

Antitrust Rulemaking: The FTC's Delegation Deficit

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Introduction

The leadership installed at the FTC by the Biden Administration is committed to using legislative rulemaking to regulate anti-competitive practices.¹ The Commission Chair, Lina Khan, has argued that the traditional method used by the FTC and the courts to enforce the antitrust laws – adjudication – “generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.”² Legislative rulemaking would reverse these deficiencies, that is, it would reduce ambiguity about what is or is not permitted, conserve the resources of enforcers, and permit affected individuals and firms to participate in the process of formulating rules. This paper will not focus on whether such rulemaking would be a good idea in determining what sorts of behavior are prohibited by the antitrust laws. That question, the paper argues, is essentially moot because the FTC has no legal authority to engage in legislative rulemaking on competition matters.

The question of the FTC's authority in this context has potentially profound implications for the future of the regulatory state. The FTC will argue that a provision allowing it to make “rules and regulations” tucked away in its 1914 organic act is ambiguous as to whether this includes authority to make legislative rules about unfair competition. It may also argue that this ambiguity means the Commission's interpretation of its regulatory powers is entitled to *Chevron* deference.³ After all, the Supreme Court held in *City of Arlington v. FCC*⁴ in 2013 that *Chevron*

¹ See generally Fed. Trade Comm'n, *Statement of Regulatory Policies*, (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf,

² Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. Chi. L. Rev. 357, 359 (2020).

³ *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁴ 569 U.S. 290 (2013).

extends to agency interpretations of the scope of their authority. Viewed as a matter of ordinary statutory interpretation, however, such as the Court employed in *AMG Capital Management v. Federal Trade Commission*,⁵ the FTC does not have legislative rulemaking authority over competition policy.

I will discuss the question of the FTC’s rulemaking authority in competition matters from three perspectives. First, I will consider how the matter should be resolved under the so-called “major questions” doctrine, which the Supreme Court has recently embraced, most prominently in *West Virginia v. EPA*.⁶ Second, I will address how the matter might be resolved under the *Chevron* doctrine, as it came to be regarded in its most expansive form, with the decision in *City of Arlington v. FCC*. Third, I will examine how the issue should be resolved as a matter of ordinary statutory interpretation. I consider the last framing to be the correct one, on the ground that courts should always determine as a matter of independent judgment whether an agency is acting within the scope of its delegated authority.⁷ But the major questions frame and the *Chevron* doctrine are likely to be invoked if the matter becomes contested in litigation. So for the sake of completeness, I consider all three ways of viewing the question.

I. Is FCC Rulemaking Authority a Major Question?

The Supreme Court Term that ended in the summer of 2022 will be remembered for, among other things, the Court’s endorsement of something called the “major questions” doctrine.⁸ A more complete statement of the doctrine is as follows: When a court encounters an agency decision that seeks to regulate a question of economic and political significance in a

⁵ 141 S. Ct. 1341 (2021) (holding that the FTC lacks authority to recover restitution of money in original civil actions brought in a district court.).

⁶ 142 S.Ct. 2587 (2022).

⁷ See THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 230-37; 263 (2022),

⁸ *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

manner that departs from prior agency practice, the Court will not uphold the agency action unless it can point to a clear congressional statement authorizing such regulation.⁹

This major questions doctrine did not come out of nowhere. The Court had episodically expressed skepticism about agency assertions of “sweeping and consequential authority” in an unprecedented fashion.¹⁰ For example, the Court held 2000 that the FDA, after consistently disclaiming such authority, could not regulate tobacco products as ordinarily marketed based on its general authority to regulate drugs and devices.¹¹ And in 2014, the Court held that EPA could not subject stationary sources of air pollution to certain stringent regulations based on their emission of greenhouse gases, since this would “bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”¹²

Until 2022, however, such expressions of skepticism had manifested themselves almost exclusively in the course of exercises in ordinary statutory interpretation, either as part of “step one” of the *Chevron* doctrine or as a free-standing matter. The Court’s expressions had the status of sayings or maxims, such as the often-quoted quip that Congress does not hide “elephants in mouseholes.”¹³ In contrast, in *National Federation of Independent Business v. Occupational Safety and Health Administration*,¹⁴ decided in January of 2022, and more clearly in *West Virginia v. EPA*, decided in late June, the Court reformulated the major questions doctrine as a clear statement rule. Under this reformulation, a reviewing court asks, first, whether the agency action represents a “major question of economic and political significance.” If the answer is affirmative, the court then considers whether there is a clear statement from Congress authorizing the action. In the absence of a clear statement, the agency will be held to

⁹ Id. at 2614.

¹⁰ *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 160 (2000).

¹¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹² *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302 (2014).

¹³ *Whitman v. American Trucking Assns.*, 531 U.S. 457, 468 (2001).

¹⁴ 142 S.Ct. 661 (2022) (per curium).

have exceeded the scope of its authority. (*West Virginia* does not say what happens if the answer to the first question is that the question is not “major,” i.e., is a “minor question.”)

Under this newly-minted clear statement doctrine, the obvious and generally dispositive question is what constitutes a major question. Chief Justice Roberts’s opinion for the Court in *West Virginia*, as is often his style, sought to ground the major question doctrine in precedent, and in so-doing offered up quotations from a number of the Court’s previous decisions. Thus, we read that a major question exists when an agency makes a “novel reading” of a statute that would result in the “wholesale restructuring” of an industry; when it advances a claim of “sweeping and consequential authority” based on a “cryptic” statutory provision; when it entails “unheralded” regulatory power over “a significant portion of the American economy;” when it invokes “oblique or elliptical language” to make a “radical or fundamental change” in a regulatory scheme; when it cites an “ancillary provision” to “adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself,” and so forth.¹⁵ It is hazardous to attempt to distill a more precise formulation of what constitutes a major question based on this collection of quotations. The root idea, as I read the Court’s opinion, is that a major question is one in which an agency advances a novel interpretation of its statutory authority that has the effect of significantly changing the scope of that authority.

