American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority

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The FTC plans to follow Europe's precautionary approach to antitrust by enacting preemptive rules of per se illegality. But American precautionary antitrust is both unlawful and economically harmful, as it opposes dynamic competition, which benefits consumers and innovation.

KEY TAKEAWAYS

- The FTC holds rulemaking authority to regulate unfair methods of competition (UMC), and one of the regulatory goals it has set for 2022 is to use that power to enact ex ante rules of per se illegality.
- The FTC's plan violates settled case law, ignores statutory language, and overlooks the fact it lacks any congressional mandate to engage in UMC rulemakings. Its only mandate is to engage in rulemaking for consumer-protection matters.
- The FTC's plan to engage in UMC rulemaking activity is not just illegal, but also economically harmful as it embodies the logic of the precautionary principle—preemptively banning innovative and disruptive behaviors.
- Antitrust through preemptive rules of per se illegality—or "precautionary antitrust"—borrows from the European school of precautionary antitrust already at play with the Digital Markets Act.
- U.S. antitrust agencies should push back, rather than endorse European precautionary antitrust, given the costs such a static approach impose on American innovation and consumers.
- Agencies should instead adhere to principles of "dynamic antitrust," wherein evolutionary economics meet an evolutionary application of the law through the adjudicative process.

INTRODUCTION

Led by Neo-Brandeisians, the Federal Trade Commission (FTC) wants to enhance its rulemaking authority to prohibit so-called "unfair methods of competition" (UMC).[1] The FTC currently enforces both antitrust laws—namely the Sherman Act of 1890 and the Clayton Act of 1914—and Section 5 of the Federal Trade Commission Act of 1914 (FTCA), which prohibits UMC.[2] Adding to these well-accepted enforcement actions, it now wishes to be able to preemptively ban UMC with ex ante rules using an arcane provision of Section 6(g) of the FTCA.[3] Section 6 grants the FTC the power to "[f]rom time to time classify corporations and … make rules and regulations for the purpose of carrying out the provisions of this subchapter."[4]

Despite lacking a valid legal basis, the Neo-Brandeisian FTC wants to weaponize this murky provision to engage in rulemaking activity on UMC.[5] While the FTC was once thought of as being second only to Congress as the most powerful legislative body in the United States, its rulemaking authority has experienced several setbacks.[6] But the new FTC controversially wants to once again engage in regulatory overreach by revitalizing the once-buried preemptive rules regarding UMC and has recently rescinded a statement it made on UMC in 2015, thereby removing any constraints regarding its desire to adopt ex ante rules of competition.[7]

Consequently, the FTC's regulatory agenda for 2022 includes a plan to design new rules governing the UMC under Section 5 of the FTCA.[8] The FTC has an excellent track record of challenging conduct through both its internal administrative process and judicial process.[9] And with the current FTC keen to pursue an unrestrained Section 5 rulemaking authority on UMC, the "national nanny" is back.[10]

However, a careful legal analysis reveals that the FTC does not have congressional authorization to do so. Furthermore, detailed economic research shows that, should the FTC engage in unjustified UMC rulemaking, United States antitrust enforcement would follow the flawed European example of preemptively prohibiting innovative behaviors—essentially engaging in "precautionary antitrust."[11]

With the current FTC keen to pursue an unrestrained Section 5 rulemaking authority regarding UMC, the "national nanny" is back.

The new FTC chair, Lina Khan, gained greater control over future rulemaking initiatives with self-granted powers.[12] And this unfettered FTC currently shows little sympathy for constitutional limits with its power grab.[13] Despite this, the FTC must refrain from engaging in precautionary antitrust by making UMC ex ante rules. Otherwise, congressional and judicial backlashes will be needed to preserve American innovation and consumer benefits.

THE NEO-BRANDEISIAN PUSH FOR PRECAUTIONARY ANTITRUST

Radical reformers of antitrust laws—the Neo-Brandeisians—have expressed at length their frustration with how time-consuming antitrust lawsuits must be in order to achieve tangible results. They question the very principles of antitrust enforcement by advocating for a shift from ex post judicial enforcement to the ex ante design of competition rules. Such a push calls for precautionary antitrust despite the absence of a legal basis and without due regard to the inevitable economic harm it would generate.

Move Fast and Break Things: The Neo-Brandeisian Case Against Antitrust

The FTC has embraced the Neo-Brandeisian argument that ex post judicial enforcement of antitrust laws is unsuitable for today's economy.

Indeed, the 2022 regulatory agenda of the FTC published on December 15, 2021, asserts that "the case-by-case approach to promoting competition, while necessary, has proved insufficient, leaving behind a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches."[14] The FTC announced that for 2022 it "will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices."[15]

This report demonstrates that the FTC cannot—and should not—adopt UMC rulemakings, but can and should consider rulemakings for unfair or deceptive acts or practices (UDAP) specifically targeting consumer protection.

That assertion in the 2022 regulatory agenda echoes years of Neo-Brandeisian calls for taking "antitrust away from the court."[16] The FTC chair herself lamented the "highly costly and protracted" judicial enforcement of antitrust laws.[17] Because "generalist judges struggle to identify anticompetitive behavior and apply complex economic criteria in consistent ways," antitrust laws need to be applied preemptively by the FTC. In that vein, it is believed that "the Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent and participatory process: rulemaking."[18]

Beyond the criticism of the cost and length of the judicial process, the case for antitrust via rulemaking pares down to an assault on the very fundamentals of antitrust enforcement.

It is thus questionable whether the FTC will, without prejudice, "explore whether rules defining certain 'unfair methods of competition' prohibited by Section 5 of the FTCA would promote competition and provide greater clarity to the market."[19] And if it does, there is little doubt that the FTC would conclude that UMC rulemakings are necessary, since the FTC chair herself wrote and advocated in that vein a couple of years ago.

In March 2021, Slaughter launched a "rulemaking group" at the FTC, contending, "It is … time for the commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy, and [I am] excited for this new rulemaking group to explore all the possibilities."[20] White House competition policy adviser Tim Wu has also advocated for antitrust via rulemaking, stating, "The promotion of competition—the antitrust regime—remains rooted in an adjudication model and might even be described as stuck there. More effective and widespread promotion of competition may require more widespread and effective use of pro-competitive rulemaking by a broader variety of agencies."[21]

Unsurprisingly, President Biden's Executive Order on Competition in July 2021 embodies the belief that rulemaking authority can spur competition.[22] Specifically, the order asks the FTC chair to "exercise the FTC's statutory rulemaking authority … to curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit mobility," and to exercise the FTC's statutory authority for a wide range of issues from data collection to occupational licensing.[23] Nevertheless, the executive order does not grant or recognize any rulemaking authority for the FTC concerning UMC.[24]

All these Neo-Brandeisian efforts unduly discredit traditional antitrust enforcement. Indeed, beyond the criticism of the cost and length of the judicial process, the case for antitrust via rulemaking pares down to an assault on the very fundamentals of antitrust enforcement. Even Tim Wu has acknowledged that regulatory regimes for competition might lead to the annihilation of antitrust, since compliance with the tailor-made rules of competition precludes subsequent claims of violation of antitrust rules.[25]

Additionally, antitrust via rulemaking constitutes an assault on antitrust principles such as the necessary judicial balancing exercise inherent to the widely acclaimed rule of reason.[26] The criticism of the rule of reason is instrumental to promoting broad rules of per se illegality. The FTC would preemptively lay down prohibitions and obligations irrespective of their pro-competitive and pro-innovative effects.

From Ex Post to Ex Ante Rules on Competition: The Assault on Efficiencies

Against this background, Neo-Brandeisians want to intervene in the markets quickly and harshly. In other words, absent any consumer harm, blanket prohibitions and bright obligations will replace the evidence-based, fact-finding exercise of judicial enforcement of antitrust laws. Ex post judicial enforcement of antitrust supposedly is inferior to ex ante regulatory enforcement of antitrust laws in terms of procedural fairness, minimizing unintended consequences, and allowing for the evolutionary process of the common law to align with the evolutionary process of creative destruction.[27]

Neo-Brandeisians disregard the merits of the rule of reason, allowing for efficiency considerations to be contemplated in antitrust enforcement, thereby favoring rules of per se illegality.

After having first emerged from the *Standard Oil* case of 1911, the rule of reason was subsequently well articulated and defended in *Chicago Board of Trade v. United States* (1918), which Justice Louis Brandeis and the rest of the court unanimously supported.[28] Neo-Brandeisians, while claiming inspiration from Justice Brandeis for their antitrust revolution, mischaracterize the rule of reason as being incongruent to antitrust laws. They disregard the merits of the rule of reason and allow for efficiency considerations to be contemplated in antitrust enforcement, thereby favoring rules of per se illegality.

Acclaimed author and professor Herbert Hovenkamp wrote, "Brandeis' statement of the rule of reason … has been one of the most damaging in the annals of antitrust … [as it] has suggested to many courts that … nearly everything is relevant."[29] Brandeis' rule of reason justified price-fixing arrangements but supported a rule of explanation and not per se rules of illegality, as Neo-Brandeisians too often advocate for.

In 2015, citing leading antitrust authorities, the FTC confidently stated that "the 'rule of reason' is the cornerstone of modern antitrust analysis."[30] Today, the Neo-Brandeisian FTC are waging war against this rule of reason—the very core of that antitrust analysis.

Despite the well-established judicial enforcement of antitrust rules, Neo-Brandeisians believe that "broken antitrust rules" require a shift toward ex ante competition rules whose efficiency arguments (including innovation) are disparaged, if not prohibited.[31] The Neo-Brandeisian FTC has an apparent disregard for the rule of reason, despite it being a fundamental principle of the balancing exercise inherent to antitrust analysis. Indeed, when rescinding the FTC's bipartisan statement from 2015 that the FTC would rely on the rule of reason to analyze UMC, the new FTC has explicitly stated:

> Importing the rule of reason's likelihood requirement would abrogate the commission's statutory mandate to combat incipient wrongdoing before it becomes likely to harm consumers or competition … Tying Section 5 back to this framework [of the rule of reason] offends the plain text, structure, and legislative history of Section 5 and needlessly constrains the commission from taking action to safeguard the public from unfair methods of competition.[32]

The controversial claim that the 2015 bipartisan statement on UMC "offends" the text and spirit of Section 5 remains unsubstantiated because nothing in Section 5 prohibits the FTC from staying faithful to one of the fundamental principles of competition analysis (i.e., the rule of reason), and the 2015 bipartisan statement does not contest the fact that Section 5's UMC may condemn practices beyond the remit of the Sherman and Clayton Acts. The FTC's rescission itself "offends" the bipartisan consensus that acknowledges not only the FTC's practice on Section 5 but also the relevant jurisprudence.[33]

To enact ex ante rules prohibiting such conduct irrespective of their efficiencies amounts to adopting a precautionary attitude to potentially innovative and disruptive business practices.

To prohibit conduct with no consideration for the rule of reason leads to false positives whereby agencies and courts prohibit pro-competitive and pro-innovative behaviors. Worse yet, enacting ex ante rules prohibiting such conduct regardless of the efficiencies gained amounts to adopting a precautionary attitude to potentially innovative and disruptive business practices.

In a call to stop using the word "antitrust" and start calling it "competition policy," Neo-Brandeisians aim to preemptively prohibit certain practices they dislike by shifting from ex post judicial enforcement to ex ante regulatory rules on competition.[34] The risk of false positives is considerable, with the over-deterrence of beneficial behavior looming large.[35] But the temptation to issue bright rules of the game seems too high for advocates not to travel this unsecure and potentially harmful road.

The new FTC wanting to use Section 5 rulemaking authority regarding UMC without the necessary legal basis would constitute a power grab. In short, the FTC runs the risk of unlawfully engaging in UMC rulemaking.

AMERICAN PRECAUTIONARY ANTITRUST IS LIKELY ILLEGAL

The new FTC wants to use Section 5, and especially Section 6(g), of the FTCA as a competition tool to define ex ante rules that prohibit UMC. However, such practices are legal under antitrust laws (i.e., the Sherman Act and the Clayton Act). Before delving into the weakness of Section 6(g) as a valid legal basis for enacting ex ante rules of competition, it is crucial to understand that Section 5 of the FTCA declares that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[36]

UMC refer to antitrust matters, while UDAP relate to consumer protection matters.[37] The most important question is whether the FTC has regulatory authority to lay down administrative rules preemptively prohibiting UMC or UDAP.

The use of Section 6(g) of the FTCA to enact ex ante rules on UMC prohibited under Section 5 of the FTCA lacks a sufficient legal basis. It amounts to precautionary antitrust—namely, applying the precautionary principle to antitrust matters despite unintended consequences. American precautionary antitrust through Section 6(g) is likely unlawful, as it constitutes a power grab from the FTC without sufficient legal basis.

