

The Rocky Relationship Between the  
Federal Trade Commission and  
Administrative Law

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ABSTRACT

*In this contribution to a symposium in honor of the 100th anniversary of the Federal Trade Commission (“FTC”), Professor Pierce describes the problems that FTC has experienced as a result of conflicts between its practices and basic principles of administrative law. He traces those problems to the history of the FTC, including the language of the FTC Act of 1914 and FTC’s attempt to implement that statute. He describes the ways in which the conflicts between FTC practices and administrative law handicap FTC’s efforts to perform its antitrust mission. He then proposes a combination of changes in antitrust statutes that would allow FTC to perform its antitrust mission more effectively over the next century. Those changes include: (1) repeal sections 5 and 13(b) of the FTC Act; (2) confer on FTC power to issue legislative rules to implement the Sherman and Clayton Acts; (3) confer on FTC exclusive jurisdiction to resolve civil cases that arise under the Sherman and Clayton Acts; and, (4) replace oral evidentiary hearings with paper hearings.*

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This contribution to a symposium in honor of the Federal Trade Commission's ("FTC") 100th anniversary focuses on the relationship between administrative law and the FTC in its role in implementing the antitrust laws. The FTC has both far too little power and far too much power to implement the antitrust laws. Unlike virtually all other agencies, the FTC lacks the power to issue rules to implement the antitrust laws. By contrast, the FTC can obtain preliminary injunctions more easily than can other agencies, and its torpid process for resolving the merits of cases creates a situation in which issuance of a preliminary injunction usually is the *de facto* end of a case. This Essay describes the unfortunate results of this situation and proposes a five-part legislative solution: (1) repeal Section 5 of the FTC Act; (2) give the FTC power to issue rules to implement the antitrust laws; (3) give the FTC exclusive power to adjudicate civil actions to enforce antitrust laws; (4) amend Section 13(b) of the FTC Act; and (5) replace oral evidentiary hearings with paper hearings.

It is an honor to be able to participate in the celebration of the 100th anniversary of the FTC. My assigned task is to look at the FTC through the eyes of someone who knows a lot about administrative law but very little about the FTC. I hope that I can provide a fresh, if naive, perspective on some of the many controversies involving the appropriate future role of the FTC. I will limit my discussion to only one of FTC's many missions—to implement antitrust law.<sup>1</sup> The FTC

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1 On the role of the FTC in the past, present, and future, see general J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1972 Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157 (2015); Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835 (2015); Jeffrey A. Eisenach & Ilene Knable Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 GEO. WASH. L. REV. 1876 (2015); Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902 (2015); Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919 (2015); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015); David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015); Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999 (2015); Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049 (2015); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 GEO. WASH. L. REV. 2101 (2015); Joshua Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130 (2015).

has exclusive jurisdiction to implement Section 5<sup>2</sup> of the FTC Act<sup>3</sup> and jurisdiction concurrent with the Department of Justice (“DOJ”) and the courts to implement the Sherman Act<sup>4</sup> and the Clayton Act.<sup>5</sup>

## I. ILLUSTRATIONS OF THE TROUBLED INTERSECTION BETWEEN FTC AND ADMINISTRATIVE LAW

The relationship between the FTC’s role in implementing anti-trust law and administrative law has been complicated and controversial for at least half a century. I will describe briefly the two major controversies that provide the bookends for the fifty years in which the FTC has been embroiled in serious administrative law disputes.

### A. *FTC Power to Issue Rules*

The vast majority of agencies have the power to issue rules that have the same legally binding effect as statutes. Rules of that type are often referred to as legislative rules.<sup>6</sup> For the first fifty years of its existence, the FTC took the position that it lacked the power to issue legislative rules.<sup>7</sup> The FTC Act of 1914<sup>8</sup> conferred on the FTC the power to issue rules, but the context in which the statute conferred that power suggested to almost everyone, including the FTC and Congress, that it referred only to the power to issue rules of procedure and interpretative rules.<sup>9</sup>

In the 1960s, the FTC began to assert for the first time its new view that it had the power to issue legislative rules to implement Section 5 of the FTC Act—an extraordinarily broad statutory provision that prohibits “unfair practices.”<sup>10</sup> The FTC began to attempt to exer-

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2 Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 719 (codified at 15 U.S.C. § 45 (2012)).

3 15 U.S.C. §§ 41–58 (2012).

4 15 U.S.C. §§ 1–7.

5 15 U.S.C. §§ 12–27.

6 For discussion of rulemaking power and the types of rules agencies issue, see generally 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 401–700 (5th ed. 2010).

7 See, e.g., *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973) (“Our conclusion . . . is not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power.” (footnote omitted)).

8 38 Stat. 717 (codified at 15 U.S.C. § 41–58).

9 *Nat’l Petroleum Refiners Ass’n*, 482 F.2d at 693–94.

10 ACUS Recommendation 79-1, *Hybrid Rulemaking Procedures of the Federal Trade Commission*, 44 Fed. Reg. 38,817, 38,818 (July 3, 1979); see also Barry B. Boyer, *Phase II Report on the Trade Regulation Rulemaking Procedures of the Federal Trade Commission* (1979), in ADMIN. CONFERENCE OF THE U.S., *RECOMMENDATIONS AND REPORTS* 33 (1980) (describing the procedures used in FTC rulemaking).

cise that power to regulate the routine practices of participants in many markets, including the practices of funeral parlors, gas stations, vocational schools, car dealers, soft drink bottlers, and insulation installers.<sup>11</sup> 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.<sup>12</sup>

Almost immediately, Congress responded to the FTC's aggressive use of its newfound rulemaking power by enacting a statute that ratified the D.C. Circuit decision.<sup>13</sup> This act added a great deal of procedural baggage to the three-step process for issuing a rule described in section 553 of the Administrative Procedure Act ("APA").<sup>14</sup> One of the many mandatory procedures required by the euphemistically titled "FTC Improvements Act" was a requirement that the FTC appoint an officer to preside over oral evidentiary hearings in every rulemaking.<sup>15</sup> The hearings were supposed to be limited to "disputed issues of material fact," but the Administrative Law Judges ("ALJ") who presided in those hearings were unwilling or unable to confine the oral evidentiary hearings to a few contested issues of fact.<sup>16</sup>

The results of the "improvements" in FTC rulemaking procedure that Congress mandated were described in a study conducted by the Administrative Conference of the United States ("ACUS").<sup>17</sup> The findings of that study included: (1) ALJs permitted "cross-examination to concentrate on policy or opinion rather than factual issues, and, because much of the testimony offered in the hearings consisted of repetitious opinion unsupported by specific factual data, such cross-examination has seldom produced useful factual information,"<sup>18</sup> (2) "[o]ral hearings generally were not used to refine or respond to points made in the prehearing written record,"<sup>19</sup> and (3) the proce-

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11 ACUS Recommendation 79-1, Hybrid Rulemaking Procedures of the Federal Trade Commission, 44 Fed. Reg. at 38,818-820; Richard J. Pierce Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 193 (1996).