Justice Gorsuch, in a concurring opinion joined by Justice Alito, sought to provide a crisper formulation of the meaning of a “major question.” He discerned three factors that provide “a good deal of guidance” about what constitutes a major question.¹⁶ First, does the agency claim the power to resolve a matter of great “political significance,” such as one in which Congress has considered and rejected “bills authorizing something akin to the agency’s proposed course of action.”¹⁷ Second, does the agency seek to regulate “a significant portion of the American economy” or does its action implicate “billions of dollars in spending” by private

¹⁵ *West Virginia*, 142 S. Ct. at 2605; 2608; 2609; 2610 (citations omitted).

¹⁶ *West Virginia*, supra, at 2620 (Gorsuch, J. concurring).

¹⁷ *Id.* at 2620-21.

persons or entities.¹⁸ Third, does the agency seek to intrude into an area “that is the particular domain of state law” thus implicating considerations of federalism.¹⁹ Whether this provides better guidance is a matter of opinion. Even under the Gorsuch formulation, the determination of whether something is a major question entails the weighing of incommensurate factors. And the Justice added that his list of “triggers” “may not be exclusive.”²⁰

In my view, the Court’s creation of a new clear statement doctrine based on the presence of a major question of “economic and political significance” was unfortunate. The root of the problem is that the doctrine requires courts to engage in an exercise in political science rather than statutory interpretation. In determining whether something is a “major question,” the factors mentioned by the Chief Justice, and by Justice Gorsuch in his concurring opinion, include such things as whether the matter is politically controversial, whether large numbers of dollars are involved, whether large numbers of people are affected, whether Congress has sought and failed to legislate on the matter, and whether the question detracts from the traditional authority of state governments. The only element that implicates the traditional interpretive role of the courts is whether the agency action is unprecedented or departs from settled agency practice. And this element appears only by implication in the Chief Justice’s opinion for the Court, but not in the concurrence. Courts have a comparative advantage in matters of legal interpretation, which includes broad questions of constitutional law.²¹ But they have no obvious advantage in determining whether an issue is too “controversial” or effects too many people or too many dollars, to be decided by an agency as opposed to Congress.

Be that as it may, the immediate question is whether the FTC’s assertion of authority to promulgate legislative rules on questions of antitrust policy is a “major question of economic and political significance.” Opponents of the FTC initiative will surely argue that it is. Conceivably they will win. The major questions doctrine, framed as a clear statement rule, is brand new, and

¹⁸ *Id.* at 2621.

¹⁹ *Id.*

²⁰ *Id.*

²¹ MERRILL, CHEVRON DOCTRINE, *supra* at 10-24.

at this point it suffers from considerable imprecision, to put it mildly. Whether an agency interpretation of its authority is major or minor is, at this juncture, largely in the eye of the beholder.

My own view, for what it is worth, is that the FTC's proposed assertion of rulemaking authority over competition matters should not be regarded as a major question. As a matter of substantive law, there is nothing new here. Antitrust law has been around since the Sherman Act was passed in 1890, and the FTC has been authorized to enforce that Act since the Clayton Act was adopted in 1914. The interpretation of the policies reflected in that law has changed, from big-is-bad to consumer welfare and now perhaps back to big-is-bad again. But these changes in interpretation are not implicated (at least not directly) in whether the FTC has rulemaking authority over competition matters. Indeed, the big-is-bad school of thought, reflected in the thinking of the Commission Chair Kahn, can claim it is seeking to restore the original "Brandeisian" understanding of antitrust law, rescuing it from the deviationism of the Chicago School.

Nor can it be claimed that the FTC's assertion of rulemaking authority based on the authority of Section 6(g) of the Act – discussed more fully in Part III *infra* – is some kind of bolt from the blue that defies settled understandings. The Commission asserted this interpretation in the late 1960s, and its claim was upheld by the D.C. Circuit in *National Petroleum Refiners Assn. v. FTC* in 1973.²² There is much more to say about this decision, which I regard as clearly wrong, but this is again covered in Part III. The point for present purposes is that the FTC's legal claim has been around for something like a half century. It has rarely been asserted. But it is something of the opposite of OSHA's claim of authority to require the vaccination or periodic testing of all employees at all major firms throughout the country, which the Court noted had never been previously asserted in the 50 years of OSHA's existence.²³

²² 482 F.2d 672 (D.C. Cir. 1973).

²³ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 142 S.Ct. 661, 666 (2022) (per curium).

Also, it is significant that the FTC, in conjunction with the Antitrust Division of the Justice Department, has for many years promulgated Merger Guidelines which FTC employees (and DOJ employees) use in opining on whether proposed mergers of companies should be allowed to go forward consistent with the antitrust laws. The Merger Guidelines are a policy statement, not a legislative rule. They are used to predict how FTC and DOJ officials will react to proposed mergers, not to prohibit or permit particular mergers. They do not bind the parties to particular mergers or the courts when a proposed merger comes before them. But they are “rules” within the meaning of the APA,²⁴ and they unquestionably have a significant impact on whether companies decide to proceed or abandon particular merger agreements. If officials of the FTC or the DOJ, interpreting the Guidelines, announce their opposition to a merger, the affected firms generally assume this will carry weight with the courts, which means that the merger will most likely be disapproved. Uncertainty about approval can be fatal to a merger, so most firms, faced with opposition of the FTC or the DOJ, will abandon the merger. Courts are familiar with this dynamic, which means that the prospect of legislative rulemaking by the FTC on matters of antitrust law more generally will not strike them as some alien intrusion into the fabric of American public law.

Putting these factors together, my view is that the FTC’s interpretation of its statutory authority to permit legislative rulemaking on competition matters should not be deemed to fit the paradigm of a “major question of economic and political significance,” however indeterminate that paradigm may be at this point. The FTC’s assertion over legislative rulemaking authority over antitrust law will be assessed either under the *Chevron* doctrine or under ordinary norms of statutory interpretation.

²⁴ The APA defines “rule” to mean “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” 5 U.S.C. §551(4). Thus, interpretative rules and policy statements are rules, as are legislative rule such as rules prescribing rates of utilities or regulated carriers.

II. FTC Rulemaking Authority as a Matter of *Chevron* Deference

If the major questions doctrine does not answer the question about the FTC’s authority to engage in legislative rulemaking in competition matters, what does? Until recently, the answer that most administrative lawyers would have given is “the *Chevron* doctrine.” That answer is no longer clear. For some 30 years, *Chevron* served as the principal metric used by the Supreme Court in reviewing challenges to an agency’s interpretation of the statute it administers. The Court invoked the two-step standard of review in over 100 decisions, and occasionally rebuked lower courts for failing to apply it.²⁵ The Supreme Court essentially stopped using the *Chevron* doctrine in 2016,²⁶ and several Justices have taken to writing separate opinion arguing that it should be overruled or at least reconsidered. The Court’s latest Term is perhaps the most striking. The Court considered seven cases in the Term that involved a challenge to an agency’s interpretation of the statute it administers. *Chevron* was not mentioned once in a controlling opinion, and received only the most fleeting mention in two separate opinions. This, notwithstanding that many parties and amici filed briefs arguing that *Chevron* should be overruled or modified, and that these pleas were expressly addressed in oral argument in at least two cases.

The Court’s determination to leave *Chevron* unmentioned is particularly striking in *West Virginia v. EPA*. The emergence of the major questions doctrine as a clear statement rule clearly operates as a modification of *Chevron*. But the Court did not offer a single word about how the new rule is to be integrated with the *Chevron* doctrine. Does the major questions doctrine function as a preliminary inquiry (a kind of reverse-*Chevron* for important questions of policy), which cuts off further analysis if the authorization is not clear? Or does the major questions doctrine function as a strong clear statement rule at step one of *Chevron*, which more-or-less predetermines the conclusion that the statute has a clear meaning? Or is the major questions

²⁵ See Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L. J. 931, 1000-04 (2021) (listing 107 Supreme Court decisions applying the *Chevron* doctrine between 1984 and 2019).

²⁶ *Cuozzo Speed Technologies, LCC v. Lee*, 579 U.S. 261 (2016), holds the distinction of being the last decision of the Supreme Court that expressly applies the “two step” framework of the *Chevron* doctrine.

doctrine analogous to *Mead*'s requirement that the agency must speak with the "force of law" in order to be eligible for *Chevron* deference, which effectively determines whether the agency is entitled to mandatory deference under *Chevron* or only respectful consideration under *Skidmore*?

The matter is further clouded by the Court's recent practice, during what can be called the "*Chevron* moratorium," of deciding all questions of statutory interpretation that arise on review of agency action de novo, without giving any weight one way or another to the agency's view. The practice has been followed by all Justices, liberal and conservative alike, and sometimes results in upholding the agency and sometimes results in reversing it.²⁷ The simple explanation for this development is that the Court is deeply divided about what to do about *Chevron*, and all Justices have tacitly agreed to ignore it until some kind of consensus emerges about what to do about it. But it is also conceivable that the Justices have tacitly agreed to replace *Chevron* with de novo review, i.e., overrule it, but cannot decide how to handle the embarrassment that the Court itself applied *Chevron* in over 100 cases. The possibility that the Court has opted for de novo review in every case would ignore the fact that it is possible for the Justices, who decide only about 70 cases per Term, to dig into the details of administrative interpretations of complex regulatory statutes and decide the matter de novo; it is far more difficult for lower court judges, who have much heavier caseloads, to function without some kind of deference doctrine.

What is a lower court judge supposed to do in this puzzling situation? If I were a lower court judge, I would first ask whether the question is major or minor. If major, the agency loses, and the matter is effectively sent back to Congress for possible resolution. If minor, the *Chevron* doctrine applies, as that doctrine had been explicated by the Supreme Court up through 2016. On the assumption that the question of the FTC's legislative rulemaking authority is not a major question (as discussed Part I), how then should the matter be resolved under the Court's explication of the *Chevron*, as of 2016?

²⁷ See *American Hospital Assn. v. Becerra*, 142 S.Ct. 1896 (2022) (striking down agency interpretation of complex Medicare reimbursement provision without mentioning *Chevron*); *Becerra v. Empire Health Foundation*, 142 S.Ct. 2354 (2022) (upholding agency interpretation of complex Medicare reimbursement provision without mentioning *Chevron*).

As detailed in my recent book, *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State*,²⁸ the *Chevron* doctrine has undergone significant revision over its almost 30-plus-year life span. What follows is a highly abbreviated version of the most relevant history.

