must conform to APA informal rulemaking procedures, including notice and comment—a far cry from the freewheeling, procedure-less process of the NRA.[216] Third, the process will be subject to arbitrary-and-capricious review, among other APA Section 706(2) standards, meaning the agency would have to give reasons and consider available data and alternatives.[217] This, too, marks a departure from the NRA's data-bereft, industry-driven process.

Still, FTC UMC rulemaking has the potential to bring proactive, industry- or economy-wide competition rulemaking back into the ambit of the executive branch. This would return to and build upon the vision of Progressive Era trust-busters who sought antitrust lawmaking by agencies rather than courts, and whose vision was briefly realized (in a distorted and ultimately unsuccessful form) in the NIRA.

B. White House Competition Rulemaking Coordination and Review

1. The Proposal

Antimonopoly reformers have also looked beyond the FTC's heretofore untapped rulemaking authority to the panoply of agency rulemaking powers already in use that impact competition. Like FTC UMC rulemaking, this proposal also responds in part to the antitrust agencies' adjudication-only approach.[218] Moreover, this proposal reflects a view, going back to the Progressive Era and illustrated in the NIRA's breadth of authority, that antitrust and industry regulation are both necessary to rein in corporate monopoly power and promote fair competition.[219]

In 2020, Tim Wu and other scholars and former antitrust enforcers, writing for the Washington Center for Equitable Growth (WCEG), proposed the

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216. *See id.* at 368-69.

217. Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(A) (2018).

218. *See* Wu, *supra* note 11, at 34 ("The promotion of competition in the American economy is a task that has traditionally fallen to the enforcement agencies at the federal and state level, relying on the main antitrust statutes. However, the challenge of declining competition has also prompted interest in the use of regulatory alternatives to antitrust to 'catalyze' competition." (internal citations omitted)).

219. *See id.* at 37-38; *see also supra* Section I.A.2 (discussing the development of public utility regulation and the social control of business as Progressive antimonopoly complements to antitrust law).

creation of a White House Office of Competition Policy to coordinate and drive such a multi-agency competition rulemaking effort.[220] This Office would (1) encourage agencies to promulgate rules that promote competition; (2) coordinate with agencies (both independent and executive) on their rulemakings and enforcement activities to "tackle endemic competition problems in specific industries"; (3) monitor the agency rulemaking process to "discourage or prevent rules" that are anticompetitive; and (4) participate in the Office of Information and Regulatory Affairs (OIRA) regulatory review process to scrutinize draft rules for potential anticompetitive impacts.[221]

President Biden's competition executive order substantially adopted this proposal.[222] The order, like the WCEG proposal, embraces a "whole-of-government approach" to create a "fair, open, and competitive marketplace."[223] And it called on a similar panoply of agencies as those identified in the WCEG report to use their regulatory and procurement authorities to promote competition.[224] Further, it established a White House Competition Council, led by the National Economic Council (NEC) and consisting of a set of cabinet secretaries, the OIRA Administrator, and (if they choose to participate) the chairs of independent commissions like the FTC, and FCC.[225] The Council has many of the same duties as the WCEG's proposed body, including coordinating agency efforts to promote "fair competition."[226] The order did not indicate whether the Council would participate in OIRA rulemaking review. However, it did direct OIRA to "consider[] . . . whether the effects on competition . . . should be included in

220. Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro & Tim Wu, *Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress*, WASH. CTR. FOR ECON. GROWTH 35-36 (Nov. 2020), https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states [https://perma.cc/7XR2-P52U].

221. *See id.* at 35-38. Since the 1980s, the Office of Information and Regulatory Affairs (OIRA), an office within the White House Office of Management and Budget (OMB), has served as an oversight and coordinating body for agency regulations by, among other functions, (a) requiring OIRA review and pre-approval of any agency regulation by any executive (i.e., non-independent) agency when the rule has a projected annual effect on the economy of $100 million or more; and (b) requiring all agencies, including independent agencies, to submit to OIRA each year a list of all planned rulemakings of any size for the coming year, for review by the President. *See* Exec. Order No. 12866 §§ 3, 6, 58 Fed. Reg. 51735, 51737-38, 51740-43 (Sept. 30, 1993). The first of those requirements, rulemaking review, mandates agencies and OIRA to conduct an analysis of the costs and benefits of the proposed regulation. *Id.* § 6(a)(3)(C).

222. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36987-99 (July 14, 2021).

223. *Id.* at 36987, 36989.

224. *Id.* at 36987-90.

225. *Id.* at 36990-91.

226. *Id.* at 36990.

regulatory impact analyses."[227] Finally, the order included dozens of directives and recommendations for action by individual agencies.[228]

As of this writing, the Council has held at least four public meetings and has announced new procompetition rulemaking efforts by the FDA, FCC, CFPB, and Department of Agriculture, among others.[229] In addition, the White House recently proposed a revision to Circular A-4—the OMB guidance document that instructs agencies on how to conduct the cost-benefit analysis required under Executive Order 12,866 and OIRA rulemaking review—that provides more detail on how issues of competition and market power should be analyzed in rulemaking review.[230] K. Sabeel Rahman, the former OIRA associate administrator in charge of this effort, has stated that these additions to Circular A-4 were meant to be "in keeping with the Administration's broader focus on competition policy."[231] And, he added, the new guidance is intended to "prompt[] agencies to take into better account the ways in which rules might either exacerbate or help mitigate against problematic forms of market power and the economic and social harms that may result."[232] Thus, the White House has already begun to substantially implement proposals to play a more active role in competition policymaking across the executive branch.

2. *How This Proposal Reconstitutes NIRA-Like Presidential Antimonopoly Authority*

The Biden Administration's new White House Competition Council has begun to horizontally, substantively, and procedurally centralize antimonopoly policy closer to the President by leveraging and coordinating the panoply of agency rulemaking that sets the terms of coordination and competition in specific economic sectors.

Although neither the original proponents of this approach nor Biden Administration officials explicitly cite the NIRA as precedent, the parallels are clear. The Competition Council's explicit purpose is to align the executive branch

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227. *Id.* at 36998.

228. *See id.* at 36990-99.

229. *Readout of the Fourth Meeting of the White House Competition Council*, WHITE HOUSE (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/readout-of-the-fourth-meeting-of-the-white-house-competition-council [https://perma.cc/2BKL-AL6M].

230. *See* Request for Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis," 88 Fed. Reg. 20915, 20915 (Apr. 7, 2023).

231. K. Sabeel Rahman, *Rewiring Regulatory Review*, LPE BLOG (May 1, 2023), https://lpeproject.org/blog/rewiring-regulatory-review [https://perma.cc/D7SL-JGFQ].

232. *Id.*

around a unified policy—the President's policy—of "fair competition."[233] That should sound familiar. Indeed, President Biden's competition executive order specifically targets many of the industry-specific regulatory agencies that New Dealers created after the NIRA fell. And it creates an office within the White House to coordinate that activity and address competition issues that span multiple agencies' spheres of delegated authority. This reform recentralizes authority horizontally—away from disparate agencies and toward the President—and substantively—by aligning these agencies' regulations around the President's competition policy vision. In addition, the proposal to incorporate competition considerations into OIRA rulemaking review would also reduce procedural decentralization by requiring all agencies to incorporate the President's competition policy into the often cumbersome procedure of analyzing the costs and benefits of their most significant regulations.

Of course, even the most intensive version of this proposal, as laid out by the Washington Center for Equitable Growth, would not fully reconstitute the President's NIRA-style authority to unilaterally dictate the rules of fair competition across every major industry in the economy. Each of the agencies that the new Council will attempt to coordinate can only act within the bounds of their substantive statutes. Moreover, these agencies must still follow the administrative procedures that either the APA or their substantive statutes require for their rulemaking and adjudicatory processes—procedures that constrain full presidential policymaking discretion.[234] And they are still subject to judicial review and its attendant biases.[235] Further, OIRA rulemaking review technically gives some room for agencies to disagree with and push back against White House assessments of their proposed rules, though it ultimately gives the President the option to make the final policy choice if a dispute between the agency and OIRA arises.[236]

Even so, this vision of setting and implementing a coherent competition policy across the regulatory state echoes core tenets of the NIRA: (1) that regulation in pursuit of fair competition involves more than just antitrust law, and (2) that the President should have significant authority to decide what constitutes fair competition. And although this effort at White House competition coordination is still in a nascent stage, an early example helps illustrate its potential impact.

As discussed in the previous Section, the FTC recently issued a proposed rule banning worker non-competes as violations of the FTC Act, as the President recommended in his 2021 competition executive order. A few months later, the

233. *See* Biden, *supra* note 1.

234. *See supra* Section II.B.2.

235. *See supra* Section II.B.2.

236. *See* Kagan, *supra* note 8, at 2289-90.

NLRB General Counsel issued a memo declaring that her office would interpret worker non-compete agreements as violations of the NLRA.[237] This interpretation means that, pending the FTC's rule becoming final, two agencies will be able to enforce against non-compete agreements under distinct authorities. In her memo, the NLRB General Counsel noted that this announcement followed on an MOU that she signed with the FTC and the DOJ Antitrust Division regarding, in part, non-compete agreements and was consistent with "an interagency approach to restrictions on the exercise of employee rights."[238] The White House Competition Council lists those MOUs as examples of competition actions that the Administration has taken consistent with the President's executive order.[239]

All told, this effort to coordinate and align the competition-related regulations of numerous agencies has the potential to steer a large portion of the executive branch in the direction of the President's vision of fair competition, as the NIRA briefly attempted to do.

