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A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC

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A CHAIR WITH NO LEGS? LEGAL CONSTRAINTS ON THE COMPETITION RULE-MAKING AUTHORITY OF LINA KHAN'S FTC

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ABSTRACT

Upon her appointment to the chair position of the Federal Trade Commission (FTC), Lina Khan wasted little time asserting that the Agency possesses the regulatory authority to promulgate rules related to unfair methods of competition. And the President has supported the Chair's proffered authority, requesting that the Agency use that authority to address competition concerns across the U.S. economy. Chair Khan's interpretation of the FTC Act relies on a single case decided by the Supreme Court in 1973—National Petroleum Refiners—*and judicial deference under* Chevron. *However, while simplistic in its logic, Chair Khan's support for the FTC's competition rule-making authority fails under both modern methods of statutory interpretation and on constitutional grounds.*

This Article looks at the history of FTC competition rule-making in the shadow of National Petroleum *and reconsiders the FTC's rule-making authority under a modern statutory interpretation of the FTC Act. This Article establishes that, even after applying the* National Petroleum *Court's purposive approach to statutory interpretation under the Court's modern precedents, the FTC wields far less rule-making power, if any. Moreover, the modern Court's renewed interest in nondelegation, violations of the*

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constitutional separation of powers by administrative agencies, and the Court's resuscitation of the major questions doctrine over the last eight years all suggest that to have competition rule-making authority, the FTC requires not Chevron *deference, but rather a congressional grant of such authority.*

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INTRODUCTION

> The problem with the FTC today is not whether it has discretion to choose one of two [enforcement] methods, but whether it has two methods.[1]

One. That is the number of legislative rules[2] related to unfair methods of competition (UMC) independently promulgated by the Federal Trade Commission (FTC) in its one hundred and eight-year history.[3] However, while that one UMC rule remained on the books for twenty-seven years until its repeal,[4] the FTC never enforced it.[5] In fact, for the first fifty years of its existence, the FTC maintained that it did not possess legally binding rule-making authority.[6]

Former FTC Commissioner Maureen Ohlhausen and former Assistant Attorney General for Antitrust at the U.S. Department of Justice, Jim Rill, observe that the inconsequential history of

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[1] Bernie R. Burrus & Harry Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L.J. 1106, 1127 (1966) (emphasis added).

[2] *See* Discriminatory Practices in Men's and Boy's Tailored Clothing Industry, 32 Fed. Reg. 15,584 (Nov. 9, 1967) (to be codified at 16 C.F.R. pt. 412) (issuing notice of final rule). As discussed *infra* Part II, the FTC promulgated its gasoline octane labeling rule, the issue in *National Petroleum Refiners Association v. FTC*, under both unfair methods of competition and unfair or deceptive acts or practices. Unless otherwise specified, references to "rules" and "rule-making" herein reflect legislative rules that carry with them the full force and effect of law.

[3] Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 45).

[4] *See* Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 59 Fed. Reg. 8527 (Feb. 23, 1994) (codified at 16 C.F.R. pt. 412) (issuing notice of repeal of rule).

[5] Comments of the ABA Antitrust Section, Federal Trade Commission Workshop on Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 58 (Apr. 24, 2020), https://ourcuriousamalgam.com/wp-content/uploads/Comment-on-Non-Competes-in-the-Workplace_Final_4.24.2020.pdf [https://perma.cc/642H-SLQP]; Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits?*, *in* RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION, 155, 166 (Daniel A. Crane ed., 2022).

[6] Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1347 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973); Note, *FTC Substantive Rulemaking Authority*, 1974 DUKE L.J. 297, 305 n.36. The FTC held that it only possessed the authority to promulgate rules related to Agency procedures, but not rules that carried with them the force of law. *Id.*

competition rule-making at the FTC reflects more than simple hesitancy: "[T]he FTC's past reticence to exercise such sweeping powers is not a result of mere timidity; rather, it is likely due to the existence of significant and unresolved questions of the FTC's UMC rule-making authority from a statutory and constitutional perspective."[7] One needs only a handful of minutes to peruse "#antitrust" on Twitter or to run a Google search of "Lina Khan antitrust rules" to know that the statutory and constitutional questions regarding the FTC's UMC rule-making authority prevail today, and these questions motivate this Article.[8]

Despite the unresolved statutory and constitutional questions about the FTC's UMC rule-making authority, Chair Khan's FTC has been resolute, signaling its intention to instigate competition rule-making.[9] Indeed, the Biden Administration has ordered the FTC to do so. On July 9, 2021, President Biden signed Executive Order No. 14036, calling upon Chair Khan and the FTC to use its "statutory rulemaking authority" to address "*any* . . . unfair industry-specific practices that substantially inhibit competition."[10] The FTC's willingness to fulfill President Biden's mandate

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[7] Ohlhausen & Rill, *supra* note 5, at 165.

[8] TWITTER, https://www.twitter.com [https://perma.cc/CP98-SZRT] (search "#antitrust" in search bar); *Lina Khan Antitrust Rules*, GOOGLE, https://www.google.com/search?q=lina+khan+antitrust+rule&sxsrf=ALiCzsbfote211dsPlwQxcvK2rWdY0YNFQ%3A1665669649062&ei=ERpIY5mPA4_a5NoPxPik-A0&ved=0ahUKEwjZ2_r9rt36AhUPLVkFHUQ8Cd8Q4dUDCA4&uact=5&oq=lina+khan+antitrust+rule&gs_lcp=Cgdnd3Mtd2l6EAMyBQghEKABMgUIIRCgATIFCCEQoAE6CggAEEcQ1gQQsAM6BAgjECc6BQguEIAEOgUIABCABDoKCAAQgAQQhwIQFDoECC4QQzoFCAAQkQI6BQguEJECOgYIABAWEB5KBAhBGABKBAhGGABQzwNYxChgrytoAXABeACAAcIBiAGIEJIBAzguOZgBAKABAcgBCMABAQ&sclient=gws-wiz [https://perma.cc/KV24-AE8T].

[9] *See, e.g.*, Memorandum from Lina M. Khan, Chair, FTC, to Commission Staff and Commissioners, on Vision and Priorities for the FTC 1–2 (Sept. 22, 2021) [hereinafter FTC Vision Memorandum], https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf [https://perma.cc/7KVJ-LGL9]; Ballard CFS Grp., *FTC Chair Khan Outlines Priorities in Memo to FTC Commissioners and FTC Staff*, JD SUPRA (Sept. 30, 2021), https://www.jdsupra.com/legalnews/ftc-chair-khan-outlines-priorities-in-4008964/ [https://perma.cc/UZ7Z-2RPU].

[10] Exec. Order No. 14036, Promoting Competition in the American Economy, 86 Fed. Reg. 36,987, 36,990 (July 9, 2021) (emphasis added). On November 17, 2021, President Biden added to the FTC's task list in a letter sent to Chair Khan,

was immediately apparent when Chair Khan was photographed during the President's signing of the Order alongside the President, members of his Administration, and members of Congress.[11] Chair Khan even walked away with a souvenir, the President's signing pen.[12]

Chair Khan has repeatedly expressed her view that "Congress [has] granted the FTC the power to issue [competition] rules."[13] And since the President's Order, the FTC, under Chair Khan's leadership, has taken affirmative steps toward promulgating such rules.[14] Who are the Chair's first rule-making victims? While it is no secret that Chair Khan has a particular ire for Amazon and Facebook,[15] her initial focus is on worker non-compete

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whereby the President "asked" that the FTC immediately examine the "mounting evidence of anti-consumer behavior by oil and gas companies." *See* @JStein_WaPo, TWITTER (Nov. 17, 2021, 11:22 AM), https://twitter.com/JStein_WaPo/status/1461006803777556482 [https://perma.cc/38KV-8B9H] (posting a copy of the President's letter).

[11] David McCabe & Jim Tankersley, *Biden Urges More Scrutiny of Big Businesses, Such as Tech Giants*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/07/09/business/biden-big-business-executive-order.html [https://perma.cc/6ZU2-ZJMY].

[12] *Id.*

[13] *See* Lina Khan, Remarks on the Passage of New Procedures to Open Up Rulemaking Petitions to the Public (Sept. 14, 2021) [hereinafter Khan, Remarks on Rulemaking], https://www.ftc.gov/system/files/documents/public_statements/1596336/p072104khanstatementpetitionrulemaking.pdf [https://perma.cc/M2Q4-RJKW]; *see also* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 358 (2020); FTC Vision Memorandum, *supra* note 9, at 1 (discussing that the Agency intends to "use its full set of tools and authorities—including rulemaking and research in addition to adjudication").

[14] *See* Khan, Remarks on Rulemaking, *supra* note 13 (discussing new procedures to open up rule-making petitions to the public); Press Release, FTC, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger [https://perma.cc/HJ7K-HBPP] (discussing changes to the FTC's procedures for initiating rule-making proceedings).

[15] Nancy Scola, *Lina Khan Isn't Worried About Going Too Far*, N.Y. MAG. (Oct. 27, 2021), https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html [https://perma.cc/AWX2-EGKN]; Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 780 (2017).

agreements and exclusionary contracts,[16] topics covered by two private petitions submitted to the FTC by the Open Markets Institute[17]—Chair Khan's former employer.[18]

Chair Khan remains unconcerned that the FTC might go too far: "When identifying the top ten threats to [the FTC] . . . [going too far is] not on the list."[19] Chair Khan has given no indication as to where, if at all, the FTC's authority to promulgate competition rules might end.[20] Taken to its logical conclusion, the FTC's proffered position is that "[e]verything the light touches . . . is [its] kingdom."[21] Ostensibly, the FTC stands on the cusp of controlling "virtually all of American businesses"[22] through UMC rule-making.[23]

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[16] FTC Vision Memorandum *supra* note 9, at 3.

[17] Open Mkts. Inst., et al., Petition for Rulemaking to Prohibit Exclusionary Contracts, FTC 1–4 (Oct. 29, 2020), https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/p002501petitionrulemakingexclusionarycontracts.pdf [https://perma.cc/DKZ3-WX7R]; Open Mkts. Inst., et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, FTC 1–5 (Mar. 20, 2019), https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/p002501petitionrulemakingnoncompeteclauses.pdf [https://perma.cc/S64C-VEFZ].

[18] Press Release, Open Mkts. Inst., Lina Khan's Confirmation as Commissioner on the Federal Trade Commission is Momentous (June 15, 2021), https://www.openmarketsinstitute.org/publications/lina-khans-confirmation-as-commissioner-on-the-federal-trade-commission-is-momentous [https://perma.cc/5JLP-U7X2].

[19] *See* Scola, *supra* note 15 (quoting Lina Khan).

[20] *Id.*

[21] THE LION KING (Walt Disney Pictures 1994). Consider that in its recent strategic plan, when describing its mission, the FTC removed the language "without unduly burdening legitimate business activity" creating a self-fulfilling prophecy of power. *See FTC Makes Way to Hinder "Legitimate Business Activity," TechFreedom Warns*, TECHFREEDOM (Nov. 30, 2021), https://techfreedom.org/ftc-makes-way-to-hinder-legitimate-business-activity-techfreedom-warns/ [https://perma.cc/76ZR-YCFN].

[22] *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 685 (D.C. Cir. 1973) ("The pervasiveness of the antitrust laws' coverage, in the sense of affecting business decision-making, needs no elaboration. Suffice it to say that it cuts deeply into and, with limited exceptions, widely across virtually all of American business.").

[23] *See* JAY B. SYKES, CONG. RSCH. SERV., LSB10635, THE FTC'S COMPETITION RULEMAKING AUTHORITY (2021) 2 (discussing whether the FTC has substantive rule-making authority).

Proponents of FTC's UMC rule-making authority argue that such authority is substantially based on a single case decided by the D.C. Circuit nearly fifty years ago, *National Petroleum Refiners Association v. FTC*.[24] Ohlhausen and Rill proffer that the FTC's UMC rule-making authority under *National Petroleum* rests on a "thin statutory reed."[25] More appropriately, a thin statutory *read*: the D.C. Circuit's 1973 decision is a relic of now-defunct methods of statutory interpretation; asked the question today, the Supreme Court would be unlikely to uphold the FTC's UMC rule-making authority.[26]

However, Chair Khan is quick to counter: the FTC is merely providing a "reasonable" interpretation of an ambiguous statute that Congress charged the Agency with administering.[27] For that, the Agency receives *Chevron* deference, and the courts will defer to the FTC's interpretation.[28] However, the Chair's view is so simplistic that it seems almost silly, particularly given that the Court recently delivered the FTC a 9–0 loss for the Agency's (incorrect) interpretation of its own statutory authority to seek

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[24] *See* Nat'l Petroleum Refiners Ass'n, 482 F.2d at 672; *see also* Chopra & Khan, *supra* note 13, at 378 (discussing *National Petroleum* to support the FTC's rule-making authority).

[25] *See* Ohlhausen & Rill, *supra* note 5, at 156.

[26] *See infra* Parts III and IV; *see, e.g.*, Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 473 (2002). The D.C. Circuit has not cited *National Petroleum* in thirty years; *see also* Randolph J. May & Andrew K. Magloughlin, *The Major Questions Doctrine Slams the Door Shut on UMC Rulemaking* (Apr. 28, 2022), https://truthonthemarket.com/2022/04/28/the-major-questions-doctrine-slams-the-door-shut-on-umc-rulemaking/ [https://perma.cc/RJ9B-PSYH].

[27] *Id.*

[28] Chopra & Khan, *supra* note 13, at 375–79; *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). *Chevron* assumes, by definition, that "Congress intends [an agency] to write regulations that have the force of law." Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 736 (2002).

restitution.[29] More generally, however, for *Chevron* purposes, whether an agency has been delegated lawmaking authority is itself a matter of statutory interpretation.[30] And the cracked cement of *Chevron* in the Roberts Supreme Court warrants caution—winning for the FTC cannot be accomplished by a simple *Chevron* dance.[31]

This Article journeys into the debate about the FTC's statutory authority to promulgate competition rules.[32] It does so by considering how the modern Supreme Court might conduct a statutory interpretation of the Federal Trade Commission Act (FTC Act).[33] To frame that analysis, Part I provides a history of the FTC Act as it relates to the Act's rule-making provisions, including the FTC's historical rule-making actions and the congressional response to those actions.[34] Part II assesses statutory interpretation used by the district court and D.C. Circuit in *National Petroleum*.[35] Part III considers the FTC Act in the context of a selection of tools of statutory interpretation employed by the modern Supreme Court.[36] Part III does not purport to put forth a complete and exhaustive statutory interpretation but rather highlights the canons of interpretation used by the Court since *National Petroleum* to illustrate the differences in statutory interpretation today.[37] Part IV uses the analysis in Part III in conjunction with the Supreme Court's recent jurisprudence on statutory interpretation to conclude that the Court is unlikely to find *National Petroleum* dispositive and, in so concluding, likely to challenge the FTC's proffer of its UMC legislative rule-making authority.[38]

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[29] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1351–52 (2021).

