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Antitrust Rulemaking: The FTC's Delegation Deficit

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ANTITRUST RULEMAKING: THE FTC'S DELEGATION DEFICIT

THOMAS W. MERRILL*

The Federal Trade Commission's (FTC's) recent assertion of authority to engage in legislative rulemaking in antitrust matters can be addressed in terms of three frameworks: the major questions doctrine, the Chevron doctrine, and as a matter of ordinary statutory interpretation. The article argues that as a matter of ordinary statutory interpretation the FTC has no such authority. This can be seen by considering the structure and history of the Act and is confirmed by the 1975 Federal Trade Commission Improvements Act. Given that the result follows from ordinary statutory interpretation, it is unnecessary for courts to consider the other two frameworks.

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* Charles Evans Hughes Professor, Columbia Law School. The article has benefited from comments from participants at workshops on FTC rulemaking sponsored by the George Mason Antonin Scalia School of Law in 2022 and the Brigham Young School of Law in 2023. Kyle Oefelein provided excellent research assistance. Research support was provided by the Gray Center of the Study of Administrative Law at George Mason University.

INTRODUCTION

The leadership installed at the Federal Trade Commission (FTC or the Commission) by the Biden Administration would like to use 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. The FTC made good on this aspiration on January 5, 2023, by issuing a notice of proposed rulemaking that, in the interest of enhancing competition among firms for workers, would make so-called non-compete clauses in employment contracts illegal.³

This Article 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, this Article 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 important 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 authorizes it to make legislative rules about unfair competition.⁴ After all, the provision does not clearly say that legislative rules are *not* included in the phrase “rules and regulations,” and courts have often assumed that similar language includes the authority to make legally binding rules.⁵ Indeed,

1. See generally FED. TRADE COMM’N (FTC), STATEMENT OF REGULATORY POLICIES, (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. See Non-Compete Clause Rule, 88 Fed. Reg. 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910); *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM’N (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>; Noam Scheiber, *U.S. Moves to Bar Noncompete Agreements in Labor Contracts*, N.Y. TIMES (Jan. 6, 2023), <https://www.nytimes.com/2023/01/05/business/economy/ftc-noncompete.html>.

4. Federal Trade Commission Act (FTC Act or the Act), Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified at 15 U.S.C. § 46(g)).

5. Two recent examples from the Supreme Court: In *Biden v. Missouri*, the Court refused to

the D.C. Circuit so held with respect to the FTC's rulemaking grant many years ago.⁶ And even if one regards the rulemaking grant as ambiguous, the Commission can point out that as recently as 2013 the Supreme Court held that agencies are entitled to *Chevron* deference with respect to interpretations of ambiguities about the scope of their own authority.⁷

Other aspects of the question, however, suggest that the FTC will encounter choppy waters. The Supreme Court has recently embraced something called the "major questions" doctrine, most prominently in *West Virginia v. EPA*.⁸ Much about the doctrine remains uncertain, but it takes little imagination to predict that opponents of antitrust rulemaking will claim that the Commission's authority to make such rules is a major question, and thus, the commission must be able to point to "clear congressional authorization" before it goes down this path.⁹

There is a more general problem: The Supreme Court seems to have lost all enthusiasm for deferring to agency interpretations of the law they administer. The Court has not applied the *Chevron* doctrine to resolve a question of agency law since 2016.¹⁰ In the most recent full Term, it was barely mentioned. Instead, the Court has taken to resolving questions of agency law *de novo*, whether the result happens to be to affirm or reverse the

stay a regulation issued by the Department of Health and Human Services (HHS) requiring that all employees in facilities funded by Medicare and Medicaid be vaccinated against the COVID-19 virus. 142 S. Ct. 647 (2022). The majority was unmoved by the dissenters' argument that HHS could point to no statute authorizing such regulations. *Id.* at 655–58 (Thomas, J., dissenting) (noting that HHS relied on a provision authorizing regulations required for the "efficient administration" of the FTC Act). It was enough, according to the majority, that HHS had imposed similar restrictions in the past. *Id.* at 652. In *West Virginia v. EPA*, the Court, without analysis of the relevant text, assumed that the Environmental Protection Agency (EPA) has authority under the Clean Air Act (CAA) to promulgate legislative regulations setting emissions standards for existing sources of air pollution. 142 S. Ct. 2587, 2601–02 (2022). The relevant text, § 111(d) of the CAA, appears to delegate authority to EPA to promulgate only *procedural* regulations governing the manner in which states submit proposed emissions limits on existing sources. Compare CAA § 111(b)(2), 42 U.S.C. § 7411(b)(2) (new sources), with § 111(d), 42 U.S.C. § 7411(d)(1) (existing sources). See Tom Merrill, *West Virginia v. EPA: Getting to Actual Delegation*, VOLOKH CONSPIRACY (July 29, 2022, 7:10 AM), <https://reason.com/volokh/2022/07/29/west-virginia-v-epa-getting-to-actual-delegation/>.

6. See *Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n (FTC)*, 482 F.2d. 672 (D.C. Cir. 1973), *rev'g* 340 F. Supp. 1343 (D.D.C. 1972).

7. See *City of Arlington v. FCC*, 569 U.S. 290 (2013).

8. 142 S. Ct. 2587, 2609–10 (2022).

9. *Id.* at 2609.

10. The last time the Court applied the two-step standard of review associated with *Chevron* was in *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 276–77 (2016).

agency position. A particularly pertinent example is *AMG Capital Management v. FTC*,¹¹ where the Court held that the FTC does not have statutory authority to bring original civil actions in federal court seeking restitution for consumers who have been victims of deceptive practices.¹² The Court reached this result by reviewing the structure of the Federal Trade Commission Act of 1914 (FTC Act or the Act) and its historical evolution over time.¹³ The Article will argue in Part III that a similar conclusion can be reached about antitrust rulemaking by tracing the history of the FTC's authority to engage in rulemaking. Such a decision would obviate any need either to defer to the FTC's interpretation, or to trot out the heavy artillery of the major questions doctrine.

In what follows, the Article will discuss the question of the FTC's rulemaking authority in competition matters from three perspectives. Part I will consider how the issue should be resolved under the newly minted major questions doctrine. Part II 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*.¹⁴ Part III will examine how the issue should be resolved as a matter of ordinary statutory interpretation. The last framing is the correct one, the Article argues, because courts should always determine as a matter of independent judgment whether an agency is acting within the scope of its delegated regulatory authority.¹⁵ 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, the Article will address all three ways of viewing the question.

I. IS FTC 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.¹⁶ There are many uncertainties about this doctrine and how it will be deployed in the future. A rough statement of the doctrine is that courts will not uphold

11. 141 S. Ct. 1341 (2021).

12. *Id.* at 1344.

13. *See id.* at 1345–49.

14. 569 U.S. 290 (2013).

15. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 230–37, 263 (2022) [hereinafter MERRILL, *CHEVRON* DOCTRINE].

16. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

novel agency interpretations that seek to regulate questions of economic and political significance unless the agency can point to clear congressional authorization for such actions.¹⁷

The major questions doctrine did not come out of nowhere. The Court has episodically expressed skepticism about agency assertions of “significant policymaking authority” in an unprecedented fashion.¹⁸ For example, in 2000, the Court held that the Food and Drug Administration (FDA) could not regulate tobacco products as ordinarily marketed based on its general authority to regulate drugs and devices.¹⁹ Then, in 2014, the Court held that Environmental Protection Agency (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.”²⁰

Until 2022, however, such expressions of skepticism had manifested themselves in the course of exercises in ordinary statutory interpretation, typically either as part of “step one” or “step two” of the *Chevron* doctrine.²¹ 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.”²² In contrast, in *National Federation of Independent Business (NFIB) v. OSHA*,²³ decided in January of 2022, and more emphatically in *West Virginia v. EPA*, decided in late June of that year, the Court reformulated these expressions of skepticism into a new canon of interpretation.²⁴

Under this new doctrine, the obvious and generally dispositive question is what constitutes a major question. What do we learn from the recent decisions about this? Chief Justice Roberts’s opinion for the Court in *West Virginia*, as is often his style, sought to ground the major questions doctrine in precedent. In so doing, the opinion includes quotations from a number of the Court’s previous decisions.²⁵ Thus, we read that a major question exists when an agency offers a “novel reading” of a statute that would result in the “wholesale restructuring” of an industry; when it advances a claim of

17. *See id.* at 2614.

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

19. *Id.*

20. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

21. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

22. *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 468 (2001).

23. 142 S. Ct. 661 (2022) (per curiam).

24. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609, 2614 (2022).

25. *Id.* at 2605, 2608–10 (citations omitted).

“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; or when it cites an “ancillary provision” to “adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”²⁶ 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 of the Court’s opinion, however, 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 its authority.

Justice Gorsuch, in a concurring opinion in *West Virginia* joined by Justice Alito, sought to provide a crisper formulation of the meaning of major question.²⁷ He discerned three inquiries that provide “a good deal of guidance” in this regard.²⁸ 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 in “bills authorizing something akin to the agency’s proposed course of action?”²⁹ 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 persons or entities?³⁰ Third, does the “agency seek to ‘intrud[e] into an area that is the particular domain of state law’” thus implicating considerations of federalism?³¹ Whether this exegesis provides better guidance is a matter of opinion. The first two inquiries are compounds of two separate factors (e.g., political controversy and prior rejection by Congress), so arguably Justice Gorsuch has posited five factors rather than three. And the Justice added that his list of “triggers” “may not be exclusive.”³²

Justice Gorsuch’s concurrence further complicates things by offering an exegesis about what qualifies as a clear statement of congressional authorization in this context. Here, as one would expect, we read that “oblique and elliptical language,” “gap filler” provisions, and “broad and unusual authority” do not count as clear statements.³³ But we also read that novel interpretations of old

26. *Id.* (citations omitted).

27. *Id.* at 2616, 2620–21 (Gorsuch, J., concurring).

