Against Antitrust Regulation

By Noah Joshua Phillips

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Key Points

- The Federal Trade Commission (FTC) is poised to issue antitrust regulations, a departure from over a century of antitrust law development through adjudication that could affect much of the US economy.
- The FTC Act does not give the agency authority to issue antitrust regulations, and the sole legal basis for doing so—an appellate court decision from the 1970s—does not comport with contemporary statutory construction or administrative law.
- The extravagant regulatory power over virtually the whole economy that the FTC claims Congress delegated to it would violate the Constitution's separation of powers.

In July 2021, President Joe Biden issued his Executive Order on Promoting Competition in the American Economy (EO).[1] The EO called for issuing regulation after regulation, including a bevy of rules concerning "unfair method[s] of competition" (UMC), to be promulgated by the Federal Trade Commission (FTC).[2] US antitrust law has been developed through adjudicated decisions for 132 years, and the commission has brought lawsuits to enforce antitrust law since it opened its doors in 1915. Political progressives are instead calling for the agency to issue antitrust regulations with the force of law,[3] and my colleague Chair Lina Khan indicated recently that one such rule will be issued soon.[4]

The power the commission would assert in promulgating antitrust regulations is illegal and unconstitutional. Neither the text nor the structure of the FTC Act support it. Even if they did, delegating to the commission plenary power over virtually all US economic activity would violate the separation of powers embedded in the US Constitution.

The EO contemplates antitrust regulation for everything from privacy to employment contracts to intellectual property to devices.[5] Chair Khan described the agency's power as "shap[ing] the distribution of power and opportunity across our economy."[6] Our Constitution does not abide an agency arrogating to itself the ability to govern any private economic affair, especially without a clear mandate from Congress. So few people grabbing so much power to govern so many with so little check on it flies in the face of the limited, divided, and democratic structure of the United States government. In issuing bright-line rules where the law commands a careful analysis of conduct in light of the market wherein it takes place, antitrust regulation would also contravene antitrust law itself.

It is not too late. The FTC should turn back.

The FTC Lacks Authority to Promulgate Antitrust Regulations

The progressive theory is that part of a sentence in Section 6(g) of the FTC Act confers on the commission the power to regulate anything a bare majority of unelected FTC commissioners considers "unfair methods of competition."[7] Yet neither the act's text nor its structure suggests that the 63rd Congress intended those few words to give the new agency authority to regulate much of the American economy.[8] And, as discussed below, the only court to rule to the contrary predicated its decision on an interpretation utterly alien to well-established jurisprudence concerning the regulatory authority of federal agencies.

The FTC Act Does Not Empower the Agency to Issue Antitrust Regulations. As originally enacted in 1914, Section 6(g) states "that the commission shall also have power . . . from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."[9] That language has not changed materially since then.[10] Those are all of the magic words that purportedly give the FTC authority to issue substantive UMC rules regulating competition across the economy.

The rest of Section 6, which enumerates "additional powers" on top of the enforcement power conveyed by Section 5, originally gave the FTC authority to investigate and report on the business practices of corporations subject to its jurisdiction.[11] Section 6 has since been expanded by amendment, but all those additional powers concern investigating, reporting, consulting, and advising.[12] None of Section 6's provisions forbid anything, let alone authorize the FTC to undertake any enforcement action or impose any penalties.[13]

Section 5, by contrast, is the FTC Act's substantive core, and it concerns enforcement, not regulation. It originally "declared unlawful" only "unfair methods of competition,"[14] but in 1938, Congress amended it to ban "unfair or deceptive acts or practices" as well.[15]

Section 5 also lays out in detail the process by which the commission is to enforce these prohibitions. In a nutshell, if the FTC has "reason to believe" that Section 5 has been violated, it must issue a complaint containing the charges against the alleged violator and then conduct a formal hearing at which the accused party has the right to mount a defense.[16] If the commission concludes that a violation has occurred, it must issue a written report of its findings and conclusions and an order forbidding the respondent from engaging in the offending conduct.[17] The respondent has the right to have that decision reviewed by a federal appellate court, which may affirm, modify, or set aside the commission's order.[18] That outcome, in turn, is reviewable by the Supreme Court upon a grant of certiorari.[19] Commission determinations are granted deference on appeal.[20]

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Section 5 says nothing about issuing rules or regulations. It describes case-by-case adjudication as the FTC's sole enforcement mechanism.[21] And for UMC violations, it limits the commission's remedial power to cease and desist orders.[22]

