THE NEW ANTITRUST RULES: THE FTC'S § 5 RULEMAKING AUTHORITY

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I. INTRODUCTION

As antitrust has gained increasing notoriety in the public discourse, a previously dormant regulatory tool under existing competition law has also received greater attention: the Federal Trade Commission's ("FTC") authority to make rules regulating "unfair methods of competition" under § 5 of the Federal Trade Commission Act ("FTCA").[1] Academics and FTC Commissioners have publicly called for the reinvigoration of § 5 rulemaking.[2] The FTC itself also announced the formation of a rulemaking group to "take a strategic and harmonized approach to rulemaking across its different authorities and mission areas," and to explore whether rules under § 5 would "promote competition and provide greater clarity to the market."[3]

Commentators have also argued that § 5 rulemaking presents an attractive means of modernizing antitrust enforcement, as it allows new regulations to come into force without relying on Congress and addresses anticompetitive conduct more quickly than enforcement by adjudication.[4] In effect, rulemaking can be nimbler and more responsive to market changes than legislation. It can also

1. 15 U.S.C. § 45.

2. *See* Eleanor M. Fox & Harry First, *We Need Rules to Rein in Big Tech* 2 (N.Y.U. L. & Econs. Rsch. Paper Series, Working Paper No. 20-46, 2020); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 357 (2020).

3. Press Release, Fed. Trade Comm'n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group [https://perma.cc/9HWE-QDH8] ("It is also time for the Commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy." (internal quotation marks omitted)); Fed. Trade Comm'n, *Statement of Regulatory Priorities* 2 (Dec. 16, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf [https://perma.cc/QZT2-L9D7].

4. As an example of a lengthy adjudication process, the Department of Justice's case to break up AT&T lasted about eight years. David Goldman, *The U.S. Government's Long History of Suing AT&T*, CNN Business (Nov. 24, 2017), https://

guide regulated parties on conduct the FTC considers to be anticompetitive ex ante, avoiding the delay inherent in resolving illegal conduct through litigation.[5]

The Biden Administration invoked § 5 rulemaking in a July 2021 executive order ("EO 14,036"), calling on the FTC to "promulgat[e] rules," and to exercise statutory rulemaking authority to address certain "unfair" conduct.[6] Some practices that EO 14,036 references, such as restrictions on third-party repairs and tying in real estate brokerage, are specific and reachable under existing antitrust laws.[7] Other practices, such as those related to data and surveillance, are beyond the scope of existing law and not traditionally considered core antitrust concerns.[8]

The Commission's authority to promulgate rules under § 5 is well-grounded in the text of the FTCA and is affirmed by longstanding judicial precedent. Section 5 states that "[u]nfair methods of competition in or affecting commerce . . . are hereby declared unlawful."[9] Section 6 gives the FTC authority to "make rules and regulations for the purpose of carrying out the provisions of this subchapter,"[10] which is understood to authorize rulemaking under

money.cnn.com/2017/11/24/news/companies/doj-vs-att/index.html [https://perma.cc/8RJ5-S7MG].

5. Relying on adjudication has been criticized for providing insufficient guidance to regulated parties. Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1304 (2014).

6. Exec. Order No. 14,036: Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36989 (July 9, 2021) [hereinafter EO 14,036]. The full list of proposed rules includes unfair non-compete clauses, data collection and surveillance practices, anticompetitive restrictions on third-party repair or self-repair of items, anticompetitive conduct or agreements in the prescription drug industries, competition in major Internet marketplaces, occupational licensing restrictions, tying practices or exclusionary practices in the brokerage or listing of real estate, and other industry-specific practices that substantially inhibit competition. *Id.* at 36992.

7. *Id.*; Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 457–58, 462 (1992) (discussing aftermarket tying of replacement parts and repair services and finding it actionable conduct under § 1 of the Sherman Act upon certain showings); Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1579 (11th Cir. 1991) (finding that association of brokers alleging tying arrangement between use of multilisting listing system and membership in real estate association branch had sufficiently alleged the five prima facie elements of a per se tying violation). This Note will use the terms "existing antitrust law," "current antitrust doctrine," "existing caselaw," and iterations thereof, to refer to the Sherman Act, 15 U.S.C. §§ 1–7, and the Clayton Act, 15 U.S.C. §§ 12–27.

8. EO 14,036, *supra* note 6, at 36992; *see* discussion *infra* Section III.E.

9. 15 U.S.C. § 45(a)(1).

10. 15 U.S.C. § 46(g).

§ 5's "unfair methods of competition" language.[11] In *National Petroleum Refiners Association v. Federal Trade Commission*, the D.C. Circuit upheld the Commission's authority to make substantive rules and regulations under § 6(c) for the purpose of carrying out § 5.[12] Yet, despite its recognized authority to promulgate substantive antitrust rules under § 5, the Commission has only produced one such rule in its history.[13]

Given increased attention to § 5 rulemaking, as well as legal challenges the Commission would likely face to rules promulgated under this Section, determining the scope of § 5 rulemaking authority is an important topic for antitrust regulation. The scope of § 5 will influence which rules the FTC promulgates, as well as the likelihood that such rules will withstand judicial scrutiny. Yet because § 5 rulemaking has been dormant, this remains an open question.

This Note will analyze this issue in two parts. The first will assess the meaning of the phrase "unfair methods of competition" under § 5 of the FTCA by consulting legislative history, caselaw, and FTC statements. Upon consideration of these sources, this Note will conclude that § 5 is intentionally broad to allow the FTC to exercise discretion in identifying practices within its scope, even those not reached by the Sherman and Clayton Acts.

The second part will assess the FTC's authority to promulgate rules prohibiting unfair methods of competition on two axes: the availability of *Chevron* deference and the type of conduct the FTC seeks to regulate. Type of conduct will be broken into three categories: (1) conduct reached by existing antitrust laws, (2) conduct not reached by antitrust laws, but squarely a concern of the doctrine, and (3) conduct not traditionally considered a core concern of antitrust doctrine.[14] Along these axes, this Note will argue that if the

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11. Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/3337-B6GX] ("Section 6(g) continues to authorize rules concerning unfair methods of competition.").

12. 482 F.2d 672, 698 (D.C. Cir. 1973) (upholding the FTC's § 5 rulemaking authority for a consumer protection rule under statutory language that applies to both consumer protection and antitrust).

13. *See* Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 32 Fed. Reg. 15584–86 (Nov. 9, 1967); Fox & First, *supra* note 2, at 4.

14. I am relying on these three abstract categories of conduct because it is not clear what rules the Commission will promulgate under § 5. These categories were refined based on rules proposed by commentators, as well as statements made by FTC Commissioners. They are not recognized in caselaw, but rather are helpful

FTC is afforded *Chevron* deference, it would have a strong basis to promulgate rules regulating conduct in categories (1) and (2), but a weaker basis to promulgate rules in category (3). If the FTC does not receive *Chevron* deference, rules regulating conduct in category (1) would be upheld, but those related to categories (2) and (3) would be less likely to withstand judicial scrutiny. This Note will also analyze the proposals in EO 14,036 to assess their likelihood of being upheld by a reviewing court and to illustrate the application of the aforementioned considerations to rules promulgated under § 5. Finally, this part will discuss potential limitations to § 5 rulemaking authority, both legal and structural.

These parts are related in that a broader scope of the phrase "unfair methods of competition" may allow the FTC to regulate more conduct through rulemaking. The meaning and scope of § 5 is also relevant for the operation of *Chevron* deference. In tandem, these parts provide a framework for considering the legal basis for rules promulgated under § 5.

II. INTERPRETING "UNFAIR METHODS OF COMPETITION"

The first step in assessing the Commission's authority to promulgate rules under § 5 is determining the meaning of the phrase "unfair methods of competition." Legislative history, caselaw, and recent FTC enforcement guidance all suggest that "unfair methods of competition" has a broad meaning that goes beyond the scope of conduct classified as anticompetitive by the Sherman and Clayton Acts.

As an initial matter, there is no unambiguous plain meaning of the phrase "unfair methods of competition." The Supreme Court's recent pronouncements on statutory interpretation make clear that analysis starts with the text.[15] Here, however, the meaning of "unfair," "method," and "competition," are all debatable, generally as a philosophical matter and specifically in the antitrust context.[16]

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heuristics for grouping types of rules that the Commission may promulgate under § 5.

15. *See generally* Adam M. Samaha, *Starting with the Text – On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. Legal Analysis 439, 440 (2016).

16. *See* Justin Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. Pitt. L. Rev. 209, 227 (2014) ("[T]he FTCA – and, in particular, the meaning of 'unfair methods of competition' – is inherently ambiguous."); *Unfair*, Merriam–Webster, https://www.merriam-webster.com/dictionary/unfair [https://perma.cc/XBF6-J3Y3] ("[N]ot equitable in business dealings[.]").

Other sources therefore provide the basis for understanding this Section.

The legislative history of § 5 shows that Congress drafted the statute with substantial breadth, in order to grant the FTC policymaking discretion unconstrained by the Sherman Act. The FTC was created in the wake of *Standard Oil Co. v. United States*, in which the Supreme Court replaced the per se prohibition on trade restraints with the rule of reason.[17] The day after the decision, Senator Francis Newlands, the FTCA's primary sponsor, expressed concerns about whether Congress would "permit in the future the administration regarding [corporate mergers] to drift practically into the hand of the courts . . . to the varying judgments of different courts . . . ."[18] Professor Neil Averitt later noted that in the wake of *Standard Oil* Congress had a "sudden realization of the costs that were always inherent in a procedure for litigating antitrust cases in the courts" and that the "congressional reaction to *Standard Oil* was motivated in large part by jurisdictional and administrative considerations."[19] Concerns about judicial administration of the antitrust laws were therefore front of mind for the FTCA's drafters.

Senator Newlands also made clear that the phrase "unfair methods of competition" in the FTCA was purposefully broad, in order to vest the FTC with substantial authority; he noted that those drafting the Bill "gave careful consideration to the question as to whether . . . to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or . . . leave it to the commission to determine what practices were unfair."[20] The drafters opted for the latter course because "there were too many unfair practices to define."[21] Senator Newlands went on to characterize "unfair methods of competition" as "every practice and method between competitors upon the part of one against the other that is against public morals, . . . or is an offense for which a remedy lies either at law or in equity."[22] He further expressed hopes that "this phrase will cover everything that we want" and "will meet every new condition and every new practice that may be invented with a view

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17. 221 U.S. 1, 60 (1911).

18. 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, 231 (1980) (quoting 47 Cong. Rec. 1225 (1911)).

19. *Id.* at 233.

20. *Id.* at 234 (second and third alterations in original) (quoting S. Rep. No. 63-597, at 13 (1914)).

21. *Id.* (quoting S. Rep. No. 63-597, at 13 (1914)).

22. *Id.* at 235 (quoting 51 Cong. Rec. 11112 (1914)).

to gradually bringing about monopoly through unfair competition."[23]

Other aspects of the FTCA's legislative history indicate Congress's desire to leave § 5 broad so as to vest the Commission with substantial discretion. The Bill's sponsors changed the proposed language of "unfair competition" to the enacted language of "unfair methods of competition" to avoid the former phrase's common law meaning of passing off goods of one company as products of another.[24] Senator Albert Cummins, another FTCA sponsor, also stated that interpreting the phrase "unfair methods of competition" would be done using the rule of reason,[25] a framework with inherent latitude, and that he was more comfortable with the FTC wielding rule of reason analysis than the courts.[26] Professor Averitt also noted two distinct sentiments in the FTCA's legislative history: "[f]irst, the Rule of Reason would henceforth be used to interpret an underlying statute that was much broader than the Sherman Act, so that the Rule itself would limit antitrust enforcement much less than it [previously] had," and "the Rule [of Reason] would be applied . . . by the new Commission rather than by the courts."[27] In sum, the FTCA drafters' discomfort with a judicially-administered rule of reason and purposeful use of the capacious phrase "unfair methods of competition" suggest that § 5 was intended to have a broad meaning that granted the FTC discretion unconstrained by the Sherman Act.

Echoing this legislative history, the Supreme Court has come to recognize § 5's broad scope and grant of discretion to the FTC. In early cases, the Court constrained the FTC's authority to determine whether conduct was an "unfair method of competition" and stipulated that this power was limited to conduct already found to

23. *Id.* at 234–35 (quoting 51 Cong. Rec. 12024 (1914)).

24. *Id.* at 235.

25. *Id.* at 235–36 ("[I]f the rule of reason is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the phrase 'unfair competition.'" (quoting 51 Cong. Rec. 12915 (1914))).

26. *Id.* at 236 ("I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people . . . than . . . upon the abstract propositions, even though they be full of importance, argued in the comparative seclusion of the courts." (quoting 51 Cong. Rec. 13047 (1914))). *See also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018) ("Courts evaluate most antitrust claims under a 'rule of reason,' which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is 'reasonable' means that it survives antitrust scrutiny.").

27. Averitt, *supra* note 18, at 236.

be anticompetitive.[28] The Court has since confirmed that § 5 covers conduct within the Sherman and Clayton Acts.[29] In *Federal Trade Commission v. R.F. Keppel & Brother, Inc.*, the Court adopted an expanded scope, however, finding that § 5 was not limited to "fixed and unyielding categories" or conduct forbidden at common law or by the Sherman Act.[30] In *Federal Trade Commission v. Sperry & Hutchinson Co.*, the Court emphasized the "sweep and flexibility" of the phrase "unfair methods of competition"[31] and concluded that the FTC "does not arrogate excessive power to itself if . . . [it] considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[32] Additional cases confirm the FTC's discretion to bring "unfair methods of competition" cases over conduct outside of the existing antitrust laws.[33]

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28. *See* Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 427–28 (1920) ("'[U]nfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals.").

29. *See* Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 693 (1948) ("The Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act."); *see also* Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 668, 706 (1941) ("If the . . . [conduct at issue] runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.").

30. 291 U.S. 304, 310 (1934). One year later, the Court in *A.L.A. Schechter Poultry Corp. v. United States* noted that "unfair methods of competition" had a broader meaning than the common law phrase "unfair competition," and was "to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." 295 U.S. 495, 532–33 (1935).

31. 405 U.S. 233, 241 (1972).

32. *Id.* at 244.

33. *See* Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (noting that the FTCA "was designed to supplement and bolster the Sherman Act and the Clayton Act to stop in their incipiency acts and practices which, when full blown, would violate those Acts [and] to condemn as 'unfair methods of competition' existing violations of them" (citations omitted)); Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons." (citations omitted)); Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316, 321 (1966) ("This broad power of the Commission [under § 5] is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.").

In the 1980s, the FTC suffered a number of circuit court losses in cases brought under § 5.[34] In some cases, the courts rejected the Commission's proffered legal standards under § 5, while in others they noted insufficient evidence of harm to competition.[35] These cases did not, however, expressly question or rein in the scope of the Commission's authority under § 5. Viewed in concert with the Supreme Court's broad pronouncements on § 5, the outcomes in these cases should not be read to suggest a narrow interpretation of § 5, but rather as results of specific factual and legal circumstances at issue.

Moreover, the FTC's recent repeal of a 2015 "Statement of Enforcement Principles" ("2015 Statement") further counsels a broad reading of the statute. In 2015, the FTC promulgated a statement outlining its principles of enforcement under § 5.[36] These were: (1) the FTC would be guided by public policy underlying antitrust laws—namely promotion of consumer welfare; (2) acts or practices would be evaluated under the rule of reason; and (3) the FTC would be less likely to challenge a practice under § 5 if enforcement under the Sherman or Clayton Acts would suffice.[37] This statement was criticized as a "narrow interpretation" that "contradicted Congress's political [and] economic vision in 1914."[38] Scholars also noted that reliance on "consumer welfare" and the rule of reason framework would restrict the FTC's ability to bring claims.[39] Given the centrality of "consumer welfare" to Sherman and Clayton

34. *See* Boise Cascade Corp. v. Fed. Trade Comm'n, 637 F.2d 573, 581–82 (9th Cir. 1980); E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 141–42 (2d Cir. 1984); Off. Airline Guides, Inc. v. Fed. Trade Comm'n, 630 F.2d 920, 927–28 (2d Cir. 1980).

35. *See* Brendan Ballou, *The "No Collusion" Rule*, 32 STAN. L. & POL'Y REV. 213, 242–43 (2021) (arguing that the rulings against the FTC in *Boise Cascade* and *E.I. du Pont* were a result of the FTC failing to demonstrate an anticompetitive price effect—i.e., factual infirmities—rather than deficient legal theories).

36. *See generally* Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57056 (Sept. 21, 2015).

37. *Id.* at 57056.

38. Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 650 (2017).

39. *See* Herbert Hovenkamp, *President Biden's Executive Order on Competition: An Antitrust Analysis*, 64 ARIZ. L. REV. 383, 384 (2022) (observing that both doctrines tend to result in underenforcement).

Act doctrine,[40] limiting § 5 in this manner narrowed enforcement to conduct actionable under existing antitrust laws.[41]

In July 2021, newly-appointed FTC Chair Lina Khan and two other Commissioners voted to rescind the 2015 Statement.[42] At the time, Chair Khan argued that the "2015 Statement contravenes the text, structure, and history of Section 5 and . . . abrogates the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute."[43] She also hinted that the FTC would consider whether to issue new guidance or rules identifying practices warranting scrutiny.[44] Rescinding the 2015 Statement opened the door for FTC antitrust rulemaking.[45]

By repealing the "narrow" 2015 Statement, the FTC endorsed a broader reading of § 5. Such a reading is consistent with the statute's legislative history and interpretation in caselaw. This repeal is significant for gauging the contours of § 5 due to courts' deference under *Chevron* to administrative agencies' interpretations of their

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40. Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 38 (2021) ("Under current case law, this assessment [on mergers or challenged conduct] is often made by applying the 'consumer welfare standard.'").

41. As an economic matter, "consumer welfare" has taken on a number of different meanings. Robert Bork used the term to include the sum of welfare enjoyed by producers and consumers, without regard to effects on third parties. Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 65 (2019). Others have suggested that trading partners should be included in the term, thereby looking at effects on downstream and upstream trade. *Id.* at 68, 78. Under the expanded trading partners approach, conspiracies among rivals to harm intermediate buyers and sellers would be of antitrust concern.

42. *See* Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy That Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under [https://perma.cc/X3YX-SHKV].

43. Fed. Trade Comm'n, *Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* 1 (July 1, 2021) [hereinafter *Statement of Chair Khan*], https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [https://perma.cc/G857-PC8P].

44. *Id.* at 7.

45. *See* Alexander Paul Okuliar & David J. Shaw, *FTC Meeting Signals Aggressive and Novel Enforcement to Come*, PROGRAM ON CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF LAW (July 19, 2021), https://wp.nyu.edu/compliance_enforcement/2021/07/19/ftc-meeting-signals-aggressive-and-novel-enforcement-to-come/ [https://perma.cc/9KE9-SZZ6].

organic statutes,[46] but also because it provides another data point in understanding § 5's facially ambiguous language.

In tandem, what do these sources tell us about the meaning of "unfair methods of competition?" They counsel that the phrase is intentionally broad, allowing the FTC to exercise significant discretion in determining the practices that fall within its scope—including practices not reached by the Sherman and Clayton Acts. The legislative history also intimates that the FTCA's drafters intended for the Commission to wield the rule of reason, an analysis with inherent latitude, to identify unfair methods of competition, rather than such analysis being the sole purview of the courts. While the 2015 Statement limited the scope of § 5, its subsequent repeal removed a burden to expansive interpretation of this Section.[47]

Some scholars argue that the FTC's authority under § 5 is more limited than that outlined above. For example, a 2014 paper by then-FTC Commissioner Joshua Wright and attorney advisor Jan Rybnicek asserted that conduct is not within § 5 merely because it "injures small businesses, violates public morals, or otherwise contravenes public policy based upon some set of non-economic considerations."[48] They also argue that § 5 is designed to remedy "the same harms, in economic terms, as those protected by the traditional antitrust laws" and that in evaluating "whether a particular business practice constitutes an unfair method of competition," the Commission must weigh the harm it causes against its efficiency.[49] These limitations echo the FTC's 2015 Statement and confine § 5 to the scope of the Sherman and Clayton Acts.

But to the extent that these purported limitations are abstracted from analysis of the FTC's past enforcement practices, they represent the Commission's enforcement conventions rather than the doctrinal boundaries of § 5.[50] The extent to which the FTC ex-

46. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

47. Though these insights came in the adjudication context whereby "unfair methods of competition" was determined ex post on a case-by-case basis, they are also relevant for the rulemaking context whereby the FTC ex ante prohibits anticompetitive conduct.

48. Rybnicek & Wright, *supra* note 5, at 1290.

49. *Id.*

50. At least one of the sources that Rybnicek & Wright cite in support of the additional limiting principles on § 5 is of this nature. They point to a 2013 speech by former FTC Chair Edith Ramirez. *Id.* at 1290 nn.10–11. In this speech, Chair Ramirez noted that the Commission "will condemn conduct only where . . . the likely competitive harm outweighs the cognizable efficiencies" and focused on activities that "endangered competition" and "served no legitimate purpose." Edith

ercises its enforcement discretion under § 5 is not determinative of the statute's scope. The FTC could have only brought actions clearly reachable under § 5 and not pursued cases on the outer bounds of the statute, though within its reach. Analysis of enforcement actions brought under § 5 is revelatory of how the Commission has exercised its enforcement discretion, not the legal meaning of the phrase "unfair methods of competition." Limitations on § 5 abstracted in this manner are therefore not doctrinally binding. Rather, the scope of § 5 is discerned by reference to statutory text, legislative history, and judicial interpretations, which again counsel a broad conception of the term.

III.
FTC RULEMAKING AUTHORITY

Despite the FTC's authority to promulgate rules under § 5,[51] the contours of this authority remain unclear because the Commission has only used § 5 rulemaking once in the agency's history. Below I discuss the scope of § 5 rulemaking authority and analyze whether it extends to rules regulating certain categories of conduct, with and without *Chevron* deference, as well as to the proposals in EO 14,036. Finally, I discuss potential limitations to FTC rulemaking authority.

A. Chevron*'s Applicability*

Under *Chevron v. Natural Resources Defense Council*, courts must defer to an agency's interpretation of a statute it is entrusted to administer when: the statute is silent or ambiguous with respect to the issue being interpreted ("*Chevron* Step 1"), and the agency's interpretation is based on a reasonable construction of the statute ("*Chevron* Step 2").[52] In *United States v. Mead Corp.*, the Supreme Court further stipulated that deference only applies when "it appears that Congress delegated authority to the agency generally to

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Ramirez, Chairwoman, Fed. Trade Comm'n, Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission's Next Century, Keynote Address at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014) (transcript available at http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf [https://perma.cc/7ZC3-N3Q7]). Again, this source provides a description of the FTC's prior enforcement practices rather than a statutory analysis of § 5. To the extent that the purported limiting principles are supported by sources of this nature, they lack basis in the statute itself.

51. *See supra* Section I.

52. 467 U.S. 837, 843–44 (1984).

make rules carrying the force of law," and the agency was acting to pursuant to this delegation.[53] Agencies granted the power to act through notice-and-comment rulemaking or formal adjudication are presumed to have such authority.[54]

There is an open debate as to whether the FTC should receive *Chevron* deference in promulgating substantive antitrust rules under § 5. Chair Khan and former Commissioner Rohit Chopra have argued that "[r]ulemaking under 'unfair methods of competition' is governed by the Administrative Procedure Act and is eligible for *Chevron* deference."[55] Other commentators have also contended that FTC rulemaking receives such respect.[56] Conversely, Professor Daniel Crane has expressed doubt that the FTC is entitled to deference in promulgating antitrust rules.[57] Crane argues that courts do not defer to agencies when a statute structures norm creation as a common law process, and that the FTCA, in allowing the FTC to create antitrust common law, is such a statute.[58] Moreover, he argues that *Chevron* does not apply to statutes that are jointly enforced by multiple agencies, precluding its application here because the FTC and Department of Justice (DOJ) share antitrust enforcement duties.[59]

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53. 533 U.S. 218, 226–27 (2001).

54. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 221–22 (2006) ("It is presumed that an agency has such authority if it has been granted the power to act through notice-and-comment rulemaking or formal adjudication.").

55. Chopra & Khan, *supra* note 2, at 375.

56. *See* C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 644 (2009) ("The FTC possesses the power to promulgate rules with the force of law that are subject to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*"); Vaheesan, *supra* note 38, at 654 ("The FTC's interpretation of Section 5's prohibition on unfair methods of competition is almost certain to receive *Chevron* deference."); Royce Zeisler, Note, Chevron *Deference and the FTC: How and Why the FTC Should Use* Chevron *to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 270 (2014) ("In summary, this Note argues that the FTC can and should use *Chevron* to create more effective antitrust regulation."); Hurwitz, *supra* note 16, at 248 ("As a threshold matter, Section 5 is precisely the sort of statute to which *Chevron* deference is meant to apply.").

57. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1206–07 (2008) ("Cases . . . illustrate the court's lack of deference to the FTC's efforts to create substantive antitrust norms, including prophylactic norms intended to reduce areas of antitrust uncertainty or risk to concrete rules.").

58. *Id.* at 1208 ("Even if courts are otherwise willing to give agencies policymaking breathing room, they may be reluctant to do so when the agency's norm creation is structured as a common law process.").

59. *Id.* at 1209.

Application of the criteria for deference laid out in *Chevron* and *Mead* suggests that FTC interpretations of the FTCA are entitled to deference. Starting with the *Mead*-imposed "Step Zero," § 6 of the FTCA gives the Commission "power . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter,"[60] which has been understood by the courts and the FTC itself to authorize rulemaking under § 5.[61] In effect, § 6 authorizes the FTC to make rules with the force of law pursuant to § 5's prohibition of "unfair methods of competition." While § 6 does not specify whether rulemaking must be done through formal notice-and-comment procedures, the FTC's use of this procedure to rescind its only substantive antitrust rule in 1994 suggested that the Commission would use it going forward.[62] Promulgation through notice-and-comment procedures would almost certainly satisfy "Step Zero."[63] Turning to *Chevron* itself, pursuant to Step 1, the plain text of § 5 and its legislative history confirm the statute's ambiguity.[64] Per Step 2, FTC interpretations of § 5 will be granted deference and upheld by courts if they are reasonable.

Professor Crane's arguments for withholding *Chevron* deference are also wanting. On his first criticism, Crane himself admits that notice-and-comment procedures would allay concerns of granting deference to a statute creating a common law system.[65] Moreover, while it is true that the FTC and DOJ split antitrust enforcement, the FTC is the only enforcer authorized to sue under the FTCA.[66] While the FTCA overlaps with the Sherman and Clay-

60. 15 U.S.C. § 46(g).

61. *Id.*; Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 698 (D.C. Cir. 1973); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 11 ("Section 6(g) continues to authorize rules concerning unfair methods of competition.").

62. *See* Trade Regulation Rule: Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 59 Fed. Reg. 8527–28 (Feb. 23, 1994) (repealing 16 C.F.R. pt. 412).

63. Proper compliance with formal notice-and-comment procedures, as well as acknowledgement of comments submitted during this process, would also help insulate the FTC from arbitrary and capricious challenges under § 706(2)(A) of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). *See generally* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

64. *See supra* Section II.

65. Crane, *supra* note 57, at 1208 ("[T]his first obstacle might be overcome if the FTC were to exercise its statutory authority and frame antitrust rules through formal 'notice and comment' rule making.").

66. 15 U.S.C. § 45(a)(2) (empowering the "Commission," defined as the Federal Trade Commission, to enforce § 5 of the FTCA); *see also* 15 U.S.C. § 41.

ton Acts, it is not coterminous with these statutes.[67] Moreover, the core tenet of *Chevron* is that agencies are granted deference in interpreting their organic statutes and the FTCA is such a statute for the FTC.[68]

Therefore, *Chevron* should apply to FTC interpretations of § 5. To avoid issues around *Chevron* Step Zero, and to enable stakeholder participation in rulemaking, the FTC should adopt formal notice-and-comment procedures in promulgating § 5 rules.[69]

B. Authority with Chevron *Deference*

Pairing the broad scope of § 5 with deference granted under *Chevron* would grant the FTC substantial authority to promulgate rules covering broad swaths of conduct. Under *Chevron*, the appropriate test in reviewing an FTC interpretation of the FTCA would be whether the interpretation is "reasonable." Given that no rules have been promulgated under § 5 since *Chevron* was decided in 1984, there is no judicial guidance on this question.[70] A court reviewing a rule promulgated under § 5 would therefore look to the text, legislative history, and caselaw on § 5 to discern whether a proffered interpretation of the Section is reasonable.[71]

A few principles of reasonable interpretation emerge upon consideration of these sources. First, as previously discussed, § 5 was left intentionally broad; there is no plain meaning of the phrase "unfair methods of competition," and the legislative history confirms the statute's intentional ambiguity.[72] The FTC therefore has a wide range of reasonable interpretations at its disposal.

Second, a reasonable interpretation does not necessarily require a showing of harm to consumer welfare. When the FTCA was passed, the term "competition" had not yet become synonymous with consumer welfare.[73] Later judicial precedent discussing the

67. *See supra* Section II.

68. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 291–92 (2006).

69. Even so, as a realistic matter, whether the D.C. Circuit or Supreme Court is likely to grant Chair Khan and the FTC *Chevron* deference, and thereby enhance the Commission's authority, remains an open question.

70. Hemphill, *supra* note 56, at 644.

71. While prior judicial interpretations of § 5 came in the context of enforcement rather than rulemaking, courts may find these sources persuasive, albeit not binding, precedent.

72. *See supra* Section II.

73. Conventional wisdom is that the economic concept of consumer welfare became increasingly influential in antitrust analysis in the 1980s. *See* Shapiro, *supra* note 40, at 36, 38. The FTCA was passed in 1914. Hurwitz, *supra* note 16, at 230.

scope of § 5 also did not limit this Section to conduct harming consumer welfare.[74] FTC statements limiting § 5 enforcement in this manner may influence a court to rule that "unfair method of competition" implies harm to consumers. Yet, given that agencies are allowed to change course and prior policy statements are not indefinitely binding,[75] inactive statements are unlikely to constrain § 5 in this manner.

Third, while the FTC has broad interpretive leeway, interpretations covering conduct not traditionally considered a core antitrust concern could be found unreasonable. If the FTC interpreted § 5 to authorize rulemaking about an issue related to competition but not a core antitrust concern, such as exercises of private political power, a reviewing court may find the proffered interpretation unreasonable due to the issues' attenuation from existing antitrust doctrine.[76]

As such, if the FTC were to receive *Chevron* deference, as this Note contends it should, its authority to promulgate rules under § 5 would be broad and unconstrained by notions of consumer welfare. The Commission would have firm legal authority to promulgate rules covering large swaths of conduct, as EO 14,036 calls for. Yet, rules based on "unreasonable" interpretations of § 5 may be struck down.

C. Authority Without Chevron *Deference*

Assuming *ad arguendo* that FTC interpretations of § 5 were not afforded *Chevron* deference, the Commission would still possess broad authority to promulgate rules under § 5—although its interpretations of § 5 would receive less respect and could be limited by a reviewing court. In this situation, the FTC could limit § 5 rules to conduct already recognized as violating the Sherman or Clayton Acts as a prudential step to avoid being overruled by a reviewing court. While the FTCA does not impose this limitation, adhering to it may reduce the likelihood that a court will invalidate a rule promulgated under § 5 as statutorily infirm.

74. *See generally* Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392 (1953); Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

75. When an agency changes course, it must provide a reasoned explanation for doing so and acknowledge reliance interests engendered by the prior interpretation in order to comply with the Administrative Procedure Act's prohibition of arbitrary and capricious rules. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 512–16 (2009).

76. *See* discussion *infra* Section III.D.3.

Even without *Chevron*, the text of § 5 grants the FTC substantial latitude to define unfair methods of competition.[77] Courts could find a sufficient legal basis for a broad array of rules promulgated under § 5. They could also reject broad interpretations of § 5, as to rein in FTC authority. *Chevron*, in effect, forces judicial modesty on a reviewing court by compelling it to defer to reasonable agency interpretations. Without this imposed restraint, a reviewing court has more authority to reject disfavored interpretations of § 5 and may be more likely to do so. FTC interpretations may therefore be more vulnerable to invalidation by a reviewing court. Judges sympathetic to the FTC could still find sufficient legal basis for broad interpretations of § 5, but more skeptical judges would have greater latitude to reject disfavored interpretations.

Absent the judicial restraint imposed by *Chevron*, the FTC should attempt to strengthen the legal basis for § 5 rules by couching them in existing caselaw. Caselaw finding certain conduct to be anticompetitive under the Sherman, Clayton, or FTC Acts could be used to support such rules, given that § 5 encapsulates these statutes. For example, Professor Scott Hemphill has raised the possibility of antitrust rulemaking around pay-for-delay schemes (i.e., reverse settlements).[78] The Supreme Court in *Federal Trade Commission v. Actavis, Inc.* found that reverse settlements were actionable under § 1 of the Sherman Act and were to be analyzed under a rule of reason.[79] Hemphill argues that the FTC should promulgate a rule establishing criteria whereby a reverse settlement presumptively violates § 5.[80] If the FTC promulgated such a rule and subsequently faced judicial scrutiny, the Commission could argue that the rule is well-grounded in existing antitrust doctrine and should be upheld.[81] This would alleviate concerns about § 5 rulemaking expanding the scope of antitrust law. What's more, the Commission could argue that its technical expertise makes it well-positioned to prescribe criteria for presumptively anticompetitive settlements.

Again, given the breadth of § 5, this may not be necessary as a doctrinal matter. Yet, as a prudential matter, given the possibility that a judge may overrule FTC interpretations without the protection of *Chevron*, the FTC would be wise to ground rules in existing antitrust doctrine. This practice would undoubtedly constrain the FTC's authority to put forward rules under § 5, but it would make

77. *See supra* Section II.
78. Hemphill, *supra* note 56, at 673–74.
79. Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 147, 159 (2013).
80. Hemphill, *supra* note 56, at 673–74.
81. *Id.* at 674–75.

rules promulgated under this Section more likely to withstand judicial scrutiny.

D. Legal Basis for Specific Categories of Conduct

Which rules promulgated under § 5 would be upheld with and without *Chevron* deference? To provide insight into this question, I discuss below the likelihood that rules regulating three broad categories of conduct would be upheld. These categories are: (1) conduct reached by existing antitrust law; (2) conduct not reached by antitrust law, but squarely a concern of antitrust doctrine; and (3) conduct not traditionally considered a core antitrust concern. These abstract categories are not recognized in caselaw but are useful heuristics for grouping rules that the FTC might promulgate.[82] This discussion assumes that *Chevron* Step 1 is met, given the ambiguity of the phrase "unfair methods of competition."[83]

1. Conduct Reached by Existing Antitrust Laws

At a baseline, the Commission could promulgate rules covering conduct that courts have already found to be anticompetitive under existing antitrust laws. Such rules would not broaden the reach of antitrust law but would provide clarity to conduct already found to be anticompetitive. Professor Hemphill's proposed rule on reverse settlements would fall into this category.[84]

Rules of this nature would contain criteria whereby the targeted conduct would be presumptively anticompetitive, and reference to such criteria would replace a judicially-administered rule of reason.[85] This would direct reviewing courts to make specific factfinding conclusions rather than to conduct elusive balancing tests.[86] It would also simplify litigation over targeted conduct, stand-

82. The likelihood that a rule will be upheld under *Chevron* deference hinges on whether an underlying interpretation is "reasonable." Given the imprecision of the term, I can predict the likelihood that a court would find that a rule meets this requirement with a limited degree of certainty. I will give my opinion on the likelihood that such interpretations will be considered "reasonable" or not, but reviewing courts could come out differently.

83. *See supra* Section II.

84. *See supra* Section III.C.

85. Returning to reverse settlements, the Court in *Federal Trade Commission v. Actavis, Inc.* stated that these agreements would be analyzed under a rule of reason. 570 U.S. at 159. By prescribing certain criteria whereby a reverse settlement is presumptively anticompetitive, the FTC could reduce discretion that courts have in deciding these cases and provide clarity to regulated parties.

86. *See generally* Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 373 (2016) ("Balancing requires that two offsetting effects can each be mea-

ardize rulings across courts, and provide ex ante clarity to regulated parties. What's more, in establishing such criteria, the FTC could study the conditions whereby the targeted conduct produces anticompetitive effects and tailor rules accordingly. The Commission's technical expertise makes it competent to conduct such review.[87] Studies conducted during the rulemaking process would thus provide the factual underpinnings for the conclusion that the targeted conduct yields anticompetitive effects.

If *Chevron* were found to apply to § 5 rulemaking, rules regulating conduct already found to be anticompetitive would almost certainly be upheld. *Chevron* Step 2 would be met, as interpreting this conduct to be an "unfair method of competition" would be reasonable given previous caselaw finding the conduct to be anticompetitive. A reviewing court would defer to the FTC's interpretation.

Even without *Chevron*, a reviewing court would be unlikely to find these rules outside § 5, given their grounding in existing competition law and § 5's breadth. Judges who are more skeptical of the FTC would likely not object to these rules: they do not raise concerns of agency overreach, as they regulate only conduct already acknowledged to be anticompetitive and simply provide clarity to regulated parties. Regulated parties may also view these rules favorably for the same reasons.

2. Conduct Not Reached by Existing Antitrust Laws, but Squarely a Concern of the Doctrine

The FTC could also promulgate rules regulating conduct not covered by existing antitrust doctrine but squarely a concern of competition law. One example of such a rule is the "No Collusion Rule" proposed by Brendan Ballou. This rule would deem it "an unfair method of competition for a seller to raise the price of a product solely because a competing seller has done so."[88] Under existing Sherman Act § 1 doctrine, tacit collusion, or an implicit agreement to coordinate, is not actionable.[89] Ballou calls for the

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sured by some common cardinal unit . . . and then weighed against each other. The factors that courts consider under the rule of reason rarely lend themselves to such treatment.").

87. *See* Hemphill, *supra* note 56, at 643 ("An agency such as the FTC is well positioned to fill . . . informational gaps. The agency has a statutory mandate to collect, study, and publish information about particular industries. It has general authority to require firms to divulge confidential information relevant to antitrust policymaking.").

88. Ballou, *supra* note 35, at 252.

89. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227–28 (1993); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007).

FTC to adopt a § 5 rule prohibiting such actions.[90] Despite not being covered by § 1, or existing antitrust doctrine more broadly, tacit collusion is squarely within a category of conduct that competition law seeks to address: inter-firm coordination on prices. Caselaw on express agreement, interdependent conduct, and tacit agreement indicates that inter-firm coordination is of antitrust concern.[91]

If *Chevron* were to apply, rules regulating this conduct would likely be upheld under § 5. Given that courts have frequently considered the Sherman and Clayton Acts' applicability to these practices, and have found similar behavior actionable, conduct of this nature reasonably constitutes a means of competition. Courts would presumably consider FTC arguments that the conduct is a form of "competition" or "method of competition" to be reasonable, and *Chevron* Step 2 would be satisfied so long as the FTC could articulate why the conduct is unfair. Returning to the "No Collusion Rule," the FTC could argue that tacit collusion is unfair because it allows firms to coordinate on price. While this argument is debatable, it is sufficiently reasonable to be accepted under *Chevron*. It would not matter that the conduct is not actionable under the Sherman and Clayton Acts, because § 5 of the FTCA is broader than both statutes.

If *Chevron* did not apply, rules in this category could be upheld by a reviewing court as within the FTC's authority under § 5, but judges would have more flexibility to strike them down. The FTC could argue that the regulated conduct is still an "unfair method of competition" despite not being actionable under existing antitrust doctrine. Yet, reviewing courts equipped with more discretion could find the likely failure of suit under the Sherman or Clayton Acts instructive in deciding the conduct is not an "unfair method of competition."

3. Conduct Not Traditionally Considered a Core Antitrust Concern

Finally, the FTC could promulgate rules regulating conduct related to antitrust, but not traditionally considered a core concern of the doctrine. In a 2020 article, Chair Khan and former Commissioner Chopra appeared to contemplate rules of this nature, arguing that "anticompetitive practices that lie beyond the reach of the

90. Ballou, *supra* note 35, at 213.

91. *See generally* Interstate Cir., Inc. v. United States, 306 U.S. 208 (1939); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 539–42 (1954); *Brooke Grp. Ltd.*, 509 U.S. 209.

antitrust laws are a particularly good candidate for being the subject of rulemaking [under § 5]."[92]

But even with *Chevron* deference, rules in this category may not have a firm legal basis. If the rule pertains to conduct that cannot reasonably be interpreted as "competition" or a "method of competition," then *Chevron* Step 2 would not be met, and a reviewing court would be unconstrained by this deference. Without *Chevron*, if interpreting the targeted conduct to be an "unfair method of competition" required a strained reading of the term, a reviewing court would be less likely to uphold the interpretation.

For example, some scholars have sought to focus antitrust enforcement on concerns over private concentration of political power.[93] Consideration of political power in antitrust analysis could take a number of forms. Professor Robert Pitofsky wrote that certain political considerations, such as concentration of economic power leading to antidemocratic political pressure and fewer actors in markets enhancing individual and business freedom, should be accounted for in antitrust analysis.[94] Politics may also be relevant in the context of private actors co-opting state organs to forestall competition. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, the Supreme Court held that competitors cooperating to lobby state legislatures are not subject to Sherman Act liability.[95] The political considerations raised in *Noerr* are likely to be a core antitrust concern, given their recognition in antitrust doctrine. Yet the considerations raised by Pitofsky are less likely to be core antitrust concerns as they relate to antitrust but do not directly pertain to inter-firm competition.[96] Rules seeking to regulate these considerations under § 5 may therefore be struck down with or without *Chevron* because they cannot reasonably be interpreted as "competition" or a "method of competition."

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92. Chopra & Khan, *supra* note 2, at 373.

93. *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 767 (2017) ("The political risks associated with Amazon's market dominance also implicate some of the major concerns that animate antitrust laws."). *See generally* Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

94. Pitofsky, *supra* note 93, at 1051–52.

95. 365 U.S. 127, 136–37 (1961).

96. This point is certainly debatable. Issues of private exertion of political power may relate to firms' competitiveness in markets. In fact, there is indication that private concentration of political power was a primary concern of the drafters of the Sherman Act. Pitofsky, *supra* note 93, at 1060–63. Yet, this is far from the "consumer welfare" standard typically used in antitrust analysis. *See* Hovenkamp, *supra* note 41, at 66.

In sum, the interplay between the type of conduct being regulated and *Chevron*'s applicability is important in assessing whether a rule promulgated under § 5 would withstand judicial scrutiny. Figure 1 below depicts this relationship. Yet, rules regulating certain forms of conduct are more likely than others to be upheld, with or without *Chevron*.

E. *Application to EO 14,036*

Below, I apply this framework to the proposals in EO 14,036, the July 2021 executive order calling for antitrust rulemaking.[97] When a proposal is vague, I propose a more specific rule and analyze its legality. This discussion provides insight into whether certain rules put forth by the FTC would be upheld by a reviewing court and illustrates the application of the aforementioned considerations to rules promulgated under § 5. Throughout this analysis, *Chevron* Step 1 is presumed to be met due to § 5's ambiguity.

1. Unfair Data Collection and Surveillance Practices That May Damage Competition, Consumer Autonomy, and Consumer Privacy

This proposal does not reference specific regulations, but instead generally calls for rules pertaining to data privacy. What rules might this proposal contemplate? A White House Fact Sheet accompanying EO 14,036 states that:

> Big Tech platforms gather[ ] too much personal information: Many of the large platforms' business models have depended on the accumulation of extraordinary amounts of sensitive personal information and related data.[98]

This statement indicates concern with the volume of data collected by Big Tech companies, the sensitive nature of this data, and the potential power that possession of such data gives companies. Yet, it does not provide clarity about the particular collection practices of concern and thus does not appear to contemplate specific rules.

As a general matter, while data collection and surveillance practices relate to antitrust, they do not directly pertain to competition among firms.[99] They are not economic factors of the sort that

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97. EO 14,036, *supra* note 6, at 36992.

98. White House, *Fact Sheet: Executive Order on Promoting Competition in the American Economy* (July 9, 2021) (underline omitted), 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/P2EX-SAUB].

99. This point is certainly debatable. Issues of data privacy may relate to firms' competitiveness in markets. *See* Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J.F. 647, 647 (2021) ("[O]ver the last twenty-five years,

have dominated antitrust analysis since the 1980s.[100] Some have noted the nexus between data privacy and antitrust,[101] yet interpreting "unfair methods of competition" to include data collection and privacy may be textually strained and unsupported by precedent. Data collection and privacy practices are therefore conduct not traditionally considered a core antitrust concern—i.e., they fall into category (3) discussed above.[102]

Rules restricting data collection and surveillance practices may therefore not withstand judicial scrutiny. If *Chevron* were to apply, a reviewing court could find that the terms "competition" or "method of competition" cannot reasonably be interpreted to include data privacy, and deference therefore should not be granted to the FTC's interpretation.[103]

Given ongoing debate around whether data privacy law is a species of competition law,[104] a court could still find this interpretation sufficiently reasonable. Yet, given that the debate is unsettled and that data privacy is a novel issue, a court may find otherwise.[105]

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data privacy has also become a separate area of legal doctrine [from antitrust] . . . data privacy law may clash at the margins with antitrust—much like intellectual property or consumer protection law did before it."); Alex Marthews & Catherine Tucker, *Privacy Policy and Competition*, BROOKINGS 4 (Dec. 5, 2019), https://www.brookings.edu/wp-content/uploads/2019/12/ES-12.07.19-Marthews-Tucker.pdf [https://perma.cc/9KTK-QEQ9] ("[D]ata privacy will be the first domain where this overlap [between consumer protection and competition] is unavoidable and will cause tension going forward as authorities have to face hard tradeoffs between ensuring effective competition and ensuring privacy."); *cf.* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121 (2015). The existence of other laws regulating data privacy may suggest that it is not within the realm of competition law. *See, e.g.*, *Children's Online Privacy Protection Act (COPPA)*, ELECTRONIC PRIVACY INFORMATION CENTER, https://epic.org/privacy/kids/ [https://perma.cc/EUM8-64E8].

100. Shapiro, *supra* note 40, at 36 (noting the "Chicago School's" role in increasing the emphasis of economics on antitrust since the 1980s).

101. *See* sources cited *supra* note 99.

102. *See supra* Section III.D.3.

103. Concerns around Facebook's data breaches and Apple's data privacy protections have recently been raised in antitrust contexts. *See, e.g.*, Siri Bulusu, *Facebook Haunted by Privacy Issues as FTC Ups Antitrust Case*, BLOOMBERG L. (Aug. 20, 2021), https://news.bloomberglaw.com/antitrust/facebook-haunted-by-privacy-issues-as-ftc-boosts-antitrust-case [https://perma.cc/X4CZ-LRDL]; *German Business Groups File Complaint Over Apple Privacy Settings*, REUTERS (Apr. 26, 2021), https://www.reuters.com/technology/german-business-groups-file-complaint-over-apple-privacy-settings-2021-04-26/ [https://perma.cc/PA73-7H52].

104. *See* sources cited *supra* note 99.

105. This Note is not taking a position on whether data privacy is reachable under antitrust law. Rather, it is asserting that there is a substantial likelihood that

Without *Chevron*, given the attenuation between data privacy and competition, a reviewing court would be even less likely to agree with an FTC argument that § 5 authorizes rules regulating data privacy. As such, rules promulgated under § 5 to address data collection practices and privacy are vulnerable to invalidation by a reviewing court.[106]

2. Unfair Anticompetitive Restrictions on Third-Party Repair or Self-Repair of Items

Restrictions on third-party repairs or self-repairs could take a number of forms. One form is aftermarket tying whereby the manufacturer of a product stipulates that buyers can only seek repairs from the manufacturer.[107] This type of restriction may have been contemplated by EO 14,036. The White House Fact Sheet accompanying the order states that:

> *Cell phone manufacturers and others blocking out independent repair shops*: Tech and other companies impose restrictions on self and third-party repairs, making repairs more costly and time-consuming, such as by restricting the distribution of parts, diagnostics, and repair tools.[108]

The Fact Sheet goes on to note that EO 14,036 encouraged the FTC to issue rules against anticompetitive restrictions on the use of independent repair shops or DIY repairs.[109] This may be an implicit reference to aftermarket tying, which is a means of limiting use of independent repair shops.

The legality of aftermarket tying arrangements was addressed in *Eastman Kodak Co. v. Imagine Technical Services*, where the Supreme Court found that Sherman Act liability for aftermarket tying turns in part on the existence of high switching costs to other prod-

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a reviewing court would find interpreting § 5 to include data privacy to be unreasonable.

106. Alternatively, the FTC can attempt to promulgate rules about data privacy through its § 18 rulemaking power, which authorizes rules about "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a(a)(1)(A).

107. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 457–58, 462 (1992) (finding that aftermarket tying of replacement parts and repair services was actionable under § 1 of the Sherman Act upon certain showings). Tying, more generally, occurs when a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service. U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 103–14 (2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/04/18/chapter_5.pdf [https://perma.cc/25LB-SWVB].

108. White House, *supra* note 98.

109. *Id.*

ucts and a lack of ex ante information on repair restrictions.[110] These restrictions are therefore reachable by existing antitrust law when such indicia are present. Absent these indicia, aftermarket tying may not be actionable under the FTC's § 5 authority, though it would still be a concern of antitrust doctrine. A rule put forward pursuant to this proposal would therefore be in category (1) or (2), depending on its specific nature.

With *Chevron*, rules addressing these restrictions would therefore likely be upheld, as aftermarket tying can reasonably be interpreted as "competition" even though all forms of this conduct are not actionable under existing antitrust law. For example, if the FTC promulgated a rule prescribing additional factors that can give rise to an aftermarket tying claim, this rule would likely be upheld because aftermarket tying arrangements are plainly a "method of competition." Per *Chevron*, a reviewing court would thus defer to the FTC's interpretation.

Absent *Chevron*, a reviewing court would likely uphold rules consistent with existing antitrust law, though it would be less likely to uphold rules prescribing additional indicia that make restrictions on third-party repairs actionable. If, for example, the FTC promulgated a rule finding aftermarket tying to be a § 5 violation based, in part, on the dollar value of repairs implicated, this rule may not be upheld without *Chevron* because it prescribes an additional criterion for illegality beyond the criteria already established by courts in Sherman Act cases. Regardless, given the likelihood that rules regulating this conduct will be upheld with or without *Chevron*, anticompetitive restrictions on third-party repairs may be ripe for § 5 rulemaking.

3. Unfair Anticompetitive Conduct or Agreements in the Prescription Drug Industries, Such as Agreements to Delay the Market Entry of Generic Drugs or Biosimilars

Similarly, various rules could be promulgated to address anticompetitive conduct in the prescription drug industry. One such possible rule, referenced in EO 14,036 itself and in the accompanying Fact Sheet, would establish criteria whereby a reverse settlement would be presumptively deemed "unfair" under § 5.[111] Again, reference to these criteria would replace a judicially-administered rule of

110. 504 U.S. at 473–74, 476; *see also* Avaya Inc., RP v. Telecom Labs, Inc., 838 F.3d 354, 399–402 (3d Cir. 2016) (explaining the factors to be analyzed in assessing antitrust liability for aftermarket tying).

111. *See supra* Section III.E; White House, *supra* note 98 ("One strategy that drug manufacturers have used to avoid competing is 'pay for delay' agreements

reason—directing reviewing courts to make specific factual conclusions on whether the enumerated indicia are met rather than having them conduct balancing tests.[112] These rules would fall under category (1), as they would not broaden the reach of antitrust law but merely provide clarity regarding conduct already found to be anticompetitive.

Given that reverse payments are reachable under existing antitrust law, a rule establishing criteria for antitrust liability would almost certainly be upheld with or without *Chevron*. With *Chevron*, reverse payments fall well within a reasonable interpretation of the phrase "method of competition" and therefore, with Step 2 satisfied, deference would be granted to the FTC's interpretation. Without *Chevron*, a reviewing court would likely find existing doctrine instructive and uphold a rule addressing reverse payments.

If, however, the FTC promulgated a rule that enlarged the scope of conduct considered to be reverse payments or departed from the indicia that courts have used to discern their anticompetitive nature, the rule would be one regulating conduct not reached by existing doctrine, but still a core antitrust concern—i.e., category (2). Even in this case, the rule would likely be upheld with *Chevron*, and could be upheld without it. There is, therefore, a substantial likelihood that rules related to reverse settlements promulgated in furtherance of this proposal would be upheld as consistent with § 5.

4. Unfair Competition in Major Internet Marketplaces

This proposal could also refer to a number of practices. The Fact Sheet accompanying EO 14,036 states the following:

> *Big Tech platforms unfairly competing with small businesses*: The large platforms' power gives them unfair opportunities to get a leg up on the small businesses that rely on them to reach customers. For example, companies that run dominant online retail marketplaces can see how small businesses' products sell and then use the data to launch their own competing products. Because they run the platform, they can also display their own copycat products more prominently than the small businesses' products.[113]

. . . . [T]he President . . . [e]ncourages the FTC to ban 'pay for delay' and similar agreements by rule." (emphasis omitted)).

112. By prescribing certain criteria whereby a reverse settlement is presumptively anticompetitive, the FTC could reduce discretion that courts have in deciding these cases and provide clarity to regulated parties.

113. White House, *supra* note 98.

This statement echoes recent litigation over Apple's App Store and reports on Amazon's use of third-party data, which may be the type of conduct that this proposal targets. In *Epic Games v. Apple*, Epic sued over Apple's coercive 30% commission on revenues from in-app purchases of apps bought on Apple's App Store and related measures to prevent working around these commissions.[114] In addition, media reports and a Congressional investigation have accused Amazon of leveraging its market power in online retail to improperly obtain and use third-party data to boost sales of its own private label products.[115] The FTC could use § 5 to promulgate rules that prohibit use of market power in Internet marketplaces to extract hefty commissions or rules that prohibit abuse of third-party data, though the exact contours of these rules are unclear.

Whether such a rule regulates conduct within existing antitrust doctrine depends on the specifics of the rule and the outcome of related litigation over the practice at issue. If *Epic v. Apple* concludes with a finding that hefty commissions and restrictions on app developers give rise to Sherman Act claims, then FTC rules about these restrictions would be in category (1) and would likely be upheld by a reviewing court, with or without *Chevron*. If this conduct is not cognizable under the Sherman Act, then rules to this effect would be in category (2) and their permissibility may turn on the availability of *Chevron*.[116] The same goes for Amazon's use of third-party data, though litigation over these allegations has not yet begun. In either situation, if *Chevron* is found to apply, rules regulating this conduct would likely be upheld, as the conduct can reasonably be

114. 493 F. Supp. 3d 817, 829–31 (N.D. Cal. 2020). On Epic's Sherman Act claims, the court found that the § 1 claim was unlikely to succeed under a rule of reason analysis and that a § 2 claim had not been made out because Epic had not proved that Apple had market power. *Id.* at 836, 842–45.

115. *See, e.g.*, Grace Dean, *House Antitrust Report Accuses Amazon of Using Third-Party Seller Data to Copy Popular Products – Something the Tech Giant Has Repeatedly Denied*, Bus. Insider (Oct. 7, 2020), https://www.businessinsider.com/amazon-uses-seller-data-copy-products-alleges-house-antitrust-report-2020-10 [https://perma.cc/9WZW-5FLT]; Dana Mattioli, *Amazon Scooped up Data from Its Own Sellers to Launch Competing Products*, Wall St. J. (Apr. 23, 2020), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015 [https://perma.cc/SLG2-PMT9].

116. Though *Epic v. Apple* provides guidance on these arrangements' permissibility under the Sherman Act, the case is not determinative of the scope of § 5. Courts could arrive at a different conclusion in evaluating similar conduct in the future. The rules discussed in this section pertain to the conduct, not individual litigation. Therefore, while *Epic v. Apple* is instructive on how courts may treat this type of conduct, the case is not determinative. For a discussion on the role of *Chevron* in this situation, see discussion *supra* Section III.D.

interpreted as "competition" or a "method of competition." As such, the permissibility of these rules under § 5 depends on the contours of the promulgated rules, the development of Sherman and Clayton Act doctrine around these practices, and the applicability of *Chevron* deference.

5. Unfair Occupational Licensing Restrictions

What constitutes "unfair occupational licensing restrictions" is not immediately clear, and the FTC has leeway in identifying rules in furtherance of this proposal. The Fact Sheet accompanying EO 14,036 decries "[o]verly burdensome occupational licensing requirements" that "can impede worker mobility without countervailing benefits" and "lock[ ] some people out of jobs, [making] it harder for people to move between states."[117] It then notes that the order encouraged the FTC to "ban unnecessary occupational licensing restrictions that impede economic mobility."[118]

To the extent that burdensome occupational licensing regimes are administered by states, antitrust may be of limited utility in reducing them. Yet licensing regimes run by non-public professional associations may be reachable.[119] The Sherman Act has been applied to scrutinize restrictions imposed by professional associations, though liability has turned on the specific restriction at issue and relevant competitive factors.[120] Given the existence of this scrutiny, restricting burdensome occupational licensing regimes is a core antitrust concern, and rules to this effect would therefore fall in category (1) or (2) depending on the rule at issue.

If the rule is consistent with existing antitrust law, then it may be upheld with or without *Chevron*. If it is inconsistent with existing doctrine, perhaps by ascribing liability when a state actor is implementing the restriction,[121] then permissibility may turn on *Chevron*'s availability. Figure 1 below lays out the likely outcomes with and without *Chevron*.

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117. White House, *supra* note 98.

118. *Id.* (emphasis omitted).

119. *See generally* Parker v. Brown, 317 U.S. 341 (1943); E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

120. *See generally* Nat'l Soc'y of Pro. Eng'rs v. U.S., 435 U.S. 679 (1978) (finding that an engineering association violated the Sherman Act by preventing members from competing with one another on the basis of price); Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756 (1999) (assessing whether a dental association's ethics code prohibiting deceptive advertising violated § 1 of the Sherman Act).

121. *See generally Parker*, 317 U.S. 341.

6. Unfair Tying Practices or Exclusionary Practices in the Brokerage or Listing of Real Estate

The Fact Sheet accompanying EO 14,036 does not reference this proposal contained within the executive order and therefore does not provide guidance on the type of conduct contemplated by this action.[122] The Sherman Act cases brought against tying and exclusionary practices in the real estate industry may be instructive.[123] These cases have focused on whether companies that own databases for brokers to search for open listings engage in illegal tying when they require brokers to purchase membership in local realtor associations to access the database.[124]

Liability for real estate tying has turned on the factors typically relevant in tying inquiries: separate products, market power in one product, forcing, and non-insubstantial amount of commerce.[125] Rules regulating tying in real estate brokerage or licensing would therefore be in categories (1) or (2) depending on the rule at issue. Rules of this nature would not fall into category (3) given existing application of antitrust law to tying arrangements. If the FTC promulgated rules prescribing criteria for presumptively anticompetitive tying practices in real estate that were consistent with existing tying doctrine, they would be upheld with or without *Chevron*.[126] These rules would be similar to rules establishing criteria whereby reverse settlements are presumptively anticompetitive.[127] Rules that substantially differ from existing doctrine may be more vulnerable to invalidation without *Chevron*, though could still be interpreted as regulating "competition" or a "method of competition" and may be upheld.

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122. White House, *supra* note 98.

123. *See, e.g.*, Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1579 (11th Cir. 1991) (finding that an association of brokers alleging tying arrangement between use of multilisting listing system and membership in real estate association branch had sufficiently alleged the five prima facie elements of a per se tying violation); *cf.* Reifert v. S. Cent. Wisc. MLS Corp., 450 F.3d 312, 315, 320 (7th Cir. 2006) (concluding that plaintiffs failed to make out a Sherman Act tying claim against a real estate trade association for requiring brokers to purchase a membership in the association to access a listing service).

124. *Thompson*, 934 F.2d at 1570, 1574.

125. *Id.* at 1574–78; *see also* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–18 (1984). Tying occurs when a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service. *See supra* note 107.

126. See *Thompson*, 934 F.2d at 1574–76 for an overview of current tying doctrine.

127. *See supra* Section III.C.

7. Any Other Unfair Industry-Specific Practices that Substantially Inhibit Competition

The permissibility of a rule to this effect would depend on the criteria discussed above, including whether the conduct the rule regulates can reasonably be interpreted as "competition" or a "method of competition," the rule's consistency with existing antitrust law, and the availability of *Chevron* deference. The results produced by these considerations would depend on the conduct at issue and nature of the rule promulgated to address it.

In sum, based on the framework articulated above, some of the § 5 rules that the FTC could promulgate pursuant to EO 14,036 would likely withstand judicial scrutiny, while other rules would be less likely to do so.

F. Potential Challenges to § 5 Rulemaking

While the FTC is on firm legal ground to promulgate certain types of rules under § 5, a number of changes to administrative law doctrine could threaten this authority.

If the Supreme Court were to overrule *Chevron*, which a number of commentators suggest is possible,[128] this would eliminate deference to FTC interpretation of § 5 and constrain the Commission's authority to promulgate rules under this Section. As discussed above, the Commission has a strong legal basis to promulgate certain types of rules without *Chevron*.[129] Yet, if this deference were struck down, the FTC may fare worse defending rules regulating conduct not actionable under antitrust laws or not typically considered a core antitrust concern.

What's more, if the Court revives the non-delegation doctrine,[130] § 5 of the FTCA may face invalidation on this basis. While this doctrine has not been invoked since the 1930s, Justice Gor-

128. *See, e.g.*, Kimberly Strawbridge Robinson, *High Court Could Take First Step to* Chevron *Doctrine's Demise*, BLOOMBERG (Mar. 28 2019), https://news.bloomberglaw.com/us-law-week/high-court-could-take-first-step-to-chevron-doctrines-demise [https://perma.cc/S92Z-79P8]; Ed Kilgore, *Supreme Court Could Go Totally Extremist This Term*, N.Y. MAG. (Oct. 5, 2021), https://nymag.com/intelligencer/2021/10/supreme-court-could-go-totally-extremist-this-term.html [https://perma.cc/S6ZZ-YUBJ] ("There is probably no cause dearer to the hearts of conservative legal theorists than overturning '*Chevron* deference' . . . . [I]f the Court overturns *Chevron* deference, it will represent an 'earthquake' and a huge inducement to litigation challenging all sorts of critical federal regulatory powers.").

129. *See supra* Section III.C.

130. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935) (striking down the National Industrial Recovery Act for being a "sweeping delegation of legislative power" that is constitutionally impermissible).

such's dissent in *Gundy v. United States* hinted at its revival.[131] If this doctrine were revived, § 5's broad authorization to the Commission to establish a common law for "unfair methods of competition" may be scrutinized for excessive delegation. A party charged with violating a § 5 rule could argue that the Section is an impermissible delegation of legislative authority to the FTC. The FTC could defend its authority by noting that *Schechter Poultry*, in dicta, appears to bless § 5's delegation to the Commission because of the agency's established fact-finding and judicial procedures.[132] While it is unclear whether revival of the nondelegation doctrine is on the horizon and, if so, whether § 5 would be struck down on nondelegation grounds, the doctrine remains a potential threat to the Commission's § 5 rulemaking power.

The "major questions doctrine," which was recently invoked to curtail the Environmental Protection Agency's authority under the Clean Air Act in *West Virginia v. Environmental Protection Agency*,[133] may also pose a threat to § 5 rulemaking. This doctrine, as articulated in *West Virginia*, requires agencies to cite "clear congressional authorization" to support statutory authority in "extraordinary cases" in which the "'history and the breadth of the authority that [the agency] has asserted', and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[134] While the contours of this doctrine have yet to be ascertained, legal scholars have noted that it provides a significant threat to regulation.[135]

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131. Justice Gorsuch likened the federal Sex Offender Registration and Notification Act's (SORNA) grant of authority to the Attorney General to the legislation invalidated in *Schechter Poultry* and argued that it raised similar concerns over separation of powers. Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting).

132. *Schechter Poultry*, 295 U.S. at 533 ("Congress set up a special procedure . . . a quasi-judicial body, . . . for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority.").

133. 142 S. Ct. 2587, 2610–16 (2022).

134. *Id.* at 2608–09 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

135. *See, e.g.*, Richard L. Revesz, *SCOTUS Ruling in* West Virginia v. EPA *Threatens All Regulation*, BLOOMBERG (July 8, 2022), https://news.bloomberglaw.com/environment-and-energy/scotus-ruling-in-west-virginia-v-epa-threatens-all-regulation [https://perma.cc/8YEK-E23S]; Alison Frankel, *U.S. Supreme Court Just Gave Federal Agencies a Big Reason to Worry*, REUTERS (June 30, 2022), https://www.reuters.com/legal/government/us-supreme-court-just-gave-federal-agencies-big-reason-worry-2022-06-30/ [https://perma.cc/55HZ-8DYU] ("At the very least, seven administrative law experts told me, the newly formalized doctrine will dis-

The FTC's § 5 rulemaking authority may not be immune to the chilling effect that this doctrine could impose on agency regulations.

In addition, the FTC may limit its own authority to promulgate rules under § 5 by constantly shifting its proffered interpretation of § 5. As with much of agency rulemaking, there may be an inherent instability to FTC interpretations of § 5 in that Chairs appointed by different presidents may adopt varying interpretations. Commissioners appointed by presidents of the same party may even have different views of § 5, as was demonstrated by Chair Khan's divergence from the 2015 Statement put forward by Obama-appointed Chair Edith Ramirez.[136]

Shifting interpretations of § 5 put forward by different FTC Commissioners may complicate judicial attempts to discern the bounds of this statute. Courts may be confused if successive Commissioners adopt different interpretations, destabilizing the legal basis for rules promulgated under § 5. Moreover, while agencies are allowed to change statutory interpretations put forward under prior leadership,[137] they must provide a reasoned explanation for doing so and acknowledge reliance interests engendered by the prior interpretation.[138] While these burdens can be satisfied by following sound administrative processes, they impose some constraints on the Commission's ability to change course.

IV. CONCLUSION

The FTC has broad authority to promulgate rules under § 5 of the FTCA. Section 5 provides the textual basis for rulemaking over wide swaths of conduct, as it was left intentionally broad to allow the FTC to exercise discretion in identifying practices within its scope. If the FTC were granted *Chevron* deference, it would have a strong legal basis to promulgate rules regulating conduct already reachable under antitrust laws, as well as conduct not reachable under

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courage regulators from pushing aggressively for innovative policies in politically charged matters, especially because the Supreme Court did not lay out a clear test for when the major questions doctrine should be invoked.").

136. *See Statement of Chair Khan*, *supra* note 43.

137. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009); *see* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1156–60 (2021) (applying this analysis in a challenge to the FCC's reversal on ownership rules following a change in administration).

138. *Fox Television Stations, Inc.*, 556 U.S. at 512–16; *Prometheus Radio Project*, 141 S. Ct. at 1156–60.

existing law but squarely a concern of antitrust doctrine. If the FTC did not receive *Chevron* deference, rules in the latter category would be more vulnerable to invalidation by a reviewing court. Rules regulating conduct traditionally outside the scope of competition law may also not withstand judicial scrutiny, with or without *Chevron* deference. What's more, some of the potential rules alluded to in EO 14,036 are likely to be upheld by a reviewing court, while others face a less certain future.

Section 5 rulemaking is a powerful tool the FTC can wield to address cutting-edge issues in competition law. Given the flexibility and breadth of this tool, the Commission should use it more frequently in order to strengthen antitrust enforcement and provide greater clarity to regulated parties. Moreover, as a normative matter, the Commission is well-situated to craft new regulations on modes of competition due to its subject-matter expertise and fact-gathering capabilities. FTC rules are also not subject to the same political processes as federal legislation and may not be the result of imperfect political compromises. They would be, at least in theory, the product of technocratic policymaking rather than political dealmaking. As such, there are certainly structural benefits to regulating competition through FTC rulemaking.

That said, these benefits of § 5 rulemaking may be illusory if reviewing courts invalidate such rules as agency overreach. Even if the FTC began by promulgating rules within existing Sherman or Clayton Act doctrine, such as rules on reverse payments, reviewing courts concerned with agency overreach or with granting the FTC quasi-legislative powers could still reject the rule. The relative novelty of substantive antitrust rulemaking under § 5 makes this more likely. Hopes for § 5 rulemaking should therefore be tempered by the prospect of judicial pushback, though this should not deter the FTC from trying.

As the Commission begins to promulgate new rules and doctrine around § 5 rulemaking, many of the questions left open by this Note may become clearer. Until then, this Note provides a framework for considering the legal basis for rules promulgated under § 5.

FIGURE 1: CATEGORIES OF RULES WITH AND WITHOUT *CHEVRON*

	With *Chevron*	Without *Chevron*
Category 1 – Reached by Existing Antitrust Laws	Likely to Be Upheld	Likely to Be Upheld
Category 2 – Not Reached by Antitrust Laws, but Core Antitrust Concern	Likely to Be Upheld	May Be Upheld, but Courts Have More Flexibility to Strike Down
Category 3 – Not Core Antitrust Concern	Vulnerable to Invalidation	Vulnerable to Invalidation