

# Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC

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*America faces twin crises of metastasizing corporate power and foundering government capacity to respond. Calls for fundamental reforms to the economic system have grown louder as corporate consolidation reaches record levels and “informational capitalism” systematically shifts power from individuals to large, data-rich firms. Americans are left vulnerable to “dark patterns” that extract customers’ wealth, to gig work companies that siphon tips away from workers, and to algorithmic decision-making that exhibits racial and gender bias. But many rightfully doubt that America’s elected branches of government remain functional enough to handle these emerging challenges, and the Supreme Court continues to impede efforts that Congress and the President do undertake.*

*The Federal Trade Commission is well-positioned to step into this breach. Section 18 of the FTC Act grants the agency the authority to issue new consumer protection rules to police against unfair or deceptive business tactics, backed by tough penalties and consumer redress. Yet, this power sat virtually dormant for the past thirty-eight years after a “Reagan Revolution” at the agency decisively ended its rulemaking activity. For the first time in decades, a majority of FTC Commissioners supports using this tool, but long-unchallenged received wisdom stands in the way. This common narrative holds that Congress saddled the FTC with almost impossibly onerous “Magnuson-Moss” procedural requirements for rulemaking in reaction to overbroad and politically unpopular regulations. This article argues that the conventional story is mistaken. A review of the history, statutory text, and judicial constructions of section 18 show that this pessimistic view confuses a historical decline in rulemaking—which was driven by non-statutory factors including an ascendant corporate lobby, changing congressional pressures, and a deregulatory ideological moment—with supposed flaws in section 18.*

*Puncturing the mythology that has grown up around the Magnuson-Moss Act provides a more clear-eyed view of the FTC’s authorities. Doing so makes apparent that the Commission can—and should—pick back up its powerful tool of consumer protection rulemaking. Future rules can rein in marketplace misconduct such as unfair privacy abuses, deceptive online “drip pricing,” and much more. Reinvigorating the FTC’s regulatory program can restore the agency as a champion of American consumers and a cornerstone of an administrative state able to counterbalance dominant corporations and establish a more just economy.*

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## INTRODUCTION

America faces twin crises of metastasizing corporate power and foundering government capacity to respond. Corporate consolidation has spiked in recent decades, and wealth inequality has surged alongside it.<sup>1</sup> This concentration of market power has led to harms to consumers, workers, and entrepreneurs alike.<sup>2</sup> A breathtaking fifty-four percent of Americans report having experienced corporate abuse over the past decade.<sup>3</sup> Unsurprisingly, then, seventy percent of the country believes “the economic system unfairly favors

<sup>1</sup> Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 QJ. ECON. 561, 562–63 (2020).

<sup>2</sup> Austan Goolsbee, *Big Companies Are Starting to Swallow the World*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html> [https://perma.cc/96DT-4Q9N].

<sup>3</sup> Katie Porter & Jill Habig, *Corporations Are Abusing People. Here’s How to Better Protect Workers and Consumers.*, USA TODAY (Aug. 23, 2019, 7:00 AM), <https://www.usatoday.com/story/opinion/2019/08/23/protect-workers-consumers-from-corporate-abuse-we-can-do-more-column/2060655001/> [https://perma.cc/K9JY-SCAM].

powerful interests.”<sup>4</sup> These stunning statistics came before the COVID-19 pandemic saw the most powerful companies collect unprecedented profits as millions of Americans lost their jobs and many more struggled under the strain of quickly rising prices.

Calls for fundamental reforms to the economic system are gaining strength in the face of these growing imbalances of power. The rise of “informational capitalism” has systemically shifted control from individuals to large, data-rich companies.<sup>5</sup> Americans are left vulnerable to “dark patterns” that exploit psychological vulnerabilities to extract wealth from customers, to gig work companies that deceptively siphon tips away from workers, and to algorithms that cloak racial or gender biases in seeming mathematical neutrality. The now-routine occurrence of data breaches exposing highly sensitive personal information can have devastating effects. Through it all, consumers are less able than ever to defend themselves against these types of technologically sophisticated harms.

Yet, many Americans do not believe that their elected branches of government remain functional enough to handle these challenges. A sense of democratic degradation is pervasive, from scholars to ordinary voters.<sup>6</sup> Even if the national legislature did not exhibit historic levels of chronic gridlock, besides a few exceptional emergency packages, Americans believe four-to-one that their government works more for wealthy donors than for people like them.<sup>7</sup>

The Federal Trade Commission (“FTC”) is far better positioned to step into this breach and beat back abuses in the marketplace than many observers realize. Section 18 of the Federal Trade Commission Act grants the agency the authority to issue binding consumer protection rules to police against unfair or deceptive business tactics across nearly the entire economy, backed by tough penalties and consumer redress. This is a potent tool. As former FTC Chair William Kovacic remarked, “no regulatory agency in the United States matches the breadth and economic reach of the Commission’s mandates.”<sup>8</sup> But this rulemaking power has sat nearly unused in the past

<sup>4</sup> Ruth Igielnik, *70% of Americans Say U.S. Economic System Unfairly Favors the Powerful*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/fact-tank/2020/01/09/70-of-americans-say-u-s-economic-system-unfairly-favors-the-powerful/> [<https://perma.cc/2M95-VH25>].

<sup>5</sup> See Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1462–63 (2020).

<sup>6</sup> See, e.g., Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 86, 95–96 (2015).

<sup>7</sup> Michael W. Traugott, *Americans: Major Donors Sway Congress More Than Constituents*, GALLUP (July 6, 2016), <https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx> [<https://perma.cc/C6HN-5JKA>].

<sup>8</sup> Letter from Rep. Lee Terry, Chairman, Subcomm. on Com., Mfg. & Trade of the H. Comm. on Energy & Com., to Daniel A. Crane, Senior Professor of Law, Univ. of Mich. 2 (Oct. 2, 2014), <https://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-CraneD-20140228-SD001.pdf> [<https://perma.cc/KN2X-8WWQ>].

The agency has both a competition mandate, to protect against “unfair methods of competition,” and a consumer protection mandate, to bar “unfair or deceptive acts or practices.” See 15 U.S.C. § 45(a)(1). Both stretch across nearly the entire U.S. economy, save for a few excep-

thirty-eight years, ever since the agency encountered a backlash to a flurry of regulation in the late 1970s.

Reinvigorating the agency's rulemaking program can restore the FTC to its one-time role as a champion of American consumers. An energetic FTC can also serve as a cornerstone of an administrative state able to counterbalance the power of dominant market actors. Section 18 rulemaking offers benefits to consumers, with tough penalties deterring corporate misconduct; to the agency, with rules allowing for more efficient enforcement; and to companies, which gain greater clarity and notice regarding their legal responsibilities. Now, for the first time in four decades, a majority of FTC Commissioners supports picking up this tool once again.<sup>9</sup> President Biden has also urged the agency to use its consumer protection rulemaking powers, calling for restrictions on surveillance-style data collection.<sup>10</sup>

The agency's renewed openness to section 18 rulemaking has run up against a conventional wisdom, solidified and nearly unexamined for decades, that such rulemaking is next to impossible. This narrative holds the Congress saddled the FTC with cumbersome and onerous procedural requirements, the so-called "Magnuson-Moss procedures," in response to politically controversial rulemakings. At best, this prevailing story continues, using this authority to craft new rules would be a poor use of agency time and resources; at worst, it is something that Congress has "virtually prohibit[ed]."<sup>11</sup>

This Article presents evidence that this conventional wisdom is mistaken. The prominence of this story is largely the result of observers conflating section 18's statutory requirements with the agency's historical experience. The FTC's regulatory activity in the 1970s crashed against an ascendant corporate lobby, changing political pressures from Congress, a fading consumer movement, and agency leadership that was ideologically committed to putting a permanent end to the agency's assertive rulemaking.

Puncturing the mythology that has grown up around the Magnuson-Moss Act provides a more clear-eyed view of the agency's authorities: The burden of section 18's statutorily mandated procedures has been dramatically overstated, while the potential benefits of using the rulemaking power to intervene against consumer abuses are under-recognized. It becomes appar-

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tions such as prudentially regulated financial institutions and common carriers. *See id.* § 45(a)(2).

<sup>9</sup> *See infra*, Part II.D.

<sup>10</sup> *See* Exec. Order No. 14,036 § 5(h)(i), 86 Fed. Reg. 36,987, 36,992 (July 9, 2021) (urging the Commission to promulgate rules to restrict "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy"). Substantial rules on these topics would likely need to be promulgated under section 18. *See* Rebecca Kelly Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission* 54–55 (August 2021) (White Paper for the YALE INFO. SOC'Y PROJECT & YALE J.L. & TECH.), [https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms\\_and\\_economic\\_justice\\_master\\_final.pdf](https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms_and_economic_justice_master_final.pdf) [<https://perma.cc/EP6F-B6ZN>]; *see also* Note, *infra* note 239.

<sup>11</sup> *Ask the Commissioner: Federal Trade Commissioner Christine Varney*, 14 ACCA DOCKET 36, 36 (1996).

ent that the FTC can and should move beyond pleading with a sclerotic Congress to provide the agency with different rulemaking procedures. The Commission should begin taking clearly needed action using the broad rulemaking authority that is already on the books.

This piece makes several novel contributions to the existing scholarship. First, because scholarly study of section 18 faded as the authority fell into disuse, this is among the first articles to have the historical distance to situate the FTC's retreat from rulemaking within the broader deregulatory fervor that swept American government in the 1980s. Second, it is the first piece of public scholarship in decades to analyze deeply the statutory bases of section 18 rulemaking and disentangle the effects of statutory requirements from those of inefficient, self-imposed agency rules and an ideological aversion to regulation. In so doing, this article rebuts the core arguments and pieces of scholarship underlying the conventional understanding that section 18 procedures are unworkable. Moreover, this discussion makes clear the importance of the Commission's recent removal of several agency-imposed sources of delay in its rulemaking proceedings. Third, this article provides a robust roadmap for approaching the issue of cross-examination in informal hearings—the feature of section 18 that many observers credit with undermining FTC proceedings in the past. It explains how the agency can embrace the statute's text and legislative history, which show that Congress left open numerous avenues for the Commission to prevent cross-examination from becoming a source of delay.

The remainder of the Article is organized as follows. Part I describes the value of substantive rule-writing at the FTC, combining arguments about the general virtues of rulemaking with those unique to the FTC due to its weak remedial powers when proceeding by adjudication alone. Part II follows with an abbreviated history of the Commission's rulemaking activity from the agency's founding in 1914 to the present day, charting shifts due to changes in legal powers, external pressures, and internal prioritization. Part III conducts a granular comparison of section 18's procedures with those required in Administrative Procedure Act ("APA") notice-and-comment proceedings, identifying the ways in which recent legislative, presidential, and judicial dictates have minimized the significance of their differences. Part IV analyzes how the Commission's recent administrative reforms to its rulemaking procedures eliminate agency-imposed sources of delay and provides new recommendations for how the agency can prevent cross-examination from undermining efficient rulemaking. Finally, Part V considers two promising candidates for section 18 rulemaking: data privacy and online "drip pricing."

## I. THE ROLE OF RULES AT THE FTC

Longstanding FTC rules are centerpieces of American consumer protection law. A return to discretionary rulemaking could deliver a range of benefits to consumers, the agency, and businesses alike. Rulemaking and

case-by-case adjudication play complementary roles in the toolbox of any administrative agency. As explained by generations of judges and administrative law scholars, adjudication offers flexibility and tailoring to a specific fact pattern, whereas rulemaking can better deter unlawful abuses, provide greater clarity for regulated parties, streamline enforcement proceedings, and incorporate public input.<sup>12</sup> The choice between these tools thus “lies primarily in the informed discretion of the administrative agency.”<sup>13</sup>

The Supreme Court accentuated the urgency of the FTC moving to rulemaking when it eliminated one of the agency’s primary tools for safeguarding consumers, in *AMG Capital Management, LLC v. FTC*.<sup>14</sup> The Court invalidated the Commission’s four-decade-long use of section 13(b) of the FTC Act, a provision defining the agency’s injunctive remedial powers, to secure restitution for consumers and disgorgement of wrongdoers’ ill-gotten gains.<sup>15</sup> The Commission’s Acting Chair responded by saying that the Court had “deprived the FTC of the strongest tool we had to help consumers.”<sup>16</sup> Two examples illustrate the chill that *AMG Capital* casts on agency enforcement. As a result of the ruling, the Commission dropped its efforts to secure nearly \$500 million in relief for consumers harmed by a pharmaceutical giant blocking access to lower-cost drugs; it also saw the Eleventh Circuit vacate an asset freeze the agency had secured on \$85 million held by operators of fake government-benefit websites.<sup>17</sup> The decision can be expected to severely undermine the agency’s ability to secure monetary relief for violations of the FTC Act’s prohibition on “unfair or deceptive acts or practices” (“UDAP”), at least if the conduct is not also covered by a trade regulation rule or prior cease-and-desist order.<sup>18</sup>

<sup>12</sup> See, e.g., Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 649–51 (2008); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 928–42 (1965).

<sup>13</sup> SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

<sup>14</sup> 141 S. Ct. 1341 (2021).

<sup>15</sup> *Id.* at 1347.

<sup>16</sup> Press Release, Fed. Trade Comm’n, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us> [<https://perma.cc/GK8K-5EU3>].

<sup>17</sup> Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Remaining Case against AbbVie after Supreme Court Decision Strips Consumers of Relief (July 30, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-withdraws-remaining-case-against-abbvie-after-supreme-court-decision> [<https://perma.cc/GD9E-AVUP>]; Morgan Conley, *11th Circ. Undoes \$85M Asset Freeze in Fake Gov’t Site Suit*, LAW360 (Nov. 4, 2021, 8:59 PM), <https://www.law360.com/articles/1437881/11th-circ-undoes-85m-asset-freeze-in-fake-gov-t-site-suit> [<https://perma.cc/CSU8-Q6PS>].

<sup>18</sup> Section 19(b) allows the FTC to pursue equitable relief for first-time section 5 violations only if the violation has already been litigated to final judgment in the agency’s administrative tribunals—including appeals by right to the full Commission and a U.S. court of appeals—and the agency can later establish scienter in federal court. See David C. Vladeck, *The Erosion of Equity and the Attack on the FTC’s Redress Authority*, 82 MONT. L. REV. 159, 178–79 & n.151 (2021).

Yet before *AMG Capital*, the FTC's UDAP enforcement already earned frequent criticism for resolving in "no-money, no-fault" settlements, which critics say create a "first time free" dynamic for initial violations.<sup>19</sup> Even if one were to believe that Congress will restore the FTC's equitable remedial powers to their pre-*AMG Capital* state—and unusually swiftly for the contemporary, gridlocked Congress—the status quo ante was far from ideal. The Commission often described the difficulty of quantifying the scale of consumer harm as a barrier to securing equitable relief in case-by-case enforcement.<sup>20</sup> Furthermore, without civil penalties, the deterrent effect of restitution or disgorgement is discounted by the proportion of offenses that go undetected.<sup>21</sup>

Section 18 of the FTC Act offers a means to begin responding to these deficiencies.<sup>22</sup> This authority empowers the agency to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and to impose "requirements prescribed for the purpose of preventing such acts or practices."<sup>23</sup> The reach of section 18 rules spans the FTC's nearly economy-wide jurisdiction, and the Commission may pursue civil penalties<sup>24</sup> and equitable remedies<sup>25</sup> for rule violations.

Such rulemaking offers a range of benefits, even beyond patching up the damage done to FTC enforcement by the Supreme Court. First, it will create a much stronger deterrent effect than the agency's past approach of relying on case-by-case adjudication and informal guidance. Equitable remedies for violations of trade regulation rules have solid textual grounding in section 19 of the Act, leaving them unaffected by *AMG Capital*. Moreover, the civil penalties for rule violations are quite substantial.<sup>26</sup> These remedial powers can make section 18 rules a far stronger deterrent to first-time offenses.

Second, trade regulation rules provide valuable clarity. Firms benefit because "clear rules mean that it is less costly for regulated parties to inform themselves of the law's requirements."<sup>27</sup> Well-defined rules also strengthen

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<sup>19</sup> See, e.g., Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 6 (Nov. 6, 2020), [https://www.ftc.gov/system/files/documents/cases/final\\_rchopra\\_sunday\\_riley\\_statement\\_dated\\_11.6.pdf](https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf) [<https://perma.cc/XEM6-GRJH>].

<sup>20</sup> See *id.* at 5.

<sup>21</sup> See *id.*

<sup>22</sup> 15 U.S.C. § 57a.

<sup>23</sup> *Id.* § 57a(a)(1)(B).

<sup>24</sup> *Id.* § 45(m)(1)(A).

<sup>25</sup> *Id.* § 57b(a)–(b).

<sup>26</sup> The civil penalty for each violation of a trade regulation rule is \$46,517. See Press Release, Fed. Trade Comm'n, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2022 (Jan. 6, 2022), <https://www.ftc.gov/news-events/press-releases/2022/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2022> [<https://perma.cc/28PN-75GF>]. Each day of a continuing violation is considered to be a separate violation. See 15 U.S.C. § 45(m)(1)(C).

<sup>27</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655 (1996).

agency enforcement efforts by removing the “first, and probably best, line of argument to defend against an FTC construction of Section 5 . . . that it violates constitutional notice and Due Process requirements.”<sup>28</sup>

Third, rules permit more efficient enforcement proceedings. When bringing an enforcement action based on a trade regulation rule, the agency can establish liability simply by showing that a given rule was violated. In contrast, even before *AMG Capital* undercut the FTC’s remedial powers, liability for a UDAP violation under a bare section 5 theory required proving that a specific party’s particular act or practice met the test either for unfairness or deception.<sup>29</sup> Having to meet the evidentiary burden to prove anew that an act or practice is likely to harm consumers or to mislead them as to material facts is an inefficient use of agency resources at best. At worst, it creates avenues for wrongdoers to avoid accountability. Trade regulation rules allow for more straightforward and less resource-intensive enforcement.

Fourth, and finally, proceeding by rulemaking strengthens the democratic legitimacy of agency action by providing greater opportunities for input by regulated parties and regulatory beneficiaries.<sup>30</sup> Public engagement is especially important given Congress’s intent for the agency to update its conceptions of unfairness and deception regularly to keep pace with evolving abuses in the marketplace.<sup>31</sup>

Alternative approaches have some merit but fail to recreate the full set of benefits offered by rulemaking. The agency’s current, adjudication-centric program has created a sort of “common law” built from consent orders and complaints. While this approach offers flexibility—and informal guidance about agency enforcement priorities can provide notice to regulated firms<sup>32</sup>—it is hamstrung by the FTC’s remedial shortcomings. It is also unstable. An adjudication-first enforcement strategy can be altered abruptly by new Commission leadership, and the dearth of binding precedent in the FTC’s UDAP “common law” leaves it vulnerable to unfriendly courts if litigants choose to resist agency enforcement.<sup>33</sup>

The recent call by then-Commissioner Rohit Chopra and his attorney-advisor Samuel Levine to reinvigorate the FTC’s use of its Penalty Offense Authority provides a complement to rulemaking, rather than a replace-

<sup>28</sup> Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 267 (2014) (discussing notice in the antitrust context).

<sup>29</sup> See 15 U.S.C. § 45(n) (test for unfairness); Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, to Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com. (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/MZ49-J6YV>] (test for deception).

<sup>30</sup> Cf. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1675–76 (2018).

<sup>31</sup> See *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 243 (3d Cir. 2015) (“Congress designed the term [unfairness] as a ‘flexible concept with evolving content’ . . . and ‘intentionally left [its] development . . . to the Commission.’” (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 353 (1941) and *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965))).

<sup>32</sup> See, e.g., 16 C.F.R. pt. 255 (2022).

<sup>33</sup> See, e.g., *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1237 (11th Cir. 2018).

ment.<sup>34</sup> This authority was created by the same Magnuson-Moss Act that defined the FTC's discretionary consumer protection rulemaking power<sup>35</sup> and involves the distribution of past cease-and-desist orders against one firm to other companies in the same industry. Firms put on notice in this way can face civil penalties if they commit similar UDAP violations.<sup>36</sup> These civil penalties serve as a valuable deterrent and a stopgap after *AMG Capital* eviscerated the agency's ability to secure equitable monetary relief in most cases. With Samuel Levine now as its Director, the Bureau of Consumer Protection has begun to distribute Notices of Penalty Offenses to put firms in particular industries on notice.<sup>37</sup> However, it may be difficult to put every potential malefactor on notice, particularly for newly founded firms and the types of misconduct prevalent among them.<sup>38</sup> Moreover, Penalty Offense Authority does not support equitable relief, while section 18 trade regulation rules unlock both civil penalties and the full suite of equitable remedies.<sup>39</sup>

The value of new trade regulation rules is not a matter of speculation. The track record of existing rules issued under the FTC's discretionary rulemaking power demonstrates their potential for preventing significant harm to consumers. The "earth-moving" Credit Practices Rule, for example, was promulgated under section 18 and prohibits a wide range of damaging contractual terms for consumer credit, including "confessions of judgment, exemption waivers, irrevocable wage assignments, non-purchase security interests in household goods, pyramiding late charges, and deceptive cosigner practices."<sup>40</sup> One need only look to an adjacent area that is unprotected by this rule, small business loans, to see the devastation that could result if practices such as confessions of judgment remained permissible in consumer loans.<sup>41</sup> The FTC still holds the power to make such transformative changes to the imbalanced relationship between corporation and consumer. But to do

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<sup>34</sup> See Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. 71, 98–104 (2021).

<sup>35</sup> See *id.* at 94.

<sup>36</sup> 15 U.S.C. § 45(m)(1)(B).

<sup>37</sup> See, e.g., Press Release, Fed. Trade Comm'n, FTC Puts Hundreds of Businesses on Notice About Fake Reviews and Other Misleading Endorsements (Oct. 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other> [<https://perma.cc/9B5R-GBMA>] (announcing the mailing of a Notice of Penalty Offenses to more than 700 companies).

<sup>38</sup> Cf. Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 6 (Nov. 6, 2020), [https://www.ftc.gov/system/files/documents/cases/final\\_rchopra\\_sunday\\_riley\\_statement\\_dated\\_11.6.pdf](https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf) [<https://perma.cc/XEM6-GRJH>].

<sup>39</sup> See Chopra & Levine, *supra* note 34, at 84–85 tbl.1.

<sup>40</sup> MARGOT SAUNDERS, NAT'L CONSUMER LAW CTR., TIME TO UPDATE THE CREDIT PRACTICES RULE: CFPB SHOULD MODERNIZE FTC RULE ADDRESSING ABUSIVE CREDITOR COLLECTION PRACTICES 2 (2010), [https://www.nclc.org/images/pdf/debt\\_collection/credit-practices-rule-update.pdf](https://www.nclc.org/images/pdf/debt_collection/credit-practices-rule-update.pdf) [<https://perma.cc/LWL3-V9QD>].