12 *Nat'l Petroleum Refiners Ass'n*, 482 F.2d at 698. For criticism of that decision, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 586-87 (2002).

13 15 U.S.C. § 57a(b)-(c) (2012).

14 For description of the APA Section 553 procedure, see 5 U.S.C. § 553 (2012). See also PIERCE, *supra* note 6, at 557-61.

15 See 15 U.S.C. § 57a(b)-(c).

16 See ACUS Recommendation 79-1, Hybrid Rulemaking Procedures of the Federal Trade Commission, 44 Fed. Reg. at 38,820-21.

17 *Id.* at 38,817.

18 *Id.* at 38,822.

19 *Id.*

dures mandated by Congress generated records that “were too massive and poorly organized to be used effectively.”<sup>20</sup> The “improvements” in the rulemaking process that Congress required the FTC to make had the practical effect of eliminating the FTC’s power to issue rules.<sup>21</sup> That unusual characteristic of the FTC dramatically reduces the agency’s power in comparison with the hundreds of agencies that can use the APA Section 553 procedure to issue legislative rules.<sup>22</sup>

### B. *FTC Power to Enjoin Mergers*

At present, the FTC is the subject of another major controversy that has its roots in administrative law. Both the DOJ and FTC have the power to enjoin mergers that would violate Section 7 of the Clayton Act.<sup>23</sup> The two agencies enter into periodic informal agreements with respect to the market sectors in which each will exercise that power. Thus, for instance, the FTC exercises power over proposed mergers involving hospitals, liquor companies, and food stores, while the DOJ exercises power over proposed mergers involving banks, beer companies, and telecommunications firms.<sup>24</sup>

If either agency decides that a proposed merger would violate Clayton Act Section 7,<sup>25</sup> it begins by seeking a temporary injunction in a federal district court.<sup>26</sup> The next step in the process of attempting to stop a merger differs between the two agencies. The DOJ seeks a permanent injunction in court, while the FTC conducts an administrative hearing to decide whether to issue a permanent injunction.<sup>27</sup>

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<sup>20</sup> *Id.* at 38,821.

<sup>21</sup> KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW* 351 (2010).

<sup>22</sup> PIERCE, *supra* note 6, at 495–502.

<sup>23</sup> 15 U.S.C. § 25 (2012) (DOJ); 15 U.S.C. § 53(b) (2012) (FTC).

<sup>24</sup> Shepard Goldfein & James Keyte, *Merger Review at FTC and Department of Justice*, N.Y. L.J., Dec. 9, 2014, <http://www.newyorklawjournal.com/id=1202678370379/Merger-Review-at-FTC-and-Department-of-Justice>; *The Enforcers*, FED. TRADE COMM’N, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Oct. 22, 2015).

<sup>25</sup> 15 U.S.C. § 18.

<sup>26</sup> See Goldfein & Keyte, *supra* note 24.

<sup>27</sup> The stark differences between the legal mechanisms available to the two agencies are discussed in Nathan Chubb, Comment, *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, 18 GEO. MASON L. REV. 533, 538–40 (2011); Robert C. Jones & Aimee E. DeFilippo, *FTC Hospital Merger Challenges: Is a “Fast-Track” Administrative Trial the Answer to the FTC’s Federal Court Woes?*, ANTITRUST SOURCE, Dec. 2008, at 3–5, 10–11, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Dec08\\_Jones12\\_22F.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec08_Jones12_22F.authcheckdam.pdf); D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1076–77 (2010).

As interpreted in recent court decisions,<sup>28</sup> the standard the FTC must satisfy to obtain a temporary injunction is much easier to meet than the standard the DOJ must satisfy to obtain a temporary injunction.<sup>29</sup> That difference has enormous practical effects because a court decision granting the FTC a temporary injunction is the end of any merger dispute as a practical matter.<sup>30</sup> FTC hearings on the merits of mergers are “notoriously slow” while merger agreements are highly time-sensitive.<sup>31</sup>

The average time the FTC takes to conduct a hearing to decide the merits of a merger case is almost two years, and it has never completed such a proceeding in less than a year, even when it takes extraordinary and controversial steps like designating a Commissioner, rather than an ALJ, to conduct the hearing.<sup>32</sup> The combination of the torpor in the FTC hearing process and the time-sensitive nature of merger agreements has produced a legal environment in which the grant of a temporary injunction is outcome-determinative.<sup>33</sup> We will never know how well the FTC hearing process performs because no firm that loses in a temporary injunction action has ever pursued the remedy of a hearing on the merits to its conclusion.<sup>34</sup> There is broad agreement that the stark differences between the results of proposed mergers that are challenged by the DOJ and the FTC are unfair and are not supportable on any basis.<sup>35</sup>

## II. SOURCES OF THE PROBLEMS

Three primary sources cause the difficulties that the FTC has experienced in its efforts to perform its important antitrust role effectively and in a manner that is consistent with administrative law doctrines and principles. The problems have their roots in the broad and vague power conferred on the FTC in Section 5 of the FTC Act, the concurrent jurisdiction of the DOJ and courts in the process of enforcing the Sherman and Clayton Acts, and the FTC’s excessive use of oral evidentiary hearings.

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<sup>28</sup> *E.g.*, *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1034–35 (D.C. Cir. 2008).

<sup>29</sup> Goldfein & Keyte, *supra* note 24.

<sup>30</sup> *Id.*; Jones & DeFilippo, *supra* note 27, at 4–5.

<sup>31</sup> Jones & DeFilippo, *supra* note 27, at 4–5.

<sup>32</sup> *Id.* at 8–12.

<sup>33</sup> *Id.* at 4–5.