28. *Id.* at 2620.

29. *Id.* at 2620–21.

30. *Id.* at 2621.

31. *Id.*

32. *Id.*

33. *Id.* at 2622–23.

statutes, interpretations by an agency that are not contemporaneous with enactment of the statute or of longstanding duration, and interpretations that reflect a “mismatch between an agency’s challenged action and its congressionally assigned mission and expertise” may not count.³⁴ These latter circumstances suggest a concern about the novelty or lack of precedent for the agency interpretation or what political scientists call policy drift, all of which seem to go to problems associated with the nature of the agency decision, not to whether Congress has supplied the requisite clear authorization. So maybe the concurrence posits eight factors, rather than three or five.

Without regard to how one tallies up the factors, the determination of whether something is a major question apparently entails a multi-factorial inquiry. And the various factors cannot be reduced to a common metric. The impression one gets is that the concept of major questions is grounded in an intuitive mix of considerations of the “know it when you see it” variety.³⁵

In terms of the future path of development, there are some intriguing differences between the description of the major questions doctrine in Chief Justice Roberts’s opinion for the Court in *West Virginia* and Justice Gorsuch’s concurring opinions in *NFIB* and *West Virginia*.³⁶ Justice Gorsuch, who appears to be the most enthusiastic proponent of the new doctrine, describes the major questions doctrine as a “clear-statement rule[].”³⁷ Chief Justice Roberts, however, never uses this expression in the portions of his *West Virginia* opinion setting forth his understanding of the doctrine. Instead, he speaks of the requirement of “clear authorization” by Congress which might include, for example, implicit ratification of the agency position by subsequent legislative action.³⁸ Perhaps even more strikingly, Justice Gorsuch grounds the doctrine in constitutional law, namely the nondelegation doctrine that posits Congress has the exclusive power to legislate and may delegate authority to executive actors

34. *Id.* at 2623.

35. See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from denial of rehearing en banc) (acknowledging that the major questions canon has a “‘know it when you see it’ quality”).

36. Compare *West Virginia*, 142 S. Ct. at 2609 (describing the major questions doctrine as “agencies asserting highly consequential power beyond what Congress could reasonably understood to have granted”), with *Nat’l Fed’n of Indep. Bus. (NFIB) v. OSHA*, 142 S. Ct. 661, 667–70 (2022) (per curiam) (Gorsuch, J., concurring) (describing the major questions doctrine as one that requires Congress to “speak clearly” when delegating authority to agencies on issues of “vast economic and political significance”) (quoting *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam)) (internal quotations omitted), and *West Virginia*, 142 S. Ct. at 2616–17, 2620–24 (Gorsuch, J., concurring) (outlining the applicability of the major questions doctrine).

37. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

38. *Id.* at 2609, 2614 (majority opinion).

only on minor or interstitial matters of implementation of legislative policy.³⁹ The Chief Justice, in contrast, locates the doctrine almost entirely in what can be called administrative common law.⁴⁰ A third difference is that the Chief Justice appears to incorporate something like the “swerve doctrine” into the major questions idea, emphasizing that prior opinions have identified major questions as being “unprecedented,” “unheralded,” or based on a “novel reading” of statutory authority.⁴¹ Justice Gorsuch does not mention this in his recitation of the elements that may qualify a question as being “major,” although he describes agency inconsistency as a factor to be considered in determining whether the agency action is supported by a clear statement from Congress.⁴²

How these differences are resolved in the future will have an important bearing on whether the major questions doctrine portends a revolution in administrative law or merely adds one more substantive canon to the proliferating list of canons collected in treatises on statutory interpretation.⁴³ This Article leaves for another day a more systematic critique of the new doctrine. For present purposes, all that can be said is that it is unclear how the major questions doctrine would apply to a claim by the FTC of antitrust rulemaking authority.

Many of the factors that help make something a major question, as enumerated by the Chief Justice and Justice Gorsuch, clearly suggest that the FTC’s proposed ban on non-compete agreements is a major question. The

39. Compare *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (reaffirming the traditional test permitting the delegation of discretionary authority if constrained by an “intelligible principle”), with *West Virginia*, 142 S. Ct. at 2617–19 (Gorsuch, J., concurring) (insisting that delegations should be limited to filling the details in statutes with major questions resolved by Congress).

40. The Chief Justice made one brief reference to “separation of powers principles” without spelling out what they were. *West Virginia*, 142 S. Ct. at 2609. This was paired in the same sentence with “a practical understanding of legislative intent.” *Id.*

41. *Id.* at 2605, 2608. The “swerve doctrine,” like most administrative common law, originated in the D.C. Circuit. See *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (stating that “an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”). For endorsements of the idea by the Supreme Court, see *Motor Vehicle Mfg. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983); *U.S. Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).

42. See *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (noting that a novel assertion of agency power “warrants a measure of skepticism”) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

43. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–339 (2012) (discussing some fifty-one canons as guides to statutory interpretation).

proposed ban, according to the Notice of Proposed Rulemaking, would affect approximately thirty million workers and increase their earnings by \$250 to \$296 billion per year.⁴⁴ This would seem clearly to satisfy the large number of persons and large number of dollars referenced by the Court as signifying a major question. The issue would also appear to implicate questions of federalism, given that the permissibility of non-compete employment contracts has long been governed by state law, with some states (e.g., California) banning them, and others permitting them if they are reasonable.⁴⁵ The issue is likely to be politically controversial, at least with employers. But it does not appear that Congress has tried, and failed, to enact a similar nationwide ban. Other factors, however, cut less clearly in favor of characterizing the FTC's proposed rule.

One factor stressed by the Chief Justice in his opinion for the Court in *West Virginia* is the swerve idea: a question is likely to be major if the agency action is unprecedented, unheralded, novel, or inconsistent with past agency understanding.⁴⁶ This also appears in the per curiam opinion for the Court in *NFIB*,⁴⁷ and in Justice Gorsuch's discussion of what constitutes a clear statement in *West Virginia*.⁴⁸

In one sense, the FTC's claim of legislative rulemaking power can be viewed as an avulse change. For more than a century, the FTC has never engaged in legislative rulemaking in a matter that unambiguously involves its antitrust authority. On the other hand, the FTC's claim that the source of this authority is § 6(g) of the FTC Act (discussed more fully in Part III), is not a bolt from the blue.⁴⁹ The Commission asserted this interpretation of § 6(g) in the late 1960s, and its claim was upheld by the D.C. Circuit in *National Petroleum Refiners Ass'n v. FTC*⁵⁰ in 1973. There is more to say about this decision (which is also covered in Part III). The point for present purposes is that the FTC's claim for legislative rulemaking authority based on § 6(g) has

44. Non-Compete Clause Rule, 88 Fed. Reg. 3,482, 3,482, 3,485, 3,501 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

45. *Id.* at 3,482, 3,493–94 (discussing variations in state statutory and common law). The RESTATEMENT (SECOND) OF CONTRACTS: ANCILLARY RESTRAINTS ON COMPETITION § 188 (AM. L. INST. 1981) provides that non-compete agreements are unreasonable if the restraint is greater than needed to protect the employer's legitimate interest or the employer's need is outweighed by the hardship to the employee and the likely injury to the public.

46. *See supra* note 41 and accompanying text.

47. *See NFIB v. OSHA*, 142 S. Ct. 661, 665–66 (2022) (per curiam).

48. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring).

49. *See* FTC Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified at 15 U.S.C. § 46(g)).

50. 482 F.2d 672 (D.C. Cir. 1973).

been around for more than half century. This authority has rarely been asserted, and virtually never in a purely antitrust context. But it is different in this respect from the Occupational Safety and Health Administration's (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 said had never been asserted by OSHA in the fifty years of its existence.⁵¹

Another variable is whether the agency interpretation significantly changes the scope of its regulatory authority. A number of cases cited as precedents for the major questions doctrine involved debatable expansions or contractions of an agency's substantive regulatory authority.⁵² *FDA v. Brown & Williamson Tobacco Corp.*,⁵³ described by the Chief Justice as the "leading case," is a clear example: the FDA, after decades of disclaiming any power to regulate tobacco products, discovered such authority based on a revised reading of its statutory mandate. Similarly, in *King v. Burwell*,⁵⁴ the government allowed persons to claim tax credits for health insurance purchased on a federally-created insurance exchange, even though the statute spoke of exchanges "established by a state."⁵⁵ The Court characterized the statute as "ambiguous," but declined to rest on the agency's interpretation.⁵⁶ Instead, it invoked the major questions doctrine and decided the matter itself in favor of the agency's position.⁵⁷

What is unclear is whether the major questions doctrine is reserved for interpretations that implicate the scope of an agency's substantive regulatory authority, as in *Brown & Williamson* and *King v. Burwell*, or whether it also applies to the changes in the *method* of exercising that authority. The question of whether the FTC has rulemaking authority over competition matters does not affect the scope of its substantive regulatory authority. The FTC has been charged with enforcing the antitrust laws for more than a century. The Sherman Act was passed in 1890,⁵⁸ and the FTC has enforced the antitrust laws ever since the Clayton Act was adopted in 1914.⁵⁹ That authority,

51. *NFIB*, 142 S. Ct. at 666.

52. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *King v. Burwell*, 576 U.S. 473, 493–97 (2015).

53. 529 U.S. 120 (2000).

54. 576 U.S. 473 (2015).

55. *Id.* at 483.

56. *Id.* at 490.

57. *Id.* at 485–86.

58. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–38 (2018)).

59. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2018)). To be sure, the Commission's current position is that its authority over "unfair methods of competition" extends beyond the scope of conduct that violates the antitrust laws. See Federal

however, has always been exercised through case-by-case adjudication. The precise question, therefore, is whether the belated discovery of legislative rulemaking power as a means of supplementing a long-existing form of substantive regulatory authority also triggers the major questions doctrine.

