

CHEVRON AND THE LIMITS OF
ADMINISTRATIVE ANTITRUST

Justin (Gus) Hurwitz

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2014.324
<http://lawreview.law.pitt.edu>



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Justin (Gus) Hurwitz *

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* Assistant Professor of Law, University of Nebraska College of Law. Many thanks to Eric Berger, John Lenich, Christal Sheppard, Adam Thimmesh, Christopher Walker, Geoff Manne, Berin Szoka, Josh Wright, Scott Hemphill, and participants of the George Mason University School of Law LEC and Law Review Symposium on Section 5, the Big10 Junior Law Scholars workshop, and the Truth on the Market Symposium on Section 5 for input on this work, as well as to the many others who have let me pick their brains on this subject over the past few years. Any errors are my own; ambiguities are intentional delegations to the reader to be constructed in a manner consistent with the text.

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INTRODUCTION

Section 5 of the Federal Trade Commission Act (the “FTCA”) makes “unfair methods of competition”¹ illegal and gives the Federal Trade Commission (the “FTC”) authority to enforce this proscription. The FTCA does not define the term “unfair method of competition.” Indeed, Congress deliberately left the term ambiguous so that judicial construction of the term would not prevent the FTC from restraining such conduct. Ordinarily, one would expect courts to defer to agency interpretations of such inherently and deliberately ambiguous terms—this is about as clear a case for *Chevron* deference as one can imagine.

Remarkably, for the past thirty years the FTC has relied exclusively upon judicially-defined understandings of its power. Namely, the FTCA’s proscription of “unfair methods of competition” allows the FTC to enforce antitrust laws as defined by the Sherman and Clayton Acts.² Indeed, there is widespread consensus within the antitrust bar that *Chevron* does not apply to FTC interpretations of Section 5. This article explores the origins of this folk knowledge, how the antitrust bar has gotten things so wrong, and the implications this has for FTC enforcement of Section 5.

This is an urgent issue. One of the most contentious issues in antitrust law today is whether Section 5 of the FTCA is broader than the Sherman Act. The scope of Section 5 is the subject of recent congressional attention,³ argument by FTC Commissioners,⁴ and debate among academics and practitioners.⁵

¹ 15 U.S.C. § 45(a) (2012). Section 5 includes FTC-enforced proscriptions against both “unfair methods of competition” and “unfair or deceptive acts or practices.” *Id.* Where Section 5 is referenced without specifying which sort of conduct is at issue, this article is discussing the FTC’s unfair methods of competition authority.

² Throughout this article, these Acts may be referred to as the “antitrust laws,” the “Sherman Act,” or both the “Sherman and Clayton Acts.” In any of these forms, this means those antitrust laws enforced by the Department of Justice in Article III courts. By virtue of its Section 5 authority and specific provisions of the Clayton Act, the FTC can enforce these laws as well.

³ See Letter from Eight Members of House and Senate Judiciary Comms. to Edith Ramirez, Chairwoman, Fed. Trade Comm’n (Oct. 23, 2013), judiciary.house.gov/_files/news/2013/Signed/%20Letter%20to%20FTC.pdf.

⁴ See Jon Leibowitz, Former Chairman, Fed. Trade Comm’n, “*Tales from the Crypt*” Episodes ‘08 and ‘09: *The Return of Section 5 (“Unfair Methods of Competition in Commerce are Hereby Declared Unlawful”)*, Remarks at the Section 5 Workshop (Oct. 17, 2008), www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/jleobowitz.pdf; Thomas Rosch, Former Comm’r, Fed. Trade Comm’n, *The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?*, Remarks before the N.Y. State Bar Ass’n Annual Antitrust Conference, N.Y.C.,

Discouraged by actual or perceived failures of the Sherman Act, commentators (including the current Chair of the FTC, Edith Ramirez) have begun advocating that the FTC adopt a more expansive understanding of Section 5.⁶ Indeed, the FTC has recently brought one of the first “pure” Section 5 unfair methods of competition claims⁷ in recent decades.⁸

The FTC’s approach to Section 5—both its unfair methods of competition authority and its unfair and deceptive acts and practices authority—is particularly important for regulation of technology and information economies. These rapidly developing sectors have tended to upset existing legal norms, and the rate at which they change has the potential to outpace regulation.⁹ The rapid pace of change in

N.Y. (Jan. 27, 2011), www.ftc.gov/sites/default/files/documents/public_statements/great-doctrinal-debate-under-what-circumstances-section-5-superior-section-2/110127barspeech.pdf; Statement of Commiss’r Joshua Wright, *Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (June 19, 2013), www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

⁵ See, e.g., Joshua D. Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, COMPETITION ANTITRUST CHRONICLE (Nov. 2013); Symposium, *Regulating the Regulators—Guidance for the FTC’s Section 5 Unfair Methods of Competition Authority*, Truth on the Market Blog Symposium (Aug. 2013); Symposium, *17th Annual Antitrust Symposium*, 21 GEO. MASON L. REV. 1111 (2014).

⁶ See Edith Ramirez, Chairwoman, Fed. Trade Comm’n, *Keynote Address at the George Mason University School of Law 17th Annual Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy: Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission’s Next Century*, 6 (Feb. 13, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf (“[W]here our expertise allows us to identify likely competitive harm, we should use the [Section 5] authority that Congress gave us [one hundred] years ago to prohibit anticompetitive conduct that falls outside the scope of the Sherman Act.”).

⁷ A “pure” Section 5 claim is a claim that would not be viable under the Sherman or Clayton Acts, so it is brought solely under Section 5’s unfair methods of competition authority.

⁸ *McWane, Inc.*, 2014-1 Trade Cas. (CCH) ¶ 78672 n.2 (F.T.C. Jan. 30, 2014), available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf. Complaint Counsel for the FTC lost on counts one through three of the claim before an Administrative Law Judge and appealed counts one and two but not three. *Id.* at n.1; see also discussion *infra* Part III.C (discussing this case in further detail).

⁹ See *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Customers—Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, and Ins. of the Comm. on Commerce, Sci., and Transp.*, 111th Cong. 2 (2010) (statement of Hon. Timothy J. Muris); *Oversight Hearings on Federal Trade Commission: Hearing Before the Consumer Subcomm. of the S. Comm. on Commerce, Science, and Transportation*, 96th Cong. 4–6 (1979) (statement of Sen. Schmitt). This phrase relates to concerns in the late 1970s that the FTC was using its unfair and deceptive acts and

these industries, combined with a perceived need to regulate them, has been a driving force behind the FTC's increasingly expansive understanding of its Section 5 authority.¹⁰ Whether such regulation is needed and whether the FTC is the proper agency to regulate these sectors of the economy are important questions. Answering them is beyond the scope of this article. But if the FTC does have the expansive Section 5 authority suggested by this article, these important policy questions are moot without ever being asked. The FTC will have reasserted itself as the "second most powerful legislative body in the country."¹¹

Both those advocating for and against this more expansive understanding of Section 5 have framed their arguments in the language of judicially enforced antitrust law, appealing to the logic that has shaped Sherman Act precedent in Article III courts. But in the world of administrative law this is the wrong language,

practices authority to engage in excessive regulation of the economy—concerns which ultimately led to congressional action to limit these excesses. *See infra* Part II.C.

¹⁰ This view was perhaps made most clear in the FTC's 2008 Section 5 workshop. Fed. Trade Comm'n, *Workshop on Section 5 of the FTC Act as a Competition Statute* (Oct. 17, 2008), http://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf. It has also been captured extensively in Dan Crane's wonderful work on the FTC as an institution. *See, e.g.*, DANIEL CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 142 (2011) (briefly discussing a limited amount of formal notice and comment rulemaking by the FTC as a possible reason for the lack of court consideration of *Chevron* deference in antitrust situations); *see also* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 817 (1991) ("One cannot explain judicial posture in the antitrust arena in *Chevron* terms."); James Campbell Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act* 9–13 (George Mason Univ. Law and Econ. Research Paper Series, Working Paper No. 13-61, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350452 (arguing that, despite there being no post-*Chevron* cases on the matter, "the courts have reserved to themselves the common-law function of fleshing out the definition of 'unfairness' as it relates to the [FTC's] competition mission"). Anecdotally, having discussed this issue with several antitrust scholars and practitioners over the past several years, I have consistently been assured that *Chevron* does not apply to Section 5. Only two references have been found that clearly suggest that *Chevron* may apply to Section 5. *See* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 384 (2000) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)) (stating that if courts contracted the scope of Section 1, the courts would defer to the FTC's policy judgments on prohibiting certain anticompetitive practices); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 644, 677–78 (2009) (citations omitted) (discussing the general concept of *Chevron* deference to agency rulemaking and the FTC's issuing and later rescinding of one legislative rule under 15 U.S.C. §§ 13(d), (e) (2012)).

¹¹ As stated, this phrase relates to concerns in the late 1970s that the FTC was using its unfair and deceptive acts and practices authority to engage in excessive regulation of the economy—concerns which ultimately led to congressional action to limit these excesses. *See infra* Part II.C.

and it is framed for the wrong audience. If FTC construction of Section 5 receives *Chevron* deference, what matters to the courts is whether that construction is a permissible reading of the statute, not whether it comports with Article III precedent.

The reason for this lack of consideration of *Chevron* is that antitrust commentators have come to believe that *Chevron* does not apply to FTC interpretations of Section 5. This article explains that this folk knowledge is wrong—that *Chevron* does apply to FTC interpretations of its Section 5 unfair methods of competition authority.

In so doing, this article makes three distinct contributions. First, it explains that *Chevron* does apply to FTC interpretations of Section 5.¹² This is practically very important to today’s ongoing debate over the proper scope of Section 5. Understanding that *Chevron* applies—and may largely allow the FTC to define the scope of Section 5—is important for participants on both sides of this debate. Second, this article argues normatively that *Chevron* deference compounds already serious jurisprudential questions about the FTC’s recently aggressive and informal approach to competition issues and considers possible limits on a *Chevron*-supercharged Section 5.¹³ Third, this article provides a useful case study in how misunderstandings of the law propagate, which serves as a stark reminder of the need for different groups of lawyers—especially those who are highly specialized—to know the limits of their own expertise.¹⁴

The first three parts of this article provide the substantive and descriptive background of Section 5, the relationship between Section 5 and antitrust law, and *Chevron*. Part I introduces *Chevron*, providing a background sufficient for the rest

¹² See Part IV.

¹³ See Part V.

¹⁴ There is longstanding debate among Administrative Law scholars over whether “Administrative Law” is a cognizable field of law of general applicability across agencies, or whether each agency is subject to its own silo of administrative precedent. See, e.g., Richard E. Levy & Robert L. Glickman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011); Kristin E. Hickman, Response, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy*, 89 TEX. L. REV. SEE ALSO 89 (2010), <http://www.texaslrev.com/wp-content/uploads/Hickman-89-TLRSA-89.pdf> [hereinafter *Agency-Specific Precedents*] (“In an interesting paradox, administrative law scholars have long debated the extent to which their field really exists.”). This article serves as a case study, repudiation, and autopsy of the FTC’s administrative law exceptionalism. Importantly, the Court has recently rejected similarly exceptional treatment of Internal Revenue Service regulations. See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) [hereinafter *The Need for Mead*].

of this article. For those not familiar with its principles, administrative law is a strange and beautiful beast. Those who expect it to operate similar to judicially-defined, *stare decisis*-bound, common law institutions will be confused and astounded to learn how different a creature it is, particularly when it comes to agency power to interpret their organic statutes.

Part II turns to the FTC's organic statute, providing a history of Section 5 and focusing on the evolution of the meaning of "unfair methods of competition" from the enactment of the FTCA in 1914 through congressional amendments of the Act in 1975, 1980, and 1994. The evolution of this phrase is complicated and confusing—particularly because it is simultaneously intertwined with, yet distinct from, Section 5's separate "unfair or deceptive acts or practices" authority. The history presented here goes beyond mere background to trace the path of this phrase through the courts and Congress. This history shows that the statutory structure, judicial treatment, and legislative history have consistently kept these two forms of authority (i.e., "unfair methods of competition" and "unfair or deceptive acts or practices") separate and that while Congress has over the years imposed restraints of the FTC's "unfair or deceptive acts or practices" authority, it has consistently maintained the broader grant of authority for the FTC to proscribe what it determines to be "unfair methods of competition."

Part III turns from the evolutionary history of Section 5 to the FTC's changing interpretations thereof over the past thirty years. Following a number of high-profile (and pre-*Chevron*) losses, the FTC began approaching Section 5 as merely coextensive with the Sherman and Clayton Acts.¹⁵ But over the past several years, building upon concern that the antitrust laws are under-enforced and about high-profile losses by the FTC in its efforts to enforce these laws, commentators have increasingly expressed concern that the FTC has dialed back its enforcement of Section 5 too far. In recent years, the FTC has been driven by these concerns to undertake a more aggressive view of Section 5.

Part IV applies *Chevron* to Section 5, explaining why the courts are likely to defer to the FTC's interpretation of the statute as well as responding to contrary views that *Chevron* does not apply. Antitrust scholars and practitioners have offered a number of explanations for why *Chevron* does not apply to Section 5 because, for instance, the FTC lacks or is not exercising rulemaking authority; because a separate agency, the Department of Justice (the "DOJ"), has concurrent

¹⁵ Ramirez, *supra* note 6, at 2 & n.4; *see also id.* at 3 ("In recent decades, however, the [FTC] has tied its standalone Section 5 authority to objectives grounded in at least the spirit of the antitrust laws.").

jurisdiction over the antitrust laws; because the courts have an established body of antitrust precedent that is binding upon FTC interpretations of Section 5; and because the courts are unlikely to defer to agencies engaging in common law-like quasi-legislation instead of mere norm-setting. Each of these arguments is either incorrect under modern understandings of *Chevron* or incorrectly applied to Section 5. Similarly, scholars and practitioners read the United States Supreme Court's decision in *FTC v. Indiana Federation of Dentists*¹⁶ as requiring *de novo* review for Section 5 cases. As explained in this section, this understanding is an over-reading of *dicta* that has come to be accepted as precedent primarily because the FTC has not sought more deferential review. Indeed, the standard announced by the Court in *Indiana Federation of Dentists* is actually contemporaneous with and part of the same line of precedent that led to the ascendance of *Chevron* deference.

To be clear, while Part IV argues that *Chevron* applies to FTC interpretations of Section 5, this does not mean that the FTC is unconstrained in these interpretations. The argument that *Chevron* applies is a “Step Zero” argument. It does not answer the question whether the courts would defer to the FTC's specific interpretation in a specific case. But given the breadth of Section 5's language—and abundant evidence that Section 5 was deliberately drafted to provide the FTC with substantial authority and flexibility in how it exercises that authority—it is likely that the courts would give the FTC wide berth. To the extent that this article argues that the FTC is likely to receive broad deference, it does not argue that this is necessarily a good thing.¹⁷ To the contrary, Part V argues that such broad deference can be problematic. That section takes up the question of possible restraints on the FTC's interpretive power, arguing that the Court's recent cases (e.g., *FCC v. Fox Television Stations, Inc. (“Fox II”)*)¹⁸ may be construed to impose Due Process and notice requirements on the FTC's interpretive power in the contexts of adjudication and rulemaking—areas in which congressional help is needed dearly to reign in the potential use of an ambiguous Section 5 far beyond the scope of any reasonable interpretation.

¹⁶ 476 U.S. 447 (1986).

¹⁷ To the contrary, under *Chevron*, the FTC is free to take a fundamentally uneconomic approach to its antitrust policy—one that could easily be harmful to competition and the broader economy. But Congress has the power to do just that and also to delegate such power to agencies such as the FTC. See discussion *infra* Part II.B.

¹⁸ 556 U.S. 502 (2012).

I. INTRODUCING *CHEVRON*

Federal courts have traditionally defined the legal standards of the antitrust laws.¹⁹ The FTC, however, has been given broad, largely ambiguous authority by Congress to proscribe “unfair methods of competition.”²⁰ Where Congress grants such authority, agencies have great leeway in defining ambiguous statutory terms. The relationship between the courts and agency-defined legal standards is controlled by *Chevron*, one of the seminal cases in administrative law.²¹ As the FTC turns to a broader understanding of Section 5, understanding *Chevron* becomes central to understanding the scope of the FTC’s power.

In this light, this section provides an overview of *Chevron* as it applies to the FTC’s enforcement of Section 5. Part III.A introduces *Chevron*, Part III.B discusses the scope of the *Chevron* doctrine, and Part III.C considers how *Chevron* applies in specific circumstances relevant to the relationship between Section 5 and the antitrust laws.

A. *Understanding Chevron*

Chevron is perhaps the most important doctrine in the modern administrative state.²² Agencies are created by, and for the purpose of, implementing statutes enacted by Congress. The *Chevron* doctrine defines the relationship between agencies and federal courts when an agency’s statute requires interpretation. The doctrine states, simply,²³ that where congressional intent²⁴ for how an agency is to

¹⁹ See, e.g., Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1226 (2014) (“It is generally accepted that antitrust law is an area where Congress has tasked the courts with developing a federal common law. In fact, scholars have often cited antitrust jurisprudence as a prime example of federal common law. This view is shared by the Court.”).

²⁰ See *infra* Section II.A, note 75.

²¹ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

²² For a contrary view, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (arguing that the importance of *Chevron* has been overstated).

²³ There have been hundreds of law review articles written over the past three decades debating how this “simple” statement should be applied. Mercifully, for our purposes, the underlying purpose of *Chevron* is more important than how *Chevron* is actually applied.

²⁴ One of the many confounding questions raised by *Chevron* is how “congressional intent” is determined—for instance, whether the court may rely only upon the statutory language or may also consider legislative history and other contextual factors.

act is unclear, courts will defer to the agency's reasonable interpretation of the agency's governing statute.²⁵

More formally, *Chevron* offers a two-part test, colloquially referred to as the “*Chevron* two-step.” In the first step, the court asks whether the statute is unambiguous. If the court determines that it is, the agency is required to implement this unambiguous intent. If, however, the statute contains ambiguity, it is left to the agency to determine how to resolve that ambiguity; the court's only task is to ensure that the agency's interpretation is a reasonable construction of the statute. Adopted in 1984, this approach imposed a fundamental constraint on the courts. Previously, courts were free to impose their preferred understanding of ambiguous statutes upon agencies. They would take the agency's views into consideration and give them weight as appropriate—but fundamentally, responsibility for interpreting statutes was given to the courts.²⁶ Following *Chevron*, this responsibility is upon the agencies.²⁷

There are four dominant reasons advanced for why such deference is appropriate, by the Court itself and by a myriad of scholars.²⁸ The dominant understanding is implied congressional intent. Ambiguity requires interpretation, and when Congress gives an agency ambiguous instruction, Congress must therefore expect that agency to supply the required interpretation. The implied

²⁵ *Chevron*, 467 U.S. at 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”).

²⁶ *See* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[The Court] consider[s] that the rulings, interpretations and opinions of [an] [a]dministrator under [an] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

²⁷ *But see* Jud Matthews, *Deference Lotteries*, 91 TEX. L. REV. 1349 (2013); David T. Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010).

²⁸ *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197–98 (2006); *see also* Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271 (2008).

intent of Congress is, therefore, that the agency resolve the ambiguity, not the courts.²⁹

Although implied congressional intent is the dominant understanding of *Chevron*, it is not the only one. The Court's language in *Chevron* appeals most directly to an expertise theory.³⁰ This theory harkens back to New Deal understandings of technocratic expert agencies, under which Congress relies on agencies to make decisions requiring expertise and resources outside the purview of the legislative process. Similarly, this understanding posits that generalist judges should defer to expert agencies.³¹ Another understanding is based on political accountability, because resolving ambiguity often requires making political value judgments, and the politically accountable branches of government should make such judgments.³² Indeed, the Court recognizes that statutory ambiguity can exist precisely because of the political realities of the legislative process. Unable to reach a compromise, legislators may agree to push politically unpopular or difficult decisions to agencies to be hashed out in a more public, deliberative, and less durable manner. They may also agree to foist such decisions onto the Executive Branch's appointees.³³ In any of these events, the ultimate accountability for these decisions returns to the political process, and because the courts are most insulated from this process, they should refrain from resolving ambiguities.

²⁹ *Chevron*, 467 U.S. at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”) (footnotes omitted).

³⁰ *Id.* at 865 (“Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so. . . .”).

³¹ *Id.* (“Judges are not experts in the field[.]”).

³² *Id.* (“In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is. . . .”).

³³ *Id.* (“[P]erhaps [Congress] simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.”).

The political accountability understanding of *Chevron* is related to a final dominant understanding: separation of powers.³⁴ Were the courts to resolve ambiguity, they would be acting as legislators, encroaching upon Congress's domain. And because it falls to the Executive to take care to enforce the laws that Congress enacts (ambiguities and all), judicial resolution of ambiguity also encroaches on the Executive's domain.

B. *Chevron's Domain*³⁵

In the thirty years since *Chevron*, the doctrine has seen continued exegesis. As developed in the following paragraphs, the Court and scholars have explained that an agency's authority to interpret statutory ambiguity—and, therefore, the courts' obligation to defer to that interpretation—is based on the agency's quasi-legislative authority. This means that an agency to which Congress has not given quasi-legislative authority is not authorized to interpret statutory ambiguity in a legally binding way. Although an agency may be well-positioned to interpret that ambiguity, lacking a congressional mandate to do so, the courts should only take the agency interpretation as persuasive, not binding.

The Court embraced this analytical approach—sometimes referred to as “*Chevron Step Zero*”³⁶—in *United States v. Mead Corp.*³⁷ As explained in *Mead*, “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁸ Congress

³⁴ *Id.* at 866 (“The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’”) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978) (explaining in the immediately preceding sentence of *Hill* that “the commitment to the separation of powers is too fundamental for us to [preempt] congressional action”)).

³⁵ This section's heading refers to Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

³⁶ See Joseph Landau, *Chevron Meets Youngstown*, 92 B.U. L. REV. 1917, 1936–37 (2012) (quoting Sunstein, *supra* note 28, at 191; 533 U.S. 218, 226–27 (2001) (“On this question, often known as ‘*Chevron Step Zero*,’ the Court held that the critical question is whether Congress appears to have ‘delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.’”)); see generally Sunstein, *supra* note 28 (analyzing the concept of *Chevron Step Zero* throughout).

³⁷ *Mead*, 533 U.S. at 234–35.

³⁸ *Id.* at 226–27.

giving an agency the power to establish binding legal norms, for instance through rulemaking and adjudication, usually shows such authority.³⁹

Fortunately, a thorough understanding of *Chevron* is not necessary to understand its application to Section 5. Rather, it is sufficient to know that, as a general matter, agency interpretations of ambiguous statutes arrived at through formal adjudication or notice-and-comment rulemaking are accorded *Chevron* deference. Generally, a congressional delegation of rulemaking authority is the hallmark of quasi-legislative power, and statutory interpretations made through the exercise of this authority command deference.⁴⁰ Provided an agency has quasi-legislative power, it need not act through rulemaking to receive deference; it is free to interpret ambiguities over the course of case-by-case adjudications.⁴¹

C. *Some Limitations and Details*

Despite its apparent simplicity, the *Chevron* doctrine suffers a surfeit of nuance. There are situations in which application of the doctrine yields uncertain results or results that are surprisingly different from traditional common law jurisprudence. Despite thirty years of development, the doctrine and its implications for the relationship between agencies and the courts continues to evolve. Discussed below are a few details useful for understanding the application of *Chevron* to Section 5. Those details will be important to the discussion in Part V as well, which considers how we may respond to a *Chevron*-supercharged Section 5.

³⁹ *Id.* at 227 (“Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”); *but see* Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (arguing that the *sine qua non* is the ability to sanction violators).

⁴⁰ *See The Need for Mead*, *supra* note 14, at 1603–04 (citations omitted) (arguing that Merrill & Watts are wrong); *contra* Merrill & Watts, *supra* note 39 (arguing against this because the FTC has limited ability to sanction violators of Section 5, which they argue is the *sine qua non* of issuing rules with the “force of law”).

⁴¹ *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“[An agency] should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *INS v. Cardoza-Forenseca*, 480 U.S. 421, 448 (1987)); *but see* Matthews, *supra* note 27.

1. Limited Deference Given to Informal or Strategic Interpretations

As explained in *Mead*, deference to an agency's statutory interpretation is based in that agency's power to issue legally binding rules. It is unsurprising, then, that when an agency interprets its statute outside the context of its rulemaking authority, the interpretation is subject to reduced deference. This was the case in *Mead*, in which the Court held that informal ruling letters issued by the United States Customs Service did not warrant *Chevron* deference.⁴² Although the agency had rulemaking authority in *Mead*, it issued the ruling letters without engaging in notice-and-comment rulemaking, which led the Court to hold that the agency did not issue the letters pursuant to its rulemaking authority.⁴³

Perhaps the most extreme version of this concern occurs in the context of interpretations made for strategic purposes. The classic example is an agency interpretation of a statute advanced as part of ongoing litigation. An agency's "litigating positions are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in a reviewing court."⁴⁴ But the fact that the interpretation is advanced in the context of adjudication is not the basis for this concern.⁴⁵

The key question is whether the interpretation reflects the agency's "fair and considered judgment"—that is, whether it is an exercise of the agency's rulemaking authority or a mere post-hoc rationalization.⁴⁶ Indeed, it well established that

⁴² *Mead*, 533 U.S. at 221.

⁴³ *Id.* at 227.

⁴⁴ *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156–57 (1991) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

⁴⁵ *Auer v. Robbins*, 519 U.S. 452, 462 (1997) ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.") (internal quotations marks and citations omitted); *Martin*, 499 U.S. at 156 ("The Secretary's interpretation of [the agency's] Act regulations in an administrative adjudication, however, is agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . [rule].") (citation omitted).

⁴⁶ *Auer*, 519 U.S. at 462.

agencies create legally binding rules through adjudicatory proceedings.⁴⁷ Sometimes an agency is better situated to develop rules through case-by-case adjudication than through rulemaking proceedings.⁴⁸

2. Statutes Enforced by Multiple Agencies

Statutes administered by multiple agencies present challenges with respect to the application of *Chevron*,⁴⁹ as do situations in which multiple agencies enforce separate statutes that require the agencies to operate within the same policy-space, such that the agencies could interpret their statutes to create legislative conflicts.⁵⁰ Multi-agency situations such as these are subject to active debate among administrative law scholars⁵¹ and occur increasingly in litigation.⁵²

Cases such as these present unsettled interpretive problems for the courts. There are some heuristics that courts may apply to dig themselves out from under competing agency interpretations of statutes.⁵³ But the general approach that courts must adopt in these cases is akin to the *Chevron* Step Zero inquiry: Courts must attempt to infer congressional intent as to which, if any, agencies are authorized to interpret the relevant statutes.⁵⁴ Presumably, if conflicting interpretations are possible, Congress either intended that those subject to the regulations also be

⁴⁷ SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

⁴⁸ *Id.* at 203.

⁴⁹ See, e.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006) (determining the role of deference in the context of the Controlled Substances Act); see also *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (“[W]here, as here, Congress has entrusted more than one federal agency with the administration of a statute . . . a reviewing court does not, therefore, owe as much deference as it might otherwise. . .”).

⁵⁰ Commentators often argue that this problem applies between Section 5 and the antitrust laws. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1146 (2012). However, this view is incorrect. See *infra* Part IV.

⁵¹ See, e.g., Freeman & Rossi, *supra* note 50; Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879 (2002); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011).

⁵² See, e.g., *Gonzales*, 546 U.S. 243; Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

⁵³ See, e.g., Marisam, *supra* note 51, at 181 (discussing what the author calls “antiduplication institutions”).

⁵⁴ See generally Freeman & Rossi, *supra* note 50.

subject to the conflicts or intended for one agency's interpretation to take precedence.⁵⁵

3. *Stare Decisis* Need Not Apply—Replacing Stable Law with Malleable Policy

One of the greatest differences between judicial and administrative rulemaking is that agencies are not bound by either prior judicial interpretations of their statutes or their own interpretations thereof. These conclusions follow from recent Supreme Court opinions—*National Cable & Telecommunications Ass'n v. Brand X Internet Services* in 2005 and the Court's first decision in *FCC v. Fox Television Stations, Inc.* in 2007 ("*Fox I*")—which have broad implications for the relationship between courts and agencies.

In *Brand X*, the Court explained that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁵⁶ This conclusion follows from a direct application of *Chevron*: Courts are responsible for determining whether a statute is ambiguous, and agencies are responsible for determining the (reasonable) meaning of a statute that is ambiguous.⁵⁷ The fact that a court has previously proffered an interpretation of an ambiguous statute cannot prevent an agency from exercising its delegated authority to adopt its own interpretation; to hold otherwise would violate each rationale underlying *Chevron*.⁵⁸

In *Fox I*, the Court went a step further, holding that an agency's own interpretation of an ambiguous statute imposes no special obligations should the agency subsequently change its interpretation.⁵⁹ It may be necessary to

⁵⁵ *Id.* at 1138–46.

⁵⁶ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

⁵⁷ *Id.* ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.") (citation omitted).

⁵⁸ *Chevron*'s four rationales being legislative intent, expertise, the greater democratic accountability of agencies than of courts, and separation of powers. See *infra* Part III.A.

⁵⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. . . . The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action. . . . And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be

acknowledge the prior policy, and factual findings upon which the new policy is based that contradict prior baseline findings may need to be explained.⁶⁰ But where a statute may be interpreted in multiple ways—that is, in any case where the statute is ambiguous—Congress (and by extension its agencies) is free to choose between those alternative interpretations. The fact that an agency previously adopted one interpretation does not necessarily render other possible interpretations less reasonable, and the mere fact that one was previously adopted cannot on its own, therefore, bar subsequent adoption of a competing interpretation.⁶¹

The reasoning underlying these cases—which is, fundamentally, the same rationale underlying *Chevron*—has broad implications. Indeed, another recent case, *American Electric Power v. Connecticut*, extends these rationales even further, arguably taking away judicial authority to engage in common law-like rulemaking in any area of law that is even arguably subject to agency regulation.⁶² Administrative law scholars are still digesting the full breadth of this conclusion, and its implications are substantial for antitrust law—perhaps the largest remaining area of federal common law.⁶³

II. INTRODUCING SECTION 5

Section 5 of the FTCA⁶⁴ provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”⁶⁵ Fortunately, the FTCA has a

better, which the conscious change of course adequately indicates.”) (emphasis in original) (citations omitted).

⁶⁰ *Id.* at 515–16 (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”) (emphasis in original) (citation omitted).

⁶¹ *Id.*

⁶² *Am. Electric Power v. Connecticut*, 131 S. Ct. 2527, 2538 (2011); *see also* Hurwitz, *supra* note 19, at 1216 (discussing *American Electric Power*).

⁶³ *Id.*

⁶⁴ 15 U.S.C. §§ 41–58 (2012).

⁶⁵ 15 U.S.C. § 45(a)(1) (2012).

consistently rich statutory history, including extensive records of the congressional and political debates surrounding both its initial enactment in 1914 and its subsequent amendments.

At the same time, however, the FTCA—and, in particular, the meaning of “unfair methods of competition”—is inherently ambiguous. Indeed, the statutory history makes clear that this was deliberate. The discussion that follows provides a brief introduction to Section 5, including its history and purpose; the meaning of its core terms (i.e., “unfair methods of competition” and “unfair or deceptive acts and practices”); and the powers that it confers upon the FTC. This history is substantive in its own right and provides necessary context and background for the discussion that follows in the rest of this article.

A. *History and Purpose of Section 5*

The FTC was established by the FTCA in 1914, largely in response to congressional concern stemming from under-enforcement of the antitrust laws by the DOJ and court system.⁶⁶ This followed the Supreme Court’s 1911 decision in *Standard Oil Co. of New Jersey v. United States*, holding that antitrust violations were to be adjudged by the rule of reason,⁶⁷ which Congress received as a lessening of its intended standard for antitrust violations.⁶⁸ In response, Congress undertook to design a new agency with the authority (and, at times, the obligation) to investigate potentially anticompetitive conduct and report its findings—including recommended changes to the law—back to the DOJ, Congress, or the President.⁶⁹

Congress subsequently expanded the FTCA to give the new agency independent authority to investigate and take action against anticompetitive conduct, which it styled as “unfair methods of competition.”⁷⁰ The unfair methods of competition standard was deliberately vague. As explained in the Senate Committee report:

⁶⁶ See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 931 (2010) (discussing “[f]ive principal motivations [that] inspired this legislative choice”).

⁶⁷ 221 U.S. 1, 61–62 (1911).

⁶⁸ 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).

⁶⁹ *Id.* at 234.

⁷⁰ *Id.*

One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by order issued after hearing. . . . The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better.⁷¹

Congress, therefore, gave power to the FTC to define the bounds of unfair methods of competition. The extent of this new standard was deliberately broad—certainly broader than that of the antitrust laws.⁷² Indeed, Senator Newlands (a chief proponent of the new commission) explained that it “covers 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.”⁷³ Given the similarity of terms, it is important to note that Congress deliberately styled the new offense as unfair *methods* of competition, interjecting “methods” between “unfair” and “competition” to make clear that this new standard was separate from the established concept of unfair competition.⁷⁴

In the FTC’s early years, courts were frequently reluctant to give the Act the breadth of authority the FTCA’s language suggests.⁷⁵ Over time, however, this view changed, driven in large part by the 1938 Wheeler-Lea Amendments.⁷⁶ Courts

⁷¹ *Id.* (alteration in original) (quoting S. REP. NO. 63-597, at 13 (1914)).

⁷² *Id.* at 236. Among the various categories of conduct constituting unfair methods of competition are conduct violating, incipient to violating, or violating the spirit of the antitrust laws; conduct violating recognized standards of business behavior; and conduct violating policy framed by the FTC. *Id.* at 242, 271, 275.

⁷³ *Id.* at 235 (quoting 51 CONG. REC. 11112 (1914)) (alteration in original).

⁷⁴ *Id.* This differentiates the new term from “unfair competition”—that is, the practice of passing off another’s goods as one’s own. *Id.*

⁷⁵ See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 969–72 (2011) (“With an extraordinarily vague statute, and the understanding that the courts had complete authority to interpret that statute as they saw fit, the federal judges could reverse the [FTC] any time they encountered an outcome they did not like. The FTC was regarded by the courts during this era with something approaching contempt. . . . What is clear is that the appellate review model was quickly and readily adapted to the end of supervising an upstart agency.”).

⁷⁶ See *infra* notes 86–89.

came to understand that “Congress intentionally left development of the term ‘unfair’ to the [FTC] rather than attempting to define ‘the many and variable unfair practices which prevail in commerce.’”⁷⁷ And the standard 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 [FTC] determines are against public policy for other reasons.”⁷⁸

As discussed below, Congress has had opportunities to return to this language, having undertaken several substantial revisions of the FTCA, including in 1938, 1975, 1980, and 1994.⁷⁹ During this process, congressional attention has focused almost exclusively on the “unfair or deceptive acts or practices” branch of Section 5.⁸⁰ But throughout, Congress has recognized the FTC’s power to make substantive rules governing unfair methods of competition. Congress has continued to declare, and affirmatively note Supreme Court precedent acknowledging, the need for courts to defer to the FTC’s determinations of unfairness.⁸¹

⁷⁷ *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) (quoting S. REP. NO. 63-592, 13 (1914)).

⁷⁸ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (citing *FTC v. Cement Inst.*, 333 U.S. 683, 689–95 (1948); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)); *see also* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *FTC v. Motion Picture Adver. Co.*, 344 U.S. 392, 394–95 (1953)) (“It is . . . clear 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[,] . . . as well as to condemn as ‘unfair methods of competition’ existing violations of them.”).

⁷⁹ *See* Wheeler-Lea Amendment, Pub. L. No. 447, 52 Stat. 111 (1938); Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975); Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374; Federal Trade Commission Act Amendments of 1994, Pub. L. No 103-312, 108 Stat. 1691.

⁸⁰ As discussed below, the FTCA consistently treats unfair methods of competition and unfair or deceptive acts and practices as two distinct violations. *See infra* Part 1.B.

⁸¹ H.R. REP. NO. 103-138 (1994); H.R. REP. NO. 93-1107 (1974) (“As previously noted in this report the courts have confirmed the FTC’s authority to prescribe substantive rules detailing what activities will constitute unfair methods of competition for unfair or deceptive acts or practices.”). The Magnuson-Moss Warranty Act went on to impose new procedural requirements on rulemaking for “unfair or deceptive acts and practices” (with the committee report noting that “rulemaking procedures . . . may be inadequate in some cases”) but made no changes to the rulemaking procedures relating to unfair methods of competition. Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, 88 Stat. 2183; H.R. REP. NO. 93-1107.

B. Unfair Methods of Competition and Unfair or Deceptive Acts and Practices

The relationship between unfair methods of competition and unfair or deceptive acts and practices bears clarification. Though they are clearly related, and the meanings of both are largely left to the FTC to define, the statutory structure establishes and consistently maintains a distinction between the two. While the meaning of this distinction is, in many ways, unclear, the fact of it is fundamentally important for purposes of statutory interpretation.

The historical origin of the two phrases is relevant. As discussed above,⁸² the original 1914 FTCA included the proscription against unfair methods of competition—“methods” having been added to make clear that this phrase was something distinct from the common law understanding of unfair competition. The original FTCA did not mention unfair or deceptive acts or practices. The Wheeler-Lea Amendment added the proscription against unfair or deceptive acts or practices in 1938.⁸³ This amendment was deemed necessary because the Court had come to interpret unfair methods of competition as meaning only those methods that harmed one’s competitors.⁸⁴ Rather than modify the existing language to specify that unfair methods of competition extended to methods harming individual consumers, Congress added the proscription against unfair or deceptive acts or practices to protect consumers directly.⁸⁵

This rationalizing purpose of the new language aside, the two phrases have grown to have disjunctive treatments.⁸⁶ This treatment is seen, perhaps most importantly, by disparate congressional treatment of the phrases.⁸⁷ Consider Section 5, the primary enabling clause of the Act, which refers to both types of

⁸² See *supra* notes 77–78.

⁸³ Wheeler-Lea Amendment, 52 Stat. at 111. In the original, the language was “unfair and deceptive acts or practices”; the “and” was changed to an “or” in subsequent amendments.

⁸⁴ *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931) (“It is obvious the word ‘competition’ imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend to affect the business of these competitors. . . .”); see *Averitt*, *supra* note 68, at 292–96.

⁸⁵ *Averitt*, *supra* note 68, at 293 (calling the amendment “‘a significant amendment showing Congress’ concern for consumers as well as for competitors’”) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965)).

⁸⁶ *Id.* at 295 (“[T]here is no doubt that the Wheeler-Lea [Amendment] did extend the substantive reach of the [FTC].”).

⁸⁷ In addition to this discussion, see the discussion of various legislative histories, *infra* Part II.C.

conduct together in three subsections.⁸⁸ It refers to unfair methods of competition alone once⁸⁹ and to unfair or deceptive acts or practices alone in three subsections.⁹⁰ One subsection referring only to unfair or deceptive acts or practices (subsection 5(n)) was added as part of the Magnuson-Moss Amendments in 1975,⁹¹ which also added Section 18. Section 18(a)(1) grants the FTC authority to make rules relating to unfair or deceptive acts or practices, subject to the procedural requirements of Section 18(b). Section 18(a)(2) expressly states that Section 18 applies only to unfair or deceptive acts or practices; it does “not affect any authority of the [FTC] to prescribe rules . . . with respect to unfair methods of competition.”⁹²

The FTCA also has a telling relationship with the antitrust laws. Nothing in Section 5 relates either unfair methods of competition or unfair or deceptive acts or practices to the antitrust laws, other than a provision that the FTC cannot immunize parties from the antitrust laws. The incorporation of the antitrust laws into Section 5 is a subsequent development attributable to the courts.⁹³ Section 6 gives the FTC certain investigatory powers in support of the antitrust laws, which reflect the FTC’s earliest design as an agency to provide support to the DOJ, Congress, and the President in their efforts to enforce and strengthen the antitrust laws.⁹⁴ Section 7

⁸⁸ FTCA § 5, 15 U.S.C. § 45(a)(1)–(2), (b), (c) (2012).

⁸⁹ *Id.* § 45(a)(3).

⁹⁰ *Id.* § 45(a)(4), (m).

⁹¹ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 205, 88 Stat. 2183, 2193–98, 2200–01 (1975) (codified as amended at 15 U.S.C. §§ 45(m), 57a).

⁹² FTCA, § 18, 15 U.S.C. § 57a; *see also id.* § 6, 15 U.S.C. § 46(g) (giving the FTC substantive rulemaking authority); Fed. Trade Comm’n, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FTC.GOV (July 2008), available at <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (noting, somewhat coyly, that “[w]hile Section 6(g) authority [to issue substantive rules relating to unfair methods of competition] still exists, in 1975, Section 18 became the exclusive statutory provision invoked for issuing rules that specify *unfair or deceptive acts or practices*”) (emphasis added). Section 18 was added by the Magnuson-Moss Act in 1975 to add additional procedures to rulemaking relating to unfair or deceptive acts or practices—the legislative history makes clear that Congress was aware that the FTC previously had substantive rulemaking authority for both unfair methods of competition and unfair or deceptive acts or practices, and that Section 18 only applies to the latter leaving the Section 6(g) authority untouched.

⁹³ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986); *see also FTC v. Cement Inst.*, 333 U.S. 683, 694–95 (1948) (stating that certain activities may be found to violate both the Sherman Act and the FTCA and that such a possibility does not limit the FTC’s jurisdiction).

⁹⁴ Section 6 (codified as amended at 15 U.S.C. § 46 (2006)).

similarly provides for the FTC to act as a master in chancery to assist the courts in fashioning equitable remedies to antitrust claims brought by the Attorney General.⁹⁵ Section 11 is also an antitrust savings clause.⁹⁶

Other than these miscellaneous and largely ancillary provisions, nothing in the FTCA itself gives the FTC substantive authority relating to the antitrust laws. Section 20, however—which authorized the FTC to issue administrative subpoenas⁹⁷—provides further insight into the relationships between unfair methods of competition, unfair or deceptive acts or practices, and antitrust law. Sections 20(a)(2), (a)(3), (a)(7), and (c)(1) differentiate between unfair or deceptive acts or practices and “antitrust violations,” and Section 20(a)(8) defines “antitrust violation” to be an unfair act or practice (within the meaning of Section 5), or a violation of the antitrust acts.⁹⁸ Thus, Section 20 continues to differentiate between unfair methods of competition and unfair or deceptive acts or practices—but it goes further, equating unfair methods of competition with, and excluding unfair or deceptive acts or practices from, antitrust violations. It is important to note, however, that these definitions are expressly limited to Section 20.⁹⁹ Given that Congress expressly limited their scope in this way, it is difficult to understand how these definitions should affect our understanding of the rest of the FTCA.

C. *Development of FTC Rulemaking Authority*

The FTC has the authority to adjudicate violations of Section 5, to seek temporary or permanent injunctions against conduct violative of Section 5, and to promulgate substantive rules as to what constitutes a violation of Section 5.¹⁰⁰ The first two parts of this statement—the FTC’s adjudicatory and enforcement powers—are not particularly controversial. The extent of the FTC’s substantive

⁹⁵ Section 7 (codified as amended at 15 U.S.C. § 47 (2006)).

⁹⁶ Section 11 (codified as amended at 15 U.S.C. § 51 (2006)) (explaining that nothing in the FTCA shall “be construed to alter, modify, or repeal the said antitrust Acts”).

⁹⁷ 15 U.S.C. § 57b-1 (“Civil investigative demands”).

⁹⁸ *Id.* § 57b-1(a)(2)–(3), (7), (c)(1).

⁹⁹ *Id.* § 57b-1(a).

¹⁰⁰ *Id.* §§ 45, 46(g). Section 5(b), *id.* § 45(b), provides for formal adjudication of Section 5 violations by the FTC, which are both reviewable by Article III courts, *id.* § 45(c), and enforceable by Article III courts, *id.* § 45(d). Section 13(b), *id.* § 53(b), allows the FTC to seek temporary, and in some cases permanent, restraining orders in Article III courts for conduct violating Section 5. The FTC’s authority to promulgate substantive rules is discussed in the remainder of this section.

rulemaking authority, however, has long been the subject of much confusion and debate.

This section provides a recent history of the FTC's substantive Section 5 rulemaking authority, particularly as it relates to unfair methods of competition. It starts with the United States Court of Appeals for the District of Columbia's 1973 holding in *National Petroleum Refiners Ass'n v. FTC* that the FTC does have such power. It then traces the evolution of the statute through a series of congressional amendments. These amendments consistently recognize, and sometimes debate, the FTC's Section 5 rulemaking power. In terms of unfair methods of competition, these amendments have consistently preserved the power that the D.C. Circuit recognized in *National Petroleum Refiners*.

1. *National Petroleum Refiners* (1973)

The FTC's rulemaking authority has a checkered history. Prior to 1973, its power to promulgate substantive rules was uncertain at best.¹⁰¹ Indeed, the FTC did not seek to promulgate substantive rules prior to 1962, and before then it had even indicated that it lacked such power.¹⁰² Ultimately, however, the D.C. Circuit resolved the FTC's authority to issue substantive rules in the affirmative. In *National Petroleum Refiners*—now a seminal case in the canon of administrative law—the court held that the substantive rulemaking authority granted to the FTC in Section 6 applies to the entirety of the FTCA, including Section 5.¹⁰³

2. Magnuson-Moss (1975)

Despite decades of lead-up to *National Petroleum Refiners*, this opinion was just the start of the saga of the FTC's rulemaking authority. In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvements

¹⁰¹ See Merrill & Watts, *supra* note 39.

¹⁰² *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973) (“[T]he agency itself did not assert power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power.”), *cert. denied*, 415 U.S. 951 (1974).

¹⁰³ *Id.* The D.C. Circuit faced the same arguments that had been previously made against the FTC's substantive rulemaking authority for Section 5: Section 5 only mentioned adjudication, and the only rulemaking authority was (at the time) in Section 6—a division that, it was argued, must have been deliberate by Congress. *Id.* at 675. The court rejected these arguments, explaining that the FTC uses rulemaking “to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes [rulemaking] and nothing in the statute or in its legislative history precludes its use for this purpose, the action of the [FTC] must be upheld.” *Id.* at 693.

Act (“Magnuson-Moss”).¹⁰⁴ Congress enacted Magnuson-Moss to give the FTC express authority to issue industry-wide rules, including requiring the agency to issue rules regulating warranties.¹⁰⁵

In addition, Magnuson-Moss provided additional procedural safeguards to the FTC’s rulemaking process for unfair or deceptive acts or practices. However, the law did not touch the FTC’s rulemaking powers as they related to its unfair methods of competition authority. This result was the product of compromise between the House and Senate. The original Senate bill did not contain new provisions relating to the FTC’s rulemaking power.¹⁰⁶ The House version of the bill, on the other hand, added a new section to the FTCA: Section 18, which provided new procedures to govern all substantive FTC rulemaking.¹⁰⁷ The new language in the House bill—which was ultimately accepted—“replace[d] the existing rulemaking authority of the FTC under [S]ection 6(g) of the [FTCA] with a new Section 18 which authorizes the FTC to issue rules defining with specificity the acts or practices which are unfair or deceptive and which are within the scope of Section 5(a).”¹⁰⁸ Note that this language speaks only to unfair or deceptive acts or practices. Under the second part of the House’s proposal, which was ultimately rejected, “the FTC would not have rulemaking authority with respect to unfair methods of competition to the extent they are not unfair or deceptive acts or practices.”¹⁰⁹

The House’s approach was rejected in committee. The conference report explains that, in the final bill, the House’s new Section 18 was adopted as the exclusive authority for rulemaking relating to unfair or deceptive acts or practices.¹¹⁰ It expressly states that, “[t]he conference substitute does not affect any

¹⁰⁴ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012) and other scattered sections of 15 U.S.C.).

¹⁰⁵ *Id.* (“An Act [t]o provide minimum disclosure standards for written consumer product warranties; to define minimum Federal content standards for such warranties; to amend the [FTCA] in order to improve its consumer protection activities; and for other purposes.”).

¹⁰⁶ S. CONF. REP. NO. 93-1408 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7755, 7761 (“The Senate bill contained no provisions relating to rulemaking procedures to be followed by the [FTC].”).

¹⁰⁷ *Id.* at 7762.

¹⁰⁸ H.R. REP. NO. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7727.

¹⁰⁹ *Id.*

¹¹⁰ S. CONF. REP. NO. 93-1408, 1974 U.S.C.C.A.N. at 7763.

authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition.”¹¹¹

Thus, the version of the bill that Congress ultimately passed and enacted into law in 1975 contained the following Section 18(b)(2):

The [FTC] shall have no authority under this act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of Section 5(a)(1)). The preceding sentence shall not affect any authority of the [FTC] to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.¹¹²

The FTC, therefore, retained substantive rulemaking authority, authorized by Section 6(g), affirmed in *National Petroleum Refiners*, and governed by the standard Administrative Procedure Act (“APA”) notice-and-comment rulemaking procedures.¹¹³

3. FTC Improvements Act (1980)

The next turn was, however, right around the corner. Between 1975 and 1980, the FTC engaged in extensive and often controversial rulemaking. This history is amply documented elsewhere.¹¹⁴ For present purposes it is sufficient to reference the FTC’s attempt to ban all advertising directed at children as unfair, arguing that it was “immoral, unscrupulous, and unethical.” The FTC had become the second most powerful legislature in the country. This famously led the *Washington Post* to declare that the FTC had assumed the role as “National Nanny.”¹¹⁵

The *Washington Post*’s concerns resonated with Congress, which took action to reverse the FTC’s newfound fervor for rulemaking, even shutting the FTC down

¹¹¹ *Id.* at 7764.

¹¹² Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 83 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 57a(a)(2) (2012)).

¹¹³ Because Section 6(g) does not contain any procedures, the APA, 5 U.S.C. § 500 *et seq.* (2012), governs as a default rule. Section 553 of the APA governs notice-and-comment rulemaking.

¹¹⁴ See J. Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC.GOV (May 30, 2003), <http://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection>.

¹¹⁵ *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

for several days. In 1980, Congress passed the FTC Improvements Act of 1980.¹¹⁶ The 1980 Act added further procedural requirements to Section 18, including requirements that notices of proposed rulemaking be submitted to Congress prior to any new rule going into effect.¹¹⁷ It also stripped the FTC of rulemaking authority relating to various specific issues, including, unsurprisingly, children's advertising.¹¹⁸ The 1980 Act also included a legislative veto for all FTC rules—including for unfair methods of competition—though this provision sunset in 1982.¹¹⁹

Despite the broad concern and additional procedural requirements placed on Section 18 rulemaking, Congress did not add any additional procedures to Section 6(g) rulemaking. The conference report briefly recounts the Magnuson-Moss amendments, noting that it “specifically addressed the [FTC’s] rulemaking authority over ‘unfair or deceptive acts or practices’” and that Section 18 expressly declaimed any effect on the FTC’s authority with respect to unfair methods of competition.¹²⁰

Thus, following the 1980 Act amendments, the FTC retained whatever rulemaking authority relating to unfair methods of competition that it previously had. By expressly declining to alter the FTC’s rulemaking authority with respect to unfair methods of competition, Congress affirmed the FTC’s rulemaking authority as authorized by Section 6(g) and affirmed in *National Petroleum Refiners*.

4. 1994 FTC Reauthorization

The final turn (to date) in the story of the FTC’s rulemaking authority came in 1994. Between 1980 and 1994, Congress failed to pass any reauthorization of the FTCA after the 1980 Act expired in 1982. A reauthorization bill was passed in 1994.¹²¹ Among other things, the 1994 Act codified a set of principles adopted by the FTC in a 1980 policy statement defining unfair acts or practices:

¹¹⁶ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified at 15 U.S.C. § 57a (2012)).

¹¹⁷ These provisions are still included in Section 18(b)(2).

¹¹⁸ *Id.* § 18(h).

¹¹⁹ *Id.* § 21. The sunset provision was included out of concern that the legislative veto might be unconstitutional. See H.R. REP. NO. 96-917, at 1154 (1980); S. REP. 96-500, at 1140 (1979).

¹²⁰ H.R. REP. NO. 96-917, at 1146–47.

¹²¹ Federal Trade Commission Act Amendments of 1994, Pub. L. No 103-312, 108 Stat. 1691 (1994).

The [FTC] shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. . . .¹²²

This language is important for two reasons. First, it again applies only to acts or practices—indeed, in this case, only unfair acts or practices, excluding both *deceptive* acts or practices and unfair methods of competition. Thus, this is the final example of the FTCA distinguishing between unfair methods of competition and unfair or deceptive acts or practices. Second, this language codifies a consumer welfare standard into the unfairness analysis—but limited this analysis to unfair acts or practices. The expression of this standard in the context of unfair acts or practices, but not in the context of unfair methods of competition, may have bearing in subsequent interpretation of the FTCA.¹²³

III. SECTION 5 AND ANTITRUST LAW

As set forth above, Congress' purpose in enacting the FTCA was to supplement the antitrust laws—to create a commission with the discretion to proscribe conduct injurious to competition that nonetheless was not proscribed by the antitrust laws. To this end, Congress gave the FTC broad adjudicatory and rulemaking authority.

Despite having this broad power, the FTC has restrained itself over the past thirty years to an interpretation of Section 5's proscription of unfair methods of competition. Until recently, the FTC has only used its Section 5 authority to enforce the Sherman Act.¹²⁴ In recent years,¹²⁵ the FTC has increasingly embraced a broader interpretation of Section 5, encouraged by a growing chorus of commentators and litigation losses.

¹²² *Id.* § 5(n).

¹²³ Indeed, as originally drafted, the FTCA condemned only “unfair methods of competition,” which the Court held to require harm to a competitor, not only to consumers. *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

¹²⁴ The FTC has authority under the Clayton Act to enforce its provisions directly. 15 U.S.C. § 21(b) (2012).

¹²⁵ See *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (noting that the FTC expressly limited its unsuccessful litigation to Section 2 of the Sherman Act).

This section traces the past thirty years of the FTC's approach to Section 5's proscription against unfair methods of competition. Part III.A discusses the period during which the FTC dialed its enforcement of Section 5 back to be coextensive with the Sherman Act. Part III.B discusses recent criticisms that the FTC has adopted an unduly restrictive understanding of Section 5. Part III.C looks at the FTC's ongoing reassertion of its Section 5 authority.

A. *Dialing Back Section 5*

This reluctance to use its Section 5 authority to challenge conduct beyond that of unlawful antitrust conduct typically finds three explanations. First, the FTC suffered a series of high-profile losses in the federal circuit courts in the early 1980s.¹²⁶ In each of these cases, the FTC alleged standalone Section 5 violations and found itself in the position of defending both the legal standard it purported to apply under Section 5 and the factual support for its conclusion under that standard.¹²⁷ The high burden suggested by these cases makes bringing independent Section 5 claims unappealing.

Ethyl Corp. v. FTC is illustrative. In *Ethyl*, the FTC argued that “Section 5 prohibits practices by individual firms which can be shown to have a significant adverse effect on competition by promoting price uniformity at supracompetitive levels, although this result is accomplished without evidence of an explicit agreement.”¹²⁸ In support of this, the FTC articulated what it called a “‘rule of reason’ test,” whereby “unilateral business practices” could violate the [FTCA] if the structure of the industry “rendered it susceptible to anticompetitive price coordination,” if there was “substantial evidence of actual noncompetitive performance,” and if there was “no ‘pro-competitive’ justification offsetting the harmful effect of the practices.”¹²⁹

¹²⁶ *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

¹²⁷ *Boise Cascade Corp.*, 637 F.2d at 581–82 (“The policies calling for deference to the [FTC] are, of course, in tension with the acknowledged responsibility of the courts to interpret Section 5. . . . [T]he weight of the case law, as well as the practices and statements of the [FTC], establish the rule that the [FTC] must find either collusion or actual effect on competition to make out a Section 5 violation for use of delivered pricing. . . . Since we have found that there is not substantial evidence in the record to support the [FTC’s] finding of anticompetitive effect, it follows that the [FTC’s] order may not be enforced.”).

¹²⁸ *Ethyl Corp. v. FTC*, 729 F.2d 128, 130 n.2 (2d Cir. 1984).

¹²⁹ *Id.*

In other words, the FTC used a balancing test in furtherance of its understood statutory mandate to take action against incipient violations of the antitrust laws. The United States Court of Appeals for the Second Circuit rejected this test and then rejected the FTC's factual support for the alleged Section 5 violation, judged against a standard the court crafted on its own.¹³⁰ The court's willingness to replace the FTC's understanding of Section 5, and its attempts to define the contours of Section 5 with its own interpretation, proved devastating to the FTC.¹³¹

¹³⁰ *Id.* at 139 (“In our view, before business conduct in an oligopolistic industry may be labeled ‘unfair’ within the meaning of [Section 5], a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.”); *id.* at 141 (“In short, we do not find substantial evidence in this record as a whole that the challenged practices significantly lessened competition in the antiknock industry or that the elimination of those practices would improve competition.”).

¹³¹ Judge Lumbard's concurrence and dissent in *Ethyl Corp.* is worth quoting at some length. He argues that the court was wrong to reject the FTC's standard, both because it need not have been an issue before the court and, more importantly for this discussion, because it was not unreasonable. After noting that the court found insufficient factual support to support a FTC's mission's own standard, Judge Lumbard explained:

As this failure [to show sufficient factual basis for the FTC's action] alone requires us to deny enforcement, it is unnecessary for us to reach the broader question raised by the FTC's order: whether, as my colleagues hold, the FTC's authority under [Section 5] is limited to conduct that is either per se pernicious (i.e., collusive, coercive, predatory or exclusionary) or could not have been adopted for other than pernicious reasons; or whether, as the FTC now argues, it extends also to conduct that may be acceptable in some situations but not in others, in light of poor industry structure and performance, substantial anticompetitive effects, and lack of offsetting procompetitive justification. . . .

On the scope of [Section 5], Judge Mansfield does not appear to argue that [Section 5] by its terms cannot be construed to extend to noncollusive practices that facilitate oligopolistic pricing. Nor do I think that such an argument has much weight, given the deliberate vagueness of the statutory language, and the generous reach of the Supreme Court's limiting gloss that [Section 5] is intended to reach only that conduct which is contrary to the spirit of the Sherman and Clayton Acts. Indeed, that limitation is particularly unlikely to prove troublesome for the FTC here, as there is substantial support for the view that the noncollusive adoption of “facilitating practices” like uniform delivered pricing systems is contrary not only to the spirit of Sherman Act § 1, but to its letter as well.

On the problem of vagueness in the FTC's proposed prohibition of noncollusive “facilitating practices,” I share Judge Mansfield's concern that it will be difficult to devise standards that are certain enough to allow companies to predict government intervention, and narrow enough not to encompass clearly desirable conduct. However, that difficulty inheres to

The second reason that the FTC has been reluctant to pursue an independent Section 5 is also related to these losses: The FTC's treatment in the courts—especially in an era in which it was already under substantial scrutiny for its rulemaking—was psychologically debilitating. The FTC reacted to these losses by restricting its Section 5 activity to the safe, court-approved confines of the antitrust laws.¹³²

The third reason for this shift was the evolution in antitrust law to focus on rigorous economic analysis, which supports the idea that Section 5 is necessarily limited by antitrust law. The publication of Robert Bork's 1978 book, *The Antitrust Paradox*, was a watershed moment in antitrust law, reshaping the law to have an almost exclusive focus on consumer welfare and economic efficiency.¹³³ Under this new approach, concern over conduct that had long been viewed as anticompetitive fell before the rigor of economic analysis. Few types of conduct, it turned out, are categorically anticompetitive. Almost any potentially anticompetitive conduct may be justified by procompetitive offsets, and antitrust law has evolved greater nuance over the past thirty-five years to avoid condemning economically efficient conduct.¹³⁴

This transition in antitrust law affected understandings of Section 5. First, an important conclusion of the economic approach to antitrust law is that conduct that harms a competitor—that is, that which has long been viewed as “unfair”—is often procompetitive and beneficial to consumers. The classic example is predatory

some degree in all balancing tests, including those decisions the FTC and the courts must routinely make in applying the Rule of Reason under Sherman Act § 1, or an analogous reasonableness standard under Sherman Act § 2 and Clayton Act § 7.

Ethyl Corp., 729 F.2d at 142–43.

¹³² See Daniel Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, at 4, LAW.UMICH.EDU (Jan. 19, 2010), <http://www.law.umich.edu/centersandprograms/lawandeconomics/abstracts/2010/Documents/10-001crane.pdf> (describing the FTC as “shell-shocked by its treatment in the courts when it has invoked an independent Section 5”).

¹³³ ROBERT BORK, *THE ANTITRUST PARADOX* (1978); see also Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2010).

¹³⁴ See, e.g., *Broad. Music v. Columbia Broad. Sys.*, 441 U.S. 1, 19 (1979) (“[O]ur inquiry must focus on whether the effect[s] . . . of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.”) (internal citations and quotations omitted).

pricing, where a person sells goods below cost to harm its competitors. Economically speaking, predatory pricing is widely viewed as a dubious strategy: Any firm engaging in it loses money and eventually must either abandon the strategy or go out of business.¹³⁵ In either case, the market will naturally remedy the “anticompetitive” conduct, and consumers actually benefit from lower prices during the period of the conduct.

Many practices traditionally thought of as unfair have been found to be economically justifiable under a wide range of circumstances. Either they are not likely to ever result in anticompetitive harms, or those harms are potentially justifiable.¹³⁶ This analysis calls into question the idea of Section 5 extending beyond the limits of antitrust law. If any ongoing practice demonstrably harms competition, it violates antitrust law. And there is little justification, the argument goes, to proscribe conduct that merely might lead to competitive harm, given the likelihood either that the market will correct the conduct on its own or that the conduct might ultimately be justified by procompetitive offsets.

B. *Dialing Back Section 5 Too Far?*

Critics have increasingly expressed concern that the FTC has dialed enforcement of Section 5 back too far.¹³⁷ Two general arguments support this view, the first of which is the concern that the antitrust laws are under-enforced or insufficient to protect against certain types of anticompetitive conduct. While most antitrust practitioners and scholars agree about most of what constitutes (and what should constitute) anticompetitive conduct, there remain some areas of disagreement.

¹³⁵ See also THOMAS J. DILORENZO, *THE MYTH OF PREDATORY PRICING* (Cato Institute 1992); John McGee, *Predatory Price Cutting: The Standard Oil (N.S.) Case*, 1 J.L. & ECON. 137 (1958); Roland Koller II, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971).

¹³⁶ See, e.g., Daniel Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911 (2009) (“As the 1980s became the 1990s, the Court jettisoned a wide swath of Warren Court precedents. Predatory pricing became a disfavored legal theory; maximum resale price maintenance became subject to the rule of reason and hence de facto legal; vertical resale price maintenance became difficult to prove. . . . Still, more work remained to be done in the 2000s, and the Chicago School continued to wreak its vengeance. Away went the presumption of market power in patent tie-ins, the duty of a monopolist to deal with competitors, . . . and, most recently, the ninety-six-year-old rule of per se illegality for vertical resale price maintenance.”).

¹³⁷ See, e.g., Rosch, *supra* note 4; Leibowitz, *supra* note 4 (“So everyone can agree (*I’ve decided*) that the [FTCA] goes beyond the metes and bounds of the Sherman Act.”) (emphasis added).

This was perhaps best demonstrated when the DOJ issued its report on Section 2 of the Sherman Act.¹³⁸ The DOJ Antitrust Division and the FTC have a long history of working together to issue joint reports and enforcement guidelines relating to the antitrust law.¹³⁹ In this pattern, the agencies worked together to host a series of workshops in the 2000s to consider the state of Section 2 of the Sherman Act. Many forms of conduct historically viewed as anticompetitive under Section 2 are increasingly viewed as competitively neutral or even procompetitive. After several years of work, the agencies could not agree on the report's conclusions. The DOJ believed that cases challenging conduct under Section 2 should be brought only under very limited circumstances, where the potential for anticompetitive harms was "substantially disproportionate" to any potential procompetitive justifications. The FTC argued that this standard "place[d] a thumb on the scales in favor of firms with monopoly or near-monopoly power."

This disagreement between the FTC and DOJ demonstrates one area of uncertainty over the extent or meaning of the antitrust laws.¹⁴⁰ We need not consider which agency's approach to Section 2 was right. Disagreement itself implies that there may be some forms of conduct that are recognized by a nontrivial number of modern antitrust practitioners and scholars that fall outside the accepted boundaries of the antitrust laws.

Another form of this argument is that as our economic theories and econometric tools continue to develop, they increasingly find exceptions to the conclusions of the first generation of post-Bork antitrust scholars. Einer Elhague, for instance, has cataloged exceptions to the economic theories that led the DOJ to

¹³⁸ United States Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, USDOJ.GOV (2008), <http://www.usdoj.gov/atr/public/reports/236681.pdf>. Section 2 of the Sherman Act governs single-firm conduct, for example where one firm refuses to deal with other firms. This is as opposed to coordinated conduct between multiple firms (e.g., price fixing), which is governed by Section 1 of the Sherman Act.

¹³⁹ United States Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property*, JUSTICE.GOV (Apr. 6, 1995), <http://www.justice.gov/atr/public/guidelines/0558>; United States Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, JUSTICE.GOV (Aug. 19, 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>; United States Dep't of Justice & Fed. Trade Comm'n, *Non-Horizontal Merger Guideline*, JUSTICE.GOV (June 14, 1984), <http://www.justice.gov/atr/public/guidelines/2614.pdf>.

¹⁴⁰ It is important to note that the DOJ subsequently withdrew the Section 2 report's conclusions. Press Release, United States Dep't of Justice, *Justice Dep't Withdraws Report on Antitrust Monopoly Law* (May 11, 2009), available at <http://www.justice.gov/opa/pr/2009/May/09-at-459.html>.

take its cautious approach to Section 2.¹⁴¹ Similarly, there is substantial current interest in behavioral economic theories, many of which claim to identify anticompetitive conduct that would not ordinarily be recognized under the antitrust laws.¹⁴² No matter whether they are right or wrong, these scholars' conclusions express a concern that modern antitrust law under-enforces, or does not recognize, restrictions on anticompetitive conduct. To the extent that they are right—both that this conduct is anticompetitive and that it falls outside the bounds of modern antitrust law—such conduct would fall under the auspices of Section 5 of the FTCA.

The second argument that enforcement of Section 5 has been dialed too far back is that it is not bounded solely by an economic conception of competition law. Thus, unlike modern antitrust law, unfair methods of competition include noneconomic public policy considerations, and Congress's delegation of authority to the FTC in Section 5 included the power to consider such factors. Indeed, Section 5(n) expressly provides that the FTC can consider public policy factors in some of its decisions, though it may not rely upon them as a primary basis for those decisions. It must be remembered that Congress is free to implement economically unsound policy, subject only to the very generous rational basis standard.¹⁴³ Congress' agencies are under no stricter requirement to implement economically sound policy, so long as they act within the reasonably interpreted bounds of their delegated authority.¹⁴⁴

C. Reasserting Section 5

In recent years, commentators and FTC Commissioners have argued for broader use of Section 5 to challenge unfair methods of competition.¹⁴⁵ This has

¹⁴¹ Einer Elhague, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

¹⁴² See, e.g., Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573 (2014); Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011).

¹⁴³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

¹⁴⁴ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

¹⁴⁵ See, e.g., Rosch, *supra* note 4; Leibowitz, *supra* note 4.

translated into a willingness on the part of the FTC to investigate an increasingly wider range of conduct under Section 5 than would be recognized under the antitrust laws alone. The FTC's approach to asserting its Section 5 authority in these cases is revealing, as discussed below. Despite the FTC's eagerness to use the uncertain breadth of Section 5 to investigate conduct, in the few cases that have proceeded to trial, the FTC's successful claims have ultimately relied on traditional Sherman Act jurisprudence. Importantly, asserting claims based upon a broader understanding of Section 5 is a step toward arguing that this broader understanding is entitled to deference.¹⁴⁶

Cases in which the FTC has asserted a broader understanding of Section 5 have generally been resolved in one of two ways: settlement or litigation. Most of the attention paid to the FTC's expanded use of Section 5 unfair methods of competition claims has focused on high-profile cases that have ultimately settled. When initially bringing a claim, the FTC need not allege anything more than a reason to believe that Section 5 has been violated.¹⁴⁷ The FTC need not frame its allegations with any greater specificity; in particular, it need not specify whether it asserts a violation of the traditional antitrust laws (which it can enforce under Section 5) or a standalone Section 5 claim. Rather than limit its options, the FTC typically does not specify a precise legal theory but rather embraces the expansive ambiguity inherent in Section 5's "unfairness" standard. This approach increases the litigation uncertainty faced by the targets of an FTC investigation, which can be used as leverage by the FTC in securing a favorable settlement.¹⁴⁸ This was the pattern used in *McWane* (discussed below). The FTC also used it in three recent high-profile investigations into high-tech industries: Intel,¹⁴⁹ N-Data,¹⁵⁰ and

¹⁴⁶ See *supra* Part I.C.1 (discussing strategic and litigating positions).

¹⁴⁷ See 15 U.S.C. § 45(b) (2012).

¹⁴⁸ See, e.g., Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835, 843 (2007) (explaining that firms may settle claims irrespective of their merits due to the "pendency, process, and uncertainty of such litigation impose unacceptable costs.").

¹⁴⁹ See *In the Matter of Intel Corp.*, 150 F.T.C. 420 (2010), in which the FTC's initial complaint alleges five violations, each of Section 5, and begins by explaining that Section 5 "gives the [FTC] a unique role in determining what constitutes unfair methods of competition." *Id.* The FTC notes that, "like a court of equity, the [FTC] may consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *Id.* (internal citations and quotations omitted).

¹⁵⁰ See Fed. Trade Comm'n, *Negotiated Data Solutions LLC.*, *In the Matter of*, FTC.GOV, <http://www.ftc.gov/enforcement/cases-proceedings/051-0094/negotiated-data-solutions-llc-matter> (last updated Sept. 23, 2008). Settlement announcement concurrent with the complaint filing prompted dissents from

Google.¹⁵¹ This approach has also been the basis of the FTC's privacy and data security jurisprudence, spanning more than one hundred cases.¹⁵²

While the FTC's use of Section 5 in high-profile cases has garnered the most attention, its use of Section 5 in lower profile cases, especially those that do not settle, is more revealing. As an administrative agency, a case brought by the FTC is typically heard by an Administrative Law Judge ("ALJ").¹⁵³ The FTC prepares and files a complaint, the subject of the investigation files an answer, and both parties submit briefs of their arguments to the ALJ, who will then submit findings of fact and law in an Initial Decision to the Commission.¹⁵⁴

A curious thing has happened between the complaint and briefing stages of unfair method of competition cases that the FTC brings before an ALJ. Often, the

two members of the FTC, who argued that the FTC's reliance on standalone Section 5 authority was inappropriate. See *Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, File No. 0510094*, FTC.GOV (2008), available at <http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf> ("The facts do not support a determination of antitrust liability. The preconditions for use of stand-alone Section 5 authority to find an 'unfair method of competition' are not present. And the novel use of our consumer protection authority to protect large corporate members of a standard-setting organization [] is insupportable."); *Dissenting Statement of Commissioner William E. Kovacic, In the Matter of Negotiated Data Solutions LLC, File No. 0510094*, FTC.GOV (2008), available at <http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122kovacic.pdf> (objecting to the finding of Section 5 liability and expressing concerns about the settlement mechanism).

¹⁵¹ See Fed. Trade Comm'n, *Motorola Mobility LLC, and Google Inc., In the Matter of*, FTC.GOV, <http://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter> (last updated July 24, 2013). As with *N-Data*, announcement of this settlement was concurrent with filing of the complaint, and again it proved to be a controversial use of the FTC's standalone Section 5 authority. See *Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Motorola Mobility LLC and Google Inc. FTC File No. 121-0120*, FTC.GOV (Jan. 3, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf> ("I dissented [in a prior case] in large part because I question whether such conduct, standing alone, violates Section 5. . . . Not only does today's decision raise many of the same concerns for me [but] the [FTC] is now expanding its new policy. . . . I decline to join in another undisciplined expansion of Section 5.").

¹⁵² See, e.g., David J. Solove & Woodrow Hartzog, *The FTC and the Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

¹⁵³ The process for administrative procedures is governed by 16 C.F.R. § 3 (2014). "Hearings in adjudicative proceedings shall be presided over by a duly qualified [ALJ] or by the [FTC] or one or more members of the [FTC] sitting as [ALJs]." *Id.* at § 3.42. See also Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC.GOV (July 2008), <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

¹⁵⁴ See *id.* (also providing for appeals to the FTC, which are subsequently appealable to Article III courts).

complaint will cite only Section 5 as the legal basis for the complaint. In the vast majority of cases, this is sufficient to spur the target of the investigation to settle, and, typically, the settlement will have been agreed to prior to the filing of the complaint. In those cases that do not settle, the FTC explains in its brief that Section 5 unfair methods of competition claims incorporate Sections 1 and 2 of the Sherman Act.¹⁵⁵

There is only one recent case in which the FTC has maintained through litigation that Section 5's proscription of unfair methods of competition is broader than that of the Sherman Act; in all other cases, the FTC has either settled the complaint based upon Section 5 or narrowed the complaint once the defendant refuses to settle.¹⁵⁶ Count three of the Administrative Complaint against McWane, Inc., alleges an "invitation to collude."¹⁵⁷ As the FTC argued in its Complaint Brief, the FTCA "encompasses Section 1 and 2 of the Sherman Act, and is also broader to capture more conduct, including invitations to collude."¹⁵⁸ Complaint counsel lost this claim before the ALJ.¹⁵⁹ Importantly, although the decision does

¹⁵⁵ See generally Fed. Trade Comm'n, *North Carolina Board of Dental Examiners, The, In the Matter of*, FTC.GOV, <http://www.ftc.gov/enforcement/cases-proceedings/081-0137/north-carolina-board-dental-examiners-matter> (last updated June 4, 2013). In its initial administrative complaint, the FTC alleged only violations of Section 5. See *id.*; see also Final Brief of Respondent, N.C. Bd. of Dental Exam'rs v. FTC, 717 F.3d 359 (4th Cir. 2013) (No. 12-117), 2012 WL 2922441, at *12 (noting that "On the Board's appeal to the [FTC], the latter reviewed the entire record de novo, and—noting that, like the ALJ, it would apply the standards of Section 1 of the Sherman Act—concluded that the Board had violated the FTC Act."). *North Carolina Board of Dental Examiners v. FTC* is currently on appeal before the Supreme Court. See *North Carolina Board of Dental Examiners v. Federal Trade Commission*, SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/north-carolina-board-of-dental-examiners-v-federal-trade-commission/> (last visited Dec. 3, 2014).

¹⁵⁶ This is based upon the author's own review of the FTC docket and conversations with others who study or participate in this area.

¹⁵⁷ See generally Fed. Trade Comm'n, *McWane, Inc., and Star Pipe Products, Ltd., In the Matter of*, FTC.GOV, <http://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter> (last updated Aug. 29, 2014).

¹⁵⁸ Complaint Counsel's Pre-Trial Brief A Exhibits, *In the Matter of McWane, Inc.* (Docket No. 9351) (F.T.C. 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120823mcwanebrief.pdf>.

¹⁵⁹ *McWane, Inc.*, File No. 101-0080, 369 (F.T.C. May 8, 2013) (ALJ Initial Decision), <http://www.ftc.gov/sites/default/files/documents/cases/2013/05/130509mcwanechappellddecision.pdf> ("For all the foregoing reasons, Complaint Counsel has failed to prove any invitation to collude. . . .") (internal citations omitted). Both *McWane* and Complaint counsel appealed their respective losses before the ALJ to the full FTC, with the exception that Complaint counsel did not appeal the pure Section 5 "invitation to collude."

accept the theoretical viability of an “invitation to collude” claim,¹⁶⁰ the ALJ notes that, “[a]lthough the [FTC] has previously challenged alleged ‘invitations to collude’ as unlawful under Section 5, Complaint Counsel cites no litigated case that has found the existence of an ‘invitation to collude’ within the purview of Section 5.”¹⁶¹

The fact that this case raises a pure Section 5 claim does not mean that it necessarily implicates *Chevron* deference, or that the FTC would necessarily win by virtue of such deference. The fact that the FTC is now litigating pure Section 5 claims, however, places the legal standard of such a claim—and the question of who determines what that standard is (that is, whether FTC interpretations of Section 5 receive *Chevron* deference)—front and center. Indeed, the ALJ in *McWane* expressly laments the lack of a clear standard by which to evaluate “invitation to collude” claims,¹⁶² and it seems likely that he would have deferred to the FTC’s preferred legal standard had it been promulgated in a way sufficient to merit *Chevron* deference.¹⁶³

IV. SECTION 5 AND CHEVRON

The extent of Section 5—in particular, whether it is broader than or bounded by the antitrust laws—has been a topic of intense debate in recent years.¹⁶⁴ Participants in this debate have given little consideration to whether the FTC has

¹⁶⁰ *McWane, Inc.*, File No. 101-0080 at 363, 365. The ALJ, noting no precedent, considers what material he can to establish “reference points.” *Id.*

¹⁶¹ *Id.* at 363.

¹⁶² *Id.* (“[T]he type of communications that will prove an unlawful ‘invitation to collude’ is unclear.”).

¹⁶³ *See id.* at 363 n.36 (rejecting Complaint counsel’s attempts to save the claim by pointing to prior FTC statements that *McWane*’s conduct constituted an invitation to collude and noting in part that statements issued in conjunction with a consent decree “do not constitute regulatory law,” having been made through neither adjudication or rulemaking). While the ALJ does not cite to *Chevron* or *Mead*, this is the sort of discussion one would expect to see in an opinion considering whether to defer to an agency construction of a statute. Substantively, the ALJ’s analysis is incomplete (under *Mead*, the question is not merely whether a construction was promulgated through adjudication or rulemaking—indeed, every agency action is, by definition, either adjudication or rulemaking, even those not meriting deference)—however, for reasons similar to those discussed in Part I.C.1 (discussing litigation positions), the conclusion that a statement accompanying a consent decree does not merit deference is almost certainly correct.

¹⁶⁴ *See, e.g.*, Fed. Trade Comm’n, *Section 5 of the FTC Act as a Competition Statute*, FTC.GOV (Oct. 17, 2008), <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

the power to resolve this question or whether it can be resolved only by the courts or Congress.

With rare exception, the few commentators who have considered whether the FTC has this power—that is, whether FTC interpretations of Section 5 receive *Chevron* deference such that they are binding upon the courts—have argued that it does not.¹⁶⁵ This section explains why these arguments are wrong. Section 5 is precisely the sort of statute to which *Chevron* applies. This section considers arguments that have been made against the application of *Chevron* to FTC interpretations of Section 5 and explains why they are wrong. It concludes by considering *FTC v. Indiana Federation of Dentists*, the only case in which the Supreme Court has considered the legal standard that applies to the FTC’s “unfair methods of competition” authority since *Chevron*.¹⁶⁶ Commentators have interpreted *Indiana Federation of Dentists* as establishing a lower level of deference for FTC interpretations of Section 5; this section explains why this is an outdated and incorrect interpretation of the Court’s opinion.

A. Section 5 is Precisely the Sort of Statute to Which Chevron Applies

As a threshold matter, Section 5 is precisely the sort of statute to which *Chevron* deference is meant to apply.¹⁶⁷ At a mechanical level, *Chevron* instructs courts to first ask whether the meaning of the statute is clear.¹⁶⁸ Both “unfair methods of competition” and “unfair or deceptive acts or practices” are inherently ambiguous; courts need not turn to historical documents to determine whether a specific meaning was intended by Congress or whether Congress clearly intended to delegate interpretive authority to the FTC. Nearly every word of the statute is rife with ambiguity: What is unfair? Unfair to whom? What is deceptive? What is a

¹⁶⁵ The discussion in this section frequently cites Dan Crane’s work. Crane has written extensively on antitrust institutions and, in so doing, has presented the most comprehensive discussions of judicial deference to agency interpretations of Section 5. The frequent citation to his work here, in the context of explaining why the common understandings that he presents are wrong, should not be taken as criticism of his work. To the contrary, it is a reflection of the comprehensive nature of his work.

¹⁶⁶ The Court has recently decided a second case relating to the FTC’s substantive legal authority, but that case did not consider the substantive legal standard that governs that authority nor the relationship between the FTC and the courts in determining that standard. *See generally* *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

¹⁶⁷ In addition to this discussion, see Caust-Ellenbogen, *supra* note 10, at 817 (explaining that FTC interpretations meet the typical factors required for *Chevron* to apply).

¹⁶⁸ *See supra* Part I.A.

method? An act? A practice? What is competition? As the Court has noted, the standard is “by necessity, an elusive one.”¹⁶⁹

Absent clarifying language in the statute itself, or in some cases references outside the statute that indicate contrary congressional intent,¹⁷⁰ the ambiguity inherent in the language of Section 5 is sufficient to trigger *Chevron* deference. The sole task of the courts is—or should be—to ensure that, whatever construction the FTC gives to Section 5, that construction is permissible within the boundaries of the statute.¹⁷¹

The argument for deference is even stronger when we consider outside references. The statutory history has consistently demonstrated a congressional intent to grant the FTC broad discretion to define the scope of Section 5 and, in particular, that the scope of Section 5 is broader than that of the antitrust laws.¹⁷² Section 5 was enacted in response to concerns that the courts had interpreted the antitrust laws too narrowly;¹⁷³ it was deliberately drafted with language that had not previously been considered by the courts.¹⁷⁴ When the Court imposed an overly narrow construction on the statute in the 1950s, Congress amended the statute to overcome that narrowing interpretation.¹⁷⁵

Section 5 is, thus, a case study in each of the four rationales for *Chevron* deference:¹⁷⁶ congressional intent; agency expertise; concern about the courts’ limited political accountability as compared to Congress and its agencies; and the separation of powers—all of which urge deference to the FTC’s interpretation of Section 5. It is hard to imagine a statute better suited to *Chevron* deference than Section 5.

¹⁶⁹ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (citing *FTC v. Cement Inst.*, 333 U.S. 683 (1948)).

¹⁷⁰ *See supra* Parts I.B and I.C.

¹⁷¹ *See supra* Part I.A.

¹⁷² *See supra* Part II.A.

¹⁷³ *See supra* Part II.A.

¹⁷⁴ *See supra* Part II.A.

¹⁷⁵ *See supra* Part II.A.

¹⁷⁶ *See supra* Part I.A.

B. *Common Explanations for Why Chevron Does Not Apply Are Wrong*

The rest of this section explores the general, but erroneous, consensus that has developed among antitrust commentators that *Chevron* does not apply to FTC interpretations of “unfair methods of competition” under Section 5.

There are two general arguments why *Chevron* does not apply to Section 5. The first argument is that *Chevron* would apply but for some circumstances that take Section 5 out from its domain. The Second is that some other standard affirmatively applies to, and therefore displaces *Chevron* from, FTC interpretations of Section 5. This first set of understandings is addressed in Part IV.B, which includes arguments that *Chevron* does not apply because: (1) the FTC lacks, or is not exercising, statutory rulemaking authority; (2) the FTC’s statutory authority overlaps with DOJ enforcement of the antitrust laws; and (3) judicial-interpretation of Section 5 takes priority over FTC interpretations, either because the courts have previously interpreted the statute or otherwise have jurisdiction to develop competition law. Part IV.C takes up the argument that *Indiana Federation of Dentists* affirmatively holds that FTC interpretations of Section 5 are subject to *de novo* review.

It is useful to note that these are all “Step Zero” questions¹⁷⁷ that go to whether *Chevron* applies at all, not to whether Section 5 is ambiguous (step one) or whether the FTC’s construction of that ambiguity is permissible (step two).

These understandings are incorrect, albeit for interesting reasons. Parts IV.B and IV.C consider how they developed and explain why they are incorrect—why, that is, *Chevron* likely does apply to FTC interpretations of “unfair methods of competition” under Section 5.

1. Does *Chevron* Not Apply Because the FTC Lacks Sufficient Rulemaking Authority?

Once of the most common explanations for why the FTC would not receive *Chevron* deference is that it lacks substantive rulemaking authority. There has long been disagreement over whether the FTC has rulemaking power and, if it does, what the extent of that power is.¹⁷⁸ *Chevron* deference is contingent upon an agency’s ability to establish binding legal norms. If the FTC lacks sufficient power

¹⁷⁷ See *supra* Part B.

¹⁷⁸ See *supra* Part II.C.

to establish such norms—typically though substantive rulemaking authority—then *Chevron* does not apply.¹⁷⁹

Dan Crane’s arguments on this front are representative. Crane explains that, “insofar as its antitrust mission is concerned, the FTC has essentially the status of a law enforcer and not a norm creator.”¹⁸⁰ In other words, with respect to antitrust matters, the FTC enforces antitrust laws (including through its own adjudicatory powers). Under this view, the FTC does not have the power to say what the antitrust law is. Crane uses this to offer a *Mead*-like explanation for why *Chevron* does not apply: “Courts are wary of agency assertions that the agency should be accorded independent space to develop *legal* norms.”¹⁸¹

The problem with this argument is that it is facially wrong: It has long been held that the FTC *does* have substantive rulemaking authority.¹⁸² Congress has expressly acknowledged, discussed, and declined to alter this power in the context of Section 5’s prohibition against unfair methods of competition.¹⁸³ There is important, ongoing debate among administrative law scholars over whether the holding in *National Petroleum Refiners* was correct—but this debate occurs in a context much broader than that of the FTC.¹⁸⁴ As a matter of long-established precedent, the FTC does have substantive rulemaking authority. This is, literally, the example casebooks use to explain this black letter principle of administrative law.

What is more, *Mead* makes clear that the “rulemaking” power necessary to receive deference—that is, “to make rules carrying the force of law”—may be satisfied “by an agency’s power to engage in adjudication or notice-and-comment rulemaking.”¹⁸⁵

It is possibly important to distinguish between the FTC’s rulemaking power relating to unfair methods of competition and unfair or deceptive acts or practices.

¹⁷⁹ See *supra* Part I.B.

¹⁸⁰ Daniel Crane, *Technocracy*, 86 TEX. L. REV. 1159, 1206 (2008).

¹⁸¹ CRANE, *supra* note 10, at 136.

¹⁸² *Supra* Part II.C.1 (discussing *National Petroleum Refiners*).

¹⁸³ See *supra* Part II.A (discussing the legislative history of the 1938, 1975, 1980, and 1994 amendments to the FTCA); see also *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).

¹⁸⁴ See *infra* V.C.

¹⁸⁵ *United States v. Mead*, 533 U.S. 218, 227 (2001).

As discussed in Part II.C, Magnuson-Moss (and subsequent amendments) added additional procedural requirements for rulemaking relating to unfair or deceptive acts or practices. On initial blush, one might expect these procedural requirements to reduce the deference given to the FTC; they arguably suggest that Congress has some skepticism as to the FTC's rulemaking judgment.

At the same time, the fact that Congress elected to add these additional procedures relating to unfair or deceptive acts or practices, but declined to do so with respect to the FTC's unfair methods of competition rulemaking power, suggests that Congress was not concerned with the FTC's power to engage in substantive rulemaking in this area. Given that Congress was aware that the Court held that the FTC does have power under Section 6(g), Congress's decision to decline to alter this power can be taken as an expression of confidence in the FTC's competence to exercise it.¹⁸⁶

2. Does *Chevron* Not Apply Because the FTC Is Not Exercising Its Rulemaking Authority?

A related argument is that FTC interpretations do not merit deference because they are not made through the exercise of its rulemaking authority. Depending upon the circumstances of a particular matter, this may or may not be a valid reason that *Chevron* does not apply. It is unquestionably the case, for instance, that interpretations made in the course of litigation may not merit deference.¹⁸⁷ Crane is correct to say that "a 'just trust us strategy' has no chance of success in the courts."¹⁸⁸

But an agency need not arrive at its interpretations through a rulemaking process for them to receive full *Chevron* deference. So long as the agency's consideration of the matter is sufficiently rigorous, interpretations arrived at in the course of case-by-case adjudications may be entitled to *Chevron* deference.¹⁸⁹ Indeed, the Court has held that many rules are best made in the context of case-by-

¹⁸⁶ See *supra* Part II.C.

¹⁸⁷ See *supra* Part I.C.1 (discussing litigation positions).

¹⁸⁸ Crane, *supra* note 180, at 5.

¹⁸⁹ See *supra* Part I.C.2.

case adjudication,¹⁹⁰ and the Court does not make deference contingent upon exalting rulemaking's form over its function.¹⁹¹

Thus, Crane is mistaken where he says that, “[b]ecause it is not formally creating antitrust norms but merely enforcing a statute, the FTC receives little deference from the courts.”¹⁹² While the FTC’s norm-creating *modus operandi* may be adjudicatory, this is quite reasonably understood as the most appropriate modality for it to carry out its statutory mandate. At the time of its creation, Congress noted the difficulty of crafting *ex ante* rules to circumscribe unfair methods of competition; rather, a case-by-case approach is better suited to the FTC’s mission of both setting and enforcing competition norms.¹⁹³

The FTC is hardly unique in this sense. As discussed by the Court in *Chenery II*, where “the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule, . . . the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.”¹⁹⁴ The Court further explained:

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.¹⁹⁵

Crane and others are undoubtedly correct that the courts have historically been reluctant to defer to agency interpretations that they do not believe are sufficiently backed by rulemaking.¹⁹⁶ But as the Court made clear in *Mead*, there are myriad ways in which agencies can exercise their power to establish binding

¹⁹⁰ SEC v. *Chenery*, 332 U.S. 194, 203 (1947).

¹⁹¹ See *supra* Part III.B.

¹⁹² Crane, *supra* note 180, at 1200.

¹⁹³ See *supra* Part II.C.

¹⁹⁴ *Chenery*, 332 U.S. at 203.

¹⁹⁵ *Id.* at 202.

¹⁹⁶ Crane, *supra* note 180.

legal norms: “Rulemaking” is not the *sine qua non* of deference.¹⁹⁷ In the specific context of the FTC, the most recent relevant case is *Ethyl Corp.*—a case decided by the Second Circuit months before the Court decided *Chevron* and more than fifteen years before *Mead*. It is true that the Court in *Ethyl Corp.* rejected the FTC’s test for what constitutes an unfair method of competition at least in part because it was adopted through adjudication instead of rulemaking.¹⁹⁸ But as discussed in Judge Lumbard’s concurring and dissenting opinion, the court need not have addressed the substance of the FTC’s preferred test.¹⁹⁹ Rather, he notes that while “it will be difficult to devise standards that are certain enough to allow companies to predict government intervention, and narrow enough not to encompass clearly desirable conduct” when acting through adjudication, this “difficulty inheres to some degree in all balancing tests.”²⁰⁰ As seen above, the Court explained in *Chenery II* that such difficulties suggest that agencies should rely on case-by-case adjudication instead of *ex ante* rulemaking to develop binding legal norms—not that they should simply forego developing such norms where developing rules is difficult.

3. Does *Chevron* Not Apply Because FTC Authority Overlaps with the DOJ’s Authority?

Perhaps the most enduring explanation for why *Chevron* does not apply to FTC interpretations of Section 5 is that its authority overlaps with that of the DOJ’s antitrust authority, and *Chevron* does not apply to agencies with overlapping statutory authority.²⁰¹ As an initial matter, it is simply not accurate to categorically say that *Chevron* does not apply in cases of overlapping statutory authority.²⁰²

¹⁹⁷ See *supra* Part I.B.

¹⁹⁸ As argued by the Second Circuit, “the [FTC] owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.” *Ethyl Corp. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984). Such a duty could only be met through *ex ante* rulemaking.

¹⁹⁹ *Ethyl Corp.*, 729 F.2d at 142.

²⁰⁰ *Id.* at 143 (Lumbard, J., dissenting). Judge Lumbard expressly notes that this “difficulty inheres . . . [in] those decisions the FTC and the courts must routinely make in applying the Rule of Reason under Sherman Act § 1, or an analogous reasonableness standard under Sherman Act § 2 and Clayton Act § 7.” *Id.*

²⁰¹ See Crane, *supra* note 180, at 1209 (discussing “the fact that the FTC and Antitrust Division [of the DOJ] share responsibility for enforcing the antitrust laws”); Caust-Ellenbogen, *supra* note 10, at 817 (“*Chevron* is also inapplicable in situations involving parallel enforcement modes, such as the antitrust laws.”); *Section 5 of the FTC Act as a Competition Statute*, FTC.GOV (Oct. 17, 2008), <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

²⁰² See *supra* Part I.C.2.

Modern *Chevron* analysis treats this as a Step-Zero question, acknowledging that Congress may have intended such overlapping delegations of statutory authority or may have intended one agency to retain interpretive authority at the expense of the other.²⁰³

But there is a more fundamental problem with this argument against the application of *Chevron*. Section 5 *does not* (necessarily) overlap with the antitrust laws. Section 5 was enacted precisely to extend to conduct outside the scope of the antitrust laws—and nothing in Section 5 references the antitrust laws. It is surely the case that current understandings of Section 5 incorporate the antitrust laws. But this is a judicial construction of the statute.²⁰⁴ Under *Brand X*, that construction is not binding on the FTC; and even if the FTC has previously endorsed that understanding, this poses little, if any, obstacle to the FTC changing this interpretation under *Fox I*.²⁰⁵

Fundamentally, this argument is premised on a circular understanding that the FTC is not entitled to deference because the courts have interpreted Section 5 in a way that precludes deference. It surely is the case that the FTC cannot interpret Section 5 in a way that constrains other agencies' (or the courts') interpretations of the antitrust laws. But so long as it is interpreting Section 5, the mere existence of a cognate area of law does not limit the applicability of *Chevron*. This must especially be the case where, as here, Congress delegated authority precisely because it felt that that cognate area of law was too constricted²⁰⁶—a concern redoubled because Congress was also concerned that part of this constriction was due to the courts.²⁰⁷

²⁰³ See Freeman & Rossi, *supra* note 50; Gersen, *supra* note 51.

²⁰⁴ See *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454–55 (1986).

²⁰⁵ See *supra* Part I.C.3.

²⁰⁶ See *supra* Part II.A (discussing the need for case-by-case adjudication because of the difficulty of legislatively circumscribing the undesirable conduct).

²⁰⁷ See *supra* Part II.A; see also Crane, *supra* note 180, at 1207 (“In the case of the [FTCA], at least, there is evidence that Congress intended to delegate to the FTC, not the courts, the primary responsibility for developing a body of antitrust common law.”).

4. Does *Chevron* Not Apply if Courts Have Previously Acted?

This case of circularity highlights another misconception about the application of *Chevron* to Section 5: that “courts are most likely to defer to administrative agency judgments . . . about which the courts have not developed a deeply rooted body of precedent.”²⁰⁸ *Brand X* speaks directly to this argument: Existing judicial precedent is relevant to the interpretation of an agency’s statute that is “otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”²⁰⁹ While some courts may have held historically to judicial precedent over agency interpretation of ambiguous statutory meaning, this is not the modern approach. It may be the case that prior judicial interpretations present concerns that must be addressed for a new statutory construction to be adopted,²¹⁰ but this concern applies the same to prior agency constructions as to prior judicial constructions.

5. Does *Chevron* Not Apply Because Courts, Not Agencies, Develop Common Law?

Possibly the most fascinating argument against the applicability of *Chevron* to Section 5 is that interpretation of Section 5 is akin to common-law lawmaking, not merely resolving statutory ambiguity—and that such power is beyond the scope of *Chevron*. This understanding is carried by—or pushes against—deep currents in administrative law.

As explained by Crane:

[The FTCA is] not merely susceptible to two or more plausible readings but [is] essentially [a] delegation[] to either courts or agencies—which one is the question—to create a federal antitrust common law within a specified remedial structure. In the case of the [FTCA], at least, there is evidence that Congress intended to delegate to the FTC, not the courts, the primary responsibility for developing a body of antitrust common law. But courts tend to be jealous about the creation of common law, which they view as their distinct prerogative.

²⁰⁸ Crane, *supra* note 180.

²⁰⁹ Nat’l Cable & Telecomms Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

²¹⁰ FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2012) (noting a possible need for heightened care where “prior policy has engendered serious reliance interests that must be taken into account”).

Under at least one view of administrative law, the more an agency's decision veers in the direction of policy making and away from interpretation of a statute, the more intrusive judicial review should be. Even if courts are otherwise willing to give agencies policy-making breathing room, they may be reluctant to do so when the agency's norm creation is structured as a common law process—a judicial archetype.²¹¹

Of course, “jealousy” is not a jurisprudential theory. But, as Crane notes, this view is shared by some administrative law scholars. For instance, David Zaring has offered a realist understanding of *Chevron*, arguing that courts defer to agencies based upon their assessment of whether the agencies are acting reasonably, instead of based on *Chevron*'s stated standard.²¹²

But the trend of modern administrative law—as crafted by the Supreme Court—runs the opposite direction. As explained previously, agencies have won the war of interpretive authority.²¹³ This was first strongly seen in *Brand X*, where the Court held that prior judicial interpretations of ambiguous statutes are not binding on agencies.²¹⁴ The point was made even more directly in *American Electric Power*, where the court held that congressional delegation of interpretive authority—based on the same reasoning used in *Chevron*—displaces federal common law.²¹⁵ In other words, the Court has spoken to Crane's concern that the FTC Act is “[a] delegation[] to either courts or agencies—which one [being] the question—to create a federal antitrust common law” in several other contexts, and it has come down on the side of the agencies.

²¹¹ Crane, *supra* note 180, at 1207–08.

²¹² See generally Zaring, *supra* note 27.

²¹³ See *supra* Part I.C.3 (discussing the *Brand X* decision).

²¹⁴ See generally *Brand X*, 545 U.S. 967.

²¹⁵ *Id.*; see also *Am. Elec. Power v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (“Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law. Due regard for the presuppositions of our embracing federal system as a promoter of democracy does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue.”); *id.* at 2539 (“It is altogether fitting that Congress designated an expert agency . . . as best suited to serve as primary regulator. . . . The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”).

I do not mean to overstate this conclusion; this is still an evolving area of administrative law. But the trend appears to be toward greater deference to agencies to develop federal common law. It is the path suggested by *Brand X*. *Mead* and *Chenery II* make clear that agencies can receive deference when acting through common law-like processes;²¹⁶ it is the path suggested by *Fox I*;²¹⁷ it is the path suggested by *American Electric Power*.²¹⁸

C. Indiana Federation of Dentists Supports Application of Chevron

Indiana Federation of Dentists bears special discussion. It is regularly cited for the proposition that courts conduct *de novo* review of FTC legal determinations under Section 5, according some (limited) deference to the FTC.²¹⁹ It also bears special note as it is the most recent Supreme Court opinion considering the application of Section 5's prohibition against unfair methods of competition—the only opinion to do so since *Chevron*.²²⁰

The most cited passage from *Indiana Federation of Dentists* explains that:

The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although even in considering such issues the courts are to give some deference to the [FTC's] informed judgment that a particular commercial practice is to be condemned as “unfair.”²²¹

²¹⁶ See *supra* Parts IV.B.1, B.2.

²¹⁷ See *supra* Part I.C.3.

²¹⁸ This topic is the subject of my own ongoing work. See Hurwitz, *supra* note 19.

²¹⁹ See, e.g., Crane, *supra* note 180, at 1200; Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); see also Caust-Ellenbogen, *supra* note 10.

²²⁰ In 2013, the Court decided another case relating to the substantive scope of the FTC's authority. See generally *FTC v. Actavis*, 133 S. Ct. 2223 (2013). That case, however, held that the alleged conduct could be found to violate the antitrust laws as traditionally understood—that is, as evaluated under the “rule of reason” standard traditionally applied under the Sherman Act. *Id.* The Court's *Actavis* opinion, therefore, offers no guidance on the role of the FTC versus that of the courts in defining the legal standard governing “unfair methods of competition.”

²²¹ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

This language has been cited as requiring *do novo* review of all legal questions, including the legal meaning of Section 5.²²² Dan Crane has called this an “odd standard,”²²³ noting that ordinarily “this is technically a question of *Chevron* deference, although the courts have not articulated it that way in the antitrust space.”²²⁴ Indeed, it seems remarkable that *Indiana Federation of Dentists* does not even mention *Chevron*—a fact that has led antitrust commentators to believe that “[o]ne cannot explain judicial posture in the antitrust arena in *Chevron* terms.”²²⁵ But this is an over-reading of *Indiana Federation of Dentists*. Indeed, the case can instead be read as entirely in line with *Chevron*.

First, it is unsurprising that *Indiana Federation of Dentists* does not cite *Chevron*. The *Indiana Federation of Dentists* petitioned for *certiorari* from a Seventh Circuit opinion that had been argued before *Chevron* was decided, and the FTC was arguing for an uncontroversial interpretation of Section 5 as applying Section 1 of the Sherman Act.²²⁶ In other words, the FTC had never structured its case to seek deference, and it had no need to argue for any deference before the Court. Given the case’s history and posture, it would have been more surprising had the parties or the Court cited to *Chevron*.

Moreover, it took several years for the importance of *Chevron* to become understood and to filter its way into judicial review of agency statutory interpretation. Over the next several years, the circuits regularly cited *Indiana Federation of Dentists* to explain the standard of review for an agency’s interpretation of its organic statutes.²²⁷ Importantly, these cases recognized that there was some confusion as to the changing standard of review,²²⁸ framed their

²²² Crane, *supra* note 180, at 1200.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Caust-Ellenbogen, *supra* note 10.

²²⁶ *Compare* Ind. Fed. of Dentists v. FTC, 745 F.2d 1124 (7th Cir. 1984), *rev’d*, 476 U.S. 447 (1986), *with Chevron*, 467 U.S. 837. And recall, as explained above, that it has long been understood that Section 5 incorporates the antitrust laws. *See supra* note 82.

²²⁷ *MesterMfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *Whiteside v. Sec’y of Health & Human Servs.*, 834 F.2d 1289 (6th Cir. 1987); *Tex. E. Prods. Pipeline Co. v. Occupational Safety & Health Review Comm’n*, 827 F.2d 46 (7th Cir. 1987); *Dir. Office of Workers’ Comp. Programs, United States Dep’t of Labor v. Ball*, 826 F.2d 603 (7th Cir. 1987).

²²⁸ “The standard of review in this case has been much discussed but little analyzed. . . . [I]n this case the dispute arises because neither the statute nor the appended regulations provide a clear answer to the issue raised by these unusual facts. [T]he scope of this court’s review is *not*, as both parties have

analysis in terms of *Skidmore* (the precursor to *Chevron* in this line of cases),²²⁹ and largely reached *Chevron*-like conclusions, despite *Indiana Federation of Dentists*'s suggestion of a lower level of deference.²³⁰ Perhaps most importantly, today it is *Chevron*, not *Indiana Federation of Dentists*, that is recognized as the law of the land—at least, for every regulatory agency other than the FTC.

Indeed, a close reading of *Indiana Federation of Dentists* finds that it accords with *Chevron*. The continuation of the paragraph quoted above goes on to explain that:

The standard of “unfairness” under the [FTCA] 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 [FTC] determines are against public policy for other reasons. *Once the [FTC] has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair.* In the case now before us, the sole basis of the FTC’s finding of an unfair method of competition was [its] conclusion that the [alleged conduct] was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act. Accordingly, the legal question before us is whether the [FTC’s] factual findings, if supported by evidence, make out a violation of Sherman Act § 1.²³¹

This language alters the paragraph’s initial proposition that the legal issues are for determination by the courts. Rather, the Court recognizes that Section 5 is inherently ambiguous. It is, therefore, up to the FTC to choose the legal standard

instructed the court, ‘de novo.’” *Whiteside*, 834 F.2d. at 1292; *but see id.* at 1297 (arguing that even after *Indiana Federation of Dentists* (and *Chevron*) “courts are under no obligation to defer to the agency’s legal conclusions”).

²²⁹ *Tex. E. Prods.*, 827 F.2d 46 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *Ball*, 826 F.2d 603; *Whiteside*, 834 F.2d at 1292.

²³⁰ *Whiteside*, 834 F.2d at 1292 (“The question for this court, therefore, is not whose interpretation of the statute we prefer, but whether the Secretary’s interpretation is reasonable, consistent, and persuasive.”); *Texas E.*, 827 F.2d at 47 (“[M]ost often a reviewing court will accord some substantial deference to an agency’s interpretation of its own statutes or regulations.”); *Mester*, 879 F.2d at 565 (“If an agency’s construction is reasonable, and consistent with congressional intent, we will accept it.”).

²³¹ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454–55 (1986) (emphasis added).

under which that conduct will be reviewed: “[A] reviewing court may not consider other reasons why the practice might be deemed unfair.”

This is precisely the standard established by *Chevron*: First, the courts determine whether the statute is ambiguous, and, if it is not, the court’s reading of the statute is binding; but if it is ambiguous, the court defers to the agency’s construction.²³² Part of why *Chevron* is a difficult test is that both parts of this analysis do, in fact, present legal questions for the court. The first step is purely legal, as the court determines on its own whether the statute is ambiguous. Then, at step two, the legal question is whether the agency correctly applied the facts to its declared legal standard—as the Court recognized in *Indiana Federation of Dentists*, “the legal question before us is whether the FTC’s factual findings make out a violation of Sherman Act § 1.”²³³ Thus, the opening, oft-quoted first sentence of the paragraph²³⁴ is correct and in accord with *Chevron*: The legal issues presented are for the courts to resolve—but according to the legal standard prescribed by the FTC.

The most likely reason that *Indiana Federation of Dentists* is viewed as the standard of review for the FTC’s interpretation of Section 5 is because the FTC has not sought greater deference. This is in part because, where the FTC couches enforcement of Section 5 in the antitrust laws, it can safely rely on judicially-crafted understandings of the antitrust laws without any need to seek deference. Thus, in *Schering-Plough*, where the FTC’s finding was based on Section 1 of the Sherman Act, the FTC’s brief recounted *Indiana Federation of Dentists* as requiring *de novo* review of its legal determinations—a standard that was then used by the Eleventh Circuit in its opinion.²³⁵ But it is also surely in part because the FTC has been reluctant to advance a more deferential standard (shell-shocked as it

²³² See Crane, *supra* note 180, at 2 (discussing *Chevron*). The Court’s discussion in *Indiana Federation of Dentists* does not include the nuance that the agency’s construction of the statute must be a reasonable one—but this is unsurprising given that the reasonableness of the FTC’s construction was not at issue.

²³³ *Ind. Fed’n of Dentists*, 476 U.S. at 455.

²³⁴ *Id.* at 454 (stating that “The legal issues presented . . . are . . . for the courts to resolve”).

²³⁵ In *Schering-Plough*, the FTC “conclude[d] that both the Schering/Upsher and the Schering/AHP agreements violated Section 5 of the [FTCA]. Specifically, we . . . find that the charges in the complaint that are grounded in Section 1 of the Sherman Act . . . have been proven.” *Schering-Plough Corp.*, Docket No. 9297 (Dec. 18, 2003), available at <http://ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf>. The FTC’s opinion in *Schering-Plough* treated Section 5 as incorporating Sections 1 and 2 of the Sherman Act. *Id.* at 83 n.107. In its reply brief on appeal to the Eleventh Circuit, the FTC explained the standard of review for its legal analyses as *de novo*, citing *Indiana Federation of Dentists*. Brief for Federal Trade Commission, 2004 WL 3557972, at *15 (July 25, 2004).

is from pre-*Chevron* losses)²³⁶ and has failed to recognize the current agency-deferential state of administrative law.

V. LIVING WITH A *CHEVRON*-SUPERCHARGED SECTION 5

Thus far, this Article has argued that *Chevron* applies to FTC interpretations of Section 5. That *Chevron* applies does not necessarily mean that courts will uphold any given agency interpretation. That is, FTC interpretations of Section 5 pass muster at *Chevron* step zero—but we still need to consider whether such interpretations are likely to pass muster at steps one and two. This Article has so far taken no position on whether such deference is normatively desirable, should it be granted.

These questions are addressed below, starting with a brief discussion of how the FTC is likely to fare under *Chevron* steps one and two and then turning to the normative question. The FTC has shown an alarming willingness in recent years to threaten litigation under Section 5 without feeling the need to define its understanding of Section 5's contours. It has leveraged the uncertain bounds of Section 5 to demand extrajudicial settlements from numerous firms, especially in high-tech industries. This has occurred even with the understanding that the FTC is not entitled to *Chevron* deference. This article's argument that the agency will, by and large, receive deference may have the regrettable effect of strengthening the agency's strong-arm settlement tactics. Sections V.B, V.C, and V.D argue that the FTC should not have such broad power. These sections also consider possible challenges to its use of that power. Finally, these sections argue for possible administrative and statutory changes to reign in the agency's power.

A. *Do FTC Constructions of Section 5 Pass Chevron Steps One and Two?*

That *Chevron* applies to FTC constructions of Section 5 does not necessarily mean that the courts will defer to agency constructions of the statute. Actual deference in any specific case will turn on the *Chevron* step one and two inquiries concerning whether the statute is ambiguous and, if so, whether the agency's interpretation is a permissible construction. Given the inherently and deliberately ambiguous nature of Section 5, it seems very likely that any agency action to

²³⁶ See Crane, *supra* note 180, at 4 (describing the FTC as “shell-shocked by its treatment in the courts when it has invoked an independent Section 5”).

regulate the conduct of a firm will satisfy *Chevron*'s step one inquiry, provided that it is arguably related to competition.²³⁷

It is more difficult to consider whether an agency construction of Section 5 would pass *Chevron* step-two without knowing the specific construction in question. At this stage, the question is whether the specific construction is permissible. Here too, however, it seems likely that any agency construction would be deemed permissible. As discussed previously, there is substantial debate within the antitrust literature on what constitutes anticompetitive conduct,²³⁸ and it is a near certainty that a court would deem as permissible any FTC construction of Section 5 arguably in line with non-fringe understandings of what constitutes anticompetitive conduct under the Sherman or Clayton Acts. This conclusion would likely hold even where the FTC may disagree with judicial constructions of the Sherman and Clayton Acts.

That alone would greatly expand the scope of Section 5 vis-à-vis current understandings of antitrust law, but Section 5 is not constrained by the Sherman and Clayton Acts, and there is no reason to think that FTC interpretations of “unfair” would be constrained by economic logic. While the FTC’s separate unfair acts and practices authority is expressly constrained by a consumer welfare test, its unfair method of competition authority is not. The history of the FTCA offers a sufficient basis for courts to find almost any construction of an “unfair” method of competition permissible—even if that construction is based in supremely uneconomic logic. This history, moreover, offers little, if anything to suggest that such a construction is impermissible.²³⁹ Thus, it is likely that the FTC could construe any form of conduct (i.e., a “method”) that harms anyone (i.e., “unfair”) operating in the same product market as the entity engaging in that conduct (i.e., “competition”) to be an unfair method of competition.

It must be emphasized that without a particular agency construction to consider, this discussion is speculative. Regardless, it serves to make two points: first, that the breadth of constructions likely to be considered permissible is very

²³⁷ To the extent there may be a question that a given matter is not related to competition—meaning it is outside the scope of the FTC’s generally understood jurisdiction—the Court’s recent holding in *City of Arlington* (applying *Chevron* to questions of ambiguous statutory jurisdiction) makes clear that the FTC would likely receive deference over jurisdictional questions as well as questions of its substantive authority. *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

²³⁸ See *supra* Part III.B.

²³⁹ But see Zaring, *supra* note 27, at 155 (offering a realist perspective on *Chevron* and arguing that, in practice, courts treat it as a reasonableness standard).

large; and second, that the proper forum in which to challenge such interpretations is not before the Article III courts. Given the breadth of the statute, once the matter has reached that point, there is great weight in favor of the FTC's position receiving *Chevron* deference. Rather, challenges to the agency interpretation must be made either before the agency (a challenging proposition) or by appeal to Congress for legislative change.

*B. The FTC Should Not Have This Power*²⁴⁰

While Congress did give the FTC very broad power, it did not give the FTC unbounded power. Unfortunately, the ambiguity in the agency's power, and the ways in which the agency uses that ambiguity, has yielded an agency with near boundless power to regulate the economy largely unconstrained by judicial review.

To understand this, we must understand how the FTC has wielded its Section 5 authority in recent years. The scope of Section 5 is unclear. This is substantially because the FTC has declined to explain what it believes the scope to be. Lacking such explanation, firms must live in constant fear of the agency's potential vigilance. The possibility that the agency may challenge a firm's conduct is a daunting one, especially because the FTC may elect to first challenge the conduct internally through an administrative hearing.²⁴¹ Should the defendant-firm lose, that decision may be appealed only to the full FTC. Until recently, the FTC never failed to uphold a complaint under its review.²⁴² Effectively, then, it is only after multiple

²⁴⁰ Geoffrey Manne, *Time for Congress to Stop the FTC's Power Grab on Antitrust Enforcement*, FORBES.COM (Dec. 20, 2012), <http://www.forbes.com/sites/beltway/2012/12/20/time-for-congress-to-stop-the-ftcs-power-grab-on-antitrust-enforcement/>; Lesli C. Esposito & Josh D. Huh, *FTC's use of Section 5 under attack*, DLAPIPER.COM (Nov. 29, 2012), <http://www.dlapiper.com/ftc-use-of-section-5-under-attack/>.

²⁴¹ Indeed, under most circumstances the FTC will pursue a Section 5 violation in an administrative hearing. The FTC has authority to litigate many matters in the first instance before an Article III court and can litigate most matters in the first instance before an Article III court upon petition to the Attorney General. See generally Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC.GOV, <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last updated July 2008).

²⁴² The FTC upheld every complaint brought by its complaint counsel for nineteen years; the first—and to date the only—reversal by the FTC of an administrative complaint occurred in 2014 when, after multiple congressional hearings, the FTC rejected the majority of claims brought against McWane by the FTC's complaint counsel. See David Balto, *FTC's winning streak is over*, THEHILL.COM (Feb. 11, 2014, 4:00 PM), <http://thehill.com/blogs/congress-blog/economy-budget/197969-ftcs-winning-streak-is-over>.

years and two complete rounds of litigation that the matter can be appealed to an Article III tribunal.²⁴³

In other words, if the FTC challenges a firm's conduct, defending that conduct is extremely expensive.²⁴⁴ It is also probabilistic due to the ambiguity inherent in Section 5. The FTC has broad power to challenge conduct that may not be an unfair method of competition with little concern that a firm will attempt to defend itself. Rather, firms do a cost-benefit analysis and decide to settle with the agency, often agreeing to decades-long oversight of their business practices.²⁴⁵ In this way, the agency wields the uncertain boundaries of Section 5 as a weapon. The possibility that the FTC would broadly receive *Chevron* deference for its

²⁴³ As governed by the Administrative Procedure Act, only "final agency action" is reviewable. 5 U.S.C. § 704 (2012) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

²⁴⁴ It is well understood that litigation costs—especially discovery costs—can force litigants to settle contrary to the merits of a case. *See, e.g.*, Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835 (2007); Pamela A. MacLean, *Cost of Discovery a Driving Force in Settling Cases, Study Shows*, ALM.LAW.COM (2008), available at <http://www.alm.law.com/jsp/article.jsp?id=1202424413938&slreturn=20140412095737> (noting that a "joint survey, released . . . by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System, found that 83 percent of the nearly [fifteen hundred] lawyers responding found costs, not the merits of a case, the deciding factor in settling"). These costs are amplified in the FTC context, where the FTC can avail itself of discovery through pre-complaint administrative subpoenas (called Civil Investigative Demands, 15 U.S.C. § 57b-1 (2012)) and because the FTC has the option of pursuing cases first through administrative proceedings, then through appeal to the FTC before a prospective litigant can even challenge FTC claims in federal court.

²⁴⁵ It is all but standard for the FTC to require firms to agree to twenty years of audits or oversight in consent decrees. *See, e.g.*, *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network*, FTC.GOV (Mar. 30, 2011), <http://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz> (indicating privacy audits for twenty years); *FTC Accepts Final Settlement with Twitter for Failure to Safeguard Personal Information*, FTC.GOV (Mar. 11, 2011), <http://www.ftc.gov/news-events/press-releases/2011/03/ftc-accepts-final-settlement-twitter-failure-safeguard-personal> (indicating twenty-year consent decree with ten years of audits); *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, FTC.GOV (Nov. 29, 2011), <http://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep> (indicating twenty years of audits); *Agency Announces Settlement of Separate Actions Against Retailer TJX, and Data Brokers Reed Elsevier and Seisint for Failing to Provide Adequate Security for Consumers Data*, FTC.GOV (Mar. 27, 2008), <http://www.ftc.gov/news-events/press-releases/2008/03/agency-announces-settlement-separate-actions-against-retailer-tjx> (announcing three separate consent decrees, each with twenty-year biennial audits).

construction of these boundaries is a force multiplier, giving firms even less incentive to defend their innocent conduct.²⁴⁶

The most problematic aspect of the FTC's approach to using the threat of litigation to extract consent decrees is that this approach yields little if any official statement of the FTC's interpretation of Section 5 or any record of the FTC's reasoning. Such records are important. They provide firms with notice of both the agency's interpretation of Section 5 and the reasons for that interpretation. They may offer some constraints on the agency's ability to subsequently change its interpretation. This is true even under *Fox I*, in which the Court gave agencies broad latitude to adopt new understandings of an ambiguous statute even in the face of prior, contrary understandings.²⁴⁷ If the agency has a longstanding construction of a given statute, it may need to address why it has changed that construction.²⁴⁸ Similarly, in explaining its basis for adopting a given construction, the agency may need to address (and contradict) the changed circumstances of prior justifications in order to change its construction—particularly where the prior policy was based on factual assumptions that have not changed.²⁴⁹ Perhaps most importantly, it provides Congress with information about the agency's performance and consistency—information that is necessary both for effective oversight and to indicate to Congress where statutory changes may be necessary.

²⁴⁶ *Cf.* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (noting that an agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”) (emphasis in original).

²⁴⁷ *Id.* (“An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”).

²⁴⁸ *Id.* (“[T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy. . . .”).

²⁴⁹ As explained in *Fox II*, fair notice is related to constitutional Due Process requirements. Fair notice concerns are raised where a regulation “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). It is meant to protect against at least two types of harm: providing regulated parties notice of the rules to which they are subject and ensuring that those making the rules “do not act in an arbitrary or discriminatory way.” *Id.*

C. Possible Limits and Challenges to FTC Assertion of Broad Section 5 Power

Regardless of whether the FTC *should* have the broad and ambiguous power that it does under Section 5—a power used by the FTC to extract settlements from firms and multiplied by the prospect of deference—this article argues that the FTC *does* have this power. What limits and challenges may there be to this power? A few possible challenges that may be considered by an Article III court (in the rare case in which an FTC order is appealed all the way to an Article III court) are considered below: Due Process, Methods as Practices, and Procedural.

The first, and probably best, line of argument to defend against an FTC construction of Section 5 is that it violates constitutional notice and Due Process requirements.²⁵⁰ Such defenses are suggested by *Fox I* and *Fox II* as responses to agencies' relative freedom to change their constructions of statutes unconstrained by *stare decisis*. In *Fox I*, while allowing the Federal Communication Commission ("FCC") to change its rules for indecent broadcasts unconstrained by its prior rules, the Court noted that firms may have a viable challenge to the new rules "when [the] prior policy has engendered serious reliance interests that must be taken into account."²⁵¹ In *Fox II*, the Court held that the FCC's changed policy could not be applied to conduct that occurred prior to that change on notice grounds, observing that, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."²⁵²

Due Process arguments such as these may well suffice if the FTC seeks to interpret Section 5 in a way that falls substantially outside the norms of established antitrust jurisprudence—at least, the first time that the agency seeks to enforce such an interpretation. That said, given the well-publicized controversy over the FTC's failure to clarify its understanding of Section 5,²⁵³ the agency may successfully be

²⁵⁰ See *Fox I*, 556 U.S. at 515.

²⁵¹ *Fox II*, 132 S. Ct. at 2317.

²⁵² *Id.*

²⁵³ This is, for instance, the position taken by FTC Chairwoman Ramirez. Chairwoman Ramirez has argued that the FTC's case-by-case approach yields precedents that provide firms with notice of its understanding of the law. See, e.g., Ramirez Questions for the Record, *Hearing before the S. Comm. on the Jud. Subcomm. on Antitrust, Competition Pol'y and Consumer Rights: "Oversight of the Enforcement of the Antitrust Laws"* (Apr. 16, 2013), available at http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/041613Q_FRs-Ramirez.pdf ("Section 5 of the [FTCA] has been developed over time, case-by-case, in the manner of common law. These precedents provide the [FTC] and the business community with important guidance regarding the appropriate scope and use of the FTC's Section 5 authority"); Edith Ramirez, Chairwoman, FTC, *Keynote Address at*

able to argue that firms do have notice that Section 5 may constrain conduct that falls outside of established antitrust jurisprudence. Similarly, the agency may also respond that the statute itself provides notice to firms to be wary of potentially “unfair” conduct and that the FTC may define the contours of such conduct broadly. Another possible argument the FTC may make is that its consent decrees provide sufficient guidance and notice to firms subject to its Section 5 authority.²⁵⁴

A second line of challenge to FTC enforcement of Section 5 focuses on the agency’s procedures. A comprehensive discussion of administrative procedure is beyond the scope of this article—but one possible line of challenge bears discussion. Agencies engaged in administrative rulemaking must respond to substantial comments about proposed rules and may not otherwise act arbitrarily and capriciously.²⁵⁵ It is perhaps somewhat obvious as a “tactic,” but those concerned about possible FTC constructions of Section 5 should seek the opportunity to enter substantive comments into any proceeding. A failure to address such comments may invalidate action taken based upon any such proceeding, or, if addressed by the agency, may provide meaningful limitations or safeguards on the outcome of the proceeding. Importantly, such comments should focus on why approaches that the FTC may take are problematic. If an agency adopts a construction of a statute without sufficiently addressing concerns expressed in the record that such a construction is itself problematic, a court might find that the agency has acted arbitrarily or capriciously or that the agency’s construction of a statute is impermissible under *Chevron* step two.²⁵⁶ Alternatively, such an approach may prompt congressional interest in the agency and its authority.

A final challenge that may be applicable in some cases is to argue that the specific “method” of competition that the FTC is proscribing is better characterized

George Mason University School of Law Symposium: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf (“[T]he real guidance rests with the primary sources. At the FTC, that means the decisions, complaints, statements, and analyses associated with our enforcement actions.”).

²⁵⁴ See, e.g., *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious [and therefore rejected] if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

²⁵⁵ *Id.*

²⁵⁶ See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

as an “act or practice.”²⁵⁷ The distinction between unfair methods of competition and unfair or deceptive acts or practices is unclear—but there is clear and consistent disparate treatment of the two by the statute, the courts, and Congress. Where the agency is challenging the specific conduct of a firm—something that can be described as distinct acts or practices instead of more generalized methods—a litigant may be able to argue that the agency must articulate a permissible distinction between the two for the challenged conduct to be proscribed under the agency’s Section 5 unfair methods of competition authority.²⁵⁸ This distinction is important because the FTC’s unfair or deceptive acts or practices authority is significantly encumbered by Magnuson-Moss.²⁵⁹ While untested, a court is likely to find that the heightened rulemaking requirements of Magnuson-Moss diminish the deference owed to the FTC’s construction of Section 5, unless that construction complies with the Magnuson-Moss requirements.²⁶⁰ Critically, there is likely no way for the FTC to comply with the Magnuson-Moss requirements through adjudication. As such, the FTC does not have the ability to create binding legal norms relating to unfair or deceptive acts or practices through adjudication. Therefore, it is unlikely to receive *Chevron* deference.²⁶¹ Moreover, any construction of what constitutes an unfair or deceptive act or practice would need to comport with Section 5(n)’s consumer welfare standard and would, therefore, need to be in line with the economic logic of established antitrust doctrine.²⁶²

D. *Whatever Shall We Do?*

Given the likelihood of deference by Article III courts to FTC constructions of Section 5’s proscription of unfair methods of competition, arguments about the proper scope of Section 5 are not best addressed to the courts. This is a

²⁵⁷ This harkens back to the language of Section 5, prohibiting both unfair methods of competition and unfair or deceptive acts or practices.

²⁵⁸ This would be a jurisdictional question that would likely be granted *Chevron* deference, given that the distinction between “methods” and “acts or practices” is ambiguous. *See City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). But common canons of statutory construction require that all terms in a statute be given meaning. Thus, a court is likely to insist that there is a coherent distinction between “methods” and “acts and practices” to deem a construction of either permissible.

²⁵⁹ *See supra* Part II.C.2.

²⁶⁰ *Id.*

²⁶¹ *See supra* Part I.B.

²⁶² 15 U.S.C. § 45(n) (2012); *see supra* Part III.B.

fundamental difference between traditional antitrust law—which has been developed by the courts as federal common law—and Section 5 antitrust, which is for the FTC to define. Antitrust scholars, commentators, and advocates must understand this difference and address their arguments about the proper scope of Section 5 accordingly. Appeals to the courts are unlikely to be effective. Rather, arguments must be addressed to the FTC itself (a path championed today by Commissioners Wright and Olhausen) or to Congress, which has the power to change the boundaries of the FTC’s power, to alter how the FTC uses that power, and to change how that power is interpreted by the courts.

1. Can the FTC Limit its Own Power?

Led by FTC Commissioners Wright and Olhausen, much recent discussion has focused on the need for the FTC to adopt a policy statement that defines the boundaries of its Section 5 authority.²⁶³ While there may be some value in issuing such a statement, such statements do surprisingly little to bind an agency as a matter of administrative law.

As seen in the previous discussion, *stare decisis* does not apply in the administrative context. This is one of the greatest differences between judicial and administrative rulemaking: Agencies are not bound by either prior judicial interpretations of their statutes or even by their own prior interpretations.

As seen in *Fox I*, an agency’s own interpretation of an ambiguous statute imposes no special obligations where the agency subsequently changes its interpretation.²⁶⁴ It may be necessary to acknowledge the prior policy; factual findings upon which the new policy is based that contradict findings upon which the prior policy was based may need to be explained.²⁶⁵ But where a statute may be

²⁶³ See Wright, *supra* note 5; Letter from Eight Members of the House Judiciary Committee to Chairwoman Edith Ramirez, *supra* note 3.

²⁶⁴ *Fox v. FCC*, 556 U.S. 502, 514–16 (2007) (“The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”).

²⁶⁵ *Id.* (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In

interpreted in multiple ways—that is, in any case where the statute is ambiguous—Congress, and by extension its agencies, is free to choose between those alternative interpretations. The fact that an agency previously adopted one interpretation does not necessarily render other possible interpretations any less reasonable. The mere fact that one was previously adopted cannot, on its own, act as a bar to subsequent adoption of a competing interpretation.

In a contentious policy environment—that is, one where the prevailing understanding of an ambiguous law changes with the consensus of a three-Commissioner majority—policy statements are not particularly compelling documents and are not afforded much deference.²⁶⁶ They may, however, have some purposes. For instances, they may provide regulated parties with notice as to how an agency may act in the future or assert facts that the agency will need to confront in the future should it wish to subsequently change its policy.²⁶⁷

But neither of these is a substantial use. A policy statement is unlikely to demonstrate to a court that the agency's interpretation of a statute is sufficiently reasoned to receive deference. There are alternate—and preferred—ways to provide regulated parties with notice. And while a policy statement *may* provide some obstacles to an agency's decision to change its interpretation of a statute, those obstacles are likely to be modest at best.²⁶⁸

Policy statements may not be entirely useless, however. As discussed above, one likely front on which to challenge an unexpected change in an agency's

such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”) (internal citations omitted).

²⁶⁶ It is important to note that policy statements are generally informal statements of policy. They are not adopted through a notice-and-comment or similar process and, therefore, do not bear the force of law. Not only do they not bind the industry, they are also even less binding on the agency than rules such as those at issue in *Fox I*. See, e.g., *Mead*, 533 U.S. at 254 (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”)).

²⁶⁷ See *Fox I*, 556 U.S. at 515 (“Sometimes [an agency] must [provide a more detailed justification for changing its existing policy]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy.”).

²⁶⁸ This follows for the same reasons that courts are unlikely to defer to policy statements: Policy statements rarely are based in or demonstrate a sufficient level of reasoning to merit deference. This also suggests that a policy statement would not require an agency to provide a more substantially detailed justification when changing policies.

interpretation of its statute is on Due Process or notice grounds. The existence of a policy statement may make it easier for a party to argue that a changed interpretation runs afoul of Due Process or notice requirements, particularly if the industry has reasonably come to rely upon that statement.²⁶⁹ Recognizing that any fundamental statutory ambiguity can ultimately be addressed only by Congress, there may also be political value to a policy statement. If an agency deviates from a policy statement, this may prompt congressional attention, and a well-crafted policy statement may serve as a guide to subsequent legislation.

2. Substantive Legislative Changes: Change the Limits of the FTC's Power

The only true path to constraining the FTC's Section 5 power is for Congress to revise the FTCA to define the boundaries of Section 5. Alternatively, Congress could define boundaries for how that power can be constructed by the agency.

Likely the easiest—and arguably the best—approach for Congress to take is to expressly state that the FTC's Section 5 authority over unfair methods of competition is concurrent with and circumscribed by the Sherman and Clayton Acts as construed by the courts. This has been the longstanding practical understanding of Section 5, and it is how the agency has long used Section 5.²⁷⁰ Today, moreover, antitrust law is far more rigorous and based on sounder theory than it was at the time of the FTC's creation and over the course of much of the agency's history.²⁷¹ The problems that Section 5 was designed to meet are now equally well-addressed by established antitrust law.²⁷² If there are other issues that need to be addressed—for instance, regulation of business practices in high-tech or other rapidly developing industries²⁷³—they are better subject to congressional attention and response.

Alternatively, Congress could clarify some of the ambiguity latent in Section 5's unfair methods of competition authority, as it has done to better control the

²⁶⁹ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“Sometimes [an agency] must [provide a more detailed justification for changing its existing policy]—when, for example . . . its prior policy has engendered serious reliance interests that must be taken into account.”).

²⁷⁰ See *supra* Part II.

²⁷¹ See *supra* Part III.

²⁷² See *supra* Part III.

²⁷³ This statement is not an endorsement of giving the FTC such authority. It merely recognizes that the FTC is most often pushing the boundaries of its Section 5 authority in these industries.

agency's authority over unfair or deceptive acts and practices. For instance, Congress could apply Section 5(n) to unfair methods of competition or specify to whom unfairness applies (that is, answer the question "unfair to whom?").

Congress could also respond to concerns over the breadth of Section 5 by limiting the FTC's power to construe the boundaries of that authority by reducing or taking away judicial deference to the agency. This could be done completely by enacting law providing that the FTC's construction of "unfair methods of competition" is not entitled to judicial deference (and perhaps specifying that a reviewing court can or cannot take into consideration factors such as those used in *Skidmore* deference, e.g., the seriousness of the agency's consideration). Or, Congress could take a more limited approach. Recognizing that the greatest concerns over FTC construction of Section 5 are likely to arise in the context of adjudicatory proceedings—especially those that go through the administrative hearing process before getting to court—Congress could strip the agency of deference in adjudicated matters. The agency would still receive deference for constructions developed through rulemaking proceedings. Either of these approaches would reduce the burden of uncertainty on private parties and both follow a sounder jurisprudential approach to statutory construction—especially as compared to the FTC's current approach of extracting settlements through private proceedings under the threat of lengthy and costly litigation.

3. Procedural Legislative Changes: Change How the FTC Uses That Power

Congress could also make procedural changes to control how the FTC uses its Section 5 authority. For instance, given the concerns raised by the FTC's use of consent decrees, Congress could place limits on the enforceability of these decrees. Further, Congress could specify that consent decrees can only impose requirements backed by established legal norms. This would prevent the agency from using an informal, secretive settlement process to develop the contours of its Section 5 authority. Or perhaps if Congress determines that there is some value in the FTC's consent decree process, it could require that any construction of Section 5 indicated in a consent decree must be backed by, and is unenforceable pending, a rulemaking proceeding complete within some fixed time (e.g., eighteen months). Should the FTC fail to meet this requirement, the consent decree would be deemed unenforceable.

Another approach would be to prescribe particular requirements that apply to rulemaking related to Section 5 unfair methods of competition. For instance, Congress could specify that Magnuson-Moss's Section 18 requirements apply to both the FTC's Section 5 unfair methods of competition and unfair or deceptive acts or practices authorities. As discussed previously, it is uncertain how enhanced rulemaking requirements would affect judicial deference to constructions of

Section 5 arrived at other than through rulemakings (e.g., those adopted in adjudication)—but it is likely that this would reduce the level of deference that courts give such constructions.²⁷⁴

A final possibility would be for Congress to recognize the concurrence of Section 5 and antitrust norms under the Sherman and Clayton Acts and require that FTC constructions of Section 5 be developed in conjunction with the DOJ. For instance, Congress could require *ex ante* discussion between the DOJ and the FTC before the FTC adopts a given construction of Section 5. It could require DOJ concurrence with changes to the FTC's construction of Section 5. Congress could also require courts to solicit an affirmative statement of support for the FTC's construction of Section 5 from the DOJ at the time of litigation. Any of these approaches would recognize that both the FTC and the DOJ are responsible for developing and shaping antitrust norms in the United States. These approaches would also impose meaningful restraints on the FTC's ability to adopt overly expansive readings of Section 5.

4. Broader Changes: Change *Chevron* Itself

A final set of changes to consider would be to *Chevron* itself. Discussion of this approach is beyond the scope of this article—but it is important to understand that *Chevron* is controversial, though long-standing. Congress may act to limit its scope either entirely (in the case of specific types of questions) or for specific agencies.²⁷⁵ For instance, Congress could say that *Chevron* deference does not extend to matters relating to competition or antitrust, recognizing the importance of consistency across the various agencies charged with competition-related statutes (e.g., the FTC, the DOJ, and the FCC).

The FTC is a poster child for why Congress should limit the extent of *Chevron*. The power Section 5 confers to the FTC is already great—and the FTC has learned to use it to maximum effect. *Chevron* supercharges this power by giving credibility to the FTC's threats of litigation and by discouraging the FTC from clarifying this ambiguity to preserve its power.

²⁷⁴ See *supra* Part IV.B.1.

²⁷⁵ Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why it Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

CONCLUSION

The FTC's authority under Section 5 to proscribe unfair methods of competition is a broad and untapped source of power. Historically interpreted by the courts and treated as coterminous with judicially-defined antitrust laws, the FTC is just beginning to test the limits of its administrative antitrust authority in the modern administrative state—and especially in the age of *Chevron*. This article argues that the FTC is likely to receive great deference from the courts in its use of that power.

The potential scope of the FTC's newfound power is problematic, particularly given the FTC's recent consent decree-based approach to developing legal norms and its interest in the high-tech and information sectors of the economy. One-hundred years ago, the FTC was given broad powers so that it would have the agility and expertise to craft rules required to give stability to, and constrain the excesses of, complex industries. But today it has taken that flexibility to the extreme, foregoing entirely the pretense of developing rules. Rather, it is developing *ad hoc* rules in an effort to keep up with the economy's most dynamic, innovative, and competitive industries. As in the 1970s, this approach has more ability to harm consumers than to protect them.

This article suggests several possible paths to constrain the unbounded discretion offered by Section 5's unfair methods of competition authority. Some may work in the short run—for instance, arguing that the FTC's current approach violates constitutional Due Process and fair notice requirements. Ultimately, however, Congress has given the FTC power that is likely to be construed very broadly by the courts. Under existing principles of administrative law, even if the FTC self-imposes limits on its power, those limits would be illusory; the FTC would be free to discard them as easily as (or even easier than) it could impose them.

Constraining this power ultimately requires either congressional action or a change to the *Chevron* doctrine. Congressional action seems more likely, but the likelihood of either solution is debatable. Rather, it seems that we are entering a brave new world of administrative antitrust, in which the sky—or the imagination of five FTC commissioners—is the limit.