# Modern Antitrust Meets Modern Rulemaking: Evaluating the Potential of FTC Competition Rulemaking

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Abstract

*In January 2023, the Federal Trade Commission ("FTC") proposed its first discretionary competition rule in fifty-seven years and its second such rule ever. In light of the proposed Non-Compete Clause Rule, this Article explores complexities and nuances surrounding the FTC's move toward competition rulemaking. We examine historical context and recent policy developments that have shaped the FTC's increased interest in rulemaking. In the context of administrative and regulatory mechanisms that could safeguard rulemaking, this Article posits that the FTC should proceed with rulemaking, but with caution. Highlighting the challenges specific to antitrust rulemaking, we advocate for nuanced rulemaking that incorporates presumptive rules, non-binding guidelines, and specific exceptions. This Article also advocates for the FTC's use of modern rulemaking strategies such as experimental rulemaking, retrospective review, and Cost-Benefit Analysis. We propose how rulemaking analysis may consider non-consumer-welfare concerns, such as distributional and political effects, alongside the traditional assessment of consumer welfare. Examples are discussed, including exclusionary conduct and mergers.*

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## INTRODUCTION

On January 19, 2023, the Federal Trade Commission ("FTC") proposed its first discretionary competition rule in fifty-seven years.[1] The proposed Non-Compete Clause Rule would prohibit non-compete clauses in employment contracts across the economy. The FTC claims the rule will directly impact one in five working Americans and increase workers' earnings by at least $250 billion per year.[2]

1. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01 (proposed Jan. 19, 2023). The last time the FTC promulgated a discretionary competition rule was in 1967, with the rule taking effect in 1968. *See* Men's and Boys' Tailored Clothing Rule, 32 Fed. Reg. 15,584 (Nov. 9, 1967). The FTC considered a rulemaking regarding product standard-setting and certification in 1981 that would have partially relied on its discretionary competition rulemaking authority, but it never promulgated a rule from that proceeding. *See* 46 Fed. Reg. 10747-03 (Feb 4, 1981). At least one statute grants the FTC competition rulemaking authority over a particular subject area, and the FTC has issued at least one rule pursuant to that statute. *See infra* note 136. In this Article, the terms "competition rule" and "competition rulemaking authority" refer to the FTC's asserted discretionary competition rulemaking authority under §§ 5(a) and 6 of the FTC Act. *See infra* Part II.B.

2. *Non-Compete Clause Rulemaking*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking

The rule caps a flurry of recent activity from the Biden administration and the FTC regarding competition rulemaking. In July 2021, President Biden issued an executive order directing the FTC to make rules to promote fair competition.[3] The President named Lina Khan FTC Chair that June, just a year after she had published a paper arguing that the FTC should conduct competition rulemaking.[4] And the FTC has moved towards rulemaking for antitrust at a steady clip. It created a new rulemaking group to study competition rulemaking in March 2021,[5] declared that it would prioritize competition rulemaking in its 2022 statement of regulatory priorities,[6] and published a policy paper asserting a legal basis for competition rulemaking in November 2022.[7] The FTC has also revamped its procedures to prepare for renewed rulemaking. In September 2021, it modified its Rules of Practice to enhance public participation in the rulemaking process.[8] If the Non-Compete Clause Rule survives legal challenges,[9] more competition rules are sure to come.

Despite this newfound enthusiasm for competitive rulemaking, the thrust of this Article is that the FTC should proceed with caution in navigating the tricky landscape of modern antitrust. Rulemaking may be apt for some parts of the antitrust (or antimonopoly, to the degree it is different) enterprise. But there is also a danger of getting blown seriously off-course. The machinery of modern rulemaking offers several safeguards against this.

This Article thus argues for a level of nuance in approaching the competitive rulemaking question. Regulators will need to consider not just whether they promulgate rules, but also what kind of rules they

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[https://perma.cc/ZUC6-KSZM].

3. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021).

4. *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

5. Press Release, Federal Trade Commission, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group [https://perma.cc/5YX8-4TJ3].

6. FED. TRADE COMM'N, STATEMENT OF REGULATORY PRIORITIES (2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf [https://perma.cc/9CRL-VDSA] (stating that the FTC will prioritize UMC competition rulemaking).

7. Fed. Trade Comm'n, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (2022) [hereinafter *UMC Policy Statement*].

8. Press Release, Federal Trade Commission, FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-opens-rulemaking-petition-process-promoting-public-participation-accountability [https://perma.cc/7WKK-9UXB].

9. *See infra* Part II.B.

promulgate, the degree to which rules are binding, how precisely they formulate these rules, and the analysis and procedures they undergo to promulgate rules. Moreover, the one-size-fits-all character of rules poses challenges specific to antitrust. Determinations of anticompetitiveness are fact- and context-dependent. Conduct that is anticompetitive in one industry may be procompetitive in another. In fact, in fast-changing industries, conduct that may have been anticompetitive at a certain time in an industry may later be procompetitive.

We consider these questions and discuss the promise and pitfalls of competition rulemaking for today's FTC. Part I provides a brief overview of the development of agency rulemaking generally and the rulemaking process. Parts II and III discuss the evolution of rulemaking at the FTC and antitrust enforcement, respectively, framing the current debate on the legal and normative propriety of competition rulemaking. Part IV applies conceptual thought on the rulemaking versus enforcement divide to the antitrust context. Part V identifies some discrete problems for antitrust rulemaking, and Part VI proposes solutions from modern innovations in rulemaking.

## I. RULEMAKING: AN OVERVIEW

Administrative agencies have helped the United States government regulate since its founding. The Bank of the United States, the U.S. Post Office, and cabinet-level departments including the Treasury, Department of War and Department of Foreign Affairs were delegated significant administrative power in the founding era.[10] And founding-era agencies did more than contemporary opponents of the administrative state sometimes assume: they administered disability pensions for veterans, provided relief for people suffering from disasters, operated the post, collected tax, and even managed relations with Native American tribes.[11]

A century of relatively uncontroversial operation of the administrative state came to an end in the New Deal era. President Roosevelt and the New Deal Congress created a set of new administrative agencies to combat the Great Depression and endowed them with far-reaching regulatory

10. *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (describing extensive legislative delegations of executive power in the founding era).

11. *See id.* at 342; *see also* Cass R. Sunstein, *The Administrative State, Inside Out* 8 (SSRN, Working Paper No. 22-02, 2022) ("[R]ecent historical work has cast grave doubt on the idea that Article I [of the U.S. Constitution] was originally understood to forbid Congress from granting broad discretion to administrators.").

power. The "New Deal Agencies," which included the Environmental Protection Agency, the Food and Drug Administration, the Federal Housing Administration, and the National Labor Relations Board, exercised regulatory authority over many new areas of the American economy. While some viewed these agencies as central to a new approach to American welfare, others saw them as rampant government overreach.[12] Some even saw them as unconstitutional. In a pair of cases that have recently returned to the spotlight,[13] the Supreme Court in 1935 struck down two broad rulemaking grants as unconstitutional delegations of legislative power to the executive.[14] Section 1 of the Constitution says that Congress—not the executive—must make the laws.[15]

The 1946 enactment of the Administrative Procedure Act ("APA") might best be understood as a compromise between the supporters and opponents of the expanded New Deal administrative state. Opponents agitated for strict procedural safeguards to limit the breadth and power of administrative agencies. Proponents of the New Deal sought to ensure the newly-expanded welfare state was not hamstrung by procedural requirements. The APA sits somewhere in the middle: although it tacitly greenlit the growing administrative state, it installed a mechanism for judicial scrutiny of administrative action, rights of public participation, and a variety of procedural safeguards. The APA continues to form the basis for agency rulemaking today.[16]

The APA creates two primary ways for agencies to make rules with the force of law. "Formal" rulemaking, under APA §§ 556 and 557, requires burdensome procedural steps such as a trial-like hearing.[17] "Notice-and-comment" or "informal" rulemaking, under APA § 553, is faster and more flexible: agencies can avoid the need for a formal adjudicative process so long as they give notice of the proposed rule and give the public an opportunity to comment.[18]

The length and procedural burden of formal rulemaking has led

12. *See*, *e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (describing the rise of New Deal Agencies and ensuing controversy); *see* Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 1079 (1983).

13. *See infra* note 31.

14. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530–33 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 432 (1935).

15. U.S. CONST. art. I, § 1 (vesting "all" legislative power in Congress).

16. *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1995).

17. 5 U.S.C. §§ 556–57.

18. *See* 5 U.S.C. § 553.

agencies to avoid it in favor of informal rulemaking wherever possible. The Supreme Court largely authorized this shift. In *United States v. Florida East Coast Ry. Co.*, the Supreme Court resolved to require formal rulemaking only in very narrow circumstances.[19] In *Vermont Yankee Nuclear Power Corp. v. NRDC*, it held that courts generally cannot impose procedural requirements on notice-and-comment rulemaking that go beyond the APA.[20] And in *Chevron U.S.A., Inc. v. NRDC*, it committed to defer to agencies' reasonable interpretations of their own rulemaking authority in the face of statutory ambiguity.[21]

But as notice-and-comment became the dominant rulemaking mode, courts toughened judicial review of the rules that resulted. The first wave of limits was procedural. Courts required agencies making rules to publish the technical data they relied on,[22] respond to significant comments,[23] and confine final rules to the "logical outgrowth" of their proposals.[24] In *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, the Supreme Court endorsed an exacting standard of review under APA § 706 that strikes down inadequately reasoned rules as arbitrary and capricious.[25] The "concise general statements" agencies issue alongside their notice-and-comment rules grew to hundreds of pages as a result.[26] A series of executive orders beginning in 1981 required agencies to justify their rules using cost-benefit analysis,[27] and the Supreme Court has hinted that an agency's failure to conduct appropriate cost-benefit analysis could invalidate a rule.[28]

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19. 410 U.S. 224, 234–38 (1973) (requiring formal rulemaking only when a statute explicitly calls for rulemaking "on the record after opportunity for an agency hearing").

20. 435 U.S. 519, 523–24 (1978).

21. 467 U.S. 837, 844 (1984).

22. Portland Cement v. Ruckelshaus, 486 F.2d 375, 400 (D.C. Cir. 1973).

23. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

24. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

25. 463 U.S. 29, 44 (1983).

26. *See* Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1499–1501 (explaining how *State Farm* led to "encyclopedic" statements of basis and purpose). Agencies must develop a sufficient procedural record to make arbitrary and capricious review possible. Although *Vermont Yankee* barred imposition of procedures beyond the APA, it simultaneously acknowledged the need for a record on which to base judicial review. *See* Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816–17 (1978) (calling *Vermont Yankee* "self-contradictory" for this reason); Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 489–90 (2003).

27. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (requiring agencies to submit proposed regulations along with cost-benefit analyses to the Office of Information and Regulatory Affairs for centralized executive review); Exec. Order No. 13,563, 76 Fed. Reg. 8821 (2011) (adjusting the required elements of the cost-benefit analysis); Exec. Order No. 14,094, 88 Fed. Reg. 21879 (2023).

28. The Supreme Court has suggested that a failure to consider cost-benefit analysis is

More recently, the Supreme Court has begun to challenge agencies' substantive rulemaking authority outright. In 2019, four justices signaled willingness to revive the nondelegation doctrine not used since 1935.[29] In 2022, the Court held that agencies must have "clear congressional authorization" to regulate questions of "vast economic and political significance."[30] And in May 2023, the Court granted certiorari to a case that proposes to scrap *Chevron* deference altogether.[31]

Notice-and-comment rulemaking today is a powerful tool that agencies use to regulate broad swaths of the economy. The FTC itself frequently uses notice and comment rules to regulate consumer protection issues. However, the Commission has historically relied on adjudication to regulate antitrust. The Biden FTC's move towards competition rulemaking marks a new chapter in the agency's practice and comes as the courts are moving to reign in broad agency rulemaking power.

## II. RULEMAKING AT THE FTC

The FTC was created in 1914 by the Federal Trade Commission Act ("FTC Act").[32] This Act is also the basis of its rulemaking power. Section 6(g) empowers the Commission to "make rules and regulations for the purpose of carrying out the provisions" of the Act.[33] Section 5 prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[34] The FTC asserts that these provisions give it two kinds of rulemaking power.

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unreasonable under *Chevron* step 2. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 226 (holding that agencies may conduct cost-benefit analysis even when not expressly authorized to do so by statute); Michigan v. EPA, 576 U.S. 743, 759 (2015) (holding that an agency's failure to consider cost is unreasonable under *Chevron* step 2); *see also* Business Roundtable v. SEC, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (requiring agencies to quantify their cost-benefit analysis to the extent possible). Since *Chevron* step 2 is similar to arbitrary and capricious review, inadequate cost-benefit analysis could also lead to a rule's invalidation under APA § 706. *See* Matthew C. Stephenson & Adrian Vermeule, *Chevron has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that *Chevron* step 2 is the same as arbitrary and capricious review).

29. *See* Gundy v. United States, 139 S. Ct. 2116, 2131–32 (2019) (Gorsuch, J., dissenting) (joined by Justice Thomas and Chief Justice Roberts); *see also* Ronald W. Paul v. United States, 140 S. Ct. 342 (2019).

30. West Virginia v. EPA, 142 S. Ct. 2587, 2595, 2605 (2022) (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). *Accord* Biden v. Nebraska, 143 S. Ct. 2355, 2380–84 (2023).

31. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 598 U.S. 1, 1–2 (2023) (No. 22-451).

32. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1914) (as amended).

33. 15 U.S.C. § 46(g).

34. 15 U.S.C. § 45(a)(1).

First, the FTC says that the prohibition on "unfair or deceptive acts or practices" in § 5 and the rulemaking power in § 6(g) empower it to make rules regulating unfair and deceptive acts or practices ("UDAP").[35] Whatever the merit of this argument, Congress explicitly confirmed the FTC's UDAP rulemaking authority in the 1975 Magnuson-Moss Act.[36] UDAP has been the basis of the Commission's active consumer protection rulemaking agenda since.[37]

Second, the FTC argues that the prohibition on "unfair methods of competition in or affecting commerce" in § 5 and the rulemaking power in § 6(g) empower it to issue rules regulating unfair methods of competition ("UMC").[38] This is the power it seeks to rely on for competition rulemaking.[39] Unlike UDAP, however, Congress has never explicitly confirmed the Commission's UMC rulemaking authority. This authority remains unclear today.

This Part describes the history and current landscape of rulemaking at the FTC. Section II.A discusses the historical development of FTC rulemaking. It has primarily focused on consumer protection rules grounded in the UDAP power. Section II.B discusses how the FTC can make competition rules today. The most obvious basis for competition rulemaking authority, the UMC power, is subject to heated debate. The FTC could also attempt to "slide in" rules with competitive effects under other statutes, or conduct "light-touch" regulation by issuing guidance.

### *A. Historical Development of FTC Rulemaking*

The FTC has only promulgated a competition rule once before. In 1967, it passed a rule regulating pricing practices in the men's clothing industry. The rule was never enforced and repealed before it faced judicial review.[40] But the FTC has also expanded its rulemaking authority over

35. For an early articulation of this argument by the FTC, *see* Cigarette Rule, 29 Fed. Reg. 8324 (July 2, 1964).

36. 15 U.S.C. § 57(a)(1).

37. *See* FED. TRADE COMM'N, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATIVE, LAW ENFORCEMENT, AND RULEMAKING AUTHORITY (2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/8KCD-9A8Q] [hereinafter *FTC Rulemaking Authority Overview*]; *see also* Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1985–91 (2015) (collecting consumer protection rulemakings based on UDAP).

38. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3499 (2023).

39. *See id.*; *see also* UMC Policy Statement, *supra* note 7.

40. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544 (2023) (dissenting opinion of Commissioner Wilson) (describing this history); Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994);

time. While it began by only issuing procedural rules, it now regularly issues substantive rules regulating consumer protection issues under UDAP. This section outlines four periods in the development of the FTC's rulemaking from its inception through to today.

1. 1914–1961: The FTC Only Makes Procedural Rules

For the first fifty years of the FTC's operation, virtually everyone agreed that § 6 of the FTC Act only empowered the FTC to issue procedural rules.[41] A 1941 Attorney General's report instrumental to the adoption of the APA indicated that the FTC did not have general substantive rulemaking power.[42] The Supreme Court appeared to take the same approach in 1935 in *Humphrey's Executor v. United States*.[43] The FTC's power was of central importance to the case, and the Court discussed the FTC's investigatory powers but failed to mention any rulemaking power[44]—implying that the Commission could not make substantive rules.[45] Even the FTC agreed. The Commission repeatedly testified to Congress in its early decades that it lacked substantive competition rulemaking authority.[46] In its 1922 Annual Report, it stated that "one of the most common mistakes is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceeding before it."[47] The FTC never attempted to issue a substantive rule until 1962.[48]

*see also* Kurt Walters, *FTC Rulemaking: Existing Authorities & Recommendations*, 32–33 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794346 (discussing the sparse history of FTC UMC rulemaking).

41. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 506–07 (2002).

42. *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 77-8, at 98 n.18, n.19; *see also* Merrill & Watts, *supra* note 41, at 507 (discussing the report).

43. 295 U.S. 602, 628 (1935).

44. *Id.*

45. *See* Merrill & Watts, *supra* note 41, at 506; *see also Humphrey's Executor*, 295 U.S. at 628 (describing the FTC's powers as merely "quasi legislative").

46. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544 (2023) (dissenting opinion of Commissioner Wilson).

47. ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION, at 36 (1922).

48. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) ("[T]he [FTC] itself did not assert the power to promulgate substantive rules until 1962.").

### 2. 1962–1975: Controversial Forays into Substantive Consumer Protection Rulemaking and Confirmation in *National Petroleum*

The FTC began to challenge the consensus that it could not make substantive rules in the 1960s. Although the Commission primarily pushed the envelope with consumer protection rules, its UMC and UDAP authority ran together in these early days: since both powers were conferred in the same sentence of § 5(a) of the FTC Act and not confirmed elsewhere, the FTC either had both powers or neither of them.[49] The FTC announced that it would begin making "trade regulation rules" in 1962.[50] It soon issued rules regulating the size of sleeping bags and battery labeling.[51] Then, in 1964, it went big: the FTC issued a rule requiring cigarette advertising and labeling to communicate the health risks of smoking.[52] In its statement of basis and purpose for the rule, the FTC published an extensive defense of its substantive rulemaking power based on §§ 5(a) and 6(g) of the FTC Act.[53] The Commission styled the rule as a consumer protection rule,[54] but its defense of its substantive rulemaking authority did not distinguish between UDAP and UMC.[55] Congress preempted the Cigarette Rule by statute before it went into effect.[56] But the rule's basis statement provided the foundation for further rulemaking, and the stage was set for a judicial challenge.

The challenge came in response to a 1971 FTC rule prohibiting the sale of gas without posting its octane content.[57] Citing the Cigarette Rule's basis statement, the FTC relied on §§ 5 and 6(g) of the FTC Act for its substantive rulemaking authority.[58] It again did not indicate whether it relied on UDAP or UMC.[59] A group of trade associations and gasoline

49. It was not until the 1975 Magnuson-Moss Act confirmed the FTC's UDAP rulemaking power—but not its UMC power—that the distinction between the two began to matter for the Commission's rulemaking authority. *See infra* Part II.A.3.

50. *See* ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION, at 35–36 (1962).

51. *See* Peter S. Title, *Authority of the FTC to Issue Substantive Rules is Upheld*, 48 TUL. L. REV. 697, 699 n.15 (1974).

52. Cigarette Rule, 29 Fed. Reg. 8324 (1964); *see* Teresa Moran Schwartz & Alice Saker Hrdy, *FTC Rulemaking: Three Bold Initiatives and Their Legal Impact*, 90th Anniversary Symposium of the Federal Trade Commission, Consumer Protection Panel (2004).

53. Cigarette Rule, 29 Fed. Reg. 8369–70 (1964).

54. *Id.* at 8325.

55. *Id.* at 8369–70.

56. *See* 15 U.S.C. § 1334(a) (2018).

57. Octane Numbers Rule, 36 Fed. Reg. 23871, 23880, 23883 (1971).

58. *Id.* at 23883. The FTC did not specifically identify whether it rested on the UDAP or UMC power in § 5.

59. *Id.*; The Octane Rule is normally understood as a consumer protection rule, even though it

companies sued on the basis that the FTC did not have the authority to make substantive rules.[60] But in a landmark 1973 decision in *National Petroleum Refiners v. FTC*, the D.C. Circuit disagreed. It held that the UDAP and UMC powers in § 5 of the FTC Act combined with section 6(g) to confer substantive rulemaking authority on the FTC.[61] The FTC continues to rely on *National Petroleum* today as the basis for its UMC rulemaking power.[62] As Part II.B will explain, however, *National Petroleum* rests on shaky ground.

### 3. 1975–2021: Substantive Consumer Protection Rulemaking After the Magnuson-Moss Act

Congress confirmed the FTC's power to make rules which define "unfair or deceptive acts or practices" in the 1975 Magnuson-Moss Act.[63] It also installed a slew of burdensome procedural requirements for UDAP rulemaking.[64] However, the Act explicitly disclaimed any effect on the "authority of the Commission to prescribe rules . . . with respect to unfair methods of competition."[65] Thus while UDAP rulemaking was firmly established after 1975, UMC rulemaking continued to rest on the shaky foundations of *National Petroleum*. This distinction shaped the FTC's subsequent rulemaking practice. The Commission began sixteen new consumer protection rulemakings within fifteen months of the passage of the Magnuson-Moss Act,[66] and continues to propose consumer protection rules regularly today.[67] But it did not propose a competition rule based on UMC in the Magnuson-Moss era until 2023.

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also had some incidental competition effects. *See* Walters, *supra* note 39, at 32 (declining to classify the Octane Rule as a competition rule); Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544 (2023) (dissenting opinion of Commissioner Wilson) (stating that the rule considered in *National Petroleum* "was grounded in both competition and consumer protection principles").

60. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 673–74 (D.C. Cir. 1973).

61. *Id.* at 697–98.

62. *See FTC Rulemaking Authority Overview*, *supra* note 37; *see also* Chopra & Khan, *supra* note 4.

63. 15 U.S.C. § 45(a)(1).

64. For a discussion of the impact of the Magnuson-Moss procedures on the FTC's rulemaking authority, *see* Lubbers, *supra* note 37.

65. 15 U.S.C. § 57(a)(2).

66. Walters, *supra* note 40, at 6.

67. *Id.* at 10–33 (discussing the FTC's history with consumer protection and competition rulemaking).

4. 2021–Present: Rulemaking for Competition

The Non-Compete Clause Rule proposed in January 2023 represents a rising focus on competition rulemaking during the Biden administration. As discussed, the Rule is the culmination of at least a decade of increasing interest in this tool.[68]

The Rule itself proposes a categorical ban on non-compete clauses.[69] The FTC cites evidence that would be unavailable to it in case-by-case litigation in support of the ban, such as aggregate studies showing that non-compete clauses interfere with labor market competitiveness.[70] It is also seeking comment on alternatives, including a rebuttable presumption of unlawfulness and creating exceptions or different standards of treatment for different kinds of workers.[71] The FTC explicitly invoked UMC as the legal basis for the rule.[72] This last point immediately sparked controversy: Commissioner Wilson dissented from the notice of proposed rulemaking on the basis that, *inter alia*, the FTC lacks substantive competition rulemaking authority.[73]

*B. Possible Sources of FTC Competition Rulemaking Authority*

The legal basis for competition rulemaking is hotly contested. The FTC relies principally on the UMC power in § 5 of the FTC Act, and this Part begins by discussing whether that provision really does confer competition rulemaking authority. We then discuss the viability of basing competition rulemaking on UDAP or other statutes, and the role of guidance.

1. Unfair Methods of Competition

UMC is the most obvious basis for FTC competition rulemaking authority. Most commentators assume that the UDAP power is only available for consumer protection rules,[74] and no other statute confers

68. *See supra* INTRODUCTION.

69. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3482 (2023).

70. *Id.* at 3484–90; Aggregate evidence of anticompetitive effects typically cannot be used in litigation, because the government must establish anticompetitiveness in the particular case at bar. *See infra* Part IV.C.

71. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3516–22 (2023).

72. *Id*. at 3482.

73. *Id.* at 3544 (dissenting opinion of Commissioner Wilson).

74. *See* Kenneth W. Clarkson & Timothy J. Muris, THE FEDERAL TRADE COMMISSION SINCE

substantive competition rulemaking power. The Non-Compete Clause Rule relies solely on UMC.[75]

However, it is far from clear that UMC really does give the FTC competition rulemaking power. The FTC has only promulgated a competition rule once—its 1968 rule involving price discrimination in men's clothing—and the rule was never enforced and repealed before it faced judicial review.[76] Congress has not confirmed the UMC power as it did for UDAP. Moreover, many doubt that *National Petroleum*, the 1973 D.C. Circuit case the FTC cites as the basis for its UMC rulemaking power, would be decided the same way today.

i. Against UMC

Opponents of FTC competition rulemaking argue that *National Petroleum* would be decided differently today. They begin by criticizing its statutory interpretation.[77] Judge Wright held that the plain language of § 6(g) authorizes FTC rulemaking.[78] But § 6(g) does not clearly grant *legislative* rulemaking power. Its grant of power "to make rules and

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1970: ECONOMIC REGULATION & BUREAUCRATIC BEHAVIOR, at 13–17 (1981) ("Although there may not be a legal distinction between the two, within the Commission it is usually thought that antitrust involves unfair methods of competition, whereas consumer protection involves unfair or deceptive acts or practices."); Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544 (2023) (dissenting opinion of Commissioner Wilson) (implying that the UDAP power is only available for consumer protection rulemaking); Chopra & Khan, *supra* note 4, at 363–74 (arguing that the FTC should pursue competition rulemaking on the basis of the UMC power); CONG. RSCH. SERV., LSB10635, THE FTC'S COMPETITION RULEMAKING AUTHORITY (2023) [hereinafter *CRS UMC Backgrounder*] (discussing only the UMC power as a potential basis for competition rulemaking); *see also* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 290–96 (1980) (arguing that while UDAP could theoretically support a limited set of antitrust challenges it would not be very practical, and observing that "[t]he reference to 'deceptive acts or practices' [in § 5 of the FTC Act] appears to be directed exclusively toward questions of consumer harm.").

75. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3482 (2023).

76. *See supra* notes 1 and 41.

77. *See, e.g.*, Jennifer Cascone Fauver, *A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC*, 14 WM. & MARY BUS. L. REV. 243, 266–68 (2023); MAUREEN K. OHLHAUSEN & JAMES RILL, PUSHING THE LIMITS? A PRIMER ON FTC COMPETITION RULEMAKING 11 (U.S. Chamber of Com., Aug. 12, 2021) ("modern statutory interpretation takes a far different approach than the court in *National Petroleum Refiners*."); Aaron L. Nielsen, *D.C. Circuit Review—Reviewed: Was National Petroleum Refiners Association v. FTC Correctly Decided?*, NOTICE & COMMENT (Jan. 10, 2020), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-was-national-petroleum-refiners-association-v-ftc-correctly-decided/ [https://perma.cc/YB4K-KZFD] (attributing to Professor Richard Pierce the view that "no current Supreme Court justice would approach statutory interpretation the way that the D.C. Circuit did in *National Petroleum Refiners*.").

78. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 686 (D.C. Cir. 1973).

regulations for the purpose of carrying out the provisions of this [Act]" is equally consistent with empowering the FTC to issue only *procedural* rules.[79] Moreover, § 5 of the FTC Act implicitly precludes rulemaking by explicitly identifying enforcement, but not rulemaking, as an available enforcement tool.[80] Judge Wright rejected this argument because he considered the *expressio unius* canon to be "increasingly considered unreliable,"[81] but the Supreme Court regularly applies the canon today.[82]

*National Petroleum* also disregarded relevant structural considerations. In *Whitman v. American Trucking Ass'ns, Inc.*, the Supreme Court held 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."[83] Construing § 6(g) to confer competition rulemaking authority might be akin to hiding an elephant in a mousehole. Section 6(g) is contained in a section of the FTC Act describing the FTC's investigative powers, and does not provide any penalties for violations of rules adopted under it. It would be odd for Congress to bury a provision conferring sweeping rulemaking power in this position.[84] Section 6(g) was more likely intended to be limited to adopting rules for investigations.

UMC opponents also criticize *National Petroleum*'s treatment of legislative history.[85] Judge Wright held that the legislative history of § 6(g) is "ambiguous."[86] But many argue that it clearly indicates that Congress did not intend to grant the FTC substantive rulemaking power. The final form of the FTC Act emerged from a Conference Committee during the reconciliation process, but neither the Senate nor House bills passed before reconciliation began included a grant of substantive rulemaking authority.[87] Section 6(g)'s general rulemaking grant originated in the House bill, but that bill only granted the FTC

79. *See* Richard J. Pierce Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?* 5 GW LAW FACULTY PUBLICATIONS & OTHER WORKS (2021), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2818&context=faculty_publications [https://perma.cc/P7B8-AGHA].

80. National Petroleum Refiners Ass'n, 482 F.2d at 675–76.

81. *Id.* at 676.

82. *See* Bittner v. United States, 598 U.S. 85, 94–95 (2023) (applying the *expressio unius* canon and collecting other recent Supreme Court cases using it); *see also* Nielsen, *supra* note 77.

83. 531 U.S. 457, 468 (2001).

84. *See* OHLHAUSEN & RILL, *supra* note 77, at 11–12.

85. *See, e.g.*, Fauver, *supra* note 77, at 277–81; Merrill & Watts, *supra* note 41, at 505–09.

86. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 686 (D.C. Cir. 1973).

87. Merrill & Watts, *supra* note 41, at 505.

investigatory powers.[88] The Senate bill granted no rulemaking power at all.[89] Thus, under established reconciliation procedures, the bill *leaving* conference cannot have conferred substantive rulemaking power.[90] Moreover, several floor statements made during congressional debate suggest that Congress did not intend to confer such power.[91] One member of the Conference Committee asserted that "the Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future" and "will not be exercising power of a legislative nature" in issuing orders.[92]

Modern courts may also place greater emphasis on the fact that the FTC failed to use UMC rulemaking throughout much of its history.[93] The *National Petroleum* court rejected this argument as insignificant.[94] But more recent decisions have weighed an agency's past approach towards its interpretation of its home statute heavily. In its 2021 decision in *AMG Capital Management, LLC v. FTC*, for example, the Supreme Court considered the FTC's past practice while interpreting its authority under § 13(b) of the FTC Act.[95] A similar approach is likely warranted for § 6(g).

The final major critique of *National Petroleum* is that FTC competition rulemaking is inconsistent with the modern major-questions and nondelegation doctrines. The major-questions doctrine presents the most obvious hurdle.[96] Major-questions jurisprudence was not well-developed at the time *National Petroleum* was decided. But in 2022, the Supreme Court held in *West Virginia v. EPA* that agencies must have "clear congressional authorization" to exert regulatory power over

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 505–06.

92. *Id.*

93. *See, e.g.*, OHLHAUSEN & RILL, *supra* note 77, at 12.

94. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 686 (D.C. Cir. 1973).

95. 141 S. Ct. 1341, 1346 (2021) ("In construing §13(b), it is helpful to understand how the Commission's authority (and its interpretation of that authority) has evolved over time."); *see also* Loving v. IRS, 742 F.3d 1013, 1021 (D.C. Cir. 2014) ("In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect."); Fin. Planning Ass'n v. SEC, 482 F.3d 481, 490 (D.C. Cir. 2007) ("[A]n additional weakness exists in the SEC's interpretation: It flouts six decades of consistent SEC understanding of its authority under [the statute]."); OHLHAUSEN & RILL, *supra* note 77, at 12.

96. *See, e.g.*, Fauver, *supra* note 77, at 298–303; EUGENE SCALIA, THE MAJOR QUESTIONS DOCTRINE, NATIONAL PETROLEUM, AND THE FEDERAL TRADE COMMISSION'S COMPETITION RULEMAKING AUTHORITY (American Enterprise Institute, Dec. 2022); Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544–45 (2023) (dissenting opinion of Commissioner Wilson) (all arguing that competition rulemaking could violate the major-questions doctrine).

questions of "vast economic and political significance."[97] UMC rulemaking would confer regulatory power over broad swathes of economic activity, and § 6(g)—tucked away in the investigative powers section of the FTC Act—is not "clear congressional authorization."

UMC rulemaking could also be inconsistent with the nondelegation doctrine.[98] The 1928 Supreme Court held that Congress cannot delegate legislative power to the executive unless the delegation contains an "intelligible principle" to guide agency conduct.[99] The Court then identified an unconstitutional delegation in 1935: in *Schechter Poultry*, it held that a law empowering the president to issue regulations to promote "fair competition" violated section 1 of the Constitution because "fair competition" was too vague a standard to constrain the statute's broad grant of substantive rulemaking power.[100]

The Supreme Court has not struck down a statute on nondelegation grounds since 1935. But as discussed, four justices on the Supreme Court in 2019 appeared ready to revive it.[101] Interpreting § 6(g) of the FTC Act to confer competition rulemaking power could mean that the FTC Act is an unconstitutional delegation. This interpretation would grant the FTC broad regulatory power constrained only by the instruction to prevent "unfair methods of competition." "Unfair methods of competition" may not be an "intelligible principle" to guide the FTC's conduct. To avoid this constitutional question, a reviewing court might interpret the FTC Act narrowly as not conferring UMC rulemaking power,[102] or more boldly, agree that the Act purports to confer competition rulemaking power but find it unconstitutional.

ii. In Defense of UMC

Proponents of UMC rulemaking offer several responses. First, they suggest that *National Petroleum*'s statutory interpretation remains valid because it accords with the plain meaning of the FTC Act. The Supreme

97. 142 S. Ct. 2587, 2605, 2609 (2022) (citations omitted).

98. *See, e.g.*, Fauver, *supra* note 77, at 293–96; OHLHAUSEN & RILL, *supra* note 77, at 14–16; Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3545 (2023) (dissenting opinion of Commissioner Wilson) (all making this argument).

99. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (articulating the intelligible principle test).

100. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935).

101. *See supra* note 29.

102. *See* Fauver, *supra* note 77, at 288–91 (discussing application of the "constitutional avoidance doctrine" to FTC UMC rulemaking authority).

Court has recently indicated that when the plain meaning of a statute is clear, the statutory interpretation process ends and resort to other interpretive tools is inappropriate.[103] Proponents of UMC argue that the plain meaning of § 6(g) is clear. It does not identify any limits on the rulemaking powers it confers. This should end the debate.[104] And even if § 6(g) is not clear, *National Petroleum*'s focus on the text comports with contemporary judicial practice.[105] The modern Supreme Court increasingly disregards legislative history and intent as unreliable in favor of focus on statutory text.[106] Even if the FTC Act's legislative history suggests an intent not to confer competition rulemaking power, that history might be irrelevant.

UMC proponents can also point to legislative history and intent arguments of their own. The 1975 Magnuson-Moss Act arguably implicitly acknowledges the FTC's UMC rulemaking authority by declaring that it "shall not affect any authority of the Commission to prescribe rules . . . with respect to unfair methods of competition . . . ."[107] Moreover, when debating the Magnuson-Moss Act, Congress considered and rejected a proposal that would have eliminated unfair methods of competition rulemaking authority.[108] The final provision left UMC authority unaffected.

Second, UMC supporters argue that the competition rulemaking would not violate the major-questions doctrine. The existence of the UMC power *itself* is not a major question. While some UMC rulemakings may address major questions, others will not. The major-questions doctrine is appropriately deployed at the level of individual rulemakings—not the threshold question of whether the FTC has UMC power at all.[109]

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103. *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541–46 (2017) (collecting cases).

104. *See* Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1750 (2020) ("[L]egislative history can never defeat unambiguous statutory text . . . ."); Kacyn H. Fujii, *National Petroleum Refiners is (Still) Correctly Decided*, YALE J. ON REG., NOTICE & COMMENT (Mar. 28, 2022), https://www.yalejreg.com/nc/national-petroleum-refiners-is-still-correctly-decided-by-kacyn-h-fujii/ [https://perma.cc/HV9B-76QV] ("*National Petroleum*'s focus on text is consistent with the approaches that courts today take . . . . [N]othing in the text limited the FTC only to adjudication as a means of implementing Section 5's substantive protections.").

105. *See Bostock*, 140 S. Ct. at 1750.

106. *See, e.g.*, *id.* at 1741–45 (focusing on the text); *see, e.g.*, *id.* at 1747–49 (deemphasizing legislative history).

107. 15 U.S.C. § 57(a)(2).

108. *See* S. REP. NO. 93-1408 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7755, 7764; *see also* Walters, *supra* note 40, at 31 n.97.

109. See Marina Lao, *The Major Questions Doctrine, FTC Rulemaking, and Rulemaking on Noncompete Clauses*, 11 J. ANTITRUST ENF'T 223, 229 (2023).

Moreover, claims that UMC rulemaking would dramatically widen the FTC's power may be overblown. The FTC can still enforce § 5's UMC prohibition through adjudication. Competition rulemaking just allows the FTC to deploy the same subject matter jurisdiction it already holds in a different way.[110]

Supporters also argue that UMC rulemaking would not violate the nondelegation doctrine. The Supreme Court's failure to find an unconstitutional delegation since 1935 illustrates that current law takes an extraordinary deferential approach to the doctrine.[111] Section 5 would not violate this test.[112] Indeed, in *Schechter Poultry*, the Court distinguished the instruction to regulate "unfair competition" deemed an unconstitutional delegation in that case from the FTC Act's call to regulate "unfair methods of competition."[113] The UMC instruction, the Court reasoned, was constitutional because it was narrower than the term "unfair competition" and its application was controlled by the procedural safeguards of the FTC's adjudicative processes.[114] Commissioner Wilson argued that competition rulemaking subverts the logic of *Schechter Poultry* by dispensing with the adjudicative procedural safeguards that the Court relied on to reach its conclusion.[115] But the FTC's robust application of the notice-and-comment procedures arguably creates equivalent safeguards.

iii. The Scope of the UMC Power

Even if the FTC has UMC competition rulemaking, the scope of this power is unclear.[116] The Supreme Court has recognized that § 5 reaches some antitrust issues not covered by the Sherman and Clayton Acts,[117]

110. *See id.*

111. *See* Meaghan Dunigan, *The Intelligible Principle: How it Briefly Lived, Why it Died, and Why it Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 260–64 (2017) (describing broad delegations upheld under the intelligible principle test).

112. *See* Marina Lao, *Competition Rulemaking: The Case for Boldness*, RULEMAKING AUTHORITY OF THE U.S. FEDERAL TRADE COMMISSION 1, 9–11 (2022). Commentators also argue that competition rulemaking would survive the new versions of the nondelegation test favored by Justices Gorsuch and Kavanaugh. *See id.*

113. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 534–35 (1935).

114. *Id.* at 532–33.

115. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3545 (2023) (dissenting opinion of Commissioner Wilson).

116. *See CRS UMC Backgrounder*, *supra* note 74.

117. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986); FTC v. Brown Shoe Co., Inc., 384 U.S. 316, 322 (1966); FTC v. Motion Picture Adv. Co., 344 U.S. 392, 394–95 (1953).

such as conduct that has the tendency to ripen into violations of antitrust laws or bring about the harms antitrust laws were designed to prevent.[118] But since courts rejected several aggressive uses of the FTC's § 5 authority in the 1980s,[119] the Commission largely followed the principles of the Sherman and Clayton Acts in exercising its § 5 authority.[120] The limits of § 5 remain incompletely explored.

The FTC signaled that it would begin to push the limits of § 5 again in a November 2022 policy statement.[121] It announced that it would consider conduct an unfair method of competition when it (1) is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature" or is "otherwise restrictive or exclusionary" and (2) "tend[s] to negatively affect competitive conditions."[122] This definition would capture a wide swath of anticompetitive activity but remains untested.

Certain competition rulemakings of "vast economic and political significance" may also exceed the FTC's authority by operation of the major-questions doctrine, even if other competition rulemakings are permissible. The FTC's Non-Compete Clause Rule is an example. The *West Virginia* Court held that major questions arise when a rule seeks to regulate "a significant portion of the American economy."[123] The FTC itself states that the Non-Compete Clause Rule would affect one in five American workers.[124] If it does not pose a major question, it is unclear what does.[125] On this theory, FTC competition rulemaking authority would be limited to relatively insignificant rules.

The FTC's Non-Compete Rule is certain to be challenged in court on the basis that the FTC lacks competition rulemaking authority. Like many

118. *See Motion Picture Adv. Co.*, 344 U.S. at 394–95; *see also UMC Policy Statement*, *supra* note 7, at 12–13 (collecting and summarizing cases).

119. *See generally* Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

120. *See CRS UMC Backgrounder*, *supra* note 74 (citing STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT, U.S. FED. TRADE COMM'N (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/9TGP-NWB3]).

121. *See UMC Policy Statement*, *supra* note 7, at 8–10.

122. *Id.* at 9–10.

123. West Virginia v. EPA, 142 S.Ct. 2587, 2621 (2022) (citations omitted).

124. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3501 (2023).

125. *See* CONG. RSCH. SERV., LSB10905, THE FTC'S PROPOSED NON-COMPETE RULE 4–6 (2023); *see also* Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544–45 (2023) (dissenting opinion of Commissioner Wilson).

others,[126] we suspect that the FTC faces an uphill battle. Recent developments in the major-questions and nondelegation doctrines mean that the FTC will lose even if the pure statutory interpretation arguments are a toss-up. A surprise victory would be a welcome development. But if the FTC loses, it could consider increasing its use of guidance to achieve rule-like effects, or seeking to base its competition rules on alternative statutory authority as discussed below. Of course, Congress could consider a statutory amendment as a way to bypass the debate altogether.

2. Alternative Bases for Competition Rulemaking Authority

Although UMC is the most obvious basis for FTC competition rulemaking authority, the Commission could try to rely on two other sources instead: the § 5 UDAP power, or subject-specific statutes conferring rulemaking power over consumer protection or the procedural aspects of competition. Neither strategy has been extensively discussed. Both are most plausible for rules that primarily regulate consumer protection or competition procedures, respectively, and have incidental substantive competition effects. To avoid invalidation under APA § 706, the FTC will have to avoid the appearance of using these strategies as pretext to make substantive competition rules.[127] But recent FTC proposals suggest that, delicately managed, these strategies could allow the FTC to slide rules with incidental competition effects under consumer protection or procedural rulemaking authorizations.

i. Unfair or Deceptive Acts of Practices

Using UDAP to support pure competition rules would be an uphill battle.[128] The FTC could argue that the plain meaning of "unfair acts" includes antitrust violations, and thus antitrust is regulable under the "unfair or deceptive acts or practices" power.[129] One commentator has suggested that the UDAP power could support competition rules long as

126. *See*, *e.g.*, Fauver, *supra* note 77; Gregory J. Werden, *The Federal Trade Commission Lacks Competition Rulemaking Authority* (Working Paper No. P201200, 2023), https://ssrn.com/abstract=4406891 [https://perma.cc/7FGD-5GSX]; Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3544 (2023) (dissenting opinion of Commissioner Wilson).

127. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019) (invalidating an agency rule as arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), on the basis that the offered rationale was pretextual).

128. *See supra* note 74.

129. *See* Pierce, *supra* note 79, at 8 ("It is difficult, if not impossible, to distinguish between an 'unfair act' and an 'unfair method of competition.'"); Walters, *supra* note 40, at 34 (similar).

the regulated harm is (1) to consumers and (2) direct rather than circumstantial.[130] However, UDAP's extension to antitrust is far from certain. In statutory interpretation, courts have long applied the rule against surplusage, which instructs them to prefer interpretations that avoid creating redundancies.[131] Interpreting "unfair acts" in UDAP to confer rulemaking authority over the same subject matter as "unfair methods of competition" in UMC would render the UMC provision redundant. Moreover, if "unfair acts" are different from "unfair methods of competition," it is because the former is even vaguer. Interpreting the FTC Act to grant the FTC competition rulemaking authority over "unfair acts" is even likelier to violate the major-questions or nondelegation doctrines than its UMC counterpart.

A more plausible role for the UDAP power is as a basis for rules that primarily target consumer protection but have significant incidental competition effects. In its 2022 Policy Statement on Gig Work, for example, the Commission opines that "restrictive contract terms" such as "non-compete clauses" "may constitute unfair or deceptive acts and practices . . . if they unfairly harm workers, render a gig company's representations misleading, or prevent fair competition for workers."[132] This section of the policy statement is primarily couched in consumer protection language. But a rule banning non-compete clauses in the gig economy would also affect competition. Indeed, the FTC went on to propose a rule banning non-compete clauses based on the UMC power and described it as a competition rule.[133] It could alternatively have styled that rule as a consumer protection proposal based on UDAP that has incidental competitive effects.

UDAP rulemakings, unlike their UMC counterparts, would require compliance with the burdensome Magnuson-Moss procedures.[134] The FTC's first choice is no doubt to cement UMC competition rulemaking. But if UMC fails, UDAP could provide a potential backup.

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130. *See* Averitt, *supra* note 74, at 290–94.

131. *See generally* J. Kodwo Bentil, *Statutory Surplusage*, 12 STAT. L. REV. 64 (1991).

132. FED. TRADE COMM'N, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 12–13 (Sept. 15, 2022) [hereinafter *Gig Work Policy*], https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf [https://perma.cc/3XEA-856L].

133. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01 (2023).

134. *See* 15 U.S.C. § 57a(a)(2).

ii. Other Statutes

The FTC could similarly try to slip rules with competition effects under the few statutes granting it rulemaking authority over discrete consumer protection issues or the procedural aspects of competition.[135] The FTC's June 2023 revision of filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") is an illustrative example.[136] The HSR Act required the FTC to create rules to set up a premerger notification system.[137] The system requires proposed mergers above certain numerical thresholds to submit information to the FTC and DOJ in advance of their merger, and wait for the agencies to decide whether they want to bring a challenge.[138]

Although the HSR Act facially authorizes only procedural rulemaking, the FTC has used it to promulgate some rules with substantive competition effects. In June 2023, for example, the FTC and DOJ proposed changes to the forms prospective merging parties must submit.[139] The new forms require parties to provide a competitive analysis of the transaction and supply vastly more detail.[140] Many commentators have observed that the new forms would increase the complexity, risk, and uncertainty of the merger review process.[141] This will cause some companies that might otherwise have attempted a merger to hold back—contributing to the "big is bad" Neo-Brandeisian cause.

135. Most statutes that grant the FTC subject-specific rulemaking power concern consumer protection or the procedural aspects of competition. One statute, § 2(a) of the 1936 Robinson-Patman Act, explicitly grants the FTC competition rulemaking authority for the purpose of setting quantity limits on commodity sales to prevent anti-competitive pricing. *See* 15 U.S.C. § 13(a). The FTC has issued at least one rule under this authority but has no such rules on the books today. *See* Walters, *supra* note 40, at 30–31.

136. Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) [hereinafter *Premerger Notification NPRM*].

137. 15 U.S.C. § 18a.

138. *Id.*; *see also* 16 C.F.R. §§ 801–03 (FTC premerger notification rules promulgated pursuant to the HSR Act).

139. *Premerger Notification NPRM*, *supra* note 136, at 42180.

140. *Id.* at 42210–16.

141. *See*, *e.g.*, William H. Stallings, Gail F. Levine & Kathryn Lloyd, *The FTC's Proposed HSR Changes: What they Mean for Dealmakers*, MAYER BROWN LLP (July 7, 2023), https://www.mayerbrown.com/en/perspectives-events/publications/2023/07/the-ftcs-proposed-hsr-changes-what-they-mean-for-dealmakers [https://perma.cc/BP3M-HEFX].

3. Using Guidance to Regulate Competition

The FTC is also increasingly regulating antitrust through guidance. "Light-touch" rulemaking instruments, such as guidelines, policy statements, and advisory opinions, do not carry the force of law. This immunizes them from uncertainty over the FTC's UMC rulemaking power.[142] But they can offer a way to issue documents with rule-like effect while avoiding legal uncertainty and procedural formality of competition rulemaking.[143]

The FTC has frequently issued guidance documents or policy statements that explain how it will approach particular kinds of enforcement problems. For example, it has issued guidance detailing its enforcement approach towards sectors including health care,[144] intellectual property,[145] and the gig economy,[146] and activities such as mergers,[147] advertising,[148] and collaborations among competitors.[149] The FTC also regularly issues "advisory opinions" on competition issues,[150] where it

142. *See* Connor N. Raso, *Strategic or Sincere? Analyzing Agency use of Guidance Documents*, 119 YALE L.J. 785, 788–96 (discussing the legal treatment of different kinds of guidance documents). However, courts can invalidate guidance that is "practically binding" such that it has the same effect as a rule where it did not go through notice and comment. *See* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 948 (D.C. Cir. 1987).

143. *Cf.* Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (arguing that agencies seek out "alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process"). *But see* Raso, *supra* note 142, at 805–819 (finding that empirical analysis does not support this claim). Once guidance is "practically binding," it must follow the APA notice and comment process. *See Cmty. Nutrition Inst.*, 818 F.2d at 946–47. But guidance just short of this mark may be a valuable tool to achieve rule-like effects in antitrust regulation, particularly if the Commission's UMC rulemaking power is rejected.

144. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), *rescinded in* Fed. Trade Comm'n, Press Release, *Federal Trade Commission Withdraws Health Care Enforcement Policy Statements* (July 14, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements [https://perma.cc/8A6W-EDN9].

145. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017).

146. *Gig Work Policy*, *supra* note 132.

147. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines [https://perma.cc/43QM-QR8K].

148. 16 C.F.R. § 240 (2014).

149. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000).

150. *See Advisory Opinions for Health Care Antitrust Issues*, FED. TRADE COMM'N, https://www.ftc.gov/antitrustcompetition/health-care-antitrust-issues?mission=All&type=advisory_opinion&page=5 [https://perma.cc/3E3J-J4UK]; *Advisory Opinions for Other Antitrust Issues*, FED. TRADE COMM'N,

responds to questions from industries posing hypothetical fact patterns or requests for clarification. The Commission had published 119 advisory opinions in the Health Care sector alone by July 2023.[151]

Many of the FTC's guidance documents contain rule-like substance. For example, a joint March 2020 policy statement from the FTC and DOJ on COVID clarified that the agencies would not generally challenge collaboration between firms on COVID research and development, joint purchasing agreements, or suggested practice parameters for COVID treatments.[152] FTC guidance also increasingly features rule-like procedure. The FTC now regularly conducts notice and comment processes for its major guidance documents, such as its 2010 revision to the Merger Guidelines[153] and 2014 guidelines on antitrust enforcement in advertising.[154] In 2023, the FTC solicited two rounds of public comments on new merger guidelines—one at the outset and a second on draft guidelines—and hosted four public listening sessions.[155] The FTC has also adopted a practice of reviewing its guidance, like its rules, on a regular ten-year cycle.[156]

## III. THE EVOLUTION OF ANTITRUST

Much of antitrust enforcement since 1890 can be broadly understood as a debate between rules and standards. This Part explains why antitrust enforcement has oscillated between rules and standards over time and situates the FTC's new competition rulemaking proposals as part of a

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https://www.ftc.gov/antitrustcompetition/other-antitrust-issues?type=advisory_opinion&mission=All [https://perma.cc/ETD5-KN9E].

151. *See id.*

152. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, JOINT ANTITRUST STATEMENT REGARDING COVID-19 (2020).

153. Fed. Trade Comm'n, Press Release, Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), https://www.ftc.gov/news-events/news/press-releases/2010/08/federal-trade-commission-us-department-justice-issue-revised-horizontal-merger-guidelines [https://perma.cc/B5J7-GDET].

154. Fed. Trade Comm'n, Press Release, FTC Seeks Public Comments as Part of Its Review of Guides Advising Business How to Avoid Illegal Discrimination in the Provision of Promotional Allowances and Services (Nov. 28, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/11/ftc-seeks-public-comments-part-its-review-guides-advising-businesses-how-avoid-illegal [https://perma.cc/6VF9-YM6W].

155. Fed. Trade Comm'n, Press Release, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines [https://perma.cc/DSX4-U56V].

156. *Retrospective Review of FTC Rules and Guides*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/rulemaking/retrospective-review-ftc-rules-guides [https://perma.cc/57ZY-HNU2].

resurgent interest in rule-like enforcement. To distinguish "rules" and "standards"—which we provide definitions for in Section IV.A—in the conceptual sense from an administrative rule as promulgated by agencies, from here on out we refer to the conceptual versions of these words in italics: *rules* and *standards*.[157]

### *A. Two Theories of Antitrust Enforcement:* Per Se *Rules and the Rule of Reason Standard*

Antitrust *rules* declare particular arrangements illegal (or legal) *per se* regardless of their actual economic effects. For example, the U.S. Supreme Court has at various points declared price fixing,[158] group boycotts,[159] geographical market divisions,[160] and maximum resale price maintenance[161] illegal regardless of their impact on consumer welfare. Similarly, some commentators have argued for *per se* legality. They argue that certain conduct should never violate antitrust laws regardless of its effect.[162]

Antitrust law has abandoned *rules* in favor of a *standard*-like case-by-case reasonableness inquiry.[163] This approach to antitrust enforcement, frequently called the "rule of reason," considers a practice illegal only when it has anticompetitive effects in a given case.[164] For example, in *Chicago Board of Trade*, the Supreme Court considered whether an

157. *See infra* Part IV.A.

158. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212–13 (1940) ("[Price-fixing] [a]greements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable . . . .").

159. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts . . . have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . .").

160. United States v. Sealy, Inc., 388 U.S. 350, 357–58 (1967); United States v. Topco Assocs., Inc., 405 U.S. 596, 609–12 (1972).

161. Albrecht v. Herald Co., 390 U.S. 145, 151–54 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

162. *See generally* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); Peter Nealis, *Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO STATE L.J. 347 (2000).

163. The rule of reason was first floated by Sixth Circuit Judge Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1899), *aff'd*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (without clearly embracing the rule of reason). It was then adopted by the Supreme Court in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) and *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

164. *See* Herbert H. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83–94 (2018) (describing development of the rule of reason in antitrust).

arrangement which capped the price of grain sales violated § 1 of the Sherman Act.[165] A *rule*-like approach would consider this conduct always illegal regardless of its effects. But the Court held that the "true test of legality" was whether the rule "promotes" or "suppress[es] . . . competition."[166] After analyzing the "facts peculiar to the business to which the restraint is applied," including the arrangement's economic effects, the court upheld the arrangement.[167]

The following section explains how antitrust enforcement has shifted between rules and standards over time. The original focus on *rules* shifted to a consumer welfare standard in the 1980s. Today's proposals to return to *rule*-like enforcement are thus in some sense a step back to the future.[168]

### *B. Antitrust Enforcement Over Time*

#### 1. 1890 to 1920: Beginnings and Breaking Trusts

Modern American antitrust emerged in response to the rise of "Great Trusts" at the end of the nineteenth century. Leading firms in major industries such as tobacco, beef, sugar, and oil agreed to transfer their shares to a single set of trustees in return for a fraction of the consolidated earnings. The trustees then managed the firms collusively as "great trusts," extracting supernormal profits and destroying competition.[169]

Congress responded by passing three statutes that form the core of contemporary antitrust enforcement. The 1890 Sherman Act limited monopolies and set out foundational antitrust principles.[170] It outlawed arrangements "in restraint of trade"[171] and prohibited monopolization.[172] The 1914 Clayton Act[173] banned several additional practices, such as anticompetitive mergers.[174] Finally, the 1914 Federal Trade Commission

165. Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 235–38 (1918). Section 1 of the Sherman Act says, "Every contract . . . in restraint of trade among the several States . . . is declared to be illegal." 15 U.S.C. § 1.

166. *Bd. of Trade*, 246 U.S. at 238.

167. *Id.* at 239–40.

168. *See* Ilene Knable Gotts, *Back to the Future: Should the "Consumer Welfare" Standard be Replaced in U.S. M&A Antitrust Enforcement?* 1 ANTITRUST REPORT 1–2 (2018).

169. *See generally* Robert L. Bradley, Jr., *On the Origins of the Sherman Antitrust Act*, 9 CATO J. 737 (1990).

170. 15 U.S.C. §§ 1–38.

171. *Id.* at § 1.

172. *Id.* at § 2.

173. 15 U.S.C. §§ 12–27.

174. *Id.* at § 18.

Act created the Federal Trade Commission to enforce the Sherman and Clayton Acts,[175] and as discussed, banned still more practices through its UMC prohibition.[176]

The Wilson administration reorganized the Department of Justice (DOJ) into divisions and created the Antitrust Division in 1919.[177] From this point on, the FTC and DOJ have shared responsibility for antitrust enforcement. The FTC focuses on segments of the economy where consumer spending is high such as health care, pharmaceuticals, professional services, food, and energy.[178] The DOJ has sole antitrust jurisdiction in industries such as telecommunications, banks, railroads, and airlines, and is the only agency that can obtain criminal sanctions. The agencies frequently coordinate and can refer matters to each other.[179]

2. 1920 to 1980: *Per Se Rules*—Big is Bad

Before 1980, courts saw the primary goal of antitrust as protecting small businesses rather than consumers. This meant that they invariably broke up great trust-like structures, regardless of their effect on consumer welfare.[180] Between 1940 and 1968, the Supreme Court adopted per-se bans on price fixing,[181] group boycotts,[182] geographical market divisions,[183] and maximum price resale agreements.[184] In *Brown Shoe Co. v. United States*, the Court blocked a merger, even though the resulting enterprise would have held only 5% of the market share.[185] It feared the impact on "small, locally owned business."[186] Judge Learned Hand summed up the judicial mood in 1945: "great industrial consolidations are

175. 15 U.S.C. §§ 41–58, as amended.

176. *See supra* Part II.B.1.iii.

177. *History of the Antitrust Division*, U.S. DEP'T OF JUST. (Dec. 13, 2018), https://www.justice.gov/atr/history-antitrust-division [https://perma.cc/WJU4-58TA].

178. *See The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/N9YU-QHKQ].

179. *Id.*

180. *See* Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 299–301 (2019).

181. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212–13 (1940).

182. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

183. White Motor Co. v. United States, 372 U.S. 253, 266 (1963) (Brennan, J., concurring).

184. Albrecht v. Harold Co., 390 U.S. 145, 151–54 (1968).

185. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

186. *Id.*

inherently undesirable, regardless of their economic results."[187]

The FTC and DOJ adopted a similar "big is bad" approach.[188] Although both agencies still relied on litigation to enforce antitrust, they mechanically brought cases to challenge "bigness," regardless of its effects. The FTC frequently challenged mergers solely on the basis of concentration.[189] The DOJ went one step further by publishing its first set of Merger Guidelines in 1968, which stated that it would challenge proposed horizontal mergers over certain market concentration thresholds without reference to consumer welfare.[190] The FTC's only historical competition rule also came during this period and fit the trend. The Commission's 1967 Men's and Boys' Tailored Clothing Rule prevented apparel suppliers from offering more generous advertising allowances to larger stores than their smaller competitors.[191]

### 3. 1980 to 2021: From *Rules* to *Standards*—The Consumer Welfare Standard

By the 1970s, support for the "big is bad" approach began to fracture. Critics charged that the FTC's mechanical focus on protecting small firms from great trusts meant that it sometimes protected firms from their more efficient competitors and made consumers worse off.[192] In 1978, Robert Bork met the moment with a transformative proposal.[193] Bork argued that the true value of competition was to increase consumer welfare.[194] Rather than declare certain practices *per se* illegal, he suggested that courts use the tools of economic theory to inquire into the consumer welfare impacts of each particular case—and only declare arrangements illegal when they decreased consumer welfare.[195] The "consumer welfare standard," a particular form of the "rule of reason," would revolutionize antitrust.

187. United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).

188. *See* Joel I. Klein, *Antitrust Enforcement in the Twenty-First Century*, 32 CONN. L. REV. 1065, 1068 (2000).

189. *See* Gotts, *supra* note 168, at 5.

190. *See* U.S. DEP'T OF JUST., 1968 MERGER GUIDELINES (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines [https://perma.cc/HXZ6-NNGD].

191. 32 Fed. Reg. 15584, 15585 (Nov. 9, 1967).

192. *See* Wright et al., *supra* note 180, at 300.

193. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (Free Press 1993) (1978).

194. *Id.* at 51.

195. *Id.* at 405–06.

Bork's consumer welfare standard prompted a shift from *rules* to *standards* in antitrust enforcement. Courts began to hold that many practices that were previously *per se* illegal, such as maximum[196] and minimum[197] resale price maintenance and vertical non-price restraints,[198] would instead be governed by the rule of reason.[199] The Supreme Court's treatment of maximum price resale maintenance is illustrative.[200] The Court declared maximum resale price maintenance *per se* illegal in *Albrecht v. Herald Co.* in 1968, even though it conceded the practice "may have different consequences in many situations."[201] It then overruled itself and subjected the practice to the rule of reason in 1997.[202] Relying on Bork's analysis of *Albrecht* in *The Antitrust Paradox*,[203] the Court held that *per se* rules were inappropriate where "the economic impact of certain practices is not immediately obvious."[204]

The FTC similarly replaced its bright-line enforcement policies with the rule of reason and a focus on consumer welfare. The Commission issued new merger guidelines in 1982 that focused on the competition effects of a proposed merger and contained no numerical merger criteria.[205] The Reagan administration appointed an economist as FTC Chair—the position had typically been held by lawyers[206]—and the FTC's economists became involved in case selection and major strategic decisions for the first time.[207] The Commission also stopped mechanically challenging mergers solely on the basis of concentration: while the number

196. State Oil Co. v. Khan, 522 U.S. 3, 7–22 (1997), *overruling* Albrecht v. Harold Co., 390 U.S. 145, 153 (1968).

197. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 396 (1911).

198. *See* Cont'l TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 70 (White, J., concurring) (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

199. *See* Hovenkamp, *supra* note 164, at 136–37 (describing per se antitrust rules overruled or limited during this period); *see generally* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014) (describing the impact of Bork's consumer welfare standard on this shift).

200. Maximum price resale maintenance involves agreements where distributors agree to sell a manufacturer's product below a price ceiling.

201. *Albrecht*, 390 U.S. at 152–53.

202. State Oil Co. v. Khan, 522 U.S. 3, 15, 21–22 (1997).

203. *Id.* at 16.

204. *Id.* at 10 (citing FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458–59 (1986)).

205. *See* James Langenfeld & David T. Scheffman, *The FTC in the 1980s*, 5 REV. INDUS. ORG. 79, 85 (1990).

206. Eleanor M. Fox, *Chairman Miller, The Federal Trade Commission, Economics, and* Rashomon, 50 LAW & CONTEMP. PROBS. 33, 33 (1987).

207. Langenfeld & Scheffman, *supra* note 205, at 83.

of HSR mergers more than tripled from 1979 to 1985, the Commission's rate of merger challenges remained roughly the same.[208] The FTC approached enforcement case-by-case, and focused only on challenging arrangements that harmed consumer welfare.

### 4. From *Standards* Back to *Rules*—The Rise of Neo-Brandeisian Antitrust

As the rule of reason came to dominate antitrust, indications of increased concentration began to surface. The number of U.S. mergers completed annually rose more than six-fold between 1985 and 2017.[209] The White House stated in 2021 that "[i]n over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago."[210] At the same time, inequality began to rise.[211]

These developments eventually led to criticism of the rule of reason in its own right. Critics charged that the approach had failed to prevent anticompetitive mergers and genuinely protect consumer welfare. In a widely cited 2015 paper, for example, Jason Furman and Peter Orszag argue that lax antitrust enforcement caused a dramatic rise in industry concentration since 1980, which in turn led to rising consumer inequality.[212] The criticism soon coalesced into the Neo-Brandeisian movement. Neo-Brandeisians argue that antitrust should return to its 1960s roots, and once again deem certain "big" arrangements *per se* unlawful without inquiring into consumer welfare effects.[213] In short, they seek to move from the consumer welfare standard back towards a system of *rules*.

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208. *Id.* at 84, 88.

209. Adil Abdela & Marshall Steinbaum, *The United States has a Market Concentration Problem*, ROOSEVELT INSTITUTE (Sept. 11, 2018), https://rooseveltinstitute.org/publications/united-states-market-concentration-problem/ [https://perma.cc/Q7WC-F6DA] ("From 1985 to 2017, the number of [U.S.] mergers completed annually rose from 2,308 to 15,361.").

210. *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/3HWG-NZ3K].

211. *See, e.g.*, Jane G. Gravelle, Cong. Rsch. Serv., R46212, Wage Inequality and the Stagnation of Earnings of Low-Wage Workers: Contributing Factors and Policy Options (2023).

212. Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality, Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz at Columbia University* (Oct. 16, 2015), http://gabriel-zucman.eu/files/teaching/FurmanOrszag15.pdf [https://perma.cc/LF67-VLDS].

213. *See* Wright et al., *supra* note 180, at 296.

Neo-Brandeisians argue the rule of reason has failed to break up anticompetitive practices and has harmed consumer welfare.[214] They also suggest that it fails to address the kinds of large global corporations that are newly dominant in the twenty-first century. For example, now-Chair Lina Khan famously articulated the rule of reason's failures with respect to Amazon in 2016.[215] The rule of reason focuses on short-term price effects on consumers. From this perspective, Amazon looks great: in the short term it offers consumers lower prices and expanded choice. But Amazon achieved these results because it focused on aggressive expansion and investment at the expense of profits, a strategy that pushes out competitors and leaves Amazon as a monopolist in the long run.[216]

Chair Khan and other Neo-Brandeisians further argue that the process rule-of-reason enforcement demands—development of antitrust law through case-by-case litigation—is inferior to rulemaking.[217] Litigation is expensive, long, and results in ambiguous decisions. It privileges wealthy established corporations with the financial resources to tolerate ambiguity. And it deprives outsiders of the chance to participate in antitrust rule formation.[218]

Not everyone agrees. Critics argue that the rising inequality, high prices, and lower output Neo-Brandeisians attribute to lax antitrust enforcement are actually caused by other economic influences.[219] They suggest that the Neo-Brandeisians' concentration data shows only that top firms are more successful today, not that their industries have become less competitive.[220] And they argue that the Neo-Brandeisians have no clear plan to balance distinct values in the competitive process, such as the harm of concentrated power, democracy, and equality.[221] A singular focus on consumer welfare would be more workable.[222]

Nonetheless, today's FTC is firmly Neo-Brandeisian. The FTC unveiled proposed merger guidelines in July 2023 that create new bright-line triggers for the presumption that a merger is anticompetitive and

214. *See, e.g.*, Furman & Orszag, *supra* note 212.
215. *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016).
216. *Id.* at 749–50.
217. Chopra & Khan, *supra* note 4, at 360–63.
218. *Id.* at 360.
219. *See* Wright et al., *supra* note 180, at 316–24.
220. *Id.*
221. *E.g.*, Justin Lindebook, *Two Challenges for Neo-Brandeisian Antitrust*, 68 ANTITRUST BULL. 392, 404 (2023).
222. *See id.*

toughen the existing numerical thresholds for that presumption.[223] It proposed to dramatically lengthen the HSR form in June, a likely prelude to tougher merger enforcement.[224] The Commission's new proposals for competition rulemaking continue this tradition. Its January 2023 Non-Compete Clause Rule would ban non-compete clauses across the economy without inquiring into their economic effects.[225]

## IV. RULEMAKING AND ENFORCEMENT IN ANTITRUST

A large literature exists on rules versus standards, and rulemaking versus enforcement. Of course, one Part in a broader Article is insufficient to satisfactorily apply the arguments in that literature to antitrust. However, given that FTC UMC rulemaking is likely to stir significant debate in the next few years, it is perhaps timely to make some headway into understanding the upshot of the academic literature for the FTC's new rulemaking bent. We first analyze the dichotomy between rules versus standards, and apply this analysis to rulemaking as a tool that allows agencies to promulgate both rules and standards. We then examine some of the main arguments in the rulemaking versus enforcement debate, and apply them to antitrust as well.

### *A. Rules versus Standards in Antitrust*

Understanding how administrative rulemaking will fare in antitrust involves developing some understanding of the distinction between rules versus standards. Typically, the distinction denotes the amount of legal content—often referred to as precision—given to the law before it reaches the enforcement stage. It is important to distinguish here between an administrative rule versus a *rule* as compared to a *standard*. The distinction is not just academic. Administrative rules can be more like *standards* than like *rules*, laying out criteria or principles for an adjudicator to follow later. As noted before, we will refer to *rules* and

223. *Draft Merger Guidelines for Public Comment*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N (June 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [https://perma.cc/SMC2-AN2G]; *see also DOJ and FTC Take Merger Review in New Direction With Rewrite of Merger Guidelines*, SIDLEY AUSTIN, LLP (July 20, 2023), https://www.sidley.com/en/insights/newsupdates/2023/07/us-doj-and-ftc-take-merger-review-in-new-direction-with-rewrite-of-merger-guidelines#:~:text=The%20new%20Merger%20Guidelines%20emphasize,are%20necessary%20to%20compete%20effectively [https://perma.cc/2GL7-GUCA] (summarizing the changes).

224. *Premerger Notification NPRM*, *supra* note 136, at 42200.

225. *See generally* Non-Compete Clause Rule, 88 Fed. Reg. 3482-01 (2023).

*standards* in the conceptual sense in italics, whereas using the unitalicized "rule" will denote an administrative rule.

1. Rules versus Standards Generally

The distinction that we will discuss between a *rule* and a *standard* is that *rules* provide content to the law *ex ante*, whereas *standards* provide content to the law *ex post*.[226] Louis Kaplow, in providing an economic analysis of *rules* versus *standards*, analyzes the difference this way. A *rule* gives content to the law upfront (relevant legal consequences of possible outcomes are defined upfront), whereas a *standard* does not provide content to the law, leaving that to the later enforcement stage.[227] A *rule* is costlier upfront (and often prohibitively costly or impossible to design optimally, manifesting in an over- or under-inclusive rule), requiring the lawmaker to anticipate and determine in advance what the law is—how it will act in response to outcomes in the natural world. A *standard* is cheaper, but provides less notice, and an enforcement authority must exert cost later to determine how to apply the *standard* to a case. When there are many contingencies to the optimal rule, an *ex ante* determination is relatively expensive compared to leaving the law as a *standard*. The optimal antitrust *rule* likely implicates many contingencies,[228] and so determining the content of a *rule* for antitrust *ex ante* is relatively costly.[229]

226. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992); *see*, *e.g.*, GEORGE WHITECROSS PATON, A TEXTBOOK ON JURISPRUDENCE (4th ed. 1972) (A legal rule sets forth definitive outcomes based on particular facts, integrating either standards or concepts. Standards possess adaptability, while concepts stand as unyielding abstractions.); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974) (distinguishing rules from standards based on their precision and generality); *see also* Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482–83, 485–86 (1933) (depicts rules as concrete directives tied to precise facts, contrasting them with standards which give a broader framework requiring interpretation based on specific scenarios); Henry M. Hart & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law 155–58 (1958) (unpublished manuscript); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

227. Louis Kaplow, in his analysis, assumes that such a rule has the same content as a standard is given at the enforcement stage. Therefore, the ultimate legal content is the same—however, the point at which it is determined is different in rules versus standards. *See* Kaplow, *supra* note 226.

228. *See infra* Part IV.

229. Note that Kaplow's analysis proceeds on the assumption that an enforcement authority will give a *standard* the same content that would have been given to a *rule ex ante*. *See* Kaplow, *supra* note 224. In practice, the likely content of a *rule*—whether created by the FTC or by courts—will be different, usually simpler content, as compared to the legal content that results from a *standard* at the enforcement stage.

2. Agency Rulemaking and Rules versus Standards

Rulemaking can promulgate both *rules* and *standards*. However, two things are worth noting. First, to the degree rulemaking supplements *just* a statute (clarifying terms or interpreting a provision), it adds content that would otherwise be lacking at the enforcement stage, and thus moves the needle towards *rules* in the *rules* versus *standards* dichotomy.[230] However, when rulemaking occurs in the context of a statute that has subsequently been interpreted by courts, or where previous administrative rules already exist, rulemaking need not move the needle further towards *rules*. Administrative rulemaking can displace or even remove such court or administrative precedent, thus reducing the overall amount of legal content.[231] In such a context, administrative rulemaking may increase the degree to which a law is *standard*-like.

3. Rules versus Standards in Antitrust

As discussed, much of how antitrust law has played out is as a move from *rules* to *standards*, as *per se* illegality gave way to a rule-of-reason standard.[232] We will generally assume that rulemaking is creating new legal content (rather than displacing or removing it), thus creating antitrust law that is more *rule*-like.[233] The *rule*-like 2023 proposed rule on Non-Compete Clauses is a good example.[234]

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230. An agency cannot overrule a statute, and therefore can only add content where none exists prior, rather than replacing or removing legislative content.

231. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, the Supreme Court ruled that if a federal court issues an opinion on a matter before an agency does, but the agency is owed Chevron deference on that matter, the court should follow the agency's later interpretation, even if it means overturning its own earlier decision. 545 U.S. 967, 1002–03 (2005); *see* Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1242 (9th Cir. 2007); Matter of Ramirez-Vargas, 24 I&N Dec. 599, 600–01 (BIA 2008).

232. *See generally* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007).

233. This is likely to occur given the predominance of rule-of-reason and the current rule-favoring bent of the FTC. See, e.g., Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, FED. TRADE COMM'N (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf [https://perma.cc/SKQ2-BATX]. However, rules may make the law more standard-like where it is currently rule-like, e.g. with predatory pricing. Rules can also operate by listing factors for enforcement, making them quite standard-like.

234. *See* Non-Compete Clause Rule, 88 Fed. Reg 3482-01 (2023).

### *B. Rulemaking versus Enforcement Factors*

Much ink has been spilled in legal academia on establishing the relative merits of rulemaking and adjudication in the administrative state.[235] The relative merits and demerits of rulemaking apply in the antitrust sphere as they do in other cases.[236] However, the particular challenges of antitrust, as will be discussed further in Part V, mean that such merits and demerits may apply differently.[237]

A general downside of the rulemaking approach is that it is subject to inertia. Regulators are slow to implement changes, even when such change is the optimal response. Notice-and-comment rulemaking takes significant time.[238] Large bodies of outdated regulations can remain on the books, unchanging—a phenomenon called "ossification."[239] Enforcement fares better; new information incentivizes parties to bring suit, and reduces incentives for agencies to actively enforce. Courts often find themselves adjudicating on claims based on new economic theories of harm, and the law can change quickly.

Rulemaking inertia is a particular issue in antitrust, because economic consensus on a particular antitrust issue can shift quickly,[240] and because industry conditions are fast-changing.[241] The optimal antitrust rule given current information is likely to change frequently over time. Therefore, rulemaking ossification can prevent the development of optimal antitrust rules.

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235. *See generally* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

236. *See* Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33, 35 (2017) (describing how rules can promote competition).

237. For another paper analyzing rulemaking versus adjudication in the context of antitrust, see Bernie R. Burrus & Harry Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L.J. 1106 (1966).

238. In some cases, rulemaking can take over 10 years. *See The OSHA Rulemaking Process*, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (Oct. 15, 2012), https://perma.cc/D49V-UJYN.

239. *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992). Notice-and-comment procedures can contribute to this, especially since sometimes N&C is required even for modifications.

240. For example, the economic view of vertical mergers changed quickly, with the Chicago School view that vertical mergers are generally economically beneficial forming the basis of the 1984 Non-Horizontal Merger Guidelines. This view evolved into one admitting the potential for both efficiencies and anticompetitive harm from vertical mergers. *See generally* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1962–94 (2018); *see also infra* Part V.F.

241. *See, e.g.*, *infra* Part V.C (discussing the digital economy).

On the other hand, FTC rulemaking may help provide firms greater notice of the likely results of their conduct. Firms can effectively plan around the likely effects of the rule, and the threat of vague enforcement standards' "chilling" behavior is reduced. In antitrust, this is significant; the FTC and DOJ antitrust division win a low percentage of suits brought (outside of horizontal merger cases),[242] suggesting that even the government is not able to understand the upshot of antitrust law in particular cases. Rulemaking towards clearer *rules* may therefore bring a measure of predictability.

### *C. The Problem of Aggregate Evidence*

An advantage of rulemaking is that it allows the use of aggregate evidence and thus allows for a potential remedy to dysfunction in antitrust enforcement, including cases of systemic underenforcement. There are two components to this. First, courts, in seeking to determine the optimal antitrust rule, may lack the expertise and information necessary to do so. In particular, they often lack information about the frequency and costliness of anticompetitive activity.[243] Second, in interpreting a rule (or applying a rule-of-reason), aggregate evidence is usually insufficient to help meet a burden of production for showing anticompetitiveness. That is, an agency or private claimant cannot usually bring aggregate statistical evidence to show that it is likely that a defendant's particular conduct is anticompetitive. In a standard antitrust case, the FTC, DOJ, or private claimants must show anticompetitive harms resulted *in that particular case*. Thus, aggregate evidence (showing that in general, allowing such conduct seems to decrease competitiveness) is often not used in court because of its lack of probative value. The aggregate effect of this is that evidence that has significant effects overall is discarded.

By contrast, in a rulemaking, the FTC would only have to show that the rule, on aggregate, reduces anticompetitive harms.[244] As a result of

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242. *See* Jon B. Dubrow, *Assessing the State of Affairs in FTC/DOJ Merger Enforcement*, REUTERS (July 10, 2023), https://www.reuters.com/legal/transactional/assessing-state-affairs-ftcdoj-merger-enforcement-2023-07-10/ ("[T]he government has won only 30% of its cases.").

243. *See* C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 631 (2009).

244. While there is an obligation to consider alternatives, agencies largely retain discretion in terms of how the rule is crafted. *See generally* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 51, 55 (1983) (declaring that the NHTSA needed to consider nondetachable belts and airbags as a possible alternative to rescission of the rule on detachable belts).

this, aggregate studies would be admissible as part of a regulatory impact analysis.[245] Thus, a rulemaking approach may reduce the probability of error because it doesn't effectively discard information that should shift the needle one way or another. In abstract terms: the FTC may struggle to produce evidence that any particular market participant of type X engaging in conduct Y is creating overall anticompetitive effects. But it may have good statistical evidence that conduct Y by participants X is creating anticompetitive effects on average. Regarding enforcement: where the court wishes to make a *rule*, it lacks such evidence. Where it uses the rule-of-reason, such evidence does not have enough probative value, on its own. By contrast, an agency can cite such evidence in rulemaking.[246] Such a discrepancy has occurred in at least one case. Scott Hemphill argues empirically that, in the case of pay-for-delay settlements between brand-name and generic firms, aggregate evidence suggests they frequently have anticompetitive effects. Despite this, courts, lacking the aggregate evidence, have tended to reject antitrust liability for settlements between brand-name and generic firms.

## V. RULEMAKING FOR MODERN ANTITRUST: CHALLENGES

Rulemaking for antitrust is hard and getting harder. The nature of competition in the modern economy presents unique challenges for antitrust.[247] Trends in concentration and market power, while worrying, do not by themselves entail a particular solution. Market definitions are expensive, empirical determinations. Competition has grown in complexity—the digital economy, the growing importance of dynamics, and multidimensional competition—meaning that prescribing a good administrative antitrust rule, especially a bright-line one, is tricky and at times, impossible. We discuss these concerns in this Part, including in the context of both mergers and exclusionary conduct.

### *A. Sensitivity in Antitrust, Generally*

In general, determinations of anticompetitiveness—at least when measured in terms of a net reduction in consumer welfare—are fact-

245. Other agencies will typically cite studies at the NPRM stage of rulemaking. *See, e.g.*, Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014).

246. The NPRM for the Non-Compete Clause rule cites aggregate studies in favor of a ban. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482-01 (2023).

247. *See generally* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001).

dependent and context-dependent. Often, potentially anticompetitive conduct creates countervailing effects where the net effect adds up differently depending on the industry. As a corollary, conduct that appears anticompetitive may in fact be procompetitive when one looks at the specific factors at play; conduct undertaken in one industry may be anticompetitive in another. To complicate matters further, in fast-changing industries, conduct that may have been anticompetitive at a certain time in an industry may later become procompetitive as the industry landscape evolves. The market properties that determine how the ultimate analysis comes out—such as its competitive structure—depend crucially on subtle features of consumer demand, supply chain, and cost. There are two upshots for rulemaking: (i) a rule's optimality depends on difficult-to-determine facts specific to an industry or market, and (ii) that small deviations in an administrative rule may lead to vastly different outcomes in terms of competition. As will be discussed in Part V, many of the marquee areas of antitrust law—such as vertical integration and certain cases of exclusionary conduct—are good examples of such sensitivity in analysis.

### *B. Market Definition*

In modern U.S. antitrust law, defining markets is often the starting point: a market must be defined before the presence of market power can be shown,[248] and conduct can only then be assessed as anticompetitive. In current antitrust law, market definition involves fact-intensive, case-by-case analysis, usually looking at empirical data to get a sense of cross-price elasticities between products.[249] Market definitions have become increasingly difficult, especially in the digital economy. Writing a manageable rule that invokes market definition is therefore difficult. Unless the FTC wishes to depart significantly in its philosophy of how it determines anticompetitive conduct,[250] a rulemaking enterprise that looks to proscribe or permit certain categories of conduct will need to take one

248. However, note that a definition of markets is not, in principle, necessary for an inquiry into potential anticompetitiveness, and may indeed obscure such an inquiry. *See generally* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

249. Often used is the SSNIP. *Horizontal Merger Guidelines*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/GUP6-53N4] ("Small but Significant and Non-transitory Increase in Price" test determines markets by considering the smallest market in which a hypothetical monopolist could impose a profitable increase in prices.).

250. Such a departure might entail removing market definitions from antitrust altogether, as advocated by Louis Kaplow. *See generally* Kaplow, *supra* note 248. However, determinations of anticompetitive conduct in that world would remain highly fact-intensive.

of several options to avoid unmanageable complexity: (1) include a reductive definition of the relevant market; (2) leave the definition open to empirical determinations at the point of enforcement; or (3) write the rule to avoid defining markets altogether. The first approach is likely to be both under- and over-inclusive depending on the particular case. On the other hand, the second approach is likely to fare better, since it leaves determination of market definition to case-by-case adjudication that will account for the appropriate facts, while potentially achieving the efficiencies of rulemaking in other parts of the rule. Where possible, it may be preferable to take the third approach and write rules proscribing conduct in ways that avoid having to define the market itself.[251]

### *C. The Digital Economy*

The increasingly digital economy presents challenges for current antitrust court doctrine and for antitrust enforcement processes more generally. Platform-based business models have become ubiquitous.[252] Companies such as Uber, Facebook, Airbnb, and Google have created tools that allow a network of people to interact with each other for mutual benefit. Platform markets present unique challenges for antitrust, because they involve multi-sided markets, where different groups of customers extract different kinds of benefits from the network. For example, Uber serves both ride-share passengers and drivers by offering a network service that matches between the two.

Digital platforms raise new difficulties for antitrust. First, defining the relevant market becomes especially difficult, since products are often free (making tests such as SSNIP harder to apply) and the multi-sidedness raises complications as to the question of which parts from each side should be included in a "market." Second, platform market concentration is especially uninformative as an indication that the market is uncompetitive. Indeed, network effects mean that for a platform to provide significant value, it usually must capture at least some significant share of the market. But incumbents that control a large portion of the market still worry about competition from entrants, and can lose their position astonishingly quickly. Therefore, analyzing the potential for entry and the behavior of incumbents towards nascent competitors is

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251. Note that the proposed Non-Compete Clause rule avoids market definition by banning outright. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01 (2023).

252. *See* Lucy Colback, *The Rise of the Platform Economy*, FINANCIAL TIMES (Mar. 13, 2023), https://www.ft.com/content/e5f5e5b9-3aec-439a-b917-7267a08d320f [https://perma.cc/X9F3-CFJU].

important for antitrust in digital platforms, but has not been a focus of enforcement so far.

These difficulties are already manifest in antitrust enforcement. The economics of how to analyze platforms is far from settled, and new models and data arise constantly for understanding platforms. Often, these are particular to one platform. For example, an economic approach that is useful in understanding Amazon's behavior may not apply well to Uber. The upshot is that, for platform rulemakings to be successful, they must (i) not be merely structural, since concentration may be important to the success of a platform; (ii) be allowed to change, or else to incorporate economic data at the enforcement stage; and (iii) likely be made for particular platforms, rather than for all platforms in general.

Another difficulty is the rise of big data. Big data is a crucial part of modern competition. While data has always been an important part of firm strategy, the proliferation of data, along with the tools to analyze it, has given "big data" renewed significance in modern competition. Data can provide distinct advantages to market competitors, for example, by allowing them to identify and market to consumers, price more effectively, and forecast markets more effectively.

Firm use of big data may impact market competitiveness negatively. The value of large data sets, particularly when they help companies optimize their strategy and product offerings, can prove a barrier to entry. Big data can create natural economies of scope, since machine learning algorithms offer better insights when trained on larger and more varied datasets. For example, in offering a product to consumers, a firm that serves more consumers can extract a greater advantage from the datasets that it obtains. The result might be a tendency towards greater concentration and market power.[253]

However, the big-data consequences for competition in any market or industry are not always clear at the offset.[254] Data can often be available from a variety of sources, which means that proprietary data does not always provide a competitive advantage. Markets for data are also highly dynamic. Data quickly becomes stale in terms of the competitive advantage it offers, and so a competitive player with an advantage at a given point should not necessarily expect to have that advantage later. In many cases, data is easy to collect. Thus, assessing anticompetitiveness

253. *See Big Data: Bringing Competition Policy to the Digital Era*, OECD (Nov. 2016), www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm [https://perma.cc/Y2L5-PBQR].

254. *See generally* D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129 (2016).

requires a case-by-case evaluation of the type of data involved, and the difficulty entailed in collecting it. Finally, because big data is so important to the provision of products and services in the digital economy, often the potential anticompetitive effects of big data are offset by significant advantages in terms of improvements to product quality and personalization that big data facilitates. Thus, rulemaking to reduce the anticompetitive potential of big data requires nuance and specificity—all of which make the task more difficult.

Third, the digital economy is increasingly characterized by competition over attention.[255] Much of the digital economy involves competition for attention. For example, while Facebook and Instagram (pre-merger) were offering significantly different products, they were competing for attention in at least some significant ways. The novel nature of competition for attention raises difficulties for modern antitrust. Assessment of consumer welfare is difficult when the product is "free," and the harms are felt through reduced competition for consumer attention. Scarcity of attention also gives hard-to-measure exclusionary power to dominant players in the digital economy; often, "self-preferencing"—whereby a platform preferences itself as a market participant to the exclusion of other participants[256]—is done subtly and through attention-steering mechanisms. There is evidence, for example, that Amazon influences consumer attention to subtly self-preference.[257] Firm manipulation of consumer attention may also confound current economic models of choice. When consumers are attention-constrained, their choices become liable to manipulation and may amplify errors and biases, such as choice overload,[258] framing bias,[259] and anchoring bias.[260]

255. *See generally* Tim Wu, Blind Spot: The Attention Economy and the Law, 82 ANTITRUST L.J. 771 (2019).

256. Mikaela Pyatt, Note, *Rulemaking to Bar Self-Preferencing by Technology Platforms*, 26 STAN. TECH. L. REV. 143, 192 n.19 (2022).

257. *See generally* Kwok Hao Lee & Leon Musolff, Entry into Two-Sided Markets Shaped By Platform-Guided Search (Sept. 25, 2023) (unpublished job market paper) (on file with the Princeton University Economics Department), https://lmusolff.github.io/papers/Entry_and_Platform_Guided_Search.pdf [https://perma.cc/9ZJF-XPEM].

258. *See generally* Alexander Chernev, Ulf Böckenholt & Joseph Goodman, *Choice Overload: A Conceptual Review and Meta-Analysis*, 25 J. CONSUMER PSYC. 333 (2015).

259. *See generally* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

260. *See generally* Adrian Furnham & Hua Chu Boo, *A Literature Review of the Anchoring Effect*, 40 J. SOCIO-ECON. 35 (2011).

Our understanding of these forces remains at a nascent stage,[261] and moreover, measuring competitive harm in digital markets will always be highly fact-intensive, requiring sophisticated models of platforms and consumer behavior. Thus, rulemaking for the digital economy is likely to be fraught until the FTC develops a better understanding of the value and perils of modern competition in the digital economy.

### *D. Complexity in Modern Competition*

Actuators of antitrust law have come to realize the complexity in modern market competition. Antitrust law has always been far too complex an area to be governed purely by *rules*. Daniel Crane writes that antitrust "governs too vast and complex an array of business practices to be reduced to a handful of categorical rules."[262] With increases in technology and the economy undergoing a digital transformation, this complexity has become even more significant. Firm behavior has become more sophisticated, with more factors becoming relevant to understanding how market participants are competing, and whether conduct is anticompetitive.[263] Antitrust authorities face a difficult task if they are to engage in rulemaking that can successfully contain anticompetitive behavior at its boundaries without being either under-inclusive or over-inclusive.[264]

#### 1. Industry Dynamics

Modern economies are often characterized by the "dynamics" of an industry, where competition plays out over time and strategic decisions are made by firms because of their future (in terms of the medium-to-long-run) impacts. The discipline of economics has—because of early concerns about the tractability of models—often analyzed "static" models of

261. Approaches are developing. *See, e.g.*, Wu, *supra* note 255, at 772 (advocating for use of an A-SSNIPS test).

262. Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55 (2007).

263. We omit further discussion for reasons of space, but a "hot" topic in modern antitrust is the way common ownership can impact competition. *See, e.g.*, José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018). Issues of common ownership might be ripe for antitrust rulemaking—e.g. the FTC could require submissions of beneficial ownership information.

264. The slow judicial move away from *per se* illegality grew out of worries that in light of economic arguments, *per se* rules seemed both over-inclusive and under-inclusive at points. *See supra* Part III.B.3.

competition. Initially, antitrust law was slow to incorporate dynamic analysis. Analyzing dynamics and its effects on competition is markedly more complex, and creates difficulties for antitrust policymakers.

There is evidence that competitive dynamics have become more important in the economy. Increasingly, technology changes have the potential to disrupt industries, creating waves of new entrants with improved products or inducing incumbents to reposition themselves in the market. Similarly, network effects, with their potential to lead to high concentration in multi-sided markets,[265] suggest that assessing potential competitor entry is crucial to understanding the level of market power in an industry. In addition, modern economics has become better at studying dynamic effects, but with the upshot that determining how they affect an industry depends heavily on that industry's particular circumstances.

Several factors become salient in a dynamic context. First, over time, consumers often learn and develop habits and expectations. For example, consumers may become upset at price increases after becoming used to stable prices. Or, they may develop brand loyalty after repeatedly purchasing from a given firm. They may also learn about what prices are like, which might condition their searching behavior in the future.

Second, firm "life-cycles" of entry and consolidation become salient. The maturity of a firm becomes an important determinant of its behavior (in contrast to older models, which assumed firms were generic profit-maximizing entities). Competitor entry over time becomes an important factor. For example, if a monopolist prices too high, it might encourage potential entrants to pay the fixed cost of entering the market to compete with the monopolist. Thus, even without entering, the threat of such entry creates a competitive effect on the market, and the lone monopolist's market power remains constrained. Similarly, large incumbent firms might stifle competition by acquiring startups at a nascent stage,[266] in some cases to kill them off completely.[267] Such behavior often escapes antitrust enforcement, because individual mergers, taken by themselves, do not seem anticompetitive.

Third, long-run innovation and operational improvements become more important in the presence of dynamics.[268] A merger, for example,

265. *See supra* Part V.C.

266. *See generally* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

267. *See* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 1, 1 (2021).

268. *See* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 155 (2010).

may increase prices, but may also wed the R&D divisions of two large firms, producing pro-competitive benefits later.

Much of the progressive movement bemoans that these competitive dynamics are not sufficiently accounted for in the antitrust process. For example, Lina Khan in *Amazon's Antitrust Paradox* bemoans that Amazon's low prices and quality service are part of an ultimately anticompetitive strategy to entrench market position and prevent any competitors from taking hold in the market.[269]

Indeed, competitive dynamics are tricky to analyze, and incorporating them into antitrust analysis is difficult. They involve complicated counterfactuals about who might enter, what long-run innovations might happen, and how firms anticipate and respond to each other's long-run behavior. Much of the economics of analyzing dynamic industrial behavior is far from settled. For example, in markets characterized by entry and exit, or winner-takes-all dynamics, small differences in market conditions (or the permissibility of antitrust laws) may lead to vast differences in entry and exit levels. The result is that modern antitrust enforcement is even more difficult when cases rest on dynamic considerations. The FTC and DOJ have struggled to make a convincing case based primarily on long-run dynamics, even when these dynamics are of first-order concern. Rulemaking will likely struggle similarly, since it likely must prescribe *rule*-like content for markets where the existence of anticompetitive harm hinges on dynamic effects that are highly specific to the particular case being considered.

### 2. Strategy, Non-Price Competition & Business Model Innovation

Modern antitrust scholarship has increasingly become concerned with multidimensional competition over non-price variables, and over position in a dynamic market.[270] For example, firms may set not just prices, but

269. *See generally* Khan, *supra* note 215.

270. *See* Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?* 5 (George Mason Univ. L. & Econ. Working Paper, Paper No. 09-44, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463732 [https://perma.cc/W872-SFJV] ("Firms compete on price, output, reputation, quality, innovation, and cost.").

also output,[271] R&D and innovation levels,[272] capacity,[273] product features,[274] product quality,[275] service levels,[276] cost,[277] advertising,[278] and reputation.[279] The result is that evaluating whether certain conduct is procompetitive or anticompetitive requires an analysis across all the major dimensions of firm decision-making evaluated by their effects over time.[280]

Concerningly, attempting to write antitrust rules that affect only some dimensions of competition may cause firms to substitute towards less competition in other forms, negating the benefits of the rule. One scholar writes that favoring "maximizing one dimension of competition, such as price competition . . . merely encourages substitution towards some other form of competition."[281] Welfare trade-offs must be made between different aspects of competition; for example, a merger may increase prices but also result in increased competition over innovation. Evaluating such tradeoffs on a case-by-case basis is already a challenge for antitrust authorities. Writing rules that, on the aggregate (possibly over different industries), achieve the correct trade-off is an even more difficult task.

To take this further, companies today compete not just on the products and services they offer customers, but on business models themselves—significant effort is spent trying to innovate in business models, and firms

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271. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 171 (McGraw-Hill Irwin, 19th ed. 2010) (discussing the Cournot model of oligopoly competition through output-setting); *see generally* PAUL BELLEFLAMME & MARTIN PEITZ, INDUSTRIAL ORGANIZATION: MARKETS AND STRATEGIES, Part II (2nd ed. 2015).

272. *See generally* Guillermo Marshall & Álvaro Parra, *Innovation and Competition: The Role of the Product Market*, 65 INT'L J. INDUS. ORG. 221 (2019).

273. *See generally* Daron Acemoglu, Kostas Bimpikis & Asuman Ozdaglar, *Price and Capacity Competition*, 66 GAMES & ECON. BEHAV. 1 (2009).

274. *See generally* Gregory S. Crawford, *Endogenous Product Choice: A Progress Report*, 30 INT'L J. INDUS. ORG. 315 (2012).

275. *See generally* Massimo Motta, *Endogenous Quality Choice: Price vs. Quantity Competition*, 41 J. INDUS. ECON. 113 (1993).

276. *See generally* Hisashi Kurata & Seong-Hyun Nam, *After-Sales Service Competition in a Supply Chain: Optimization of Customer Satisfaction Level or Profit or Both?*, 127 INT'L. J. PROD. ECON. 136 (2010).

277. *See generally* Michael Spence, *Cost Reduction, Competition, and Industry Performance*, 52 ECONOMETRICA 101 (1984).

278. *See generally* William S. Comanor & Thomas A. Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J. ECON. LIT. 453 (1979).

279. *See generally* Johannes Hörner, *Reputation and Competition*, 92 AM. ECON. REV. 644 (2002).

280. For example, evaluating predatory pricing requires an evaluation of dynamics. *See infra* Section V.F.2.

281. *See* Wright, *supra* note 269.

can differentiate themselves from competitors by making complicated combinations of strategic decisions differently.[282] As a corollary, overall business practices can change over time.[283] Players in a competitive industry can gain competitive advantages—often decisive ones—by developing new business models. Whether such innovations are procompetitive or anticompetitive depends on the particulars of the business model, and the industry. Moreover, because competition in modern markets is increasingly multidimensional and dynamic, firms take time to learn the optimal strategic responses to a particular situation,[284] with the learning often taking years.

The result of the multidimensional, business-model driven nature of modern competition presents intrinsic difficulties for rulemaking, especially when applied to unilateral exclusionary conduct. To be effective, rulemakings must be finely crafted to account for numerous contingencies, and they must change often to reflect business model innovation and evolving business practices. In particular, if the FTC promulgates simpler rules to regulate certain business practices, it risks proscribing conduct that is competitive in a multidimensional context or under some new business model innovation.

### *E. Concentrations, Market Power*

Rises in concentration and market power have been a rallying call for the FTC, with Lina Khan and others pointing to studies and statistics showing such rises as a call to action for the FTC.[285] There is evidence that, concomitant with the rise of big tech, concentration has increased in the U.S., based both on simplified metrics for concentration[286] and more

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282. *See* Rachel Tennis & Alexander Schwab, *Business Model Innovation and Antitrust Law*, 29 YALE J. REG. 307, 309–10 (2012).

283. *See* Christine S. Wilson, *Rule-A-Palooza: Realities and Repercussions*, REMARKS AT THE PAST, PRESENT, AND FUTURE OF FTC RULEMAKING CONFERENCE, at 4 (Feb. 24, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/wilson-byu-speech.pdf [https://perma.cc/AA3M-VXFX].

284. *See* WenJun Huang & Takeyasu Ichikohji, *A Review and Analysis of the Business Model Innovation Literature*, 9 HELIYON 1, 10 (2023) (conducting a systematic review of business model learning and innovation literature).

285. *See*, *e.g.*, Lina Khan, *Oversight of the Enforcement of the Antitrust Laws*, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 20, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf [https://perma.cc/TWB3-TBJ4].

286. *See supra* note 209 ("In over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago.").

sophisticated studies.[287] Studies also suggest that market power is on the rise.[288] Such changes have been linked to other worrying economic developments—falling labor share of output, rising dispersion in firm productivity, rising dispersion in the gap between the labor productivity of firms, and falling firm entry, inequality, real wage stagnation, unemployment, and even inflation.[289]

While such trends are worrying, evidence is mixed.[290] Where rising concentration has occurred, such rises do not necessarily imply increased market power.[291] Indeed, U.S. antitrust in general has been moving away from inferring competitive effects from the structure of a market.[292] As we discuss, even in concentrated markets, markets might remain competitive due to the threat of entry;[293] even "winner-takes-all" markets might be highly competitive, with competition occurring *for* a market rather than *in* it. Even where higher concentration implicates higher market power, the causal factors driving increased concentration are not often well understood. The nature of the causes of market power has implications for the evaluation of antitrust conduct.[294] Moreover, depending on why market power exists in a particular market, the

287. *See generally* Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FINANC. 697 (2019).

288. *See* Loecker, *infra* note 352.

289. For evidence on market power and its implications, see *id.*; Ufuk Akcigit & Sina Ates, *What Happened to U.S. Business Dynamism?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25756, 2019); *see generally* Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSP. 23 (2019); Federico J. Diez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications* (Int'l Monetary Fund, Working Paper No. 18/137, 2018); *see generally* Sean F. Ennis, Pedro Gonzaga & Chris Pike, *Inequality: A Hidden Cost of Market Power*, 35 OX. REV. ECON. POL'Y 518 (2019); *see generally* José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US labor markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. 101886 (2020); *see generally* Flavio M. Menezes & John Quiggin, *Market Power Amplifies the Price Effects of Demand Shocks*, 221 ECON. LETTERS 110908 (2022); *see generally* Ian M. McDonald, *Market Power and Unemployment*, 3 INT'L J. INDUS. ORG. 21 (1985).

290. DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, HEARING ON MARKET CONCENTRATION 2 (2018) (reporting that the DOJ and FTC found that "claims of increasing concentration are unsupported by data for meaningful markets.").

291. *See* Tim Sablik & Nicholas Trachter, *Are Markets Becoming Less Competitive?*, FED. RSRV. BANK OF RICHMOND 1 (2019), https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/economic_brief/2019/pdf/eb_19-06.pdf [https://perma.cc/HE42-N7FU].

292. Int'l Devs. & Comments Task Force, Common Issues Relating to the Digital Economy and Competition 7 (2020).

293. *See supra* Part V.D.

294. For example, a change in underlying technologies may create new economies of scale, leading to an increase in concentration (and market power), but not necessarily indicating heavier enforcement is needed.

implications for antitrust policy may be very different.[295]

Therefore, despite the political appeal of targeting increased concentration, FTC rulemakers should be wary about using concentration or market power as a factor, indicator, or condition for proscribing conduct. To give concentration its proper role in rulemaking, the FTC should seek a nuanced understanding of how concentration and market power have evolved on a granular, sector-by-sector basis.

### *F. Particular Issues*

#### 1. Mergers

Mergers raise challenges for the modern antitrust framework. FTC rulemaking endeavors, including through the issuance of guidance, could allow the law to adjust quickly to the issues of modern antitrust and the new empirical evidence on mergers. Mergers can occur either between horizontal competitors or vertically—where a company acquires or merges with a company it buys from or sells to. In both cases, significant challenges exist for modern antitrust.

Horizontal mergers present challenges for modern antitrust and antitrust rulemaking for several reasons. First, evidence suggests that, on the aggregate, horizontal mergers that are permitted under the current enforcement framework may lead to economically significant price increases.[296] These anticompetitive effects are felt even with some mergers that are too small to be reported under the Hart-Scott-Rodino Act.[297] There may, therefore, be some credence to the position that merger enforcement suffers from aggregate under-enforcement. FTC rulemaking could therefore fare better in adjusting the standards for merger enforcement in response to aggregate evidence and laying out rules for further scrutiny. However, there is also a real danger that the complexity of understanding the effects of mergers and acquisitions could result in the

295. *See* Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1407 (2017) (finding that different components of market power point to different antitrust policies).

296. *See* Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J. L. & ECON. 417, 417 (2010); *cf.* Graeme Hunter, Gregory K. Leonard & G. Steven Olley, *Merger Retrospective Studies: A Review*, 23 ANTITRUST 34, 34 (2008) (finding mixed evidence).

297. Thomas G. Wollmann, *Stealth Acquisitions: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AER: INSIGHTS 77, 78 (2019); Nancy L. Rose & Carl Shapiro, *What Next for the Horizontal Merger Guidelines?*, 36 ANTITRUST 4, 4 (2022) (arguing that anticompetitive effects are present in mergers too small to be reported under the Hart-Scott-Rodino Act).

FTC preventing some economically beneficial mergers.

Second, worries have arisen in modern antitrust about businesses acquiring nascent competitors.[298] Antitrust enforcement has been lax in such cases, since it is difficult to show that the individual acquisition of a small company implicates anticompetitive concerns: mergers that do not significantly change the concentration in a market are seen as unlikely to be anticompetitive.[299] As a result, the acquisition of nascent competitors is generally not subject to the same level of scrutiny as mergers and acquisitions involving larger companies.