The Court's limited jurisprudence of major questions points both ways. Consider *West Virginia*. At times the Chief Justice appears to say that the Obama Administration's Clean Power Plan (CPP) was a major question because it was designed to force utilities to enter into cap-and-trade systems in order to reduce carbon dioxide emissions, and this particular regulatory tool had not been clearly authorized by Congress under the relevant provision of the Clean Air Act.⁶⁰ This points toward the choice of method for achieving a regulatory goal as being included within the ambit of the major questions doctrine. At other times, the Chief Justice seems to say that the CPP was designed to force coal-burning plants out of business, transforming the nation's electric power industry into one based on renewables and natural gas rather than coal, and that this goal had not been authorized by Congress.⁶¹ This points toward the major questions doctrine being concerned with the scope of regulatory authority.

Justice Gorsuch, in his concurring opinion in *West Virginia*, cited a late nineteenth-century decision holding that the Interstate Commerce Commission (ICC) could not prescribe rates for the future without a "clear and direct" authorization from Congress.⁶² Rate prescription orders are a form of legislative rulemaking, as opposed to awards of reparations for unreasonable rates charged in the past, which are a type of adjudication.⁶³

Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under § 5 of the Federal Trade Commission Act, Commission file No. P221202 at 1 (Nov. 10, 2022). The proposed rulemaking that would ban non-compete agreements in employment contracts, see Non-Compete Clause Rule, 88 Fed. Reg. 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910), would appear to fall in this category since there is no allegation of collusion or monopolization as a basis for the proposed rule. The assertion of authority over "methods of competition" that the FTC deems "unfair" (but not violative of the antitrust law) combined with an assertion of authority to condemn such conduct by legislative rule is likely to enhance the judicial perception that the proposed action is a major question.

60. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–11 (2022).

61. *See id.* at 2610, 2612.

62. *Id.* at 2619 (Gorsuch, J., concurring) (citing and quoting *Interstate Com. Comm'n (ICC) v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 505 (1897)).

63. *See* 5 U.S.C. § 551(4) (definition of "rule"); *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 383–89 (1932) (distinguishing rate prescription orders which have legislative effect from rates previously established by carriers that are subject to adjudication for reasonableness).

So *The Queen and Crescent Case*⁶⁴ is a close parallel to the question we are considering and suggests that the major questions doctrine applies to an agency interpretation discovering a new source of rulemaking authority.⁶⁵ But the Chief Justice in his opinion for the Court did not include the decision in his rendition of the precedents for the major questions doctrine.

The better view is that both agencies and reviewing courts “are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”⁶⁶ This would seem to be required by the principle of legislative supremacy.⁶⁷ But this position does not answer the question whether a deviation from “the means” Congress has selected should be regarded as a major question, in all or even some cases. That remains unclear and may depend on other contextual factors.

Yet another factor, implicit in the majority decision in *West Virginia*, was labeled by the concurrence and Justice Kagan’s dissent as “a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise.”⁶⁸ The majority and the concurrence regarded the mismatch to be EPA’s decision to balance “the many vital considerations of national policy implicated in deciding how Americans will get their energy.”⁶⁹ EPA, in their view, was charged with controlling air pollution, not with formulating energy policy.⁷⁰ Justice Kagan demurred, finding “no misfit, of the kind apparent in our precedents, between the regulation, the agency, and the statutory design[.]”⁷¹

Whatever the correct conception of EPA’s statutory mandate to deal with climate change, this variable would not seem to impeach the FTC’s desire to engage in antitrust rulemaking. In this regard, consider that the FTC, in conjunction with the Antitrust Division of the Justice Department, has for many years promulgated the Merger Guidelines (the Guidelines), which FTC officials and Department of Justice (DOJ) officials use in opining on whether proposed mergers of companies should be allowed to go forward consistent with the antitrust laws.⁷² The Guidelines are a policy

64. *Cincinnati, New Orleans, Tex. Pac. Ry. Co.*, 167 U.S. at 479. It was colloquially known as “The Queen and Crescent Case” because of the nicknames given to the principal cities—Cincinnati (the Queen City) and New Orleans (the Crescent City).

65. *Id.* at 498–99.

66. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994).

67. See MERRILL, *CHEVRON DOCTRINE*, *supra* note 15 at 195–216.

68. *West Virginia v. EPA*, 142 S. Ct. 2687, 2623 (Gorsuch, J., concurring).

69. *Id.* at 2612 (majority opinion).

70. See *id.* at 2611–12.

71. *Id.* at 2638 (Kagan, J., dissenting).

72. U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES

statement, not a legislative rule.⁷³ They are used to predict how FTC and DOJ officials, as enforcement agents, regard a proposed merger, not to prohibit or permit particular mergers. But they are “rules” within the meaning of the Administrative Procedure Act (APA),⁷⁴ 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, applying 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 is more likely to be disapproved.⁷⁵ Uncertainty about approval can be fatal to a merger, so many firms—faced with opposition of the FTC or DOJ—will abandon the merger.⁷⁶ Courts and lawyers are familiar with this dynamic, which means that the prospect of legislative rulemaking by the FTC on matters of antitrust law more generally may not strike them as some alien intrusion into the fabric of American public law.⁷⁷

(2010), <https://www.ftc.gov/sites/default/files/attachments/mergers/100819hmg.pdf>.

73. Press Release, Federal Trade Commission, Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010) (“The Horizontal Merger Guidelines . . . serve as an outline of the main analytical techniques, practices and enforcement policies the Department of Justice (DOJ) and the FTC use to evaluate mergers and acquisitions . . .”).

74. The Administrative Procedure Act (APA) defines “rule” to mean: [T]he 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 rules, such as rules prescribing rates of utilities or regulated carriers.

75. See HERBERT HOVENKAMP, *PRINCIPLES OF ANTITRUST* 105 (2d ed. 2021) (noting in § 3.8 that courts have generally concurred with the judgments of the FTC and DOJ based on the Merger Guidelines).

76. See, e.g., William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *ANTITRUST J.* 377, 435 (2003) (noting that the merger guidelines are the “most significant contribution by the federal agencies to non-criminal competition policy analysis in the modern era” and have “changed the way the U.S. courts and enforcement agencies examine mergers”).

77. See D. Daniel Sokol, Marissa Ginn, Robert J. Calzaretta, Jr. & Marcello Santana, *Antitrust Mergers and Regulatory Uncertainty* (Dec. 6, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4295283> (reporting on an empirical survey of how lawyers have changed their advice to clients in response to uncertainty created by the failure of the FTC and DOJ to propose new merger guidelines).

In sum, many of the factors cited in the recent decisions about what constitutes a major question, such as the large numbers of persons and dollars implicated by the agency decision clearly point to the proposed rule as being a major question. Other factors, such as the novelty of the agency interpretation or whether a change in the methods of enforcement can count as a major question, could be resolved either way. A final factor, whether there is a mismatch between the agency's basic mission and the assertion of agency authority, seemingly counts against characterizing the claim of rulemaking authority in competition matters as a major question. On balance, my view is that the issue should not be classified as a major question, but that is surely debatable, given the uncertain scope of the doctrine. Opponents of antitrust rulemaking will certainly claim that it is.⁷⁸ Because the question can be resolved as a matter of ordinary statutory interpretation, as discussed in Part III, courts should resist the temptation to invoke the major questions doctrine in resolving it. In other words, they should avoid using the new form of constitutional avoidance, if that is what it is.

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, most administrative lawyers would answer "the *Chevron* doctrine."⁷⁹ That answer is no longer clear either. For some thirty 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.⁸⁰ The Court invoked the two-step standard of review in over 100 decisions, and occasionally rebuked lower courts for failing to apply it.⁸¹ The Supreme Court essentially stopped using the *Chevron* doctrine in 2016,⁸² and several Justices have taken to writing separate opinions

78. See, e.g., Eugene Scalia, *The FTC's Breathtaking Power Grab*, WALL ST. J. (Jan. 12, 2023, 6:50 PM), <https://www.wsj.com/articles/the-ftcs-breathtaking-power-grab-noncompetitiveness-rule-capital-investment-wage-gap-job-growth-compliance-11673546029>.

79. So named for *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

80. See generally MERRILL, *CHEVRON DOCTRINE*, *supra* note 15.

81. 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). For a decision reversing and remanding a lower court for failing to apply the *Chevron* doctrine, see, for example, *Immigr. & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

82. See *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276–77 (2016) (invoking *Chevron*

arguing that it should be overruled or at least reconsidered.⁸³ The Court's latest Term is perhaps the most striking. The Court considered seven cases that involved a challenge to an agency's interpretation of its statute.⁸⁴ *Chevron* was not mentioned once in a controlling opinion and received only the most fleeting mention in two separate opinions.⁸⁵ 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 two cases.⁸⁶

The Court's determination to leave *Chevron* unmentioned is particularly striking in *West Virginia v. EPA*. The emergence of the major questions doctrine clearly operates as a modification of *Chevron*. Indeed, it is a kind of reverse-*Chevron*. *Chevron* says if the statute is unclear, defer to the agency;⁸⁷ *West Virginia* says, if the question is major, do not defer to the agency unless the statute is clear.⁸⁸ But the Court did not offer a single word in any of its recent decisions about how to integrate the new major questions doctrine with the *Chevron* doctrine. Does the major questions doctrine function as a preliminary inquiry (a "step zero" or maybe "step minus one"), which cuts off further analysis if the authorization is not clear? Or does the major questions doctrine operate like a substantive canon of interpretation applied at step one of *Chevron*, which supports the conclusion that the statute has a clear meaning contrary to the meaning urged by the agency? Or is the major questions doctrine analogous to the *Mead* doctrine, determining that the

in deferring to agency's interpretation of the standard of review on inter partes patent appeal).