Sections 5 and 6 of the FTC Act reflect the debate in the 63rd Congress over what the new agency was to be. The House passed a bill to create an investigative bureau, while the Senate wanted to create an enforcement agency. The House bill, H.R. 15613, conferred no enforcement authority to the commission. The agency's powers were limited to collecting information about corporations, investigating business practices, issuing reports, and making recommendations—essentially the same powers that ended up in Section 6 of the FTC Act.[23] H.R. 15613 included language nearly identical to that of Section 6(g),[24] but in the context of a bill that contained no substantive liability standards or enforcement authority, such language cannot be read as authorizing substantive antitrust regulations. When amendments conferring substantive rulemaking authority came up in debate, the House rejected them.[25]

Upon receiving the House bill, the Senate replaced everything after the enacting clause with new language, including a provision that would become

Section 5 of the FTC Act.[26] The Senate's bill made no mention of rules or regulations, and like Section 5 of the act, it specified case-by-case proceedings as the only way in which the commission could go after any unlawful conduct.[27]

Thus, the Conference Committee was between two bills, neither of which contemplated substantive rulemaking. The compromise was melding the two, with Section 5 reflecting the Senate's vision of the agency and Section 6 reflecting the House's. This legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it.[28]

An unassuming sliver in Section 6(g) allows "rules and regulations for the purpose of carrying out the [FTC Act's] provisions."[29] *Ab initio*, those provisions included the powers already discussed: (1) studying business practices and providing input to Congress, the courts, and the business community and (2) stopping UMC by issuing cease and desist orders following an administrative adjudication.[30] The phrase preceding Section 6(g)'s reference to "rules and regulations" also gives the commission authority to "classify corporations," an essential feature of the congressional plan for the fledgling agency to study and assess business practices. A clause lodged among Section 6's overall research-and-reporting functions in a sentence describing the classification of businesses is an odd place to cram substantive rulemaking authority that could affect nearly the entire US economy. As Professors Thomas W. Merrill and Kathryn Tongue Watts wrote,

> The failure to provide any sanction for the violation of rules adopted under section 6(g), along with the placement of the rulemaking grant in section 6, which conferred the FTC's investigative powers, clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC's investigative duties.[31]

The most natural reading of Section 6(g) is an authorization of interpretive rules and procedural, or "housekeeping," rules governing how the FTC conducts its affairs,[32] not substantive rules broadly condemning certain practices as UMC.

Some argue that Congress subsequently affirmed Section 6(g)'s substantive rulemaking power in 1975, when it passed the Magnuson-Moss Warranty–FTC Improvement Act (the "Magnuson-Moss Act").[33] But even a cursory review of the statute's text and history shows that it cannot justify the epic power grab that substantive antitrust regulation would constitute. The relevant portion of the Magnuson-Moss Act is Section 202, which added to the FTC Act a new Section 18 explicitly giving the FTC both interpretive and substantive rulemaking authority, *but only with respect to unfair or deceptive acts or practices*.[34] At the same time, it established more robust procedural safeguards to ensure that the commission took sufficient public (and congressional) input before exercising this authority.[35] A beefed-up process was Congress's response to the FTC's regulatory bender of "unfair or deceptive acts or practices" rules in the years following the FTC's "discovery" of Section 6(g)'s purported regulatory power and the blessing of said power by the US Court of Appeals for the DC Circuit in *National Petroleum Refiners Association v. Federal Trade Commission* (discussed later).[36]

On the existence of UMC rulemaking authority, the Magnuson-Moss Act simply says: "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."[37] *First*, that language does not convey rulemaking authority of any kind, substantive or otherwise. *Second*, it only says that the commission's UMC rulemaking authority, whatever that might be, was not changed by the Magnuson-Moss Act. *Third*, that law was enacted to cabin rulemaking power. *Finally*, to the extent it reflects congressional understanding of the state of the law following *National Petroleum Refiners*, the implied views of Congress in 1975 tell us nothing about congressional intent in 1914.

The text and structure of the FTC Act thus offer no evidence that Congress intended to confer extravagant regulatory power on the commission. Neither does the legislative history. Don't take it from me, though. Even the DC Circuit, in concluding that the commission did have the power

to regulate any conduct that came within the broad ambit of Section 5, found the legislative history to be "ambiguous."[38] So: no text, no structure, and—for those who roll that way—no legislative history.

National Petroleum Refiners Association v. Federal Trade Commission. That leaves judicial precedent—to wit, *National Petroleum Refiners*.[39] Some of the judges on the panel were giants of the federal bench, but, respectfully, the keystone they chiseled cannot support the weight of the regulatory cathedral the commission would build on it.

