The Tension between Agency Authority and the Constitution

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Introduction

How administrative agencies—and the powers they wield—fit within the U.S. constitutional system has been a point of tension between lawyers, judges, and academics for decades. At the core of this tension is the separation of powers, and the crux of the issue is what constitutes a violation. The separation of powers doctrine, inherent in the structure of the Constitution, creates the "checks and balances" that prevent one branch of government from exercising enough power to effectively control all government action.

The authority of administrative agencies, therefore, poses concerns for a government structured under the Constitution. Through rulemaking and adjudication proceedings, these agencies exercise quasi-legislative and judicial functions.[1] Thus, the nature of these agencies involves the routine use of powers generally reserved for separate branches of government. If the legislative branch is allowed to delegate its duties to the executive, how will checks and balances be ensured? Indeed, as Justice Gorsuch has noted, "If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense."[2]

This dissonance has prompted the Supreme Court to address numerous cases involving the constitutionality of certain agency actions. The latest battle between agency authority and the separation of powers will likely stem from the Federal Trade Commission's (FTC) attempt to overextend regulatory authority once again. Recent enforcement action and rulemaking seek to heavily regulate digital data and ban the use of noncompete agreements. Such overbroad actions likely violate the separation of powers.

This article analyzes current disputes over the FTC's regulatory power within the context of recent Supreme Court rulings. It argues the FTC's desire to drastically expand its regulatory authority over the United States economy will likely face challenges before the Supreme Court. Specifically, the agency's recent rulemaking attempting to bar the use of noncompete agreements highlights the tension between the administrative impulse to expand executive power and the limits imposed by the constitutional principle of the separation of powers.

This discussion will proceed in four parts. First, I examine the Supreme Court doctrines which have emerged to protect the separation of powers from erosion through the excessive exercise of administrative power. Second, I discuss the FTC's current intention to significantly expand the agency's power. This section will focus heavily on the agency's change of direction, particularly actions taken since the release of the agency's November 2022 Policy Statement. Third, I consider the FTC's clash with major questions of jurisprudence. Lastly, I explore the constitutional problems with the expansion of the FTC's authority.

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1 Humphrey's Ex'r v. United States, 295 U.S. 602, 618, 55 S. Ct. 26 (1935).

2 Gundy v. United States, 139 S. Ct. 2116, 2134–2135 (2019).

Part I. SCOTUS Separation of Power Doctrines

The ongoing discordance between the administrative state and the separation of powers doctrine has led to various distinct yet overlapping Supreme Court holdings designed to guard against threats to the separation of powers. The nondelegation doctrine, *Chevron* step analysis, and the major questions doctrine are the most common weapons the Court uses when rebutting overzealous agency action.

While it is arguable that recent FTC action runs afoul of numerous holdings, the major questions doctrine is the most likely doctrinal tool the Court will wield to hold the agency's overzealous regulatory agenda at bay. However, to grasp the full import of this violation requires an understanding of the protective layers SCOTUS has had to develop in order to stop the kind of broad regulatory authority the FTC is currently undertaking.

A. The Nondelegation Doctrine

The nondelegation doctrine upholds the separation of powers by preventing Congress from delegating legislative power to another branch of government.[3] Congress may not delegate legislative authority to an agency without indicating in statute a policy or standard that limits the use of legislative power.[4]

However, nondelegation is notoriously difficult to apply. This application issue is inherent to the limitations of statutory drafting. Once the reality of flawed statutory construction is acknowledged, it directly follows that "some judgements involving policy considerations … must be left to officers executing the law;" therefore, nondelegation debates often collapse into questions of degree rather than principle.[5]

Successfully litigating a case against agency action on nondelegation grounds can prove immensely difficult. In the vast majority of circumstances, Congress has articulated within statute some guiding standards the agency may use to determine the scope of their authority. In fact, only two cases have found constitutional violations under this doctrine.[6] Although several justices have shown interest in revisiting the nondelegation doctrine, the Court is unlikely to make a major statement related to a deeply controversial doctrine when other doctrines could be invoked to curb the excesses of FTC action.[7]

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3 Mistretta v. United States, 488 U.S. 361, 371–72 (1989).

