GENERAL RULEMAKING GRANTS AND THE FEDERAL TRADE COMMISSION

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The legal campaign against the administrative state has a new front: general rulemaking provisions. General rulemaking provisions authorize agencies, in an open-ended way, to write rules to carry out Congress's directives. Administrative agencies have relied on such provisions for decades. But over the last several years, some litigators, scholars, and judges have advanced limiting theories that would, if applied widely, greatly reduce the ability of agencies to execute federal statutes. The leading edge of this campaign is an effort to negate the rulemaking authority of the Federal Trade Commission (FTC). The reasoning employed by the FTC's opponents, already adopted by a district court, could affect thousands of rules regulating matters from bank powers to air quality.

This Article carefully examines the challenge to the FTC's general rulemaking power and rebuts it. Through meticulous reconstruction of the FTC's history, it shows how judges and legislators transformed the FTC into a modern rulemaking agency in the 1970s and built an entire rulemaking apparatus into the FTC Act. It further shows that this is not a special case: Judges and legislators have long approached these provisions using ordinary principles of statutory interpretation. The current attack on their scope often employs the language of restraint. But it is narrowing the FTC's power that would mark a radical departure from administrative law principles, upending over fifty years of settled understandings about the meaning of the word "rules" as employed by legislators across the U.S. Code.

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INTRODUCTION

Deborah Brantley, a bartender in Florida, earned ten dollars an hour.[1] At work, she faced persistent sexual harassment and verbal abuse.[2] After a year in this environment, she accepted a position at a nearby family-owned bar.[3] Only then did she discover that she had signed a noncompete agreement barring her from working for any competitors within fifty miles for two years.[4] Deborah nonetheless left to take the new job, assuming that her employer's threats to enforce the noncompete were an empty scare tactic.[5] She was wrong. Her former employer sued, seeking thirty thousand dollars in damages.[6]

Deborah's situation is all too common. Noncompete agreements constrain about thirty million people, or nearly one in five American workers.[7] These clauses keep workers in jobs they might otherwise leave or force costly choices: moving to a lower-paying field, exiting the workforce, or

1. Deborah Brantley, Comment on Proposed Non-Compete Clause Rule (Mar. 13, 2023), https://www.regulations.gov/comment/FTC-2023-0007-8852 [https://perma.cc/MJ94-G2XQ].

2. Id.

3. Id.

4. Amelia Pollard, James Fontanella-Khan & Anjli Raval, Millions of Workers Are Caught in a 'Non-Compete' Trap, Fin. Times (Apr. 18, 2024), https://www.ft.com/content/d39a04ae-9e09-49cd-8fe9-90ba5c825fa7 (on file with the *Columbia Law Review*).

5. Brantley, supra note 1.

6. Id.

7. Press Release, FTC, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/7MFA-P9DJ].

defending against expensive litigation.[8] Proponents of noncompete agreements argue they protect trade secrets and encourage investment in employee training.[9] But these claims are difficult to square with the proliferation of noncompetes for nurses, hairdressers, truck drivers, and fast-food workers.[10] As Deborah put it, "What trade secrets can a bartender possess?"[11]

On April 23, 2024, the Federal Trade Commission (FTC) finalized a rule banning the overwhelming majority of noncompete clauses.[12] The final rule capped a multiyear process that drew on open workshops, empirical research, and extensive public comment.[13] That same day, Ryan LLC, a Texas-based tax services firm, filed suit in the Northern District of Texas challenging, among other things, the FTC's authority to promulgate the noncompete rule.[14] The Commission grounded the rule in sections 5 and 6(g) of the FTC Act.[15] Section 5 declares unfair methods of competition unlawful and empowers the Commission to litigate to prevent them.[16] Section 6(g) authorizes the Commission to make rules and regulations to carry out the Act.[17] The FTC argued that, read together, these provisions permit it to promulgate legislative rules that identify and prohibit unfair methods of competition.[18] Ryan disagreed, arguing that

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8. Id.

9. Id.

10. See, e.g., Dave Jamieson, Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements, HuffPost (Oct. 13, 2014), https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180 (on file with the *Columbia Law Review*) (last updated Apr. 23, 2024) (describing noncompetes for sandwich makers and delivery drivers); Spencer Woodman, Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes, The Verge (Mar. 26, 2015), https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts (on file with the *Columbia Law Review*) (describing noncompetes for seasonal warehouse workers).

11. Brantley, supra note 1.

12. FTC, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Non-Compete Clause Final Rule 1 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-khan-joined-by-slaughter-and-bedoya-regarding-non-compete-clause-final-rule.pdf [https://perma.cc/ZMP7-6PJT].

13. Id.

14. The U.S. Chamber of Commerce joined as plaintiff-intervenors in support of Ryan's challenge to the noncompete rule. Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. 2024).

15. 16 C.F.R. pt. 910 (2025). In 1938, Congress expanded the Commission's jurisdiction to include "unfair or deceptive acts or practices." Wheeler–Lea Act, Pub. L. No. 75-447, sec. 3, § 5(a), 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45 (2018)) ("Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."); see also infra note 61.

16. 15 U.S.C. § 45.

17. Id. § 46(g).

18. *Ryan LLC*, 739 F. Supp. 3d at 506.

the word "rules" in section 6(g) referred only to procedural rules and the like and did not encompass legislative rules.[19]

The district court sided with the plaintiffs, holding that the FTC lacked statutory authority to issue the noncompete rule.[20] The Commission appealed to the Fifth Circuit Court of Appeals, but in September 2025, under new Republican leadership, the FTC voted 3-1 to dismiss the appeal and vacate the rule.[21]

Ryan's challenge to the FTC's rulemaking authority was one front in a broader campaign to halt, or even reverse, recent developments in federal competition policy. It also signals a new line of attack on the administrative state: the scope of agency authority under general rulemaking grants. The dispute sounds in statutory interpretation, and the basic question is straightforward: When Congress authorizes an agency to make rules, does that term include rules with the force of law?[22] A number of scholars and judges argue that, at least in the case of the FTC, the answer is no.[23]

This Article evaluates those arguments and rebuts them. It shows that the FTC's opponents elevate the aims and structure of the 1914 statute over later amendments and judicial interpretation. Section 6(g), read in

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19. Id. at 511.

20. Id. at 514.

21. FTC, Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, *Ryan, LLC v. FTC* 1 (Sep. 5, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-holyoak-statement-re-noncompete-acceding-vacatur.pdf [https://perma.cc/YG5L-EPE2].

22. This Article uses the terms "substantive rules" and "legislative rules" to denote rules "with the force of law." When issued in accordance with governing law, such rules have the force of law and bind both the agency and regulated parties. Kate R. Bowers & Daniel J. Sheffner, Cong. Rsch. Serv., R46673, Agency Rescissions of Legislative Rules 1 (2021), https://www.congress.gov/crs-product/R46673 (on file with the *Columbia Law Review*). By contrast, interpretive rules, such as guidance or policy statements, do not have any binding effect. Id.; see also Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979) ("The central distinction among agency regulations found in the [Administrative Procedure Act] is that between 'substantive rules' . . . and 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' . . . ." (quoting 5 U.S.C. § 553(b), (d) (1979))).

23. See infra note 147; see also Thomas W. Merrill, Antitrust Rulemaking: The FTC's Delegation Deficit, 75 Admin. L. Rev. 277, 299–302 (2023) [hereinafter Merrill, Antitrust Rulemaking] (collecting evidence that Congress did not contemplate granting the FTC legislative rulemaking power through FTC Act section 6(g)); Thomas M. Dyer & James B. Ellis II, Note, The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition, 41 Geo. Wash. L. Rev. 330, 346 (1972) (arguing that the legislative history, legislative drafting, relative placement of section 6(g) within the FTC Act, and many more bases provide a strong indication that the rulemaking power in section 6(g) pertains only to procedural functions); Comment, Substantive Rule-Making in the Federal Trade Commission: The Validity of Trade Regulation Rules, 59 Iowa L. Rev. 629, 635 (1974) ("A great deal of the legislative history of the [FTC Act] suggests that the section 6(g) rule-making provision was only meant to authorize procedural rules and regulations.").

its proper context—the FTC Act as amended—clearly authorizes the FTC to issue legislative rules.

The Article proceeds in four parts. Part I traces the early development of the FTC, beginning with the political and legal debates that shaped its founding in 1914. It explains how the FTC's initial reliance on individualized adjudication and interpretive rules failed to provide clear, enforceable standards, prompting the FTC to experiment with other regulatory tools.

Part II situates the FTC's turn to legislative rulemaking within mid-twentieth-century administrative law. It explains how rulemaking became the preferred policymaking tool of many agencies and traces how the Supreme Court read general rulemaking grants to authorize legislative rules. These developments culminated in *National Petroleum Refiners Ass'n v. Federal Trade Commission*, in which the D.C. Circuit upheld the FTC's legislative rulemaking authority under section 6(g).[24]

Part III examines how Congress responded to *National Petroleum Refiners* in the Magnuson–Moss Warranty—Federal Trade Commission Improvement Act. Rather than overturn the decision, Congress incorporated and ratified its holding by amending the FTC Act to cabin consumer protection rulemaking under a new section, while preserving the Commission's competition rulemaking authority under section 6(g).[25] Postenactment practice and the 1980 FTC Improvements Act further confirm that Congress incorporated the *National Petroleum Refiners* holding into Magnuson–Moss.[26]

Part IV turns to how contemporary courts should construe the FTC's competition rulemaking authority. It begins by addressing a new wave of skepticism toward that authority, most prominently the argument—advanced by Professors Thomas Merrill and Kathryn Watts—that *National Petroleum Refiners* rested on a theory of mass amnesia about an unwritten convention limiting legislative rulemaking powers. The Article explains why that theory is implausible as a matter of both history and law: It lacks an adequate textual, judicial, or legislative foundation, and it asks courts to disregard Congress's explicit preservation of competition rulemaking in the Magnuson–Moss Act. In place of this revisionist account, Part IV urges courts to interpret section 6(g) through the lens of the 1975 amendments, which reworked the FTC Act around rulemaking and incorporated *National Petroleum Refiners* into the statutory text. This approach aligns with a long line of Supreme Court precedent reading general rulemaking grants to authorize legislative rules. Finally, Part IV shows that overturning *National Petroleum Refiners* would disrupt settled reliance interests across the administrative state, calling into question

24. 482 F.2d 672, 698 (D.C. Cir. 1973).

25. See infra section III.A.

26. See infra section III.B.

thousands of rules issued under analogous provisions by agencies from the EPA to the Office of the Comptroller of the Currency.[27]

I. THE FTC'S EARLY YEARS

The FTC's story begins with the Sherman Act.[28] Following the Civil War, rapid industrialization in the United States led to significant concentrations of economic power in critical industries like oil, steel, transportation, and finance.[29] Dominant firms acquired and coordinated entire supply chains, achieving vertical integration while simultaneously eliminating horizontal competition.[30] Workers endured harsh working conditions, long hours, and low wages.[31] Consumers faced higher prices and limited choices.[32] Meanwhile, farmers and small businesses found themselves at the mercy of monopolistic railroads and grain elevators that charged exorbitant rates for transportation and storage.[33] These conditions fueled a political movement committed to taming unaccountable corporate power. By 1888, both the Republican and Democratic party platforms incorporated measures to address trusts, and in 1890, Congress enacted the Sherman Antitrust Act.[34]

The Sherman Act marked the federal government's first foray into competition policy, prohibiting agreements "in restraint of trade" and

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27. This Article does not address arguments that the FTC's noncompete rule violates the Major Questions Doctrine and the Non-Delegation Doctrine. See Alexander H. Pepper & Jay B. Sykes, Cong. Rsch. Serv., LSB11228, Federal Courts Split on Legality of the FTC's Non-Compete Rule 4–7 (2024), https://www.congress.gov/crs-product/LSB11228 (on file with the *Columbia Law Review*).

28. See Neil W. Averitt, The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act, 21 B.C. L. Rev. 227, 230 (1980).

29. See Susan Wagner, The Federal Trade Commission 3–5 (1971) ("[T]he agrarian economy dependent upon the individual had given way to impersonalized industry and a trend toward concentration of industry into fewer business entities.").

30. See id. at 5–6 (explaining that by the end of the nineteenth century, "entrepreneurs recognized the advantages of companies that could control their sources of supply, means of production, and marketing outlets" and that they "sincerely regarded competition as a destructive rather than a constructive force").

31. See Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 29–30 (2018) ("[T]he monopolization movement also marked . . . the break with the ideal that the United States was a nation characterized by a relative sense of equality among its citizens. . . . [T]he wealthy might earn millions a year, while the average worker earned between one and two dollars a day.").

32. See Meg Jacobs, Pocketbook Politics: Economic Citizenship in Twentieth-Century America 38–43 (2005) (illustrating price increases in the early twentieth century and the protests they caused).

33. See Wagner, supra note 29, at 5–7 (explaining that railroads became notorious for their discriminatory dealings after the birth of the railroad pool, which enabled each line to have exclusive rights to carry goods and passengers in certain territory).

34. See Chris Jay Hoofnagle, Federal Trade Commission Privacy Law and Policy 5 (2016) (detailing the inclusion of measures to address trusts in Republican and Democratic Party platforms).

monopolization.[35] To enforce these prohibitions, Congress adopted a "crime-tort model," under which antitrust law developed in a common law fashion through litigation in federal court.[36] One problem with this enforcement scheme was that it allowed judges to put their own "gloss" on the law.[37] This yielded a body of law that was unpredictable and inconsistent, a development that troubled Congress.[38]

Those tensions culminated in *Standard Oil Co. v. United States*, the Supreme Court's 1911 decision involving the paradigmatic Gilded Age trust.[39] Under John D. Rockefeller's leadership, the oil conglomerate had used aggressive acquisitions, exclusionary practices, and predatory pricing to dominate every stage of petroleum production, transportation, refinement, and marketing.[40] The Supreme Court held that the company had illegally monopolized the American petroleum industry and ordered the company to break itself up.[41] Yet, in doing so, it replaced the Sherman Act's categorical ban on restraints of trade with a new "rule of reason," empowering judges to decide case by case which business practices were unreasonable.[42] Critics viewed this shift as a judicial power grab because it transferred primary authority for defining competition policy from Congress to the courts.[43]

The backlash to *Standard Oil* and the perceived judicial capture of antitrust policy spurred a wave of Progressive Era reform.[44] After Woodrow Wilson's victory in the 1912 presidential election, Congress sought to

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35. See Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–38 (2018)).

36. Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. Chi. L. Rev. 357, 377 (2020).

37. See Averitt, supra note 28, at 230 ("[District] courts soon added a judicial gloss to the [Sherman] Act, replacing an absolute prohibition on trade restraints with the 'Rule of Reason.'").

38. See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 7 (2003) ("[T]he law's application to other forms of interfirm cooperation, and more importantly its application to business consolidations, remained in doubt."). Another development that concerned Congress was the merger wave at the turn of the century, in which "[c]onsolidation piled on consolidation." Id.; see also Hoofnagle, supra note 34, at 4 ("A wave of consolidation and growth among companies triggered a public debate concerning 'bigness.'"); Wagner, supra note 29, at 9 ("The trusts, too, were falling into the hands of groups that threatened to merge the whole of American industry into a supertrust.").

39. See 221 U.S. 1 (1911).

40. Id. at 42–43.

41. Id. at 32–37.

42. Id. at 60–62.

43. See Averitt, supra note 28, at 230–31, 233 ("The initial task for the legislature was to recover the power to control antitrust policies.").