When the DC Circuit held that Section 6(g) conferred broad regulatory authority on the FTC, it had a clear goal in mind. The court felt the "need to interpret liberally broad grants of rulemaking authority."[40] Reading precedents concerning other agencies, the court credited and then followed an "obvious judicial willingness to permit substantive rule-making to undercut the primacy of adjudication in the development of agency policy."[41] As explained earlier, Section 5 makes clear that primacy of adjudication *is* the policy Congress laid out. What some judges' willingness (or desire) to "undercut" this policy has to tell us about Section 6(g) is far from clear.

But the *National Petroleum Refiners* court saw a policy benefit to giving the FTC rulemaking authority. It perceived an agency "hobbled in its task by the delay inherent in repetitious, lengthy litigation" and sought to give it "an invaluable resource-saving flexibility in carrying out its task of regulating parties."[42] Doing so would "yield significant benefits" both to enforcers and regulated parties.[43] Reading rulemaking authority into the statute would "further[]" the "undisputed policies which clearly motivated the framers of the Federal Trade Commission Act of 1914."[44]

Clear-eyed about its judicial policy preferences, the DC Circuit knew just how to play it: backward. Instead of asking whether Congress gave the FTC rulemaking authority in Section 6(g), the court created a judicial presumption in favor and then sought "compelling evidence" to the contrary.[45] The question was wrong enough, but so was how the court sought to answer it. It read text colored by a judicial "gloss"[46] and devoted most of its analysis to an exegetical meander through legislative history it characterized as "indecisive" and "ambiguous."[47] Different and unclear "comments made by legislators" meant that "the *specific* intent of Congress here cannot be stated with any assurance."[48] (Emphasis in original.) It concluded that "the Commission's power to make rules was not a central issue in the lengthy debate," so "firm contrary intent" was not apparent.[49]

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The court thus found "no compelling evidence in the Act's legislative history or in the language of the statute" to "limit the exercise of that power to the prosecutorial function or prevent the Commission from making that function more effective."[50] Since, in the court's view, "nothing . . . precludes its use for" rulemaking, it reasoned that power must exist.[51] "Not compel[led]" to conclude that "the Commission was not meant to exercise the power to make substantive rules," the DC Circuit created it.[52] This approach clashes directly with the way the Supreme Court analyzes whether Congress intends to convey regulatory authority in situations where that grant would give an agency broad power to shape economic activity.

Statutory Interpretation and the Major Questions Doctrine. The DC Circuit understood the major impact on American business its decision would have: "The pervasiveness of the antitrust laws' coverage, in the sense of affecting business decision-making, needs no elaboration. Suffice it to say that it cuts deeply into and, with limited exceptions, widely across virtually all of American business."[53]

The president's EO underscores the point, contemplating using Section 6(g) to regulate data collection and "surveillance" that may harm competition, settlements of pharmaceutical patent litigation, labor noncompete agreements, the "right

to repair" devices from cell phones to tractors, app stores and other internet marketplaces, and occupational and licensing restrictions.[54] If you can imagine something as implicating competition, then accepting the EO's theory of Section 6(g) means we can regulate it.

The scope of Section 5's UMC and the pith of Section 6(g) are simply incompatible with a congressional grant of regulatory power of this magnitude. As the Court made clear most recently in *West Virginia v. Environmental Protection Agency*, the major questions doctrine counsels "skepticism" toward agency "assertions of 'extravagant statutory power over the national economy.'"[55] The Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[56] Thus, "to overcome that skepticism, the Government must . . . point to 'clear congressional authorization' to regulate in that manner."[57] "Modest words, vague terms, or subtle device[s]," like the language of Section 6(g), do not suffice.[58]

To the DC Circuit in the early 1970s, combining regulatory power with vast jurisdiction was a feature, not a bug. But the Court today "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[59] As the EO makes clear, Section 5 could be applied to answer not one major question, but untold numbers of them.

In *Whitman v. American Trucking Associations*, Justice Antonin Scalia wrote that, when legislating a major regulatory scheme, Congress "does not . . . hide elephants in mouseholes."[60] If Section 6(g) confers regulatory power, it surely is an elephant. And boy did it live in a mousehole.

Congress passed the FTC Act in 1914. For half a century, the position of the commission and other bodies that considered the question was that the FTC lacked regulatory power.[61] As far as I can tell, the first indication from the commission to the contrary was in 1962.[62] While the *National Petroleum Refiners* court was "not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power,"[63] we should be.[64]

Separation of Powers and the Nondelegation Doctrine

Section 6(g) does not give the FTC the power to make antitrust regulations. But if it did, it would be an awesome power indeed. The authority to regulate anything the commission simply deems "unfair," leaving it up to the commission and only the commission to decide what that encompasses, is legislative power.[65] Under Article I, Section 1, of the US Constitution, "all legislative powers" are "vested in a Congress of the United States."[66] Where Congress attempts to delegate that legislative power, it runs afoul of the separation of powers.[67] As Justice Neil Gorsuch wrote in his dissent in *Gundy v. United States*, enforcing the Constitution's separation of powers to prohibit unconstitutional delegations of legislative power is "about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law."[68]

Giving the FTC unbounded power to issue antitrust regulations violates the nondelegation doctrine. In *A. L. A. Schechter Poultry Corp. v. United States*, the Supreme Court struck down a provision of the National Industrial Recovery Act (NIRA) that gave the president authority to approve "codes of fair competition."[69] The FTC Act concerns "unfair methods of competition."