83. See *Michigan v. EPA*, 576 U.S. 743, 761–64 (2015) (Thomas, J., concurring) (noting that EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes"); *Buffington v. McDonough*, 143 S. Ct. 14, 22 (Nov. 7, 2022) (cert. denied) (Gorsuch, J., dissenting) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (noting *Chevron* analysis depends on "an initial determination of whether a text is clear or ambiguous[,] which judges often cannot make "in a settled, principled, or evenhanded way.").

84. Gary Lawson, "*Mostly Dead?*": *Chevron's Shade* (forthcoming) (on file with author).

85. *West Virginia v. EPA*, 142 S. Ct. 2587, 2635 (2022) (Kagan, J., dissenting); *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2368 (2022) (Kavanaugh, J., dissenting).

86. Transcript of Oral Argument at 52–53, *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022) (No. 20-1312); Transcript of Oral Argument at 30–35, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114).

87. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

88. *West Virginia*, 142 S. Ct. at 2608–09.

agency is not entitled to *Chevron*-style deference but only respectful consideration under *Skidmore*?⁸⁹ Or perhaps no deference at all?

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 consideration 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 in reversing it.⁹⁰ 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 the doctrine until some kind of consensus emerges about the path forward. 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 critical fact that it is possible for the Justices, who decide only about seventy cases per Term, to dig into the details 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.⁹¹

What is a lower court judge supposed to do in this puzzling situation? Perhaps the most obvious course of action is to ask, first, if the question is major or minor in light of the multiple factors listed by the Court. If major, the agency loses, and the matter is effectively sent back to Congress for possible resolution. If minor, the *Chevron* doctrine applies, as the Court explicated through 2016. On the assumption that the question of the FTC's antitrust rulemaking authority is not a major question, as discussed in Part I, how then should the matter be resolved under the Court's explication of the *Chevron* doctrine as of 2016?

As detailed in *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State*,⁹² the *Chevron* doctrine has undergone significant

89. See *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Mead* effectively made *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which requires giving agency interpretations of statutes respectful consideration but does not make them binding, the general default standard of review, with *Chevron* reserved for cases in which the agency is exercising delegated authority to make binding rules or decisions.

90. See *Am. Hosp. Ass'n*, 142 S. Ct. at 1902–06 (striking down agency interpretation of complex Medicare reimbursement provision without mentioning *Chevron*); *Empire Health Found.*, 142 S. Ct. at 2358, 2361–67 (upholding agency interpretation of complex Medicare reimbursement provision without mentioning *Chevron*).

91. See Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1395–1398, 1415, 1443 (2017).

92. See MERRILL, *CHEVRON DOCTRINE*, *supra* note 15.

revision over its thirty-plus-year life span. What follows is a highly abbreviated version of the history most relevant to the question of whether the FTC has antitrust rulemaking authority.

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 Corp.*,⁹³ 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*.⁹⁴ 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 were implicitly regarded as the core cases.⁹⁵ The pattern of later decisions applying *Mead* is consistent with this understanding.⁹⁶ 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.⁹⁷ Justice Scalia continued in later cases to condemn *Mead* and its “force of law” requirement.⁹⁸

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.”⁹⁹ 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 questions in the agency context.¹⁰⁰ When the issue came back to the Court twenty-five years later, Justice Scalia was able to command a bare majority for this position.¹⁰¹ The distinction between jurisdictional and nonjurisdictional decisions was meaningless in the administrative context, he wrote for the Court, because all statutory limits on agency authority, if violated, make the

93. 533 U.S. 218 (2001).

94. *Id.* at 226–27.

95. *Id.* at 226–27, 230.

96. MERRILL, *CHEVRON DOCTRINE*, *supra* note 15, at 137–41 (discussing post-*Mead* decisions).

97. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

98. MERRILL, *CHEVRON DOCTRINE*, *supra* note 15, at 138–41.

99. *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013).

100. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377, 381–82 (1988) (Scalia, J., concurring).

101. *See generally* *City of Arlington v. FCC*, 569 U.S. 290 (2013) (Justice Scalia was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan.).

agency action *ultra vires*.¹⁰² Ergo all agency interpretations should be reviewed under *Chevron*.¹⁰³

In order to reach this result, Justice Scalia had to adopt a narrowing interpretation of *Mead* and the proposition that only agency actions having force of law are eligible for *Chevron* deference. In doing so, Justice 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.¹⁰⁴ Thus, as long as Congress has generally authorized an agency to engage in legislative rulemaking or to render binding adjudications, a court should apply *Chevron* to any and all agency decisions the agency adopts, whether or not Congress has specifically authorized the agency to act with the force of law with respect to the issue in question.

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.¹⁰⁵

Specifically, Chief Justice Roberts objected to the interpretation of *Mead* as making an agency eligible for *Chevron* deference based on one generic authority to act with the force of law.¹⁰⁶ 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.¹⁰⁷

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*—the FCC—Justice Scalia was able to rely on precedent holding that it has general authority

102. *Id.* at 297–98.

103. *See id.* at 306–07. The “ergo,” of course, does not follow. One could equally argue that if the transgression of any limit on agency authority renders its action *ultra vires*, all limits should be interpreted as a matter of independent judgment, which is effectively what the APA requires. *See* 5 U.S.C. § 706(2)(C).

104. *City of Arlington*, 569 U.S. at 306.

105. *Id.* at 312 (Roberts, C.J., dissenting).

106. *Id.* at 317.

107. *Id.* at 318.

to issue legislative rules as to all titles that it administers.¹⁰⁸ 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 § 5 of the FTC Act, which authorizes the agency to file complaints and determine whether particular firms are engaging in unfair methods of competition.¹⁰⁹ If the FTC finds a violation, it can issue a cease and desist order.¹¹⁰ However, under the original FTC Act, and still today, the agency has no authority to enforce such orders if they are challenged in court.¹¹¹ Rather, the order must be reviewed by a federal court of appeals, and if the court determines that it is valid, it will be *enforced by the court*.¹¹² Whether this constitutes agency authority to act with the force of law, or is more accurately characterized, as the Court did in a landmark decision in 1935, *Humphrey's Executor v. United States*,¹¹³ as the agency acting as a “judicial aid” to the court, is debatable.¹¹⁴

Another possible source of authority for the FTC to act with the force of law is § 6(g), which authorizes the agency to “make rules and regulations for the purpose of carrying out the provisions of this subchapter.”¹¹⁵ As discussed in Part III, 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.¹¹⁶ But the historical understanding of the FTC rulemaking grant, and the fact that Congress saw fit in 1975 to adopt an explicit grant of legislative rulemaking authority for the FTC with respect to deceptive practices, would seem to counsel against this interpretation.¹¹⁷

108. *See id.* at 296 (“Chevron thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (Souter, J., concurring in part and dissenting in part)).

109. 15 U.S.C. § 45(b).

110. *Id.*

111. *See infra* Part III.A, Part III.E.

112. 15 U.S.C. § 45(c) (“To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.”).

113. 295 U.S. 602 (1935).

114. *Id.* at 628; *see* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 890–92 (2001) (arguing that agency orders that can only be enforced by an Article III court do not have the “force of law”).

115. FTC Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified at 15 U.S.C. § 46(g)).

116. *See, e.g.*, sources cited *supra* note 5.

117. *See infra* Part III.

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 *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 when a court concludes, at step one, that Congress has not clearly or unambiguously addressed the precise question at issue. *Arlington* reaffirms this understanding.¹¹⁸ Courts should enforce the limits Congress has placed on agency authority, Justice 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.”¹¹⁹

So even if the *Chevron* doctrine applies, the decisive question is likely to boil down to one question of statutory interpretation: has Congress clearly or unambiguously foreclosed FTC authority to issue legislative rules on matters of competition policy? If the answer is yes, then the FTC’s assertion of such authority must be rejected at *Chevron*’s step one. As the Court observed in *Chevron*, “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously intent of Congress.”¹²⁰ It is to that question of statutory interpretation that the Article now turns.

III. FTC RULEMAKING AUTHORITY AS A MATTER OF ORDINARY STATUTORY INTERPRETATION

A. *The Original Understanding*

Congress created the FTC in 1914.¹²¹ And, as a creation of Congress, it has only the powers given to it by Congress.¹²² In terms of regulatory

118. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

119. *Id.*

120. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

121. *See generally* FTC Act, ch. 311, §§ 1–10, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41–58).

122. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”). The Court reaffirmed this understanding in *West Virginia v. EPA*, 142

authority, the relevant provision was § 5, which declared that “unfair methods of competition in commerce are hereby declared unlawful.”¹²³ Congress subsequently amended this provision in two respects. The current Act declares that unfair methods are also prohibited when they only “affect[] commerce.”¹²⁴ And it now also prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹²⁵ 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.

The enforcement powers given to the Commission under § 5 remain largely as they were established in 1914. The Act empowers the Commission 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.¹²⁶ 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.¹²⁷ 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 the person or entity directed to cease and desist does not appeal the order or, if it has been appealed, after a final judgment upholding it on appeal.¹²⁸ With respect to “final orders” regarding “unfair or deceptive” acts, the Commission itself may file a civil action seeking penalties for violation of a final order in federal district court.¹²⁹ Otherwise, however, the DOJ must bring civil penalty actions in federal district court.¹³⁰ By negative implication, therefore, cease and desist

S. Ct. 2587, 2609 (2022) (agencies “have only those powers given to them by Congress”).

123. FTC Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. § 45(a)(1)).

124. *Id.*

125. 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.” *Id.* Congress added the explicit extension to unfair and deceptive acts and practices in the Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111. Congress added the change from acts and practices “in commerce” to those “affecting commerce” in the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975. *See* Pub. L. No. 93-637, sec. 201(a), § 5, 88 Stat. 2183, 2193 (1975).

126. FTC Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. § 45(b)).

127. § 5, 38 Stat. at 720 (codified at 15 U.S.C. § 45(l)).

128. § 5, 38 Stat. at 721 (codified at 15 U.S.C. § 45(g)(1)–(2)).

129. 15 U.S.C. § 45(m)(1)(A).

130. *Id.* § 45(l).

orders 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 a court pursuant to an action brought by the DOJ. Which makes sense, given that DOJ has concurrent authority to ask courts to adjudicate violations of the antitrust laws.¹³¹

The original Act also authorized the Commission, under § 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.”¹³² Section 6(g) of the Act authorized the Commission “[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.”¹³³

What was the original meaning of the rulemaking grant found in § 6(g)? The best answer would seem to be that it was understood to empower the FTC to adopt “procedural” or internal housekeeping rules.¹³⁴ The relevant substantive authority over unfair competition was conferred by § 5.¹³⁵ This clearly contemplated adjudication, not rulemaking. Indeed, § 5 did not even contemplate an adjudication having the force of law, something that was regarded as problematic for an administrative body in 1914.¹³⁶ Any order issued under § 5 could only be enforced by an Article III court. Section 6 included a grant of authority to “make rules and regulations for the purpose[s] of carrying out the provisions of this Act.”¹³⁷ The referenced “rules and regulations” almost certainly meant procedural rules and regulations, since there was no provision in § 6 (or elsewhere) for the Commission to bring an enforcement action based on such rules.¹³⁸ This inference is reinforced by the placement of the rulemaking grant in § 6, which authorized investigations and reports but not any form of substantive regulation.¹³⁹

131. See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 694–95 (1948) (holding that the FTC and DOJ can exercise concurrent jurisdiction over the same conduct by the same parties).

132. § 6, 38 Stat. at 722 (codified at 15 U.S.C. § 46).

133. § 6(g) 38 Stat. at 722 (codified at 15 U.S.C. § 46(g)).

134. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 505 (2002).

135. § 5, 38 Stat. at 719 (codified at 15 U.S.C. § 45).

136. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 969–70 (2011).

137. § 6(g), 38 Stat. at 722 (codified at 15 U.S.C. § 46(g)).

138. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (explaining that rules are legislative rather than interpretive when they are the predicate for an enforcement action).

139. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court

The fact that the rulemaking provision appears in a sentence authorizing the Commission to “classify corporations” further supports this inference.

Admittedly, it is logically possible to interpret § 6(g) as a grant of legislative rulemaking authority, and as interpreted, to assert that such rules could then be enforced through adjudications conducted under § 5, which is another “provision[] of [the] Act.”¹⁴⁰ But the structure of the Act makes it highly unlikely that this was the original meaning of the Act. 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 § 6. If § 6 contemplated legislative rules defining unfair competition, the only possible way to enforce such rules would be under § 5. But recall that orders issued under § 5 had to be developed through adjudication, and the 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 adjudication 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 by courts. We usually think of legislative rulemaking authority as carrying with it various forms of ancillary authority, such as the power to enforce and interpret the rules so adopted.¹⁴¹ But under the structure of the FTC Act, as originally enacted, the power to enforce—and presumably to interpret—the supposed rules would be lodged, via § 5, not in the agency, but in the enforcement court.

Any uncertainty about the original meaning of the rulemaking grant in § 6 is resolved by considering the jurisprudence of rulemaking as it existed in 1914. In 1914, both Congress and the courts followed a conv[ention] for differentiating between grants of legislative and procedural rulemaking authority.¹⁴² Grants of rulemaking were regarded as legislative only if the organic statute provided some sanction or penalty for violation of the rules in question.¹⁴³ If the grant did not include such a provision, it was understood to confer only procedural or internal housekeeping authority.¹⁴⁴ The rulemaking grant in § 6 of the FTC Act contains

interpreted § 6 as conferring “quasi-legislative” powers on the FTC, by which it meant power to aid Congress in its legislative functions. *Id.* at 624. The Court made no mention of the § 6(g) rulemaking grant.

140. § 6(g), 38 Stat. at 722 (codified at 15 U.S.C. § 46(g)).

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

142. *Merrill & Watts*, *supra* note 134, at 495.

143. *Id.* at 472, 549–50.

144. *Id.* at 472.

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.¹⁴⁵ As previously noted, this shared understanding is reinforced by the placement of the rulemaking grant in § 6, which deals with information gathering and issuing reports.

For those who would consult legislative history—a shrinking 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 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.¹⁴⁶ Section 6(g) originated in the House bill, which conferred only investigative powers on the FTC, not adjudicative power.¹⁴⁷ The Senate bill granted the FTC adjudicative power but contained no reference to rulemaking.¹⁴⁸ The Conference Committee adopted the House measures on investigation, including § 6(g), and the Senate provisions regarding adjudication.¹⁴⁹ Under established practices for reconciling bills in conference, the Committee could not have granted the FTC legislative rulemaking authority over unfair competition matters, since neither bill granted the agency such authority.¹⁵⁰ In explaining the conference report to the House, Representative Covington, a member of the Conference Committee, stated that the “[FTC] will have no power to prescribe the methods of competition to be used in the future.”¹⁵¹ If one believes that we should consult legislative history to help determine meaning, this evidence is as close to conclusive as one can get.

145. The so-called “[H]ousekeeping [S]tatute,” 5 U.S.C. § 301, which predates the FTC Act, generally authorizes executive branch agencies to promulgate procedural rules and internal operating procedures. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 308–10 (1979). But the Act confers this authority only on “the head[s] of . . . [e]xecutive department[s] or military department[s],” and the FTC was envisioned as an “independent agency,” not an executive department. *Id.* at 309; Merrill & Watts, *supra* note 134, at 486. So, Congress may have felt it was necessary to include a specific grant of authority for the FTC to adopt procedural rules.

146. VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 79–88 (2016).

147. See S. Doc. No. 63-573, at 15 (2d Sess. 1914).

148. *Id.* at 7–10.

149. Merrill & Watts, *supra* note 134, at 505.

150. *Id.*

151. 51 CONG. REC. 14,932 (1914).

B. Contemporary and Longstanding Agency Interpretation

Even if one thinks that § 6(g) is ambiguous, relevant canons of statutory interpretation powerfully reinforce the conclusion that Congress did not contemplate legislative rulemaking. 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.¹⁵² A related canon is that longstanding and consistent agency interpretations by an agency are entitled to significant weight.¹⁵³

Soon after the enactment of the FTC Act in 1914, and consistently for nearly fifty 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.”¹⁵⁴ But these were understood to be voluntary, not legally binding.¹⁵⁵

C. 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 Congress has ratified that interpretation. Congress ratified the FTC’s original understanding of § 6(g) on multiple occasions. Over the years, it enacted several discrete statutes conferring legislative rulemaking power on the FTC—in each case with respect to a specific industry. These enactments included the Wool Products Labeling Act of 1940,¹⁵⁶ the Fur Products Labeling Act of 1951,¹⁵⁷ and the Flammable Fabrics Act of 1953.¹⁵⁸ 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 unnecessary.

152. See generally Merrill & Watts, *supra* note 134, at 487.

153. See MERRILL, *CHEVRON DOCTRINE*, *supra* note 15, at 33–54, 146–65 (reviewing both canons). See generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

154. Merrill & Watts, *supra* note 134, at 551–52.

155. *Id.* at 471–72, 551–52.

156. Wool Products Labeling Act of 1940, ch. 871, § 1, 54 Stat. 1128 (codified at 15 U.S.C. § 68d(a)); see Merrill & Watts, *supra* note 134, at 549.

157. Fur Products Labeling Act, ch. 298, § 1, 65 Stat. 175 (1951) (codified at 15 U.S.C. § 69f(a)); see Merrill & Watts, *supra* note 134, at 549.

158. Flammable Fabrics Act, Pub. L. No. 83-88, 67 Stat. 111, 112 (1953); see Merrill & Watts, *supra* note 134, at 550.

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 labeling appropriate for the sale and promotion of cigarettes.¹⁵⁹ Congress promptly overturned the rule with the enactment of the Federal Cigarette Labeling and Advertising Act in 1965.¹⁶⁰

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,¹⁶¹ Congress enacted a series of statutes prescribing restrictions on marketing tobacco products and assigned authority to enforce those statutes to agencies other than the FDA.¹⁶² 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.¹⁶³ 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.¹⁶⁴ Similarly, the history between the FTC and Congress indicates that it was well understood that the agency had no authority to make legislative rules.

D. *National Petroleum Refiners*

Frustrated by Congress's piecemeal approach to conferring rulemaking authority on the FTC, proponents of more aggressive FTC action pushed the agency to adopt legislative rules and dare the courts to stop them.¹⁶⁵ The oil industry, as always, was a convenient target. The FTC was convinced to issue a legislative rule, grounded in both its competition rule and deceptive practices authority, requiring all gasoline stations to post octane ratings at every gas

159. 16 C.F.R. pt. 408 (1966).

160. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965); see Merrill & Watts, *supra* note 134, at 553–54.

161. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 168–69 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

162. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 143–44.

163. *Id.* at 126.

164. *Id.* at 159–60.

165. For a history of fluctuating attitudes toward FTC rulemaking, see Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519 (2022).

pump.¹⁶⁶ The FTC explained that the rule would be applied in § 5 enforcement actions, with the only issue being whether the company had complied with the rule.¹⁶⁷ 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.¹⁶⁸

The D.C. Circuit, acting through an arch-liberal panel consisting of judges Wright, Bazelon, and Robinson, reversed.¹⁶⁹ The appeals court framed the question as whether the text of § 6(g), in particular the reference to “rules and regulations,” could be interpreted to authorize legislative rulemaking.¹⁷⁰ The court characterized the “plain meaning” of this phrase to be broad enough to including binding regulations, i.e., legislative rules.¹⁷¹ But of course, there are other types of rules—interpretive rules, statements of policy, and procedural rules. So, the unadorned reference to “rules and regulations” was in fact ambiguous as to whether legislative rules were included. The court's basic strategy was to interpret the ambiguous language of § 6(g) using the broadest possible form of purposive interpretation:

In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute.¹⁷²

The fact that § 5—the only provision that gave the FTC regulatory authority—made no mention of rulemaking was not dispositive, because no language in § 5 made the power to adjudicate unfair acts and practices the exclusive method of regulation.¹⁷³ 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.¹⁷⁴ When the court turned to

166. Posting of Minimum Octane Ratings on Gasoline Pumps, 36 Fed. Reg. 23,871, 23,871 (1971). The current octane rating rules are stated to be based on the Commission's authority over deceptive practices. See 16 C.F.R. § 306.1 (2022).