<sup>41</sup> Zachary R. Mider, Zeke Faux, David Ingold & Demetrios Pogkas, "I Hereby Confess Judgment," BLOOMBERG (Nov. 20, 2018), <https://www.bloomberg.com/graphics/2018-confessions-of-judgment/> [<https://perma.cc/B3T6-87NL>].

so, it must shake off the now-longstanding cultural aversion to assertive regulation that swept over the agency in the wake of past controversy.

## II. A BRIEF HISTORY OF FTC RULEMAKING

The effort dedicated to FTC rulemaking has waxed and waned in response to popular pressure, legislative reforms, and internal culture change at the agency. It has ranged from a flurry of rulemakings across the agency's expansive purview to more recent disuse. Discretionary rulemaking at the FTC can be broken into three broad eras: entrepreneurial invocation of section 6(g) of the FTC Act from 1962 to 1974, active section 18 rulemaking beginning in 1975 with the passage of the Magnuson-Moss Act, and a retreat from regulation cemented by the advent of the Reagan Administration in 1981. Perhaps, we see a new era emerging today.

### A. *Controversial Claim of Rulemaking Authority: 1962–74*

The FTC's experience with rulemaking started slowly. Over its first five decades, the FTC had promulgated rules only when authorized by specific acts of Congress, starting with the Wool Products Labeling Act of 1939.<sup>42</sup> Instead, the agency in that period shaped industry practice primarily with voluntary Trade Practice Rules, now known as "guides."<sup>43</sup> Rulemaking related to the agency's competition mandate was rarer still. The Robinson-Patman Act of 1936 gave the agency the authority to set "quantity limit" rules on the sales of commodity products to help the Commission to police price discrimination, which was seen as promoting monopoly. The agency did not use that authority until 1949 when it set limits on the quantities of rubber tires sold, and only then at the persistent prodding of a U.S. House of Representatives committee.<sup>44</sup>

The Commission began its move into discretionary rulemaking during the early 1960s, as the administrative state entered an "age of rulemaking."<sup>45</sup> Legal scholars began to advocate for increased use of rulemaking starting in the late 1950s and early 1960s.<sup>46</sup> These thinkers emphasized that, relative to case-by-case adjudication, rules offered clarity, more predictable and consis-

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<sup>42</sup> Act of Oct. 14, 1940, ch. 871, §2, 54 Stat. 1128 (codified at 15 U.S.C. §§ 68–68j). The Act supported the agency's 1941 promulgation of the Wool Products Labeling Rules. *See* 16 C.F.R. pt. 300 (2022); 6 Fed. Reg. 3426 (July 15, 1941).

<sup>43</sup> *See Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations*, 62 YALE L.J. 912, 925 (1953); STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 5:6 (rev. ed. 2018).

<sup>44</sup> *See* 17 Fed. Reg. 113 (Jan. 4, 1952); Alan Buxton Hobbs, *Clayton Act Quantity Limit Proceedings*, 7 WASH. & LEE L. REV. 131, 138 (1950).

<sup>45</sup> J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

<sup>46</sup> *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1146–51 (2001).

tent application, and efficient enforcement proceedings that reduced agency caseloads.<sup>47</sup>

The Commission embraced these arguments in 1962 when it claimed broad rulemaking authority under the loosely worded section 6(g) of the FTC Act.<sup>48</sup> It established a Division of Trade Regulations and Rules and issued an internal rule stating that it would promulgate binding trade regulation rules under APA notice-and-comment rulemaking procedures.<sup>49</sup> Covering subjects ranging from retail food advertising to door-to-door sales tactics, the agency then engaged in thirty-five rulemaking proceedings over its first twelve years of discretionary rulemaking,<sup>50</sup> finalizing dozens by 1974.<sup>51</sup> Many of these rules were framed as applying to both the FTC's consumer protection and competition mandates, restricting both "unfair or deceptive acts or practices" and "unfair methods of competition."<sup>52</sup> The Commission's rulemaking was spurred forward from the outside. A pair of hard-hitting reports issued in 1969 by affiliates of Ralph Nader and by the American Bar Association assailed the agency's assertedly meek approach, and powerful members of the FTC's oversight committees in Congress continuously pressed for greater regulatory action.<sup>53</sup>

This assertion of rulemaking power proved controversial. Commentators vigorously debated whether the legislative history of the FTC Act and section 6(g)'s text and placement within a section devoted largely to internal agency organization could support this type of substantive rulemaking.<sup>54</sup> That legal uncertainty was effectively resolved by the U.S. Court of Appeals

<sup>47</sup> See *id.* at 1150.

<sup>48</sup> 15 U.S.C. § 46(g) (empowering the agency to "[f]rom time to time classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions of this subchapter," subject to certain exceptions). The agency also asserted inherent authority to issue substantive rules due to its adjudicative powers, although this received less attention. See Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 493 n.33 (1970).

<sup>49</sup> See *Developments in the Law—Deceptive Advertising: VI. The Federal Trade Commission: Modes of Administration*, 80 HARV. L. REV. 1063, 1091 (1967); Schiller, *supra* note 46 at 1147.

<sup>50</sup> ADMIN. CONF. OF THE U.S., RECOMMENDATION 79-1: HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION 2 (1979), <https://www.acus.gov/sites/default/files/documents/79-1-with-table.pdf> [<https://perma.cc/7KXW-STXU>] [hereinafter ACUS 1979 RECOMMENDATION].

<sup>51</sup> See MILES W. KIRKPATRICK, JOAN Z. BERNSTEIN, ROBERT PITOFKY, MICHAEL F. BROCKMEYER, JAMES F. RILL, NANCY L. BUC, EDWIN S. ROCKEFELLER, CALVIN J. COLLIER, J. THOMAS ROSCH, KENNETH G. ELZINGA, ALAN H. SILBERMAN, ERNEST GELHORN, CASS R. SUNSTEIN, CASWELL O. HOBBS III, WILLIAM L. WEBSTER, BASIL J. MEZINES, ALAN B. MORRISON, TIMOTHY J. MURIS & STEPHEN CALKINS, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 64 (1989) [hereinafter 1989 ABA REPORT].

<sup>52</sup> See, e.g., Care Labeling of Textile Wearing Apparel, 36 Fed. Reg. 23,883, 23,884 (Dec. 16, 1971) (codified as amended at 16 C.F.R. pt. 423).

<sup>53</sup> See Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, REGULATION, May/June 1982, at 33, 34–36; Robert E. Freer, Jr., *The Federal Trade Commission—A Study in Survival*, 26 BUS. LAW 1505, 1505–06 (1971).

<sup>54</sup> See Richard A. Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L. REV. 678, 740 n.280 (gathering arguments for and against).

for the D.C. Circuit, which in 1973 upheld the FTC's power to regulate, in a paean to the virtues of rulemaking.<sup>55</sup> Nonetheless, a broader debate continued in Congress over whether to codify the agency's rulemaking power and whether to impose greater procedural requirements and oversight over the process.

### B. Use of Sweeping Powers Draws Backlash: 1975–80

The FTC's rulemaking powers saw a seismic shift with the enactment of the Magnuson–Moss Warranty—Federal Trade Commission Improvement Act (“Magnuson–Moss Act”) in January 1975.<sup>56</sup> In the face of present-day mythology, it is critical to recall that the Act was both intended to be and received as a means to empower the agency's regulatory program. The Magnuson–Moss Act created a new section 18 of the FTC Act, which made explicit the agency's authority to issue rules prohibiting unfair or deceptive acts or practices and laid out procedural requirements for such rulemaking proceedings.<sup>57</sup> These procedures included informal oral hearings with a limited right of cross-examination, reflecting best practices recommendations by the Administrative Conference of the United States (“ACUS”) during that era.<sup>58</sup> The Act also provided for civil penalties and consumer redress in cases of rule violations,<sup>59</sup> made those remedies apply to extant rules issued under section 6(g) as well as to future rules promulgated under section 18,<sup>60</sup> and expanded the agency's UDAP jurisdiction to be coterminous with Congress's Commerce Clause power.<sup>61</sup>

The “chief architect” of that legislation was Michael Pertschuk, top counsel to the Senate Commerce Committee chaired by a lead sponsor of the legislation, Senator Warren Magnuson.<sup>62</sup> *Newsweek* reported that “[i]t was mainly as a result of Pertschuk's prodding that Congress passed the Magnuson–Moss Act of 1974” and that “his most conspicuous accomplishment [was] his use of legislative clout to transform the FTC from a somnolent backwater . . . into an activist agency.”<sup>63</sup> The victory was a triumph of Pertschuk's legislative maneuvering—he was able to secure his desired FTC

<sup>55</sup> Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973).

<sup>56</sup> Magnuson Moss Warranty–Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections of 26 U.S.C.).

<sup>57</sup> However, the Act explicitly left unchanged the Commission's authority to promulgate rules restricting unfair methods of competition. Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 378 (2020).

<sup>58</sup> See 38 Fed. Reg. 19,782, 19,792 (July 23, 1973).

<sup>59</sup> See 15 U.S.C. §§ 45(m)(1)(A), 57b(b).

<sup>60</sup> *Id.* § 45(m)(1)(A).

<sup>61</sup> Magnuson Moss Warranty–Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 45).

<sup>62</sup> Morgan Norval, *Kept Critics*, REASON (July 1981), <https://reason.com/1981/07/01/kept-critics/> [<https://perma.cc/2MBV-DGUH>].

<sup>63</sup> Allan J. Mayer & James Bishop, Jr., *Regulation: A Tough Man for the FTC*, NEWSWEEK, Mar. 7, 1977, at 61.

reform package by tying it to measures that responded to public uproar regarding deceptive warranties.<sup>64</sup> Pertschuk then was appointed Chairman of the FTC in early 1977 and bolstered his reputation as a “hero of the consumer movement” and a strong proponent of regulatory action.<sup>65</sup>

During the decade after its passage, the Magnuson-Moss Act was viewed as substantially increasing the agency’s rulemaking powers. In 1979, a *New York Times* contributor stated that the bill was responsible for “sending new waves of energy through the commission, dramatically increasing its power.”<sup>66</sup> The authors of a leading treatise on the FTC shared this view, writing that the Magnuson-Moss Act “has transformed the FTC into one of the most powerful of government agencies by confirming its authority to prescribe . . . rules.”<sup>67</sup> This common understanding of Magnuson-Moss continued through at least 1984, when the *Washington Post* described the bill as having “liberalized the commission’s rulemaking authority.”<sup>68</sup>

The FTC also viewed section 18 as empowering and responded with a flurry of activity. It began a stunning sixteen rulemaking proceedings within sixteen months of the passage of the Magnuson-Moss Act, adding four more by 1978<sup>69</sup>—perhaps the most expansive suite of rulemakings ever pursued at once by a single agency. The Eyeglass Rule was the first rule to be finalized of those proposed after the passage of the Magnuson-Moss Act.<sup>70</sup>

The pace of action and breadth of affected industries prompted attacks by an ascendant business lobby as the energy of the consumer movement faded. Newly aggressive entities such as the U.S. Chamber of Commerce joined with networks of anti-regulation scholars to take aim at the agency for allegedly trying to become “the second most powerful legislative body in the United States.”<sup>71</sup> In so doing, they employed the approach advocated in the famous memorandum to the Chamber from later Supreme Court Justice Lewis Powell.<sup>72</sup> The most vitriolic opposition came in response to a rulemaking that proposed blocking television advertisements aimed at young children and advertisements for sugary foods on programs reaching a wider range of children, nicknamed the “Kidvid” rule. Despite initially strong public support for restricting advertising to young children, business-led resistance and a “Stop the FTC” campaign funded to the then-unprecedented

<sup>64</sup> See *id.*; MICHAEL PERTSCHUK, WHEN THE SENATE WORKED FOR US: THE INVISIBLE ROLE OF STAFFERS IN COUNTERING CORPORATE LOBBIES 150–51 (2017).

<sup>65</sup> Peter Passel, Opinion, *Is Consumerism Dead?*, N.Y. TIMES, Nov. 22, 1982, at A18.

<sup>66</sup> A.O. Sulzberger Jr., *Should the F.T.C. Be Reined?*, N.Y. TIMES, Nov. 5, 1979, at D1.

<sup>67</sup> STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 6:3 (rev. ed. 2018) (internal citation omitted).

<sup>68</sup> Mark Potts & Michael Isikoff, *Pertschuk Exits FTC With Guns Blazing*, WASH. POST (Sept. 26, 1984), <https://www.washingtonpost.com/archive/business/1984/09/26/pertschuk-exits-ftc-with-guns-blazing/5e9c7df9-e639-41af-8c8c-202fdb55eca/> [<https://perma.cc/A835-MGVB>].

<sup>69</sup> See ACUS 1979 RECOMMENDATION, *supra* note 50, at 6–8.

<sup>70</sup> See 43 Fed. Reg. 23,992, 23,992 (June 2, 1978) (codified at 16 C.F.R. pt. 456).

<sup>71</sup> J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2228 (2015) (quoting Jean Carper, *The Backlash at the FTC*, WASH. POST, Feb. 6, 1977, at C1).

<sup>72</sup> See Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 491–92 (2021).

tune of \$30 million saw enormous success in the media and in Congress. The blowback culminated with a *Washington Post* editorial that famously decried the rulemaking as a “preposterous intervention that would turn the agency into a great national nanny.”<sup>73</sup>

As politically influential groups mobilized against the FTC, Congress took several temporary steps to slow the agency’s rate of regulation. These moves escalated to the point that a late 1979 funding rider imposed a thirty-day prohibition on finalizing trade regulation rules or engaging in “any new activities.”<sup>74</sup> In May 1980, Congress briefly let funding for the agency lapse entirely.<sup>75</sup> In a scarring experience for agency staff, the Commission was forced to initiate procedures to shutter the agency.<sup>76</sup> These measures, and tough oversight committee hearings, served as “shock therapy for bureaucrats.”<sup>77</sup>

Despite the tumult, the Federal Trade Commission Improvements Act of 1980<sup>78</sup> (“1980 Act”) that followed this controversy was “compromise legislation” between FTC boosters and detractors that held few lasting statutory restrictions.<sup>79</sup> The Act’s most notable check on the agency was a two-year experiment with a legislative veto power over FTC rules—cut short when the D.C. Circuit struck the provision down as unconstitutional and the Supreme Court foreclosed legislative vetoes in *I.N.S. v. Chadha*.<sup>80</sup> The legislation also impeded the agency’s ability to continue three specific rulemakings, including the children’s advertising rule, although it did not foreclose future action in all of those areas.<sup>81</sup> The 1980 Act also required the agency to issue Advance Notices of Proposed Rulemaking for section 18 rulemakings and added a bevy of minor revisions to section 18 that were either temporary or of marginal significance.<sup>82</sup> A former FTC Chair remarked with surprise,

<sup>73</sup> Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

<sup>74</sup> See William J. Baer, *Where to from Here: Reflection on the Recent Saga of the Federal Trade Commission*, 39 OKLA. L. REV. 51, 54 (1986).

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> Weingast & Moran, *supra* note 53, at 34.

<sup>78</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

<sup>79</sup> See Earl W. Kintner, Christopher Smith & David B. Goldston, *The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC’s Rulemaking and Enforcement Authority*, 58 WASH. U. L.Q. 847, 847 (1980).

<sup>80</sup> 462 U.S. 919 (1983). See *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575, 577 (D.C. Cir. 1982), *aff’d sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

<sup>81</sup> See Kintner et al., *supra* note 79, at 848.

<sup>82</sup> In addition to the ANPRM requirement, see *supra* note 79, the amendments included mandatory submission of NPRMs to Congress thirty days before publication in the *Federal Register*, *id.*, a requirement that presiding officers be independent of other FTC staff, *id.* § 9, 94 Stat. at 377, further restrictions to ex parte communications, *id.* § 12, 94 Stat. at 379, limitations on subpoena power in rulemakings, *id.* § 13, 94 Stat. at 380, and an obligation to produce regulatory analyses, *id.* § 15, 94 Stat. at 388. The Act also restricted section 18 rulemaking governing standard-setting by private bodies and compelled substantive changes to the Funeral Rule through conditions on funding. *Id.* § 7, 19, 94 Stat. at 376, 391–93. As discussed in Part III.A, these revisions around the edges of FTC’s authority ought not be considered fatal to effective rulemaking.

“[p]retty clearly . . . no fundamental changes have been imposed by the 1980 amendments.”<sup>83</sup> The lasting threat to FTC rulemaking came not from statutory restrictions but from the personnel who would soon assume control of the agency.

### C. *The Enduring “Reagan Revolution”: 1981–Present*

The advent of the Reagan Administration proved the most influential step toward ending the FTC’s focus on rulemaking—far outstripping any legislative changes. The transition memo produced during President Reagan’s 1980–81 transition effort is a revealing guide to the ensuing transformation in FTC self-image, personnel, and culture.<sup>84</sup> The document attacked the agency’s actions during the 1970s as “misguided,” “counterproductive,” and “overly aggressive,” and argued that “President Reagan can and should point this agency in a new direction.”<sup>85</sup> Crucially, the memorandum’s authors recognized that “[t]he bulk of our specific recommendations could be carried out under existing legislative authority,” and did not require intervention by Congress.<sup>86</sup> Three focuses stand out as most relevant to orienting the agency away from rulemaking: establishing a strong presumption in favor of voluntary guidance rather than binding regulation, due to perceived costs to industry; installing personnel committed to the Reagan Administration’s deregulatory vision; and elevating the role of economists in agency action.

The transition memo called for a radical reduction in rulemaking. It urged a shift from agency regulation to the “enlightened use” of industry self-regulation, aiming to minimize “the emotive content of the adversarial relationship with business that is indigenous to much of the FTC’s work.”<sup>87</sup> Accordingly, rulemaking staff was cut precipitously. Staff hours dedicated to rulemaking dropped from 89 “workyears” in 1976 to 25 in 1982 and only 12 in 1988.<sup>88</sup> Meanwhile, the number of FTC presiding officers dwindled from nine immediately after the passage of the Magnuson-Moss Act to just one by the late 1980s.<sup>89</sup>

The memo also highlights the importance of a visionary Chairman to change the FTC’s culture. This focus matches the credo of ideological conservatives within the Reagan Administration that “personnel is policy.”<sup>90</sup> The

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<sup>83</sup> *Debate: The Federal Trade Commission Under Attack: Should the Commission’s Role Be Changed?*, 49 ANTITRUST L.J. 1481, 1482 (1980).

<sup>84</sup> See generally *Conclusions and Recommendations from Federal Trade Comm’n Transition Team Report Submitted to Reagan Adm’n* [sic], reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 999, at G-1 [hereinafter *FTC Transition Memo*].

<sup>85</sup> *Id.* at G-1, G-3.

<sup>86</sup> *Id.* at G-1.

<sup>87</sup> *Id.*

<sup>88</sup> 1989 ABA REPORT, *supra* note 51, at 154 fig.17.

<sup>89</sup> William D. Dixon, *Rulemaking and the Myth of Cross-Examination*, 34 ADMIN. L. REV. 389, 400 n.41 (1982); 1989 ABA REPORT, *supra* note 51, at 89 n.96.

<sup>90</sup> Stewart Lawrence, Opinion, “Personnel Is Policy”: *To Get Back on Track, Trump Must Recall Reagan’s Example*, DAILY CALLER (Feb. 17, 2017), <https://dailycaller.com/2017/02/17/personnel-is-policy-to-get-back-on-track-trump-must-recall-reagans-example/>.

transition team urged the President to choose a “Chairman from outside the agency . . . who is committed to filling key staff positions with qualified persons who share a new vision for the agency.”<sup>91</sup> They perceived, correctly, that the adoption of their proposals “depend[ed] critically on strong leadership from the Commission and, especially, its Chairman.”<sup>92</sup> President Reagan delivered by selecting the author of the transition report, James Miller, as his first FTC Chairman in 1981. Within three years, the agency had executed twenty-five of the twenty-nine recommendations in the transition memo, with “substantial progress” toward another two.<sup>93</sup>

Economists hostile to regulation were put in charge at the FTC, both literally and figuratively. In Miller, the agency had its first Chairman with a background as an economist rather than as an attorney.<sup>94</sup> The transition memo aimed to raise the influence of economists throughout the agency. It urged the agency to reallocate prized space in its small, central headquarters building to Bureau of Economics staff and to increase the power of economists to shape which matters were considered by the Commission.<sup>95</sup> Despite its air of neutrality, this push to elevate economic thinking had a marked anti-regulation slant. The transition team sought to require that agency economists focus greatly on any costs imposed by government action or regulation, with less emphasis given to the corresponding benefits.<sup>96</sup> This approach dovetailed with efforts rooted in the Chicago School of economics to limit rulemaking by mandating quantified “cost-benefit analysis.”<sup>97</sup> Industry helped to fund the cultivation of this intellectual development precisely because costs to regulated parties, such as industrial pollution controls, are systematically easier to quantify than benefits to regulatory beneficiaries, such as improved health outcomes for children.<sup>98</sup> While seeking to raise the influence of economists, the transition team sought to reduce the power of the rest of the agency—it requested that Congress cut the FTC’s budget by twenty-five percent, provide a “sorely needed” reduction in the agency’s legal authority, and eliminate many of its regional offices.<sup>99</sup>

The push to halt rulemaking was a dramatic success. After the rapid pace of the previous decade, the agency promulgated only two rules during the 1980s.<sup>100</sup> Upon his departure from the agency he had once chaired, then-

<sup>91</sup> *FTC Transition Memo*, *supra* note 84, at G-2.

<sup>92</sup> *Id.* at G-1.

<sup>93</sup> PETE SEPP, *FTC: A THREE-LETTER WAY TO SPELL “NANNY”?*, NAT’L TAXPAYERS UNION 4 (2015), <https://www.ntu.org/library/doclib/NTU-PP-135-FTC.pdf> [<https://perma.cc/4UJV-R8JC>].

<sup>94</sup> Eleanor M. Fox, *Chairman Miller, the Federal Trade Commission, Economics, and Rashomon*, 50 L. & CONTEMP. PROBS. 33, 33 (1987).

<sup>95</sup> *FTC Transition Memo*, *supra* note 84, at G-2.

<sup>96</sup> *See id.* at G-2.

<sup>97</sup> *See* Herrine, *supra* note 72, at 498–99.

<sup>98</sup> *See* Elizabeth Popp Beraman, *Let’s Politicize Cost-Benefit Analysis*, L. & POL. ECON. (Oct. 5, 2021), <https://lpeproject.org/blog/lets-politicize-cost-benefit-analysis/> [<https://perma.cc/YCD5-FCBL>].

<sup>99</sup> *FTC Transition Memo*, *supra* note 84, at G-1, G-3.