<sup>34</sup> *Id.*

<sup>35</sup> *See, e.g.*, Chubb, *supra* note 27, at 580; Jones & DeFilippo, *supra* note 27, at 13; Sokol, *supra* note 27, at 1074–80.

### A. Section 5 of the FTC Act

Section 5 of the FTC Act authorizes the FTC to prohibit any practices that it determines to be “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”<sup>36</sup> The existence of an agency with such an extraordinarily broad and vague statutory mandate terrifies the business community.<sup>37</sup> That fear is contagious. It has an adverse effect on the attitudes of all branches of government toward the FTC.<sup>38</sup> Fear of Section 5 goes a long way in explaining the decision of Congress to gut the FTC’s rulemaking power by conditioning it on the use of extraordinarily inefficient and time-consuming procedures.<sup>39</sup> It also explains the many opinions in which courts have refused to accept FTC theories that are based on section 5 rather than the Sherman or Clayton Acts.<sup>40</sup>

Even the proponents of renewed efforts by the FTC to provide independent content to section 5 to supplement the agency’s applications of the Sherman and Clayton Acts implicitly recognize that Section 5 is far too broad.<sup>41</sup> Each proponent urges the FTC to begin any attempt to give life to Section 5 by issuing guidelines or policy statements in which it explains and limits the scope and meaning it proposes to give Section 5.<sup>42</sup> Not surprisingly, given the breadth and vagueness of Section 5, each of the proponents of efforts to give it vitality urges the FTC to use quite different criteria in describing the scope and meaning the FTC should attribute to the Congress that enacted Section 5.<sup>43</sup>

It is unlikely that any of these efforts to use policy statements to impose reasonable limits on the FTC’s Section 5 power would be successful in reducing the high level of concern that firms, Congress, and courts have about the unbridled power Section 5 confers on the FTC. Even if a firm, a member of Congress, or a judge agreed with a partic-

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<sup>36</sup> 15 U.S.C. § 45(a)(1).

<sup>37</sup> See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 943 (2010).

<sup>38</sup> See *id.* at 942–43.

<sup>39</sup> JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 500 (6th ed. 2009).

<sup>40</sup> For a discussion of those opinions, see Kovacic & Winerman, *supra* note 37, at 941–42.

<sup>41</sup> See, e.g., *id.* at 932.

<sup>42</sup> *Id.* at 930; Robert H. Lande, *Should Section 5 Guidelines Focus on Economic Efficiency or Consumer Choice?*, CPI ANTITRUST CHRON., May 2014, at 2–3, 7, 10; Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission’s Section 5 Unfair Methods of Competition Authority*, CONCURRENCES, no. 4, 2013, at 1.

<sup>43</sup> See *supra* note 42.

ular FTC statement of policy that described coherent, sensible limits on the FTC's power and trusted the then-current Commissioners to act in accordance with that policy, the policy statement would not, and could not, limit the discretion of future Commissioners. The courts have held that a policy statement cannot limit the prosecutorial discretion of an agency,<sup>44</sup> and an agency can amend or rescind a policy statement at any time.<sup>45</sup> Thus, the FTC would retain discretion to use the unbridled power described in Section 5 in a wide variety of ways that are inconsistent with any policy statement it might issue.

### *B. Concurrent Jurisdiction with DOJ and Courts*

The DOJ has concurrent jurisdiction with the FTC with respect to enforcement of the Sherman and Clayton Acts.<sup>46</sup> Since the DOJ, unlike the FTC, has no power to make decisions on the merits in the process of enforcing the antitrust laws, it necessarily is dependent on the courts to perform that role.<sup>47</sup> Moreover, states and private parties also have the power to file civil actions to enforce the antitrust laws.<sup>48</sup> As a result, the FTC shares the power to interpret and apply the Sherman Act and the Clayton Act with hundreds of federal judges and potentially with juries.<sup>49</sup> The existence of that concurrent jurisdiction has adverse effects on the FTC in three significant ways.

First, concurrent jurisdiction deprives the FTC of the power to issue legislative rules to which courts will defer. Even if Congress could be persuaded to take the sensible step of giving the FTC the same power that virtually all other agencies have to use the procedures described in APA Section 553 to issue legislative rules,<sup>50</sup> the FTC's concurrent jurisdiction with the DOJ and the courts would render that power meaningless in the context of the Sherman Act and

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<sup>44</sup> *E.g.*, *Cmt. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987).

<sup>45</sup> Policy statements are exempt from rulemaking procedures. 5 U.S.C. § 553(b)(A) (2012).

<sup>46</sup> ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, CHAPTER VII 3 (5th ed. 2015), <http://www.justice.gov/atr/public/divisionmanual/chapter7.pdf>; *see also* 15 U.S.C. § 4.

<sup>47</sup> The FTC will issue an agency report with findings of fact and cease and desist orders with respect to antitrust disputes, whereas the Antitrust Division of DOJ has no comparable authority and may only bring actions in court. *Compare* 15 U.S.C. § 45(b) (FTC authority to conduct hearings) *with* 28 C.F.R. §§ 0.40–0.41 (2015) (functions of the Antitrust Division).

<sup>48</sup> 15 U.S.C. § 15(a).

<sup>49</sup> The right to jury trial applies to antitrust actions. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

<sup>50</sup> *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1385 (2004) (noting that while many agencies have shifted towards making policy by rulemaking, the FTC primarily uses policymaking by adjudication).



the Clayton Act; for obvious reasons, courts cannot and do not defer to agency interpretations of statutes announced in legislative rules if the statutes are implemented jointly with another agency or with the courts.<sup>51</sup>

Second, concurrent jurisdiction deprives the FTC of the ability to issue credible rules that announce the manner in which the agency interprets the Sherman Act or the Clayton Act and the ability to issue credible statements describing the policies the agency intends to apply in implementing those statutes. The controversy about the FTC's power to issue rules exists only in the context of legislative rules.<sup>52</sup> The FTC has always had the power to issue interpretative rules and policy statements.<sup>53</sup> Virtually all other agencies issue hundreds of interpretative rules and policy statements to inform regulated firms and other interested parties of how the agencies interpret the statutes they implement and of the policies they will pursue in that process.<sup>54</sup> The FTC has little incentive to engage in that socially beneficial process, and any interpretative rules or policy statements it issued would lack credibility, because the FTC has no ability to describe or to control the interpretations and policies that the DOJ and the courts will use in implementing the Sherman and Clayton Acts.