167. *Nat'l Petroleum Refiners Ass'n v. FTC*, 340 F. Supp. 1343, 1344–45 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

168. *Nat'l Petroleum Refiners Ass'n*, 340 F. Supp. at 1345–46.

169. *Nat'l Petroleum Refiners Ass'n*, 482 F.2d. at 672.

170. *Id.* at 677.

171. *Id.* at 685–86.

172. *Id.* at 689.

173. *Id.* at 675–76.

174. *Id.* at 673, 691. Many years ago, in the *Queen and Crescent Case*, the Supreme Court

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.”¹⁷⁵ The details were largely relegated to an appendix, so as to disguise the dissembling about this.¹⁷⁶

With the presumption about the scope of delegated powers flipped on its head, the court had little trouble determining that the § 6(g) gave the FTC the power to issue legislative rules, which would then be enforced through § 5 adjudications. 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.¹⁷⁷ In point of fact, the majority of these “similar provisions” were actually quite different, as they concerned the proper interpretation of *existing* grants of legislative rulemaking authority, not the question of whether there was a grant of such authority in the first place.¹⁷⁸

To its credit, the D.C. Circuit addressed the interpretive arguments relied upon by the district court in concluding that legislative rulemaking power had not been given to the FTC.¹⁷⁹ These included the structural argument that the rulemaking grant appeared in § 6 rather than § 5, the weight ordinarily given the FTC’s contemporaneous and longstanding understanding that it had no legislative authority, and Congress’s apparent ratification of this understanding through the enactment of multiple rulemaking grants.¹⁸⁰ But the panel concluded that these interpretive guideposts were outweighed by what it characterized as the “felt and openly articulated concerns motivating

held that the power of an agency to make legislative rules was “never to be implied” but had to be conferred expressly. *See* *ICC v. Cincinnati, New Orleans, & Tex. Pac. Ry.*, 167 U.S. 479, 494–95 (1897). Justice Gorsuch, in his concurring opinion in *West Virginia v. EPA*, cited the case as demonstrating the venerable provenance of the major questions doctrine. 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring).

175. *Nat’l Petroleum Refiners Ass’n*, 482 F.2d. at 686.

176. *Id.* at 698–709.

177. *Id.* at 678–83.

178. *Id.* at 678. For example, the issue in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), was whether a grant of authority to the FCC to make “special regulations applicable to radio stations engaged in chain broadcasting” was limited to regulations governing matters of signal interference, or also extended to regulations restricting the number of stations owned by networks. *Id.* at 215. Other decisions cited by the court held that an agency given legislative rulemaking authority could cut off further consideration of issues governed by a rule in individual adjudications. *See* *United States v. Storer Broad. Co.*, 351 U.S. 192, 202 (1956); *Fed. Power Comm’n v. Texaco, Inc.*, 377 U.S. 33, 39–41 (1964).

179. *Nat’l Petroleum Refiners Ass’n*, 482 F.2d. at 693–97.

180. *Id.*

the law's framers": protecting the public from unfair competition and deceptive marketing practices.¹⁸¹ Congress took the first step in 1914 when it eliminated the judicial monopoly on trials and gave the Commission authority to conduct adjudications.¹⁸² Now, the Commission required authority to adopt legislative rules "to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices."¹⁸³ The rationale for the decision boiled down to the proposition that an ambiguous rulemaking grant should be construed to include the power to make binding legislative rules, because Congress could not foresee in 1914 how important rulemaking would become as a supplement to adjudication.

With the panel adopting the broadest conceivable purposive argument, and bending every possible precedent to favor the FTC, it came as no surprise that it overturned the district court and held the FTC had the power to issue the octane rule. The real surprise was that only Justice Stewart publicly noted that he would have granted certiorari, presumably to correct the D.C. Circuit's result-oriented decision.¹⁸⁴

E. The 1975 Federal Trade Improvements Act

At the same time the D.C. Circuit was revising the FTC 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 Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975.¹⁸⁵ That 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.¹⁸⁶ However, in keeping with the then-fashionable enthusiasm for "hybrid rulemaking," this new authority was hedged in with certain procedural requirements not found in the APA's

181. *Id.* at 690.

182. *Id.* at 693.

183. *Id.*

184. *Nat'l Petroleum Refiners Ass'n v. FTC*, 415 U.S. 951 (1974).

185. Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975). This Act was two statutes in one. The largest part dealt with warranty claims and conferred additional authority on the FTC to regulate warranties to make them more useful for consumers. A second part gave the FTC new powers to enforce its orders, seek relief for consumers when harmed by violations of FTC orders, and engage in legislative rulemaking on matters of deceptive practices.

186. 15 U.S.C. § 57a.

general provisions that govern legislative rulemaking.¹⁸⁷ For example, the FTC was directed to allow oral presentations and cross examination if necessary to resolve disputed issues of fact, and all rules were subject to judicial review under the substantial evidence standard of review.¹⁸⁸

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.¹⁸⁹ 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 [§ 5] of this title).”¹⁹⁰ This was an express affirmation of the *expressio unis canon*—the expression of one thing precludes the inclusion of another. Standing alone, this sentence would preclude any exercise of rulemaking by the FTC under the general notice-and-comment procedures of the APA.

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 competition in or affecting commerce.”¹⁹¹ 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. Congress underscored the

187. 5 U.S.C. § 553. On the movement for hybrid rulemaking, see Stephen F. Williams, “Hybrid Rulemaking” under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1974). At least as a matter of judicially-imposed procedures, the trend came to an abrupt end with *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (holding that courts generally have no authority to impose procedures on agencies beyond those required by the APA).

188. See Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, § 202(c)(1), (e)(3), 88 Stat. 2183, 2194–95 (1975). The original hybrid provisions are codified at 15 U.S.C. § 57a(c)(2) and § 57a(e)(3)(B). Without expanding the FTC’s authority beyond deceptive practices rulemaking, Congress added additional hybrid procedures in 1980, including a requirement that rulemaking be conducted before an independent hearing officer, a prohibition on ex parte contacts, a requirement that the Commission provide a regulatory analysis of the need for the rule, a requirement that rules be submitted to the appropriate congressional committees before they become final, and a provision for a two-House veto of rules. See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified in part at § 57a(b)(2)(A), (c)(1)(B), (d)(1)).

189. § 57a(a).

190. § 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. § 57a(a)(1)(A).

191. § 57a(a)(2) (emphasis added).

significance of these qualifying sentences by amending the original § 6(g) to provide that the FTC had authority to make rules and regulations for the purposes of carrying out the provisions of this Act “except as provided in section 57a(a)(2) of this title”—the provision containing the two forgoing sentences.

Herein lies what may be the dispositive question about the scope of the FTC’s authority to issue legislative rules dealing with unfair competition as opposed to deceptive practices. Clearly, the second sentence meant to preserve the status quo with respect to the FTC’s rulemaking authority in antitrust matters. Chairman Kahn and her supporters will argue that the status quo was the meaning attributed to the Act by the D.C. Circuit’s 1973 decision in *National Petroleum Refiners*.¹⁹² After all, the D.C. Circuit had authoritatively construed the original § 6(g) to confer legislative rulemaking authority on the FTC in both competition and deceptive practices matters, the Supreme Court had denied certiorari, and this had occurred before the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act in 1975.¹⁹³

The first thing to do, as always, is to take a close look at the text of this savings clause. Note that the savings clause mentions only two types of “rules” affecting unfair competition which are to remain unaffected by the adoption of rulemaking authority over deceptive practices: interpretative rules and general statements of policy.¹⁹⁴ As previously discussed, the most important “rules” employed by the FTC and DOJ in competition matters are the Merger Guidelines, which are general statements of policy, not legislative rules. One or more members of Congress, or someone on the staff, was apparently aware of the importance of the Merger Guidelines and thought it was important to provide that they were not affected.¹⁹⁵ There is no mention of legislative rules about competition policy, although Congress

192. The only source cited by the FTC for its authority to promulgate a legislative rule in an unfair competition matter is *National Petroleum Refiners Association v. FTC*, 415 U.S. 951 (1974). Non-Compete Clause Rule, 88 Fed. Reg. 3,482, 3,499 n.226 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

193. The Supreme Court denied certiorari on February 25, 1974. See *Nat’l Petroleum Refiners Ass’n v. FTC*, 415 U.S. 951 (1974). The House approved the conference report on the bill that became the FTC Improvements Act ten months later, on December 16, 1974. 120 CONG. REC. 40,238 (1974). The Senate followed suit two days after that. 120 CONG. REC. 40,711 (1974).

194. It says, “including interpretive rules” and “general statements of policy,” however, there are other types of rules besides legislative rules, such as procedural rules and rules governing matters of internal organization. 15 U.S.C. § 57a(a)(2). So, one cannot infer from the use of the word “including” that legislative rules were saved.

195. The Merger Guidelines were first issued in 1968. *1968 Merger Guidelines*, U.S. DEPT. OF JUST., <https://www.justice.gov/archives/atr/1968-merger-guidelines> (Aug. 4, 2015).

added a provision preserving rules adopted under the authority of § 6(g) prior to the date of the amendment, thereby saving the octane rule.¹⁹⁶

Consider, too, the oddity that Congress would see fit to adopt relatively more restrictive hybrid procedures for rulemaking about deceptive practices while supposedly allowing the FTC to engage in legislative rulemaking in competition matters using the more streamlined notice-and-comment procedures of § 553 of the APA. Antitrust cases are often fact-intensive, which is one reason why they have been resolved using trial-type procedures ever since the Sherman Act was passed in 1890. Given that Congress was enamored of hybrid rulemaking procedures in 1975, on the ground that they would allow more intensive probing of fact issues, one would expect it to require the use of such procedures in competition cases if Congress intended to ratify FTC rulemaking authority in competition cases. Instead, it focused its attention exclusively on deceptive practices, and mentioned the FTC's unfair competition authority only in a savings clause.