[30] *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 257–58 (2006).

[31] *See* Guedes v. ATF, 140 S. Ct. 789, 790 (2020) (statement of Justice Gorsuch in denial of petition of writ of certiorari); *see also* Note, *The Rise of Purposivism and Fall of* Chevron: *Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1237–43 (2017) [hereinafter *The Rise of Purposivism*]; Ohlhausen & Rill, *supra* note 5, at 170; discussion *infra* Part IV.

[32] *See* SYKES, *supra* note 23, at 2–3.

[33] *See Gonzales*, 546 U.S. at 258.

[34] *See infra* Part I.

[35] *See infra* Part II.

[36] *See infra* Part III.

[37] *Id.*

[38] *See infra* part IV.

I. THE FTC ACT AND THE FTC'S LIMITED HISTORICAL RULE-MAKING

A. The Creation of the FTC and Its Acknowledged Lack of Rule-Making Authority

Congress created the FTC in 1914 "to serve as both an adjudicatory and an investigative body."[39] Section 5 of the FTC Act gave the Commission adjudicatory authority to prevent violations of unfair methods of competition.[40] As part of that authority, the FTC could file complaints, hold hearings, determine violations of the Act, and issue cease and desist orders.[41] Section 6 of the FTC Act gave the Commission investigative powers, including the authority to request reports from corporations and the responsibility to deliver reports to Congress at its direction or the direction of the President.[42] The only reference to rule-making was in section 6(g): "From time to time [the Commission shall also have the power] to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."[43]

In its 1935 decision in *Humphrey's Executor v. United States*, the Supreme Court described the FTC's authority as "quasi-judicial" and "quasi-legislative."[44] The Court acknowledged the FTC's adjudicatory (or judicial) authority laid out in section 5 of the FTC Act[45] and described the FTC's legislative authority, laid out in section 6 of the FTC Act, as encompassing "wide powers of investigation in respect of certain corporations subject to the [FTC Act], and in response to other matters, in which it must report to Congress with recommendations."[46] At the time *Humphrey's* was decided, the FTC *only* had adjudicatory and investigative authority for unfair methods of competition; its consumer protection authority would not come until three years later.[47]

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[39] *See* Merrill & Watts, *supra* note 26, at 504.

[40] *Id.*

[41] *See id.*

[42] *See id.*

[43] *See* Ch. 311, § 6(g), 38 Stat. at 722 (codified as 15 U.S.C. § 46(g)).

[44] *See* 295 U.S. 602, 624 (1935).

[45] *See id.* at 620–21, 624.

[46] *See id.* at 621.

[47] *See* Federal Trade Commission Act Amendments of 1938, Pub. L. No. 75 447, 52 Stat. 111, 114 (codified as 15 U.S.C. §§ 45, 52–54); *see also* Glen E.

The *Humphrey* Court's description of the FTC was consistent with the Agency's own assessment of its authority and the methods on which the Agency relied for policymaking.[48] While the FTC almost exclusively relied on case-by-case adjudications to enforce the FTC Act's prohibitions against unfair methods of competition,[49] it also employed other policy tools to advance its mission.[50] For example, in 1919, the FTC began using "Trade Practice Conference Rules."[51] These Conference Rules did not carry with them the force of law but rather were developed by the FTC in conjunction with industry participants for the purpose of "fostering self-regulation."[52] Professor Glen Weston observed the FTC's dissatisfaction with these Conference Rules because the FTC "lack[ed] [the] authority to consider nonobservance of the rules as a per se violation of law."[53] To the extent the FTC had rule-making authority, it could have singlehandedly eliminated its dissatisfaction.[54] The fact that the FTC did not eliminate its dissatisfaction is consistent with the FTC's then-contemporaneous statements that the Agency did not believe it had rule-making authority.[55] The FTC's description of its authority in 1922 is illustrative:

> One of the most common mistakes is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceedings before it. It is frequently asked to do this, not

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Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. BAR J. 548, 551 (1964).

[48] *Compare* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 n.4 (2020) (Roberts, C.J., writing for the majority) ("Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not."), *with id.* at 2239 n.10 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("Still more, the FTC has always had statutory rulemaking authority, even though . . . it relied on adjudications until the 1960s.").

[49] *See FTC Substantive Rulemaking Authority*, *supra* note 6, at 298; Merrill & Watts, *supra* note 26, at 551.

[50] *See* Weston, *supra* note 47, at 566–67.

[51] *See id.* at 566.

[52] *See id.* at 566–67.

[53] *See id.* at 567.

[54] *Id.* at 566–68.

[55] *See* Merrill & Watts, *supra* note 26, at 506 (quoting ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION 36 (1922)).

> only in a broad general way, but also to issue warnings to concerns alleged to be using unfair practices.[56]

In 1938, Congress expanded the FTC's jurisdiction when it passed the Wheeler-Lea Amendments.[57] These amendments gave the FTC the authority to prevent "unfair or deceptive acts or practices in commerce" in addition to "unfair methods of competition."[58] However, the Wheeler-Lea Amendments made no changes to section 6 of the FTC Act and did nothing to alter the FTC's understanding of its lack of rule-making authority.[59] Professors Thomas Merrill and Kathryn Watts discuss a 1939 monograph prepared by the Attorney General's Committee on the Administrative Procedure, which concluded "that rules issued by the FTC should be called 'advisory interpretations' rather than 'rules' because '[n]othing in the statutes administered by the Commission makes any provision for the promulgation of rules applicable to whole industries.'"[60] A 1941 *Final Report* by the same Attorney General's Committee further identified the FTC as one of the few administrative agencies that "lack[ed] legislative rule-making powers."[61] And the FTC continued to concur with these independent assessments of its authority.[62] In 1955, the FTC added a third policymaking method to its adjudication and Trade Practice Conference Rules: Guides.[63] However, like its Trade Practice Conference Rules, these Guides only contained a summary of the FTC's interpretation of the FTC Act and did not carry with them the full force and effect of law.[64]

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[56] *See id.*

[57] Federal Trade Commission Act Amendments of 1938, Pub. L. No. 75-447, 52 Stat. 111, 114 (codified as 15 U.S.C. §§ 45, 52–54); *see also* Weston, *supra* note 47, at 550–51.

[58] Weston, *supra* note 47, at 551 (describing changes to the FTC jurisdiction as a result of the amendments).

[59] *See* Merrill & Watts, *supra* note 26, at 556.

[60] *See id.* at 507 (quoting THE ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, U.S. DEP'T OF JUSTICE, MONOGRAPH NO. 6, THE FEDERAL TRADE COMMISSION 67 (1939)).

[61] *See id.* at 507 & n.195 ("The Final Report stated that section 6(g) of the [FTC Act] conferred only procedural rulemaking powers on the FTC.").

[62] *See id.* at 506.

[63] *See id.* at 552.

[64] *See id.*

Rather than sitting on some dormant rule-making authority not exercised, congressional behavior during this time informed the FTC that it did not possess legislative rule-making authority.[65] Between 1940 and 1951, on only two occasions, Congress granted the FTC limited and specific legislative rule-making authority by statute: the Wool Products Labeling Act and the Fur Products Labeling Act.[66] As Merrill and Watts observe, to the extent the FTC already possessed such rule-making authority, "subsequent grants of legislative rule-making powers by Congress would have been superfluous."[67] As noted below, after the FTC began to promulgate legislative rules in 1962, the congressional response was swift and limiting.[68]

B. The FTC Commences Rule-Making

In 1962, the FTC began promulgating Trade Regulation Rules (TRRs).[69] The FTC promulgated TRRs in the protective shadow of courts that viewed rule-making as a more effective option for case-by-case adjudications;[70] this view resulted in the courts upholding broad grants of rule-making for administrative agencies regardless of the relevant statute's language, legislative history, or congressional intent.[71]

Statements by then-sitting FTC Commissioners suggest several reasons—other than a receptive judiciary—for its pursuit of TRRs: (1) dissatisfaction with voluntary compliance with its Trade Conference Rules and "Guides";[72] (2) rule-making would

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[65] *See id*. at 549 & nn.421–22.

[66] *See id.*

[67] *See id.* at 549–50.

[68] *See id*. at 553–54.

[69] *See id.* at 552; *FTC Substantive Rulemaking Authority, supra* note 6, at 299 n.6; *see also* Burrus & Teter, *supra* note 1, at 1109 ("[A]ll five of [the FTC's] commissioners have publicly stated their desire to see more issues decided by promulgation of rules.").

[70] *See* Burrus & Teter, *supra* note 1, at 305 n.36; *FTC Substantive Rulemaking Authority, supra* note 6, at 306–12.

[71] *See, e.g.*, *id.* at 306–14; Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681 (D.C. Cir. 1973) ("Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.").

[72] Weston, *supra* note 47, at 566–67.

"prevent[ ] discriminatory enforcement" by the FTC and would thus be fairer to parties before it;[73] (3) rule-making was less time consuming than case-by-case adjudication, which was important given the FTC's limited staff resources;[74] (4) rule-making provided businesses with "greater guidance and predictability" relative to case-by-case adjudication;[75] and (5) rule-making allowed the FTC more opportunities to leverage the expert nature of the Agency.[76] The voices of the 1960s FTC appear to echo through the halls of today's FTC, as Chair Khan has cited many of these same reasons for pursuing rule-making.[77]

Whether the TRRs would carry the full force and effect of law was initially unclear, reflecting some disagreement—or discomfort—within the FTC regarding its authority to promulgate such legislative rules.[78] In January of 1962, then FTC Chair Paul Rand Dixon expressed his support for the FTC's issuance of "substantive rules" with the "force and effect of law."[79] However, four months later, Chair Dixon walked that back:

> Another area about which there is a lot of uncertainty concerns a proposal for the issuance of what some of the newsletter writers and the press have been calling "substantive rules." The idea had hardly gained any circulation before the cry went up that the Commission was substituting itself for the Congress and was going to try to make law. To those who are fearing this, I have words of comfort: the Commission has no such intentions or aspirations . . . .[80]

Similarly, Commissioner Everette MacIntyre initially expressed that the FTC's TRRs would be binding; that is, the FTC

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[73] *Id.* at 569–70.

[74] *Id.*; Burrus & Teter, *supra* note 1, at 1111 n.22.

[75] Weston, *supra* note 47, at 569–70; *see also* Burrus & Teter, *supra* note 1, at 1114 (Commissioner Philip Elman in a March 1964 address at the Third Antitrust Conference of the National Industrial Conference Board noted that in the antitrust context, rule-making would allow the FTC to provide a more "positive, comprehensive, flexible and expert approach to trade regulation problems").

[76] Weston, *supra* note 47, at 569–70.

[77] *See* Chopra & Khan, *supra* note 13, at 358.

[78] *See* Burrus & Teter, *supra* note 1, at 1110; Weston, *supra* note 47, at 568–69.

[79] Burrus & Teter, *supra* note 1, at 1110.

[80] *Id.* (quoting Chair Dixon at an April 1962 address to the American Association of Advertising Agencies).

would have to establish only that a company engaged in the prohibited conduct, but not that the conduct itself was an unfair method of competition.[81] A year later, Commissioner MacIntyre softened his stance, noting that a company would be permitted to challenge whether the rule was legally binding.[82] Likewise, Commissioner Philip Elman argued his general support for rule-making in the antitrust context but was quick to clarify that the FTC could not go outside the antitrust laws to formulate such rules and would "still be bound by the competitive tests laid down by Congress in the substantive antitrust laws."[83] Commissioner Elman argued against per se antitrust rules, particularly in the merger context: "the object of the Commission's rule making . . . is not to promulgate per se rules or codes rigidly demarcating the limits of lawful merger activity."[84] As indicated in her public comments, Chair Khan has already expressed a willingness to embrace per se rules for antitrust and specifically for mergers.[85]

Regardless of the Commissioners' expressed concerns, it soon became apparent that the FTC intended TRRs to be substantive rules with the full force and effect of law.[86] At the time, Weston observed that the FTC lacked the authority to issue such legally binding rules:

> [I]t seems clear that the FTC lacks any authorization from Congress to issue [legislative rules]. It is difficult to see how any objective reader of the legislative history of the FTC Act could reach the conclusion that Congress gave the FTC any "legislative" rule-making power back in 1914. There is simply no indication in the legislative history of intent to confer any such power and plenty of evidence of an intent *not* to empower the FTC to make "legislative" rules.[87]

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[81] Weston, *supra* note 47, at 568 & n.146 (quoting Commissioner MacIntyre's August 1962 address before the Convention of National Congress Petroleum Retailers, Inc.).

[82] *Id.* at 568–69.

[83] Burrus & Teter, *supra* note 1, at 1115.

[84] *Id.* at 1115 n.44 (quoting Philip Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 390 (1964)).

[85] *See* Ohlhausen & Rill, *supra* note 5, at 164 & n.49; *see also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT 1 (2022).

[86] Merrill & Watts, *supra* note 26, at 552.

[87] Weston, *supra* note 47, at 570 (emphasis added).

Concerned with congressional and public reaction—after all, to date, the FTC had only conducted rule-making through specific grants by Congress and not under the umbrella of the FTC Act—the FTC's initial TRRs were benign, dealing with "trivial matters" such as the rules requiring that sleeping bags be marked with the size of the finished product and rules identifying certain descriptions of sewing machines as violating section 5 of the FTC Act.[88] Even the FTC itself exhibited difficulty in describing what, exactly, its TRRs were; these difficulties were likely driven by its uncertainty about what powers Congress had given the Agency.[89]

In 1964, the FTC issued its "first major, controversial TRR," which dealt with unfair methods of competition and unfair acts and deceptive practices in the labeling and advertising of cigarettes.[90] The tobacco industry quickly mounted an offensive and convinced Congress to issue weaker labeling rules.[91] In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act, which overrode and nullified the FTC's TRR.[92]

The FTC's response to the congressional overrule of its first major TRR was to return to promulgating benign TRRs.[93] The FTC's single, unenforced, and subsequently repealed UMC rule was one such example.[94] It was not until *The Nader Report on the Federal Trade Commission* was published in 1969 that the FTC changed course yet again.[95] The pages of the *Nader Report* were unflattering: they portrayed the FTC as the ineffective regulator that allowed big business to fleece the American people—despite its ability to stop the destruction.[96] "The report

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[88] Merrill & Watts, *supra* note 26, at 552, 552–53 nn.443–44.