44. See Daniel Jay Baum & Eugene R. Baker, Enforcement, Voluntary Compliance, and the Federal Trade Commission, 38 Ind. L.J. 322, 325–27 (1963) ("Thus, it was at the turn of the century that Congress considered the creation of an agency charged with studying and reporting on the 'corporate problem' to the public.").

reclaim control over competition policy. One way it did so was by creating the FTC, a multimember body with broad investigatory powers and authority to define and enforce a general standard of fair competition.[45] In the decades that followed, however, the Commission struggled to fulfill its mandate as individual adjudications proved systematically inadequate and industry-wide standard-setting programs failed because they lacked the force of law.[46]

A. *The Origin Story*

Standard Oil forced Congress to begin considering antitrust reform. As Senator Francis Newlands framed the situation, lawmakers faced two choices: either cede policymaking authority over the industrial trusts to the judiciary or reclaim Congress's power by creating a new administrative tribunal that would more closely follow its direction.[47] To advance the latter, he introduced two bills that were "precursors [to] the Federal Trade Commission Act."[48] Even though neither bill became law, they led to congressional hearings about new antitrust legislation.[49] Those hearings produced the *Cummins Report*, which reinforced preexisting concerns about the Sherman Act: the rule of reason had shifted policymaking powers to the courts, resulting in unpredictable and inconsistent outcomes.[50]

The 1912 presidential election also featured intense debates about antitrust policy.[51] The three main candidates—Democrat Woodrow Wilson, Republican incumbent President William Howard Taft, and Bull Moose (Progressive) candidate and former Republican President Theodore Roosevelt—all had different theories of how to deal with the trusts. Taft favored the status quo, arguing that the Sherman Act's enforcement scheme was sufficient to maintain a competitive economy.[52] Roosevelt, by contrast, believed that large-scale businesses had become a permanent feature of the modern economy.[53] He argued that Congress should not use antitrust to dismantle the trusts but should instead create an administrative agency that would regulate their conduct.[54]

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45. Id. at 337; see also Hoofnagle, supra note 34, at 5.

46. Baum & Baker, supra note 44, at 337–38.

47. 47 Cong. Rec. 1225 (1911) (statement of Sen. Newlands).

48. Averitt, supra note 28, at 231.

49. See id. (explaining that Senator Newland's bills "paved the way" for authorization of the Committee on Interstate Commerce, which published the *Cummins Report*).

50. S. Rep. No. 62-1326 (1913).

51. See Daniel A. Crane, All I Really Need to Know About Antitrust I Learned in 1912, 100 Iowa L. Rev. 2025, 2027 (2015) ("Antitrust policy played a critical role in the 1912 election . . . .").

52. See Winerman, supra note 38, at 27–32.

53. Id. at 23–25.

54. Id. at 38, 42–48.

The ultimate victor, Wilson, staked out a middle position. Like Taft, he embraced an economy regulated through competition.[55] But he also viewed the Sherman Act as ill-equipped to achieve that end. So once elected, Wilson called for new antitrust legislation to prohibit anticompetitive practices using traditional criminal and civil remedies.[56] He also urged Congress to establish a commission to investigate business practices, assess their significance, and prohibit those which tended to promote monopoly.[57] It was against this backdrop that Congress created the FTC in 1914.

B. *The Rise of Industry-Wide Rules*

Since its creation, the FTC has had two principal functions. First, section 6 empowers the FTC to investigate businesses, collect data, and issue reports about new commercial developments.[58] This authority was instrumental in identifying market problems that required legislative solutions. For example, the Commission's 1916 report on foreign trade prompted Congress to enact the Webb–Pomerene Act, which created an antitrust exemption for export trade activities by associations that registered with the Commission.[59] Likewise, the Packers and Stockyards Act, which subjected the stockyards to public utility style regulation, followed a 1919 report about the meatpacking industry.[60]

The Commission's second and primary purpose is to define and enforce the FTC Act's prohibition of "unfair methods of competition."[61]

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55. Id. at 45–46.

56. Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914), https://www.presidency.ucsb.edu/documents/address-joint-session-congress-trusts-and-monopolies [https://perma.cc/YP8B-TTE7] ("These [monopolistic] practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."). The Clayton Act, passed within a few weeks of the FTC Act, ultimately served Wilson's aims of outlawing specific business practices. See Winerman, supra note 38, at 49.

57. Wilson, supra note 56.

58. 15 U.S.C. § 46(b) (2018).

59. Marc Winerman & William E. Kovacic, Outpost Years for a Start-Up Agency: The FTC From 1921–1925, 77 Antitrust L.J. 145, 156–57 (2010) [hereinafter Winerman & Kovacic, Outpost Years].

60. Id. at 196–97.

61. 15 U.S.C. § 45 (2018); see also Wheeler–Lea Act, Pub. L. No. 75-447, sec. 3, § 5, 52 Stat. 111, 111 (codified at 15 U.S.C. § 44). Since 1914, Congress has expanded section 5(a)'s reach in two respects. First, the FTC Act, as enacted in 1914, only declared unfair methods of competition *in commerce* unlawful. 6 Legislative History of the Federal Antitrust Laws and Related Statutes: The Antitrust Laws 5028 (Earl W. Kintner ed., 1983). Today, the FTC's jurisdiction extends to those methods of competition that *affect* commerce. Id. at 5260. Second, section 5(a) also proscribes "unfair or deceptive acts or practices in or affecting commerce." Id. at 5032 (internal quotation marks omitted) (quoting Wheeler–Lea Act § 3). Thus, while the Act originally prevented only unfair methods of competition, such

When drafting the FTC Act, lawmakers recognized that a statute listing specific prohibited practices would quickly grow outdated.[62] As a result, it adopted a broad standard capable of encompassing new forms of anticompetitive conduct as markets evolved. The breadth of the phrase "unfair methods of competition" also reflects Congress's intent for section 5 to reach conduct not rising to the level of a Sherman Act violation, enabling the Commission to check anticompetitive behaviors at an earlier stage.

Section 5(b), which has remained largely unchanged since 1914, provides the enforcement framework for FTC Act violations. If the Commission has "reason to believe" that an entity subject to its jurisdiction has engaged in unfair methods of competition and that proceedings would serve the public interest, it issues a complaint describing the alleged conduct.[63] An administrative law judge (ALJ) then conducts an adjudicative proceeding to determine whether: (1) the respondent actually engaged in the alleged conduct and (2) said conduct is an unfair method of competition.[64] An affirmative answer to both questions amounts to a violation of the FTC Act, at which point the Commission can issue a cease-and-desist order on the basis of the ALJ's decision.[65]

In its early years, the Commission did not rely exclusively on adjudications to enforce its section 5 mandate. Their individualized nature made them inefficient and caused a significant backlog of cases.[66] Adjudications also forced the FTC to regulate industries piecemeal because firms only violated section 5 once they were subject to a cease-and-desist order.[67] As a result, different standards of conduct applied to different firms operating in the same industry. This undermined Congress's goal of "provid[ing] explicit and intelligible guidance to businessmen on how to avoid those unfair methods of

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as antitrust violations, Congress amended the FTC Act to cover unfair or deceptive acts or practices like consumer protection violations. Id.

62. See 6 Legislative History of the Federal Antitrust Laws and Related Statutes: The Antitrust Laws, supra note 61, at 3706.

63. Id.

64. William F. West, Administrative Rulemaking: Politics and Processes 111 (1985).

65. Id.

66. See Glen E. Weston, Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor, 24 Fed. Bar J. 548, 561 (1964) ("The Federal Trade Commission has long been plagued by a huge backlog of cases and a resulting inordinate time lag between the issuance of a formal complaint and a final cease and desist order."); see also Carl A. Auerbach, The Federal Trade Commission: Internal Organization and Procedure, 48 Minn. L. Rev. 383, 449 (1964) ("From its earliest days, the FTC has operated under the handicap of not having sufficient authority to take effective action to prohibit industry-wide illegal practices."); Marc Winerman & William E. Kovacic, The William Humphrey and Abram Myers Years: The FTC From 1925 to 1929, 77 Antitrust L.J. 701, 713 (2011) [hereinafter Winerman & Kovacic, William Humphrey] (explaining the FTC's backlog of over 260 cases).

67. Winerman & Kovacic, William Humphrey, supra note 66, at 732.

competition and deceptive acts and practices which would undermine the economic system."[68]

Beginning in 1919, the FTC began holding trade practice conferences—meetings in which FTC staff and industry representatives identified practices considered harmful, wasteful, or unfair—and issuing Trade Practice Rules (TPRs) that contained standards of conduct for market participants.[69] The rules were advisory rather than binding. They covered industries ranging from artificial limbs to knit goods and issues such as misbranding and exclusionary distribution arrangements.[70] By addressing recurring practices on an industry-wide basis, TPRs enabled the Commission to provide guidance without bringing repetitive case-by-case adjudications.[71] In 1955, the FTC broadened these efforts by launching an industry guidance program.[72] Like the TPRs, the guides explained in plain language "what the Commission believe[d] to be illegal in a business practice."[73] But because TPRs and guides were "mere interpretive rules" without the force of law, firms could, and did, disregard them.[74]

Given the distinct shortcomings of adjudications, TPRs, and guides, the FTC faced a basic enforcement dilemma: individualized proceedings lacked breadth, while industry-wide guidance lacked force. Meanwhile, the Commission failed to satisfy its mandate to provide clear guidance to businesses and prevent unfair methods of competition.

II. THE FTC TURNS TO LEGISLATIVE RULEMAKING

Faced with the limits of adjudication and nonbinding rules, the FTC turned to legislative rulemaking. It began issuing Trade Regulation Rules (TRRs), which combined the industry-wide reach of TPRs with the binding force of adjudications.[75] Unlike TPRs, which were voluntary and advisory by design, TRRs predetermined that certain conduct violated section 5 as

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68. Wagner, supra note 29, at 49.

69. Winerman & Kovacic, Outpost Years, supra note 59, at 200.

70. 1926 FTC Ann. Rep. 47; see also Comment, Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations, 62 Yale L.J. 912, 917 (1953).

71. 1927 FTC Ann. Rep. 7; see also 1926 FTC Ann. Rep., supra note 70, at 50 (explaining the benefits that the TPRs afforded the Commission in adjudicative proceedings).

72. Wagner, supra note 29, at 51.

73. 1961 FTC Ann. Rep. 7. For a more detailed discussion of the FTC's industry guidance program, see Auerbach, supra note 66, at 452–54.

74. West, supra note 64, at 115–16. Commissioner Everette MacIntyre observed this, noting that "in a number of very important areas, industry practices . . . apparently inconsistent with the law, have been continued despite the advice set forth in Trade Practice Conference Rules and Guides." Id (internal quotation marks omitted) (quoting Weston, supra note 66, at 567 n.140).

75. Id. at 133–36.

a matter of law.[76] This shift streamlined enforcement: Instead of proving unfairness from scratch, the Commission needed only to show that a respondent had engaged in conduct covered by the rule.[77]

The FTC's shift towards rulemaking reflected a broader trend across a variety of federal agencies throughout the 1960s.[78] Alongside the FTC, the Federal Power Commission (FPC) and the FDA issued their first legislative rules.[79] The FPC, for example, began setting regional gas rates via rulemaking rather than case-by-case adjudication.[80] Starting in 1966, the FDA similarly issued rules establishing drug efficacy standards.[81] By 1970, the Federal Register reported 136 notices of proposed rulemaking per month across federal agencies—a steep increase from the forty-one notices per month reported in 1960.[82] This rapid increase in rulemaking across federal agencies instigated the birth of a new administrative era: the "age of rulemaking."[83]

Even though agencies increasingly relied on legislative rulemaking, there were different types of statutory authority that allowed them to do so.[84] In some cases, agencies drew authority from statutes that expressly authorized rulemaking in particular areas. The National Highway Traffic Safety Commission, for example, relied on section 103 of the National Traffic and Motor Vehicle Safety Act of 1966 to issue specific rules related to motor vehicle safety.[85] Such rules required the Secretary of Commerce to "consider relevant available motor vehicle safety data" from research and testing results and "consult" as needed with other agencies, including the Vehicle Equipment Safety Commission.[86]

In other circumstances, agencies issued rules based on broad statutory grants of rulemaking authority. The FDA, for example, relied on section

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76. See Earl W. Kintner & Christopher Smith, The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency, 26 Mercer L. Rev. 651, 674 (1975).

77. Trade Regulation Rules were not legislative in the sense of adding new substantive rights or obligations. They did not broaden or expand the reach of section 5. Rather, they defined section 5's application to specific practices or a specific industry within the FTC's jurisdiction. See Trade Regulation Rule on the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8365 (July 2, 1964) (codified at 16 C.F.R. pt. 408).

78. See Reuel E. Schiller, Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 Admin. L. Rev. 1139, 1147 (2001).

79. Id.

80. Id.

81. Id. at 1148.

82. Id. at 1147.

83. See infra Part II; see also Schiller, supra note 78, at 1147.

84. See Schiller, supra note 78, at 1148.

85. Id. at 1148 n.39.

86. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103, 80 Stat. 718, 719-20 (codified as amended at 49 U.S.C. § 30111 (2018)).

701(a) of the Federal Food, Drug, and Cosmetic Act, which authorized rulemaking "for the efficient enforcement" of the Act.[87] This allowed the FDA to "develop whatever innovative and creative regulatory programs" were "reasonable" and "most appropriate to achieve the fundamental objectives laid down by Congress."[88] The "general provisions" of section 701(a) thereby provided "ample legal authority" to adopt "enforcement procedures by rulemaking."[89] As the FDA embraced section 701(a) throughout the 1970s, courts continuously affirmed its broad statutory authorization.[90] The FDA consequently continued "to emphasize rulemaking as the primary vehicle for policy formulation."[91] To the FDA, section 701(a)'s broad grant of authority was "in everyone's interest," providing "fairer and more efficient" legal requirements than case-by-case adjudications.[92]

This Part focuses on general grants of rulemaking authority. It begins with a discussion of the relevant case law. It then considers how broader developments in administrative law precipitated the FTC's adoption of legislative rulemaking in 1962 with the launch of its TRR program. The final section examines the D.C. Circuit's interpretation of section 6(g) in *National Petroleum Refiners*, demonstrating how the court's reading of the FTC Act reflected and applied the ordinary interpretive framework for general rulemaking grants.

A. *Changes in Administrative Law*

National Broadcasting Co. v. United States "inaugurated the modern approach" to interpreting general rulemaking grants.[93] There, the Supreme Court upheld the FCC's chain broadcasting rule, which governed contractual relationships between networks and affiliated broadcasting stations.[94] The FCC had issued the rule to prevent network practices it deemed inconsistent with the public interest.[95] The broadcasting networks argued the regulations were unlawful because the Communications Act of 1934 did not explicitly grant the FCC authority to

87. Federal Food, Drug, & Cosmetic Act, Pub. L. No. 75-717, § 701(a), 52 Stat. 1040, 1055 (1938).

88. See Peter Barton Hutt, Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act, 28 Food Drug Cosm. L.J. I77, 179 (1973).

89. Id. at 185.

90. See generally Richard A. Merrill, FDA and the Effects of Substantive Rules, 35 Food Drug Cosm. L.J. 270 (1980) (reflecting on judicial interpretations of section 701(a)).

91. Id. at 282.

92. Stephen Hull McNamara, The New Age of FDA Rule-Making, 31 Food Drug Cosm. L.J. 393, 400 (1976).

93. Nat'l Ass'n of Pharm. Mfrs. v. Food & Drug Admin., 637 F.2d 877, 880 (2d Cir. 1981) (citing Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943)).

94. *Nat'l Broad. Co.*, 319 U.S. at 209–10.

95. Id. at 194–209.

regulate network practices or contractual relationships between networks and stations.[96]

The Court rejected this argument, explaining that the Communications Act "endowed" the FCC with "comprehensive powers," including the power to "adopt 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the] Act.'"[97] The word "rules," the Court reasoned, included legislative rules because "there [was] no evidence that Congress did not mean its broad language to carry the authority it expresses."[98] Because the chain broadcasting rules "represent[ed] a particularization" of the Agency's broader statutory mandate, the FCC had not exceeded its authority by issuing them.[99]

The Court relied on the same line of reasoning in *American Trucking Ass'ns v. United States*, in which it upheld regulations issued by the Interstate Commerce Commission (ICC).[100] The ICC had issued rules regulating the leasing practices of trucking companies.[101] Trucking associations argued the regulations were unlawful because the Motor Carrier Act did not explicitly delegate the ICC authority to regulate their leasing practices.[102] And as in *National Broadcasting*, the Supreme Court rejected the argument. It explained that the two relevant rulemaking provisions the ICC had relied on, one specific and one general, delegated the ICC authority that was "coterminous with the scope of agency regulation itself."[103] Because the ICC's rules addressed conditions that threatened to undermine the broader regulatory scheme, the ICC had not exceeded its statutory authority.[104]

National Broadcasting and *American Trucking* established that general rulemaking grants empowered agencies to issue legislative rules that advanced the statutory scheme's overarching purposes. In the years that followed, the Supreme Court developed two related lines of cases. The first addressed whether an agency could use rulemaking to adopt legislative

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96. Id.