C. Sectoral Bargaining: Presidential Labor Coordination

1. The Proposal

A third major institutional-reform proposal of today's antimonopolists is sectoral bargaining. The Biden-Harris campaign committed during the 2020 transition to exploring the expansion of sectoral bargaining, a model in which workers, employers, and government engage in tripartite negotiations to set industry-wide labor standards in each major industry.[240] Although the Administration has not yet put forward a specific sectoral bargaining proposal, which would require legislation to enact, the idea had strong support in the 2020

237. Office of Pub. Affs., *NLRB General Counsel Issues Memo on Non-Competes Violating the National Labor Relations Act,* NAT'L LAB. RELS. BD. (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national [https://perma.cc/Z2TQ-QAZ3].

238. Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, on Non-Compete Agreements that Violate the National Labor Relations Act, at 6 n.25 (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national [https://perma.cc/D4YV-2WGC].

239. *White House Competition Council*, WHITE HOUSE, https://www.whitehouse.gov/competition [https://perma.cc/P9YM-RBRV].

240. *See* Alexia Fernández Campbell, *The Boldest and Weakest Labor Platforms of the 2020 Democratic Primary*, VOX (Oct. 29, 2019), https://www.vox.com/2019/9/5/20847614/democratic-debate-candidate-labor-platforms [https://perma.cc/MQ9Y-LXUZ].

Democratic primary.[241] Further, the idea remains a prominent demand of labor progressives at both the federal and state level as a critical, structural response to the power of corporate monopoly employers.[242] In fact, a few states, including New York and California, already have laws on the books that enable some form of sectoral bargaining, and a coalition of workers and unions used New York's sectoral-bargaining system to win a $15 minimum wage for fast-food workers in the state.[243] Sectoral bargaining could easily rise on the Administration's list of priorities going forward.[244]

This push toward sectoral bargaining responds to serious structural imbalances in the current U.S. labor-law regime. With rates of labor unionization at their lowest levels in several decades, the vast majority of U.S. workers cannot collectively bargain for their wages and other terms of their employment.[245] Workers have thereby lost the ability to counterbalance the market power of employers, even as employers have gained market power in both labor and product markets.[246] This loss of countervailing power has contributed to decades of stagnant wages and a declining labor share of income.[247]

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241. *See id.* (discussing support for sectoral bargaining among multiple Democratic candidates, including then-candidate Biden).

242. *See, e.g.*, Domestic Workers Bill of Rights Act, H.R. 4826, 117th Cong. (2021) (proposing a sectoral-bargaining model for domestic workers); Chris Marr, *California Fast Food Bill Inches US Toward Bargaining by Sector*, BLOOMBERG L. (Aug. 18, 2022, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/california-fast-food-bill-inches-us-toward-bargaining-by-sector [https://perma.cc/6XZM-UV3A].

243. *See* Andrias, *supra* note 11, at 46-57.

244. The Administration has also begun to administratively set labor standards by attaching prevailing wage requirements and other minimum labor standards to clean-energy and infrastructure tax credits and grants. *See, e.g.*, Betony Jones, *Good Jobs with Good Pay and Benefits are Key to Building the Clean Energy Future*, U.S. DEP'T ENERGY (Sept. 4, 2023), https://www.energy.gov/policy/articles/good-jobs-good-pay-and-benefits-are-key-building-clean-energy-future [https://perma.cc/EP7Q-ZLVT]; Press Release, U.S. Department of the Treasury, IRS Release Guidance on Inflation Reduction Act Provision to Ensure Good-Paying Clean Energy Jobs, Expand Clean Energy Workforce, U.S. Dep't of Treasury (Aug. 29, 2023), https://home.treasury.gov/news/press-releases/jy1708 [https://perma.cc/FKA2-FL7B]. Although the Administration has not framed this effort in antimonopoly terms, it is consistent with an approach to set labor standards in various industries, including the emerging clean energy sector, through the executive branch rather than relying on private market ordering or union negotiations.

245. Andrias, *supra* note 11, at 5.

246. Ioana Marinescu, *Boosting Wages When U.S. Labor Markets Are Not Competitive*, WASH. CTR. FOR EQUITABLE GROWTH (Jan. 14, 2021), https://equitablegrowth.org/boosting-wages-when-u-s-labor-markets-are-not-competitive [https://perma.cc/R8LB-HX4X].

247. *See, e.g.*, *id.*; Rudy Fichtenbaum, *Do Unions Affect Labor's Share of Income: Evidence Using Panel Data*, 70 AM. J. ECON. & SOCIO. 784, 804, 806-07 (2011).

Sectoral bargaining would directly combat declining unionization rates by enabling industry-wide collective bargaining in every industry. A sectoral-bargaining regime would create industry-by-industry "wage boards" made up of representatives from business, labor, and the federal government. These boards would negotiate wages and benefits for all workers in that industry, nationwide.[248] Though the details of the proposals differ, one version by the Center for American Progress (CAP)[249] envisions wage boards with representation from employers, workers, and the Department of Labor (DOL).[250] A board would be formed for each industry category, as defined by the DOL, and would set wage scales and benefits for each occupation (also defined by the DOL) within that industry.[251] The boards' standards could go above federal legislative standards but not below. As with the statutory minimum wage, state and local governments could set wages and benefits above the federal standards set by the boards, as could firm-level collective-bargaining agreements.[252] Wage-board standards would become law, would apply to all workers in the industry (whether or not they are unionized), and would be enforceable by the DOL, states, and private parties.[253]

Proponents of sectoral bargaining claim it would improve coordination and competition dynamics in the labor market in at least five ways. First, sectoral bargaining would enable collective bargaining in industries where union

248. *See, e.g.*, David Madland, *Wage Boards for American Workers: Industry-Level Collective Bargaining for All Workers*, CTR. FOR AM. PROGRESS 8 (Apr. 9, 2018), https://www.americanprogress.org/wp-content/uploads/sites/2/2018/04/wpA-WageBoards-report-2.pdf [https://perma.cc/5GTB-RU2D]; Andrias, *supra* note 11, at 64-68, 84-89.

249. This Note uses the Center for American Progress (CAP) proposal as an example of how to implement sectoral bargaining because it is a particularly thorough proposal that gets into more detail than most about the institutional form that a national sectoral-bargaining regime could take. To be clear, though, this proposal has not been endorsed by the White House or Congress, nor would any actual sectoral-bargaining legislation necessarily take this form. It is used only as a stand-in to exemplify the kinds of institutional considerations at play in implementing sectoral bargaining.

250. The CAP proposal envisions wage boards of eleven members: five representing employers, chosen by trade association(s) in that industry; five representing workers, representing either the unions in that industry or, if there is no unionization in that industry, selected by the DOL; and a delegee of the Secretary of Labor as the government representative. Madland, *supra* note 248, at 11.

251. *Id.* at 8, 12.

252. *Id.* at 8.

253. *Id.* at 2-3, 13.

representation is low,[254] which describes most industries.[255] Second, it would place government at the bargaining table with workers and employers, moving the collective-bargaining process from a private affair to a public one.[256] Third, the resulting industry-wide labor standards would prevent companies from gaining a competitive advantage by reducing wages or worker protections. Businesses would instead have to "compete on an even playing field."[257] Fourth, the boards would cover workers regardless of their classification as employees or independent contractors, whereas current law inhibits independent contractors from collectively bargaining. This, too, would prevent companies from evading minimum-wage laws and other requirements by merely reclassifying their employees, as they have done throughout the economy over the past generation.[258] Finally, sectoral bargaining would counterbalance the growing power of monopolies in the labor market, which have driven down wages, working conditions, and benefits through their monopsony power.[259] As such, sectoral bargaining should be understood as a critical antimonopoly tool, just as it was when antimonopoly Populists and Progressives proposed it in the early twentieth century.[260] Antimonopoly law asks the fundamental question of who gets to coordinate, who has to compete, and on what terms. Sectoral bargaining dramatically

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254. *See id.* at 8-9 (describing the decline in unionization rates and the fact that sectoral bargaining would allow workers to be represented in collective bargaining whether or not they are unionized); Kate Andrias, *Union Rights for All: Toward Sectoral Bargaining in the United States*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 56, at 56, 59 (Richard Bales & Charlotte Garden eds., 2020) (citing the low rate of U.S. private sector unionization as a reason for sectoral bargaining and explaining that, in sectoral bargaining regimes, "the law facilitates or mandates bargaining throughout an economic sector, extends the fruits of collective bargaining to the entire sector, and/or guarantees worker organizations a seat at the table when governmental decisions about employment standards are made").

255. In 2022, the U.S. private-sector unionization rate fell 0.1 percentage points to 6.0%. U.S. Bureau of Lab. Stat., *Economic News Release: Union Members Summary*, U.S. DEP'T LAB. (Jan. 19, 2023, 10:00 AM ET), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/NK57-YTQC].

256. *See* Andrias, *supra* note 11, at 63.

257. Madland, *supra* note 248, at 3.

258. *Id.* at 8-9.

259. *See supra* notes 192-195 and accompanying text.

260. *See* Andrias, *supra* note 46 and text accompanying notes 46-48. Indeed, forms of sectoral bargaining predate even the Populists and can be seen, for example, in the operations of the Freedmen's Bureau during Reconstruction. There, proto-sectoral bargaining was used to support the freedpeople's countervailing labor power against the powerful planter monopolies that controlled the Southern economy. *See* Daniel Backman, Note, *"A Vast Labor Bureau": The Freedmen's Bureau and the Administration of Countervailing Black Labor Power*, 40 YALE J. ON REGUL. 837, 855-59, 865-66 (2023).

expands labor coordination, backs it up with government support, and thereby changes the conditions of competition in the market.

2. *How This Proposal Would Reconstitute NIRA-Like Presidential Antimonopoly Authority*

Like the other two proposals discussed above, sectoral bargaining would meaningfully alter the institutional structure of antimonopoly law—in this case, labor law—by handing the President and his direct appointees greater authority over the terms of economic competition and coordination. This includes elements of horizontal, substantive, and procedural centralization.