[89] *See* Weston, *supra* note 47, at 570 (discussing how the FTC would not classify the rules as "legislative" nor would it classify them as "interpretive," settling, instead, on "substantive" and leaving open whether, in fact, the rules would have the force of law).

[90] Merrill & Watts, *supra* note 26, at 553.

[91] *Id.* at 553–54.

[92] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified at 15 U.S.C. §§ 1331–39); Merrill & Watts, *supra* note 26, at 554.

[93] Merrill & Watts, *supra* note 26, at 554.

[94] *See id.* at 554 & n.456.

[95] *Id.* at 554.

[96] *See* Simon Lazarus, *The Nader Report*, N.Y. TIMES, Oct. 19, 1969, at BR3.

panicked F.T.C. chairman Paul Rand Dixon into a public tirade,"[97] setting off a wave of legislative (and judicially challenged) TRRs,[98] including the FTC's gasoline octane rule that was the source of the D.C. Circuit's 1973 decision in *National Petroleum*.[99] In *National Petroleum*, the D.C. Circuit held that section 6(g) of the FTC Act gave the FTC the authority to promulgate rules under section 5 related to unfair methods of competition and unfair or deceptive acts or practices.[100] However, as Professor Gus Hurwitz observed, *National Petroleum* "was just the start of the saga of the FTC's rule-making authority."[101]

C. National Petroleum *and the FTC's Rule-Making Aftermath*

Rather than celebrate the court's affirmation of its delegated rule-making authority to the FTC, Congress responded to *National Petroleum* by *limiting* the FTC's rule-making authority under the FTC Act.[102] In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Mag-Moss).[103] Mag-Moss, known as section 18 of the FTC Act, gave the FTC the authority to issue TRRs related to unfair or deceptive acts or practices (i.e., consumer protection) under a more stringent rule-making standard than the informal notice-and-comment available under the Administrative Procedures Act (APA).[104]

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[97] *Id.*

[98] *See* Merrill & Watts, *supra* note 26, at 554 & n.460.

[99] *National Petroleum* was not the first judicial challenge to the FTC's substantive rule-making authority. *See id.* at 555 & nn.462–64 (discussing Bristol-Myers Co. v. FTC, 284 F. Supp. 745 (D.D.C. 1968)).

[100] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 678 (D.C. Cir. 1973).

[101] Justin (Gus) Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 233 (2014).

[102] *See* Merrill & Watts, *supra* note 26, at 557; Hurwitz, *supra* note 101, at 235.

[103] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2193–98 (1975) (codified as amended in scattered sections of 15 U.S.C.).

[104] Hurwitz, *supra* note 101, at 234; *see also* Ohlhausen & Rill, *supra* note 5, at 160–61 (describing Mag-Moss as a hybrid rule-making process including the difference with informal notice-and-comment rule-making under the APA); Transcript, Federal Trade Commission, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 226:9–229:5 (Jan. 9,

Despite congressional legislation limiting its rule-making authority, the FTC, riding high on its win in *National Petroleum*, could not be deterred.[105] What followed was a wave of aggressive rule-making by the FTC and another smackdown by Congress.[106] There was, for example, the FTC's proposed ban on television advertising directed at children on the grounds that it was "immoral, unscrupulous, and unethical."[107] And then there was FTC Chair Michael Pertschuk's suggestion that the Commission use the FTC Act "to regulate the employment of illegal aliens and to punish tax cheats and polluters."[108] While the FTC's aggressive posture on rule-making earned it the title of "National Nanny,"[109] it did not earn the Agency congressional approval.[110] An exasperated Congress shut down the FTC for several days and refused to provide the Commission with the necessary funding.[111] More telling, the FTC had so operated outside of its scope of authority that Congress chose to legislate *yet again* to further limit the FTC's rule-making authority.[112]

2020) [hereinafter FTC Non-Compete Transcript], https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf [https://perma.cc/2PSU-AU2E] (testimony of Professor Aaron Nielson explaining the Mag-Moss rule-making process: "This is not typical. This is not how most agencies operate. It is how the FTC operates when it comes to consumer protection.").

[105] *See* Hurwitz, *supra* note 101, at 235.

[106] *Id.*

[107] J. Howard Beales, Former Director Bureau of Consumer Protection, FTC, Remarks at the Marketing and Public Policy Conference, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection [https://perma.cc/95MX-8EX9] (discussing the Notice of Proposed Rulemaking on Television Advertising to Children, 43 Fed. Reg. 17,967 (1978)).

[108] *Id.*

[109] *See The FTC as National Nanny*, WASH. POST., Mar. 1, 1978, at A22, https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/ [https://perma.cc/CF6P-AY2H].

[110] Beales, *supra* note 107.

[111] *Id.*

[112] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, § 1.

In 1980, Congress passed the Federal Trade Commission Improvements Act.[113] The 1980 Act required the FTC to submit proposed consumer protection rules to Congress prior to the rule taking effect—so that Congress would have *more*, *not less*, control over FTC rule-making.[114] Moreover, the 1980 Act stripped the FTC's rule-making authority "relating to various specific issues," including rule-makings to restrict advertising.[115] The 1980 Act also included a legislative veto for rules promulgated by the FTC for a period of two years.[116] According to Howard Beales, Former Director of the FTC's Bureau of Competition: "Thus chastened, the Commission abandoned most of its rulemaking initiatives . . . ."[117] Congressional irritation with the FTC's rule-making binge was so great that Congress failed to reauthorize the FTC for fourteen years after the 1980 Act.[118] In 1994, Congress passed the Federal Trade Commission Act Amendments of 1994.[119] As part of the 1994 amendments, Congress further clarified the FTC's rule-making authority in the consumer protection space.[120]

According to Ohlhausen and Rill, Mag-Moss proved to be rule-making quicksand; a rule took an average of five years to promulgate, and the FTC only managed to issue a total of seven rules and nine amendments.[121] And for the last forty years, the FTC has not issued any new TRRs.[122] And following the D.C. Circuit's 1973 decision in *National Petroleum*, the FTC never

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[113] *Id.* at § 8.

[114] Hurwitz, *supra* note 101, at 236 (discussing section 18(b)(2) of the FTC Act).

[115] *Id.*; Beales, *supra* note 107.

[116] Hurwitz, *supra* note 101, at 236.

[117] Beales, *supra* note 107.

[118] *Id.*; Hurwitz, *supra* note 101, at 236.

[119] Pub. L. No. 103-312, 108 Stat. 1691.

[120] Hurwitz, *supra* note 101, at 237 ("The [FTC] shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition . . . .").

[121] Ohlhausen & Rill, *supra* note 5, at 163 & nn.42–43 (citing Jeffry S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1997–98 (2015)). By comparison, APA rule-making by the FTC under direct statutory authority by Congress (think Wool and Fur) took less than a year on average. *Id.*

[122] *Id.* at 161.

promulgated another rule related to unfair methods of competition.[123] Such behavior seems odd for an Agency that has—and has had—as Chair Khan suggests, UMC rule-making authority.[124] Surely, the FTC has not spent the last forty-eight years allowing "[t]he chicken farmer [to be] subject to the whims of the massive chicken processor,"[125] has it?[126]

II. STATUTORY INTERPRETATION IN *NATIONAL PETROLEUM*

The story of UMC rule-making authority at the FTC really begins with *National Petroleum*.[127] On December 30, 1970, the FTC issued a TRR stating that a failure to post octane numbers on gasoline pumps constituted an unfair method of competition *and* an unfair, deceptive practice (the "Octane Rule").[128] The National Petroleum Refiners Association challenged the FTC's authority to promulgate the Octane Rule under the FTC Act.[129] The FTC argued that the general reference to "rules and regulations" in section 6(g) of the FTC Act, where the Agency gets its *investigative* authority, applied to section 5, where the FTC gets its *adjudicative* authority to prevent unfair methods of competition and unfair or deceptive acts or practices.[130] Thus, the question before the court was whether the rule-making authority in section 6(g) extended to section 5, such that the FTC had the authority to promulgate rules with the full force and effect of law, to prevent unfair methods of competition and unfair or deceptive acts or practices found.[131] The U.S. District Court for the District of Columbia answered "no."[132]

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[123] *See* Ohlhausen & Rill, *supra* note 5, at 168.

[124] *See* Chopra & Khan, *supra* note 13, at 363–71.

[125] Scola, *supra* note 15 (quoting Lina Khan).

[126] *See* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp*, 12 J. COMPETITION L. & ECON. 623, 636–37 (2016) (discussing the FTC's very impressive win rate on case-by-case adjudication since 1977).

[127] Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1344 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

[128] *Id.*

[129] *Id.* at 1344–45.

[130] 15 U.S.C. §§ 45, 46(g).

[131] *Nat'l Petroleum*, 340 F. Supp. at 1344–45.

[132] *Id.* at 1350.

Echoing Weston's concerns expressed eight years earlier in his 1964 article, the district court found no evidence that Congress meant for the FTC to have rule-making authority: "Section 6(g) of [the FTC Act] was intended only as an authorization for internal rules of organization, practice, and procedure."[133] The court focused on the placement of the rule-making provision within the FTC Act and the legislative history of the Act.[134]

The district court observed that section 6(g) of the FTC Act is "where the [FTC's] investigative powers are conferred."[135] The court rejected the FTC's contention that section 5(a)(6) authorizing the Commission to "prevent unfair methods of competition, constitutes implied rulemaking authority" because, as the court observed, the very next paragraph of the FTC Act, section 5(b), grants the FTC *adjudicatory* authority *only*.[136]

The district court further found that the legislative history of the Act did not support the FTC having legislative rule-making authority.[137] First, the district court emphasized that only the House bill considered rule-making and that the House's provision only conferred investigative rule-making powers to the Agency; the Senate bill had no rule-making provision whatsoever and only gave the FTC adjudicatory and interpretive authority.[138] Second, during House debates about the FTC Act, the House denied—not once, but twice—subsequent proposed amendments that would have given the FTC legislative rule-making authority.[139] Thus, the FTC Act in its final form was merely the result of combining the House and Senate bills in committee and not some conscious delegation of legislative rule-making authority to the FTC born out of congressional fiat.[140] Simply put, the district court concluded that there was no mention of "this extraordinary grant of [rule-making] power" in the FTC Act's legislative history.[141]

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[133] *Id.* at 1345.

[134] *Id.* at 1345–47; *see also FTC Substantive Rulemaking Authority*, *supra* note 6, at 314.

[135] *Nat'l Petroleum*, 340 F. Supp. at 1345.

[136] *Id.* at 1349.

[137] *Id.* at 1345.

[138] *Id.* at 1345–46.

[139] *Id.* at 1346.

[140] *Id.* at 1346 n.12.

[141] *Id.* at 1347.

But the district court did not stop there.[142] The court also acknowledged the FTC's own admissions over fifty years that it lacked such legislative rule-making authority and Congress's specific legislation mandating FTC rule-making authority in specific situations, which would have been "meaningless and superfluous" if the FTC had in effect already possessed such authority.[143] To the district court, if "Congress [had] intended to grant substantive rulemaking authority to the FTC, it [would have] done so clearly and unequivocally."[144]

After the district court's decision, the FTC found itself in the difficult spot of arguing that its rule-making authority was statutorily granted (on appeal to the D.C. Circuit Court of Appeals) and that the authority was ambiguous (in an attempt to get Congress to legislate).[145] However, before Congress could legislate, the D.C. Circuit reversed the district court's decision in what Merrill and Watts call "a remarkable legal document."[146]

The reader need only invest in reviewing a handful of sentences of Judge Wright's opinion in *National Petroleum* to find that the D.C. Circuit had little intention of relying on the text of the FTC Act or the Act's legislative history to arrive at its conclusion.[147] The D.C. Circuit acknowledged the plausibility of the district court's analysis, agreeing that: (1) the district court's reading that "the phrase 'rules and regulations for the purpose of carrying out' section 5 refers only to rules of procedure and practice" was "not implausible;"[148] (2) the FTC had only historically promulgated rules that were procedural in nature;[149]

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[142] *Id.*

[143] *Id.*

[144] *Id.* at 1347, 1349–50 ("The record amply reflects that the Commission itself has repeatedly admitted that it has no power to promulgate substantive rules of law and Congress has implicitly rejected the efficacy of [TRRs] by legislatively superseding them.").

[145] Merrill & Watts, *supra* note 26, at 555.

[146] *Id.* at 556.

[147] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d at 675–76 (D.C. Circuit 1973) (refusing to read the words of the FTC Act as indicating that the FTC was only permitted to use adjudication).

[148] *Id.* at 685.

[149] *Id.* at 677.

(3) legislative rule-making by the FTC was only accomplished through specific *additional* legislation by Congress;[150] and (4) the legislative history of the Act was "ambiguous."[151]

Rather than review the evidence before it, the D.C. Circuit went on to summarize a series of *unrelated* statutes that gave *other* administrative agencies legislative rule-making authority as evidence that such authority should also accrue to the FTC:

> [J]udicial precedents concerning rule-making by other agencies and the background and purpose of the [FTC Act] lead us *liberally to construe* the term "rules and regulations . . . ." The need to interpret liberally broad grants of rule-making authority like the one we construe here has been emphasized time and again by the Supreme Court.[152]

The D.C. Circuit was not modest about its intentions: to favor an interpretation that would allow the FTC to fulfill its alleged rule-making mission like other administrative agencies, even if that meant the court would need to rewrite Congress's law to do it.[153] And rewrite the law is exactly what the D.C. Circuit did.[154]

The D.C. Circuit's decision was a tortured *Where's Waldo* exercise to find any "thin statutory reed" on which the court could afford the FTC rule-making authority.[155] And that "thin statutory reed" was merely the court's desire to expand the administrative state and afford the FTC with a grant of rule-making authority that Congress had given other agencies.[156] But

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[150] *Id.* at 695–96.

[151] *Id.* at 686. So ambiguous was the legislative history of the FTC Act, that the D.C. Circuit was forced to bury its discussion of that history in an Appendix at the end of its decision. *See id.* 687, 698–709 ("[P]roponents of the agency were hardly agreed on exactly what powers the agency should assume.").