4 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

5 *Mistretta*, 488 U.S. 361 at 415.

6 Cases found to have violated the nondelegation doctrine include Panama Refining Co. v. Ryan, 293 U.S. 388, 405 (1935) (agency action voided because "the power sought to be delegated is legislative power, yet nowhere in the statute has Congress declared or indicated any policy or standard to guide or limit the President when acting under such delegation."); and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (the Court invalidated regulation of intrastate transactions that affected interstate commerce only indirectly).

7 Scholars have noted that a broad application of the nondelegation doctrine could cause the Court itself to violate the very doctrine it seeks to uphold. Since the limits of statutory construction require agencies to engage in at least *a degree* of legal interpretation, a court that too broadly reviews congressional action could lead to the judicial usurpation of the legislative functions the Court intended to protect. *See*, Nathan S. Chapman & M.W. McConnell *Due Process as Separation of Powers,* 121 Yale L.J. 1672, 1786 (2012).

B. Chevron Deference

Given the limitations of the nondelegation doctrine, the Court has developed case law using other concepts to protect the integrity of the separation of powers. Some scholars have identified what they call "nondelegation canon" to describe how the Court handles claims involving the broad exercise of agency power.[8] The two most important doctrines of this canon are *Chevron* deference and major question doctrine.

Chevron deference is the accommodation appellate courts give to agency interpretations of law. It was granted by SCOTUS when Congress intended for an agency to have the authority to interpret law. Thus, unless the Court determines otherwise, agency interpretations of the law are subject to deferential review. But not every case passes this so-called "step zero analysis." Instead, step zero only determines whether *Chevron* deference is applicable in a given case.[9] After this initial analysis, the Court must still determine whether the statute in question is ambiguous (step one)[10] and whether the agency's statutory interpretation passes a rational basis test (step two).[11]

Although cases that turned on step analysis are integral to the Court's review of impermissible agency actions, the recent actions of the FTC are likely to be analyzed directly under the major questions doctrine.[12] This is because agency action is so overly broad and significant to national economic life that the natural starting point for analysis would begin with major questions, as compared with statutory technicalities.

C. The Major Questions Doctrine

The major questions doctrine has been called an "identifiable body of law,"[13] addressing recurring questions surrounding the scope of agency power,[14] and is the current jurisprudential framework used by the Court. In short, the doctrine holds that the Court expects clear congressional intent when it "wishes to assign to an agency decision of vast economic and political significance."[15]

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8 Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. Davis L. Rev. 955, 1005 (2021); Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J.L. & Pub. Poly 463, 472 (2021); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000); Chapman & McConnell, *supra* at 1786.

9 The step zero test is satisfied in circumstances where a statutory schema shows Congress leaves a statutory "gap for an agency to fill." The existence of such a gap shows there is a clear delegation of authority given to the agency empowering it to clarify the specific meaning through further interpretation. Chevron, U.S.A., Inc. v. NRDC Inc., 467 U.S. 843–44 (1984).

10 Step one analysis involves determining whether the applicable statute is clear or ambiguous. Given the statutory schemes under which agencies operate, there is almost inevitably a statutory ambiguity—or gap—for the agency to fill. However, this does not mean statutory terms within this gap may be given whatever meaning an agency would like. To determine congressional intent, the Court looks at the overall statutory context. For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court struck down the FDA's attempt to assert jurisdiction over the regulation of tobacco products because ruling in favor of the FDA required reading internal inconsistencies into statute. This is because, under the statutory scheme, to regulate a product, it must first meet the definition of "safe." (FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 130 (2000)).