97. Id. at 217 (quoting Communications Act of 1934, Pub. L. No. 73-416, § 303, 48 Stat. 1064, 1082 (1934), amended by Act of 1937, Pub. L. No. 75-97, sec. 6(b), § 303, 50 Stat. 189, 191 (codified as amended at 47 U.S.C. § 303 (2018))). The FCC relied on three rulemaking grants, two general and one specific, to justify its rule. The two specific rulemaking provisions were section 303(g), which provided the FCC shall "generally encourage the larger and more effective use of radio in the public interest" and section 303(i), which granted the FCC "authority to make special regulations applicable to radio stations engaged in chain broadcasting." Id. at 215 (internal quotation marks omitted) (quoting 47 U.S.C. § 303(g), (i)).

98. Id. at 217–18.

99. Id.

100. Am. Trucking Ass'ns v. United States, 344 U.S. 298, 321–23 (1953).

101. Id. at 304.

102. Id. at 309.

103. Id. at 311.

104. Id.

rules that curtailed statutory hearing rights in individual adjudications. This line includes *United States v. Storer Broadcasting Co.* and *Federal Power Commission v. Texaco*. The second addressed whether an agency's general rulemaking grant empowered it to issue substantive legislative rules at all, even when no procedural rights were at stake. This line includes *Thorpe v. Housing Authority* and *Mourning v. Family Publications Service, Inc.*

The first category arose in *Storer*, which presented the question of whether the FCC could use rulemaking to impose ownership caps that automatically disqualified applicants who exceeded them.[105] The FCC had relied on several grants of rulemaking authority to support its rule.[106] But Storer argued that section 309(b) of the Communications Act required a "full hearing" before license denial and that the rule unlawfully deprived it of that right.[107] The Supreme Court disagreed, reiterating that the hearing requirement did not preclude the FCC from adopting rules "necessary for the orderly conduct of its business"[108] and to effectuate the policy aims of the Communications Act.[109]

The Supreme Court reaffirmed *Storer* in *Texaco*, in which it sustained a FPC rule that established pricing provisions for natural gas supply contracts and automatically rejected any inconsistent provisions.[110] Significantly, *Texaco* involved a rule based on a single general rulemaking

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105. United States v. Storer Broad. Co., 351 U.S. 192, 201 (1956). Professors Merrill and Watts assert that "[t]he Court concerned itself only with the question whether the rules were within the scope of the agencies' authority, not with whether the rules were legislative." Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules With the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 533 (2002). But the FCC argued that its rulemaking authority empowered the Agency to promulgate binding standards:

> The Commission asserts that its power to make regulations gives it the authority to limit concentration of stations under a single control. It argues that rules may go beyond the technical aspects of radio, that *rules may validly give concreteness to a standard of public interest*, and that the right to a hearing does not exist where an applicant admittedly does not meet those standards as there would be no facts to ascertain.

Storer, 351 U.S. at 201 (emphasis added) (footnote omitted).

106. See Communications Act of 1934, Pub. L. No. 73-416, § 303(f), 48 Stat. 1064, 1082 (codified as amended at 47 U.S.C. § 303(f) (2018)) (authorizing the FCC to make "regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions" of the Federal Communications Act); see also Amendments to the Communications Act of 1934, Pub. L. No. 75-97, sec. 6(b), § 303, 50 Stat. 189, 191 (1937) (codified as amended at 47 U.S.C. § 303) (authorizing the FCC to make "rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out" the chapter); *Storer*, 351 U.S. at 193.

107. *Storer*, 351 U.S. at 202 (internal quotation marks omitted) (quoting 47 U.S.C. § 309(e)).

108. Id. This was the holding, so long as an applicant could seek a waiver or demonstrate special circumstances that would result in the FCC setting that rule aside. Id. at 201–02.

109. Id. at 203.

110. See Fed. Power Comm'n v. Texaco Inc., 377 U.S. 33, 39 (1964) (upholding the FPC's threshold standards despite the statutorily prescribed hearing requirement).

grant.[111] Nevertheless, the Court concluded the statute supported the rule because the rule "effectuat[ed] the aim of the Act."[112] This was the first time that the Court upheld a regulation adopted under a general rulemaking power that denied a hearing otherwise available in an adjudication. Together, *Storer* and *Texaco* encouraged administrative agencies to address important policy questions by regulation.[113]

The second line of cases concerned the breadth of agencies' substantive rulemaking power. Consider *Thorpe*, in which a public housing tenant argued that a Department of Housing and Urban Development (HUD) circular required the local housing authority to give her notice and an opportunity to respond before eviction.[114] The housing authority countered that the circular was merely advisory and, if mandatory, exceeded HUD's statutory authority.[115] The Court disagreed on both points. It concluded the circular was a legislative rule and upheld its validity under section 8 of the Housing Act of 1937.[116] The Court reasoned the regulation, which required housing authorities to explain evictions, was "reasonably related" to the Housing Act's purpose of ensuring adequate housing.[117] Four years later, in *Mourning*, the Court held that rules issued under general rulemaking grants would be upheld so long as they were reasonably related to the statute's purpose[118]—a test courts repeatedly applied in the decades that followed.[119]

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111. Section 16 of the Natural Gas Act gave the FPC authority to prescribe such regulations "as it may find necessary or appropriate to carry out the [Act's] provisions." Natural Gas Act, Pub. L. No. 75-688, § 16, 52 Stat. 821, 830 (1938) (codified at 15 U.S.C. § 717o (2018)).

112. *Texaco Inc.*, 377 U.S. at 39 (citing Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 610 (1944)).

113. See Ralph F. Fuchs, Agency Development of Policy Through Rule-Making, 59 Nw. U. L. Rev. 781, 788–89 (1965) (describing the potential rulemaking and policy implications of *Storer* and *Texaco*).

114. 393 U.S. 268, 283–84 (1969).

115. Id. at 274.

116. See id. at 276–78 (holding that although the circular was intended to be mandatory, it also remained within the scope of HUD's rulemaking powers). To come to this conclusion, the Court observed in a footnote that similar "broad rule-making powers have been granted to numerous other federal administrative bodies in substantially the same language." Id. at 277 n.28.

117. Id. at 280.

118. Articulating the relevant standard, the majority opinion stated:

> The standard to be applied in determining whether [an agency] exceeded the authority delegated to it . . . is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973) (third alteration in original) (footnote omitted) (quoting *Thorpe*, 393 U.S. at 280–81).

119. See, e.g., Alexander v. Trs. of Bos. Univ., 766 F.2d 630, 636 (1st Cir. 1985); Wales Transp., Inc. v. Interstate Com. Comm'n, 728 F.2d 774, 780 (5th Cir. 1984); Glob. Van Lines,

B. *The FTC's Turn to Legislative Rulemaking*

As the courts developed the modern jurisprudence of general rulemaking grants, the FTC began issuing TRRs—that is, legislative rules. The early TRRs addressed straightforward cases of consumer deception, allowing the Commission to refine its approach to rulemaking in relatively uncontroversial settings.[120] These early rules included a range of practices as simultaneously violating both the FTC Act's prohibitions on unfair methods of competition (UMCs) and unfair or deceptive acts or practices (UDAPs). The prohibited conduct included misleading consumers about the size of sleeping bags by advertising the "cut size" as the finished size;[121] misrepresenting nonprismatic instruments as prismatic;[122] advertising or marketing dry cell batteries as leakproof;[123] claiming belts were leather when they were made of other materials;[124] and misrepresenting the condition of lubricating oil.[125]

But within two years of its first TRR, the FTC asserted its rulemaking authority in a more politically charged setting. In 1964, the Surgeon General issued a report on the health hazards of cigarette smoking.[126] The report "highlighted the deleterious health consequences of tobacco use" and was "front page news and a lead story on every radio and television station in the United States."[127] Given these revelations, the report recommended that "appropriate government agencies" take remedial

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Inc. v. Interstate Com. Comm'n, 714 F.2d 1290, 1296 (5th Cir. 1983); Nat'l Ass'n of Pharm. Mfrs. v. Food & Drug Admin., 637 F.2d 877, 889 (2d Cir. 1981); West v. Bergland, 611 F.2d 710, 721 (8th Cir. 1979); Touche Ross & Co. v. Sec. & Exch. Comm'n, 609 F.2d 570, 579 (2d Cir. 1979); Graham v. Nat'l Transp. Safety Bd., 530 F.2d 317, 319 (8th Cir. 1976); Florida v. Mathews, 526 F.2d 319, 323 (5th Cir. 1976).

120. Note, The Magnuson–Moss Amendments to the Federal Trade Commission Act: Improvements or Broken Promises, 61 Iowa L. Rev. 222, 222–27 (1975).

121. Advertising and Labeling as to Size of Sleeping Bags, 28 Fed. Reg. 10,900 (Oct. 11, 1963), repealed by 60 Fed. Reg. 65,528 (Dec. 20, 1995) (codified at 16 C.F.R. pt. 400).

122. Deception as to Non-Prismatic and Partially Prismatic Instruments Being Prismatic Binoculars, 29 Fed. Reg. 7316 (June 5, 1964), repealed by 60 Fed. Reg. 27,241 (May 23, 1995) (codified at 16 C.F.R. pt. 402).

123. Deceptive Use of "Leakproof," "Guaranteed Leakproof," Etc., as Descriptive of Dry Cell Batteries, 29 Fed. Reg. 6535 (May 20, 1964), repealed by 62 Fed. Reg. 61,225 (Nov. 17, 1997) (codified at 16 C.F.R. pt. 403).

124. Misbranding and Deception as to Leather Content of Waist Belts, 29 Fed. Reg. 8166 (June 27, 1964), repealed by 61 Fed. Reg. 25,560 (May 22, 1996) (codified at 16 C.F.R. pt. 405).

125. Deceptive Advertising and Labeling of Previously Used Lubricating Oil, 29 Fed. Reg. 11,650 (Aug. 14, 1964), repealed by 61 Fed. Reg. 55,095 (Oct. 24, 1996) (codified at 16 C.F.R. pt. 406).

126. Willard F. Mueller, Fighting for Antitrust Policy: The Crucial 1960's at 143 (2009); see also Walter Sullivan, Cigarettes Peril Health, U.S. Report Concludes; 'Remedial Action' Urged, N.Y. Times, Jan. 12, 1964, at 1, https://static01.nyt.com/images/section/learning/general/onthisday/pdf/01111964article.pdf [https://perma.cc/24TN-JLMF].

127. The 1964 Report on Smoking and Health, NIH, https://profiles.nlm.nih.gov/spotlight/nn/feature/smoking [https://perma.cc/K567-P4AJ] (last visited Oct. 10, 2025).

action.[128] Within days, the FTC's five commissioners agreed the Commission would issue a TRR that required cigarette companies to disclose the health hazards of cigarettes in both advertising and packaging.[129] With the help of his legal assistant, Richard Posner, Commissioner Philip Elman drafted a statement of basis and purpose.[130]

The statement marked the Commission's first "vigorous[] defen[se]" of its "authority to act by rulemaking."[131] It began by explaining why rulemaking was preferable to adjudications in the cigarette context.[132] It then addressed arguments that the FTC was "confined to the cease-and-desist order adjudicative procedure provided in section 5(b) of the [FTC] Act."[133] Section 5(a)(6) empowered and directed the Commission to prevent the use of UMCs and UDAPs, while section 6(g) "authorize[d] the Commission 'to make rules and regulations for the purpose of carrying out the provisions of this Act.'"[134] The "literal terms of the section" thus "clearly embraced" the FTC's authority to issue TRRs under section 6(g).[135] And Supreme Court precedent—*National Broadcasting*, *Storer*, and *Texaco*—weighed against interpreting the FTC Act to preclude legislative rulemaking authority.[136]

Soon thereafter, Congress enacted the Federal Cigarette Labeling and Advertising Act, which created national standards for cigarette packaging.[137] Because the law preempted the FTC's cigarette rule before it could be implemented or litigated, any debate over the Commission's section 6(g) authority subsided.[138] Still, Congress alluded to the FTC's rulemaking authority when it stated that "nothing in [the Federal Cigarette Labeling and Advertising Act] shall be construed to . . . affirm or deny the Federal Trade Commission's holding that it has authority to issue trade regulation rules."[139] Because Congress expressly acknowledged the FTC's legislative

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128. Mueller, supra note 126, at 144 (internal quotation marks omitted).

129. Id.

130. Mueller, supra note 126, at 143–44. For the full argument, see Trade Regulation Rule on the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8365 (July 2, 1964) (codified at 16 C.F.R. pt. 408).

131. David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 925 (1965).

132. Trade Regulation Rule on the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes, 29 Fed. Reg. at 8365–69.

133. Id. at 8369.

134. Id. (quoting 15 U.S.C. § 46(g) (1964)).

135. Id.

136. Id. at 8373 n.157.

137. See Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified at 15 U.S.C. § 1331 (2018)).

138. See id. § 5.

139. H.R. Rep. No. 89-586, at 3 (1965) (Conf. Rep.). Chairman Paul Rand Dixon acknowledged the salience of the question when he testified before Congress. He maintained, however, that legislative rulemaking was the most effective method for the

rulemaking but did nothing to stop it, the Commission continued the practice.[140]

C. National Petroleum Refiners

Courts finally weighed in on the scope of the FTC's rulemaking authority under section 6(g) in 1972.[141] At issue in *National Petroleum Refiners* was the Commission's 1970 octane rule, which provided that a gas station's failure to post octane numbers at pumps was both a UMC and a UDAP.[142] Two trade associations and thirty-four gasoline refining

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Commission to fulfill its statutory duty to inform "clearly and unequivocally and, in advance, of what practices were deemed unlawful by the Commission." Cigarette Labeling and Advertising: Hearings on Bills Regulating the Labeling and Advertising of Cigarettes and Relating to Health Problems Associated With Smoking Before the H. Comm. on Interstate & Foreign Com., 88th Cong. 100 (1964) (statement of Paul Rand Dixon, Chairman, FTC) (quoting Trade Regulation Rule on the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes, 29 Fed. Reg. at 8373) (misquote).

140. See, e.g., Trade Regulation Rule Concerning the Incandescent Lamp (Light Bulb) Industry, 35 Fed. Reg. 11,784 (July 23, 1970) (establishing that failure to disclose certain features of light bulbs on packaging is a UMC and a UDAP), repealed by 61 Fed. Reg. 33,308 (June 27, 1996) (codified at 16 C.F.R. pt. 409 (2025)); Trade Regulation Rule: Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers, 33 Fed. Reg. 8446 (June 7, 1968) (making certain misrepresentations about the number of transistors in radios a UDAP), repealed by 55 Fed. Reg. 25,090 (June 20, 1990) (codified at 16 C.F.R. pt. 414); Trade Regulation Rule Concerning the Failure to Disclose that Skin Irritation May Result From Washing or Handling Glass Fiber Curtains and Draperies and Glass Fiber Curtain and Drapery Fabrics, 32 Fed. Reg. 11,023 (July 28, 1967) (dictating that failure to make certain disclosures about the handling of glass fiber products and contact with certain products containing glass fiber is a UMC and UDAP), repealed by 60 Fed. Reg. 65,532 (Dec. 20, 1995) (codified at 16 C.F.R. pt. 413). Although rulemakings sound in consumer protection, the Commission invoked its competition rulemaking authority when issuing the rules because they also structured competition within discrete industries. The FTC also considered promulgating legislative rules in more traditional antitrust contexts. For example, the Commission explored the possibility of promulgating TRRs to address mergers in the cement industry. See Permanente Cement Co., 65 F.T.C. 410, 494 (1964) ("In recognition that the problem of vertical integration in the cement industry through merger is of growing importance . . . the Commission has determined forthwith to institute a Trade Regulation Rule proceeding for the study and consideration of this problem."); see also Mueller, supra note 126, at 118 (discussing the FTC's consideration of methods to counter consolidation in the cement industry).

141. In 1968, Bristol-Myers challenged a TRR based in part on the theory that the FTC lacked the statutory authority under section 6(g) to promulgate legislative rules. Bristol-Myers Co. v. Fed. Trade Comm'n, 284 F. Supp 745, 748 (D.D.C. 1968) ("It is claimed in behalf of the plaintiff that the type of rule that is contemplated . . . is not within the power of the Commission to enact.") aff'd in part, rev'd in part, 424 F.2d 935 (D.C. Cir. 1970). The district court, however, avoided the issue. See id. ("[I]t is argued that the Commission is not clothed with power to conduct rule-making proceedings . . . . On this aspect of the case the Court is of the opinion that the action is premature.").

142. Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n (*Nat'l Petroleum Refiners Ass'n I*), 340 F. Supp. 1343, 1344–45 (D.D.C. 1972), rev'd, 482 F.2d 672 (D.C. Cir. 1973); see also John D. Morris, F.T.C. Tells Gas Stations to Post Octane Ratings, N.Y. Times, Dec. 31, 1970, at 1, https://timesmachine.nytimes.com/timesmachine/1970/12/31/issue.html (on file with the *Columbia Law Review*) (explaining that the octane regulation "is designed to give

companies challenged, among other things, the FTC's statutory authority to issue the rule.[143] The district court sided with the plaintiffs, holding that "Section 6(g) of [the FTC Act] was intended only as an authorization for internal rules of organization, practice, and procedure."[144] But the following year, a unanimous three-judge panel of the D.C. Circuit reversed.[145] Writing for the court, Judge James Skelly Wright held that section 6(g) authorized the FTC to promulgate legislative rules defining unfair methods of competition and unfair or deceptive acts or practices.[146]

The court rejected all the leading arguments against the FTC's legislative rulemaking authority.[147] It first dismissed the claim that section

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motorists a reliable benchmark for determining the antiknock quality of" gasoline brands, as different engines need different minimum levels of octane to operate).

143. *Nat'l Petroleum Refiners Ass'n I*, 340 F. Supp. at 1345. Plaintiffs' arguments built on academic work conducted since the launch of the FTC's trade regulation rules. To learn more about those arguments, see generally Bernie R. Burrus & Harry Teter, Antitrust: Rulemaking v. Adjudication in the FTC, 54 Geo. L.J. 1106 (1966) (challenging the legality and propriety of the movement within the FTC to replace certain adjudicatory enforcement procedures with rulemaking proceedings); Dyer & Ellis, supra note 23, at 334 (arguing that sections 5 and 6(g) of the FTC Act do not provide the FTC with the power to issue substantive rules that carry the force of law); Weston, supra note 66 at 570 (arguing the FTC Act's legislative history did not support the FTC's promulgation of "legislative" or "substantive" rules). The D.C. Circuit's decision failed to convince some skeptics of the FTC's section 6(g) rulemaking authority. See, e.g., Comment, supra note 23, at 633–34 ("[S]uch expanded rule-making powers as the *National Petroleum* court has bestowed upon the FTC should not be assumed . . . . Rather, the FTCA itself must be examined, and it contains little in the way of a congressional grant of substantive rule-making power."). Collectively, these skeptics levied many of the same arguments against the FTC's section 6(g) rulemaking authority as the plaintiffs in *National Petroleum Refiners*. See infra notes 155–158 and accompanying text.

144. *Nat'l Petroleum Refiners Ass'n I*, 340 F. Supp. at 1345.

145. Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n (*Nat'l Petroleum Refiners Ass'n II*), 482 F.2d 672, 697–98 (D.C. Cir. 1973). The panel was comprised of Chief Judge David Bazelon, Judge James Skelly Wright, and Judge Spottswood William Robinson III. Id. at 673.

146. Id. at 698. After losing before the D.C. Circuit, the plaintiffs petitioned for certiorari, which the Supreme Court denied. Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 415 U.S. 951 (1974) (mem.).

147. Contemporary critics of the FTC's noncompete rule have drawn on many of the arguments made by opponents of the FTC's octane rule. Professor Merrill, a leading scholar of administrative law, produced the most thorough argument against the FTC's legal position. See Merrill, Antitrust Rulemaking, supra note 23, at 299 (arguing that it is "logically possible" but "highly unlikely" that the FTC possesses legislative rulemaking power). This Article focuses primarily on his arguments, with occasional reference to arguments advanced by other commentators. See, e.g., Noah Joshua Phillips, Am. Enter. Inst., Against Antitrust Regulation 1 (2022), https://www.aei.org/wp-content/uploads/2022/10/Against-Antitrust-Regulation.pdf?x85095 (on file with the *Columbia Law Review*) (arguing that "[n]either the text nor the structure of the FTC Act support" competition rulemaking); Alden F. Abbott, Legal Constraints on FTC Competition Rulemaking, *in* Rulemaking Authority of the US Federal Trade Commission 129, 137 (Daniel A. Crane ed., 2022) (arguing that the legal basis for FTC rulemaking is weak and uncertain); Maureen K. Ohlhausen & Ben Rossen, Dead-End Road: *National Petroleum Refiners Association* and FTC "Unfair Methods of Competition" Rulemaking, *in* Rulemaking Authority of the US Federal Trade Commission, supra, at 31, 33 (arguing that UMC rulemaking is a "dead end" because

5(b)'s adjudication procedures were the Commission's exclusive enforcement mechanism, noting the FTC Act did not restrict the Commission to enforcing the law through adjudication.[148] In support, the court pointed to *National Broadcasting* and *American Trucking*, in which the Supreme Court relied on the absence of limiting language to uphold a broad interpretation of general rulemaking grants.[149] The court also invoked *Storer* and *Texaco*, in which the Supreme Court upheld rulemaking even though the agencies' organic statutes referred to adjudicatory hearings.[150] Those decisions emphasized that rulemaking could complement

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modern principles of statutory interpretation, the legislative history of Magnuson–Moss, and subsequent legislation weigh against a broad interpretation of section 6(g)); Maureen K. Ohlhausen & James F. Rill, Pushing the Limits? A Primer on FTC Competition Rulemaking, *in* Rulemaking Authority of the US Federal Trade Commission, supra, at 155, 159 (arguing that several policy and institutional factors counsel against legislative-style antitrust rulemaking); Richard J. Pierce, Jr., Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?, *in* Rulemaking Authority of the US Federal Trade Commission, supra, at 101, 112 (doubting whether the Supreme Court would uphold the FTC's section 6 rulemaking power); Berin Szóka & Corbin Barthold, The Constitutional Revolution that Wasn't: Why the FTC Isn't a Second National Legislature, *in* Rulemaking Authority of the US Federal Trade Commission, supra, at 49, 53 ("Simply put, when it passed the FTC Act, Congress did not bury a constitutional revolution deep in fine print."); Gus Hurwitz, The Legality of the FTC's Noncompete Ban Is Less Certain Than Masur and Posner Suggest, ProMarket (June 13, 2024), https://www.promarket.org/2024/06/13/the-legality-of-the-ftcs-noncompete-ban-is-less-certain-than-masur-and-posner-suggest/ [https://perma.cc/XK98-N9MM] (arguing that congressional action indicates that it is "impossible" to find an "unequivocal endorsement of the FTC's authority to issue rules such as the noncompete rule"). In addition to these commentators, the two Republican commissioners, Melissa Holyoak and Andrew N. Ferguson, cited the FTC's lack of legislative rulemaking authority under section 6(g) of the FTC Act as a reason for their vote against the Noncompete Rule. See FTC, Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak in the Matter of the Non-Compete Clause Rule 8 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf [https://perma.cc/T99D-SL7G]; FTC, Dissenting Statement of Commissioner Melissa Holyoak Joined by Commissioner Andrew N. Ferguson in the Matter of the Non-Compete Clause Rule 3 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf [https://perma.cc/WP99-JDD8].

148. *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d at 675.

149. "These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority." National Broad. Co. v. United States, 319 U.S. 190, 217 (1943) (quoting the Communications Act of 1934, Pub. L. No. 73-416, § 303, 48 Stat. 1064, 1082 (1934) (amended 1937)). This responds directly to the arguments of contemporary skeptics that Judge Wright's approach "reversed the standard presumption about the scope of delegated powers" because the "court framed the question as whether there was affirmative evidence *not* to confer power to make legislative rules." Merrill, Antitrust Rulemaking, supra note 23, at 303.

150. *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d at 678–79, 692 (holding that "substantive rule-making is a widely utilized practice throughout our administrative agencies, and its use has been upheld even in cases where its use appears to conflict with regulated parties' adjudicatory rights, as in *Storer, Texaco, Inc.*, and their successors").

adjudication and was often essential to the "orderly conduct" of agency business.[151] By the same reasoning, the FTC could promulgate rules that would alter the adjudicatory process.[152]

The court next rejected the plaintiff-appellees' argument that section 6(g) authorized rulemaking only when the Commission acted under its section 6 authority. It did so "for the simple reason that Section 6(g) clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions of section 5 and it has been so applied."[153] Agency practice and Supreme Court precedent had also weighed in the FTC's favor.[154]

Finally, the court rejected the plaintiff-appellees' claim that section 6(g) only authorized procedural rules. The plaintiff-appellees had pointed to the Commission's limited use of legislative rules before the 1960s,[155] discrete statutes in which Congress expressly granted legislative rulemaking authority to the FTC,[156] and the legislative history of the 1914 Act—including drafting history[157] and floor statements from key members of

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151. Id. at 679 (internal quotation marks omitted) (quoting United States v. Storer Broad. Co., 351 U.S. 192, 202 (1956)). This mirrored the argument that Elman and Posner made in the Cigarette Advertising Rule. See Trade Regulation Rule on the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8365–66 (July 2, 1964) (codified at 16 C.F.R. pt. 408) ("The Commission has been made responsible not only for the prevention of unfair or deceptive practices, but also, and as a necessary threshold step, for the definition of such prohibited practices.").

152. *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d at 692.

153. Id. at 677.

154. See id. at 677 ("[T]he Commission has issued rules specifying in greater detail than the statute the mode of Commission procedure under Section 5 in matters involving service of process, requirements as to the filing of answers, and other litigation details necessarily involved in the Commission's work of prosecuting its complaints . . . ."). In *United States v. Morton Salt Co.*, the Supreme Court recognized "that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and lawapplying role laid out in Section 5." Id. (citing 338 U.S. 632 (1950)).

155. Id. at 685. The argument did not persuade the court, which instead relied on the Supreme Court's instruction in *Morton Salt* that "powers [that] long have been unexercised . . . are not lost by being allowed to lie dormant." Id. at 694 (internal quotation marks omitted) (quoting *Morton Salt*, 338 U.S. at 647–48). The court also dismissed the significance of FTC officials questioning the Commission's authority to promulgate rules with the force of law. Id. Notwithstanding the judicial practice of giving "'great weight' to an agency's construction of its own enabling legislation, particularly when such a construction stretches back . . . to a time close to the agency's origin," the court found that the need for judicial deference was weaker when the question did not implicate specific agency expertise and was simply a question of statutory interpretation. Id.

156. Id. at 696. The court rejected this argument, noting that "it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation." Id.

157. Section 6(g)'s rulemaking grant originated in the House bill. See H.R. 15613, 63d Cong. §§ 1–2 (1914). The bill would have created an investigatory commission with the power to compel annual reports from corporations, investigate potential Sherman Act violations on behalf of the Justice Department, and advise the President and Congress on

Congress.[158] The court rejected each argument individually and their cumulative force. It proclaimed the text of section 6(g) to be "as clear as it is unlimited." [159] The court applied the test for general rulemaking grants established in *Mourning*, which had been decided just weeks earlier.[160] Surveying the FTC Act's history and objectives, the court concluded that legislative rulemaking was both consistent with and well-suited to the FTC's broad mandate.[161]

III. CONGRESS UPDATES THE 1914 ACT

As the *National Petroleum Refiners* suit progressed through the courts, Congress was engaged in a years-long effort to rework the FTC Act. The fruit of that effort was the Magnuson–Moss Warranty—FTC Improvement Act.[162] Signed into law on January 4, 1975, Magnuson–Moss contained "the

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the need for additional antitrust legislation. Averitt, supra note 28, at 232–34; see also Winerman, supra note 38, at 59–60 (noting that the commission would be an "independent agency" that could "investigate, issue subpoenas," and "produce its own reports for the public or Congress"). In contrast, the bill that passed the Senate would have granted the commission adjudicative and investigative powers but omitted any reference to rulemaking. S. 4160, 63d Cong. (1914); see also Introduction: Federal Trade Commission Act of 1914, *in* 5 The Legislative History of the Federal Antitrust Laws and Related Statutes: The Antitrust Laws 3701, 3703–04 (Earl W. Kintner ed., 1982). Thus, going into conference, neither bill gave the FTC authority legislative rulemaking authority with respect to unfair methods of competition.

The plaintiff-appellees argued that, because neither chamber granted such authority, established conference practices precluded the conference committee from doing so. *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d at 704.

158. For example, in discussing the scope of judicial review of the Commission's orders on the floor, Representative Harry Covington distinguished the FTC's power to issue new cease-and-desist orders from the power of the Interstate Commerce Commission to order new railroad rates. See *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d at 707 (quoting 51 Cong. Rec. 14,932 (1914) (statement of Rep. Covington)). He suggested that limited judicial review was appropriate in the former situation, but not the latter, since the ICC was performing an essentially "'legislative' task." Id. (quoting 51 Cong. Rec. 14,932 (statement of Rep. Covington)). He went on to say that the Commission would "have no power to prescribe the methods of competition to be used [the] in future." Id. (internal quotation marks omitted) (quoting 51 Cong. Rec. 14,932 (statement of Rep. Covington)). The court rejected this argument, reasoning that "the power to frame substantive rules, in the context of the FTC, is hardly tantamount to the ICC's power to issue *orders* specifying the prices railroads must thereafter charge," and that the FTC's rules were "merely norms which, in the absence of agency-brought proceedings to enforce them, had no legal effect whatever." Id.

159. Id. at 693.

160. Id. at 689–90 (citing Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973)).

161. Id. at 686.

162. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2018)).

most significant set of amendments to the FTC Act since it was originally enacted in 1914."[163]

This Part demonstrates that Magnuson–Moss directly incorporated the D.C. Circuit's interpretation of section 6(g) into the FTC Act. Section III.A analyzes the text and structure of Magnuson–Moss. It explains how Congress added a new section 18 to the FTC Act that governed consumer protection rulemaking while preserving competition rulemaking authority under section 6(g). Drawing on the legislative history, it further shows that Congress was aware of the D.C. Circuit's holding and chose to legislate against its backdrop rather than repudiate it. Section III.B examines how the FTC's postenactment practice and the Federal Trade Commission Improvements Act of 1980 further ratified the broad interpretation of "rules" in section 6(g).

A. *The Incorporation of* National Petroleum Refiners

Magnuson–Moss incorporated *National Petroleum Refiners* by making key revisions to the FTC Act. It amended section 6(g) by inserting the phrase "(except as provided in section 57a(a)(2) of this title)" before the Commission's general grant "to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[164] At the same time, Magnuson–Moss created section 18 to govern consumer protection (UDAP) rulemaking, which provided, among other things, that:

> The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.[165]

Congress thereby bifurcated the FTC's legislative rulemaking authority: Post-1975, section 18(a) governs consumer protection rulemaking, while section 6(g) authorizes all other rulemaking, including competition rules with the force of law.

To understand why Magnuson–Moss took this form, it helps to begin in the Senate at the start of the ninety-third Congress. On January 12, 1973, Senators Warren Magnuson and Frank Moss introduced Senate Bill 356, the Consumer Products Warranties and Federal Trade Commission

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163. Kintner & Smith, supra note 76, at 652. The components of the bill that were unrelated to consumer protection included expanding the Commission's jurisdiction to matters "'in or affecting' commerce." Id. (quoting Magnuson–Moss Warranty—Federal Trade Commission Improvement Act § 201).

164. 15 U.S.C. § 46(g).

165. Id. § 57(a).

Improvements Act.[166] The bill did two things with respect to the FTC's rulemaking authority: It reaffirmed the FTC's rulemaking authority and layered on new procedural requirements for rules related to UDAPs.[167] A few months later, FTC Chairman Lewis A. Engman asked Senator Magnuson to delete the rulemaking provisions from Senate Bill 356.[168] At the time, *National Petroleum Refiners* was pending before the D.C. Circuit and Chairman Engman anticipated that the court would uphold the FTC's authority under section 6(g) to issue legislative rules governing both competition and consumer protection.[169] Senator Magnuson accepted Chairman Engman's suggestion because Senate Bill 356, as initially drafted, would have paradoxically weakened the FTC by restricting the Commission's legislative rulemaking to unfair acts or deceptive practices and requiring the Commission to undergo additional procedural requirements when issuing such rules.[170] But Senator Magnuson also noted that should the D.C. Circuit rule against the FTC, he would reintroduce language restoring the Commission's rulemaking authority.[171]

That turned out to be unnecessary. In June 1973, the D.C. Circuit vindicated Chairman Engman, holding that FTC rules carry the force of law.[172] So, when the Senate passed Senate Bill 356 on September 12, 1973 (without provisions on rulemaking), section 6(g) had been authoritatively interpreted to empower the FTC to issue legislative rules for both competition and consumer protection rulemaking.[173]

Members of the House had also followed the *National Petroleum Refiners* litigation. Indeed, the House Committee on Interstate and Foreign Commerce noted that "[t]he effect of the Circuit Court's decision was to recognize the FTC's authority" to issue legislative rules with respect to consumer protection and competition using notice-and-comment procedures.[174] During hearings, industry representatives railed against

166. S. Rep. No. 93-151, at 11, 57–58 (1973).

167. Id. Senate Bill 356 contained rulemaking requirements that emerged in an earlier iteration of the legislation. West, supra note 64, at 131. That bill, Senate Bill 986, would have required, among other things, the Commission to conduct a hearing in accordance with sections 556 and 557 of the Administrative Procedure Act. S. Rep. No. 92-269, at 38–40 (1971). Final rules would have also been subject to congressional review. Id. at 25–27; see also id. at 38–40 (containing proposed statutory text).

