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FTC Competition Rulemaking Is Unlawful

by

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At the Free State Foundation's Fourteenth Annual Policy Conference on May 6, FTC Commissioner Noah Phillips predicted that FTC Chair Lina Khan's likely plans to issue substantive rules for "unfair methods of competition" will be "illegal and unconstitutional," and Commissioner Christine Wilson concurred. Specifically, while addressing the D.C. Circuit's untested *Petroleum Refiners Association v. FTC* (1973) precedent that held that the FTC has competition rulemaking authority based on "a strong presumption in favor of regulatory power for agencies," Commissioner Phillips expressed skepticism that any court today would find *Petroleum Refiners*' reasoning persuasive. Commissioner Phillips also said that the major questions doctrine as applied in *NFIB v. OSHA* and the nondelegation doctrine as applied in *A.L.A Schecter Poultry Corp. v. United States* should lead a court to find that the FTC lacks authority to issue competition rules.

On May 11, shortly after the Free State Foundation conference, the Senate confirmed Professor Alvaro Bedoya as an FTC Commissioner, giving Chair Khan the Democratic majority she needs if she wants to issue "unfair methods of competition" rules. Chair Khan's law review article arguing that the FTC has competition rulemaking authority relied largely on *Petroleum Refiners*.

Thus, it is timely to review why, as Commissioner Phillips and Wilson said, any attempt at issuing competition rules by the Commission's newly constituted Democratic majority likely would be unlawful.

As a preliminary matter, we agree with Commissioner Phillips' separate assessment of the major questions doctrine and nondelegation doctrine, but it is outside the scope of this piece. Our submission to the recent *Truth on the Market* symposium explains why the major questions doctrine likely forecloses FTC competition rulemaking. But our focus here is on the vitality of *Petroleum Refiners* as a matter of statutory interpretation without considering separation of powers-specific doctrines.

Petroleum Refiners relied on a credulous reading of Section 6(g) of the FTC Act, which allows the Commission to "make rules and regulations for the purpose of carrying out the provisions of this subchapter." Within the same subchapter as Section 6(g) is Section 5 of the FTC Act, which declares that "unfair methods of competition" are unlawful and specifies that the Commission, when it finds it to be in the public interest, "*shall*" launch an adjudicatory proceeding to stop them. The *Petroleum Refiners* panel, purporting to pay homage to the FTC Act's text, relied on the phrase "rules and regulations" in Section 6(g), and the authority to stop unfair methods of competition in Section 5, to permit substantive competition rules.

But it's not that easy. As Professor Richard Pierce explains, Section 6(g) is at best ambiguous, and could also be read to authorize only procedural rules, statements of policy, and interpretative rules. Deeper analysis is needed.

Rather than explain why the *text itself* conveys substantive rulemaking authority, the *Petroleum Refiners* panel spent most of its opinion explaining that "contemporary considerations of practicality and fairness" and "the background and purpose of the Federal Trade Commission Act lead us liberally to construe the term 'rules and regulations'" to include substantive rulemaking authority. The panel also found it relevant that rulemaking is a widespread practice at other agencies, rather than recognizing that each agency operates according to its own grant of authority from Congress. And the panel argued that, because the FTC Act lacked "limiting language" indicating that adjudication is the only available method for prohibiting unfair methods of competition, rulemaking authority must be available.

Petroleum Refiners is suspect from a textualist standpoint. First and foremost, the panel's interpretation ignores the "Whole-Text Canon" of statutory interpretation, an error that Justice Antonin Scalia and Bryan A. Garner, in their book *Reading Law: The Interpretation of Legal Texts*, deemed the "most common" error made by courts while interpreting statutes. The Whole-Text Canon simply means that the text of a statute must be construed as a whole, as Scalia and Garner explain, "in view of its structure and of the physical and logical relation of its many parts."

As applied to the FTC Act, the Whole-Text Canon means that Section 5(a), the FTC's authority to prevent unfair methods of competition, must be read in conjunction with Section 5(b), which directs the Commission to stop such unfair methods by means of an adjudicatory process. Because Section 5(b) commands that the Commission "*shall*" use the adjudicatory process to

stop unfair methods of competition, Section 5(a) cannot be uncoupled from the context of Section 5(b) – it is adjudication or nothing. Thus, the Section 6(g) authority to "make rules and regulations for the purpose of carrying out the provisions of this subchapter" cannot be read to apply solely to Section 5(a). Rather, the FTC can only issue procedural rules, interpretative rules, and statements of policy for the adjudicative process specified in Section 5(b), not substantive rules that replace that adjudicative process.

Justice Scalia's reasoning in MCI Telecommunications Corp. v. AT&T Co. (1994) exemplifies how textualists ought to apply the Whole-Text Canon. *MCI* held unlawful an FCC order removing tariffing requirements for certain long-distance telephony providers. At the time, Section 203 of the Communications Act required all common carriers to file tariffs and allowed the FCC to "in its discretion and for good cause shown, modify any requirement made by or under the authority of this section." The FCC justified its order by interpreting "modify any requirement" to mean the Commission could eliminate tariff filings altogether for a designated class of carriers. But in holding the order unlawful, Justice Scalia applied the Whole-Text Canon, explaining that Section 203(b) explicitly prevented the Commission from modifying the notice period for tariff filings to extend longer than 120 days. Reading Section 230(b) in conjunction with the statue as a whole, it would have been nonsensical for the word "modify" to permit the FCC to entirely eliminate tariffing when Congress explicitly preserved the tariffing notice period. Instead, Justice Scalia explained that consideration of the whole text dictated that the plain meaning of "modify" in this instance was moderate, not radical, change.

Likewise, Justice Breyer's recent unanimous opinion in AMG Capital Management LLC v. FTC applied the Whole-Text Canon in a similar manner while interpreting different provisions of the FTC Act. In *AMG*, the Court rejected the FTC's interpretation of Section 13(b) of the FTC Act, which states that the Commission "may bring suit in a district court of the United States to enjoin" violations of the law that the FTC enforces. The FTC argued that Section 13(b) empowered it to seek equitable monetary relief, despite the provision's circumscribed focus on injunctions. But the court explained that the focus on injunctions, as well as *the structure of the act as a whole*, counseled otherwise. Justice Breyer wrote:

> But to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. *In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large dog*.

So, the Supreme Court has already held, at least implicitly, that the Whole-Text Canon is relevant to the interpretation of the FTC Act, "[i]n light of the historical importance of administrative proceeding" to the Act's structure. It would "allow a small statutory tail to wag a very large dog" to allow the ambiguous language in Section 6(g) to grant substantive competition rulemaking authority when the context of Section 5 compels adjudicative proceedings.

Some commentators argue otherwise, claiming that *Petroleum Refiners* is a proper textualist interpretation because it allows the Commission to do what Section 6(g) says – "to make rules and regulations for the purpose of carrying out [Section 5]." Because of this language, which

they claim is clear, these commentators argue that a different canon of statutory interpretation, the Negative Implication Canon (also known as *expressio unius*), should not apply to the FTC Act. The Negative Implication Canon means that the expression of one thing in a statute implies the exclusion of others. If applicable to the FTC Act, the Negative Implication Canon would mean that Section 5's identification of adjudication to remedy unfair methods of competition precludes competition rulemaking authority.

But the context of the entire FTC Act means it should not matter whether the Negative Implication Canon applies. Whether Section 6(g)'s at-best ambiguous language rebuts the application of the Negative Implication is immaterial because, as explained above, the FTC Act's context as a whole makes clear that adjudication, and not substantive rulemaking, is the prescribed method for eliminating unfair methods of competition.

A fresh interpretation of the FTC Act by a court today should hold any substantive competition rulemaking attempts by FTC Chair Khan "illegal and unconstitutional," as Commissioners Phillips and Wilson predicted. *Petroleum Refiners* was wrongly decided. The Whole-Text Canon, as applied by Justice Scalia, and as recently applied by Justice Breyer in *AMG* makes clear that claims regarding "unfair methods of competition" must be resolved by adjudication, not substantive rulemaking. And as we explained in our recent contribution to the *Truth on the Market* symposium, the major questions doctrine and nondelegation doctrine could pose constitutional barriers for competition rulemaking. The Commission's newly-constituted Democratic majority should heed the admonition from Commissioners Phillips and Wilson: *Do not attempt competition rulemaking*.

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