Recall as well that the FTC's authority to enforce the antitrust laws is exercised concurrently with DOJ. DOJ has always enforced those laws using case-by-case adjudication in court. There has always been some tension between the FTC and DOJ over their respective spheres of authority in enforcing the antitrust laws.¹⁹⁷ If DOJ thought that Congress was ratifying FTC authority to adopt legislative rules dealing with competition policy, while the Antitrust Division 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.

Finally, the entire focus of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975 was on protecting consumers from misleading warranty claims and other deceptive practices. Improvements in antitrust enforcement were not on the table. There is much to be said for assuming that long and well-established institutional practices have not been overturned by obscure and ambiguous clauses in legislation devoted to other

196. Section 202(c)(1) of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act provided that the new rulemaking grant and the provision making it exclusive “shall not affect the validity of any rule which was promulgated under § 6(g) of the FTC Act prior to the date of enactment of this section.” 88 Stat. 2198 (not codified). Congress codified a version of the octane rule in 1978. Petroleum Marketing Practices Act, Pub. L. No. 95-297, tit. II, § 202, 92 Stat. 334 (1978) (codified at 15 U.S.C. § 2822). The implementing regulations currently state that a violation of the rule “is an unfair or deceptive act or practice” under § 5 of the FTC Act, 16 CFR § 306.1 (2022), indicating that the rule is now understood to be grounded in deceptive practices concerns, rather than unfair competition.

197. HOVENKAMP, *supra* note 75, at 521 (focusing on § 13.1).

matters. (No “elephants in mouseholes” again).¹⁹⁸ By 1975, the FTC had enforced antitrust claims through case-by-case adjudication for fifty years; DOJ had been doing so even longer. Congress undoubtedly assumed that 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. The agency’s institutional practice in this regard was thoroughly entrenched and it is highly unlikely that Congress would act to upset this settled convention through ratification of a recent D.C. Circuit decision.

It is fair to ask whether the legislative history sheds any light on the two sentences of the 1975 Act making the new legislative rulemaking authority for deceptive practices “exclusive” and stating that the new authority “shall not affect any authority” of the Commission to prescribe rules in competition matters.¹⁹⁹ One thing we learn from that history is that the two sentences in question were added by the Conference Committee at the last moment. The Senate bill that served as the primary vehicle for the 1975 Act (S.B. 356) contained no grant of legislative rulemaking authority for the Commission.²⁰⁰ The House amended the Senate bill in various ways, including by adding the grant of rulemaking for deceptive practices.²⁰¹ The House amendment stated flatly that “[t]he Commission shall have no authority under this Act, other than its authority under this section, to prescribe rules.”²⁰² The matter was referred to a Conference Committee to iron out the differences, which returned a conference substitute that included, for the first time, the two sentences in question.²⁰³ The Joint Explanatory Statement of the Committee of Conference observed that the new rulemaking grant “would be the exclusive authority for such rules” and that “[t]he conference substitute does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce.”²⁰⁴ In effect, the Joint Explanatory Statement simply paraphrased the two sentences in the text.

Some additional context is provided by the House Report issued in connection with the House bill that added the rulemaking grant.²⁰⁵ The Report observed that hearings were held and the markup of the bill began after the District Court held that the FTC has no legislative rulemaking

198. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

199. 15 U.S.C. § 57a(a)(2).

200. See S. REP. NO. 93-151 (1973); S. REP. NO. 93-280 (1973).

201. 120 CONG. REC. 33,979 (1974).

202. *Id.* (reproducing House amendments to Senate Bill 356 as reported to the Senate).

203. 120 CONG. REC. 40,247 (1974).

204. *Id.* (reproducing conference substitute and the Joint Explanatory Statement).

205. H. Rep. No. 93-1107, 93d Cong., 2d Sess., 29–34 (June 13, 1974).

authority.²⁰⁶ In contrast, the final version of the bill, and the accompanying Report, were prepared after the D.C. Circuit had reversed that decision.²⁰⁷ The Report described the effect of the D.C. Circuit's decision as being "to recognize the FTC's authority to prescribe rules having substantive effect which would constrain the conduct of legitimate businesses based on the very broad standards of unfair methods of competition and unfair or deceptive acts or practices."²⁰⁸ It went on to observe that such rules would be adopted using the notice-and-comment procedures of § 553 of the APA, and would be reviewed under the arbitrary and capricious standard of review. It then stated: "Your committee believes that these rulemaking procedures and the scope of judicial review are inadequate for proceedings in which the integrity of the proposed rule may rest on the resolution of issues of material fact."²⁰⁹ Hence, the hybrid procedures prescribed for the new rulemaking grant for deceptive practices were designed to "afford the safeguards which are needed."²¹⁰ Similar statements are found in the section-by-section analysis of the Report.²¹¹

In describing the new rulemaking authority in greater detail, the Report made clear that the House bill repealed the rulemaking grant in § 6(g), and hence precluded any authority for the FTC to engage in legislative rulemaking in antitrust matters:

Section 202 replaces the existing rulemaking authority of the FTC under section 6(g) of the Act with a new section 18 which authorizes the FTC to issue rules defining with specificity the acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of the Federal Trade Commission Act This rulemaking authority would be the exclusive substantive rulemaking authority of the FTC under the Federal Trade Commission Act. Thus, the Commission would not have rulemaking authority with respect to unfair methods of competition to the extent they are not unfair for deceptive acts or practices.²¹²

206. *Id.* at 33.

207. *Id.* (citing the Appeals Court decision and noting the Supreme Court's denial of certiorari).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 45-48; *see, e.g., id.* at 45 ("Your committee believes these [notice-and-comment] rulemaking procedures and this scope of judicial review may be inadequate in some cases where fundamental factual premises of a rule are at issue.").

212. H.R. REP. NO. 93-1107, at 46 (1974) (emphasis added).

The FTC responded to the House bill with a critical letter.²¹³ The Commission stated that the D.C. Circuit's decision in *National Petroleum Refiners* had "laid to rest" any doubts about whether the agency had authority to promulgate legislative rules.²¹⁴ Therefore, the Commission saw "no need for legislative reaffirmation of its rulemaking authority."²¹⁵ The FTC was especially critical of the bill's adoption of hybrid procedures for deceptive practices rulemaking which, according to the Commission, would "prevent the Commission from expeditiously fulfilling its responsibilities."²¹⁶ Finally, the Commission objected to prohibition of rulemaking in competition matters. It wrote:

The Commission perceives no reason for curtailing its powers in this area. Admittedly, the Commission's consumer protection responsibilities are far more conducive to the rulemaking process, and, for this reason, the Commission does not foresee a high level of rulemaking activity in the antitrust area. That is not to say, however, that rulemaking is not an appropriate or an effective regulatory device for antitrust enforcement. For instance, where the legality of identical, similar, or related practices of an anticompetitive nature may be addressed responsibly and more efficiently in a single proceeding than in case-by-case adjudication, law enforcement by rulemaking would be considered more favorably."²¹⁷

Although it reproduced the Commission's letter in its Report, the House Committee was unmoved by these entreaties.

As previously noted, the Conference Committee softened the House's language that expressly precluded rulemaking in antitrust matters, substituting instead the savings clause that preserved "any authority" the FTC had to engage in rulemaking with respect to unfair competition.²¹⁸ The Joint Explanatory Statement of the Committee of Conference contains no explanation for the last-minute change,²¹⁹ although as previously speculated, it may have been motivated by a desire to avoid casting doubt on the Merger Guidelines. There is no suggestion in the Joint Explanatory Statement that the savings clause was added to preserve the D.C. Circuit's interpretation of the original § 6(g). There is one reference to the "octane rating" rule, but no mention of the D.C. Circuit's decision in *National Petroleum Refiners* upholding that rule based on its

213. *Id.* at 56–61 (reproducing the April 29, 1974 letter from the FTC to Congressman Harley Staggers, Chair of the House Committee on Interstate and Foreign Commerce).

214. *Id.* at 57.

215. *Id.*

216. *Id.* at 57–58.

217. *Id.* at 57.

218. 15 U.S.C. § 57a(a)(2).

219. *See generally* 120 CONG. REC. 40,244–50 (1974).

interpretation of the original § 6(g).²²⁰ As previously noted, the Conference Bill amended § 6(g) by qualifying the authority of the FTC to make rules under § 6(g) by referencing the limitations added by new rulemaking grant and the savings clause.²²¹

When we examine the statements made on the floor of the House and Senate as the members prepared to vote on the conference report, we find some references to the “octane ruling” and in one instance to *National Petroleum Refiners*.²²² Particularly in the Senate, which was taken by surprise by the House’s addition of legislative rulemaking in deceptive practices cases, several speakers appeared to assume that the FTC had been “granted” rulemaking authority by a recent judicial decision. But with one exception,²²³ the Senators had only a vague notion about which court had rendered the decision or whether it applied to competition matters as well as deceptive practices.²²⁴

The House provided a more extensive explanation of the reason for the rulemaking grant and its limits. Representative James Broyhill of North Carolina was closely involved in the drafting of the grant of rulemaking authority and was one of the House managers in the Conference Committee. In urging his fellow legislators to adopt the

220. *Id.* at 40,247.

221. *See infra* notes 222–223.

222. Senator Gary Hart of Colorado, who was not a member of the Conference Committee, quoted from the D.C. Circuit’s opinion in *National Petroleum Refiners* and observed that the bill about to be passed would establish a kind of natural experiment between hybrid procedures, which would apply to deceptive practices rules, and informal rulemaking procedures, which would apply to rules respecting unfair competition. 120 CONG. REC. 40,713 (1974) (statement of Sen. Hart). So, he at least read the savings clause as preserving the *National Petroleum Refiners* interpretation as applied to competition matters.

223. *See supra* note 200 and accompanying text.

224. For example, Senator Warren Magnuson, a bill sponsor and a member of the Conference Committee, thought that the hybrid rulemaking procedures in the conference report struck the right balance between fairness and avoiding abuse, at least relative to “the completely informal rulemaking procedure under which the Commission is presently authorized to operate.” 120 CONG. REC. 40,713 (1974) (statement of Sen. Magnuson). Senator Taft of Ohio, who was not a member of the Conference Committee, expressed concern that the hybrid procedures endorsed by the Conference Committee provided inadequate protection to firms in developing a record about contested questions of fact. This was especially true given that “the Supreme Court in a recent ruling has recently given to the Federal Trade Commission very broad rulemaking power, subject only, of course, to the due process requirement.” *Id.* at 40,723 (statement of Sen. Taft) (Although one cannot be completely sure, he evidently thought that *National Petroleum Refiners* was a decision of the Supreme Court).

conference report, he began by explaining the rationale for the rulemaking provision:

For a number of years, the FTC issued rules defining acts or practices deemed unfair or deceptive to consumers. During this period, there were continuing assertions that the FTC did not possess substantive rulemaking authority, and that any rules it issued had only the effect of being a guideline to industries.

In the Octane Rating case, the court held that the Federal Trade Act did confer authority to the FTC to issue substantive rules defining both unfair methods of competition and unfair or deceptive acts or practices to consumers. Under this interpretation, the FTC has the authority to issue substantive rules which may affect an entire industry and, in some cases, a great number of industries. However, the Act is silent regarding the procedural requirements to be followed in issuing these rules; therefore, those persons immediately and seriously affected by such rules have no procedural rights before the agency except the informal rulemaking procedure set by the Administrative Procedures Act. Thus, the Interstate and Foreign Commerce Committee determined that the Federal Trade Commission Act should be amended to provide adequate procedural safeguards for those affected by the Commission's rules. In our judgment, more effective, workable, and meaningful rules will be promulgated if persons affected by such rules have an opportunity, by cross-examination and rebuttal evidence, to challenge the factual assumptions on which the agency is proceeding and to show in what respect such assumptions are erroneous.²²⁵

This summary of the background running up to the new legislation is entirely accurate, from the recognition of controversy over the authority of the FTC to make legislative rules (what Representative Broyhill calls “substantive rules”), to the recent interpretation of the FTC Act by the D.C. Circuit in *National Petroleum Refiners* (which he calls the “Octane Rating case”), to the recognition that such rules would be governed by the informal notice-and-comment procedures of the APA, to the rationale that the House committee had for adopting hybrid procedures in lieu of the APA procedures.²²⁶

Representative Broyhill then proceeded to describe the savings clause, i.e., what import the new rulemaking authority in deceptive practice matters would have for FTC authority in competition cases. His comments appear under the heading (which was likely added after he spoke): “Antitrust Rulemaking Authority Not Intended.”²²⁷ The transcript reads:

The rulemaking provision, I might add, does not affect any authority the FTC might have to promulgate rules which respect to “unfair methods of competition” including, of course, antitrust prohibitions. I myself do not believe that the FTC has any such authority. I am advised that there is a passing reference in the appellate court decision in the Octane

225. 120 CONG. REC. 41,407 (1974) (statement of Rep. Broyhill).

226. *Id.*

227. *Id.*

Posting case, to the effect that the FTC may have some kind of authority to issue some kind of antitrust rules. Antitrust rules would obviously have a far more pervasive effect than rules defining unfair or deceptive acts or practices, and I would feel very uncomfortable giving such antitrust rules the same effect as this bill gives consumer practices rules. Accordingly, we have made clear that the new bill does not deal with the antitrust laws.²²⁸

These statements are subject to the usual caveats about the probative value of interpretive statements of individual legislators. Representative Broyhill speaks primarily about his own views and caution is always in order before attributing the views of a single legislator to those of Congress as a whole.²²⁹ But he spoke from a position of authority, as a member of the House committee that drafted the rulemaking grant and a member of the Conference Committee. No one in the House rose to challenge his views. Perhaps more importantly, his final sentence purports to speak for the Conference Committee: “[W]e have made clear that the new bill does not deal with the antitrust laws.”²³⁰

Broyhill’s understanding of the FTC Act as it existed in 1974 is consistent with the statements of Senators noted above.²³¹ They all assume that the D.C. Circuit’s decision is the most recent and authoritative judicial interpretation of the scope of the FTC’s rulemaking authority. The Senators, however, do not offer any independent view about the correct meaning of the FTC Act as of 1974. Representative Broyhill states that “I myself do not believe the FTC has any such authority.”²³² So he, at least, disagreed with the D.C. Circuit interpretation of the Act. The bottom line of the Broyhill comments is that the Improvements Act “does not deal with the antitrust laws.”²³³ This is consistent with the best understanding of the 1975 legislation that can be gathered from the text.

In sum, the enactment of the FTC Improvements Act in 1975 cannot be construed as a ratification of the D.C. Circuit’s interpretation of § 6(g) of the original FTC Act in *National Petroleum Refiners*. The text of the 1975 Act makes no reference to *National Petroleum Refiners*. The context of the 1975 enactment makes clear that Congress was focused entirely on the Commission’s authority to regulate deceptive practices, especially misleading warranties. The sole reference to rulemaking in competition matters; the savings clause now codified as 15 U.S.C. § 57a(a)(2) makes clear that antitrust rulemaking

228. *Id.* (emphasis added).

229. *Id.*

230. *Id.*

231. *See supra* notes 222–223.

232. 120 CONG. REC. 41,407 (1974) (comments of Rep. Broyhill).

233. *Id.*

was left untouched.²³⁴ The fact that some participants in the legislative process assumed the D.C. Circuit had correctly interpreted § 6(g) does not matter; others thought it had not. The fact that the FTC wanted the D.C. Circuit's decision to be regarded as correct does not matter. The House and the Conference Committee rejected the Commission's entreaty to preserve its rulemaking authority as construed in *National Petroleum Refiners*.²³⁵

When Congress wrote that the conferral of new rulemaking authority on the FTC with respect to 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 determined*.²³⁶ Conceivably, the D.C. Circuit might accept the claim that the decision in *National Petroleum Refiners* should be regarded 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 original Act. *National Petroleum Refiners* does not bind the Court, and it would be short work for the Court to see through the 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 1975.²³⁷ It has not authorized it with respect to unfair competition as of today.

CONCLUSION

The FTC's chair has made clear that she wants the FTC to have authority to issue legislative rules in competition matters. In early 2023, the Commission threw down the gauntlet, issuing a notice in the Federal Register proposing to adopt a legislative rule that would ban all non-compete agreements in employment contracts, on a nationwide basis.²³⁸ If upheld by the courts, this would constitute a precedent for other legislative rules, such as rules requiring that high tech firms be broken up if they obtain a specified level of market dominance or rules that effectively transform tech firms into

234. 15 U.S.C. § 57a(a)(2).

235. Any attempt by the FTC to argue that the 1975 Act ratified the interpretation in *National Petroleum Refiners* is undermined by the fact nearly fifty years have elapsed since the decision and the enactment of the Reform Act, and the FTC has not asserted authority to engage in legislative rulemaking based on § 6(g) in the intervening years. *See Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973); 15 U.S.C. § 46(g). As always, novel interpretations of agency authority inconsistent with longstanding practice should be regarded with skepticism.

236. 15 U.S.C. § 57a(a)(2).

237. *Id.* § 57a(a)(1)(A).

238. *See Non-Compete Clause Rule*, 88 Fed. Reg. 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

common carriers.²³⁹ Whatever one thinks of such ideas, administrative agencies are powerless to act under our system of government unless Congress gives them such power. When considered against the drafting conventions followed when Congress passed the FTC Act in 1914, the original law was never intended to grant legislative rulemaking authority to the FTC. The Commission adhered to this understanding for the first fifty years of its existence. Congress repeatedly ratified this understanding by enacting limited grants of rulemaking power to the FTC. The evidence that the FTC has the power to promulgate legislative rules regulating anti-competitive behavior consists of a single D.C. Circuit opinion that boils down to the proposition that legislative rulemaking had come to be regarded in the 1970s to be a good thing. The Supreme Court should make quick work of such a claim if and when any forthcoming 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.²⁴⁰ 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 interpretation of ambiguities that fall within the scope of its delegated authority.²⁴¹ But this structure of government can be sustained only if courts conclude that Congress has *actually*, even if only implicitly, made the required delegation of regulatory authority. Adopting a fiction that any ambiguity in an agency’s organic act is an implicit delegation of the power to regulate, to be accepted by courts if reasonable, is a recipe for a runaway administrative state. *West Virginia v. EPA* indicates that the Court now believes some corrective to *Arlington* is required. But the corrective should not be limited to what a majority of the Justices regard as a major question. *Chevron* should be clarified by requiring courts to determine the delegated authority of an agency in every case in which the scope of its authority is contested.²⁴² A future case addressing the FTC’s assertion of authority to make legislative rules governing antitrust law would be a fitting occasion to do so.

239. Some journalistic accounts suggest the FTC would like to adopt rules that would require high tech companies “to offer open and fair access to their platforms, enable data sharing with new entrants and offer data portability to consumers.” Steve Lohr, *Biden Administration and Antitrust Officials Take Aim at Big Tech Companies*, N.Y. TIMES, Dec. 12, 2022, at B4.

240. See *supra* note 122 and accompanying text.

241. *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276–77 (2016).

242. See MERRILL, *CHEVRON* DOCTRINE, *supra* note 15.