Indeed, sectoral bargaining presents the clearest parallels to the NIRA. Like the NIRA, and unlike the NLRA regime that replaced it, sectoral bargaining would put the President's appointees back at the bargaining table with business and labor to set wages, benefits, and other working conditions. In addition, the members of the wage boards would make recommendations that would be subject to the approval of the Secretary of Labor (who serves at the pleasure of the President), much like the NRA industry groups' proposals were subject to approval by the President (via the removable NIRA Administrator). Relative to the post-NIRA separation of powers, this would reduce labor law's horizontal decentralization toward the NLRB and its vertical decentralization toward private union negotiations. Further, as under the NIRA, the wage boards' approved recommendations would cover an entire industry, thereby constraining the ways in which businesses could compete. The President could once again bring labor and business together to set key rules of competition across the economy.

Still, under no major proposal to date would sectoral bargaining fully reassemble the President's NIRA-style authority over labor law. For one thing, at least in the CAP proposal, the Secretary of Labor would only be able to approve or deny standards recommended by the wage boards.[261] Neither she nor the President would have the authority to unilaterally impose their own standards if they deemed the boards' proposals inadequate. This would also reduce the Secretary's and President's leverage over the outcome of the negotiation; the President could not hang the threat of an imposed standard over the parties to coerce them to agree to certain terms, as FDR did under the NIRA. Further, the boards as proposed would be subject to procedures for representativeness, transparency, public participation, and likely some forms of judicial review. And workers would have a private right of action to sue for employers' failure to meet the approved standards, which was not an option under the NIRA (nor is it currently, under the NLRA). In other words, key elements of procedural

261. Madland, *supra* note 248, at 12.

decentralization and horizontal decentralization (to courts) could be retained. Finally, in most proposals, the scope of the negotiations would be limited to pay, benefits, scheduling, and profit-sharing, rather than covering the broader set of competitive rules that the NLRA codes could set, leaving significant substantive decentralization in place.[262]

* * *

The three proposals discussed in this Part all seek to grant the President greater authority to set the terms of economic competition and coordination. Further, they do so across the very same legal spheres that were the subject of the antimonopoly movement in the Progressive Era, regulated by the NIRA, and later decentralized by the courts and Congress in the years that followed. The critical question, then, is how to reconstitute an antimonopoly presidency without repeating the NIRA's mistakes.

IV. AVOIDING THE NIRA'S TWIN EVILS IN A RENEWED ANTIMONOPOLY PRESIDENCY

As described in Section I.C, the NIRA failed because of its twin evils. The first was that the NIRA unconstitutionally delegated power to the President, with barely any procedural constraints. The second was that the President and his direct appointees used this power to cater to industry interests at the expense of democratic decision-making. This Part analyzes the three antimonopoly reforms in light of these twin evils and finds that each policy proposal is resilient to the NIRA's fatal flaws. It demonstrates that, if today's reformers heed the NIRA's lessons, the three noted proposals can revive the presidency's muscular antimonopoly authority; conform that authority to the most efficacious, accountable, participatory, and constitutionally sound features of the modern administrative state; and discard the post-*Schechter* settlement's less useful constraints.

A. *Addressing Nondelegation and Major Questions Challenges to FTC Antitrust Rulemaking*

As the FTC prepares to promulgate its first substantive rules in decades under its FTC Act Section 5 "unfair methods of competition" (UMC) authority, skeptics are sounding the nondelegation alarm. Among others, former Republican FTC Commissioners Noah Phillips and Christine Wilson have argued that rulemaking, as opposed to just adjudication, under the FTC's UMC authority

262. *See id.* at 8.

raises potentially fatal nondelegation issues.[263] Commissioner Phillips noted that the Supreme Court in *Schechter Poultry* invoked the FTC's UMC authority and discussed its textual similarity (and similar breadth) to the NIRA's unconstitutional "codes of fair competition" delegation.[264] According to Phillips, "the key distinction that saved [the FTC's use of its UMC authority] was its *adjudicative* process."[265] Commissioner Wilson made similar arguments in her opposition to the FTC's proposed rule banning worker non-compete clauses.[266] The U.S. Chamber of Commerce issued a report echoing Commissioner Phillips's arguments,[267] as did a pro-tech-industry think tank in a comment to the FTC.[268] Given the opposition to the FTC's rulemaking plans in certain corners of industry, it appears likely that the FTC's anticipated UMC rules will face nondelegation challenges in court.[269]

But the skeptics fundamentally misunderstand the meaning of *Schechter Poultry* for this case. As the foregoing analysis of the *Schechter Poultry* decision

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263. *See* Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Prepared Remarks, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues 5-7 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf [https://perma.cc/K5BN-4ETD]; Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule 12-13 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf [https://perma.cc/EQ72-ZRVJ].

264. Phillips, *supra* note 263, at 6.

265. *Id.*

266. Wilson, *supra* note 263, at 12-13.

267. *See* Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. CHAMBER COM. 14-16 (Aug. 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf [https://perma.cc/C4GU-QJ4T].

268. *See* Tech Freedom, Comments for July 1 Open Commission Meeting in Re Unfair Methods of Competition Policy Statement 1-2 (June 30, 2021), https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-FTC-Open-Meeting-Comments-6.30.21-UMC-Policy-Statement-1.pdf [https://perma.cc/A2WR-6HX9].

269. *See, e.g.*, Suzanne P. Clark, *The Chamber of Commerce Will Fight the FTC in Court*, WALL ST. J. (Jan 22, 2023), https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656 [https://perma.cc/D2RT-W49P] (stating, as the president and CEO of the U.S. Chamber of Commerce, that her organization "will fight in court to hold the FTC accountable to the rule of law" if the agency promulgates a final worker noncompete ban under Section 5 and arguing that such a rule would violate "the constitutional separation of powers"); Chamber of Com. of the U.S., Comment Letter on Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule 25-27 (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf [https://perma.cc/8M9W-84HW] (arguing that an interpretation of Section 5 that permits a non-compete ban would violate the nondelegation doctrine).

and its historical and legal context demonstrates, the FTC's use of rulemaking instead of adjudication is far from the only meaningful distinction between the FTC's UMC authority and the President's code-making authority under the NIRA. Rather, two other key factors rendered the NIRA's broad delegation unconstitutional and the FTC's similarly broad delegations constitutional. First was the presence or absence of constraining agency procedures.[270] Second, and related, was the NIRA's delegation to the President in particular, and through him to private industry groups, rather than an independent commission or at least some congressionally created executive agency.[271] Indeed, the enduring New Deal administrative state's subsequent development centered in significant part around those concerns.[272]

This Section argues that those concerns—about the procedures accompanying a delegation and the presidential nature of the delegation—represent key factors on which to base a nondelegation examination of FTC rulemaking today. Taken together, a proper understanding of both the *Schechter* case and the broader constitutional significance of the NIRA moment in history shows that a court should uphold FTC UMC rulemaking as a constitutional delegation. Such an understanding also points toward principles for the nondelegation doctrine more generally.[273] The Supreme Court's current nondelegation doctrine does not address these principles in any explicit way, but it should.

1. Schechter *Does Not Suggest That UMC Rulemaking Would Fail*

First, to be clear, the *Schechter* Court did not directly hold the FTC UMC's rulemaking delegation to be unconstitutional. Commissioner Phillips is correct that the *Schechter* Court favorably referenced the FTC's case-by-case adjudicatory process as part of what distinguished it from the NRA's code-making process.[274] However, the FTC had, at that time, never issued legislative rules, even

270. *See supra* notes 123-129 and accompanying text.

271. *See supra* notes 126-130 and accompanying text.

272. *See supra* Section II.B.

273. This Section's arguments parallel another recent reframing of the nondelegation doctrine as concerning presidential power and procedure. *See* David Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REGUL. (forthcoming Jan. 2024), https://ssrn.com/abstract=3953864 [https://perma.cc/B4LK-Q6F6]. Whereas Froomkin's argument is mostly doctrinal and theoretical, this Note comes to similar conclusions about the nondelegation doctrine through greater attention to the legal and historical context of the NIRA and the Court's 1935 nondelegation decisions, the relationship between those Court decisions and the post-*Schechter* institutional structure of the administrative state, and implications for current debates about the FTC's authority and the execution of antimonopoly policy.

274. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532-33 (1935).

though it had rulemaking authority since its creation in 1914.[275] Thus, the Court had had no occasion to consider a nondelegation challenge to FTC rulemaking. As a result, we must look beyond *Schechter*'s narrow discussion of the FTC's adjudicatory authority to determine *Schechter*'s meaning for the FTC's *rulemaking* authority.

Notably, *Schechter* did point to other agencies with similarly broad statutory delegations that engaged in rulemaking, not just adjudication. As discussed above, the Court referenced the Interstate Commerce Commission (ICC) and the Federal Radio Commission (FRC) as contemporary agencies that permissibly exercised broad delegations. Both of those agencies promulgated rules, in addition to conducting adjudications.[276] Indeed, the same Court in *Panama Refining* defended the constitutionality of rulemaking, not just adjudications, by the ICC and FRC under its then-recently articulated "intelligible principle" test.[277] Further, the Court in both cases focused on those agencies' administrative procedures and compared them to the lack of procedural constraints in the NIRA. The FTC was an independent agency like the ICC and FRC and had many of the same procedural constraints, including but not limited to removal protections and judicial review.

Thus, although *Schechter* did not clearly state that FTC UMC rulemaking would be constitutional, neither did the Court say nor suggest that it would not be. The fact that the FTC used adjudication rather than rulemaking was not the pivotal issue. Rather, the Court's defense of similarly broad delegations to other independent agencies that engaged in rulemaking suggests that the Court would have looked favorably upon UMC rulemaking under the "intelligible principle" test that it applied at the time and continues to apply today.