[152] *Id.* at 678, 680 (emphasis added).

[153] *Nat'l Petroleum*, 482 F.2d at 689 ("In determining legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment, and to avoid an interpretation which would make such policies more difficult of fulfillment . . . .").

[154] *Id.*

[155] *Id.* at 674; Ohlhausen & Rill *supra* note 5, at 156.

[156] *Nat'l Petroleum*, 482 F.2d at 695–96; Ohlhausen & Rill *supra* note 5, at 156.

such a "remarkable" interpretation of the law is unlikely to survive under the Supreme Court's modern jurisprudence.[157]

III. Application of Modern Statutory Interpretation Tools to the FTC Act

The FTC's proffered UMC rule-making authority is—and was at the time of *National Petroleum*—predicated on a single, nondescript reference buried in section 6(g) of the FTC Act, where the FTC obtains its *investigative* authority: "The Commission shall also have power . . . . [f]rom time to time to classify corporations and . . . to make *rules and regulations* for the purpose of carrying out the provisions of this [Act]."[158] Congress vested the FTC with its *adjudicatory* authority to prevent unfair methods of competition (and unfair or deceptive acts or practices) in section 5 of the FTC Act.[159] There is no mention of rules and regulations within section 5, nor is there any mention of unfair methods of competition in section 6(g).[160]

As discussed in Part II, neither the text nor the structure of the FTC Act were of much concern to the courts in *National Petroleum*, although at least the district court acknowledged that the structure of the Act could not support the FTC's proffered position.[161] However, as Section III.A examines, the D.C. Circuit applied a strict purposive framework to its grant of legislative rule-making authority, ignoring almost every tool of statutory interpretation that would have compelled the D.C. Circuit to decide otherwise.[162] Applying even some of the modern tools of statutory interpretation to the FTC Act shows the folly of the *National Petroleum* court's reading of the Act and signals the reception the FTC is likely to face from the Court today when its rule-making authority is challenged.[163]

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[157] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348 (2021).
[158] 15 U.S.C. § 45(6)(g) (emphasis added).
[159] 15 U.S.C. § 45.
[160] *Id.* §§ 45, 45(6)(g).
[161] *Nat'l Petroleum*, 340 F. Supp. at 1349.
[162] *See infra* Section III.A.
[163] *Id.*

A. Theories of Statutory Interpretation: A Brief Primer[164]

Professors Henry Hart, Jr. and Albert Sacks observe "that American courts have no intelligible, generally accepted and consistently applied theory of statutory interpretation."[165] Courts employ—albeit indirectly through tools of interpretation—theories of statutory interpretation to determine a statute's meaning and fulfill the judiciary's role in this context.[166] It is the court's job to say "what the law is,"[167] and in doing so, the court must be "faithful agents" of Congress[168]:

> [The American people] made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice . . . .[169]

While it is true that different tools of statutory interpretation are applied depending on the theory of interpretation deployed by a court, the goal of statutory interpretation is the same regardless of the prevailing theory: "legislative supremacy."[170] "Purposivism" and "textualism" are the two primary theories of statutory interpretation, although, as discussed in this Section,

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[164] A comprehensive review of the different theories of statutory interpretation is outside the scope of this Article. For a more extensive analysis of these theories, see, for example, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEM IN THE MAKING AND APPLICATION OF LAW 1111–380 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 271–74 (2020); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–77 (2006) [hereinafter *What Divides*]; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 1–4 (2006).

[165] HART & SACKS, *supra* note 164, at 1169.

[166] *See id.* at 1113.

[167] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[168] VALERIE C. BRANNON, CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, 4 (2018).

[169] King v. Burrell, 576 U.S. 473, 515 (2015) (Scalia, J., dissenting).

[170] VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., *CHEVRON* DEFERENCE: A PRIMER 14 (2017); BRANNON, *supra* note 168, at 11 (quoting John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2413, 2425 (2017)).

what emerges from the Court is more of a case-specific, process-oriented approach that reflects elements of different theories.[171]

Purposivism interprets statutes in a way that allows for the execution of legislative purpose.[172] It upholds that the "'spirit' [of a statute can] prevail over the 'letter' of a statute."[173] By comparison, textualism prioritizes the words and structure of a statute over legislative purpose;[174] it relies "on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted."[175] In their strictest forms, purposivism and textualism are antipodean theories of statutory interpretation.[176] Unfortunately, the reality is far more complicated.[177]

Purposivism is most famously linked to the Court's 1892 decision in *Church of the Holy Trinity v. United States*.[178] In *Holy Trinity*, the Court was asked to assess whether the Alien Contract Labor Act of 1885, which prohibited *any* foreigner or alien from "perform[ing] labor or service of any kind" in the United States, included the services of an English (and thus, foreign) pastor.[179] The Court held that "labor or service of *any* kind" meant *only* "cheap unskilled labor" because Congress could not have intended to exclude pastors from employment by churches in the United States[180]:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . . . It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.[181]

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[171] *See infra* Section III.A.

[172] BRANNON, *supra* note 168, at 11.

[173] Grove, *supra* note 164, at 272.

[174] BRANNON, *supra* note 168, at 13–14 (quoting Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting)).

[175] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

[176] *Id.* at 56.

[177] *Id.* at 312.

[178] 143 U.S. 457, 458 (1892); *see* John F. Manning, *The New Purposivism,* 2011 SUP. CT. REV. 113, 113–14 (2011).

[179] *Holy Trinity*, 143 U.S. at 457–58, 472.

[180] *Id.* at 458, 465 (emphasis added).

[181] *Id.* at 459, 472.

Justice Scalia observed that the Court has not favorably cited *Holy Trinity* since 1989, save in a single 2007 concurrence written by Justice Stevens that "was joined by no other Justice."[182]

Under purposivism, even when the plain meaning of a statute is clear if that meaning is unreasonable considering the statute's purpose, the plain meaning is rejected in favor of an interpretation that gives life to the statute's purpose[183] "[C]ourts . . . first ask what problem Congress was trying to solve, and then ask whether the suggested interpretation fits into that purpose."[184] Purposivism primarily relies on extrinsic sources for statutory interpretation, such as the legislative process, the legislative history of the statute, and the policy context of the statute.[185]

Purposivism was the primary theory that motivated the courts' decisions in *National Petroleum*.[186] While deciding differently, both courts relied almost exclusively on the legislative history of the FTC Act.[187] Paying some lip service to the text of the statute, both courts found their answer in the ambiguity of (the D.C. Circuit) or the definitive nature of (the district court) the Act's journey through the bicameral process.[188] Moreover, the D.C. Circuit—in strict homage to *Holy Trinity* in a way that would tickle the fancy of Justice Stevens and enrage Justice Scalia—ignored just about every piece of statutory construction available to it and, instead, asked what Congress would have *wanted* to enact, rather than what it *did* enact.[189]

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[182] SCALIA & GARNER, *supra* note 175, at 13.

[183] *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.").

[184] BRANNON, *supra* note 168, at 13.

[185] *Id.* at 12–13; *see also Holy Trinity,* 143 U.S. at 463 ("[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.").

[186] *See* discussion *supra* Part II (analyzing the purposive approach to the decisions in *National Petroleum*).

[187] *See* discussion *supra* Part II.

[188] *See* discussion *supra* Part II (comparing the distinct approaches of the District Court and the D.C. Circuit in deciding *National Petroleum*).

[189] *See, e.g.*, Argentina v. Weltover, Inc., 504 U.S. 607, 612, 614, 617–18 (1992).

The D.C. Circuit was not unique in its approach in *National Petroleum*.[190] Purposivism remained the dominant form of statutory interpretation through the 1980s, which is why the D.C. Circuit's opinion was not, at its time, as "remarkable" as it might be today.[191] Professor Tara Leigh Grove describes the emergence of textualism—led by Justice Scalia and Judge Easterbrook—as a direct response to purposivism.[192] Supporters of textualism advertised it as a way for courts to remain more faithful agents of Congress.[193] The concern among textualists was that purposivism had allowed judges to read their own proclivities into the law rather than Congress's.[194]

By comparison, textualism prioritizes the words and structure of a statute over its intended purpose; textualists read the words of a statute as an ordinary individual would, including Congress, at the time of the statute's enactment.[195] The purpose of the statute enters the interpretive analysis *only* if it is explicitly evident from the text of the statute; most textualists do not believe that purpose can be derived from the legislative history.[196] This is because it is the words of the statute that survive the legislative process, and it is the words that are ultimately enacted by Congress.[197] The legislative process might involve compromises

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[190] *See* Manning, *The New Purposivism*, *supra* note 178, at 122–23, 123 n.57 (highlighting courts' consistent use of materials like legislative history to "ascertain whether the statutory text adequately captured the legislative purpose.").

[191] *See id.* at 113.

[192] Grove, *supra* note 164, at 271, 273.

[193] *Id.* at 271.

[194] *Id.* at 273 ("When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . ." (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 17–18 (Amy Gutmann ed., 1997))).

[195] BRANNON, *supra* note 168, at 13–14; *see also* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

[196] *See* SCALIA & GARNER, *supra* note 175, at 56; *see also* BRANNON, *supra* note 168, at 15.

[197] *Id.* at 14; *see also* Grove, *supra* note 164, at 273 ("[Textualists] respect the (at times messy and unknowable) compromises reached through [the

that cannot "capture a coherent set of purposes," making the text the best resource to decipher the objective meaning of the law.[198]

Examples of textualism in the jurisprudence of the modern Supreme Court are plenty.[199] For example, in its 2012 decision in *Mohamad v. Palestinian Authority*, the Court held that the petitioner's "purposive argument simply cannot overcome the force of the plain text."[200] And in its recent decision in *AMG Capital Management, LLC v. FTC*, the Court held that the language and structure of section 13(b) of the FTC Act indicated that "permanent injunction" did not include "monetary relief."[201] However, despite these examples of textualism, the Roberts Court has been willing to employ a purposive approach in conjunction with extensive textual analysis.[202] This is particularly true in cases "[that] implicate constitutional principles, especially . . . nondelegation . . . ."[203]

Professor John Manning has flagged the Court's approach as a new kind of purposivism: "[P]urpose plays a decisive role *if and only if* Congress has framed the text at a high enough level of generality to accommodate it."[204] This approach, according to Manning, is still "textually-structured," with new purposivists willing "to invoke legislative history in cases of genuine semantic ambiguity."[205] This approach is often referred to as "legal process purposivism" where interpretation involves purpose, but the text casts "the most important light on the purpose[ ] to be attributed."[206]

For example, in *Utility Air Regulatory Group v. EPA*, the Court assessed an EPA regulation that certain stationary sources

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bicameralism and presentment] process by enforcing the specific provisions of a statute, even when those provisions seem to conflict with some background policy or purpose.").

[198] Manning, *What Divides*, *supra* note 164, at 74.

[199] *See, e.g.*, *The Rise of Purposivism, supra* note 31, at 1230 nn.24–25.

[200] 566 U.S. 449, 450 (2012).

[201] 141 S. Ct. 1341, 1348 (2021).

[202] *The Rise of Purposivism, supra* note 31, at 1230.

[203] *Id.*

[204] Manning, *The New Purposivism*, *supra* note 178, at 117 (emphasis added).

[205] *Id.*

[206] Manning, *What Divides*, *supra* note 164, at 78 (attributing the conceptual underpinnings of legal process purposivism to Hart & Sacks).

required permits under the Clean Air Act (CAA) because of greenhouse gas emissions from those sources.[207] The EPA had interpreted the term "any air pollutant" in the CAA to include "greenhouse gases," since "air pollutant" was defined in the CAA as "including any physical, chemical, biological [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[208] Despite this plain meaning, Justice Scalia, writing for the majority, rejected the EPA's definition, arguing such an interpretation would yield a "massive administrative burden"[209]: "The fact that EPA's greenhouse-gas-inclusive interpretation . . . would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it."[210] Nevertheless, the Court found an additional reason to reject the EPA's interpretation: the "enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization" that would result.[211]

Commentators identify *King v. Burrell* as the "premier example of legal process purposivism."[212] *King* involved a challenge to the IRS's interpretation of the Affordable Care Act (ACA), specifically, whether tax credits for a "[healthcare] Exchange established by the State" included federal exchanges.[213] Through an analysis that included reading the phrase "established by the State" in context, the Court held that the phrase was "ambiguous."[214] The Court then concluded that the phrase, when assessed in the context of the whole Act, was unambiguous and clearly included tax credits for federal exchanges.[215] According to the Court, to hold otherwise would invalidate the ACA's two major reform proposals[216]: "It is implausible that Congress meant

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[207] 573 U.S. 302, 307, 312–13 (2014).

[208] *Id.* at 315–16.

[209] *The Rise of Purposivism, supra* note 31, at 1233.

[210] *Utility Air*, 573 U.S. at 323–24.

[211] *Id.* at 324; *see also infra* Part IV.

[212] *The Rise of Purposivism*, *supra* note 31, at 1236.

[213] King v. Burrell, 576 U.S. 473, 483 (2015).

[214] *Id.* at 490.

[215] *Id.* at 492–93.

[216] *Id.* at 493 ("Under petitioners' reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the

the Act to operate in this manner."[217] Justice Roberts, writing for the majority, observed that "[a] fair reading of [the] legislation demand[ed] a fair understanding of the legislative plan."[218] Similar to *Utility Air*, the *King* Court also highlighted the important economic and political implications of the interpretation at issue.[219]

As hinted earlier, the Court attempts to perform statutory construction holistically—without pretense as to any specific theory of statutory interpretation.[220] Of course, the reality is far more complicated, with some decisions showing signs of strict purposivism and others of strict textualism.[221] In the following Section, modern tools of statutory interpretation are applied to the FTC Act without prejudice as to the specific theory of statutory interpretation to which they typically attach.[222] This work is not intended to be a comprehensive statutory analysis of the FTC Act.[223] Rather, what follows is an attempt to apply the tools of interpretation that the modern Court is most likely to consider.[224] And for that, we start where the Court will invariably begin—with the text of the FTC Act.[225]

Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way.").

[217] *Id.* at 494.

[218] *Id.* at 498.

[219] *Id.* at 485–86; *see infra* Part IV.

[220] *King*, 576 U.S. at 4.

[221] *See infra* Section III.A.