<sup>100</sup> 1989 ABA REPORT, *supra* note 51, at 89 n.96 (In fairness, the few rules that emerged from the new internal order found more success in court, although it is difficult to distinguish

Commissioner Michael Pertschuk stated of the Reagan appointees, “Part wittingly, part unwittingly, they have crippled the FTC.”<sup>101</sup> Reporters also noted this “turnabout in the commission’s approach to industry regulation, from what many characterized as an adversarial position to one of accommodation.”<sup>102</sup>

The fundamental reorientation of the FTC’s approach during the Reagan years had remarkable durability over ensuing decades. Tim Muris, who led the Bureau of Consumer Protection during the Reagan years and was Chairman from 2001 to 2004, recalled the staff purge at the root of the agency’s metamorphosis: “Many FTC staff, with a different vision of the FTC, were asked to leave or left on their own accord. There really was a Reagan Revolution in antitrust and consumer protection. As I like to say, my side won.”<sup>103</sup> He credits the staying power of this philosophical shift to key Reagan-era staff continuing to lead the Bureau of Consumer Protection into the 2000s.<sup>104</sup> Later Chairmen continued to extend Chairman Miller’s legacy decades later: “The FTC Chairmen from 1995–2004, Robert Pitofsky and Timothy Muris, both had worked at the agency in the 1970s [and 1980s]; [and] both shared the market-oriented vision of the FTC.”<sup>105</sup>

This longevity was by design. At a conference “to celebrate the 30th anniversary of the Reagan Revolution at the FTC,”<sup>106</sup> former Chairman Miller recounted his efforts to create a lasting transformation in agency culture:

[W]e also recognized that reforms could be undone after we left. Accordingly, we went about trying to prevent recidivism in a number of ways. We endeavored to teach the highly motivated career staff that the approach that we advocated to competition and consumer protection matters was the one most efficient and serving the true interest of consumers.<sup>107</sup>

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how much of this change is due to learning from earlier legal setbacks from how much was due to the greater length of proceedings during the Reagan years); *see generally* Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984); Am. Fin. Servs. Ass’n v. FTC, 767 F.2d 957 (D.C. Cir. 1985); Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417 (D.C. Cir. 1986).

<sup>101</sup> Potts & Isikoff, *supra* note 68.

<sup>102</sup> Irvin Molotsky, *It Sometimes Seems Like the Federal Tirade Commission*, N.Y. TIMES, June 5, 1984, at E5.

<sup>103</sup> Kirstin Downey & Kirk Victor, *FTC at 100: Reagan Revolution Transforms FTC in the 1980s*, FTCWATCH (Feb. 13, 2015), <https://www.mlexwatch.com/articles/1788/ftc-at-100-reagan-revolution-transforms-ftc-in-the-1980s> [<https://perma.cc/B6W6-ZFNC>]; *Looking Back on the Muris Years in Consumer Protection: An Interview with Timothy J. Muris*, 18 ANTI-TRUST, Summer 2004, at 9, 10; FED. TRADE COMM’N, *Timothy J. Muris: Former Chairman*, <https://www.ftc.gov/about-ftc/biographies/timothy-j-muris> [<https://perma.cc/L6R6-UGBX>].

<sup>104</sup> *See* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2228 (2015).

<sup>105</sup> *See id.*

<sup>106</sup> Transcript of Lessons Since the Reagan Revolution at the FTC: A 30-Year Perspective on Competition and Consumer Policies 1 (Sept. 30, 2011), [https://masonlec.org/site/rte\\_uploads/files/LEC\\_AM.pdf](https://masonlec.org/site/rte_uploads/files/LEC_AM.pdf) [<https://perma.cc/9L9C-4EQR>].

<sup>107</sup> *Id.* at 4.

New administrations brought little change to the agency's approach to discretionary rulemaking. At the end of the George H.W. Bush presidency, the FTC adopted a plan to review each of its rules every ten years, training the agency's efforts on repeal of old rules considered outdated rather than promulgation of new rules to respond to consumer harm.<sup>108</sup> In keeping with President Clinton's deregulatory mantra that the "era of big government is over,"<sup>109</sup> this move only accelerated in the mid-1990s. The agency's regulatory activity centered on cutting back existing trade regulation rules, including six section 18 rules that were repealed in just seven months.<sup>110</sup> Rulemaking did continue under some specific acts of Congress,<sup>111</sup> although other grants of APA notice-and-comment rulemaking authority sat unused for decades.<sup>112</sup>

The Federal Trade Commission Act Amendments of 1994 made some minor tweaks to section 18, eliminating a long-defunded program to compensate rulemaking participants and adding a non-justiciable requirement that the agency have reason to believe that industry misconduct is "prevalent" before beginning a rulemaking.<sup>113</sup> But the much more significant pressure against rulemaking during that era was the continuation of a twenty-year shift in agency self-conception, from regulatory agency to law-enforcement agency,<sup>114</sup> which continued through the George W. Bush, Obama, and Trump Administrations. Yet, because the agency's turn away from rulemaking was caused by changes in culture rather than statute, "the basic authorization for substantive rulemaking remain[s] in place to be reawakened in a more receptive political climate."<sup>115</sup>

#### D. *A New Era?*

There is a palpable sense that the FTC is on the precipice of a new, more assertive era after President Biden designated pioneering antitrust scholar Lina Khan to be FTC Chair.<sup>116</sup> In recent years, a growing set of scholars have urged the FTC to resuscitate long-underutilized authorities across both its competition and consumer protection mandates, including

<sup>108</sup> See Lydia B. Parnes & Carol J. Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 997 (1997).

<sup>109</sup> William J. Clinton, *Address Before a Joint Session of the Congress on the State of the Union*, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996).

<sup>110</sup> See Parnes & Jennings, *supra* note 108, at 997.

<sup>111</sup> See, e.g., 16 C.F.R. pts. 309, 315 (2021).

<sup>112</sup> See 15 U.S.C. § 45a (Made in the USA labeling); 42 U.S.C. § 16471(a)–(d) (consumer energy); 21 U.S.C. § 355 note (generic drug applicant agreements); 12 U.S.C. § 5519(d) (motor vehicle dealer practices).

<sup>113</sup> See Pub. L. No. 103-312, §§ 3, 5; 108 Stat. 1691, 1691–92 (1994).

<sup>114</sup> Parnes & Jennings, *supra* note 108, at 999 ("Over the past twenty years, the Commission has gradually shifted its focus from regulation to law enforcement.").

<sup>115</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 12:13 (rev. ed. 2018).

<sup>116</sup> See David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html> [<https://perma.cc/PD6U-323S>].

Khan's own calls to reinvigorate competition rulemaking.<sup>117</sup> The impression of an imminent return to FTC rulemaking grew even stronger when, in its first meeting under Chair Khan, the Commission issued a suite of administrative reforms to streamline section 18 proceedings.<sup>118</sup>

Interest in a renewed embrace of section 18 rulemaking has grown to a greater level today than at any time in the past forty years. In 2019, Commissioner Rebecca Slaughter broke a decades-long taboo by beginning to discuss seriously the possibility of brand-new section 18 rulemakings—calling for a data protection rule<sup>119</sup> and a regulation to prevent consumer harm from AI-powered algorithms that exhibit racial or gender bias.<sup>120</sup> The following year, then-Commissioner Rohit Chopra started to advocate the use of section 18 to create “restatements” of existing precedents to unlock civil penalties for first-time offenders, listing imposter fraud and tip-theft by gig work companies as prime areas for rulemaking.<sup>121</sup> Then, in 2021, Commissioner Christine Wilson—who, unlike Slaughter and Chopra, occupies a Republican seat on the Commission—voiced her tentative support for a section 18 rulemaking to address data privacy.<sup>122</sup> Regardless of bipartisan support, the recent confirmation of privacy expert Alvaro Bedoya to the Commission, filling the seat vacated by Chopra, gives the Commission a majority that observers expect will pursue a privacy rulemaking.<sup>123</sup> The agency signaled its seriousness with the creation of a new rulemaking group in the Office of General Counsel.<sup>124</sup> Just days before the start of 2022, the

<sup>117</sup> See Chopra & Khan, *supra* note 57, at 378.

<sup>118</sup> See Revisions to Rules of Practice, 86 Fed. Reg. 38,542 (July 22, 2021).

<sup>119</sup> Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at Silicon Flatirons: The Near Future of U.S. Privacy Law 8–9 (Sept. 6, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1543396/slaughter\\_silicon\\_flatirons\\_remarks\\_9-6-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf) [<https://perma.cc/37VJ-NVCA>].

<sup>120</sup> Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at UCLA School of Law: Algorithms and Economic Justice 15–16 (Jan. 24, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1564883/remarks\\_of\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_on\\_algorithmic\\_and\\_economic\\_justice\\_01-24-2020.pdf](https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf) [<https://perma.cc/49L9-UM65>].

<sup>121</sup> Statement of Comm'r Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers 2 (Oct. 19, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581862/p144400choprastatementolderamericansrpt.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581862/p144400choprastatementolderamericansrpt.pdf) [<https://perma.cc/6SAP-HAQQ>]; Statement of Comm'r Rohit Chopra Regarding the Deception of Delivery Drivers by Amazon.com 2 n.12 (Feb. 2, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1587003/20200102\\_final\\_rchopra\\_statement\\_v2.pdf](https://www.ftc.gov/system/files/documents/public_statements/1587003/20200102_final_rchopra_statement_v2.pdf) [<https://perma.cc/Z8HP-R8Q2>].

<sup>122</sup> *FTC Commissioner Wilson Signals Openness to Data Privacy Rulemaking*, ELEC. PRIVACY INFO. CTR. (Feb. 12, 2021), <https://epic.org/ftc-commissioner-wilson-signals-openness-to-data-privacy-rulemaking/>.

<sup>123</sup> See Andrea Vittorio, *New Data Privacy Rules Loom for Businesses as Bedoya Joins FTC*, BLOOMBERG L. (May 12, 2022, 4:50 AM), <https://news.bloomberglaw.com/privacy-and-data-security/new-data-privacy-rules-loom-for-businesses-as-bedoya-joins-ftc> [<https://perma.cc/33Z9-E3XL>].

<sup>124</sup> Press Release, Fed. Trade Comm'n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group> [<https://perma.cc/L3AP-24HL>].

full Commission took its first formal step toward a new rulemaking by requesting public input on a rule to restrict government and business impersonation fraud;<sup>125</sup> a similar step for false future-earnings claims followed a few months later.<sup>126</sup>

The agency has also begun to see outside pressure to re-engage with its rulemaking authority. President Biden has called for an FTC rule to restrict surveillance-style data collection,<sup>127</sup> which would likely be issued under section 18.<sup>128</sup> So, too, a sizeable contingent of U.S. Senators has written the agency to urge it to begin a section 18 rulemaking on digital privacy,<sup>129</sup> an appeal echoed by a coalition of more than forty civil society groups.<sup>130</sup> The Build Back Better Act that the U.S. House of Representatives passed in November 2021 included \$500 million over eight years to fund a new privacy bureau at the FTC.<sup>131</sup> Even if the fate of that legislation remains unclear as this article goes to print, it is apparent that many in Congress seek to press the agency into action.

The Commission's renewed interest in rulemaking has run headlong into a longstanding, if weakly supported, conventional wisdom that section 18's "Magnuson-Moss procedures" are almost impossibly onerous. This mythology arose as part of the "hangover" that followed harsh congressional criticism of the agency's substantive priorities in the 1970s.<sup>132</sup> It has received scant scrutiny since that point. In fairness, before Commissioner Slaughter began to signal interest in section 18 rulemaking in 2019,<sup>133</sup> there was little practical reason for deep scholarship on the topic. The FTC had not initiated an entirely new section 18 rulemaking in the thirty-eight years since it finalized the Credit Practices Rule.<sup>134</sup> The scholarly conversation is accordingly thin and, unfortunately, flawed, as discussed in Part III.C. Indeed, Professor Chris Hoofnagle has noted that the FTC is the subject of many "zombie ideas" with curiously strong staying power, "bad arguments that re-surface in the face of disconfirming evidence," which he credits to the con-

<sup>125</sup> See Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72,901, 72,901 (Dec. 23, 2021).

<sup>126</sup> Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,951 (Mar. 11, 2022).

<sup>127</sup> See Exec. Order No. 14,036 § 5(h)(i), 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

<sup>128</sup> See Slaughter, *supra* note 10, at 54–55.

<sup>129</sup> Letter from Richard Blumenthal, Brian Schatz, Ron Wyden, Elizabeth Warren, Christopher A. Coons, Ben Ray Lujan, Amy Klobuchar, Cory A. Booker & Edward J. Markey, Senators, U.S. Senate to Lina Khan, Chair, Fed. Trade Comm'n (Sept. 20, 2021), <https://www.blumenthal.senate.gov/imo/media/doc/2021.09.20%20-%20FTC%20-%20Privacy%20Rulemaking.pdf> [<https://perma.cc/VB9A-4PZX>].

<sup>130</sup> Press Release, Free Press, 45 Civil-Rights, Media-Democracy and Consumer-Advocacy Groups Urge FTC to Act Against Data Abuses and Discrimination (Oct. 27, 2021), <https://www.freepress.net/news/press-releases/45-civil-rights-media-democracy-and-consumer-advocacy-groups-urge-ftc-act> [<https://perma.cc/Q55H-UUJE>].

<sup>131</sup> H.R. 5376, 117th Cong. § 31501 (as passed by the House of Representatives, Nov. 19, 2021).

<sup>132</sup> See Terrell McSweeney, *Psychographics, Predictive Analytics, Artificial Intelligence, & Bots: Is the FTC Keeping Pace*, 2 GEO. L. TECH. REV. 514, 526 (2018).

<sup>133</sup> Slaughter, *supra* note 120, at 8–9.

<sup>134</sup> However, the Business Opportunity Rule was spun off from the Franchise Rule in 2011. 76 Fed. Reg. 76,816, 76,816 (Dec. 8, 2011).

fluence of business influence and the work of then-budding conservative scholars before and during the Reagan era.<sup>135</sup> The need for a clear-eyed assessment of section 18 could not be more apparent.<sup>136</sup>

The moment is ripe for debunking the unsupported mythology surrounding Magnuson-Moss. No observer appears to have attempted to distinguish the effects of the statutory requirements of the Magnuson-Moss Act from those wrought by shifts in partisan and ideological control of the Commission or by inefficient, self-imposed agency rules of practice. This omission is peculiar when one considers the twenty-one-month Residential Thermal Insulation Rule proceeding, conducted solely under the chairmanship of consumer champion Michael Pertschuk, in comparison to the nine-year proceeding leading to the finalization of the complex Credit Practices Rule under deregulation-minded Chairman Miller.<sup>137</sup> A deep statutory analysis of section 18 reveals that skeptics greatly over-emphasize the differences between the FTC's rulemaking authority and contemporary APA notice-and-comment rulemaking. The FTC's discretionary consumer protection rulemaking authority thus presents an important, untapped opportunity to prevent consumer abuses and promote a fairer economic system.

### III. A FRESH LOOK AT SECTION 18

#### A. Comparing Section 18 with APA Rulemaking

While section 18 of the FTC Act establishes a rulemaking process specific to the FTC, one should not exaggerate the extent of its departure from informal rulemaking under the Administrative Procedure Act ("APA"). The APA was enacted in 1946 as the "armistice of a fierce political battle over administrative reform" following the New Deal, a fight that ended favorably for New Deal supporters.<sup>138</sup> The Act is a "quasi-constitution" of the administrative state that sets the default rules for agency action throughout the government.<sup>139</sup> It broadly classifies all administrative actions either as case-by-case adjudications or generally applicable rules. Then, the Act further

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<sup>135</sup> CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION: PRIVACY LAW AND POLICY* 351 (2016).

<sup>136</sup> See Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at the Cybersecurity and Data Privacy Conference: FTC Data Privacy Enforcement: A Time of Change 6 & n.11 (Oct. 16, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581786/slaughter\\_-\\_remarks\\_on\\_ftc\\_data\\_privacy\\_enforcement\\_-\\_a\\_time\\_of\\_change.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf) [<https://perma.cc/5C63-Y6NY>].

<sup>137</sup> See 49 Fed. Reg. 7740, 7740 (Mar. 1, 1984); 44 Fed. Reg. 50,218, 50,218 (Aug. 27, 1979) (note, though, that only three of the nine years of the Credit Practices Rule proceeding occurred under Chairman Miller).

<sup>138</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561, 1680 (1996).

<sup>139</sup> Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 733 (2021).

divides each category into informal and formal modes, with the formal mode carrying elevated procedural requirements.

Section 18 builds upon the foundation of informal APA rulemaking.<sup>140</sup> It thus does not trigger the more demanding requirements of many adjudicative processes or formal APA rulemaking.<sup>141</sup> While now uncommon, formal rulemaking has led to notoriously lengthy proceedings, such as the rulemaking for the Food and Drug Administration's infamous "peanut butter rule," which took nine years to complete.<sup>142</sup>

Informal rulemaking, also commonly labeled "notice-and-comment" rulemaking, is defined by 5 U.S.C. § 553. It requires (1) a notice of proposed rulemaking ("NPRM"),<sup>143</sup> (2) a written comment period,<sup>144</sup> and (3) publication of the rule and a "concise general statement of [its] basis and purpose" thirty days before the rule becomes effective.<sup>145</sup> Rules issued using these procedures are subject to judicial review under the APA, most notably the "arbitrary or capricious" standard.<sup>146</sup> In addition to these explicit statutory requirements, there are further steps effectively mandated by judicial review,<sup>147</sup> presidential proclamation,<sup>148</sup> or various statutes.<sup>149</sup> Agencies also frequently engage in a range of discretionary measures such as issuing advance notices of proposed rulemaking ("ANPRMs") and holding informal public workshops.

Thus, it is not uncommon for a section 553 rulemaking at another agency to involve a staff investigation of a relevant industry or practice, placement of the potential rule on a regulatory agenda, ANPRM with com-

<sup>140</sup> See 15 U.S.C. § 57a(b)(1) (referencing 5 U.S.C. § 553).

<sup>141</sup> See *id.* § 57a(b)(1), (e)(5)(C); see also *FTC v. Brigadier Indus.*, 613 F.2d 1110, 1116 (D.C. Cir. 1979) ("The drafters of the Magnuson-Moss Act, however, were quite explicit that the inclusion of these new procedural safeguards had not turned rulemaking proceedings into adjudicatory proceedings." (internal quotation marks omitted)); *Ass'n of Nat'l Advertisers, Inc. v. FTC (Nat'l Advertisers II)*, 617 F.2d 611, 633 (D.C. Cir. 1979) (Wright, J., concurring) ("Any attempt to characterize [FTC rulemaking] as an 'adjudication' or 'adversarial process' completely disregards the congressional mandate in Section 18 requiring informal rulemaking.").

<sup>142</sup> See *New Paper by the Coalition for Sensible Safeguards Exposes the Dangers of the Regulatory Accountability Act*, PUB. CITIZEN (Nov. 17, 2011), <https://www.citizen.org/news/new-paper-by-the-coalition-for-sensible-safeguards-exposes-the-dangers-of-the-regulatory-accountability-act-congress-public-safeguard/> [<https://perma.cc/7483-85MP>]. Trial-like procedures may also have contributed less to the length of the FDA's proceeding than did unrelated dysfunction in the agency. One commentator writes, "out of eleven years total time, the trial-type hearing was responsible for a little over one quarter of one year." Dixon, *supra* note 89, at 420.

<sup>143</sup> 5 U.S.C. § 553(b).

<sup>144</sup> *Id.* § 553(c).

<sup>145</sup> *Id.* § 553(b)-(d).

<sup>146</sup> *Id.* § 706(2); See generally *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>147</sup> See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1155-56 (D.C. Cir. 2011); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

<sup>148</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

<sup>149</sup> Rulemaking must comply with cross-agency rules such as the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Paperwork Reduction Act. See 5 U.S.C. §§ 601-612; 44 U.S.C. §§ 3501-3521.

ment period, informal workshop, NPRM with detailed proposed rule along with alternatives, written comment period, “reply comment” period, agency staff analysis of comments and submitted data, robust cost-benefit analysis, review by the Office of Information and Regulatory Affairs (“OIRA”), rule revision, publication of a Final Rule in the Federal Register, and judicial review. Significant rulemakings take an average of between two and four years.<sup>150</sup> Indeed, a number of scholars have criticized the procedural requirements courts have imposed on APA rulemaking—which they characterize as creating a phenomenon of “ossification,” undermining agency action with a “rigid and burdensome” regulatory process.<sup>151</sup>

Section 18 rulemaking must be considered in context. Whether compared to judicially mandated “hybrid rulemaking” and FTC practice prior to passage of the Magnuson-Moss Act or to present-day mandates, section 18’s variations on APA notice-and-comment rulemaking are far more modest than generally presumed. The D.C. Circuit, administrative law’s most important circuit court of appeals, had imposed elevated “hybrid rulemaking” requirements on many administrative proceedings beginning in the mid-1960s. By 1974, the D.C. Circuit had reversed a section 553 rulemaking for lack of adjudicative procedures and asserted its power to require oral presentations and cross-examination in rulemaking—essentially the same procedures found in section 18.<sup>152</sup> Perhaps for this reason, the FTC had already chosen to institute essentially all of the procedures of section 18 before the Magnuson-Moss Act was passed, with the exception of cross-examination.<sup>153</sup> The Supreme Court beat back the D.C. Circuit’s hybrid requirements only in 1978, several years after Magnuson-Moss.<sup>154</sup>

Today, too, courts impose relatively tough standards for section 553 rulemaking. These proceedings involve so-called “paper hearings” with demands to explicitly consider and respond to public comments,<sup>155</sup> engage in quantified cost-benefit analysis,<sup>156</sup> consider reasonable alternative rules,<sup>157</sup>

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<sup>150</sup> GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 19 (2009) (finding an average length of four years for major rules analyzed between 2006 and 2008); MICHAEL TANGLIS, PUB. CITIZEN, UNSAFE DELAYS 7 (2016), <https://www.citizen.org/wp-content/uploads/unsafe-delays-report.pdf> [<https://perma.cc/U2QN-R9C6>] (finding economically significant rules issued during a twenty-year period to have an average length of 2.4 years).

<sup>151</sup> Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992); see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 357 (2019) (collecting examples of criticism).

<sup>152</sup> See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 348–52 (1978).

<sup>153</sup> Dixon, *supra* note 89, at 393.

<sup>154</sup> See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978).

<sup>155</sup> See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

<sup>156</sup> See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011).

<sup>157</sup> See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–49 (1983).

and meet the standards of “hard look” judicial review<sup>158</sup>—each of which is reminiscent of one of section 18’s provisions. Presidential orders have also demanded that executive agencies’ rules provide robust cost-benefit analyses and survive a pre-promulgation review by OIRA.<sup>159</sup> The following pages provide the first concerted comparison of contemporary APA rulemaking practice with the FTC Act’s section 18 procedures.