In its classical formulation, the *Chevron* doctrine was understood to require courts to accept reasonable agency interpretations of ambiguities in the statutes they administer. The Court narrowed the doctrine in *United States v. Mead Corporation* [in](#) 2001, holding that the agency must act with the “force of law” in order to be eligible for *Chevron* deference, as opposed to some lesser degree of deference like *Skidmore*. The Court was unclear about what sorts of agency decisions should be regarded as having the force of law, but legislative rulemaking and binding adjudication appeared to be the core cases, which is consistent with later caselaw. Justice Scalia filed the only dissent in *Mead*, arguing that *Chevron* should apply whenever the agency has offered an “authoritative” interpretation of the statute it administers, as when the agency files an amicus brief endorsed by the head of the agency or its general counsel. Scalia continued in later cases to reject *Mead* and its “force of law” requirement.²⁹

In 2013, the Court agreed to decide an issue that had divided the Justices early in the *Chevron* era, and had produced a split in the circuits: whether *Chevron* should apply to an agency interpretation that implicates the scope of the agency’s “jurisdiction.” Justice Scalia had staked out the position in 1988 that *Chevron* should apply to “jurisdictional” questions, because there is no meaningful distinction between jurisdictional and nonjurisdictional decisions in the agency context.³⁰ When the issue came back to the Court 25 years later, Scalia was able to write his views into a majority opinion, joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan. The distinction between jurisdictional and nonjurisdictional decisions being meaningless in the

²⁸ See note __, *supra*.,

²⁹ MERRILL, CHEVRON, *supra* at 137-41 (discussing post-*Mead* decisions).

³⁰ *Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354, 377 (1988) (Scalia, J. concurring).

administrative context, he wrote for the Court, all agency interpretations should be reviewed under *Chevron*.³¹

In order to reach this result, Justice Scalia had to adopt a narrowing interpretation of *Mead* and the proposition that only agency action having force of law is eligible for *Chevron* deference. In doing so, Scalia held that it is not necessary to identify a delegation of power to act with the force of law with respect to the specific statutory provision in question; it is enough that Congress has in general terms authorized the agency to act with the force of law. Thus, as long as Congress has generally authorized an agency to engage in legislative rulemaking, this is enough to require court to apply *Chevron* to any and all agency decisions adopted by legislative rule, whether or not Congress has specifically authorized the agency to make legislative rules with respect to the issue in question.³²

Chief Justice Roberts filed a vigorous dissent, joined by Justices Kennedy and Alito. He wrote in part: “Courts defer to an agency’s interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.”³³ Specifically, Roberts objected to the interpretation of *Mead* as making an agency eligible for *Chevron* deference based on one generic rulemaking grant. Instead, courts must undertake to determine whether the agency has been given authority to act with the force of law with respect to the specific issue in contention.³⁴

The question whether the FTC has authority to issue legislative rules on competition matters would seem to implicate the scope of the agency’s regulatory authority or jurisdiction. Under *Arlington*, this does not matter. The critical question is whether the agency has been given general authority to act with the force of law. With respect to the agency at issue in *Arlington*,

³¹ *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013).

³² *Id.* at 306.

³³ *Id.* at 316 (Roberts, C.J. dissenting).

³⁴ *Id.* at 318 (Roberts, C.J. dissenting).

the FCC, Justice Scalia was able to rely on precedent holding that it has general authority to issue legislative rules as to all titles that it administers.³⁵ With respect to the FTC, the answer to this question is by no means simple or straightforward.

One possible source of authority for the FTC to act with the force of law is Section 5 of the FTC Act, which authorizes the agency to file complaints and determine whether particular firms are engaging in unfair methods of competition. If the FTC finds a violation, it can issue a cease and desist order. However, under the original FTC Act, and still today, the agency has no authority to enforce such orders. Rather, the order must be submitted to a court of appeals, which then determines whether enforcement should be ordered. Whether this constitutes authority to act with the force of law, or is more accurately characterized, as the Court suggested in *Humphrey's Executor*, that the agency acting as a “judicial aid” to the court, is debatable.³⁶

Another possible source of authority for the FTC to act with the force of law is Section 6(g), which authorizes the agency to “make rules and regulations for the purpose of carrying out the provisions of this Act.”³⁷ This was long understood to refer to procedural rules and other housekeeping matters. It is true that in recent cases the Court has often construed such generic rulemaking grants to include the authority to issue legislative rules. But the historical understanding of the FTC rulemaking grant (discussed in Part III below), and the fact that Congress saw fit in 1975 to make an explicit grant of legislative rulemaking authority with respect to unfair and deceptive practices, would seem to counsel against this interpretation.

Even if a court were to conclude that the FTC has a generic source of authority to act with the force of law, within the meaning of *City of Arlington*, there is still the question whether the FTC Act, as amended, is “unclear” or “ambiguous” as to whether this force of law authority extends to issuing legislative rules about competition policy. *Chevron* deference applies only

³⁵ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999).

³⁶ *Humphries Executor v. United States*, 295 U.S. 602, ___ (1935).

³⁷ 15 U.S.C. §469(g) (2006).

when a court concludes, at step one, that Congress has not clearly or unambiguously addressed the precise question at issue. *City of Arlington* reaffirms this understanding. Courts should enforce the limits Congress has placed on agency authority, Scalia wrote, “by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.”³⁸

So even if the *Chevron* doctrine applies, the decisive question is likely to boil down to one of statutory interpretation: has Congress clearly or unambiguously denied the FTC authority to issue legislative rules on matters of competition policy? It is to that question of statutory interpretation that I now turn

III. .FTC Rulemaking Authority As a Matter of Ordinary Statutory Interpretation

A. The Original Understanding

The FTC was created by Congress in 1914. And, as a creation of Congress, it only has powers given to it by Congress. The provision relevant to this topic was Section 5, which declared that “unfair methods of competition in commerce are hereby declared unlawful.”³⁹ Congress would subsequently amend this provision in two respects. The current Act declares that unfair methods are also prohibited when they only “affect commerce.” It also specifies that “unfair or deceptive acts or practices in or affecting commerce” are prohibited.⁴⁰ Thus, while the Act originally prevented only “unfair methods of competition,” i.e., antitrust violations, it now prohibits not only antitrust violations but also “unfair or deceptive acts or practices,” i.e., false advertising and the like.