Vertical mergers are also under greater scrutiny under the modern antitrust framework. In the early days of antitrust, the stance on vertical mergers held by courts and enforcers vacillated between seeing them as either benign or presumptively harmful. As economic understanding evolved and markets became more complex, the antitrust framework moved towards a more nuanced view: vertical mergers had the potential to cause anticompetitive harm, but could also create offsetting efficiencies, such as by eliminating the problem of double marginalization, reducing costs, and increasing incentives for investment.[300] However, vertical mergers may also cause anticompetitive foreclosure of the market, preventing other competitors from effectively participating or accessing critical resources. The way these countervailing forces add up against each other will depend on the specific facts of the case at hand. Identifying the effects of a particular vertical merger remains fact-intensive, and it would be bad economics to generalize about the competitive effects of vertical mergers overall. FTC rulemaking—including the issuance of vertical merger guidelines—should remain cognizant of this multifaceted reality.

### 2. Exclusionary Conduct

Exclusionary conduct—referring to business tactics or strategies used by a company to limit competition, often by preventing competitors from entering the market or by making it more difficult for them to compete effectively—comes in all shapes and sizes, and related rulemaking is

298. *See* Hemphill & Wu, *supra* note 266, at 1880.

299. *Horizontal Merger Guidelines*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/23QD-A8KC].

300. *See* Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, GEORGETOWN LAW FACULTY PUBLICATIONS & OTHER WORKS, at 32–36 (Dec. 8, 2014), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub [https://perma.cc/V9PC-MRFY].

inherently difficult. Examples of exclusionary conduct include tying products together (forcing consumers to buy an unwanted product to get the desired product), exclusive dealing agreements (a seller agrees to only sell a particular buyer's products), refusal to deal with certain businesses, and predatory pricing (setting prices low to force competitor exits, then raising prices once they leave the market). Scholars and practitioners have discussed the feasibility of a general test for exclusionary conduct. The candidate for such a test that has attracted the most attention is the "no economic sense" test. But this test has been criticized for being both under-inclusive and over-inclusive, has not been endorsed by courts, and has been explicitly rejected by the FTC.[301] Even particular instances of exclusionary conduct—such as predation, most-favored nation clauses, and loyalty rebates—require case-by-case analysis.

Predation has increasingly become a focal point of modern antitrust. While courts have remained skeptical of predatory pricing and have adopted a "static, non-strategic" view, this is no longer in line with the economists' view of predatory pricing.[302] Modern economic analysis has developed a more nuanced view of predatory pricing, and indeed has led to the increasing belief that predatory pricing may sometimes be an effective way for market participants to preclude their competitors and potential entrants.[303] The result is that, with a mixed record of evidence on predatory pricing, and a lingering judicial skepticism, enforcing against predatory pricing remains a significant challenge for the FTC.

The issue of enforcing against predation highlights the difficulty of a rulemaking approach. The economics of predatory pricing suggest that while in the short-term consumers may benefit from low prices, in the long run, the elimination of competitors can lead to higher prices, reduced innovation, and less choice. This long-term harm is often not immediate or obvious, and the initial decrease in prices can mask the predatory intent of dominant firms. The current law on predatory pricing, which uses a static test, does not account for economic particulars. As the Neo-Brandeisians have suggested, the current judicial rule against predatory pricing may be too permissive, and does not capture the different ways

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301. *See* Jonathan M. Jacobson, *A General Test for Exclusionary Conduct? The Case of Exclusive Dealing Agreements*, at 12, 15 (2006), https://www.justice.gov/sites/default/files/atr/legacy/2006/12/27/219944.pdf [https://perma.cc/7GRM-LPSU].

302. *See* Paul Bolton, Jennifer F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2242 (2000).

303. *Id*. at 2243.

predatory pricing might benefit a dominant firm while excluding rivals. However, on the other side of the coin, price reductions are the "hallmark of competition."[304] Telling the difference is difficult and fact-intensive. Any FTC-written legislative rule against predatory pricing, designed to be more inclusive of potentially anticompetitive conduct, risks being over-inclusive, failing to account for low pricing that is fiercely competitive.

Other pricing schemes, such as Most Favored Nation (MFN) clauses and loyalty rebates also pose competitive concerns. Most Favored Nation clauses are used by a seller to guarantee a buyer that no other buyer is receiving better terms. While, as a guarantee of price, MFN clauses appear procompetitive, they may in fact result in higher prices in practice. This is because MFN clauses can discourage sellers from offering lower prices to any buyer, fearing they would have to extend the same lower price to all their customers, including larger, more influential ones. This, in effect, prevents the market from benefiting from potential price reductions that could have been triggered by competition. Loyalty rebates are pricing contracts that explicitly reference rivals by charging a lower price for consumers who refrain from purchasing from rivals. While theoretical frameworks have identified practical criteria for distinguishing between procompetitive and anticompetitive uses of loyalty rebates,[305] such criteria cannot be applied mechanically, requiring a case-by-case evaluation of the specific circumstances in which the loyalty rebates were used. For example, in the pharmaceutical industry, a dominant company might offer significant rebates to hospitals or pharmacies if they primarily stock or promote its drug over a rival's newer or cheaper alternative.[306] This can restrict market entry and limit consumer choice, despite appearing to provide immediate cost savings to the buyers.

These challenges, while they have contributed to the chorus of voices asking for increased antitrust rulemaking, also suggest that FTC rulemaking should proceed with caution. Unwisely constructed antitrust rules have the potential to do great harm. Several takeaways emerge for a rulemaking enterprise. First, rules must not be too general in the face of significant heterogeneity across industries. A rule that works for one industry or market may not for another. Even when they apply narrowly,

304. *Id*. at 2241.

305. *See*, *e.g.*, Patrick Greenlee, David Reitman & David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT'L. J. INDUS. ORG. 1132 (2006).

306. *See FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs*, FED. TRADE COMM'N (Jun. 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes [https://perma.cc/QNX4-FVUB].

rules must be intricately written—with well-researched caveats and exceptions. Else, given the sensitivity of anticompetitiveness theories of harm to market particulars, there is a real risk that a rule will be under-inclusive in some places and over-inclusive in others.

## VI. IS MODERN RULEMAKING UP TO THE CHALLENGE?

Given the argument of Part V that modern antitrust poses significant and at-times-unique challenges for antitrust, is rulemaking even appropriate? Our contention is that at appropriate times it may be, but only if it takes full advantage of the modern methodologies and approaches for rulemaking developed within the executive, other agencies, and academia. The focus of this Part will be on modern rulemaking procedures and tools. We evaluate developments in modern rulemaking procedure and regulatory analysis, and evaluate their appropriateness for FTC competition rulemaking.

### *A. Light-Touch Approaches*

The modern administrative state has frequently seen agencies utilize a "light-touch" approach to rulemaking. Crucial to this has been the rise of three approaches prominent in modern administrative rulemaking: rules establishing presumptions, non-legislative rules, and "unrules" (referring to waivers, exemptions, or exceptions).[307] Each of these provide crucial nuance and precision in different ways to agency staff. Light-touch approaches allow agencies to achieve compliance without engaging in heavy and often clumsy legislative prohibitions. Also, and critically, light-touch approaches avoid the question of whether the FTC has substantive competition rulemaking authority.[308]

#### 1. Presumptions

Agencies may promulgate rules that establish *presumptions* of facts for the purposes of enforcement.[309] Such rules are "softer" than an underlying rule that outright prohibits the same conduct, since they provide the relevant party a chance to present evidence to rebut the

307. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 885 (2021).

308. As Part II showed, the scope of FTC rulemaking authority is deeply contested.

309. A "rebuttable presumption" is "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." *Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019).

presumption. Rulemaking to create presumptions would allow agencies to steer enforcement without creating as high a risk of an over- or under-inclusive rule. Should a firm's conduct meet the conditions for a presumption to be triggered, a firm nonetheless can prove in court that the conclusion presumed does not actually hold. Conversely, a presumption against anti-competitiveness may be overturned by sufficiently strong evidence of consumer harm. Therefore, adopting a presumption, rather than an outright prohibition, allows for a judicial check against egregious cases of over-inclusiveness.

The clearest application of presumptions in antitrust is the presumption that certain conduct is or is not anticompetitive. Such a rule (either coming from a court holding or from agency rules or guidance) helps establish some certainty for regulated parties, while allowing courts to act when there is a clear case to do so.[310]

Presumptions are already utilized in the rulemaking sphere, including by major rulemaking agencies such as the EPA[311] and the SEC.[312] Moreover, presumptions have already been used in antitrust, most notably in the vertical and horizontal merger guidelines, creating a presumption that a merger is anticompetitive under certain conditions. Notably, in an encouraging turn, the FTC itself is seeking comment on whether it should adopt a rebuttable presumption that non-compete clauses are harmful, rather than an outright ban.[313] However, presumptions are not a panacea to the problem of over- and under-inclusiveness. Winning a court battle is still costly, possibly enough to discourage businesses from undertaking that conduct, making the presumption an effective ban.

2. Non-Legislative Rules

Non-legislative rules—provided for in § 553 of the APA and often taking the form of policy statements, guidelines, and interpretive rules—have become an increasingly important part of the agency toolkit in recent years, as notice-and-comment rulemaking has become more unwieldy,[314]

310. The use of presumptions in antitrust rulemaking has been suggested or advocated by a number of articles. *See generally* Chopra & Khan, *supra* note 4; *see generally* Lao, *supra* note 109.

311. An EPA rule adopts a rebuttable presumption that used oil with more than a certain amount of halogens mixed in is a hazardous waste. *See* 40 C.F.R. §§ 261.3(a)(2)(v), 279.10(b)(ii), 279.21(b), 279.44(a)–(c), 279.53, 279.63, and 279.70(c).

312. An SEC rule establishes rebuttable presumptions under which a company is deemed to control a second company. 12 C.F.R. § 225.32.

313. Non-Compete Clause Rule, 88 Fed. Reg. 3482-01, at 3482 (2023).

314. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short*

and often behave, in practice, like legislative rules.[315] Such rules are characterized by the fact that they are not formally legally binding. The evidence shows that most private entities voluntarily comply with agency guidance, so non-legislative rules may be sufficient to induce an agency's desired behavior from private parties.[316] While the precise distinction between legislative and non-legislative rules has often been criticized as tenuous,[317] there is no doubt that non-legislative rules as a distinct category are oft-used as part of agency toolkits.

Such rules have a number of purposes.[318] First, they offer a "softer" touch than legislative rulemaking. Private entities often voluntarily comply with non-legislative rules, so such guidance may be a way to induce desirable behavior without the heavy-handed threat of enforcement. Second, they allow for "sorting"—whereby those parties for whom the guidance is least relevant or who can benefit the most from ignoring it can do so without the same fear of being afoul of the law. Third, non-legislative rules allow agencies to avoid the onerous machinery of notice-and-comment rulemaking.[319] While soliciting comments may still be desirable, the agency need not do it, and in any case can pass the guidance simultaneously with a solicitation for comments (and can then modify the guidance if need be). Finally, in the context of antitrust rulemaking, the FTC can avoid challenges to its UMC rulemaking authority by issuing guidance instead.[320] Guidance has been used,[321] and should continue to be used, by the FTC.

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*Cut*, 120 YALE L.J. 276, 283 (2010).

315. *See, e.g.*, Simon F. Haeder & Susan Webb Yackee, *Policies that Bind? The Use of Guidance Documents by Federal Agencies*, 43 J. HEALTH & HUM. SERVS. ADMIN. 88, 89 (2020).

316. *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 166 (2019) (finding empirical evidence that regulated parties often face overwhelming pressure to follow agency guidance).

317. *See, e.g.*, Nadav D. Ben Zur, *Differentiating Legislative from Nonlegislative Rules: An Empirical and Qualitative Analysis*, 87 FORDHAM L. REV. 2125 (2019); see Franklin, supra note 314, at 278–79.

318. The value of non-legislative rules is discussed in depth in Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE. L.J. 381, 385 (1985).

319. *See* Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385, 1393 (1992); *see generally* Raso, *supra* note 142.

320. *See supra* Part II.B.3.

321. See HORIZONTAL MERGER GUIDELINES, *supra* note 249, and *Antitrust Guidelines for Collaborations Among Competitors*, FED. TRADE COMM'N & U.S. DEP'T OF JUST. (Apr. 2000) for good examples of non-legislative rules that are near-binding in practice.

3. Unrules

During the rulemaking process, agencies frequently establish "unrules"—waivers, exemptions, or exceptions—encompassing both carveouts during the adoption or amendment of a regulation and dispensations granted after the initial rulemaking.[322] The FTC should make extensive use of unrules that lift or limit the scope of its antitrust rules. Unrules provide a degree of certainty for affected parties. Especially in the context of antitrust, providing parties with a sense of certainty is important—uncertainty about antitrust rules can chill procompetitive behavior. In the context of mergers, the FTC already wisely uses exemptions to provide safe harbors. In general, heterogeneity in effect across markets and industries should counsel in favor of the use of unrules. However, caution is warranted. Regulatory burdens that affect certain parties but not others can significantly affect the competitive structure of a market or even an entire industry, and may even unfairly harm certain players in an economy. That said, to combat the potential over-inclusiveness of such antitrust rules, there is a strong rationale for the FTC's inclusion of carve-outs to protect economic activity where the FTC believes such activity to be likely procompetitive. And the FTC should regularly update rules with new exceptions and exemptions for industries or patterns of conduct where the FTC has come to learn that anticompetitive harms are unlikely.

*B. Sophistication in Rulemaking*

FTC Rulemaking should take advantage of increased sophistication in agency rulemaking approaches. A concern about the overall success of agency rulemaking—even while procedures grew more complicated—led to increased calls for sunsetting,[323] retrospective review,[324] consideration of cumulative effects,[325] and the use of experimentation.[326] An eager but

322. Coglianese, *supra* note 307, at 888.

323. For a definition, see *Sunset Law*, BLACK'S LAW DICTIONARY (11th ed. 2019). For discussion, see Jacob Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

324. *See Retrospective Review of Regulations*, WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET, https://perma.cc/4N5U4GZX (archived May 24, 2022).

325. *See* Memorandum from Cass R. Sunstein, Administrator, Office of Mgmt. & Budget, to the Heads and Acting Heads of Exec. Dep'ts and Agencies (Mar. 20, 2012). For discussion on how to consider cumulative effects, see Vartan Shadarevian & Robert Delaney, *Multiple-Rule Cost-Benefit Analysis*, 15 CHARLESTON L. REV. 373, 394 (2021).

326. *See generally* Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014).

judicious adoption of these approaches is likely to allow the FTC to better handle the complex antitrust regulatory landscape.[327]

1. Sunsetting, Retrospective Review, and Rule Revision

Where the FTC does engage in procompetitive rulemaking, retrospective review and sunsetting provisions should be used to examine the resulting rules down the road. Sunsetting provisions, which have been increasingly adopted by other agencies, are predetermined expiration clauses embedded within regulations. A rule with a sunset clause has a defined shelf-life unless affirmatively renewed. By contrast, retrospective review, which has gathered steam in regulatory circles recently, entails reanalyzing existing regulations to determine their continued relevance, efficiency, and impact. The intent is to prune regulations that have become burdensome or obsolete and refine others.

Given the difficulty of ascertaining competitive effects up front, and the problem of rulemaking inertia, the FTC should rely on sunsetting provisions as a check against regulatory entrenchment. Beliefs about antitrust enforcement have changed over time and will continue to do so as competition evolves and new information emerges. Indeed, changing information and an updated understanding of markets was already crucial to the gradual erosion of *per se* prohibitions.[328] Changes in technology, business model innovation, and exogenous FTC learning mean that the optimal regulation will change, often quickly. Should the FTC make rules, there is a danger of outdated rules remaining on the books despite new economic data. Sunsetting provides an important guard against this tendency. Sunsetting creates an impetus for FTC regulators to continually update the relevant regulations in response to new data.

Retrospective review should also be a feature of the FTC antitrust toolkit. Institutionalized retrospective review of regulations has been a feature of agency rulemaking since its articulation in Executive Orders 13563 and 13610.[329] The FTC already conducts 10-year rolling retrospective review of rules and guidelines,[330] a policy which should

327. Another possibility that we do not discuss further is variations on the notice-and-comment process. For example, agencies may issue an Advance Notice of Proposed Rule Making (ANPRM) or engage in negotiated rulemaking, which follows a different structure centered around getting stakeholders to come to a negotiated consensus. *See* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (March 27, 2017).

328. *See supra* Part III.B.3.

329. *See* Exec. Order No. 13,563 (2011); Exec. Order No. 13,610 (2012).

330. *Supra* note 155.

apply to UMC rulemaking. Often, the evidence of an antitrust rule or action becomes clear only after the fact.

Finally, even aside from where the FTC conducts express sunsetting or retrospective review, it should liberally revise rules where appropriate, correcting errors, clarifying policies, and making substantive and incremental changes where appropriate.[331]

2. Interdependencies and Cumulative Effects

Increasingly, the executive branch has become concerned about the cumulative effects of rules, with a series of executive orders and memoranda emerging that instruct agencies to consider cumulative costs and benefits to rules. The FTC should be attentive to interdependencies—interrelated effects—between rules.[332] Potential antitrust rules likely have competition-related interdependencies. For example, merger effects are evaluated in part by potential for coordination effects in the post-merger market. These effects, of course, depend on what the rules are for monitoring or policing coordination. Evaluating each rule individually against the status quo is likely to give misleading estimates of which combination of rules are likely to work best as an ensemble.[333] In regulatory impact analyses, the FTC should thus carefully consider potential interactions with other rules.

3. Experimental Rules and Randomization

Experimental rules—defined by Zachary Gubler as "rules that terminate automatically and are designed for the express purpose of generating data during the sunset period that can then be used to determine the optimal policy strategy for the long run"—are also an important part of the modern administrative rulemaking toolkit.[334] Also crucial is randomization, which in the legal context means a temporary period involving random assignment of legal rules to individuals, firms, or jurisdictions.[335] Doing so can allow agencies to glean information on the

331. The use and benefit of such "dynamic" rulemaking by agencies is analyzed in depth in Wendy E. Wagner, Bill West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017).

332. *See* Shadarevian & Delaney, *supra* note 325, at 394.

333. This issue is discussed at length in Shadarevian & Delaney, *supra* note 325.

334. Gubler, *supra* note 326, at 129.

335. *See generally* Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929 (2011).

causal effect of a particular legal rule.[336]

The idea of experimentation—and especially randomization—through law has often been met with skepticism, especially by courts,[337] on the grounds of fairness, regulatory overreach, and an abdication of the lawmaker's obligation to pass the best possible rule. It is no surprise that experimental approaches often face judicial and political obstacles.[338]

That said, random assignments[339] and experimental rules may work well in antitrust for several reasons. First, antitrust rulemaking is highly uncertain; the ultimate effect on consumer welfare depends pivotally on second-order effects and strategic responses to the rule by market participants. Second, agencies may lack necessary information.[340]

### *C. Cost-Benefit Analysis*

With the rise of the administrative state has come an increasing reliance on Cost-Benefit Analysis as a means of analyzing economically significant regulations. Other agencies, in promulgating regulations, will engage in Cost-Benefit Analysis (CBA) to determine the desirability of a regulation in that area. Cost-Benefit Analysis, while it can refer to a family of methods,[341] generally refers to the concept of analyzing regulations by estimating and comparing its costs and benefits, usually quantitatively. Several executive orders lay out the obligation to conduct CBA and lay out principles for conducting it. The FTC should apply these principles and, should it follow a neo-Brandeisian path, should apply CBA to discipline its consideration of the wider values that Neo-Brandeisians espouse.

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336. Discussion on the implementation of experimental rules is discussed in Zachary J. Gubler, *Making Experimental Rules Work*, 67 ADMIN. L. REV. 551 (2015).

337. *Id.* at 556 (discussing worries that the D.C. Circuit would vacate an experimental rule); *see also* Abramowicz, *supra* note 338, at 932–38.

338. *Id.*

339. Staggering implementation of a rule based approach on region could be another way to randomize treatments.

340. On a cautionary note, several factors suggest experimentation in antitrust rulemaking may be difficult. First, firms and markets are not independent (one of the main assumptions of the traditional experimentation hypothesis). Interdependence may confound a randomization approach and bias statistical estimates. Second, standard fairness concerns of randomization are amplified if randomizing treatments places some firms at a disadvantage to some of their competitors. Third, since strategic responses are more likely to matter in antitrust, it makes a substantial difference whether firms expect a legal rule to be permanent; explicitly "experimental" rules will see different firm responses than real ones.

341. Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 96 (2015) (arguing that CBA refers to a collection of methods, rather than a monolith).

To begin with, the CBA approach to rulemaking is a natural option to assess the value of procompetitive regulations. CBA, when conducted formally, requires constructing estimates of individual willingness-to-pay (WTP) for a particular regulator change, and then taking the sum of these individual WTP values. This is similar to assessments of consumer welfare, which also require assessing individual WTP values in individual markets, so CBA is naturally applied in the context of FTC rulemaking. Much of the methodology that has been developed and used in courts to assess the consumer welfare effects of alleged anticompetitive conduct is therefore applicable to the conduct of a CBA.

CBA could also be successful in addressing—and providing rigor to—some of the concerns of progressives—who argue for a move away from antitrust enforcement focusing on consumer welfare. This would require some adjustment of the standard CBA approaches. Concerns that fall outside the standard WTP or consumer welfare approach are typically not measured by standard CBA. For example, CBA does not account for distributional concerns.[342] In fact, if unadjusted WTP values are concerned, CBA may skew in favor of the interests of individuals with higher incomes, since their WTP for their preferred regulatory outcome will be higher by virtue of their higher income. However, even if a WTP-based approach is inappropriate for these concerns—such as wider effects on inequality, real wages, and unemployment—CBA nonetheless allows quantification of them, although not without challenges.[343] Crucially, CBA provides the flexibility to consider these different concerns, while providing an important check against overly politicized decision-making in the FTC that takes such concerns as pretenses.

Despite the promises of CBA methods, modern antitrust also poses unique challenges for such methods. For Cost-Benefit Analysis to be a worthwhile method for rulemaking decision-making, regulators must be able to come to a reasonable estimate of the net benefits of a regulation.

342. Standard CBA based on WTP does not account for distributional concerns. *See* Matthew D. Adler, *Benefit-Cost Analysis and Distributional Weights: An Overview*, 10 REV. ENV'T ECON. & POL'Y. 264, 264 (2016). This applies to antitrust law and regulation based on a WTP or consumer-welfare standard. *See* Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J. L. & EQUALITY 190, 203 (2022). However, recent White House executive orders outline holistic forms of CBA that may better account for distributional effects. *See* Exec. Order 13563 (2011) and Exec. Order 14094 (2023).

343. For example, many of the aggregate effects Neo-Brandeisians would like to consider—such as distributional effects—are difficult to measure, since they depend on the aggregate effect of anticompetitive conduct by a number of players within a market, industry, or even the economy at large.

Quantifying the net benefits of procompetitive rulemaking can be incredibly difficult. Regulators must first develop some understanding of the competitive structure of a market to begin with. In particular, regulators must understand the strategic responses of customers and other players in the market to new regulation (or the threat of new regulation).[344]

Furthermore, for rulemaking on competition to be successful, regulators must be able to assess quickly changing conditions. As discussed, firms now often compete on business models, as well as on many variables like price, capacity, or quality. Digital platforms, for example, often feature quite complicated pricing menus, bundling, and in general, different variations on two-sided models. Oftentimes, this means the prevailing business model in an industry will shift over time, as firms experiment with new ideas and new ways to package and market their products and offerings. Regulators are often playing catch-up in such a circumstance.[345] The difficulty of quantifying regulatory effects where strategic responses by market participants creates some unpredictability is discussed in the financial regulation context.

Adjustments to CBA in response to highly uncertain environments have been used by other agencies and discussed by scholars. Some of their proposed solutions are highly applicable in an antitrust context. For example, the use of sensitivity analyses,[346] breakeven analyses,[347] and value of information analyses[348] are wise approaches for the FTC to use in cases where it lacks a strong epistemic basis for pinpointing a particular CBA estimate. Where non-monetizable concerns matter, using CBA alongside multidimensional approaches may be appropriate.[349]

### *D. Non-Consumer-Welfare Considerations*

Many of the proponents of a rulemaking approach have suggested that the FTC consider non-economic effects, such as the effect on

344. Large market players are highly strategic in their interactions with the government. For example, see Victor Stango, *Strategic Responses to Regulatory Threat in the Credit Card Market*, 46 J. L. & ECON. 427 (2003).

345. *See*, *e.g.,* Natasha Sarin, *Dynamic Regulation*, 94 S. CAL. L. REV. 1005, 1012 (2021) (arguing that financial regulators operate in a way that makes them slow to react to crises).

346. ANTHONY E. BOARDMAN, COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 269 (5th ed. 2018).

347. Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369, 1369–70 (2014).

348. BOARDMAN, *supra* note 346, at 290.

349. *See* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 229–39 (1999); *see generally* BOARDMAN, *supra* note 346.

democracy,[350] or the effect on other economic variables other than consumer welfare (such as wage growth or inequality).[351] Measuring such effects is not an easy endeavor. The causal links between market competitiveness and other economic variables are not fully understood.[352] Understanding the true effects would involve a macroeconomic general equilibrium analysis of the economy incorporating different market power conditions.[353] Within economics, this has led to significant macro market power literature,[354] but many open questions in that field of research remain. Neo-Brandeisians are also concerned about social and political concerns—such as political influence—that they believe antitrust ignores at its own peril. However, academics have not reached consensus on how such non-economic effects of market consolidation should be measured.[355] Neither is there a great deal of precedent in measuring these effects in regulatory impact analyses. In this Article we do not wade into the significant debate on whether antitrust enforcement should focus on wider social, economic, and political factors, but propose how such concerns are best accounted for in rulemaking.

Developing a consistent scheme for valuing non-consumer-welfare ("non-CW") effects is important. Otherwise, accounting for non-CW considerations may lead to arbitrariness in rulemaking. Without some rigor—in terms of implementing a methodology for understanding how to measure non-economic benefits—the danger is that regulators will use it as a method to sway the analysis in whatever direction they want. Broad, imprecise standards are more subject to capture, allowing the government to become complicit in picking winners and losers on the basis of political compromise. This can be particularly self-defeating from the perspective of encouraging competition. Absent clear, rigorous criteria for determining when accumulations of market power are a threat to wider

350. *See generally* Daniel A. Crane, *Antitrust as an Instrument of Democracy*, 72 DUKE L.J. ONLINE 21 (2022).

351. *See generally* Furman & Orszag, *supra* note 212.

352. *See* Syverson, *supra* note 289, at 28; *see also* Loecker *supra* note 288; *see also* Diez, *supra* note 289.

353. *See generally* Joel M. David, *The Aggregate Implications of Mergers and Acquisitions*, 88 REV. ECON. STUD. 1796, 1796–1830 (2020); *see generally* Laurent Cavenaile, Murat Alp Celik & Xu Tian, *The Dynamic Effects of Antitrust Policy on Growth and Welfare*, 121 J. MONET. ECON. 42 (2021); *see generally* Louis Kaplow, *Competition Policy in a Simple General Equilibrium Model*, 1 J. POL. ECON. MON. 80, 80–114 (2023).

354. Gubler, *supra* note 336, at 555.

355. A reasonable attempt at measuring political influence is demonstrated in Bo Cowgill, Andrea Prat & Tommaso Valletti, *Political Power and Market Power*, CEPR Discussion Paper No. DP17178 (Nov. 10, 2023).

values (such as fair wages or preventing private concentrations of political power), a FTC that engages in rulemaking may act arbitrarily or, even worse, at the behest of the private firms that are best able to court the FTC's regulators.[356] That is, selective and discretionary use of "political criteria" in rulemaking may be worse, from a competition standpoint, than no use at all.[357] Therefore, developing some proxies or assumptions driving the analysis of non-economic effects will be an important factor going forward.[358]

Without making a choice between camps, we make several suggestions. First, even were such concerns to become a part of the FTC antitrust approach, a consumer welfare assessment should still form part of the decision-making approach. Consumer welfare should certainly be considered in antitrust, even if it is not always controlling. Ideally, a rigorous method like CBA could be used to measure consumer-welfare effects against non-consumer-welfare effects. Second, a decision-making approach that looks both at consumer welfare and other factors should make clear the distinction between those two. A rulemaking deliberation should assess consumer welfare effects and broader effects *separately*. Third, antitrust decision-making should preserve, to the degree possible, the institutional knowledge and approaches to effects-based analysis that have been pruned over years of antitrust enforcement across the DOJ and FTC[359]—in scenarios where consumer-welfare-effects are evaluated

356. "These decades of applying well-intentioned but misguided goals led to an internally inconsistent and incoherent regime that fostered corporate welfare over consumer welfare." Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem For a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 313 (2018).

357. For example, consider that four firms (A, B, C, D) are competing for a market. If any of the firms merge, they become a super-firm. Only another super-firm can remain in the market with a super-firm—a normal sized firm will have to leave the market. The worst possible outcome is if there is only one super-firm remaining in the economy. Suppose, furthermore, that in our hypothetical, in a world with no antitrust regime, the four firms will form two pairs of two—(A+B, and C+D). Each pair merges to form a super-firm. This is a worse scenario (from a consumer welfare scenario) than if no merger occurs, but it is a better scenario than if only one super-firm remains in the market. In the optimal scenario, an antitrust regime prevents all mergers, and four firms remain. Suppose a "captured" antitrust regime bends to Firms A and B's superior industry contacts, and allows their merger, but prevents C and D from merging. A and B merge to become super-firm AB, and by our assumption, C and D leave the market. Thus, AB monopolizes the market, which is worse than the scenario with no antitrust at all.

358. It might be useful to develop a measure such as "social cost of concentration," akin to the social cost of carbon, which captures the idea that increased concentration may have negative societal externalities. While such measures may be crude proxies for the negative effects of concentration, they also prevent abuse of non-economic justifications on an ad-hoc basis.

359. *See* Wilson, *supra* note 283, at 3 (warning of the impacts of bright-line antitrust rules).

effectively, any intrusions by rulemaking on such analysis should be minimal.

### *E. Rulemaking and Democracy*

Proponents of FTC rulemaking have suggested that court battles often devolve into costly "battles of the experts," creating a "democratic deficit," since members of the public find the back and forth on competitive effects inaccessible. In court cases, experts argue over the correct economic models to apply to a market or industry. These models are often complex, requiring an understanding of both economic theory and sophisticated data techniques that economists and statisticians use to make sense of the relevant markets. Moreover, judges (and occasionally juries),[360] usually not specialists in the use of quantitative evidence, may struggle to make sense of competing expert testimony. Thus, a "democratic deficit" emerges, since the resulting judicial back-and-forth is inaccessible to members of the general public and results in judicial decisions that are not reflective of the underlying merits of the case. Important antitrust cases that determine the fate of large and significant companies are decided with reference to economic nuances that the public struggles to follow. As a result, proponents of FTC rulemaking have suggested that rulemaking may be a more democratic form of enacting competition policy. There is a strong prima facie case that notice-and-comment rulemaking, with its onus on regulators to explain their reasoning in detail, and its opportunities for private comment, is a more democratic approach.[361]

However, a rulemaking approach similarly risks becoming opaque to the public. Despite the notice-and-comment process, significant agency decisions are not subject to public scrutiny. Agency deliberation often occurs before a Notice of Public Rulemaking is even published and therefore takes place mostly "in the dark." At this stage, internal expertise may be used in choosing how to build a justification. This internal expertise is often "invisible," reflecting the intuitive, unexplained sense of judgment accumulated by regulators over years of practice. Crucially, an agency's choice of regulation often remains unexplained. Often, these

360. *See* Daniel A. Crane, *The Much-Maligned Antitrust Jury*, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 110 (2011) ("A culture of jury avoidance permeates antitrust litigation, rendering actual jury trials rare and quaint events.").

361. Note that, to the degree that the alternative to legislative rulemaking is guidance, rulemaking forces some kinds of disclosure and preserves public participation rights in ways guidance-making does not. For example, rulemaking forces the FTC to respond to significant comments, articulate reasoned bases for its rules, and disclose the technical data it relied on. *See supra* INTRODUCTION.

exercises of judgment are especially important in the early stages of rulemaking, where regulators are making decisions as to the shape and form of a rule and are eliminating alternatives. At this stage, there is very little process, and many decisions occur without a rulemaking record that can be scrutinized.

Moreover, delegating too much of the decision-making on antitrust to the FTC runs the risk of information capture by regulated parties or, at worst, some degree of regulatory capture.[362] Within agencies that rely heavily on rulemaking, informal ex parte communications with agencies are often dominated by regulated parties.[363] Usually, this communication takes place before an NPRM has been issued. As a result, often the informational process that goes into rulemaking may be opaque. This is a danger even in the FTC, which as of late has had a more neo-Brandeisian bent. Informal communications can occur at many different levels of the FTC organizational structure, and moreover delineating between useful contact (yielding information to regulators) and undue influence within the FTC is difficult.[364]

## CONCLUSION

The proper role of rulemaking for the challenges of antitrust is sure to spur significant academic and political debate in the next few years, with the FTC the likely center of such a debate. Over the course of this Article, we hope to have laid out both the difficulties and opportunities for the FTC were it to use rulemaking approaches. Our prescription is: proceed, but with caution. Absent further congressional authorization, the FTC's authority to make rules is likely to be challenged, perhaps successfully. And the tricky nature of competition issues presents challenges—perhaps unlike those faced by other agencies—that make FTC rulemaking a uniquely fraught enterprise. That said, one might ask what the optimal amount of rulemaking is that the FTC should engage in. The answer is probably more than zero, and maybe significantly more. This is especially true given the increasing sophistication and nuance in modern rulemaking.

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362. Regulatory capture occurs when a regulatory agency's decision-making is dominated by the industry it oversees, leading to policies favoring that industry over the public interest. Information capture refers to a regulator's over-reliance on industry-provided data and expertise, resulting in decisions based on potentially skewed or incomplete information.

363. *See*, *e.g.*, Wendy E. Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 112 (2011).

364. Being *too* reliant on private parties for information and direction, combined with the incentives of civil servants within the agency, may plausibly lead to some information or regulatory capture.

The FTC should take full advantage of this, using a range of strategies such as presumptive rules, experimental rulemaking, retrospective review, and Cost-Benefit Analysis. With some care, there is hope for the FTC to make rules that are not over- or under-inclusive, preserve the role of economic effects analysis in antitrust, and successfully address those cases where chronic underenforcement appears to be an issue.