168. S. Rep. No. 93-151 at 32.

169. Id. at 57–58.

170. Id.

171. Id.

172. See *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d 672, 698 (D.C. Cir. 1973).

173. See 119 Cong. Rec. 29,472–94 (1973) (recording the passage of the Senate bill).

174. H.R. Rep. No. 93-1107, at 33 (1974), as reprinted in 1974 U.S.C.C.A.N. 7702, 7727. Academic skeptics of the D.C. Circuit's decision reached the same conclusion. See Dyer & Ellis, supra note 143, at 333 ("Since the Commission's assertion of authority to issue substantive rules, the legality of such rules has been the subject of controversy both within and without the Commission.").

competition rulemaking.[175] Some contended that rulemaking was too rigid to enforce antitrust law and asserted that competition rulemaking would have the perverse effect of lessening competition.[176] There was also a concern that competition rulemaking might lead the federal government to *overenforce* the antitrust laws.[177] Still others posited that competition rulemaking would create tension between the DOJ and the FTC given their shared jurisdiction over antitrust enforcement.[178]

House Bill 7917 reflected this skeptical view of competition rulemaking. One of its provisions stripped the reference to rulemaking from section 6(g).[179] Another provision created a new section 18,[180] which authorized consumer protection but not competition rulemaking and included the heightened procedures first included in Senate Bill 356.[181] Under the House bill, section 18 would have been "the exclusive substantive rulemaking authority of the FTC."[182] It would thus have prohibited the FTC from issuing any competition rule with the force of law while also mandating hybrid rulemaking procedures (of the sort first suggested by the Senate in Senate Bill 356) for all consumer protection rules with the force of law.[183]

Congress rejected the House's proposed amendments. While Magnuson–Moss adopted the new section 18 to govern consumer protection rulemaking, it dropped the House provisions repealing section 6(g) rulemaking authority as well as the language specifying that section

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175. See, e.g., Consumer Warranty Protection: Hearing on H.R. 20 & H.R. 5021 Before the Subcomm. on Com. & Fin. of the H. Comm. on Interstate & Foreign Com., 93d Cong. 327 (1973) (statement of the Chamber of Com. of the U.S.) ("[I]t is necessary that the bill be explicitly limited to make clear that antitrust matters are not included . . . [and] that the rulemaking authority vested in the Commission is strictly limited to enunciating and prohibiting unfair or deceptive acts as they relate to consumer protection.").

176. See, e.g., Burrus & Teter, supra note 143, at 1127–28 (asserting that "antitrust law operates in the constantly changing area of economics and business," requiring only "case-by-case adjudication"); Weston, supra note 66, at 573 n.159 ("The opportunities for curtailment of price competition by good faith oversimplified rules governing complex marketing structures are manifest.").

177. One commentator fretted that if the FTC had legislative rulemaking authority in the context of antitrust, would it then "have the power to institute trade regulation rule proceedings and decide that certain firms are too large and should not be permitted to grow either by acquisition or by internal growth?" Weston, supra note 66, at 572–73 n.159 (emphasis omitted).

178. For example, would "the Antitrust Division also rely on FTC trade regulation rules to dispense with proof? Would the Division be bound by FTC determinations in such hearings?" Id. at 573 n.159.

179. See H.R. Rep. 93-1107, at 46 (1974), as reprinted in 1974 U.S.C.C.A.N. 7702, 7727 ("[T]he Commission would not have rulemaking authority with respect to unfair methods of competition . . . .").

180. Id. at 55.

181. Id. at 46.

182. Id.

183. Id.

18 would be the exclusive source of rulemaking authority of the Commission. Instead, Congress added to section 18 the above-mentioned language disclaiming any intention to "affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce."[184] Consequently, the final legislative text maintained section 6(g)'s rulemaking authorization and amended it to carve out consumer protection rules, which would henceforth be governed by section 18.[185]

The final bill that emerged was thus a compromise. The Senate bill would have left the Commission's competition rulemaking authority untouched. The Senate wanted the FTC to be able to promulgate consumer protection legislative rules.[186] The Senate also wanted the FTC to be able to enforce those rules in federal court with lawsuits for civil penalties as well as other equitable relief.[187] Meanwhile, House members were much more skeptical of empowering the FTC. The House Interstate and Foreign Commerce Committee sought to divest the Commission of its competition rulemaking authority under section 6(g) and to restrain consumer protection rulemaking.[188] And, in contrast with the Senate bill, the House bill did not grant the Commission any enhanced remedial

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184. H.R. Rep. No. 93-1606, at 32 (1974) (Conf. Rep.). Skeptics of the FTC's competition rulemaking authority cite a statement by Representative James E. Broyhill (R-NC) reflecting a contrary interpretation of the conference substitute, arguing that the bill did not "deal with the antitrust laws" and that he did "not believe that the FTC has . . . authority" to promulgate legislative rules under section 6(g):

> The rulemaking provision, I might add, does not affect any authority the FTC might have to promulgate rules which respect to "unfair methods of competition" including, of course, antitrust prohibitions. I myself do not believe that the FTC has any such authority. I am advised that there is a passing reference in the appellate court decision in the Octane Posting case, to the effect that the FTC may have some kind of authority to issue some kind of antitrust rules.

Merrill, Antitrust Rulemaking, supra note 23, at 313–14 (quoting 120 Cong. Rec. 41,407 (1974) (statement of Rep. Broyhill)).

Representative Broyhill's statement lacks credibility. He supported revoking the FTC's authority to issue competition rules under section 6(g). 120 Cong. Rec. 31,316. And he had previously recognized the Commission's unfair competition rulemaking authority given the D.C. Circuit's decision in *National Petroleum Refiners*. Id. at 31,738. His comment is thus a classic example of "gaming" the legislative history and should be ignored by courts. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 18–19 (1994) (discussing the problem of strategic behavior by legislators); Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 Yale L.J. 70, 118–28 (2012) (warning against uses of legislative history that over-emphasize the viewpoint of the losing side, analogizing to the lack of legal authority backing a judicial dissent).

185. See H.R. Rep. No. 93-1606, at 16, 31–32.

186. See id. at 29–30. Senator Magnuson argued that these changes were significant because they would enable the FTC to do more than just "slap[] the wrists of persons who engage in unfair or deceptive practices." 120 Cong. Rec. 40,712 (statement of Sen. Magnuson).

187. H.R. Rep. No. 93-1606, at 39–41.

188. See supra notes 175–183 and accompanying text.

authority to enforce consumer protection rules.[189] So in effect, the House's hybrid procedures for consumer protection rulemaking were the price that advocates for expanding the FTC's authority paid to secure the final bill's enhanced remedial authority to penalize consumer protection rule violations.

Although the bill dealt primarily with consumer protection, Senator Philip Hart, who reflected on both mandates, saw the heightened procedures for legislative UDAP rules as compared to the notice-and-comment procedures for legislative UMC rules as an experiment: "An assessment and comparison . . . of the experiences and results of this dual approach to FTC rulemaking will facilitate future congressional determination of what, if any, changes should be made in [the rulemaking provisions] of this bill."[190] Senator Hart also commented on "the unique opportunity to assess and compare actual experience and results under somewhat different approaches to the rulemaking process."[191] This would happen, he explained, because the legislative compromise struck with respect to consumer protection rulemaking was "not intended to affect the Commission's authority to prescribe and enforce [competition] rules . . . in accordance with the informal rulemaking procedures of section 553, title 5, United States Code."[192] As a result, he expected the FTC to "promptly commence" *both* consumer protection and competition rulemaking proceedings.[193]

The text and structure of the FTC Act, as amended by Magnuson–Moss, affirms Senator Hart's interpretation. Consider the structure of section 18. Section 18(a)(1) describes two types of consumer protection rules: legislative rules, that is, "rules which define with specificity acts or practices which are unfair or deceptive" and nonlegislative rules, that is, "interpretive rules and general statements of policy."[194] Section 18(a)(2) follows by authorizing the Commission to prescribe "*any rule* with respect to unfair or deceptive acts or practices in or affecting commerce."[195] The key word is "any," which means "unmeasured or unlimited in amount, number, or extent" or "one, some, or all indiscriminately of whatever

189. H.R. Rep. No. 93-1606, at 40–41. Members of the House thought granting the FTC additional remedial authority would have amounted to a "radical change" in how governmental agencies protected the public. 120 Cong. Rec. 31,736 (statement of Rep. Young). Despite these concerns, Magnuson–Moss empowered the FTC to punish rule violators by levying civil penalties of up to $10,000 per day and authorized courts to order remedies such as refunds, damages payments, or contract clause rewrites. Bernice Rothman Hasin, Consumers, Commissions, and Congress: Law, Theory, and the Federal Trade Commission, 1968–1985, at 111 (1987).

190. 120 Cong. Rec. 40,713 (statement of Sen. Hart).

191. Id.

192. Id.

193. Id.

194. 15 U.S.C. § 57a(a)(1) (2018).

195. Id. § 57a(a)(2) (emphasis added).

quantity."[196] Thus, the term "any" conveys that the restriction on the Commission's consumer protection rulemaking authority encompasses *both* the legislative and nonlegislative rulemaking power delegated in section 18(a)(1).

The word "rules" maintains that broad meaning through the next sentence of section 18(a)(2), the savings clause. By specifying "rules (including interpretive rules), and general statements of policy,"[197] and by employing the same word, "rules"—which includes both legislative and nonlegislative consumer protection rules—in the previous sentence, Congress included in the savings clause those competition rules that carry the force of law. Any other interpretation would render the phrase "(including interpretive rules), and general statements of policy" mere surplusage.[198]

The fact that "rules" in the savings clause encompasses legislative rules carries interpretive significance. Even if section 6(g)'s text was ambiguous, courts would heed the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.'"[199] As applied, this suggests that "rules" in

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196. Any, Merriam-Webster, https://www.merriam-webster.com/dictionary/any [https://perma.cc/4C26-TLBW] (last visited Aug. 28, 2025); see also Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) ("We have previously noted that '[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" (alteration in original) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997))).

197. 15 U.S.C. § 57a(a)(2). For an opposing perspective, see Merrill, Antitrust Rulemaking, supra note 23, at 307 n.194 (arguing that section 18(a)(2)'s explicit exception for rules "including interpretive rules" does not determine whether other types of rules are also excluded (internal quotation marks omitted)).

198. See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) (holding that the Court is reluctant "to treat statutory terms as surplusage"); United States v. Menasche, 348 U.S. 528, 538–39 (1955) (holding that it is the Court's "duty to 'give effect, if possible, to every clause and word of a statute'" (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883))).

199. Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) (internal quotation marks omitted) (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934)). The Supreme Court has reiterated this lesson several times. For example, in *West Virginia University Hospitals, Inc. v. Casey*, Justice Antonin Scalia argued that:

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.

499 U.S. 83, 100–01 (1991) (citation omitted). *Casey* came three years after Justice Scalia wrote: "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . ." United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

section 6(g) includes legislative rules because it carries the same broad meaning in the savings clause.

Moreover, assigning a narrow definition to the word "rules" would render some of Magnuson–Moss's amendments to the FTC Act meaningless. After all, if section 6(g) did not already grant the power to issue legislative rules, then section 18 would have introduced a new authority (legislative rulemaking authority) that the statute had previously not conferred. If that were the case, then Congress would have had no reason to amend section 6(g) to exclude the rulemaking authority specified in section 18(a). Similarly, the only reason it made sense for Congress to specify that the Commission had no authority "other than its authority under [section 18]" to issue consumer protection rules was if the Commission had a preexisting source of authority that it could have relied on to issue legislative rules.[200] And finally, if Congress had not already understood section 6(g) to grant legislative rulemaking authority, there would have been no reason to include section 202(c)(1) in Magnuson–Moss, which provided that any new rulemaking would "not affect the validity of any rule which was promulgated under section 6(g) of the Federal Trade Commission Act prior to the date of enactment of [Magnuson–Moss]."[201] Thus, because "the rule against treating [a statutory term] as a nullity is as close to absolute as interpretive principles get,"[202] the word "rules" in section 6(g) must encompass legislative rules.

B. *After Magnuson–Moss*

1. *Subsequent FTC Actions.* — Even though Magnuson–Moss incorporated the FTC's rulemaking authority under section 6(g), the Commission generally relied on section 18 when issuing legislative rules. The reason was straightforward: Magnuson–Moss gave the Commission stronger enforcement tools for consumer protection rules, including civil penalties and consumer redress.[203] Section 6(g) did not give the Commission

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200. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, sec. 202(a)(2), § 18, 88 Stat. 2183, 2193 (codified at 15 U.S.C. §§ 2301–2312 (2018)).

201. Id. § 202(c)(1), 88 Stat. at 2198.

202. King v. Burwell, 576 U.S. 473, 502 (2015) (Scalia, J., dissenting).

203. See supra note 189. Judge Robert Katzmann argued that "[b]ureaucratic resistance" prevented the FTC from relying more extensively on rulemaking in the competition context. Robert A. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy 191 (1980).

His research revealed that:

> [A]ttorneys who are convinced that trial experience is central to their career prospects are not likely to look favorably upon rule making, since it may reduce litigative activity with respect to conduct cases—precisely those vehicles that lawyers believe will help them secure their professional objectives. In addition, many lawyers might conceivably interpret the use of rule-making as an attack on their competence as litigators. In [former Director of the Bureau of Competition Owen] Johnson's view: "It's a little

comparable tools to enforce competition rules.[204] Moreover, the Supreme Court's broad interpretation of the Commission's UDAP authority allowed the FTC to make rules that sounded in consumer protection but relied on competition considerations.[205]

The Eyeglass Rule illustrates this strategy.[206] Before the rule, many optometrists and ophthalmologists refused to release eyeglass prescriptions to patients.[207] The Commission found that this practice harmed competition because it prevented opticians from competing in the retail ophthalmic market[208] and harmed consumers by limiting their access to less expensive glasses.[209] The Eyeglass Rule addressed both concerns by requiring optometrists and ophthalmologists to give patients their prescriptions. Doing so enabled consumers to choose freely among different providers.[210]

The standards and certification rule provides another example. The Commission initiated rulemaking in response to allegations that some standards were too lax, while others deliberately imposed onerous

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> hard to convince them they won't lose their masculinity if they get into rule-making."

Id. (quoting FTC Bureau of Competition Considers Regulating Competition by Rulemaking, Antitrust & Trade Regul. Rep., Dec. 14, 1976, at A-23 (on file with the *Columbia Law Review*)).

204. Although Magnuson–Moss required the Commission to assume a more extensive procedural burden in promulgating section 18 rules, "[t]he burden of section 18's statutorily mandated procedures has been dramatically overstated." Kurt Walters, Reassessing the Mythology of Magnuson–Moss: A Call to Revive Section 18 Rulemaking at the FTC, 16 Harv. L. & Pol'y Rev. 519, 522 (2022). This explains why it would have been reasonable for the Commission to voluntarily assume the more extensive procedural obligations of section 18, even if it could have relied on section 6(g). But see Ohlhausen & Rill, supra note 147, at 166 (arguing that section 6(g) of the Act expressly excludes unfair methods of competition from the FTC's rulemaking authority).

205. Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972); see also Averitt, supra note 28, at 286–87 (describing the FTC's ability post-*Sperry* to use competition considerations to issue consumer protection rules).

206. Ophthalmic Practice Rules, 16 C.F.R. pt. 456 (2025).

207. FTC, Staff Report on Advertising of Ophthalmic Goods and Services and Proposed Trade Regulation Rule 241 (1977), https://www.ftc.gov/system/files/documents/reports/staff-report-advertising-ophthalmic-goods-services-proposed-trade-regulation-rule-16-cfr-part-456/r611003_-_staff_report_on_advertising_of_ophthalmic_goods_and_services_and_proposed_trade_regulation.pdf [https://perma.cc/EM82-NVZW].

