



Comments of

TechFreedom

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In the Matter of

Petition for Rulemaking to Prohibit Worker Non-Compete Clauses;

Petition for Rulemaking to Prohibit Exclusionary Contracts

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I. Introduction

Did the Federal Trade Commission Act of 1914¹ empower the Federal Trade Commission to issue “substantive” or “legislative” rules with the “the force and effect of law”² to define “unfair methods of competition” (UMC)? The Commission first claimed such power in 1962.³ Eleven years later, the D.C. Circuit upheld that theory.⁴ Now, for the first time since that decision, the FTC has initiated UMC rulemakings, seeking public comment on two petitions.⁵

Lina Khan, the agency’s new Chair, and Commissioner Rohit Chopra assert that the FTC has such rulemaking power, citing only *National Petroleum Refiners* and four academic articles about the case.⁶ Last year, however, when the FTC held a workshop on whether to issue a UMC rule restricting non-compete agreements (the same topic on which a rule is now being proposed), George Washington Law School Professor Richard J. Pierce, co-author of a leading administrative law coursebook,⁷ said that the court’s conclusion that the FTC has rulemaking power is “by today’s standards. . . laughable. I teach it as an illustration of something no modern court would do.”⁸

Reading Section 6(g) to empower the FTC to issue legislative rules is “laughable” for multiple reasons. First, such a reading broadly flouts both the Act’s context and the Constitution. At the time the FTC Act was passed (1914), both the non-delegation doctrine (barring Congress from handing legislative power to executive agencies) and the removal power (ensuring that the president has broad authority to remove executive-branch officers at will) were broader

¹ Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), available at <https://bit.ly/3CYwaCQ>.

² U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1947), available at <http://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947iii.html>.

³ See *Nat’l Petroleum Refiners Ass’n. v. FTC*, 482 F.2d 672, 709, n.29 (1973) (“The Commission first announced it would enforce the prohibitions of § 5 with the assistance of substantive rules in 1962 when it amended its Rules of Practice to provide for issuance of Trade Regulation Rules, 27 FED. REG. 4636, 4796 (1962).”).

⁴ *Id.*

⁵ See *Petition for Rulemaking to Prohibit Exclusionary Contracts*, Open Markets Institute (Jul. 21, 2020), available at <https://bit.ly/3F7gEGz>; See *Petition for Rulemaking to Prohibit Non-Compete Contracts*, Open Markets Institute (Jul. 21, 2020), available at <https://bit.ly/3mcm0aX>

⁶ See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 378 (2020), <https://bit.ly/3F9BTYk> (citing Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1288–89 (2011); Hemphill, 109 COLUM. L. REV. at 673–82; Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 250–52 (2014); Sandeep Vaheesan, *Resurrecting ‘A Comprehensive Charter of Economic Liberty’: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 651–57 (2017).).

⁷ See generally Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994).

⁸ Transcript of Panel 3: Should the FTC Initiate a Rulemaking Regarding Non-Compete Clauses? at 296, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, Federal Trade Commission (2020).

and more rigid than they are today. Even aside from Section 6(g), the FTC Act tested these boundaries, by letting the FTC enforce a broad “unfair methods” standard case-by-case, and by granting the FTC’s commissioners “for-cause” removal protection. The (half of) Section 6(g) at issue here, meanwhile, lies buried in a long section detailing the FTC’s power simply to gather and report information in furtherance of its duties. As a matter of statutory interpretation, therefore, to read Section 6(g) as a grant of substantive (i.e., legislative) rulemaking authority is to assume that Congress, in a statute already at risk of bursting multiple constitutional seams, implanted, in a single vague sentence in an otherwise unrelated section, a further, sweeping assault on the non-delegation doctrine. That’s an untenable assumption. And as a matter of constitutional law, the proposed reading of Section 6(g) *still* violates the non-delegation doctrine, a conclusion made all the clearer by the Supreme Court’s recent decision in *Gundy v. United States*.⁹

Second, *National Petroleum Refiners* ignored a longstanding convention that Congress signaled its intention that an agency issue “legislative” or “substantive” rules with the “force and effect of law” by empowering the agency to impose some sanction upon those who violated those rules.¹⁰ Absent any provision for sanctions, this convention holds that an agency could issue only procedural (“housekeeping”) or “interpretive”¹¹ rules, which do no more than “advise the public of the agency’s construction of the statutes and rules which it administers.”¹² The FTC Act has *never* authorized sanctions for violations of the Act itself, and only in 1975 did Congress authorize civil penalties for violations of regulations issued under the Act.¹³ The 1914 Act authorized a single method for applying Section 5’s prohibition of unfair methods of competition: the FTC would issue a cease-and-desist order, but it would be up to federal courts to enforce that order. Such enforcement involved no sanction whatsoever, merely the cessation of unlawful activity.

Third, *National Petroleum Refiners* misread the cases it cited. In each case, it was clear that the statute at issue conferred substantive rulemaking authority — not only because Congress empowered the agency to sanction violations but also because of the plain text of the rulemaking provision at issue and because of other clues found in the structure of the

⁹ 139 S. Ct. 2116 (2019).

¹⁰ See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: the Original Convention*, 116 HARV. L. REV. 467 (2002), <https://bit.ly/3D0yoSd>.

¹¹ “Interpretive rules” are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” See ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947), available at <https://bit.ly/2Y7sG2o>.

¹² *Id.*

¹³ Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-657, 88 Stat. 2183 (1975); 15 U.S.C. § 45(l).

act. The FTC Act is just the opposite: nothing in the act suggests that Congress intended the FTC to make substantive rules.

Fourth, amendments to the FTC Act enacted after *National Petroleum Refiners* are irrelevant to what Congress intended in 1914. The only relevant Congressional action confirms that Congress understood an act exactly parallel to the FTC Act *not* to confer substantive rulemaking authority.

In short, *National Petroleum Refiners* was wrongly decided. Section 6(g) empowers the FTC to make only procedural or interpretive rules, not legislative or substantive rules defining liability. While administrative agencies have varied in their understanding of what interpretive rules do,¹⁴ the Administrative Conference of the United States, the official organ of the federal judiciary, has been clear: “An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.”¹⁵ Thus, issuing interpretive rules regarding what is an unfair method of competition would have essentially the same effect upon regulated parties as issuing a policy statement: either way, the FTC must still wield its power over “unfair” competition case-by-case. It must still be Congress and state legislatures that decide whether to proscribe as unlawful certain methods of competition, either directly through legislation or by granting authority for the FTC (or state regulators) to make rules.

II. The FTC Act in Its Historical Context

Statutory terms should be understood to “mean what they conveyed to reasonable people at the time they were written.”¹⁶ Further, “general terms as used on particular occasions,” in a statute, “often carry with them implied restrictions as to scope.”¹⁷ These are important principles here, because the Congress that passed the FTC Act in 1914 operated in a very different constitutional landscape than that which exists today.

¹⁴ Blake Emerson & Ronald M. Levin, *Interpretive Rules in Practice*, *The Regulatory Review*, (Oct. 30, 2019), <https://bit.ly/3mhJ4VZ>.

¹⁵ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *AGENCY GUIDANCE THROUGH INTERPRETIVE RULES* (2019), available at <https://bit.ly/3F0FrFH>.

¹⁶ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

¹⁷ *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2451 (2014) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting).

Consider the state of two key constitutional doctrines in the early twentieth century: the non-delegation doctrine and the removal power. Both are vital to understanding why Congress crafted the FTC Act as it did — and why it is implausible in the extreme that Congress intended Section 6(g) to confer the power to issue substantive rules. Simply put, when it passed the FTC Act, Congress did not bury a constitutional revolution deep in the fine print.

A. Bedrock Constitutional Principle #1: Non-Delegation

Since the beginning of the Republic, it has been understood that Article I, Section 1 of the Constitution, which says that Congress alone holds “all legislative Powers,” must place *some* limit on how much legislative authority Congress may hand to an executive agency. Although in the second half of the twentieth century, Congress would stretch the boundaries of that limit ever farther out, in 1914 the limit remained firm.

The seminal statement of non-delegation is, of course, Chief Justice Marshall’s declaration, in *Wayman v. Southard*, that the legislature must set the rules and policy for all “important subjects,” but that it may leave to the executive the task of “fill[ing] up the details.”¹⁸ Because “nineteenth century legislators” generally “decided not delegate broad authority to the executive branch,” this statement long reigned, unchallenged and unquestioned.¹⁹

Although things began to change at the end of the nineteenth century, with the rise of the populist movement, clear boundaries remained. The Interstate Commerce Commission, established in 1887, had no independent enforcement power, and it “lacked any power to *set* railroad rates.”²⁰ Upholding portions of the Tariff Act of 1890—which merely delegated certain “yes-or-no trade decisions,”²¹ based on findings of fact about other nations’ tariff rates—the Court remained full-throated in its defense of the principle of non-delegation.²² “That Congress cannot delegate legislative power to the President,” the Court confirmed, “is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”²³ Indeed, it remained the case that delegations of legislative power were “*never to be implied*” from ambiguous statutory text.”²⁴

¹⁸ 23 U.S. 1, 43 (1825).

¹⁹ See JAMES COPLAND, *THE UNELECTED* 24 (2020).

²⁰ *Id.* at 27.

²¹ *Id.*

²² *Field v. Clark*, 143 U.S. 649, 692 (1892).

²³ *Id.*

²⁴ *ICC v. Railway Co.* (“the Queen and Crescent Case”), 167 U.S. 479, 494 (1897) (emphasis added). See Merrill, *supra* note 10, at 491 (“The Queen and Crescent Case suggests a nondelegation canon in the form of an

Shortly before passage of the FTC Act, the Court, in *United States v. Grimaud* (1911), explained how the non-delegation principle applied to the distinction between an agency's ability to set its own "housekeeping" rules—rules governing its own proceedings—and an agency's ability to set substantive rules with binding effect on the public.²⁵ "From the beginning of the Government," *Grimaud* said:

various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power.²⁶

As *Grimaud* explained, Congress could go beyond conferring to an agency the power to make rules to "*administer*" legislatively set policies, but only if Congress set the *punishments* that would accompany the violation of such rules.²⁷ Congress, in other words, could give an agency the "power to fill up the details" of a legislative policy, so long as the "fine or imprisonment" or "penalties" for a violation were either "fixed by Congress" or "measured by the injury done."²⁸ In short, an agency had no power to set *substantive* rules—to "fill up the details" of a policy—unless it was doing so within a rubric of pre-set statutory penalties established by Congress.²⁹

B. Bedrock Constitutional Principle #2: The Removal Power

The Constitution vests "the executive Power" in a single "President,"³⁰ who must "take Care that the Laws be faithfully executed."³¹ The task of executive officers is, in Washington's words, to "assist the supreme Magistrate in discharging the duties of his trust."³² Or, as Madison put it, "the lowest [executive] officers, the middle grade, and the highest" all therefore "depend, as they ought, on the president."³³ The first Congress confirmed this understanding—that executive officers serve at the pleasure of the president—in what's

'express statement' rule: all grants of rulemaking authority confer only housekeeping powers, unless Congress expressly confers the power to make legislative rules.").

²⁵ 220 U.S. 506 (1911).

²⁶ *Id.* at 517.

²⁷ *Id.* at 517-18.

²⁸ *Id.* at 517.

²⁹ *Id.*

³⁰ U.S. CONST. art. II, § 1, cl. 1.

³¹ *Id.* art. II, § 3, cl. 3.

³² 30 Writings of George Washington 334 (John C. Fitzpatrick ed., 1939).

³³ 1 Annals of Cong. 499 (Madison).

known as the “Decision of 1789.”³⁴ It passed several bills that contained no removal clause, but that discussed who would manage the papers of a removed officer.³⁵ The traditional view holds that Congress thereby affirmed that the Constitution empowers the president to remove officers at will.³⁶ As Madison explained in a letter to Jefferson, the legislators thus adopted the position “most consonant” to “the text of the Constitution” and “the requisite responsibility and harmony in the Executive Department.”³⁷

This is basically where things stood in 1914. *Myers v. United States* (1926), the first decision in which the Court squarely considered “whether under the Constitution the President has the exclusive power of removing executive officers,”³⁸ was still twelve years off. The notion that Congress could create “independent” officers with for-cause removal protections—let alone the notion that it could do so while handing those officers *legislative* power—remained uncertain and untested.

C. Putting the FTC Act in Its Proper Context

This is the constitutional background before which Congress passed the Federal Trade Commission Act of 1914. The FTC, the Act says, “shall be composed of five commissioners,” who, although “appointed by the President, by and with the advice and consent of the Senate,” can be “removed by the President” only “for inefficiency, neglect of duty, or malfeasance in office.”³⁹

Section 5 of the Act makes a sweeping claim: it declares that “unfair methods of competition in commerce are hereby declared unlawful.”⁴⁰ It then sets forth, in excruciating detail, how the commission shall go about prosecuting such “methods.”⁴¹

Section 6 of the Act provides the Commission a series of ancillary powers for investigating, reporting, and publicizing the “unfair methods” barred by Section 5.⁴² Under Section 6, the Commission may, for instance, “gather and compile information”; demand that businesses “file” with the commission “reports or answers in writing to specific questions”; “make

³⁴ Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1066 (2006).

³⁵ *Id.* at 1023 & nn. 7-9.

³⁶ *Id.* at 1065-66.

³⁷ Letter from James Madison to Thomas Jefferson (June 30, 1789), available at <https://bit.ly/36BYhZd>.

³⁸ 272 U.S. 52, 106 (1926).

³⁹ Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 718 (1914) (*FTC Act*).

⁴⁰ *Id.* § 5, 38 Stat. at 719.

⁴¹ *Id.* at 719-21.

⁴² *Id.* § 6, 38 Stat. at 721-22.

investigation” to ensure that adjudicatory decrees are being complied with; and “make public” “information obtained” through its investigations.⁴³ As with the enforcement powers in Section 5, the investigatory powers in Section 6 are set forth in great detail.

Buried within Sections 6’s detailed explanation of the Commission’s investigatory powers lies Section 6(g), with its single line about the Commission’s power to set “rules.”⁴⁴ Consider how that line sits, in this image of the statutory text:

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith

⁴³ *Id.*

⁴⁴ *Id.*

recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Deep within this detailed section (so detailed that it clarifies how much *time* a business should have to file a report with the commission), sitting beside a line about whether the commission may “classify corporations,” sits a few obscure words on making rules for “carrying out the provisions of this Act.”⁴⁵

D. If Section 6(g) Had Conferred Quasi-Legislative Power, the FTC Would Have Represented a Complete Constitutional Revolution in 1914

In granting the commission the power—albeit under well-defined procedures and close court supervision—to prosecute “unfair methods of competition,” Congress was *already* undertaking a risky, novel, aggressive attack upon the traditional understanding of the non-delegation doctrine. Likewise, in granting the commissioners protection from being fired other than for “inefficiency, neglect of duty, or malfeasance in office,” Congress was *already* undertaking a risky, novel, aggressive attack upon the traditional understanding of the removal power.

Yet to read Section 6(g) as granting the commission the power to set substantive rules defining “unfair methods of competition” is to assume that Congress was not *just* trying to *test* boundaries, but that it was on something of a kamikaze mission. After all, this reading of Section 6(g) would mean that Congress wanted to hand unprecedented *legislative* power to unprecedentedly *insulated, independent* executive officers without *even the safeguards of well-defined procedures or judicial supervision*. So open-ended is the term “unfair methods of competition,” in fact, that this reading would mean Congress had suddenly, in an act of startling defiance toward all governing precedent at the time, given an unaccountable mini-legislature a roving commission (so to speak) to “do justice.” The Supreme Court has indeed recognized that the FTC wields remarkably broad powers, but even then, it was careful to emphasize that the FTC wields those powers only in a quasi-*judicial* role:

the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a *court of equity*, considers public values beyond

⁴⁵ *Id.*

simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.⁴⁶

Reading Section 6(g) to confer the power to make *legislative* rules assumes that Congress did this in *half* of a one-sentence *sub-section* of detailed instructions about the commission's power simply to *investigate* and *collect and report information*. Really? Look again at the image of the statutory text. The picture tells the tale. It is utterly implausible that Section 6(g) was the constitutional ticking nuclear time bomb that this reading makes it out to be.

Not surprisingly, when the Act was brought before the Court in *Humphrey's Executor v. United States* (1935), the justices did not read Section 6 this way.⁴⁷ Although *Humphrey's Executor* is famous for breaking new ground concerning the removal power, the decision reads Section 6 consistent with the uncontested understanding of non-delegation that reigned at the time. "The Federal Trade Commission," it says, was created "to carry into effect legislative policies *embodied in the statute* in accordance with *the legislative standard therein prescribed*, and to perform other *specified* duties as a *legislative or judicial aid*."⁴⁸ Consistent with this understanding of the commission as a body that simply "fill[s] in and administer[s] the details embodied by" the "general standard" (i.e., "unfair methods of competition"), the Court understood Section 6 as empowering the commission to "mak[e] investigations and reports ... for the information of Congress ... , in aid of the legislative power."⁴⁹ It is in *that* sense—as a maker of investigations and reports—that the Court viewed the commission as acting as a "quasi legislative" body.⁵⁰

The notion that the Commission would *make substantive rules itself* is not mentioned in, or suggested by, *Humphrey's Executor's* explicit reference to Section 6. Such a power would have been revolutionary, as the Court's careful effort to describe the commission as a mere "aid" to the other branches—a maker of *reports!*—confirms.⁵¹ Had the justices been told that, in

⁴⁶ Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (emphasis added).

⁴⁷ 295 U.S. 605 (1935).

⁴⁸ *Id.* at 628 (emphasis added).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* ("In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say, in filling in and administering the details embodied by that general standard—the commission acts in part *quasi-legislatively* and in part *quasi-judicially*. In *making investigations and reports thereon for the information of Congress under § 6*, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary.") (emphasis added).

making their landmark ruling cabining the removal power, they were affirming the for-cause protections and overall independence of true *legislators*, they'd likely have been shocked.

But that's just what those justices did, concluded the D.C. Circuit, in effect, in *National Petroleum Refiners*.

"Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"—or, for that matter, with the Constitution.⁵² Perhaps, when considered in total isolation, the term "carrying out the provisions of this Act"⁵³ means "make substantive rules about what 'unfair methods of competition' means." But when that term is considered in the context of the Constitution, the specific understanding of that charter that governed in 1914, and the rest of Section 6, there can be no doubt that the term refers to internal "house-keeping" rules.

E. Congress Crafted the FTC Act to Respect a More Rigid Non-Delegation Doctrine

National Petroleum Refiners artfully sidestepped the non-delegation doctrine, burying a brief discussion of the issue at the bottom of the decision. Judge Wright does not mention why Senator Albert Cummins, "one of the bill's main proponents,"⁵⁴ assured his fellow Senators that the bill would not violate the non-delegation doctrine:

Every lawyer understands that we can not delegate to a commission legislative power; that when we give to an administrative body the execution of a law of Congress we must at the same time give it a standard, a guide and rule which it is to apply to the particular case and determine whether that particular case falls under the prohibition of the law.⁵⁵

In a footnote, the court reprints a legislative colloquy on the House floor:

Mr. SHERLEY. If the gentleman will permit, the Federal trade commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

⁵² *Smith v. United States*, 508 U.S. 223, 234 (1993).

⁵³ Federal Trade Commission Act, Pub. L. No. 63-203, § 6, 38 Stat. 717 (1914).

⁵⁴ *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 706 (1973); FTC, DOCKET NO. 9341 AT 2, STATEMENT OF CHAIRMAN LEIBOWITZ AND COMMISSIONER ROSCH, available at <https://bit.ly/3kU9JIL>.

⁵⁵ 51 CONG. REC. 11,103 (1914).

Mr. STEVENS of Minnesota. Certainly.

Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?

Mr. STEVENS of Minnesota. Yes, The gentleman is entirely right. We desired clearly to exclude that authority from the power of the commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question.⁵⁶

The court dismisses this exchange, like other floor comments, as “utterly unhelpful.”⁵⁷ While the FTC Act’s legislative history is indeed complex, the text of the Act is clear: The Commission could *allege* that a particular practice in a particular case was unfair; it could even order a company to cease and desist from that practice.⁵⁸ But ultimately, it would be the Courts, not the Commission, which would decide what constituted an unfair method of competition.⁵⁹ The Commission’s role would be that of a special prosecutor, not a judge — and not a legislator.

F. Reading Section 6(g) to Confer Legislative Power Violates the Non-Delegation Doctrine as the Supreme Court Has Recently Signaled It Will Apply It

That an expanded reading of Section 6(g) would have clearly violated the non-delegation doctrine, as that doctrine was understood *in 1914*, shows, as a matter of statutory interpretation, that that expanded reading is not the correct one. Equally important, however, is the fact that, as a matter of constitutional law, the expanded reading likely violates the non-delegation doctrine *today*. Although it is true that since 1914, Congress has passed, and the Court has blessed, broad delegations of power, the non-delegation doctrine appears set for a revival.

Gundy v. United States (2019) is the Supreme Court’s most recent statement on how much authority Congress may delegate to executive agencies.⁶⁰ *Gundy* upholds an “intelligible

⁵⁶ *National Petroleum Refiners*, 482 F.2d at n.19 (citing 51 CONG. REC. 14,938 (1914)).

⁵⁷ *Id.* at 709.

⁵⁸ Federal Trade Commission Act, § 6, 38 Stat. at 719-20.

⁵⁹ 51 CONG. REC. 11,104 (1914) (statement of Senator Cummins) (“We say that if you find that unfair competition exists then you must prevent it, but in order to ascertain what unfair competition is you must go to the courts and to the common sense of mankind, and there are many adjudications on the subject.”).

⁶⁰ 139 S. Ct. 2116 (2019).

principle” test, under which Congress’s power to delegate authority is broad indeed.⁶¹ Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his “support” for “reconsider[ing] th[at] approach,” if and when a majority of the Court wishes to do so.⁶² Justice Kavanaugh, who did not participate in *Gundy*, has expressed just such a willingness.⁶³ And Justice Ginsburg, one of the four justices to stand by the “intelligible principle” standard in *Gundy*, has been replaced by Justice Barrett.

Justice Gorsuch’s dissent in *Gundy*—a dissent joined by Chief Justice Roberts and Justice Thomas; and a dissent Justices Alito, Kavanaugh, and Barrett are likely to find attractive in a future case—thus warrants more attention than an average dissent. If the executive branch may make “laws,” Justice Gorsuch notes, they will “not be few in number,” nor “the product of widespread social consensus,” nor “likely to protect minority interests,” nor “apt to provide stability and fair notice.”⁶⁴ Executive “lawmaking” would also enable both the legislature and the executive to evade accountability, each branch blaming the other for the consequences of open-ended legislation implemented through detailed agency rules.⁶⁵ For these and other reasons, Justice Gorsuch urges the Court to end its “intelligible principle misadventure” and insist that “Congress, and not the Executive Branch, make the policy judgments” that are implemented through agency action.⁶⁶

Even when the FTC applies it only case-by-case, under a rubric of congressionally set procedural rules and close judicial scrutiny, the “unfair methods of competition” standard is, post-*Gundy*, at high risk of being declared an unconstitutional over-delegation. “The term ‘unfair,’” after all, “is an elusive concept, often dependent upon the eye of the beholder.”⁶⁷ Indeed, as Commissioner Phillips observed last year, the term “unfair methods of competition” in Section 5 is “almost the exact wording” as “codes of fair competition,” the

⁶¹ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

⁶² 139 S. Ct. at 2131 (concurring opinion).

⁶³ See *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari).

⁶⁴ 139 S. Ct. at 2135.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2141.

⁶⁷ *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984).

term struck down under the non-delegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*.⁶⁸

So there might be a non-delegation problem with Section 5 *no matter what*. Under an expanded reading of Section 6(g), the problem simply becomes all the more acute. You could say, in fact, that passing substantive competition rules under Section 6(g) would amount to double-dog-daring the Supreme Court to follow through on transforming Justice Gorsuch's *Gundy* dissent into a controlling opinion.

It is not hard to envision how, in its push to use essentially a single word, “unfair,” to expand its power over markets, the economy, and the country itself, the FTC might ultimately ensure that its authority is snapped back into bounds that are *narrower* than those that exist today. A recent case involving another vague and open-ended word, “necessary,” shows how this might occur.

That case, *Florida v. Becerra*, involved a law that gives the Surgeon General the authority to “make and enforce such regulations as in his judgment are necessary to prevent ... the spread of communicable diseases.”⁶⁹ The Centers for Disease Control (CDC) argued that, so long as it concluded that a measure was “necessary” to prevent even a *risk* of interstate transmission of a disease, the statute empowered it to take any such measure it deemed fit.⁷⁰ Although the District Court adopted a narrower reading of the statute, it also ruled, in the alternative, that the CDC's preferred reading contained no “intelligible principle” and thus violated the non-delegation doctrine. As the court noted, the CDC's reading, if accepted, amounted to “a breathtaking, unprecedented, and acutely and singularly authoritarian claim” of authority.⁷¹

In a passage that (as here shortened) could easily be applied to an unchecked reading of “unfair methods of competition,” the court marveled at some of the implications of the CDC's unchecked reading of “necessary to prevent the ... spread of communicable diseases”:

The [modern] law of the United States on non-delegation has ... [enabled] an argument ... about whether Congress, based on an ambiguous sentence or two in a statute, can bestow on an executive agent the power indefinitely to halt the operation of, and perhaps destroy, an entire industry or several industries or perhaps the industries of the entire nation, destroy businesses and lives

⁶⁸ 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). See Noah Phillips, *Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues*, FTC (Jan. 9, 2020), <https://bit.ly/2U7jGrv>.

⁶⁹ No. 8:21-cv-839 (M.D. Fla., Jun. 18, 2021). See 42 U.S.C. § 264(a).

⁷⁰ *Id.* at *69-72.

⁷¹ *Id.* at *73.

dependent on industry, ... or otherwise alter the course, history, prosperity, and health of the nation[.]⁷²

If it is pegged to the jurisprudence of the Sherman Act (starting with the consumer welfare standard), the phrase “unfair methods of competition” could not lead to the results contemplated in this passage. If left undefined, however—if left to mean whatever the agency *says* it means—the phrase is *quite aptly* captured by this passage. The phrase *could* potentially enable an independent commission—a group of “unelected, electorally unaccountable, and largely anonymous executive agents”⁷³—to halt industries, destroy businesses, and otherwise alter the course of the nation. Whatever it takes to stamp out “unfairness.”⁷⁴

Far from hastening to disclaim that the word “unfair” gives it this kind of power, the FTC of late seems to be in a rush to *insist* that it does. That is the message sent by the agency’s attempt to detach itself from the Sherman Act through its recent repeal of the Unfair Methods of Competition Policy Statement.⁷⁵ It is also the message sent when the Chair urges the agency to see itself as a “body whose work shapes the distribution of power and opportunity across our economy.”⁷⁶

The agency’s Section 5 power may be in peril no matter what the agency does. Nothing could force the issue faster, however, than an effort to assert broad rulemaking authority under Section 6(g). Such an effort would send the agency hurtling toward conflict with the non-delegation doctrine. And if the agency insisted on sliding down that chute, it might well find itself with less power at the bottom than it had the top. This much is guaranteed: in the end, a court, and not the agency, would draw the definitive boundary of the agency’s authority.

⁷² *Id.* at *84.

⁷³ *Id.* at *85.

⁷⁴ Perhaps the weak but still extant protections of property in the Fifth and Fourteenth Amendments would prevent the worst excesses. But cf. Kurt Vonnegut, *Harrison Bergeron* (1961) (in which the 211th, 212th, and 213th amendments to the Constitution enable the Handicapper General, by making all Americans equal in every respect, to ensure that there truly are no “unfair methods of competition”).

⁷⁵ See *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act*, FTC (July 1, 2021), <https://bit.ly/3ilp6bH>. Error! Hyperlink reference not valid.

⁷⁶ *Memo from Chair Lina M. Khan to Commission Staff and Commissioners*, FTC (Sept. 22, 2021), available at <https://bit.ly/3uqtBXL>.

III. Before *National Petroleum Refiners*, Congress Signaled Its Intention to Confer Quasi-Legislative Powers by Specifying Sanctions

Professor Pierce, the administrative law expert who told the FTC's 2020 workshop that the reasoning of *National Petroleum Refiners* was "laughable," is far from alone among leading experts in administrative law in deriding the case. Columbia Law Professor Thomas Merrill, "[o]ne of the most cited legal scholars in the United States,"⁷⁷ debunked Judge Skelly Wright's analysis in a 2001 article published in the Harvard Law Review.⁷⁸ Merrill calls the decision a "remarkable legal document,"⁷⁹ noting Wright's "self-confident tone and masterful blending of Supreme Court precedents."⁸⁰ But it was "remarkable" for its impressive sleight of hand in misconstruing the FTC Act (FTCA) and the cases it cites, not its sound reasoning, as Merrill concludes:

The legislative history of the FTCA ... provides significant evidence that Congress did not intend to grant legislative rulemaking authority to the FTC. Judge Wright nevertheless pronounced this history to be "ambiguous" regarding the meaning of Section 6(g), and then relegated the details to an appendix for the especially diligent reader to consult. Such ambiguity, he said, was not enough to overcome "the plain language of Section 6(g)," which, "read in light of the broad, clearly agreed-upon concerns that motivated passage of the Trade Commission Act, confirms the framers' intent to allow exercise of the power claimed here." In the end, Judge Wright adopted what amounted to a new canon: unless the legislative history reveals a clear intent to the contrary, courts should resolve any uncertainty about the scope of an agency's rulemaking authority in favor of finding a delegation of the full measure of power to the agency.⁸¹

National Petroleum Refiners, Merrill laments, "provided the roadmap for a more general erasure of the convention"⁸² that had guided Congress for decades in drafting legislation:

Starting around World War I, Congress began following a convention for indicating whether an agency had the power to promulgate legislative rules. Under this convention, the requisite textual signal was provided by the

⁷⁷ Thomas W. Merrill, COLUMBIA LAW SCHOOL, <https://www.law.columbia.edu/faculty/thomas-w-merrill>.

⁷⁸ See Merrill, *supra* note 10.

⁷⁹ *Id.* at 555.

⁸⁰ *Id.* at 557.

⁸¹ *Id.* at 556-57.

⁸² *Id.* at 557.

inclusion of a separate provision in the statute attaching "sanctions" to the violation of rules and regulations promulgated under a particular rulemaking grant. If the statute prescribed a sanction, then the authority to make "rules and regulations" included the authority to adopt legislative rules having the force of law. If the statute did not include a sanction, the authority to make "rules and regulations" encompassed only interpretive or procedural rules.⁸³

In nearly all the cases cited by *National Petroleum Refiners*, the act at issue clearly involved sanctions,⁸⁴ but violations of the FTC Act trigger no sanction at all. Under Section 5, the key provision of the FTC Act, the Commission was "empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."⁸⁵ Section 5 spelled out, at length, how this process was to work: the Commission would, upon "reason to believe" that someone was violating the Act, issue an order designating the matter for hearing, hold the hearing, and, if it concluded that a violation had occurred, issue a cease-and-desist order.⁸⁶ The Commission had no power to enforce its own orders or impose any sanction upon anyone who violated them, only the power to ask a federal court to enforce such orders.⁸⁷ Congress was unmistakably clear on this point: "The jurisdiction of the circuit court of appeals of the United States court of appeals to enforce, set aside, or modify orders of the commission shall be exclusive."⁸⁸ The Act authorized the courts, not the FTC, to impose penalties, and only in limited circumstances: upon those who refused to comply with subpoenas issued by the FTC, those who made false statements to the FTC, corporations that failed to file reports ordered by the FTC, or employees of the FTC who made public

⁸³ *Id.* at 493. Merrill continues:

"The 'sanctions' took various forms. The clearest case, of course, was when Congress imposed criminal or monetary civil penalties on persons who violated an agency's regulations. On other occasions, however, the sanctions might take the form of the forfeiture or destruction of property, the revocation of licenses, or the denial of benefits. In contrast, 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."

Id. at 493-94.

⁸⁴ *See infra* at III.

⁸⁵ Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), available at <https://bit.ly/3CYwaCQ>.

⁸⁶ *Id.* at Sec. 5.

⁸⁷ *Id.*

⁸⁸ *Id.*

information obtained by the Commission.⁸⁹ No penalties could be imposed for violation of a cease-and-desist order.

“The failure to provide any sanction for the violation of rules adopted under section 6(g),” Merrill concludes, “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, regarding which Congress had not given the agency the authority to act with the force of law.”⁹⁰ In 1975, Congress amended the FTC Act to empower the agency to impose civil penalties upon those who violate orders of the Commission,⁹¹ but the current Section 5(l) would be irrelevant to Merrill's analysis of how the convention applied to the FTC Act even if the provision had been included in the 1914 Act: sanctions apply not to violations of the Act itself, but to violations of court orders imposed for previous violations of the Act — roughly akin to penalties for contempt of court.⁹²

A. The Rise and Fall of the Sanctions/Rulemaking Convention

Merrill traces the evolution of the convention by conducting a comprehensive survey of legislation enacted in the Progressive and New Deal eras.⁹³ He summarizes its history:

The convention did not emerge full-blown at any one moment. Rather, it gradually developed around the second decade of the twentieth century as Congress created new administrative entities and considered what kind of rulemaking authority to give them. Moreover, as we shall see, the convention was never explicitly memorialized in an authoritative text, such as a statute, a legislative drafting guide, or a prominent judicial decision. It remained part of the unwritten “common law” of legislative drafting in the first half of the twentieth century. Accordingly, the only way to establish the existence of the convention is to examine a significant number of regulatory statutes and their

⁸⁹ *Id.*

⁹⁰ Merrill, *supra* note 10, at 504-05.

⁹¹ Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-657, 88 Stat. 2183 (1975); 15 U.S.C. § 45(l).

⁹² 15 U.S. Code § 45(l).

⁹³ Merrill, *supra* note 10, at 494 n. 129 (“We began by identifying and analyzing numerous nineteenth-and early twentieth-century regulatory statutes, which we located through a variety of sources, including case law, legal articles and books about rulemaking, and by scanning the United States Code's Popular Name Table, which lists acts and the years in which they were enacted. We next identified those regulatory statutes that include facially ambiguous rulemaking grants and sought to determine whether there was any authority discussing whether these grants conferred legislative or merely housekeeping powers.”).

associated legislative histories, supplemented by contemporary writings by knowledgeable participants in the legislative and administrative processes.

This convention has its roots in two Supreme Court decisions: *United States v. Eaton* (1892) held that a “sufficient statutory authority should exist for declaring any act or omission a criminal offence,”⁹⁴ and suggested that if “Congress ... ma[de] it a crime to violate a regulation adopted by an agency... Congress would have to speak ‘distinctly’ in criminalizing failures to abide by agency regulations.”⁹⁵ While Eaton relied “on a blend of nondelegation and lenity precepts,”⁹⁶ *United States v. Grimaud* (1911)⁹⁷ “framed its analysis exclusively in terms of whether the delegation was permissible.”⁹⁸ The pertinent passage, which we quoted previously in discussing non-delegation, bears repeating here:

When Congress [has] legislated and indicated its will, it [can] give to those who were to act under such general provisions “power to fill up the details” by the establishment of administrative rules and regulations, the violation of which [can] be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.⁹⁹

Another case we quoted in that section, the *Queen and Crescent* case, is also pertinent.¹⁰⁰ The Interstate Commerce Act empowered the ICC to declare whether a given railroad rate was reasonable. At issue in the Queen and Crescent Case was whether the Act further empowered the ICC to set future rates through rulemaking. The Court concluded that it didn’t. Although whether the Act granted the power was debatable, the Court explained, such grants of rulemaking power are “never to be implied.”¹⁰¹

The convention ultimately fell into obscurity because, as Merrill explains, it was never codified:

The most remarkable aspect of this drafting convention is that modern administrative lawyers are not aware of its existence. How could a convention that Congress consistently followed during the formative years of the

⁹⁴ 144 U.S. 677, 688 (1892).

⁹⁵ Merrill, *supra* note 10, at 500 (quoting *Eaton*, 144 U.S. at 688).

⁹⁶ *Id.*

⁹⁷ 220 U.S. 506 (1911).

⁹⁸ Merrill, *supra* note 10, at 501.

⁹⁹ 220 U.S. at 517.

¹⁰⁰ 167 U.S. 479 (1897).

¹⁰¹ *Id.* at 494.

administrative state simply disappear from legal consciousness? The explanation, we suggest, lies in the fact that during the time the convention was developed and followed by Congress, no appellate court rendered a decision that required it to determine whether Congress had conferred authority on an agency to make rules with the force of law. In administrative law, as in other areas of American law, legal knowledge is transmitted through the study of appellate opinions. With no opinion to flag the issue, questions about the meaning of ambiguous rulemaking grants were ignored in post-World War II treatises and instructional materials devoted to administrative law. As a result, knowledge of the convention died out. When, in subsequent years, the Supreme Court occasionally encountered cases that implicated the meaning of such rulemaking grants, none of the parties alerted the Court to the existence of the convention, even if it would have been in their interests to do so — presumably because their lawyers did not know about it.¹⁰²

As we note below, most of the cases cited by *National Petroleum Refiners* involved statutes that would clearly have satisfied the convention, had the court applied it; instead, in each case, the court found other reasons for interpreting the grants of rulemaking authority to be substantive in nature.¹⁰³ And in inventing such specious reasons, these courts laid the groundwork for the confusion to which Judge Wright gave voice.

B. Applying that Convention to the FTC Act

In *United States v. George* (1913), the Supreme Court applied *Grimaud* to strike down a substantive regulation issued by the General Land Office. Each of the four statutory provisions invoked as authority for the regulation, concluded the Court, “confer[red] administrative power only” — and “indubitably so.”¹⁰⁴ One of them bears a striking resemblance to Section 6(g): “The Commissioner of the General Land Office ... is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.”¹⁰⁵

In this context, Congress’s decision, the very next year, not to include any sanction for violations of the FTC Act, let alone rules issued by the FTC, speaks clearly about its intentions. As Merrill concludes:

¹⁰² Merrill, *supra* note 10, at 473.

¹⁰³ See *infra* Section V at 24-37.

¹⁰⁴ 228 U.S. 14, 19 (1913).

¹⁰⁵ *Id.* at 22, n.1.

Neither *Eaton* nor *Grimaud* spoke directly to the question of how facially ambiguous rulemaking grants should be interpreted. Nevertheless, the decisions established points of reference that Congress could use in signaling whether particular grants authorized rules and regulations having the force of law. If Congress specifically provided that the violation of a regulation would result in the imposition of sanctions, such as criminal penalties, then the rule would have the force of law (*Grimaud*). If Congress did not so provide, an agency could not enforce the rule with criminal penalties (*Eaton*), and it was doubtful whether it could be enforced with any type of civil sanction.¹⁰⁶

National Petroleum Refiners, noted Merrill, “reflected no recognition of a central difference between the rulemaking grants given to the agencies in [the] cases [it cites] and the FTC’s general rulemaking grant: namely, that the rulemaking grants in those cases, unlike Section 6(g), were coupled with statutory provisions imposing sanctions for rule violations.”¹⁰⁷ Merrill’s conclusion speaks for itself:

The failure to provide any sanction for the violation of rules adopted under Section 6(g)—or, indeed, even of the FTC Act itself — 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, regarding which Congress had not given the agency the authority to act with the force of law.

The legislative history of the Act supports the conclusion that the FTC’s rulemaking grant did not confer legislative rulemaking authority. Section 6(g)’s general rulemaking grant originated in the House Bill of 1914, which conferred only investigative powers on the FTC, such as the power to require reports from corporations and to classify corporations. In contrast, the bill that passed the Senate granted adjudicative and investigative powers but included no rulemaking provision at all. As a consequence, when the Conference Committee met, the only rulemaking provision under consideration was the one included in the House bill. 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.¹⁰⁸

¹⁰⁶ Merrill, *supra* note 10, at 502.

¹⁰⁷ *Id.* at 556.

¹⁰⁸ *Id.* at 504-05.

IV. Post-Enactment History of the FTC Act

Chairman Khan, Commissioner Chopra and Professor Gus Hurwitz, whose work they cite, rely on Congressional actions after 1914 to support their conclusion that Congress,¹⁰⁹ in 1914, intended to confer substantive rulemaking authority upon the FTC. The examples they point to have no bearing upon what Congress intended in 1914. There is only one Congressional enactment post-1914 that speaks clearly to the original meaning of the FTC Act, Merrill notes:

The history of the Flammable Fabrics Act of 1953 confirms most strikingly that Congress did not grant the FTC legislative rulemaking powers under the original FTCA. The Flammable Fabrics Act included a general rulemaking grant that authorized the FTC to "prescribe such rules and regulations as may be necessary and proper for purposes of administration and enforcement of this Act." Congress wrote this grant in language similar to the general grant included in section 6(g) of the FTCA. Both stood alone, lacking any statutory sanctions to put teeth into the regulations. In 1967, however, Congress amended the Flammable Fabrics Act by adding the following language to the rulemaking provision: "The violation of such rules and regulations shall be unlawful and shall be an unfair method of competition ... under the Federal Trade Commission Act." Congress also gave the FTC the authority to enjoin any violations of the rules and regulations promulgated under the Act.¹¹⁰

A. The Magnuson-Moss Act of 1975 Did Not Resolve the Question

In 1975, Congress created a special procedure by which the FTC could issue substantive rules defining unfair and deceptive acts and practices — and empowered the FTC to sanction those who violated such rules with civil penalties.¹¹¹ Section 18(b)(2) specified that this was to be the *only* process by which the FTC could make such rules:

The [FTC] shall have no authority under this act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of Section 5(a)(1)). The preceding sentence shall not affect any authority of the [FTC] to prescribe

¹⁰⁹ Chopra & Khan, *supra* note 6; Hurwitz, *supra* note 6.

¹¹⁰ Merrill, *supra* note 10, at 109.

¹¹¹ Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 83 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 57a(a)(2) (2021)).

rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.¹¹²

Hurwitz concludes: “The FTC, therefore, retained substantive rulemaking authority, authorized by Section 6(g), affirmed in *National Petroleum Refiners*, and governed by the standard Administrative Procedure Act (“APA”) notice-and-comment rulemaking procedures.”¹¹³ This is a non-sequitur. First, as a semantic matter, note how the second sentence is worded: it does not say “The preceding sentence shall not affect the authority of the [FTC] to prescribe rules...” That definitive wording would at least have implied that Congress thought that the FTC had this authority. Rather, Congress worded the sentence in vague, conditional terms — as if to say “any authority the FTC may (or may not!) have.” The more natural reading of this sentence is that Congress was not sure what authority the FTC had and simply intended to ensure that the new law did not “affect” whatever authority the Commission might have had. The conference report, quoted by Hurwitz, says essentially the same thing: “[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.”¹¹⁴

More fundamentally, as the Supreme Court has declared, “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”¹¹⁵ This is especially so when Congress enacts new legislation touching upon earlier legislation whose precise meaning is “still to be authoritatively determined” and remains “a subject of speculation.”¹¹⁶ This was, and remains, the case for Section 6(g) — with the Supreme Court having declined to review *National Petroleum Refiners* and with no other appellate court having ruled on the question.

Nor can we infer anything, as Hurwitz does, about the original meaning, in 1914, of Section 6(g) from the 1974 conference committee’s rejection of the House’s proposal “that the FTC would not have rulemaking authority with respect to unfair methods of competition to the extent they are not unfair or deceptive acts or practices.”¹¹⁷ Such decisions to reject legislative language are inherently unreliable indicators of Congressional intent, as the Supreme Court has ruled: “Whether Congress thought the proposal unwise ... or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the

¹¹² *Id.*

¹¹³ Hurwitz, *supra* note 6, at 234.

¹¹⁴ S. Conf. Rep. No. 93-1408, 1974 U.S.C.C.A.N. at 7763.

¹¹⁵ *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

¹¹⁶ *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 348-49 (1963).

¹¹⁷ H.R. Rep. No. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7727.

failure of the Congress to act.”¹¹⁸ Here, that is doubly true: Congress decided (a) *not* to enact a proposal that (b) might, or might not, have accurately reflected the actual state of the law. That lawmakers in 1974 *might* have thought that the FTC *might* have had UMC rulemaking authority does not actually tell us whether the Congress that enacted the FTC Act intended to confer such power in 1914. As Justice Scalia famously put it, “the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed. ... Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”¹¹⁹

B. 1980 FTC Improvements Act Did Not Validate UMC Rulemaking

If anything, the FTC Improvements Act of 1980 tells us even less about whether the FTC may make “unfair methods” rules. As Hurwitz notes, the 1980 Act was passed in response to the FTC’s “extensive and often controversial rulemaking” following passage of Mag-Moss in 1975. Hurwitz highlights “the FTC’s attempt to ban all advertising directed at children as unfair[.]”¹²⁰ “The FTC had become the second most powerful legislature in the country,” Hurwitz continues, which “famously led the *Washington Post* to declare that the FTC had assumed the role as ‘National Nanny.’”¹²¹

It was in response to this overreach that Congress passed the 1980 Act, which placed new restrictions on the FTC’s UDAP rulemaking authority, stripped the FTC of authority to make rules for (among other things) children’s advertising, and gave Congress a (temporary) veto on all FTC rules.

Given this background, what are the chances that the 1980 Act tacitly endorses Section 6(g) “unfair methods” rulemaking? Put another way, did Congress pass the 1980 Act simultaneously (1) to explicitly act on its white-hot rage at the FTC’s aggressive, overreaching, meddlesome UDAP rules and (2) to implicitly endorse the notion that the FTC may embark on grand new adventures in the realm of “unfair methods” rulemaking? To ask the question is to answer it. It makes no sense. “Despite the broad concern and additional requirements

¹¹⁸ *United States v. Price*, 361 U.S. 304, 312 (1960).

¹¹⁹ *Sullivan v. Finkelstein*, 496 U.S. 617 (1990) (Scalia, J. dissenting) (“In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration — which provision, if passed, may in turn affect judicial interpretation of the previously enacted statute, since statutes *in pari materia* should be interpreted harmoniously. Such an expression would be useful, if at all, not because it was subsequent legislative history of the earlier statute, but because it was plain old legislative history of the later one.”).

¹²⁰ Hurwitz, *supra* note 6, at 235.

¹²¹ *Id.*

placed on Section 18 [Mag-Moss] rulemaking,” Hurwitz notes, “Congress did not add any additional procedures to Section 6(g) rulemaking.”¹²² Well of course. Congress was addressing the problem before it—the FTC’s “National Nanny” UDAP rules. Congress was not obligated to play a hypothetical game of whack-a-mole, slapping down agency abuses that had not yet occurred. To conclude, to the contrary, that Congress reined in the FTC’s UDAP rulemaking authority with one hand, but anointed the FTC a maker of “unfair methods” rules with the other, is illogical. To further conclude, as one adopting this line of thought is obliged to do, that Congress actually made it *easier* to pass UMC rules than UDAP rules, is downright perverse.

V. *National Petroleum Refiners* Ignored Obvious Differences between the FTC Act and the Statutes at Issue in the Cases It Cited

National Petroleum Refiners declared that the courts have not hesitated “in construing broad grants of rule-making power to permit promulgation of rules with the force of law as a means of agency regulation of otherwise private conduct.”¹²³ With one notable exception, the cases cited by Judge Wright involve statutes that either plainly confer substantive rulemaking authority or that were reasonably assumed to imply such authority, given their structure or the fact that they confer sanctions power upon the agency.

A. The Communications Act & the Motor Carrier Act Are Readily Distinguishable from the FTC Act

Judge Wright claimed that *U.S. Nat. Broadcasting Co. v. U.S.* (1943), had “rejected arguments similar to those made” by the refiners, “ruling that” the “FCC’s generalized rule-making authority in 47 U.S.C. § 303(r) ... extended beyond specification of technical and financial qualifications to be used as guides in the administration of the Commission’s license-granting power.”¹²⁴ Thus, declared the Supreme Court, the Commission could regulate the contractual relationships between a broadcast station and its affiliated broadcast network.¹²⁵

Am. Trucking Ass’ns v. United States (1953) upheld the Interstate Commerce Commission’s (ICC) authority to issue binding substantive rules.¹²⁶ The Motor Carrier Act of 1935

¹²² *Id.*

¹²³ *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 680 (D.C. Cir. 1973).

¹²⁴ *Id.* at 678.

¹²⁵ *See Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943).

¹²⁶ 344 U.S. 298 (1953).

empowered the ICC “[t]o administer, execute, and *enforce* all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.”¹²⁷ The Court rejected “appellants’ contention that the rule-making authority of § 204(a)(6) merely concerns agency procedures and is solely administrative” because that argument “ignores the distinct reference in the section to enforcement.”¹²⁸

The FTC Act could hardly be more different from either of these acts. Both acts authorized the implementing agency to impose penalties for violations of regulations issued under the act.¹²⁹ As Merrill explains,

The Court upheld the regulations in both cases without specifying which rulemaking grants endowed the regulations with the force of law. It is not surprising that the Court proceeded in this manner. The challenger in each case claimed that the agency was acting beyond the scope of its regulatory jurisdiction. In neither case did the challenger maintain that the agency lacked the power to adopt regulations having the force of law. Thus the Court probably felt no compulsion to discuss which statutory provisions supported legislative rulemaking.¹³⁰

The original FTC Act made no provision whatsoever for penalties. Section 5(l), added in 1975, authorizes the Commission to impose penalties for violations of orders issued by the Commission¹³¹ — supplementing the adjudicatory process at the heart of the original FTC Act. Section 5(m), also added in 1975, authorizes the FTC to seek civil penalties from a federal

¹²⁷ *Id.* at 311 (quoting 49 U.S.C. § 204(a)(6) (1953)).

¹²⁸ *Id.*

¹²⁹ Communications Act of 1934, Pub. L. No. 73-416, § 312(a), 48 Stat. 1064, 1086 (revocation of licenses based on violations of FCC regulations), § 502, 48 Stat. at 1100-11 (criminalizing violation of “any rule, regulation, restriction, or condition” imposed by the agency under authority of Title III of the Act); National Labor Relations Act, Pub. L. No. 74-198, § 12, 49 Stat. 499, 457 (violations of “any rule, *regulation*, requirement, or order” issued by under the Act could result in revocation of licenses and permits as well as fines up to \$5,000). Motor Carrier Act of 1935, Pub. L. No. 74-255, § 222(a), 49 Stat. 543, 564 (“Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than \$ 100 for the first offense and not more than \$ 500 for any subsequent offense.”); § 222(b), 49 Stat. at 564 (“If any motor carrier or broker operates in violation of ... any rule, regulation, requirement, or order ... the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition.”).

¹³⁰ Merrill, *supra* note 10, at 530.

¹³¹ 15 U.S.C. § 45(l).

court for violations of the Commission's rules, but only those "respecting unfair or deceptive acts or practices."¹³²

Merrill assails the sloppiness of both *National Broadcasting* and *American Trucking*: their "significance for the future lay not in what the Court said, but in what it did not say: the opinions demonstrated an apparent indifference to the question of the sources of the agencies' authority as legislative rulemakers."¹³³ But even under the rationale followed by the courts in these cases, the FTC Act is easily distinguishable: Section 6(g) confers no power to "enforce" the Act, nor does any other provision of the original Act do so.¹³⁴ The Act referenced "enforcement" only in three instances — each time, making clear that it was the court, not the Commission, that was responsible for "enforcement."¹³⁵

B. The Public Utility Holding Company Act, *Morgan Stanley*, and *Chenery* Are Easily Distinguishable from the FTC Act

The *National Petroleum Refiners* court cited two related cases without carefully examining the statutes at issue in those cases.¹³⁶ The Supreme Court's *Chenery* decision is by far the more significant of the two, but we must first consider a previous appellate decision involving the same statute.

In *Morgan Stanley & Co. v. Securities Exch. Comm'n*,¹³⁷ the Second Circuit upheld "SEC rules involving underwriters' commissions in public utility offerings under the Public Utility Holding Company Act [of 1935.]"¹³⁸ The case turned not on whether the SEC had the authority to make substantive rules but on whether one specific section of PUHCA (12(f))

¹³² Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-657, 88 Stat. 2183 (1975).

¹³³ Merrill, *supra* note 10, at 531.

¹³⁴ Federal Trade Commission Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717 (1914).

¹³⁵ First, the Commission was empowered to "apply to" the appropriate circuit court "for the enforcement of its order." Second, when a party subject to an FTC cease-and-desist order appealed that order, "court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive." Third, the appellate courts had "exclusive" jurisdiction "to enforce, set aside, or modify orders of the commission." A fourth provision makes the point clear by distinguishing between an "order of the Commission" and a "judgment of the court to enforce the same" (in clarifying that neither shall affect antitrust liability). *See id.* § 5.

¹³⁶ *See Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 681-84 (1973) (discussing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *see id.* at 680 (discussing *Morgan Stanley & Co. v. Sec. Exch. Com.*, 126 F.2d 325 (2d Cir. 1942)).

¹³⁷ 126 F.2d 325 (2d Cir. 1942).

¹³⁸ *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 680 (D.C. Cir. 1973) (citing *Morgan Stanley Co. v. SEC*, 126 F.2d 325 (2d Cir. 1942)).

served as an adequate basis for the rule, even though “that section deals only with ‘affiliates,’ and the Rule covers persons not previously found to be affiliates under § 2(a) (11) (D).”¹³⁹

Under Merrill’s convention, the SEC clearly had rulemaking power:¹⁴⁰ PUHCA included clear provisions authorizing the SEC to enforce sanctions on “Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act.”¹⁴¹ Sanctions for violating PUHCA regulations include fines up to \$200,000 and “imprisoned not more than two years.”¹⁴² Thus, regulations under PUHCA had the “force of law.”¹⁴³ These sanctions amply distinguish PUHCA from the FTC Act.

PUHCA is clearly distinguishable from the FTC Act in other respects, despite using roughly equivalent “carry out” language: “The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this chapter.”¹⁴⁴ The very next sentence of Section 20(a) does what FTCA § 6(g) does not: it spells out a list of subjects about which the FTC can make rules. “Among other things,” declares Section 201(a), the SEC “shall have authority” to make specific kinds of rules governing not only how companies file reports with the agency (akin to the procedural rules issued under the “carry out” authority found in earlier statutes described above) but also the way that companies maintained their own documents and accounts in minute detail.¹⁴⁵ Section 20(c) goes on to provide that “[t]he rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe.”¹⁴⁶ This suggests that Congress intended these rules to have binding effect. Further, Section 20(d) provides: “No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with *any rule, regulation, or order* of the Commission, notwithstanding that such rule, regulation or order may, after such act or omission, be amended or rescinded or be determined by judicial or

¹³⁹ *Id.* (“The argument is made, however, that the Rule does not contemplate a § 2(a) (11) (D) determination. But the Commission notes that it ought to be competent to construe its own rules, within the limits of statutory power. We agree, and shall, therefore, assume that the Rule is in effect a § 2(a) (11) (D) determination.”).

¹⁴⁰ Merrill, *supra* note 10, at 493-94.

¹⁴¹ Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (SEC. 29.).

¹⁴² *Id.*

¹⁴³ Merrill, *supra* note 10, at 493-94.

¹⁴⁴ Public Utility Act of 1935 § 20(a), 49 Stat. at 833.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 20(c).

other authority to be invalid for any reason.”¹⁴⁷ In short, even without applying Merrill’s convention, the court had ample grounds for concluding that the SEC had, indeed, been “given broad rule-making powers for furthering the statutory provisions.”¹⁴⁸

Five years after *Morgan Stanley*, the Supreme Court decided another case involving PUHCA. *SEC v. Chenery Corp*¹⁴⁹ has since served as the basis for much of modern administrative law. *Chenery* famously declared that “[t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”¹⁵⁰ Judge Wright places great weight upon this sentence:

[T]here is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency’s job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. 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.¹⁵¹

But, as we have already seen, PUHCA differs fundamentally from the FTC Act — in ways that Judge Wright ignores. What *Chenery* said was true only of statutes that, like PUHCA, clearly contemplated substantive rulemaking (and thus, arguably, statutes that authorized sanctions for violations of rules). The sentence preceding the much-quoted “interstices” line makes this clear: “Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act.”¹⁵² In other words, *Chenery* took for granted that the SEC had rulemaking authority. *Chenery* tells us nothing about statutes that lack the essential attributes of PUHCA: clear sanctions for violations of regulations and explicit references to the enforcement of regulations and their substantive effect — statutes such as the FTC Act.

¹⁴⁷ *Id.* § 20(d).

¹⁴⁸ *Morgan Stanley & Co. v. Sec. Exch. Com.*, 126 F.2d 325, 327 (2d Cir. 1942).

¹⁴⁹ 332 U.S. 194 (1947).

¹⁵⁰ *Id.* at 202.

¹⁵¹ *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 681 (D.C. Cir. 1973).

¹⁵² *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947).

C. The National Labor Relations Act Did Not Authorize Sanctions; Cases Interpreting It Are Inconclusive; and in Any Event, the Act Is Distinguishable from the FTC Act

In *Nat'l Labor Relations Bd. v. Wyman-Gordon Co.* (1969), the Supreme Court upheld the Board's ability to make substantive rules.¹⁵³ Merrill calls the decision "[p]erhaps the most influential judicial stimulus to use legislative rulemaking."¹⁵⁴ *National Petroleum Refiners* cites *Wyman-Gordon* as "hint[ing] that there may be circumstances where agency policy innovations should be made *only* in rule-making proceedings."¹⁵⁵ Judge Wright also cited another appellate decision decided earlier in 1973 to that effect.¹⁵⁶ But a year later, the Supreme Court overruled that decision, reaffirming that the NLRB could announce new interpretations of its statute through adjudication¹⁵⁷ — without addressing whether the Board could issue legislative rules. The NLRB returned to operating purely through adjudication until 1987.

As enacted in 1935, the National Labor Relations Act contained no provision for sanctioning violations.¹⁵⁸ Thus, as Merrill explains, Section 6(a)'s grant of rulemaking authority¹⁵⁹ (roughly equivalent to Section 6(g) of the FTC Act) should, under the convention he describes, have been interpreted to confer only the power to make procedural rules. Yet in *American Hospital Association v. NLRB* (1991), the Supreme Court upheld a legislative rule promulgated by the NLRB under this provision.¹⁶⁰ Section 6(a), declared the Court without further explanation, was "unquestionably sufficient to authorize the rule at issue."¹⁶¹ Merrill notes that this question was not actually presented to the court. He explains why:

The willingness of the parties in *American Hospital* to accept that the NLRB had been delegated legislative rulemaking powers most likely stemmed from two sources. First, the pathbreaking opinions of Judges Wright and Friendly that had treated ambiguous rulemaking grants as presumptively authorizing legislative rules had by then been on the books for a decade or more. Second,

¹⁵³ 394 U.S. 759 (1969).

¹⁵⁴ Merrill, *supra* note 10, at 567.

¹⁵⁵ *National Petroleum Refiners*, 482 F.2d at 682 (emphasis original).

¹⁵⁶ *Id.* at 682-84 (citing *Bell Aerospace Div. of Textron, Inc. v. NLRB*, 475 F.2d 485 (2d Cir. 1973)).

¹⁵⁷ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

¹⁵⁸ National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169).

¹⁵⁹ "The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to *carry out* the provisions of this Act." § 6(a), 49 Stat. 449, 74th Cong. (1935).at 452.

¹⁶⁰ 499 U.S. 606, 609-610 (1991).

¹⁶¹ *Id.* at 609-10.

although Wyman-Gordon did not expressly consider the NLRB's rulemaking powers under section 6(a), the opinions in that case, as well as the Court's treatment of the rulemaking versus adjudication issue in *Bell Aerospace*, implicitly suggested that the NLRB possessed legislative rulemaking powers. Thus, by the time the Court decided *American Hospital* in 1991, counsel for the Association no doubt concluded it was not worth the effort to challenge the NLRB's exercise of legislative rulemaking powers.¹⁶²

As Merrill notes, the "legislative history of the NLRA substantiates [the] conclusion" that the Act should not have been interpreted to confer substantive rulemaking power:

Upon consideration of different versions of the bill, one Senator made a proposal to limit the NLRB's rulemaking powers under what became section 6(a) to such "reasonable rules and regulations as may be necessary to carry out the provisions of this Act." However, the proposal was rejected because, according to a Senate memorandum, "in no case do the rules have the force of law in the sense that criminal penalties or fines accrue for their violation, and it seems sufficient that the rules prescribed must be "necessary to carry out the provisions' of the act." The Final Report of the Attorney General's Committee of 1941 confirms this legislative history: it notes that the NLRB's "power to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter' has been assumed to extend only to matters of procedure."¹⁶³

The Court may yet reverse *American Hospital* for the reasons Merrill summarizes.¹⁶⁴ But even if it does not, the NLRA is distinguishable from the FTC Act in at least three respects — despite the similarities between NLRA § 6(a) and FTCA § 6(g). First, Section 8, arguably contemplates limited substantive rulemaking to define a statutory safe harbor from immunity under the NLRA's key operative provisions:

It shall be an unfair labor practice for an employer-

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

¹⁶² Merrill, *supra* note 10, at 570.

¹⁶³ Merrill, *supra* note 10, at 511 (citing See Attorney General's Comm. on Admin. Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 77-8, at 98 n.18 (1st Sess. 1941) (internal citation omitted).

¹⁶⁴ Merrill, *supra* note 10, at 586.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided, That subject to rules and relations made and published by the Board pursuant to section 6(a)* an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.¹⁶⁵

By contrast, the FTC Act says nothing about the application of the rules issued under Section 6(g) to suggest that they may have substantive effect.

Second, the two acts have markedly different structures. Only after authorizing “administrative rules” in a free-standing provision (§ 6(a)) and specifying a substantive application of such rules (§ 8), does the NLRA authorize enforcement of the Act through adjudication (§ 10).¹⁶⁶ The FTC Act does the opposite: it bars unfair methods of competition, describes the agency’s adjudicatory process in exquisite detail, then briefly mentions rulemaking among many “additional powers” of the FTC.¹⁶⁷

Finally, even by the time *Wyman-Gordon* was decided, Congress amended the original act to add that rulemakings conducted under Section 6(a) be conducted “in the manner prescribed by subchapter II of chapter 5 of title 5” — *i.e.*, the Administrative Procedure Act (APA).¹⁶⁸ As the Court noted, the APA “contains specific provisions governing agency rule making, which it defines as ‘an agency statement of general or particular applicability and future effect.’”¹⁶⁹ Merrill argues that this reference does not resolve the question, because the APA also applies to interpretive rules.¹⁷⁰ Whatever this amendment means, Congress has never done the same for the FTC Act.

Judge Wright insists that “[t]he statutory method of adjudication and enforcement used by the NLRB is, of course, very similar to that of the FTC.”¹⁷¹ Maybe so, maybe not. But of course, the potential similarity in the statutes’ *adjudication* and *enforcement* structures does not automatically carry over into the statutes’ rulemaking clauses. And indeed it doesn’t. As we have explained, the statutes’ rulemaking clauses are in fact quite distinct.

¹⁶⁵ S. 1958, 74th Cong. § 8(1)-(2) (1935).

¹⁶⁶ National Labor Relations Act § 6(a), 8, 10, Pub. L. 74-198, 49 Stat. 449 (1935).

¹⁶⁷ See Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914).

¹⁶⁸ 29 U.S.C. § 156 (as codified on authority of Pub. L. 89-554, 89th Cong. §7(b) (1966)).

¹⁶⁹ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763 (1969) (citing 5 U.S.C. § 551(4)).

¹⁷⁰ Merrill, *supra* note 10, at 472.

¹⁷¹ *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 684 (D.C. Cir. 1973) (comparing 29 U.S.C. § 160 (1970) with 15 U.S.C. § 45 (1970)).

“[T]he Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions,” and “such assumptions ... are not binding in future cases[.]”¹⁷² So *American Hospital* cannot necessarily be said even to have settled whether *the NLRB*—never mind the FTC—has legislative rulemaking authority under a statutory “carry out” proviso. In any event, the NRLA is distinguishable in several respects.

D. That Rulemaking May Sometimes Be Required by Due Process Principles Is Irrelevant to Whether the FTC Act Conferred Rulemaking Power

National Petroleum Refiners concedes:

This judicial trend favoring rule-making over adjudication for development of new agency policy does not, of course, directly dispose of the question before us. There was no question that the SEC in *Chenery* had substantive rule-making powers. See 332 U.S. at 201, 67 S.Ct. 1575. And *Wyman-Gordon* assumed that the NLRB also had substantive rule-making powers under 29 U.S.C. § 156 (1970). 394 U.S. at 763-765 n. 3, 89 S.Ct. 1426. Here we must decide just that question, whether Congress has given the FTC the same alternate means of proceeding, not whether the FTC should be required to use rule-making in some circumstances. But *Chenery*, *Wyman-Gordon* and *Bell Aerospace* cannot be ignored, for they indisputably flesh out the contemporary legal framework in which both the FTC and this court operate and which we must recognize.¹⁷³

This is probably the aspect of Judge Wright’s mode of statutory interpretation that has aged most poorly. Because the Supreme Court favored rulemaking over adjudication in some cases, he suggests, the FTC Act must, somehow, confer substantive rulemaking authority *regardless of the text of the statute*. Wright continues:

To us, these cases suggest that contemporary considerations of practicality and fairness — specifically the advisability of utilizing the Administrative Procedure Act’s rule-making procedures to provide an agency about to embark on legal innovation with all relevant arguments and information, 5 U.S.C. § 553 — certainly support the Commission’s position here. As *Wyman-Gordon* and *Bell Aerospace* explicitly noted, utilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication. Moreover, the availability of notice before promulgation and wide public participation in rule-making

¹⁷² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

¹⁷³ *Nat’l Petroleum Refiners*, 482 F.2d at 683.

avoids the problem of singling out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation.¹⁷⁴

We share Judge Wright's concerns about adjudication. Rulemaking does, indeed, have many advantages over adjudication in such circumstances. But such concerns are irrelevant to the question of what Section 6(g) means, understood within the context of the rest of the FTC Act.

Judge Wright dismissed the refiners' arguments that the "[FTC] is somehow *sui generis*, that it is best characterized as a prosecuting rather than a regulatory agency, and that substantive rule-making power should be less readily implied from a general grant of rule-making authority where the agency does not stand astride an industry with pervasive license granting, rate-setting, or clearance functions."¹⁷⁵ Instead, he turned their argument on its head, claiming that the vast breadth of the FTC's powers over "unfair methods of competition" justified giving the agency *even more* power:

a more compelling argument can be made that the FTC's duty to prevent "unfair methods of competition" and "unfair or deceptive acts or practices" is just as potentially pervasive, in the sense of affecting commercial practices, as the regulatory schemes of agencies utilizing rate-making, licensing, and similar means of regulation. The FTC's charter to prevent unfair methods of competition is tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or the spirit of the antitrust laws....

Given the expanse of the Commission's power to define proper business practices, we believe it is but a quibble to differentiate between the potential pervasiveness of the FTC's power and that of the other regulatory agencies merely on the basis of its prosecutorial and adjudicatory mode of proceeding. Like other agencies, wholly apart from the question of rule-making power it exerts a powerful regulatory effect on those business practices subject to its supervision. Of course, its regulatory authority is not complete. But neither is the regulation exercised by other agencies.¹⁷⁶

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 684.

¹⁷⁶ *Id.*

Wright presumes that it is of little significance whether the FTC proscribes conduct as unfair through the procedure Congress established in Section 5 or by issuing a rule:

And the Commission has this regulatory effect irrespective of whether it chooses to elaborate the vague but comprehensive statutory standards through rule-making or through case-by-case adjudication. Businesses whose practices appear clearly covered by the Trade Commission's adjudicatory decisions against similarly situated parties presumably will comply with the Commission's holding rather than await a Commission action against them individually; we must presume that in many cases where a guideline is laid down in an individual case it is, like many common law rules, generally obeyed by those similarly situated.¹⁷⁷

This passage misses the essential point: When the Commission follows the adjudicatory procedure of Section 5, its cease-and-desist order cannot be enforced even against that defendant unless a court decides a violation of law has occurred; it is, ultimately, the court decision that has legal effect. But when an agency issues a substantive rule, that rule, by definition, has the "force and effect of law" in itself.¹⁷⁸

E. The Natural Gas Act of 1938 Clearly Imposed Sanctions

The *National Petroleum Refiners* court cited yet another case involving New Deal legislation — this time, the Natural Gas Act of 1938.¹⁷⁹ In *Public Service Comm'n of State of New York v. FPC*, the appeals court upheld a regulation issued by the Federal Power Commission defining the criteria for issuing temporary certificates of authority to gas producers in emergencies — even though the Natural Gas Act did not explicitly authorize such regulations.¹⁸⁰ "All authority of the Commission need not be found in explicit language," declared the court.¹⁸¹ "Section 16 [the general rule-making provision] demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation.

¹⁷⁷ *Id.*

¹⁷⁸ See Merrill, *supra* note 10.

¹⁷⁹ Natural Gas Act of 1938 (NGA), Pub. L. No. 75-688, § 21(b), 52 Stat. 821, 833 (codified at 15 U.S.C. §§ 717 et seq.).

¹⁸⁰ Pub. Serv. Comm'n of N.Y. v. FPC, 327 F.2d 893, 897 (D.C. Cir. 1964).

¹⁸¹ *Id.*

While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail.”¹⁸²

Once again, the court reached the right result for the wrong reasons. The NGA clearly satisfied Merrill’s convention: The law’s “General Penalties” provision authorized a daily penalty of up to \$500 for violation of any regulation made by the Commission.¹⁸³ The law also empowered the Commission to bring suit against parties that violate its regulations.¹⁸⁴

Yet the court had ample other grounds for reaching the same conclusion: The Natural Gas Act *explicitly* contemplates that the Commission’s rules would have binding substantive effect: “For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different *requirements* for different classes of persons or matters.”¹⁸⁵ Such a “requirement” is, obviously, a substantive rule rather than a rule of procedure. Furthermore, the Act mentions “regulation(s)” no fewer than 37 times — while the FTC Act mentions “rules” in just one other provision besides Section 6(g), referring to civil service rules applicable to government employees.¹⁸⁶

Either way, the Natural Gas Act is easily distinguishable from the FTC Act.

F. The Truth in Lending Act of 1968 Authorizes Sanctions and the Enforcement of Regulations

In *Mourning v. Family Publications Service, Inc.*,¹⁸⁷ the Supreme Court ruled that Section 105 of the Truth in Lending Act of 1968 empowered the Federal Reserve Board to make substantive rules:

The [Federal Reserve] Board shall prescribe regulations to *carry out* the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Natural Gas Act of 1938 § 20(a), 52 Stat. at 832; Merrill, *supra* note 10, at 533-534.

¹⁸⁵ *Id.* § 16, 52 Stat. at 830 (emphasis added).

¹⁸⁶ Federal Trade Commission Act, Pub. L. No. 63-203, § 2, 38 Stat. 717, 718 (1914) (codified as amended at 15 U.S.C. § 45(m)).

¹⁸⁷ *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.¹⁸⁸

Again, the *Mourning* court missed what should have been the clear basis for the decision: the Act clearly authorized stiff fines and imprisonment for those who failed to disclose information required by any regulation issued under the Act.”¹⁸⁹

And once again, other factors distinguish that law from the FTC Act. Besides the fact that TILA mentions “regulation” no fewer than 30 times,¹⁹⁰ the law explicitly contemplates the enforcement of regulations: “For the purpose of the exercise by any agency referred to in subsection (a) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act.”¹⁹¹

G. A 1941 Veterans’ Benefits Law Is Irrelevant

National Petroleum Refiners concludes that “the question before us — whether the Commission can elaborate the meaning of Section 5’s standard of illegality through rule-making as well as through case-by-case adjudication — was not confronted straightforwardly and decisively” in the FTC Act’s legislative history.¹⁹² Thus, Judge Wright wrote, “we are hardly at liberty to override the plain, expansive language of Section 6(g) as well as the gloss that has been placed on that kind of rule-making provision by the series of decisions dealing with agencies whose enabling statutes have similar rule-making provisions. *See United States v. Oregon*, 366 U.S. 643, 647-648 (1961).”¹⁹³

This citation is baffling: Yes, the legislation at issue in that case involved a grant of rulemaking authority that resembles Section 6(g) of the FTC Act.¹⁹⁴ But the Supreme Court’s decision said nothing about the question of the Administrator’s rulemaking power, nor was

¹⁸⁸ Consumer Credit Protection Act (Truth in Lending Act), Pub. L. 90-321, § 105, 82 Stat. 146, 151 (codified as amended, 15 U.S.C. § 1601 et seq.).

¹⁸⁹ *Id.* § 112, 82 Stat. at 151.

¹⁹⁰ *Id.* at 146-166.

¹⁹¹ *Id.* § 108(b), 82 Stat. at 150.

¹⁹² *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d at 686 (D.C. Cir. 1973).

¹⁹³ 482 F.2d at 686.

¹⁹⁴ Veterans’ Administration facilities, 77 Pub. L. 382, § 11, 55 Stat. 868, 871 (codified as amended, 38 U.S.C. (1852 ed.) § 17j) (“The Administrator of Veterans’ Affairs shall have power to issue rules or regulations necessary or appropriate to carry out the purposes of this Act.”).

any such rule at issue in the case.¹⁹⁵ The statute governed the disposal of a veteran's possessions if they die in a veteran's hospital.¹⁹⁶ Had the *Oregon* court actually assessed the question of whether the rulemaking provision authorized substantive rules, it would have noticed that it contained no sanctions provision, and thus the rulemaking provision would not have been considered substantive under Merrill's convention.

VI. Conclusion

If the FTC issues substantive rules claiming the force and effect of law, those rules will be challenged. Once in court, the FTC will find itself in a terrible bind. The agency will try to build its case on *National Petroleum Refiners*; but that decision, the agency will quickly discover, is a pile of sand. The case reflected the assumptions of its time. Statutory interpretation has changed profoundly since 1973. Today, courts recognize that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."¹⁹⁷

It would be difficult to image a larger elephant than the power to issue legislative rules; rules that claim the force and effect of law, and that can declare the practices of almost any business in America to be "unfair." Making such a value judgment is a job for Congress, the democratically accountable holder of all "legislative Powers" under the Constitution. It is simply unfathomable that the Congress of 1914 would have delegated this power to the FTC in so sly a fashion, without any debate over whether the Constitution permitted so sweeping a delegation — and without imposing any sanctions for violations of the Act, let alone violations of rules issued under the Act.

And it would be difficult to imagine a smaller mousehole than Section 6(g), an "additional power" "to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Had such an elephant been hiding in such a mousehole, the Supreme Court certainly would have noticed it in *Humphrey's Executor*. Were the Court to confront such a creature today, it

¹⁹⁵ *United States v. Oregon*, 366 U.S. 643, 647-648 (1961) (A veteran who was declared incompetent died while in an Oregon veterans' hospital. Under the statute, if a veteran dies while in a veterans' hospital without a will or legal heirs, his estate becomes property of the United States. Oregon also had a statute mandating that a veteran's estate escheats to the State. Oregon argued that the federal statute depended on a contractual relationship between the veteran and the United States government, which could not exist because of insanity. The 1941 amendment removed references to contract in section 1, and the Court decided that, as a matter of interpretation, the presence of references to contracts in the rest of the statute did not negate that the language was removed from section 1.).

¹⁹⁶ *Veterans' Administration facilities*, Pub. L. No. 77-382, 55 Stat. 868 (1941).

¹⁹⁷ *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

would say once again what Congress understood so clearly in 1914: Congress could not delegate such sweeping power to any regulatory agency even if it wanted to. At a minimum, the Court would expect Congress to speak clearly before it attempted to confer legislative power upon an agency.

Respectfully submitted,

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