11 Step two cases involve circumstances where the statute in question is ambiguous. For example, in *Utility Air Regulatory Group v. EPA,* the Court rejected the EPA's attempt to expand the statutory definition of "air pollutants" to include the regulation of greenhouse gas emissions. The Court's analysis found no statutory evidence that the EPA's authority extended to requiring permits based solely on such emissions. Thus, although the Court did not dispute that the agency had interpretive leeway to define "air pollutants," the agency's creative efforts failed to pass even the low bar of reasonableness. Instead, an interpretation this broad was deemed to be "incompatible" with the intent of Congress evident in the statutory scheme. (Util. Air Regulatory Group v. EPA, 573 U.S. 302, 322 (2014)).

12 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

13 *Id.* at 2609.

14 *Id.*

15 *Id*. at 2605.

The skepticism embodied in the major questions doctrine is born from the Court's belief that Congress intends to make significant policy decisions rather than placing this responsibility in the hands of agency officials.[16] Thus, when agencies attempt to exercise new powers that will have a "vast economic and political significance," they tread on thin ice.[17]

Interestingly, because of the underlying concern about the separations of powers, decoupling the major questions and nondelegation doctrines is often an effort in futility. Some scholars refer to the major questions as a "fig leaf" under which the nondelegation doctrine functionally operates.[18]

Consequently, the FTC could feasibly face litigation that involves theories relying on both nondelegation and major questions doctrines. However, major questions cases decided in the past several years indicate the Court is more likely to strike down overly broad agency action on major questions—rather than nondelegation—grounds.

Part II. The FTC Seeks Vast Regulatory Expansion

A. Background

The FTC was created by Congress in 1914 to "protect consumers and promote competition."[19] To that end, Congress granted the agency a broad mandate. On its face, section 5 of the FTC Act has no obvious limiting principle. Among other delegations of power, the Act prohibits "[u]nfair methods of competition in or affecting commerce."[20]

The extent of the agency's power has been an open-ended question since agencies became a prominent feature of American governance. In 1941, for instance, the Supreme Court rejected a broad reading of the FTC's section 5 authority in *FTC v. Bunte.*[21] At the time *Bunte* was decided, section 5 stated unfair or deceptive actions and practices "in commerce" were unlawful.[22]

The Court determined the FTC lacked the authority to regulate behavior outside of interstate commerce because to read section 5 as a mandate to regulate unfair competition methods "in any way affecting interstate commerce" was outside the scope of congressional intent.[23] In support of the ruling, the Court pointed to three things: the FTC's history of failing to assert its authority,

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16 *Id.* at 2609.

17 Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 U.S. 665, (2022).

18 Gocke, *supra* at 1017. Others have pushed back on the notion that the nondelegation doctrine is "dead," instead, asserting the Court's nondelegation cases are better read as a series of "equivocations" that include simultaneous concerns with excessive delegation combined with the "ludicrously low" standard for determining when Congress has granted agency authority. Philip Hamburger, *Is Administrative Law Unlawful?* 378 (2015).

19 *Our History*, FTC (Feb. 11, 2022), https://www.ftc.gov/about-ftc/history.

20 15 U.S.C. § 45(a)(1).

21 FTC v. Bunte Bros., Inc., 312 U.S. 349, 355 (1941).

22 *Id.* at 350.

23 *Id.*

Congress's explicit rejection of FTC attempts to claim statutory authority for broader regulatory power, and the extraordinary amount of power the FTC would obtain should the Court uphold its request.[24]

B. FTC Battles with Congress and the Court

Between 1964 and 1972 the FTC and Congress were locked in a contentious relationship. At the center of this dispute was the FTC's interpretation of "unfair" in relation to its section 5 authority. In 1964, the FTC released a rule laying out its three-part test for assessing whether practices were "fair." The three prongs assessed fairness by determining whether practices: (1) offended public policy in statutes, common law, or otherwise; (2) were immoral, unethical, oppressive, or unscrupulous; and (3) cause substantial injury to consumers, competitors, or other businessmen.[25]

Under this highly subjective test, the FTC passed a series of zealous rulemakings relying on public policy justifications unmoored from tangible consumer harm.[26] When the FTC attempted to ban all advertising to children on the grounds the practice was "immoral, unscrupulous, and unethical," Congress reacted by refusing to authorize the agency's funding, forcing the FTC to temporarily shut down.[27]

During the FTC's battle with Congress, the D.C. Circuit handed a favorable ruling to the agency. The Court upheld a rule labeling the failure to post octane ratings numbers on gasoline pumps at service stations an "unfair method of competition and an unfair or deceptive act or practice."[28]

Two years after the ruling, Congress responded to this ruling by passing the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 (Mag-Moss Act).[29] This bifurcated rulemaking by creating a complex set of requirements governing the promulgation of rules related to unfair or deceptive acts or practices while leaving rules related to unfair methods of competition untouched.[30]

Following this battle with Congress, the FTC moved toward a fairness standard that assessed consumer harm, and away from purely subjective analysis. In 1980, the FTC issued a unanimous statement declaring "[u]njustified consumer injury is the primary focus of the FTC Act."[31] The statement goes on to say the FTC relies on "an independent criterion of consumer injury," indicating the agency was moving away from the overly broad, easily abused "public policy" justifications of its recent past.[32]

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24 *Id.* at 352, 354. Had *Bunte* been decided today, it could have invoked the major questions doctrine. The Court cited the agency's past failure to assert the authority in question, as well as the implications for economic policy nationwide. Questions surrounding how to resolve the inherent tension between excessive agency authority and the separation of powers may now fall under the banner of the major questions doctrine, but fundamentally the Court is addressing the same issues of law (*Bunte* at 352, 354). Statutorily speaking, the landscape has changed since the *Bunte* decision. An expansion of the agency's mandate to clearly encompass regulatory authority over intrastate commerce has rendered the decisions moot. But not all statutory changes have increased the Commission's power.

25 *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC (May 30, 2003), https://www.ftc.gov/es/node/49466.

26 *Id.*

27 *Id.*

28 Nat'l Petroleum Refiners Ass' v. FTC, 482 F.2d 672, 697–98 (D.C. Cir. 1973).

29 15 U.S.C. § 57a(a)(2).

30 *Id.*

31 *FTC Policy Statement on Unfairness*, FTC (June 24, 2014), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

32 *Id.*

Until the recent—and drastic—change in agency direction, the consumer protection standard unanimously announced in the 1980s accurately represented the framework used by the FTC when determining how to assess whether business practices were "unfair."

C. Change in Agency Direction

Since the change in FTC leadership, the agency has signaled a dramatic departure from grounding its enforcement decisions in the bedrock principles of antitrust law, the rule of reason.[33] Additionally, instead of maintaining the longstanding practice of bringing section 5 claims in conjunction with violations of the Sherman or Clayton Acts, the FTC seeks to normalize standalone section 5 claims.

These changes in the regulatory trajectory of the FTC have coincided with a change in presidential administrations. Not long after President Biden appointed a new head of the FTC, the president issued an executive order asking the agency to "exercise statutory rulemaking authority" to (1) "address persistent and recurrent practices that inhibit competition," including practices related to "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy," and (2) curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility.[34]

Chairwoman Khan's behavior since her confirmation has been in line with President Biden's desires. In July 2021, she rescinded the FTC's 2015 policy statement, jettisoning the rule of reason in favor of an agency agenda that seeks to "rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts."[35]

Additionally, the agency issued advanced notice of proposed rulemaking (ANPR) concerning trade regulation of commercial surveillance and data security, seeking to expand the agency's regulatory power into the area of data regulation. This would include issues related to how companies "collect, aggregate, protect, use, analyze, and retain consumer data" and how corporate entities "transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive."[36]

Although attempts at rulemaking surrounding commercial surveillance and data privacy remain in their infancy, the FTC has taken concrete steps to heavily regulate the private marketplace by attempting to bar the use of noncompete agreements. In November 2022, the FTC replaced the rescinded 2015 policy statement with a statement announcing the agency's intention to file

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33 Ben Gris et al., *The FTC Abandons (The Rule of) Reason*, Sherman & Sterling (Nov. 17, 2022), https://www.shearman.com/en/perspectives/2022/11/the-ftc-abandons-the-rule-of-reason.

34 Exec. Order 14036, Fed. Reg. 15069 (2021).

35 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.

36 Trade Regulation Rule on Commercial Surveillance and Data Security, 16 C.F.R. pt. 464 (2022).

standalone cases.[37] The FTC then filed a standalone section 5 complaint[38] and proposed a rule to ban the use of noncompete agreements.[39]

The FTC's most recent policy statement lists two key criteria the agency will use when evaluating whether it violates section 5. First, the FTC lists malicious adjectives that describe illicit behavior. "Coercive," "exploitative," "collusive," and "deceptive" practices are barred. Second, the FTC examines conduct that has a "tendency to interfere with competitive conditions."[40]

The economic implications of the FTC's rulemaking are profound. Following the promulgation of a rule seeking to bar the use of noncompete agreements, some within the industry are discussing litigation. According to the *Wall Street Journal*, the U.S. Chamber of Commerce is prepared to battle the FTC's rule in court, stating the FTC knows it is on "tenuous ground" because the agency lacks the statutory authority to enact such a sweeping regulation.[41] The Chamber of Commerce is not alone in voicing concerns regarding the legality of the FTC's actions. FTC Commissioner Christine Wilson issued a statement dissenting against the proposed rule, citing concerns that the rulemaking likely runs afoul of the Constitution and could be credibly litigated under major questions and nondelegation grounds.[42]

Part III. Major Question Issues with the FTC's Broad Interpretation of Agency Power

Despite the murkiness of the major questions body of law, several cases elucidate the issues presented by the FTC's new course of action.

A. EPA

In the case of *EPA,* implementation of the agency's rulemaking would have had profound implications for the basic regulation of how Americans across the nation obtain energy. The agency's attempt to utilize section 111(d) to enact a "best system of emission reduction" (BSER) in a manner that not only regulated operations occurring at specific buildings, but that also regulated the operation of the energy grid as a whole, would have resulted in a transformation of the economy nationally.[43] Known as "generation shifting," this system-wide regulation would have fundamentally altered how Americans access energy.

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37 Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act Commission File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

38 Complaint, Ardagh and O-I Glass, Inc., 88 Fed. Reg. 2618 (FTC 2023) (No. 211-0182).

39 *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

40 *Id.*

41 Eric Lee, *FTC Proposes Banning Noncompete Clauses for Workers*, Wall St. J. (Jan. 5, 2023), https://www.wsj.com/articles/ftc-proposes-banning-noncompete-clauses-for-workers-11672900586.

42 *NPRM for the Non-Compete Clause: Dissenting Statement of Commissioner Wilson*, FTC (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

43 West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

The Court ruled against the agency's interpretation of section 111(d) of the Clean Power Plan, stating the separation of powers statutory interpretation caused the Court to doubt the agency possessed the power it sought to assert.[44] According to the Court, ruling in favor of the agency's statutory interpretation would involve agreeing that Congress had granted the agency the authority to "substantially restructure the American energy market" through the vehicle of a gap-filler section of code that had "rarely been used in the preceding decades."[45] This result did not pass constitutional muster because it would "revise" the statute by changing the statutory scheme. Specifically, the agency would move from "ensuring the efficient pollution performance of each individual regulated source," to determining how much of the national energy market should come from coal.[46]

As a result, the FTC would be wise to avoid attempting to assert regulatory power that bars the use of noncompete agreements. Such a move almost certainly expands the agency's authority beyond its congressional mandate because it seeks to fundamentally alter aspects of contract law. The legality of noncompete agreements has always been challenged on a case by case basis in courts, but to *per se* bar their use on the grounds they represent an "unfair method of competition" is a move that would reverberate throughout the economy.

B. Ala. Ass'n of Realtors

Similar themes emerged in cases involving agency attempts to assert sweeping, never before exercised powers. In *Ala. Ass'n of Realtors v. HHS*, the Centers for Disease Control and Prevention (CDC) argued Congress granted the agency the authority to bar landlords from evicting tenants in areas of the country where COVD-19 levels had reached a certain threshold and tenants had made a declaration of financial need.[47]

The Court saw no statutory authority for the powers the agency sought to exert, stating the agency's authorization to "make and enforce such regulations as in his judgment are necessary to prevent the … spread of communicable diseases from foreign countries"[48] must be read within the full context of the statute, which empowers the agency to destroy the disease *itself*, not to regulate interstate migration that *could* have an impact on the spread of the disease.[49] However, even if the statutory language was more favorable to the agency's interpretation, the "sheer scope of the CDC's claimed authority" made the government's argument implausible.[50]

C. Nat'l Fed'n of Indep. Bus. v. DOL, OSHA

The Court's ruling overturning the vaccine mandate from the Occupational Safety and Health Administration (OSHA) also turned on major questions analysis. OSHA sought to require employers to require a vaccination or weekly testing and daily masking as conditions of

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44 *Id.* at 2609.

45 *Id.* at 2610.

46 *Id.* at 2612.

47 Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2486 (2021).

48 *Id.* at 2487.

49 *Id.* at 2488.

50 *Id.* at 2489.

employment.[51] The mandate covered over 84 million employees and would have required significant business resources to effectively implement.[52]

According to the Court, OSHA's interpretation of their congressional mandate was too broad because the agency failed to distinguish between occupational hazards and universal risks. While the agency has clear authorization to regulate dangers at work, universal risks do not fall within its ambit of authority. Expanding the definition of occupational hazard to include any risk individuals face in daily life, *including* work, would place virtually no limit on agency authority. When viewed in context of the entirety of the statutory scheme, this interpretation would defy congressional intent.[53]

Once again, the majority of justices were concerned with the use of broad power "lack[ing] historical precedent." These circumstances were a "telling indication" that the agency was acting outside its congressionally mandated boundaries.[54] While the agency attempted to root their authority in the American Rescue Plan Act of 2021, the Court viewed this argument as a maneuver to evade congressional authority.[55] As a result, the FTC should be wary of attempting to root their authority in novel interpretations of statutes.

Agencies such as OSHA lack the authority to transform the definitions of their regulatory mandate from a limited congressional grant of power. Congress grants agencies restricted power. This means regulators may not transform the definition of their regulatory mandate from a limited to an infinite grant of power. Forcing Americans to accept medical procedures they would otherwise reject "simply because they work for employers with more than 100 employees" falls outside the boundaries of any reasonable interpretation of OSHA's regulatory authority.[56]

The commonalities of the major questions cases focus heavily on an agency's use of novel, unprecedented authority that has vast implications for national economic policy. As discussed hereafter, the regulatory ambitions of the FTC fit the pattern of agency behavior that the Court views with skepticism, making it likely that the agency's behavior will result in judicial backlash.

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51 Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 662 (2022).

52 *Id.*

53 *Id*. at 661–65.

54 *Id.* at 666.

55 *Id.*

56 *Id.*

Part IV. Constitutional Problems with the Expansion of the FTC's Authority

Commissioner Wilson and the U.S. Chamber of Commerce are correct to question the legal validity of the FTC's competition rulemaking, particularly when utilized in an attempt to nullify millions of private contracts across the nation.