The Impossibility of Defining "Unfair Methods of Competition"

As the late Gilbert Montague explained, the congressional debates regarding the proposed FTCA did not help clarify with satisfactory precision the lawmakers' intent behind prohibiting UMC in the FTCA.[38] The general prohibition of "unfair competition" was favored over "an attempt to define the numerous unfair practices, such as local price-cutting, interlocking directorates, and holding companies intended to restrain substantial competition."[39]

Senator Newlands, the main sponsor of the FTC bill, ambiguously defined "unfair competition" as including i) all violations of the antitrust laws, ii) any act affecting a competitor for which any remedy "lies either at law or equity," and iii) any act affecting a competitor that is "against public morals." However, another senator, Albert Cummins, warned that "the unfairness must be tinctured with unfairness to the public; not merely with unfairness to the rival or competitor … We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and of course, there must be in the imposture or the vicious practice or method something that tends to affect the people of the country or be detrimental to their welfare."[40] Senator Cummins seems to have been referring more to deceptive practices than to unfair competition in his language, anticipating the consumer welfare standard.

But it is clear from the congressional debates that courts will have to define the vague expression of "unfair competition," as the judiciary only has the power to define this notion on a case-by-case basis. Indeed, unfair competition is understood only narrowly due to lawmakers' interventions during the discussion of the FTC bill. It appears that unfair competition refers to the breach of ethical rules of a profession, the violation of trademarks, and the use of deceptive means by competitors to infringe on both the intellectual property rights of rivals and well-accepted rules about professionalism.

Indeed, Senator Borah argued that "the court in no instance undertakes to define or even discuss 'unfair competition' separate and apart from the infringement of trademarks. Nothing therein contained gives the slightest suggestion as to the general rules of business."[41] Senator Sterling perceived unfair competition as potentially ensuring the respect of the "innumerable standards of business morals, to questions of business ethics."[42] However, the vagueness of the term may open the doors to an "overzealous and self-constituted guardian of the business morals of the community" to express his "fear or jealousy of a business rival."[43] Unless the generality of the term is narrowly defined, the FTCA will be prone to reducing competition under the moniker of "unfair competition."

Also, Senator Sutherland claimed that although they knew what unfair competition meant, no one knew what UMC were: "I do know that the words 'unfair competition' has a very well settled meaning in the law and that the words 'unfair methods of competition' have not … What are unfair methods of competition? Can anybody tell me?"[44] He misrepresented unfair competition as "an attempt upon the part of one person or a corporation to impose his or its goods or business upon the public as the goods or business of another."[45] Again, this notion of deceptive representation better corresponds to UDAP (consumer protection policy) than UMC (competition policy). It is the very desire to go beyond the misrepresented meaning of unfair competition that prompted Senator Hollis to suggest that "unfair methods of competition" be replaced with "unfair competition." The confusion is further expanded because the leading senators responsible for the bill affirmed that the two expressions meant the same thing.[46]

Therefore, not only are "unfair competition" and UMC to be defined narrowly to mean "professional rules of conduct" and "lack of misrepresentation," but the courts alone (and not the FTC itself) may have the task of defining them on a case-by-case basis.

Most of the practices referred to during the congressional debates as potential instances of unfair competition were, shortly after the passing of the FTCA, found to be examples of "fair and just" competition—namely, the essence of competition whereby a company undercuts rivals with better and cheaper products.[47]

Irrespective of the highly confusing congressional debates surrounding the vagueness of UMC, one can draw two conclusions: UMC certainly go beyond antitrust violations to include professional misconducts such as misrepresentations by companies that do not enjoy "monopoly" power (but are only at a nascent stage of development). Irrespective of the vagueness of UMC, the FTC has no power to define this notion—namely, the judiciary remains the legitimate power of government tasked with the need to determine on a case-by-case basis what UMC mean in practice.

In conclusion, an honest assessment of the legislative history of the FTCA can only lead to great humility concerning the meaning of UMC.[48] As MacIntyre and von Brand put it, despite the initial objective to minimize business uncertainty regarding antitrust violations, "it is ironic that the FTC was to be given the broadest conceivable mandate under its organic act, namely, that of defining and prohibiting 'unfair methods of competition.'"[49] Finally, the legislative history of the FTC reveals that there is no clear evidence of congressional authorization for the FTC to engage in substantive rulemaking for UMC, and courts will repeatedly ensure that the FTC respects its regulatory constraints.

As previously detailed, the FTC has recently rescinded a statement on UMC issued by the FTC in 2015.[50] It announced that, when challenging practices that may be UMC under the standalone Section 5 authority, the FTC will:

- apply traditional antitrust analysis, with the "promotion of consumer welfare" as its objective;
- apply a "framework similar to the rule of reason," with due consideration for efficiency arguments; and
- be "less likely" to use its standalone Section 5 authority if a practice falls within the ambit of the Sherman or Clayton Acts.[51]

The 2015 statement emerged as a need to prioritize a common-law approach to UMC rather than "a prescriptive codification of precisely what conduct is prohibited."[52] In other words, antitrust laws' ex post judicial enforcement was preferred over ex ante regulatory rules on UMC to fight anticompetitive conduct.

American precautionary antitrust through Section 6(g) is likely unlawful as it constitutes a power grab from the FTC without sufficient legal basis.

The expression "unfair competition" harkens back to the very origin of the FTC and its predecessor, President Roosevelt's Bureau of Corporations. As Neil Averitt of the FTC stated:

> For Roosevelt, antitrust was anti-big business and, in many industries, anti-efficiency. Roosevelt didn't want to break up big firms, he wanted to keep them honest. To that end, he sought a Bureau of Corporations in 1903. After Congress created it, the Bureau soon wrote that antitrust laws should essentially be displaced by-laws using an interesting term: "unfair competition."[53]

While the next president, William Howard Taft, saw antitrust enforced by courts, Roosevelt envisaged antitrust enforced by an administrative agency. His successor Woodrow Wilson favored antitrust enforced via precise rules designed by the legislature. With the passing in 1914 of the FTCA creating the FTC and prohibiting UMC, together with the Clayton Act prohibiting certain incipient practices, Wilson combined Roosevelt's and his vision atop Taft's preference for traditional judicial enforcement of antitrust rules. But what do UMC mean in the context of Section 5 of the FTCA? Prohibited practices under Section 5, which are already illegal under the Sherman Act and the Clayton Act, constitute an uncontroversial matter. Indeed, the legislative history of the FTCA demonstrates that UMC (together with the Clayton Act prohibitions) aim to preemptively prohibit some conduct by firms that do not enjoy market power (or a monopoly position).

By rescinding the 2015 UMC statement, the Neo-Brandeisian FTC wants to explore ex ante rules that preemptively prohibit specific behaviors whose anticompetitive effects remain unclear. This shift from ex post judicial enforcement to ex ante regulatory rules to address antitrust matters illustrates the rising precautionary logic in competition enforcement—or precautionary antitrust. Not only is such precautionary antirust economically harmful, but it is also legally unfounded.

The FTC does not have the legislative authority to enact rules of UMC. Judicial and legislative history sheds light on the limits of the current FTC's efforts to enact ex ante rules on antitrust matters.

However, substantive rulemaking authority refers to an even more controversial aspect of the FTC's Section 5 authority—namely, the claim that Congress empowered the FTC to adopt ex ante rules under Section 6(g).[54] In other words, does Section 5, in general, empower the FTC to adopt ex ante rules about UMC and UDAP? In short, the answer is positive concerning UDAP (the FTC can adopt ex ante rules on the grounds of consumer protection) but negative concerning UMC (the FTC cannot adopt ex ante rules on the grounds of competition policy).[55] As Robert Pitofsky once claimed, "Section 5 is the most marvelously flexible instrument of consumer protection that I could imagine."[56] In other words, Section 5 rulemaking is a consumer protection (UDAP) instrument, not an antitrust instrument (UMC).

The FTC has no congressional authorization to engage in substantive rulemaking concerning UMC. But, since "no rule is valid unless it is authorized by law and promotes a statutory purpose of some kind," the FTC has no rulemaking authority regarding UMC.[57]

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What is controversial is industry-wide prohibitions of business practices for antitrust purposes as a standalone basis under Section 5 of the FTC.[58] Indeed, Senator Newlands introduced the FTC bill and explained unfair competition by stating, "There are numerous practices tending toward monopoly that may not come within the antitrust law provisions and amount to a monopoly or to monopolization. We want to check monopoly in the embryo."[59]

During the congressional debates of the FTC bill, Senator Cummins made clear that "the attempt is to go further and make some things offenses that are not now condemned by antitrust law; That is the only purpose of Section 5—to make some things punishable, to prevent some things, that cannot be punished or prevented under antitrust law."[60]

This prohibition of embryonic "unfair competition" complements the Clayton Act prohibitions with preemptive enforcement actions.[61] But, irrespective of the fact that such activities are questionable, they do not grant the FTC substantive rulemaking authority, or the power to enact ex ante rules beyond congressional language.

Several arguments justify the absence of rulemaking authority by the FTC when it comes to UMC. First, the Supreme Court has historically been reluctant to grant the FTC broad regulatory powers. Second, Congress has failed to provide the FTC with a valid legal basis for UMC rulemakings, unlike the explicit permission it offered the FTC for UDAP rulemakings.

The Supreme Court Limited the FTC's UMC Rulemaking Authority

The FTCA alone does not allow the commission to enact substantive rulemaking. Indeed, the bill's pertinent legislative report, which then became the FTCA, explicitly states that "the establishment of a commission having powers of regulation or control of prices … has no place in the bill now reported."[62] In other words, the FTCA did not grant the FTC the power to enact substantive prohibitions beyond those of the Clayton Act, which contains a list of prohibited practices.

The FTCA enabled the FTC to enforce the previous antitrust rules (i.e., those of the 1890 Sherman Act) and the expressed prohibitions contained in the 1914 Clayton Act.[63] However, the FTCA did not grant the FTC further substantive rulemaking authority without a subsequent congressional intent stating otherwise, as in the case of UDAP rulemakings.[64]

In the years following the 1914 passing of the FTCA, the Supreme Court had the opportunity to repeatedly express its reluctance to grant the FTC broad regulatory powers under Section 5. Three cases illustrate this reluctance: the *Gratz* decision of 1920, the *Klesner* decision of 1929, and the *Raladam* decision of 1931.[65]

Neo-Brandeisians now want to resurrect Brandeis's minority opinion in *Gratz* as a priority in the 2022 FTC regulatory agenda against judicial precedents.

In *Gratz*, the FTC argued that tying arrangements were illegal under Section 3 of the Clayton Act and under Section 5 of the FTCA. According to the FTC, these practices harmed rivals and thereby were "unfair methods of competition." The Supreme Court ruled on this case that "it is for the courts, not the commission, ultimately to determine as a matter of law what [UMC] include."[66] Notably, Justice Brandeis dissented and argued that the FTCA had left the determination of UMC to the commission:

> What section 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair methods of competition"; that is, the method or means by which an unfair end might be accomplished. The commission was directed to act if it had reason to believe that an "unfair method of competition in commerce has been or is being used." The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice.[67]

It is hard to fathom how tying was then not an already general practice, thereby falling outside the scope of Brandeis's peculiar conception of Section 5 of the FTCA. Regardless of such inconsistency, Neo-Brandeisians now want to resurrect Brandeis's minority opinion as a priority in the 2022 FTC regulatory agenda against judicial precedents.

Justice Brandeis, in delivering the Supreme Court's opinion in *Klesner*, argued that Section 5's UMC could not generate rights to private actions:

> Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the commission's name; the prosecution is wholly that of the government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the commission a complaint against the alleged wrongdoer. Nor may the commission authorize him to do so. He may of course bring the matter to the commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.[68]

In other words, the FTC has broad discretion to file a complaint under Section 5's UMC, and the public interest at stake must be "specific and substantial." UMC are therefore detached from the concern of protecting private persons; the purpose of complaints under Section 5 of the FTC is the protection of the public.[69]

Finally, the decision in *Raladam* illustrates the reluctance of the Supreme Court to grant the FTC the power to define UMC. Before then, the Sixth Circuit circumscribed in its decision the role of the FTC as a mere aid to the Department of Justice's antitrust efforts when it stated that "the commission came into being as an aid to the enforcement of the general government antitrust and anti-monopoly policy, and that its lawful jurisdiction did not go beyond the limits of fair relationship to that policy."[70] The Supreme Court then confirmed the Sixth Circuit's decision after the commission had failed to document "the existence of some substantial competition to be affected," and went on to detail the limited boundaries of Section 5's UMC:

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessen or otherwise injured. It is that condition of affairs which the commission is given power to correct, and it is against that condition of affairs, and not some other, that the commission is authorized to protect the public.[71]

From these three decisions, it appears limpid that the courts were willing to circumscribe the FTC's regulatory reach under Section 5 of the FTCA to a narrow notion of UMC.[72] This aspect remains unchanged despite a controversial decision by the Sixth Circuit.

The FTC still does not have substantive rulemaking authority with respect to UMC, as neither the Supreme Court nor Congress would accept it.

The question of whether the FTC can enact ex ante rules to preemptively regulate UMC through its rulemaking authority was controversially addressed in the *National Petroleum Refiners Association v. FTC* case of 1973.[73] Congress ratified the D.C. Circuit's decision with the Magnuson-Moss Act, wherein the FTC's rulemaking authority remained conscribed to UDAP.[74] The FTC did not receive congressional authorization or judicial assent to engage in UMC rulemaking, except for procedural and interpretive rules. The FTC still does not have substantive rulemaking authority concerning UMC, as neither the Supreme Court nor Congress would accept it.[75]

UDAP rulemaking in the 1970s led to fears that the FTC had become unrestrained in its ability to enact such legislative rules.[76] Also, the FTC's approach to unfairness suffered many setbacks in the 1980s despite its unquestioned rulemaking authority on UDAP.[77] Indeed, a former director of the Bureau of Consumer Protection noted in 2003 that "in the 1970's, the Commission began to use its unfairness authority to legislate against perceived violations of 'public policy.' This misuse of its unfairness jurisdiction caused consternation in Congress."[78]

As Commissioner Christine S. Wilson aptly pointed out in her dissent for the rescission of the 2015 FTC statement on UMC, "[T]he Commission needs to acknowledge the Commission's losses in the *Ethyl* case, *Boise Cascade Corp. v. FTC*, and *the Official Airline Guides* case."[79] In each of these three decisions issued in the 1980s, the FTC experienced blows from federal courts not keen on allowing an unchecked expansion of the Section 5 rulemaking authority of the FTC.[80]

Therefore, the "chastened" FTC abandoned its rulemaking initiatives on UDAP even though such rulemaking authority was legitimate.[81] Consequently, the controversial rulemaking authority of the FTC on UMC is likely to suffer comparable, if not more significant, congressional setbacks.

Congress Failed to Pass a Legislative Authorization for FTC's UMC Rulemakings

The Antitrust Law Section of the American Bar Association has recently stated that, regarding the FTC's substantive rulemaking authority on UMC under Section 6(g), "Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act."[82] Any attempt to advocate otherwise would be ill-fated and vain.[83]

Congress needs to authorize agencies to adopt rules. Indeed, as Kerwin and Furlong wrote, it is widely accepted that:

> No rule is valid unless it is authorized by law and is promoting a statutory purpose of some kind. Key features of such legislation are the substantive mission it establishes for rulemaking, the number and timing of rules the agency will be required to write, the degree of discretion the agency enjoys in determining the content of rules, and the procedural requirements imposed on the agency.[84]

The rulemaking process is long and meticulous but guarantees the legal basis and procedural compliance of the rules to be adopted. It involves 11 stages, as outlined in table 1.

Table 1: Outline of the rulemaking process[85]

Stages	Procedural Steps	Description
Stage 1	Origin of Rulemaking Activity	Rules mandated or authorized by law (discretion, procedural requirements, volume, and frequency of rules to be produced)
Stage 2	Origin of Individual Rulemaking	Content of legislation; internal sources; external sources
Stage 3	Authorization to Proceed with Rulemaking	Priority-setting process; the agency approval process
Stage 4	Planning the Rulemaking	Goals of the rule; Legal requirements; Information requirements; Participation plan; Securing necessary resources; Assigning staff
Stage 5	Developing the Draft Rule	Collection of information; Analysis of information; Impact studies; Internal consultations; External consultations; Draft language; Implementation plan
Stage 6	Internal Review of the Draft Rule	Horizontal review; Vertical review
Stage 7	External Review of the Draft Rule	Office of Management and Budget; Congress; Interest groups; Other agencies
Stage 8	Revision and Publication of the Draft Rule	Notice of Proposed Rulemaking transmitted to the Federal Register

Stages	Procedural Steps	Description
Stage 9	Public Participation	Receipt of written comment; hearings; review and analysis of public input; draft responses
Stage 10	Action on the Draft Rule	Choice of alternatives (changes, further consultations, abandon)
Stage 11	Post-rulemaking Activities	Staff interpretations; Technical corrections; Respond to petitions; Prepare for litigation

The rulemaking process is meticulous, but it is not well-suited to agencies' proposed policy changes and cannot start without congressional authorization.

Regarding Section 5, the FTC's rulemaking authority on UDAP was derived from Congress passing the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act (Magnuson-Moss Act) in 1975.[86] Before the Magnusson-Moss Act was passed, the very ability of the FTC to engage in rulemaking for UDAP—and not merely through adjudication—was widely in doubt, including by members of the commission.[87]

Congress authorized the commission's rulemaking authority regarding UDAP and denied the commission's rulemaking authority regarding UMC.

Also, regarding the rulemaking authority of the FTC concerning UDAP, Section 18 of the FTCA clearly states that "the Commission may prescribe (A) interpretive rules and general statements of policy concerning unfair or deceptive acts or practices in or affecting commerce … (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[88] Consequently, the FTC's rulemaking authority for UDAP is unequivocal but cumbersome.[89]

But contrary to the current Neo-Brandeisian FTC that wants to promulgate legislative rules for UMC rulemaking, the Magnuson-Moss Act explicitly excludes such a possibility:

> The Commission shall have no authority under this subchapter, 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 45(a)(1) of this title). The preceding sentence shall not affect any authority of the commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.[90]

Congress authorized the commission's rulemaking authority regarding UDAP and denied the commission's rulemaking authority regarding UMC. The current efforts to make Section 6(g) say something contrary to congressional intent is bound to fail in courts, since the Magnuson-Moss Act "is best read as declining to endorse the FTC's UMC rulemaking authority and instead leaving the question open for future consideration by the courts."[91]

The Magnuson-Moss Act requires written warranties to comply with the "rule of the Commission" explicitly authorized for the FTC to enact. For instance, Section 102(b)(1)(A) of the act states that "the Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or proscriptive consumer) before the sale of the product to him."[92] When Congress wants to prohibit the FTC from enacting specific rules, it does so explicitly and unequivocally. For instance, Section 102(2) of the act reads, "[N]othing in this title … shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted."[93] In short, Congress dedicates efforts to delineate the breadth of the authorization it gives the FTC when the commission is tasked with enacting ex ante rules on consumer protection.

Following the Magnuson-Moss Act, the FTC was empowered to preemptively issue industry-wide rules designed to promote the FTC's policy on consumer protection. Additionally, the FTCA empowered the FTC to recover civil penalties for violations and seek judicial restitution on behalf of injured consumers. As early as 1975, the FTC initiated a pilot enforcement program prohibiting or regulating practices such as bait and switch, door-to-door selling problems, and the sale of defective goods.[94]

The Magnuson-Moss Act provides for an arduous rulemaking process more cumbersome than the notice-and-comment rulemaking process stipulated by the Administrative Procedure Act (APA). Since 1975, only seven FTC rulemaking initiatives under the Magnuson-Moss rulemaking process have been finalized, with each rule taking an average of six years to be adopted.

When Congress wants the FTC to engage in rulemaking activity, it explicitly provides the necessary authorization. There is no implied authorization.[95] The Telephone Disclosure and Dispute Resolution Act of 1992, the Children's Online Privacy Protection Act of 1998, and the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1984 are examples of such legislative authorizations.[96]

The ability of the FTC to adopt UMC rulemakings is close to nil.[97] The FTC has adopted only one ex ante rule as UMC rulemaking: the Discriminatory Practices in Men's and Boy's Tailored Clothing Industry of 1968.[98] This rule was a magistral failure, as acknowledged by the FTC in 1995 when it decided to rescind the rule. Indeed, the rule established a presumption that promotional allowances and services in the tailored clothing industry that were not provided following a written plan were not available on proportionately equal terms, therefore constituting UMC.

When Congress wants the FTC to engage in rulemaking activity, it explicitly provides the necessary authorization. The is no implied authorization.

In its 1968 ruling, the Supreme Court ordered the FTC to issue detailed guidelines on promotional allowances to provide better legal certainty. Those "Fred Meyer Guides" guidelines deemed the industry-specific rule "unnecessary." Most glaringly, the FTC acknowledged that "since the rule was promulgated, it does not appear that the agency has ever relied on the rule in a law enforcement matter, or that any litigant has ever made use of it in a reported private action. Moreover, no industry members responded to the Notice of Proposed Rulemaking to urge retention of the rule." The FTC was bound to repeal the rule to "resolve the inconsistency" between the rule and the guides. As a telling blow to its rulemaking authority, the FTC concluded, "The benefits of repealing this Rule include removal of an unnecessary provision from the Code of Federal Regulations, the increased efficiency of law enforcement when uniform standards are applicable, and the increased respect for the law that may be anticipated when regulations are current and relevant."[99]

The only adopted ex ante rule on UMC failed. But did the FTC ever have the power to enact such a rule? Because Congress did not pass a similar authorization for the FTC to engage in substantive UMC rulemaking, the FTC cannot claim regulatory powers not granted to it by Congress. There is no implied congressional authorization. Only a clear, explicit, and unambiguous congressional approval can allow the FTC to engage in substantive rulemaking on UMC. As former acting FTC chairwoman Maureen Ohlhausen and former assistant attorney general for antitrust at the Department of Justice James Rill aptly noted, "In sharp contrast with these well-defined grants of power, broad legislative-style rulemaking against unfair methods of competition under Section 6(g) of the FTC Act would be bounded neither by meticulous procedural requirements nor by a specific Congressional mandate."[100]

As aptly pointed out by Professor Richard J. Pierce, most federal agencies have explicit power to issue legislative rules to prohibit certain practices ex ante aside from adjudicative powers.[101] These legislative powers granted to agencies result from APA Section 553, which allows agencies to issue legislative rules to implement the statutes relevant to the agency. But Pierce also noted that "in antitrust context, the FTC lacks that power." Since there is no implied power regarding rules agencies can adopt, the FTC cannot enact rules on antitrust matters.

The FTC's UMC rulemaking would not only be unlawful, as Section 6(g) of the FTCA provides an insufficient legal basis for it, but economically harmful. Adopting ex ante rules of competition would mimic the European attempt with the Digital Markets Act (DMA), which favors precaution over innovation.

The shift to ex ante rules of competition illustrates the global rise of precautionary antitrust—first initiated by the European Commission and then imported to the United States via a misguided reading of Section 6(g) of the FTCA.

AMERICAN PRECAUTIONARY ANTITRUST IS LIKELY HARMFUL

The FTC lacks substantive rulemaking authority under Section 5 and 6(g) of FTCA to enact legislative ex ante rules on UMC. But should the FTC nevertheless engage in such a rulemaking process despite its likely unlawfulness, it would be economically harmful. Indeed, shifting the enforcement of antitrust laws, and more generally of competition analysis, from ex post judicial and administrative enforcement where the rule of reason allows for an assessment of the countervailing benefits of alleged anticompetitive conduct toward an ex ante set of regulatory prohibitions would lead to false positives that disparage consumer benefits.

Such a shift illustrates the global rise of precautionary antitrust, first initiated by the European Commission and then imported to the United States via a misguided reading of Section 6(g) of the FTCA.[102] Precautionary antitrust means that the core elements of the precautionary principle—reversed burden of proof, preemptive prohibitions despite the absence of actual harm, and preference for the status quo over disruptions—enter into antitrust matters. While the precautionary principle undermines innovation, precautionary antitrust undermines innovation incentives.[103] Preemptive interventionism characterizes the precautionary logic: It is better to be safe than sorry. Nevertheless, excessive precaution deters innovation and thereby prevents firms from competing.[104]

This precautionary antitrust would apply per se rules of illegality to rapidly changing markets and innovative companies, thereby fossilizing market dynamism with immutable prohibitions amid changing market circumstances. Judicial enforcement of antitrust laws (i.e., a common law approach) proves far superior to regulation-based, ex ante rules of competition, especially as markets become increasingly more dynamic.[105]

Precautionary Antitrust as Preemption on Innovation

Given that "officials charged with enforcing antitrust laws are even more inclined [than economists] to find monopoly purposes lurking in unfamiliar or unconventional business practices," disruption and innovation often are conflated with monopolization.[106] Against that background, the ability of officials to enact ex ante rules prohibiting firms from competing would inevitably lead to the outlawing of disruptive practices, since such innovations are inherently unfamiliar to officials and unconventional to the business community. Otherwise, they would be disruptive and potentially successful. Nobel Prize winner Ronald Coase has indeed affirmed that "if an economist finds something—a business practice of one sort or another—that he does not understand he looks for a monopoly explanation."[107]

For instance, blanket prohibitions of self-preferencing would lead to consumer harm. Many companies that engage in self-preferencing strive to offer lower prices thanks to their leveraging power and ability to imitate and innovate.[108] In that regard, would ex ante legislative rules prohibit self-preferencing by large online platforms? Would companies such as Google no longer offer cheaper smartphones to compete with Apple's iPhones? Would Amazon no longer offer more affordable private-label products to compete with brand-name products, despite the commonness of such practices in the retail market?[109]

The ability of officials to enact ex ante rules prohibiting firms from competing will inevitably lead to the outlawing of disruptive practices, since such innovations are inherently unfamiliar to officials and unconventional to the business community.

Also, despite the well-recognized efficiencies of price discrimination, blanket prohibitions on it would prevent companies from increasing consumer welfare. Legislative ex ante rules would, for example, enable the FTC to outlaw different prices for families or students purchasing Microsoft Office or allow the FTC to outlaw Apple One (which bundles six digital services into one subscription). What would be the consumer benefits? Nothing. Only less-integrated, less-efficient rivals would benefit from these blanket prohibitions that ignore countervailing consumer benefits. Obviously, given the current populist narrative of "big is bad," it is likely that these blanket prohibitions would only apply to large online platforms, similarly to how many antitrust bills discriminate against these large online platforms.[110]

Consequently, in addition to generating consumer harm, these blanket prohibitions only targeting a narrow range of companies would inevitably cause unfair competition (rather than fair competition) since regulators would distort the level playing field.

Indeed, to illustrate from these examples, how fair would the competition be if Google were not allowed to offer cheaper alternatives to compete with Apple's iPhone, but Huawei could?[111] Also, would Microsoft be precluded from offering different prices for its Microsoft Office's software suite, whereas its rival WordPerfect Office could offer student prices? Finally, would Apple be prohibited from providing one bundled subscription of six digital services only because Spotify considers such a bundle anticompetitive?[112] Prohibition of innovative efforts looms large with ex ante rules of per se illegality in fiercely competitive markets.

The risks of false positives increase whenever companies are disruptive. But blanket prohibitions of disruptive practices would harm consumers. Consumers would not benefit from innovation, and companies would be deterred from innovating as they would internalize these prohibitions or anticipate prosecutions.

But ex ante rules of competition, such as those envisaged by the FTC under Section 6(g), are blanket prohibitions: They are per se rules of illegality precluding the essential balancing exercise inherent to the rule of reason. Countervailing benefits justifying the practice would be ignored at the expense of American consumers and innovation.

The dynamism of markets opposes rigid, static per se prohibitions, which inevitably will arise from substantive rulemaking on UMC. The rigidity of ex ante rules of competition clashes with the desired flexibility of case-by-case adjudication of antitrust rules, as Ohlhausen and Rill noted:

> In the case of bright-line conduct prohibitions, the result will be rules frozen in time and unresponsive to rapidly changing industry dynamics. Unlike case-by-case adjudication, which benefits from the continued evolution of economic and industrial learning, substantive unfair methods of competition rulemaking would rely on static and potentially inaccurate views of how markets function. Any such misguided rules would then require additional rulemaking or an act of Congress to correct, undermining the flexibility of future FTC adjudications.[113]

Therefore, not only is substantive UMC rulemaking susceptible to congressional and judicial backlashes, but it is detrimental to dynamic competition because disruptive innovations can hastily be considered "unfair competition."

Ex ante rules of competition such as those envisaged by the FTC under Section 6(g) are blanket prohibitions: They are per se rules of illegality precluding the essential balancing exercise inherent to the rule of reason.

Preemptively prohibiting certain conduct by innovative companies based on UMC would inevitably lead to a precautionary logic whereby a reversed burden of proof would deter companies from innovating and disrupting their competitors at the very expense of the benefits of competition. In other words, since the precautionary principle runs counter to innovation considerations, precautionary antitrust through Section 6(g) of the FTCA would harm innovation, with prohibitions taking precedence over disruptions.

Despite the likely unlawful American precautionary antitrust under Section 6(g) of the FTCA and its harmfulness in deterring innovation, new FTC management may very well engage in it, particularly in two specific areas of law: noncompete clauses and exclusionary contracts.

The FTC's Envisaged Areas of Precautionary Antitrust

President Biden's Executive Order on Competition issued in July 2021 identifies "noncompete clauses and other clauses or agreements that may unfairly limit worker mobility" as subject to "exercise of the FTC's statutory rulemaking authority."[114] This is interpreted as mandating the FTC to engage in substantive rulemaking for noncompete clauses.[115]

Also, the executive order encourages the FTC to exercise its statutory rulemaking authority concerning a number of practices. Consequently, the FTC solicited in August 2021 public comments on "contract terms that may be harmful to fair competition."[116]

Additionally, the Open Markets Institute, together with other advocacy groups, petitioned the FTC in 2020 for "rulemaking to prohibit exclusionary contracts."[117]

Noncompete Clauses and Other Labor-Related Agreements

Two fundamental traits traditionally characterize the legal treatment of noncompete clauses in employment contracts. First, state laws preempt federal law. And second, analysis of the reasonableness of the clauses remains essential.[118] These two fundamental traits are in jeopardy today. Indeed, thanks to Section 5 UMC rulemakings, bolstered by President Biden's executive order, the Neo-Brandeisian FTC plans to preemptively prohibit noncompete clauses through ex ante legislative rules.

Before delving into the excessive precautionary logic of banning noncompete clauses per se rather than addressing them on a case-by-case basis at the state level, it is essential to note that no-poaching agreements are largely anticompetitive and do not deserve deferential antitrust treatment.[119] Indeed, conducive to a cartelization of the labor market, no-poaching agreements involve employers undermining competition between workers through commitments not to poach one another's employees. Agencies are right when they consider:

> An individual likely is breaking the antitrust laws if he or she agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements).[120]

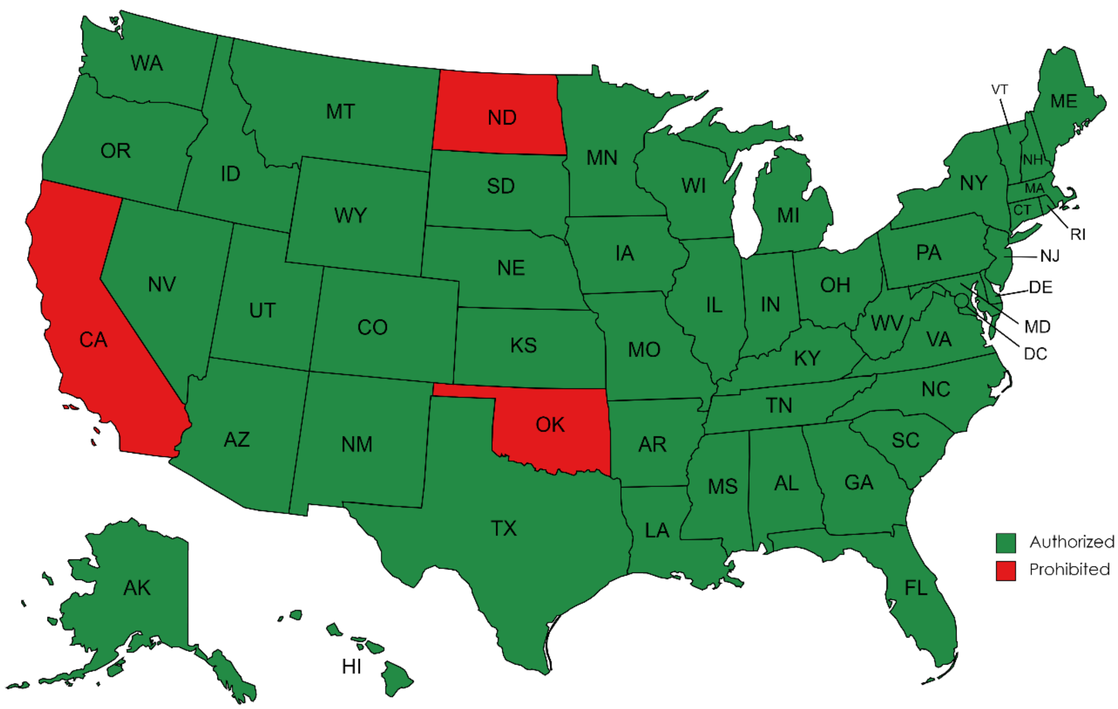
Unsurprisingly, the result of these cartel-like commitments is deflated wages, reduced worker competition and mobility, and reduced incentives to innovation since investments in human capital decrease. No-poaching agreements are antitrust violations whenever interested firms have market power, and are UMC whenever firms do not hold market power.

Beyond no-poaching agreements, noncompete clauses constitute centuries-old practices that may either be anticompetitive or pro-competitive, depending on a wide range of factors and market circumstances. Indeed, if noncompete clauses restrict workers' mobility and entrepreneurship without justifiable business considerations, then they are anticompetitive.[121] However, if noncompete clauses proceed from legitimate business considerations, then they may incentivize investments in human capital, thereby generating innovation and increased competition on human capital. These legitimate business considerations can be the protection of trade secrets and other intellectual property rights, the organization and internal efficiency of franchises, the internal efficiency of platforms, and the need to recoup essential investments in human capital.[122]

More than the substance and presence of noncompete clauses, the more concerning aspect is that 8.8 percent of employees have "unknowingly signed at least one such provision that they discovered only at some later date."[123] It is thus more the lack of full consent and transparency than the presence of noncompete clauses that can be a source of concern. Labor regulations and employment law—not antitrust laws—can readily address those concerns that are excessively applied to large companies.

Be that as it may, noncompete clauses are limited to just 1 percent of the population.[124] Also, the extent to which these clauses are "anticompetitive" differs from state to state. But most importantly, states decide whether to allow, prohibit, or apply a reasonableness test to noncompete clauses.

Figure 1: Lawfulness of noncompete clauses as of 2021[125]



Remarkably, the State of California prohibits noncompete clauses except for instances when trade secrets are involved.[126] The State of North Dakota prohibits noncompete clauses whose reach extends beyond "a reasonable geographic area."[127] And Oklahoma prohibits noncompete clauses "as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer."[128] These three states aside, the federal government, let alone the FTC, has neither the legal nor economic grounds to restrict nationwide noncompete clauses, especially when most states have allowed them for centuries.

One of the first recorded competition cases involved a noncompete clause. In *Dyer's case* (1414), John Dyer had broken his promise to a competitor (the plaintiff) not to practice the trade of dyeing in his hometown in England for a half year.[129] The judge ruled for Dyer, saying the agreement went against common law and was therefore invalid, resulting in a common-law approach contributing to a judge-made law of noncompete clauses for centuries.

This sensible approach led to a better understanding of the reasonableness of noncompete clauses.[130] Common law seeks to minimize trade restrictions while allowing for legitimate business practices that contribute to efficiency, innovation, and investments in human capital.[131]

Noncompete clauses have an economic rationale that essentially benefits both employees and employers. They resolve the principal-agent problem (when the priorities of an authorized agent or representative conflict with those of the person or group they represent).[132] Employers must demonstrate their reasoning, and judges are then able to amend noncompete clauses accordingly:

> In many states, the employer bears the burden of showing that restrictions are both reasonable and necessary to protect against unfair competition. While some states might enforce this agreement, a state's courts often are allowed to "blue pencil" noncompete provisions to those aspects that are absolutely necessary to prevent a competitor from gaining an unfair advantage.[133]

The new FTC ignoring this centuries-old evolution favoring ex ante rules of blanket prohibitions would override states' powers, go beyond the FTC's regulatory limits, and harm employees and employers equally. If a legislative body has to prohibit noncompete clauses despite their economic rationale, it is Congress, not the FTC.[134]

Exclusionary Contracts

Together with its solicitation for public comments on contract terms that may harm competition, the FTC enclosed a "Petition for Rulemaking to Prohibit Worker Non-Compete Clauses," and also a "Petition for Rulemaking to Prohibit Exclusionary Clauses."[135] This latter petition reveals that the FTC wants to move beyond unreasonable blanket prohibitions of noncompete clauses to blanket prohibitions of specific exclusionary provisions in contracts between business partners.

Exclusionary contracts are a vague and undefined legal notion and could become unlimited in scope should they be subject to the FTC's rulemaking authority. Exclusionary contracts as exclusive dealings generally generate pro- and anticompetitive consequences, which cannot be addressed under rules of per se illegality.[136] The efficiency and innovation rationales of exclusionary contracts lie in the ability of firms to maximize their returns on investments in proprietary assets, thus excluding rivals from the use (and abuse) of those assets. In turn, the incentives for investments and the ability to generate innovation are preserved.

To illustrate, assume that a supermarket cannot insert in its contract with third-party sellers certain clauses that provide for exclusion should the third-party sellers breach one of the fundamental obligations, such as shelving fees, inherent to leasing shelf space in that supermarket. Absent such clauses, the third-party sellers are incentivized to appropriate shelf space at the expense of both other third-party sellers and, more importantly, the supermarket itself. Accordingly, the supermarket invests less in assets it no longer controls, despite being the owner of those assets. Consequently, investments and innovation decrease, and consumers enjoy a lower-quality supermarket with lower choices of product brands.

This illustration can be extrapolated to tech platforms on which digital supermarkets and app store owners need to design contracts with exclusionary clauses to ensure qualitative features beneficial to consumers and innovation.

Consequently, given the economic rationale of exclusionary contracts when property rights are taken seriously, the law has consistently applied a rule of reason to exclusive dealings. For instance, in the seminal case of *Jefferson Parish*, the court argued that "exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."[137]

Exclusionary contracts are a vague and undefined legal notion, and could become unlimited in scope should they be subject to the FTC's rulemaking authority.

Given all the economic literature and the evolution of case law, it appears clear that exclusionary contracts need to be tested for reasonableness. Indeed, as Manne and Dauer noted, "There is thus broad consensus among economists that these restraints should not be subjected to *per se* prohibitions, and that rule of reason analysis (or even, according to some, *per se* legality) is appropriate in these settings."[138]

Vertical integration generates considerable benefits costly market transactions could otherwise theoretically achieve only at a much greater cost to consumers.[139] In other words, the ability to restrict and exclude within vertical integration enables greater investment and cost-saving efficiencies to benefit both consumers and innovation.[140]

However, against the economic evidence that vertical integration and vertical restraints foster efficiency and innovation thanks to the avoidance of the principal-agent problem, Neo-Brandeisian advocates argue that the FTC must per se prohibit exclusionary contracts that nevertheless constitute the backbone of efficient distribution channels at the benefit of consumers:

> Given the real evidence of harm from certain exclusionary contracts and the specious justifications present in their favor, the FTC should ban exclusivity with customers, distributors, or suppliers that results in substantial market foreclosure as illegal under the FTC Act. The present rule of reason governing exclusive dealing by all firms is infirm on multiple grounds.[141]

Again, the bête noire is the rule of reason. The ability of defendant companies to economically justify their practices on an efficiency basis appears unfeasible, while blanket prohibitions of standard business practices are considered acceptable. The foundations of capitalism tremble as the freedom of contract appears severely curtailed. Preemptive prohibitions, irrespective of the merits of the banned conduct, thus become widespread. Precautionary antitrust becomes enshrined in a misguided law enforced by an unrestrained FTC.

Congress and the courts would hardly accept the FTC engaging in substantive rulemaking to prohibit per se exclusionary contracts, such encroachments in a market-based economy whereby market actors remain free to intensify their commercial relationships with some business partners and not with others—or else Congress and the courts would implicitly turn every company in America into a de facto public utility micro-managed by politicians and regulators.

The unrestrained FTC needs to face opposition in its appeal for precautionary antitrust. Preemptive prohibitions go against basic economic knowledge and centuries-old jurisprudence based on reasonableness (or rule of reason) only to embrace unreasonableness and arbitrariness.

BEYOND PRECAUTIONARY ANTITRUST: DYNAMIC ANTITRUST

The assault on the rule of reason illustrates a disdain for efficiency and innovation considerations brought forward by defendant companies and deliberate neglects the need to preserve the enforcement of antitrust laws characterized by judge-made law. Indeed, it is illustrative of a more profound, more transformational shift of antitrust laws by Neo-Brandeisians now running the FTC. It represents the end of antitrust as a prosecutorial tool to prohibit anticompetitive practices in favor of ex ante regulatory rules as a proscribing tool to prohibit disruptive practices. In other words, preemptive blanket prohibitions do not merely suggest excessive interventionism by an unrestrained FTC. More importantly, they signal regulators' preference for the status quo and their distaste for disruption.

Blanket prohibitions cannot accommodate disruptive practices because these practices shake up the status quo in an authentic and legally unwary way. When bans are enforced through presumptions rather than per se rules of illegality, the reversed burden of proof deters innovative companies from upsetting the market structure, thereby reinforcing the status quo at the expense of innovation and consumers. The willingness of regulators to escape the debate between false positives (over-interventionism) and false negatives (under-interventionism) is illustrative of the growing and irrepressible trend to disregard false positives in favor of false negatives.

Preemptive blanket prohibitions do not merely suggest excessive interventionism by an unrestrained FTC. They signal regulators' preference for the status quo and their aversion for disruption.

According to the precautionary motto "better safe than sorry," the European Commission proposed the DMA because, allegedly, only ex ante regulatory rules can prevent hypothetical harm from materializing before it is too late.[142] The FTC now models its aggressive reform agenda regarding both Section 5's rulemaking authority, and Section 6(g)'s UMC rulemakings on the same precautionary logic. Competition issues, which are disparaged for being time-consuming and too sensitive to defendants' rights, can presumably no longer be resolved in courts. In the footsteps of the European Commission, bright rules and blanket prohibitions enforced preemptively seem to be the FTC's new plan.

This American precautionary antitrust takes place after the European precautionary antitrust. The so-called "Brussels effect" and its precautionary principle (rather than an innovation principle) is applauded in Europe as the lodestar of a cumbersome regulatory framework. Should the United States find inspiration in Europe's existential adherence to the precautionary principle for competition matters?

If one takes innovation seriously, the answer seems to be no. Nevertheless, without sufficient legal basis and against basic economic rationale, the FTC has already chosen its path: importing

European precautionary antitrust into the United States at the expense of consumers and America's leadership in innovation.

Precautionary antitrust is an assault on the judge-made antitrust laws, disregards the rule of reason, and wages war against efficiencies and innovation. In reverse, case-by-case enforcement of antitrust laws, adherence to the rule of reason to balance legitimate business interests, respect for the rule of law in adjudicative processes, and a genuine concern for efficiencies and innovation constitute the current fundamentals of antitrust enforcement.

In the footsteps of the European Commission, bright rules and blanket prohibitions enforced preemptively seem to be the FTC's new plan.

Should antitrust enforcement be improved? Of course, it should, as in any area of law—but only at the margins. Antitrust enforcement needs to shift from an excessively static view of competition toward a more dynamic view of competition. An evolutionary perspective of antitrust matters would embrace the Schumpeterian insights of creative destruction whereby market power enables efficiencies (and does not necessarily constitute an abusive practice), corporate size signals both possible efficiencies and possible weaknesses, innovation drives competition (rather than competition simply driving innovation), and competitive constraints materialize from the ability of firms to nurture dynamic capabilities rather than their predefined positions in a given market structure.

Antitrust enforcement can become accommodating, with dynamic competition relying on competition through innovation and static competition relying on price competition. In short, antitrust must become dynamic—or "dynamic antitrust."[143]

The principles of dynamic antitrust improve current antitrust enforcement and squarely oppose precautionary antitrust. Dynamic antitrust relies on a judge-made law wherein evolutionary economics meet an evolutionary application of the law through the adjudicative process. Precautionary antitrust fossilizes the market and rigidifies the institutions through inevitably obsolete ex ante competition rules.

The Neo-Brandeisian FTC engages in substantive rulemaking despite lacking valid legal justification, not to mention the tremendous costs to be anticipated with ex ante rules. In that regard, it echoes European precautionary antitrust with its version of American precautionary antitrust.[144]

Such a regulatory surrender by the FTC (to the benefit of the European Commission) is taking place during a critical time when innovative companies are both engaging in disruptive practices in an increasingly fierce global competition and calling for the adoption of principles of "dynamic antitrust" as radical antinomy of the precautionary antitrust the Neo-Brandeisians are regrettably choosing to embrace at the expense of American consumers and innovation. Another path for antitrust is possible—and much needed.[145]

About the Author

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ENDNOTES

1. The Administrative Procedure Act of 1946 defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Oliver Wendell Holmes defined a rule as "the skin of living policy … it hardens an inchoate normative judgment into the frozen form of words … Its issuance marks the transformation of policy from the private wish to public expectation … [T]he framing of a rule is the climactic act of the policy making process," quoted on p.2–3 in Cornelius M. Kerwin, Scott R. Furlong, *Rulemaking. How Government Agencies Write Law and Make Policy*, 4th Ed. (CQ Press: Washington, D.C., 2011).
2. Section 57(a)(2) defines "rulemaking" as "any Commission process for formulating or amending a rule," in 15 U.S. §57b-3. On Section 5, see the seminal article of Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition'" in Section 5 of the Federal Trade Commission Act, *Boston College of Law Review*, Vol.21(2), pp.227–299, https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1634&context=bclr (considering that "Section 5 is a broad and flexible statute, and one that leaves considerable room for thoughtful and constructive application").
3. Additionally, the FTC removed procedural guardrails to rulemaking, as it announced on July 9, 2021, revising the Commission's Rules of Practice. See Federal Trade Commission, Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedure, July 9, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf (considering that "revitalizing the Commission's ability to issue timely Trade Regulation Rules under Section 18 will provide much-needed clarity about how our century-old statute applies to contemporary economic realities and will allow the FTC to define with specificity what acts or practices are unfair or deceptive under Section 5 of the FTC Act"); See also Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures, July 9,

2021,
https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf (concluding that "the revisions of our Rules of Practices adopted by the majority last Thursday, without public input, undermine the goals of participation and transparency that Congress sought to advance when it enacted and amended Section 18. These changes will facilitation more rules, but not better ones").

4. 15 U.S.C. §46(g).

5. Not only is rulemaking on UMC likely unlawful, but it is also certainly economically detrimental, as it amounts to adopting a precautionary logic to innovative conduct.

6. Jean Carper, "The Backlash at the FTC," *Washington Post*, February 6, 1977.

7. Federal Trade Commission, "FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act," press release, July 1, 2021, https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under; Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act, July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf (stating that "withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets"); See "Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section Policy Statement," July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf (expressing that "I am deeply concerned that the Commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful"); Dissenting Statement of Commissioner Christine S. Wilson, July 1, 2021, https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-wilson (pointing out, "When these Enforcement Principles were issued, most people in the antitrust community concluded that the Policy Statement imposed very few limits on the use of Section 5. But today's vote to rescind the 2015 Policy Statement appears to be an effort to remove even the modest constraint that the Commission will be guided by the public policy of promoting consumer welfare and that the full effects of conduct will be considered").

8. Federal Trade Commission, State of Regulatory Priorities, December 15, 2021, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf. Strangely, this 2022 regulatory agenda does not appear on the FTC's website. The next day, the FTC unanimously embarked on rulemaking to combat a "sharp spike in impersonation fraud." However, see Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on December 16, 2021, Advance Notice of Proposed Rulemaking to Combat Government and Business Impersonation Fraud, December 16, 2021; Tim Wu, "Antitrust Via Rulemaking: Competition Catalysts," *Colorado Technology Law Journal*, Vol.16(1), pp.33–63 (2017), https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf; See, FTC, "FTC Launches Rulemaking to Combat Sharp Spike in Impersonation Fraud," press release, December 16, 2021, https://www.ftc.gov/news-events/press-releases/2021/12/ftc-launches-rulemaking-combat-sharp-spike-impersonation-fraud?utm_source=govdelivery; See also, the Federal Trade Commission Act, 15 U.S.C. §§41-59.

9. Maureen K. Ohlhausen and James Rill, "Pushing the Limits? A Primer on FTC Competition Rulemaking," U.S. Chamber of Commerce, August 12, 2021, https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf (noting that "the FTC has enjoyed considerable success in recent years with its administrative adjudications,

both in terms of winning on appeal and in shaping the development of antitrust law overall (not simply a separate category of UMC law) by creating a citable precedent in key areas").

10. Jean Carper, "The Backlash at the FTC (describing the FTC as the "National Nanny").
11. Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust" (ITIF, May 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust; Aurelien Portuese, "The Digital Markets Act: Precaution Over Innovation," Epicenter, June 1, 2021, http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf.
12. On July 1, 2021, the FTC voted 3-2 in favor of a motion that removed the chief administrative law judge from the role of presiding officer in Section 18 rulemaking. In other words, Chair Khan (or her designee) will assume the role of the presiding officer, thereby concentrating even more power in her hands when it comes to rulemaking initiatives. See Federal Trade Commission, Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra Regarding the Adopting of Revised Section 18 Rulemaking Procedures, July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf (describing decades-old procedural requirements as "self-imposed red tape").
13. Caleb Kruckenberg, "The FTC's rebellion against the judiciary," *The Hill*, January 3, 2022, https://thehill.com/opinion/judiciary/587728-the-ftcs-rebellion-against-the-judiciary (stating in light of an FTC's recent illegal disgorgement settled, "The FTC should have to answer for its continued abuses. The Supreme Court's directives were clear, but the agency has not followed its legal duty. Perhaps it's time for another branch—Congress—to demand answers"); On the FTC banning staffers from speaking publicly, see Leah Nylen and Betsy Swan, "FTC Staffers Told to Back Out of Public Appearances," *Politico*, July 6, 2021, https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386 (noting that "the temporary moratorium on public appearances may hamper efforts to portray the agency as newly transparent").
14. Federal Trade Commission, State of Regulatory Priorities, December 15, 2021, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.
15. Ibid.
16. Ganesh Sitaraman, "Taking Antitrust Away from the Courts" (The Great Democracy Initiative Report, September 2018), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2055&context=faculty-publications.
17. Lina Khan and Rohit Chopra, "The Case for 'Unfair Methods of Competition' Rulemaking," *University of Chicago Law Review*, Vol.87(2), 357–379 (2018), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6181&context=uclrev (criticizing the very nature of the common law process on p.360 when they write "relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions").
18. Ibid, p.366. (Also describing their goals is "to reflect on the current state of antitrust enforcement and consider ways to address the ambiguity, burdens, and democratic deficiency.").
19. Federal Trade Commission, State of Regulatory Priorities, December 15, 2021, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.
20. Rebecca Slaughter, "FTC Acting Chairwoman Slaughter Announces New Rulemaking Group," FTC press release, March 25, 2021, https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.
21. Tim Wu, "Antitrust Via Rulemaking."

22. White House, Executive Order on Promoting Competition in the American Economy, July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
23. Ibid., Section 5(g) and (h).
24. The only provision that may come close to issues of competition and not consumer protection is Section 5(h)(vii) wherein the executive order suggests that the FTC use its rulemaking authority for "any other unfair industry-specific practices that substantially inhibit competition." However, far from unconditionally granting the FTC's rulemaking authority, this provision is limited to "industry-specific," thereby preventing the FTC from adopting across-the-board rules on UMC. It is a sectoral entitlement, not a generic one.
25. Tim Wu, "Antitrust Via Rulemaking" (noting on pp.61–62 that "a poorly designed regime may both fail to create any additional competition and worse, serve to insulate the industry from antitrust scrutiny").
26. Lina Khan and Rohit Chopra, "The Case for 'Unfair Methods of Competition' Rulemaking" (considering on p.359 that "one reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the 'rule of reason' standard").
27. The Supreme Court has largely supported the rule of reason rather than per se rules of illegality. See, e.g., *Bus. Elec. Corp. v. Sharp Elec. Corp.* 485 U.S. 717, 726 (1988) (the U.S. Supreme Court stating that departure from the rule of reason standard in favor of per se rules "must be justified by demonstrable economic effect"). More recently, see *Leegin Creative Leather Prods. Inc, v PSKS*, Inc. 554 U.S. 877, 882 (2007) (judging that the 1911 case of Dr. Miles must be overturned because vertical price restraints must be assessed through a rule of reason and not through a per se rule.) On the evolutionary process of the common law and the evolutionary process of creative destruction inherent to entrepreneurial innovation, see Nuno Garoupa and Carlos Gomes Ligüerre, "The Evolution of the Common Law and Efficiency," *Georgia Journal of International and Comparative Law*, Vol.40(2) (2012), http://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1542&context=facscholar; Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 3rd edition, (New York, NY: HarperPerennial, 1942) [2008] (writing on pp.82–83 that "capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary … The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers' goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates").
28. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See also *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) (arguing that "the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law").
29. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practices*, 3rd edition, (New York, West Group: 2005).
30. Federal Trade Commission, Statement of the Federal Trade Commission on the Issuance of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act, August 13, 2015, chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (noting that antitrust laws "have evolved over time and are guided by the goal of promoting consumer welfare and informed by economic analysis. The result of this evolution is the modern 'rule of reason'").
31. See, e.g., Hal Singer, "Fixing a Broken Antitrust Regime," ProMarket.org, May 26, 2021, https://promarket.org/2021/05/26/amy-klobuchar-antitrust-monopoly-ovation-review/; See also, Greg Ip, "Antitrust's New Mission: Preserving Democracy Not Efficiency," *The Wall Street Journal*, July 7, 2021, https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424; For a critique, see Aurelien Portuese, "Principles of Dynamic Antitrust: Competing

Through Innovation," (ITIF, June 2021), https://itif.org/sites/default/files/2021-exec-summary-principles-dynamic-antitrust.pdf (writing on p.14, "Without the need to resort to legally binding ex-ante rules, soft law instruments also participate in the necessary evolutionary formation of antitrust enforcement—an inherent trait of dynamic antitrust"); Joshua Wright and Aurelien Portuese, *Antitrust Populism: Toward a Taxonomy, Stanford Journal of Law, Business & Finance*, Vol.21(1), (2020), https://awards.concurrences.com/en/awards/2020/academic-articles/antitrust-populism-towards-a-taxonomy; Aurelien Portuese, *Beyond Antitrust Populism: Towards Robust Antitrust, Journal of Economic Affairs*, Vol.40(2), pp.237–258, https://onlinelibrary.wiley.com/doi/10.1111/ecaf.12401.

32. Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act, July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.
33. See, e.g., *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (stating that "we decline to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a per se violation of section 5 by analogy to section 1 price-tampering cases").
34. See Amy Klobuchar, *Antitrust, Taking on Monopoly Power from the Gilded Age to the Digital Age*, (New York: Alfred Knopf, 2021), (arguing on p.347 that "we should curtail our use of the word 'antitrust,' excepting when talking about the history of the trusts and the specific antitrust laws that were enacted in response to the power of those trusts").
35. For a recent critical discussion, see Andrew I. Gavil, Steven C. Salop, "Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing The Rule of Reason for Exclusionary Conduct," University of Pennsylvania Law Review, Vol.168(2107), https://www.pennlawreview.com/wp-content/uploads/2021/01/Gavil-Salop_FINAL.pdf (arguing on p.2140 that "it makes sense today to assume that the error cots from false positives and false negatives are relatively equal"); For the seminal argument warning against false positives, see Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review*, Vol.63(1), (1984), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles.
36. 15. U.S. §45.
37. See Timothy J. Muris, Statutory powers, in Kenneth W. Clarkson & Timothy J. Muris (Eds.), *The Federal Trade Commission Since 1970: Economic Regulation & Bureaucratic Behavior*, (New York: Cambridge University Press, 1981, pp.13–17 (noting on p.13 that "although there may not be a legal distinction between the two, within the Commission it is usually thought that antitrust involves unfair methods of competition, whereas consumer protection involves unfair or deceptive acts or practices"); See also Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5."
38. Gilbert Montague, "Unfair methods of Competition," *Yale Law Journal*, Vol.25 No 1, pp.20–41 (1915), https://doi.org/10.2307/787527; See also Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5."
39. Cong. Rec. Vol.51, p.12136.
40. Cong. Rec. Vol.51, pp.12150–12151.
41. Cong. Rec. Vol.51 p.12456.
42. Ibid.
43. Cong. Rec. Vol.51, p.13306.
44. Cong. Rec. Vol.51 p.13994.
45. Ibid.

46. Cong. Rec. Vol.51, pp.16143–5.

47. Gilbert Montague provides a seminal list of examples of practices once deemed “unfair” but later found to be part of “fair competition.” During the congressional debates, lawmakers referred to an academic article published by Dr. Stevens containing a list of practices deemed to be “unfair competition.” Gilbert Montague provides an account of the fate of these apparently unfair methods of competition: “The International Harvester Company, by which Dr. Stevens illustrated various kinds of ’unfair competition,’ has since been held by the Federal Court to have been ’fair and just‘ to its competitors and to the public. The National Cash Register Company, of which Dr. Stevens said that ’no student … is likely to believe that the predominance of that organization could have been secured without the unfair methods which it employed,’ has since passed under the scrutiny of the Circuit Court of Appeals, which has overturned the conviction of the company's officials with the statement that the company's basic and improvement patents together with its very great capacity in the management of its affairs … without reference to any unfair treatment of its competitors are sufficient in themselves to account in large measure for the success it has attained. The United Shoe Machinery Company's leases, the ’unfairness‘ of which Dr. Stevens declared to be ’so clear that a judicial decision upholding them can hardly be expected to stand the test of time,’ have since been appraised in the Federal courts, from Dr. Stevens' own ’economic standpoint‘ of ’economic and productive efficiency,’ and have been upheld. Local price-cutting for the purpose of regaining lost business, which Dr. Stevens denounced as ’unfair competition,’ has since been apparently permitted by Section 2 of the Clayton Act, and upon economic grounds has been justified in the Federal courts.’ The allowance of rebates by manufacturers to the trade, which Dr. Stevens included under ’unfair competition,’ has since been apparently permitted by Section 2 of the Clayton Act, and has several times been justified by the courts.”

48. See Joshua D. Wright, Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority at the Executive Committee Meeting of the New York State Bar Association's Antitrust Section, 2, June 19, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf (noting that “nearly one hundred years after the agency’s creation, the Commission has still not articulated what constitutes an unfair method of competition, leaving many wondering whether the Commission’s Section5 authority actually has any meaningful limits”).

49. Everette MacIntyre and Theodor P. von Brand, “Unfair Methods of Competition as an Evolving Concept— Prelude to Consumerism,” *St. John’s Law Review*, Vol.44 No 4, 597–625, 599 (1970), https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=3438&context=lawreview.

50. Federal Trade Commission, “FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act,” press release, July 1, 2021, https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under; Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act, July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf (stating that “withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today’s markets”); See “Remarks of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the Section Policy Statement,” July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf (expressing that “I am deeply concerned that the Commission’s action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful”); Dissenting Statement of Commissioner Christine S. Wilson, July 1, 2021, https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-

wilson (pointing out, "When these Enforcement Principles were issued, most people in the antitrust community concluded that the Policy Statement imposed very few limits on the use of Section 5. But today's vote to rescind the 2015 Policy Statement appears to be an effort to remove even the modest constraint that the Commission will be guided by the public policy of promoting consumer welfare and that the full effects of conduct will be considered").

51. Federal Trade Commission, "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," August 13, 2015, https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act. Commissioner Ohlhausen dissented on procedural aspects. See Maureen K. Ohlhausen, "Dissenting Statement of Commissioner Ohlhausen— FTC Act Section 5 Policy Statement," https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy (suggesting that another "Section 5 policy statement be put out for public comment before adoption and include, among other things: (1) a substantial harm requirement; (2) a disproportionate harm test; (3) a stricter standard for pursuing conduct already addressed by the antitrust laws; (4) a commitment to minimize FTC-DOJ conflict; (5) reliance on robust economic evidence on the practice at issue and exploration of available non-enforcement tools prior to taking any enforcement action; and (6) a commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice").
52. Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School, August 13, 2015, https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf
53. Neil Averitt, "The History of Section 5, in Workshop on Section 5 of the FTC as a Competition Statutes," October 17, 2008, Federal Trade Commission, FTC Conference Center, p.25, https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf.
54. Substantive rulemaking refers to ex-ante rules that directly affect business conduct and differ from informal rulemaking provided in 5 U.S. §553, which regulates public comments on a proposed rule.
55. See Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5."
56. Antitrust and Trade Regulation Report (BNA) (January 11, 1972) p.A-6, quoted in Kenneth W. Clarkson & Timothy J. Muris (Eds.), *The Federal Trade Commission Since 1970: Economic Regulation & Bureaucratic Behavior*, (New York: Cambridge University Press, 1981, p.43.
57. Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking. How Government Agencies Write Law and Make Policy*, 4th Ed. (CQ Press: Washington, D.C., 2011), p.75.
58. The possibility of prosecuting UMC under Section 5 as a standalone provision, beyond the violations included in the Sherman and Clayton Acts, was confirmed by the Supreme Court. See *FTC v Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922); *FTC v. Motion Picture Advert. Serv. Co*, 344 U.S. 392, 394–395 (1953); *Fashion Originators' Guild of Am v. FTC*, 312 U.S. 457 (1941); *FTC v. Brown Shoe*, 284 U.S. 316, §321-322 (1966).
59. Cong. Rec. Vol.51 p.13111. See also Cong. Rec. Vol.51, pp.12130–2.
60. Cong. Rec. Vol.51, 12454.
61. Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5."
62. H.R. Rep. No 533, 63rd Cong. 2d. Sess. (1914).
63. Sen. Rep. No. 594, 63rd Cong. 2d. Sess. (1914); H.R. Rep. No 1142, 63rd, Cong. 2d Sess. (1914).
64. Gilbert Montague, "Unfair Methods of Competition," *Yale Law Journal*, Vol.25 No 1, pp.20–41 (1915), https://doi.org/10.2307/787527 (noting that the notion of "unfair competition" generated "the greatest divergence of opinion" in Congress during the debates preceding the passing of the FTC act).

65. FTC v. Gratz, 253 U.S. 421 (1920); *FTC v. Klesner*, 280 U.S. 19 (1929); *FTC v. Raladam Co.*, 283 U.S. 643 (1931). See also *FTC v. Beech-Nut Co.*, 257 U.S. 441 (1922); *FTC v. Keppel & Bros.*, 291 U.S. 304, (1934). More generally, see Richard K. Decker, "Unfair Competition and the Federal Trade Commission," *Federal Bar Journal*, Vol.24, pp.513–540, (1964), https://heinonline.org/HOL/P?h=hein.barjournals/fedbj0024&i=529.
66. *FTC v. Gratz*, 253 U.S. 421, 427 (1920).
67. *FTC v. Gratz*, 253 U.S. 421, (1920) (Brandeis dissent).
68. *FTC v. Klesner*, 280 U.S. 19 (1929).
69. Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5."
70. *Raladam Co. Federal Trade Commission*, 42 F.2d 430, at 435.
71. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931).
72. See also *Royal Baking Powder Co. v. FTC*, 281 F. 744, 753 (2d Cir. 1922); *Fioret Sales Co. v. FTC*, 100 F.2d 358, 359 (2d Cir. 1938); *FTC v. F.A. Martoccio Co.*, 87 F.2d 561, 564 (8th Cir. 1937); *Belmont Laboratories, Inc. v. FTC*, 103 F.2d 538, 542 (3d Cir. 1939) (noting a judicial trend to "broaden the meaning of competition in the interests of consumer protection"); *Minter Bros. v. FTC*, 102 F.2d 69, 70 (3d Cir. 1939) (noting "trend is away from the requirement of injury to a particular competitor and toward the protection of the general consumer"); *FTC v. Balme*, 23 F.2d 615 (2d Cir.), cert. denied, 277 U.S. 598. (1928).
73. *National Petroleum Refiners Associations v. FTC*, 482 F. 2d 672 (D.C. Cir. 1973).
74. Richard J. Pierce, Jr., "The Rocky Relationship Between the Federal Trade Commission and Administrative Law," *George Washington Law Review*, Vol.83, pp.2026–2048 (2015), https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2026.pdf ("to the surprise of many, the D.C. Circuit upheld the FTC's new view that it had the power to issue legislative rules in 1973 in an opinion that remains controversial today").
75. See *Christensen v. Harris County*, 529 U.S. 576 (2000), *United States v. Mead Corp*. 533 U.S. 218 (2001). Both cases held that the Chevron doctrine, which allowed for a high level of congressional deference regarding agencies' rulemaking authorities, applies only to agency interpretation that have the "force of law." On Chevron doctrine, see *Chevron U.S.A Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In that regard, see Federal Trade Commission, "Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission," Report 1.0 of the FTC: Technology & Reform Project, December 13, ("the modern administrative states as it has evolved over roughly the past 30 years (e.g., since around the time of the Supreme Court's opinion in Chevron) recognizes agencies as operating more in the realm of policy than of law"). Rules can be distinguished between "legislative" and "non-legislative rules." See Michael Asimow, "Nonlegislative Rulemaking and Regulatory Reform," *Duke Law Journal*, Vol.85, pp.381–426 (1985), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2909&context=dlj ("legislative rules frequently prescribe, modify, or abolish duties, rights, or exemptions. In contrast, nonlegislative rules do not exercise delegated lawmaking power and thus are not administrative statutes. Instead, they provide guidance to the public and to agency staff and decisionmakers. They are not legally binding on members of the public"). See also, Thomas W. Merril and Kathryn Tongue Watts, "Agency Rules with the Force of Law: The Original Convention," *Harvard Law Review*, Vol.116, pp.467–591 (2002), https://digitalcommons.law.uw.edu/faculty-articles/46/ (concluding that "all agree that agencies have no inherent authority to act with the force of law. Agencies can issue edicts that have the effect of status only if Congress delegates to them the authority to do so").
76. Alan Berlow, "Federal Trade Commission: Business Wants Congress to Limit Powers of Agency," *Congressional Quarterly Weekly Report*, August 11, 1979, pp.1647–1657 (1979); Kenneth Clarkson and Timothy J. Muris, "Constraining the Federal Trade Commission: The Case of Occupational Regulation," *University of Miami Law Review*, Vol.35, pp.77–130 (1980),

https://repository.law.miami.edu/umlr/vol35/iss1/4/; Thomas M. Dyer and James B. Ellis, "The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition," *George Washington Law Review*, Vol.41, pp.330–347 (1972), https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr41&div=18&id=&page=; Caswell O. Hobbs, "Legal Issues in FTC Trade Regulation Rules," *Food Drug Cosmetic Law Journal*, Vol.22 pp.414–422 (1977), https://www.jstor.org/stable/26657989.

77. Before 1980, the Commission applied its unfairness authority according to the so-called "Cigarette Rule," which follows from the Supreme Court's decision in *FTC v. Sperry & Hutchinson Co*., 405 U.S. 23, 244 n.5 (1972) wherein the unfairness criteria were i) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by states, the common law, or otherwise, ii) whether it is immoral, unethical, oppressive, or unscrupulous, iii) whether it causes substantial injury to consumers. The Commission revised these criteria in its Policy Statement in 1980. See Federal Trade Commission, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, 104 FTC 1070, December 17 (1980) appended in International Harvester Co., 104 FTC 100 (1984). Congress codified the new unfairness approach in 1994. See 15 U.S. §45.

78. J. Howard Beales, "The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection," The Marketing and Public Policy Conference, Washington, D.C., May 30, 2003, https://www.ftc.gov/es/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection (also noting that "at one point, Congress refused to provide the necessary funding, and simply shut down the FTC for several days … Eventually, Congress acted to restrict the FTC's authority, including legislation preventing the FTC from using unfairness in new rulemakings to restrict advertising").

79. Dissenting Statement of Commissioner Christine S. Wilson, July 1, 2021, https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-wilson (pointing out that "prudence dictates that the Commission limit its use of standalone Section 5 cases to the public policy underlying the antitrust laws and to conduct that harms consumers").

80. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (concluding that "even if the Commission has authority under Sec. 5 to forbid legitimate, non-collusive business practices which substantially lessen competition, there has not been a sufficient showing of lessening of competition in the instant case to permit the exercise of that power"); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (stating that "we decline to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a per se violation of section 5 by analogy to section 1 price-tampering cases"); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (considering that "we think enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry. Such a decision would permit the FTC to delve into, as the Commission itself put the extreme case, 'social, political, or personal reasons' for a monopolist's refusal to deal").

81. Ibid.

82. American Bar Association Antitrust Law Section, Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on 'Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues.," April 24, 2020, p.54, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf.

83. Thomas W. Merrill and Kathryn Tongue Watts, "Agency Rules with the Force of Law: The Original Convention," *Harvard Law Review*; Vol.116, pp.467–592 (2002), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1431&context=faculty_scholarship ("The failure to provide any sanction for the violation of rules adopted under section 6(g), along with the placement of the rulemaking grant in section 6, which conferred the FTC's investigative powers,

clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC's investigative duties, regarding which Congress had not given the agency the authority to act with the force of law."). In a vain attempt to argue otherwise, see Lina Khan and Rohit Chopra, "The Case for 'Unfair Methods of Competition' Rulemaking."

84. Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking. How Government Agencies Write Law and Make Policy*. 4th Ed. (CQ Press: Washington, D.C., 2011), p.75.

85. Ibid, pp.76–77.

86. The 1970s saw a particular increase of special statute legislation empowering the FTC with an expanded regulatory authority. See, the Magnuson-Moss Warranty Act, effective in 1976; the Fair Credit Reporting Act, effective in 1971; the Equal Credit Opportunity Act, effective in 1975; the Fair Credit Billing Act, effective in 1975; the Consumer Leasing Act, effective in 1976; the Fair Debt Collection Practices Act, effective in 1977; the Energy Policy and Conservation Act, effective in 1976. Notably, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 amended the Clayton Act to require notification of certain mergers. See, more generally, Timothy J. Muris, Statutory powers, in Kenneth W. Clarkson & Timothy J. Muris (Eds.), *The Federal Trade Commission Since 1970: Economic Regulation & Bureaucratic Behavior*, (New York: Cambridge University Press, 1981, pp.13–17.

87. See the authorities quoted in *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), §693-694, n.27.

88. 15 U.S.C. 57a.

89. Seven rules and nine amendments were adopted under the Magnusson-Moss rulemaking procedure. A five-year period was necessary, on average, for each rule to be adopted. See Maureen K. Ohlhausen and James Rill, "Pushing the Limits?" Additionally, the Federal Trade Commission Improvements Act of 1980 further required the FTC to issue an Advance Notice of Proposed Rulemaking (ANPRM) before initiative rulemaking. See Pub. L. No. 96-252, §8(a)(3).

90. 15 U.S. §57(a)(a)(2).

91. Maureen K. Ohlhausen and James Rill, "Pushing the Limits?" (predicting that "broad rulemaking of this sort would also be very likely to encounter stiff resistance in the courts due to its tenuous statutory basis and the myriad constitutional and institutional problems it creates").

92. Pub. Law. 93-637, Jan. 4, 1975.

93. Ibid.

94. FTC Budget Justification to Congress for Fiscal Year 1977 (1976), p.51. See also Timothy J. Muris, Statutory powers, in Kenneth W. Clarkson & Timothy J. Muris (Eds.), *The Federal Trade Commission Since 1970: Economic Regulation & Bureaucratic Behavior*, (New York: Cambridge University Press, 1981, pp.13–17

95. See also *AMG Capital Management, LLC, et al. v. Federal Trade Commission*, 41 S. Ct. 1341 (2021) (where the Supreme Court recently considered that the FTC has no implicit authority in its regulatory powers).

96. Respectively, 15 U.S.C. §5701-5724; 15 U.S.C. §6501-6505; 15 U.S.C. §6101-6108; See Maureen K. Ohlhausen and James Rill, "Pushing the Limits?"

97. See Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST Law Journal, Vol.58, pp.43–178 (1989), http://www.jstor.org/stable/40841199 ("We are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions on specific types of business conduct.").

98. Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. p.412 (1968). See Daniel A. Crane, "Debunking Humphrey's Executor," *George Washington Law Review*, Vol.83, pp.1835–1875 (2015), https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-

1835.pdf (noting that "Over the course of its first century, the FTC promulgated exactly one substantive antitrust rule (in 1968),175 which it apparently never enforced").

99. 16 C.F.R. pt.412, F. Reg.

100. Maureen K. Ohlhausen and James Rill, "Pushing the Limits?", p.9.

101. Richard J. Pierce, Jr., "The Rocky Relationship Between the Federal Trade Commission and Administrative Law," *George Washington Law Review*, Vol.83, pp.2026–2048 (2015), https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2026.pdf (noting that the FTC "has no power to issue rules to implement the Sherman or Clayton Acts, and its power to issue rules to implement Section 5 of the FTC Act is so laden with burdensome, inefficient mandatory procedures that it is useless").

102. Aurelien Portuese, "European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust," The Global Antitrust Institute Report on the Digital Economy, pp.597–651 (2020), https://gaidigitalreport.com/wp-content/uploads/2020/11/The-Global-Antitrust-Institute-Report-on-the-Digital-Economy_Final.pdf ("the new competition tools proposed by the European Commission strongly advocate for a shift from ex-post antitrust liability balancing pro and anti-competitive effects, towards ex-ante regulatory obligations akin to sectoral regulations. Should these types of initiatives materialize in Europe and abroad, the precautionary shift will radically change competition enforcement and the antitrust discipline as we understand it."); Aurelien Portuese, "Precautionary Antitrust: A Precautionary Tale in European Competition Policy," in Klaus Mathis, Avishalom Tor (Eds.) Law and Economics of Regulation, pp.203–231 (2021), https://www.dropbox.com/s/omyqhlof8ofbsgt/Portuese_Precautionary%20Antitrust.pdf?dl=0; Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust," (ITIF, May 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust ("the paradigm shift from ex post antitrust liability to ex ante regulatory compliance represents a resurgence of the precautionary principle concerning tech companies at the expense of innovation"); Aurelien Portuese, "The Rise of Precautionary Antitrust: An Illustration with the EU Google Android Decision," Competition Policy International, November 17, 2019, https://www.competitionpolicyinternational.com/the-rise-of-precautionary-antitrust-an-illustration-with-the-eu-google-android-decision/ ("Under precautionary antitrust, choice trumps welfare, ex ante regulatory interventionism trumps an ex post antitrust liability system, the shifted burden of proof prevails over non-presumed fault, and irreversible damages replace demonstrated consumer harm.").

103. On how the precautionary principle harms innovation, see Aurelien Portuese and Julien Pillot, "The Case for an Innovation Principle: A Comparative Law and Economic Analysis," *Manchester Journal of International Economic Law*, Vol.15, pp.214–237 (2018), https://www.dropbox.com/s/wdk60ukt7r5xb2v/Innovation%20Principle.pdf?dl=0.

104. On why innovation is the cause, and not only the consequence, of competition, see David J. Teece, *Competing Through Innovation. Technology Strategy and Antitrust Policies* (Edward Elgar Publishing: New York, 2013); Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation" (ITIF, June 2021), https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation ("This relationship between competition and innovation considers and empirically demonstrates that innovation is the consequence of competition and, more fundamentally, the engine of competition."); Philippe Aghion et al., "Competition, Imitation and Growth with Step-by-Step Innovation," Review of Economic Studies, Vol.68, pp.467–492 (2001), https://www.jstor.org/stable/2695893.

105. See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."); *United States v. Topco Assocs*., 405 U.S. 596, 620–21 (1972) (Burger, J., dissenting) ("Senator Sherman...[stated] 'I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.'" (quoting 21 Cong. Rec. 2457, 2460)); *State Oil Co. v.*

Khan, 522 U.S. 3, 20–21 (1997) ("the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'"; *Nat'l Soc'y of Pro.Eng'rs v. United States*, 435 U.S. 679, 688 (1978)).

106. Oliver E. Williamson, "Review of Bowman's Patent and Antitrust Law," *Yale Law Journal*, Vol.83, pp.647–661 (1974), https://doi.org/10.2307/795361.

107. Ronald H. Coase, "Industrial Organization: A Proposal for Research," in V. Fuchs (Ed.) Industrial Organization (Washington, D.C.: National Bureau of Economic Research, p.59–73, https://www.nber.org/books-and-chapters/economic-research-retrospect-and-prospect-volume-3-policy-issues-and-research-opportunities/industrial-organization-proposal-research.

108. Aurelien Portuese, "' Please, Help Yourself': Toward a Taxonomy of Self-Preferencing" (ITIF, October 2021), https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing; See also Daniel D. Sokol, "The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason, and Per Se Legality*," Antitrust Law Journal*, Vol.79 (2014): 1003–1016, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1561&context=facultypub.

109. Ibid.

110. Aurelien Portuese, "The House's Antitrust Legislative Package: An Innovation Perspective" (ITIF, August 2021), https://itif.org/publications/2021/08/02/houses-antitrust-legislative-package-innovation-perspective ("would reform antitrust laws according to firms' size, not their conduct. Under these proposals, pro-competitive conduct would become anticompetitive simply because the concerned companies have reached a certain size threshold. Introducing a size threshold to enforce antitrust laws is reminiscent of a populist "big is bad" motto."); See also Aurelien Portuese, "'Please, Help Yourself': Toward a Taxonomy of Self-Preferencing" (ITIF, October 2021), https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing (on p.17, "Like the European Commission's Digital Markets Act, the Klobuchar-Grassley bill defines "covered platforms" in a way that subjects just a few very large online platforms to regulation.").

111. Arjun Kharpal, "Huawei launches its own operating system on smartphones in challenge to Google Android," CNBC, June 2, 2021, https://www.cnbc.com/2021/06/02/huawei-harmonyos-operating-system-launched-on-smartphone-smartwatch.html ("Huawei is trying to differentiate its operating system from Google's Android and Apple's iOS.").

112. Clare Duffy, "Why Spotify is picking a fight with Apple over Apple One," CNN, September 19, 2020, https://www.cnn.com/2020/09/19/tech/apple-one-spotify-antitrust/index.html (noting that Spotify "criticized the bundle, calling it 'anticompetitive' … If left unchecked, Spotify says Apple's bundling of services will harm competitors, and could limit choice for consumers.").

113. Maureen K. Ohlhausen and James Rill, "Pushing the Limits?" 9–10.

114. Section 5(g) of the Executive Order on Promoting Competition in the American Economy, July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

115. However, even before the executive order, the FTC organized a workshop in January 2020 to "examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts." See Federal Trade Commission, "FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts," December 5, 2019, https://www.ftc.gov/news-events/press-releases/2019/12/ftc-hold-workshop-non-compete-clauses-used-employment-contracts; See also, Global Antitrust Institute, "Noncompete Clauses Used in Employments Contracts," February 7, 2020, https://downloads.regulations.gov/FTC-2019-0093-0243/attachment_1.pdf ("We are concerned, however, that many proposals to address them through ex ante antitrust regulatory interventions, such as an FTC rule, are ill-suited and will likely do more harm than good.").

116. Federal Trade Commission, “Solicitation for Public Comments on Contract Terms that May Harm Competition,” FTC-2021-0036-0022, August 5, 2021, https://downloads.regulations.gov/FTC-2021-0036-0022/content.pdf.

117. Open Markets Institute and others, Re: Petition for Rulemaking to Prohibit Exclusionary Contracts, Petition for Rulemaking Before the Federal Trade Commission, July 21, 2021, https://downloads.regulations.gov/FTC-2021-0036-0002/content.pdf.

118. See Alden F. Abbott and Andrew Mercado, “FTC Rulemaking on Noncompete Agreements,” Policy Brief, September 2021, https://www.mercatus.org/system/files/abbott_and_mercado_-_policy_brief_-_a_critical_appraisal_of_ftc_rulemaking_procedures_for_noncompete_agreements_-_v1.pdf (“non-compete clauses have been “governed by state laws that differ in approach, from total prohibition to case-by-case evaluation of reasonableness”).

119. Eric S. Hochstardt and Nicholas J. Pappas, “Restrictions on Employee Change of Jobs: Antitrust Challenge to ‘Non-Compete’ and ‘No-Poach’ Clauses,” *ABA Journal of Labor and Employment Law*, Vol.34(2), pp.253–266, https://heinonline.org/HOL/P?h=hein.journals/lablaw34&i=269.

120. Department of Justice, Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals,” October 2016, https://www.justice.gov/atr/file/903511/download/ (adding that “even if an individual does not agree orally or in writing to limit employee compensation or recruiting, other circumstances—such as evidence of discussions and parallel behavior—may lead to an inference that the individual has agreed to do so”).

121. A growing literature has recently focused on the anticompetitive aspects of noncompete clauses. See, e.g., Evan Starr, J.J. Prescott, and Norman D. Bishara, “Noncompetes in the U.S. Labor Force,” *Journal of Law & Economics*, Vol.64(1), pp.53–84, (2021), DOI: 10.1086/712206 (noting that “relatively little is known about the use of noncompete agreements by employers because employee- level noncompete data are scarce”); Ioana Marinescu and Herbert Hovenkamp, “Anticompetitive Mergers in Labor Markets,” *Indiana Law Journal*, Vol.94, p.1031–1063 (2019); Office Of Econ. Policy, U.S. Dept Of The Treasury, Non-Compete Contracts: Economic Effects And Policy Implications (2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf; J.J. Prescott, Norman D. Bishara, and Evan Starr, “Understanding Noncompetition Agreements: The 2014 Noncompete Project,” *Michigan State Law Review*, Vol.2016, pp.369–464, (2016), https://repository.law.umich.edu/articles/1796/; Alan B. Krueger and Eric A. Posner, “A Proposal for Protecting Low-Income Workers from Monopsony and Collusion” (The Hamilton Project, February 2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf; Marshall Steinbaum, “A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High Profit, Low-Wage Economy” (Roosevelt Institute Issue Brief, April 2018), https://rooseveltinstitute.org/wp-content/uploads/2018/04/Monopsony-issue-brief.pdf.

122. See, for instance, the Department of Justice, “No-Poach Approach,” Antitrust Division Spring Update 2019, September 30, 2019, https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach (considering that “a restriction in a franchise agreement that forbids franchisees from poaching each other’s employees, however, is subject to the rule of reason in the absence of agreement among the franchisees because it is a vertical restraint”); Eric S. Hochstardt and Nicholas J. Pappas, “Restrictions on Employee Change of Jobs: Antitrust Challenge to ‘Non-Compete’ and ‘No-Poach’ Clauses,” *ABA Journal of Labor and Employment Law*, Vol.34(2), pp.253–266, https://heinonline.org/HOL/P?h=hein.journals/lablaw34&i=269 (noting that “the Government made clear that some form of hiring restriction that is ancillary to a broader economic trans-action, such as within the context of a franchise system, should be subject to the traditional, full-blown "rule of reason" standard”).

123. Evan Starr, J.J. Prescott, and Norman D. Bishara, “Noncompetes in the U.S. Labor Force,” p.60.

124. J.J. Prescott, Norman D. Bishara, and Evan Starr, “Understanding Noncompetition Agreements,” pp.369–464.

125. Beck Reed Riden, "50 State Noncompete Chart," June 27, 2021, https://faircompetitionlaw.com/wp-content/uploads/2021/06/Noncompetes-50-State-Survey-Chart-20210627.pdf.

126. See. California Business & Professions Code, §§16600-16602.5.

127. See North Dakota Century Code, §9-08-06.

128. See Oklahoma Statutes, §15-219A.

129. Yearbook 2 Hen. V, 5B (1414). See also William L. Letwin, "The English Common Law Concerning Monopolies," *The University of Chicago Law Review*, Vol.21, pp.355–385 (1954), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2832&context=uclrev ("the common law relating to contracts in restraint of trade stems from the Case of John Dyer, decided in 1414").

130. Griffin Toronjo Pivateau, "Putting the Bleu Pencil Down: An Argument for Specificity in Noncompete Agreements," *Nebraska Law Review*, Vol.86, pp.672–707 (2008), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1095&context=nlr ("are meant to protect the employer from unfair competition. Noncompete agreements arguably protect an employer's customer base, trade secrets, and other information necessary to its success. One might argue that a noncompete agreement encourages employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the company's customers, with him to another employer."); Robert W. Goumulkiewicz, "Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation," *University of California Davis Law Review*, Vol.49; pp.251–304 (2015), https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1064&context=faculty-articles (demonstrating "that states do not need to adopt California's approach in order to foster innovation").

131. Abraham L. Wickelren, "A novel justification for legal restrictions on non-compete clauses," *International Review of Law and Economics*, Vol.54, pp.49–57 (2018), https://www.sciencedirect.com/science/article/abs/pii/S0144818817300583 (finding that legal restrictions "force firms to use higher wages instead of non-competes" but not recommending banning non-compete clauses"); Walter Block, "Are Non-Compete Clauses Legitimate? Yes.," EconLib.org, July 24, 2021, https://www.econlib.org/are-non-compete-clauses-legitimate-yes/.

132. Jay P. Kesan and Carol M. Hayes, "The law and policy of non-compete clauses in the United States and their implications," in Marilyn Pittard, Ann L. Monotti, and John Duns (Eds.) *Business Innovation and the Law. Perspective from Intellectual Property, Labour, Competition and Corporate Law*, pp.381–404, Edward Elgar: London, 2013).

133. Matthew Rossetti, "Non-Competes: Useful Or Futile?" *Forbes*, January 30, 2018, https://www.forbes.com/sites/forbeslegalcouncil/2018/01/30/non-competes-useful-or-futile/?sh=2a9f17536581.

134. Actually, such efforts were made by the Obama Administration to pass legislation prohibiting noncompete clauses. See White House, "State Call to Action on Non-Compete Agreements," October 26, 2016, https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf ("In order to reduce the misuse of non-compete agreements in states that choose to enforce them, the White House is calling on state policymakers to join in pursuing best-practice policy objectives"). Proposed legislation failed to pass in Congress. See, among others, "A bill to prohibit certain noncompete agreements, and for other purposes," S.2614, October 16, 2019, https://www.congress.gov/bill/116th-congress/senate-bill/2614/text; Consequently, the FTC does not have the authority to prohibit what Congress failed to prohibit.

135. FTC, Solicitation for Public Comment, August 5, 2021, https://downloads.regulations.gov/FTC-2021-0036-0022/content.pdf (noting that "Concerns have been raised about exclusivity provisions that require small businesses to limit their trade to a single company, non-compete clauses that prevent

workers from seeking employment with other firms, and other one-sided contract terms that may exacerbate or lock in power disparities").

136. Patrick Rey and Jean Tirole, "The Logic of Vertical Restraints," *American Economic Review*, Vol.79, pp.921, 937(1986), https://www.jstor.org/stable/1816460 ("Another major contribution of the earlier literature on vertical restraints is to have shown that per se illegality of such restraints has no economic foundations … So at the current stage of research, the rule of reason seems safer.").

137. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 35, 45 (1984) (O'Connor, J., concurring).

138. Geoffrey A. Manne and Dirk Auer, "Comments of the International Center for Law & Economics Regarding Contract Terms That May Harm Fair Competition," FTC Docket No. 2021-0036, September 30, 2021, p.6, https://laweconcenter.org/wp-content/uploads/2021/10/ICLE-Comments-on-Exclusive-Contracts-Rulemaking-Petition-2021-09-30.pdf; See also Aurelien Portuese, "The Antitrust Prohibition of Favoritism, or the Imposition of Corporate Selflessness," Truthonthemarket.com, December 16, 2020, https://truthonthemarket.com/2020/12/16/the-antitrust-prohibition-of-favoritism-or-the-imposition-of-corporate-selflessness/ (arguing, "Self-preferencing is to listings what the default setting is to operating systems. They both are ways to market one's own products (i.e., an alternative to marketing toward end-consumers)").

139. Ronald H. Coase, "The Nature of the Firm," Economica, Vol.4 (16) (1937): 386–405, https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-0335.1937.tb00002.x (where Coase explains the nature of the firm by scrutinizing on "why one integrating force (the entrepreneur) should be substituted for another integrating force (the price mechanism)"). See also Robert H. Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," *University of Chicago Law Review*, Vol.22 (1954): 157–201, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2870&context=uclrev (arguing, "A comparison of the law and the economics of vertical integration makes it clear that the two bear little resemblance. If the law in this area is to be concerned with the kind of competition with which economists are familiar, the concept of vertical integration will have to be abandoned as an analytical tool").

140. Aurelien Portuese, "'Please, Help Yourself': Toward a Taxonomy of Self-Preferencing" (ITIF, October 2021), https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing; See also Daniel D. Sokol, "The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason, and Per Se Legality," *Antitrust Law Journal*, Vol.79 (2014): 1003–1016, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1561&context=facultypub.

141. Open Markets Institute and others, Re: Petition for Rulemaking to Prohibit Exclusionary Contracts, Petition for Rulemaking Before the Federal Trade Commission, July 21, 2021, https://downloads.regulations.gov/FTC-2021-0036-0002/content.pdf.

142. Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust" (ITIF, May 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust; Aurelien Portuese, "The Digital Markets Act: Precaution Over Innovation," Epicenter, June 1, 2021, http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf.

143. Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation" (ITIF, June 2021), https://itif.org/sites/default/files/2021-principles-dynamic-antitrust.pdf.

144. Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust" (ITIF, May 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust.

145. Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation."