

The Case for “Unfair Methods of Competition” Rulemaking

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A key feature of antitrust today is that the law is developed entirely through adjudication. Evidence suggests that this exclusive reliance on adjudication has failed to deliver a predictable, efficient, or participatory antitrust regime. Antitrust litigation and enforcement are protracted and expensive, requiring extensive discovery and costly expert analysis. In theory, this approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules. It is difficult to quantify this harm.

This Essay argues that rulemaking under § 5 of the Federal Trade Commission Act should supplement antitrust adjudication, and that this institutional shift would lower enforcement costs, reduce ambiguity, and facilitate greater democratic participation. We build on existing scholarship to debunk the view that the Federal Trade Commission (FTC) does not have competition rulemaking authority pursuant to the Administrative Procedure Act conferring Chevron deference, and trace legislative history to underscore how Congress designed the FTC to play a unique institutional role.

We close by outlining an initial set of factors that should weigh in favor of rulemaking: when there is significant learning from past enforcement and when private litigation would be unlikely. Finally, we pose questions in the context of the FTC’s recent hearings to prompt further discussion on where this unused tool would be most useful.

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INTRODUCTION

Open, competitive markets are a foundation of economic liberty. A lack of competition, meanwhile, can enable dominant firms to exercise their market power in harmful ways. In uncompetitive markets, firms with market power can raise prices for consumers, depress wages for workers, and choke off new entrants and other upstarts, undermining innovation and business dynamism.

Given these far-reaching effects, the Federal Trade Commission (FTC)'s mandate to promote fair competition is critical. The Commission's recent hearings provided an important opportunity for it to reflect on ways to increase the effectiveness of the Commission's enforcement of the antitrust laws. This is especially important given that these hearings came against the backdrop of concerns about increasing concentration and declining competition across sectors of the US economy.

When establishing the FTC over a century ago, Congress sought to harness the value of an expert administrative agency to collect market data, analyze it rigorously, and use this analysis to inform enforcement and policymaking. As the FTC reflects on how the agency advances its competition policy and enforcement goals, a key aim of this exercise should be to examine its full set of tools and authorities—not only those that the Commission has traditionally relied upon.

The Commission should approach this inquiry with three goals in mind:

- (1) Reduce ambiguity around what the law is, enhancing predictability;
- (2) Reduce the burdens of litigation and enforcement, enhancing efficiency; and
- (3) Reduce opacity and certain undemocratic features of the current approach, enhancing transparency and participation.

In this Essay, we begin by explaining how the current approach to antitrust has delivered a regime that generates ambiguity, drains resources, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules. Second, we explore how the FTC can bolster antitrust enforcement through participatory rulemaking. We close by identifying two factors to guide when participatory rulemaking might be especially apt: in situations where (1) there exists an

extensive enforcement record or (2) private litigation is unlikely to deter anticompetitive conduct.

I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of even the most capable institutional actors.¹ Generalist judges struggle to identify anticompetitive behavior² and to apply complex economic criteria in consistent ways.³ Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.⁴ And if a standard isn’t administrable, it won’t yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms

¹ Richard D. Cudahy and Alan Devlin, *Anticompetitive Effect*, 95 Minn L Rev 59, 87 (2010). See also Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 UC Davis L Rev 1375, 1440 (2009).

² C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rule-making to Preserve Drug Competition*, 109 Colum L Rev 629, 674 (2009).

³ *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877, 917 (2007) (Breyer dissenting) (“One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.”).

⁴ See, for example, *id.* at 916 (“How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.*”); *FTC v Actavis*, 570 US 136, 173 (2013) (Roberts dissenting) (“[T]he majority declares that such questions should henceforth be scrutinized by antitrust law’s unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.”).

into their business decisions.⁵ Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.⁶

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication “may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies.”⁷ Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades.⁸

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”⁹ The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”¹⁰ Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but

⁵ Thomas A. Piraino Jr., *A New Approach to the Antitrust Analysis of Mergers*, 83 BU L Rev 785, 807 (2003) (arguing that the rule of reason has “become so confusing that it preclude[s] antitrust practitioners from advising their clients as to the legality of particular conduct”).

⁶ See *FCC v Fox Television Stations, Inc.*, 567 US 239, 253 (2012). A lack of fair notice raises constitutional due process concerns. As the Supreme Court has explained, fair notice concerns arise when a law or regulation “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Id.* (citations omitted).

⁷ Philip Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 NYU L Rev 613, 621 (1965).

⁸ See, for example, *Actavis*, 570 US at 160 (“We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.”).

⁹ ABA Section of Antitrust Law, *Controlling Costs of Antitrust Enforcement and Litigation* *1 (ABA, Dec 20, 2012), archived at <https://perma.cc/S94N-DWMMR>.

¹⁰ *Id.*

may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business.

Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.¹¹ Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”¹² In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”¹³

Paid experts are a major expense. Some experts charge over \$1,300 an hour, earning more than senior partners at major law firms.¹⁴ Over the last decade, expenditures on expert costs by public enforcers have ballooned.¹⁵ In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.¹⁶

Another component of the burden is that antitrust trials are extremely slow and prolonged.¹⁷ The Supreme Court has criticized antitrust cases for involving “interminable litigation”¹⁸ and the

¹¹ Michael R. Baye and Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J L & Econ 1, 2 (2011).

¹² Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 Nw U L Rev 1261, 1263 (2012).

¹³ *Id.* at 1261.

¹⁴ Jesse Eisinger and Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers* (ProPublica, Nov 16, 2016), archived at <https://perma.cc/4DBF-4KGM>.

¹⁵ See, for example, Federal Trade Commission Office of Inspector General, *Audit of Federal Trade Commission Expert Witness Services* *3 (Nov 14, 2019), archived at <https://perma.cc/UASA-2FUS> (“During FY 2015 and FY 2016, [The Bureau of Competition] obligated an average \$9.3 million on expert services and this spending continues to increase. In FY 2017, spending totaled over \$10.7 million and approached \$14.9 million in FY 2018.”).

¹⁶ The FTC Office of Inspector General identified soaring expert costs as one of the two top management challenges facing the Commission in 2019. Federal Trade Commission Office of Inspector General, *Management Challenges Facing the Federal Trade Commission* (Sept 27, 2019), archived at <https://perma.cc/23VE-ETX5>.

¹⁷ See, for example, Kevin Caves and Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, 26 Geo Mason L Rev 395, 424 (2019) (“[I]t is unlikely that the slow pace of antitrust enforcement could keep up with the fast pace of high-tech markets.”).

¹⁸ *Verizon Communications, Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 414 (2004).

“inevitably costly and protracted discovery phase,”¹⁹ yielding an antitrust system that is “hopelessly beyond effective judicial supervision.”²⁰ That it can easily take a decade to bring an antitrust case to full judgment means that by the time a judge orders a remedy, market circumstances are likely to have outpaced it.²¹ The same 2012 ABA report suggested that lengthy, costly litigation may be contributing to reduced government-enforcement efforts over time relative to the expansion of the US economy.²²

Lastly, the current approach deprives both the public and market participants of any real opportunity to participate in the creation of substantive antitrust rules.²³ The exclusive reliance on case-by-case adjudication leaves broad swaths of market participants watching from the sidelines, lacking an opportunity to contribute their perspective, their analysis, or their expertise, except through one-off amicus briefs.²⁴ Nascent firms and startups are especially likely to be left out—despite the vital role they play in the competition ecosystem—given that they do not comprise a significant portion of the parties represented in litigated matters, and they usually lack the resources to engage in amicus activity. Furthermore future entrants, whose interests should be carefully considered in all aspects of competition law and policy, have no voice.

Firms, entrepreneurs, workers, and consumers across our economy vary wildly in their experiences and perspectives on

¹⁹ *Bell Atlantic Corp v Twombly*, 550 US 544, 558 (2007).

²⁰ Stucke, 42 UC Davis L Rev at 1378 (cited in note 1).

²¹ See, for example, Jonathan M. Jacobson, *Tackling the Time and Cost of Antitrust Litigation*, 32 Antitrust 3 (Fall 2017) (describing a case where the final remedy was issued over twenty years after the underlying conduct had taken place, impeding the efficacy of the remedy).

²² ABA Section of Antitrust Law, *Controlling Costs* at *5 (cited in note 9).

²³ Courts, policymakers, and scholars have long acknowledged the democratic and participatory benefits of rulemaking. See, for example, *NLRB v Wyman-Gordon*, 394 US 759, 777–78 (1969) (Douglas dissenting):

The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . . This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

²⁴ For a detailed explanation of how the current antitrust system lacks adequate democratic participation or oversight, see generally Harry First and Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 Fordham L Rev 2543 (2013).

market conduct. Enforcement and regulation of business conduct can more successfully promote competition when it incorporates more voices and evidence from across the marketplace.

The ambiguity of the laws, the administrative and resource burdens of enforcing them, and the exclusivity of the current process tend to advantage incumbents and suppress market entry. For example, when courts disagree with one another on the legality of particular conduct, new entrants are likely to eschew the practice, since the threat of litigation could prove fatal at an early stage. Incumbents, by contrast, will be more likely to conduct a cost-benefit analysis of engaging in a potentially unlawful practice, since they are likely to have higher tolerance for protracted litigation and deeper pockets to fund it. Continued ambiguity and complexity also create business opportunities for lawyers, economists, and lobbyists, who effectively profit from the lack of clarity.

II. THE CASE FOR RULEMAKING UNDER “UNFAIR METHODS OF COMPETITION”

Legislative history is clear that Congress sought to advance competition law outside the courts as well as through them.²⁵ Two decades into enforcement of the federal antitrust laws, Congress was frustrated with the exclusively common law approach to antitrust. In particular, lawmakers worried that the case-by-case approach to enforcement was yielding a body of law that was inconsistent, unpredictable, and unmoored from congressional intent.²⁶ The solution, lawmakers decided, was the creation of a new expert administrative agency: the Federal Trade Commission.