[222] *See infra* Section III.A. Getting bogged down in the nomenclature of statutory interpretation theories does not necessarily yield the Court's most likely read of a statute. Consider that the Court's recent decision in *Bostock v. Clayton County* has been called "progressive textualism," "flexible textualism," "modern textualism," and a break from textualism all together. *See* Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, THE ATLANTIC (July 24, 2020, 10:16 AM), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/ [https://perma.cc/6WKX-9E3Z]; Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ [https://perma.cc/3Y9G-EC6P]; Grove, *supra* note 164, at 273.

[223] *See infra* Section III.A.

[224] *See infra* Section III.B.

[225] *See infra* Section III.B.

B. "We're All Textualists Now"[226]

Regardless of the theory of statutory interpretation applied by the Court to arrive at its decision, the Court begins its analysis with the statute's text.[227] This includes the plain meaning of the words in the statute, as well as the placement of the relevant provision(s) within the statute.[228] According to the Court, "The meaning . . . of certain words or phrases may only become evident when placed in context . . . . [T]he Court must read the words 'in their context and with a view to their place in the overall statutory scheme.'"[229] Even the district court in *National Petroleum* acknowledged the language of section 6(g) in the context of the structure of the FTC Act as support for its conclusion that the FTC lacked rule-making authority.[230] And while the D.C. Circuit rejected the district court's interpretation, it credited the district court's interpretation as "not implausible."[231]

It is true that a standalone reading of section 6(g) of the FTC Act cannot, alone, solve the ambiguity of the FTC's legislative rule-making grant.[232] Section 6(g) of the FTC Act reads:

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[226] *Harvard Law School*, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg ("[W]hen judges confront a statutory text, they're not the writers of that text; they shouldn't be able to rewrite that text. There is a text that somebody . . . has put in front of them, and . . . what you do with that text is a very different enterprise than the enterprise that Congress . . . has undertaken in writing that text."); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) ("[W]e've long since come to realize that the real cure doesn't lie in turning judges into rubber stamps for politicians, but in redirecting the judge's interpretive task back to its roots, away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original public meaning. Today it is even said that we judges are, to one degree or another, 'all textualists now.'").

[227] SCALIA & GARNER, *supra* note 175, at 16.

[228] *Id.* (discussing semantic, syntactic, and contextual tools of statutory interpretation).

[229] King v. Burrell, 576 U.S. 473, 486 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000)).

[230] Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1349 (D.C. Cir. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

[231] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 685 (D.C. Cir. 1973).

[232] *Id.*

"The Commission shall also have power . . . from time to time to classify corporations and . . . to make *rules and regulations* for the purpose of carrying out the provisions of this [Act]."[233] Here "rules" are susceptible to multiple dictionary meanings. A "rule" is "a statement that tells you what is or is not allowed in a particular . . . situation."[234] A "rule" is also "a piece of advice about the best way to do something" or "a prescribed guide for conduct or action."[235] In the first definition, a rule appears to be a binding statement, while in the subsequent two definitions, a rule appears to have no binding effect.[236]

Even considering the term "rules" in the context of its technical definition as used by Congress when legislating does not, alone, resolve the ambiguity: do "rules" refer to legislative rules that have the full force and effect of law?[237] Do "rules" refer to non-legally binding interpretive rules—rules that advise the public how an agency interprets the statutes it administers?[238] Or do "rules" refer to procedural rules—rules that dictate agency processes?[239] Unfortunately, the words that precede the phrase "rules and regulations" in section 6(g) do not provide additional context, moving from the classification of corporations to a general reference to "rules."[240] Merrill and Watts observe that such ambiguous rule-making language was common at the time and makes it impossible to decipher, from the phrase alone, whether the rule-making grant includes legislative, procedural, or interpretive authority.[241] However, considering the text in terms of its placement in the overall Act removes some ambiguity.[242]

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[233] 15 U.S.C. § 46(g) (2006) (emphasis added).

[234] *Rule,* MERRIAM-WEBSTER DICTIONARY (11th ed. 2020), https://www.merriam-webster.com/dictionary/rules [https://perma.cc/4WYY-WN8B].

[235] *Id.*

[236] *Id.*

[237] Merrill & Watts, *supra* note 26, at 471.

[238] *Id.* at 476–77.

[239] *Id.* at 477–78 ("[N]early all of the rulemaking grants adopted by Congress in the twentieth century do not specify whether they authorize legislative rules, procedural rules, interpretive rules, or policy statements.").

[240] *Id.* at 504–05.

[241] *Id.* at 481–82.

[242] *Id.* at 484.

Section 6(g) appears in the part of the FTC Act where the FTC obtains its investigative authority.[243] Each of the other eleven provisions within section 6, (a)–(f) and (h)–(l), gives the FTC investigative powers.[244] Moreover, the words "rules and regulations" are buried in a single provision discussing the FTC's authority to "classify corporations."[245] There is no defined link between the language in section 6(g) and the language in section 5 addressing the FTC's adjudicatory authority to prohibit unfair methods of competition.[246] In *National Petroleum*, the district court highlighted that giving the FTC legislative rule-making authority from the simple provision in section 6(g) would "circumvent the due process procedures expressly provided for in Section 5 of the [FTC Act]."[247] The placement of section 6(g) strongly supports the inference that the grant of any authority related to "rules and regulations" is investigative in nature rather than legislative.[248] The Court's recent analysis in *AMG* is also strong evidence that the Court is likely to reach this same conclusion.[249]

In *AMG*, the court considered whether section 13(b) of the FTC Act allowing for "permanent injunction[s]" gave the FTC the authority to dispense with administrative proceedings and obtain monetary relief directly from the courts.[250] As part of its analysis, the Court pointed to the structure of the language at issue within the FTC Act: the words "permanent injunction" were "buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief."[251] The Court unanimously held that the location of the words in the Act—in a section dealing only with permanent injunctions—confirmed that the relief referred only to a permanent injunction; outside of an administrative proceeding, the FTC did not have the authority to seek monetary relief.[252]

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[243] *Id.* at 504.

[244] *Id.* at 505.

[245] *Id.* at 504.

[246] *Id.*

[247] Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1346 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

[248] *Id.*

[249] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348 (2021).

[250] *Id.* at 1347.

[251] *Id.* at 1348.

[252] *Id.*

In *AMG*, the issue before the Court was the FTC's interpretation, validated by courts, that section 13(b) gave the FTC the authority to seek monetary relief by circumventing the administrative proceedings that the Act, in sections 5 and 19, required the Agency to fulfill to obtain such monetary relief.[253] Here, the FTC proffers a similar authority.[254] The FTC argues that sixteen words buried in a provision regarding only its investigative authority permit the FTC to promulgate competition rules, with the full force and effect of law, without fulfilling the due process requirements of section 5.[255] Section 5 is clear on the FTC's authority: issue complaints, hold hearings, commence administrative proceedings, and issue cease and desist orders.[256] And the Act is extensive in its explanation, consistent with this section of the statute addressing the primary powers vested in the FTC.[257]

Given the Court's decision in *AMG*, the FTC likely faces a similar battle before the Court: convincing the Court that section 6(g), buried in a section of the FTC Act that *only* addresses the FTC's investigative authority, grants the FTC with legislative rule-making authority sufficient to circumvent the due process requirements of section 5.[258]

C. Legislative History of the FTC Act

The legislative history of the FTC Act can have two equally plausible interpretations when analyzed in isolation.[259] Section 6(g) of the FTC Act originated in the House bill, which gave the FTC investigative powers and the powers to make recommendations to Congress;[260] the House bill provided no independent enforcement power to the FTC at all, including adjudicatory power.[261]

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[253] *Id.* at 1347.

[254] *Id.*

[255] *Id.* at 1350–51.

[256] 15 U.S.C. § 45(b).

[257] *Id.*

[258] *See, e.g.*, Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026, 2040 (2015).

[259] *See* Merrill & Watts, *supra* note 26, at 505.

[260] *Id.*

[261] *Id.*; *FTC Substantive Rulemaking Authority*, *supra* note 6, at 302–03; Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973)

By comparison, the Senate bill gave the FTC both adjudicatory and investigative authority but contained no rule-making provision of any kind.[262] The Conference Committee, unable to do anything other than reconcile the differences between the House and Senate bills, adopted the House's rule-making provision as is, in combination with the Senate's bill.[263] The floor debates related to the reconciliation confirmed that the FTC lacked legislative rule-making authority: "House members of the Conference Committee asserted that the Commission would 'have no power to prescribe the methods of competition . . . in [the] future' and that 'it will not be exercising power of a legislative nature.'"[264] Moreover, there is no direct discussion in the legislative history about the relationship between sections 5 and 6(g) of the FTC Act.[265]

As Manning observed, the legislative process involves compromise, which means that a "coherent set of purposes" often cannot be captured from the legislative history.[266] This makes relying on legislative history as evidence of Congressional "intent" difficult.[267] For example, from the FTC Act's legislative history, a court might conclude that Congress assessed and dismissed the idea that the FTC would possess legislative rule-making authority, as the district court did in *National Petroleum*.[268] However, a court might otherwise conclude, as Judge Wright did in *National Petroleum*, that, while the rule-making provision was only in the House bill, the lack of actual debate on the topic of legislative rule-making authority for the FTC does not preclude the possibility that the FTC possesses such authority.[269] Viewed in a light most favorable to the FTC's position, the legislative

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("The proposed agency lacked any independent power to order a halt to business practices involving a violation of law.").

[262] Merrill & Watts, *supra* note 26, at 505; *FTC Substantive Rulemaking Authority*, *supra* note 6, at 302–03; *Nat'l Petroleum*, 482 F.2d at 703.

[263] Merrill & Watts, *supra* note 26, at 505; Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1346 n.12 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

[264] *FTC Substantive Rulemaking Authority*, *supra* note 6, at 304.

[265] *See* Merrill & Watts, *supra* note 26, at 505–06.

[266] Manning, *What Divides*, *supra* note 164, at 74.

[267] *Id.*

[268] *See Nat'l Petroleum*, 340 F. Supp. at 1350.

[269] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 706–08 (D.C. Cir. 1973).

history of the FTC Act is, at best, ambiguous as to the FTC's UMC rule-making authority.[270]

Merrill and Watts provide yet another twist to the FTC Act's legislative history.[271] They observe that at the time the Act was passed, Congress had adopted a specific legislative convention that identified when Congress intended for an agency to have the authority to promulgate rules with the full force and effect of law.[272] They observe that grants of legislative rule-making authority included provisions detailing the sanctions for a failure to conform to the promulgated rules.[273] They conclude that general grants of rule-making without such provisions meant an agency only had the authority to promulgate procedural (or housekeeping) rules.[274] In the context of the FTC Act, Merrill and Watts observe that section 5 only gave the FTC the ability to seek remedies in response to a violation of a cease and desist order;[275] the statute is otherwise silent on the FTC's ability to seek sanctions for violation of any rules promulgated by the FTC[276]:

> The failure to provide any sanction for the violation of rules adopted under section 6(g), along with the placement of the rulemaking grant in section 6, which conferred the FTC's investigative powers, clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC's investigative duties . . . .[277]

Moreover, they point to the statutes used by the D.C. Circuit in *National Petroleum* to support FTC legislative rule-making authority: unlike the FTC Act, all the other statutes considered by the D.C. Circuit contained rule-making grants *and* a provision that imposed sanctions for rule violations.[278]

Of course, Merrill and Watts's observed convention can be interpreted in two distinct ways: as evidence that Congress drafted

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[270] *See id. But see Nat'l Petroleum*, 340 F. Supp. at 1350.
[271] *See* Merrill & Watts, *supra* note 26, at 493.
[272] *Id.*
[273] *Id.* at 494.
[274] *Id.*
[275] *Id.* at 504 & n.180.
[276] *Id.* at 504 & n.179.
[277] *See* Merrill & Watts, *supra* note 26, at 504–05, 556.
[278] *Id.* at 556.

the FTC Act in the shadow of this construction and thus understood that, without sanctions, any rule-making authority the FTC had would be investigative, not legislative,[279] or that the Act as passed represents sloppy drafting, or an attempt by Congress to consciously legislate outside of the boundaries of construction observed by Merrill and Watts.[280] However, the judicial environment in which the 1914 Congress operated lends some credibility to Merrill and Watts's observation.[281]

In 1912, the Court took a far more stringent view of the scope of lawmaking authority that it permitted Congress to delegate to maintain the separation of powers.[282] In its 1912 decision in *Interstate Commerce Commission v. Goodrich Transit Co.*,[283] the Court held that Congress could not "delegate its purely legislative power," but could, "having laid down general rules of action under which [an agency] shall proceed, . . . require of that [agency] the application of such rules to particular situations . . . ."[284]

But in the context of the FTC Act, no "general rules of action" exist to guide the FTC's rule-making.[285] In fact, the FTC Act is entirely silent on what conduct constitutes an unfair method of competition, leaving it to the Agency to define.[286] Thus, at the time of the FTC Act, it is unlikely that Congress would have considered such a broad grant of legislative authority—allowing the FTC to decide what is an unfair method of competition and make laws to prohibit that conduct.[287] At the minimum, additional guidance detailing what constituted an unfair method of

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[279] *See id.*

[280] *See id.* at 493, 503.

[281] *See id.* at 504.

[282] *See* Interstate Com. Comm'n v. Goodrich Transit Co., 224 U.S. 194, 214–15 (1912).

[283] *Id.* This became known as the nondelegation doctrine and is the subject of the Court's 1935 decision in *A.L.A. Schechter Poultry Corp. v. United States*. 295 U.S. 495, 537–38 (1935).

[284] 224 U.S. at 214. (The intelligible principle of the nondelegation doctrine is present in the Court's decision in *Goodrich*.)

[285] *Id.*; Hurwitz, *supra* note 101, at 228.

[286] *Id.*

[287] *See id.*

competition would have been necessary.[288] As discussed in Section III.F below, such a broad delegation of legislative authority with no principles to guide the Agency likely runs afoul of the nondelegation doctrine.[289]

D. The FTC Act's Post-Enactment History

In *National Petroleum*, the district court found that the FTC's consistent and persistent denial—lasting fifty years—of its legislative rule-making authority was strong evidence that the FTC did, in fact, lack such authority.[290] The D.C. Circuit took a different approach: arguing that just because the FTC had decided not to use its rule-making authority for fifty years did not mean that the FTC lacked such authority.[291] The D.C. Circuit's approach is unlikely to find a home in today's Supreme Court.[292] Since *National Petroleum*, the Court has given more weight to an agency's historical interpretation of its own authority.[293]

In *FDA v. Brown & Williamson Tobacco Corp.*, the FDA had promulgated rules to regulate the sale of tobacco products to children under the Food & Drug Administration Act.[294] In invalidating the FDA's rules, the Court found the FDA's historical interpretation of its own authority to be compelling evidence.[295] The Court stressed that, since its inception, the FDA had repeatedly disavowed its authority to regulate tobacco products.[296] The Court further highlighted that the FDA's position was consistent with Congress's view of the FDA's authority; Congress had repeatedly enacted tobacco legislation on its own for a period of thirty-five years.[297]

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[288] *See id.* at 227–28.

[289] *See* discussion *infra* Section III.F.

[290] *See* Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1347 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

[291] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 694 (D.C. Cir. 1973).

[292] *See* Hurwitz, *supra* note 101, at 256.

[293] *See id.* at 249.

[294] 529 U.S. 120, 126 (2000).

[295] *See id.* at 170.

[296] *Id.* at 146, 170.

[297] *See id.* at 143–46.

The FDA's situation is not unlike the FTC's.[298] For the first fifty years, the FTC persistently and consistently disavowed having any legislative rule-making authority:

> It is important, also, to consider the fact that the FTC, for approximately [fifty] years from the passage of the FTCA, never asserted the authority it claims to have always possessed. This indicia points to the fact that the FTC knew it was not originally granted . . . rulemaking authority.[299]

The Court will likely find the evolution of the FTC's authority an important component in assessing the scope, if any, of the FTC's rule-making grant by Congress.[300] Ohlhausen and Rill observe that the Court recently considered the evolution of the FTC's authority in its *AMG* decision.[301] Moreover, the *AMG* Court afforded little weight to the FTC's argument that courts have accepted its interpretation of its authority to seek restitution under section 13(b) of the FTC Act,[302] suggesting that the Court is unlikely to view *National Petroleum* as dispositive.[303]

The Court will likely afford great weight to the FTC's lack of competition rule promulgation over the last forty-eight years.[304] If, as the FTC claims, it had the authority to promulgate such rules, it surely would have done so to fix what Chair Khan has identified as "power asymmetries" and "harms across markets, including those directed at marginalized communities."[305] Justice Gorsuch's statement in the Court's recent denial of certiorari in *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives* may be illustrative of how the Court is likely to see the FTC's

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[298] Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1347 (D.D.C. 1972).

[299] *Id.*; *FTC Substantive Rulemaking Authority*, *supra* note 6, at 305 n.36. The FTC held that it only possessed the authority to promulgate rules related to housekeeping procedures, but not rules that carried with them the force of law. *Id.*; *see also* discussion *supra* Section I.A.

[300] *See* Ohlhausen & Rill, *supra* note 5, at 165–66.

[301] *See id.*

[302] *See* AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1351 (2021).

[303] *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 684 (D.C. Cir. 1973).

[304] *FTC Substantive Rulemaking Authority*, *supra* note 6, at 317 n.99.

[305] FTC Vision Memorandum, *supra* note 9.

recent, broad, and bold interpretation of its competition rule-making authority:

> The law hasn't changed, only an agency's interpretation of it. And these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations . . . . [W]hy should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?[306]

Hurwitz offers a different view of Congress's response to FTC rule-making in the context of unfair methods of competition.[307] Hurwitz proffers three facts to show that Congress acknowledged the FTC's UMC rule-making authority following *National Petroleum*.[308] First, Hurwitz argues that the rule-making procedure in Mag-Moss was related to unfair or deceptive acts or practices and not unfair methods of competition.[309] His evidence: the rejection of a House proposal that would have added language to Mag-Moss announcing that the FTC did not possess UMC rule-making authority—in other words, Mag-Moss was silent on such authority.[310] Second, Hurwitz points to the FTC Improvements Act of 1980.[311] He proffers that the 1980 Act added further procedural requirements to Mag-Moss but left untouched the Agency's UMC rule-making authority under *National Petroleum*.[312] Finally, Hurwitz highlights language codified in the Federal Trade Commission Act Amendments of 1994:

> The [FTC] shall have no authority under this act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practice in or affecting commerce . . . . The preceding sentence shall not affect any authority of the [FTC] to prescribe rules (including interpretive rules),

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[306] 140 S. Ct. 789, 790–91 (2020).

[307] *See* Hurwitz, *supra* note 101, at 233.

[308] *See id.* at 233–36.

[309] *Id.* at 234.

[310] *Id.* at 234–35 ("The FTC, therefore, retained substantive rulemaking authority, authorized by Section 6(g), affirmed in *National Petroleum Refiners*, and governed by the standard [APA] notice-and-comment rulemaking procedures.").

[311] *Id.* at 236.

[312] *Id.*

> and general statements of policy, with respect to unfair methods of competition in or affecting commerce.[313]

Hurwitz finds compelling that the codified language excludes unfair methods of competition and leaves the rule-making authority of the FTC untouched in that regard.[314] But there are two reasons to question Hurwitz's conclusion.[315]

First, focusing on the language in the 1994 amendment, it is notable that Congress used the term "any" in referring to the FTC's UMC rule-making authority: "*any* authority of the Commission to prescribe rules."[316] "Any" is defined as "one or some indiscriminately of whatever kind" with the specific "kind" not identified.[317] By comparison, the word "the"—not used in the Act—is a definite article signaling a specific identity.[318] Here, by using "any," Congress may have been signaling that the issue of legislative rule-making was yet unresolved; at the time, it was understood that the FTC did have procedural and interpretive rule-making authority.[319] Thus, the use of "any" does not, alone, confirm that the FTC has legislative UMC rule-making authority; at best, it leaves the question unanswered.[320]

Second, Hurwitz equates Congress's failure to legislate to limit the FTC's UMC rule-making authority with congressional agreement that the FTC had such authority.[321] In *FDA v. Brown & Williamson Corporation*, Congress had considered—but did not pass—bills that would have given the FDA the authority to regulate tobacco products.[322] There, the majority found that Congress's failure to enact legislation, *coupled with* its enactment

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[313] 15 U.S.C. § 57(a)(2); Hurwitz, *supra* note 101, at 236–37.

[314] Hurwitz, *supra* note 101, at 235.

[315] *See infra* notes 316, 321 and accompanying text.

[316] Hurwitz, *supra* note 101, at 237.

[317] *Any*, MERRIAM-WEBSTER (11th ed. 2020), https://www.merriam-webster.com/dictionary/any [https://perma.cc/SF2N-EZUK].

[318] *Definite Article,* MERRIAM-WEBSTER (11th ed. 2020), https://www.merriam-webster.com/dictionary/definite%20article [https://perma.cc/7LTC-ZCX7]; *The*, MERRIAM-WEBSTER (11th ed. 2020), https://www.merriam-webster.com/dictionary/the [https://perma.cc/Z9GS-F8AF] ("[U]sed as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance.").

[319] Pierce, *supra* note 258, at 2028.

[320] *See id.; see also* 15 U.S.C. § 57(a)(2).

[321] Hurwitz, *supra* note 101, at 236.

[322] 529 U.S. 120, 133–34 (2000).

of "six separate pieces of legislation" to regulate tobacco advertising, was evidence that Congress did not grant the FDA the proffered authority.[323] But the FTC's case for UMC rule-making is distinguished from *Brown & Williamson*.[324] While Congress did not pass legislation to limit the FTC's alleged UMC rule-making authority, it also did not, as it did for tobacco, enact legislation directly related to unfair methods of competition.[325] Thus, Hurwitz's argument appears to be more about congressional *inaction* than failed congressional action—in other words, congressional silence.[326] But the Court has warned that congressional inaction or silence can mean any number of things or simply nothing at all.[327]

For example, Hurwitz's analysis does not contemplate that the 1975 legislature that passed Mag-Moss was a different legislature than that which passed the FTC Act: "Silence from a subsequent legislature should have absolutely no relevance to the meaning the enacting legislature intended."[328] Moreover, Professor Linda Jellum observes that such acquiescence "bypasses the constitutional process for enacting legislation" since "silence is neither passed bicamerally nor presented to the president."[329] Thus, according to Jellum, this would equate to legislating outside the Constitution.[330] But it is the *AMG* Court that fires the best warning shot against Hurwitz's analysis:

> We have held that Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation. We have also said, however, that when "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a court's] statutory interpretation.[331]

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[323] *Id.* at 143.

[324] *Compare id.*, *with* Hurwitz, *supra* note 101, at 236.

[325] Hurwitz, *supra* note 101, at 236.

[326] *Id.*

[327] *See* Cleveland v. United States, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring).

[328] *See* Hurwitz, *supra* note 101; LINDA D. JELLUM, MASTERING LEGISLATION, REGULATION, AND STATUTORY INTERPRETATION 299 (3d ed. 2020).

[329] JELLUM, *supra* note 328, at 299.

[330] *See id.*

[331] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1351 (2021).

E. "Congress Does Not Hide Elephants in Mouseholes"

Famously coined by Justice Scalia in the majority opinion in *Whitman v. American Trucking Associations, Inc.*, in its official form, this canon of statutory interpretation reads: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes" ("the mousehole canon").[332] However, Jacob Loshin and Aaron Nielson observe that the spirit of the mousehole canon was present in Court decisions issued almost a decade earlier.[333] The question in applying this canon is what constitutes a "fundamental detail" in a statute.[334] Justice Scalia offered a guiding principle: "For a body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole. Loss of an entire toenail is insignificant; loss of an entire arm tragic."[335]

The Court recently applied the mousehole canon in its decision in *AMG*, where it assessed the FTC's authority to seek monetary restitution directly from courts outside its administrative process.[336] The Court explained that section 5 of the FTC Act permits the FTC to commence its own administrative proceedings and court actions for violations of unfair methods of competition or unfair or deceptive acts or practices.[337] Section 5 also allows the FTC to seek civil penalties for violations of cease and desist orders.[338] Section 19 gives district courts the authority to grant relief "to redress injury to consumers," including the "refund of money or return of property."[339] However, the redress in section 19 is limited to violations of cease and desist orders.[340] Finally, section 13(b), the provision at issue, allows the FTC to obtain a preliminary injunction for ongoing violations of section

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[332] 531 U.S. 457, 468 (2001).

[333] Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 27 (2010).

[334] *Id.* at 28–29.

[335] MCI Telecomms. Corp. v. Am. Tel. & Tel., Co., 512 U.S. 218, 229 (1994).

[336] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1346–47 (2021).

[337] *Id.*

[338] *Id.* at 1347.

[339] *Id.* at 1346.

[340] *Id.*

5.[341] The FTC had interpreted section 13(b) as giving it the authority to seek restitution, including disgorgement, directly from the courts outside the administrative process in section 5.[342]

In invoking this canon, the *AMG* Court expressed concern that the FTC's proffered interpretation of its authority under section 13(b) "could not have been Congress' intent."[343] According to the Court, it was improbable that Congress would have enacted sections 5 and 19, giving the FTC "*conditioned* and *limited* monetary relief" if the Agency could obtain the same monetary relief without "satisfying those conditions and limits."[344] The Court held that Congress did not intend for the FTC to use section 13(b) as a substitute for sections 5 and 19, limiting the FTC's authority to injunctive relief only outside of the administrative process.[345]

In arguing its authority to promulgate UMC rules, the FTC similarly seeks a waiver from the Court for its broad interpretation of its authority.[346] Ohlhausen and Rill argue that the FTC's argument that absent limiting language in section 5 of the FTC Act, section 6(g) provides the FTC with legislative rulemaking authority is in "clear tension" with the mousehole canon: "The FTC's recent claim of broad substantive UMC rulemaking authority based on the absence of limiting language and a vague, ancillary provision authorizing rulemaking alongside the ability to 'classify corporations' stands in conflict with the Court's admonition in *Whitman*."[347] UMC rule-making authority would give the FTC the power to promulgate rules for "virtually all of American businesses"[348] or even for a single business alone if a majority of the Commissioners so elected.[349] Such UMC rules

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[341] *Id.*

[342] *Id.* at 1346–47.

[343] *Id.* at 1349.

[344] *Id.* ("Nor is it likely that Congress, without mentioning the [conditions and limitations] would have granted the Commission authority to so readily circumvent its traditional § 5 administrative proceedings.").

[345] *Id.*

[346] *Id.* at 1350–51.

[347] Ohlhausen & Rill, *supra* note 5, at 166–67.

[348] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 684–85 (D.C. Cir. 1973).

[349] *See* Loshin & Nielson, *supra* note 333, at 28 (discussing MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 221 (1994) (whereby a rule promulgated by the FCC only applied to AT&T).

would allow the Agency to circumvent the administrative proceedings in section 5 of the FTC Act in favor of *per se* rules that prevented or hindered parties from even receiving an administrative proceeding.[350] The Court's decision in *AMG* may sound a warming alarm.[351]

F. The Canon of Constitutional Avoidance to Address Nondelegation Concerns

Ohlhausen and Rill proffer that the FTC's "claimed authority for UMC rulemaking," given the meager language in section 6(g), "runs afoul of the constitutional nondelegation doctrine."[352] The nondelegation doctrine holds that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested [under Article I]."[353] The doctrine requires that Congress provide an "intelligible principle" to guide the Agency's enforcement.[354] However, the nondelegation doctrine has long been considered dead in the Court; the last time the court applied the doctrine was in 1935.[355] While that is true, the Court has employed canons of statutory interpretation as a way to address nondelegation concerns.[356] In particular, the

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[350] *See AMG*, 141 S. Ct. at 1346–47.

[351] As discussed in Part IV, Loshin & Nielson argue that "what really lies in the mousehole is neither an elephant nor a mouse—but the ghost of the nondelegation doctrine." *See* discussion *infra* Part IV; Loshin & Nielson, *supra* note 333, at 22, 60–61.

[352] Ohlhausen & Rill, *supra* note 5, at 167–68.

[353] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). In *Chrysler Corp. v. Brown*, Justice Rehnquist wrote that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." 441 U.S. 281, 302 (1979).

[354] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); *see also* Ohlhausen & Rill, *supra* note 5, at 167.

[355] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (2002).

[356] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 & n.2 (2000) [hereinafter *Nondelegation Canon*] ("In

Court has used the canon of constitutional avoidance as a statutory interpretation tool to "promote nondelegation interests."[357] The constitutional doubt canon holds that a court should interpret a statute in a way that "avoids placing [the statute's] constitutionality in doubt."[358] The concern is not just that the interpretations would make the statute unconstitutional, but also that an adopted interpretation would raise other questions of constitutionality.[359] The canon protects the separation of powers by assuming that Congress did not intend to enact a statute that would raise constitutional questions, absent a clear statement from Congress that it so intended.[360]

In *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (*Benzene*),[361] the Court narrowly interpreted the Secretary of Labor's statutory authority to avoid nondelegation concerns.[362] Manning considers the *Benzene* case the most well-known illustration of the Court's narrow construction of a statute to avoid nondelegation concerns.[363] The statute at issue in *Benzene* was the Occupational Safety and Health Act (OSHA), which required the Secretary of Labor to set a standard for exposure to "toxic materials and harmful physical agents."[364] The relevant section of OSHA required the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible," that no employee will suffer ill health effects from of exposure to the toxic materials.[365] The issue was how the Secretary

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recent years, [the Court's] application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise might be thought to be unconstitutional.") (quoting Mistretta v. United States, 488 U.S. 361, 374 n.7 (1989)); *see also* Loshin & Nielson, *supra* note 333, at 22–23.

[357] Manning, *Nondelegation Canon*, *supra* note 356, at 242; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

[358] SCALIA & GARNER, *supra* note 175, at 247.

[359] *Id.* at 247–48.

[360] JELLUM, *supra* note 328, at 308; *see also* Clark v. Martinez, 543 U.S. 371, 381 (2005).

[361] 448 U.S. 607, 660–62 (1980).

[362] Loshin & Nielson, *supra* note 333, at 22–23.

[363] Manning, *Nondelegation Canon*, *supra* note 356, at 244.

[364] *Id.*

[365] *See id.*

of Labor had interpreted "to the extent feasible;" the Secretary had regulated such that exposure to Benzene would be set at that lowest level "technologically" and "economically" possible.[366]

In assessing the Secretary's interpretation, the Court held that the statute provided no "intelligible principle" to guide the Secretary: there was "no indication where on the continuum of relative safety [the Secretary] should draw his line."[367] Writing for the plurality, Justice Stevens narrowed the act to what Manning describes as a "constitutionally acceptable breadth."[368] Holding that OSHA, as written, would give the Secretary of Labor "unprecedented power over American industry" if "limited by the constraint of feasibility," the Court held that the Secretary was required to conclude a "significant risk" existed for employees before adopting a regulation.[369]

The FTC's interpretation of its UMC rule-making authority arguably looks a lot like the Secretary of Labor's interpretation of "to the extent feasible."[370] The FTC is asking the Court to award it legislative rule-making authority to establish competition rules for all industries using a thirteen-word ambiguous provision buried in the FTC Act's discussion of the Agency's legislative powers.[371] Given that the grant of UMC rule-making authority would give the FTC control over the U.S. Gross Domestic Product—worth $18.4 trillion in 2020[372]—the Court is likely to view the power afforded to the Agency by rule-making similarly to the power that would have accrued to the Secretary of Labor in *Benzene*: as exceeding the constitutional bounds of congressional delegation.[373]

Opponents of the nondelegation canon argue that the canon allows courts to rewrite the law.[374] Sometimes, these opponents

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[366] *Id.*

[367] *Id.* (quoting Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 637 (1980)).

[368] *Id.*

[369] *Id.* at 245.

[370] *Id.* at 244.

[371] *Id.* at 244–45.

[372] *2020 Gross Domestic Product*, BEA, https://www.bea.gov/data/gdp/gross-domestic-product [https://perma.cc/KM83-A68R].

[373] *See* Manning, *Nondelegation Canon*, *supra* note 356, at 244–46.

[374] *See, e.g.*, *id.* at 245, 247.

argue, broad delegations of powers are necessary because Congress cannot always anticipate in advance the applications that a statute will require.[375] Thus, the use of *Chevron* deference to agency interpretations of its administered statutes reflects this ambiguity.[376] But denying the FTC UMC rule-making authority on nondelegation grounds does not require the Court to rewrite any part of the FTC Act; it only requires that the Court interpret the relevant provision, as it did in *AMG*, within the structure of the entire FTC Act, which would even have the benefit of allowing the Court to stay true to its textualist tendencies.[377]

IV. THE FTC LIKELY LACKS UMC RULE-MAKING AUTHORITY UNDER A MODERN STATUTORY INTERPRETATION OF THE FTC ACT

Employing modern techniques of statutory interpretation, as discussed in Part III, exposes three primary arguments for why the Roberts Court is unlikely to conclude that the FTC has UMC rule-making authority: (a) the Court's 2021 decision in *AMG*;[378] (b) the constitutional issues of nondelegation and separation of powers that a judicial grant of UMC rule-making authority would raise;[379] and (c) the Court's use of the major questions doctrine in *West Virginia v. EPA*.[380]

A. FTC Rule-Making in the Shadow of AMG

The Court's recent decision in *AMG* may be a warning to the FTC and its asserted UMC rule-making authority.[381] The considerations that influenced the Court to rule against the FTC in *AMG* appear in the FTC's interpretation of its UMC rule-making authority: a provision buried in a section of the FTC Act thematically different from the authority the FTC claims from the provision, and an interpretation that would have allowed the FTC to circumvent the *exact* process—administrative proceedings—that

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[375] *Id.* at 251.
[376] *Id.*
[377] *See* AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348–49 (2021).
[378] *See* discussion *infra* Section IV.A.
[379] *See* discussion *infra* Section IV.B.
[380] 142 S. Ct. 2587, 2607–08 (2022); *see* discussion *infra* Section IV.C.
[381] *See AMG*, 141 S. Ct. at 1348–49.

Congress expects the Agency to follow.[382] The *AMG* Court concluded that the FTC's interpretation proved too much for the statute to bear: "In light of the historical importance of administrative proceedings, [the FTC's] reading would allow a small statutory tail to wag a very large dog."[383] However, the FTC now claims that the small statutory tail of section 6(g) wags the large dog of section 5.[384]

In addition to calling on the "dog-doesn't-bark" canon of interpretation, the *AMG* Court also cautioned that the FTC's interpretation of its statutory authority exceeded Congress's intent.[385] As discussed in Section III.E, to arrive at its conclusion, the FTC invoked the mousehole canon, which is likely to play a more prominent role in the Court's review of the FTC's proffered UMC rule-making authority.[386] Loshin and Nielson argue that "what really lies in the mousehole is neither an elephant nor a mouse—but the ghost of the nondelegation doctrine."[387] The narrow construction of statutes that is the basis of the mousehole canon has, as Loshin and Nielson observe, been applied by the Court to address nondelegation concerns—concerns likely present in any assessment of the FTC's UMC rule-making authority.[388] This makes it even more likely that the Court will employ the mousehole canon in considering the FTC's scope of authority to promulgate competition rules.[389]

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[382] *See id.*

[383] *See id.* at 1348 (2001); *see also* Ohlhausen & Rill, *supra* note 5, at 167. The mousehole canon is related to the "dog-doesn't-bark" canon. *See* Rebecca M. Kysar, *Penalty Default Interpretive Canons*, 76 BROOK. L. REV. 953, 963 (2011).

[384] *Compare AMG*, 141 S. Ct. 1341, 1348 (arguing that the § 13(b) statutory "tail" could not wag the broader FTC Act "dog"), *with* 15 U.S.C. §§ 45–46 (codifying the Commission's UMC powers).

[385] *See AMG*, 141 S. Ct. at 1349.

[386] *See* discussion *supra* Section III.E.

[387] Loshin & Nielson, *supra* note 333, at 22.

[388] *Id.*

[389] *See id.* at 60–62 (arguing that the mousehole canon may not go far enough to protect nondelegation and the separation-of-power interests originally flagged by the Constitution's framers); *see also* Joel Hood, *Before There Were Mouseholes: Resurrecting the Non-delegation Doctrine*, 30 BYU J. PUB. L. 123, 123 (2015). While a full discussion of the relationship between the mousehole canon and the nondelegation doctrine is outside the scope of this Article, the point is simply that the nondelegation and other constitutional

B. Constitutional Issues: Nondelegation and Separation of Powers

The FTC's claimed UMC rule-making authority is also likely to present the Court with direct questions regarding nondelegation and separation of powers.[390]

1. Nondelegation Issues

While the Court has yet to resurrect the long-defunct nondelegation doctrine, and there remains some debate as to whether the Court will fully resurrect the doctrine, the Court has recently expressed interest in reconsidering that doctrine, at least on a case-by-case basis.[391] The Court recently addressed nondelegation issues in *Gundy v. United States*.[392] While a plurality of the Court held that the statute in *Gundy* was permissible, most of the Justices voiced concern that the Court has historically been quick to dispose of nondelegation concerns.[393] Justice Alito observed that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[394] Moreover, the three dissenting

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concerns raised by the FTC's claim of UMC rule-making authority suggest that the Court may embrace the mousehole canon if not directly invoking the nondelegation canon discussed *infra*. *See* discussion *infra* Section IV.B.1.

[390] *See* discussion *infra* Section IV.B.

[391] *See, e.g.*, Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1081 (2021).

[392] 139 S. Ct. 2116, 2123 (2019) ("Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.").

[393] Ohlhausen & Rill, *supra* note 5, at 170–71; *see also Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken [to nondelegation arguments] for the past 84 years, I would support that effort."); *id.* at 2133 (Gorsuch, J., dissenting) (highlighting the nondelegation issues raised in *Gundy* and the Court's attempt to work around them stating that the "unbounded policy choices have profound consequences for the people they affect").

[394] *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring).

Justices in *Gundy* grounded their argument in the ghost of *A.L.A. Schechter Poultry Corp. v. United States*.[395]

At issue in *Schechter Poultry* was a statute that permitted the President "to approve codes of fair competition" for slaughterhouses.[396] The Court held that the statute "conferred . . . an unconstitutional delegation of legislative power" because it provided no limiting principles to guide what constitutes "fair" competition.[397] In reaching its decision, the Court relied on the FTC Act:

> What are "unfair methods of competition" [under the FTC Act] are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. To make this possible, Congress set up a *special procedure. A Commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority*.[398]

The *Schechter Poultry* Court's description of the limitations of the FTC's authority in 1935—that kept the FTC operating *within* nondelegation concerns—confirms that, at the time Congress enacted the FTC Act, it did so in the shadows of the nondelegation doctrine.[399] As Ohlhausen and Rill observe, the guardrails the Court identified as *limiting* the FTC's authority disappear completely in the face of UMC rule-making.[400] This unilateral extension of the FTC's statutory authority means that the modern Court may use a challenge to the FTC rule-making authority to resurrect the nondelegation canon.[401]

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[395] *Id.* at 2137–39 (Gorsuch, J., dissenting).

[396] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22 (1935).

[397] *Id.* at 542.

[398] *Id.* at 532–33 (emphasis added).

[399] *See* discussion *supra* Section III.C.

[400] Ohlhausen & Rill, *supra* note 5, at 171. Given the extensive discussion of the FTC's authority in *Seila Law* and Justice Roberts's heroic attempt to give *Humphrey's Executor* new life, the FTC's claims of UMC rule-making authority may raise other constitutional issues involving the separation of powers, including the limited for-cause removal power that the President has over the Commissioners. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2194 (2020).

[401] *See* Ohlhausen & Rill, *supra* note 5, at 170–71. While Justice Kavanaugh took no part in the *Gundy* decision, in a subsequent statement on a denial of

The FTC, and its rule-making authority supporters, may argue that the use of the nondelegation canon in statutory interpretation ignores instances where Congress purposefully provided broad delegation because it could not foresee all the possibilities at the time it legislated.[402] The concern in those cases is that applying the nondelegation canon allows a court to rewrite a statute.[403] But in the case of the FTC rule-making, the Court would have to do no such thing.[404] Unlike *Benzene*, where the Court rewrote language in the statute to limit the Secretary of Labor's authority,[405] the Court need not change a single phrase, word, comma, period, or space in the FTC Act to conclude that Congress did not intend the FTC to have the broad grant of statutory authority it seeks—at least not in 1914.[406] And here, the Court need not worry about strong stare decisis; the FTC has not promulgated a competition rule in over fifty years.[407] The Court also need not worry that without competition rule-making, the FTC would be unable to fulfill its mission.[408] Unlike *King*, where the life of the ACA *depended* on the IRS's interpretation of the ACA, the FTC Act and the FTC's ability to meet its mission does *not* depend on the FTC having rule-making authority.[409]

Moreover, Professor Cass Sunstein argues that *Chevron* runs afoul of the nondelegation doctrine: "[*Chevron*] is an emphatically prodelegation canon, indeed it is the quintessential prodelegation canon."[410] Sunstein argues that under *Chevron*,

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certiorari, he wrote expressing his support for revisiting the nondelegation doctrine: "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." *See* Paul v. United States, 140 S. Ct. 342, 342 (2019).

[402] Manning, *Nondelegation Canon*, *supra* note 356, at 251.

[403] *Id.* at 252.

[404] *See id.*

[405] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 654–58 (1980).

[406] Weston, *supra* note 47, at 570.

[407] *See* Pierce, *supra* note 258, at 2028–30.

[408] *See* TechFreedom, Comments In the Matter of Draft FTC Strategic Plan for FY2022–2026, at 8–9 (Nov. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/11/FTC-2021-0061-0010_attachment_1.pdf [https://perma.cc/JF53-35JG].

[409] *See* King v. Burwell, 576 U.S. 473, 494–95 (2015).

[410] Sunstein, *supra* note 357, at 329.

agencies are permitted to interpret the scope of their authority allowing an agency to interpret a statute in any way that is "reasonable."[411] If the FTC's claim of UMC rule-making authority runs afoul of the nondelegation canon—as this Article claims it does—the Court is more likely to apply a nondelegation canon and thus, *less* likely to provide *Chevron* deference to the FTC; as Sunstein observes: it can have one, but not the other.[412]

2. Constitutional Separation of Powers Concerns and the FTC's Status as an Independent Agency

Even absent the Court's resurrection of the nondelegation doctrine, the FTC's assertion of UMC rule-making authority also likely introduces violations of the constitutional separation of powers.[413] In its 2020 decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court considered whether the President's authority to remove the head of the Consumer Financial Protection Bureau (CFPB) only for cause violated constitutional separation of powers.[414] And in doing so, the Court compared the for-cause removal restriction of the President for the CFPB to the same for-cause removal restriction that applied to the FTC.[415]

In *Seila Law*, the Court reasoned that, as a general rule, the Constitution vests all executive power in the President and that the "President possesses 'the authority to remove those who assist him in carrying out his duties.'"[416] However, the Court noted that FTC Commissioners were, according to the Court's 1935 decision in *Humphrey's Executor*, an exception to this general rule.[417] In *Humphrey's Executor*, the Court upheld a statute that permitted for removal of FTC Commissioners only for "inefficiency, neglect of

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[411] *Id.*

[412] *Id.* at 330.