208. Id. at 264–65.

209. See id. at 265 ("[W]ide variations in eyeglass prices exist within the market. Without the ability to unconditionally obtain their prescriptions, consumers are unable to utilize the information which does exist to seek out the mixture of quality and price which best satisfies their needs." (footnote omitted)).

210. In the rule's statement of basis and purpose, the Commission explained that the evidence from the Staff Report overwhelmingly demonstrated that optometrists' and ophthalmologists' conduct deprived consumers of the ability to effectively utilize available market information, subjecting "consumers . . . to substantial economic loss." Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23,992, 24,003 (June 2, 1978) (codified at 16 C.F.R. pt. 456).

requirements to prevent competition from new market entrants.[211] Even though this conduct harmed both competition and consumers—supporting legislative rules under either section 6(g) or section 18—staff urged the Commission to proceed under section 18 because it offered stronger remedial authority.[212]

Given this historical record, skeptics claim the Commission's post Magnuson–Moss record reveals that the FTC can issue legislative rules that address consumer injury, but not competitive injury.[213] But this ignores that the FTC, even while conducting rulemaking under its section 18 authority, consistently maintained it had rulemaking authority under section 6(g).[214] Indeed, as late as 1980, the Commission considered competition rulemakings in the oil and health insurance industries.[215]

2. *Subsequent Congressional Action.* — Subsequent action by Congress reflects it also understood Magnuson—Moss as having incorporated *National Petroleum Refiners*. Indeed, the only way to make sense of the text of the Federal Trade Commission Improvements Act of 1980 (FTCIA) is to assume it did so.[216] For instance, section 15 required the Commission to issue advance notices of proposed rulemakings and to conduct regulatory

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211. Quentin Riegel, The FTC in the 1980's: An Analysis of the FTC Improvements Act of 1980, 26 Antitrust Bull. 449, 463 (1981) (describing that complaints that some standards under section 18 were so high that they unreasonably excluded new market entrants led the FTC to propose mandatory rules relating to notice, intervention, and appeal).

212. FTC, Standards and Certification: Proposed Rule and Staff Report 279 (1978) ("A Trade Regulation Rule concerning unfair methods of competition alone could be promulgated under the procedures of APA § 553. However, there are well recognized reasons for using the more rigorous Magnuson–Moss procedures. . . . Magnuson–Moss rulemaking provides additional enforcement tools for the Commission to use . . . .").

213. See Pierce, supra note 147, at 110 (questioning then-FTC Chair Lina Khan's interpretation of the Act as allowing the FTC to "use pure notice-and-comment rulemaking" that is used to address consumer injury to "issue legislative rules that define 'unfair methods of competition'").

214. See Antitrust Section, ABA, Report of the Section Concerning Federal Trade Commission Structures, Powers, and Procedures, 49 Antitrust L.J. 323, 325 (1980) (referencing the "FTC staff's position that the Commission has the power to promulgate industry-wide rules in the antitrust area").

215. Id. at 340.

216. Skeptics take a different view, asserting the FTCIA was a rebuke rather than a ratification of the FTC's rulemaking efforts at the time. See Hurwitz, supra note 147 ("It is impossible to read [the legislative history and veto] as an unequivocal endorsement of the FTC's authority to issue rules such as the noncompete rule."). Members of Congress still doubted the FTC's authority to promulgate antitrust rules, with one senator remarking on the "unresolved legal issues" regarding that authority and asserting that the conference report for the legislation left that authority "an open question." Id. (internal quotation marks omitted) (quoting Sen. Wendell Ford). In the FTCIA, Congress also enacted a temporary legislative veto on all FTC rulemaking, subjecting all FTC rules to congressional review for three years. See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21(a), 94 Stat. 374, 393 (expired Sep. 30, 1982). The Supreme Court struck down such vetoes several years later. See Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (ruling that a one-chamber legislative veto violated the constitutional requirements of bicameralism and presentment).

analyses for both proposed and final rules.[217] It applied these requirements to all rulemakings under sections 6 and 18, except for interpretive rules, internal management rules, general policy statements, or rules concerning the FTC's organization, procedure, or practice.[218] Because Magnuson–Moss limited consumer protection rulemaking to section 18, Congress's reference to substantive rulemaking under section 6 can only be understood as a reference to competition rulemaking. By excluding interpretive rules, internal management, and general statements of policy, section 15 thus operates as a further statutory incorporation of section 6 as a legislative rulemaking authority.[219]

The drafting history of section 7 points in the same direction. Section 7 barred the Commission from issuing a standards and certification rule under section 18.[220] This represented a change from the Senate's proposed language, which would have eliminated the Commission's rulemaking authority under both sections 6(g) and 18.[221] The Senate committee wanted to prevent a section 18 rule because it did not think the conduct at issue was a UDAP.[222] The Committee understood the conduct

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217. See Federal Trade Commission Improvements Act § 15.

218. Id. The definition of "rule," codified at 15 U.S.C. § 57b-3(a)(1), also provides that amendments to an existing rule do not count unless the amendment has an "annual effect on the national economy of $100,000,000 or more" or has a "significant impact upon persons subject to regulation under such amendment." See id. These details further affirm that "rules" refer to rules that subject the public to regulation (i.e., legislative rules) and have significant effects. Such characteristics are not reflective of interpretive rules.

219. This provision appeared in the version of the bill reported to the House on May 15, 1979, and remained more or less unchanged throughout the legislative process. See H.R. Rep. No. 96-181, at 1–3 (1979) (outlining sections 101 and 201–204, which were ultimately incorporated into the official provision). The committee report on that May 1979 bill did not supply much explanation: "This section defines the term 'rule' to include any rule prescribed under either section 18 or section 6 of the [FTC] Act. Rules involving commission management or personnel, interpretive rules and general statements of policy, or rules of Commission organization, procedure, or practice are excluded from the definition." Id. at 15. The definition also appeared in the principal Senate companion bill in November 1979. See S. 1991, 96th Cong. § 14 (1979). The Senate Commerce Committee's executive session featured no debate of the provision. See S. Comm. on Com., Sci., & Transp., Executive Session #13 (Nov. 20, 1979). When the Committee considered section 14, which contained the definition, a staffer explaining the bill to Committee members noted that "Section 14 is simply a definition section." Id. at 91 (statement of staffer Mullen). Senator Wendell Ford remarked that the "language of these sections tracks the language of the House Authorization Bill with few modifications." Id. (statement of Sen. Ford). It was agreed to without objection. Id. at 92.

220. See S. Rep. No. 96-500, at 16–18 (1979) (explaining the purpose of section 7). As discussed above, the FTC had initiated a section 18 rulemaking proceeding in response to complaints that some standards-setting organizations were allegedly excluding certain goods from the market by setting unreasonably high standards and that others were allegedly mandating insufficient levels of safety. See supra note 162 and accompanying text.

221. See S. 1991, § 14.

222. The Committee argued that "[s]uch conduct, if proven, would constitute a boycott under the Sherman Act." S. Rep. No. 96-500, at 19. This was significant because

as a UMC but still aimed to block a section 6(g) rule because members believed the FTC had not shown a pervasive pattern of anticompetitive conduct that warranted rulemaking over case-by-case adjudication.[223] The Senate's attempts to prevent rulemaking under both provisions shows that Congress understood sections 18 and 6(g) to confer legislative rulemaking authority. If Congress had believed otherwise, it would have sufficed to revoke section 18 authority alone. So the decision to target section 6(g) underscores that the Committee recognized the FTC's power to promulgate legislative rules under that provision.

In the end, the FTCIA preserved the Commission's section 6(g) authority by preventing the FTC from issuing a standards and certification rule under section 18, but leaving intact the Commission's power to issue competition rules under section 6(g).[224] The legislative history confirms as much. Senator John Danforth admitted he "would have preferred to limit the FTC rulemaking authority to procedural requirements in the development of product standards."[225] But he acknowledged that "[u]nder the compromise, the FTC also can rulemake in the substantive areas of product standards."[226] Representative James Scheuer echoed the sentiment, saying: "I believe that the substitute leaves unaffected the Commission's authority under section 6(g) of the FTC Act to continue this proceeding and issue rules with respect to 'unfair methods of competition' relating to standards and certification activities."[227]

> [T]he Commission has no authority to issue antitrust trade regulation rules under the Magnuson–Moss Act, since section 18 is specifically limited to authority to issue rules to prohibit unfair or deceptive acts or practices. The clear intent of Congress in granting this authority was to address problems causing direct consumer injury, not to provide new rulemaking authority over antitrust violations.

Id. at 19 n.6.

223. See id. at 19 (explaining the Committee's belief that the exclusion of products from the market does not justify a rulemaking over "case-by-case activities").

224. See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, sec. 7, § 18(a)(1)(B), 94 Stat. 374, 376 (codified at 15 U.S.C. § 57a(a)(1)(B) (2018)) (explaining "that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section").

225. 126 Cong. Rec. 11,919 (1980) (statement of Sen. Danforth).

226. Id. (statement of Sen. Danforth). Senator Danforth also said that the "Senate-House compromise prohibits the FTC from using its authority in the FTC Act under Sec. 18 (Consumer Protection) [to regulate standards and certification] but allows it to use whatever authority it may have under Sec. 6 (antitrust)." Id. (statement of Sen. Danforth).

227. 126 Cong. Rec. 11,820 (statement of Rep. Scheuer) (quoting Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722). Representative Scheuer also noted that the bill's legislative veto provision applied to "trade regulation rules promulgated under section 18(a)(1)(B) of the FTC Act and substantive rules promulgated under section 6(g) of the FTC Act." Id. at 11,819 (statement of Rep. Scheuer). Representative Thomas Luken echoed this aspect of the bill, too: "Although the conference report is silent on this point, the FTC may continue its standards and certifications rulemaking procedures under 6(g)." Id. at 11,825 (statement of Rep. Luken). Although he

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In sum, Congress incorporated *National Petroleum Refiners* into the FTC Act. It created a process for consumer protection rulemaking in section 18 and left section 6(g) in place for UMC rules.[228] The statute's plain text, structure, and savings clause all demand that interpretation. The committee reports and floor debates further reflect Congress's awareness of *National Petroleum Refiners* and its decision to restructure UDAP rulemaking without retracting competition authority.[229] Subsequent agency practice and the FTC Improvements Act of 1980 presupposed section 6(g) authority, confirming that Congress refined consumer protection procedures and preserved legislative rulemaking for UMCs.

IV. HOW TO READ SECTION 6(G) TODAY

This Part turns to the question of how contemporary courts should interpret the FTC's competition rulemaking authority under section 6(g). The history above depicts an agency charged by Congress in 1914 with implementing President Wilson's vision of regulated competition in commerce.[230] Over the years, its approach evolved and became the subject of a long-running conversation with Congress. At times the Commission narrowed its focus to emulate the Antitrust Division at the DOJ. And, at other points it issued TRRs, a practice first affirmed by the D.C. Circuit and later incorporated by Congress.

Yet a new generation of critics have nonetheless argued—despite binding precedent and statutory affirmation—that the FTC lacks competition rulemaking authority under section 6(g). This argument overlooks several features of antitrust law and of the Commission's history, and it rests on several implausible premises. It requires assuming that Congress, in the 1970s, was unaware of *National Petroleum Refiners* (or, less plausibly, that it anticipated shifting tastes in interpretive method). It also depends on the post-hoc discovery of an unwritten convention of statutory interpretation that was somehow never once mentioned in the voluminous history of the FTC Act or its amendments. As discussed below, it is the critics who urge an activist reading of the FTC's authority as they seek to relitigate battles long ago lost.

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noted that "the ultimate question of the FTC's authority in this regard is left with the courts," he further explained that "[t]he courts have already ruled that the FTC does have rulemaking authority under 6(g)" and cited *National Petroleum Refiners Ass'n v. FTC*. Id. (statement of Rep. Luken).

228. Id. at 11,820 (statement of Rep. Scheuer).

229. See id. at 11,825 (statement of Rep. Luken).

230. See supra section I.A.

A. *The Mass Amnesia Theory*

The criticism of *National Petroleum Refiners* and FTC rulemaking is part of a broader effort to limit the rulemaking powers of the administrative state.[231] Relevant to that effort is a 2002 paper by Professors Merrill and Watts on the topic of legislative rulemaking.[232] The paper suggested that the courts had wrongly found rulemaking powers in numerous agencies.[233] The reason, they argued, was that Congress's Offices of Legislative Counsel, during the New Deal and Progressive Era, had followed an obscure, unwritten convention when it came to the granting of legislative rulemaking powers to an agency.[234] It was limiting: "If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction . . . then the grant conferred power to make rules with the force of law."[235]

The existence of an unwritten convention is of unquestionable interest to historians of the Offices of Legislative Counsel.[236] But the two authors, and especially Merrill, argue that it should be of present relevance and even given retroactive influence over appellate and Supreme Court cases.[237]

Yet considered as matter of legal authority, as opposed to historic interest, it is far too elusive and ethereal to be relied on. The authors admit

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231. See supra note 148.

232. Merrill & Watts, supra note 105, at 533.

233. Id. at 529.

234. Id. at 472.

235. Id.

236. See id. (explaining the history and importance of Congress's convention for delegating rulemaking powers). Recent scholarship by Ph.D. candidate Beau Baumann promises to have located evidence of the convention in the form of a 1929 memo written by a congressional staff attorney, C.E. Turney. Beau J. Baumann, The Turney Memo, 97 Notre Dame L. Rev. Reflection 155, 156 (2022), https://ndlawreview.org/wp-content/uploads/2022/01/NDLRR_13_Beau-J.-Baumann-The-Turney-Memo-Reproduction-C.E.-Turney-Office-of-Legislative-Counsel-of-the-United-States-Senate-97-Notre-Dame-.pdf [https://perma.cc/FB3J-56DZ] [hereinafter Baumann, Turney Memo]. In Baumann's words, "Turney suggests that, for the purposes of civil and criminal penalties, a regulation carried the force of law if Congress delegated to agencies the ability to flesh out those penalties." Id. at 159. Baumann argues that Turney's writing "confirms the existence of the force-of-law convention" because his memo declares that "Congress must fix the penalty." Beau J. Baumann, Resurrecting the Trinity of Legislative Constitutionalism, 134 Yale L.J. 2249, 2337 (2025) (internal quotation marks omitted) (quoting Memorandum from C.E. Turney, Off. of Legis. Couns. of the U.S. Senate, to the Sec'y of Com., reprinted in Baumann, Turney Memo, supra, at 170).But we note this line in the Turney Memo concerned criminal, not civil, liability. See Memorandum from C.E. Turney, Off. of Legis. Couns. of the U.S. Senate, to the Sec'y of Com., reprinted in Baumann, The Turney Memo, supra, at 170 (discussing the Supreme Court's holdings striking down criminal convictions for violating regulations unless Congress expressly made such violations a crime).

237. See Merrill, Antitrust Rulemaking, supra note 23, at 316 ("When considered against the drafting conventions followed when Congress passed the FTC Act in 1914, the original law was never intended to grant legislative rulemaking authority to the FTC.").

that "the convention was never explicitly memorialized in an authoritative text, such as a statute, a legislative drafting guide, or a prominent judicial decision."[238] They also concede that it was never actually raised, let alone litigated, over the many postwar decades in which the Supreme Court considered the scope of rulemaking powers of the various agencies.[239] The FTC is no exception: Despite more than a decade of debate, there is no mention of it.[240]

Explaining so many dogs that did not bark is obviously a challenge. The authors posit a mass amnesia theory.[241] Dozens of lawyers across generations, they suggest, failed to remember the convention's existence, and hence no judge ever wrote of it, even to reject it.[242] It is akin to a mysterious ghost of administrative law—spoken of, but never seen, yet still possessed of supernatural power.[243]

The mass amnesia hypothesis and lack of any official recognition raise significant doubts as to the weight of the convention, if it indeed did exist in the posited form.[244] It seems most likely to have been a pet theory within the congressional Offices of Legislative Counsel—unknown to members of Congress, and one unofficial enough that no one bothered to write it down in any official document. What seems impossible to believe is that the convention could be both authoritatively binding on such a significant question, yet also so easily forgotten.[245] No one has forgotten obscure canons like the *Charming Betsy* canon or the derogation canon—at least if there is any chance such cannons might help in a high-stakes case.[246]

The Supreme Court's legislative-rules cases from the 1950s through the 1970s were high-stakes cases, attracting some of the best lawyers and greatest judges in American history.[247] Yet Merrill and Watts suggest that

238. Merrill & Watts, supra note 105, at 495.

239. See id. at 541 (explaining the convention's lack of formal roots).

240. See id. at 557 (describing the "general erasure" of the convention by cases like *National Petroleum Refiners*).

241. See id. at 529 ("[T]he only conclusion one can draw . . . is that the Justices—and the lawyers appearing before them—had no knowledge of the convention.").

242. Id.

243. Id.

244. Id.

245. See id. at 472 ("The most remarkable aspect of this drafting convention is that modern administrative lawyers are not aware of its existence. How could a convention that Congress consistently followed during the formative years of the administrative state simply disappear from legal consciousness?").

246. See Benjamin Eidelson & Matthew C. Stephenson, The Incompatibility of Substantive Canons and Textualism, 137 Harv. L. Rev. 515, 536 (2023) ("Consider, for example, the *Charming Betsy* canon, which favors interpretations of statutes that would put them on the right side of international law."); Anita S. Krishnakumar, Reconsidering Substantive Canons, 84 U. Chi. L. Rev. 825, 834 (2017) (explaining, among others, the derogation canon).

247. See Merrill & Watts, supra note 105, at 529, 531, 533, 539 (noting the involvement of Justices Felix Frankfurter, William Douglas, and William Rehnquist in several of these cases). Then-advocate Ruth Bader Ginsburg submitted an amicus brief in General Electric

this entire generation of lawyers simply forgot about what should have been (according to the authors) the winning argument, committing malpractice en masse.[248] What seems more likely is that the theory was not widely accepted outside the Offices of Legislative Counsel, and not seen as worth bothering with.

Even if we assume that lawyers should have raised the unwritten convention, it was uniformly waived.[249] Legal history is full of cases that lawyers later think should have been litigated differently. Merrill and Watts, however, argue that the convention still has force, that *National Petroleum Refiners* was wrongly decided, and that the statutory law affirming it did not do so.[250] Let us pause to consider this claim and what it demands.

B. National Petroleum Refiners *and the Savings Clause*

We have pointed out that Congress, in the wake of *National Petroleum Refiners*, was asked to overrule it but declined and instead inserted text to save it.[251] Merrill believes the case to be wrongly decided; as detailed above, we believe the decision follows from both plain text and Supreme Court precedent.[252] But should there be any doubt outside of the D.C. Circuit, it is the Magnuson–Moss Act and its statutory text affirming section 6(g) that now control.[253]

Merrill and other critics ask for a textual reading of the FTC Act that presupposes that Congress was simply unaware of *National Petroleum Refiners* in 1975.[254] It is otherwise quite impossible to make sense of their interpretation of the Magnuson–Moss Act and its statutory text affirming the understanding of section 6(g).[255] That is why Congress provided that Magnuson–Moss would "not affect any authority of the Commission to prescribe *rules* (including interpretive rules), and general statements of

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Co. v. Gilbert, 429 U.S. 125 (1976), while working at the Women's Rights Project. Women's Rts. Project, ACLU, Timeline of Major Supreme Court Decisions on Women's Rights (2006), https://www.aclu.org/sites/default/files/pdfs/timelinesupremecourt20060302.pdf [https://perma.cc/3HFA-2FBH].

248. See Merrill & Watts, supra note 105, at 472 (introducing the mass amnesia theory).

249. See id. at 542–43 (arguing that even in situations in which the convention "provided a winning argument," it was waived by counsel).

250. See id. at 556–57 ("The legislative history of the FTCA, as we have seen, provides significant evidence that Congress did not intend to grant legislative rulemaking authority to the FTC. Judge Wright nevertheless pronounced this history to be 'ambiguous' . . . ." (footnote omitted) (quoting *Nat'l Petroleum Refiners Ass'n II*, 482 F. 2d 672, 686 (D.C. Cir. 1973))).

251. See supra section II.C.

252. See Merrill, Antitrust Rulemaking, supra note 23, at 302–05.

253. 15 U.S.C. §§ 2301–2312 (2018).

254. See Merrill & Watts, supra note 105, at 556.

255. Then-professor Amy Coney Barrett argued that substantive canons are "at apparent odds with the central premise from which textualism proceeds." Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 110 (2010).

policy, with respect to unfair methods of competition in or affecting commerce."[256] As Merrill acknowledges, that "sentence meant to preserve the status quo with respect to the FTC's rulemaking authority in antitrust matters."[257] That would seem, most naturally, to suggest affirming *National Petroleum Refiners,* the status quo at the time.[258]

To avoid that conclusion, Merrill makes the implausible suggestion that the savings clause was meant to preserve not the legislative rules just upheld by the D.C. Circuit, but something else: the Merger Guidelines coissued by the FTC and Justice Department in 1968.[259] But the Commission, as detailed in the history above, has long issued rules seeking to govern industry practice, including the trade practice rules (also styled as interpretative rules) and, later on, trade regulation rules under section 6(g).[260] The Merger Guidelines—technically styled as enforcement guidelines—have never been described as "rules" by the agencies or the antitrust bar.[261] That makes it implausible that the "rules" language was added to refer to the guidelines.[262]

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256. 15 U.S.C. § 57(a) (emphasis added); see also H.R. Rep. No. 93-1606, at 32 (1974) (Conf. Rep.).

257. Merrill, Antitrust Rulemaking, supra note 23, at 307.

258. *National Petroleum Refiners* continues to be an administrative law case in good standing. See Blake Emerson, The Progress of FTC Rulemaking, Yale J. on Regul.: Notice & Comment (Mar. 21, 2023), https://www.yalejreg.com/nc/the-progress-of-ftc-rulemaking-by-blake-emerson/ [https://perma.cc/9ZF6-ZHZ6] ("*National Petroleum Refiners* isn't some obscure case. It's a landmark holding on agency rulemaking authority by the nation's most important administrative law circuit court—one that is frequently taught in administrative law courses.").

Courts view the case similarly. Judge Friendly relied on the "comprehensive" *National Petroleum Refiners* opinion in *National Ass'n of Pharmaceutical Manufacturers v. Food & Drug Administration*. 637 F.2d 877, 879–80 (2d Cir. 1981). In the same section, Judge Friendly noted that "at one time it was widely understood that generalized grants of rulemaking authority conferred power only to make rules of a procedural or an interpretative nature." Id. at 880. But, he continued, following "an outstanding opinion by Justice Reed" in *American Trucking Ass'ns v. United States*, a "generous construction of agency rulemaking authority has become firmly entrenched." Id. Justice Elena Kagan likewise relied on *National Petroleum Refiners* in her dissent in *Seila Law*. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2239 n.10 (2020) (Kagan, J., concurring in the judgment and dissenting in part) (relying on *National Petroleum Refiners* to support the proposition that "the FTC has always had statutory rulemaking authority, even though (like several other agencies) it relied on adjudications until the 1960s").

259. See Merrill, supra note 23, at 307 (arguing that the saving clause ensures that only two types of rules affecting unfair competition remain unaffected, including the Merger Guidelines).

260. See supra section I.B.

261. See, e.g., Press Release, FTC, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines [https://perma.cc/C2AJ-58EM] (describing the Merger Guidelines as a "framework[]" but not as rules).

262. See Merrill, Antitrust Rulemaking, supra note 23, at 307.

Merrill alternatively suggests that the savings clause's specific mention of "Guidelines" and "rules (including interpretative rules)" should be understood as excluding legislative rules.[263] This only makes sense if we imagine that Congress was unaware of *National Petroleum Refiners*. If Congress was instead reacting to the case, then saving "rules . . . with respect to unfair methods of competition" would naturally refer to the trade regulation rules.[264] Meanwhile, the parenthetical "(including interpretive rules)" would protect the older trade practice rules.[265] In sum, the clause protects all three tools used by the FTC: trade regulation rules, trade practice rules, and policy guidelines.[266]

Stated differently, the savings clause reflects the FTC's ongoing dialogue with Congress and needs to be read in that context. In the text of *National Petroleum Refiners*, Judge Wright invited Congress into such a debate, writing, "In the event Congress decides that the scope of rulemaking power that we find to be implied in the 1914 Act is too broad or lacks sufficient safeguards, surely it appears in a prime position to make the required changes."[267] Congress, as detailed above, took up the invitation in crafting Magnuson–Moss with full awareness of *National Petroleum Refiners* as well as the FTC's trade regulation and trade practice rules.[268] The debate proposed by Judge Wright found its answer in sections 18 and 22 of the FTC Act.[269] By passing those sections, Congress understood that the FTC would retain its ability to issue trade regulation rules with respect to competition.[270] Magnuson–Moss, in short, should be understood as

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263. Id. at 306 (internal quotation marks omitted) (quoting 15 U.S.C. § 57a(a)(2) (2018)).

264. Id. (internal quotation marks omitted) (quoting 15 U.S.C. § 57a(a)(2)).

265. Id. (internal quotation marks omitted) (quoting 15 U.S.C. § 57a(a)(2)).

266. See id. (noting that Congress carved out protections for the FTC's rulemaking and policy-stating powers).

267. *Nat'l Petroleum Refiners Ass'n II*, 482 F.2d 672, 697 n.40 (D.C. Cir. 1973).

268. See supra section III.B.

269. Supra section III.B.

270. After the D.C. Circuit decided *National Petroleum Refiners*, Senator Hart read part of the decision into the record on the Senate floor when discussing provisions further amending the FTC Act's rulemaking procedures:

> This case presents an important question concerning the powers and procedures of the Federal Trade Commission. We are asked to determine whether the Commission, under its governing statute . . . is empowered to promulgate substantive rules of business conduct . . . . The effect of these rules would be to give greater specificity and clarity to the broad standard of illegality—"unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"—which the agency is empowered to prevent . . . .
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> . . .
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> We hold that under the terms of its governing statute . . . and under Section 6(g), 15 U.S.C. § 46(g), in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of

Congress's settlement of the long debate over the FTC's rulemaking powers.

C. *Relevant Reliance Interests*

Abandoning *National Petroleum Refiners* would unsettle a "vast cluster of public and private expectations" extending far beyond the FTC Act.[271] Holding that the broadly worded rulemaking grant in the FTC Act does not authorize legislative rules would call into question other similar statutory frameworks and rules promulgated pursuant to them. Agencies that regulate based on such delegations include, but are not limited to, the FDA, NLRB, IRS, HUD, EPA, Department of the Treasury, and HHS.[272] A small sample of regulations issued under general rulemaking authorities include standards for the discharge of industrial wastewater,[273] rules that prevent racial discrimination in access to federally assisted housing,[274] standards for the contents of infant formula,[275] and procedures for customs officers to seize property related to violations of immigration statutes.[276] And there are many more: We found over ten thousand sections of the U.S. Code of Federal Regulations that cite general rulemaking grants.[277] Many of these do not have clear sanctions contained in their statutes and would not pass muster under the reasoning advanced by Merrill and others for reading in a restriction on the sorts of "rules" the FTC can promulgate pursuant to section 6(g). Many of the rulemaking authorities that *do* have clear sanctions are located in ancillary or housekeeping sections—these mouseholes are oddly elephant-sized.[278]

> the statutory standards of the illegality the Commission is empowered to prevent.

120 Cong. Rec. 40,713 (1974) (statement of Sen. Hart) (quoting *Nat'l Petroleum Refiners II*, 482 F.2d at 673, 698).

271. William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1367 (1988).

272. See infra Appendix.

273. See 40 C.F.R. § 437 (2025) (regulating wastewater discharges from centralized waste treatment facilities, authorized in part by 33 U.S.C. § 1361 (2018)).

274. See 24 C.F.R. § 1 (2025) (effectuating provisions of Title VI of the Civil Rights Act of 1964 to ensure nondiscrimination in HUD programs, authorized in part by 42 U.S.C. § 3535(d) (2018)).

275. See 21 C.F.R. § 107 (2025) (promulgating requirements for the labels for and content of infant formula, authorized in part by 21 U.S.C. § 107 (2018)).

276. See 8 C.F.R. § 274.1 (2025) (relying on 8 U.S.C. § 1324(a) (2018) to authorize the seizure of property related to immigration violations).

277. See infra Appendix.

278. For example, the FCC's general rulemaking authorities sit, respectively, in a general housekeeping section (47 U.S.C. § 154(i) (2018)) next to subsections concerning how many commissioners constitute a quorum and how to conduct Commission proceedings and in a section entitled "Service and charges" that mostly concerns the responsibilities of common carriers. Id. § 201. The same is true of the EPA, whose general authority sits in a section titled "Administration" that otherwise addresses personnel details, payments under grants, and tribal authority (id. § 7601); the SSA, whose general authority

In short, vast swathes of the federal regulatory apparatus would face an uncertain future if the rulemaking grants that authorized them were stripped of legislative authority.

The reliance interests extend to agencies and regulated parties, both of which operate under certain assumptions about agencies' rulemaking authorities and might engage with Congress with those assumed authorities in mind.[279] Legislative rules undergird some of the broadest and most complex regulatory schemes that agencies implement. For example, the rulemaking grant challenged in *National Ass'n of Pharmaceutical Manufacturers v. Food & Drug Administration* authorizes the FDA's Current Good Manufacturing Practices program, which ensures that pharmaceutical manufacturers produce drugs under conditions and practices that result in safer drugs—and allows the FDA to bring a seizure or injunction case against producers that do not comply.[280] If the courts

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is located in a section entitled "Evidence, procedure, and certification for payments" (42 U.S.C. § 405); and the FEC, whose general authorities lie in sections titled "Administrative provisions" (52 U.S.C. § 30111 (2018)) and "Powers of Commission" (id. § 30107), both of which mostly address administrative functions such as filing reports, publishing lists, and disclosing information.

279. See William N. Eskridge, Jr., Reliance Interests in Statutory and Constitutional Interpretation, 76 Vand. L. Rev. 681, 718 (2023) ("Legislators voting on bills that become law, people subject to those laws, and administrators who implement them presumptively read them in light of well-established language conventions, public law norms, and statutory policies.").

280. 637 F.2d 877, 879 (2d Cir. 1981); Facts About the Current Good Manufacturing Practice (CGMP), FDA, https://www.fda.gov/drugs/pharmaceutical-quality-resources/facts-about-current-good-manufacturing-practices-cgmp (on file with the *Columbia Law Review)* (last visited Aug. 29, 2025).

Other significant rules also rely on general rulemaking authorities. The HUD Discriminatory Effects Standard, issued under a general rulemaking authority to implement the Fair Housing Act, is one such rule. See 24 C.F.R. pt. 100 (2025); see also 42 U.S.C. § 3614a ("The Secretary may make rules . . . to carry out this subchapter."). The Discriminatory Effects Standard, first codified in 2013, establishes a three-step burden-shifting test to determine liability for discriminatory practices. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). The final rule explicitly references 42 U.S.C. § 3614a as its authority. Id. When the Trump Administration sought to revise the rule in 2019, it received approximately forty-five thousand comments. Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19,450, 19,452 (Mar. 31, 2023) (codified at 24 C.F.R. pt. 100).

The NLRB's regulatory program similarly relies on a general rulemaking authority. See 29 U.S.C. § 156 (2018) ("The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter."). The NLRB has used its rulemaking authority to define the scope of its jurisdiction with regard to certain industries. See, e.g., 29 C.F.R. §§ 103.1–103.3 (2025) (explaining the circumstances under which the NLRB will assert jurisdiction over higher education, symphony orchestras, and horseracing). These rules govern how thousands of union elections unfold every year. See Josh Boak, Petitions for Union Representation Doubled Under Biden's Presidency, First Increase Since 1970s, AP News, https://apnews.com/article/biden-trump-unions-labor-harris-a312a2d9b3ef77e139ae45f19d493894 (on file with the *Columbia Law Review*) (last updated Oct. 15, 2024) (noting that 3,286 workplaces filed union election petitions in fiscal year 2024).

adopted the interpretive theories proffered by trade regulation rule skeptics, only the interpretive rules issued under such grants would remain lawful. The legal force of a program like Current Good Manufacturing Practices would be cast into doubt.

It is also unclear which rules would lose the force of law. Agencies often do not mark a rule as "legislative" or "interpretive." Indeed, a whole corner of the administrative law universe is concerned with litigating whether an agency action falls under one banner or the other.[281] Agency attorneys and private parties would thus have to pick over rules that have been promulgated under authorities similar to section 6(g), determining which remain valid and which are now defunct. If they could identify the defunct rules, agencies would have to figure out how to fulfill their statutory mandates with less authority and how to provide some measure of regulatory continuity to private parties. Regulated parties would have to determine how to reorient their affairs around a suddenly unstable regulatory regime.[282]

CONCLUSION

We are in the early stages of what could become a campaign to challenge agency rulemaking through a new channel: limiting the scope of general rulemaking grants. The effort at present is cloaked in the language of restraint, but something close to the opposite is true. It would impress a new standard on old legislative text and dramatically weaken agency authority by doing so. If successful, the campaign might well undermine the authority underlying decades of established law and scores of judicial precedents governing general rulemaking provisions. It is an effort done in the name of a past understanding of how to give meaning to the word "rules" in general rulemaking provisions that is dead and gone, if it ever really lived at all.

281. See, e.g., Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("The term 'interpretive rule' is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate.").

282. See Anita S. Krishnakumar, Longstanding Agency Interpretations, 83 Fordham L. Rev. 1823, 1855 (2015) (describing private parties' reliance interest on regulatory consistency).

APPENDIX[283]

Agency	Statute	General Rulemaking Grant	Citations[284] in Regulations	Indicia of Enforcement
Food and Drug Administration	Federal Food, Drug, and Cosmetic Act	21 U.S.C. § 371(a)	166[285]	No[286]
National Labor Relations Board	National Labor Relations Act	29 U.S.C. § 156	313	No[287]
Internal Revenue Service	Internal Revenue Code of 1984	I.R.C. § 7805(a)	52[288]	No[289]

283. The citation numbers reflect the number of sections in the Code of Federal Regulations that cite to a given rulemaking authority, per Westlaw search in the summer of 2023. The number of citations may have shifted since then, as regulations have been withdrawn, revised, or issued.

284. The authors of this Article determined the number of references to each rulemaking grant by using Westlaw to search the number of citations to the grant contained in the regulatory code. If a rulemaking grant was a subsection (e.g., I.R.C. § 7805(a) (2018)), the authors searched within the regulatory code for references to that subsection's statutory section. For example, using the search term "7805(a)" narrowed regulatory code references within the broader section of I.R.C. § 7805. Because many regulatory references cite the statutory section even when the rulemaking grant is contained in a subsection, this method was frequently underinclusive. The authors note when that is the case. The number of citations thus reflects the number of sections in the U.S. Code of Federal Regulations that cite each rulemaking grant.

285. The authors limited their search to regulations citing "371(a)" within regulations citing the broader section, so this figure is likely an undercount.

286. See Merrill & Watts, supra note 105, at 557 ("[T]he FDCA included a facially ambiguous rulemaking grant that did not confer legislative rulemaking authority under the convention." (footnote omitted)).

287. See id. at 511 (describing the apparent lack of any signal from Congress that rules promulgated under the National Labor Relations Act would have legislative effect).

288. The authors limited their search to regulations citing "7805(a)" within regulations citing the broader section, so this figure is likely an undercount.

289. See Merrill & Watts, supra note 105, at 570 ("The tax world continues to adhere to the notion that the facially ambiguous general rulemaking grant in section 7805(a) of the Internal Revenue Code (IRC) confers only interpretive, not legislative, rulemaking authority."). But see I.R.C. § 6662(b) (imposing penalties on tax underpayments attributable to, among other reasons, "[n]egligence or disregard of rules or regulations"); but see also Altera Corp. v. Comm'r, 145 T.C. 91, 116 (2015) ("[T]he Secretary [of the Treasury] is authorized to 'prescribe all needful rules and regulations for the enforcement of' the Code. Such regulations carry the force of law, and the Code imposes penalties for failing to follow them." (quoting I.R.C. § 7805(a))), rev'd, 926 F.3d 1061 (9th Cir. 2019).

Federal Communications Commission	Communications Act of 1934	47 U.S.C. § 154(i)	1204[290]	Yes[291]
Federal Communications Commission	1938 Amendments to the Communications Act	47 U.S.C. § 201(b)	34	Yes[292]
Federal Energy Regulatory Commission[293]	Natural Gas Act	15 U.S.C. § 717o	81	Yes[294]
Department of Housing and Urban Development	Fair Housing Amendments Act of 1988	42 U.S.C. § 3614a	21	No[295]

290. The authors limited their search to regulations citing "154(i)" within regulations citing the broader section, so this figure is likely an undercount.

291. See 47 U.S.C. § 502 (2018) ("Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the [Federal Communications] Commission . . . shall . . . be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.").

292. Id.

293. The Federal Energy Regulatory Commission was known as the Federal Power Commission until 1977. Department of Energy Organization Act, Pub. L. No. 95-91, sec. 710, § 101, 91 Stat. 565, 609 (1977) (codified at 42 U.S.C. § 7101 (2018)).

294. The relevant proposition reads:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

15 U.S.C. § 717t(a) (2018); see also Merrill & Watts, supra note 105, at 533 (detailing the Court's stance on the depth of the general rulemaking grant to the Federal Power Commission).

295. See Merrill & Watts, supra note 105, at 585 (describing the lack of sanctions, and thus lack of "teeth" in the "generalized rulemaking grant in the chapter of the United States Code that establishes HUD and describes its administrative powers").

Department of Housing and Urban Development	Department of Housing and Urban Development Act	42 U.S.C. § 3535(d)	5513[296]	No[297]
Federal Reserve Board	Truth in Lending Act	5 U.S.C. § 1604(a)	18[298]	Yes[299]
Federal Reserve Board	Federal Reserve Act	12 U.S.C. § 248(i)	206[300]	Yes[301]
Environmental Protection Agency	Clean Water Act	33 U.S.C. § 1361(a)	80[302]	No[303]

296. The authors limited their search to regulations citing "3535(d)" within regulations citing the broader section, so this figure is likely an undercount.

297. See supra note 295.

298. The authors limited their search to regulations citing "1604(a)" within regulations citing the broader section, so this figure is likely an undercount.

299. See 15 U.S.C. § 1611 ("Whoever willfully and knowingly . . . fails to comply with any requirement imposed under this subchapter[] shall be fined not more than $5,000 or imprisoned not more than one year, or both."). The provision indicates enforceability through the inclusion of "requirements."

300. The authors limited their search to regulations citing "248(i)" within regulations citing the broader section, so this figure is likely an undercount.

301. The relevant provision reads:

> The Board may act in its own name and through its own attorneys in enforcing any provision of this title, regulations promulgated hereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Board is a party and which involves the Board's regulation or supervision of any bank, bank holding company (as defined in section 1841 of this title), or other entity, or the administration of its operations.

12 U.S.C. § 248(p) (2018) (footnote omitted).

302. The authors limited their search to regulations citing "1361(a)" within regulations citing the broader section, so this figure is likely an undercount.

303. 33 U.S.C § 1319(a)(1) provides the EPA Administrator with powers of enforcement against violators of certain provisions:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title . . . the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action . . . .

Environmental Protection Agency	Clean Air Act (1963 Amendments)	42 U.S.C. § 7601(a)(1)	960[304]	Yes[305]
Office of the Comptroller of the Currency	Depository Institutions Deregulation and Monetary Control Act of 1980	12 U.S.C. § 93a	1097	Yes[306]
Office of the Comptroller of the Currency	National Bank Act / Financial Institutions Supervisory Act of 1966	12 U.S.C. § 1818(n)	31[307]	Yes[308]

33 U.S.C. § 1319(a)(1) (2018). The provision does not, however, grant the EPA Administrator enforcement authority with respect to the EPA's generalized rulemaking grant. Id.

304. The authors limited their search to regulations citing "7601(a)" rather than "7601(a)(1)," so this figure may be a slight overcount.

305. At the time of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which upheld a legislative regulation issued under this authority, there were no statutory sanctions. See Merrill & Watts, supra note 105, at 588 ("The original Clean Air Act . . . was little more than a grant-in-aid program . . . . Congress did not prescribe statutory sanctions for violations of the regulations issued under this grant."). In 1990, however, Congress added sanctions during an overhaul of the statutory scheme. Id. at 589; see also 42 U.S.C. § 7413(b) (2018) (authorizing the EPA Administrator "to assess and recover a civil penalty of not more than $25,000 per day . . . [w]henever [a] person has violated . . . a requirement or prohibition of any rule . . . promulgated, issued, or approved under this chapter").

306. See 12 U.S.C. § 1818(i)(2)(A) ("Any insured depository institution which, and any institution-affiliated party who . . . violates any law or regulation . . . shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues."). Merrill, however, argued in a brief to the Court that § 93a "does not unambiguously confer authority on the OCC to issue legislative regulations." Brief of the Nat'l Governors Ass'n et al. as Amici Curiae in Support of Petitioner at 30, Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009) (No. 08-453), 2009 WL 583793. The authors of this Article nonetheless assume that the broad sanctions language of 12 U.S.C. § 1818(i)(2)(A) applies to 12 U.S.C. § 93a.

307. The authors limited their search to regulations citing "1818(n)" within regulations citing the broader section, so this figure is likely an undercount.

308. See supra note 306.

Department of Labor	Longshoremen's and Harbor Workers' Compensation Act	33 U.S.C. § 939(a)	1[309]	Yes[310]
Department of Labor	Black Lung Act	30 U.S.C. § 936(a)	4[311]	Yes[312]
Department of the Interior	Surface Mining Control and Reclamation Act	30 U.S.C. § 1211(c)	120[313]	Yes[314]
Department of the Treasury	Tariff Act of 1930	19 U.S.C. § 1624	1182	No[315]

309. The authors limited their search to regulations citing "939(a)" within regulations citing the broader section, so this figure is likely an undercount.

310. See infra note 312.

311. The authors limited their search to regulations citing "936(a)" within regulations citing the broader section, so this figure is likely an undercount.

312. Another subsection in the same section as the general rulemaking grant provides that "[n]othing in this subchapter shall relieve any operator of the duty to comply with any State workmen's compensation law, except insofar as such State law is in conflict with the provisions of this subchapter and the Secretary by regulation, so prescribes." 30 U.S.C. § 936(c) (2018). It's unclear whether this refers to the general rulemaking authority in § 936(a) or to the multiple specific rulemaking grants elsewhere in this subchapter. See, e.g., id. § 942(a) (allowing the Department to regulate to "require employers to file reports concerning miners who may be or are entitled to benefits").

313. The authors limited their search to regulations citing "1211" rather than "1211(c)" because there were no results for the latter, so this figure may be a slight overcount.

314. The Secretary shall "order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this chapter or any rules and regulations adopted pursuant thereto." 30 U.S.C. § 1211(c)(1).

315. There are a lot of specific rulemaking authorities in this subchapter and many references to enforceability, but those references are hard to trace to any regulation promulgated by the Department (i.e., that would encompass the general rulemaking authority). See, e.g., 19 U.S.C. § 1627a(b) (2018) ("A person attempting to export a used self-propelled vehicle shall present, pursuant to regulations prescribed by the Secretary, to the appropriate customs officer . . . . Failure to comply with the regulations of the Secretary shall subject such person to a civil penalty of not more than $500 for each violation."). Because we cannot trace sanctions to violations of general rules, we assume that there are no applicable sanctions here.

Social Security Administration	Social Security Act	42 U.S.C. § 405(a)	1263[316]	Yes[317]
Occupational Safety and Health Administration	Occupational Safety and Health Act of 1970	29 U.S.C. § 657(g)(2)	79[318]	Yes[319]
Department of Health and Human Services, Department of Labor, and Social Security Administration	Federal Mine Safety and Health Act	30 U.S.C. § 957	1209	Yes[320]

316. The authors limited their search to regulations citing "405(c)" within regulations citing the broader section, so this figure is likely an undercount.

317. The same provision that grants rulemaking authority provides that such rules are designed to "establish the right to benefits hereunder." 42 U.S.C. § 405(a) (2018).

318. The authors limited their search to regulations citing "657(g)" rather than "657(g)(2)," so this figure may be a slight overcount.

319. There are multiple rulemaking grants within the same section that suggest enforceability. See, e.g., 29 U.S.C. § 657(c)(1) (2018) ("[T]he Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses."); id. § 657(e) ("Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . ."); id. § 657(f)(2) ("The Secretary shall . . . establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation . . . and shall furnish the employees or representative of employees . . . a written statement of the reasons for the Secretary's final disposition of the case.").

320. See 30 U.S.C. § 814(a) (2018) ("If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter . . . he shall, with reasonable promptness, issue a citation to the operator.").

Department of Labor	Fair Labor Standards Act (Amendments of 1974)	Pub. L. No. 93-259, § 29(b), 88 Stat. 76[321]	270[322]	No[323]
Department of Labor	Walsh-Healey Act	41 U.S.C. § 6506(b)	234[324]	No[325]
Federal Election Commission	Federal Election Campaign Act of 1971	52 U.S.C. § 30111(a)(8)	376[326]	Yes[327]

321. The rulemaking authority was contained in statutory notes and thus was not codified. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76.

322. Supra note 320.

323. It is difficult to find in this chapter clear language establishing sanctions for violations of regulations issued under the general rulemaking authority, rather than specific rulemaking grants. For example, 29 U.S.C. § 211(c) provides that:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records . . . and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

29 U.S.C. § 211(c). This encompasses obligations, suggesting enforceability. But it may just be a specific rulemaking authority—it is buttressed by § 215(a)(5), which makes it unlawful to violate any provision of § 211(c). Id. § 215(a)(5).

324. The authors limited their search to regulations citing "6506" rather than "6506(b)," so this figure may be a slight overcount.

325. The closest indicia of enforcement is contained in a separate chapter, which provides that 41 U.S.C. §§ 6506–6507 "govern the Secretary's authority to *enforce* this chapter, including the Secretary's authority to prescribe regulations, issue orders, hold hearings, make decisions based on findings of fact, and take other appropriate action under this chapter." 41 U.S.C. § 6707(a) (2018) (emphasis added). While the inclusion of "enforce" may indicate enforceability under Merrill and Watt's convention, it is unclear that such a reference in a different statutory chapter inserts qualifying sanctions into the rulemaking grant of § 6506(b).

326. The authors limited their search to "30111(a)(8)" within regulations citing the broader section, so this figure is likely an undercount.

327. See 52 U.S.C. § 30108(b) (2018) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title."); see also id. § 30108(c)(2) ("[A]ny person who relies upon any provision or finding of an advisory opinion . . . and who acts in good faith in accordance with the provisions and

Federal Election Commission	Federal Election Campaign Amendments Act of 1974	52 U.S.C. § 30107(a)(8)	36[328]	Yes[329]
Department of Health and Human Services, Department of Labor, and Department of the Treasury	Social Security Act	42 U.S.C. § 1302(a)	141[330]	No[331]
Small Business Administration	Small Business Act	15 U.S.C. § 634(b)(6)	1051[332]	Yes[333]
Department of the Interior	Mineral Leasing Act	30 U.S.C. § 189	1000	Yes[334]

findings of such advisory opinion shall not . . . be subject to any sanction provided by this Act . . . .").

328. The authors limited their search to "30107(a)(8)" within regulations citing the broader section, so this figure is likely an undercount.

329. See supra note 312.

330. This figure is certainly an undercount because the search was limited to "1302(a)." *Blum v. Bacon*, for example, cited to "1302." 457 U.S. 132, 140 n.8 (1982). The case upheld a regulation issued under § 1302(a) that prescribed requirements for state programs detailing eligibility for certain benefits and was thus a substantive rule. See id. ("We have described [§ 1302(a)] as creating 'broad rule-making powers.'" (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 277 n.28 (1969))). "1302" is cited in 6,403 CFR sections.

331. See Merrill & Watts, supra note 105, at 512 ("[T]he Social Security Act contained both a general grant of rulemaking power and several more specific rulemaking grants. Congress specified no legal consequences for violations of rules promulgated under the general grant." (footnote omitted)).

332. The authors limited their search to "634(b)(6)" within regulations citing the broader section, so this figure is likely an undercount.

333. The Small Business Administrator has authority to investigate potential violations of "any rule or regulation under this chapter," compel testimony during such investigations, and obtain a court order to ensure that testimony if need be. 15 U.S.C. § 634(b)(11) (2018). The Administrator can also terminate financial support upon the "willful violation of any rule or regulation of the Administration pertaining to material issues." Id. § 636(j)(10)(F)(iv).

334. See 30 U.S.C. § 195(a) (2018) ("It shall be unlawful for any person . . . to organize or participate in any scheme, arrangement, plan, or agreement to circumvent or defeat the provisions of this chapter or its implementing regulations . . . .").