Congress established the FTC to supplement the authority of the Attorney General.²⁷ While both institutions were tasked with enforcing the antitrust laws, lawmakers designed the FTC with two distinct features: (1) delegated authority to interpret and prohibit “unfair methods of competition,” as established by § 5 of the

²⁵ See Appendix.

²⁶ Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 *Geo Wash L Rev* 1835, 1859 (2015).

²⁷ Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* 130 (Oxford 2011) (“The FTC was designed as a complement to, not as a substitute for, the Justice Department. The FTC Act’s legislative history evidences a Congressional intent that “[f]ar from being regarded as a rival of the Justice Department . . . the [FTC] was envisioned as an aid to them.”).

Federal Trade Commission Act²⁸ (FTC Act) and (2) extensive authority to collect confidential business information and conduct industry studies, as established by § 6(b) of the FTC Act.²⁹

By designing the Commission this way, Congress sought to create a regime where the law developed not just through the judiciary but also through an expert agency. Congress envisioned that the Commission's data collection from market participants would ensure that the agency stayed abreast of evolving business practices and market trends, and that it would use this expertise to establish market-wide standards clarifying what practices constituted an "unfair method of competition," even as the market evolved. This unique role would complement adjudication pursued by the Attorney General, state attorneys general, and private parties.³⁰ Indeed, Congress expected that federal judges and other policymakers would defer to the Commission on competition matters because it would "serve as an indispensable instrument of information and publicity, as a clearinghouse for the facts by which both the public mind and the managers of great business

²⁸ 15 USC § 45(a). Judicial decisions that have reviewed the legislative history confirm that the Commission enjoys flexibility in determining which specific acts or practices constitute "unfair methods of competition." Senator Francis Newlands, the statute's chief sponsor, said that § 5 would "have such an elastic character that it [would] meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition." Federal Trade Commission Act, 63d Cong, 2d Sess in 51 Cong Rec 12024 (July 13, 1914). See also, for example, *Atlantic Refining Co v FTC*, 381 US 357, 367 (1965) ("The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce' In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight."); *FTC v Standard Education Society*, 86 F2d 692, 696 (2d Cir 1936):

The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.

²⁹ 15 USC § 46(b). Section 6(b) of the FTC Act authorizes the Commission to require corporations to file informational reports regarding the company's "organization, business, conduct, practices, management, and relation to other corporations."

³⁰ Ahead of the passage of the FTC Act, President Woodrow Wilson explained that the Commission could "provide clear rules and direction for business that courts had been incapable of providing." Crane, 83 Geo Wash L Rev at 1859 (cited in note 26), referencing Woodrow Wilson, *Address to a Joint Session of Congress on Trusts and Monopolies* (American Presidency Project, Jan 20, 1914), archived at <https://perma.cc/683G-WWVS> ("And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.").

undertakings should be guided.”³¹ It would, in other words, be “unusually expert.”³²

The Commission, at times, has drawn on its expansive information collection authorities to follow market trends and establish expertise on industry practices. For example, in the 1970s the FTC ordered over 450 of the country’s largest firms to report certain financial information. The Commission used this data to identify uncompetitive areas of the economy and to guide industry-wide investigations into potential antitrust violations.³³ More recently, the FTC has used this § 6(b) authority to study the business practices of patent assertion entities and data brokers, as well as the efficacy of the FTC’s merger remedies.³⁴

As a whole, however, the Commission has fulfilled its mandate to promote competition by functioning less as an expert agency and more as a generalist enforcer and adjudicator.³⁵ This is not to say the agency lacks expertise; indeed, the Commission’s work with particular markets has provided indispensable insights into the marketplace. But, on competition matters, the agency has rarely used this expertise to affirmatively identify what conduct or practices constitute an “unfair method of competition.” Instead, the Commission has sought to define “unfair methods of competition” on a case-by-case basis.

Former Commissioner Wright and Jan Rybnicek have observed that relying exclusively upon adjudication has “thus far proved incapable of generating any meaningful guidance as to what constitutes an unfair method of competition,” resulting in a “boundless standard.”³⁶ They have described this “failure to identify what precisely comprises an unfair method of competition” as

³¹ Crane, 83 Geo Wash L Rev at 1859 (cited in note 26).

³² William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 Admin L Rev 915, 919 (1997).

³³ Federal Trade Commission Bureau of Economics, *Statistical Report: Annual Line of Business Report 1977* 1–4 (1985).

³⁴ Federal Trade Commission, *Patent Assertion Entity Activity: An FTC Study* (Oct 2016), archived at <https://perma.cc/ACU8-D93N>; Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability* (May 2014), archived at <https://perma.cc/R44A-PS2Q>; Federal Trade Commission Bureaus of Competition and Economics, *The FTC’s Merger Remedies 2006–2012: A Report of the Bureaus of Competition and Economics* (Jan 2017), archived at <https://perma.cc/5HC5-93SM>.

³⁵ Crane, 83 Geo Wash L Rev at 1839 (cited in note 26) (“The FTC functions primarily by enforcing the antitrust and consumer protection laws as a plaintiff, no more expert than the executive branch agencies doing the same thing.”).

³⁶ Jan M. Rybnicek and Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo Mason L Rev 1287, 1304 (2014).

“an unfortunate and persistent black mark on the Commission’s record.”³⁷

We agree that relying solely on adjudication to define the substance of § 5 has generated persistent ambiguity. However, relying on courtroom battles to create precedents that set expectations for the marketplace is not the only vehicle through which the Commission can establish what conduct constitutes an “unfair method of competition.” The Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent and participatory process: rulemaking. Through engaging in rulemaking, the Commission could define “unfair methods of competition” through processes established by the Administrative Procedure Act³⁸ (APA).³⁹

There is an enormous body of literature on the choice between adjudication and rulemaking, and this Essay does not seek to fully address the various trade-offs.⁴⁰ Instead, our goal is to reflect on the current state of antitrust enforcement and consider ways to address the ambiguity, burdens, and democratic deficiency that we discuss above.

“Rulemaking” often evokes the idea of government imposing some inflexible prescription upon the marketplace. This is not what we are suggesting. As former Commissioner Elman rightly noted, rulemaking can also be related to “standards, guidelines,

³⁷ Id at 1288.

³⁸ 60 Stat 237 (1946), codified as amended in various sections of Title 5.

³⁹ We are not the first to suggest that the Commission engage in competition rulemaking. See, for example, 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 (cited in note 2); 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).

⁴⁰ The Supreme Court weighed in on the relative benefits and drawbacks of adjudication and rulemaking in *SEC v Chenery Corp*, 332 US 194 (1947). For representative scholarship, see generally David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv L Rev 921 (1965); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L Rev 375 (1974); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U Pa L Rev 485 (1970); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U Chi L Rev 1383 (2004); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L J 103; Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking & Adjudication*, 38 Admin L Rev 149 (1986).

pointers, criteria, or presumptions.”⁴¹ Rules come from courts, legislative bodies, and agencies. While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve as rules once courts adopted them.⁴² The merger guidelines stipulate the analytical framework that the agencies rely on to enforce the merger law. Agency rulemaking could do the same for “unfair methods of competition.”

We see three major benefits to the FTC engaging in rulemaking under “unfair methods of competition,” even if the conduct could be condemned under other aspects of antitrust laws. As we describe above, the current approach generates ambiguity, is unduly burdensome, and suffers from a democratic participation deficit. Rulemaking can benefit the marketplace and the public on all of these fronts.

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable.⁴³ The APA requires agencies engaging in rulemaking to provide the public with adequate notice of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.⁴⁴ An agency must publish the final rule in the Federal Register at least thirty days before the rule becomes effective.⁴⁵

These procedural requirements promote clear rules and provide clear notice. As the Supreme Court has stated, a “fundamen-

⁴¹ Philip Elman, *Rulemaking Procedures in the FTC’s Enforcement of the Merger Law*, 78 Harv L Rev 385, 385 (1964).

⁴² See generally Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 Wm & Mary L Rev 771 (2006).

⁴³ Notably, rulemaking would address criticisms that the FTC uses § 5 to extract favorable settlements using “strong-arm” tactics without even defining what § 5 is. See Hurwitz, 76 U Pitt L Rev at 262 (cited in note 39) (“The FTC has shown an alarming willingness in recent years to threaten litigation under Section 5 without feeling the need to define its understanding of Section 5’s contours. It has leveraged the uncertain bounds of Section 5 to demand extrajudicial settlements from numerous firms, especially in high-tech industries.”).

⁴⁴ 5 USC § 553(b)–(c). The requirement under § 553 to provide the public with adequate notice of a proposed rule is generally achieved through the publication of a notice of proposed rulemaking in the Federal Register. The APA requires that the notice of proposed rulemaking include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 USC § 553(b)(1)–(3).

⁴⁵ 5 USC § 553(d).

tal principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”⁴⁶ Clear rules also help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively and will allow market entrants and entrepreneurs to compete on more of a level playing field.

Second, establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials. Identifying *ex ante* what types of conduct constitute “unfair method[s] of competition” would obviate the need to establish the same exclusively through *ex post*, case-by-case adjudication. Targeting conduct through rulemaking, rather than adjudication, would likely lessen the burden of expert fees or protracted litigation, potentially saving significant resources on a present-value basis.⁴⁷

Moreover, establishing a rule through APA rulemaking can be faster than litigating multiple cases on a similar subject matter. For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation. At the same time, rulemaking is not so fast that it surprises market participants. Establishing a rule through participatory rulemaking can often be far more efficient. This is particularly important in the context of declining government enforcement relative to economic activity, as documented by the ABA.⁴⁸

And third, rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy.⁴⁹ APA procedures require that an agency provide the public with meaningful opportunity to comment on the rule’s content through the submission of written “data, views, or arguments.”⁵⁰

⁴⁶ *FCC v Fox Television Stations*, 567 US 239, 253 (2012). See also *FTC v Colgate Palmolive Co*, 380 US 374, 392 (1965) (noting that FTC orders “should be clear and precise in order that they may be understood by those against whom they are directed”).

⁴⁷ To be sure, the agency may face litigation challenges to the rule itself, though these risks can be mitigated through the development of a clear record of empirical evidence.

⁴⁸ ABA Section of Antitrust Law, *Controlling Costs* at *1 (cited in note 9).

⁴⁹ See David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *Fordham L Rev* 81, 102–03 (2005) (observing that greater public participation in notice-and-comment rulemaking can generate greater public support for the rule that the process ultimately delivers).

⁵⁰ 5 USC § 553(c).

The agency must then consider and address all submitted comments before issuing the final rule. If an agency adopts a rule without observing these procedures, a court may strike down the rule.⁵¹

This process is far more participatory than adjudication. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the Commission can put forth rules after considering a comprehensive set of information and analysis.⁵² Notably, this would also allow the FTC to draw on its own informational advantage—namely, its ability to collect and aggregate information and to study market trends and industry practices over the long term and outside the context of litigation.⁵³ Drawing on this expertise to develop rules will help antitrust enforcement and policymaking better reflect empirical realities and better keep pace with evolving business practices.

Given that the FTC has largely neglected this tool, some may question the Commission’s authority to issue competition rules and the legal status these rules would have.⁵⁴ Indeed, a common misconception is that this authority is extremely limited because FTC rulemaking is subject to the extensive hurdles posed by the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act⁵⁵ (“Magnuson-Moss”). In reality, Magnuson-Moss governs only rulemakings interpreting “unfair or deceptive acts or practices.”⁵⁶ For rules interpreting “unfair methods of competition,” the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed

⁵¹ Those affected by the rule may challenge it on several grounds, including it being: “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.” 5 USC § 706(2).

⁵² In adjudication, outside observers may be limited to participation through the filing of amicus briefs.

⁵³ Hemphill, 109 Colum L Rev at 633 (cited in note 2).

⁵⁴ The FTC has issued an antitrust rule only once in its history. *Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry*, 16 CFR Part 412 (1968). This past December, however, the FTC issued an announcement that seemed to acknowledge its legal authority to do engage in competition rulemaking. See Federal Trade Commission, *FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts* (Dec 5, 2019), archived at <https://perma.cc/8ERZ-7HNZ> (“Should the FTC consider using its rulemaking authority to address the potential harms of non-compete clauses, applying either UMC or UDAP principles?”).

⁵⁵ Pub L No 93-637, 88 Stat 2183 (1975), codified as amended at 15 USC § 2301 et seq.

⁵⁶ 15 USC § 57(a)(1)(A).

this authority, and the Appendix lays out further background on and discussion of it.⁵⁷

Others acknowledge the authority exists but assert that antitrust law is ill suited for rulemaking because antitrust is a common law enterprise. It is true that, as a descriptive matter, antitrust enforcement has proceeded almost exclusively through adjudication.⁵⁸ But the idea that this approach is normatively desirable is neither clear nor persuasive. Indeed, relying solely on adjudication has certainly not delivered a system with sufficient clarity, efficiency, or transparency.⁵⁹

Others question how § 5 rulemaking would intersect with existing Sherman Act jurisprudence, and whether it would conflict with or undermine the Justice Department's authority. Former Acting Chair Maureen Ohlhausen, for example, has expressed concern that using § 5 to "supplant" the Sherman and Clayton Acts could weaken the Justice Department's hand in some cases or create a situation where firms engaged in the same conduct would face different liability standards based on which agency conducted the investigation.⁶⁰

Notably, these concerns are responding to the prospect of advancing—through adjudication—interpretations of § 5 that go beyond the bounds of the Sherman and Clayton Acts. It is less clear that these concerns are as salient in the context of § 5 rulemaking that interprets "unfair methods of competition" that fall under the other antitrust laws.⁶¹ Moreover, it is worth noting that the FTC Act already contemplates a role for the Attorney General in bringing certain claims when authorized to do so by the FTC.⁶² We see no reason why the Attorney General could not plead counts involving violations of rules proscribing "unfair methods

⁵⁷ See, for example, Crane, 83 Geo Wash L Rev at 1862 (cited in note 26); Hurwitz, 76 U Pitt L Rev at 250–52 (cited in note 39); Vaheesan, 19 U Penn J Bus L at 651–57 (cited in note 39). See also Appendix.

⁵⁸ Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 Colo Tech L J 33, 35 (2005) (observing that with several exceptions, the antitrust regime "remains rooted in the adjudication model").

⁵⁹ Notably, other agencies do engage in competition rulemaking. See *id.* at 34–35.

⁶⁰ Maureen K. Ohlhausen, *Section 5: Principles of Navigation* *12 (Federal Trade Commission, July 25, 2013), archived at <https://perma.cc/4PQ5-NP44>.

⁶¹ This question echoes concerns raised by Commissioner Elman in 1967, when he noted that "the Congress of 1914 intended the Commission to supplement, not to duplicate, the work of the courts and the Department of Justice in antitrust enforcement." Philip Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 ABA J 609, 610 (1967).