³⁸ 566 U.S. at 307.

³⁹ 38 Stat. 719 (1914).

⁴⁰ The current Act reads: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45 (2006).

The enforcement powers given to the Commission under Section 5 remain largely as they were established in 1914. The Commission is empowered to file complaints, hold hearings, and issue cease and desist orders when it finds that some person or entity has engaged in unfair methods of competition or unfair and deceptive acts or practices. In order to enforce a cease and desist order, the original Act required the FTC to bring an enforcement action in the court of appeals. Thus, Commission orders were not self-executing but could only be enforced by an Article III court. Congress has since modified the Act to provide that the Commission’s orders are “final” if not appealed by the person or entity directed to cease and desist or, if they have been appealed, after a final judgment upholding them on appeal.⁴¹ With respect to “final orders” regarding “unfair or deceptive” acts, the Commission may file an enforcement action in federal district court.⁴² Otherwise, however, enforcement actions are brought by the Department of Justice in federal district court.⁴³ By negative implication, therefore, cease and desist orders of the FTC regarding antitrust matters (that is, “unfair methods of competition” as opposed to “unfair or deceptive” acts or practices), when they become final, may only be enforced by the Department of Justice. Which makes sense, given that the Justice Department has concurrent authority to ask courts to adjudicate violations of the antitrust laws.

The original Act also authorized the Commission, under Section 6, to investigate corporations and issue reports for the use of the public and Congress about the “organization, business, conduct, practices and management of any corporation.”⁴⁴ Section 6(g) of the Act authorized the Commission “from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.”⁴⁵

⁴¹ 15 U.S.C. § 45(g)(1).

⁴² *Id.* at § 45(m)(1)(A).

⁴³ *Id.* at § 45(I).

⁴⁴ 38 Stat. 721-22 (1914).

⁴⁵ *Id.* at 722, codified at 15 U.S.C. § 46(g) (2006).

What was the original public meaning of the rulemaking grant found in Section 6(g)? The best answer would seem to be that it was understood to empower the FTC to adopt “procedural” or internal housekeeping rules. The relevant substantive authority over unfair competition was conferred by Section 5. This clearly contemplated adjudication, not rulemaking. Indeed, Section 5 did not even contemplate an adjudication having the force of law, something that was regarded as problematic for an administrative body in 1914.⁴⁶ Any order issued under Section 5 could only be enforced by an Article III court. Section 6 included a grant of authority to “make rules and regulations for the purposes of carrying out the provisions of this Act.” The referenced “rules and regulations” almost certainly meant procedural rules and regulations, since there was no provision in Section 6 (or elsewhere) for the Commission to bring an enforcement action based on such rules.⁴⁷ This inference is reinforced by the placement of the rulemaking grant in Section 6, which authorized investigations and reports but not any form of substantive regulation.⁴⁸ The fact that the rulemaking provision appears in a sentence authorizing the Commission to “classify corporations” further supports this inference.

I admit it is logically possible to interpret Section 6(g) as a grant of substantive rulemaking authority, and as interpreted, to assert that such rules would include the power to make legislative rules carrying out Section 5, which is another “provision of the Act.” But the structure of the Act makes this exceedingly unlikely. There is no language in the 1914 Act conferring authority on the Commission to bring enforcement actions against firms for violating the “rules” adopted under Section 6. If Section 6 contemplated legislative rules defining unfair competition, any action to enforce such rules would have to be brought under Section 5. But recall that orders issued under Section 5 had to be developed through adjudication, and the

⁴⁶ Thomas Merrill, *Article III, Agency Adjudication, and the Origin of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 669–670 (2011).

⁴⁷ See *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (Williams, J.) (explaining that rules are substantive rather than interpretive when they are the necessary predicate for an enforcement action).

⁴⁸ In *Humphrey’s Executor v. United States*, 295 U.S. 602, 624 (1935), the Supreme Court interpreted Section 6 as conferring “quasi-legislative” powers on the FTC, by which it meant power to aid Congress in its legislative functions. The Court made no mention of the rulemaking grant in Section 6(g).

description of the adjudication process clearly indicates that it is de novo. There is no hint of structuring the adjudication by promulgating pre-existing substantive rules. Recall too that FTC orders, once entered, could only be enforced by a court. It would be odd, to say the least, for a statute to confer legislative rulemaking authority on an agency, which rules would then be applied in orders that can only be enforced only by courts. We usually think of legislative rulemaking authority as carrying with it the authority to interpret the rules so adopted.⁴⁹ But under the structure of the FTC Act as originally enacted, the power to interpret the supposed rules would be lodged, via Section 5, not in the agency, but in the enforcement court.

Any uncertainty about the original meaning of the rulemaking grant in Section 6 is resolved by considering the emerging jurisprudence of rulemaking as it existed in 1914. As Kathryn Watts and I have documented, in 1914 both Congress and the courts followed a convention for differentiating between grants of legislative and procedural rulemaking authority.⁵⁰ Grants of rulemaking were regarded as legislative only if the organic statute provided some sanction or penalty for violation of the rules in question. If the grant did not include such a provision, it was understood to confer only procedural or internal housekeeping authority. The rulemaking grant in Section 6 of the FTC Act contains no mention of any sanction for violation of the rules issued under its authority. Thus, it was clearly understood at the time of enactment to be a grant of procedural rulemaking authority.⁵¹ As previously noted, this shared understanding is reinforced by the placement of the rulemaking grant in Section 6, which deals with information gathering and issuing reports.