Third, concurrent jurisdiction creates an environment in which the Supreme Court Justices believe that they must adopt narrow interpretations of the Sherman Act and the Clayton Act.<sup>55</sup> The scholarly literature on antitrust law documents the potential adverse effects of allowing hundreds of lay judges, and potentially juries, significant discretion to interpret and apply the language of the broadly worded antitrust statutes.<sup>56</sup> Since it is easy for a lay judge or a jury to err and to mistake a socially beneficial practice for a practice that adversely affects a market, allowing judges and juries significant discretion in interpreting and applying antitrust statutes can produce considerable harm by deterring socially beneficial conduct.<sup>57</sup> Allowing judges and juries discretion in that process also has the potential to render antitrust law so complicated that it is not predictable or practically ad-

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<sup>51</sup> PIERCE, *supra* note 6, at 196, 198–99.

<sup>52</sup> Merrill & Watts, *supra* note 12, at 470.

<sup>53</sup> The FTC first began issuing nonbinding policy statements as early as 1919 through Trade Practice Conference Rules. *Id.* at 551.

<sup>54</sup> Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 82–83 (1995).

<sup>55</sup> See Kovacic & Winerman, *supra* note 37, at 937–39.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 938.

ministrable.<sup>58</sup> This Essay endorses William Kovacic's belief that the Supreme Court would be far more open to arguments in support of more aggressive interpretations of antitrust statutes if it knew that any statutory interpretations it upheld would be applied by a single agency that has subject-matter expertise and that is subject to a duty to explain its decisions in some detail to satisfy reviewing courts.<sup>59</sup>

### C. *Excessive Use of Oral Evidentiary Hearings*

The FTC Act requires the FTC to conduct a "hearing" before it makes a final decision on the merits in any antitrust case.<sup>60</sup> The FTC implicitly interprets "hearing" to refer to an oral evidentiary hearing.<sup>61</sup> The vast majority of agencies abandoned that archaic interpretation years ago, with the blessing, and often the active encouragement, of courts.<sup>62</sup> Today, most agencies rely entirely on paper hearings to adjudicate disputes of the type that FTC adjudicates under the antitrust statutes.<sup>63</sup>

Prior to 1973, many lawyers and judges believed that any statute that required an agency to conduct a "hearing" required it to conduct an oral evidentiary hearing if a party contested any material fact.<sup>64</sup> The Supreme Court corrected that widespread misunderstanding in *United States v. Florida East Coast Railway Co.*<sup>65</sup> Congress had authorized the Interstate Commerce Commission ("ICC") to issue a rule that would encourage railroads to send their hopper cars to the grain harvesting region during the harvest season to reduce the recurrent problem of a shortage of hopper cars during the harvesting season.<sup>66</sup> The statute required the agency to consider several contested facts in making its decision and to make its decision "after hearing."<sup>67</sup> The

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<sup>58</sup> See *id.* at 938–39.

<sup>59</sup> See *id.* at 944–50.

<sup>60</sup> 15 U.S.C. § 45(b).

<sup>61</sup> See *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last updated July 2008) (describing the FTC's use of "trial-type proceeding[s]" before an ALJ to adjudicate complaints and oral argument before the Commission for appeals); see also PIERCE, *supra* note 6, at 708–10 (describing shift in federal courts' interpretation of "hearing" from requiring oral evidentiary hearing to requiring only paper hearing).

<sup>62</sup> See PIERCE, *supra* note 6, at 703, 709–11.

<sup>63</sup> See *id.* at 703, 705.

<sup>64</sup> See *id.* at 705.

<sup>65</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

<sup>66</sup> *Id.* at 230–33.

<sup>67</sup> *Id.* at 225–26 n.1.

agency made its decision based exclusively on written submissions from the railroads and others who were interested in the proceeding.<sup>68</sup>

In *Florida East Coast Railway*, the Court recognized that the appellees were required to incur millions of dollars in costs to comply with the rule the ICC issued.<sup>69</sup> The railroads argued that the ICC had not conducted the “hearing” required as a prerequisite to the action it took.<sup>70</sup> The Supreme Court rejected that argument.<sup>71</sup> It held that “hearing” is ambiguous, and that the agency had the discretion to interpret the hearing requirements in both the Interstate Commerce Act and the APA to consist entirely of a paper hearing in the context of the case.<sup>72</sup> The Court noted that the contested issues of fact the agency was required to consider in its decisionmaking were the types of issues that lent themselves to resolution through use of a paper hearing.<sup>73</sup> These contested questions of fact included what types of rail cars were useful for hauling grain, who owned and controlled those cars, where most of those cars were located during the harvest season, and what incentives would be effective to induce those who owned and operated the cars to take the steps required to make them available in the grain harvesting region during the harvesting season.<sup>74</sup> “The Court determined that these contested questions of fact were less dependent on witness testimony or witness credibility and could be resolved by a record developed through paper hearing.”<sup>75</sup>

Circuit courts divided initially in their interpretations of the Supreme Court’s holding in *Florida East Coast*.<sup>76</sup> Some interpreted it to apply to all types of cases, including adjudications, in which agencies were required to conduct a hearing and to act on the basis of consideration of contested facts similar to those at issue in *Florida East Coast*.<sup>77</sup> Others interpreted it to apply only to rulemakings.<sup>78</sup> Those courts held that a statute requiring an agency to conduct an adjudicative proceeding meant an oral evidentiary hearing.<sup>79</sup>

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<sup>68</sup> See *id.* at 231–34.

<sup>69</sup> See *id.* at 249, 256 (Douglas, J., dissenting).

<sup>70</sup> *Id.* at 236–38 (majority opinion).

<sup>71</sup> *Id.* at 241.

<sup>72</sup> See *id.* at 239–41.

<sup>73</sup> See *id.* at 245–46.

<sup>74</sup> *Id.* at 252–53 n.6 (Douglas, J., dissenting).

<sup>75</sup> *Id.* at 239–41.

<sup>76</sup> *PIERCE*, *supra* note 6, at 706–09.

<sup>77</sup> See *id.* at 708–09.

<sup>78</sup> *Id.* at 706–07.

<sup>79</sup> See *id.* at 706–08.

In 1984, the courts that interpreted *Florida East Coast* to apply only to rulemakings began to overrule their prior decisions and to apply *Florida East Coast* to adjudications as well as to rulemakings.<sup>80</sup> That change in direction was based in part on judicial applications of the Supreme Court's 1984 holding in *Chevron v. Natural Resources Defense Council*<sup>81</sup> that a court must uphold any reasonable agency interpretation of ambiguous language in an agency-administered statute.<sup>82</sup> Since the Court held that "hearing" was ambiguous in *Florida East Coast* and that it was reasonable for an agency to rely exclusively on a paper hearing to resolve contested issues of fact similar to those found in *Florida East Coast*, courts concluded that the combination of *Chevron* and *Florida East Coast* required them to uphold agency interpretations of "hearing" to require only a paper hearing in any type of case, including an adjudication, as long as the contested facts were similar to those at issue in *Florida East Coast*.<sup>83</sup> Since 1984, no circuit court has held that an agency is required to conduct an oral evidentiary hearing when it is required to conduct a "hearing" to resolve contested issues of fact of that type.<sup>84</sup>

Under *Chevron*, a court is required to uphold an agency interpretation of "hearing" to refer to a paper hearing only if the court concludes that the agency interpretation of hearing is "reasonable."<sup>85</sup> Since 1984, all courts have reached that conclusion as long as the contested issues of fact are similar to those the ICC addressed in *Florida East Coast*.<sup>86</sup> Courts begin by recognizing that oral evidentiary hearings are time-consuming and resource-intensive.<sup>87</sup> They then divide contested issues of facts into two broad categories. They hold that it is reasonable for an agency to interpret "hearing" to require only a paper hearing when the agency addresses contested issues of scientific or economic fact that can be resolved at least as well in a paper hearing as in an oral evidentiary hearing.<sup>88</sup> By contrast, they hold that it is not reasonable for an agency to interpret "hearing" to require only a paper hearing when the agency addresses contested issues such as

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<sup>80</sup> See PIERCE, *supra* note 6, at 709.

<sup>81</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc. (Chevron)*, 467 U.S. 837 (1984).

<sup>82</sup> *Id.* at 843–44.

<sup>83</sup> See, e.g., *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17–18 (1st Cir. 2006).

<sup>84</sup> See PIERCE, *supra* note 6, at 711 (listing cases).

<sup>85</sup> See *Chevron*, 467 U.S. at 845.

<sup>86</sup> E.g., *Dominion*, 443 F.3d at 17–18.

<sup>87</sup> E.g., *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1485 (D.C. Cir. 1989).

<sup>88</sup> E.g., *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 371 (D.C. Cir. 1998) (oral hearing not required to determine whether a firm has market power).

whether an individual committed a particular, and, if so, when, where, and why the person acted in that manner. Courts hold that contested issues of that type cannot be resolved with tolerable accuracy in the absence of oral testimony subject to cross-examination.<sup>89</sup>

Most agencies have adopted interpretations of “hearing” that require only a paper hearing except in circumstances in which the agency has to resolve contested issues of fact like who did what, when, where, and why.<sup>90</sup> The FTC can adopt a similar interpretation of “hearing” because that ambiguous term is also used in the FTC Act.<sup>91</sup> The vast majority of contested issues of fact that the FTC addresses in antitrust cases are issues of economic fact that can easily be addressed in a paper hearing. Only a small subset of antitrust cases require resolution of contested issues of fact that modern courts require agencies to subject to an oral evidentiary hearing.

Thus, for instance, if the FTC had a case like *United States v. United States Steel Corp.*<sup>92</sup> before it today, it would be required to conduct an oral evidentiary hearing to resolve questions like whether executives of competing steel companies met to discuss price fixing on particular days.<sup>93</sup> It would then have the discretion to conduct a paper hearing to resolve questions like whether persistent attempts to engage in industry-wide horizontal minimum price fixing violate the Sherman Act even if they are not completely successful.<sup>94</sup>

The FTC’s implicit interpretation of “hearing” to require an oral evidentiary hearing in every case creates major problems. Paper hearings can be conducted much more expeditiously than oral evidentiary hearings.<sup>95</sup> Thus, for instance, if the FTC relied on paper hearings to resolve the merits of contested merger cases, it could make a final decision in months rather than years. The FTC should have no problem making a final decision in a contested merger case expeditiously through use of a paper hearing. Both the FTC staff and the firms that propose to merge will have already gone through most of the steps required to develop and present their respective positions with sup-

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<sup>89</sup> See, e.g., *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997) (oral hearing required only for issues like “motive, intent, or credibility”).

<sup>90</sup> See PIERCE, *supra* note 6, at 704–15.

<sup>91</sup> See 15 U.S.C. § 45(b) (2012).

<sup>92</sup> *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920).

<sup>93</sup> *Id.* at 440.

<sup>94</sup> See PIERCE, *supra* note 6, at 715 (explaining that an oral evidentiary hearing is required only for disputed material facts, not issues of law or policy).

<sup>95</sup> See Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 ADMIN. L. REV. 787, 815 (2003).

porting data and analysis as a result of their participation in the merger clearance process initiated by the firms' Hart-Scott-Rodino filing.<sup>96</sup>

That change in procedure would create a legal environment in which decisions to issue temporary injunctions are not a de facto determination of the outcome of all such cases. Parties to a proposed merger could get a final decision from the FTC on the merits in a timely manner that would permit them to complete the merger if they prevailed on the merits. Encouraging paper hearings also would have the effect of eliminating ALJs from that decisionmaking process.<sup>97</sup> Most people who are involved in the FTC's antitrust decisionmaking process do not give ALJs high marks for their contributions to the process.<sup>98</sup> That should not be surprising. Lay ALJs suffer from the same lack of subject-matter expertise that causes federal district judges to be poor candidates to decide antitrust cases.<sup>99</sup>

### III. PROPOSED STEPS TO REDUCE THE CONFLICTS BETWEEN THE FTC AND ADMINISTRATIVE LAW

My proposed steps to reduce the conflicts between the FTC's performance of its antitrust mission and general principles of administrative law follow logically from my description of the conflicts between the FTC and standard administrative law practices and the sources of those conflicts. I would: (1) repeal Section 5 of the FTC Act,<sup>100</sup> (2) give the FTC the power to use the APA Section 553 procedure<sup>101</sup> to issue legislative rules to implement the antitrust laws, (3) take away the power of the DOJ, states, and private parties to bring civil antitrust actions, leaving the DOJ with the power to bring criminal actions, and leaving states and private parties with the power to bring

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<sup>96</sup> The Hart-Scott-Rodino Act requires certain firms that propose to merge to make a filing with the DOJ or the FTC in which they state their intent and explain why they believe that the proposed merger would not violate antitrust law. The agency can then conduct a paper hearing of sorts by requiring the firms to provide additional data and analysis if the agency is concerned that the merger might have adverse effects on the performance of a market. If, at the end of that process, the agency believes that the merger would violate Section 7 of the Clayton Act and the firms decide to attempt to implement the merger, the agency can seek a temporary injunction against the merger. This decisionmaking process is described in all antitrust casebooks. See, e.g., THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 794–818 (5th ed. 2014).

<sup>97</sup> ALJs preside at oral evidentiary hearings. See Boyer, *supra* note 10, at 41.

<sup>98</sup> E.g., Sokol, *supra* note 27, at 1067–68.

<sup>99</sup> See *id.* For a general discussion of this problem, see Diane P. Wood, Speech, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1766 (1997).

<sup>100</sup> 15 U.S.C. § 45 (2012).

<sup>101</sup> See PIERCE, *supra* note 6, at 557–61.

actions for treble damages once the FTC has decided that one or more firms violated antitrust law,<sup>102</sup> (4) repeal or amend the provision of the FTC Act that makes it easy for the FTC to obtain a temporary injunction against a proposed merger,<sup>103</sup> and (5) replace oral evidentiary hearings with paper hearings in the vast majority of FTC adjudications.<sup>104</sup>

#### A. *Repeal Section 5*

A century of experience with Section 5 has produced no tangible benefits and lots of costs.<sup>105</sup> Repeal of Section 5 would reduce significantly the widespread fear of a potentially out-of-control FTC that is felt by many people in firms, in Congress, and in the judiciary.<sup>106</sup> That widespread fear is a major impediment to the kinds of efforts proposed by this Essay that would make it easier for the FTC to perform its mission efficiently and effectively. Moreover, most, if not all, of the goals of those who want to breathe life into Section 5 can be pursued more effectively through implementation of the other proposals found in this Essay.

#### B. *Give FTC the Power to Issue Legislative Rules*

The FTC is extremely rare among administrative agencies. The vast majority of agencies have the power to use the notice and comment procedure described in APA Section 553 to issue legislative rules pursuant to each of the statutes implemented by the agency.<sup>107</sup> In the antitrust context, the FTC lacks that power.<sup>108</sup> It has no power to issue rules to implement the Sherman or Clayton Acts,<sup>109</sup> 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.<sup>110</sup>

The FTC could use rulemaking to issue legislative rules that perform important functions, like creating and describing the presump-

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<sup>102</sup> See 15 U.S.C. § 15 (any person may sue for treble damages under antitrust laws); 15 U.S.C. § 26 (same for injunctive relief); see also *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972) (confirming concurrent right to sue of government, states, and private parties).

<sup>103</sup> 15 U.S.C. § 53(b); see, e.g., *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 30 (D.D.C. 2009) (granting temporary injunction against merger).

<sup>104</sup> See *supra* notes 95–99.

<sup>105</sup> See generally Kovacic & Winerman, *supra* note 37, at 933–34.

<sup>106</sup> See *supra* notes 37–39 and accompanying text.

<sup>107</sup> See *PIERCE*, *supra* note 6, at 557–61.

<sup>108</sup> See FED. TRADE COMM’N, OPERATING MANUAL § 7.2, <https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch07rulemaking.pdf>.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* § 7.3.2.

tions it will apply and the decisional frameworks and criteria it will use in various types of cases.<sup>111</sup> Courts would be more likely to acquiesce in more aggressive interpretations and implementations of the Sherman and Clayton Acts when they are supported by the kind of detailed analysis courts require from an agency when it issues a legislative rule. Legislative rules that describe frameworks and criteria for application of the Sherman and Clayton Acts also would help to reassure business executives, legislators, and judges who fear that the FTC might abuse its power. Unlike policy statements, legislative rules bind agencies and cannot be rescinded or amended without going through the APA Section 553 notice and comment procedure.<sup>112</sup>

It would not be easy to persuade Congress to confer rulemaking power on the FTC in the antitrust context, but such an effort would have a chance of success if it is part of a package of statutory amendments that includes other changes like the repeal of Section 5 of the FTC Act. A congressional decision to repeal Section 5 and to confer on FTC power to issue legislative rules to implement the Sherman and Clayton Acts would simultaneously increase the FTC's ability to persuade courts to uphold more aggressive interpretations of those statutes and reassure business executives, legislators, and judges that they need not fear that the FTC would engage in unduly intrusive regulation. That reassurance would come in part from the repeal of Section 5 and in part from the high likelihood that the FTC would impose reasonable limits on its discretion to interpret and apply the Sherman and Clayton Acts by issuing legislative rules.

### *C. Give FTC Exclusive Power to Bring Civil Actions*

Conferring rulemaking power on the FTC in the antitrust context would be an exercise in futility without also eliminating the concurrent powers of the DOJ and the courts to interpret and to implement antitrust statutes. Rules issued by the FTC would have no legal force and effect and no credibility if other agencies or the courts had concurrent power to interpret and to implement the Sherman and Clayton Acts.<sup>113</sup> To make FTC rulemaking viable and effective, the antitrust statutes have to be amended to give the FTC exclusive power to adjudicate all civil antitrust actions. The DOJ would continue to have exclusive power to bring criminal actions, while states and pri-

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<sup>111</sup> “[T]he FTC offers a superior platform for elaborating competition policy.” Kovacic & Winerman, *supra* note 37, at 939.

<sup>112</sup> See generally PIERCE, *supra* note 6, at 406.

<sup>113</sup> See *supra* note 51 and accompanying text.



vate citizens would have the power to bring actions to recover treble damages from defendants in cases in which the FTC has previously determined that the defendants violated either statute.<sup>114</sup>

Statutory changes that confer on the FTC exclusive power to implement antitrust law would have many benefits in addition to rendering a grant of rulemaking power viable. The FTC would then be able to act like most other agencies by issuing numerous interpretive rules and policy statements. This would provide lawyers, companies, and the general public with a much better understanding of antitrust law than they could possibly obtain through the extraordinarily difficult process of drawing inferences about the general contours of modern antitrust law based on the sprawling body of often inconsistent opinions the Supreme Court has issued over the past 125 years. Once the Supreme Court recognized that it no longer needed to limit the discretion of hundreds of lay judges and juries, it would be far more likely to uphold the somewhat more aggressive interpretations of the Sherman and Clayton Acts that the FTC would be likely to adopt through some combination of legislative rules, interpretive rules, and policy statements.

#### *D. Amend Section 13(b) of the FTC Act*

Section 13(b) of the FTC Act provides the standard applicable in FTC actions to obtain temporary injunctions that prohibit the parties to a proposed merger from completing the merger until after FTC has issued a final decision with respect to its merits.<sup>115</sup> As it has been interpreted in a series of recent court opinions, Section 13(b) provides a standard applicable to FTC actions that is much easier to meet than the standard that applies to all other requests for temporary injunctions, including DOJ requests to obtain temporary injunctions with respect to the mergers that it reviews.<sup>116</sup> That difference is unfair and unsupportable. Far worse, when the easy-to-meet standard applicable to FTC requests for temporary injunctions is combined with the “notoriously slow” FTC process of making a final decision on the merits of a proposed merger and the time-sensitive nature of merger agreements, the effect is to deprive the parties to a proposed merger of any

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<sup>114</sup> See *supra* note 102 and accompanying text.

<sup>115</sup> 15 U.S.C. § 53(b).

<sup>116</sup> *E.g.*, *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035–36 (D.C. Cir. 2008) (describing section 13(b) standard); see also Chubb, *supra* note 27, at 533, 538–40 (describing differences between standards applicable to the FTC and the DOJ).

real opportunity to obtain a final decision on the merits of the proposed merger.<sup>117</sup>

The effects of Section 13(b) are unacceptable on many grounds. They can be avoided by amending the FTC Act to eliminate the special easy-to-meet standard applicable to FTC requests for temporary injunctions. That would leave the FTC with the power to request such an injunction through application of the same standard that now applies to DOJ requests for temporary injunctions. That change in law would also increase the FTC's incentive to make prompt final decisions on the merits of proposed mergers. The next change this Essay proposes would make that possible.

#### *E. Replace Oral Hearings with Paper Hearings*

Delay in deciding the merits of contested mergers has created the unacceptable situation in which no firm that proposes a merger that the FTC opposes can realistically expect to be able to obtain a final decision on the merits of its proposal.<sup>118</sup> The typical time-sensitive proposed merger collapses before the FTC can even make a decision on the merits.<sup>119</sup> More broadly, antitrust law has long been plagued by undue delay in resolving disputes. A torpid antitrust dispute resolution process is not a good fit with a dynamic economy. By the time a dispute is ripe for final decision, the relevant facts on the ground often have changed in ways that could have a major influence on the outcome of the dispute.

The antitrust decisionmaking process would have the potential to be far more efficient and expeditious if Congress were to make the kinds of changes in institutional structure that this Essay urges—replacement of lay judges and juries with FTC expert decisionmaking, subject to deferential circuit court review, in all civil cases. We can realize the full advantages of those changes only if the FTC follows the lead of most other federal agencies and replaces oral evidentiary hearings before ALJs with paper hearings decided directly by the Commissioners, without the delay and distraction created by a hearing presided over by a lay ALJ and the ALJ's issuance of an initial decision.<sup>120</sup> That change in procedure would substantially reduce the duration of antitrust cases. The FTC probably could accomplish that change in decisionmaking procedure even without any congressional

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<sup>117</sup> See Jones & DeFilippo, *supra* note 27, at 4–5.

<sup>118</sup> See *supra* notes 30–33 and accompanying text.

<sup>119</sup> See Jones & DeFilippo, *supra* note 27, at 4–5.

<sup>120</sup> See Sokol, *supra* note 27, at 1067–68.

action.<sup>121</sup> Since many of the other changes this Essay proposes require congressional action, however, it would be better if Congress made explicit the FTC's discretion to rely on paper hearings to resolve most antitrust disputes.

### CONCLUSION

The FTC has served the nation well during its first century. I am convinced that it can perform its antitrust mission even better over the next century if Congress makes the changes in its statutory power that this Essay proposes. It would be difficult to persuade Congress to make those changes, but a carefully designed and implemented lobbying campaign would have a reasonable prospect of success.

It should be easy to persuade legislators and constituencies that want to strengthen the FTC's role in antitrust enforcement that the combination of changes this Essay proposes would have the effects they desire. Loss of the special easy-to-meet standard to obtain a temporary injunction and loss of Section 5 power would be a small price to pay to get exclusive jurisdiction over all civil cases, discretion to use APA Section 533 procedures to issue legislative rules, discretion to issue credible interpretive rules and policy statements to supplement the legislative rules, and discretion to substitute paper hearings for oral evidentiary hearings to resolve the vast majority of adjudicative disputes.<sup>122</sup>

The bigger challenge would be to persuade the many legislators and constituencies that fear that the FTC might abuse its power that the changes this Essay proposes would also have effects they desire; however, it should be possible to make that case with emphasis on three ways in which the combination of changes this Essay proposes would further their interests. First, the changes would eliminate the risk that a future FTC might abuse its power through interpretation and application of the broad and vague mandate in Section 5 of the FTC Act to outlaw "unfair practices."<sup>123</sup> Second, the change would eliminate the unfairness inherent in the FTC's power to use the special easy-to-meet standard to obtain a temporary injunction against a merger and then to use delay in its decisionmaking process on the merits to deprive proponents of a merger of the opportunity to convince the FTC or a reviewing court to acquiesce in the proposed

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<sup>121</sup> See *supra* Part III.C (explaining that *Chevron* deference should provide sufficient power for the FTC to change its procedures without specific congressional authorization).

<sup>122</sup> See *supra* Part III.

<sup>123</sup> See *supra* Parts II.A, III.A.

merger.<sup>124</sup> Third, the combination of changes I propose would create conditions in which the FTC could significantly improve the clarity, coherence, consistency, and predictability of antitrust law.<sup>125</sup>

This third advantage of the changes this Essay proposes is easiest to understand and to appreciate by contrasting the relative ease with which lawyers and their clients could obtain an understanding of antitrust law in the legal regime this Essay proposes with the appalling lack of clarity and predictability that afflicts antitrust law in the present legal regime. Every year I do my best to teach law students modern antitrust law with reference to the dominant source of that law today—the opinions the Supreme Court has issued over the past 125 years.<sup>126</sup> Those opinions contain hundreds of inconsistent passages. In most cases, the Court does not overrule or distinguish in a credible manner the precedents that are inconsistent with each new opinion it issues. The result is a mass of holdings and reasoning that is extraordinarily difficult to interpret and apply.

The best way to illustrate the serious interpretive difficulties that the present legal regime creates is to describe just four of the scores of questions that I regularly get from the best of my students, which I am unable to answer with any degree of confidence. The first question goes something like this: “The Court seemed to reject application of the per se rule to horizontal minimum price fixing in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,<sup>127</sup> but the Court applied the per se rule to horizontal maximum price fixing in *Arizona v. Maricopa County Medical Society*.<sup>128</sup> Does that mean that horizontal maximum price fixing is per se illegal while horizontal minimum price fixing is subject to the rule of reason?” I am forced to answer with a lengthy explanation that begins with, “Your interpretation of both opinions is plausible and defensible, and the Court has not overruled either opinion. But the resulting legal regime would be so indefensible that it cannot be the current state of the law.” I then have to explain why the common law decisionmaking process the Court uses to create and describe the law in the antitrust context often yields conflicts and ambiguities, which require lawyers and lower court judges to make educated guesses about the manner in which the Court will de-

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<sup>124</sup> See *supra* Part III.D.

<sup>125</sup> See *supra* Parts III.B–C, III.E.

<sup>126</sup> See Kovacic & Winerman, *supra* note 37, at 929–38 (discussing the history of Supreme Court decisions since the enactment of the Sherman Act in 1890 as alternating between expansive and restrictive interpretations of antitrust laws).

<sup>127</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>128</sup> *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332 (1982).

cide the next case that raises one of the many issues the Court has addressed in inconsistent ways in its prior opinions.

The second recurring question goes something like this: "Is the test to determine the legality of a tying arrangement still the test announced and applied by a plurality of Justices in *Jefferson Parish Hospital District No. 2 v. Hyde*?"<sup>129</sup> My necessarily unsatisfactory answer to that recurring question is, "The Court has never overruled *Jefferson Parish*, so it is still officially the law today. That opinion was written thirty years ago, however, and it seems unlikely that a majority of Justices would apply it today. Lower court judges are likely to find clever ways of distinguishing *Jefferson Parish* and are likely to announce and apply quite different tests today, as the en banc D.C. Circuit did in *United States v. Microsoft Corp.*<sup>130</sup> However, I cannot predict with confidence what test either the Supreme Court or a lower court would apply today."

The third recurring question is, "What is the difference between an acceptable and an unacceptable application of the quick look test? Is it just the difference between a 14-page discussion of a pattern of behavior and an 8-page discussion of that pattern, as the Supreme Court majority suggested in *California Dental Association v. FTC*?"<sup>131</sup> My unsatisfactory answer is, "I don't know. The reference to the difference between an 8-page discussion and a 14-page discussion in *California Dental* is the closest the Court has come to describing the characteristics of an acceptable application of the quick look test."

The fourth question I get from my better students is, "Has the Supreme Court effectively overruled *United States v. Topco*<sup>132</sup> and *United States v. Sealy*?"<sup>133</sup> My unsatisfactory answer is, "I don't know. As you know, the Supreme Court has issued several opinions that seem to be inconsistent with *Topco* and *Sealy*, and a D.C. Circuit panel that included a highly respected antitrust scholar from Yale concluded that the Court has effectively overruled *Topco* and *Sealy*.<sup>134</sup> On the other hand, the Court has cited, quoted, and relied on *Topco* as if it were still good law since the D.C. Circuit concluded that the Court effectively overruled *Topco*."<sup>135</sup>

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129 *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

130 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

131 *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

132 *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

133 *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

134 *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986).

135 *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990).

The fourth recurring question and answer illustrates the lack of clarity, consistency, and predictability of antitrust law particularly well. If the most experienced antitrust professors at the top law schools in the country cannot answer accurately and confidently the most basic questions that arise routinely in antitrust law, it is hard to imagine how lawyers can provide accurate advice to clients or how lower court judges can determine the law that they must apply in resolving antitrust disputes.

The merger context provides a hint of the many advantages that the legal regime this Essay proposes would offer. When I try to teach merger law by referring to the twenty or so merger opinions the Supreme Court has issued, my students become extremely frustrated in their efforts to tease sensible, coherent principles from that mass of inconsistent and ambiguous verbiage. Light bulbs go on for my students, however, when I introduce them to the DOJ and FTC Merger Guidelines.<sup>136</sup> Those guidelines provide an excellent roadmap of modern merger law. They describe in detail the analytical steps that the DOJ or FTC will take in the process of considering whether to acquiesce in a proposed merger. They are extraordinarily valuable to lawyers who are asked to advise clients with respect to the legality of a proposed merger and to the lower court judges who must resolve the disputes that arise between the two agencies and proponents of a merger. The guidelines have the effect of rendering merger law far more clear, predictable, sensible, and consistent than it would be if lawyers and courts had access only to the opinions the Supreme Court has issued in merger cases.

The FTC and DOJ deserve a great deal of credit for the extraordinary efforts they have made to issue the merger guidelines and to amend them periodically to reflect changes in the ways in which they predict the likely effects of mergers. Both firms and lower courts could obtain similar major benefits from the issuance of similar guidelines applicable to all other areas of antitrust law. That is not possible in today's legal environment for two reasons. First, it is unrealistic to expect the FTC and DOJ to be able to draft, agree upon, and revise in a timely manner joint guidelines applicable to every aspect of antitrust law. Second, such guidelines would be of limited value because of the absence of FTC rulemaking power and the major role that lay judges and juries now play in resolving antitrust disputes outside the merger context. Implementation of the changes in institutional roles that this

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<sup>136</sup> DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

Essay proposes would eliminate those problems and create a legal environment in which the FTC could improve significantly the clarity, consistency, and predictability of antitrust law.