⁶² See, for example, 15 USC § 56.

of competition” in complaints that follow investigations by the Antitrust Division for entities that are covered by the Act.

Here, it is also worth underscoring that claims under the Sherman Act are enforceable by private plaintiffs and subject to treble damages.⁶³ While private enforcement with treble damages is an important element of the antitrust enforcement regime, generalist judges may be reluctant to condemn certain anticompetitive conduct and impose remedies with very large financial awards in close cases. If the Commission promulgates rules under § 5 with respect to anticompetitive conduct, private plaintiffs would generally be unable to rely on these rules for the purpose of seeking treble damages. This presents an opportunity for the Commission to use its analytical and information advantages to advance and further develop the law without opening the door to treble damages in private suits and prompting judicial reluctance to find conduct in violation of the law.

Lastly, it is worth noting that FTC rulemaking can also be used to define what is not an unfair method of competition, which may address concerns from some critics about the purported boundlessness of the law.

III. POTENTIAL CONSIDERATIONS TO GUIDE FTC RULEMAKING

Rulemaking would advance clarity and certainty about what types of conduct constitute—or do not constitute—an “unfair method of competition.”⁶⁴ Commission studies of specific industries and business practices would guide which practices the FTC should use rulemaking to address. Indeed, as an enforcer and regulator across industries, the Commission is uniquely positioned to identify practices that it determines are anticompetitive. Below we offer two other considerations that could weigh in favor of FTC rulemaking.

First is the existence of an extensive enforcement record. The Commission may have a robust record of agency action against a particular anticompetitive practice—yet that enforcement record

⁶³ 15 USC § 15(a) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained.”).

⁶⁴ It is worth noting again that rulemaking can also serve to provide certainty about the bounds of § 5 in a manner that is more durable than FTC Enforcement Policy statements, such as the one adopted by the Commission in 2015. See Federal Trade Commission, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the Federal Trade Commission Act, 80 Fed Reg 57056, 57056 (2015).

may not be enough to eliminate the practice altogether, especially when the conduct is highly profitable or can evolve in ways that do not precisely mirror prior application. Here, rulemaking might be a useful tool.

Investigations of anticompetitive conduct yield significant quantitative and qualitative insights about how firms employ certain practices. In certain situations, these data, supplemented by other data collected through a process of public participation, might inform the criteria under which a specific practice should be deemed anticompetitive.

For example, in 2002 the FTC published a significant study assessing pay-for-delay settlements that impeded generic drug entry.⁶⁵ The agency conducted additional analyses and has pursued a number of cases that were ultimately successful.⁶⁶ At the same time, these settlements have evolved in ways that do not replicate the fact patterns previously condemned by courts. This has led the FTC to continue to expend significant resources to confront these practices in protracted litigation.

Given the extensive enforcement and factual record developed by the agency, it is fair to consider whether the FTC might have been more effective in targeting pay-for-delay settlements through both adjudication and rulemaking, which would have established for courts the clear rules by which to evaluate these agreements.⁶⁷ For an agency with scarce resources, it will be important to carefully analyze whether investing time and effort into rulemaking might be a better use of limited resources than many years of intense and expensive litigation.

The second circumstance that could favor FTC rulemaking is one in which private litigation is unlikely to discipline anticompetitive conduct. Relying on adjudication as a primary way of developing legal rules and standards is most sensible when there is a rich body of disputes. When conduct has anticompetitive impli-

⁶⁵ Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* *1 (July 2002), archived at <https://perma.cc/A2US-Y8RG>.

⁶⁶ See, for example, *In the Matter of Impax Laboratories, Inc.*, FTC Matter 141 0004 (2019); Notice of Voluntary Dismissal with Prejudice, *Federal Trade Commission v Allergan PLC et al*, No 17-cv-00312-WHO, *2 (ND Cal filed Feb 22, 2019); Joint Motion for Entry of Stipulated Revised Order for Permanent Injunction and Equitable Monetary Relief, *Federal Trade Commission v Cephalon, Inc.*, No 2:08-cv-2141-MSG, *1–3 (ED Pa filed Feb 19, 2019).

⁶⁷ Hemphill, 109 Colum L Rev at 673–75 (cited in note 2) (explaining that courts have struggled to understand and apply the agency's deep expertise in this area, while rulemaking would likely provide clearer guidance).

cations but is unlikely to be challenged by private litigants, adjudication is not a reliable means of targeting the anticompetitive practice. Here, rulemaking may also be a useful tool.

Section 5 does not provide for a private right of action. This means that actions by the Commission—be it through adjudication or rulemaking—are the only vehicles for developing legal standards under “unfair methods of competition.” Legal issues that only the government can pursue are not likely to effectively evolve and develop through common law. This is because the body of disputes on that issue will be much smaller. For this reason, anticompetitive practices that lie beyond the reach of the antitrust laws are a particularly good candidate for being the subject of rulemaking.

Anticompetitive practices that are reachable under the other antitrust laws but that private litigation is unlikely to target may also be ripe for rulemaking. Take, for example, noncompete clauses in employment contracts. These agreements prevent employees from working for rival firms for a period of time after they leave. As recent studies show, these agreements—which now cover roughly twenty-eight million Americans—deter workers from switching employers, weakening workers’ credible threat of exit, and diminishing their bargaining power.⁶⁸ By reducing the set of employment options available to workers, employers can suppress wages.

In theory, workers could bring lawsuits alleging that certain noncompete clauses are anticompetitive under the Sherman Act. In practice, however, private litigation in this area is effectively nonexistent. Employers now frequently include in employment contracts forced arbitration clauses and class action waivers, provisions that prevent workers from banding together to bring a case in court.⁶⁹ Any challenges must be pursued in isolation and through a private arbitrator, whose proceedings lie entirely outside the common law system.

Given the paucity of private litigation challenging noncompete agreements as antitrust violations, the FTC might consider

⁶⁸ Evan Starr, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force* *17 (U Mich L and Econ Research Paper No 18-013, Aug 30, 2019), archived at <https://perma.cc/2UTG-RWCB>.

⁶⁹ In 2018, a 5–4 majority of the Supreme Court upheld the validity of class action waivers in employment contracts. *Epic Systems Corp v Lewis*, 138 S Ct 1612, 1632 (2018). See also Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* *5 (Economic Policy Institute, Sept 27, 2017), archived at <https://perma.cc/724B-BZDZ> (noting that roughly sixty million workers are subject to mandatory arbitration terms).

engaging in rulemaking on this issue. A rule could grant clarity as to when noncompete agreements are permissible or not. Pursuing this through rulemaking will allow for a general rule that would give notice to a much larger set of market participants than addressing noncompetes through adjudication.

CONCLUSION

The choice between adjudication and participatory rulemaking is neither strictly binary nor categorical. The Federal Trade Commission can pursue each in the appropriate circumstances. As the Commission undertakes a period of reflection in a time of scarce agency resources, we encourage interested parties to explore whether and how rulemaking might lead to antitrust policy that is more predictable, efficient, and participatory.

APPENDIX: THE FEDERAL TRADE COMMISSION’S AUTHORITY TO
DEFINE “UNFAIR METHODS OF COMPETITION” THROUGH
RULEMAKING

Rulemaking under “unfair methods of competition” is governed by the Administrative Procedure Act and is eligible for *Chevron* deference. Given the misunderstanding on this issue, it is worth tracing the legal developments around the FTC’s rulemaking authority and understanding how this authority fits with the institutional role that Congress intended for the Commission to play.

By passing the Sherman Act, Congress tasked the Justice Department with targeting anticompetitive conduct through punishing bad acts. Enforcement was to proceed through litigation in federal courts, and courts, in turn, soon began introducing their own standards, a trend that troubled Congress. A key inflection point was *Standard Oil Co v United States*,⁷⁰ in which the Supreme Court replaced the absolute prohibition on restraints of trade with a prohibition on only those restraints found to be “unreasonable” in the context of a particular case.⁷¹

The day after the Supreme Court announced its decision, members of Congress began recommending new legislation to take back power from the courts. Senator Francis Newlands said the key issue was whether Congress would allow future administration of “these great combinations to drift practically into the hands of the courts,” subjecting questions about the legality of a restraint of trade “to the varying judgments of different courts upon the facts and the law.”⁷² He introduced two bills providing for the federal registration of corporations, creating an interstate trade commission, and introducing “an elastic concept of unfairness.”⁷³ The bills also authorized the Commission to “revoke and cancel the registration of any corporation” upon a finding of violation of any operative judicial decree rendered under the Sherman Act, or upon the use of “materially unfair or oppressive methods of competition.”⁷⁴

While neither bill became law, the effort led Congress to hold hearings on the need for new antitrust law. After three months of

⁷⁰ 221 US 1 (1911).

⁷¹ *Id.* at 53–55, 64.

⁷² 62d Cong, 1st Sess in 47 Cong Rec 1225 (May 16, 1911).

⁷³ Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 BC L Rev 227, 231 (1980).

⁷⁴ *Id.*, quoting 62d Cong, 1st Sess in 47 Cong Rec 2619–20 (1911) (cited in note 72).

testimony, the Committee issued the “Cummins Report.”⁷⁵ Echoing Senator Newlands’s view, the report criticized the *Standard Oil* decision, noting that “whenever the rule [of reason] is invoked the court does not administer the law, but makes the law.”⁷⁶ The report stated that it was “inconceivable that in a country governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve.”⁷⁷ This approach, they noted, did not create adequate predictability or uniformity of outcomes.⁷⁸ The weaknesses in the current system, the report concluded, called for new legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”⁷⁹

This set the scene for the creation of the Federal Trade Commission. Most notably, the authorizing statute declared “unfair methods of competition” in commerce unlawful. The committee report explained the reason for including such a broad term:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.⁸⁰

In other words, Congress would leave it up to the new Commission to define and identify practices that constituted “unfair

⁷⁵ *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce*, S Rep No 1326, 62d Cong, 3d Sess 1 (1913) (*Cummins Report*).

⁷⁶ *Id.* at 10.

⁷⁷ *Id.*

⁷⁸ *Id.* at 12. The report stated:

There are many forms of combination, and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful; but as the statute is now construed there are . . . many other practices that seriously interfere with competition, and are plainly opposed to the public welfare, concerning which it is impossible to predict with any certainty whether they will be held to be due or undue restraints of trade.

⁷⁹ *Cummins Report*, 62d Cong, 3d Sess at 12 (cited in note 75).

⁸⁰ *Federal Trade Commission*, S Rep No 597, 63d Cong, 2d Sess 13 (1914).

methods of competition.” Indeed, the FTC would be especially suited to this task, given that Congress was designing the agency to gather and develop expertise in business practices and industry trends.⁸¹

These aspects of the FTC’s design reflect Congress’s intention for the new agency to alter the institutional structure of antitrust enforcement. By passing the Sherman Act, Congress had adopted a crime-tort model—which prohibited certain bad acts—rather than a corporate-regulatory model, which would have created a regulatory regime for policing the capital-concentrating effects of incorporation laws.⁸² By creating the Federal Trade Commission, Congress was adopting an expert-agency model alongside the crime-tort model. A key aim was for legislators to recover power to steer antitrust law back from the courts. As Senator Albert Cummins expressed, “I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people . . . than . . . upon the abstract propositions, even though they be full of importance, argued in the comparative seclusion of the courts.”⁸³

In order to equip the FTC to fulfill this institutional mission, Congress endowed the Commission with the authority to “make rules and regulations for the purpose of carrying out the [FTC Act’s] provisions.”⁸⁴ In the parlance of *Chevron*, this means “Congress delegated authority to the agency generally to make rules carrying the force of law,” and agency interpretations made pursuant to that authority fall within the domain of *Chevron*.⁸⁵ In light of confusion around whether “unfair methods of competition” applied only to practices that harmed competitors, Congress

⁸¹ *FTC v R.F. Keppel & Brothers, Inc.*, 291 US 304, 314 (1934):

[The FTC] was created with the avowed purpose of lodging the administrative functions committed to it in a ‘body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,’ and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would ‘give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.

⁸² See Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* 13 (Oxford 2011); Daniel A. Crane, *Antitrust Antifederalism*, 96 Cal L Rev 1, 2 (2008).

⁸³ Federal Trade Commission, 63d Cong, 3d Sess, in 51 Cong Rec 13047 (1914).

⁸⁴ 15 USC § 46(g).

⁸⁵ *United States v Mead*, 533 US 218, 234–35 (2001).

in 1938 passed the Wheeler-Lea Amendment,⁸⁶ adding the prescription against “unfair or deceptive acts or practices.”⁸⁷

In 1973, the DC Circuit clarified that the FTC did, indeed, have the authority to promulgate substantive rules, not just procedural ones.⁸⁸ The court observed that the “use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates” and that “[i]ncreasingly, 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.”⁸⁹

Two years later, Congress enacted the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act. The law granted the Commission authority to promulgate industry-wide rules prohibiting “unfair or deceptive acts or practices” and introduced heightened procedural requirements for rulemaking made under that provision. Legislative history documents that a House proposal would have subjected all FTC rulemaking to the new procedures, but that this version of the bill was rejected for one that spoke only to “unfair or deceptive acts or practices.”⁹⁰ The final statute contains a provision limiting its effect to “unfair or deceptive acts or practices,”⁹¹ and the conference report, too, states that the legislation “does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition.”⁹²

In 1980, Congress passed the Federal Trade Commission Improvements Act,⁹³ which added procedural requirements to rulemaking governed by Magnuson-Moss and stripped the FTC of rulemaking authority on specific issues. The 1980 Amendments, like the 1975 Act, applied only to the FTC’s authority over “unfair or deceptive acts or practices.” The Commission’s “unfair methods of competition” rulemaking authority was not subjected to the

⁸⁶ 52 Stat 111, codified as amended at 15 USC §§ 41–58.

⁸⁷ 15 USC § 45.

⁸⁸ See *National Petroleum Refiners Association v FTC*, 482 F2d 672, 698 (1973) (“We hold that under the terms of its governing statute, 15 U.S.C. § 41 *et seq.*, and under Section 6(g), 15 U.S.C. § 46(g), in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent.”).

⁸⁹ *Id.* at 681.

⁹⁰ Hurwitz, 76 U Pitt L Rev at 234 (cited in note 39).

⁹¹ 15 USC § 57.

⁹² Hurwitz, 76 U Pitt L Rev at 234–35 (cited in note 39) (citations omitted).

⁹³ Pub L No 96-252, 94 Stat 374 (1980), codified as amended at 15 USC § 57.

new procedures. It remains governed by the Administrative Procedure Act, and FTC interpretations of “unfair methods of competition” are subject to *Chevron* deference.