A. The FTC's Actions Violate Due Process and Fairness

Although this essay focuses primarily on the major questions concerning the FTC's actions, it is worth noting that the grounding of agency action within a context of clear guidelines surrounding the definition of violative behavior is essential to comport with legal doctrines of due process and fairness.[57] As dissenting voices on the FTC have mentioned, abandoning clear standards, such as the rule of reason, for assessing violations of section 5 threatens the operations of honest businesses that are unable to ascertain what actions may result in regulatory headaches.[58]

While litigation that may come before the Court is more likely to turn on major questions analysis because the FTC's actions fit the pattern of behavior the Court finds incompatible with the scope of its statutory authority, it is notable that the FTC's actions open it to litigation rooted in fundamental notions of fairness and due process.

B. The FTC's Statutory Interpretation Is Too Broad

Chairwoman Khan believes the statutory landscape provides the FTC with the authority to make broad unfair methods of competition (UMC) rulemaking.[59] In her view, the noncompete rulemaking derives its authority from sections 5 and 6(g) of the FTC Act.[60] And, in other writing, Khan has argued the text and legislative history of the FTC Act as her vision of expanded regulatory authority.[61]

Despite Khan's confidence, her vision of vastly expanding the FTC's regulatory authority is unlikely to come to fruition for several reasons. First, the statutory landscape is not as favorable to Khan's vision as she believes. Second, the breadth of power the agency seeks to assert, coupled with its historical novelty, will be viewed with suspicion by the Court, forcing the agency to bear the burden of proof if a case is brought. Based on the Court's recent rulings, this places the agency in a poor position to successfully litigate at the highest level.

The statutory landscape does not favor Khan's expansive interpretation of agency power. Practitioners dispute whether the FTC may exercise competition rulemaking power, arguing the Magnuson-Moss Act passed in the 1970s does not support competition rulemaking. Instead,

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57 *Vagueness Doctrine*, Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012); *Void for Vagueness Doctrine,* Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012).

58 Dissenting Statement of Commissioner Wilson on the Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022).

59 Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020).

60 *Id.* at 378.

61 *Supra* note 38.

they say a charitable interpretation of the Act would lead to the conclusion that it "declin[es] to endorse" this rulemaking, leaving the issue to be teased out in the courts.[62]

Commissioner Wilson echoed these concerns, noting in her dissent that Congress has not authorized competition rulemaking.[63] Indeed, the FTC's chairman at the time of the Act's passage expressed confusion regarding whether the law was intended to clarify existing rulemaking or grant the FTC the power to engage in substantive rulemaking. Thus, even if this legal ambiguity were resolved in favor of the FTC possessing substantive rulemaking power, the reality is that this authority would likely be limited to *consumer* not *competition* rulemaking.[64]

Additionally, recent Supreme Court cases following the major questions doctrine show the Court is inclined to view broad statutory interpretation with caution.

C. Invalidating Noncompete Agreements Is an Act of "Vast Economic and Political Significance"

The major questions doctrine will apply to the agency's actions. It is almost certain the Court would view the voiding of nearly all noncompete agreements across the nation as an act of "vast political and economic significance."[65] Attempts to bar the use of noncompete clauses in contracts between employers and employees will have reverberations across every industry of the economy and conflicts with laws in almost every state.[66]

Although the precise number is subject to change, it is estimated that over 30 million Americans have entered into noncompete agreements with businesses.[67] Additionally, because the validity of a noncompete agreement is currently determined on a case-by-case basis through appropriate litigation claims, the FTC's rule would override the adjudication of contract claims.

Furthermore, the invalidation of these agreements pursuant to the FTC's proposed rule would extinguish millions of private agreements, resulting in a drastically different employment landscape. Overnight, employers and employees alike would be forced to adjust their economic behavior in accordance with a new national legal regime governing contract law.

D. The Court Will View FTC Action with Skepticism

Given the vast consequences of such a policy change, it is almost certain the Supreme Court would view this rule with skepticism. The EPA's attempt to use the administrative rulemaking process as a vehicle to transform how American's access energy was scrutinized—and ultimately rejected—by the Court. It is difficult to imagine the FTC's attempt to fundamentally alter contract rights would be viewed differently.

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62 Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking* (U.S. Chamber of Com., white paper, Aug. 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.

63 *Id.*

64 *Id.*

65 West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

66 *NPRM for the Non-Compete Clause: Dissenting Statement of Commissioner Wilson*, FTC (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

67 Matt Kent, *The Ban on Noncompete Clauses Will Face a Fierce Legal Battle. Its Architects Are Prepared*, Slate (Jan. 10, 2023), https://slate.com/news-and-politics/2023/01/noncompete-clauses-ban-ftc-legal-challenge.html.

Additionally, both the *Ala. Ass'n of Realtors v. HHS* and *OSHA* cases failed in part because they attempted to drastically alter rights far outside the scope of the agency's purpose. The Court did not view HHS attempts to alter the property rights of Americans based on the spread of COVID-19 as having any plausible connection to the statutory scheme. Similar concerns were expressed in the *OSHA* decision, where the agency conflated workplace and universal risks.

The Court will likely view the FTC's noncompete rulemaking in a similar light. Although there is some truth to the FTC's claim that noncompete agreements may be used in ways that harm individual workers,[68] the assertion that these agreements are *inherently* unfair alters contract rights in a way that fundamentally revises the statutory authority of the agency in a manner similar to the above-referenced cases.

Once the Court applies the major questions doctrine to the FTC's actions, the agency's break from its historical scope of power will work against its interest. The January 2023 filing of a standalone section 5 violation alleging that the use of noncompete agreements as a condition of employment constitutes an "unfair method of competition" is a radical departure from the past forty years of FTC precedent.[69]

As previously discussed, the FTC traditionally analyzed whether an act constitutes an "unfair method of competition" by adhering to the well-established consumer welfare standard.[70] Under this approach, "unfair" methods are those that cause harm to competition or to the competitive process. Business justifications for methods are considered when determining what constitutes "harm."[71] Additionally, violations of section 5 were generally brought in conjunction with enforcement of the Sherman or Clayton Acts.[72]

The FTC's decision to abandon the historical limits on its authority while simultaneously proposing a rule that would bar noncompete agreements in most circumstances signals the agency's willingness to assert a staggering breadth of control over the policies governing the national economy. Because of the extraordinary nature of the regulatory power asserted, the Court will want to see a clear congressional mandate, one that does not require reading significant authority into "vague terms."[73]

The FTC relies on section 6(g) of the FTC Act, which grants it the authority to issue its proposed rule. This section of code states the FTC may "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including the Act's prohibition of unfair methods of competition."[74]

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68 *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

69 *Supra* note 34.

70 *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act*, FTC (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

71 *Id.*

72 *Id.*

73 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

74 15 U.S.C. § 46.

However, the FTC's statutory interpretation fails to account for the context of the statutory scheme as a whole. The Court views efforts by agencies to interpret broad powers in historically insignificant sections of code as a way of working around congressional intent.[75]

Conclusion

The FTC's attempt to drastically expand its regulatory authority over the United States economy will likely face challenges before the Supreme Court in a noncompete case that highlights the tension between the administrative impulse to expand executive power and the limits imposed by the constitutional principle of the separation of powers.

As demonstrated by the Supreme Court's recent rulings, the agency's actions will likely trigger the application of the major questions doctrine. Under this analysis, the FTC will bear the burden of proving their actions fall under clear congressional authorization. In this case, the FTC is fighting an uphill battle. The scope of power the FTC asserts, the lack of historical precedence for this level of authority, and the absence of a clear congressional mandate make it likely the agency will lose in court.

Although the FTC faces a negative jurisprudential landscape, the ambitions of the agency under its current leadership increase the likelihood of litigation. In the event this occurs, the major questions doctrine will be applied, and agency power will likely take another significant loss.

75 West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).