While the FTC Act language is the linguistic obverse of NIRA's "fair competition," the *A. L. A. Schechter Poultry* Court explicitly distinguished NIRA from the FTC Act. The key distinction that saved the FTC in the eyes of the Court was Section 5's adjudicative process, in which the commission, acting as "a quasi judicial body," determines what are UMC "in particular instances, upon evidence, in light of particular competitive conditions" via a process of formal complaint, fair notice and hearing, and findings supported by evidence—all subject to judicial review.[70] That adjudication is precisely the process the *National Petroleum Refiners* court sought to "undercut" in favor of economy-wide rulemaking. Thus, *A. L. A. Schechter Poultry*'s distinction between NIRA and the FTC Act cannot hold if Section 6(g) gives the commission such regulatory authority.

Justice Benjamin Cardozo, in his concurring opinion, dubbed NIRA's provision "delegation running riot."[71] The delegation of UMC rulemaking authority contemplated here—as reflected in the EO and elsewhere—runs riot as well.

Antitrust Regulations and Antitrust Law

Antitrust regulation also threatens to clash directly with the US antitrust law it purports to effectuate. Proponents advocate "clear" rules to, in their view, reduce ambiguity, ensure predictability, promote administrability, and conserve resources otherwise spent on case-by-case adjudication.[72] If that means administrative adoption of per se illegality standards, it flies in the face of contemporary antitrust law, which has been moving away from per se standards toward the historical "rule of reason" first adopted by the Supreme Court in *Standard Oil Co. of New Jersey v. United States*.[73]

The rule of reason was and remains today a fact-specific inquiry.[74] The per se approach, by contrast, involves no weighing of the restraint's pro-competitive effects; once proven, a restraint subject to the per se rule is presumed to be unreasonable and illegal. Although certain categories of conduct, such as price fixing and market allocation by competitors,[75] are per se antitrust violations, the Supreme Court has been limiting per se treatment, even overruling some of its per se precedents.[76] Per se rules are sensibly reserved for "conduct that is manifestly anticompetitive" and "that would always or almost always tend to restrict competition and decrease output."[77]

If the FTC attempts administratively to adopt per se rules for conduct that is properly considered under the rule of reason, it will run right up against antitrust law itself. Although few would dispute that the FTC Act reaches some conduct *beyond* the Sherman Act, that is not a license to apply per se treatment to conduct *within* the Sherman Act's scope that courts have held to be subject to the rule of reason.

The FTC Should Not Enforce Antitrust Through Regulation

The major questions and nondelegation doctrines both sound in the idea that exercising broad power over private economic affairs is for the states and Congress. A bare majority of FTC commissioners should not have wholesale control over the American economy. That should be self-evident, because it contravenes the limited, checked, and balanced powers the Constitution set out for the federal government, including to manage the US economy.

The FTC was signed into law by President Woodrow Wilson. He took a dim view of that constitutional structure because he believed it inadequate to achieve his progressive goals.[78] I tend to view the Constitution in a much more positive light. But regardless of how you feel about it, it is the law of the land. That law does not contemplate a bare majority of FTC commissioners managing whatever private economic affairs they want. And to be clear, neither President Wilson nor the 63rd Congress contemplated that either.

Many Americans feel the urgency of the economic issues that confront us, individually, nationally, and as families, communities, and businesses. So I understand the impulse to identify a problem and try to solve it, no matter what the law says. Those of us exercising executive authority may feel that impulse most acutely, especially with the enthusiastic encouragement we sometimes get from political supporters, members of the legislative branch, and the president himself. But the economic benefits we as Americans enjoy stem largely from our faithful adherence to the rule of law, and leaving that aside truly would throw the baby out with the bathwater.

The law does not permit the FTC to issue antitrust regulations. And so we shouldn't.

Acknowledgments

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About the Author

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Notes

1. Exec. Order 14036, 86 Fed. Reg. 36,987 (July 14, 2021).
2. Exec. Order 14036, at 36,992. Although the executive order does not specify whether the specific practices it enumerates should be treated as "unfair or deceptive practice[s]" or "unfair method[s] of competition" under Section 5 of the Federal Trade Commission (FTC) Act, almost all fall squarely into the latter category. The distinction matters because the FTC's authority to issue rules concerning unfair methods of competition is highly dubious, while its authority for rules on unfair or deceptive acts or practices is well established by both law and practice.
3. By "regulations with the force of law," I mean legislative rules with binding legal effect on the general public. See Thomas W. Merrill and Kathryn Tongue Watts, "Agency Rules with the Force of Law: The Original Convention," *Harvard Law Review* 116, no. 46 (2002): 477, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1431&context=faculty_scholarship. These "substantive" rules, regulations, and rulemaking are distinct from procedural and interpretive rules, which are not legally binding. This report focuses exclusively on the substantive kind.
4. Dave Michaels and Ryan Tracy, "FTC Considers Restricting the Use of Noncompete Clauses by Companies," *Wall Street Journal*, June 9, 2022, https://www.wsj.com/articles/ftc-considers-restricting-the-use-of-noncompete-clauses-by-companies-11654747203.
5. Exec. Order 14036, at 36,992.
6. Corbin Barthold and Noah Phillips, "#322: FTC Commissioner Noah Phillips," June 2, 2022, in *Tech Policy Podcast*, podcast, 00:39, http://podcast.techfreedom.org/e/322-ftc-commissioner-noah-phillips, citing Lina M. Khan, *Memorandum to Commission Staff and Commissioners: Vision and Priorities for the FTC*, September 22, 2021, 2, https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.
7. The quoted language is one of two liability standards in Section 5 of the FTC Act, the other being "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1) (2018) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").
8. See *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2608 (2022), citing *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427, 2444 (2014).
9. Federal Trade Commission Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914).
10. Today, Section 6(g) states that "the Commission shall also have power . . . from time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter." 15 U.S.C. § 46(g) (2018).
11. Federal Trade Commission Act § 6, 38 Stat. at 721–22.
12. 15 U.S.C. § 46 (2018).
13. 15 U.S.C. § 46 (2018).
14. Federal Trade Commission Act § 5, 38 Stat. at 719.
15. Wheeler-Lea Act, Pub. L. No. 75-447, § 3, 52 Stat. 111 (1938).
16. Federal Trade Commission Act § 5, 38 Stat. at 719; and 15 U.S.C. § 45(b) (2018).
17. Federal Trade Commission Act § 5, 38 Stat. at 719–20; and 15 U.S.C. § 45(b) (2018).
18. Federal Trade Commission Act § 5, 38 Stat. at 720; and 15 U.S.C. § 45(c) (2018).
19. Federal Trade Commission Act § 5, 38 Stat. at 720; and 15 U.S.C. § 45(c) (2018).
20. See, for example, *Federal Trade Commission v. Indiana Federation of Dentists*, 476 US 447, 454 (1986) ("the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'").
21. Federal Trade Commission Act § 5, 38 Stat. at 719–21; and 15 U.S.C. § 45 (2018).
22. Federal Trade Commission Act § 5, 38 Stat. at 720; and 15 U.S.C. § 45(b) (2018). See also *AMG Capital Management v. Federal Trade Commission*, 141 S. Ct. 1341, 1348–49 (2021), denying the FTC's authority to seek, and the courts' authority to award, equitable

monetary relief under Section 13(b) of the FTC Act, because other parts of the statute authorize monetary relief or penalties only "in cases where the Commission has *issued cease and desist orders, i.e.,* where the Commission has engaged in administrative proceedings." Indeed, no part of the unamended FTC Act specifies fines for violations of rules and regulations the commission might promulgate. The absence of fining authority suggests the absence of substantive rulemaking authority. See Merrill and Watts, "Agency Rules with the Force of Law," at 494 ("If the statute was silent regarding the legal consequences for failure to conform to regulations, it was understood as granting the agency the power to make only housekeeping rules."). This stands in contrast to the Magnuson-Moss Warranty–FTC Improvement Act, in which Congress specifically identified fines as a mechanism for enforcing the consumer protection rulemaking it authorized. See Pub. L. No. 93-637, § 205, 88 Stat. 2183, 2200 (1975); and Maureen Ohlhausen and Ben Rossen, "Dead End Road: National Petroleum Refiners Association and FTC 'Unfair Methods of Competition' Rulemaking," in *Rulemaking Authority of the US Federal Trade Commission,* ed. Daniel A. Crane (New York: Concurrences, forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4076267.

23. H.R. 15613, 63d Cong. §§ 7, 8–13, 17 (as introduced by Rep. James Covington (R-MD) and referred to the House Committee on Interstate and Foreign Commerce on April 13, 1914).