2. *Who Cares About* Schechter *Anyway?*

Of course, just because the reasoning and context of *Schechter* weigh in favor of upholding FTC UMC rulemaking under the Court's standard at the time, that

275. *See* Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (codified at 15 U.S.C. § 46(g) (2018)); Chopra & Khan, *supra* note 12, at 369 n.54 (noting that the FTC has only once, in 1968, promulgated a rule under its antitrust authority); Leah Samuel, *UMC Rulemaking After Magnuson-Moss: A Textualist Approach*, TRUTH ON THE MKT. (Apr. 27, 2022), https://truthonthemarket.com/2022/04/27/umc-rulemaking-after-magnuson-moss-a-textualist-approach [https://perma.cc/Q8CW-JYVW] (stating that the FTC operated through adjudications and nonbinding "trade practice rules," not binding legislative rules, until the 1960s).

276. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 399-400 (2017).

277. Panama Refining Co. v. Ryan, 293 U.S. 388, 428-30 (1935) (citing Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928)).

does not mean that today's Court would be persuaded. Indeed, signs suggest that a majority of the current Supreme Court supports abandoning the "intelligible principle" test and replacing it with a more stringent one.[278] These Justices claim that the text, structure, and original meaning of the Constitution require Congress to legislate with much greater specificity in order to ensure that it has not delegated away to the executive branch its fundamental, nondelegable legislative power.[279] Yet, as many scholars have argued, the text, structure, and Founding Era history of the Constitution are not at all conclusive as to the scope of delegable authority or the proper place to draw the line.[280]

Justices seeking to revise the nondelegation test would do well to look instead to the history and context of the NIRA. They should do so because the NIRA and its aftermath represented an important constitutional moment, one in which all three branches of government reconciled the administrative state with their conceptions of democracy, effective government, and the rule of law. As numerous scholars have previously argued—though none with as much focus on the NIRA as this Note[281]—the contours of the administrative state that emerged from the Progressive and New Deal Eras hold constitutional import.

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278. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting); *id.* at 2130-31 (Alito, J., concurring in the judgment); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318-19 (2014) (arguing for more stringent limits on Congress's ability to delegate to the executive for at least "certain types of laws," such as those involving "fundamental rights").

279. *Gundy*, 139 S. Ct. at 2131-35 (Gorsuch, J., dissenting).

280. *See, e.g.*, Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administration Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1298-1300 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 349 (2021); *see also* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (conceding that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts").

281. This Note is far from the first to argue for the constitutional significance of the New Deal Era for the administrative state, even if few have focused as squarely on the NIRA. Gillian Metzger, for example, has argued that the administrative state's post-New Deal procedures and institutions are "essential for actualizing constitutional separation of powers today" and that the administrative state that emerged after the New Deal "yields important constitutional benefits." Gillian E. Metzger, *The Supreme Court, 2016 Term, Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017). More broadly, Bruce Ackerman contends that the intense and broad political mobilization in favor of the New Deal resulted in an unwritten (but no less authoritative) constitutional amendment that permitted formerly impermissible types of federal regulatory authority. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105-30 (1991). In response, Akhil Amar argues that it was in fact the Progressive Era's *written* constitutional amendments, particularly the Sixteenth Amendment, that

What, then, is the constitutional import of the post-NIRA separation of powers for our understanding of nondelegation? And does it bring any clarity to the case of FTC UMC rulemaking? The remainder of this Section advances three principles as starting points.

3. Importance of Procedures

First, this Note's account of the NIRA and its aftermath suggests that broad statutory delegations should be less constitutionally suspect when they are accompanied by administrative procedures that promote deliberation, transparency, and democratic participation. In other words, the Constitution demands a degree of procedural decentralization within the executive branch. Beyond just the reasoning of the *Schechter* opinion itself—which was centrally concerned with the lack of administrative procedures governing the NIRA's implementation—the history that followed reconciled broad federal regulatory power with constitutional principles by ratcheting up administrative procedures. Indeed, the procedures governing the regulatory apparatus emerged in large part as a reaction to the procedural failures of the NIRA.[282]

Consistent with that understanding, some nondelegation cases in the decades after *Schechter* explicitly cited the presence of constraining administrative procedures as reason to uphold broad statutory delegations.[283] Moreover, other

enshrined the constitutionality of the redistributive regulatory state and justified the New Deal. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 273-74 (2012); Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL'Y 219, 222-23 (1998). Other scholars have given their own accounts, too, of the Progressive and New Deal Eras' imprints on the Constitution. *See, e.g.*, Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 185-319 (2022).

282. *See supra* Section II.B; *see also* Shepherd, *supra* note 168, at 1569-78 (describing the American Bar Association's opposition to the administrative structure and power authorized by the NIRA and how the ABA's positions ultimately influenced the politics that led to the APA).

283. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 777-78, 783 (1948); Fahey v. Mallonee, 332 U.S. 245, 250-54 (1947); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971); *see also* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1868 (2019) (noting that the *Schechter* Court found that the NIRA lacked normal administrative procedure). Some have suggested that the Supreme Court rejected the relevance of agency procedures to the nondelegation doctrine in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 456 (2001). *See, e.g.*, Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. ON REGUL. (Feb. 28, 2020), https://www.yalejreg.com/nc/major-questions-and-the-judicial-exercise-of-legislative-power-by-blake-emerson [https://perma.cc/D27Y-QM9S]. However, the *Whitman* opinion appeared only to reject consideration, in a nondelegation administrative-law doctrines conduct a similar balancing between the breadth of substantive agency discretion and the procedures involved.[284]

On this score, FTC UMC rulemaking is unproblematic. Such rulemaking is subject to APA informal rulemaking requirements, including notice and comment, as well as the attendant judicial review provisions and doctrines.[285] Indeed, when compared to the FTC's (and DOJ's) current adjudication-and-enforcement-only approach to antitrust, FTC rulemaking looks particularly favorable. Under the APA, FTC UMC rules are subject to both public input and the analysis and decision-making of agency experts, not just the generalist judges who make antitrust policy in their chambers by common-law methods under the current status quo.[286] Moreover, the FTC and DOJ's current antitrust-enforcement policies and nonenforcement decisions are unreviewable in court, even when they take the form of highly persuasive (though not formally binding) enforcement guidelines and policy statements.[287] By contrast, the same policies enshrined in FTC rules would be reviewable. In short, at least in the case of the FTC's broad Section 5 delegation, rulemaking has significant constitutional advantages over case-by-case adjudication from the standpoint of procedural constraints. The lessons of the NIRA suggest that such constraints render FTC UMC rulemaking even *more* constitutionally sound than UMC adjudication, not less so.

analysis, of an agency's *own* decisions to adopt a "limiting construction of the [challenged] statute" or otherwise "declin[e] to exercise some of [the] powers" that Congress has delegated to it. *Whitman*, 531 U.S. at 472-73. The Court did not reject consideration of the *congressionally mandated* procedures that may accompany a delegation to an agency, such as requirements for a structured agency fact-finding process, judicial review, agency independence, or other procedural constraints that the NIRA lacked and that the *Schechter* Court favored. Further, even if one were to read *Whitman* to reject those considerations, the Court could revisit that precedent. After all, this discussion assumes that the Court will be seeking to overturn or modify its longstanding "intelligible principle" test. In that scenario, stare decisis would not likely be the Court's primary concern.

284. *Mead*, for example, limited *Chevron* deference to instances in which Congress delegated authority to the agency to "make rules carrying the force of law" through processes like formal adjudication or notice-and-comment rulemaking. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

285. *See* Chopra & Khan, *supra* note 12, at 368-69.

286. As others have argued, the status-quo approach has resulted in an unpredictable body of antitrust law that market participants struggle to navigate. *See id.* at 362. In addition, case-by-case adjudication, which lacks opportunities for public comment, makes it harder for market participants to inform the body of law under which they are governed.

287. *See* sources cited *supra* notes 156-157.

4. *Importance of Presidential Delegation vs. Agency Delegation*

As this Note has demonstrated,[288] the legal battles surrounding the NIRA and its aftermath suggest that broad delegations should be less constitutionally suspect when they delegate to an agency—executive or independent—rather than to the President herself. After all, the Court in *Schechter* found the NIRA to be an unconstitutional delegation to *the President*.[289] Post-*Schechter* Congresses heeded the Court's suspicion of unilateral presidential discretion by subjecting the executive branch to new procedures and agency structures, even as Congress continued expanding the executive's substantive regulatory powers.[290] Further, *Humphrey's Executor* echoed the Court's deep suspicion of centralized power within the presidency and revealed the Court's receptiveness to Congress's Progressive Era structures for containing that centralized power.[291] Thus, the most faithful reading of *Schechter* and the broader constitutional debates of its time point to greater scrutiny for delegations to the President and greater leeway for delegations to agencies.

Such a rule would also be consistent with one specific feature of the APA: the APA does not deem presidential decisions reviewable "agency actions."[292] Thus, delegations to the President are not subject to APA procedural constraints or its arbitrary-and-capricious standard. While other mechanisms exist to ensure that presidential decisions are consistent with substantive statutory standards and constitutional requirements,[293] the procedural protections that formed an important part of the post-*Schechter* settlement fall away when Congress delegates directly to the President. If, as argued above, greater procedural requirements render broad delegations less suspect, delegations to the President should face greater suspicion on that score.

Perhaps this proposal would fall on deaf ears at today's unitarian Supreme Court. Yet, as now-Justice Kagan noted in her defense of "presidential administration," the President can still exert enormous, even decisive, influence on the discretion of agencies when the substantive statute specifically delegates

288. *See supra* Section II.A.

289. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935).

290. *See supra* Section II.B; *see also* Metzger, *supra* note 281, at 73-78 (describing the coinciding growth of both presidential control and bureaucracy).

291. *See supra* Section II.A.

292. *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

293. *See, e.g.*, Chamber of Com. v. Reich, 74 F.3d 1322, 1325-32 (D.C. Cir. 1996) (allowing plaintiff to sue the lower-level implementing official for carrying out a presidential directive that was inconsistent with the substantive statute).

authority to the agency head.[294] Thus, applying greater scrutiny to broad statutes that delegate directly to the President need not be inconsistent with the principle that the President, as the source of electoral legitimacy in the executive branch, should have the prerogative to direct the actions of the branch beneath her. Instead, such a rule maintains the basic agency procedures central to the post-NIRA administrative state while still permitting a high degree of presidential involvement and accountability.

The FTC Act delegates rulemaking authority to the FTC, not the President—thereby avoiding that aspect of the NIRA's nondelegation problem. But what about the fact that the FTC is an independent agency and therefore more insulated from certain mechanisms of presidential control? *Schechter Poultry* and *Humphrey's Executor* suggest that the 1935 Court found that feature of the FTC to be salutary, rather than suspect, in comparison to the NIRA. Today's Court, on the other hand, might see the FTC's independent-agency status as a liability. Even if they could accept broad delegations to *executive* agencies, due to the presence of strong presidential influence, perhaps delegations to *independent* agencies lack sufficient accountability to the President and should therefore be more heavily scrutinized under a nondelegation test, not less.

Two additional considerations might help to quell that concern. First, Presidents still exert significant influence over independent agencies, including the FTC. Presidents still appoint the agency's leadership, and Presidents since Clinton have involved independent agencies in the OMB rulemaking review process to at least some extent.[295] Further, Presidents can and do still call on independent agencies to take certain actions within their statutory authority, although they tend to couch these as "recommendations" rather than "directives."[296] Here, it would strain credulity for any court to claim that the FTC's use of its UMC rulemaking authority lacks meaningful presidential influence. After all, the President's appointed Chair is pursuing this policy after having publicly advocated

294. Kagan, *supra* note 8, at 2369.

295. *See id.* at 2288.

296. The FTC's UMC rulemaking itself is a prime example: President Biden's executive order on competition explicitly "encourage[s]" the FTC to use its rulemaking authority to address "persistent and recurrent practices that inhibit competition" in an enumerated list of areas. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36992 (July 14, 2021). Notably, the executive order uses the exact same "encourage" language when referring to the Attorney General as it does to the Chair of the FTC. *See, e.g.*, *id*. at 36991. This symmetry exemplifies Kirti Datla and Richard L. Revesz's argument that the difference between executive and independent agencies is best understood not as a binary but as a continuum. On that continuum, organizational features and norms (not only, or even primarily, for-cause removal) render some agencies more or less independent from presidential control than others. *See* Datla & Revesz, *supra* note 155, at 825-27.

for it two years prior to her appointment and after the President explicitly recommended it in an executive order.[297]

Second, today's Supreme Court unitarians should heed and extend their own principle as to the distinctive accountability features of multi-headed independent agencies like the FTC. In *Seila Law LLC v. Consumer Finance Protection Bureau*, the Court struck down removal protections on the position of Director of the CFPB.[298] The Court held that removal protections on principal officers violate the separation of powers *unless* those officers are part of a multimember commission with features like the FTC—a "body of experts" with multiple heads, subject to staggered terms and requirements of party balance, and exercising quasi-legislative and quasi-judicial functions.[299] In the majority's reasoning, these features serve to create an internal division of powers within the agency that, from a constitutional standpoint, adequately substitutes for direct presidential control via removability.[300]

Although *Seila Law* narrowed the holding of *Humphrey's Executor* and the Court's other removal precedents, the Court nonetheless identified a core teaching of the NIRA experience recounted above. *Humphrey's*, like *Schechter*, stands in part for the constitutional advantages of multiheaded, deliberative, "expert" agencies like the FTC as alternatives to total presidential discretion.[301] And in the years after the NIRA fell, Congress denied President Roosevelt's attempt to eliminate independent agencies and instead created even more multimember, expert regulatory bodies.[302] Therefore, even if, as many argue, the *Seila* Court erred in deeming multimember-ness constitutionally *necessary* for agency independence, the Court was right to deem a multiheaded agency like the FTC constitutionally *sufficient*. The Court should extend its reasoning as to the benefits of multimember independent commissions to the context of nondelegation. As *Schechter* and its surrounding history show, FTC-like procedural and institutional independence from the President, while not required to make a broad substantive delegation constitutional, makes such a delegation more permissible, not less so.

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297. *See supra* note 296; Section III.A.

298. 140 S. Ct. 2183, 2192 (2020).

299. *Id.* at 2199.

300. The Court called this a "constitutional strategy" that derives from first principles of constitutional structure: "divide power everywhere except the Presidency, and render the President directly accountable to the people through regular elections." *Id.* at 2203.

301. Indeed, the same procedural and institutional features that justified a broad substantive delegation to the FTC in *Schechter Poultry*'s reasoning also justified removal protections in *Humphrey's Executor*. *See supra* notes 135-138 and accompanying text.

302. *See supra* Section II.B.

In short, the fact that the FTC Act delegates UMC rulemaking authority to the FTC rather than the President should increase its constitutional validity under a proper understanding of *Schechter* and of the Supreme Court's recent separation-of-powers case law.

Thus, although FTC UMC rulemaking would increase the executive branch's authority over competition policy relative to the status quo, it does so in ways that are constitutionally permissible. Indeed, in light of the NIRA experience and surrounding history, moving antitrust policymaking toward FTC rulemaking—subject to APA procedures and under the aegis of a multimember commission of experts, not generalist Article III judges—should be seen as constitutionally *preferred*. At a minimum, such rulemaking clears the Court's current "intelligible principle" standard. And should the Court seek to apply a narrower or more stringent nondelegation analysis, this Section offers appropriate principles for the Court to consider—principles informed by the relevant constitutional structure, history, and traditions.[303]

303. One additional feature of FTC UMC rulemaking that arguably weighs in favor of its constitutional validity is that it would help to rein in another broad, and less democratic, delegation: the antitrust laws' broad policymaking delegation to courts. Fully developing this argument would require further analysis outside the scope of this Note. For present purposes, it is merely worth noting that some scholars, including a current federal circuit judge, have argued that the Sherman Act's delegation to courts may itself violate the nondelegation doctrine. *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 436, 464 (2008); Oldham, *supra* note 143, at 324, 367-79. One key challenge to such a theory is that the Supreme Court rejected the argument in 1911. *See* Standard Oil Co. v. United States, 221 U.S. 1, 69-70 (1911) (considering and rejecting the argument that "in view of the generality of the [Sherman Act], it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power"). Yet the Court did so in the very case that prompted Congress to create the FTC as a more expert, democratically accountable alternative delegee to identify what constitutes "unfair methods of competition" and inform the broader development of antitrust law. In other words, the FTC Act's UMC rulemaking delegation arguably reflects Congress's preference for antitrust policymaking by an agency rather than the judiciary. And *Schechter Poultry* shows that the Court was open to broad antitrust policymaking delegations to agencies, as long as those agencies had sufficient procedural constraints. This history suggests that, if faced with a nondelegation challenge to FTC UMC rulemaking, the Court should consider weighing the constitutionality of a broad delegation to an agency against the continued broad delegation to courts. It is arguable that, at least in the context of antitrust, delegation to agencies—specifically the one that *Schechter Poultry* and *Humphrey's Executor* affirmed—should be preferred over delegation to courts.

5. *The Major Questions Doctrine: Nondelegation Through Statutory Interpretation*

The above principles should also guide any examination of FTC UMC rulemaking under the "major questions doctrine" (MQD), a recently created and newly strengthened canon of statutory interpretation that seeks to implement principles of the nondelegation doctrine. The MQD, like a revived nondelegation doctrine, remains nascent and underdeveloped. It is not too late for the Court to course-correct in its MQD analysis of FTC UMC rules, if and when it hears such a question. This Section suggests how the Court should do so, using the NIRA story as a guide.[304]

In its 2021 Term, the Supreme Court issued two opinions invalidating agency regulations because the rules addressed questions of "vast economic and political significance" without sufficiently "clear congressional authorization" in the enabling statute.[305] Following those decisions, multiple conservative scholars and advocates have argued that the FTC's contemplated antitrust rulemakings—including the agency's proposed rule banning non-compete clauses in employment contracts—would be vulnerable to "major questions" challenges.[306] Indeed, two Republican former agency officials have predicted challenges to these rules under both the nondelegation doctrine and the MQD.[307]

Such a two-pronged challenge would not be surprising. As became clear in the October Term 2021 decisions, the MQD and nondelegation are closely intertwined. The majority in *West Virginia v. EPA* explained that the MQD is

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304. By this point, many other scholars have critiqued the "major questions doctrine" (MQD). This Section does not rehash all of those arguments, but instead focuses on the lessons of the NIRA for (a) the MQD in general and (b) a major-questions analysis of FTC rulemaking in particular.

305. West Virginia v. EPA, 142 S. Ct. 2587, 2605, 2609 (2022); Nat'l Fed'n of Indep. Bus. (*NFIB*) v. Dep't of Labor, 142 S. Ct. 661, 665 (2022) (quoting Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.,141 S. Ct. 2485, 2489 (2021)). In its 2022 Term, the Court also invoked the MQD as one of the bases for invalidating the Biden Administration's student loan forgiveness plan. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373-75 (2023).

306. *See, e.g.*, Daniel Lyons, *The Supreme Court's Major Questions Doctrine (and Its Implications for Big Tech)*, AM. ENTER. INST. (July 5, 2022), https://www.aei.org/technology-and-innovation/the-supreme-courts-major-questions-doctrine-and-implications-for-big-tech [https://perma.cc/Z2MA-NVMZ]; Jeffrey Westling, *Major Questions Doctrine and the Impact on Biden's Technology Priorities*, AM. ACTION F. (July 14, 2022), https://www.americanactionforum.org/insight/major-questions-doctrine-and-the-impact-on-bidens-technology-priorities [https://perma.cc/NK8H-CZQD]; Wilson, *supra* note 263, at 11.