[413] *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207 (2020).

[414] *Id.* at 2207–08.

[415] *Id.* at 2200–01.

[416] *Id.* at 2198 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010)).

[417] *Id.*

duty, or malfeasance in office."[418] The *Humphrey's Executor* Court reasoned that the characteristics of the FTC, its five-member "balanced" bipartisan body of experts performing judicial and legislative functions, made it "neither political nor executive."[419] While continuing to recognize the President's for-cause removal of FTC Commissioners under *Humphrey's Executor*, Chief Justice Roberts, writing for the majority in *Seila Law*, did so cautiously, warning that "[t]he Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."[420] Justice Thomas, concurring with the majority opinion, further called on the Court to fully repudiate *Humphrey's Executor*'s "erroneous precedent," which Justice Thomas argued was "an unfortunate example of the Court's failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design."[421]

A broad grant of UMC rule-making authority to the FTC would permit the Agency to promulgate rules affecting all American businesses.[422] Those rules would come with the force of law.[423] And it would be the five Commissioners of the FTC who would possess the unilateral authority to execute and enforce those laws, with limited Executive oversight, at least under the existing *Humphrey's Executor* exception.[424] Moreover, this rule-making would take place in the shadow of a clear link between the FTC and the Executive, with President Biden having already directed the FTC to address *any* industry practices that inhibit competition, including the promulgation of rules that call out labor, agriculture, healthcare, airlines, technology, banking, and manufacturing as industries ripe for review.[425] And in a

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[418] *Id.* (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

[419] *Id.* at 2199 (internal quotation marks omitted) (citations omitted).

[420] *Id.* at 2198 n.2.

[421] *Id.* at 2211–12 (Thomas, J., concurring).

[422] *See supra* notes 375–77 and accompanying text.

[423] *See supra* note 86 and accompanying text.

[424] *Seila Law*, 140 S. Ct. at 2191 (Breyer, J., concurring).

[425] Exec. Order No. 14036, Promoting Competition in the American Economy, 86 Fed. Reg. 36,987, 36,990 (July 9, 2021).

subsequent letter to the FTC, the President instructed the Agency to investigate higher gas prices.[426] And, in response, the FTC has done as asked by the President.[427]

The result of giving the FTC UMC rule-making authority may prove too much given the cautious carve-out of Executive power that Chief Justice Roberts continued to recognize for the FTC.[428] But Chief Justice Roberts is a known pragmatist.[429] To keep the FTC and *Humphrey's Executor* alive—as Roberts attempted to do in *Seila Law*—the decision that does the least damage to the constitutionality of the FTC as an independent agency is to maintain the status quo of its authority unless, or until, Congress legislates an explicit change to the Agency's authority.[430]

C. Major Questions Doctrine and the Limits of Chevron *Deference*

Putting aside the likely constitutional issues implicated by a finding of FTC UMC rule-making authority, the FTC also cannot rely on what it proffers is a "reasonable" interpretation of the FTC Act entitled to *Chevron* deference by the Court[431]:

> [The Court's] inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it

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[426] *See* @JStein_WaPo, TWITTER (Nov. 17, 2021, 11:22 AM), https://twitter.com/Jstein_WaPo/status/1461006803777556482 [https://perma.cc/A458-EVH9] (posting a copy of the President's letter).

[427] *See, e.g.*, Kate E. Gehl et al., *One Year of Action Since President Biden's Executive Order on Competition*, FOLEY & LARDNER LLP (July 27, 2022), https://www.foley.com/en/insights/publications/2022/07/1-year-president-biden-executive-order-competition [https://perma.cc/M5GA-DZEK].

[428] Aaron J. Nielson, *Is the FTC on a Collison Course With the Unitary Executive?*, YALE J. ON REGUL.: NOTICE & COMMENT (July 2, 2021), https://www.yalejreg.com/nc/is-the-ftc-on-a-collison-course-with-the-unitary-executive/ [https://perma.cc/G4RN-HB6K].

[429] Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, THE ATLANTIC (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/ [https://perma.cc/8W3U-S6UK].

[430] Seila L. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

[431] *See supra* notes 27–28 and accompanying text.

> administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation*.[432]

To wit, *Chevron* does not apply when an agency's interpretation of a statute comes with exceptional "economic and social significance."[433] In those situations, absent a clear statement by Congress of the Agency's regulatory authority—a prerequisite to *Chevron*—the Court will not defer to the Agency's interpretation of the statute, even if that interpretation is reasonable.[434] This situation is typically known as the "major questions doctrine,"[435] famously invoked by the Court, although not by name, in the its 2014 *Utility Air Regulatory Group v. EPA* decision.[436]

In *Utility Air*, the Court declined to afford the EPA *Chevron* deference for the Agency's rules regulating greenhouse gas emissions from stationary sources.[437] Writing for the majority, Justice Scalia found that the "EPA's interpretation [was] unreasonable because it would bring about an enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization."[438] The EPA's claimed "extravagant statutory power over the national economy" fell "comfortably within the class of authorizations that we have been *reluctant to read into ambiguous statutory text*."[439] It is hard to imagine a more "extravagant" expansion of the FTC's authority than to have it unilaterally set competition rules for the entire U.S. economy based on ambiguous language buried in the FTC Act[440]:

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[432] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (emphasis added).

[433] Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

[434] Loshin & Nielson, *supra* note 333, at 21.

[435] Sunstein, *supra* note 433, at 476–77 ("[T]he Court's skepticism [of *Chevron*] is the 'major questions doctrine,' which is a clear effort to limit *Chevron's* reach, or to blunt its force, by depriving agencies of *Chevron* deference in a certain set of cases.").

[436] 573 U.S. 302, 325–26 (2014).

[437] *Id.* at 311–14, 320.

[438] *Id.* at 324.

[439] *Id.* (emphasis added).

[440] *See supra* Part III.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of "vast economic and political significance."[441]

The Court once again invoked the major questions doctrine in its 2015 decision in *King*.[442] Writing for the majority, Chief Justice Roberts withheld *Chevron* deference from the IRS's statutory interpretation of tax credits under the Affordable Care Act (ACA) because of the "question of deep economic and political significance that is central to [the] statutory scheme; had Congress wished to assign [the] question to an agency, it surely would have done so expressly."[443] Chief Justice Roberts highlighted the "billions of dollars in spending each year and the affect[ed] price of health insurance for millions of people" as evidence of the deep economic and political significance of the Agency's interpretation at issue.[444] With the ability to promulgate competition rules affecting every individual business and consumer in every corner of the United States, it is difficult to see how the Court will view the question of FTC competition rule-making under the FTC Act as having *less* economic and political significance than the IRS's tax-credit interpretation under the ACA.[445]

Seven years after *King*, the major questions doctrine remains the tool by which the Supreme Court limits *Chevron* deference.[446] In its 2022 decision in *West Virginia v. EPA*, the Court held that

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[441] *Utility Air,* 573 U.S. at 324.

[442] King v. Burrell, 576 U.S. 473, 485–86 (2015).

[443] *Id.* (internal quotation marks omitted) (citations omitted); *see also* Gonzales v. Oregon, 546 U.S. 243, 267 (2006). ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." (internal quotation marks omitted) (citation omitted)); FDA v. Brown & Williamson, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

[444] *King*, 576 U.S. at 485; *see also The Rise of Purposivism, supra* note 31, at 1238.

[445] *The Rise of Purposivism, supra* note 31, at 1239, 1241.

[446] *See West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022).

the EPA's interpretation of section 111(d) of the CAA fell under the major questions doctrine.[447] In *West Virginia*, the EPA had used a generation-shifting approach to establish emissions caps.[448] These caps, the Court found, were so strict that no existing coal power plant could achieve them without triggering a rule that required the existing power plant to shift generation to cleaner sources by producing less electricity; building a new natural gas power plant, wind farm, or solar installation or invest in one already existing; or by purchasing an emissions allowance under a cap-and-trade regime.[449] The EPA acknowledged that these steps, individually or collectively, would result in a "sector-wide shift in electricity production from coal to natural gas and renewables."[450] The Court held that the EPA's interpretation of section 111(d) "empower[ed] [the EPA] to substantially restructure the American energy market," which, the Court held, represented a "transformative expansion in [the EPA's] regulatory authority" for which the EPA could not receive *Chevron* deference.[451] The Court held that the EPA had "located [a] newfound power in the vague language" of section 111(d)—"an ancillary provision" of the CAA, which was designed to be a "gap filler and had rarely been used [by the EPA] in the preceding decades."[452] The Court further held that the EPA's interpretation of its authority under section 111(d) represented a "fundamental revision of the statute, changing it from one sort of scheme . . . into an entirely different kind."[453] The EPA's power, under its own interpretation, was almost boundless, according to the Court, permitting the EPA to unilaterally force coal plants to stop producing electricity altogether.[454] Without "clear congressional authorization" to so regulate, the Court held that the EPA lacked its proffered authority under section 111(d).[455]

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[447] *Id.* at 2610.
[448] *Id.* at 2603.
[449] *Id.*
[450] *Id.*
[451] *Id.* at 2610 (internal quotation marks omitted) (citations omitted).
[452] *Id.*
[453] *Id.* at 2612 (internal quotation marks omitted) (citations omitted).
[454] *Id.* at 2614–15.
[455] *Id.*

The Court's decision in *West Virginia v. EPA* cautions the reception that the FTC's assertion of competition rule-making authority is likely to face in the Court.[456] Like in *West Virginia v. EPA*, the FTC's UMC rule-making authority depends on alleged authority that has only been used twice in its more than one hundred years.[457] In fact, for more than fifty years, the FTC claimed it *lacked* the authority to promulgate competition rules with the full force of the law, and the Agency had historically interpreted its rule-making authority related to competition as merely procedural in nature.[458] Moreover, similar to the EPA in *West Virginia v. EPA*, the FTC's authority would be transformative—moving it from case-by-case adjudication to a rule-making, executive function with the power to "substantially restructure . . . [*any*] market."[459] Not only would the FTC have the power to restructure industries, but the power to restructure firms, deciding which firms can or cannot exist or can only exist with certain alterations.[460] This could have the FTC enacting law that would exceed what Congress would be willing to legislate.[461] For example, consider the American Innovation and Choice Online Act pending in the Senate.[462] This law is designed, in part, to prevent online platform companies of a certain size from self-preferencing their own products in search results.[463] Despite what has appeared to be widespread support for the bill, Senate Majority Leader Chuck Schumer announced in late July, 2022, that the Senate lacked the sixty votes required to pass the bill.[464] With the competition rule-making authority that Chair Khan argues the FTC possesses, the FTC could do what Congress cannot.[465] Yet, without

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[456] *See id.*

[457] *See* discussion *supra* Section I.B.

[458] *FTC Substantive Rulemaking Authority*, *supra* note 6, at 305.

[459] *See West Virginia*, 142 S. Ct. at 2610.

[460] *Id.* at 2595–96.

[461] *See infra* notes 462–67 and accompanying text.

[462] S. 2992, 117th Cong. § 1 (as reported and amended by Sen. Durbin, Mar. 2, 2022).

[463] *Id.* § 3.

[464] Emily Birnbaum, *Senate's Antitrust Crackdown Sputters as Schumer Signals Doubts,* BLOOMBERG (July 27, 2022, 10:31 AM), https://news.bloomberglaw.com/antitrust/schumer-tells-donors-tech-antitrust-measure-is-unlikely-to-pass?context=search&index=0 [https://perma.cc/RR2Y-VVTV].

[465] *See* Khan, Remarks on Rulemaking, *supra* note 13.

a clear congressional grant of such authority—which the FTC likely does not have[466]—under the Court's logic in *West Virginia v. EPA*, a challenge to any rule promulgated by the FTC would likely be subject to the same fate as the EPA's emission caps under section 111(d): restricted from *Chevron* deference given the major questions raised by such authority.[467]

CONCLUSION

To Chair Khan, the warm blanket of *Chevron* over *National Petroleum* puts to bed any legal challenge that the FTC lacks the authority to promulgate competition rules.[468] But such sweeping conclusions are folly for an Agency only months ago handed a 9–0 loss by the Court for an incorrect statutory interpretation of its own authority.[469] If the FTC wants to avail itself of the promised land of competition rule-making, it must ditch the crutch of *Chevron* and *National Petroleum* and embrace a modern statutory interpretation of the FTC Act—an interpretation that will bear little resemblance to the D.C. Circuit's decision in *National Petroleum* and that will challenge Chair Khan's assertion of the FTC's competition rule-making authority.[470] As Professor Richard Pierce observed, *National Petroleum* no longer has the same judicial appeal that it had almost fifty years ago:

> Let me just express my complete agreement with [the] analysis of the extraordinary fragility of the FTC position that *National Petroleum Refiners* is going to protect them. I teach *National Petroleum Refiners* every year and I teach it as an object lesson in what no modern court would ever do today. The reasoning is, by today's standards, preposterous.[471]

With the Supreme Court as her audience, Chair Khan might be concerned about going too far. That said, Chair Khan is right

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[466] *See* discussion *supra* Sections III.C–D.

[467] *See supra* notes 446–55 and accompanying text.

[468] *See* Chopra & Khan, *supra* note 13, at 375–78.

[469] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1344, 1347, 1349–52 (2021).

[470] *See supra* notes 161–63, 378–80 and accompanying text.

[471] FTC Non-Compete Transcript, *supra* note 104, at 294:18–25; s*ee also* Richard J. Pierce, Jr., *Unsolicited Advice for FTC Chair Khan,* YALE J. REGUL.: NOTICE & COMMENT (July 15, 2021), https://www.yalejreg.com/nc/unsolicited-advice-for-ftc-chair-khan-by-richard-j-pierce-jr/ [https://perma.cc/H398-L7L5].

about one thing: "[C]hange [*is*] hard."[472] But in the context of competition rule-making is it even appropriate? The answer rests with the Court, whose recent treatment of *Chevron* suggests that the change to the FTC's authority will come from Congress and not from a Chair with no legal legs to stand on.

[472] Scola, *supra* note 15 (quoting Lina Khan).