⁴⁹ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) (“when granting rulemaking power to agencies Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.”).

⁵⁰ Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002).

⁵¹ The so-called “Housekeeping Act,” 5 U.S.C. 301, authorizes executive branch agencies to promulgate procedural rules and internal operating procedures. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 308-310 (1979). But the Act confers this authority only on “the heads of executive departments or military departments,” and the FTC was envisioned as an “independent agency,” not an executive department. So Congress may have felt it was necessary to include a specific grant of authority for the FTC to adopt procedural rules.

For those who would consult legislative history – a diminishing tribe largely on the defensive these days – the available evidence fully confirms the inference of original meaning drawn from the text, the structure of the Act, and existing conventions about rulemaking in effect at the time of enactment. As Victoria Nourse has emphasized, the most powerful form of legislative history is the Conference Report, since this is where divergent versions of legislative bills are reconciled, and both Houses vote to approve the Report.⁵² Section 6(g) originated in the House bill, which conferred only investigative powers on the FTC, not adjudicative power. The Senate bill granted the FTC adjudicative power but contained no reference to rulemaking. The Conference Committee adopted the House measures on investigation, including Section 6(g), and the Senate provisions regarding adjudication. Under established practices for reconciling bills in conference, the Committee could not have granted the FTC legislative rulemaking authority, since neither bill granted the agency such authority.⁵³ In explaining the Conference Report to the House, Representative Covington, a member of the Conference Committee, stated that the “Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future.”⁵⁴ If one believes that we should consult legislative history to determine meaning, this evidence is as close to conclusive as one could get.

A. Contemporary and Longstanding Agency Interpretation

Even if one thinks that Section 6(g) is ambiguous, relevant canons of statutory interpretation powerfully reinforce the conclusion that legislative rulemaking was not contemplated. A prominent canon of statutory interpretation, well established in 1914 and frequently referenced afterwards, is that the interpretation of a statute by an agency closely contemporaneous with its enactment is entitled to significant weight. A related canon is that longstanding and consistent agency interpretations by an agency are entitled to significant weight.⁵⁵

⁵² Victoria Nourse, *MISREADING LAW, MISREADING DEMOCRACY* (2016); see also Robert A. Katzmann, *JUDGING STATUTES* (2104).

⁵³ Merrill & Watts, *supra* at 505.

⁵⁴ 51 Cong. Rec. 14,932 (1914).

⁵⁵ See MERRILL, *CHEVRON DOCTRINE* *supra*, chs. 2 & 7.

Soon after the enactment of the Federal Trade Commission Act in 1914 and consistently for nearly 50 years thereafter, the FTC interpreted the statute as conferring only the power to conduct adjudications and investigations and not as conferring any power to issue legislative rules. During the latter part of this period, the FTC experimented with various “Guides” and “Trade Practice Conferences.” But these were understood by everyone to be voluntary, not legally binding.⁵⁶

B. Congressional Ratification

Another relevant canon of interpretation is that the interpretation of a statute by the relevant administrative agency will be given significant weight if that interpretation has been ratified by Congress. Congress ratified the FTC’s original understanding of 6(g). Over the years, it enacted multiple discrete statutes conferring legislative rulemaking power on the FTC, in each case with respect to a specific industry. These enactments include the Wool Products Labeling Act of 1940, the Fur Products Labeling Act of 1951, and the Flammable Fabrics Act of 1953.⁵⁷ These discrete enactments of legislative rulemaking authority clearly presuppose that the FTC did not have any general authority to make legislative rules under the original FTC Act, otherwise, these laws would have been wholly redundant.

Any doubt on this score is eliminated by an episode that occurred in the early 1960s. Prodded by advocates who, like Chairman Kahn and her supporters, earnestly believed the agency should have legislative rulemaking authority, the FTC adopted a legislative rule prescribing the types of product labelling appropriate for the sale and promotion of cigarettes. The rule was promptly overturned by Congress with the enactment of the Federal Cigarette Labeling and Advertising Act in 1965.⁵⁸

⁵⁶ Merrill and Watts, *supra* at 471–72.

⁵⁷ Merrill and Watts, *supra* at 549–50.

⁵⁸ Merrill and Watts, *supra*, at 553–54.

Indeed, the history of the FTC with respect to legislative rulemaking authority is strikingly similar to the history of the FDA with respect to the latter agency's authority to regulate tobacco products. When the FDA disclaimed any authority over tobacco, Congress enacted a series of statutes prescribing appropriate restrictions on tobacco and assigning authority to enforce those statutes to agencies other than the FDA. When the FDA, at the urging of the Clinton Administration, changed its mind and asserted that it did have regulatory authority over tobacco, the Supreme Court struck down its rule.⁵⁹ The Court concluded that the history of interaction between Congress and the agency made it clear that Congress gave the FDA no regulatory authority over tobacco.⁶⁰ Similarly, the history between the FTC and Congress indicates that it was well understood that the agency had no authority to make legislative rules.

C. *National Petroleum Refiners*

Frustrated by Congress's piecemeal approach to conferring rulemaking authority on the FTC, the proponents of more aggressive FTC action pushed the agency to pass legislative rules and dare the courts to stop them. The oil industry, as always, was a convenient target. The FTC was convinced to issue a legislative rule, not clearly demarcated as either a competition rule or a deceptive practices rule, requiring all gasoline stations to post octane ratings at every gas pump. The FTC explained that the rule would be applied in Section 5 enforcement actions, with the only issue being whether the company had complied with the rule. When the industry challenged the rule in court, the district court examined the historical evolution of the FTC's regulatory authority and concluded that Congress had delegated no authority to the agency to issue such a rule.⁶¹

⁵⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁶⁰ *Id.* at 159–60.

⁶¹ *National Petroleum Refiners Ass'n. v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972) *rev'd in* *National Petroleum Refiners Assn. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

The D.C. Circuit, acting through an arch-liberal panel consisting of judges Wright, Bazelon, and Robinson, reversed.⁶² The appeals court framed the question as whether the text of Section 6(g) could be interpreted to authorize legislative rulemaking. Section 5 was said not to be dispositive, because there was no language in Section 5 making the power to adjudicate unfair trade practices the “exclusive” method of regulation. This effectively reversed the standard presumption about the scope of delegated powers. Rather than seeking affirmative evidence of a delegation of power to make legislative rules, the court framed the question as whether there was affirmative evidence *not* to confer power to make legislative rules. When the Court turned to legislative history, which was still very much in vogue at the time, it pronounced the legislative history of the 1914 Act on the point “ambiguous,” which as we have seen it was not. The details were relegated to an appendix, so as to disguise the dissembling about this.

With the presumption about the scope of delegated powers flipped on its head, the court had little trouble determining that the Section 6(g) gave the FTC the power to issue legislative rules. Citing “similar provisions” in other statutes, the court determined that “contemporary considerations of practicality and fairness” supported the FTC’s position that it had the power to engage in legislative rulemaking.⁶³ In point of fact, these “similar provisions” were actually quite different, as they concerned the proper interpretation of *pre-existing* grants of legislative rulemaking authority, not the question of whether there was a grant of such authority in the first place.⁶⁴ With the panel bending every possible precedent to favor the FTC, it came as no surprise that it overturned the district court and held the FTC has the power to issue the legislative rule in question. The real surprise was that only Justice Stewart publicly noted that he would have granted certiorari, presumably to correct the D.C. Circuit’s egregious misstatement of the law.⁶⁵

D. The 1975 Federal Trade Improvements Act.

⁶² *National Petroleum Refiners Assn.*, 482 F.2d. 672 (D.C. Cir. 1973).

⁶³ *Id.* at 682–83.

⁶⁴ *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

⁶⁵ *National Petroleum Refiners Ass’n v. FTC*, 415 U.S. 951 (1974).

At the same time the D.C. Circuit was revising the Federal Trade Commission Act through aggressive interpretation, Congress was also considering whether to confer legislative rulemaking authority on the agency (which likely explains why the Supreme Court was reluctant to grant certiorari). The result was something called the Federal Trade Commission Improvement Act in 1975.⁶⁶ The Act gave the FTC authority to issue legislative rules with respect to unfair or deceptive acts or practices in or affecting commerce, i.e., deceptive advertising.⁶⁷ However, this new authority was hedged in with certain procedural requirements not found in the APA's general provisions that govern legislative rulemaking.⁶⁸ For example, the FTC was required to report its rules to the relevant House and Senate Committees before they were adopted, rulemaking proceedings were to be conducted by ALJs not the Commission, ex parte contacts were prohibited, and all rules were subject to special pre-enforcement judicial review.⁶⁹

Significantly, Congress also expressly provided that the new rulemaking authority with respect to unfair or deceptive acts and practices would be the *exclusive source* of authority to make such rules. The Act provided: "The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section [5] of this title)."⁷⁰ This was an express affirmation of the *expressio unis* canon – the expression of one thing precludes the inclusion of another. Then came the following sentence: "*The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of*

⁶⁶ 88 Stat. 2183 (codified at 15 U.S.C. § 2301 *et seq* (2006)).

⁶⁷ 15 U.S.C. § 57a.

⁶⁸ 5 U.S.C. § 553.

⁶⁹ 15 U.S.C. § 57a(b)(2)(B); *id.* at § 57a(b)(1); *id.* at § 57a(c)(1)(A), (C); 15 U.S.C. § 2309(a).

⁷⁰ 15 U.S.C. § 57a(a)(2). The Act clarified that the Commission would also have authority to issue interpretative rules and statements of policy (which do not have the force of law) with respect to unfair or deceptive acts or practices. *Id.* at §57a(a)(1)(A).

competition in or affecting commerce.”⁷¹ Thus, the addition of express rulemaking authority with respect to unfair or deceptive practices did not extend to “any authority” the Commission might have to issue rules with respect to unfair methods of competition, i.e., antitrust matters.

Herein lies the most uncertain question about the scope of the FTC’s authority to issue legislative rules dealing with unfair competition (as opposed to deceptive practices). Clearly, the italicized sentence meant the question of the FTC’s rulemaking authority in antitrust matters was to be resolved by looking to the meaning of the FTC Act as it stood prior to 1975. Chairman Kahn and her supporters will argue that this is the meaning attributed to the Act by the D.C. Circuit’s 1973 decision in *National Petroleum Refiners*. After all, the D.C. Circuit had authoritatively construed Section 6(g) to confer legislative rulemaking authority on the FTC, the Supreme Court had denied certiorari, and this had occurred before the enactment of the Federal Trade Improvements Act in 1975.

More closely considered, I do not think this will wash. First, the italicized savings clause mentions only two types of “rules” affecting unfair competition which are preserved: interpretative rules and general statements of policy. As previously discussed, the most important “rules” employed by the FTC and the DOJ in competition matters are the Merger Guidelines, which are general statements of policy, not legislative rules. Congress was clearly aware of the importance of the Merger Guidelines, and they are expressly preserved. There is no mention of preserving legislative rules about competition policy, most likely because there were no such rules to preserve.

Second, the D.C. Circuit construed Section 6(g) to apply to *any* authority exercised by the FTC under Section 5 – whether it be unfair competition (antitrust) or unfair and deceptive practices (false advertising). Under the D.C. Circuit’s decision, the FTC could engage in legislative rulemaking on *any* subject covered by Section 5, and could do so using the relatively streamlined notice-and-comment procedures of Section 553 of the Administrative Procedure Act. Why then would Congress overrule this aspect of *National Petroleum Refiners* with respect to deceptive practices – requiring a more procedurally demanding form of rulemaking – without

⁷¹ 15 U.S.C. § 57a(a)(2).

also extending these same provisions to rulemaking about unfair competition? It is hard to believe that Congress thought that unfair competition – antitrust claims -- should be subject to legislative rulemaking under the more streamlined procedures of Section 553 of the APA that did not provide for notification of Congress, and so forth, whereas unfair and deceptive practices should be regulated by rules hedged in by greater procedural protections for industry.

It is more plausible that Congress assumed that unfair competition claims would continue to be addressed through case-by-case adjudication, informed by interpretive rules and general statements of policy like the Merger Guidelines. . For one thing, antitrust claims had been enforced by the FTC through case-by-case adjudication since the adoption of the Clayton Act in 1914. The agency’s institutional practice in this regard was thoroughly entrenched and it is unlikely that Congress would act to upset this settled convention through a silent ratification of a recent D.C. Circuit decision. For another, the FTC’s authority to enforce the antitrust laws is exercised concurrently with the Justice Department, and the Justice Department has always enforced those laws using case-by-case adjudication (in court). There has always some tension between the FTC and Justice Department over their respective spheres of authority in enforcing the antitrust laws. If the Justice Department thought that Congress was giving the FTC authority to adopt legislative rules dealing with competition policy, while it had to remain content to engage in case-by-case adjudication, the protests would have penetrated even the thickest walls of the legislative office buildings on the Hill.

A more likely characterization of what happened is that Congress, in 1975, did not want to confer legislative rulemaking authority on the FTC with respect to antitrust matters. Congress had before it in 1975 in all its dimensions the question whether the FTC should be delegated authority to engage in legislative rulemaking. It reached a judgment that such authority should be granted with respect to deceptive practices, subject to special procedural limitations. It did not agree to grant such authority with respect to antitrust matters. If Congress thought that *National Petroleum Refiners* established that the FTC had legislative rulemaking authority with respect to antitrust matters – and it *agreed* with this conclusion -- it would have been simplicity itself to include “unfair competition” in the provision conferring legislative rulemaking power. Instead, it granted such authority only with respect to deceptive practices. Since administrative

agencies can only exercise the authority delegated to them by Congress, the failure to confer legislative rulemaking authority on the FTC with respect to competition matters means the agency has no such authority.

Finally, and I think most dispositively, when Congress wrote that the conferral of new rulemaking authority on the FTC with respect to unfair and deceptive practices “*shall not affect any authority of the Commission to prescribe rules ... with respect to unfair methods of competition*” it undoubtedly meant the “authority” of the FTC *correctly construed*. Conceivably, the D.C. Circuit might accept the claim that the decision in *National Petroleum Refiners* should be accepted as the correct interpretation of the FTC’s authority in this respect, on grounds of stare decisis. But for all the reasons previously given, this is not a plausible interpretation of the Act. The Supreme Court is not bound by *National Petroleum Refiners*, and it would be short work for the Court to see through the unprincipled activism of that decision. The FTC Act did not authorize legislative rulemaking on any issue in 1914, and it did not authorize it for deceptive practices until 1975. It has not authorized it with respect to unfair competition as of today.

E. Conclusion

It is unclear what the FTC proposes to do if it gets legislative rulemaking authority over antitrust policy. Perhaps it wants to adopt rules requiring that high tech firms be broken up if they obtain a specified level of market dominance, without regard to whether they have used monopolistic tactics to achieve that level of market penetration. Whatever one thinks of such ideas, administrative agencies are powerless to act under our system of government unless they are given such power by Congress. As evinced by the drafting conventions at the time Congress passed the Federal Trade Commission Act, the original law was never intended to grant legislative rulemaking authority to the FTC. Likewise, Congress repeatedly ratified this interpretation by enacting limited grants of rulemaking power to the FTC in the decades after the original Act. The evidence that the FTC has the power to promulgate legislative rules regulating anti-competitive behavior consists of a single activist D.C. Circuit opinion and a plethora of

arguments about why legislative rulemaking power would be a good thing. The Supreme Court should make quick work of these arguments if and when any upcoming rules are challenged.

The stakes here go to the heart of our system of separation of powers. Under the Constitution, only Congress has the power to legislate. We have come to understand that this means only Congress can create administrative agencies and delineate their authority. When Congress has delegated authority to an agency, we have also come to understand – most prominently in the *Chevron* decision – that courts should generally defer to the agency’s understanding of its delegated power. But this structure of government can be sustained only if courts conclude that Congress has *actually*, even if only implicitly, made the required delegation. Adopting a fiction that any ambiguity in an agency’s organic act is an implicit delegation, to be accepted by courts if reasonable, is a recipe for administrative takeover of the legislative function. To this extent, *Chevron* should be clarified.⁷² A future case addressing the FTCs assertion of authority to make legislative rules governing antitrust law would be a fitting occasion to do so.

⁷² As argued in MERRILL, THE *CHEVRON* DOCTRINE, *supra*.