24. H.R. 15613, § 8.

25. Rep. Abraham Lafferty (R-OR) criticized H.R. 15613 for giving the FTC too little power and proposed a set of amendments to the bill that would have greatly expanded the agency's authority. H.R. Rep. No. 63-533, pt. 3, at 1 (1914). These amendments left Section 8 (the precursor to Section 6(g) of the FTC Act) untouched but added several provisions, including Section 22, which said: "The commission is empowered to make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition made unlawful by this or any other Act." H.R. Rep. No. 63-533, at 7, 12, 20–21. That Lafferty added this language without altering Section 8 indicates that he did not read the latter provision to confer such power. The House did not adopt Lafferty's changes. Later, during the House debate on H.R. 15613, Rep. Rick Morgan (R-OK) moved to strike Section 8 entirely and replace it with:

> The commission is hereby authorized and empowered to make and establish rules and regulations not in conflict with the Constitution and laws of the United States to aid in the administration and enforcement of the provisions of this act, and may by such rules and regulations prohibit corporations subject to the provisions of section 9 of this act in conducting their business from engaging in any practice or from using any method or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance that constitutes unfair competition or unjust discrimination as between competitors, individuals, or communities.

15 Cong. Rec. 9047 (House Debate, 63d Cong., 2d Sess., May 22, 1914). The House voted down the motion, 50–18. 15 Cong. Rec. at 9049–50.

26. H.R. 15613, 63d Cong. (as reported by the Senate Committee on Interstate Commerce, June 13, 1914).

27. H.R. 15613, § 5.

28. Statements in the final House debate from Rep. Covington, who introduced H.R. 15613, confirm that the FTC was intended to act against unfair methods of competition solely through case-by-case adjudication. 51 Cong. Rec. 14928 (House Debate, 63d Cong., 2d Sess., Sep. 10, 1914) ("Mr. GREEN of Iowa: Then the commission will do, in the language of [Section 5 of] the bill, in accordance with their opinion. Mr. COVINGTON: But the language of the bill does not say exactly that. It says that after a hearing and findings of fact the commission is of opinion. . . . It does not say merely in accordance with their opinion. It says that if in their opinion, after the hearing, the person or corporation has violated the statute. A court also does that."). See also Merrill and Watts, "Agency Rules with the Force of Law," 505 ("Under established practices for reconciling bills in conference, the Committee could not have granted the FTC legislative rulemaking powers, because neither bill granted the agency such authority.").

29. 15 U.S.C. § 46(g) (2018).

30. In the century and then some since Congress enacted Section 6(g), Americans have grown accustomed to independent regulatory agencies controlling wide swaths of the economy, with the power to impose massive fines, among other things. Congress itself has, in certain contexts, vested the FTC with such power. See, for example, Children's Online Privacy Protection Act (COPPA), Pub. L. No. 105-277, Title XIII, §§ 1303(b)-(c), 112 Stat. 2681-728, 2681-730-32 (1998); and COPPA Rule, 16 C.F.R. § 312.9 (2013). And so, today, the agency's original powers to study businesses and enjoin particular companies from engaging in unlawful practices may seem modest by comparison. But in 1914, Congress broke important new ground when it created the FTC. At the time, Congress lacked the kind of professional staff it has today, so it invested the FTC with the power to study markets and propose laws that Congress could make. The agency's research laid the groundwork for legislation including the Federal Power Act, the National Gas Act, and the Public Utility Holding Company Act. See, generally, Richard J. Pierce, "Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry," *Harvard Law Review* 97, no. 2 (December 1983): 345–85, https://www.jstor.org/stable/1340851. The FTC's Section 5 power to enjoin prohibited conduct following a proceeding and enjoy deference on appeal continues to be an essential part of the FTC's antitrust enforcement work today, and it is a feature that distinguishes the agency from the Antitrust Division of the Department of Justice. When the Supreme Court considered the constitutionality of the FTC's independence from the presidency in 1935, it relied substantially on its view that the commission's work was "predominantly

quasi judicial and quasi legislative." *Humphrey's Executor v. United States*, 295 US 602, 624, 628 (1935) ("In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency."). To accomplish all of this important work, the agency would have to make rules "to carry out the provisions" of its authority.

31. Merrill and Watts, "Agency Rules with the Force of Law," 504–5.

32. Merrill and Watts, "Agency Rules with the Force of Law," 504–5. The FTC itself stated that it lacked such power. Merrill and Watts, "Agency Rules with the Force of Law," 506, noting that, by way of example, the FTC's 1922 Annual Report stated, "One of the most common mistakes is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceeding before it. . . . It is hoped, in time, to bring about a thorough understanding of the fact that the commission can not and will not function by any method not authorized in its organic act."