### 1. *Pre-Proposal*

The first step that section 18 requires the FTC to take before commencing a rulemaking is to publish an ANPRM in the *Federal Register* and share it with a committee in each chamber of Congress.<sup>160</sup> The ANPRM must contain a “brief description of the area of inquiry under consideration,” the “objectives which the Commission seeks to achieve,” any “possible regulatory alternatives under consideration by the Commission,” and an invitation for public comment on the rulemaking.<sup>161</sup>

The APA does not mandate this step,<sup>162</sup> but agencies often release ANPRMs, particularly for complex or significant rules.<sup>163</sup> Critics of the practice emphasize that rulemakings that begin with an ANPRM take an average of 1.3 to 2.2 years longer to complete than those that do not.<sup>164</sup> These commentators offer no causal story for why the fact of issuing an ANPRM would create delays of this length, though, rather than the intuitive explanation that agencies take this step during more complex rulemakings.

There is little reason to think that section 18’s pre-proposal requirements of an ANPRM and notice to Congress need add dramatically to the time required to promulgate a rule. There is no mandatory length of time for acceptance of public comment<sup>165</sup> and the ANPRM may be shared with Congress simultaneously with or even after publication in the *Federal Register*.<sup>166</sup>

<sup>158</sup> *See id.*

<sup>159</sup> *See* Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>160</sup> *See* 15 U.S.C. § 57a(b)(2)(A); 16 C.F.R. § 1.10(b)–(c) (2021).

<sup>161</sup> *Id.* § 57a(b)(2)(A).

<sup>162</sup> *See* 5 U.S.C. § 553.

<sup>163</sup> *See, e.g.*, 77 Fed. Reg. 30,923 (May 24, 2012) (Consumer Financial Protection Bureau Electronic Fund Transfers Rule).

<sup>164</sup> MICHAEL TANGLIS, PUB. CITIZEN, UNSAFE DELAYS 17 (2016), <https://www.citizen.org/wp-content/uploads/unsafe-delays-report.pdf> [<https://perma.cc/945F-8ENH>].

<sup>165</sup> In recent rulemaking proceedings to amend trade regulation rules under section 18, the Commission has frequently announced ANPRM comment periods of sixty days. *See, e.g.*, 82 Fed. Reg. 29,256, 29,256 (June 28, 2017); 81 Fed. Reg. 19,936, 19,936 (Apr. 6, 2016). It likely would be reasonable to establish shorter comment periods in light of the many opportunities for public input.

<sup>166</sup> *See* 15 U.S.C. § 57a(b)(2)(A); 16 C.F.R. § 1.10(c) (2021).

## 2. *Proposal & Written Input*

The phase of officially initiating a rulemaking and collecting written comments is also nearly indistinguishable between APA notice-and-comment rulemaking and section 18. Both types of rulemaking formally commence with the publication of an NPRM.<sup>167</sup> The content of those documents is also quite similar. An NPRM for a notice-and-comment rulemaking must include details of the proposed rule, the legal authority under which it is proposed, and a description of the rulemaking proceedings.<sup>168</sup> A section 18 NPRM must also “stat[e] with particularity the text of the rule, including any alternatives,” and include “the reason for the proposed rule.”<sup>169</sup> While this is superficially more demanding than the corresponding text in section 553,<sup>170</sup> judicial doctrines such as the “logical outgrowth” test disincentivize any agency from issuing an NPRM without concretely articulating the proposed rule, alternatives, and the agency’s reasoning.<sup>171</sup> Presidential and statutory directives also require agencies to consider reasonable alternatives when engaged in notice-and-comment rulemaking.<sup>172</sup> NPRMs released under either authority invite the public to submit written comments, typically for periods of sixty days.<sup>173</sup>

Section 18 also has two ersatz requirements that lack judicial enforceability. Observers sometimes portray the requirement that the FTC issue an NPRM “only where it has reason to believe” that the conduct to be restricted by the rule is “prevalent” as a foreboding barrier to rulemaking.<sup>174</sup> While no court has construed this provision, its text and legislative history do not support this interpretation. The Senate Report that accompanied the 1994 legislation creating this requirement made clear that the “reason to believe”

<sup>167</sup> See 5 U.S.C. § 553(b); 15 U.S.C. § 57a(b)(1)(A). The FTC Act also requires the agency to place its rules on a “regulatory agenda” before releasing an NPRM, which is common practice across agencies due to the Regulatory Flexibility Act. See *Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions*, OFF. INFO. & REG. AFF., <https://www.reginfo.gov/public/do/eAgendaMain> [<https://perma.cc/G99R-5T5F>].

<sup>168</sup> 5 U.S.C. § 553(b)(1)–(3).

<sup>169</sup> 15 U.S.C. § 57a(b)(1)(A).

<sup>170</sup> Section 553 provides that the notice shall include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3) (emphasis added).

<sup>171</sup> See, e.g., *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

<sup>172</sup> Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (directing that “each agency must . . . choos[e] among alternative regulatory approaches” and “identify and assess available alternatives to direct regulation”). All executive agencies must comply with cross-agency requirements such as the Regulatory Flexibility Act, which requires consideration of alternatives to economically significant rules. See 5 U.S.C. § 603(c).

<sup>173</sup> See, e.g., 84 Fed. Reg. 13,150, 13,150 (Apr. 4, 2019) (opening sixty-day comment period). The FTC extends its comment periods frequently. The most recent new section 18 rulemaking featured four extensions of comment periods. See 74 Fed. Reg. 29,149, 21,149 (June 16, 2009); 73 Fed. Reg. 34,895, 34,895 (June 19, 2008); 71 Fed. Reg. 46,878, 46,878 (Aug. 15, 2006); 71 Fed. Reg. 31,124, 31,124 (June 1, 2006).

<sup>174</sup> 15 U.S.C. § 57a(b)(3); see STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 6:3 (rev. ed. 2020) (describing the requirement as having “bite”); Parnes & Jennings, *supra* note 108, at 996 (crediting the “prevalence” requirement as a principal reason why the agency rarely uses its section 18 rulemaking power).

language was intentionally selected to *preclude* judicial review of a prevalence determination,<sup>175</sup> a fact that has not previously been cited in the literature. So, too, the content of the Preliminary Regulatory Analysis is expressly exempted from judicial review unless “the Commission has failed entirely to prepare a regulatory analysis.”<sup>176</sup>

The one truly distinct statutory requirement during this phase of section 18 rulemaking is a mandate that the Commission share a copy of its NPRM with two congressional committees thirty days before it is published in the *Federal Register*.<sup>177</sup> This relic of the days in which Congress actively meddled in the agency’s substantive priorities adds only slightly to the length of the rulemaking process.

### 3. *Informal Hearings*

Sections 18’s most meaningful addition to APA notice-and-comment rulemaking is a period for informal oral hearings following the NPRM comment period. In fact, the Chief Presiding Officer during the 1970s considered the addition of limited cross-examination rights to be the *only* difference from the procedures that the agency followed before 1975.<sup>178</sup> The other procedures required by the Magnuson-Moss Act, including informal oral hearings without cross-examination, had already been imposed by agency discretion before 1975.<sup>179</sup> But while informal oral hearings with cross-examination are unfamiliar to many practitioners of administrative law, they are far from prohibitive. With reforms such as the new method for selecting presiding officers, informal oral hearings can be a relatively brief portion of a section 18 proceeding.

Interested persons have the right to make an oral presentation at an informal hearing conducted by the agency.<sup>180</sup> Because the statute requires only that the opportunity for an informal oral hearing be provided,<sup>181</sup> recent practice has seen the agency frequently conduct section 18 rulemakings for rule amendments or repeals without a hearing when no participant requests one.<sup>182</sup> Still, any meaningful new rule will be sure to garner enough opposition from the affected industry to trigger a hearing.

<sup>175</sup> See S. REP. NO. 103-30, at 10 (1993), as reprinted in 1994 U.S.C.C.A.N. 1776 (“The ‘reason to believe’ standard is intended to bar any judicial review.”).

<sup>176</sup> 15 U.S.C. § 57b-3(c)(1).

<sup>177</sup> *Id.* § 57a(b)(2)(C).

<sup>178</sup> See Dixon, *supra* note 89, at 393; see also *Report of the Section Concerning FTC Trade Regulation Rulemaking Procedures Pursuant to the Magnuson-Moss Act*, 49 ANTITRUST L.J. 347, 370–72 (1980) [hereinafter *1980 ABA Report*].

<sup>179</sup> This fact is relevant to the “before and after” comparisons of rulemaking length provided by Professor Lubbers. See *infra* Part III.C.

<sup>180</sup> See 15 U.S.C. § 57a(c)(2)(A).

<sup>181</sup> See *id.* § 57a(b)(1)(C).

<sup>182</sup> See, e.g., 83 Fed. Reg. 2934, 2947 (Jan. 22, 2018) (listing procedures for a trade regulation rule amendment proceeding, including “holding an informal hearing such as a workshop, if requested by interested parties”).

The first steps at this stage of the process are the selection of a presiding officer and issuance of a notice of informal hearing. This hearing notice is not mentioned in the statute, but the FTC Rules of Practice describe an “initial notice of informal hearing” that specifies the time and location of the hearing, the Commission’s designation of any issues that are subject to cross-examination or rebuttal, and an invitation for requests to cross-examine or rebut another presenter.<sup>183</sup> A “final notice of informal hearing” then identifies any interested persons who will be allowed to cross-examine other participants or to make rebuttal submissions.<sup>184</sup> After historically deferring to the presiding officer on designation of issues subject to cross-examination or rebuttal and on requests to exercise those rights, the Commission has re-centered itself in these determinations with recent administrative reforms to its rulemaking procedures.<sup>185</sup> However, it is likely inevitable that the presiding officer will receive numerous requests to exercise cross-examination or rebuttal rights after publication of the final notice of informal hearing. That circumstance is particularly likely if the agency publishes the final notice of informal hearing before participants must disclose the contents of their oral presentations. A court may blanch at a timeline that requires a participant to decide whether to ask to cross-examine or rebut a particular presenter prior to knowing what she will assert in her presentation.

Next is the informal oral hearing itself. The Commission and its presiding officer are empowered by statute to make rules or issue rulings for these informal hearings “as may tend to avoid unnecessary costs or delay.”<sup>186</sup> This power expressly includes “reasonable time limits” on presentations, and a federal court of appeals affirmed the power of the presiding officer to limit the number of witnesses making presentations.<sup>187</sup> These are critical tools to foreclose attempts at delay by flooding a hearing with an unmanageable number of witnesses.

Finally, there is the aspect of the proceeding that initially raises the hackles of many administrative lawyers: cross-examination. Section 18 provides a qualified right for participants to present rebuttals to others’ presentations or to cross-examine those who gave oral presentations. However, this right arises only if a number of precedent conditions are satisfied. It is also subject to extensive discretionary limits and rules set by the presiding officer. Section 18 cross-examination should not be considered nearly as intimidating as one might imagine if envisioning a courtroom during a criminal trial.

First, the cross-examination right applies only “*if* the Commission determines that there are disputed issues of material fact it is necessary to resolve.”<sup>188</sup> As detailed in Part IV, this frequently ought not to be the case,

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<sup>183</sup> 16 C.F.R. § 1.12(a) (2021).

<sup>184</sup> *Id.* § 1.12(c) (2021).

<sup>185</sup> See *infra* Part IV.A.

<sup>186</sup> 15 U.S.C. § 57a(c)(3).

<sup>187</sup> See *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 997 (4th Cir. 1984).

<sup>188</sup> 15 U.S.C. § 57a(c)(2)(B) (emphasis added).

particularly if the agency releases guidelines outlining the rare circumstances in which such a designation is appropriate. The history of this provision makes clear that Congress intended the Commission only to designate “issues of specific fact in contrast to legislative fact.”<sup>189</sup> While serving as Chairman of ACUS, future Supreme Court Justice Antonin Scalia explained to a lead sponsor of the Magnuson-Moss Act that these issues of “specific fact” should only “arise occasionally” in rulemakings of general applicability such as those conducted by the FTC.<sup>190</sup> The Commission has at times employed a “no designated issues” format. In this type of rulemaking, the Commission can pose questions for public comment in the NPRM with a disclaimer such as “[t]he list of questions is not intended to be a list of ‘disputed issues of material fact that are necessary to resolve.’”<sup>191</sup> Such questions create no right to cross-examination.

Second, anyone wishing to qualify for rebuttal or cross-examination must persuade the Commission or presiding officer that the particular rebuttal or cross-examination is “required for the resolution of a designated issue.”<sup>192</sup> Moreover, full cross-examination is only permitted if the interested person can demonstrate that a “full and true disclosure with respect to the issue can *only* be achieved through cross-examination” rather than written rebuttals or additional oral presentations.<sup>193</sup> These are exacting standards.

Third, the presiding officer can organize participants granted cross-examination rights into groups with the “same or similar interests,” with each group entitled to a single representative who can conduct cross-examination.<sup>194</sup> The group members may either select this representative or have one selected for them by the presiding officer.<sup>195</sup> The presiding officer may also elect to conduct cross-examination on behalf of those who were granted cross-examination rights, working off of questions submitted by those individuals. The statute explicitly lists this last approach as an example of a power that may be invoked “to avoid unnecessary costs or delay.”<sup>196</sup>

Fears about judicial review of the informal hearings stage of section 18 rulemaking are likely overblown. A unique judicial review provision allows a reviewing court to vacate a rule based upon decisions regarding cross-examination or rebuttal, but several factors make the bite of this provision less than it first appears. Courts have soundly rejected attempts at interlocutory chal-

<sup>189</sup> *Ass’n of Nat’l Advertisers, Inc. v. FTC (Nat’l Advertisers III)*, 627 F.2d 1151, 1163 (D.C. Cir. 1979) (quoting H.R. REP. NO. 93-1606, at 33 (1974) (Conf. Report)).

<sup>190</sup> *Id.* at 1164.

<sup>191</sup> 50 Fed. Reg. 43,224, 43,226 (Oct. 24, 1985).

<sup>192</sup> 16 C.F.R. § 1.12(b)(3) (2021) (emphasis added).

<sup>193</sup> *Id.*

<sup>194</sup> 15 U.S.C. § 57a(c)(4)(A).

<sup>195</sup> *See id.*; 16 C.F.R. §§ 1.12(d), 1.13(a)(3) (2021). An individual who dissents from the choice of group representative may conduct cross-examination individually only if he can “satisf[y] the Commission that he has made a reasonable and good faith effort to reach agreement” with the other group members and the “the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.” 15 U.S.C. § 57a(c)(4)(B).

<sup>196</sup> *Id.* § 57a(c)(3)(B).

lenges to these sorts of decisions.<sup>197</sup> Even for timely challenges, the standard of review is favorable to the agency. Only “preclud[ing] disclosure of disputed material facts which was *necessary* for fair determination by the Commission of the rulemaking proceeding *taken as a whole*” will jeopardize a rule.<sup>198</sup> The presiding officer was historically empowered to set limits on the length of presentations or even the number of witnesses when many “seek to present essentially repetitious comments, views, or arguments.”<sup>199</sup> The Fourth Circuit upheld numerous assertive exercises of discretion by the presiding officer in the Funeral Rule proceeding against challenge in *Harry & Bryant*.<sup>200</sup> Section 18 also immunizes these decisions against standard APA challenges that assert a rule is arbitrary, capricious, or made without observance of procedure required by law.<sup>201</sup>

On the whole, there is little reason to believe that the informal hearings stage of a section 18 rulemaking must add substantially to the length of that rulemaking. Recently instituted rules now limit informal hearings to no more than five hearing days, to take place within a thirty-day period.<sup>202</sup> Moreover, technological developments since the 1980s have lessened the significance of adding oral presentations to the record. A historical complaint about informal hearings was that they produced a lengthy record to analyze.<sup>203</sup> Yet, digital submissions have allowed comment dockets for APA notice-and-comment rulemaking to swell into the millions of public comments,<sup>204</sup> a surge in scale that would not transfer to in-person proceedings. In fact, a digitized record with searchable text would make analysis of the rulemaking record more straightforward than it was in the 1970s and 1980s.

#### 4. Agency Analysis & Promulgation

In APA notice-and-comment rulemaking, an agency must consider material comments submitted by the public and weigh whether to finalize the proposed rule as-is, revise it, or end the proceeding. Courts police the thoroughness of the agency’s consideration by reviewing the “concise general

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<sup>197</sup> See *Ass’n of Nat’l Advertisers, Inc. v. FTC (Nat’l Advertisers I)*, 565 F.2d 237, 239 (2d Cir. 1977) (finding presiding officer determinations to be procedural and not final agency actions); *Ass’n of Nat’l Advertisers, Inc. v. FTC (Nat’l Advertisers II)*, 617 F.2d 611, 620–21 (D.C. Cir. 1979) (dismissing attacks on procedural adequacy of trade regulation rulemaking based on lack of ripeness).

<sup>198</sup> 15 U.S.C. § 57a(e)(3)(B) (emphasis added).

<sup>199</sup> FED. TRADE COMM’N, *FTC OPERATING MANUAL* § 7.3.19.3.3.1 (1991).

<sup>200</sup> *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 997–99 (4th Cir. 1984).

<sup>201</sup> See 15 U.S.C. § 57a(e)(5)(C).

<sup>202</sup> See 16 C.F.R. § 1.13(a)(2)(ii) (2021). The *FTC Operating Manual* from when trade regulation rulemaking was common suggested holding no more than three informal oral hearings over a maximum of five weeks. FED. TRADE COMM’N, *supra* note 199. Even this may be more than the literal text of the statute requires: “an informal hearing,” singular. 15 U.S.C. § 57a(b)(1)(C).

<sup>203</sup> See 1980 *ABA Report*, *supra* note 178, at 376.

<sup>204</sup> See Michael A. Livermore, Vladimir Eidelman & Brian Grom, *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. 977, 988 (2018).

statement” of basis and purpose that accompanies a Final Rule—these are misleadingly named, as they frequently run in the hundreds of pages.<sup>205</sup> Failure to consider and respond to material public comments can lead to a rule being set aside as arbitrary or capricious.<sup>206</sup> Meaningful revisions to the rule can also require an additional written comment period in order to abide by the logical outgrowth doctrine.<sup>207</sup>

Section 18 adds only a few steps after the close of public input. The statute requires the public release of a written transcript of any oral hearings and a “recommended decision” of the presiding officer regarding the “relevant and material evidence” illuminated by the rulemaking proceeding.<sup>208</sup> Then, the Commission may issue a Final Rule “based on the matter in the rulemaking record” along with a statement of basis and purpose<sup>209</sup> and Final Regulatory Analysis.<sup>210</sup> That statement of basis and purpose must include statements as to the prevalence of the acts or practices restricted by the rule, how that conduct is unfair or deceptive, and the economic effects of the rule.<sup>211</sup> Similar to the prevalence requirement and Preliminary Regulatory Analysis at the NPRM stage, the contents of the statement of basis and purpose and Final Regulatory Analysis are exempt from judicial review.<sup>212</sup> Furthermore, even if those requirements did not exist at all, the agency would still need to demonstrate that the acts or practices regulated by a rule are unfair or deceptive to show them to be within the agency’s regulatory authority. Rigorous empirical analysis might also be required by the general demands of many reviewing courts<sup>213</sup> and government-wide mandates such as the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act.<sup>214</sup>

Until recently, internally set agency rules added substantially to what the statute requires. Those rules had provided for the public release of a formal staff report summarizing the rulemaking record before the presiding officer’s recommend decision was released,<sup>215</sup> required at least sixty days of a

<sup>205</sup> See, e.g., 77 Fed. Reg. 30,923 (May 24, 2012) (454 pages).

<sup>206</sup> See 5 U.S.C. § 706(2)(A); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

<sup>207</sup> See, e.g., *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

<sup>208</sup> See 15 U.S.C. § 57a(c)(1)(B), (5).

<sup>209</sup> See *id.* § 57a(b)(1)(D).

<sup>210</sup> See *id.* § 57b-3(b)(2).

<sup>211</sup> See *id.* § 57a(d)(1).

<sup>212</sup> See *id.* §§ 57a(e)(5)(C), 57b-3(c)(1); S. REP. NO. 93-1408 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7755, 7764 (stating that, while a statement of basis and purpose must exist, “its contents are not to be subject to court review on any basis at any time”). *But see* *Pa. Funeral Dirs. Ass’n v. FTC*, 41 F.3d 81, 86–89 (3d Cir. 1994); *Am. Optometric Ass’n v. FTC*, 626 F.2d 896, 906 (D.C. Cir. 1980) (finding the exemption of the statement of basis and purpose to contradict other judicial review provisions in section 18 and resolving to “consult[ ] the statement of basis and purpose where the statement is helpful in understanding the Commission’s reasoning, but, nevertheless, be[ ] careful not to impose upon the statement the unreasonable demands about which Congress was concerned”).

<sup>213</sup> See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144 1150–51 (D.C. Cir. 2011).

<sup>214</sup> See 5 U.S.C. §§ 601–612.

<sup>215</sup> 16 C.F.R. § 1.13(f) (2020). The statute indirectly encourages the agency to make some staff analysis public. Section 18(j) prohibits *ex parte* communication regarding facts not on the

post-record comment period on this staff report and the presiding officer's recommended decision,<sup>216</sup> and gave the Commission the option to hear again from a person who previously participated in the proceeding.<sup>217</sup> In total, the agency provided eight distinct opportunities for public input—only four of which were required by the statute.<sup>218</sup> After reducing the large number of agency-imposed procedural steps in July 2021, this stage of a section 18 rulemaking no longer must take substantially longer than APA notice-and-comment procedures. Now, the only time-additive requirements will be the presiding officer's report—which the revised rules mandate must issue within sixty days of the close of informal hearings<sup>219</sup>—and the non-justiciable Final Regulatory Analysis.

Taken as a whole, the preceding comparison of section 18's requirements with the underlying procedures of the APA is strikingly incongruous with the conventional understanding of FTC rulemaking. The text of the statute provides little support for assertions that the variations section 18 adds around the edges of the APA notice-and-comment rulemaking process make the process exceedingly onerous. Turning next to section 18's record in court, we will see that judicial construction of the statute does little more to justify the conventional story—rather, it shows that the primary hurdles confronting an FTC rule are the same ones faced by any agency's administrative rulemaking.

### B. *Lessons from Case Law*

Proponents of FTC rulemaking should be heartened by the relevant case law. After a few setbacks in 1979 and 1980, courts have largely upheld FTC rules against challenges under the judicial review provisions of section 18 and the APA. While the Commission's later aversion to section 18 rulemaking has left this case law somewhat dated, the agency's track record during the 1980s suggests that appropriately crafted rules do not face a materially greater legal risk than those promulgated using APA notice-and-comment procedures.

Judicial review for section 18 rules is quite standard in one respect: A court can review nearly all aspects of the rule on the familiar bases of 5

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rulemaking between any Commission employee with "responsibility relating to any rulemaking proceeding" and any Commissioner or their staff. 15 U.S.C. § 57a(j).

It is not evident why making staff analysis public ought to cause such work to take substantially longer to complete. Yet, in the promulgation of the agency's most recent section 18 rule, sixteen months passed between the close of public input and publication of the staff report. *See* 75 Fed. Reg. 68,559, 68,559 (Nov. 8, 2010); 74 Fed. Reg. 29,149, 29,150 (June 19, 2009).

<sup>216</sup> 16 C.F.R. § 1.13(h) (2020).

<sup>217</sup> *See id.* § 1.13(h)–(i) (2020).

<sup>218</sup> The ANPRM comment period, NPRM comment period, oral presentations, and rebuttals and cross-examination are required by statute. The post-comment-period solicitation of proposals for designated disputed issues of material fact, petition period, post-record comment, and discretionary option to permit oral appeals to the Commission were not. *See* 16 C.F.R. §§ 1.11(a)(4), 1.13(b), (h)–(i) (2020).

<sup>219</sup> *See* Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,549 (July 22, 2021).

U.S.C. § 706(2), with the exception of decisions regarding cross-examination or rebuttal.<sup>220</sup> Would-be litigants have sixty days after a section 18 rule is promulgated to file a petition in a federal circuit court challenging the rule.

However, there are also a few less traditional aspects to the process. One is that petitioners can “appl[y] to the court for leave to make additional oral presentations or written submissions.”<sup>221</sup> If the petitioner can persuade the court that the information would be material and there were reasonable grounds not to have made the submission earlier, the court can remand back to the Commission to accept that submission. This provision does not appear to have been litigated. Another is the requirement that the agency’s action be “supported by substantial evidence in the rulemaking record . . . taken as a whole.”<sup>222</sup> A final sub-section allows attack on Commission decisions denying cross-examination or rebuttal rights or limiting their exercise, although it imposes a daunting standard of review—and such decisions are immune to challenge under the APA or any other provision of law.<sup>223</sup>

Numerous parts of the proceeding are not subject to any judicial review whatsoever. Some are explicitly immunized from judicial review by the text of the statute, including the Preliminary and Final Regulatory Analyses, and the Final Rule’s statement of basis and purpose, which includes the statement as to the prevalence of the conduct governed by the rule.<sup>224</sup> Other requirements feature legislative history evincing an intent that they not be judicially enforceable, including the mandate that the Commission have “reason to believe” the actions to be restricted by a proposed rule are prevalent before issuing an NPRM.<sup>225</sup> Returning to the aspects of section 18 rulemaking subject to judicial scrutiny, case law provides valuable insight into how courts might analyze future FTC rules.

*Substantial-Evidence & Arbitrary-or-Capricious Review*—The D.C. Circuit has held the standard for finding that the FTC’s actions were not supported by substantial evidence in the record to be effectively identical to the arbitrary-or-capricious standard applicable to all APA rulemaking. The arbitrary-or-capricious standard at its essence assesses whether agency action was the “product of reasoned decisionmaking.”<sup>226</sup> The D.C. Circuit wrote that the section 18 substantial-evidence standard requires “the same degree of evidentiary support needed to satisfy the arbitrary and capricious standard,” thereby reversing the court’s earlier “flirt[ation]” with a heightened standard.<sup>227</sup> The FTC has had numerous rules upheld under these substantial-evidence and arbitrary-or-capricious standards. These include the

<sup>220</sup> See 15 U.S.C. § 57a(e)(3) (invoking 5 U.S.C. § 706(2)(A)–(D)).

<sup>221</sup> *Id.* § 57a(e)(2).

<sup>222</sup> *Id.* § 57a(e)(3)(A).

<sup>223</sup> *Id.* § 57a(e)(3)(B), (5)(C).

<sup>224</sup> *Id.* §§ 57a(e)(5)(C), 57b-3(c)(1).

<sup>225</sup> S. REP. NO. 103-130, at 10 (1993), as reprinted in 1994 U.S.C.C.A.N. 1776 (“The ‘reason to believe’ standard is intended to bar any judicial review.”).

<sup>226</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

<sup>227</sup> *Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986).

agency's Funeral Rule,<sup>228</sup> Credit Practices Rule,<sup>229</sup> and portions of its Eyeglass Rule.<sup>230</sup> A future court making a substantial-evidence determination would likely adopt the Supreme Court's directed-verdict standard articulated in *Allentown Mack*,<sup>231</sup> although its application "is essentially the same as review under the arbitrary and capricious standard."<sup>232</sup>

The agency's biggest concerns would come from recent decisions applying the APA, not section 18. For example, the D.C. Circuit held that numerous authorities show "no basis" in section 18 to require the agency to conduct a "rigorous, quantitative" cost-benefit analysis to satisfy the substantial-evidence standard.<sup>233</sup> It is instead contemporary APA arbitrary-or-capricious review cases, such as *Business Roundtable v. SEC*,<sup>234</sup> that have sometimes demanded such quantified analysis. This imposition would apply equally to rules issued pursuant to section 18 or to APA notice-and-comment procedures.

Section 18's standards still have some bite, however. The Second Circuit in *Katharine Gibbs* invalidated an agency rule after finding no rational connection between specific examples of unfair or deceptive enrollment practices of vocational schools in the rulemaking record and the challenged rule's provisions making it easier for all students to obtain tuition refunds.<sup>235</sup> Shifts in the legal landscape can also undermine the Commission on substantial-evidence grounds—the D.C. Circuit remanded the Eyeglass Rule after holding that a Supreme Court decision issued during the rulemaking process had changed the "core" circumstances to which the rule responded.<sup>236</sup>

*Presiding Officer Discretion*—Courts have broadly upheld presiding officers' decisions to streamline the section 18 rulemaking process, confirming the capacious discretion suggested by statutory text. The Fourth Circuit in *Harry & Bryant v. FTC* affirmed that presiding officers can not only set time limits on individual presentations but also may limit the number of individuals permitted to present at all—even if this limitation affects unequal numbers of pro-rule and anti-rule witnesses.<sup>237</sup> The court stated, "Section 18 does not guarantee every person a right to testify . . . [and] the right to testify is expressly subordinated to the Commission's authority under Section 18(c)(3) to make rulings for the purpose of avoiding unnecessary costs or delay."<sup>238</sup>

The same case also supports the broad application of presiding officer discretion regarding cross-examination. For example, the court upheld the

<sup>228</sup> Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 92 (3d Cir. 1994); *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 999 (4th Cir. 1984).

<sup>229</sup> Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 986–88 (D.C. Cir. 1985).

<sup>230</sup> Am. Optometric Ass'n v. FTC, 626 F.2d 896, 915 (D.C. Cir. 1980).

<sup>231</sup> *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366 (1998).

<sup>232</sup> Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 & nn.25–26 (2008).

<sup>233</sup> *Am. Fin. Servs. Ass'n*, 767 F.2d at 986.

<sup>234</sup> *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011).

<sup>235</sup> *Katharine Gibbs Sch. (Inc.) v. FTC*, 612 F.2d 658, 664 (2d Cir. 1979).

<sup>236</sup> *Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 907, 909–11 (D.C. Cir. 1980).

<sup>237</sup> See *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 997 (4th Cir. 1984).

<sup>238</sup> *Id.*

presiding officer's choice to personally conduct the cross-examination of one class of participants (consumers) while permitting other classes of participants to be cross-examined in a more traditional fashion.<sup>239</sup> In the twelve reported cases challenging section 18 trade regulation rules, it does not appear that *any* procedural determination by a presiding officer or the Commission regarding the oral hearings has ever failed judicial review.<sup>240</sup> Recall as well that these determinations are not subject to review under the APA's "observance of procedure required by law" requirement, making other precedents inapt.<sup>241</sup>

*Specificity of the Regulation*—An aspect of section 18 that caused trouble in early rulemakings is the requirement to "define with specificity" the unfair or deceptive acts or practices that a rule serves to prevent. The agency misstepped in its Vocational Schools Rule by merely stating that violations of its rules requiring improved tuition refund policies and disclosure of job-placement rates would be considered unfair, rather than identifying the unfair industry practices to which its rulemaking responded.<sup>242</sup> The agency's success satisfying this requirement in several other rulemakings<sup>243</sup>—and the judicial skepticism that the *Katharine Gibbs* court's interpretation received<sup>244</sup>—suggest that the agency has a viable path to meeting this requirement.

*Ripeness*—Section 18 proceedings are generally secure against any sort of challenge outside of the sixty days following promulgation. Courts have rejected attempted interlocutory challenges to Commission actions as unripe when coming before this sixty-day window.<sup>245</sup> Attacks coming after these sixty days are also foreclosed.<sup>246</sup>

*Other Issues*—A variety of other, smaller questions have come before courts in challenges to section 18 rules. Among them, the D.C. Circuit handled allegations on two different occasions that chairmen participating in rulemaking were impermissibly biased. The court announced a demanding standard: Commissioners may be disqualified only if a litigant can make a clear and convincing showing that the Commissioner has "an unalterably closed mind."<sup>247</sup> Unsurprisingly, this standard was met in neither case.<sup>248</sup>

<sup>239</sup> See *id.* at 997; accord *Ass'n of Nat'l Advertisers, Inc. v. FTC (Nat'l Advertisers I)*, 565 F.2d 237, 240 (2d Cir. 1977).

<sup>240</sup> Note, though, that the D.C. Circuit expressed "serious doubts about the validity" of the Commission's "experiment[al]" procedures announced under 16 C.F.R. § 1.20 for the Children's Advertising Rule, albeit in dicta in an opinion settled by questions of ripeness. *Nat'l Advertisers, Inc. v. FTC (Nat'l Advertisers II)*, 617 F.2d 611, 620–21 (D.C. Cir. 1979).

<sup>241</sup> See 5 U.S.C. § 706(2)(D).

<sup>242</sup> *Katharine Gibbs Sch. (Inc.) v. FTC*, 612 F.2d 658, 664 (2d Cir. 1979).

<sup>243</sup> *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 984 (D.C. Cir. 1985); *Harry & Bryant Co.*, 726 F.2d at 999.

<sup>244</sup> *Am. Fin. Servs. Ass'n*, 767 F.2d at 984 & n.30.

<sup>245</sup> See *Ass'n of Nat'l Advertisers, Inc. v. FTC (Nat'l Advertisers I)*, 565 F.2d 237, 239 (2d Cir. 1977) (finding presiding officer determinations not to be final agency actions); *Nat'l Advertisers II*, 617 F.2d at 620–21 (dismissing attacks on procedural adequacy of trade regulation rulemaking as unripe).

<sup>246</sup> *Mono-Therm Indus. v. FTC*, 653 F.2d 1373, 1378 (10th Cir. 1981).

<sup>247</sup> *Ass'n of Nat'l Advertisers, Inc. v. FTC (National Advertisers III)*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

Courts also limited the effect of FTC rules on state law, resisting field pre-emption of state regulation<sup>249</sup> and restrictions on states' ability to legislate on a subject.<sup>250</sup> Narrower pre-emption of state regulations survived challenge in 1985 when it provided a regulatory floor above which states could add their own requirements,<sup>251</sup> aligning with the trend in American law toward conflict pre-emption.<sup>252</sup>

A few other issues' treatment in judicial review is still undetermined. One is prevalence. The non-justiciability of the discussion of prevalence in a Final Rule's statement of basis and purpose earned judicial validation in a challenge to the FTC Funeral Rule.<sup>253</sup> However, the challenged rulemaking had concluded before the 1994 enactment of a second prevalence requirement, that the agency have "reason to believe" acts or practices are prevalent before issuing an NPRM.<sup>254</sup> Despite the clear legislative intent to exclude this determination from judicial review,<sup>255</sup> no new section 18 rules have faced challenge after 1994.<sup>256</sup> Thus, it is possible that a circuit court panel averse to legislative history could demand more, as the 1994 prevalence requirement lacks explicit *statutory* exemption from judicial review.

Another untested area is the boundary between a "rule with respect to unfair or deceptive acts or practices," which must use section 18 procedures, and a rule "with respect to unfair methods of competition," which could be conducted using APA notice-and-comment procedures under the FTC's section 6(g) authority.<sup>257</sup> Many issues, such as data privacy, arguably implicate both consumer protection and competition concerns. The potential cost could be extreme if a court reviewing a Final Rule held that the Commission had wrongly declined to satisfy section 18's requirements. Such a ruling could effectively require a redo of the entire proceeding if the agency had never completed pre-proposal steps such as issuing an ANPRM or notifying the relevant congressional committees.

<sup>248</sup> *Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 427 (D.C. Cir. 1986); *Nat'l Advertisers III*, 627 F.2d at 1154.

<sup>249</sup> *See Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 910 (D.C. Cir. 1980); *Katharine Gibbs Sch. (Inc.) v. FTC*, 612 F.2d 658, 664, 666–67 (2d Cir. 1979).

<sup>250</sup> *See Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir. 1990).

<sup>251</sup> *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 991 (D.C. Cir. 1985).

<sup>252</sup> *See, e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

<sup>253</sup> *See Pa. Funeral Dirs. Ass'n v. FTC*, 41 F.3d 81, 86–89 (3d Cir. 1994).

<sup>254</sup> Pub L. No. 103-312, § 15(b), 108 Stat. 1691, 1698 (1994).

<sup>255</sup> *See S. REP. NO. 103-130*, at 10 (1993), as reprinted in 1994 U.S.C.C.A.N. 1776 ("The 'reason to believe' standard is intended to bar any judicial review.").

<sup>256</sup> The only new section 18 rule commenced after this requirement came into force was not challenged. *See* 16 C.F.R. pt. 437 (2021).

<sup>257</sup> 15 U.S.C. § 57a(a)(2). This issue arose after the FTC purported to switch from conducting a proceeding under both sections 6(g) and 18 to relying on section 6(g) alone after legislation barred the agency from issuing rules relating to product certifications and standards under section 18. *See Am. Nat'l Standards Inst., Inc. v. FTC*, No. 79-CV-1275, 1982 WL 20106, at \*1 (D.D.C. Feb. 4, 1982). The court found it lacked jurisdiction due to final action doctrine and the inapplicability of interlocutory review. *Id.* at \*3, \*6. The rule was abandoned before promulgation, leaving the line between sections 6(g) and 18 unclear.

## C. Responses to Section 18 Skepticism

In contemporary conversation about the Commission's powers, a bevy of adjectives often stops consideration of section 18 rulemaking before it starts. Take, for instance, the debate about possible revisions to FTC authorities following the 2008 financial crisis. The full Commission described section 18's "Magnuson-Moss" procedures as "onerous" and "burdensome" processes,<sup>258</sup> which the Chairman believed leave the agency "hamstrung" in the face of rapidly evolving misconduct in the economy.<sup>259</sup> Perhaps the language employed in this advocacy was strategically overstated to some degree, in an unavailing attempt to persuade Congress to replace section 18 with standard APA notice-and-comment rulemaking authority.<sup>260</sup> But still, outside observers have called section 18 procedures "too slow to be of much use"<sup>261</sup> and "unworkable."<sup>262</sup> This understanding could hardly be more different from that shown in the 1970s and early 1980s when the popular press wrote that the bill had "sen[t] new waves of energy through the commission, dramatically increasing its power."<sup>263</sup>

Once one moves beyond mere rhetoric, three arguments against the use of section 18 rulemaking emerge. Two are from those who would favor greater FTC regulation but are under the impression that it would not be practicable under the so-called Magnuson-Moss procedures. The third comes from those who are skeptical of FTC rulemaking in principle, fearful of a supposed roving bureaucracy.

The first form of section 18 skepticism can be labeled "the argument from inaccurate history." Conventional wisdom in Washington has consolidated around a narrative that Congress, reacting to an agency it perceived as out of control, enacted the Magnuson-Moss Act in an effort to constrain the

<sup>258</sup> *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public: Hearing Before the Subcomm. on Com., Trade & Consumer Prot. of the H. Comm. on Energy & Com.*, 111th Cong. 21, 23 n.56 (2009) (statement of the Fed. Trade Comm'n.).

<sup>259</sup> *Id.* (response of Jonathan Liebowitz, Chairman, Fed. Trade Comm'n, to the question of Rep. Bobby Rush, Chairman, Subcomm. on Com., Trade & Consumer Prot. of the H. Comm. on Energy & Com.).

<sup>260</sup> See, e.g., *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Com., Sci. & Transp.*, 111th Cong. 3 (2010), [https://www.commerce.senate.gov/public/\\_cache/files/1481149b-1f5d-4f17-92f3-a06396fddedcd/406BAF26B63F093A9DBC85CC43C45834.pridgen-testimony.pdf](https://www.commerce.senate.gov/public/_cache/files/1481149b-1f5d-4f17-92f3-a06396fddedcd/406BAF26B63F093A9DBC85CC43C45834.pridgen-testimony.pdf) [<https://perma.cc/FTT5-QD64>] (statement of Prof. Dee Pridgen, Univ. of Wyo. Coll. of Law); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1979 (2015). Standard APA notice-and-comment rulemaking has also come under criticism for becoming "ossified." See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992).

<sup>261</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 12:14 (2021).

<sup>262</sup> Mike Swift, *FTC's 'Mag-Moss' Rulemaking Authority Could Break Logjam on US Privacy Legislation*, MLEX (Mar. 8, 2021, 12:00 AM), <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/data-privacy-and-security/ftcs-mag-moss-rulemaking-authority-could-break-logjam-on-us-privacy-legislation> [<https://perma.cc/CDT7-HQNX>].

<sup>263</sup> Sulzberger, *supra* note 66.

agency in a procedural straitjacket. Few batted an eye when a representative of a prominent trade organization included in her written congressional testimony a chronology in which the Commission launched the “Kidvid” rulemaking to restrict television advertising to children, this effort garnered massive pushback, and “[a]s a result, Congress took steps to curb such FTC overreaching by enacting the Magnuson-Moss Act.”<sup>264</sup> Magnuson-Moss, of course, was enacted in January 1975, more than twenty-seven months before the Kidvid proceeding began.<sup>265</sup> This is no isolated error. Worryingly, the Obama-era Director of the Bureau of Consumer Protection—who would largely have determined whether the agency engaged in section 18 rulemaking—seems to share this misconception, recently writing that “[t]hese hurdles were imposed by Congress precisely because Congress was concerned about regulatory overreach in the 1970s.”<sup>266</sup> Advocates and scholars have referred to Congress’s “Magnuson-Moss shackles”<sup>267</sup> or the “Mag-Moss albatross,”<sup>268</sup> connoting either punishment or penance. Even one of the most-cited scholarly considerations of section 18 in the past decade writes of an agency that had been “saddled” with these procedural requirements.<sup>269</sup>

The history does not match this narrative. As detailed above, the 1975 Magnuson-Moss Act was architected by the very members of Congress and staffers who had spent nearly a decade prodding the agency to take a *more* active role on rulemaking. The mainstream press, too, framed the Act as having “liberalized the commission’s rulemaking authority”<sup>270</sup> and “dramatically increasing its power.”<sup>271</sup> Industry-led pushback to the agency’s rulemaking, such as the “Stop the FTC” campaign, only began to change the approach of many in Congress several years later. Charitably, adherents to the conventional wisdom may invoke “Magnuson-Moss” as a shorthand for all of the FTC’s rulemaking procedures, including those from the Magnuson-Moss Act and from later legislation. But this does no better to

<sup>264</sup> *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Com., Sci. & Transp.*, 111th Cong. 7 (2010), <https://www.commerce.senate.gov/services/files/A8A7E41C-C291-44B9-ACAC-380EACAEBE5E> [<https://perma.cc/KNS5-GNAA>] (statement of Linda A. Woolley, Exec. Vice President, Direct Marketing Ass’n).

<sup>265</sup> The Kidvid rulemaking began in April 1978 in response to a 1977 petition for rulemaking. *See* 43 Fed. Reg. 17,967, 17,968 (Apr. 27, 1978).

<sup>266</sup> Jessica Rich, Laura Riposo VanDruff, Alysa Z. Hutnik & William C. MacLeod, *FTC Chair Khan’s Vision for Privacy—and Some Dissents*, AD L. ACCESS (Oct. 3, 2021), <https://www.adlawaccess.com/2021/10/articles/ftc-chair-khans-vision-for-privacy-competition-and-big-tech-and-some-dissents/> [<https://perma.cc/8ECZ-2Y2K>].

<sup>267</sup> Randy Milch & Sam Bieler, *A New Decade and New Cybersecurity Orders at the FTC*, LAWFARE (Jan. 29, 2020, 8:00 AM), <https://www.lawfareblog.com/new-decade-and-new-cybersecurity-orders-ftc> [<https://perma.cc/QSJ2-J7RX>].

<sup>268</sup> *Improving Consumer Protections in Subprime Home Lending: Hearing Before the Subcomm. on Interstate Com., Trade & Tourism of the S. Comm. on Com., Sci. & Transp.*, 110th Cong. 8 (2008), <https://www.commerce.senate.gov/services/files/02286A86-532A-4F2D-A4BE-A0B461DCECBE> [<https://perma.cc/M3QG-4J9Y>] (statement of Kathleen E. Keest, Senior Policy Counsel, Center for Responsible Lending).

<sup>269</sup> Lubbers, *supra* note 260, at 1980.

<sup>270</sup> Potts & Isikoff, *supra* note 68.

<sup>271</sup> Sulzberger, *supra* note 66.

align history and narrative. The 1980 Act, passed at the apex of backlash to the Commission, contained procedural requirements that were temporary, relatively trivial, or held unconstitutional.<sup>272</sup> Former FTC Chairman Miles Kirkpatrick expressed surprise afterward that, despite threats from Congress, “now that the legislation has been finally approved and the dust has settled, most people seem to agree that no real damage has been done . . . [and] no fundamental changes have been imposed by the 1980 amendments.”<sup>273</sup> It was the 1975 legislation—designed by proponents of greater FTC rulemaking—that added the informal hearings and limited cross-examination that are most associated with section 18.

This brings up a second thread of pessimism, which can be called “the argument from misjudged empirics.” Its adherents could concede the first point. Perhaps Congress did not *intend* to compromise the FTC’s ability to issue rules, they say, but its well-meaning efforts to promote greater public participation in rulemaking were a failure. Whatever the intention, the end result was a set of impracticable and onerous statutory requirements.

This group of pessimists point to the observed length of rulemakings under section 18 procedures. Professor Jeffrey Lubbers conducted the most prominent version of this analysis, comparing the duration of FTC rulemakings that were or were not conducted under section 18.<sup>274</sup> In addition to typifying the conventional skepticism of section 18, this piece plays a central role in advocacy against the use of the FTC’s discretionary rulemaking power. Voices from law firms and trade groups representing companies likely to be subject to new FTC rules point to the article as evidence of the “slow and cumbersome nature” of section 18 procedures.<sup>275</sup> Numerous scholars also cite the piece as support for the proposition that section 18 rulemaking is impractical, with one going so far as to write that the article demonstrates that section 18 “has been shown to lengthen the rulemaking process by more than five times.”<sup>276</sup> This is not so. Given the prominence of Professor Lubbers’s piece in the debate, a rebuttal is necessary.

Professor Lubbers’s article shows a set of correlations. Rules completed after the passage of Magnuson-Moss took an average of 5.57 years, while rules completed beforehand averaged 2.94 years.<sup>277</sup> Rule amendments conducted under section 18 took an average of 5.26 years, whereas recent rules issued under APA notice-and-comment authority averaged only 287 days.<sup>278</sup>

<sup>272</sup> See *supra*, Part II.B.

<sup>273</sup> *Debate*, *supra* note 83, at 1481–82.

<sup>274</sup> Lubbers, *supra* note 260, at 1982.

<sup>275</sup> Andrew Smith & Christina Higgins, *Prospects for FTC Privacy Rules*, PRIV. L. & BUS., Aug. 2021, at 15, 15, <https://www.cov.com/-/media/files/corporate/publications/2021/08/prospects-for-ftc-privacy-rules.pdf> [<https://perma.cc/B6F4-C4D7>]; see also MAUREEN K. OHLHAUSEN & JAMES RILL, U.S. CHAMBER OF COM., PUSHING THE LIMITS?: A PRIMER ON FTC COMPETITION RULEMAKING (2021), [https://www.uschamber.com/assets/archived/images/ftc\\_rulemaking\\_white\\_paper\\_aug12.pdf](https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf) [<https://perma.cc/AU26-U7UH>].

<sup>276</sup> Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 368 (2020).

<sup>277</sup> Lubbers, *supra* note 260, at 1997.

<sup>278</sup> *Id.* at 1997–98.

Ipsa facto, many readers think, something about Magnuson-Moss must substantially slow down rulemaking. But what the Lubbers piece does not demonstrate is causation. By failing to engage with four critical points, the article produces a misleading picture.

First, the comparisons elide political context. While Lubbers acknowledges in introduction that “the agency became less activist due to congressional pressure” during the late 1970s,<sup>279</sup> the piece does not consider whether fervent pushback from business, media, and Congress—including budget gamesmanship and briefly shutting down the FTC—might be responsible for any portion of the observed difference in rulemaking length after the late 1970s. Nor is it noted that the three rules initiated under Magnuson-Moss procedures and finalized before President Reagan entered office took an average of 2.84 years—slightly *quicker* than their APA notice-and-comment predecessors—while the three finalized in the 1980s after Reagan installed an ideological foe of rulemaking as FTC Chairman took an average of 8.28 years.<sup>280</sup>

Second, the article does not consider fundamental differences between rules promulgated according to a specific legislative grant of authority and those issued under discretionary rulemaking power. Indeed, the 287-day average of the APA notice-and-comment rules analyzed should raise an eyebrow; the Government Accountability Office has found significant rules to take an average of four years across agencies.<sup>281</sup> When Congress passes legislation mandating that the FTC promulgate a particular rule, the investigative steps to determine whether that policy is prudent have effectively been outsourced to the legislature. Additionally, many of the twelve FTC regulations issued pursuant to specific acts of Congress are simple “implementing rules” that require little more than a transcription of statutory text into regulation.<sup>282</sup> A discretionary rule based on a general rulemaking power is necessarily more involved, regardless of procedural requirements. Furthermore, numerous of these congressional grants included statutory deadlines by which to promulgate rules.<sup>283</sup> As a matter of agency prioritization, it is hard to imagine the wisdom in delaying a task ordered by the body that controls the FTC’s budget.

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<sup>279</sup> *Id.* at 1981 (emphasis omitted).

<sup>280</sup> *Id.* at 1987–88 & nn.63, 65. Commissioner Pertschuk recounted that the rules completed during this period faced withering opposition from the FTC Chair and Director of the Bureau of Consumer Protection and demands to repeat prior steps of the process—which seem to have added substantially to the length of rulemakings. See MICHAEL PERTSCHUK, FED. TRADE COMM’N, FTC REVIEW (1977–84), at 153–61 (1984).

<sup>281</sup> See GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 19 (2009).

<sup>282</sup> The Contact Lens Rule provides an example of such near-verbatim transcription. *Compare, e.g.*, 15 U.S.C. § 7601(a)(1)–(2), *with* 16 C.F.R. § 315.3(a)(1)–(2) (2021). The Health Breach Notification Rule provides another. *Compare, e.g.*, 42 U.S.C. § 17937(a)–(b), *with* 16 C.F.R. § 318.3(a)–(b) (2021).

<sup>283</sup> See, e.g., 15 U.S.C. § 7607 (setting a 180-day deadline to promulgate the Contact Lens Rule).

Third, the article does not attempt to disentangle the time required by statutorily mandated procedural steps from delays produced by self-imposed agency rules. As just one example, the “Mail or Telephone Order Merchandise Amendment I” proceeding saw more than twelve months pass between two interested parties requesting the opportunity to give post-record oral presentations to the Commission and those presentations taking place—more than one-quarter of the 3.81 year proceeding.<sup>284</sup> This procedural step was required not by statute, but by an agency rule that was revoked in 2021. It is difficult to consider internally set agency rules to be statutory shackles. The piece’s discussion of the seven-year-long Funeral Rule proceeding similarly fails to note that (1) a judicial setback for the Vocational Schools Rule in *Katharine Gibbs* forced the agency to fundamentally rework the similarly structured Funeral Rule,<sup>285</sup> (2) congressional gamesmanship regarding funding for the rule compelled the agency to make further substantive revisions,<sup>286</sup> and (3) Congress imposed additional procedural hoops for the Funeral Rule, in particular.<sup>287</sup> None of those features is a standard part of a section 18 rulemaking.

Fourth, the analysis does not consider the relevance of the agency’s broader move away from regulation during this era. Penalty Offense Authority fell into disuse beginning in the 1980s.<sup>288</sup> Similarly, competition rulemaking under section 6(g) has been unexplored since the 1970s despite operating under APA notice-and-comment procedures.<sup>289</sup> Several specific grants of standard APA rulemaking authority for consumer protection issues have sat unused for as long as a quarter-century.<sup>290</sup> These parallel moves away from regulation cannot be explained by the Magnuson-Moss Act or the 1980 Act. They underscore, instead, that the FTC’s reticence to regulate during the decades studied came irrespective of the applicability of section 18. The imprints of a scarring blowback to energetic rulemaking and an ideological takeover by deregulatory leadership seem necessary to an accurate causal story of the retreat from section 18 rulemaking.

A final argument against engaging in section 18 rulemaking is what might be called “the argument from institutional role.” It comes from those at the other end of the ideological spectrum, who would prefer limited levels of administrative rulemaking by the FTC. As former FTC Chair William Kovacic observed, “no regulatory agency in the United States matches the breadth and economic reach of the Commission’s mandates.”<sup>291</sup> Some worry that the agency lacks the expertise to issue prescriptive rules whose reach

<sup>284</sup> Lubbers, *supra* note 260, at 1990.

<sup>285</sup> See 47 Fed. Reg. 42,260, 42,263 (Sept. 24, 1982).

<sup>286</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 19(b), (c)(1), 94 Stat. 374, 392 (1980).

<sup>287</sup> *Id.* § 19(b), (c)(2)(A).

<sup>288</sup> See Chopra & Levine, *supra* note 34, at 98.

<sup>289</sup> See Chopra & Khan, *supra* note 57.

<sup>290</sup> See 15 U.S.C. § 45a. The FTC first invoked this authority twenty-six years after it was enacted. See Notice of Proposed Rulemaking, 85 Fed. Reg. 43,162, 43,162 (July 16, 2020).

<sup>291</sup> Letter, *supra* note 8, at 2.

spans nearly the entire U.S. economy—or that a single, unelected body with such broad rulemaking authority would not be democratically accountable.

The Republican Commissioners at the agency were singing from this hymnal when they dissented from the recent administrative reforms to section 18 rulemaking. They expressed fears that these reforms presage “a sweeping campaign to replace the free market system with [the Commission’s] own enlightened views of how companies should operate.”<sup>292</sup> These types of prudential and normative concerns are raised about all manner of administrative rulemaking and go beyond the scope of this article.<sup>293</sup> Critically, they are also distinct from the descriptive question of whether section 18 procedures are particularly time-consuming.

#### IV. ADMINISTRATIVE REFORMS FOR EFFICIENT RULEMAKING

As just discussed, the FTC Act does not impose dramatically greater procedural requirements for section 18 rulemaking than are found in APA notice-and-comment procedures. Thus, the common impression that Congress had restrained FTC rulemaking in a straitjacket of onerous procedural requirements is unfounded as a matter of history and of statutory interpretation. Until recently, though, many of the agency’s internally set Rules of Practices imposed procedural demands above those required by the FTC Act itself.

Reflecting a new moment at the FTC, one of the Commission’s first acts under its new Chair, Lina Khan, was to streamline its internal procedures governing section 18 rulemaking. The Commission stripped away decades of rules that imposed red tape with little benefit. But while these reforms will be critical to making future rulemaking more efficient, the Commission should continue to consider additional reforms to ensure that its rulemaking is both timely and robust in judicial review. Certainly, in making any reform, the Commission must be sure to avoid “preclud[ing] disclosure of disputed material facts which was necessary for fair determina-

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<sup>292</sup> Dissenting Statement of Comm’rs Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures 1 (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591702/p210100\\_wilsonphillips\\_joint\\_statement\\_-\\_rules\\_of\\_practice.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf) [<https://perma.cc/G25X-74LK>].

<sup>293</sup> The Roberts Court’s 6–3 conservative majority has moved to constitutionalize similar concerns with expansive conceptions of the non-delegation doctrine and major questions doctrine. There is little principled basis to think either doctrine should pose a significant threat to FTC rulemaking. Tellingly, a prominent scholarly call to strengthen the non-delegation doctrine portrays the FTC’s “unfairness” authority as an impermissible delegation—but seems entirely to overlook the fact that Congress codified a statutory test for unfairness in 1994. See Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1885–86 (2019).

Regarding major questions doctrine, it would take an extraordinary reading of history to believe that Congress “spoke unclearly” when it expressly codified the agency’s ongoing practice of promulgating economy-wide trade regulation rules. Cf. *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

tion . . . of the rulemaking proceeding taken as a whole.”<sup>294</sup> The Commission should nonetheless err on the side of making its valuable tool of consumer protection rulemaking as efficient as possible. The agency would gain nothing by being so risk-averse that it continues to allow section 18 to gather dust.

### A. Recent Amendments to Agency Rules

In its first meeting under Chair Khan, the Commission made well-advised amendments to its Rules of Practice. The changes to the section 18 rulemaking process eliminated several unnecessary constraints that the Commission had imposed upon itself, over and above the requirements of the FTC Act. Selecting more appropriate presiding officers and harmonizing the agency’s internal rules with the statute’s less-imposing demands will lead to substantially streamlined rulemaking proceedings.

#### 1. Reforming the Role of Presiding Officer

The Commission’s most consequential rulemaking reform of July 2021 ended the requirement that the agency’s Chief Administrative Law Judge (“Chief ALJ”) supervise rulemaking proceedings. Prior rules had designated the Chief ALJ as Chief Presiding Officer, outsourced to him the selection of presiding officers for individual proceedings, and implied that those positions should be filled with ALJs.<sup>295</sup>

Presiding officers are essential to an effectively run proceeding. Participants in an informal hearing can make dilatory requests of the presiding officer that are as varied as lawyers are creative, from pushing for discovery to moving to re-open comment periods. The presiding officer’s capacity to drive forward a rulemaking in a self-sufficient fashion is vital because non-public correspondence between the presiding officer and FTC Commissioners and staff regarding issues of fact is limited during the rulemaking.<sup>296</sup>

The earlier practice of naming ALJs as presiding officers created an inappropriate impediment to rulemaking. Given their training, ALJs are likely to apply their discretion in ways that create a more formal and trial-like rulemaking process than the one intended by Congress.<sup>297</sup> The vast ma-

<sup>294</sup> 15 U.S.C. § 57a(e)(3)(B); *see also id.* § 57a(e)(2).

<sup>295</sup> *See* 16 C.F.R. §§ 0.14, 1.13(c)(1) (2021). These rules sharply limited the pool of potential presiding officers—there is only one ALJ at the FTC. *Administrative Law Judges: ALJs by Agency*, U.S. OFF. OF PERS. MGMT. (Mar. 2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/EVY4-2AJJ>].

<sup>296</sup> *See* 15 U.S.C. § 57a(c)(1)(C).

<sup>297</sup> Note that during the agency’s era of active rulemaking, presiding officers were drawn from the Bureau of Consumer Protection staff from 1975–78 and Office of General Counsel from 1978–80, *see* EDWIN S. ROCKEFELLER, *DESK BOOK OF FTC PRACTICE AND PROCEDURE* 143 (3d ed. 1979), then the Office of Presiding Officers after the passage of the 1980 Federal Trade Commission Improvements Act, *see* 45 Fed. Reg. 36,338, 36,341 (May 29, 1980).

majority of ALJs conduct formal APA adjudications in Social Security Administration (“SSA”) benefits hearings,<sup>298</sup> and other agencies usually hire their ALJs from those at SSA.<sup>299</sup> These adjudications “provid[e] the full measure of due process”<sup>300</sup> and are “unusually protective” of non-governmental parties.<sup>301</sup> Section 18 explicitly distinguishes informal FTC rulemaking proceedings from those formal processes.<sup>302</sup> Yet commenters have noted that, in FTC rulemakings, “ALJs seem unable or unwilling to distinguish between adjudicative and legislative fact” and provided cross-examination rights on far too many topics.<sup>303</sup> Most ALJs have little or no experience with rulemaking. Thus, they are ripe targets for financially interested parties seeking to hinder a rulemaking by abusing section 18 procedures. Considering their obstructive effects, it is unsurprising that the rules so empowering ALJs in FTC rulemaking came under President Reagan’s final appointee as FTC Chair.<sup>304</sup>

In a brilliant stroke, the Commission in 2021 re-assigned the Chief Presiding Officer role to the FTC Chair.<sup>305</sup> By statute, the Commission may select anyone it pleases as presiding officer, so long as he or she is responsible to a Chief Presiding Officer who is not responsible to “any other officer or employee of the Commission.”<sup>306</sup> This rule change permits the Chair herself to act as Chief Presiding Officer or to delegate the role to someone who is broadly in support of consumer protection rulemaking.

The rule revisions further empower presiding officers by affording them all powers “useful to” the end of “the orderly conduct of the informal hearing.”<sup>307</sup> This new language expands beyond the prior grant of powers “neces-

<sup>298</sup> See Brief for William A. Araiza et al. as Amici Curiae in Support of Neither Party at 9, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1156622 (“The vast majority of ALJs, 1,655 out of 1,926, work for the Social Security Administration (SSA).”).

<sup>299</sup> See Brief of Association of Administrative Law Judges as Amicus Curiae in Support of Respondent at 19, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1638089 (“[M]ost ALJs start at the Social Security Administration before moving to positions at other agencies.”).

<sup>300</sup> Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 279, 318 (2002), <http://digitalcommons.pepperdine.edu/naalj/vol22/iss2/1> [<https://perma.cc/2ETC-TMK9>] (quoting Letter from Kenneth S. Apfel, SSA Comm’r, to Judge Ronald G. Bernoski, President, Association of Administrative Law Judges (Jan. 9, 2001)).

<sup>301</sup> *Heckler v. Day*, 467 U.S. 104, 106 (1984).

<sup>302</sup> See 15 U.S.C. § 57a(b)(1); see also *Ass’n of Nat’l Advertisers, Inc. v. FTC (Nat’l Advertisers III)*, 627 F.2d 1151, 1161 (D.C. Cir. 1979).

<sup>303</sup> Cooper J. Spinelli, *Far from Fair, Farther from Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking*, 6 LEG. & POL’Y BRIEF 129, 146 n.116 (2014) (citing KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.7 (3d ed. 1994)).

<sup>304</sup> See Caroline E. Meyer, *Daniel Oliver*, WASH. POST (Apr. 27, 1987), <https://www.washingtonpost.com/archive/politics/1987/04/27/daniel-oliver/d53bb117-8327-4de8-bcff-265ad9ee8093/> [<https://perma.cc/7P7B-8VE2>].

<sup>305</sup> Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,543 (July 22, 2021) (codified at 16 C.F.R. § 0.8).

<sup>306</sup> See 15 U.S.C. § 57a(c)(1)(A)–(B).

<sup>307</sup> Revisions to Rules of Practice, 86 Fed. Reg. at 38549.

sary to” such a goal.<sup>308</sup> The Chair should select presiding officers with significant rulemaking experience who will use their authority to create an efficient regulatory proceeding rather than the adversarial atmosphere of a trial. It will also be valuable to choose presiding officers with expertise in the subject matter of the proposed rule, whether they are drawn from the Office of General Counsel’s new rulemaking group, the Bureau of Consumer Protection, or outside the FTC. Presiding officers with relevant experience will be able to weigh the evidence more effectively if the Commission designates any disputed issues of material fact and to ascertain more easily when participants seek to make an excessive number of duplicative presentations or cross-examinations. Prior to the next informal hearing under section 18, the Commission ought also to use its power to “prescribe such rules . . . concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay” by releasing guidelines to ensure that the hearings reflect Congress’s intent to create a workable rulemaking power.<sup>309</sup>

The July 2021 reforms also re-established boundaries around the role of the presiding officer. The presiding officer’s ambit had expanded far beyond that required by the Magnuson–Moss Act or 1980 Act—or the “fact testing” objective those statutes set for informal hearings.<sup>310</sup> Under the revised rules, presiding officers will no longer designate disputed issues of material fact in the first instance or be able to lengthen the informal hearing period unilaterally.<sup>311</sup> Nor will they expend enormous amounts of time on “recommended decision” reports. Such reports will now be cabined to determinations regarding any designated disputed issues of material fact and will have to be issued within sixty days of the end of the informal hearing period.<sup>312</sup> Past presiding officer reports were far more sweeping and could take more than fifteen months to complete after the close of informal hearings.<sup>313</sup>

## 2. *Harmonizing Agency Procedures with Statutory Requirements*

Until recently, the FTC’s internal Rules of Practice had imposed numerous procedural burdens on rulemaking beyond what is required by statute. The Commission’s July 2021 reforms included several changes to

<sup>308</sup> 16 C.F.R. § 1.13(c)(2)(i) (2020).

<sup>309</sup> 15 U.S.C. § 57a(c)(3).

<sup>310</sup> BARRY B. BOYER, ADMIN. CONF. OF THE U.S., EXECUTIVE SUMMARY OF BARRY B. BOYER REPORT: TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION 46 (1979), <https://www.acus.gov/sites/default/files/documents/1979-01%20Hybrid%20Rulemaking%20Procedures%20of%20the%20Federal%20Trade%20Commission.pdf> [<https://perma.cc/498S-NN6M>].

<sup>311</sup> Revisions to Rules of Practice, 86 Fed. Reg. at 38,549.

<sup>312</sup> *Id.*

<sup>313</sup> See 44 Fed. Reg. 53,538, 53,538 (Sept. 14, 1979); ACUS 1979 RECOMMENDATION, *supra* note 50, at 7.

harmonize the FTC's administrative procedures with the statute's less demanding requirements.<sup>314</sup>

In the early stages of a section 18 rulemaking, these reforms removed the agency-imposed requirement that an NPRM state the reasons for a rule "with particularity"—which could have been interpreted to demand greater evidence-gathering before issuance of the NPRM.<sup>315</sup> During informal hearings, the new rules toughen the standard for when a participant may dissent from the selection of a group representative for cross-examination and can exercise cross-examination rights individually.<sup>316</sup> They also eliminated references to "examination," which may have erroneously implied that participants should operate with a lawyer in a format resembling direct examination during trial.<sup>317</sup> Moreover, the reforms eliminated procedures for the presiding officer to exercise a subpoena-like power, a move away from the inappropriate litigation-style motion practice that caused heated conflict during early proceedings.<sup>318</sup>

The Commission also removed extra-statutory periods for public comment and set limits on stages of proceedings that had proven lengthy in the past. It discontinued the stand-alone comment period for participants to propose disputed issues of material fact for designation.<sup>319</sup> Instead, the Commission will decide which, if any, issues to designate on the basis of input gathered during the ANPRM and NPRM comment periods.<sup>320</sup> The post-record comment period was cut, as well. This appears to be a calculated risk given the potential cost of a court remanding a finalized rule back to the Commission for additional presentations.<sup>321</sup> The reformed rules also no longer require publication of a formal staff report before the Commission may finalize a regulation,<sup>322</sup> although the statute's *ex parte* provisions will still require any staff input to be placed on the rulemaking record.<sup>323</sup>

Finally, the amendments imposed strict limits on several forms of appeals to the Commission. Participants will have only ten days after an infor-

<sup>314</sup> See generally Revisions to Rules of Practice, 86 Fed. Reg. at 38,542. Numerous of these reforms were proposed in previous iterations of this article. See Kurt Walters, *FTC Rulemaking: Existing Authorities & Recommendations* 26–28 (July 31, 2019), <https://ssrn.com/abstract=3794346>.

<sup>315</sup> Compare Revisions to Rules of Practice, 86 Fed. Reg. at 38,548, with 16 C.F.R. § 1.11(a)(3) (2020).

<sup>316</sup> See Revisions to Rules of Practice, 86 Fed. Reg. at 38,548.

<sup>317</sup> See *id.*; see also William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017), <https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/> [<https://perma.cc/9KMN-S85U>] (noting attorneys' ability to use direct examination to "tie up" a rulemaking proceeding).

<sup>318</sup> See Lionel Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 709 (1976); BOYER, *supra* note 310, at 65 (explaining that "discovery requests were the largest and most important category" of motions witnesses attempted to make).

<sup>319</sup> Cf. 16 C.F.R. § 1.13(b), (c)(3)(ii) (2020).

<sup>320</sup> See Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,544 (July 22, 2021) (codified at 16 C.F.R. pt. 1).

<sup>321</sup> See 15 U.S.C. § 57a(e)(2).

<sup>322</sup> Revisions to Rules of Practice, 86 Fed. Reg. at 38,544.

<sup>323</sup> 15 U.S.C. § 57a(j).

mal hearing to petition the Commission to review a presiding officer's decision and the Commission will have thirty days to resolve any such appeals that it chooses to accept.<sup>324</sup> The streamlined rules omit a provision that strongly favored granting leave for participants to make another set of oral presentations directly to the Commission after the completion of all statutorily required steps,<sup>325</sup> a process that added significantly to the length of some past rulemakings.<sup>326</sup>

### B. Recommendations for Further Reforms

The Commission should treat its mid-2021 reforms to the section 18 rulemaking process as a foundation for further improvements. In several respects, the FTC of 2022 is better positioned to make effective use of section 18 than the FTC of 1975 or 1980. Bodies such as ACUS and the American Bar Association synthesized a series of best-practices recommendations for FTC rulemaking around 1980, following the trial and error that inevitably accompanies a new procedural framework.<sup>327</sup> By that point, though, the agency had ceased beginning new section 18 proceedings and its incoming leadership had more interest in halting ongoing rulemakings than adopting these recommendations as agency practice. Today's FTC can put to good use the insights gained from real-world experience during the agency's era of frequent rulemaking.

The Commission can also leverage judicial developments that came after the decline in FTC rulemaking to prevent informal hearings from becoming a roadblock. Agency interpretations of the procedural requirements imposed by the FTC Act are entitled to *Chevron* deference, a doctrine announced only in 1984.<sup>328</sup> By that point, the FTC had essentially ceased new rulemaking activity. Articulating agency interpretations of ambiguous aspects of section 18 can strengthen the agency's hand in later litigation.

#### 1. Restoring the Cross-Examination Compromise

As recounted above, informal oral hearings with cross-examination were section 18's significant departure from the baseline of APA notice-and-comment procedures.<sup>329</sup> The drafters of the Magnuson-Moss Act built in several features intended to ensure that these informal hearings would not "hamstring" rulemaking and to "assure that rulemaking conducted by the Commission will be a far cry from the formal trial-type procedures under sections 554 and 556 of the Administrative Procedure Act."<sup>330</sup> The legisla-

<sup>324</sup> Revisions to Rules of Practice, 86 Fed. Reg. at 38,550.

<sup>325</sup> Compare *id.*, with 16 C.F.R. § 1.13(i) (2020).

<sup>326</sup> See Lubbers, *supra* note 260, at 1990 and text accompanying *supra* note 284.

<sup>327</sup> See Dixon, *supra* note 89; 1980 ABA Report, *supra* note 178; BOYER, *supra* note 310.

<sup>328</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>329</sup> See *supra* Part III.A.3.

<sup>330</sup> 120 Cong. Rec. 40,711 (1974) (statement of Sen. Moss).

tion's architect thus saw the provision calling for informal hearings as only a "modest compromise" from a proposal for APA notice-and-comment rulemaking.<sup>331</sup> Yet, presiding officers and outside observers quickly found that it was difficult during rapid-fire analysis of motions and pleadings to insist on the distinction between the issues of "specific fact" that were meant to be subject to cross-examination and the issues of policy or "legislative fact" that were not.<sup>332</sup>

The Commission can apply past experience to better effectuate congressional intent and prevent informal hearings from impeding rulemaking. It can do so with a two-tiered approach. On the front end of the process, the agency should insist on the narrow meaning of "specific fact" that Congress intended—and designate "disputed issues of material fact" far more sparingly than it did in the 1970s. Later, during the informal hearing stage, presiding officers should impose a strong presumption for allowing rebuttal submissions rather than cross-examination. But when participants do conduct cross-examination, presiding officers should learn from the "freedom for time" tradeoff developed in early section 18 proceedings. They should focus on the overall length of the proceeding rather than tightly policing the content of particular presentations or cross-examinations.

First, the Commission should clearly define criteria establishing when the agency is to designate issues for cross-examination. The FTC's recently reformed Rules of Practice carried over a long-standing provision that stated that an issue is appropriate for cross-examination when it "is an issue of specific fact in contrast to legislative fact."<sup>333</sup> Leaving these terms undefined is a missed opportunity to earn *Chevron* deference for the agency's interpretation of critical language in the FTC Act: "disputed issues of material fact it is necessary to resolve," which defines the scope of cross-examination.<sup>334</sup>

The Magnuson-Moss Act's sponsors portrayed that phrase as a key to orderly proceedings. Congressional skeptics, in turn, complained it "severely limited" cross-examination.<sup>335</sup> Tracing the provenance of this provision illustrates clearly that Congress intended for cross-examination only to "arise occasionally."<sup>336</sup> The Commission has considerable flexibility to come to a "reasonable interpretation" of this admittedly ambiguous phrase that streamlines the rulemaking process.<sup>337</sup>

The Magnuson-Moss Act's imposition of limited cross-examination relied upon a distinction between "specific fact" and "legislative fact" that was introduced in a 1972 ACUS recommendation:

<sup>331</sup> MICHAEL PERTSCHUK, WHEN THE SENATE WORKED FOR US: THE INVISIBLE ROLE OF STAFFERS IN COUNTERING CORPORATE LOBBIES 151 (2017).

<sup>332</sup> See Kestenbaum, *supra* note 318, at 709; see also Dixon, *supra* note 89, at 399.

<sup>333</sup> Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,548 (July 22, 2021) (codified at 16 C.F.R. § 1.12(b)(1)).

<sup>334</sup> 15 U.S.C. § 57a(c)(2)(B).

<sup>335</sup> 120 Cong. Rec. 40,724 (1974) (statement of Sen. Taft).

<sup>336</sup> Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers III*), 627 F.2d 1151, 1164 (D.C. Cir. 1979).

<sup>337</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

[W]hen it has special reason to do so, [Congress] may appropriately require opportunity for . . . trial-type hearings on issues of specific fact. . . . Congress should never require trial-type procedures for resolving questions of policy or broad or general fact. Ordinarily, it should not require such procedures for making rules of general applicability.<sup>338</sup>

ACUS based this distinction on Professor Kenneth Culp Davis's foundational taxonomy of "adjudicative facts" and "legislative facts."<sup>339</sup>

Then-ACUS Chairman Antonin Scalia intervened to ensure that Congress hewed closely to this framework. Scalia warned that the language in an early version of Magnuson-Moss, which provided for cross-examination "as may be required for a full and true disclosure of all disputed issues of material fact," was unworkable—it would have led to routine use of "a procedural technique designed for the resolution of particularized factual disputes" in crafting generally applicable rules.<sup>340</sup> The conference committee then revised that passage, and the final language in the Act requires cross-examination only "if the Commission determines that there are disputed issues of material fact it is necessary to resolve."<sup>341</sup> The Conference Report emphasized that this change embraced the "specific fact" distinction: "[t]he only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact."<sup>342</sup> Finally, the Office of Management and Budget asked for ACUS's interpretation of the Act's language before President Ford would sign it. ACUS's Executive Secretary responded, "[s]ince consideration of many, if not most proposed rules of general applicability involve exclusively questions of legislative fact, the Commission would often be able to dispense with cross-examination entirely."<sup>343</sup>

The Commission should formally embrace the understanding that cross-examination is appropriate for FTC rulemaking only in limited circumstances. One, the Commission should more clearly emphasize that "disputed issues of material fact it is necessary to resolve" (*i.e.*, issues of "specific fact") are distinct from issues of policy, issues of general fact, "distractive technical issues," or issues that blend categories.<sup>344</sup> Two, it should specify that such designated disputed issues should be capable of proof or disproof with evidence, precluding matters of prediction or issues whose definitive

<sup>338</sup> 38 Fed. Reg. 19,782, 19,792 (July 23, 1973).

<sup>339</sup> Cf. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365–66 (1942); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932 (1980) (outlining a continuum from circumstances in which added procedure is appropriate in rulemaking to those in which it is not).

<sup>340</sup> *Nat'l Advertisers III*, 627 F.2d at 1164 n.29.

<sup>341</sup> 15 U.S.C. § 57a(c)(2)(B).

<sup>342</sup> H.R. REP. NO. 93-1606, at 33 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7755, 7765.

<sup>343</sup> *Nat'l Advertisers III*, 627 F.2d at 1164 n.29.

<sup>344</sup> See PERTSCHUK, *supra* note 331, at 152; 38 Fed. Reg. 19,782, 19,792 (July 23, 1973).

“resolution” is unrealistic.<sup>345</sup> Three, it should state that an issue is appropriate for cross-examination only if definitive resolution of that particular issue is “essential to the formulation of the rule.”<sup>346</sup> Four, it can clarify that issues that pertain to a large number of firms are more likely to be issues of general fact—and thus inappropriate for cross-examination—than those whose resolution requires information known only to a small number of entities. Last, the Commission should express its view that these conditions will be met only rarely, reflecting Congress’s original intent.<sup>347</sup> Most rulemaking proceedings would thus have few or no issues designated for cross-examination. These guidelines should prevent situations such as the Mobile Homes rulemaking, which had nineteen designated issues, including policy-laden questions of the “adequacy” or “reasonableness” of the industry’s actions and a request for predictions of “the probable economic effect” of the rule—inquiries incapable of definitive proof.<sup>348</sup>

Second, the agency can streamline the informal hearings by applying a strong presumption in favor of rebuttal submissions over cross-examination. A Commission decision regarding cross-examination or rebuttal submissions is a ground for judicial reversal only if it “precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.”<sup>349</sup> This standard will rarely be met if a participant is allowed to make a rebuttal submission. It is difficult to portray credibility attacks and impeachment of opposing presenters, the focus of cross-examination in past FTC rulemakings, as themselves “disclosure of disputed material facts” rather than attempts to undermine a prior disclosure. Only when a cross-examination would induce the *cross-examinee* to make a new “disclosure of disputed material fact” would the agency need to allow cross-examination rather than a rebuttal submission.

Third, when cross-examination is permitted, presiding officers should embrace the “freedom for time” tradeoff innovated in the 1970s.<sup>350</sup> This was the practice by presiding officers of imposing strict time limits on cross-examination but not attempting to police tightly whether questioning crossed the line between designated issues and other subject matter. Presiding officers found this approach manageable while not adding to the length of proceedings. In fact, reducing some of the attempts at procedural appeals resulted in hearings “taking very little longer than previous hearings [before

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<sup>345</sup> See ADMIN. CONF. OF THE U.S., RECOMMENDATION 80-1: TRADE REGULATION RULEMAKING UNDER THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT 7 (1980) (separate statement of Kenneth Culp Davis), <https://www.acus.gov/sites/default/files/documents/80-1-ss.pdf> [<https://perma.cc/YN9R-CSP9>].

<sup>346</sup> See *id.*

<sup>347</sup> See *Nat'l Advertisers III*, 627 F.2d at 1164 n.29.

<sup>348</sup> Mobile Home Sales and Service, 42 Fed. Reg. 26,398, 26,399–400 (proposed May 23, 1977) (codified at 16 C.F.R. pt. 441).

<sup>349</sup> 15 U.S.C. § 57a(e)(3)(B).

<sup>350</sup> Dixon, *supra* note 89, at 400, 427 (“Once the right sort of atmosphere is created, hearings can then proceed free of any fear of cross-examination, for with the unused residual powers lurking in the background, the technique can be used, subject to the one simple limitation of time.”).

passage of the Magnuson-Moss Act] without cross-examination.”<sup>351</sup> When the Commission designates only a few issues and clearly communicates reasonable time limits, it will be up to participants to focus their cross-examination on designated issues. If participants engage in questioning on issues of policy or general fact, this would belie later arguments that the agency’s time limit precluded disclosure of disputed material facts. The experience of the 1970s also shows that the agency can affect the tenor of proceedings for the better by carefully considering the physical space in which informal oral hearings are held. A room with a panel-style layout may foster a less adversarial atmosphere than one modeled on a courtroom, with a single adjudicator raised above participants who are seated below.<sup>352</sup>

## 2. *Additional Steps*

The FTC should also embrace *Chevron* with respect to the meaning of “prevalence.” Although the legislative history is clear that both provisions relating to prevalence in section 18 are intended to be non-justiciable,<sup>353</sup> some courts have overlooked this fact and examined the issue closely.<sup>354</sup> The agency could limit uncertainty by releasing an interpretive rule with a non-exhaustive list of factors and types of data that support a belief that a certain practice is “prevalent.”

Because section 18 does contain some added procedural requirements, agency leadership should start the clock for these proceedings as early as possible. One key way to do so is to err on the side of publishing an ANPRM quickly rather than waiting for bulletproof evidence that a challenged act or practice is “prevalent.” The agency must have reason to believe a practice is prevalent only by the time it publishes an NPRM. The ANPRM comment period should be an important source of data with which to determine the prevalence of particular types of misconduct.

Finally, Commissioners interested in effective rulemaking should recognize that dedicating resources to rulemaking will create a virtuous feedback loop. Placing a priority on issuing well-crafted rules will build experience with section 18 among agency personnel. This internally developed institutional knowledge, in addition to staffing the new Office of Rulemaking with veterans of rulemaking from other federal agencies, will make future rulemakings even more timely and efficient.

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<sup>351</sup> *Id.* at 400.

<sup>352</sup> See 1980 ABA Report, *supra* note 178, at 362 (“The layout of the hearing room gives the unexperienced witness the impression that the presiding officer has a role similar to that of a judge in a formal adjudication.”).

<sup>353</sup> See *supra* Parts III.A.1, III.A.4.

<sup>354</sup> See *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 855 (9th Cir. 2017); *Pa. Funeral Dirs. Ass’n v. FTC*, 41 F.3d 81, 86–89 (3d Cir. 1994); see also *Am. Optometric Ass’n v. FTC*, 626 F.2d 896, 906 (D.C. Cir. 1980) (considering the statement of basis and purpose, despite legislative history indicating its contents are not subject to judicial review).

## V. OPPORTUNITIES FOR REGULATION

Reviving consumer protection rulemaking would equip the FTC to better address the disconcertingly broad range of business misconduct harming consumers. The public is ill-served if the Commission attempts to fight economic wrongdoing with only a subset of its authorities—employing the full range of the FTC’s powers will allow the Commission to select the right instrument for each job.<sup>355</sup>

A spring 2021 FTC workshop on digital “dark patterns” suggests one topic ripe for rulemaking.<sup>356</sup> Dark patterns are manipulative design techniques that induce consumers to part with more money or more personal data than they would if presented with an intuitive and fair user-experience design. One common example is a service that makes it very easy for a user to confirm a default option to share her data publicly but buries options to limit data sharing or close her account beneath layers of confusing and difficult-to-navigate menus.<sup>357</sup> A rule restricting the use of dark patterns would emulate the Cooling-Off Rule promulgated in 1972, which strengthened consumers’ hands against the high-pressure sales tactics of the day used by door-to-door salespeople.<sup>358</sup> That regulation provides consumers with up to three days to cancel a transaction made at their door—after the potentially aggressive salesperson has left their property.<sup>359</sup> Other relatively thorough proposals of substantive topics appropriate for rulemaking include cyber-security and algorithmic transparency and fairness.<sup>360</sup>

Each of the types of misconduct identified by former Commissioner Chopra and Samuel Levine as suitable for Penalty Offense Authority could also be addressed through rulemaking. Rulemaking on these subjects would offer advantages of stronger equitable relief<sup>361</sup> and could remove legal de-

<sup>355</sup> Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm’n, Remarks at the Future of Privacy Forum: Protecting Consumer Privacy in a Time of Crisis 3–4 (Feb. 10, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1587283/fpf\\_opening\\_remarks\\_210\\_.pdf](https://www.ftc.gov/system/files/documents/public_statements/1587283/fpf_opening_remarks_210_.pdf) [<https://perma.cc/VA4H-D6FG>].

<sup>356</sup> Press Release, Fed. Trade Comm’n, FTC to Hold Virtual Workshop Exploring Digital “Dark Patterns” (Feb. 24, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-hold-virtual-workshop-exploring-digital-dark-patterns> [<https://perma.cc/WSQ4-NN62>]; see also Justin (Gus) Hurwitz, *Designing A Pattern, Darkly*, 22 N.C. J.L. & TECH. 57, 97 (2020) (suggesting an FTC rulemaking on this topic).

<sup>357</sup> See Thomas Germain, *How to Spot Manipulative ‘Dark Patterns’ Online*, CONSUMER REPS. (Jan. 30, 2019), <https://www.consumerreports.org/privacy/how-to-spot-manipulative-dark-patterns-online-a7910348794/> [<https://perma.cc/M53E-36DL>].

<sup>358</sup> Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,933, 22,934 (Oct. 26, 1972).

<sup>359</sup> See 16 C.F.R. § 429.1 (2021).

<sup>360</sup> See Ian M. Davis, Note, *Resurrecting Magnuson-Moss Rulemaking: The FTC at a Data Security Crossroads*, 69 EMORY L.J. 781, 813 (2020); Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, Remarks at UCLA School of Law: Algorithms and Economic Justice 15–16 (Jan. 24, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1564883/remarks\\_of\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_on\\_algorithmic\\_and\\_economic\\_justice\\_01-24-2020.pdf](https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf) [<https://perma.cc/W5YD-S552>].

<sup>361</sup> Compare 15 U.S.C. § 57b(b), with *id.* § 53(b).

fenses of inadequate notice by upstart firms that have not been noticed with copies of relevant FTC cease-and-desist orders.<sup>362</sup> Penalty Offense Authority and section 18 rulemaking might be viewed as complementary tools on these topics, which include deceptive for-profit college recruitment, false earning claims in recruiting workers, fake-review fraud and other online disinformation, and illegally targeted advertising using data protected by federal law.<sup>363</sup> Early indications suggest that the Bureau of Consumer Protection is moving toward this multi-pronged approach, laying the groundwork to use both Penalty Offense Authority and section 18 rulemaking to target specific categories of wrongdoing.<sup>364</sup>

Each potential rulemaking can be classified into one of two broad categories, based on the extent of prior agency enforcement. The first is the “restatement rulemaking” suggested by former Commissioner Chopra.<sup>365</sup> In such a case, there are sufficient past FTC cease-and-desist orders, settlement agreements, or judicial precedents to synthesize into a set of clear proscriptions.<sup>366</sup> The rulemaking process then effectively operates as a complement to case-by-case adjudication, unlocking greater remedial power for the Commission. The FTC has issued two ANPRMs in recent months that signal it intends to begin its return to section 18 rulemaking by crafting rules in this archetype. The Commission is gathering and reviewing public comments on potential rules to restrict government and business impersonation fraud and to bar false future-earnings claims; each practice is the subject of an extensive

<sup>362</sup> Cf. Statement of Comm’r Rohit Chopra Joined by Comm’r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 3 (Nov. 6, 2020), [https://www.ftc.gov/system/files/documents/cases/final\\_rchopra\\_sunday\\_riley\\_statement\\_dated\\_11.6.pdf](https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf) [<https://perma.cc/U3HY-RVGJ>].

<sup>363</sup> See Chopra & Levine, *supra* note 34, at 104–21.

<sup>364</sup> Two of the first three Notices of Penalty Offenses that the Commission distributed in October 2021 relate to false claims about future earnings or career prospects by for-profit colleges and misleading claims of potential earnings by multi-level marketing firms or gig work companies. See Press Release, Fed. Trade Comm’n, FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties>; Press Release, Fed. Trade Comm’n, FTC Targets False Claims by For-Profit Colleges (Oct. 6, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-targets-false-claims-profit-colleges>.

A few months later, the Commission released its second section 18 ANPRM under Chair Khan, which signaled interest in promulgating a rule barring false future-earnings claims. See Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,951 (Mar. 11, 2022). That notice explicitly noted the complementary nature of Penalty Offense Authority and section 18 rulemaking. See *id.* at 13,952 (“While the Commission recently issued a Notice of Penalty Offenses concerning earnings claims, which will permit the Commission to seek civil penalties for misleading earnings claims in some cases, this authority does not provide a basis for the Commission to recover funds to return to injured consumers.”).

<sup>365</sup> See Statement of Comm’r Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers 2 (Oct. 19, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581862/p144400choprastatementolderamericansrpt.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581862/p144400choprastatementolderamericansrpt.pdf) [<https://perma.cc/6PJG-XLT6>].

<sup>366</sup> The recently issued ANPRM regarding Deceptive or Unfair Earnings Claims provides an illustrative example. See 87 Fed. Reg. at 13,951–52 & nn.3–15 (collecting precedents and synthesizing their core principles).

body of past agency actions.<sup>367</sup> Because there is a smaller amount of novel substantive ground to cover in such a proceeding, a restatement rulemaking is a prudent option for a first new section 18 rulemaking. The agency will be able to fine-tune its use of the recently amended FTC Rules of Practice and rebuild institutional experience with section 18. Meanwhile, work on more ambitious rules can begin.

The second category is proactive rulemaking, comparable to the types of rules promulgated by most agencies. In areas in which enforcement activity has been held back by evidentiary challenges or the difficulties of providing adequate notice before beginning enforcement, there may not be much precedent to restate. Moving expeditiously to a section 18 proceeding may prove more efficient in many instances than crafting informal guidance and waiting years for enforcement efforts to generate a critical mass of precedents before initiating a rulemaking. Furthermore, section 18 empowers the agency not only to specify acts or practices that violate section 5's UDAP prohibition, but additionally to impose "requirements prescribed *for the purpose of preventing* such acts or practices."<sup>368</sup> Under the FTC Act, a violation of a rule's preventive requirements is itself an unfair or deceptive act or practice.<sup>369</sup> These provisions are explicit authorization by Congress for FTC rules to reach conduct that the agency could not proscribe solely through case-by-case adjudications under its section 5 authority. It certainly may be wise to avoid rulemaking regarding topics with which the agency has no experience whatsoever. Still, the same tools that agency staff use when creating industry guides or setting enforcement strategy—such as public workshops and section 6(b) industry studies<sup>370</sup>—can inform rulemaking as well. Among the wide range of candidates for rulemaking, a discussion of one that typifies each of these categories follows.

### A. Data Privacy

An area that calls out for a section 18 rulemaking is data privacy. It is a rare issue on which a bipartisan majority of Commissioners has agreed that a rulemaking may be warranted.<sup>371</sup> Action could be imminent—the Commission recently submitted a notice to OIRA indicating that it is “considering initiating a rulemaking under section 18 of the FTC Act to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination.”<sup>372</sup> The FTC has become the

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<sup>367</sup> See Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72,901, 72,903 & nn.25–27 (Dec. 23, 2021); 87 Fed. Reg. at 13,951–52 & nn.3–15.

<sup>368</sup> 15 U.S.C. § 57a(a)(1)(B) (emphasis added).

<sup>369</sup> *Id.* § 57a(d)(3).

<sup>370</sup> See *id.* § 46(b).

<sup>371</sup> Swift, *supra* note 262.

