5-4-2022

Making Rules vs Ruling

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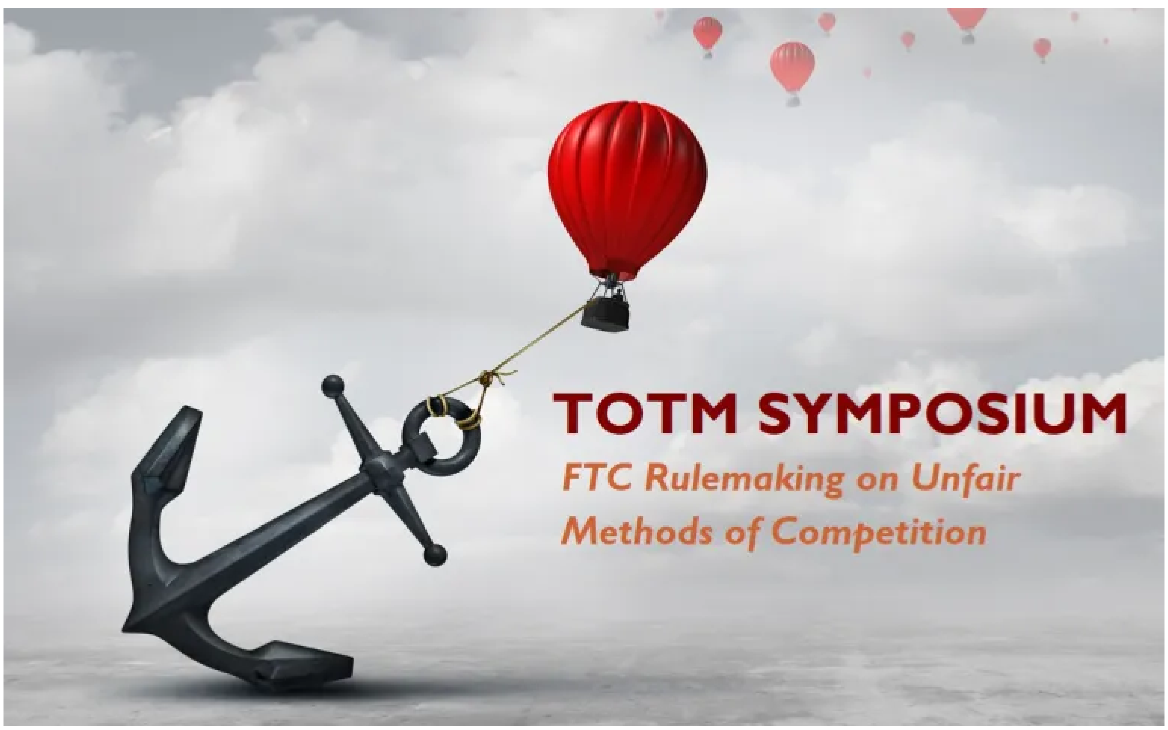

[*Today's guest post—the 11th entry in our FTC UMC Rulemaking symposium—comes from Ramsi A. Woodcock of the University of Kentucky's Rosenberg College of Law. You can find other posts at the* symposium page here. Truth on the Market *also invites academics, practitioners, and other antitrust/regulation commentators to send us 1,500-4,000 word responses for potential inclusion in the symposium*.]

In an effort to fight inflation, the Federal Open Market Committee raised interest rates to 20% over the course of 1980 and 1981, triggering a recession that threw more than 4 million Americans, many in well-paying manufacturing jobs, out of work.

As it continues to do today, the committee met in secret and explained its rate decisions in a handful of paragraphs.

None of the millions of Americans thrown out of work—or the many businesses driven to bankruptcy—sued the FOMC. No one argued that the FOMC's power to disrupt the American economy was an unconstitutional delegation of legislative authority. No one argued that, in adopting its rate decisions, the FOMC had failed to comply with any of the notice-and-comment procedures required by the Administrative Procedure Act (APA).

They were wise not to sue, because they would have lost.

There have been only five lawsuits against the FOMC since it was created in 1933. All have failed; none has challenged a FOMC rate decision.

As Judge Augustus Hand put it in a related case: "it would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review."

Even if everything Frank Easterbrook has had to say about antitrust is correct, it is unlikely that the Federal Trade Commission (FTC) could ever trigger a recession, much less one as severe as the one the FOMC created 40 years ago. And yet, no FTC commissioner can dream of the agency enjoying anything like the level of deference from the courts enjoyed by the FOMC.

The reality of FTC practice is just too depressing.

The FTC Act of 1914 is an expression of profound ambivalence about the administrative project, denying to the FTC even the authority to carry out *internal* deliberations other than through an adjudicative process. The FTC must bring an administrative complaint; firms have the right to a hearing; and so on. A Congress that would do *that* to an agency would certainly subject the agency's final decisions to review by the federal courts—which, of course, Congress did.

Unlike their francophone peers on the European Court of Justice (ECJ), who have leveraged a culture of judicial deference to administrative action—as well as the fact that the ECJ's language of business is their native tongue—to give the European Union's antitrust agency something like *carte blanche*, American judges have delighted at using their powers to humiliate the FTC.

Take pay-for-delay. The FTC—informed by a staff of 80 PhD economists, not all Democrats—declared the practice to be bad for consumers in the late 1990s. But several courts actually decided that the practice was so good for consumers that it should be per se *legal* instead. It took more than a decade of litigation before the FTC was able to make a dent in the rate of accumulation of these agreements.

So whipped is the FTC by the courts that even when it dreams of a better life, the commission seems unable to imagine one without judicial review. During a period when bipartisan groups of legislators are seeking to reform the antitrust laws, one might have hoped that the FTC would ask for some of the discretion enjoyed by the FOMC.

Instead, the FTC's current leadership appears intent to strap the FTC into the straightjacket of notice-and-comment rulemaking under the APA, which will only extend the FTC's subjugation to the courts.

Indeed, progressives understood the passage of the APA in 1946 to be a signal defeat, clawing back power for the courts that progressives had fought for two generations to lodge in administrative agencies. The act was literally adopted over FDR's dead body—he vetoed its forerunner in 1940 and died in 1945. It is consistent with contemporary progressives' habit of mistaking counterproductive, middle-of-the-road policies for radical interventions (the original progressives of a century ago didn't think much of the entire antitrust enterprise, either), that they should mistake the APA's notice-and-comment rulemaking for a recipe for FTC invigoration.

To be sure, the issuance of competition regulations would be a new thing for the FTC. Rather than just enforce existing antitrust rules (and fantasizing that, one day, a court might read the FTC's power to condemn "unfair methods of competition" more broadly), the FTC would be able actually to make new antitrust law.

But law is a double-edged sword for an administrative agency. It binds the public, *but it also binds the agency*. Any rule the FTC seeks to adopt, the FTC itself must follow; if a defendant can show that the firm complied, the FTC loses its case.

And that's after the FTC has made it through the hell of the rulemaking process itself—the notice-and-comment periods, the court challenges to the agency's interpretation of every point of process, along with the substantive basis for the rule—for every single rule the agency wishes to adopt. Or to repeal.

The FOMC suffers no such indignities.

Although Congress calls the FOMC's decisions "regulations," they are not subject to the APA. The FOMC can make a rate decision and then change its mind whenever and however it wishes. The FOMC does not need to provide the public with notice and an opportunity to comment—indeed, the FOMC waits five years to release transcripts of its deliberations—and its decisions are never reviewed, even for caprice.

If the FTC wanted real power—if it wanted to get something done—it would want *discretion*. Discretion has made the FOMC nimble and being nimble has made the FOMC effective. Economists agree that the FOMC's rate decisions slew inflation in the early 1980s; it could not have done that if, like the FTC and pay-for-delay, it had had to wait a decade for the courts' approval.

As Judge Hand put it, "the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made."

How strange it is to read this as an antitrust scholar and reflect that the single most important attack on antitrust enforcement has always been, in Judge Hand's words, that "the disease [is] ordinarily … over long before a judicial diagnosis [is] made."

Is that not the lesson drawn by antitrust's critics from the Microsoft litigation? Microsoft may well have monopolized operating systems in 1992 or 1994. But by the time the case settled in 2001, Windows' dominance could not be rolled back. America was already used to a single operating system, a single Office suite, and so on. And mobile, which Microsoft did not dominate, was on the horizon. If there had been a time when antitrust enforcers could have done something to promote competition, it had passed.

Or AT&T. Antitrust managed to break the company up just in time for the cell-phone revolution to render its decades-old landline monopoly irrelevant.

If, as Judge Hand observed, "conditions in the money market change from hour to hour," so too do conditions in virtually every market—including the markets that the FTC regulates. If that is the argument for FOMC discretion, it is an equally potent argument for FTC discretion.

But to get power, you have to want it, and the current leadership cries out instead only for a more varied servitude.

The case for instead making the FTC more like the FOMC is strong. (Even the name fits.)

Both institutions are charged with using indirect methods to get prices right in fluid market environments—the FOMC by using the purchase and sale of securities to get interest rates right; the FTC by tweaking market structure to get market prices to competitive levels. As has already been observed, this can be done effectively only through the unfettered exercise of administrative discretion.

Independence from all three branches of government (including the courts) is essential to both. Just as an accountable FOMC would probably not have had the will to throw millions out of work and drive many businesses into bankruptcy in order to fight inflation—even though that was ultimately best for the economy—an accountable FTC cannot embark on a campaign of economy-wide deconcentration when that is the right thing for the economy (which is not to say that it always is).

The sort of systemic regulation of the preconditions for a successful capitalism in which both the FOMC and the FTC are engaged creates too many powerful winners and losers for either institution to be able to do its job without complete and utter discretion to act as it sees fit—something the FTC lacks.

Indeed, the last time the FTC tried to flex its muscles, it was smacked down by all three branches of government—attacked by both Jimmy Carter and Ronald Reagan from the campaign trail, threatened with defunding by Congress, and rejected by the courts.

One can distinguish the FOMC from the FTC on the grounds that the FOMC paints with a broader brush than does the FTC. To get interest rates right, the FOMC directs the purchase and sale of securities, often in great volumes, whereas the FTC may need to tell a single, identifiable company how to do a particular, identifiable thing, such as to distribute a particular input on reasonable terms or to excise a particular provision from its contracts. Because of the potential for abuse of the individual that might result from such individualized action, the argument goes, the courts must keep the FTC on a tighter leash.

There is a fictional premise here. The FTC rarely deals with individuals—flesh-and-blood humans—but instead with corporations, often so large that they have thousands of workers and managers, and still more shareholders. The potential for abuse of actual individuals, as opposed to the fictive corporate individual, is low.

But even if we accept this fiction—as, alas, the courts have done—the FTC differs from the FOMC here only because it has so far adhered to an adjudicatory model of decisionmaking. The FTC could, for example, decide instead to target competitive prices by ordering every firm in the economy having an accounting profit in excess of 15% to be broken up, along the lines of the Industrial Reorganization Act considered by Congress in the 1970s.

That would paint with a brush of FOMCian breadth. Indeed, by varying the triggering profit percentage, the FTC would be able to vary, in a rough way, the level of competition and hence the level of prices in the economy, just as, by varying its target interest rate, the FOMC varies, in a rough way, the level of inflation in the economy.

(I do not mean to suggest an equivalence between monopoly pricing and inflation; monopoly pricing is a problem of *levels* whereas inflation is a problem of *rates of change*; they are two different problems with two different causes, two different institutions to mind them, and two different fixes.)

And although such a broad approach would surely send copious “good” firms that have engaged in no monopolizing activities to their fates, the FOMC’s rate increases doubtless also send to their fates plenty of “good” firms that have not inflated their prices but cannot survive at a 20% cost of capital. The FOMC does that because it is more expedient to discipline every firm than to identify the inflators and coax them into altering their behavior on a case-by-case basis.

We tolerate this sacrifice of innocents because we believe that low inflation confers long-term gains on everyone. If we believe that competitive pricing confers long-term gains on everyone—and that is the premise of competition policy—surely we must tolerate the same from the FTC.

If anything, the case for a broad-brush FTC is stronger than that for the FOMC, because, as already noted, no matter how overzealous the deconcentration program, it is hard to imagine deconcentration plunging the economy into recession and throwing millions of Americans out of work, at least in the short run.

If anything, deconcentration should raise employment, because competition is wasteful and duplicative; all those shards of big firms need their own independent support staffs. And, of course, it is a staple of antitrust theory that when competition increases, output goes up, not down.

One might also seek to distinguish between the FOMC and the FTC on the grounds that what the FTC must do is more complicated, and hence more prone to error, than what the FOMC must do, making oversight more appropriate for the FTC. Both inflation and monopoly power are bad for growth, the argument might go, but the connection between inflation and growth is clear whereas that between monopoly power and growth—not so much.

Indeed, too much inflation prevents firms from planning and, so, from innovating. But while the adversity associated with competition is the mother of invention, many innovations—such as social networks—can be delivered only at scale, suggesting that too much competition can be as bad for growth as too little. It would seem to follow that getting monetary policy right is easy, whereas getting competition policy right is hard.

Except that the FOMC must strike a balance between too much inflation and too little, just as the FTC must strike a balance between too much competition and too little.

Deflation can be just as bad for growth—just as hard on business planning—as inflation, as any Japanese central banker of the previous generation can tell you. The FOMC must, therefore, find the interest rates that produce neither too much nor too little inflation, just as the FTC must find the level of concentration that produces neither too much nor too little competition.

Both the FOMC and the FTC have hard jobs. Why do we trust one to handle its job better than the other?

One reason might be that the FOMC is a friend to big business whereas the FTC is a natural enemy thereof. Inflation, when unexpected, *levels*, because it reduces the real value of debts. If firms tend to be creditors and consumers debtors, and firms' shareholders tend to be richer than consumers, the wealth gap narrows.

It follows that, in preventing inflation, the FOMC *tilts*, and so big business wants the FOMC healthy and free. The FTC, by contrast, levels, because it eliminates monopoly profits, benefiting consumers at the expense of shareholders. So, big business prefers the FTC *shackled*.

If that is right, then the FOMC enjoys a level of discretion that the FTC never can, because the power behind government never will give the FTC so loose a leash. Congress has authorized both the FOMC and the FTC to create regulations. But the courts would never interpret this language consistently; for the FOMC, to "adopt" a "regulation" means to do whatever you like whereas for the FTC to "make" a "regulation" means either nothing at all or, at best, notice-and-comment rulemaking under the APA.

But I rather think there is a better explanation for the divergent experiences of the FOMC and the FTC, one that does not turn on class conflict and which has been staring us in the face all along.

Just as competition policy probably cannot cause a recession or throw millions of Americans out of work, it probably cannot much increase growth or employ many more Americans either. The future of an economy may be decided by the variance of an interest rate between 0% and 20%; this is not so for the variance of a market price between the competitive level and the monopoly level. The FOMC is simply more important to the success of the capitalist system than is the FTC.

And both are probably not that important for economic inequality. While unexpected inflation does tend to make debts go away, firms rewrite contracts to account for expected inflation, so inflation's contribution to equality is blip-like.

The contribution of monopoly profits to inequality is also likely to be small; scarcity profits, which firms generate even in competitive markets, are likely to play a more important role. At least, that's what Thomas Piketty, the dean of inequality studies, happens to think.

And maybe also what the rich think: there is conservative support for more competition policy, but none for more tax policy, which tells us something about which is likely to have a more radical impact on the distribution of wealth.

So, it is because the FTC is not dangerous, rather than because it is dangerous, that we feel free to hobble it with process. And because the FOMC is dangerous that we want it free and maximally effective.

Just so, there is no due process in wartime because there is so much at stake, whereas in peacetime you can't kill a statue without multiple appeals.

Which takes us back to the real deficit in progressive radicalism. Yes, rulemaking for the FTC is a cop out.

But so is the entire antitrust project.

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Posts

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