33. See, for example, Leah Samuel, "UMC Rulemaking After Magnuson-Moss: A Textualist Approach," Truth on the Market, April 27, 2022, https://truthonthemarket.com/2022/04/27/umc-rulemaking-after-magnuson-moss-a-textualist-approach.

34. Magnuson-Moss Act, Pub. L. No. 93-673, § 202(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57a(a)).

35. Magnuson-Moss Act, Pub. L. No. 93-673, at 2193-96 (codified at 15 U.S.C. § 57a(b)-(e)).

36. See, for example, Barry B. Boyer, *Executive Summary of Barry B. Boyer Report, Trade Regulation Rulemaking Procedures of the Federal Trade Commission,* 1979, 41, 43, https://www.acus.gov/sites/default/files/documents/1979-01%20Hybrid%20Rulemaking%20Procedures%20of%20the%20Federal%20Trade%20Commission.pdf ("The statutory standard governing the FTC's consumer protection activity provided few real limits. . . . As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion.").

37. Magnuson-Moss Act § 202(a), 88 Stat. at 2193 (codified at 15 U.S.C. § 57a(a)(2)).

38. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672, 686 (DC Cir. 1973). As discussed, some of the legislative history clearly cuts against the theory.

39. *National Petroleum Refiners*, 482 F.2d at 672.

40. *National Petroleum Refiners*, 482 F.2d at 680.

41. *National Petroleum Refiners*, 482 F.2d at 679.

42. *National Petroleum Refiners*, 482 F.2d at 681, 690.

43. *National Petroleum Refiners*, 482 F.2d at 690. See also Rohit Chopra and Lina M. Khan, "The Case for 'Unfair Methods of Competition' Rulemaking," *University Chicago Law Review* 87, no. 2 (2020): 378, https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf ("Use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates," and "increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication," citing *National Petroleum Refiners*, 482 F.2d at 681.).

44. *National Petroleum Refiners*, 482 F.2d at 686.

45. *National Petroleum Refiners*, 482 F.2d at 685.

46. *National Petroleum Refiners*, 482 F.2d at 686.

47. *National Petroleum Refiners*, 482 F.2d at 686.

48. *National Petroleum Refiners*, 482 F.2d at 686.

49. *National Petroleum Refiners*, 482 F.2d at 698.

50. *National Petroleum Refiners*, 482 F.2d at 685.

51. *National Petroleum Refiners*, 482 F.2d at 693.

52. *National Petroleum Refiners*, 482 F.2d at 686.

53. *National Petroleum Refiners*, 482 F.2d at 684–85.

54. Exec. Order 14036, at 36,992.

55. *West Virginia*, 142 S. Ct. at 2609, quoting *Utility Air Regulatory Group*, 573 US at 324. The doctrine arises out of a line of cases "all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."

56. *Alabama Association of Realtors v. US Department of Health and Human Services*, 141 S. Ct. 2485, 2489 (2021), quoting *US Forest Service v. Cowpasture River Preservation Association*, 140 S. Ct. 1837, 1850 (2020). (Internal quotations omitted.)

57. *West Virginia*, 142 S. Ct. at 2614, quoting *Utility Air Regulatory Group*, 573 US at 324.

58. *West Virginia*, 142 S. Ct. at 2609, quoting *Whitman v. American Trucking Association*, 531 US 457, 468 (2001). (Internal quotations omitted.)

59. *Utility Air Regulatory Group*, 573 US at 324 (2014), quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 US 120, 160 (2000).

60. *Whitman*, 531 US at 468.

61. Merrill and Watts, "Agency Rules with the Force of Law," 506–7.

62. Merrill and Watts, "Agency Rules with the Force of Law," 551–52.

63. *National Petroleum Refiners*, 482 F.2d at 693.

64. The FTC has issued a competition rule just once in its history, in the 1960s. FTC Men's and Boy's Tailored Clothing Rule, 16 C.F.R. § 412 (1968). That rule proscribed conduct barred by the Robinson-Patman Act, which amended Section 2 of the Clayton Act. 16 C.F.R. at § 412.1; and Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936). It was never enforced and was withdrawn in the 1990s. Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994). Since the Magnuson-Moss Act was enacted, the FTC has never once even attempted to fashion a regulation concerning unfair methods of competition. Ohlhausen and Rossen, "Dead End Road," 8.

65. In the context of adjudicated cases, courts considering unfair methods of competition read the word "unfair" as an indicator that they, not the FTC, have the final say. See, for example, *FTC v. Indiana Federation of Dentists*, 476 US at 454 ("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although, even in considering such issues, the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'"). See also Daniel A. Crane, "Technocracy and Antitrust," *Texas Law Review* 86 (2008): 1159, 1200, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030632.