307. Svetlana Gans & Eugene Scalia, *The FTC Heads for Legal Trouble*, WALL ST. J. (Aug. 8, 2022, 6:02 PM ET), https://www.wsj.com/articles/ftc-may-test-the-courts-limits-meta-lina-khan-roberts-nondelegation-major-questions-enforcement-authority-humphreys-executor-administrative-law-noncompete-11659979935 [https://perma.cc/F4M7-RU4U].

grounded in "separation of powers principles."[308] Justice Gorsuch further explained that the MQD operates as a constitutional canon of statutory construction that "protect[s] foundational constitutional guarantees" – specifically, the same guarantees that he and the other administrative-state skeptics on the Court believe the nondelegation doctrine protects.[309] While the nondelegation doctrine prevents Congress from *intentionally* delegating its nondelegable legislative power, Justice Gorsuch explained in another concurrence, the MQD "serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[310]

Accordingly, the Justices' defenses of a stringent MQD echo many of the same fears that drove the Court's and Congress's reaction to the NIRA and the separation of powers in antimonopoly law that followed.[311]

Yet, as this Note has demonstrated, the strictures of the post-NIRA institutional structure of antimonopoly law corrected – and, in several ways, overcorrected – for those NIRA-esque evils.[312] The MQD, like the nondelegation doctrine, should be deployed as means of reinforcing the most salutary features of the post-NIRA separation of powers, without enshrining its more harmful (pro-corporate power) functions. If today's majority truly believes that the MQD can provide "a vital check on expansive and aggressive assertions of executive authority,"[313] promote democratic participation, and limit the influence of special interests,[314] it should craft that doctrine in a way that bolsters the post-NIRA administrative state's tools for doing so.

308. *West Virginia*, 142 S. Ct. at 2609.

309. *Id.* at 2616-19 (Gorsuch, J., concurring).

310. *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

311. For example, in his *West Virginia v. EPA* concurrence, Justice Gorsuch claimed that the MQD responds to the "explosive growth of the administrative state" that began in the Progressive Era and continued throughout the twentieth century. 142 S. Ct. at 2619 (Gorsuch, J., concurring). He portrayed an empowered administrative state as fundamentally antidemocratic, providing as evidence President Wilson's praise of "expertness" and supposed disdain for "popular sovereignty." *Id.* at 2617 n.1. Without a strong MQD, he argued, "[l]egislation would risk becoming nothing more than the will of the current President" and "[p]owerful special interests" would exercise undue influence through their ability to navigate agency processes. *Id.* at 2618. In this parade of horribles, Justice Gorsuch may as well have been describing the actual failures of the NIRA.

312. Further, the next Section argues that antimonopoly reformers can further guard against these evils by facilitating greater and more equitable participation in rulemaking than the default APA notice-and-comment procedures and other features of the post-NIRA administrative state provide.

313. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

314. *See supra* note 311.

Unfortunately, the MQD as currently formulated does the opposite. Instead of enabling agencies to effectively regulate private corporate power, it creates a presumption of invalidity for regulations that impact major industries or large segments of the economy.[315] Instead of promoting expert-driven processes, the MQD punishes agencies that use their statutory authority in creative or novel ways that they deem most effective to address current market realities.[316] And instead of deferring to agencies' reasonable interpretations of Congress's purposefully broad statutes—interpretations promulgated after a notice-and-comment process and subject to other procedural constraints—the MQD privileges the least democratic branch's (the judiciary's) determination of how expansive agencies' authority should be.[317]

If faced with an MQD challenge to an FTC UMC rule, the Court should take the opportunity to reformulate this doctrine into something more democratically and historically legitimate—for the same reasons and along the same lines as it should reconsider a revived nondelegation doctrine. As with nondelegation, a better MQD would focus less on how Congress has *substantively* equipped the agency, and more on the *procedural* and *institutional* constraints that Congress has provided. *Schechter Poultry* held that Congress failed to provide sufficient procedural and institutional guardrails on the President's exercise of his broad statutory authority.[318] Congress, in the NIRA, had empowered the executive branch to answer major questions—the terms of industrial cooperation and coordination—but had not equipped the executive branch with any agency procedures or structures to promote democratic participation and rational decision-making, contain corporate influence, or prevent presidential overreach.

315. *West Virginia*, 142 S. Ct. at 2609 ("[W]e typically greet assertions of extravagant statutory power over the national economy with skepticism.") (internal citations and quotation marks omitted).

316. *See id.* at 2611-12 (noting that the EPA adopted the challenged rule because it found it "necessary to mitigate the dangers presented by climate change" in view of the state of the energy market and power grid and described it as a "forward-thinking approach") (internal citations and quotation marks omitted); *id.* at 2628, 2640-41 (Kagan, J., dissenting) ("A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems.")

317. *See id.* at 2643-44 (Kagan, J., dissenting) ("[N]othing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's."); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019, 2023-25 (2020); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1065-66 (2023).

318. *See supra* Section II.A.

Fortunately, the Court's reasoning in MQD cases already contains some seeds of this reformulation. The MQD appears to ask whether Congress has sufficiently equipped the agency to promulgate the kind of economically or politically significant rulemaking that it has chosen to promulgate. The Court focuses on Congress's *substantive* grant of authority, requiring agencies promulgating a major regulation to point to sufficiently "clear congressional authorization" for the substance of the challenged regulation.[319] Critically, the Court looks for such authorization not just in the statute's *text*, but also in the agency's "past interpretations of the relevant statute" and the match or "mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[320] It looks, in other words, to the broader character of the agency and its enabling statute.

A better MQD, like a better nondelegation doctrine, would focus more on the procedural and institutional character of the delegee agency, and less on the character of its substantive authority, just as the *Schechter* Court did. It would enable agencies to exercise authority over major questions when they do so pursuant to congressionally mandated procedures and within a rationalized decision-making structure that provides some degree of independence from unilateral presidential diktat. Under such a doctrine, the Court would uphold a "major" reasonable agency interpretation of its enabling statute when the interpretation was made (a) pursuant to notice-and-comment rulemaking procedures (or, ideally, even more participatory and equitable procedures, as described in the next Section), and (b) through a congressionally created agency, subject to APA-style rationality review, rather than solely by the White House. This would subject major agency regulations to the same substantive standard as other regulations—*Chevron* deference, typically—but ratchet up the procedural and institutional scrutiny.[321] This revised MQD, not the Court's current deregulatory one, would implement the constitutional lessons of the NIRA and avoid the NIRA-style excesses that the Justices say they fear.

319. *West Virginia*, 142 S. Ct. at 2614 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

320. *Id.* at 2623 (Gorsuch, J., concurring).

321. Although this MQD formulation would be more permissive than the current one for much agency action, it would still have some bite. This can be seen in recent cases. For example, the proposed MQD test points toward upholding the EPA's Clean Power Plan in *West Virginia*—which emerged from a rigorous, multiyear public engagement and notice-and-comment process, *see* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, but casts some doubt on the student loan forgiveness program in *Biden v. Nebraska*—which was promulgated through an expedited process that did not provide for public comment, *see* Dep't of Ed. v. Brown, 143 S. Ct. 2343, 2348-49 (2023) (discussing the expedited procedure used in a companion case to *Biden v. Nebraska*).

For similar reasons as discussed above with respect to nondelegation, any "major" FTC rulemaking that reasonably interpreted the statute's text—"unfair methods of competition"—would survive MQD review under this revised test. This is not to suggest that UMC rules of the kind that the FTC is contemplating would necessarily fail the Court's current MQD standard. Still, the MQD remains notoriously vague and evolving.[322] It is reasonable to fear that the Court would further extend the MQD to strike down FTC UMC rules, particularly if those rules become sufficiently politicized in popular debate (which, under the Court's test, increases the scrutiny).[323] The Court can avoid such an error by reformulating its MQD to heed the NIRA's constitutional lessons, and the FTC should make that argument if and when necessary.

B. *Avoiding Industry Capture and Promoting Democratic Participation in Rulemaking and Sectoral Bargaining*

The NIRA experience also offers important implementation lessons for all three antimonopoly proposals discussed in Part I. Because each of the proposals would bring back elements of the NIRA model, one might wonder whether they also carry the risk of repeating one of the NIRA's biggest failures: industry capture. On one level, the answer to that is a clear "no": these proposals would each maintain core components of the post-NIRA structures that Congress put in place to guard against the excesses of the NIRA, including but not limited to the accountability and transparency-promoting procedures of the APA and other statutes. Yet the modern regulatory state has not escaped the threat of outsized industry influence.[324] Perhaps expanding the President's and the executive branch's authority over the rules of economic competition and coordination would exacerbate that problem.

In the end, such a result is not inevitable. In fact, the critique of regulatory bureaucracy as inevitably captured by interest groups has frequently been

322. *See* Deacon & Litman, *supra* note 317, at 1023-33 (discussing the "evolving major questions doctrine"); Biden v. Nebraska, 143 S. Ct. 2355, 2373-74 (2023) (citing, as reasons for applying the MQD to the Biden Administration's student loan forgiveness plan, the "sharp debates generated by the Secretary's extraordinary program" and the notion that the issue of student loan cancellation is "personal and emotionally charged") (internal quotation marks omitted).

323. *See* Deacon & Litman, *supra* note 317, 1050-68); *West Virginia*, 142 S. Ct. at 2622-23 (Gorsuch, J., concurring).

324. *See, e.g.*, George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4-5 (1971). *See generally* PREVENTING REGULATORY CAPTURE (Daniel Carpenter & David A. Moss eds., 2014) (discussing regulatory capture and its types, its prevention, case studies, and capture scholarship).

deployed in the service of economic deregulation and privatization.[325] As the past four decades have shown, deregulation hardly solves the problem of undue industry influence on society, particularly in today's era of market concentration and domination. The point of today's antimonopoly reforms is, instead, to better regulate competition and coordination in order to reduce the influence of concentrated private economic power.

Nonetheless, today's antimonopolists should work to avoid the NIRA's mistakes by implementing procedures that promote broad democratic participation and reduce the likelihood of excessive industry influence. This Section discusses three specific NIRA challenges and some administrative reform ideas that could be brought to bear to make sure they do not reappear in modern proposals.

1. *Democratizing and Equalizing Participation in Informal Rulemaking*

The NRA's code-making process had several features that contributed to its capture by industry. At the most basic level, the NRA code-making lacked the standardized notice-and-comment process that has become commonplace in regulation today, which enables input from both the regulated parties and any other interested individuals or groups. On the other hand, the code-making process had its own participatory features.[326] And though the NIRA statute did not require these procedures (hence the *Schechter* Court's concern), the Administration did implement them with regularity. Yet, the NRA's procedures were mostly for show. The real negotiation over the codes happened within the industry trade groups, which in fact rarely represented labor or consumer interests, and also in private meetings with NRA officials.[327]

Notice-and-comment rulemaking has been subject to similar critiques. Indeed, numerous scholars have argued that notice-and-comment alone does not prevent, and can at times facilitate, outsized industry influence.[328] While this

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325. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1672-73 (2018); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 39-43 (2017).

326. The codes were submitted by industry groups that were supposed to be "representative" of the industry as a whole. The codes were then reviewed by representatives of industry, labor, and consumers who sat on NRA advisory boards. And each code involved at least one public hearing, for which public notice was given and at which anyone "who had indicated a desire to be heard" could speak. ROOS, *supra* note 68, at 69. For further discussion of these procedures, see *supra* Sections I.B and I.C.

327. *See supra* Section I.C.

328. For instance, due in part to courts' doctrines for scrutinizing proposed and final rules, agencies often substantially decide on the outcome of a rulemaking process before issuing the notice of proposed rulemaking, which is supposed to be the start of the notice-and-comment process.

problem is not unique to FTC rulemaking or other competition-oriented agency rules, the prospect of implementing vast areas of competition policy through informal rulemaking under the antimonopoly proposals discussed here raises the stakes of that procedure's flaws. As businesses face more rules governing their ability to coordinate and compete, they may gain even greater opportunity to intervene in competition policymaking and steer it toward their interests.[329]

Accordingly, the FTC should consider implementing additional processes in its UMC rulemaking to ensure that their new rules of unfair competition do not repeat the mistakes of the NIRA's codes of fair competition. The White House should also encourage other rulemaking agencies to experiment with similar processes as part of its competition-policy coordination and regulatory-review role. As one place to start, several scholars have put forward proposals for more intensive stakeholder and citizen engagement in the administrative process.[330]

See William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 73 (2004). In this "front-end" period before the first public notice, agency officials gather stakeholder input largely through private meetings. Interest groups work hard to develop connections with officials such that their views will be heard in that critical front-end period, and evidence suggests that they get results. *See id.*; *see also* Brian Libgober, *Meetings, Comments, and the Distributive Politics of Rulemaking*, 15 Q.J. POL. SCI. 449, 479 (2020) (CSAS, Working Paper No. 20-28) ("[R]ule development meetings should be a more reliable channel for producing particularistic benefits than comments, because of how rulemaking discretion is distributed within an agency and over time."). The comment process itself, meanwhile, often serves as an opportunity to either get changes around the margins or merely have a comment in the administrative record that, when it is disregarded, can be the basis for a court challenge. *See, e.g.*, Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, 32 ADMIN. & REGUL. L. NEWS 15, 15 (2007).

329. At the same time, it is also possible that concentrating more competition policy decisions within the White House, as opposed to industry-specific agencies, will reduce industry's ability to influence those decisions. Tim Wu has observed that industry-specific agencies often have closer relationships to the industries they regulate than does the White House, which oversees the entire economy and is less reliant on cooperation from – or the possibility of post-government job offers from – any given industry. As Professor Wu put it, describing his work on the White House Competition Council, "Our idea was to use the Presidency and the White House as a countervailing force and to give agencies backbone . . . [to do] what the statutes suggested they should do." Email from Tim Wu to author (Aug. 16, 2023) (on file with author).

330. *See, e.g.*, CARMEN SIRIANNI, INVESTING IN DEMOCRACY: ENGAGING CITIZENS IN COLLABORATIVE GOVERNANCE (2009) (discussing collaborative governance design, which allows citizens and stakeholder groups to collaboratively solve problems); Tina Nabatchi, *Addressing the Citizenship and Democratic Deficits: The Potential of Deliberative Democracy for Public Administration*, 40 AM. REV. PUB. ADMIN. 376 (2010) (discussing the potential power of deliberative democracy to address deficit problems in American public administration).

These proposals include ways of moving toward a "collective decision-making process that is formal, consensus-oriented, and deliberative."[331]

While a full review and discussion of this vast literature is outside the scope of this Note, the NIRA's failures suggest a few lessons to keep in mind when constructing a more participatory rulemaking approach. First, both the NRA code-making process and today's notice-and-comment process incorporate the views and input of well-organized constituencies, especially industry, early in the process. In the NRA, this first-mover advantage set the baseline against which later rounds of input (e.g., from the labor and consumer representatives) had to push back. Given the speed with which the NRA was trying to approve new codes and the agency's limited internal capacity, the views of the party that first put their proposals to paper and got them to the negotiating room—which was almost always the industry groups and the big businesses that dominated them—tended to win out in the final codes. A similar first-mover advantage pervades notice-and-comment rulemaking. The FTC and the White House (with respect to its competition-rulemaking coordination) should explore ways to craft the front-end of the rulemaking process to best incorporate a wide array of stakeholders, including less well-organized or well-connected groups.

This leads to a second lesson: the importance of identifying, cultivating, and incorporating into the rulemaking process organizations that are truly representative of diverse interests. Contemporary observers found that NRA codes tended to be more labor-friendly, as opposed to industry-friendsly, when the industry had a higher rate of unionization.[332] For similar reasons, critics of the NRA pushed Roosevelt to create more robust and independent labor and consumer advisory boards within the NRA after he fired probusiness Administrator Johnson.[333] The goal was to cultivate countervailing forces to push back against the influence of industry within the code-making process. Advocates of greater civic participation in rulemaking today have echoed the importance of cultivating organized citizen groups and incorporating them into the administrative process.[334] The FTC should consider ways to institutionalize representation

331. Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RSCH. & THEORY 543, 544 (2007); *see also* K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 134-37 (2019) (examining collaborative and new governance frameworks).

332. ROOS, supra note 68, at 69 ("When an industry in which unions predominated refused to yield to labor's demand or vacillated too long, a strike call was sounded, and generally such threats were sufficient to force rapid compromises. In other industries a more perfunctory fight for shorter hours and increased pay was made; consequently, concessions to labor were smaller. However, even here labor's demands had to be met in part to avoid unionization.").

333. *See* HAWLEY, *supra* note 16, at 107-08.

334. *See, e.g.*, RAHMAN, *supra* note 325, at 97-180; Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1352 (2016).

from small businesses, workers, and consumers throughout the UMC rulemaking process, be it through the creation of representative advisory committees on the national or local level, or through capacity-building grants for independent groups to support their organizing of underrepresented communities and interests. The White House could promote similar efforts across other competition rulemaking agencies.

Finally, the experience of the NIRA demonstrates that the desires of well-organized and well-funded interests can fill the vacuum left by inadequate agency capacity and expertise. The NRA was severely understaffed relative to its audacious goal of rapidly reorganizing the industrial economy, and its research and policy departments were neglected and often ignored.[335] Instead, NRA deputy administrators charged with negotiating and approving the codes often deferred to industry's own data and analyses as to the predicted impacts of the codes – data that the industry groups regularly refused to share with the administrators.[336] The FTC, which is notoriously underfunded,[337] should continue to work with the White House and Congress to ensure that it has sufficient resources and authority to conduct its own analyses of the impacts of potential rules, rather than relying solely on analysis from outside groups. Similarly, to the extent the White House plans to incorporate competition considerations and metrics into the OIRA rulemaking review process, it should invest in both OMB's internal capacity and the regulatory agencies' capacities to accurately assess the impacts of proposed rules on competition.

Admittedly, this call for centralized, technocratic agency expertise stands in some tension with the previous call for more interest group representation.[338]

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335. *See supra* Section I.C.

336. *See supra* notes 98-105 and accompanying text.

337. *See, e.g.*, Leah Nylen, *FTC Suffering a Cash Crunch as It Prepares to Battle Facebook*, POLITICO (Dec. 10, 2020, 6:50 PM EST), https://www.politico.com/news/2020/12/10/ftc-cash-facebook-lawsuit-444468 [https://perma.cc/BN87-22GU].

338. Indeed, advocates for greater civic participation in rulemaking often point to the rise of technocratic reforms like OIRA rulemaking review as stifling democratic participation in service of narrow economistic analysis. *See* RAHMAN & GILMAN, *supra* note 331, at 120 ("[T]he problem [of an emphasis on rationality and expertise in policymaking] is not the concept of expertise itself, but rather the way in which it operates to narrow, rather than expand, the scope of governmental action – and how little it does to redress deeper disparities of political power and influence."); K. Sabeel Rahman, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. ON LEGIS. 555, 588 (2011) ("OMB and OIRA review embodies the technocratic ideal of good governance, rather than embedding technocratic considerations in a broader framework of political, normative, and democratic decisionmaking."); DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 113 (2010) ("Better alignment is needed between the nature of the harms we suffer and the techniques of valuation we deploy.").

The challenge for today's competition administrators is to develop the internal capacity to incorporate, assess, balance, and gain iterative feedback on all forms of input, from independently gathered data to public comments to outcomes of negotiated consensus among stakeholder groups. Centralizing competition law and policy within the FTC and the White House provides an exciting and urgent opportunity to develop such models.

2. *Equalizing Influence in Sectoral Bargaining*

Many of the considerations discussed above in the informal rulemaking context also apply with equal or greater force to sectoral bargaining. Though no single model for sectoral bargaining has been adopted by policymakers, the proposals that do exist suggest that the wage boards' decision-making process would look more like the negotiation process of the NRA codes than the process of notice-and-comment rulemaking. That is partly the point: as discussed above, sectoral bargaining is meant to ensure that the collective interests of workers and the public are represented in wage-setting decisions in all industries, including those with low unionization rates, by institutionalizing collective bargaining within the federal government.[339] However, no proposal to date has specified the administrative procedures that these wage boards would follow.

The NIRA experience suggests that, similar to informal rulemaking, sectoral bargaining must support the strength and capacity of both the labor and government sides of the tripartite negotiating model if sectoral bargaining is to effectively counterbalance the power of today's monopolies. On the labor front, the CAP sectoral bargaining proposal, for instance, specifies that the wage boards would be made up of an equal number of representatives from labor as from business.[340] If that proposal were adopted, it would clearly distinguish the wage boards from the NRA, where only ten percent of code authorities (which made the initial code proposals and implemented the approved codes) had any labor representation at all.[341]

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339. *See supra* Section III.C.

340. *See* Madland, *supra* note 248, at 11.

341. *See supra* note 103 and accompanying text. Similarly, the FLSA industry committees that Congress authorized from 1938 to 1949 contained equal representation from employers, workers, and government. Andrias, *supra* note 181, at 667. On this score, another important design question in any sectoral bargaining proposal is who should represent workers in industries with low rates of unionization – which describes most industries. The CAP proposal recommends that, in industries with few or no labor unions or other worker organizations, the DOL would select worker representatives based on certain representativeness criteria. *See* Madland, *supra* note 248, at 11. Recall, however, that the NRA also attempted to construct labor

For similar reasons, the government representatives on the wage boards must be equipped to both effectively analyze the wage boards' recommendations and push back against recommendations that would lead to inequitable or undesirable outcomes. Ensuring that the DOL is well-equipped—with sufficient resources, staffing, and analytical capabilities—to analyze the wage boards' proposals throughout the process and flag issues early on would help to address this potential concern. Such resources and expertise would represent a marked departure from the NRA process, where (limited) independent NRA analyses came late in the process, after industry codes had already been submitted. In addition, Congress in creating a sectoral bargaining regime might consider authorizing the Secretary of Labor to unilaterally modify the submitted recommendations, within certain bounds, in order to give the government side more power in the negotiation. To avoid the risk that a probusiness President could use this authority to undermine labor interests, the legislation could specify that the Secretary's modifications may only *increase* the recommended standards (e.g., impose higher wages and benefits) rather than lowering them.

In addition, sectoral bargaining must ensure that the business side of the tripartite negotiation does not just represent the dominant businesses in the industry at the expense of smaller players. Despite the NIRA's requirement that industry code authorities be "representative,"[342] the authorities often came to be dominated by the largest companies.[343] To the extent these associations might be at risk of selecting their most dominant members as representatives, as happened in the case of the NRA code authorities, the DOL should develop more rigorous and equitable representativeness requirements.[344]

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representation through the labor advisory board, whose representatives participated in code negotiation meetings. Yet even so, what seemed to matter in the end was not the labor representatives' input in the room but the organizational capacity of labor outside the room. *See* LYON ET AL., *supra* note 62, at 123 ("The actual power of labor advisers [in the code-making process], however, varied in the widest degree between one set of negotiations and another. Where they were backed up by strong labor organizations they were in a strategic position and the codes for such industries reflect the advantage. But in relation to those extensive fields in which labor organization is rudimentary or non-existent, employers were in a much more strategic position for resisting labor demands."). Strong unionization rates in an industry provided leverage for the labor representatives because industry knew that the alternative to a fair agreement was concerted labor action. As such, a sectoral-bargaining process should not just ensure equal representation of labor at the negotiating table, but also support those representatives to organize workers on the outside who can apply unified pressure to counterbalance the private power of monopolized industries.

342. National Industrial Recovery Act, Pub. L. No. 73-67, § 3(a), 48 Stat. 195, 196 (1933).

343. *See* ROOS, *supra* note 68, at 79.

344. That said, it may not be obvious at first blush who should be represented from the employer side. Perhaps it should be the employers who collectively employ the most workers in that

Further, Congress will need to consider the procedural rules and standards for judicial review that should apply to the sectoral-bargaining process. Would the Secretary of Labor's approval decision be subject to arbitrary-and-capricious review? What about the decision as to who represents whom on the board? What level of deference would courts provide to the Secretary's decisions, given their often-skeptical treatment of NLRB decisions in the labor context today?[345] Would other parties besides the members of the wage boards have the opportunity to comment on the recommended standards before they became final? If, and when, Congress reaches the point of having to answer these questions, it should consider the faults of both the relatively procedure-less and reviewless NIRA regime and the often ossifying and unequal judicial-review regime of the APA and NLRA.

In sum, antimonopolists' proposals to reassert executive authority over the rules of economic competition in ways that pull from the most promising pieces of the NIRA model will require careful attention to the administrative procedures that surround this rulemaking. While the NIRA contained several pitfalls to avoid, the existing alternatives would not eliminate the risks of industry capture and inequitable policy. These new proposals present an opportunity to experiment with new administrative models that advance equality in both substance and process. Moreover, by reducing industry influence and expanding democratic participation, these reforms would also further enhance antimonopoly rulemaking's constitutionality by reaffirming the anti-industry capture and prodemocracy principles that underlay *Schechter Poultry*'s reasoning.[346]

That said, expanding participation and reducing industry influence in the administrative state is no simple task. Similarly, the challenge of avoiding undue industry influence in a sectoral-bargaining regime is potentially vast. This Section does not provide a full institutional-design proposal for a more democratic regulatory state, but instead seeks to (1) highlight some of the lessons of the

industry, and whose input and buy-in are therefore most important. However, bringing only the largest employers into the sectoral-bargaining process risks recreating the "publicly sanctioned cartelization" that small business and labor advocates harshly criticized in the NRA. HAWLEY, *supra* note 16, at 143. Like the NRA codes, such representation could lead to standards that further entrench the interests of monopolies and oligopolies. While such monopolization would not necessarily lead to lower wages, as long as the wage boards had sufficient countervailing pressure from labor and government, it could exacerbate the other harms of market consolidation: higher prices, reduced output, higher barriers to entry, reduced innovation, and greater corporate political power. Representation from smaller businesses, alongside a thorough review process from the DOL and opportunities for comment from other stakeholders, could help to mitigate those risks.

345. *See supra* note 186 and accompanying text.

346. *See supra* notes 128, 132 and accompanying text.

NIRA for today's proposals, and (2) point toward potential solutions for further exploration.

CONCLUSION

The United States faces a crisis of private monopoly power. Though the nature and causes of today's crisis do not exactly mirror those of the Gilded Age or the Great Depression, the need for government intervention is no less profound. Yet the institutional structure of antimonopoly law that emerged after the New Deal divided up the tools of market governance across the three branches and into the states and the private sector. In an era of gridlocked and polarized Congresses, ossified and sometimes-captured agencies, an antiregulatory judiciary, low unionization rates, and the immense private power of concentrated capital, the current model is not enough. In response, antimonopoly reformers are attempting to piece back together the powers over economic competition and cooperation that the NIRA briefly centralized in the President's hands, while accommodating this vision to the constitutional, statutory, and doctrinal strictures of the modern administrative state. This Note aims to assess and promote that effort by bringing lessons of the NIRA and its surrounding history to bear on today's antimonopoly agenda.

Of course, it remains to be seen whether this shift back toward an antimonopoly presidency will persist beyond the Biden Administration. On the one hand, conservatives have generally opposed the FTC's push toward UMC rulemaking.[347] On the other, the last few decades' shift toward greater presidential control over the administrative state has been driven as much by Republicans as by Democrats, and legislative gridlock will likely fuel the continued appeal of expansive executive action for Presidents of both parties.[348] For that matter, conservatives who embrace a unitary executive may be particularly willing to dismantle forms of horizontal and procedural decentralization in antimonopoly law that the post-*Schechter* regime put in place and that a progressive antimonopoly vision would, and should, retain.[349] These trends suggest that greater

347. *See supra* notes 263-269 and accompanying text.

348. *See* Kagan, *supra* note 8, at 2277-2315 (describing the influence of both the Reagan and Clinton Administrations in expanding the President's role over the administrative state); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 109-10 (2021) (describing the continued trend toward presidential administration in the terms of Presidents Obama and Trump in response to legislative gridlock).

349. For example, President Trump has proposed eliminating many independent agencies, turning others like the FTC into executive agencies, and reducing the procedural independence and

presidential influence over antimonopoly law, in some form, may well continue beyond President Biden's tenure. Whether this institutional shift works—whether it succeeds in reducing private monopoly power and enhancing the countervailing power of workers, consumers, and the democratic citizenry—will depend on how well reformers learn and implement the NIRA's lessons.

The goal is a vision of fair competition that brings together antitrust law, administrative law, and labor law under an inclusive, responsive, democratic market-governance system. That vision, and many of the tools required to get there, originated with the Progressives and the New Dealers. But the task of molding those pieces into a workable whole is our own.

expertise of all agencies by scaling back or removing federal civil service protections. *See* H.J. Mai & Steve Inskeep, *If Trump Is Reelected, the Independence of Federal Agencies Could Be at Risk*, NPR (Aug. 16, 2023, 6:41 AM ET), https://www.npr.org/2023/08/07/1192432628/conservatives-mull-how-2nd-trump-presidency-could-reshape-the-federal-government [https://perma.cc/AAY7-PQYN]; Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html [https://perma.cc/STX7-DCN2] (noting that this plan's "legal underpinning is a maximalist version of the so-called unitary executive theory"). Such moves would fly in the face of the lessons of the NIRA and the constitutional underpinning of presidential antimonopolism described in this Note, but they are consistent with continued presidential influence, in some form, over antimonopoly law.