<sup>372</sup> Becky Burr, Walter Anderson & Landyn Rookard, *What To Expect From FTC Unfair, Deceptive Acts Rule Plans*, LAW360 (Feb. 17, 2022, 5:24 PM), <https://www.law360.com/arti->

country's "de facto Data Protection Authority"<sup>373</sup> by enforcing the UDAP prohibition that fills the gaps in the United States' fragmented, sectoral approach to privacy and holding implementing authority over several specific privacy laws.<sup>374</sup> Based on its experience as the leading American data privacy enforcer and the breadth of its legal authority, the FTC is the agency best-positioned to establish a national approach to data privacy.<sup>375</sup>

The FTC's adjudications have formed what scholars have persuasively labeled a "common law" of privacy.<sup>376</sup> The Commission's standards go far beyond enforcing privacy promises; it also challenges data collection with inadequate notice or through pretextual means, retroactive alteration of the terms governing data use, and meager data security measures.<sup>377</sup> Unlike traditional common law, though, the FTC's variant generally does not involve binding judicial precedent: "Respondents in FTC proceedings settle almost all matters. Thus, FTC online privacy law is largely a body of complaints and consent decrees."<sup>378</sup> Through incremental, case-by-case evolution, the standards applied by the Commission "have become so specific they resemble rules."<sup>379</sup>

But rules they are not. For that reason, the agency acts from a substantially weaker position in attempting to secure relief for the public. Dissenting Commissioners criticized FTC settlements with Zoom<sup>380</sup> and Facebook<sup>381</sup> as inadequate even before *AMG Capital* eliminated the leverage provided by the prospect of section 13(b) equitable remedies.<sup>382</sup> Furthermore, the agency recently received a bracing reminder that its common law-style body of settlements and complaints does not have binding effect when, in a rare privacy matter that failed to settle, a federal appellate court held one of the FTC's standard cease-and-desist orders to be unenforceable.<sup>383</sup>

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cles/1465949/what-to-expect-from-ftc-unfair-deceptive-acts-rule-plans [https://perma.cc/TYG6-F5TC].

<sup>373</sup> Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 584 (2014).

<sup>374</sup> See Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2252, 2269 (2015).

<sup>375</sup> *Id.* at 2271 ("[T]he FTC is the only agency currently capable of responding to a number of vexing privacy issues.").

<sup>376</sup> Solove & Hartzog, *supra* note 373, at 584.

<sup>377</sup> See *id.* at 628–43.

<sup>378</sup> HOOFNAGLE, *supra* note 135, at 159.

<sup>379</sup> Solove & Hartzog, *supra* note 373, at 586.

<sup>380</sup> Dissenting Statement of Comm'r Rohit Chopra Regarding Zoom Video Communications, Inc. 6 (Nov. 6, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1536918/final\\_commissioner\\_chopra\\_dissenting\\_statement\\_on\\_zoom.pdf](https://www.ftc.gov/system/files/documents/public_statements/1536918/final_commissioner_chopra_dissenting_statement_on_zoom.pdf) [https://perma.cc/9CUJ-URWQ].

<sup>381</sup> Dissenting Statement of Comm'r Rebecca Kelly Slaughter in the Matter of FTC vs. Facebook 5–6 (July 24, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1536918/182\\_3109\\_slaughter\\_statement\\_on\\_facebook\\_7-24-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf) [https://perma.cc/TQT3-RV5F].

<sup>382</sup> See *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021).

<sup>383</sup> *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1237 (11th Cir. 2018). *But see* *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 247, 256 (3d Cir. 2015) (affirming the FTC's authority to police data security lapses and holding that the firm had adequate notice on the basis of cease-and-desist orders issued to others).

The FTC also faces challenges due to the nature of its deception and unfairness authorities. The great majority of the agency's past privacy actions have been premised on a deception theory, which necessarily involves an interaction between the harmed individual and the offending party. A required element of deception is "a representation, omission or practice that is likely to mislead [a] consumer."<sup>384</sup> Many privacy harms are only accessible through an unfairness theory. A large proportion of actors in the data ecosystem, such as data brokers, have no direct interaction with individuals whose data they handle. They are therefore unlikely to mislead consumers, as is necessary for a deception theory. Another hurdle is that the FTC's unfairness authority restricts conduct only if it causes or is likely to cause substantial harm to consumers that is not outweighed by benefits to consumers or competition.<sup>385</sup> Privacy harms are notoriously confounding for courts<sup>386</sup> and pose challenges for this test. First, "the injury may appear small when viewed in isolation," even if the aggregate harm is significant "when done by hundreds or thousands of companies."<sup>387</sup> Second, "privacy harms often involve increased risk of future harm," a concept "the law struggles mightily to grapple with."<sup>388</sup> Both features of privacy harms may make it more difficult to establish a substantial injury in an adjudication against a single company than in an industry-wide rulemaking that takes a broader view and builds a more robust record. Perhaps for this reason, a recent analysis found that the Commission brought enforcement actions on a standalone unfairness theory only four times over ten years, compared to sixty-one actions premised solely on its deception authority.<sup>389</sup>

A solution to both the remedial and litigation challenges is to issue a new trade regulation rule governing data privacy. A starting point for such a rule is former Commissioner Chopra's concept of a restatement rulemaking. As Chopra noted, the Commission has entered into "scores of settlements that address deceptive practices regarding the collection, use, and sharing of personal data," which mark out conduct that is indisputably illegal.<sup>390</sup> Synthesizing the Commission's privacy pseudo-precedents into a binding sec-

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<sup>384</sup> Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com. 1 (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/X3RF-V6US>].

<sup>385</sup> See 15 U.S.C. § 45(n).

<sup>386</sup> See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. (forthcoming 2022) (manuscript at 2).

<sup>387</sup> *Id.* at 3.

<sup>388</sup> *Id.* at 19.

<sup>389</sup> See GOV'T ACCOUNTABILITY OFFICE, GAO-19-52, INTERNET PRIVACY: ADDITIONAL FEDERAL AUTHORITY COULD ENHANCE CONSUMER PROTECTION AND PROVIDE FLEXIBILITY 43-50 (2019).

<sup>390</sup> See Statement of Comm'r Rohit Chopra in the Matter of Everalbum and Paravision 2 (Jan. 8, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1585858/updated\\_final\\_chopra\\_statement\\_on\\_everalbum\\_for\\_circulation.pdf](https://www.ftc.gov/system/files/documents/public_statements/1585858/updated_final_chopra_statement_on_everalbum_for_circulation.pdf) [<https://perma.cc/Q6K3-JQM8>].

tion 18 rule would open the door to civil penalties and enhanced equitable remedies.

The FTC should also go further. Section 18 rulemaking presents an opportunity to extend beyond the notice-and-consent privacy regime, which has been roundly criticized as inadequate to respond to contemporary privacy harms.<sup>391</sup> Under the proceduralist notice-and-comment model, nearly any use of data is permissible so long as an information collector discloses the ways it plans to use an individual's information (often in an unreadably long or dense "notice") and offers the chance for the individual to decline those terms (frequently an illusory "choice," due to the ubiquity of take-it-or-leave-it policies imposed by critical services).<sup>392</sup> Rulemaking can be an effective means of moving toward substantive limits on the collection and use of data.<sup>393</sup>

Policymakers and advocates have proposed a bevy of approaches that a new data privacy rule could take. Chief among them is "data minimization." Such a rule could limit data collection, use, and retention to that which is reasonably necessary for the core functionality of an application or service.<sup>394</sup> In a variation to this approach, the Commission could deem the use of an individual's data beyond that person's reasonable expectations to be an unfair act or practice.<sup>395</sup> A rule provision of this kind would be an analogue to the purpose limitation found in Europe's General Data Protection Regulation ("GDPR").<sup>396</sup>

An alternative model for a rule would restrict secondary uses of a more narrowly defined category of data. Representatives Katie Porter and Jamie

<sup>391</sup> See, e.g., John A. Rothchild, *Against Notice and Choice: The Manifest Failure of the Proceduralist Paradigm to Protect Privacy Online (or Anywhere Else)*, 66 CLEV. ST. L. REV. 559, 608 (2018).

<sup>392</sup> See *id.* at 561–62.

<sup>393</sup> See Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597024/state-ment\\_of\\_chair\\_lina\\_m\\_khan\\_regarding\\_the\\_report\\_to\\_congress\\_on\\_privacy\\_and\\_security\\_-\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597024/state-ment_of_chair_lina_m_khan_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf).

<sup>394</sup> See CONSUMER REPS. & ELEC. PRIVACY INFO. CTR., HOW THE FTC CAN MANDATE DATA MINIMIZATION THROUGH A SECTION 5 UNFAIRNESS RULEMAKING 16 (2022), [https://advocacy.consumerreports.org/wp-content/uploads/2022/01/CR\\_Epic\\_FTCDDataMinimization\\_012522\\_VF\\_.pdf](https://advocacy.consumerreports.org/wp-content/uploads/2022/01/CR_Epic_FTCDDataMinimization_012522_VF_.pdf); Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Keynote Address to the National Advertising Division Annual Conference: Disputing the Dogmas of Surveillance Advertising (Oct. 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597050/commis-sioner\\_slaughter\\_national\\_advertising\\_division\\_10-1-2021\\_keynote\\_address.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597050/commis-sioner_slaughter_national_advertising_division_10-1-2021_keynote_address.pdf).

<sup>395</sup> Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at the Cybersecurity and Data Privacy Conference: FTC Data Privacy Enforcement: A Time of Change 5–6 (Oct. 16, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581786/slaughter\\_-\\_remarks\\_on\\_ftc\\_data\\_privacy\\_enforcement\\_-\\_a\\_time\\_of\\_change.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf) [<https://perma.cc/FZ92-LUZ2>]; see also HOOFNAGLE, *supra* note 135, at 345–46; Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. 439, 448 (2020).

<sup>396</sup> See Principle (b): Purpose Limitation, INFO. COMM'R'S OFF., <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/purpose-limitation/> [<https://perma.cc/P6WW-V4AK>].

Raskin led more than forty members of Congress to urge the FTC to issue a section 18 rule limiting the use of geolocation data. Their proposed rule would define as an unfair practice “the sale, transfer, use, or purchase of precise location data collected by an app for purposes other than the essential function of the app” and establish as a deceptive practice “app developers’ mislabeling of users’ location data as ‘anonymous,’” because of the ease with which data can be de-anonymized.<sup>397</sup> Two civil society groups have floated the possibility of a similar rule restricting the processing of facial recognition or other biometric data and the practice of “cross-device tracking” for secondary purposes.<sup>398</sup>

These proposals merely scratch the surface. Other concepts include bans of particular harmful applications of data, such as the use of discriminatory, data-fueled algorithms;<sup>399</sup> a requirement for companies to honor global “do not track” opt-out signals;<sup>400</sup> and a prohibition of unequal treatment of users who choose to exercise a right to restrict the use of their data.<sup>401</sup> A mandate that companies grant each user a right to access or delete data that pertain to that user seems like it could qualify as a “requirement[ ] prescribed for the purpose of preventing” unfair or deceptive acts or practices such as the use of data beyond a person’s reasonable expectations.<sup>402</sup> A rule with such a requirement could function similarly to the GDPR right of access and right to erasure.<sup>403</sup> The flowering of ideas just summarized occurred after the FTC reformed its approach to section 18 rulemaking and started sending signals that it was seriously considering a privacy rule. The prospect of section 18 rulemaking ought to prompt similarly vibrant discussions among policymakers and advocates in a number of consumer protection fields.

Promulgating a privacy rule will also simplify the FTC’s task in enforcement. The agency will then only have to demonstrate a violation of the rule to prevail. In contrast, the FTC currently must engage in the factual development necessary to prove every element of deceptiveness or unfairness is satisfied by the specific conduct found in a particular case. Because challenges of section 18 rules can occur only within the first sixty days after

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<sup>397</sup> Letter from Rep. Katie Porter, Congresswoman, U.S. House of Representative, et al. to Lina Khan, Chair, Fed. Trade Comm’n 2–3 (Dec. 9, 2021), [https://raskin.house.gov/\\_cache/files/b/b/bba089eb-7b97-4b74-a7ad-f44cef5fd1bc/EA1DAC0E56C44CC379A28B713093351B.porter-raskin-location-data-privacy-letter-to-ftc-fcc.pdf](https://raskin.house.gov/_cache/files/b/b/bba089eb-7b97-4b74-a7ad-f44cef5fd1bc/EA1DAC0E56C44CC379A28B713093351B.porter-raskin-location-data-privacy-letter-to-ftc-fcc.pdf) [<https://perma.cc/CHM4-5LAD>].

<sup>398</sup> See CONSUMER REPS. & ELEC. PRIVACY INFO. CTR., *supra* note 394, at 19.

<sup>399</sup> Slaughter, *supra* note 10, at 51–55.

<sup>400</sup> Letter, *supra* note 129, at 2.

<sup>401</sup> CONSUMER REPS. & ELEC. PRIVACY INFO. CTR., *supra* note 394, at 19.

<sup>402</sup> See 15 U.S.C. § 57a(a)(1)(B).

<sup>403</sup> Cf. *Right of Access*, INFO. COMM’R’S OFF., <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-of-access/> [<https://perma.cc/85DL-C9HH>]; *Right to Erasure*, INFO. COMM’R’S OFF., <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-erasure/> [<https://perma.cc/LP4V-UZXB>].

promulgation,<sup>404</sup> a privacy rulemaking would also limit the possibility of future adverse surprises in court.<sup>405</sup>

### B. Drip Pricing

A candidate for a rulemaking that is more purely in the paradigm of proactive rulemaking is online drip pricing. Drip pricing is the practice of a seller first disclosing a low “base” price to a consumer and later revealing additional mandatory fees in subsequent “drips” after a customer has taken steps toward completing the transaction. An advocate shared an illustrative example: For a particular major league baseball game in 2021, ticket sales website Ticketmaster showed consumers prices as low as \$15, but then—only after consumers chose their seats and reached the final payment stage—revealed a mandatory surcharge of \$7.50 for a “service fee” and “processing fee.”<sup>406</sup> The total price was *fifty percent* higher than initially shown. But many frustrated consumers may simply give up and complete the transaction rather than bearing the time cost to search out an entirely new alternative. This dark pattern is particularly common in online sales of lodging and live event tickets, and presents a straightforward opportunity for section 18 rulemaking.

Consumers experience considerable harm from the process, paying approximately twenty percent more when faced with drip pricing rather than its opposite, “all-in” pricing.<sup>407</sup> The tactic exploits psychological biases such as the tendency to “anchor” on the first prominent piece of information one perceives about a potential transaction, such as the initially displayed price, and to be unable to sufficiently adjust that internal estimate afterward.<sup>408</sup> Drip pricing appears to clearly meet the first two prongs of the FTC’s three-part test for unfairness. That test is satisfied by conduct that (1) “causes or is likely to cause substantial injury to consumers,” (2) which “is not reasonably avoidable by consumers themselves,” and (3) which is “not outweighed by countervailing benefits to consumers or to competition.”<sup>409</sup> The often-daunting third prong is even more straightforward. Not only do hidden fees fail to provide any benefit to consumers, they undermine the transparency required for comparison shopping between competing merchants.<sup>410</sup> Similarly, drip

<sup>404</sup> 15 U.S.C. § 57a(e)(1)(A).

<sup>405</sup> Cf. *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1237 (11th Cir. 2018) (holding language frequently used by FTC in cease-and-desist orders to be unenforceably vague).

<sup>406</sup> Max Sarinsky, *Stop the Hidden-Fee Rip-Off*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/08/02/opinion/consumers-drip-pricing.html> [<https://perma.cc/J5N6-2BVZ>].

<sup>407</sup> Tom Blake, Sarah Moshary, Kane Sweeney & Steve Tadelis, *Price Salience and Product Choice* 10 (working paper) (July 7, 2020), <http://faculty.haas.berkeley.edu/stadelis/AIP.pdf> [<https://perma.cc/38ZK-Q23J>].

<sup>408</sup> David Adam Friedman, *Regulating Drip Pricing*, 31 STAN. L. & POL’Y REV. 51, 67–68 (2020).

<sup>409</sup> See 15 U.S.C. § 45(n).

<sup>410</sup> Ticket seller StubHub attempted to move to all-in pricing by default but abandoned the feature after hemorrhaging sales to competitors that continued to use drip pricing. See

pricing seems to satisfy the agency's elements for deception: a representation, omission, or practice that (1) is "likely to mislead the consumer," (2) when examined "from the perspective of a consumer acting reasonably in the circumstances," and (3) is material.<sup>411</sup>

A section 18 proceeding to restrict drip pricing would be a proactive rulemaking, as the FTC has not yet brought an enforcement action directly against the practice. But one benefit of rulemaking in this area is that much of the preliminary work is already complete. The FTC held a public workshop in 2012 on the general issue of drip pricing, one of its Bureau of Economics staff members published an economic analysis in 2017 surveying hotels' use of drip pricing to impose mandatory "resort fees,"<sup>412</sup> and agency staff held another workshop in 2019 dedicated to the pricing practices of the ticketing industry.<sup>413</sup> In addition to this fact-gathering, attorneys general in the District of Columbia and Nebraska have sued hotel operators Marriott and Hilton over drip pricing of mandatory "resort fees," using their jurisdictions' versions of the FTC Act.<sup>414</sup>

The Commission could build from this foundation to promulgate a rule prohibiting drip pricing. Such a rule can establish it to be both unfair and deceptive to display an upfront price for a product or service that fails to include all mandatory surcharges added by the company.<sup>415</sup> The Commission might learn from the example of the Department of Transportation's 2011 regulation that bars airlines from using drip pricing to obscure mandatory fees.<sup>416</sup> Several foreign regulators already restrict drip pricing more broadly and may also provide helpful models for FTC action. These include the Australian Competition and Consumer Commission and the

Ethan Smith, *StubHub Gets Out of 'All-In' Pricing*, WALL ST. J. (Aug. 31, 2015), <https://www.wsj.com/articles/stubhub-gets-out-of-all-in-pricing-1441065436> [<https://perma.cc/XDM4-K7MZ>].

<sup>411</sup> Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com. 1 (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/X3RF-V6US>].

<sup>412</sup> MARY W. SULLIVAN, BUREAU OF ECON., FED. TRADE COMM'N, ECONOMIC ANALYSIS OF HOTEL RESORT FEES (2017), [https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503\\_hotel\\_resort\\_fees\\_economic\\_issues\\_paper.pdf](https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf) [<https://perma.cc/KX5M-JX6J>].

<sup>413</sup> See Kaitlyn Tiffany, *How Ticket Fees Got So Bad, and Why They Won't Get Better*, VOX (June 12, 2019, 1:30 PM), <https://www.vox.com/the-goods/2019/6/12/18662992/ticket-fees-ticketmaster-stubhub-ftc-regulation> [<https://perma.cc/5RYF-SR3G>].

<sup>414</sup> See Press Release, Off. of the Att'y Gen. for the D.C., AG Racine Sues Marriott for Charging Deceptive Resort Fees and Misleading Tens of Thousands of District Consumers (July 9, 2019), <https://oag.dc.gov/release/ag-racine-sues-marriott-charging-deceptive-resort> [<https://perma.cc/2YSG-JTU3>]; Press Release, Neb. Att'y Gen., AG Peterson Sues Hilton on Behalf of Nebraska Consumers (July 23, 2019), <https://ago.nebraska.gov/news/ag-peterson-sues-hilton-behalf-nebraska-consumers> [<https://perma.cc/6VFG-HVSV>].

<sup>415</sup> One proposal of language for such a rule has been submitted to the Commission as a formal petition for rulemaking. See Inst. for Pol'y Integrity, *Petition for Rulemaking Concerning Drip Pricing* (July 7, 2021), <https://downloads.regulations.gov/FTC-2021-0074-0002/content.pdf> [<https://perma.cc/3RJQ-JCPW>].

<sup>416</sup> See 14 C.F.R. § 399.84 (2022).

Canadian Competition Bureau,<sup>417</sup> each an FTC analogue. Both bodies have proceeded through enforcement, although they may not face the same remedial limitations as their American counterpart. In section 5 enforcement actions, the FTC often encountered difficulty in demonstrating consumer harm with enough precision to support equitable relief, even before *AMG Capital* undermined the agency's remedial powers. This challenge is particularly acute when the harm includes inducing consumers to make purchases that they would not otherwise have made.<sup>418</sup> The civil penalties made available by a trade regulation rule would accordingly be invaluable to deterring drip pricing in the United States.

### CONCLUSION

With new FTC leadership at the outset of the Biden Administration, there could not be a more fitting time to revive the Commission's consumer protection rulemaking program. The imbalance between increasingly concentrated corporate actors and individual consumers—starker in many ways than it has been since the last Gilded Age—makes a change of course desperately needed.

Restoring the use of section 18 rulemaking will return a powerful tool to the agency's arsenal. American consumers and honest businesses alike will benefit when the country's consumer protection watchdog embraces all of its powers in the fight against bad actors' use of unfair and deceptive tactics. While any regulatory action takes time and carries costs, the pessimistic view of section 18 has held back rulemaking activity to an unfounded degree. This article's review of the FTC's history of rulemaking, its statutory authorities, and the relevant case law shows that this pessimism about the FTC's statutory powers is based more in myth than in fact. The Commission's rulemaking program instead fell victim to ideologically driven shifts in agency culture and self-imposed norms. Reagan-era leadership at the FTC decisively turned the agency away from putting its regulatory powers to use. The current Commission can learn from this example in carrying out a similar, but converse, transformation.

The potential value of new FTC rules is difficult to overstate. A section 18 rule governing data privacy could finally roll back the near-inescapable commercial surveillance at the heart of informational capitalism. A rulemaking to bar drip pricing could save consumers hundreds of millions or billions of dollars each year. Changes like stopping tip theft of gig workers and imposing real consequences for online fake review fraud can make the marketplace a more fair environment for customers, workers, and honest businesses. Standards for algorithmic decision-making and penalties for the deceptive

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<sup>417</sup> See Friedman, *supra* note 408, at 85.

<sup>418</sup> See Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 6 (Nov. 6, 2020), [https://www.ftc.gov/system/files/documents/cases/final\\_chopra\\_sunday\\_riley\\_statement\\_dated\\_11.6.pdf](https://www.ftc.gov/system/files/documents/cases/final_chopra_sunday_riley_statement_dated_11.6.pdf) [<https://perma.cc/R7RS-WZ2K>].

use of emerging “deep fake” technology can protect against technologically driven harms that are growing at exponential rates.

In a time of persistent legislative dysfunction and rampant corporate predation, waiting for intervention by Congress is tantamount to a knowing abdication of the FTC’s mission. An agency that fails to use the authorities at its disposal leaves consumers and good faith businesspeople at the mercy of economic bad actors. The Commission’s broad jurisdiction and latent rulemaking powers thus create not just an opportunity but a responsibility. Leaders at the FTC who wish to stand up assertively for the American consumer will find the authority to do so is already on the books, waiting to be used.