66. US Const. art. I, § 1.

67. See, for example, *A. L. A. Schechter Poultry Corp. v. United States*, 295 US 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); and *Panama Refining Company v. Ryan*, 293 US 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

68. *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

69. *A. L. A. Schechter Poultry*, 295 US at 541–42, 551.

70. *A. L. A. Schechter Poultry*, 295 US at 532–34.

71. *A. L. A. Schechter Poultry*, 295 US at 553 (Cardozo, J., concurring). Justice Benjamin Cardozo had a different reason for believing that the FTC Act did not raise a delegation problem. He viewed "unfair methods of competition" as limited to conduct that violated "accepted business standards or accepted norms of ethics." Compare with *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) ("[In the statute at issue in *A. L. A. Schechter Poultry*,] Congress offered no meaningful guidance. It did not, for example, reference any pre-existing common law of fair competition that might have supplied guidance on the policy questions, as it arguably had done earlier with the Sherman Act."). To the extent the limitation he read into the statute provides an intelligible principle that cabins a regulatory grant, the executive order contemplates no such limit and, in fact, seeks dramatic changes in widespread and legal business practices. While the Constitution may permit Congress to grant the agency authority to issue rules consistent with the antitrust laws, the FTC cannot eat its cake and have it, asserting power it declines intelligibly to limit and claiming regulatory authority to implement it.

72. Chopra and Khan, "The Case for 'Unfair Methods of Competition' Rulemaking," 368.

73. *Standard Oil Co. of New Jersey v. United States*, 221 US 1 (1911). The rule of reason soon became "the prevailing standard of analysis" for determining whether an agreement constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act. See *Continental T.V. v. GTE Sylvania*, 433 US 36, 49 (1977) ("Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis."); *State Oil Co. v. Khan*, 522 US 3, 10 (1997) ("most antitrust claims are analyzed under a 'rule of reason'"); and *Arizona v. Maricopa County Medical Society*, 457 US 332, 343 (1982) ("we have analyzed most restraints under the so-called 'rule of reason'").

74. In 1918, Justice Louis Brandeis described the scope of the "rule of reason" inquiry as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade v. United States, 246 US 231, 238 (1918).

75. *United States v. Socony-Vacuum Oil Co.*, 310 US 150 (1940); and *United States v. Sealy*, 388 US 350 (1967).

76. See, for example, *GTE Sylvania*, 433 US at 58–59 (holding that vertical customer and territorial restraints are subject to the rule of reason, overruling *United States v. Arnold, Schwinn & Co.*, 388 US 365 (1967)); *Broadcast Music v. Columbia Broadcasting System*, 441 US 1 (1979) (holding that a blanket license issued by a clearinghouse of copyright owners that set a uniform price should be analyzed under the rule of reason); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 US 2 (1984) (holding that the per se rule does not apply to all tying arrangements); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 US 284, 295 (1985) (holding that the per se rule does not apply to all group boycotts); *Khan*, 522 US at 22 (holding that vertical maximum resale price should be analyzed under the rule of reason, overruling *Albrecht v. Herald Co.*, 390 US 145 (1968)); and *Leegin Creative Leather Products v. PSKS*, 551 US 877, 907 (2007) (holding that all vertical price restraints should be analyzed under the rule of reason, overruling *Dr. Miles Medical Company v. John D. Park & Sons Company*, 220 US 373 (1911)). It has also demonstrated a reluctance

to adopt even a truncated rule-of-reason inquiry, sometimes called "quick look." *Federal Trade Commission v. Actavis*, 570 US 136 (2013) (rejecting the FTC's contention that "quick look" should apply to reverse-payment settlements); and *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141, 2155, 2021 WL 2519036 (2021) (rejecting the National Collegiate Athletic Association's argument for quick look treatment). These decisions make clear that the rule of reason is the "accepted standard for testing" whether a practice is an unreasonable restraint of trade. *Leegin*, 551 US at 885.

77. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 US 717, 723 (1988) (citing *GTE Sylvania*, 433 US at 50, and *Northwest Wholesale Stationers*, 472 US at 289–90).

78. Daniel A. Crane, "Debunking *Humphrey's Executor*," *George Washington Law Review* 83, no. 6 (November 2015): 1859, https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf ("Much of the impetus behind the FTC Act was Progressive frustration with the sedulous pace, fact specificity, and conservative character of antitrust litigation in the federal courts."); and Marc Winerman, "The Origins of the FTC: Concentration, Cooperation, Control, and Competition," *Antitrust Law Journal* 71 (2003): 52–53 (2003), https://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf (quoting President Woodrow Wilson describing the commission as "an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate").