

Governing Information Privacy:
Understanding How the Federal Trade Commission Regulates Privacy

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Abstract

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The rapid growth of digital transformation calls for a rethinking of how to regulate privacy-related issues, which challenges the wisdom of policymakers around the world. Relying on textual analysis of existing legislation, regulations, judicial opinions, and agency decisions, this dissertation examines the “Enforcement-as-Regulation” (EAR) model, the regulatory approach that the Federal Trade Commission has adopted in regulating information privacy. Drawing on the history of the administrative state in general, and that of the FTC in particular, this dissertation finds that the FTC has invented the EAR model as a workaround to overcome the limits on its rulemaking power. These limits, mostly imposed by Congress in response to the FTC’s aggressive efforts to regulate industry in 1960s and 70s, require the Commission to comply with additional procedural obligations when prescribing rules, making it nearly impossible to issue any privacy rules. Then this dissertation argues that the EAR model is a

proper exercise of the FTC's authority within the existing legal framework. Not only does the FTC have the discretion to utilize a case-by-case approach for announcing its policies, but also when doing so, the Commission has satisfied the constitutional standards of due process. Finally, this dissertation concludes that the FTC's EAR model is compatible with the emerging framework of information governance. Through the lens of information governance, if private companies have incentives to maintain the level of privacy, then regulators can develop innovative strategies to encourage self-organization of companies in protecting consumer privacy. Such a framework could inform future research on administrative law and information privacy law.

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DEDICATION

This dissertation is dedicated to my parents. Without their understanding, support, and most of all, love, the completion of the work would have been impossible.

CHAPTER 1 INTRODUCTION

I. Background

Innovations in information technology is transforming the world and reshaping our lives, triggering a heated debate on how to manage personal information. Since the appearance of mainframe computers and databases, advances in information technology have brought considerable benefits to individuals and society. At the same time, information collection and use threaten values, such as dignity and autonomy, that people cherish. The increasing likelihood of identity theft, surveillance, and discrimination gives rise to an outcry for initiatives that seek to restrict the collection and use of personal information, which in turn may prevent us from unveiling the full potential of information technology.

In response to the challenges imposed by information technology, information privacy law has emerged and rapidly in prominence in the past decades. Falling between the established field of laws, the boundary of information privacy law is highly contested and constantly evolving.

Historically, privacy law derived predominantly from constitutional guarantees, statutory protection, and the common law of torts. Contracts and property law also had played a role in safeguarding one's interest in information privacy. In the past two decades, as regulatory agencies are actively engaged in regulating information collection and use, administrative law has become entangled with information privacy law and reshaped the landscape of the privacy field.

It is a challenge to strike a balance between maximizing the benefits of information technology and minimizing its potential costs through information privacy law. A common solution in other parts of the world is to designate a regulatory body as the national data protection authority

(DPA) and charge it with the duty of regulating information collection and use. For example, the General Data Protection Regulation requires each Member State of the European Union to establish independent public authorities to supervise the application of the data protection law.¹ Likewise, on the other side of the Atlantic Ocean, Canada designates the Office of Privacy Commissioner as its national DPA, which regulates information processing activities by both public and private organizations.

However, that is not the case in the United States. The United States “uses a sectoral approach that relies on a mix of legislation, regulation, and self-regulation” in regulating information privacy.² Due to the absence of a national DPA, privacy regulation involves multiple regulatory bodies. At the federal level, a few independent agencies and departments of the government have a say on privacy-related issues under sectoral privacy statutes. At the state level, state attorneys general enforce their own state constitutions and privacy laws. The multiplicity of regulatory bodies adds another layer of complexity to the country’s disorganized legal framework of information privacy law.

The rise of the Federal Trade Commission (FTC) as a national major privacy regulator has changed this regulatory landscape. The FTC is primarily a consumer protection agency. Though information privacy is not explicitly on the radar of the FTC’s regulation, it has enforced privacy statutes since the 1970s. Especially after the commercialization of the Internet, the FTC has actively engaged itself in the privacy field, policing information collection and use in different industry sectors. It establishes baseline standards for information privacy, filling the void left by a patchwork of sectoral privacy statutes.

¹ General Data Protection Regulation, Article 51, (EU) 2016/679.

² U.S. Department of Commerce, U.S.-EU Safe Harbor Overview, http://build.export.gov/main/safeharbor/eu/eg_main_018476.

In regulating information privacy, the FTC has invented a distinctive regulatory strategy, which will be referred in this dissertation as “Enforcement-as-Regulation (EAR).” One feature of the EAR model is its case-by-case approach. Though the FTC has issued formal “rules” relating to financial privacy and children’s privacy, among others, it primarily relies upon its enforcement power to set the privacy-related policies incrementally. The FTC may bring enforcement actions against any violation of sectoral privacy statutes or Section 5 of the FTC Act, which authorizes the agency to prohibit any “unfair or deceptive acts or practices in or affecting commerce.”³ The accumulation of FTC enforcement actions stands for the Commission’s interpretation of what information practices constitute a deceptive or unfair act.

Another feature of the EAR model is that the FTC’s privacy standards rely heavily upon voluntary compliance for their effectiveness. A majority of FTC enforcement actions in the privacy field end with consent orders, which are settlements between the FTC and private companies. The FTC also uses the tools of responsive regulation⁴—workshops, reports, guidance, etc.—to further clarify its privacy policies under Section 5 of the FTC Act and other privacy laws. By analogizing to the common law, consent orders function as precedents, while workshops, reports, and guidance function as dicta; together, they constitute the “new common law of privacy.”⁵

Despite the utility of the EAR model in policing how personal information is collected and used, its legitimacy is contested. The regulated parties challenge the EAR model as a valid strategy for privacy regulation. For example, Wyndham sued the FTC after being charged with failing to

³ 15 U.S.C. § 45(a).

⁴ See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* Oxford University Press (February 16, 1995).

⁵ See Daniel J. Solove and Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 *Colum. L. Rev.* 583, 620-627 (2014).

maintain reasonable and appropriate data security for sensitive personal information. The hotel company claimed that the FTC lacked the authority to regulate cybersecurity and did not provide fair notice.⁶ However, the Third Circuit rejected both arguments, ruling in favor of the FTC. In a more recent case, *LabMD v. FTC*,⁷ the Eleventh Circuit vacated the FTC's cease and desist order on the ground of vagueness. The court found that the FTC's order did not instruct LabMD to stop committing a specific act or practice; rather, the FTC "commands LabMD to overhaul and replace its data security program to meet an indeterminable standard of reasonableness,"⁸ which denied LabMD due process right. The *LabMD* decision not only restrained the FTC's ability to regulate data security through the EAR model, but also opened the door for future FTC defendants to challenge the FTC's practice in court.

While issues related to the legitimacy of the FTC's EAR model have often captured public attention, there are other reasons that the EAR model represents a significant development in U.S. administrative law that is less widely noted. In terms of administrative law, some commentators have argued that rulemaking is superior to the EAR model. What these commentators apparently overlook is that a fundamental shift in U.S. administrative law appears to be underway. As rulemaking, a great invention of the Administrative Procedures Act, becomes ossified, formal decision-making processes are being replaced with informal ones, including consent orders used by the FTC as a tool for regulating information privacy. Besides the FTC, state attorneys general often settle privacy disputes in multistate actions against private companies. Beyond the privacy field, regulatory settlements are frequently used by, for example,

⁶ *FTC v. Wyndham*, 799 F.3d 236, 240 (3rd Cir. 2015).

⁷ *LabMD, Inc. v. Federal Trade Commission*, 891 F.3d 1286 (11th Cir. 2018).

⁸ *Id.*

the Securities and Exchange Commission in its financial regulation.⁹ Therefore, a careful examination of the EAR model could provide a framework through which fundamental changes in administrative law can be viewed.

Similarly, the nuances of the FTC's EAR model on information privacy law deserves more attention. Unlike the conventional wisdom of information privacy law, which focuses solely on individuals' control over personal information, the EAR model reflects a more balanced view towards the management of personal information. According to this balanced view, the interest of companies in information collection and use and that of individuals in preserving information privacy are equally important. Consequently, the protection of information privacy should not be done at the cost of technological innovation and other values. To this extent, the EAR model serves as a good example for balancing benefits and costs associated with information collection and use, and could renew our understanding of information privacy law.

This dissertation seeks to fully reveal the virtue of the FTC's EAR model, mainly through the lens of administrative law. It begins with a review of the dynamics of administrative law in the United States, then investigates how the FTC in the past has shaped the agency today when regulating privacy-related issues. It will also explore the justifications for the FTC's EAR model both as a matter of administrative law and political economics.

By analyzing the FTC's EAR model in particular, this dissertation seeks to make three contributions to existing knowledge. To begin with, it will offer a new perspective to understand how the FTC regulates the collection and use of personal information by companies. Existing study on the EAR model focuses largely on the internal perspective of law as a separate domain.

⁹ See, e.g., David Raskin and Ha-Thanh Nguyen, *Deferred Prosecution Agreements and U.S. Approaches to Resolving Criminal and Civil Enforcement Actions* (April 2012), available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/05/deferred-prosecution-agreements-and-us-approaches-to-resolving-criminal-and-civil-enforcement-actions.pdf>.

It fails to consider the interaction of the EAR model and the ongoing transformation of the government's role in economic activities. A systematic analysis of the EAR model will render a blueprint that could guide its future development.

Nest, this dissertation provides an opportunity to evaluate the profound regulatory reform that is happening in the background. Privacy regulation is not the only area where traditional regulation should be adapted to new conditions. Taking the FTC's EAR model as an example, this dissertation explores how American regulators have tried to become more effective and innovative by supplementing traditional adversarial enforcement actions with more collaborative and non-coercive strategies. The lessons from a careful study of the EAR model should be relevant to understanding regulatory reforms and innovation in other areas of administrative law. Finally, this dissertation contributes to the broader scholarly agenda of exploring new theories for information privacy. Rather than relying on the dominant rights-based model, this dissertation suggests the possibility to a new framework for analyzing information privacy based on the notion of governance. This new framework of information governance not only offers additional justifications for the EAR model, but also is instructive in designing new institutions for managing personal information.

II. Research Questions

This dissertation explores the FTC's regulatory approach to information privacy by addressing two questions:

- First, as a practical matter, why the FTC has adopted the EAR model in regulating privacy-related issues, and
- Second, can the EAR model be justified under the administrative law and beyond?

This dissertation begins by exploring some of the reasons behind the FTC's regulatory approach to information privacy. As a privacy regulator, the FTC only occasionally prescribes privacy rules when Congress directs it to do so. The FTC's approach to information privacy is directed more toward the accumulation of enforcement actions and consent orders, which are less formal and organized than rules. This dissertation explores the hypothesis that the FTC adopted the EAR model in regulating information privacy as a response to a series of limits, which severely restricted its capacity to issue rules.

Then this dissertation examines the legitimacy of the EAR model under administrative law. Critics have attacked the FTC's regulatory model for lacking authority, consistency, transparency, and predictability, while the supporters justified the FTC's acts by analogizing the EAR model to the common law. To resolve the legitimacy problem of the EAR model, this dissertation explores two further issues: whether the FTC is entitled to set agency policies through the case-by-case approach as it does in the EAR model, and whether the EAR model satisfies the procedural obligations of due process.

In determining the propriety of FTC's choice of *ex post* adjudications over *ex ante* rules, this dissertation reviews the Supreme Court's jurisprudence on this issue. With some exceptions, the general rule is that an agency has the discretion to decide the appropriate process for policymaking. This dissertation concludes that in regulating information privacy, the choice of procedure for policymaking is properly the hands of the FTC and the FTC has not abused its discretion by preferring *ex post* adjudication.

To resolve the procedural adequacy of the EAR model, one needs to reconcile two recent court decisions that arguably conflict with each other: in *FTC v. Wyndham*, the Third Circuit ruled in favor of the EAR model, finding that the FTC had given the defendant fair notice, thus its

regulatory activities were consistent with the constitutional requirements of due process.¹⁰ By contrast, the Eleventh Circuit, in *LabMD v. FTC*, found that since the FTC's cease-and-desist order commanded LabMD "to overhaul and replace its data security program to meet an indeterminable standard of reasonableness," rather than instructed the latter to stop committing a specific act or practice, the FTC denied LabMD due process right.¹¹ A superficial reading of *Wyndham* and *LabMD* might suggest a split among the federal circuit courts. This dissertation suggests that the two cases can be reconciled if the FTC's EAR model meets the constitutional requirements of due process as the agency provides adequate procedural safeguards.

III. Methodology

This dissertation project primarily adopts a doctrinal approach, which examines legislation, case law, and other legal documents that are common in classic legal analysis. In particular, I analyze relevant statutes as well as Supreme Court cases in reviewing the development of administrative law and the history of the FTC, respectively. In determining the legitimacy of the FTC's EAR model, I analyze judicial decisions by both the Supreme Court and appellate courts. From these legal documents do I distill applicable legal standards. In addition, a large volume of secondary materials, including treatises and journal articles, were reviewed and inform many of the arguments presented in this dissertation.

¹⁰ In answering the issue of the FTC's jurisdiction, the court first found that recent privacy laws did not "contradict reading corporate cybersecurity into § 45(a)," and concluded "that the FTC later brought unfairness actions against companies whose inadequate cybersecurity resulted in consumer harm is not inconsistent with the agency's earlier position." The court also recognized, beyond other things, that the FTC's complaints and consent decrees in administrative cases "raising unfairness claims based on inadequate corporate cybersecurity" constituted fair notice. The court even identified a previous complaint that is close to *Wyndham*'s case. See *Wyndham*, *supra* note 6, at 247-57.

¹¹ *LabMD*, *supra* note 7.

Central to this project is a survey of FTC enforcement actions, in form of consent orders, on privacy-related issues. Agency decisions, especially consent orders, are previously overlooked by doctrinal research, but in the case of the FTC, consent orders consist of the basis of its regulatory approach to information privacy. The FTC has issued over 200 privacy-related consent orders since the late 1990s, and the number of consent orders grows steadily every year. These consent orders involve topics ranging from children's privacy and financial privacy to data security and Safe Harbor enforcement. To better grasp the features of FTC enforcement actions, I examine in depth a random selection of enforcement actions, as well as a handful of influential cases such as those against Microsoft and Facebook.

This dissertation also adopts some of the methods and perspectives of historical institutionalism, a social science approach to analyzing institutional change, in identifying the cause of the FTC's EAR model. Historical institutionalism emphasizes the importance of observing how institutions and behaviors evolve through time. As a result of adopting a historical institutionalism approach, this dissertation examines non-legal documents, including press releases and public statements made by the FTC and its officials, in addition to formal legal documents such as statutes, regulations, judicial decisions. The textual analysis of these non-legal materials will supplement doctrinal analysis.

IV. Findings of This Dissertation

Drawing on the history of the administrative state in general, and that of the FTC in particular, this dissertation examines some of the most important factors contributing to the FTC's adoption of the EAR model. One of the most critical factors contributing to the rise the EAR model is the decline of the FTC's rulemaking power. Section 18 of the FTC Act requires the FTC to issue

trade regulation rules only through the so-called “hybrid rulemaking” procedures. Hybrid rulemaking is more burdensome than the notice-and-comment rulemaking articulated in the Administrative Procedures Act. The development of rules under Section 18 have taken the FTC significantly more time than is morally required to develop rules using notice-and-comment rulemaking. As a practical matter, unless Congress explicitly grants the FTC authority to use notice-and-comment rulemaking process, the hybrid rulemaking process is so time consuming that it has made it almost impossible for the FTC to issue any privacy rules. To this extent, the EAR model represents a successful workaround by the FTC designed to overcome the barriers it faces in making generally applicable privacy rules.

The barriers that prevented the FTC from prescribing comprehensive privacy rules are largely the result of political dynamics in the 1970s and 80s. Following the FTC’s aggressive efforts to expand its authority over industry in the 1960s and 70s by means of rulemaking, Congress enacted the Magnuson-Moss Warranty Act of 1975 to curtail the agency’s rulemaking activities. When the FTC failed to restrain its aggressive posture toward industry, Congress followed up with the so-called FTC Improvements Act of 1980 to constrain the agency’s rulemaking authority even more severely by limiting its rulemaking powers and cutting its budgets. The constraints on the FTC’s rulemaking power also echoed a broader transition of political atmosphere from favoring heavy-handed command-and-control regulation to a more responsive style of regulation designed to promote competition and market solutions, which also contributed to a long-lasting change in the range of policy instruments favored by the FTC.

This dissertation also argues that despite the apparent tension between the EAR model and some conceptions of what constitutes the rule of law, the EAR model is clearly a proper exercise of FTC authority within the existing legal framework. The FTC may choose *ex post* adjudication

over *ex ante* rulemaking in carrying out its policies. In contrast to calls by some critics for the FTC to address privacy-related issues with rulemaking rather than the EAR model, the Supreme Court's jurisprudence afforded agencies great discretion in choosing the proper process for agency policymaking. Though Congress can require an agency to use rulemaking rather than adjudication, the implied congressional intent here is the opposite—by severely constraining the FTC's rulemaking power, Congress is encouraging the FTC to double down on adjudication. This dissertation further argues that the EAR model satisfies the constitutional standards of due process. Due process would require an agency to provide fair notice to the regulated parties. Compared to rules, applicable standards established by the EAR model may seem more ambiguous. But as the Third Circuit found in *Wyndham*, the EAR model still offers adequate notice to the regulated parties.

Last but not the least, this dissertation concludes that, as a practical matter, the FTC's adoption of the EAR model is compatible with the emerging framework of information governance. Through the lens of information governance, it may be possible to provide private companies incentives to maintain the level of privacy consumers actually prefer. Accordingly, regulators seek to develop innovative strategies to facilitate the self-organization of companies as a possible route to protecting consumer privacy. The EAR model may also serve this goal. For example, the new Uniform Personal Data Protection Act contains provisions that would permit state privacy regulators to recognize voluntary consensus standards and confer a *de facto* safe harbor status on them. In a similar vein, the actual requirements of consent orders issued within the FTC's EAR model incorporate the most important features of voluntary, consensus standards for information privacy. Aligning the EAR model with market-compatible norms such as voluntary consensus standards for information privacy could facilitate the flow of regulatory information, enhance the

private sector compliance rate, and help the FTC keep its policymaking up to date. It may permit the FTC to coordinate the acts of private sector without resorting to coercive regulatory instruments.

V. Organization of the Dissertation

Chapter 2 provides an overview of the scholarly works on the FTC's regulatory approach to information privacy. In particular, this chapter examines arguments relating to three topics, that is, the FTC's authority to regulate information privacy; and the conception of the regulatory approach adopted by the FTC; and the appropriate manner of regulating information privacy.

The next two chapters lay the groundwork for the subsequent analysis of the FTC's regulatory approach to information privacy. Chapter 3 reviews the history of modern administrative law in the United States, especially a couple of periods critical to the rise of the modern administrative state. The early period starts with the Progressive Era and continues through the New Deal.

During this period, the number and authority of regulatory agencies grew rapidly, but the courts resisted the expansion of agency authority.

In the following period, the political battle was waged over the fate of the New Deal resulted in the procedural reform of administrative law. The ultimate compromise reached between different camps led to the Administrative Procedure Act, which imposed procedural obligations on agencies, and subjected agency actions to judicial review.

The third period began in the 1970s, when the pendulum of social dynamics swung increasingly toward pro-competitive policies and became skeptical of heavy-handed regulation. The three branches of the U.S. government have taken a series of initiatives that paved the way for the reform of independent regulatory agencies such as the FTC.

Chapter 4 focuses on the FTC and examines the agency's history in light of consumer movements. Consumer protection has played an important role in shaping the FTC since its inception. The first wave of consumer movement partly led to the passage of the FTC Act. The second wave resulted in the reversal of the *Raladam* limitation and the formal adoption of consumer protection authority for the FTC. The third wave of consumer movement witnessed the aggressive law enforcement by the FTC. As it faced huge political backlash at the end of the 1970s, the FTC underwent substantial reforms, which had a profound impact on its subsequent regulatory programs.

Chapter 5 explores the practical reasons that lead to the FTC's adoption of the EAR model. Though the FTC's rulemaking power is recognized by courts and by Congress, the exercise of that power has been strictly restricted. The Magnuson-Moss Warranty Act first imposed obligations on the FTC rulemaking procedures in addition to those under the APA, then the FTC Improvements Act of 1980 further restricted the FTC's rulemaking power. On rare occasions can the FTC promulgate rules following §553 informal rulemaking proceedings. Given how difficult it would be to use rulemaking process to regulate a fast-moving field like information privacy, the FTC has chosen to address information privacy issues mainly through enforcement actions. The EAR model relies upon consent decrees, settlements between the FTC and the regulated companies. On a case-by-case basis, the FTC sets its standards on privacy-related issues. Therefore, the EAR model is the FTC's invention to overcome obstacles to prescribe comprehensive privacy rules.

Chapter 6 surveys the justifications for the EAR model. It begins by analyzing two procedural issues: first, whether the FTC, by utilizing the EAR model, can make agency policies in an *ad hoc* manner instead of issuing *ex ante* rules, and second, whether the EAR model meets the

constitutional requirements of due process. On the first issue, an examination of the Supreme Court rulings reveals that the choice between rulemaking and adjudication is within the discretion of regulatory agencies. Given the nature of privacy-related issues, the FTC has not abused its discretion by announcing policies on a case-by-case approach. On the second issue, by reconciling two recent cases decided by appellate courts, the EAR model arguably affords sufficient procedural protections to the regulated parties, thus satisfying the constitutional due process requirements.

The last part of Chapter 6 seeks to analyze the EAR model on the ground of information governance. Contrary to the conventional approach to information privacy that empowers individuals by giving them unilateral control over personal information, information governance balances the interests between individuals and private organizations. On the implementing level, information governance calls for innovative regulation other than the command-and-control regulation. To this extent, the EAR model satisfies the needs of information governance. Taking advantage of a cooperative manner, the EAR model promotes the flow of regulatory information between regulators, private organizations, consumers and beyond, and improves the rate of actual compliance without sacrificing innovation.

Chapter 7 concludes by considering whether the FTC is likely to issue privacy rules after the 2020 presidential election. Because the FTC's authority may be expanded under the Biden Administration, the agency may obtain the power to issue a comprehensive privacy rule.

However, the lessons from the past show that an overreaching rule might be detrimental to the FTC in the long run. In contrast to rulemaking, the EAR model, as explained in this dissertation, may be a more effective policy instrument for dealing with issue as politically controversial as

information privacy. Therefore, even if the FTC does issue privacy rules, it would not negate the importance of the EAR model.

Finally, this dissertation calls for additional studies of the FTC's EAR model. As a matter of administrative law, the EAR model transcends the administrative procedures articulated by the APA, and creates a new form of interaction between regulators and the regulated parties based on regulatory settlements. Given the widespread use of strategies similar to the EAR model by other federal agencies, future studies might focus on identifying appropriate safeguards on these strategies so that agencies will not abuse their discretion. On the other hand, the EAR model creates a public-private partnership for information governance, which might have a far-reaching impact on information privacy law. Further research could reveal the full picture of information and fundamentally change our conception of managing information privacy.

CHAPTER 2 LITERATURE REVIEW

The past decades have seen the emerging role of the FTC as a national privacy regulator, which plays an indispensable role in regulating how businesses handle personal information. In contrast, its privacy jurisprudence has been “largely ignored by the legal academy and . . . underappreciated” both at home and abroad. The publish of Danial Solove and Woodrow Hartzog’s article, *The FTC and the New Common Law of Privacy*,¹ brings the FTC to the spotlight and spurs a heated debate on the FTC’s regulatory approach to information privacy. An increasing number of commentators begin to examine the strength and weaknesses of the FTC’s regulatory approach from different perspectives. Some commentators argue for the Commission’s attempts to regulate the collection and use of personal information by firms, and give their advice for improvements, while others criticize the FTC’s regulatory approach on both substantive and procedural ground. This chapter will focus on their arguments on three issues: first, whether, and to what extent, does the FTC have jurisdiction over information privacy; second, the strength and weakness of the FTC’s regulatory approach to information privacy; and third, how should the FTC police information privacy issues in the future.

I. The FTC’s Jurisdiction over Information Privacy

1. The Sources of the FTC’s Authority

The FTC is the nation’s consumer protection agency throughout most part of the twentieth century, but in terms of consumer privacy, the Commission’s authority is limited. Prior to the commercialization of the Internet, it has enforced few privacy laws other than the Fair Credit

¹ Daniel J. Solove and Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2014).

Reporting Act, which authorized the Commission to protect personal information collected by consumer reporting agencies. However, the FTC jumped into the field of online privacy in the mid-1990s and quickly became a major privacy regulator.

The turn of the twenty-first century has witnessed the dramatic expansion of the Commission's authority in policing information privacy. The FTC obtained new powers in nearly every passing year. In 1998, the FTC acquired the power to protect children's online information under the Children's Online Privacy Protection Act (COPPA). In 1999, the Gramm–Leach–Bliley Act (GLBA) subjected certain financial institutions handling personal information to the FTC's enforcement authority. In 2000, the Safe Harbor Agreement between the United States and Europe further expanded the FTC's jurisdiction. This trend continued in the first decade of the twenty-first century, as Congress enacted a series of privacy statutes, including the CAN-SPAM Act of 2003, Do-Not-Call Registry Legislation, and the HITECH Act of 2009, that delegated new enforcement authority to the agency.

Despite the sectoral statutes that explicitly authorize the FTC to regulate how information is collected and used in relatively confined areas, it is Section 5 of the FTC Act that gives the primary source of authority for its privacy regulation. It authorizes the Commission to prohibit deceptive or unfair trade practices. This legislative mandate is so broad that the Commission's jurisdiction is not restricted to any specific sector of the industry. Unless otherwise excluded, the FTC can take actions against any person or for-profit institution. Though Section 5 does not mention information privacy or data security, Hartzog and Solove argue that the legislators, the courts, and the Commission have “repeatedly confirmed that Congress gave the FTC very broad and general

regulatory authority by design to allow for a more nimble and evolutionary approach to the regulation of [information privacy].”²

The FTC began its foray into the privacy field by enforcing promises in privacy policies. Steven Hetcher argues that privacy policies have increased the FTC’s jurisdictional grasp over online privacy.³ Compared to the unfairness power under Section 5, which is “too uncertain of a standard to seek enforcement actions,” deception offers a relatively easy ground for enforcement actions.⁴ Though privacy policy is not a contract, a company is obliged to keep the promises contained in the privacy policy when it collects and uses personal information. Failure to keep up with its words constitutes deceptive trade practices that are subject to the FTC’s enforcement authority. Meanwhile, when policing privacy policies, the FTC sidesteps both a practical difficulty of properly defining “fair” information practices and a political environment against public intervention with the emerging Internet at the time.⁵

Furthermore, the promotion of privacy policies allows the FTC to create “a collective good that the industry would be interested to promote, the avoidance of congressional legislation.”⁶ If the industry does not demonstrate sufficient respect for consumer privacy, the FTC would push for additional legislation. The FTC encouraged the businesses to adopt privacy policies, then policed privacy policies, acting “as if it has a plan to migrate its activities to the Internet.”⁷

Later, the FTC has extended its application of the deception doctrine beyond the four corners of the privacy policy. For example, the FTC has charged companies with deception for their use of

² Woodrow Hartzog and Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 *Geo. Wash. L. Rev.* 2230, 2250 (2015).

³ Steven Hetcher, *FTC as Internet Norm Entrepreneur*, 53 *Vand. L. Rev.* 2041, 2057 (2000).

⁴ *Id.* at 2061.

⁵ Hartzog and Solove, *supra* note 2, at 2256.

⁶ Steven Hetcher, *The De Facto Federal Privacy Commission*, 19 *J. Marshall. J. Computer & Info. L.* 109, 131 (2000).

⁷ Hartzog and Solove, *supra* note 2, at 2255.

spyware and gathering personal information through misrepresentation.⁸ Also, failure to provide adequate privacy notice to the consumer regarding information collection and use, can also lead to a finding of deceptive acts.⁹

Besides the theory of deception, the FTC also relies upon the unfairness doctrine in regulating how a company handles personal information. Solove and Hartzog mark the FTC's exercise of its unfairness authority as "judicious."¹⁰ It is partly due to the requirements prescribed in the legislation. The FTC must follow a three-prong test in regulating information privacy.¹¹ The test asks the FTC to prove that the collection and use of personal information cause substantial consumer injuries, which outweigh other countervailing values. The three-prong test limits the FTC's ability to find unfair trade practices. Also, the political pressure since the 1970s discourages the FTC from using the unfairness authority. In fact, the FTC largely avoided using the authority unless stronger legal authority was missing.¹² For these reasons, not only did the FTC not invoke its unfairness authority until it policed deceptive information practices for several years, but it has exercised the unfairness authority with notable caution. Many of the FTC's unfairness cases are in the realm of data security.

Despite the cautions taken by the FTC, its application of the unfairness theory to information privacy and data security is highly contested. Some critics note that consumer injuries identified by the FTC are too speculative. For example, in the context of data security cases, the FTC claims that privacy harm resulting from unauthorized disclosure of sensitive information is a substantial injury, and an actual breach is not required so long as there is a "significant risk" of privacy harm.¹³

⁸ See, e.g., Complaint at 5, DesingerWare, LLC., FTC File No. 112 3151, No. C-4390 (2013).

⁹ See, e.g., Complaint at 1, Sears Holdings Mgmt. Corp., FTC File No. 082 3099, No. C-4264 (2009).

¹⁰ Solove and Hartzog, *supra* note 1, at 638 (2014).

¹¹ Section 5(n) of the FTC Act.

¹² Justin (Gus) Hurwitz, Data Security and the FTC's UnCommon Law, 101 Iowa L. Rev. 955, 965 (2016).

¹³ Opinion of the Commission, LabMD Inc, FTC Docket No. 9357, at 19 (Jul. 28, 2016).

James Cooper contends that “the harms associated with the FTC’s privacy agenda are largely subjective and intangible, often boiling down to little more than the creepy feeling of being tracked online.”¹⁴ The FTC often identifies unexpected information practices as privacy harm. But unexpected information practices do not necessarily result in substantial consumer injuries. Rather, the substitution of privacy harm with consumer expectation is “a distraction from determining whether [the requirement for substantial consumer injury] has been met.”¹⁵

Cooper also claims that the FTC’s claim of consumer harm is not supported by empirical evidence.¹⁶ Research and surveys suggest that consumers are comfortable with the current information-sharing environment, but the FTC fails to take this evidence into account. Instead, it gives too much weight to opinions from privacy-sensitive people. Therefore, the FTC’s regulatory efforts, especially in the context of unfairness cases, are likely to be over-inclusive and too aggressive.

2. The Scope of the FTC’s Jurisdiction

The boundary of the FTC’s jurisdiction as a national privacy regulator is also controversial. In contrast to nations with designated data protection authorities (DPA), whose power is explicitly stated in their national data protection laws, the United States lacks a comprehensive privacy law. A piecemeal of privacy statutes enacted by Congress delegate the authority to multiple regulatory bodies. On the other hand, state attorney generals also play a critical role in safeguarding consumer privacy and data security at the state level. Myriad federal and state privacy regulators result in a

¹⁴ James C. Cooper, Identity Theft, Not Big Data, Should Be at the Top of the FTC’s Priority List, Daily Caller (September 24, 2013), <https://dailycaller.com/2013/09/24/identity-theft-not-big-data-should-be-at-the-top-of-the-ftcs-priority-list/>.

¹⁵ James C. Cooper & Joshua Wright, The Missing Role of Economics in FTC Privacy Policy, in *The Cambridge Handbook of Consumer Privacy* 480 (Evan Selinger, Jules Polonetsky, & Omer Tene eds., 2018).

¹⁶ *Id.* at 480-82.

regulatory landscape of overlapping or concurring jurisdiction, in which the FTC is merely one regulatory agency.

Though Section 5 of the FTC Act delegates broad power to the FTC, to what extent does the FTC's authority reach when it overlaps with that of other privacy regulators? The critics argue that the role of the FTC in regulating information privacy and data security is limited. As a matter of law, the fact that Congress delegates specific powers to the FTC in privacy statutes like the GLBA and COPPA implies that the FTC lacks a general authority to regulate information privacy and data security issues. This argument was brought up by *Wyndham* in its legal challenge to the FTC's enforcement authority.¹⁷ As a practical matter, no matter how the FTC depicts itself, critics find that both consumers and businesses do not naturally view the FTC as a data security regulator, let alone the *de facto* data protection authority in the nation.¹⁸ Though the body of legal norms yielded by the FTC is familiar to privacy practitioners, they are largely unknown to many businesses, especially small businesses in some traditional, non-information-rich industries. Consequently, when a business has "the sophistication necessary to seek out and comply with legal guidance" for its data systems, it is more likely to turn to state laws or industry-specific regulators for guidance than to the FTC.¹⁹

However, for the advocates of the FTC's privacy regulation, the FTC is the "go-to agency" for privacy-related issues.²⁰ Though Congress has not delegated to the FTC a general authority to police information privacy and data security, neither does it intend to exclude the agency from doing so. As recognized by the *Wyndham* court, the breath of the FTC's Section 5 authority suggests that Congress implicitly gives the FTC jurisdiction over data security. If Congress wishes

¹⁷ *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 611 (D.N.J. 2014).

¹⁸ Hurwitz, *supra* note 12, at 1011.

¹⁹ *Id.* at 1003.

²⁰ See Solove and Hartzog, *supra* note 1, at 604.

to exempt data security issues from the FTC's jurisdiction, it should explicitly repeal the Commission's authority. However, not only does Congress not confine the scope of the FTC's jurisdiction under Section 5, but also delegates more powers in privacy legislation like the GLBA and the COPPA. If an act violates a sectoral privacy law as well as Section 5, the FTC can rely on both laws to address the violation.

Additionally, it does not automatically deny the FTC's jurisdiction that multiple regulators have a say over private, for-profit institutions' information handling practices. In many scenarios, the FTC does not encroach upon the existing jurisdiction of other regulatory bodies. Rather, the FTC jumps into the regulatory space and remains active before other regulators obtain their enforcement authority. For example, the FTC's role as a privacy regulator dates to 1970, when the FCRA authorized the agency to regulate information collection and use in the credit reporting industry. The FTC is also one of the first regulatory bodies that pay attention to online privacy, health privacy, and financial privacy. By contrast, the Consumer Financial Protection Bureau (CFPB) does not play a role in regulating financial privacy until the 2008 financial crisis ends.

Despite the divergence in positions, both advocates and critics agree that the FTC should share with other regulators the regulatory jurisprudence over information privacy and data security. Chris Hoofnagle, for instance, argues that the FTC does not have sufficient resources to "cover the privacy and security issues in the entire twenty-first-century economy," so it needs to share the responsibility with the Federal Communication Committee (FCC) and the CFPB.²¹ Both the FCC and CFPB are suitable as privacy regulators in their own sectors. Together, the three agencies can

²¹ Chris J. Hoofnagle, *Federal Trade Commission Privacy Law and Policy*, 335-37 (2016).

protect consumer privacy against partisan changes.²² Similarly, Hurwitz urges the FTC to “develop relationships with other, industry-specific, regulators.”²³

In some cases, the FTC’s jurisdiction may overlap with that of state privacy regulators. For instance, Elysa Dishman identifies a cooperative relationship between the FTC and state attorney generals. In the field of information privacy, states rely upon the FTC for expertise and resources, while the FTC relies upon states to expand its enforcement capacity.²⁴ In addition, innovations by state regulators can act as a catalyst for the FTC to update its regulatory approach.²⁵

II. The FTC’s Current Enforcement Program

In the past decades, a variety of regulatory bodies have taken advantage of regulatory settlements in exercising their law enforcement authorities. For example, the Department of Justice has extensively used deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in resolving enforcement actions against financial institutions.²⁶ Other financial regulators, including the Security Exchange Commission (SEC), the Office of the Comptroller of the Currency (OCC), the Commodity Futures Trading Commission (CFTC), have also adopted similar settlement procedures in the civil enforcement areas.²⁷ Together, these regulatory settlements have shaped post-crisis financial regulation.

²² *Id.*, at 356.

²³ Hurwitz, *supra* note 12, at 1014.

²⁴ Elysa M. Dishman, Settling Data Protection Law: Multistate Actions and National Policymaking, 72 *Ala. L. Rev.* 839, 874 (2020-2021).

²⁵ *Id.* at 862.

²⁶ See, Matthew C. Turk, Regulation by Settlement, 66 *Kansas L. Rev.* 259, 264 (2017); see also, Geoffrey P. Miller, *The Law of Governance, Risk Management and Compliance*, Wolters Kluwer (3rd ed. 2019).

²⁷ See, Hester Peirce, Regulating through the Back Door at the Commodity Futures Trading Commission, Mercatus Working Paper, Mercatus Center at George Mason University, November 2014. <http://mercatus.org/publication/regulating-through-back-door-commodity-futures-trading-commission>.

A similar trend can be found in the FTC’s privacy regulation. Except for a few cases where Congress explicitly authorizes the FTC to issue a rule that is specific to a particular sector, the agency relies heavily on case-by-case adjudication in regulating privacy-related issues. In addition, a majority of FTC enforcement actions end in consent orders, which later lay the foundation of the FTC’s privacy jurisprudence. It is the case-by-case approach that leads to a heated debate among commentators.

1. Regulation by Settlement

The FTC’s adoption of consent orders fits into the model of “regulation by settlement” identified by Matthew Turk, where regulatory agencies leverage settlements that are “nominally packaged in form of particularized adversarial disputes” in a way that “effectively establishes new legal standards of general applicability.”²⁸ Consequently, a growing number of commentators analogize to the common law the generally applicable norms that the FTC has developed through consent orders over the last two decades. For example, Christopher Wolf claims that “the net effect of [the Commission’s] privacy enforcement actions has been to create a ‘common law’ of consent decrees that dictates what privacy violation.”²⁹ His argument is echoed by Kenneth Bamberger and Deirdre Mulligan, who find that for privacy practitioners, state-of-the-art privacy practices reflect not only “established real black letter law,” but also “FTC cases and best practices,” including the Commission’s enforcement actions public statements. The common law analogy gains its

²⁸ Matthew C. Turk, Regulation by Settlement, 66 Kansas L. Rev. 259, 260 (2017).

²⁹ Targeted Enforcement and Shared Lawmaking Authority as Catalysts for Data Protection in the United States, BNA Privacy and Security Law Report, Oct. 25, 2010.

popularity as officials from the FTC also refer to the agency’s regulatory efforts as a common law body of legal norms.³⁰

Rather than equating the case-by-case adjudication with the common law, Solove and Hartzog assert that the FTC approach is the “functional equivalent of common law,” or the “de facto common law.”³¹ Their analysis begins by explaining why settlements predominate the FTC’s enforcement actions. Settlements are a reasonable choice for the FTC, since the Commission is limited in resources, but enjoys nearly unrestrained discretion in consent order proceeding. On the other hand, businesses are also reluctant to challenge the agency. First, as the FTC lacks the power to impose penalties for violations of Section 5 and monetary sanctions associated with complaints are relatively low, it is not cost-effective to challenge the complaints. Second, given judicial deference accorded to the FTC, the company against which the FTC brings an action is less likely to prevail. Third, businesses do not need to concede liability or admit wrongdoing in reaching a settlement, which saves them from reputational costs.

According to Solove and Hartzog, the FTC’s settlements are akin to judicial decisions with precedential weight, because both the FTC and the regulated entities treat them like the common law in practice.³² Not only does the FTC intend that its settlements will guide the similarly situated businesses, but also privacy practitioners view consent orders as having precedential weight and use the settlements to predict the agency’s future regulatory activities. They further argue that the FTC’s “soft law”— reports, guidelines, press releases, and other materials—functions as dicta in

³⁰ See, e.g., Julie Brill, Privacy, Consumer Protection, and Competition, Keynote speech to the 12th Annual Loyola Antitrust Colloquium (Apr. 27, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-consumer-protection-and-competition/120427loyolasymposium.pdf; Edith Ramirez, Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission’s Next Century, Keynote Address at the 17th Annual Antitrust Symposium, The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), https://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf.

³¹ Solove and Hartzog, *supra* note 1, at 619.

³² *Id.* at 619-625.

the common law. These materials are statements about “how [the agency] interprets its regulatory authority and Section 5, and how it might choose to enforce.”³³ They do not have the same precedential value as consent orders do, thus the FTC is not required to follow the guides embodied in them. Instead, they only create incentives for businesses to comply.

However, the common law analogy has also triggered extensive skepticism. For instance, Berin Szoka and Geoffrey Manne claim that the “common law of consent decrees” is “just a series of unadjudicated assertions.”³⁴ Later, Justin Hurwitz provides a more systematic skepticism of the common law analogy. He argues that the so-called common law of privacy is a “rhetorical flourish” that is “jurisprudentially deficient.”³⁵ Although the common law analogy bears some relevance, the FTC’s approach is fundamentally different from that of the common law.³⁶ To begin with, several key characteristics of the common law are missing from the FTC’s case-by-case approach. For example, the operation of the common law relies on courts, acting as independent adjudicators, to hear a multiplicity of cases that present issues at the margins of existing law. By contrast, the FTC plays both the role of an adjudicator and of a litigant in regulating information privacy, allowing the agency to select which cases to bring. Unlike the common law judges who cannot hear any cases and cannot select which cases to hear, the FTC can select cases that are most likely to advance its goals in shaping the contours of the legal norms.

The ability of case selection, according to Hurwitz, distinguishes the FTC’s approach from that of the common law. First, case selection leaves the FTC’s impartiality as an adjudicator in question.

The fact that the FTC selects cases in its favor, combined with its dual roles as adjudicator and

³³ Id. at 626.

³⁴ Berin Szoka and Geoffrey Manne, *The Second Century of The Federal Trade Commission*, *Techdirt* (Sept. 26, 2013), <https://www.techdirt.com/articles/20130926/16542624670/second-century-federal-trade-commission.shtml>.

³⁵ Hurwitz, *supra* note 12, at 971.

³⁶ Id.

litigant, results in an unprecedented success rate in its adjudications.³⁷ Second, the common law demands multiple adjudicators deciding similar issues, which explores the margins and directions of the law. By contrast, the FTC knows the potential direction that the law needs to develop, and intentionally selects “cases that allow it to proceed along this path.”³⁸ The FTC’s path manipulation eliminates the possibilities of crafting a better policy from perspectives other than that of the agency.

In addition, Hurwitz argues that unlike precedents of the common law, consent orders, which, in essence, are settlements, are inappropriate vehicles for developing legal norms. In common law, settlements do not have precedential value. The reason lies in that private litigant’s incentives to settle are not aligned with the public’s interest in developing the law.³⁹ Where the law is unsettled, private litigants’ investment in litigation contributes to the clarification or innovation of the law. But settlements cannot achieve the same outcome. In a similar vein, the high settlement rate of the FTC’s enforcement actions only reflects the incentives of both parties to avoid the high cost of litigation, which undermines the value of consent orders. Despite the insight provided by the documents relating to enforcement actions, consent orders are “disingenuous to describe the resulting policy in common-law terms.”⁴⁰ Therefore, consent orders should not be used as a source of the FTC’s legal norms.

Also, because the FTC is not bound by the common-law principle of *stare decisis*, one should doubt the stability of the FTC’s jurisprudence.⁴¹ *Stare decisis* only applies to judicial decision-making, not to its administrative counterparts. Administrative agencies, on the other hand, are

³⁷ Id. at 985-96.

³⁸ Id. at 986.

³⁹ Id. at 983.

⁴⁰ Id. at 986.

⁴¹ Id. at 987.

generally free to change their policies, even if new policies contradict their previous policies or the judicial construction of their previous policies. Though the FTC claims to maintain the consistency of its jurisprudence, there is no guarantee that its jurisprudence will not have an about-face change in the future.

The most fundamental difference between the FTC's case-by-case approach and the common law is that the FTC operates in "a domain of policy modalities," rather than in "a domain of policy convergence" as the common law courts do.⁴² Within the space defined by congressional mandate, administrative agencies make policies as political questions through the political process. The very political questions are what common law courts seek to avoid. Especially where rulemaking by some administrative agency is available, the courts prefer not to adjudicate even if the rule has not been promulgated yet.⁴³

Instead of debating on the validity of the common-law-of-privacy analogy, some commentators assert that the FTC's privacy enforcement has given rise to a set of "standards," which are less constraining than "rules." For example, Jane Winn argues that the legal norms embodied in FTC consent orders are "some form of 'management system standards' or 'quality management standards.'"⁴⁴ These standards require an organization "to create governance frameworks that employees can be trained to follow and that independent third parties can use to audit [its] compliance . . ."⁴⁵ Standards emerged from FTC enforcement actions create an autonomous framework. Within the framework, it is the business that learn "to integrate the creation of value

⁴² Id. at 1000.

⁴³ See *Am. Elec. Power Co., v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

⁴⁴ Jane K. Winn, *The Governance Turn in Information Privacy Law*, at 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418286#:~:text=The%20governance%20turn%20in%20information%20privacy%20law%20is%20a%20turn,of%20shared%20interests%20in%20information.

⁴⁵ Id.

for its customers with the mitigation of unacceptable risks to its customers,” and the FTC often does not “substitute its ideas . . . for those of the business and its customers.”⁴⁶

2. Due Process Concerns

The FTC’s case-by-case approach also suffers from due process concerns. The constitutional due process requires an administrative agency like the FTC to provide adequate notice to the regulated entities before establishing legal norms. It is the fair notice doctrine that both *Wyndham*, a hotel chain, and *LabMD*, a local cancer-detecting laboratory, invoked when challenging the FTC’s enforcement actions in courts. However, courts in the cases reach different conclusions: the *Wyndham* court upheld the FTC’s consent order on the fair notice ground, while the *LabMD* court held that the requirements in the consent order are too vague to implement.

Commentators are also divided on the issue of fair notice. FTC consent orders are supposed to have “both a direct impact on the firm subject to [them] and send a message to the industry about the FTC’s view of what conduct crosses the deception and unfairness line,”⁴⁷ but many criticize that the FTC has not provided sufficient notice, especially in the context of data security. For example, Michael Scott asserts that in data security cases, the FTC has seemingly filed complaints “at random, without any guidelines, and without any advance notice” to the regulated entities, and its complaints and consent orders only provide “limited guidance as to what a company should do . . . to avoid being the target of an unfairness action.”⁴⁸ Szoka and Manne state that by using

⁴⁶ *Id.* at 25.

⁴⁷ David Vladeck, Charting the Course: The Federal Trade Commission’s Second Hundred Years, 83 *Geo. Wash. L. Rev.* 2101, 2105 (2015).

⁴⁸ Michael D. Scott, The FTC, the Unfairness Doctrine and Data Security Litigation: Has the Commission Gone Too Far?, 60 *Admin. L. Rev.* 127, 183 (2008).

consent orders and reports, the FTC regulates data security problems at the expense of “any legal constraints or due process.”⁴⁹

As a matter of law, the FTC’s approach may fail the fair notice doctrine, if the D.C. Circuit’s “ascertainable certainty” test is applicable. Given the fact that the FTC has published no notice in the Federal Register, provided no policy statements, and used exclusively informal adjudication proceedings, Gerard Stegmaier and Wendell Bartnick conclude that the FTC’s privacy regulation may be “inadequate to address perceived data security concerns in an effective and fair manner.”⁵⁰ Also, the agency’s best practice guide is unlikely to warrant fair notice, because the guide is not the outcome of any formal administrative process that deserves Chevron deference.⁵¹ Therefore, the information contained in “settlements with individual parties and in a set of recommendations posted on an agency website” does not sufficiently inform the regulated entities, whose awareness of these information sources is likely limited.⁵² For the purpose of fair notice, the FTC’s guidance and other public statements provide “very little, if any, information on what entities must do.”⁵³ Stegmaier and Bartnick also argue that as a practical matter, the case-by-case approach is inherently ambiguous for nonparties. For one thing, it is unclear whether nonparties should follow the complaints and/or consent orders when complying with the FTC’s requirements, or whether the failure to implement some or all measures would be regarded as a violation of Section 5.⁵⁴

⁴⁹ Berin Szoka and Geoffery Manne, Now in its 100th year, the FTC has become the Federal Technology Commission, TechFreedom, (Sept. 26, 2013), <https://techfreedom.org/now-in-its-100th-year-the-ftc-has-become-the/>.

⁵⁰ Gerard Stegmaier & Wendell Bartnick, Psychics, Russian Roulette, and Data Security: The FTC’s Hidden Data Security Requirements, 20 Geo. Mason L. Rev. 673, 698 (2013).

⁵¹ Id. at 703.

⁵² Id. at 699.

⁵³ Id. at 695.

⁵⁴ Id. at 693.

Also, it is difficult for nonparties to distinguish between mandatory and advisable actions from the language of the complaints and consent orders.⁵⁵

Likewise, Jennifer West finds that though the quality of parties and non-complying practices vary across cases, the words of consent orders are “all nearly identical,” which makes consent orders less informative as to what a company should or should not do in a specific context.⁵⁶ Additionally, the reference to “a comprehensive information security program” in data-security cases is vague. The FTC should offer more specific guidance as to what practices would meet the adequate security requirement.

In response to the skepticism, Hartzog and Solove offer a justification other than the resemblance with the common law—the reasonableness standard embodied in the FTC’s privacy jurisprudence. The FTC builds its privacy norms on the ground of industry standards. It “defer[s] to the industry to set the appropriate standards for good data security,” and urges businesses to “reasonably follow industry standards.”⁵⁷ When evaluating whether a company’s information privacy or security program is reasonable, industry standards serve as the touchstone. Meanwhile, reasonableness is not alien to privacy laws; rather, many state regulations and federal statutes, such as the HIPPA, incorporate the requirement for reasonableness.⁵⁸ The reasonableness standard is also embodied in the common law ranging from the tort of negligence,⁵⁹ to the Supreme Court’s Fourth Amendment doctrine.⁶⁰ Since these laws do not violate due process, neither should the FTC’s

⁵⁵ *Id.* at 694.

⁵⁶ Jennifer L. West, A Case of Overcorrection: How the FTC’s Regulation of “Unfair Acts and Practices” is Unfair to Small Business, 58 *Wm. & Mary L. Rev.* 2105, 2117 (2017).

⁵⁷ Hartzog and Solove, *supra* note 2, at 2259.

⁵⁸ For example, the HIPPA requires that covered entities should take “reasonable and appropriate” safeguard measures to protect personal health information. 45 C.F.R. §§ 164.306-316 (2014).

⁵⁹ See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Stevens, J., dissenting) (noting that the question in negligence cases is “what would a ‘reasonable person’ do in a same or similar situation.”).

⁶⁰ See, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (discussing the two-part test of a reasonable expectation of privacy).

reliance on reasonableness raise any due process concern. As long as the FTC does not disassociate its mandate from generally accepted industry practices, the requirement of “reasonable . . . adherence to those practices” is predictable and provides adequate notice to the businesses.⁶¹

However, Hurwitz refutes the argument made by Solove and Hartzog that privacy practitioners can distill from the FTC’s enforcement program a coherent set of principles on two grounds: first, not every business appoints a legal counsel with expertise in privacy law, and second, businesses are more likely to refer to state laws or industry-specific regulators, instead of the FTC, for guidance.⁶² Hurwitz also alleges that the FTC’s reliance upon industry standards (best practices) to develop its legal norms adds another layer of uncertainty to the FTC’s privacy policy. He argues that the use of industrial standards is asymmetric: a party can use its compliance with industry practices to argue that a regulator fails to meet the fair notice requirement, while the regulator cannot use the failure to comply with industry standards to prove the satisfaction of fair notice, as “deviation from industry norms does not necessarily suffice to establish liability.”⁶³

3. Regulatory Impact Analysis

The requirement of regulatory impact analysis (RIA) was first injected by Executive Order 12291 as a part of the Reagan Administration’s effort to reform the federal government. Executive Order 12291 required all federal agencies, except for independent agencies, to conduct regulatory impact analyses of major rules and transmit the analyses to the Director of the Office of Management and Budget (OMB).⁶⁴ Later, the RIA requirement was incorporated in Executive Order 12866, *Regulatory Planning and Review*, which provided that federal agencies should submit for review

⁶¹ Hartzog and Solove, *supra* note 2, at 2262-63.

⁶² Hurwitz, *supra* note 12, at 965, 1003.

⁶³ *Id.* at 965, 1005-6.

⁶⁴ Executive Order 12291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982).

any significant regulatory action to the Office of Information and Regulatory Affairs (OIRA) in the OMB.⁶⁵ Finally, the Obama Administration reaffirmed and amplified the RIA requirement in Executive Order 13563, *Improving Regulation and Regulatory Review*. Executive Order 13563 encouraged agencies to coordinate their regulatory activities and to consider regulatory approaches that reduce the burden of regulation while maintaining flexibility and freedom of choice for the public.⁶⁶ The OMB also issued Circular A-4 to give regulatory agencies further guidance as to complying with the RIA requirement.

The goal of the RIA is to inform agency decisions prior to any regulatory action and to ensure that an agency only makes regulatory choices where necessary and in a cost-effective and least burdensome fashion. Pursuant to OMB Circular A-4, an RIA requires that an agency should (1) state the need for the regulatory action, (2) clearly identify potential regulatory approaches, and (3) weigh both the quantitative and qualitative benefits and costs of proposed regulatory action and its alternatives.⁶⁷ It should build its RIA on robust and reliable resources, and properly document and make public its assumptions, methods as well as the supporting materials so that a third party could review the analysis.

Through the lens of RIA, critics point out several defects from which the FTC's privacy enforcement program suffers. One is the missing role of the cost-benefit analysis in the FTC's regulatory actions. Given the profound impact of the legal norms on the information economy that the FTC seeks to design, the Commission should weigh the benefits of privacy regulation against the cost before taking any action. While information collection and use make consumers vulnerable to privacy harm, they also produce a wide range of consumer welfare, including free or

⁶⁵ Executive Order 12866, 58 FR 51735 (1993).

⁶⁶ Executive Order 13563, 76 FR 3821 (2011).

⁶⁷ OIRA, *Regulatory Impact Analysis: A Primer*, 2-3 (August 15, 2011).

low-cost services supported by ads, convenience associated with personalization, among others. Besides, the commercial use of personal information spurs innovation and competition. Therefore, the FTC should be aware that privacy regulation is a trade-off between the cost and benefits of government intervention.

However, cost-benefit analysis is absent from the FTC's reasoning. When the FTC brings enforcement actions, it never mentions the benefit from information sharing in the complaints or analyses, but simply assumes that the benefits do not exist or at least less than the harm.⁶⁸ Nor does the FTC's reports contain a cost-benefit analysis. For example, Paul Rubin and Thomas Lenard point out that one of the FTC most influential Staff Report in the last decade, *Protecting Consumer Privacy in an Era of Rapid Change*, only "mentions some of the benefits produced by consumer data," yet fails to "evaluate the trade-offs inherent in greater privacy protections."⁶⁹ Lacking economic analysis, the FTC's policy consequently "has failed to provide a coherent analytic framework to identify practices that are actually harmful to consumers."⁷⁰

Another problem is the potential impact associated with the FTC's regulatory actions, especially the adverse impact on competition. For instance, Solove and Hartzog noted that the compromise reached in the settlements may be workable for businesses of a similar size and structure, but not every business in the marketplace. Therefore, there is a danger that the FTC, in crafting norms via settlements, could "bully small companies with limited resources" to "collaterally attack larger organizations." However, the authors argued that this concern is alleviated by the fact that the companies that the FTC pursue often are "the largest and most popular players" in the market.⁷¹

⁶⁸ Cooper and Wright, *supra* note 15, at 487.

⁶⁹ Paul H. Rubin and Thomas M. Lenard, *The FTC Then and Now: Privacy*, in *The Regulatory Revolution at the FTC*, 113 (James C. Cooper ed., 2013).

⁷⁰ James Cooper, et. al., *Consumer Protection at the FTC and the CFPB*, the Regulatory Transparency Project of the Federalist Society, at 8 (Nov. 16, 2017).

⁷¹ Solove and Hartzog, *supra* note 1, at 625.

By contrast, many others identify that the FTC’s regulatory approach may disproportionately disadvantage small businesses. To begin with, small businesses bear a substantial burden from clarifying the regulatory obligations set out by the FTC. The case-by-case approach creates ambiguity to the FTC’s privacy jurisprudence. Large corporations like Microsoft or Facebook can benefit from chief privacy officers or other privacy professionals who can distill the FTC’s jurisprudence from the settlements and other public statements. By contrast, small businesses often lack such resources to learn the obligations, so they “cannot ensure that their practices pass FTC muster.”⁷² The risk of sanction is likely to force some small businesses to shy away from innovation and competition with large ones.⁷³

Moreover, the obligations laid out in consent orders are not adequately tailored to the size and resources of businesses.⁷⁴ The consistency of consent orders, on the downside, indicates that the FTC applies “the same, or at least nearly identical standards” to every case. However, what is reasonable to large companies is “far beyond what smaller companies can sustain.”⁷⁵ One of the burdens in consent orders is security measures and support staff that small businesses need to deploy. A quick estimate shows that data security will cost a 50-employee company around \$57,600 per year.⁷⁶ The high cost of data security may drive some small or independently owned companies out of business.

Similarly, the 20-year duration of consent orders is burdensome to businesses. Some FTC consent orders prevent firms from collecting data for 20 years or limit firms’ ability to merge data sets without explicit consent. Considering the average half-life of a company is closer to 2 years instead

⁷² West, *supra* note 56, at 2107.

⁷³ *Id.*

⁷⁴ *Id.* at 2132.

⁷⁵ *Id.* at 2133.

⁷⁶ See, Patrick Clark, The Bill for Cybersecurity: \$57,600 a Year, Bloomberg Bus. (Oct. 31, 2014).

of 10 years, placing businesses under 20-year monitoring and reporting obligations is likely to hinder their ability to innovate and compete.⁷⁷ The adverse effect associated with the duration, which applies to large and small companies alike, is underestimated by the FTC. Hartzog and Solove also acknowledge that the 20-year duration is not justified in every case. They suggest that the FTC should shorten the duration of consent orders for companies that “took significant steps to protect user data yet still [violate] Section 5.”⁷⁸

III. Strengthening the FTC’s Privacy Regulation

In the last two and half decades, the FTC has played a critical role in filling the regulatory void left by the patchwork of sectoral privacy statutes, but there is still room for the Commission to improve its regulatory activities. A straightforward solution would be to confer to the FTC additional powers and resources.⁷⁹ Besides, commentators have made a large range of recommendations for the FTC to improve its regulatory strategies, so that it can stay current with the fast-changing environment and afford meaningful protection to consumer privacy.

1. Improving Existing Tools

The FTC’s privacy regulation can be enhanced by equipping the Commission with better regulatory tools.⁸⁰ An option is to improve the instruments that the FTC is currently deploying in regulating information privacy. Given the due process concerns raised by its privacy regulation, Hartzog and Solove claim that the FTC should increase the transparency of its regulation. Just like

⁷⁷ Cooper and Wright, *supra* note 15, at 487.

⁷⁸ Hartzog and Solove, *supra* note 2, at 2297.

⁷⁹ David Vladeck, Charting the Course: The Federal Trade Commission’s Second Hundred Years, 83 Geo. Wash. L. Rev. 2101, 2109 (2015).

⁸⁰ *Id.*

common law courts disclose both opinions granting summary judgment and those denying summary judgment, the FTC should not make public only investigations resulting in a finding of unfair or deceptive practices.⁸¹ Rather, it should also disclose those investigations being dropped, where it finds the practices are fair and truthful. Hartzog and Solove further suggest that the FTC can use closing letters as a vehicle to inform businesses of what constitutes fair and truthful information processing activities.

In addition to enhancing the existing case-by-case approach, commentators note that the FTC can utilize other regulatory tools in regulating information privacy and data security issues. A consensus reached by both supporters and opponents is that the FTC should promulgate substantive rules when possible. The fast-changing environment does not justify the FTC's preference for adjudication over rulemaking. Rather, the fact that the FTC has promulgated regulations under the COPPA or the Fair and Accurate Credit Transactions Act (FACTA) indicates that issuing privacy rules is a viable option. Solove and Hartog claim that the FTC can draw from industry norms and customs that have developed in the past decades and enforce them as substantive rules.⁸²

Rulemaking is more desirable than informal adjudication upon which the FTC currently relies. The clarity of rulemaking can lift the burdens on the regulated entities, especially on small companies. Not only will it save companies from the high costs of potential noncompliance, but also help them to commit the limited resources to safeguard data security.⁸³ Furthermore, rulemaking provides an opportunity for greater public participation.⁸⁴ Unlike adjudication, which excludes nonparties, rulemaking invites all stakeholders to participate in the formation of public

⁸¹ Hartzog and Solove, *supra* note 2, at 2294.

⁸² Solove and Hartzog, *supra* note 1, at 673.

⁸³ See, Stegmaier and Bartnick, *supra* note 50, at 711.

⁸⁴ *Id.*

policies. The openness of the rulemaking process allows the FTC to identify issues that would be otherwise ignored in case-by-case adjudication. Finally, in terms of law enforcement, the potential cost savings associated with rulemaking are significant. Since rules offer relatively clear guidance as to what is a violation, rulemaking will spur voluntary compliance by companies, and reduce litigation costs where an investigation occurs. By crafting standardizing regulations, the FTC also can “harness the power of the market to assist in [developing legal norms].”⁸⁵ For these reasons, Stegmaier and Bartnick conclude that rulemaking may be “the best method for providing authoritative, detailed guidance” to the regulated entities.⁸⁶

In addition to rulemaking, Stegmaier and Bartnick suggest that the FTC can take advantage of formal adjudication.⁸⁷ In formal adjudication, the FTC should issue a cease-and-desist order at the end of its enforcement actions, rather than settling the charges. Comparing to the FTC’s current approach, the formal adjudication process would meet the requirement for fair notice, because not only does the FTC need to report its findings of fact, but also the applicability of Section 5 will be disputed before courts.

Stegmaier and Bartnick’s argument is echoed by Hurwitz, who advises that the FTC’s adjudicatory process should be subject to meaningful availability of judicial review. Judicial review is both a statutory requirement under the Administrative Procedural Act and a constitutional one under the Due Process Clause. “If the [FTC] is truly committed to developing sound legal norms, it should work to maximize litigants’ access to judicial review.”⁸⁸ To ensure access to judicial review, the FTC should pursue cases “that are least likely to settle,” which is contrary to the FTC’s current

⁸⁵ Hurwitz, *supra* note 12, at 965, 1016.

⁸⁶ Stegmaier and Bartnick, *supra* note 50, at 710.

⁸⁷ *Id.* at 714.

⁸⁸ Hurwitz, *supra* note 12, at 965, 1013.

practices.⁸⁹ Since these cases often present issues at the margins of legal norms, challenging them in courts will clarify the boundaries of the FTC's privacy regulation. Finally, the call for judicial review also implies that the FTC should cease creating legal norms from settlements, since settlements prevent the FTC's activities from being challenged in courts.

2. Exploring Innovative Strategies

In addition to improving the instruments currently available to the FTC, a more general issue is what is the appropriate approach to privacy regulation. At the turn of the century, Fred Cate, responding to the call for a positive role of government in shaping privacy norms, outlined five to “guide government legislative and regulatory activities concerning privacy.”⁹⁰ Cate's principles require that privacy regulators should balance the restrictions on information on an individual basis, take seriously the value of open information flows, limit the scope of information privacy applicable to the private sector, adopt a harm-based approach, and finally give board preference to privacy, market-based solutions. The principles reflect an inclination to self-regulation in the U.S. approach to information privacy.

However, the FTC's embrace of self-regulation has often ended in “frustration and a call for legislation.”⁹¹ To overcome the weaknesses of self-regulatory privacy programs, Ira Rubinstein advocates for a co-regulatory approach. Co-regulation is a departure from a command-and-control regime. It gives the market players considerable elbowroom in designing self-regulatory guidelines, while allows the government to set default rules and retain general oversight authority over the approval and enforcement of self-regulatory guidelines. Using four case studies, Rubinstein shows

⁸⁹ Id.

⁹⁰ Fred H. Cate, *Principles of Internet Privacy*, 32 Conn. L. Rev. 877, 879 (2000).

⁹¹ Ira S. Rubinstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 ISJLP 355, 420 (2011).

that compared to voluntary codes of conduct, co-regulatory programs are more likely to be successful if the government plays a role. It is “an effective and flexible policy instrument” that can transcend the “false dichotomy of voluntary industry guidelines and prescriptive government regulation.”⁹²

To assess the effectiveness of co-regulatory initiatives, Rubinstein designs a normative framework. The framework contains six elements, including efficiency (whether it achieves regulatory goals at the lowest attainable cost), openness and transparency (whether it allows public participation in making and enforcing the rules), completeness (whether a self-regulatory code of conduct addresses every aspect of industry standards), strategies to address free-riding, oversight, and enforcement (the availability of consumer remedy, verification of a company’s compliance, and sanctions to any violation or failure to comply), and use of second-generation design features (whether it encourages self-interested mutual promises that reward good actors and punish bad ones).⁹³

In terms of carrying out co-regulatory programs, Rubinstein recommends that the FTC can take advantage of three alternative policy tools. The first is experimental projects that model “Project XL” implemented by the Environmental Protection Agency (EPA). Dennis Hirsch is the first person who argued that privacy regulators could learn from the EPA’s Project XL.⁹⁴ The EPA’s Project XL, in essence, authorizes the agency to negotiate covenants on an individual basis under which the agency grants regulatory reliefs in exchange for an enforceable commitment of improved compliance.⁹⁵ In a similar vein, Project XL for privacy would allow privacy regulators

⁹² Id. at 358.

⁹³ Id. at 380-83.

⁹⁴ See Dennis D. Hirsch, *Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law*, 41 Ga. L. Rev. 1 (2006).

⁹⁵ See Rubinstein, *supra* note 91, at 374.

like the FTC to review and approve privacy-enhancing initiatives submitted by the regulated parties. The FTC could select a couple of meritorious projects with clear goals, devise appropriate stakeholder processes, and only make policy decisions after the experimental projects have been completely scrutinized. Comparing to choosing any privacy-enhancing initiatives in a top-down way, allowing the FTC and the relevant stakeholders to identify and experiment with worthy projects is likely to yield better results.⁹⁶

Another strategy is negotiated rulemaking (or “reg. neg.”), in which regulatory covenants are reached with an industry sector instead of individual companies. Once the FTC overcomes the hurdles in commencing rulemaking, it should choose negotiated rulemaking over the notice-and-comment rulemaking that it has traditionally relied upon in promulgating rules on children’s online privacy and financial privacy.⁹⁷ The negotiated rulemaking process encourages “more creditable transmission of information” among the regulators, the regulated industry, and other interested persons.⁹⁸ Rubinstein suggests that the FTC can form a negotiated rulemaking committee to facilitate information sharing.

The last policy tool available to the FTC is statutory safe harbor programs modeled on the COPPA safe harbor. Rubinstein suggests that Congress can establish new safe harbors, which are enforced by the FTC, in its future legislation on information privacy.⁹⁹ Once the FTC approves industry self-regulatory guidelines, compliance with approved self-regulatory guidelines will be regarded as compliance with regulatory requirements. On the other hand, compared to the COPPA safe harbor, new safe harbor programs should be redesigned to reflect second-generation strategies. Under new safe harbor programs, the FTC should enjoy broad discretion in approving self-

⁹⁶ Id. at 421.

⁹⁷ Id. at 412.

⁹⁸ Id. at 413.

⁹⁹ Id. at 414.

regulatory guidelines for different industry sectors. The FTC should also adopt a “tiered liability system”, or gradual sanctions, in enforcing these safe harbors.¹⁰⁰ It asks the FTC to treat participants of the safe harbor on the basis of their performance. Finally, given the difficulties in measuring privacy performance, public regulators like the FTC should not “attempt to define performance measures,” but encourage the development of such measures by private actors.¹⁰¹ As the standards mature, the FTC can either give preferred treatment to companies meeting the standards or openly adopting privately generated standards in its regulation.

¹⁰⁰ Id. at 416.

¹⁰¹ Id. at 420.

CHAPTER 3 HISTORICAL DEVELOPMENT OF THE ADMINISTRATIVE STATE

Before moving to the regulatory landscape in the privacy field shaped by the Federal Trade Commission, it is worthwhile to pause and review the history of the administrative state. Being a regulatory agency, the Federal Trade Commission does not enforce its organic statutes and others in a vacuum; instead, its authority waxes and wanes as the dynamics of the administrative state change. The rise of the administrative state, as Justice Jackson acknowledged, is "probably the most significant legal trend of the last century" in the United States.¹ Though at the outset, the administrative state evolved as a piecemeal response to specific political pressures, it has "pok[ed] into every nook and cranny of daily life."² Thus, a thorough review of the administrative state from a historical perspective would facilitate further analyses of the Federal Trade Commission.

I. Early Growth of the Administrative State

The rise of the administrative state in the late nineteenth century was a child of necessity.³ At the time, the ideas of laissez-faire and social Darwinism had reached the climax, and large businesses dominated many sectors of the industry. Rising industrialism led to a large range of social problems including unfair trade practices, unfair labor practices, and unhealthy food and drugs. These social problems challenged the common law, as well as the judicial system that implemented it, which was designed to resolve disputes between two parties. In response to the

¹ Fed. Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

² City of Arlington v. Federal Communications Commission, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

³ Lawrence M. Friedman, A History of American Law, 417 (4th ed. 2019).

inability of the existing institutions in resolving multi-party, large-scale policy disputes, a new form of institution—the administrative state—began to take place in the late nineteenth century.

1. The Emergence of the Administrative State

In antebellum America, the common law played a dominant role in settling disputes arising from commercial activities. When it comes to the late-nineteenth century, however, the growing complexity of the economy challenged the ability of the judicial system to provide meaningful relief. It is especially true for the railroad industry in the post-Civil War period. At that time, several giant state-subsided railway networks were in operation. They developed overlapping routes and engaged in fierce competition. To secure the feasible traffic routes, the huge railway networks charged short-haul shippers at a highly arbitrary rate, since long hauls were more profitable than short ones. Every interest affected by the railroads were potential victims of the rate discrimination. Despite the harms suffered by the deprived groups, cases involving rate discrimination rarely came before the courts.⁴ Although the courts recognized that unfair competition principles were applicable to transportation, the common-law principles were ill-fitted to control the rate discrimination by railroad networks.⁵

The judicial failure to control the mounting indignation against railroad abuses gave rise to regulations at the state level. Around the 1870s, several states enacted railroad regulations and established railroad commissions to maintain fair and equitable rates. These railroad regulations were supported by the Grange, whose livelihoods were devastated by the increases in rail rate to ship crops.

⁴ George H. Miller, *Railroads and the Granger Laws*, 29 (1971).

⁵ Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1200 (1986).

Nonetheless, state regulations on railroads were unsatisfactory. On the one hand, with railroads crisscrossing the nation, each state may regulate interstate transportation only within its boundaries. It significantly restrained the effectiveness of state regulation on railroads. On the other hand, the Supreme Court found unconstitutional state regulation on the intrastate segment of interstate rails. In *Wabash, St. Louis & Pacific Railroad Company v. Illinois*, the state statute at issue was an Illinois law that imposed a penalty on railroads that charged the same or more for passengers or cargo being shipped shorter distances than for longer distances. Through the Illinois law only regulated the intrastate segment of the railroad, the Supreme Court held that a statute of a State attempting “to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States,” is not a valid law.⁶ Therefore, the Court struck down the Illinois law that intended to regulate the rates for interstate railroads.

The federal government reacted quickly to the Supreme Court’s ruling that denied state power to regulate rail rate. In the year following the *Wabash* case, Congress enacted the Interstate Commerce Act, declaring that charges for interstate rail transportation should be “reasonable and just.”⁷ Also, Congress created a new agency— Interstate Commerce Commission (ICC)—to enforce the Interstate Commerce Act. The ICC was the first independent regulatory agency established in the United States. It was led by five commissioners, who were appointed by the President for a six-year term. The main purpose of the ICC was to regulate the economics and services of specified carriers engaged in interstate transportation. It might police a large range of anti-competitive practices, but its enforcement powers were limited to conducting hearings and issuing cease and desist orders.

⁶ 118 U.S. 557, 575 (1886).

⁷ Interstate Commerce Act § 11, 24 Stat. at 379.

As the ICC set maximum shipping rates for railroads, its rate-making authority was challenged in the courts. In *Kentucky & I. Bridge Co. v. Louisville & N.R. Co.*, a circuit court in Kentucky first got the opportunity to review an ICC order. The court read the Interstate Commerce Act narrowly and asserted that:

It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.⁸

By recognizing the primary purpose of the ICC as investigative and treating the ICC's findings as merely *prima facie* evidence in subsequent judicial proceedings, the court's ruling in *Kentucky Bridge* considerably constrained the ICC's authority.

Later, the Supreme Court adopted the *Kentucky Bridge* approach when reviewing policies made by the ICC. In *ICC v. Alabama Midland Railway*, the Supreme Court affirmed this practice, ruling that the lower courts should give effect "to the findings of fact in the report of the Commission as *prima facie* evidence of the matters therein stated."⁹ Moreover, when reviewing agency actions, the courts were not bound by the ICC's findings; rather, additional evidence was allowed, and "the duty of the court is to decide, as a court of equity, upon the entire body of evidence."¹⁰

Furthermore, the Supreme Court undermined the ICC's attempt to prescribe reasonable and just rates. In contrast to the Granger laws enacted in the 1870s, which allowed state commissions to

⁸ 37 F. 567, 614 (Cir. Ct., D. Ky. 1889).

⁹ 168 U.S. 144, 175 (1897).

¹⁰ *Id.*

prescribe maximum charges,¹¹ Congress did not confer such authority upon the ICC in the Interstate Commerce Act. Though the Act only delegated to the ICC the authority to review rates and set aside unreasonable or unjust ones, not the one to fix rates, the ICC argued that the power was implied from the authority to prescribe rates. The ICC's argument was later rejected by the Supreme Court in *ICC v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*

In the *Cincinnati* ruling, the Court asserted that the powers of the ICC were judicial and administrative, but not legislative. To justify the ICC's rate-making practices, Congress must either explicitly confer the power to the agency, or implicitly through the language of the agency's organic statute. The Court found that Congress neither gave "the express power [of prescribing rates]" to the ICC nor did it "intend to secure the same result indirectly" by empowering the ICC to determine the disputes and to obtain a peremptory order from the courts.¹² Rather, the power to prescribe rates was "a power of supreme delicacy and importance" that could not be implied from "doubtful or uncertain" language.¹³

To sum up, Congress reacted to the inadequacy of existing common-law methods in addressing the prevalent abuses in the railroad industry by creating the Interstate Commerce Commission. But this "weak and ambivalent" political impulse to create a federal regulatory system was opposed by a "strong and hostile" judicial reaction.¹⁴ As a practical matter, the Supreme Court, through a series of opinions issued in the 1897 term, considerably paralyzed the ICC. In doing so, the Court made the ICC so powerless that the ICC, as once admitted by itself, "ha[d] no

¹¹ James W. Ely, Jr., *Railroads and American Law* 93 (2001).

¹² 167 U.S. 479, 511 (1897).

¹³ *Id.* at 505.

¹⁴ Rabin, *supra* note 5, at 1215.

power to determine what rate is reasonable, and such orders as it can make have no binding effect.”¹⁵

2. The Progressive Era

The Progressive Era, extending roughly between the 1890s and the 1920s, saw a large-scale industrial centralization across the country, when firms in the same industry joined together in form of trusts. In 1882, Rockefeller formed the Standard Oil Trust, whose trustees took control of the entire oil industry with vertical and horizontal integration. Later, corporate leaders in other industries ranging from railroads to sugar refining organized their own trusts. At the turn of the twentieth century, trusts controlled a majority of American industries.

The initial response of Congress to the problem of growing consolidations was the passage of the Sherman Antitrust Act in 1890. The purpose of the Sherman Act was to protect the public from economic activities that would “unfairly . . . destroy competition.”¹⁶ The Sherman Act prohibited “every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade,” and criminalized efforts to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of” interstate or foreign trade.¹⁷ However, the Sherman Act hardly stopped industrial centralization in the 1890s. Besides the vague language contained in the Act, the failure of the Sherman Act was attributed to the absence of enforcement. In contrast to the Interstate Commerce Act that was enforced by the ICC, Congress enacted the Sherman Act without establishing an administrative agency to implement the statute. Additionally, in the decade following passage of the Sherman Act, Attorney Generals who

¹⁵ 17 ICC ANN. REP. 17 (1903).

¹⁶ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

¹⁷ Sherman Act §§ 1-2, 26 Stat. 209.

served under Presidents Grover Cleveland and William McKinley rarely policed consolidations under the Sherman Act. Theodore Roosevelt, who was known as a “trustbuster,” did not oppose industrial concentration *per se*, but advocated that the government should monitor commercial activities to ensure that they would not hinder competition. The foreseeable result was that after the enactment of the Sherman Act, more consolidations took place in the marketplace.

As the trust problem persisted, small enterprises, civic groups, as well as political leaders shared a general concern about “bigness and the evils of monopoly,”¹⁸ and reached a consensus that a drastic revision of existing antitrust legislation was essential. Congress passed two major pieces of legislation in 1914: the Clayton Antitrust Act and the Federal Trade Commission Act. The Clayton Act addressed specific practices that the Sherman Act failed to clarify. Specifically, the Clayton Act prohibited practices like price discrimination, tie-ins, interlocking directorates, and acquisitions of competitor’s stocks.¹⁹ The Federal Trade Commission Act, on the other hand, prohibited “unfair methods of competition.”²⁰ Both Acts gave the U.S. government a full complement of legal tools to fight against anti-competitive practices in the marketplace.

Important for this history, Congress established a new agency, the Federal Trade Commission (FTC), to enforce both the Clayton Act and the FTC Act. The FTC was the successor of the Bureau of Corporations, a creation of the Theodore Roosevelt Administration. The function of the Bureau of Corporations was mainly advisory: it studied and reported on the industry. The Bureau’s reports facilitated the passage of the Hepburn Act of 1906 and the prosecution against Standard Oil. When President Woodrow Wilson signed the Federal Trade Commission Act into law, the newly created agency, the FTC, absorbed the staff and duties of the Bureau of

¹⁸ Rabin, *supra* note 5, at 1220-23.

¹⁹ 15 U.S.C. §§ 13, 14, 18, 19.

²⁰ 38 Stat. 717, 719 § 5.

Corporations. Like the ICC, the FTC was topped by five commissioners appointed by the president. The primary purpose of the FTC was to curb unfair trade practices. Congress authorized the FTC to investigate violations of statutes, give reports on corporations, and issue "cease and desist" orders to end unfair business practices.

Besides the creation of the FTC in combatting trusts, the Progressive Era also witnessed the expansion of the ICC's power. As previously illustrated, the ICC lacked sufficient powers to enforce the Interstate Commerce Act. To fortify the ICC, Congress incrementally sharpened the agency's regulatory tools. The first step was the enactment of the Elkins Act in 1903. The Interstate Commerce Act prohibited a carrier from offering preferential prices or rebates, but the proscription did not stop trusts from demanding a rebate from the carrier after paying the standard shipping rate. To address the practice of rebates, the Elkins Act required carriers to charge exactly the rates that carriers published with the ICC.²¹ Three years later, Congress passed the Hepburn Act. The Hepburn Act authorized the ICC to determine and prescribe maximum, though not minimum, rates.²² In searching for any evidence of unfair pricing practices, the Hepburn Act allowed the ICC to investigate the financial records of railroad companies. Finally, instead of vesting the final authority over the reasonableness of the rates in the judicial branch, the Hepburn Act gave the rulings of the ICC the force of law.

The judicial response to the expansion of the administrative state in the Progressive Era was mixed. Though a reviewing court seldomly questioned the congressional power to create independent agencies, neither did it give any deference to the newly created agencies; rather, it sought to confine the scope of these agencies' power within the boundaries of the common law. In *FTC v. Gratz*, for instance, the Supreme Court was asked to determine the meaning of "unfair

²¹ Elkins Act, ch 708, 32 Stat. 847 (1903).

²² Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

method of competition” under the FTC Act. Since Congress failed to unambiguously define the phrase, the Court asserted that “[i]t is for the courts, not the commission, ultimately to determine as matter of law what they include.”²³ As a practical matter, the Court limited the scope of trade practices that the FTC could police to those recognized by the common law.

Similarly, the incompatibility between the common law tradition and the administrative state led to the judicial restriction on agencies’ investigative power. In *FTC v. American Tobacco, Co.*, the Supreme Court faced the issue that whether the Commission enjoyed “an unlimited right of access” to the respondents' papers in searching for possible violations.²⁴ The FTC argued for an unlimited right of access, since the FTC Act authorized the Commission to collect all “documentary evidence.” However, the Court was unwilling to accept the FTC’s argument on the ground of the common law, which required the party wanting evidence to lay a reasonable ground before demanding the documents, thus prohibiting the party from demanding all documents to see if they do not contain it.²⁵ Since “fishing expeditions into private papers” would be inconsistent with the common law tradition, the Court contended that the term was limited to those documents “as [were] evidence.”²⁶ In reaching the conclusion, the Court disregarded the potential congressional intent to strengthen the agency.

Contrary to the newly established regulatory agencies, the two-decade-old ICC received relatively favorable treatment from the Supreme Court. During the Progressive Era, the Supreme Court read the Interstate Commerce Act broadly to recognize broad agency discretion.²⁷ For instance, in *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*,²⁸ despite the availability of the

²³ 253 U.S. 421, 427 (1920).

²⁴ 246 U.S. 298 (1924).

²⁵ *Id.*, at 306.

²⁶ *Id.*

²⁷ Carl McFarland, *Judicial Control of the FTC and the ICC, 1920-1930*, 120-22 (1933).

²⁸ 204 U.S. 426 (1907).

common law remedies under the Interstate Commerce Act, the Court held that the uniformity of policy on rail rates would require the primary jurisdiction for such claims to be in the ICC.²⁹ Additionally, in reviewing the ICC's actions, the Supreme Court diverted its previous approach of *de novo* review. The path-breaking case was *ICC v. Illinois Cent. R. Co.*³⁰ For the first time did the Supreme Court recognized that the judicial branch should not "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."³¹ The impact of the Court's ruling was profound: after *Illinois Cent.*, the courts would decide questions of law, while leave questions of fact to the agency, to whose decision the courts would defer.

To summarize, the judicial resistance against the administrative agencies continued in the Progressive era. Judges would substitute their opinions for those of an agency, or assumed the legitimacy of the agency but prepared to reverse or modify orders with which they did not agree.³² The favorable treatment of the ICC was partly due to the strong reaction of Congress. When the Supreme Court paralyzed the ICC, Congress responded by passing the Hepburn Act and the Mann-Elkins Act to override the Court's decisions. Again, the tension between the regulatory impulses from the political branch and the resistance of a conservative judicial branch of government had shaped the landscape of the administrative state during the Progressive era.

3. The New Deal

²⁹ *Id.*, at 439-41.

³⁰ 215 U.S. 452 (1910).

³¹ *Id.*, at 470.

³² Carl McFarland, *Judicial Control of the FTC and the ICC, 1920-1930*, 92 (1933).

The New Deal was a watershed in the history of the administrative state. Severe deflation and unemployment during the Great Depression brought a new president, Franklin Delano Roosevelt, to the White House, which marked the beginning of the New Deal. In the First Hundred Days of Roosevelt's presidency, he presented a series of initiatives to Congress designed to address economic collapse. Roosevelt believed that the relief for the unemployed, the reform of the financial system, and the recovery of the economy back to normal would mobilize the national economy.

The centerpiece of the New Deal programs was the National Industry Recovery Act (NIRA).³³ Under the NIRA, Congress established two administrative bodies: the Public Works Administration (PWA) and the National Recovery Administration (NRA). The PWA funded and administered the construction of large-scale public projects ranging from dams and bridges to schools and hospitals. The NRA, replicating the experience of the War Industries Board during World War I, was staffed with administrative officials who had close ties to the business groups engaged in writing and implementing the codes. The purpose of the codes was to reduce “destructive competition,” as well as to help workers set minimum wages, maximum weekly hours, and minimum prices.

In the meantime, the New Dealers adopted other major programs. To avoid another crash of Wall Street, Congress enacted the Securities Act of 1933,³⁴ and created the Securities and Exchange Commission (SEC) to regulate the stock market. Furthermore, Roosevelt and his secretary of agriculture, Henry Wallace, were keenly interested in farmers-related issues. At the federal level, programs including the Resettlement Administration and the Rural Electrification Administration

³³ Pub.L. 73–67, 48 Stat. 195 (1933). The statute was later declared unconstitutional by the Supreme Court in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

³⁴ Pub.L. 73–22, 48 Stat. 74, codified as 15 U.S.C. § 77a et seq (1933).

specifically address the farmers' needs. Congress also passed the Agricultural Adjustment Act (AAA),³⁵ which was enforced by the Agricultural Adjustment Administration.

As the New Deal entered its second phase in 1935, its focus had diverted to government intervention in spending and social insurance. The most important program in this phase, and perhaps the New Deal, was the Social Security program established under the Social Security Act of 1935.³⁶ The Social Security program included universal retirement benefits, unemployment insurance, and welfare benefits for the children meeting certain criteria. The Social Security Administration was in charge of managing the program. Congress also financed an emergency relief program that was administered by the Works Progress Administration, the purpose of which was to bring the unemployed back to the workforce. To guarantee the rights of the workers, Congress further enacted the National Labor Relations Act,³⁷ and established the National Labor Relations Board (NLRB) to facilitate wage negotiations and suppress the repeated labor disturbances.

However, the legitimacy of virtually every important regulatory scheme of the New Deal had been challenged before the Supreme Court since its inception. In 1934, two cases involving the state police power on regulating economic activities came before the Supreme Court. In *Home Building & Loan Association v. Blaisdell*,³⁸ the Court upheld a Minnesota statute that temporarily relieved debtors from the foreclosure of valid mortgages. Recognizing that the constitutional protection of the freedom of contract was not absolute, the Court held that the economic emergency, as well as the temporary and restricted nature of the statute, justified the

³⁵ Pub. L. 73-10, 48 Stat. 31, codified as 7 U.S.C. ch. 26 § 601 et seq (1933).

³⁶ Pub.L. 74-271, 49 Stat. 620, codified as 42 U.S.C. ch. 7 (1935).

³⁷ Pub.L.74-198, 49 Stat. 449, codified as 29 U.S.C. § 151-169 (1935).

³⁸ 290 U.S. 398 (1934).

reasonable exercises of the police power.³⁹ Similarly, the Court sustained a New York regulation on the minimum price of milk in *Nebbia v. New York*.⁴⁰ Again, the Court rejected the challenge on the ground that Due Process clauses did not prohibit governmental regulation for public welfare, but required methods to be consistent with due process.⁴¹ Despite the victories in *Nebbia* and *Blaisdell*, the one-vote wins both cases indicated the danger that the Court might shift to the opposite position.

During the next two years, the Supreme Court became hostile to the federal regulatory programs in the Roosevelt Administration and systematically invalidated them. The NIRA, a major piece of legislation of the First Hundred Days, has been held unconstitutional in different instances. At the beginning of 1937, the Supreme Court decided *Panama Refining Co. v. Ryan*,⁴² and found unconstitutional. Section 9 of the NIRA, which conferred the legislative power to the president. The majority of the Court maintained that since the Constitution vested all legislative powers in Congress, Congress could not “abdicate or transfer its essential legislative functions.”⁴³ Were Congress to delegate power to the executive branch to make rules, it should specify policies and standards. Several months later, the Court unanimously demolished the NIRA in *Schechter Poultry Corp. v. U.S.*⁴⁴ The Court found that the NIRA unconstitutionally delegated the legislative power to prescribe “fair competition” to trade or industrial associations or groups and gave industrial-established standards the force of law.

In addition to the non-delegation doctrine, the Supreme Court also struck down New Deal laws on the ground of substantive due process. Substantive due process was a legal doctrine identified

³⁹ Id. at 447.

⁴⁰ 291 U.S. 502 (1934).

⁴¹ See, Id. at 510.

⁴² 293 U.S. 388 (1935).

⁴³ Id. at 421.

⁴⁴ 295 U.S. 495 (1935).

by courts on the basis of the due process clauses of the Fifth and Fourteenth Amendments, and protected people's fundamental rights from government interference. In *Lochner v. New York*, the Supreme Court embraced substantive due process to void a state law that limited bakery employees' working hours.⁴⁵ In the post-*Lochner* era, the Court had played "a judicially activist but politically conservative role."⁴⁶ It struck down federal and state laws infringing freedom of contract. In the 1935 and 1936 terms, the Supreme Court, applying substantive due process, invalidated a number of New Deal programs seeking to regulate working conditions, including Frazier-Lemke Farm Bankruptcy Act,⁴⁷ Agricultural Adjustment Act,⁴⁸ and Bituminous Coal Conservation Act⁴⁹

It was not until 1937 that the Supreme Court reversed its course, when President Franklin Roosevelt proposed the Judicial Procedures Reform Bill of 1937, or the "court-packing plan." The invalidation of major New Deal programs between 1935 and 1936 was largely attributed to the fact that President Roosevelt was unable to influence a Supreme Court consisting of conservative Justices. In the first term of his presidency, Roosevelt only appointed one Justice, Benjamin Cardozo, who shared with his political ideas. The proposed court-packing plan, by contrast, would allow him to appoint an additional justice for every member of the Supreme Court over the age of 70 years and 6 months.

⁴⁵ *Lochner v. New York*, 198 U.S. 45 (1905) (held that the New York law interfered with bakers' freedom of contract, which was protected by the Fourteenth Amendment). The *Lochner* decision was overturned by *West Coast Hotel Co. v. Parrish* in 1937.

⁴⁶ Jean-Christophe Agnew, *A Companion to Post-1945 America*, Wiley-Blackwell 386 (2005).

⁴⁷ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

⁴⁸ *U.S. v. Butler*, 297 U.S. 1 (1936).

⁴⁹ *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

Though Roosevelt lost the court-packing battle, he won the war for control of the Supreme Court.⁵⁰ In *West Coast Hotel Co. v. Parrish*,⁵¹ the Court rejected its earlier decision in *Adkins v. Children's Hospital*, and recognized that state legislatures were entitled to protect an economically disadvantaged class from “unscrupulous and overreaching employers.”⁵² A reviewing court could not ignore that many states had adopted similar requirements, and regarded such legislative initiative as arbitrary or capricious. The *Parrish* ruling also marked the end of the *Lochner* era. The freedom of contract was no longer the paramount principle for the Supreme Court.

Later in the same year, in the landmark case of *NLRB v. Jones & Laughlin Steel Corp.*,⁵³ the Court revealed a new attitude towards federal regulatory power. Speaking for the Court, Chief Justice Hughes declared that “[t]he fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for its ‘protection or advancement.’”⁵⁴ The Court could not deny Congress the power to control activities that were “intrastate in character when separately considered,” but had “a close and substantial relation to interstate commerce.”⁵⁵ In a series of cases followed *Jones & Laughlin*, the Court steadily rejected the constitutional challenges to the New Deal regulatory scheme. By switching its position just in time, the Supreme Court also saved itself from a drastic reform.

The New Deal has shaped the landscape of the administrative state in the United States. Not only did it signal a shift toward the support for expertise, but it also fundamentally changed the conception of government intervention. The idea of a minimal state has dominated the time

⁵⁰ William H. Rehnquist, Judicial Independence Dedicated to Chief Justice Harry L. Carrico: Symposium Remarks, 38 U. Rich. L. Rev. 579, 595 (2003).

⁵¹ 300 U.S. 379 (1937).

⁵² Id. at 397-98.

⁵³ 301 U.S. 1 (1937).

⁵⁴ Id. at 36-37.

⁵⁵ Id. at 37.

preceding the New Deal. A minimal government would ensure the normal functioning of the market. Therefore, regulatory initiatives were largely discrete and limited measures. By contrast, the recovery programs undertaken by the federal government put it in the position of “employer and insurer of last resort.”⁵⁶ The experience of the New Deal rejected the assumption of the free market and created a belief that the public could rely upon the government in preserving their interests. The change in how people perceive government intervention has had a persistent effect on the succeeding evolution of the administrative state.

II. Procedural Reform of Administrative Law

As noted above, the rapid growth of independent agencies raised considerable controversies. The Brownlow Committee, for instance, referred to independent agencies as a “headless ‘fourth branch of the Government.’”⁵⁷ Though independent regulatory agencies, after nearly a half-century of uncharted growth, had become an accepted part of the nation’s political life, the criticism of independent agencies had never stopped. By the late-1930s, the ongoing critique of the administrative state gradually shifted from “concerns about the appropriate realm” of agency actions to issues of agency’s decision-making proceedings.⁵⁸ This change in perspective eventually gave rise to a reform of the administrative procedure, which resulted in the passage of the Administrative Procedure Act (APA) in 1946.

1. The Needs for Procedural Reform

⁵⁶ Rabin, *supra* note 5, at 1253.

⁵⁷ The President’s Comm. on Admin Mgmt., *Administrative Management in the Government of the United States* 29 (1937).

⁵⁸ Rabin, *supra* note 5, at 1263.

As the New Deal programs reached into areas where no pre-existing regulatory framework existed, the procedural aspect of agency decisionmaking was often “given short shrift.”⁵⁹ Agencies are not “simply an extension of executive power”; instead, they could promulgate regulations and settle disputes, and present “an assemblage of rights normally exercisable by government as a whole.”⁶⁰ There were no comprehensive rules to govern administrative proceedings, which left agency officers with broad discretion in implementing the regulatory programs. Harry Hopkins, then-Head of the Federal Emergency Relief Administration, refused to explain how he made decisions and allocated funds when he testified in Congress.⁶¹ The broad discretion intensified the concerns about the abuse of power. Irritated by the creation of regulatory agencies like the NLRB and the SEC, which were hostile to the interests of the businesses, businesspeople regarded government intervention as a dictatorship and central planning. They were afraid that agency officials would abuse their discretionary powers and hurt the freedom and profits of private companies. The anxiety of businesses was shared by many Americans in the late 1930s, who witnessed the European dictators’ success in economy and military on the other side of the Atlantic Ocean. The public feared that the United States would follow European countries into dictatorship or communism.

The Supreme Court had recognized the inadequacies of administrative procedure in the 1930s. In *Schechter Poultry*, one of the grounds upon which the Court relied to strike down the NIRA was the failure to take appropriate procedures in promulgating the codes. To decide whether the President could legally approve the codes of fair competition under the NIRA, the Court compared the NIRA to the FTC Act. The Court found that in introducing the term “unfair

⁵⁹ Rabin, *supra* note 5, at 1264.

⁶⁰ James M. Landis, *The Administrative Process* 15 (1938).

⁶¹ John Joseph Wallis, *The Political Economy of New Deal Federalism*, 29 *Econ. Inquiry* 510, 518 (1991).

methods of competition” in the FTC Act, Congress had prescribed the procedure to determine its meaning in specific instances. In particular, the FTC Act created a quasi-judicial body and provided detailed procedural requirements, including those for formal complaints, notice and hearing, evidence, and judicial review. Unlike the FTC Act, the NIRA “dispense[d] with this administrative procedure and with any administrative procedure of an analogous character.”⁶² Therefore, the Court concluded that the NIRA failed to “undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure.”⁶³ The flaws of administrative proceedings were also evident in a widely publicized report prepared by the Special Committee on Administrative Law of the American Bar Association (ABA Special Committee) in 1938. Established shortly after Roosevelt’s First One Hundred Days, the ABA Special Committee was a critical instrument for advancing the reform of the administrative law.⁶⁴ In 1938, the ABA Special Committee was led by Roscoe Pound, who was a leading legal scholar as well as an opponent to the New Deal bureaucracy. As the chairman, Pound criticized the regulatory system for administrative absolutism and cataloged suspicious agency actions in the ABA’s annual report.

Among the defects the report identified, some were related to the adjudication proceedings of administrative tribunals. For instance, the report found that administrative tribunals would decide a case either without a hearing or hearing all interested parties, or based on matters not before the tribunal or unproduced evidence, or based on preformed opinions or prejudices.⁶⁵ In other cases, administrative tribunals might disregard jurisdictional limits and extend their regulatory power.⁶⁶

⁶² 295 U.S. 495, 533.

⁶³ Id., at 541.

⁶⁴ George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1569 (1996).

⁶⁵ Report of the Special Committee on Administrative Law, 1938 ABA Ann. Rep. 346-49.

⁶⁶ Id., at 349-50.

In doing so, administrative tribunals sought to escape from judicial review. Finally, administrative tribunals might delegate the jurisdiction to their deputies, which was inconsistent with the tradition of the common law.⁶⁷

The report also pointed to the unfettered agency discretion. It found that independent agencies could do “what will get by,” or yield to political pressure at the expense of the law.⁶⁸ They might be arbitrary when making rules and regulations. To illustrate this point, the report expressly referred to the minimum financial requirement under the National Prohibition Act. The financial requirement was arbitrarily fixed, which turn out to be prohibitive and inapplicable to cases with different conditions. The unfettered discretion allowed agency officers to reflect their “‘tunnel vision,’ an agency’s supreme confidence in the importance of its own mission to the point where it leaves common sense aside.”⁶⁹

Finally, the report reaffirmed the fears about the accumulation of different functions in independent agencies. As early as 1933, the ABA Special Committee professed its objection to the combination of quasi-legislative and quasi-judicial functions in an independent agency. It referred to administrative tribunals as “something that looks like a court and acts like a court but somehow escapes being classified as a court whenever you attempt to impose any limitations on its power.”⁷⁰ Combined with the absence of checks, the accumulation of different functions not only represented a departure from the rigid application of the separation of powers but also upset the delicate equilibrium articulated under the Constitution.⁷¹ In the 1938 report, the ABA Special Committee continued to question the mix of different functions. On the one hand, agencies

⁶⁷ Id. at 350.

⁶⁸ Id. at 350.

⁶⁹ Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 *Cardozo L. Rev.* 2189, 2190–91 (2011).

⁷⁰ Report of the Special Committee on Administrative Law, 1933 ABA Ann. Rep. 197.

⁷¹ Report of the Special Committee on Administrative Law, 1933 ABA Ann. Rep. 409.

would consider the administrative determining function one of acting rather than deciding, and “apply to the determining function the methods of the directing function.”⁷² On the other hand, they would improperly blended proceedings, including rulemaking, investigation, and adjudication, so that the entire process is “to one to give effect to a complaint.”⁷³

In contrast to the defects of administrative proceedings identified by contemporary judges, lawyers, and legal scholars, the laws governing the procedural aspects of agency action were limited. Some procedural requirements were contained in the agency’s enabling statutes. The statutes would specify the procedures that an agency should follow when delegating powers to that agency, as the FTC Act did. Besides the sporadic statutory requirements, the Due Process Clauses provided the most fundamental procedural safeguards against misuse of agency discretion. The Fifth Amendment of the Constitution guarantees that no one shall be “deprived of life, liberty or property [] without due process of law.”⁷⁴ Through the Fourteenth Amendment, the due process requirements extend to all state and local governments.⁷⁵

The Due Process Clause incorporates both substantive and procedural facets. Substantive due process protected against state legislation that infringed upon individual’s “privileges and immunities” unrelated to the proceedings. By contrast, procedural due process assures that all levels of government should operate within the law and provide fair procedures to private parties. Procedural due process not only echoed the promise of the Magna Carta to offer the ordinary procedures of law, but also reflected the strong insistence on the observance of legal order in pre-Revolutionary America. Under the procedural due process, the government is

⁷² Id., at 349.

⁷³ Id., at 351.

⁷⁴ U.S. Const. amend. V.

⁷⁵ U.S. Const. amend. XIV.

obliged to carry out legal procedures in a fair and just way. Governmental action denying the process that is “due” would be unconstitutional.

However, in the first half of the twentieth century, the constitutional protection under the Due Process Clause was limited in width and depth. On the one hand, the Due Process Clause applied only to agency actions affecting private parties on “individual grounds” and deprive them of “life, liberty or property.” In *Bi-Metallic Investment Co. v. State Board of Equalization*, the Supreme Court recognized an important and lasting distinction between rules and adjudication. The case involved the adoption of a system of undervaluation throughout a county by local taxing officers, and invited the Court to decide “whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned.”⁷⁶ The Court found that it was impracticable and beyond the constitutional requirement that everyone should have a direct voice in the adoption of a rule that applied to the general public. It further distinguished the pending case from an earlier decision in *Londoner v. Denver*, where a right to a hearing was found based on a small number of persons who were exceptionally affected, as well as that the state acted against individuals “in each case upon individual grounds.”⁷⁷

To trigger the Due Process protections, a state action should not only meet the criteria of “individual grounds,” or impact, but also deprive one of life, liberty, or property. Until the Supreme Court expanded the scope of protection to certain entitlements under state laws in the 1970s, the law was that due process was required when State acted against one’s right, but not in

⁷⁶ *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

⁷⁷ *Id.* at 446.

cases involved privileges.⁷⁸ The dichotomy between rights and privileges left a large range of agency actions falling outside the range of the Due Process Clause.

On the other hand, the Due Process Clause fails to provide clear guidance as to what procedure is “due.” Compared to criminal or civil trials, administrative proceedings represented a relatively new challenge to the Due Process Clause. The Due Process Clause guarantees an individual’s right to a hearing. The early Supreme Court decisions suggested that if only property rights were at issue, hearings could be postponed, especially when the need for state action was urgent. Later in the 1970s, the Court finally made it clear that the form of a hearing was “flexible and call[ed] for such procedural protections as the particular situation demands.”⁷⁹ In deciding the adequacy of an action, one should weigh an individual’s “interest in avoiding [the loss]” against “the governmental interest in summary adjudication.”⁸⁰ In specific, three factors should be taken into account: first, the private interest being affected; second, “the risk of an erroneous deprivation of such interest through the procedures used,” and “the probable value of additional or substitute procedural safeguards;” and third, the government’s interest, including “the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁸¹ As a result, the Due Process Clause does not always guarantee a full hearing, including the right to before an impartial judicial officer, to obtain an attorney, to present evidence and oral argument, to examine all materials that would be relied on, or to confront and cross-examine adverse witnesses.

⁷⁸ The Supreme Court changed its position in the 1970s. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a Taxes teacher under a long-term arrangement had an implied property interest in re-employment and should be given an opportunity for a hearing before nonrenewal of his contract).

⁷⁹ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁸⁰ *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

⁸¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Given the serious concerns about the abuse of agency discretion, as well as the absence of no comprehensive procedural rule governing agency action, there was a practical need for legislation on administrative procedure.

2. The Enactment of the APA

It would be an oversimplification to argue that the enactment of the Administrative Procedure Act (APA) was a scientific attempt “to restore constitutional balance” and “to improve agencies efficiency and accountability.”⁸² Instead, the procedural reform was a part of the debate on the fate of the New Deal.⁸³ The legislative history of the APA indicated a battle over the conservatives’ attempts to hinder liberal government by “limiting the power of agencies to implement the programs.”⁸⁴ Before 1938, the debate primarily occurred in the courts. The New Deal opponents relied on the judicial branch to prevent the implementation of the New Deal programs. Between 1935 and 1937, the Supreme Court had systematically struck down those programs. However, as the Court substantially changed its course in *Jones & Laughlin*, it put to rest questions regarding the appropriate fields of administrative agencies. Without the help of the courts, the New Deal opponents diverted their focus to the procedural aspects of agency action and sought to constrain agency authority through legislating procedural laws.

At the outset, the primary focus of the reform was the establishment of an administrative court. In its 1933 annual report, the ABA Special Committee discussed three possible solutions: Congress could prescribe stringent procedural rules for regulatory agencies, or demand additional judicial review of agency actions, or create a specialized administrative court. Among

⁸² Shepherd, *supra* note 64, at 1590.

⁸³ *Id.* at 1595.

⁸⁴ *Id.* at 1678.

three solutions, the committee preferred the creation of a specialized administrative court. In the words of Louis Caldwell, who chaired the committee at the time, “the ideal solution lies in the direction of a federal administrative court, with appropriate branches so as to take over or review the judicial functions” of the administrative agencies.⁸⁵

Several legislative initiatives endorsed the administrative court proposal contained in the Special Committee’s report. In 1936, for instance, the Special Committee offered a bill for an administrative court, which was introduced by Mills Logan in the Senate, and Emanuel Celler in the House. The Logan-Celler bill would have transferred not only the jurisdiction of existing courts to the administrative court, but also extracted jurisdiction from regulatory agencies and place it in the new court.⁸⁶ However, both the House and Senate bills did not pass the committee. Later, Senator Logan introduced another bill with moderate controls on agencies, but the Judiciary Committee took no action on the bill.

In 1938, the ABA Special Committee drafted another bill, titled “An Act to Provide for a More Expeditious Settlement of Disputes with the United States.” Francis Walter and Logan introduced the bill in the House and Senate, respective, which was later known as the Walter-Logan bill. The focus of the Walter-Logan bill again followed the administrative court approach, and proposed to create a new Court of Appeals for Administration “to receive, decide, and expedite appeals from federal commissions, administrative authorities, and tribunals in which the United States is a party or has an interest, and for other purposes.”⁸⁷ In effect, the Walter-Logan bill would have subjected administrative agencies directly to the proposed appellate court, which could evaluate agency rulings and issue declaratory determinations.⁸⁸ With the support of the

⁸⁵ 1933 ABA Ann. Rep. 204 (statement of committee Chairman Louis G. Caldwell).

⁸⁶ Shepherd, *supra* note 64, at 1578.

⁸⁷ ABA, Report of the Special Committee on Administrative Law, in ABA Ann. Rep. (1938).

⁸⁸ McNollgast, The Political Origins of the Administrative Procedure Act, 15 J.L. Econ. & Org. 180, 196 (1999).

ABA, the Walter-Logan bill quickly passed through both the House and Senate of Congress, regardless of the opposition from several agency's heads. However, President Roosevelt vetoed the bill and, in his veto message, indicated that a report would soon address comprehensive reform of administrative processes.

The report mentioned by Roosevelt was that of the Attorney General's Committee on Administrative Procedure (Attorney General's Committee). As Walter-Logan bill went to Congress and was still under consideration, the Roosevelt administration directed the Attorney General to set up a committee, hoping the committee to assemble a proposal that would prevent the Walter-Logan bill from being passed. Attorney General's Committee consisted of twelve practitioners, judges, and scholars, among whom eight were supporters of the New Deal, and four were conservatives.

Shortly after the House failed to override Roosevelt's veto of the Walter-Logan bill, the Attorney General's Committee submitted its report (Attorney General's report). However, the committee failed to agree on a single bill. Rather, the report included two draft bills: a majority bill proposed by seven liberal members and a minority bill proposed by three conservative members. Both bills shared the assumption that given the diversity of administrative agencies, it was inappropriate to prescribe a single set of procedural rules for all agencies, but proposed different solutions. The majority bill embraced the idea of independent agencies and imposed few constraints on agencies. Moreover, the majority bill recommended that agencies should nominate independent hearing examiners to alleviate concerns about the separation of powers. Also, the majority bill proposed to create a Federal Office of Administrative Procedure (FOAP) to control agency action, but the FOAP little authority to compel agencies to adopt its recommendations.

In contrast, the minority bill, titled “Code of Standards of Fair Administrative Procedure,” presented comprehensive procedural rules for agency actions. In addition to the requirement for creating the FOAP, the minority bill contained several procedural requirements. To begin with, the minority bill, for the first time, prescribed the notice and comment rulemaking. It allowed an agency to provide public notice of a rulemaking while omitting a hearing. Instead, the agency would accept public comment, either in oral or written forms, on the proposed rule. Moreover, the minority bill required that all agencies should publish their rules and regulations in the Federal Register. Also, the minority bill demanded the appointment of special hearing officers in adjudicatory proceedings. Despite the stringent procedural rules contained in the minority bill, it read largely as “suggestions” rather than as “commands.”⁸⁹

The Attorney General’s report served as the foundation of the upcoming legislation on the administrative process. The majority and minority bills were introduced in the Senate as S. 675 and S. 674, respectively, while only the majority bill was introduced in the House. However, the outbreak of World War II interrupted the legislative process.

After the war ended, the minority members in the Attorney’s General Committee Report controlled the drafting of what would become known as the APA. The change in political culture also gave both Democrats and Republicans motives to pass the legislation on administrative procedures. For Democrats who supported the New Deal, as Franklin Roosevelt was succeeded by Harry Truman, who lacked political strength as Roosevelt had, they feared that they might lose in both the mid-term election of 1946 and the presidential election two years later.

Therefore, their goal was to preserve the New Deal without controlling either the Legislature or the White House.

⁸⁹ Shepherd, *supra* note 64, at 1635.

Then procedural reform provided both sides an appropriate vehicle to achieve that goal. For one thing, the absence of formal procedural requirements would allow a Republican president to direct agency decision-making at his discretion.⁹⁰ Were procedural constraints in place, the opponents could only repeal the New Deal policies if they controlled both Congress and the White House. For the other, Democrats found that judicial review, which used to be hostile to the New Deal, would be friendly to the status quo of the New Deal. After a decade and more, liberal judges appointed by Roosevelt had filled the courts. Thus, a procedural reform that enhanced judicial review would help them to preserve the New Deal politics.

Republicans, on the other hand, retained their interests in the reform of administrative procedures. Though the proposed bill was not as strict as the Walter-Logan bill or any other reform bills introduced by the conservatives in the 1930s, they recognized that some reform was better than no reform at all.⁹¹ Additionally, despite the liberal judges appointed by the Roosevelt administration, Republicans concluded that enhanced judicial review would substantially limit agency discretion and make it difficult for administrative agencies to set new policies. Finally, voting for the APA would not preclude Republicans from passing further legislation to restrain or eliminate the New Deal programs.⁹²

The legislative history of the APA “represents a long period of study and strife; it settles long continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces ha[d] come to rest.”⁹³ The Act passed House and Senate with a unanimous vote, then was signed into law by President Truman in 1946. By formally enunciating agency due

⁹⁰ McNollgast, *supra* note 88, at 192.

⁹¹ Shepherd, *supra* note 64, at 1764.

⁹² McNollgast, *supra* note 88, at 194-95.

⁹³ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).

process in the Act, both supporters and opponents of the New Deal finally recognized the broad agency powers to regulate the market.

3. Statutory Constraints under the APA

The APA represents the first uniform body of administrative law at the federal level.⁹⁴ By codifying pre-existing procedural rules embedded in organic statutes, regulations, and court decisions, the Act spells out a comprehensive set of rules that regulate the operation of both independent agencies and executive agencies. Its objectives are to require federal agencies to keep the public informed of their organization, procedures, and rules, to provide for public participation, to establish uniform standards for agency action, and to define the scope of judicial review.⁹⁵ To achieve these objectives, the APA addresses two major issues: the procedures that administrative agencies should employ, as well as the judicial review of agency actions.⁹⁶

A. The Procedural Framework

The procedural framework established by the APA relies on two fundamental distinctions about agency action. First, as aforementioned, it follows the *Bi-Metallic* ruling that distinguishes “rules” from “orders.” The APA does not strictly follow the distinction between forward-looking actions of general applicability and backward-looking actions of particular applicability. Instead, it defines “rule” as agency statement of “general or particular applicability and future effect,” and “order” as “a final disposition . . . in a matter other than rule making but including

⁹⁴ Martin Shapiro, *A Golden Anniversary? The Administrative Procedure Act of 1946*, 19 Regulation 40 (1996).

⁹⁵ Tom C. Clark, U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*. (1947).

⁹⁶ Despite the requirements prescribed in the APA, a regulatory agency’s enabling statute always trumps the APA. If Congress desires that an agency departs from the APA, it can state this explicitly in the enabling legislation.

licensing.”⁹⁷ The term “order” is explicitly defined to exclude rules, but injunctions and licensing, two types of agency activities with prospective effect, are within the definition of the term. In accordance with the dichotomy between rules and orders, the APA identifies two categories of agency actions, namely rulemaking, the process for formulating, amending, or repealing a rule, and adjudication, the agency proceedings for devising an order.

The Choice between rulemaking and adjudication is within agencies’ discretion unless a statute explicitly dictates which mode the agency should employ. In *SEC v. Chenery Corp.*, the Supreme Court held that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”⁹⁸ The Court further confirmed the rule in *NLRB v. Bell Aerospace Co.* By reversing the lower court’s findings, the Court concluded that “the [National Labor Relation] Board is not precluded from announcing new principles in an adjudicative proceeding, and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.”⁹⁹ An agency is still able to set general policies through rulemaking, even if a statute requires it to employ adjudication.¹⁰⁰

Second, the APA further distinguishes between formal and informal procedures. The APA does not explicitly use the words “formal” or “informal,” but Sections 556 and 557 of the APA prescribe in great detail hearing procedures that resemble a full-dress judicial trial. A neutral hearing officer will preside the trial-type hearing, in which parties are entitled to present evidence and cross-examine contrary evidence. In the end, agencies will make decisions based

⁹⁷ 5 U.S.C. § 551.

⁹⁸ *SEC v. Chenery Corp.* 332 U. S. 194, 203 (1947) (quoting *Columbia Broadcasting System v. United States*).

⁹⁹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

¹⁰⁰ Most regulatory agencies use their rule-making authority to make policy. The notable exception is the NLRB, which makes most of its policy announcements in adjudications. See, i.e., Cornelius J. Peck, *Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. Pa. L. Rev. 254 (1968).

solely on materials presented during the hearing. Agency actions that follow these procedural requirements are named formal rulemaking and formal adjudication, respectively.

Despite the highly formal, trial-type hearings prescribed in the APA, if Congress does not require the agency to adopt formal procedures in a specific case, then informal procedures apply.¹⁰¹ For instance, unless the agency's organic statutes require rules "to be made on the record after opportunity for an agency hearing," the exercise of agency authority is governed by the informal rulemaking outlined in Section 553. First, the agency should give notice of its intention to promulgate a rule. Second, after providing the notice, the agency shall "give interested persons an opportunity to participate . . . through submission of written data, views, or arguments with or without opportunity for oral presentation."¹⁰² Third, after consideration of the relevant materials, the agency shall incorporate "a concise general statement of their basis and purpose" in the rules adopted.¹⁰³ Different from formal rulemaking, which requires rules to be made on the record, informal rulemaking allows the agency to consider materials not presented during the rulemaking proceeding. Because informal rulemaking requires the agency to provide the public with notice and a right to comment, such procedures are often called notice-and-comment rulemaking. The notice-and-comment rulemaking is the most prevalent form of rulemaking practiced in the United States today.

To guarantee meaningful public participation in informal rulemaking, the APA articulates specific requirements for notice and comment. The APA demands the agency to provide the public with the notice, which should include "a statement of the time, place, and nature" of the

¹⁰¹ *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973) (holding that the language of "after hearing" in § 1(14)(a) of the Interstate Commerce Act did not trigger formal rulemaking procedure under §§ 556 and 557 of the APA.

¹⁰² 5 U.S.C. § 553(c).

¹⁰³ *Id.*

rulemaking, “reference to the legal authority,” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹⁰⁴ Following the required notice, the agency should provide interested persons with a meaningful opportunity to comment on the proposed rule. Once the comment period ends, the agency should also prepare a concise general statement. The concise general statement should enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.”¹⁰⁵

These barebones requirements have often garnered comments in the courts and Congress. Both Congress and particularly reviewing courts often mandate additional procedures above and beyond what the APA directed in informal rulemaking process. Congress can, in its organic statute, ask an agency to incorporate some elements of formal rulemaking into the existing informal rulemaking proceedings, resulting in a hybrid type of rulemaking. The Occupational Safety and Health Act of 1970, for instance, without invoking formal rulemaking under the APA, directs Secretary of Labor, upon the request of interested persons, to provide a public hearing in promulgating standards.¹⁰⁶ These additional procedural obligations articulated in an agency’s organic statute always prevail the relevant requirements in the APA.

On the other hand, court-ordered hybrid rulemaking was the creation of the D.C. Circuit, which required the agency to adopt, for example, cross-examination in informal rulemaking.¹⁰⁷

However, the Supreme Court rejected lower courts’ efforts to impose more procedural requirements on the agency in *Vermont Yankee Nuclear Power Corp. v. NRDC*. In that case, the Court held that a reviewing court could not impose upon agencies procedural obligations that had

¹⁰⁴ 5 U.S.C. § 553(b).

¹⁰⁵ S. Rep No.75, in APA Legislative History at 225.

¹⁰⁶ 29 U.S.C. § 655(b).

¹⁰⁷ See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973) (requiring “reasonable cross-examination” on remand). See also, Stephen F. Williamst, “Hybrid Rulemaking” under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. Chi. L. Rev. 401, 437-38 (1975); William D. Dixon, Rulemaking and the Myth of Cross-Examination, 34 Administrative L. Rev. 389 (1982).

no basis in the APA.¹⁰⁸ As a practical matter, *Vermont Yankee* put an end to court-ordered hybrid rulemaking.

Agency actions that are not rulemaking nor fit the definition of formal adjudication fall into the category of informal adjudication. This category subsumes the great bulk of agency action. In contrast to informal rulemaking, the APA does not specify procedures equivalent to the notice-and-comment rulemaking that an agency should employ in informal adjudication. Section 555 of the APA sets forth several general requirements that are applicable to informal adjudication. The procedural requirements regulate party participation, agency collection of relevant information, and prompt notice in case of the denial of a written application made to an agency.¹⁰⁹

The APA's failure to provide specific rules governing informal adjudication is, to some extent, mitigated by other sources of procedural rules. The agency's organic statutes or regulations, for instance, can prescribe specific procedures in informal adjudication. Besides, the procedure that an agency employed in informal adjudication must also satisfy the constitutional requirement of the Due Process Clause. Finally, courts may impose extra procedural requirements on informal adjudication. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court found that through formal findings did not apply to the case, the Secretary of Transportation's failure to make necessary fact findings hampered judicial review. The effectiveness of judicial review thus would require administrative officials to prepare written "testimony explain their action" in informal adjudication.¹¹⁰

B. Judicial Review

¹⁰⁸ 435 U.S. 519, 547-49 (1978).

¹⁰⁹ 5 U.S.C. § 555.

¹¹⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971).

The APA reflected “a highly conventional lawyer’s view” of how to control agency actions.¹¹¹

The Act confirms that any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹¹² The APA does not intend to preclude pre-existing rules for judicial review, which had been established by courts long before the passage of the statute. Instead, the legislative history indicates that the judicial review provisions under the APA would supplement, not substitute, the court-made rules for judicial review.¹¹³

Section 706 of the APA outlines the standards for judicial review upon which courts rely to invalidate agency action. The reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

¹¹¹ Rabin, *supra* note 5, at 1265.

¹¹² 5 U.S.C. § 702.

¹¹³ Sen. Comm. Print. 25 in APA Legislative History, at 36. (asserting that judicial review include both “those contained in statutes” and “those developed by the courts in absence of legislation”).

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.”¹¹⁴

The applicability of these standards depends on the issue at hand. If the issue is question of fact raised from formal proceedings pursuant to sections 556 and 557, courts should determine whether the agency’s finding of facts is supported by “substantive evidence.” In assessing the agency’s fact-findings, the APA directs that a reviewing court should refer to “the record as a whole,” rather than materials that are favorable to the agency.¹¹⁵ Agencies cannot cherry pick evidence favorable to the agency’s point of view. However, substantial evidence standard does not apply to factual conclusions in informal proceedings. If an agency finds facts in informal proceedings, without further direction from the agency’s organic statutes, courts should rely on Section 706(2)(A) and overturn agency decisions on the ground of arbitrary and capricious. Before the passage of the APA, courts used *de novo* review to the agency fact-finding procedures. Section 706(2)(F) of the APA allows *de novo* review to the extent that “the facts are subject to trial *de novo* by the reviewing court.” But the Supreme Court confined the scope of *de novo* review to limited circumstances. For *de novo* review to apply, the agency action should be “adjudicatory in nature,” and the agency factfinding procedures be inadequate; or, issues not before the agency are raised in a subsequent proceeding to enforce non-adjudicatory agency action.¹¹⁶

When questions of law are disputed, the APA authorizes a reviewing court to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”¹¹⁷ The courts can invalidate an agency action on

¹¹⁴ 5 U.S.C. § 706(2).

¹¹⁵ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-92 (1951).

¹¹⁶ *Overton Park*, 401 U.S., at 415.

¹¹⁷ 5 U.S.C. § 706.

the ground that the action is unconstitutional, *ultra vires*, contrary to required procedures, or not in accordance with law.

One of the biggest judicial issues is centered around the level of deference that should be given to agency interpretations of law. Such interpretations are important aspect of imparting particularized political implications to an agency's work as it works with the enabling act.

Though the APA does not specify whether courts should scrutinize the agency's determination of law *de novo* or in a deferential fashion, courts often defer to agency's interpretation of the statutes that Congress intends it to enforce. The Supreme Court first recognized judicial deference in *Skidmore v. Swift & Co.* In that case, the Court was confronted with an Administrator's interpretation of working time under the Fair Labor Standards Act. In deciding whether waiting time constitutes "work," the Court found that the Administrator's rulings, interpretations, and opinions constituted "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹¹⁸ The deference that the Court afforded to agency decision in *Skidmore* depends on its persuasiveness. In deciding the weight of the agency's judgment, courts should take into account "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."¹¹⁹

The Supreme Court took one step further in *Chevron, Inc. v. Natural Resources Defense Council, Inc.* It recognized that "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."¹²⁰ Where there is a statutory ambiguity, the

¹¹⁸ 323 U.S. 134, 140 (1944).

¹¹⁹ *Id.*

¹²⁰ *Chevron v. NRDC*, 467 U.S. 837, 843 (1984).

Chevron deference requires the reviewing court to the agency's determination, and the agency's interpretation is a reasonable or permissible reading of the statute and the agency acted in a way that the regulation at issue has "the force of law."¹²¹ Compared to *Skidmore* deference, which depends on the persuasiveness of an agency's decision, *Chevron* deference ask judges to give controlling deference to agency's interpretation that meets the two-prong test, regardless of whether the interpretation is the best or most persuasive one.¹²²

In short, the passage of the APA reflects a shift from an obsession with the legitimacy of agency authority to concern about controlling agency discretion in the post-New Deal era.¹²³ Not only does the Act established uniform standards for rulemaking and adjudication, but it also ensures public participation in agency procedures. It is the bill of rights for the emerging regulatory state, defining the fundamental relationship between those who regulate and those who are regulated.¹²⁴ Regardless of the benefits brought by the APA, its impact is considerably limited. By being entirely silent on informal adjudication, and employing broad and ambiguous language, the Act gives administrative agencies leeway to fashion regulatory policy in a particular context.

III. Deregulation and the Regulatory Reform

Most of the New Deal's legacy stayed in place until the 1970s when the recession, partly caused by the oil crisis, put an end to the economic expansion in post-World War II era. The economic thoughts of the Chicago School gradually gained prominence, giving rise to a discernible political movement to reevaluate the need for regulatory programs. Public officials, policy

¹²¹ See, *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹²² The differences between *Skidmore* and *Chevron* deference have engendered a great deal of academic and judicial debate. For the purposes of the analysis here, however, *Skidmore* deference applies where the agency's interpretation does not have the "force of law."

¹²³ See, Rabin, *supra* note 5, at 1299.

¹²⁴ Shepherd, *supra* note 64, at 1678.

institutes, journalists, and academic scholars carefully scrutinized existing regulatory programs. They pointed to a series of studies indicating that in the fields ranging from health and safety to environmental protection, the costs produced by regulations had considerably outweighed their regulatory benefits.¹²⁵ They sought to reduce or remove state regulations, thus lift the burdens from heavily regulated industries. Though the results of deregulation turn out to be a mixed bag, it has a considerable impact on the shape of the administrative state.

1. The Deregulation Movement

In the post-WWII period of the United States, the price and entry regulation had become a dominant feature of the regulatory landscape, especially in those transportation-related industries.¹²⁶ For instance, both interstate railroads and commercial trucking were under the jurisdiction of the ICC. The Transportation Act of 1920 provided the ICC the authority to set minimum rates for railroads, and the Motor Carrier Act of 1935 authorized the ICC to decide the eligibility of companies as “motor carriers,” the services they could offer, and the rates they could charge. Similarly, the Civil Aeronautics Act of 1938 created a federal agency—the Civil Aeronautics Board (CAB)—to promote the health and well-being of the airline industry through rate and route certification. As a practical matter, price-and-entry regulation not only hindered competition in the marketplace but also caused considerable economic waste.¹²⁷

In response to the heavy-handed regulations, Congress took a series of legal initiatives to deregulate transportation. During the Nixon Administration, a comprehensive bill, developed by an interagency group consisting of, among others, the Council of Economic Advisors, White

¹²⁵ See Sidney Shapiro, Elizabeth Fisher and Wendy Wagner, *The Enlightenment of Administrative Law: Looking inside the Agency for Legitimacy*, 47 *Wake Forest L. Rev.* 463, 475 (2012).

¹²⁶ Rabin, *supra* note 5, at 1317.

¹²⁷ Stephen Breyer, *Regulation and Its Reform*, 197-260 (1982).

House Office of Consumer Affairs, Department of Justice, Department of Transportation, Department of Labor, came to Congress in 1971.¹²⁸ The proposed bill addressed both rail and truck transportation. After Nixon left office, the successive administration secured the passage of the Railroad Revitalization and Regulatory Reform Act of 1976. The Act signaled the change in regulatory policy toward a pro-competitive direction.

The congressional assault on price and entry regulation continued in the late 1970s. Congress enacted the Airline Deregulation Act of 1978 to promote competition in the airline industry. By encouraging new air carriers to enter the air transportation market, the Act broke up the regulatory cartel among four national airlines that had remained almost unchallenged in the previous four decades. It also the death warrant for the CAB, whose rate-setting authority was gradually eliminated, and remaining powers transferred to the Department of Transportation. Besides, Congress passed two pieces of legislation in 1980: the Motor Carrier Act and the Staggers Rail Act. The dominant theme of both Acts was to lessen barriers to entry in transport markets and promote more independent, competitive pricing among transport service providers. The efforts of Congress to deregulate industries were not limited to the field of transportation. The financial sector used its political sway in Congress and pressed for deregulation. Congress passed the Depository Institutions Deregulation and Monetary Control Act of 1980. The Act repealed the parts of the Glass–Steagall Act that set interest ceilings on time and saving deposits. The passage of the Gramm-Leach-Bliley Act (GLBA) further eliminated the prohibition among banking companies, securities companies, and insurance companies, and allowed these institutions to consolidate. Likewise, Congress passed the Energy Policy Act of 1992 to deregulate the electricity sector, which eliminated the barriers for wholesale electricity

¹²⁸ S. 2842, 92nd Congress (1971-1973).

competition. The congressional embrace of deregulation marked a pause after the steady growth of the administrative state in the past century.

In the meantime, the White House has played a role in the deregulation movement arguably more significant than that played by Congress. Starting from the Carter administration, the White House sought to relax regulations through cost-efficient measures at the implementation stage. For instance, the Carter administration formally introduced emissions trading as a supplemental concept of air pollution control. The concept of emissions trading was further expanded in the Reagan administration, which relaxed constraints that imposed heavy burdens on the industry and impeded the acceptance and use of emissions trading. The Reagan administration also appointed unsympathetic agency administrators and proposed significant budget cuts in regulatory programs, thus pursuing a *de facto* deregulation.

Another effort that featured the White House's deregulatory policy is the requirements of regulatory impact analysis. The Reagan administration issued two critical executive orders in his presidency: Executive Order 12291 in 1981 and Executive Order 12498. Executive Order 12291 imposed regulatory impact analysis requirements on all federal agencies, except for independent agencies, before implementing major policy changes, and transmit the results to the Director of the Office of Management and Budget (OMB).¹²⁹ By asking the agency to adopt a regulatory strategy whose benefits outweigh the costs, regulatory impact analysis would encourage comprehensive and analytical decision makings. Executive Order 12498, on the other hand, brought more agency action within the purview of the White House through the channel of the Office of Information and Regulatory Affairs (OIRA) located in the OMB.¹³⁰ It demanded all executive agencies to annually submit to the Director of the OMB each year "a statement of its

¹²⁹ Executive Order 12291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982).

¹³⁰ Aaron L. Nielson, Visualizing Change in Administrative Law, 49 Georgia L. Rev. 757, 783-84 (2015).

regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned.”¹³¹

Although the Clinton administration formally revoked Reagan’s executive orders and issued its own Executive Order 12866, the new order remained largely the same. Executive Order 12866 required that executive agencies should submit significant regulatory actions for OIRA review.¹³² Clinton's order was left in place during the Bush administration, then reaffirmed and amplified by President Obama in Executive Order 13563. Under Executive Order 13563, the agency should coordinate its regulatory activities and consider regulatory approaches that reduce the burden of regulation while maintaining flexibility and freedom of choice for the public.¹³³ By reinforcing its control of the over major regulatory proposals and periodically reviewing existing regulations, the White House expanded the scope of deregulation dramatically.

The judicial branch also sought to curtail agency discretion in the deregulation movement. As many agencies intended to deregulate, it was often the revocation of pre-existing regulations that came before the courts. In *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, the Supreme Court confronted the rescission of a passive restraint regulation adopted by the National Highway Traffic Safety Administration (NHTSA). The NHTSA’s repeal of the regulation partly resulted from a change of administration. Right after Ronald Reagan became the President and

¹³¹ Executive Order 12498, 3 C.F.R. 323 (1985).

¹³² Executive Order 12866, 58 FR 51735 (1993). A “significant regulatory action” refers to “any regulatory action that is likely to result in a rule that may:

- (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

¹³³ 76 FR 3821 (2011).

appointed a new secretary of the Department of Transportation, the NHTSA revoked the passive restraint requirement of Standard 208, adopted in the Carter administration. The Court asserted that though it might be easier to justify a deregulatory action, since “the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard,” deregulation did not “alter the standard of judicial review established by law.”¹³⁴ Finding that the NHTSA’s explanation failed to survive the “arbitrary and capricious” standard, it remanded the new regulation to the agency for further consideration.

The overturn of the NHTSA’s rescission of the prior regulation in *State Farm* did not indicate that the Supreme Court objected to the deregulation movement. On the one hand, the hard-look doctrine that the Court invoked in *State Farm* constitutes one of the major constraints on agency discretion.¹³⁵ Embracing the *Overton Park’s* decision, the Court imposed on agencies additional procedural burdens to demonstrate the reasons for their action. An agency should “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹³⁶ By requiring the agency to show the connection between the congressional mandate and the reasonableness of the regulation, the hard look review allows a reviewing court to test the substantive rationality of the regulation. The process of reasoning would not only enhance the legitimacy of the agency, but also increase the likelihood of wise policies that further statutory objective.¹³⁷

¹³⁴ 463 U.S. 29, 42 (1983).

¹³⁵ See, Matthew C. Stephenson, A Costly Signaling Theory of Hard Look Review, 58 Admin. L. Rev. 753, 764-65 (2006).

¹³⁶ Id. at 43 (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)).

¹³⁷ Alfred C. Aman, Administrative Law in A Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency, 73 Cornell L. Rev. 1101, 1144 (1992). However, courts don’t always invoke “hard look” review. In fact, their choice of hard look review often signals whether a particular agency action will survive, which is highly variable and unpredictable.

On the other hand, four justices recognized the political justification for deregulation in their concurring opinion. They acknowledged that the election of a new President of a different political party had led to the NHTSA's changed view of the standard. "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."¹³⁸

The deregulation movement signifies a divert in regulatory policies from the New Deal. The New Deal regulatory model, featured by hierarchy and command and control, sought to consolidate formerly dispersed powers into the newly created agencies with expertise. By contrast, the nation became suspicious of overregulation in the 1970s, and considerably rolled back regulations as a response. It has improved the efficiency of regulations and transformed the role of government. The impact of deregulation on administrative law is profound. Arguably, there has been hardly a significant structural change in administrative law in the past four decades ago.

2. Regulatory Reform

The deregulatory initiatives have fueled a parallel development: regulatory reform. There is a discrepancy between the capacities of the regulatory state and the growth of social demands. As Daniel Fiorino once stated, where society demands flexibility and dynamism, the state offers bureaucracy and rules. Where society requires legal instruments that are almost self-implementing, the state builds an elaborate

¹³⁸ *State Farm*, 463 U.S. at 59.

oversight apparatus. While societies need a legal system that induces self-reflection toward “sustainable” behavior, the state maintains a legal strategy of forcing desired behavior from outside the firm, through threats of exposure and punishment.¹³⁹

The complexity of modern society requires innovative approaches to regulation. At both federal and state levels, administrative agencies are reinventing regulation and increasingly relying upon non-coercive regulatory strategies to replace traditional top-down rulemaking and enforcement.

Commentators associate the regulatory reinvention with different concepts, including “responsive regulation,”¹⁴⁰ “regulatory pluralism,”¹⁴¹ “collaborative governance,”¹⁴² and “empowered participatory governance.”¹⁴³

The emerging forms of regulation are different from the traditional regulatory model in several ways. To begin with, comparing to traditional regulations, regulatory reform encourages the participation of non-governmental individuals and groups in administrative process. For the last several decades, a large range of policies has invited private actors to join different stages of regulation, ranging from legislation and rulemaking to implementation and enforcement. In many areas, the standard-setting authority has been delegated to private actors. For example, private producer groups could not only set prices that bind dissenting members of the industry, but also establish quotas and determine unfair labor practices.¹⁴⁴ The codes and standards established by private groups might later be recognized and incorporated by regulatory agencies

¹³⁹ Daniel J. Fiorino, Rethinking Environmental Regulation: Perspectives on Law and Governance, 23 Harv. Envtl. L. Rev. 441, 464 (1999).

¹⁴⁰ Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992); John Braithwaite, Restorative Justice & Responsive Regulation (2002).

¹⁴¹ Neil Gunningham & Darren Sinclair, Regulatory Pluralism: Designing Policy Mixes for Environmental Protection, 21 Law & Pol’y 49 (1999).

¹⁴² See, Freeman, *supra* note 118.

¹⁴³ Deepening Democracy: Institutional Innovations in Empowered Participatory Governance (Archon Fung & Erik Olin Wright ed., 2003).

¹⁴⁴ See Jody Freeman, Private Parties, Public Functions and the New Administrative Law, 52 Admin. L. Rev. 813, 826 (2000).

like the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration, the Federal Aviation Administration, etc.

Private actors also participate in the stage of implementation. The most common example of participation is that agencies outsource to nongovernmental actors the responsibility to provide social services through contracts. In the United States, many infrastructures and services funded by government, such as road construction and building maintenance, have been provided by nongovernmental entities. Similarly, non-profit organizations as well as for-profit firms deliver the bulk of social services from health care to education. In addition, private actors even extend their participation to some areas that used to be exclusive to government. Since the 1990s, several states have legalized the contracting out of prison labor to private companies.¹⁴⁵ Public policies also encourage private individuals and groups to act like private attorney generals and to promote the achievement of regulatory goals.

Private participation in administrative process challenges the assumption of traditional regulation. The traditional regulation relies heavily on expertise of administrative officers. “we are singularly in need . . . of the deliberateness and truthfulness of really scientific expertness.”¹⁴⁶ By contrast, regulatory reform diversifies the types of expertise by including non-governmental individuals and groups in the decision-making process. Compared to regulatory agencies, private entities possess an enormous information advantage. They can provide to agencies information about their current performance via-a-vis regulatory requirements and their potential improvement. The information provided by private actors serves as the foundation of an agency’s decision-making. Since agencies often lack enough resources to obtain the information

¹⁴⁵ See, Jody Freeman, *Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 627 (2000).

¹⁴⁶ James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 45 (1978) (quoting Note, *The Democratic Faith of Felix Frankfurter*, 25 Stan. L. Rev. 420, 433 (1973)).

by themselves, their regulatory programs are unlike to succeed without the cooperation of their counterparts in private sectors.

As a growing number of private actors join the regulatory process, it has a profound impact on other aspects of emerging regulatory strategies. Under the traditional regulatory model, the regulated are the objects of the regulation, subject to the command and control of the regulators. Their choice is limited to either comply or defy regulations imposed on them. But regulatory reform attempts to create a relatively collaborative atmosphere. The commitment to collaboration is a natural consequence of the inclusive structure of administrative process. With the increased engagement of non-governmental actors, regulation becomes a shared problem-solving process rather than an ordering activity in a hierarchy.¹⁴⁷ In this process, non-governmental actors bear the responsibility of achieving regulatory goals as regulatory agencies do.

One example of collaboration between public and private actors is regulatory negotiation (reg-neg). The idea of reg-neg can be traced back to 1982, when Philip Harter published his article *Negotiating Regulations: A Cure for Malaise*.¹⁴⁸ Harter's articles advocated for the adoption of the reg-neg process. The essence of the reg-neg is a consensus-based process. It is usually convened by a regulatory agency and enables stakeholders to negotiate the substance of a rule. Regulatory agencies have intensively employed negotiated rule makings since 1982. After a decade of experimentation, Congress institutionalized the process by enacting the Negotiated Rulemaking Act (NRA) in 1990.¹⁴⁹ Under the NRA, the role of the agency and that of stakeholders are equal, since they enjoy "the same rights and responsibilities as other

¹⁴⁷ Freeman, *supra* note 118, at 28-30.

¹⁴⁸ Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

¹⁴⁹ 5 U.S.C. §§ 561-570 (1994).

members”¹⁵⁰ The reg-neg process facilitates information sharing among its participants, who will collaboratively reach a decision.

The collaborative approach is also embodied in the EPA's Project XL (Excellence and Leadership). The Project XL attempts to directly involve stakeholders at implementation stage of regulatory process. A firm could negotiate an agreement in which it makes detailed commitments of "superior" environmental performance in exchange for more unified performance. Once the agency approves XL projects proposed by individual firm, the firm convenes a stakeholder process to negotiate a Final Project Agreement. The purpose of Project XL is to give firms some flexibility in satisfying traditional regulatory requirements, providing they equal or exceed applicable standards.¹⁵¹

In addition to collaboration, regulatory reform seeks to introduce flexibility into regulatory activities. Flexibility first requires the variation of regulatory strategies employed by the regulator, depending on the circumstance. In *Responsive Regulation: Transcending the Deregulation Debate*, Ian Ayres and John Braithwaite argued that the deterrence options at a regulator's disposal fell into the "enforcement pyramid," which includes persuasion, civil penalty, criminal penalty, etc.¹⁵² As one escalates up the pyramid, the severity of sanctions increases. The regulator's choice of sanction should be responsive to the seriousness of the offense, and escalation of sanction only happen when the subsidiary option was unable to secure compliance. Both authors further pointed out that a regulatory agency should possess a number of options in its regulatory toolbox.¹⁵³ The "one-size-fits-all" approach favored by the traditional regulatory model would result in undesirable outcome. The agency with only one

¹⁵⁰ Id. § 566(b).

¹⁵¹ Freeman, *supra* note 144, at 837.

¹⁵² Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 35 (1992).

¹⁵³ Id. at 36.

sanction would be unable to deliver a punishment payoff, because it could use the sanction when the sanction was politically or legally unacceptable in a certain case. In the end, Ayres and Braithwaite recommended that regulatory agencies should act like “benign big guns” which had enormous powers but rarely used them.

Flexibility also implies that regulatory strategies should be able to adapt to the changing conditions. One critique of the traditional regulation is its rigidity and lack of fallibility.

“[M]ost of the classic complaints about public bureaucracies are really criticisms of agencies for being too legalistic in their strict adherence to the statute, . . .”¹⁵⁴ Such a regime might be workable in an environment where everything is clear and predictable. However, the real world is fast-changing and full of uncertainty and heterogeneity, which requires that regulatory agency should constantly update their strategies. New forms of regulation attempt to incorporate learning process into regulatory activities. Since private firms are in a better position in terms of information, drawing them into areas previously occupied by government would “stimulate new knowledge and infrastructure.”¹⁵⁵ The learning process transforms the business of regulatory agencies from decision making to “regulatory research and development.”¹⁵⁶ By regularly engaging with monitoring, evaluation, and revision, the agency is able to keep its regulation up to date.

The regulatory reform occurred in the United States echoes the global trend. In the 1980s, the United Kingdom was undergoing a New Public Management (NPM) movement under a conservative government led by Margaret Thatcher. Among other things, NPM aimed to

¹⁵⁴ Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 *Cardozo L. Rev.* 775, 790 (1999).

¹⁵⁵ Martha Minow, *Public and Private Partnerships: Accounting for the New Religion* 116 *Harv. L. Rev.* 1229, 1245 (2003).

¹⁵⁶ Freeman, *supra* note 118, at 31.

transform governmental institutions by shifting from bureaucratic administration to business-like professional management. It has improved the efficiency of the public service by adopting private sector management models. Similar reforms of regulation have taken place in other countries as well. The emerging forms of regulatory strategies transcend the traditional regulatory model and poses new challenges to the existing legal system.

Conclusion

A recurring theme emerged from the history of the administrative state is that politics motivates the reform attempts. Since the enactment of the Interstate Commerce Act, regulatory politics had consistently exhibited a tension between interests opting for a policing model of regulation and those seeking to legitimate private arrangements designed to exercise control over price and access to markets.¹⁵⁷ In administrative law, the advocates for the policing model intends to empower agencies, while the latter seeks to reduce agency discretion. The tension between discretion-enhancing and discretion-constraining, after a compromise of a century and more, “has produced specific elements enabling direction and specific safeguards constraining discretion.”¹⁵⁸ As new social dynamics emerge or old dynamics resurrect, political pressure is put on administrative law’s structure and causes the rise and fall of the administrative state. It is in this context that the FTC’s regulatory approach to information privacy should be assessed.

¹⁵⁷ Rabin, *supra* note 5, at 1316.

¹⁵⁸ Nielson, *supra* note 130, at 794.

CHAPTER 4 CONSUMER PROTECTION AT FEDERAL TRADE COMMISSION

The Federal Trade Commission's (FTC) role as a consumer protection agency is the key to understanding its regulation of information privacy. As the chief consumer protection agency in the United States, the FTC is at the vanguard of some most important challenges facing America in the twenty-first century. Since its inception in 1914, the FTC has focused on print chemical products, on direct selling, on motion pictures, and other products. With the emergence of radio and later televisions, the FTC began to police advertising on the airwaves and broadcasters. Similarly, with the growth and prevalence of the Internet, protecting consumers in e-commerce has become the FTC's next mission. For the FTC, consumer protection is a major activity that is as important as its anti-competitive function.

Consumer activism, in turn, has influenced the birth and growth of the FTC. Consumer activism emerged in the post-Civil War period as a response to the dramatic changes in production, distribution, and marketing of products. In the twentieth century, American society witnessed three waves of consumer movements,¹ and every wave played a critical role in shaping the Commission. Amid the first wave of consumer movement between 1900 and 1915, Congress created the FTC for the sake of protecting consumers from monopolies, but the Commission lacked an explicit consumer protection power. It was not until the second wave of consumer movement reached its peak in the 1930s that Congress formally conferred to the FTC the consumer protection mission. The modern FTC was largely shaped by the third wave of consumer movement. After a decade's revitalization, the FTC entered a period of aggressive prosecutions and sanctions in the early 1970s, which led to severe backlashes from the public

¹ See, e.g., Robert N. Mayer, *The Consumer Movement: Guardians of the Marketplace*, Twayne Publish (1989).

and Congress. With its resources cut in half and its authority strictly constrained, the FTC started a new approach to consumer protection in the next decade, which laid the groundwork for it to regulate the digital flow of personal information today. An examination of the history of consumer protection at the FTC will provide insight lessons for the analysis of the current privacy regulation embarked by the FTC.

I. From Trust Buster to Protector of Consumers

As noted in the previous Chapter, the FTC opened its door for business amid the political sentiment against bigness in the marketplace. The initial motivation for creating the FTC was the need to enforce and clarify in specific terms the prohibition under the Sherman Antitrust Act. The FTC Act of 1914 charged the Commission with the responsibility to fight monopolies and to bring civil lawsuits against violators. It could only indirectly protect consumer through the regulation of competition. The Supreme Court later affirmed this point in *FTC v. Raladam*.² It was not until the passage of the Wheeler-Lea Act in 1938 that Congress formally conferred to the FTC the authority of consumer protection.³ Since then, the FTC has become an indispensable force in safeguarding consumer interest.

1. Protecting Consumers by Regulating Competitors

The turn of the twentieth century saw the emergence of the first organized consumer movement in the United States. During the 1890s, consumers leagues were formed in several states, and then at the national level. Consumer activists paid considerable attention to food adulteration, where the absence of laws left the public unprotected from dangerous additives. Their request for

² *FTC v. Raladam*, 283 U.S. 643 (1931).

³ Pub. L. 75-447, 52 Stat. 111.

additional regulations met strong resistance in Congress from groups representing the interests of business. The standstill persisted until Upton Sinclair's well-known novel, *The Jungle*, came out in 1906. The novel uncovered the unethical and unhealthy conditions in the meatpacking industry. Meat contaminated in this process was the sold to the consumers. Although Sinclair's call for labor reform fell largely on deaf ears, his plea for harsher food regulations won extensive support.⁴ In the wake of Sinclair's book, legislation on food safety was rushed through Congress,⁵ resulting in the enactment of both the Pure Food and Drug Act and the Meat Inspection Act in 1906.

In addition to the concern for the safety of food and drugs, the early consumer movement placed a substantial weight on containing monopolies in the market. The unprecedented business growth challenged the classical assumption that business efficiency was compatible with competition and fair distribution. Many people worried that big businesses would charge monopolistic prices to defraud consumers. Theodore Roosevelt's Administration secured the Bureau of Corporations, an investigatory agency within the then Department of Commerce and Labor. The Bureau of Corporations was delegated the power to document the industry, especially monopolistic practices, and make recommendations. The Bureau of Corporation played a role against the trust problem in the first decade of the twentieth century. Its report led to the successful break up of Standard Oil.

The catalyst for the creation the FTC was Supreme Court's decision in *Standard Oil v. United States* in 1911.⁶ In *Standard Oil*, the Supreme Court announced a rule of reason in construing the

⁴ Inger Stole, History of Consumer Movements, in *The Wiley Blackwell Encyclopedia of Consumption and Consumer Studies*, 1 (Daniel Thomas Cook & J. Michael Ryan eds, 2015). As wrote by Upton Sinclair, "I aimed at the public's heart, and . . . hit it in the stomach."

⁵ Tim Lang & Yiannis Gabriel, A Brief History of Consumer Activism, in *The Ethical Consumer* 44 (Rob Harrison, Terry Newholm & Deirdre Shaw eds, 2005).

⁶ Chris J. Hoofnagle, *Federal Trade Commission Privacy Law and Policy*, 6 (2016).

Sherman Act. Under the rule of reason, the government could only prohibit activities that unreasonably restrain trade, and it was up to the courts to determine which practices constituted unreasonable restraints of trade proscribed by the Sherman Act. The rule of reason provoked ambiguities in implementing the Sherman Act. It became debatable to what extent a business had grown through efficiencies instead of unfair competition, and how government could protect consumers and competitors in cases where businesses were too big and undermined the competition.⁷ Confronting with these questions, the Bureau of Corporations' investigation and publicity functions became inadequate, calling for a more powerful regulatory body.

The need to enforce the antitrust laws after *Standard Oil* led to the enactment of the FTC Act⁸ and the Clayton Act,⁹ both of which outlawed trade practices that would limit or eliminate competition to the detriment of investors, consumers, and the free market in general. In addition, Congress created a new regulatory agency under the FTC Act to halt trade practices condemned by the Sherman Act and the Clayton Act, as well as unfair practices at the common law.¹⁰ The FTC was given the power to investigate violations of laws, give reports from corporations, and deter unfair trade practices.¹¹

Despite the impact of the consumer movement on the passage of the FTC Act, the consumer protection authority of the newly created agency was restricted. The Act gave the FTC the jurisdiction to regulate a vast range of trade practices, but only in cases where one business's action injured the interest of another. By explicitly prohibited "unfair methods of competition," Section 5 of the FTC Act assumed the existence of present or potential competitors that would be

⁷ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Antitrust L. J.* 1, 96 (2003).

⁸ Pub. L. 63-203, 38 Stat. 717, enacted September 26, 1914, codified at 15 U.S.C. §§ 45.

⁹ Pub. L. 63-212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

¹⁰ The FTC Act, *supra* note 8, § 1

¹¹ *Id.* §§ 5-6.

affected by unfair trade practices. By contrast, the text did not concern the consuming public. Consequently, the Commission's consumer protection function could only be achieved in an indirect manner: it protected the consumer through the protection of the competitor. Were no competitors injured, the FTC lacked the authority to regulate unfair methods of trade practice on consumer's behalf, even if the latter suffered from the practice.

For example, the restriction on the FTC's consumer protection authority was evident in *FTC v. Raladam Co.*¹² The respondent in *Raladam* was a manufacturer, which advertised a preparation as an “obesity cure” that was the result of scientific research, knowledge, and accuracy, and was safe and effective. However, one ingredient contained in the preparation could impair one's health if taken without medical advice. The FTC charged that the respondent's advertisements misled and deceived the purchasing public into the belief that the preparation is safe, effective, dependable, and without danger of harmful results. Thus, the FTC ordered the respondent to cease from representing its “obesity cure” as a scientific method of treating obesity, unless its representation was accompanied by the statement that it could not be taken safely except under medical direction.

The question before the Supreme Court was whether the FTC acted beyond its authority. The prerequisite for the FTC to issue a complaint is to decide “whether there is reason to believe that a given person, partnership, or corporation has been or is using any unfair method of competition in commerce.”¹³ The original text of Section 5 of the FTC Act, as construed by the Court, set out a three-prong test. To justify the cease and desist order was legitimate, the FTC should prove “(1) that the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods

¹² 283 U.S. 643 (1931).

¹³ *Id.* at 649.

appears to be in the interest of the public.”¹⁴ While the Court recognized that the methods used by Raladam Company to advertise its preparation were unfair, and that these methods could potentially cause harm to the public, the legitimacy of the FTC's cease and desist order nonetheless depended upon whether the respondent's misrepresentation interfered with competition in commerce.

After reviewing the legislative history of the FTC Act, the Court declared that the primary goal of the prohibition against unfair competition was to protect the public from “the evils likely to result from the destruction of competition or the restriction of it in a substantial degree.”¹⁵ By adopting the term “competition,” Section 5 concerned “present or potential competitors” whom unfair practices would affect, rather than the general public.¹⁶ Therefore, Congress did not intend to delegate to the FTC the general power to prevent every kind of unfair trade practices apart from their actual or potential effect on competitors. The Court further acknowledged that though Section 5 did not require the FTC to specify any particular competitors, the agency could not only assume the existence of competition and confer to itself the authority to police trade practices. Instead, the agency should show, either by proof or by inference, that there was a present or potential competition, which had been injured or threatened by the use of unfair trade practice.¹⁷ Finding that the FTC failed to prove that the advertisements at stake “substantially injured, or tended thus to injure, the business of any competitor or competitors generally,” the Court held that the FTC's exercise of authority was unlawful.

Practically speaking, the limitation placed by *Raladm* was mostly procedural, rather than substantive. Though a literal reading of the Supreme Court's holding would substantially curtail

¹⁴ Id. at 646.

¹⁵ Id. at 648.

¹⁶ Id. at 649.

¹⁷ Id. at 651.

the authority of the FTC, *Raladam* was the only case in the 1930s in which a Commission order was reversed on the ground of failing to show the existence of actual or potential competitors.¹⁸ Four years later, when another case involving an obesity cure came before the court, the Second Circuit upheld the FTC's order based on the finding that the petitioner's product was competing with other saline laxatives.¹⁹ By contrast, the principal result of *Raladam* was a waste of the FTC's resources. In spite that the fact of competition could be shown in almost every case, the FTC had to spend "considerable time and money . . . in many cases" to show evidence of competition.²⁰ As the exercise of the FTC's authority became procedurally burdensome, the *Raladam* limitation prevented the agency from effectively protect the consumers against false and misleading advertisements.

Though the Supreme Court overruled the FTC's cease and desist order in *Raladam*, it left the door open for the FTC to police unfair trade practices without showing the presence of legitimate competition. The Supreme Court acknowledged that the authority to delegate such powers to the agency was within the hand of Congress.²¹ It was not until the late 1930s that Congress took action to reverse the limitation by enacting the Wheeler-Lea amendments to the FTC Act, thus empowering the FTC to regulate trade practices and protect the public interest.

2. Empowering the FTC by the Wheeler-Lea Act

The first three decades of the twentieth century witnessed a rapid growth in advertisements.

However, advertisers tended to attract consumers to products with appealing images, rather than

¹⁸ The Federal Trade Commission Act of 1938, 39 Colum L. Rev. 259 262 (1939) (quoting hearings before Committee on Interstate and Foreign Commerce on H. R. 3143, 75th Cong., 1st Sess. 5 (1937)).

¹⁹ *E. Griffiths Hughes, Inc. v. Fed. Trade Comm.*, 77 F.2d 886 (2d Cir. 1935), cert. denied, 296 U.S. 617 (1935).

²⁰ H. R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937).

²¹ *Raladam*, *supra* note 12, 283 U. S. at 650 ("If broader powers be desirable, they must be conferred by Congress").

providing them facts and truthful information about the products. The proliferation of false advertisements caused physical damages and monetary losses to many people who relied on advertising misrepresentations. It was especially true in the field of food, drugs, and cosmetics. In a famous book written by Arthur Kallet and F.J. Schlink, *100,000,000 Guinea Pigs*, the authors argued that the manufacturers of foods, drugs, cosmetics, and alike used the Americans as guinea pigs in a giant experiment.

The false and misleading advertising acts quickly caught the attention of another wave of consumer movement in the 1930s. Unlike its predecessor in the Progressive Era that focused on improvements in food sanitation and worker's conditions, the 1930s consumer movement shifted its primary concern to citizen's rights in a commercialized society.²² The emerging consumer protection placed considerable emphasis on rights to information and labeling, as well as redress if something went wrong.²³ Pro-consumer organizations like Consumers Union and Consumers' Research revealed many instances of deceptive or misleading advertisements. They attempted to protect the public from false advertising by changing their buying habits.

In contrast to the grievances caused by false advertising, the legal remedies available to the consumer were few. There was only a handful of federal regulations on advertising. The Pure Food and Drug Act of 1906 outlawed the misbranding of food and drugs, but it did not mention advertising. As a result of the Supreme Court's decision in *Raladam*, the FTC was not permitted to police false advertisements on behalf of the consumer. Besides, common law remedies at the time were ineffective in deterring false advertisers. From the consumer's perspective, it was difficult for them to recover their loss of health or money through judicial proceedings. Even if

²² Inger L. Stole, Consumer Protection in Historical Perspective: Five Year Battle Over Federal Regulation of Advertising 1933 to 1938, 3 *Mass Communication & Society* 351, 354 (2000).

²³ See Tim Lang & Yiannis Gabriel A Brief History of Consumer Activism, in *The Ethical Consumer*, SAGE Publications (Rob Harrison, Terry Newholm & Deirdre Shaw, eds. 2005).

the consumer could prevail, the amount at stake, usually equaled the price of the goods, was so trivial to make the case economically reasonable. From a competitor's perspective, the common law of unfair competition was also unlikely to regulate false advertising, since only in a small number of cases would the courts find false advertising constituting unfair competition.²⁴

The tension between the rapid growth of modern advertising and the inadequacy of legal remedies put pressure on Congress to take further action. Soon after Franklin D. Roosevelt's inauguration in 1933, Senator Royal S. Copeland (Dem., NY) introduced a bill to amend the existing Pure Food and Drug Act. Strongly endorsed by Rexford G. Tugwell, the Assistant Secretary of Agriculture, Copeland's bill was also referred to as the Tugwell Bill (S. 1944, 1934).²⁵ The Tugwell bill not only proposed new legislation on labeling and mandatory grading, but also authorized the Food and Drug Administration (FDA) to prohibit false advertisements of foods, drugs, and cosmetics. Consumer advocates welcomed the Tugwell bill, but the bill met stiff resistance from the advertising industry. Both sides debated the key terms and scope of the proposed bill in and out of congressional hearings, which resulted in numerous rewriting and amendments to the bill.²⁶ Two years after its introduction, the Tugwell bill and its successors were unlikely to be passed any time soon.

The FTC, which had a long history of competing with the FDA in policing false advertising, joined this political debate in 1935 when Senator David I. Walsh (Dem., MA) introduced a new bill. Unlike the Tugwell bill, Walsh's bill would place the authority over advertising with the FTC and expand its jurisdiction. It diverted the discussion to whether the FDA or the FTC should

²⁴ Milton Handler, *False and Misleading Advertising*, 39 *Yale L.J.* 22, 34-42 (1929).

²⁵ S. 1944, 73d Cong., 1st Sess. (1934).

²⁶ Stole, *supra* note 22, at 355-61.

regulate false advertisements. In the following year, the FTC officially recommended the amendments to the original FTC Act to broaden its powers over advertising.

In 1937, Representative Clarence F. Lea (Dem., CA) introduced a bill to amend the FTC Act of 1914. The new initiative would empower the FTC to regulate all "unfair or deceptive acts or practices" for the sake of the consuming public. In the meantime, the Senate passed the Wheeler bill, a companion bill to the Lea bill, as S. 1077. When S. 1077 was sent to the House Interstate and Foreign Commerce Committee for review. Fearing that the House would not pass S. 1077, Representative Lea, the chair of the committee, substituted the text of the Wheeler bill with that of the Lea bill while kept the title. The new S. 1077 was now referred to as the Wheeler-Lea bill. The Wheeler-Lea bill was then sent to the Senate Committee on Interstate Commerce chaired by Senator Wheeler, rather than the Senate Committee on Commerce chaired by Senator Copeland. This process facilitated the passage of the legislation in 1938.²⁷

The Wheeler-Lea Act strengthened the FTC in several ways. To begin with, the Wheeler-Lea Act shifted the focus from inquiry to the competitors to that to the consumers. The Act added a clause to Section 5 of the FTC Act, stating that "unfair or deceptive acts or practices in commerce are hereby declared unlawful."²⁸ By proscribing "unfair or deceptive acts or practices" in addition to "unfair methods of competition," not only did it remove the *Raladam* limitation that required a finding of injury to competitors, but crystalized the FTC's dual mission of anti-trust and consumer protection. Since its passage, the FTC could protect the consumer against unfair and deceptive acts without proving the involvement in commercial competition. It allowed the FTC to address the primary concern of the second wave of consumer protection, which was

²⁷ Pub. No. 447, 75th Cong., 3d Sess. (March 21, 1938).

²⁸ Fed. Trade Comm. Act, as amended by Public No. 447, 75th Cong., March 12, 1938, §3, 15 U. S. C. A. § 45 (Supp. 1938).

unfair and deceptive acts in the exploitation and sale of foods, drugs, diagnostic and therapeutic devices, as well as cosmetics.²⁹

Furthermore, the Wheeler-Lea Act added injunctions to the FTC's regulatory toolbox. Before the Wheeler-Lea Act, the FTC could only issue cease and desist orders to prohibit unfair competition. There was a considerable lag between the issuance of a complaint and the cease-and-desist order. An early study of the FTC demonstrated that the average elapsed time was thirteen months.³⁰ The significant gap was the outcome of the rigid procedure articulated in the original FTC Act. The FTC should offer hearings at least thirty days after issuing a formal complaint, then decide whether there is an unfair method of competition based on the facts that originated from the evidence received in the hearings. Upon finding the existence of an unfair method of competition the Commission could issue its order to cease and desist. Further delay would occur if the person against whom the order was directed sought judicial review. During all this time, the advertiser was free to continue his misrepresentation without being punished.³¹ By introducing injunctive relief, the Wheeler-Lea Act resolved the procedural defect left by the original FTC Act. The Wheeler-Lea Act provided that if the FTC reasonably believed that any person was disseminating or was about to spread a false advertisement about food, drugs, devices, or cosmetics, the Commission could act in the interest of the public and obtain a temporary injunction from a district court before issuing a complaint.³² The injunction would enjoin the dissemination of false advertisements and cause additional losses to the consumer.

²⁹ In the field of foods, drugs, devices and cosmetics, the FTC shared jurisdiction with the FDA. The FTC had the authority to police misleading advertising, while the FDA would regulate the labeling of these product. In 1971, the FTC and FDA further developed a memorandum of understanding. The memorandum provides that the FTC is responsible for the advertising of foods, cosmetics, and medical devices, and the FDA is responsible for the advertising of prescription drugs, as well as the labeling of food, drugs, and cosmetics.

³⁰ Gerard C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure*, 89 (1924).

³¹ *Id.* at 78.

³² Fed. Trade Comm. Act, as amended by Public No. 447, 75th Cong., March 12, 1938, §12(a), 15 U.S.C.A. §52(a) (Supp. 1938).

Finally, the Wheeler-Lea Act made the cease-and-desist orders more effective in regulating trade practices like false advertising. Under the FTC Act of 1914, the FTC's cease and desist orders were weak because the Commission lacked the authority to collect penalties for any violation of the orders. Accordingly, businesses could disregard the Commission's orders and still use false or misleading representation without being punished. A study indicated that one business continued its misrepresentation eight months after being ordered to desist from that act.³³ The violation of cease-and-desist orders was punishable only after a Circuit Court had affirmed the order, which would turn the violation of the Commission's order into a contempt of the court's order.

However, the business against whom the cease-and-desist order was directed could indefinitely delay such judicial review, due to the lack of limitation on his time to appeal. Therefore, one could ignore the Commission's cease and desist order until courts took further action.

Things were different under the Wheeler-Lea Act. To prevent the Commission's order from being indefinitely delayed, the Act provided a 60-day period for anyone against whom an order was directed to challenge the order in the Court of Appeals.³⁴ If the person failed to file a claim in time after the order being served, the order of the Commission became final.³⁵ Also, the Act allowed the FTC to impose civil penalties for violation of its cease-and-desist orders. Once a cease-and-desist order became final, any violation of it would result in a civil penalty not exceeding \$5,000 for each violation.³⁶ In these ways, the Wheeler-Lea Act put some teeth into the FTC's cease and desist orders.

³³ See 8783 Cong. Rec. 415 (1938), remarks of Mr. Coffee of Washington; 83 Cong. Rec. 399-400 (1938), remarks of Mr. Chapman.

³⁴ Fed. Trade Comm. Act, as amended by Public No. 447, 75th Cong., March 12, 1938, §5(c), 15 U.S.C.A. §45(c) (Supp. 1938).

³⁵ Id. §5(g) (1), 15 U.S.C.A. §45(g) (1) (Supp. 1938).

³⁶ Id. §5(l), 15 U.S.C.A. §45(l) (Supp. 1938) (the amount of civil penalty has been increased to no more than \$10,000 for each violation).

The impact of the Wheeler-Lea Act on the FTC was far-reaching. By shifting the focus on consumer injury, the Wheeler-Lea Act opened up a whole new area for FTC enforcement actions.³⁷ It freed the FTC from the burden of showing the harm incurred to present or potential competitors by unfair or deceptive acts and practices. Besides, in addition to issuing cease and desist orders, the FTC could impose penalties and seeking injunctions. The broad mandate in the Wheeler-Lea Act gave the FTC considerable flexibility to address emerging consumer protection problems in the upcoming decades.³⁸ Though promoting competition remained an essential function of the Commission, it has become a guardian of consumer interest since the passage of the Wheeler-Lea Act.

II. The Rise and Fall of the FTC and Consumerism

The third wave of consumer movement witnessed the rise and fall of the FTC's intervention in consumer protection between the 1960s and 1980s. The beginning of the third wave of consumer movement was marked by President John Kennedy's speech to Congress in 1962. Kennedy asked that four consumer rights be recognized, which include:

1. the right to safety, which requires that products should not cause any harm to consumers if the use is executed as prescribed;
2. the right to be informed, which asks business to provide consumers with enough information to make informed choices;
3. the right to choose, which protects consumers of a variety of options provided by different companies; and

³⁷ Stole, *supra* note 22, at 365.

³⁸ Hoofnagle, *supra* note 6, at 38.

4. the right to be heard, which guarantees the ability of consumers to voice complaints and concerns about a product.³⁹

Kennedy also called for stronger regulatory bodies and more ambitious strategies. In this environment of broad public support for greater consumer protection, the FTC had embarked on an activist consumer protection agenda and changed its regulatory strategy from case-by-case adjudication to rulemaking. Yet the Commission's move toward aggressive regulations invoked large public backlash in the late 1970s. Congress enacted new law to contain the discretion of the FTC, and the FTC, under the leadership of James Miller, retreated from aggressive rulemaking and undertook substantial regulatory reforms.

1. The Revitalization of the FTC

Commentators in the 1960s often referred to the FTC as the “little old lady of Pennsylvania Avenue” who tended to be asleep at the wheel when it came to consumer protection.⁴⁰ For example, the seminal Nader report accused FTC of being ineffective in regulating the market. In 1969, a group of law students led by Ralph Nader, later known as “Nader's Raiders,” unleashed a bitter report criticizing the FTC's enforcement actions. It described the Commission as “a self-parody of bureaucracy, fat with cronyism, . . . manipulated by the agents of commercial predators, impervious to governmental and citizen monitoring.”⁴¹ According to the report, the FTC systematically failed to detect violations, to establish clear priorities, to vigorously enforce

³⁹ 108 Cong. Rec. 4263 (1962).

⁴⁰ See Molly Niesen, *The Little Old Lady Has Teeth: The U.S. Federal Trade Commission and the Advertising Industry, 1970–1973*, *Advertising & Society Review* 12, (2012). Commissioner Lowell Mason first used the phrase “little old lady of Pennsylvania Avenue.” See, Lowell B. Mason, *A Funny Thing Happened on the Way to the Federal Trade Commission*, 1964 N.Y. State Bar Association Antitrust Symposium 1 (1964).

⁴¹ Edward F. Cox, Robert C. Fellmeth and John E. Schulz, *The Nader Report on the Federal Trade Commission*, vii (1969).

the laws, and to seek sufficient statutory authority to make its work effective.⁴² At the end, the Nader Report made several recommendations, including a re-staffing of the FTC and the resignation of Chairman Dixon.

The Nader Report reached many sympathetic ears on Capitol Hill. Not only did Congress initiated hearings on the FTC, but also recommended that President Nixon should let the American Bar Association evaluate the performance of the Commission. Upon the request of Nixon, the ABA Commission, chaired by Miles W. Kirkpatrick and Robert Pitofsky, was created. The report of the ABA Commission reached a similar conclusion with the *Nader* report: the FTC had focused on trivia, lacked clear direction, and been inefficient, mismanaged and inadequately staffed. Although many ABA members might have preferred to completely abolish the FTC, the ABA report suggested otherwise. It encouraged the President to appoint an “outstanding chairman” with “sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the business community that tend to cripple effective performance of the FTC.”⁴³

Although the Nader and ABA reports were soon followed by a reorganization of the FTC, the roots of the reorganization could be traced to the early 1960s. As early as 1960, James Landis, a former commissioner of the FTC and the Chairman of the SEC, submitted a report to the president-elect Kennedy.⁴⁴ The Landis report analyzed the status of the FTC at the end of the Eisenhower administration and proposed an internal reorganization of regulatory agencies, including the FTC, that would expand the Chairman’s authority to all administrative matters

⁴² Id. at 39.

⁴³ John Osborne, *The Nixon Watch: Reform at the FTC*, *The New Republic*, 14 (October 2, 1971).

⁴⁴ James M. Landis, *Report on Regulatory Agencies to the President-Elect* (1960).

within the agency.⁴⁵ Following the Landis report, the Reorganization Plan No. 4 of 1961 came out and was soon implemented by the FTC.

In 1970, President Nixon appointed Caspar Weinberger as the chair of the FTC, whose mission was “go in there and clean it up.”⁴⁶ Under the leadership of Weinberger, the FTC cut off a half of the top-level staff and a third of the attorneys by, among others, eliminating positions or transferring functions to other government bodies.⁴⁷ In addition to a complete re-staffing, Weinberger’s reorganization plan included the creation of two new divisions: the Bureau of Competition and the Bureau of Consumer Protection, which replaced four old bureaus of the FTC.⁴⁸ The aim of creating the Bureaus of Competition and Consumer Protection was to speed up the operation of the FTC at the staff level. Weinberger also advocated for additional funds and authorities for the FTC. Despite Weinberger’s short tenure, the FTC became strengthened and increasingly caught on major headlines.

Besides internal reorganization, the FTC amended its General Procedures and Rules of Practice to permit the promulgation of trade regulation rules, only two months after President Kennedy’s speech.⁴⁹ The Commission’s sudden move of direction was influenced by Kennedy’s nominee, Commissioner Philip Elman. Prior to join the FTC, Elman was a former assistant to the Solicitor General at the Department of Justice and known for his active role in *Brown v. Board of Education*. At the FTC, he proposed several advances that increased the productivity and moved the Commission toward structural intervention. For example, Elman wanted the cigarette industry to be the first to be regulated by the Commission’s trade regulation rules, and his

⁴⁵ Id. at 96.

⁴⁶ Osborne, *supra* note 43.

⁴⁷ Hoofnagle, *supra* note 6, at 53.

⁴⁸ Fed. Trade Comm’n, Annual Report of the Federal Trade Commission, 1 (1970).

⁴⁹ 27 Fed. Reg. 4609 (1962).

extensive discussion of the FTC's authority was incorporated in the Commission's early trade regulation rule regarding cigarette advertising and labeling.

Occasionally, Congress expressly conferred upon the FTC specific statutory authority to make substantive rules, but the rules were only applicable to the trade practices within certain industries, like the labeling of textile and wool products. The amendment of the internal procedures allowed the FTC to promulgate substantive rules with the effect of law. The rules would be applied in subsequent adjudicative proceedings to resolve relevant issues. Compared to case-by-case enforcement actions, trade regulation rules help the FTC to reach a large range of trade practices with limited resources. The FTC took rulemaking as a preferable method to remedy consumer harms than individual cases. By the early 1970s, nearly two dozen of trade regulation rules promulgated by the FTC were in force.⁵⁰ In its rulemaking heyday, the FTC initiated 17 trade regulation rulemaking proceedings in a single year.⁵¹

Moreover, the FTC adopted another innovative tactic by invoking the unfairness doctrine under Section 5 of the FTC Act. Though the Wheeler-Lea Act permitted the FTC to halt both "unfair or deceptive acts or practices" and "unfair methods of competition," the FTC had only occasionally used its unfairness jurisdiction until the late-1960s. In 1968, the FTC found that Sperry & Hutchinson's contractual prohibition on the exchange for "trading stamps" among consumers constituted an unfair practice under Section 5. Sperry & Hutchinson challenged the FTC's decision for being *ultra vires*, and its argument prevailed in the appeal to the Fifth Circuit. When the case reached the Supreme Court, the Court agreed with the Fifth Circuit that the FTC's decision could not be sustained but found that the lower court erred in the construction of the

⁵⁰ See David Saul Guttman, The FTC's Newly Recognized Power to Issue Substantive Intra-Agency Rules – or – Why the Sleeping Beauty of Section 6(g) Was Awakened by Court Order, note 41, 5 Loyola Univ. Chicago L. J. 107, 119 (1974).

⁵¹ Fed. Trade Comm'n, Annual Report of the Federal Trade Commission, 1 (1976).

FTC's authority under Section 5 of the FTC Act.⁵² Relying on the legislative history and precedents, the Court found that to protect consumers as well as competitors, wide discretions were within the FTC in determining the definition of unfair practices. Unfair practices, on the other hand, were not limited to those with anticompetitive consequences or solely competitive behavior.⁵³ Therefore, the FTC did not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.⁵⁴

In addition, by quoting in a footnote the definition of unfairness that the FTC previously outlined in the cigarette rule, arguably the Court endorsed the FTC's unfairness standard. *S&H* marked the beginning of the FTC's unfairness doctrine. After *S&H*, the FTC could proscribe a business practice without showing explicit violation of existing antitrust law, and define "unfairness" and "public values" at its discretion.⁵⁵

Thus, the FTC shifted away its regulatory strategies from its long-standing "mailbag" approach.⁵⁶ The mailbag approach was the FTC's principal source of identifying violations, where the Commission reacted to complaints filed by consumers. However, consumers could not complain until they knew the violations of their rights. The FTC made many attempts to reach out to consumers, consumer groups and state and local consumer protection offices. Those attempts not only provide consumers with information and guidance, but also gave the Commission the first-hand knowledge about frauds that consumers concerned most.

⁵² *FTC v. Sperry & Hutchinson Trading Stamp Co.*, 405 U.S. 233 (1972).

⁵³ *Id.* at 244.

⁵⁴ *Id.* at 244.

⁵⁵ Timothy J. Muris, *Judicial Constraints*, in *The Federal Trade Commission since 1970*, 35 (Kenneth W. Clarkson and Timothy J. Muris eds., 1981).

⁵⁶ Mary Gardiner Jones, *The Federal Trade Commission in 1968: Times of Turmoil and Response*, 7 *Journal of Public Policy & Marketing* 1, 3 (1988).

The 1960s was the golden age for the FTC as it woke up from its long dormancy. A decade's revitalization strengthened the FTC and improved its regulatory strategies. The little old lady in the past finally had some teeth.⁵⁷ By the beginning of the 1970s, the FTC had become one of the most powerful regulatory bodies in the national capital, which was ready for being a vigorous consumer activist for the rest of the decade.

2. Controversies of the FTC's Intervention

The FTC had embarked on an activist consumer protection agenda throughout the 1970s. It specifically targeted the advertising industry and initiated a series of policy agendas. Relying on its tobacco case, the FTC ordered businesses to run corrective advertising as a remedy for false and misleading advertisements. ITT Continental Baking was the first company to agree to comply with the FTC's order for corrective advertising.⁵⁸ The order would require ITT Continental Baking to spend no less than 25 percent of its annual budget on running corrective advertisements in major national publications.⁵⁹ By the end of the 1970s, the FTC ordered Warner-Lambert and American Home Products, the manufacturers of Listerine and Anacin respectively, to spend millions of dollars for advertisements disclaiming their prior claims.

In the meantime, the FTC shifted the burden for proving the truth of a claim to advertisers. In the summer of 1971, the Bureau of Consumer Protection announced the plan to launch advertising substantiation. The new program would require advertisers to substantiate, that is, provide supporting evidence for, all claims that their advertisement conveyed to reasonable consumers.

⁵⁷ Stanley Cohen, Marketers who staved off old FTC now find the "little old lady" has teeth, *Advertising Age*, 47 (Dec 14, 1970).

⁵⁸ See, *ITT Continental Baking Co., Decision and Order* (FTC Docket No. 2-2015, Aug. 17, 1971) (the respondent agreed to devote "not less than 25 per cent of the expenditures . . . to advertising . . . that Profile [Bread] is not effective for weight reduction, contrary to possible interpretations of prior advertising").

⁵⁹ *Fed. Trade Comm'n, In the Matter of ITT Continental Baking Co., Inc* (1971).

Advertisers would have to collect scientific evidence to support their claims and make the evidence public if being questioned by the FTC. Though Chairman Kirkpatrick saw substantiation as “nothing radical or controversial,” it was among the FTC’s most controversial policies. Critics argued that the high cost associated with substantiation would make advertising more expensive, that the difficulty to substantiate some true claims would prevent those claims from being presented, and that substantiation would discourage information-rich marketing and compel advertisers to invest in low-information brand marketing.⁶⁰

As the FTC adopting an increasingly consumer activist approach, its regulations of advertising raised serious First Amendment concerns. The freedom of speech under the First Amendment was inapplicable to commercial speech, including advertisements, until the Supreme Court decided *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* in 1976.⁶¹ *Virginia Pharmacy* is a landmark case in commercial speech, for it extended the First Amendment protection to purely commercial speech.⁶² Following the *Virginia Pharmacy* decision, advertisers became more assertive about their First Amendment rights, both in public statements and in the courts.

Virginia Pharmacy weakened the soundness of the FTC’s advertising regulation. Companies like Warner Lambert soon asserted its First Amendment right and appealed the order to run corrective ads.⁶³ A couple of months later, the Third Circuit set aside an order against Beneficial Tax Corp, in which the FTC alleged its slogan “Instant Tax Refunds” was deceptive and misleading.⁶⁴ The court found that “there [was] no commercial speech exception to the First

⁶⁰ Hoofnagle, *supra* note 6, at 136-37.

⁶¹ *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁶² *Id.* at 762 (“that the advertiser's interest is a purely economic one . . . hardly disqualifies him from protection under the First Amendment”).

⁶³ *Warner-Lambert Co. v. Federal Trade Comm’n*, 562 F.2d 749 (D.C. Cir. 1977).

⁶⁴ *Beneficial Corp. v. Federal Trade Comm’n*, 542 F.2d 611, (3d Cir. 1976).

Amendment” after *Virginia Pharmacy*, and the remedy could “go no further . . . than is reasonably necessary to accomplish the remedial objective of preventing the violation.”⁶⁵

Commissioner Elman cautioned that to survive the strict scrutiny after *Virginia Pharmacy*, FTC actions should be “the least restrictive available.”⁶⁶ In its testimony to Congress, the FTC also admitted that *Virginia Pharmacy* would invalidate its trade regulation rules on drug price disclosures.⁶⁷

Furthermore, since the FTC’s work had been mostly adjudicative rather than legislative for half a century, its departure from case-by-case adjudication and reliance upon the substantive rulemaking authority in the 1970s provoked massive debates. National Petroleum Refiners Association challenged an FTC trade regulation rule concerning octane ratings and secured a stay of the rule in the district court.⁶⁸ On appeal, the D.C. Circuit reversed the ruling and upheld the FTC’s authority to prescribe trade regulation rules.⁶⁹

Following the *National Petroleum* decision, Congress enacted the Magnuson-Moss Warranty Act, which formally conferred to the FTC the rulemaking authority.⁷⁰ Meanwhile, the Magnuson-Moss Warranty Act formalized the process that the FTC had to follow when promulgating trade regulation rules. In addition to the notice-and-comment requirements defined in the APA, the FTC should engage in oral hearings, extensive public comments, and other procedures.⁷¹ The burden of the Magnuson-Moss procedures signaled Congress’s concern about the FTC’s exercise of the new legislative authority.

⁶⁵ Id. at 619.

⁶⁶ Mart T. O’Brien, Regulatory Update: The Next Battleground: Advertising versus the First Amendment, Food Product Development, 65 (1976).

⁶⁷ Prescription Drug Labeling and Price Advertising: Hearings on H.R. 882, H.R. 884, and All Identical Bills Before the Subcommittee on Consumer Protection and Finance, 94th Cong. 88, 14 (1976).

⁶⁸ *Nat’l Petroleum Refiners Ass’n v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972).

⁶⁹ *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

⁷⁰ Pub. L. 93-637, 88 Stat. 2183 §202 (1975).

⁷¹ See the next chapter for extensive discussion on the procedures defined in the Magnuson-Moss Warranty Act.

The straw that broke the FTC's back was the campaign against advertising to children. Since the 1960s, television advertisers had targeted children as an audience for commercials. Congress directed researchers to study the effects of television violence on children. Part of their findings revealed that children under eight had difficulty distinguishing programming from commercials and did not understand the persuasive intent of commercials.⁷² In 1973, the FTC brought together both advertising groups and consumer advocates to work with the FTC staff.⁷³ It aimed at developing a voluntary code for advertising to children that was enforceable by the FTC. However, as time passed by, the FTC felt that existing methods, including self-regulation and enforcement actions, were ineffective, and a new trade regulation rule might be necessary to regulate advertising directed to children.

In 1977, President Carter appointed Mike Pertschuk, a long-time consumer advocate, to chair the FTC. Chairman Pertschuk favored the use of the newly obtained rulemaking authority to regulate unfair advertising. At the time, there were three advocacy organizations, including Action for Children's Television, the Center for Science in the Public Interest, and Consumers Union of America, which petitioned the Commission to take action to restrict the television advertising of sugared products to kids. On February 28, 1978, the FTC voted unanimously to initiate a rulemaking proceeding to investigate all television advertising to children.⁷⁴ The Commission made it clear that advertising to children was unfair due to their inability to comprehend the persuasive intent of the advertising.⁷⁵ In its Notice of Proposed Rulemaking (NPR), the FTC invited comment on three areas:

⁷² Molly Niesen, *Crisis of Consumerism: Advertising, Activism, and the Battle over the U.S. Federal Trade Commission, 1969–1980*, 212 (quoting *Television and Growing Up: The Impact of Televised Violence*, report by the Surgeon General's Scientific Advisory Committee on Television and Social Behavior (1972)).

⁷³ Association Management Magazine, *The Aggressive New Chairman at FTC* (November 1973).

⁷⁴ Action for Children's Television, *Closing Act: A Report to the Lilly Endowment*, (1992).

⁷⁵ S.B. Foote and R.H. Mnookin, *The "Kid Vid" Crusade*, 61 *Public Interest* 90 (1980).

- (1) ban all television advertising for any product that is directed to, or seen by, audiences with a significant proportion of children too young to understand the selling purpose of advertising;
- (2) ban television advertising for food products posing the most serious dental health risks which is directed to, or seen by, audiences with a significant proportion of older children; and
- (3) require that television advertising for sugared food products not included in the ban, but directed to, or seen by, audiences with a significant proportion of older children, be balanced by nutritional or health disclosures funded by advertisers.⁷⁶

The FTC's rulemaking proposal, later known as the *KidVid crusade*, turned out to be a toxic regulatory venture. The NPR met strong opposition from the business community. The coalition of business interests hired the nation's largest public relations firm, Burston-Martseller, and started a campaign aimed at the FTC. For them, the FTC acted as the "National Nanny" who usurped individuals' ability to make decisions and "ma[de] parents less responsible, not more."⁷⁷ In addition to discrediting the FTC, businesses directly attacked its chairman. The three major advertising organizations filed a lawsuit against Pertschuk, charging him with prejudice against advertising to children. They successfully convinced the district judge Gerhard Gesell to disqualify Pertschuk from any FTC proceedings related to advertising to children. Though the district court's decision was later reversed, Pertschuk resigned from the KidVid rulemaking proceedings.

⁷⁶ Fed. Trade Comm'n, Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967; 17,968 (Apr. 27, 1978).

⁷⁷ The FTC as National Nanny, Washington Post, editorial, March 1, 1978.

Given the strong resistance from the businesses, the FTC's NPR resulted in hundreds of written comments and 6,000-page hearing transcripts.⁷⁸ It forced the FTC to finally abandon the rulemaking proceeding three years later, recognizing that rulemaking was not a "workable solution" at the time.⁷⁹ The termination of rulemaking was just one of many consequences of the failed KidVid crusade. What awaited the FTC was the backlash by Congress as well as a radical reformation.

3. Reaction by Congress

Businesses' efforts to discredit the FTC resulted in strong appeals to Congress. Congress reacted quickly to the public backlash by cutting off the FTC's funding. In June 1978, the House struck down the entire FTC budget on procedural grounds. At the same time, the Senate passed resolutions to reduce the FTC's funding by 25 percent. Ending regular funding left the FTC to "live hand to mouth on temporary appropriations."⁸⁰

As the Congress failed to renew its funding, the FTC's funding had officially run out on May 1, 1980. Attorney General Benjamin Civiletti invoked the Antideficiency Act, and Congress shut the FTC down. The FTC became the first federal agency in country that close its doors due to insufficient funds. On the next day, emergency funds from the State Department brought the FTC back in business, but the funds would expire again in 30 days.⁸¹

On May 21, Congress passed a three-year authorizations bill before the FTC's funding ran out. Prior to the passage, the House and Senate voted for their own bill, respectively. The House bill

⁷⁸ Susan Elliot et al., Fed. Trade Comm'n, FTC Final Staff Report and Recommendation 13 (Mar. 31, 1981).

⁷⁹ Id. at 2.

⁸⁰ Susan Bartlett Foote & Robert H. Mnookin, The "Kid Vid" Crusade, 61 *The Public Interest* 90, 93 (1980).

⁸¹ A.O. Sulzberger Jr., After Brief Shutdown, F.T.C. Gets More Funds: Temporary Funding Approved Long Ignored Act Enforced, *New York Times* (May 2, 1980).

would not only end the FTC's regulatory initiatives ranging from the funeral rules to on-going investigations against agricultural co-ops, but also allow either house to veto any future FTC rules. By contrast, the Senate bill contained a two-house veto provision, and would require the FTC to cease the children's advertising proceeding and investigation of insurance industry as well as private standard-setting organizations.⁸² The House and Senate reached the final bill as a compromise. On May 28, President Carter reluctantly signed the bill into law, which was ironically titled the FTC Improvements Act of 1980.⁸³

The FTC Improvement Act of 1980 strengthened congressional oversight on the FTC and restricted the Commission's authority in many ways. To begin with, the 1980 Act authorized the FTC's rules to be vetoed by both Houses of Congress. Before coming into effect, the Commission was required to submit its trade regulation rules for congressional review. During the 90-day review period, the House and Senate could pass a resolution and disapprove the rule. If a rule was vetoed, the FTC could revise the rule and resubmit it for another congressional review.⁸⁴ The Two-House veto provision ensured that both Houses would have an opportunity to vote on the FTC's trade regulation rules before they became effective.

Furthermore, the 1980 Act placed new procedural restraints on the FTC's rulemaking authority in addition to those procedures already required by the Magnuson-Moss Warranty Act. Congress requested the FTC to provide "an advance notice of proposed rulemaking" for public comment before initiating any future rulemaking proceeding. In addition, the Commission should submit any notice of proposed rulemaking to the Senate and House Commerce Committees thirty days in advance of its publication in the Federal Register.⁸⁵

⁸² Susan Bartlett Foote & Robert H. Mnookin, The "Kid Vid" Crusade, 61 *The Public Interest* 90, 93 (1980).

⁸³ The FTC Improvements Act, Pub. L. No. 96-252, 94 Stat. 374 (1980).

⁸⁴ *Id.* § 21.

⁸⁵ *Id.* § 8.

The 1980 Act also curtailed the FTC's authority in regulating advertising. In response to the KidVid crusade, not only did the Act suspend the FTC's rulemaking proceeding for advertising to children,⁸⁶ but also prohibited the FTC from regulating advertising on the ground of unfairness, which was the main rationale for banning children's television advertising. Accordingly, the FTC could only proscribe acts or practices that were deceptive unless Congress would remove the restriction.⁸⁷ Lastly, the FTC could not use its funding in the next 3 years to "initiat[e] any new rulemaking proceeding . . . prohibit[ing] or otherwise regulat[ing] any commercial advertising."⁸⁸

The 1980 Act marked "a turning point in the consumer rights movement."⁸⁹ It not only forced the FTC to drop the children's advertising initiative, but also halted the agency's regulatory renaissance since the 1960s. Three decades later, the FTC Improvement Act, as well as the KidVid crusade that led to it, still has a profound impact on the FTC, both practically and psychologically.

4. Reorientation at the Miller FTC

At the time Congress passed the FTC Improvement Act, Ronald Reagan was elected as the new president, who sought to roll back economic regulations and reduce the size of government. He used the FTC as an example of government out of control, which interfered too much with private enterprise.⁹⁰ In response, he made the FTC answerable to, and under the control of, himself. Reagan appointed James C. Miller III as Chairman to reflect the administration's non-

⁸⁶ Id. § 11.

⁸⁷ The original restriction on the FTC's authority to issue unfair advertising rule was limited to the duration of the authorization bill, which would expire on September 30, 1982, but the restriction had been continued through annual appropriations measures between 1982 and 1993.

⁸⁸ Id.

⁸⁹ Gary Cross, *An All-Consuming Century*, 64 (2000).

⁹⁰ Hoofnagle, *supra* note 6, at 31.

interventionist policies. Under the direction of Chairman Miller, the FTC was reformed in several ways.

On the theoretical level, Chairman Miller reoriented the FTC by advocating for an economic approach. Being the first and the only economist to head the FTC, Miller saw the FTC as “overly adversarial” to business interests.⁹¹ From a neoliberal view, an ordinary market would figure out the solution by itself because prices provide the best information to sellers on what to produce, and to buyers on what to buy. The market, for example, would wipe out of false claims made by advertisers without regulation. To make a case for government intervention, the perceived market failure should be supported by empirical evidence, instead of general feeling or common knowledge, which was often true in the previous administration of the FTC.⁹² Therefore, Miller felt that the FTC should spend its resources on strengthening market forces, rather than initiating costly regulations. The economically oriented approach improved the relationship between the Commission and business, but not consumers.

Additionally, Miller advocated for the adoption of the cost-benefit analysis in policymaking. The imperfection of the market does not justify government intervention, which could also be imperfect. Government intervention would only be in society’s best interest if the benefits would outweigh the costs. In his confirmation hearing, Miller claimed that the FTC should perform “a fairly substantial benefit-cost test” necessary before initiating investigations or rulemaking proceedings.⁹³ In the ensuing years, the FTC favored “good old-fashioned consumer flimflams” and abandoned the exotic theories of consumer protection that dominated the previous

⁹¹ Hearing before the Committee on Commerce, Science, and Transportation on Nominations of Dr. James C. Miller III, to Be Chairman, Fed. Trade Comm’n; and Dr. Robert G. Dederick, To Be Assistant Secretary of Commerce, 97 Cong. 19 (1981).

⁹² For example, in the Statement of Basis and Purpose of the Cooling-Off Rule, there was no quantitative evidence, but anecdotes and a law student note.

⁹³ Miller’s Hearing, *supra* note 91, at 5.

administration.⁹⁴ As the FTC shifted towards an economically oriented approach, the Miller years saw a decrease in the number of the Commission's caseloads.

In terms of the FTC's jurisdiction, the Miller administration recommended that Congress should revise its statutory mandate to include a definition of "unfairness" and "deception." In 1980, the FTC formally adopted the FTC Policy Statement on Unfairness with a unanimous vote by five commissioners. The Unfairness Statement was a response to the FTC's zealous application of the ill-defined unfairness doctrine in the preceding decades. Prior to the Unfairness Statement, the FTC articulated three factors for finding unfairness along with the promulgation of the cigarette rule in 1964. To be considered as unfair, an act should offend public policy, be "immoral, unethical, oppressive, or unscrupulous," and cause "substantial injury to consumers."⁹⁵ In comparison, the three-prong test in the Unfairness Statement focused on substantial injury: the injury to consumers "must be substantial; it must not be outweighed by countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."⁹⁶ In addition, the Unfairness Statement rejected the "immoral, unscrupulous, or unethical" test as an independent basis for unfairness, and treated public policy as evidence to be taken into account in balancing costs and benefits.⁹⁷

Two years after the adoption of the Unfairness Statement, the FTC, in a letter to the Senate Committee on Commerce, Science and Transportation, suggested a statutory definition of unfair acts or practices consistent with the Unfairness Statement. At the same time, Miller personally advocated for a statutory clarification of unfairness in his testimony and claimed that were

⁹⁴ Fred S. McChesney, *Consumer Protection and James Miller at the Federal Trade Commission*, in *The Regulatory Revolution at the FTC*, 74 (James Campbell Cooper ed., 2013).

⁹⁵ Fed. Trade Comm'n, *Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (1964).

⁹⁶ *Unfairness Policy Statement*, 104 Fed. Trade Comm'n. at 1073.

⁹⁷ *Id.* at 1075-76.

Congress to fail to define unfairness, it should eliminate the FTC's unfairness jurisdiction over commercial speech all together.⁹⁸ In response, Congress prohibited the FTC from issuing rules to regulate advertising under its unfairness jurisdiction, but rejected the proposal to codify the definition of unfairness as recommended by the FTC.⁹⁹ It was not until 1994 that Congress finally codified the limits on the FTC's unfairness jurisdiction.¹⁰⁰

In addition to a statutory clarification of unfairness, the Miller administration also urged Congress to define the term "deception" under Section 5 of the FTC Act. Testifying on behalf of himself, Miller suggested that by introducing materiality as an element of deception, any finding of deception should be backed by proof of actual harms to consumers.¹⁰¹ He further included reasonableness as a standard for deception: an act would be deceptive if reasonable consumers, rather than any consumers, were likely to be deceived.¹⁰² Besides, Miller would limit the FTC's jurisdiction to cases involving representations of fact, instead of opinion. Miller's proposal on deception, however, was not backed by the Senate and not included in the reauthorization bill. Upon the request of the House Committee on Energy and Commerce, the FTC submitted a statement on deception in 1983. The Deception Statement offered "a single definitive statement of the Commission's view of its authority" over deceptive acts and practices,¹⁰³ but it was more controversial than the Unfairness Statement. The Deception Statement was passed with a one-

⁹⁸ See Miller Suggests Revisions in Deception Standard of § 5, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1057, at 628 (Mar. 25, 1982).

⁹⁹ See Appropriations Conference Committee Rejects Amendment Governing Professions, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1095, at 1121 (Dec. 23, 1982).

¹⁰⁰ 15 U.S.C. 45 (n); added by the FTC Act Amendments of 1994, Pub. L. No. 103-312, August 26, 1994, 108 Stat 1691.

¹⁰¹ See *Miller Circulates Proposal to Limit FTC Attacks on Deception*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1056, at 589-90 (Mar. 18, 1982).

¹⁰² See *id.*

¹⁰³ *FTC's Policy Statement on Deception Sent to Chairmen of Senate Commerce, Science and Transportation Committee and House Energy and Commerce Committee*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 689 (Oct. 27, 1983).

vote win on Republican-appointed commissioner David Clanton's last day in office. Had the FTC voted when Clanton left office, it would take no action on the Deception Statement because of the voting tie. On the other hand, unlike the Unfairness Statement, Congress had not formally codified the Deception Statement so far. Therefore, the FTC could give up its position in the Deception Statement at any time.

Despite its controversial nature, the Deception Statement represented the FTC's voluntary effort to constrain its regulatory power. It identified three elements of a deception case: (1) a representation, omission, or practices that is likely to mislead a consumer, (2) the interpretation or reaction by a reasonable consumer to the representation, omission, or practices, and (3) the representation, omission, or practices should be material.¹⁰⁴

Last but not the least, the Miller FTC retreated from vigorous rulemaking and devoted most of its resources to case-by-case adjudication. By enacting the FTC Improvement Act of 1980, Congress sent a clear signal that the FTC had gone too far in issuing trade regulation rules. In response, Miller halted the approval process of the rules already in the pipeline but not promulgated at the time he took the office, thus undermining a large part of the previous administration's rulemaking agenda.¹⁰⁵ In the past, the FTC "had been prone to take on whole industries through the rules . . . without sufficient concern for the effects on those regulated and on consumers," which "caused considerable bitterness among business people and led to congressional attacks that resulted in the commission's shutting down."¹⁰⁶ The FTC's previous rulemaking agenda "diverted work toward the multiplication of anecdotal horror stories and

¹⁰⁴ See *id.* at 689-94.

¹⁰⁵ Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 *Catholic Univ. L. Rev.* 371, 413 (1997).

¹⁰⁶ James Clifford Miller, *The Economist as Reformer: Revamping the FTC, 1981-1985*, 25 (1989).

away from serious analysis of real problems and possible solutions.”¹⁰⁷ From Miller’s perspective, “poorly articulated or poorly enforced” rules could be “worse than no rules at all.”¹⁰⁸ While stalling the rulemaking agenda, the Miller FTC promised to bring more enforcement cases against consumer fraud. Miller preferred the common-law-like adjudication as a favorable approach to address deceptive acts or practices, because adjudication was consistent with the economic approach, which could provide “a sense of limits” as well as “better standards for judgment and evaluation.”¹⁰⁹ In Miller’s tenure, the FTC embarked on bringing enforcement actions against cases of “hard-core fraud.”¹¹⁰ It also launched a campaign against misleading advertising for auto credit.¹¹¹ Furthermore, the FTC relied upon voluntary compliance in carrying out its statutory mandates. For example, the FTC initiated a program to enforce the Truth in Lending Act to “educat[e] instead of prosecut[e]” the targeted business community, which succeeded in increasing their compliance levels.¹¹²

As the Chairman, Miller set a new direction for the FTC. Not only did he lessen government intervention in the market, but integrated economic analysis into the Commission’s law enforcement activities, including investigations, prosecutions, and justifications of remedies. He also encouraged the involvement of private initiative and self-regulation and the provision of information to consumers to facilitate their decision-making. The reorientation in the Miller era helped save the FTC from congressional attacks and laid the groundwork for its subsequent regulatory activities.

¹⁰⁷ Id.

¹⁰⁸ Id. at 8.

¹⁰⁹ Id. at 25.

¹¹⁰ See FTC Will Record Conversations to Get Evidence in Gas Lease Swindles, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1086, at 774 (Oct. 21, 1982).

¹¹¹ See FTC Begins Investigation of Misleading Ads for Auto Credit, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1107, at 642 (Mar. 24, 1983).

¹¹² See FTC Touts Success of Voluntary TILA Compliance, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1120, at 1209 (June 23, 1983).

III. Protecting Consumer Privacy as FTC's New Frontier

For decades, American society has struggled with the collection and use of personal information by both the government and private companies. The issue was further exacerbated by the commercialization of the Internet in the mid-1990s, which significantly expanded the ability of gathering information from ordinary people. As more and more personal information being digitalized and networked, people became vulnerable to the risk of privacy harms, such as identity theft and data breaches. In contrast to a growing concern for information privacy, the market failed to appropriately address overcollection and misuse of consumer information in the ensuing years. It made information privacy a prominent problem of consumer protection, and gave the FTC, the national chief consumer protection agency, a new mission: to guard consumer privacy in the information age.

1. The Need for Privacy Regulation

The collection, use, storage, and disclosure of personal information challenge the capability of common law in safeguarding consumer information privacy. The effectiveness of the common law depends upon people's appreciation of information privacy and their willingness to enforce it through lawsuits, as well as the ability of the judicial system to properly apply the law.¹¹³ For centuries the United States has applied tort law to privacy harms, but many of current information privacy harms fall outside of the scope of privacy torts. Adopting the classifications

¹¹³ Viktor Mayer-Schönberger, *Beyond Privacy, Beyond Rights-Toward a "Systems" Theory of Information Governance* 98 Cal. L. Rev. 1853, 1873 (2010).

by William Prosser,¹¹⁴ the Restatement (Second) of Torts recognizes four groups of privacy torts, including

- (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
- (2) public disclosures of embarrassing private facts about the plaintiff;
- (3) publicity which places the plaintiff in a false light in the public eye; and
- (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.¹¹⁵

However, these privacy torts have not been applied to issues involving the processing of personal information. For instance, three out of four privacy torts in the Restatement, namely intrusion, publicity, and false light, would require a finding of an action that is “highly offensive to a reasonable person.”¹¹⁶ By contrast, courts rarely found that simply accessing or using one’s information would meet the high threshold of offensiveness.¹¹⁷ In terms of appropriation, actions like transferring lists of user names for advertising purposes hardly “deprive[d] any [individual] of any value their individual names may possess.”¹¹⁸

Courts also have struggled to recognize information privacy injuries as harms for the purpose of standing. In *Spokeo, Inc. v. Robins*,¹¹⁹ the Supreme Court reaffirmed “the irreducible constitutional minimum” of Article III standing: the plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to

¹¹⁴ William Prosser, Privacy, 48 Cal. L. Rev. 383, 389 (1960).

¹¹⁵ Restatement (Second) of Torts, § 652.

¹¹⁶ Id. §§ 652B, 652D and 652E.

¹¹⁷ See, e.g., *Loeffler v. City of Anoka* 79 F.Supp.3d 986 (D. Minn. 2015) (finding that accessing of an individual's private data via the database would not be highly offensive to reasonable person); *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272, 211 P.3d 1063 (Cal. 2009) (finding that employer's installation of secret surveillance camera in employees' office is not a sufficiently offensive or serious intrusion upon employees' reasonable privacy expectations).

¹¹⁸ *Dwyer v. American Exp. Co.*, 652 N.E.2d 1351, 1356 (Ill. App. 1995).

¹¹⁹ 578 U.S. 300, 136 S. Ct. 1540 (2016).

be redressed by a favorable judicial decision.”¹²⁰ In terms of injury-in-fact, Justice Alito, writing for the Court, claimed that the injury incurred should be a result of “an invasion of a legally protected interest” that is “concrete and particularized.”¹²¹ In addition, he noted that concreteness was distinctive from particularization, which required an injury to be “*de facto*” or “actually exist,” rather than being “abstract.”¹²²

Though concreteness does not exclude from being remedied intangible injuries like those incurred in data breaches or identity theft, courts should consider additional factors articulated by Justice Alito in *Spokeo* when deciding whether intangible harms amount to injury-in-fact.¹²³ One factor is whether the alleged intangible harm has “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in” the common law.¹²⁴ For example, the plaintiff could show that the harm is akin to any specific privacy torts listed in the Restatement Second of Torts. Also, Congress could elevate some intangible harms to the status of legally cognizable injuries.¹²⁵ It is notable that the plaintiff still needs to prove the concreteness of the injury in case of statutory violations. Since the lower court failed to address whether the procedural violation of the FCRA “entail a degree of risk sufficient to meet the concreteness requirement,”¹²⁶ the Court remanded the case for further consideration.

However, *Spokeo* has resulted in divergent approaches taken by the courts of appeals. Some circuits have interpreted the *Spokeo*’s multi-factors analysis broadly. The Ninth Circuit, for instance, held in two instances that Congress had the power to establish concrete harms for the purpose of Article III standing, and the plaintiff did not need to show additional harms beyond

¹²⁰ Id. at 1547 (quoting *Lujan v. Defenders of Wildlife*, citation omitted).

¹²¹ Id. at 1548.

¹²² Id.

¹²³ Id. at 1549.

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id. at 1550.

those already identified in the statute.¹²⁷ By contrast, other courts have read *Spokeo* more narrowly. In *Beck v. McDonald*, the Fourth Circuit held that the risk of future identity theft caused by the theft of a hospital clinic laptop containing unencrypted personal information was “too speculative to constitute an injury-in-fact.”¹²⁸ Similarly, the Eighth Circuit held that the common law did not proscribe unlawful retention of lawfully obtained personal information; the plaintiff had to prove material risk of harm from the retention.¹²⁹

The difficulty of remedying information privacy harms reveals only a part of tension between the need to protect consumer privacy and the capacity of the common law. At heart of the tension is the inability of the common law to facilitate the resolution of large-scale policy disputes. The common law, as well as the judicial system that carry it out, is mainly designed to address private disputes between two parties. By contrast, information privacy often involves multiple parties, including consumers, firms collecting information directly from consumers, data brokers, advertisers, and so on. Given their different interests in the collection and use of personal information, whether and the extent to which information privacy should be protected is more likely a policy question.

As the history of administrative state illustrated, Congress, using administrative agencies as a vehicle, is a better positioned than the common-law courts in resolving large-scale policy disputes like those associated with information privacy. From the 1970s, Congress began to pass statutes to address nontraditional forms of privacy harms. In the private sector, the Fair Credit Reporting Act was one of the earliest laws around the world that regulated the collection and use

¹²⁷ See, *Van Patten v. Vertical Fitness Group*, 847 F.3d 1037 (9th Cir. 2017) (holding that a plaintiff alleging a violation of the Telephone Communication Protection Act “need not allege any additional harm beyond the one Congress has identified”); *Syed v. M-I, LCC*, 853 F.3d 492 (9th Cir. 2017) (holding that there is a concrete injury when “applicants are deprived of their ability to meaningfully authorize the credit check” under the Fair Credit Reporting Act).

¹²⁸ 848 F.3d 262, 274 (4th Cir. 2017).

¹²⁹ *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016).

of personal information;¹³⁰ in the public sector, the Privacy Act of 1974 established a unified standard applicable to all federal agencies, prohibiting them from disclosing personal information without the subject's approval or authorization under the law.¹³¹ The trend has lasted for several decades, resulting in a piecemeal body of privacy statutes, governing the processing of one's, among others, financial information, health information, educational information and records. Congress also delegates the power to enforce the privacy statutes to administrative agencies, including the Department of Health and Human Services, the Federal Communication Commission, and most importantly, the Federal Trade Commission.

2. FTC's Early Attempts to Regulate Privacy

The FTC jumped into the field of privacy regulation in 1995. Between 1995 and 1996, the FTC held three events, led by Commissioner Christine Varney, by then-Director of Consumer Protection Jodie Bernstein, and by attorneys David Medine and C. Lee Peeler, respectively, to address online privacy concerns. The final workshop, held by the FTC in June 1996, covered both general questions about online privacy and privacy concerns in specific contexts. The workshop resulted in the agency's first staff report on consumer privacy, entitled *Consumer Privacy and the Global Information Infrastructure*.

As shown in the 1996 report, the FTC took a pro-self-regulation position in terms of protecting consumer privacy in a networked environment. For example, then-FTC Chairman Robert Pitofsky contended that:

We are not here to lay the groundwork for any government rules, guidelines or otherwise.

Rather, we would like to learn more about industry and consumer initiatives that have

¹³⁰ Pub. L. 91-508, October 26, 1970, 84 Stat. 1114-2. Codified at 12 U.S.C. §§ 1830-1831.

¹³¹ Pub. L. 93-579, December 31, 1974, 88 Stat. 1896. Codified at 5 U.S.C. § 552a.

emerged over the past year. I hope the Bureau will contribute to self-regulatory efforts, and to the Commission's understanding of online privacy issues . . . That is our goal.¹³²

The FTC's willingness to permit the industry to regulate itself was also reflected in its subsequent reports. For example, the FTC's 1997 report, *Individual Reference Services: A Report to Congress*, permitted the industry group to regulate itself, regardless of the finding that the proposed self-regulatory efforts failed to resolve important issues like consumer access to the information.¹³³ The FTC reiterated its preference of self-regulation in *Privacy Online: A Report to Congress*, a report built upon the findings of the workshops and surveys conducted between 1995 and 1997 (hereinafter the *Privacy Online Report*). In the *Privacy Online Report*, it explained that its goal was "to encourage and facilitate effective self-regulation as the preferred approach to protecting consumer privacy online."¹³⁴ Finally, the FTC reaffirmed its deference to self-regulatory approach in *Self-regulation and Privacy Online: A Report to Congress*, a report issued in July 1999. It claimed that "self-regulation is the least intrusive and most efficient means to ensure fair information practices, given the rapidly evolving nature of the Internet and computer technology."¹³⁵ The FTC further acknowledged that "legislation to address online privacy was not appropriate at this time," and set out an agenda to evaluate industry progress.¹³⁶ Among main elements of the privacy self-regulation is FTC enforcement of privacy policies.¹³⁷ Initially used by some websites to promote their privacy practices, privacy policies are statements or legal documents that inform consumers of how their personal information will be

¹³² Fed. Trade Comm'n, Staff Report on the Public Workshop on Consumer Privacy on the Global Information Infrastructure, 10 (1996).

¹³³ Fed. Trade Comm'n, *Individual Reference Services: A Report to Congress*, ii (1997).

¹³⁴ Fed. Trade Comm'n, *Privacy Online: A Report to Congress*, i-ii (1998).

¹³⁵ Fed. Trade Comm'n, *Self-regulation and Privacy Online: A Report to Congress*, 6 (1999).

¹³⁶ *Id.* at 12-14.

¹³⁷ Michael D. Scott, *The FTC, THE Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 *Admin. L. Rev.* 128, 130 (2008).

gathered and used. By promoting privacy policies, the FTC is able “to sink its jurisdictional hooks more firmly into the Internet privacy debate . . .”¹³⁸ If a company violates its privacy policy, then the FTC can bring enforcement actions against it for deception under Section 5 of the FTC Act. From the FTC’s perspective, the more contractual privacy policies are written, “the more enforceable they will be.”¹³⁹ However, due to the voluntary nature of privacy policies, the FTC cannot force companies to adopt them in the first place.

In spite that it viewed self-regulation as a favored solution to address privacy concerns, the FTC had recognized that self-regulation was inadequate to protect consumer privacy. When the time the *Privacy Online* Report went public, the FTC claimed that it had seen no effective regulatory system emerge; instead, it found that

[a]s evidenced by the Commission’s survey results, and despite the Commission’s three-year privacy initiative supporting a self-regulatory response to consumers’ privacy concerns, the vast majority of online businesses have yet to adopt even the most fundamental fair information practice (notice/awareness). Moreover, the trade association guidelines submitted to the Commission do not reflect industry acceptance of the basic fair information practice principles. In addition, the guidelines, with limited exception, contain none of the enforcement mechanisms needed for an effective self-regulatory regime.¹⁴⁰

Later, the FTC reversed its support for self-regulation. In a statement submitted to the Senate Committee on Commerce, Science and Transportation, Chairman Pitofsky contended that the majority of the FTC no longer believed that asking the industry to regulate itself was working:

¹³⁸ Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 *Vand. L. Rev.* 2041, 2046 (2000).

¹³⁹ *Id.* at 2057.

¹⁴⁰ *Privacy Online* Report, *supra* note 134, at 41.

The Commission applauds the significant efforts of the private sector and commends industry leaders in developing self-regulatory initiatives. The 2000 Survey, however, demonstrates that industry efforts alone have not been sufficient. Because self-regulatory initiatives to date fall far short of broad-based implementation of effective self-regulatory programs, a majority of the Commission has concluded that such efforts alone cannot ensure that the online marketplace as a whole will emulate the standards adopted by industry leaders.¹⁴¹

In light of the insufficiency of self-regulation, the FTC admitted that “substantially greater incentives” were required to protect consumer privacy, both online and offline.¹⁴² One of the incentives was the FTC’s threat of endorsing federal legislation on information privacy. By the turn of the twenty-first century, the FTC had proposed legislation in at least two areas that would authorize it to issue and enforce privacy regulations.

The FTC first recommended Congress to act in the field of children’s privacy. Children’s privacy had been a controversial issue in the late 1990s, as sales of children’s information for advertising purposes were common for data brokers. However, given the enduring impact of KidVid crusade, the FTC could only play a limited role in protecting children’s privacy, most of which were information gathering and reporting. In the June 1996 workshop, the FTC dedicated a whole session to discussion of information about children. In the following year, upon the petition by the Center for Media Education to investigate KidsCom.com, the FTC staff released a public letter regarding the website’s information practices. In the letter the FTC warned

¹⁴¹ Prepared Statement of The Federal Trade Commission on “Privacy Online: Fair Information Practices in the Electronic Marketplace,” before the Committee on Commerce, Science, and Transportation, May 25, 2000.

¹⁴² *Privacy Online* Report, *supra* note 134, at iii.

KidsCom.com that its collection of personal information from children and sharing of children's information with others without parental informed consent would be viewed as deceptive.¹⁴³ Upon the request by Congress, the FTC surveyed the issues surrounding children's privacy, and the survey's result was summarized in its 1998 *Privacy Online* report. The FTC found that most websites surveyed collected personal information from children, while only less than a quarter had privacy policies disclosing their information practices.¹⁴⁴ On the other hand, the agency recognized that only a few websites got parents involved in the collection and use of children's information, indicating "a low level of compliance with the basic parental control principles." Therefore, the FTC recommended that Congress should enact legislation "placing parents in control of the online collection and use of personal information from their children."¹⁴⁵ The FTC's recommendation was echoed by the White House. The Clinton Administration would also "seek legislation that would specify a set of fair information principles applicable to the collection of data from children."¹⁴⁶

A few months after the FTC's recommendation, Congress passed the Children Online Privacy Protection Act (COPPA).¹⁴⁷ COPPA regulates any websites or online services being directed at children or having actual knowledge of gathering information from children. The statute also authorizes the FTC to promulgate rules in accordance with §553 of the APA, which relaxed the constraints on the agency's rulemaking power. Pursuant to COPPA, the FTC issued the

¹⁴³ Letter from Jodie Bernstein, Director, FTC Bureau of Consumer Protection, to Kathryn C. Montgomery, President, Center for Media Education (July 15, 1997).

¹⁴⁴ *Privacy Online* report, supra note 134, at 31-35.

¹⁴⁵ Id. at 42.

¹⁴⁶ Office of the Vice President, Vice President Gore Announces New Steps toward an Electronic Bill of Rights, July 31, 1998.

¹⁴⁷ Pub. L. 105-277, Div. C, Title XIII, §1302, October 21, 1988, 112 Stat. 2681-728. Codified at 15 U.S.C. §6501 et seq.

Children’s Online Privacy Protection Rule that governs the operators of websites and online services that collect personal information from children under thirteen.

Another area that the FTC advocated federal legislation was online profiling. Online profiling became popular in the advertising industry in the late 1990s, when websites used cookies or “Web bugs” to gather consumer data, which were combined with other information about consumers to infer each consumer’s interests and preferences. In November 1999, the FTC and the Department of Commerce sponsored a workshop on online profiling. The workshop had an extensive discussion on the problem of online profiling and the privacy concerns raised by website’s information collection.¹⁴⁸

Following the online profiling workshop, the Network Advertising Initiative (NAI), an industry organization consisted of leading online advertising companies, developed a set of principles that if implemented by its members, would meet the privacy and security requirement of any potential regulation. The NAI principles included four elements—notice, choice, access, and security—but omitted an effective enforcement mechanism.

Though the FTC helped to develop and commended the NAI principles, it advocated for further legislation. In 2000, four of the five Commissioners¹⁴⁹ found that legislation was necessary to expand the NAI principles to non-NAI members:

For while NAI’s current membership constitutes over 90% of the network advertising industry in terms of revenue and ads served, only legislation can compel the remaining 10% of the industry to comply with fair information practice principles.¹⁵⁰

¹⁴⁸ Fed. Trade Comm’n., *Online Profiling: A Report to Congress* (June 2000).

¹⁴⁹ Though Commissioner Leary agreed with the necessity of legislation, he argued that the legislative proposal should “focus on adequate ‘notice’” rather than mandate overbroad standards for the fair information practices.

¹⁵⁰ Fed. Trade Comm’n., *Online Profiling: A Report to Congress (Part 2): Recommendations* 10 (July 2000).

The proposed legislation would “set out the basic standards of practices” and provide an agency like the FTC with the authority to promulgate and enforce more detail standards.¹⁵¹ However, the FTC’s recommendation regarding online profiling was short-lived, as the new leadership of the Commission changed the course after the 2000 general election.

By threatening to endorse privacy legislation, the FTC created a strong incentive for companies to respect consumer privacy. Confronting the FTC’s credible threat of legislation, “the avoidance of congressional legislation” became “a collective good that the industry would be interested to promote.”¹⁵² The entire industry had to demonstrate greater respect for consumer privacy, otherwise the FTC would recommend Congress to enact new privacy laws. As a result, the industry had seen a surge in the adoption of privacy policies. A 1998 survey of 1400 websites showed that only 14 percent of the commercial sites had some privacy notices and 2 percent of had a comprehensive privacy policy.¹⁵³ In comparison, by 2001, nearly all the commercial websites had privacy notices that could be policed by the FTC.¹⁵⁴

Conclusion

Not only is consumer protection a core function performed by the modern FTC, but also exerts a considerable influence over the Commission. Looking backward, every time when a wave of consumer movement came into force, the FTC would see a significant expansion of its authority. For example, when the second wave of consumer movement reached its climax, Congress passed the Wheeler-Lea Act and explicitly gave the Commission the power to protect consumers.

¹⁵¹ Id.

¹⁵² Steven Hetcher, *The De Facto Federal Privacy Commission*, 19 J. Marshall J. Computer & Info. L. 109, 131 (2000).

¹⁵³ *Privacy Online* report, *supra* note 134, at ii-iii.

¹⁵⁴ Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information?*, 111 Penn. St. L. Rev. 587, (2007).

Similarly, during the third wave of consumer movement, both the legislative and judicial branches recognized the FTC's authority to promulgate trade regulation rules.

On the other hand, “[p]olicy-making *is* politics.”¹⁵⁵ If the FTC becomes too aggressive and overreaching in enforcing its regulatory mandate, the political atmosphere will turn against it, like what happened to the Commission in the late 1970s and early 1980s. In response to the political backlash since the late 1970s, the FTC took a new approach under James Miller's leadership. The new approach was more cooperative with business interests without sacrificing its consumer protection functions. The FTC's new approach saved itself from the risk of abolishment, and prepared it for being the chief consumer protection agency in the dawn of commercialization of the Internet. As the FTC moves to regulate information privacy with expanded authority and new powers, the lessons from its experience in consumer protection becomes more important than ever.

¹⁵⁵ Luis Jaffe, *Judicial Control of Administrative Action* 22 (1965).

CHAPTER 5 ENFORCEMENT AS REGULATION: THE FTC'S INNOVATION OUT OF NECESSITY

In Chapter 4, we have seen how three consumer movements shaped and reshaped the FTC. In short, Congress created the FTC as an enforcement agency amid the first consumer movement at the turn of the 20th century, and officially delegated to the agency the consumer protection authority as the second consumer movement reached its climax. At the dawn of the third consumer movement, the FTC expanded its powers from law enforcement to the issuance of rules and regulations, a new legislative power that Congress later recognized with a caveat: the FTC should meet heightened procedural obligations when issuing a rule. However, at the end of the third consumer movement, Congress placed major limits on the FTC in the FTC Improvements Act of 1980 as a response to the Commission's aggressive regulations of several sectors of industry.

The rise and fall of the FTC as a rule maker have partly attributed to its current regulatory approach to information privacy. When information privacy has risen as a major issue of an emerging consumer movement, the limits imposed on the FTC rulemaking authority remain in place. These limits prevent the FTC from regulating information privacy in a general manner, though the Commission can still police privacy-related issues on a sector-by-sector basis.¹ As Congress has been reluctant to empower the FTC to issue any privacy rule beyond sectoral ones, the FTC has built a distinctive approach to information privacy. It builds a coherent body of legal norms consisting of enforcement actions and consent orders in lieu of a general privacy rule.

I. Introduction: A Swinging Role of the FTC

¹ See Section III.1.

In 1914, when the FTC Act was being debated in the two chambers of Congress, the House emphasized the investigative or advisory nature of the proposed commission.² The House bill contained neither substantive prohibitions nor declaration of illegality nor provisions for an enforcement mechanism.³ By contrast, the Senate highlighted the prosecutorial functions of the commission.⁴ In addition to investigatory and advisory functions already provided in the House bill, the Senate bill granted to the Commission powers to enforce a broad prohibition of “unfair competition.”⁵

At the time the House and Senate bills came before the Conference Committee, the Committee synthesized the provisions contained in two bills, resulting in the final bill that gave the proposed Commission both investigatory authority and the powers to prosecute. For example, Section 5 of the FTC Act allowed the Commission to issue cease and desist orders to anyone who commits “unfair methods of competition” or “unfair or deceptive acts or practices” outlawed by the statute. Section 6 authorized the Commission to investigate, and obtain information from, any business except financial institutions and common carriers.⁶ Finally, Section 7 further asked the Commission to act as “a master in chancery” in cases in equity brought by or under the direction of the Attorney General.⁷ Though the final bill kept the rulemaking provision contained in the House bill, several House members of the Conference Committee claimed that the newly

² H. Rep. No. 533, 63d Cong., 2d Sess., 3-7 (1914).

³ H.R. 15613, 63d Cong., 2d Sess. 15 (1914).

⁴ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Anti. L. J.* 1, 5 (2003).

⁵ S. 4160, 63d Cong., 2d Sess. (1914).

⁶ 15 U.S.C. §46(a) & (b).

⁷ *Id.* §47.

established Commission should have “no power to prescribe the methods of competition . . . in [the] future,” and that it “w[ould] not be exercising power of a legislative nature.”⁸

Until it asserted substantive rulemaking authority in the 1960s, the FTC had remained largely as a quasi-judicial body for the next five decades. During this period, the Commission had intermittently claimed its adjudicative role under the enabling statute. In the FTC’s Annual Reports, the Commission had asserted that its enforcement proceedings were the sole method of defining the standard of illegality.⁹ Consequently, the agency did not attempt to fulfill its congressional mandate by issuing binding substantive rules. Rather, it adopted the filing of complaints and several types of informal settlement techniques, notably the trade practice conference, as its principal regulatory tools.¹⁰

In 1962, the FTC amended its procedures, in which it unilaterally changed its interpretation of the scope of the “rules and regulations” language in Section 6(g). As enacted in 1914, Section 6(g) of the FTC Act provided that the FTC could “to make *rules and regulations* for the purpose of carrying out” the FTC Act.¹¹ This provision was presumed to authorize the FTC to make procedural rules that were related to the exercise of its enforcement powers with no force of law. By contrast, the 1962 amendment empowered the FTC to promulgate trade regulation rules. Trade regulation rules, published in Title 16 of the Code of Federal Regulations, were substantive rules that have the force of law. Any person who knowingly violated the rule should be liable for civil penalties for each violation, as well as the injury caused to consumers by the

⁸ 51 Cong. Rec. 14,932 (1914) (remarks of Representative Harry Covington); see *id.* at 14,938 (remarks of Representative Frederic Stevens). But see *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 706-09 (D.C. Cir. 1973) (indicating that the context of these remarks was too dubious to conclude that they foreclosed substantive rulemaking).

⁹ 1951 FTC Ann. Rep. 16-18.

¹⁰ *Substantive Rulemaking and the FTC*, 42 *Fordham L. Rev.* 178, 178 (1973).

¹¹ 15 U.S.C. § 46(g).

violation. The FTC's claim for rulemaking power was consistent with a broad trend in the post-APA era, when rulemaking had become a favored strategy for agency policymaking.

The industry sought to challenge the FTC's newly acquired rulemaking authority in courts. In *National Petroleum Refiners Association v. FTC*, after the FTC issued a rule in 1970 that outlawed the failure to post octane numbers on gasoline pumps at service stations, trade associations and gasoline refining companies sued the agency in court. The district court agreed with the plaintiffs, and ruled that the FTC lacked rulemaking authority under its enacting statute.¹²

On appeal, the D.C. Circuit reversed the district court's finding. Looking at the plain language of the section 6(g) of the FTC Act, the D.C. Circuit concluded that there was "no reason to import [a restriction that limited the rulemaking power to procedural or housekeeping matters] on the 'rules and regulations' permitted by [the section]."¹³ In reaching its conclusion, the D.C. Circuit first referred to the construction of agencies' enabling statutes by other courts, whose decisions convinced it that a reviewing court should "interpret liberally broad grants of rulemaking authority."¹⁴ Therefore, it found itself being obliged to interpret "rules and regulations" in Section 6(g) as conferring on the FTC substantive rulemaking unless there was compelling evidence that the legislative history pointed to the opposite direction.¹⁵ In contrast to the "ambiguous" legislative history of the FTC Act,¹⁶ the court of appeals found that the FTC's use of trade regulation rules was "not only consistent with the original framers' broad purposes,

¹² Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972).

¹³ Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 678 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

¹⁴ Id., at 678-84.

¹⁵ Id. at 684-86.

¹⁶ Id. at 686. The court reviewed the legislative history of the FTC Act in an appendix to the opinion, id. at 698-709. The court concluded that

the history of the pertinent 1914 debates leaves us with a few affirmative indications that Section 6(g) encompassed substantive rule-making and a few cryptic indications that this is not so. As a consequence the need to reply on the section's language is obvious. Id. at 709.

but . . . a particularly apt means of carrying them out.”¹⁷ On the other hand, the court overlooked the fact that the FTC did not claim substantive rulemaking authority until 1962. Given that neither the legislative history nor the post-enactment history of the FTC Act required a narrow construction of Section 6(g), the D.C. Circuit held that the FTC was “authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent.”¹⁸

Congress quickly reacted to the judicial recognition of the FTC’s rulemaking authority in *National Petroleum* by enacting the Magnuson-Moss Act in 1975. Title II of the Act, now codified at Section 18 of the FTC Act, authorized the FTC to promulgate “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5(a)(1) of the FTC Act.¹⁹ After the Magnuson-Moss Act came into force, Section 18 replaced the role of Section 6(g), and became the FTC’s exclusive authority for issuing consumer protection rules concerning unfair or deceptive acts or practices, while Section 6(g) continues to serve as the foundation for rulemaking with respect to unfair methods of competition.

The recognition of the FTC’s rulemaking authority led to an ambitious regulatory agenda between the 1960s and 1970s, in which period the FTC had promulgated a series of trade regulation rules and intended to issue more. The extensive use of its rulemaking authority triggered a backlash from Congress, which curbed the FTC’s rulemaking authority in the FTC Improvements Act of 1980.²⁰ The Act imposed stringent limits on its ability to issue new rules under its “unfairness” authority.

¹⁷ Id. at 686.

¹⁸ Id. at 697.

¹⁹ Pub. L. 93-637, 88 Stat. 2183, at sec.202(a), codified at 15 U.S.C. § 57a.

²⁰ See *infra* notes 75-80 and accompanying texts.

However, under the FTC Improvements Act of 1980, the FTC retained its authority to bring enforcement actions against unfair and deceptive trade practices. As a result, the FTC shifted its resources to prosecutorial functions in the 1980s.²¹ In the Miller administration, the FTC preferred bringing lawsuits before federal courts instead of adjudicatory matters before administrative law judges. By having federal judges deciding the disputes, litigation reduced the legitimacy problem inherent in administrative proceedings in which the FTC played both roles of prosecutor and adjudicator. The FTC exercised its Section 13(b) authorities to seek preliminary injunctions and other equitable remedies.²² The Miller-era reform had a profound impact on the modern FTC, including how it would exercise the authority in regulating privacy-related issues.

II. The Hurdles of Issuing General Privacy Rules

As the FTC has assumed the role of national *de facto* privacy regulator, many commentators suggest that the FTC should issue rules clarifying the specific requirements for compliance.²³ However, the procedural requirements make it practically impossible to issue a privacy rule with general applicability. The FTC is among a handful of federal agencies that have follow so-called hybrid rulemaking procedures.²⁴ Hybrid rulemaking is so burdensome that the FTC has not issued any privacy rule pursuant to hybrid rulemaking. By contrast, the FTC has issued sector-specific privacy rules following notice-and-comment rulemaking, where Congress explicitly waives the FTC from hybrid rulemaking. However, when the FTC requests Congress to expand

²¹ J. Howard Beales, III, The FTC in the 1980s, In *Marketing and Advertising Regulation: The Federal Trade Commission in the 1990s* (Patrick E Murphy and William L Wilkie, eds., 1990).

²² 15 U.S.C. § 53(b).

²³ See, e.g., Justin Hurwitz, Data Security and the FTC's Uncommon Law, 101 *Iowa L. Rev.* 955 (2016).

²⁴ See *infra* notes 53-66 and accompanying texts.

its rulemaking authority, Congress is reluctant to authorize the FTC to promulgate privacy rules covering all industry sectors.

1. Current Status of FTC’s Privacy Rulemaking Authorities

Though the FTC’s enabling statute, the FTC Act, does not explicitly authorize the Commission to regulate privacy-related issues, let alone to promulgate privacy rules, some sector-specific statutes delegate to the FTC the power to issue privacy rules. These sector-specific privacy statutes include:

a. The Fair Credit Reporting Act (FCRA) and its subsequent amendments. The FCRA, as originally enacted by Congress in 1970, authorized the FTC to issue “procedural rules in enforcing compliance with the requirements imposed under [the FCRA].”²⁵ However, the FTC could not rely on this power to issue any trade regulation rule that legally bound regulated parties. In fact, Congress made it clear in 1996 that the FTC could not “prescribe trade regulation rules or other regulations” under the FCRA.²⁶

It was not until the enactment of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) that the FTC obtained the power to issue rules and regulations. The FACT Act amended the FCRA in several ways and directed the FTC to prescribe regulations to implement the new requirements. Pursuant to the FACT Act, the FTC has promulgated three major pieces of privacy rules, including:

- (1) The Disposal Rule.²⁷ Section 216 of the FACT Act directed the FTC, in consultant to other agencies, to issue regulations requiring “any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived

²⁵ Pub. L. 91-508, 84 Stat. 1114-2, at § 621.

²⁶ Consumer Credit Reporting Reform Act Section 2461(a)(4), Public Law 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Title II, Subtitle D, Chapter 1.

²⁷ See Disposal of Consumer Report Information and Records, 16 C.F.R. 682.

from consumer reports for a business purpose[,] properly dispose of any such information or compilation.”²⁸ Accordingly, the FTC issued and sought comment on a proposed rule on April 16, 2004, and promulgated the rule on November 24, 2004, which took effect on June 1, 2005.

- (2) The Pre-screen Opt-out Notice Rule.²⁹ Section 213(a) of the FACT Act, amending section 615(d) of the FCRA, required that the statement mandated by section 615(d) “be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule . . .”³⁰ The FTC issued the proposed rule on September 27, 2004. The final rule was issued on January 31, 2005, which became effective on August 1, 2005.
- (3) The Red Flags Rule.³¹ Section 114 of the FACT Act required the FTC, among other agencies, to prescribe regulations requiring “each financial institution and each creditor to establish reasonable policies and procedures.”³² On November 9, 2007, the FTC, along with Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Thrift Supervision Office, the National Credit Union Administration, published in the Federal Register final rules and guidelines to implement the identity theft red flags.³³

However, the Dodd-Frank Act, which amended the FCRA in 2010, transferred to the Consumer Financial Protection Bureau most of the rulemaking responsibilities added to this Act by the FACTA and the Credit CARD Act. The FTC did not issue any privacy rule under the FCRA until 2018, when the Economic Growth, Regulatory Relief and

²⁸ The FACT Act section 216, 15 U.S.C. § 1681w(a)(1).

²⁹ See Prescreen Opt-Out Disclosure, 16 C.F.R. 642.

³⁰ The FACT Act section 213(a), 15 U.S.C. § 1681m(d)(2).

³¹ See Identity Theft Rules, 16 C.F.R. 681.

³² The FACT Act section 114, 15 U.S.C. § 1681m(e).

³³ 72 Fed. Reg. 63717 (Nov. 9, 2007).

Consumer Protection Act delegated new rulemaking authority to the Commission.³⁴

Pursuant to the new power, the FTC issued and sought comment on a proposed rule implementing the requirement of Section 302 of the Act, which asked credit reporting agencies to provide free electronic credit monitoring services to active-duty military consumers.³⁵ The final rule, the Military Credit Monitoring Rule, was published on July 1, 2019.³⁶

b. The Children's Online Privacy Protection Act (COPPA). The COPPA required the FTC to promulgate such rules under section 553 of the APA within one year of October 21, 1998. Pursuant to the COPPA, the FTC published a proposed rule in April 1999. The Commission also conducted a public workshop on children's privacy. In November 1999, the FTC published its final rule, the Children's Online Privacy Protection Rule (COPPA Rule).³⁷ Later, the FTC amended the COPPA Rule in 2013. As part of its mandated 10-year regulatory review process for the COPPA, the FTC sought public comments and held workshops in 2019, exploring the necessity of updating the COPPA Rule.

c. The Gramm-Leach-Bliley Act (GLBA). The FTC has issued two privacy rules under the GLBA. One is the Financial Privacy Rule, appearing in the Code of Federal Regulations as Privacy of Consumer Financial Information Rule.³⁸ Section 504(a) of the GLBA required the FTC the authority to prescribe regulations as may be necessary to implement the requirements of notice and restrictions on the financial institutions' ability to disclose nonpublic personal information.³⁹ Pursuant to Section 504(a), the FTC published the notice of proposed rulemaking on March 1, 2000, and issued its final rule two months later.

³⁴ The Economic Growth, Regulatory Relief and Consumer Protection Act section 302(d), 15 U.S.C. § 1681c-1(k)(3).

³⁵ 83 Fed. Reg. 57693 (Nov. 16, 2018).

³⁶ 84 Fed. Reg. 31180 (Jul. 1, 2019), codified at 16 C.F.R. 609.

³⁷ 16 C.F.R. 312.

³⁸ 65 Fed. Reg. 33,645 (May 24, 2000), codified at 16 C.F.R. 313.

³⁹ Pub. L. 106-102, § 504(a), codified as amended at 15 U.S.C. § 6804(a)(1)(C).

Another privacy rule that FTC issued under the GLBA is the Standards for Safeguarding Customer Information, or the Safeguards Rule.⁴⁰ Section 501(b) of the GLBA mandated federal regulatory agencies, including the FTC, to “establish appropriate standards for the financial institutions . . . relating to administrative, technical, and physical safeguards.”⁴¹ The FTC published a proposed rule in August 2001, then promulgated the final rule on May 23, 2002.⁴²

d. The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act). In 2003, Congress passed the CAN-SPAM Act to set national standards for the transmission of commercial e-mails. The CAN-SPAM Act directed the FTC to issue regulations, not later than 12 months after December 16, 2003, “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.”⁴³ The FTC published the proposed rule on May 12, 2005, then issued the final rule on May 21, 2008.⁴⁴

e. The Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act). The Telemarketing Act directed the FTC to prescribe rules defining and prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.⁴⁵ Pursuant to this rulemaking authority, the FTC promulgated the Telemarketing Sales Rule (TSR) in 1995.⁴⁶ The FTC subsequently amended the TSR several times in the twenty-first century. In particular, the FTC amended the TSR in 2003 to create the National Do Not Call Registry.⁴⁷

⁴⁰ Standards for Safeguarding Customer Information, 16 C.F.R. 314.

⁴¹ Pub. L. 106–102, § 501(b), codified at 15 U.S.C. § 6801(b).

⁴² 67 Fed. Reg. 36,483 (May 23, 2002), codified at 16 C.F.R. 314.

⁴³ 15 U.S.C. 7702(2)(C).

⁴⁴ Definitions and Implementation Under the CAN-SPAM Act, 73 Fed. Reg. 29653 (May 21, 2008) (codified at 16 C.F.R. 316). It is noteworthy that the FTC also issued an Advance Notice of Proposed Rulemaking on March 11, 2004, which was more than one year earlier than its Notice of Proposed Rulemaking. See Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 11,776 (Mar. 11, 2004).

⁴⁵ 15 U.S.C. 6102(a).

⁴⁶ 60 Fed. Reg. 43842 (Aug. 23, 1995).

⁴⁷ 68 Fed. Reg. 4580 (Jan. 29, 2003).

f. The American Recovery and Reinvestment Act of 2009 (Recovery Act). Part of the Recovery Act required vendors of personal health records and third parties providing services to vendors to notify any breach of identifiable health information. The Recovery Act also directed the Department of Health and Human Services, in consultation with the FTC, to conduct a study and report to address privacy- and security-related issues, which should be completed by February 2010. In the interim, the FTC should issue interim rules requiring these entities to notify consumers in case of the compromise of their health information.⁴⁸ The FTC issued and sought comments on a proposed rule on April 20, 2009. On August 25, 2009, the FTC issued the Health Breach Notification Rule.⁴⁹

It is noteworthy that all FTC privacy rules are issued in accordance with the notice-and-comment rulemaking,⁵⁰ rather than the rulemaking process defined in the FTC Act. Regardless of their sector-specific nature, these privacy rules have the same force as trade regulation rules promulgated under the FTC Act. Any violation of these rules is treated as a violation of the FTC Act.

2. Burdens of Hybrid Rulemaking

Given that Congress has not given the FTC the power to make any privacy rule with general applicability, the FTC's any attempt to do so would rely upon the broad authority to police deceptive and unfair acts or practices under the FTC Act, which, in turn, directs the FTC to follow a special set of procedural safeguards, known as hybrid rulemaking.

The APA prescribes two types of rulemaking: section 553 of the APA outlines informal rulemaking, where federal agencies, after noticing in the Federal Register, build final rules on

⁴⁸ The American Recovery and Reinvestment Act section 13407 (g)(1), Pub. L. 111-5, 123 Stat. 271.

⁴⁹ 16 C.F.R. 318.

⁵⁰ See, e.g. the CAN-SPAM Act section 13(a), 15 U.S.C. 7711(a) ("Any such regulations shall be issued in accordance with section 553 of [the APA]").

consideration of written comments on proposed rules submitted during a public comment period, so informal rulemaking is also known as notice-and-comment rulemaking.⁵¹ By contrast, formal rulemaking requires deliberation of a proposed rule in a trial-like hearing.⁵² Hybrid rulemaking is a type of rulemaking in which Congress places on agencies additional procedural requirements that exist in the context of adjudication in addition to notice-and-comment rulemaking procedures, but fall short of formal rulemaking requirements.⁵³ By blending some elements of formal rulemaking into informal rulemaking, hybrid rulemaking is more flexible than formal rulemaking and offers more opportunities for public participation than informal rulemaking. The requirement for hybrid rulemaking is often found in statutes that Congress enacted in the 1970s, which were known as hybrid rulemaking statutes. Some of hybrid rulemaking statutes include the Occupational Safety and Health Act of 1970,⁵⁴ the Consumer Product Safety Act of 1972,⁵⁵ the Safe Drinking Water Act of 1974,⁵⁶ the Energy Policy and Conservation Act of 1975,⁵⁷ the Magnuson-Moss Warranty Act of 1975,⁵⁸ the Security Acts Amendments of 1975,⁵⁹ the Toxic Substance Control Act of 1976,⁶⁰ the Clean Air Act of 1977,⁶¹ the Federal Mine Safety and Health Amendment Act of 1977,⁶² and the Endangered Species Act Amendments of 1978.⁶³

⁵¹ 5 U.S.C. § 553.

⁵² *Id.* at §§ 556-557.

⁵³ See Vanessa K. Burrows & Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, 3 (Jan. 4, 2011).

⁵⁴ 29 U.S.C. § 655.

⁵⁵ 15 U.S.C. §§ 2056, 2058.

⁵⁶ 42 U.S.C. § 300g-1(d).

⁵⁷ 42 U.S.C. §§ 6295, 6306.

⁵⁸ 15 U.S.C. § 57a.

⁵⁹ 15 U.S.C. § 78f(e).

⁶⁰ 15 U.S.C. § 2605(c)(3). But note that in 2016, Congress amended the TSCA and eliminated the requirements for oral hearings and an opportunity for cross-examination. Pub. L. 114-182 at § 6, 130 Stat. 467.

⁶¹ 42 U.S.C. § 7606(d).

⁶² 30 U.S.C. § 811.

⁶³ 16 U.S.C. § 1533.

The enactment of hybrid rulemaking statutes faced a lot of criticism.⁶⁴ In the face of criticism, Congress has not passed new hybrid rulemaking statutes since the 1980s,⁶⁵ but existing laws are still on the books.⁶⁶

In the context of FTC rulemaking, it is the Magnuson-Moss Warranty Act that first introduced the procedural safeguards of hybrid rulemaking. Title II of the Magnuson-Moss Warranty Act formally granted rulemaking authority to the FTC but only in a limited form: in addition to the requirements of notice-and-comment rulemaking as defined by the APA, the Magnuson-Moss Warranty Act directed the FTC to adopt the following procedures when issuing a rule:

- (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule;
- (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available;
- (3) provide an opportunity for an informal hearing in accordance with subsection (c); and
- (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record, together with a statement of basis and purpose.⁶⁷

These procedures were later known as the Magnuson-Moss procedures.

Comparing to the notice-and-comment rulemaking, the Magnuson-Moss Warranty Act injected not only a legislative-type hearing, but also an opportunity for cross-examination. Under the

⁶⁴ See e.g., Administrative Conference of the U.S., Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability (urging that “statutory requirements going beyond those of section 553 should not be imposed in absence of special reasons for doing so”), 38 Fed. Reg. 19,782 (July 23, 1973); ACUS Recommendation 80-1, Trade Regulation Rules under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (finding that hybrid rulemaking was an effective means of controlling an agency's discretion in its exercise of a broad delegation of legislative power,” and “should not, as a general matter, be statutorily mandated”), 1 C.F.R. 305.80-1(B) (1980).

⁶⁵ Beside criticism, Supreme Court’s decision in Vermont Yankee in 1978, which ended court-imposed additional rulemaking, as well as the rise of deregulation in the 1980s, also contributed to the decline of hybrid rulemaking. See Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking, 320, note 93 (2018).

⁶⁶ See Jeffrey S. Lubbers, The Transformation of the U.S. Rulemaking Process - For Better or Worse, 34 Ohio N. Univ. L. Rev. 469, 474 (2008).

⁶⁷ 15 U.S.C. § 57a(b)(1).

Magnuson-Moss procedures, the FTC should provide mandatory hearings presided over by a hearing officer.⁶⁸ During the hearing, the FTC should afford interested persons an opportunity to present their positions orally or in writing,⁶⁹ and designate “disputed issues of material fact” with opportunities for cross-examination by interested persons or the representatives of a group of interested persons.⁷⁰ Also, the FTC should take a “verbatim transcript” of any oral presentation and cross-examination in the hearing, and make the transcript available to the public.⁷¹

Moreover, the Magnuson-Moss Warranty Act specified the requirements for a statement of basis and purpose that accompanied the final rule. The FTC’s statement of basis and purpose should include statements as to “the prevalence of the acts or practices treated by the rule,” “the manner and context in which such acts or practices are unfair or deceptive,” and “the economic effect of the rule, taking into account the effect on small business and consumers.”⁷²

Finally, the Magnuson-Moss Act articulated pre-enforcement judicial review specially designed for FTC trade regulation rules. For example, in review an FTC rule, either the petitioner or the Commission could apply for leave to make additional oral submissions or written presentations, and the court could order the Commission to provide additional opportunities to make such submissions and presentations.⁷³ In addition, the Magnuson-Moss Act expanded the standard of judicial review applicable to the FTC rulemaking. Not only could the court found unlawful and set aside an FTC rule on the ground of arbitrary-and-capricious, but also on the ground that the rule was not supported by the substantive evidence or that the FTC limited the petitioner’s cross-examination or rebuttal submissions.⁷⁴

⁶⁸ Id. § 57a(c).

⁶⁹ Id. § 57a(c)(2)(A).

⁷⁰ Id. § 57a(c)(2)(B).

⁷¹ Id. § 57a(c)(5).

⁷² Id. § 57a(d).

⁷³ Id. § 57a(e)(2).

⁷⁴ Id. § 57a(e)(3).

When the FTC continued to pursue its aggressive regulatory agenda after the enactment of the Magnuson-Moss Warranty Act, Congress responded by, among other things, sharply curtailing the FTC's rulemaking authority with the FTC Improvements Act of 1980.⁷⁵ In addition to prohibit the FTC from making any industry-wide unfair advertising rule, the FTC Improvements Act of 1980 imposed on the FTC more procedural obligations than those already existed in the Magnuson-Moss procedures. To begin with, Congress reinforced the requirements for notice prior to the promulgation of a rule. Before publishing any notice of proposed rulemaking required by the Magnuson-Moss Warranty Act, the FTC should also publish an "advance notice of proposed rulemaking (ANPR)" for public comment.⁷⁶ An ANPR should contain a brief description of the area of inquiry under consideration, the objectives of the rule, and possible regulatory alternatives to the rule.⁷⁷ The FTC should submit such ANPR to the Senate and House Commerce Committees. It should also submit any notice of proposed rulemaking to those congressional committees thirty days in advance of its publication in the Federal Register.⁷⁸ Furthermore, the FTC Improvements Act of 1980 directed the FTC to conduct regulatory analyses as part of its rulemaking process. Prior to issuing a proposed rule, the FTC should publish a preliminary regulatory analysis, describing the need for, and the objectives of the proposed rule, reasonable alternatives to the proposed rule, and the projected benefits and adverse effects of the proposed rule and each alternative.⁷⁹ Similarly, the FTC should issue a final regulatory analysis before promulgating a final rule. In a final regulatory analysis, the FTC should not only reiterate those included in a preliminary regulatory analysis, but also explain

⁷⁵ The FTC Improvements Act of 1980, Pub. L. 96-252, 94 Stat. 389.

⁷⁶ Id. § 57a(b)(2)(A).

⁷⁷ Id. § 57a(b)(2)(A)(i).

⁷⁸ Id. § 57a(b)(2)(C).

⁷⁹ Id. § 57b-3(b)(1).

why the Commission decides that the final rule would achieve its objectives, as well as the Commission’s assessment of significant issues raised in the public comment period.⁸⁰

By placing more and more procedural impediments in the way of FTC rulemaking, the Magnuson-Moss Warranty Act and the subsequent FTC Improvements Act of 1980 significantly reduced the FTC’s capacity to issue rules and regulations. Specifically, hybrid rulemaking that the FTC ought to follow made its rulemaking time-consuming and burdensome. Jeffrey Lubbers surveyed the time needed for issuing trade regulation rules before and after the Magnuson-Moss Act. Of all FTC trade regulation rules list in 16 C.F.R. Subchapter D, ten rules were issued prior to the enactment of the Magnuson-Moss Act, and six rules promulgated in accordance with the Magnuson-Moss procedures. Lubbers found that the hybrid rulemaking requirements articulated in the Magnuson-Moss Act almost doubled the duration of FTC rulemaking: it took an average of 1,086 days to issue pre-Magnuson-Moss Act rules, while it took 2,035 days on average to issue post-Magnuson-Moss Act rules.⁸¹ This comparison did not take into account unsuccessful rulemaking in the post-Magnuson-Moss Warranty Act era, which on average cost more than 8 years before the FTC terminated the rulemaking process.⁸²

Table 1 Length of FTC Trade Regulation Rules⁸³

	Title	Length
Trade Regulation Rules before MMWA	Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking	163 days
	Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets	556 days
	Care Labeling of Textile Wearing Apparel and Certain Piece Goods	773 days
	Retail Food Store Advertising and Marketing Practices	546 days
	Use of Prenotification Negative Option Plans	1,017 days

⁸⁰ Id. § 57b–3(b)(2).

⁸¹ Jeffrey S. Lubbers, It’s time to Remove the Mossified Procedures for FTC Rulemaking, 83 Geo. Wash. L. Rev. 1979, 1985-89 (2015).

⁸² Id. at 1989.

⁸³ Id. at 1985-89.

	Cooling-Off Rule	759 days
	Amplifier Rule	1,208 days
	Holder in Due Course Rule	1,758 days
	Mail, Internet, or Telephone Order Merchandise Rule	1,486 days
	Franchise Rule	2,598 days
<i>Average</i>		1,086 days
Trade Regulation Rules after MMWA	Eyeglass Rule	868 days
	Labeling and Advertising of Home Insulation rule	647 days
	Vocational Schools Rule	1,596 days
	Credit Practices Rule	3,247 days
	Used Car Rule	3,240 days
	Funeral Rule	2,583 days
	Business Opportunity Rule	2,066 days
<i>Average</i>		2,035 days
Unsuccessful Rulemakings	Mobile Home Sales and Service	~2,016 days
	Hearing Aid Industry	~3,698 days
	Health Spas	~3,567 days
	Advertising and Labeling of Protein Supplements	~3,269 days
	Food Advertising	3,116 days
	Advertising for Over-the-Counter Antacids	3,153 days
<i>Average</i>		3,136.5 days

The imposition of the Magnuson-Moss procedures made it difficult for the FTC not only to make new rules, but also to amend existing rules. After the passage of the FTC Improvements Act of 1980, FTC rulemakings pursuant to the FTC Act were limited to amendments to its existing rules. Following the Magnuson-Moss procedures, the FTC took an average of nearly 1,922 days to make these substantive amendments (see Table 2), which was close to the average length of issuing a new rule in accordance with the Magnuson-Moss procedures.

Table 2 Length of FTC Amending Existing Rules

	Title	Length
Rule Amendments after the FTCIA of 1980	Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking	163 days
	Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets	556 days
	Care Labeling of Textile Wearing Apparel and Certain Piece Goods	773 days
	Retail Food Store Advertising and Marketing Practices	546 days

	Use of Prenotification Negative Option Plans	1,017 days
	Cooling-Off Rule	759 days
	Amplifier Rule	1,208 days
	Holder in Due Course Rule	1,758 days
	Mail, Internet, or Telephone Order Merchandise Rule	1,486 days
	Franchise Rule	2,598 days
<i>Average</i>		1,086 days

In comparison, where Congress explicitly exempted FTC rulemakings from the Magnuson-Moss procedures, allowing the FTC to issue rules pursuant to notice-and-comment rulemaking, the length of rulemaking is much shorter. For example, in order to fulfill its responsibility under section 383 of the Energy Policy and Conservation Act and prescribe test procedures and labeling standards for recycled oil, the FTC spent as little as 64 days between publishing a proposed rule and issuing the final rule.⁸⁴ The same is true for existing all privacy rules discussed above. On average, it took the FTC less than a year—321.3 days—to issue a sectoral privacy rule in accordance with section 553 of the APA, with the median time of 206 days (see Table 3). There is no doubt that the comparing to the Magnuson-Moss procedures, the notice-and-comment rulemaking allows the FTC to issue rules in a more efficient manner.

Table 3 Length of FTC Privacy Rulemaking⁸⁵

	Title	Length
Privacy Rules Pursuant to § 553	COPPA Rule (1999)	190 days
	Financial Privacy Rule (2000)	84 days
	Safeguards Rule (2002)	289 days
	National Do Not Call Amendment to TSR (2003)	364 days
	CAN-SPAM Rule (2003)	1105 days

⁸⁴ See, Test Procedures and Labeling Standards for Recycled Oil, 60 Fed. Reg. 44,712 (proposed Aug. 28, 1995) (to be codified at 16 C.F.R. pt. 311); Test Procedures and Labeling Standards for Recycled Oil, 60 Fed. Reg. 55,414 (Oct. 31, 1995) (codified at 16 C.F.R. pt. 311).

⁸⁵ See *supra* note 26-48 and accompanying texts.

	Disposal Rule (2004)	222 days
	Prescreen Opt-out Notice Rule (2005)	126 days
	Red Flags Rule (2007)	479 days
	Health Breach Notification Rule (2009)	127 days
	Military Credit Monitoring Rule (2019)	227 days
<i>Average</i>		321.3 days

To summarize, after Congress hobbled the FTC’s rulemaking authority between the 1970s and 1980s, the lengthiness of the Magnuson-Moss procedures makes it an ill-fitted candidate for announcing policies in the field of information privacy, where the fast-changing conditions call for quick responses. If the FTC were to issue a general privacy rule following the Magnuson-Moss procedures defined in section 18 of the FTC Act, then the final rule would be most likely “stale by its implementation date.”⁸⁶ Partly due to this reason, the FTC has not engaged in Magnuson-Moss rulemaking on privacy and data security.

3. Unsuccessful Efforts to Obtain General Rulemaking Power

The FTC, acting as the nation’s *de facto* privacy regulator, faces a dilemma in prescribing its privacy regulations. On one hand, if the FTC would like to issue a general rule regarding consumer privacy, then it should follow the time-consuming Magnuson-Moss procedures, which in practice prohibits the FTC from making such rule; on the other hand, if the FTC would like to use the less burdensome procedures defined in section 553 of the APA, then it could only promulgate sector-specific privacy rules as directed by Congress. Consequently, the FTC has sought to enlarge its rulemaking authority and permit it to issue omnibus privacy rules in accordance with the notice-and-comment rulemaking procedures.

⁸⁶ Chris Hoofnagle, *Federal Trade Commission Privacy Law and Policy*, 102 (2016).

Instead of explicitly asking Congress to give it rulemaking power under section 553, the FTC preferred to recommend new privacy legislation that would give the “implementing agency”—presumably the FTC—rulemaking authority until the early 2000s. For example, the FTC, in its seminal 1998 report, *Privacy Online: A Report to Congress*, recommended that Congress should develop legislation with respect to children’s privacy.⁸⁷ Congress enacted the COPPA, pursuant to which the FTC issued the COPPA rule. When testifying before the House Committee on Commerce, then-Chairman, Robert Pitofsky, asserted that “[a]s part of the proposed legislative model [in the report], the *implementing agency* would be given rule-making authority under the Administrative Procedure Act.”⁸⁸

In 2000, the FTC published the report, *Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress*. In the report, the FTC recommended that Congress should pass legislation with general terms and technological neutrality, which gave rulemaking authority to an implementing agency to “define fair information practices with greater specificity.”⁸⁹ The FTC also submitted a prepared statement to the Senate Committee on Commerce, Science, and Transportation, in which Pitofsky informed the Committee that a majority of the FTC commissioners believed that

[t]he proposed legislation would set forth a basic level of privacy protection for consumer-oriented commercial Web sites. Such legislation would establish basic standards of practice for the collection of information online, and provide an

⁸⁷ Fed. Trade Comm’n, *Privacy Online: A Report to Congress*, 42 (1998).

⁸⁸ Robert Pitofsky, Former Chairman, Fed. Trade Comm’n, *Consumer Privacy on the World Wide Web*, Testimony before Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce (July 21, 1998).

⁸⁹ Fed. Trade Comm’n, *Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress*, 37 (2000).

implementing agency with the authority to promulgate more detailed standards pursuant to the Administrative Procedure Act.⁹⁰

In another report published in the same year, the FTC further recommended that legislation that would set forth a basic level of privacy protection for all visitors to consumer-oriented commercial Web sites with respect to profiling. Such legislation would set out the basic standards of practice governing the collection and use of information online for profiling, and provide an implementing agency with the authority to promulgate more detailed standards pursuant to the Administrative Procedure Act, including authority to enforce those standards.⁹¹

In the second decade of the twenty-first century, the FTC began to request additional rulemaking authority for itself. For example, David Vladeck, former director of the Bureau of Consumer Protection, claimed that

[i]f Congress enacts privacy legislation, the Commission agrees that such legislation should provide APA rulemaking authority to the Commission. In particular, at the FTC’s privacy roundtables, many stakeholders expressed concern about the significant difficulties associated with providing effective privacy disclosures. The content, timing, and scope of privacy disclosures required by the legislation would benefit from broad stakeholder input and consumer testing, which can be accomplished in an APA rulemaking.⁹²

Likewise, in the statement prepared by Maneesha Mithal, who was the associate director of the Division of Privacy and Identity Protection, the FTC suggested that “the bill grant it rulemaking

⁹⁰ Robert Pitofsky, Prepared Statement of The Federal Trade Commission on Privacy Online: Fair Information Practices in the Electronic Marketplace, Before the Committee on Commerce, Science, and Transportation United States Senate Washington, D.C. May 25, 2000.

⁹¹ Fed. Trade Comm’n, Online Profiling (Part 2): Recommendations, 10 (2000).

⁹² David Vladeck, Former Director of the Bureau of Consumer Protection, Prepared Statement on Consumer Privacy before Subcommittee on Commerce, Trade, and Consumer Protection, Senate Committee on Energy and Commerce, July 22, 2010.

authority to determine circumstances under which the provision of free credit reports or credit monitoring may not be warranted.”⁹³

In 2012, the FTC published another influential report, *Protecting Consumer Privacy in an Era of Rapid Change*, in which it called on Congress to enact baseline privacy legislation and repeated its call for data security legislation.⁹⁴ Meanwhile, Commissioner Maureen Ohlhausen submitted a prepared statement and claimed that the proposed data security legislation “should empower the FTC to promulgate regulations for the protection of personal data from unauthorized access.”⁹⁵

In the following years, FTC commissioners and officials continued to advocate for rulemaking powers under the APA in numeral occasions. In 2014, then-Chairwoman Edith Ramire claimed that legislation regarding data security and breach notification should, among other things, “give the FTC rulemaking authority under the Administrative Procedure Act,” which would “create a strong consistent standard and enable the FTC to protect consumers more effectively.”⁹⁶

Ramire’s claim for APA rulemaking power was echoed by other FTC officials and commissioners. For example, Jessica L. Rich, the former director of the Bureau of Consumer Protection argued in 2016 that the new data security legislation “should give the FTC the ability

⁹³ Maneesha Mithal, Associate Director of the Division of Privacy and Identity Protection, Prepared Statement on Consumer Privacy before Subcommittee on Consumer Protection, Product Safety, and Insurance, Senate Committee on Commerce, Science, and Transportation, September 22, 2010.

⁹⁴ Fed. Trade Comm’n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, i (2012).

⁹⁵ Statement of Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n., before the Senate Committee on Commerce, Science and Transportation, Hearing on The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission, May 9, 2012.

⁹⁶ Edith Ramirez, Chairwoman of the Federal Trade Commission, PREPARED STATEMENT On Privacy in the Digital Age: Preventing Data Breaches and Combating Cybercrime Before the Senate Committee on the Judiciary, February 4, 2014.

to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking authority under the Administrative Procedure Act.”⁹⁷

Similarly, in 2018, Chairman Joe Simons said in separate remarks before House Energy and Commerce Subcommittee that

[i]n my view, [the FTC] need[s] more authority. I support data security legislation that would give us three things: (1) the ability to seek civil penalties to effectively deter unlawful conduct, (2) jurisdiction over non-profits and common carriers, and (3) the authority to issue implementing rules under the Administrative Procedure Act.”⁹⁸

Commissioner Rebecca Slaughter, who later became the acting FTC chair before the appointment of Lina Khan, made clear the FTC’s position in an FTC hearing:

the majority of the Commission supports the enactment of a comprehensive federal privacy law that does three things in terms of enforcement: (1) empowers the FTC to seek significant monetary penalties for privacy violations in the first instance; (2) gives the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with technological developments; and (3) repeals the common-carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to a consistent standard.⁹⁹

The FTC’s call for the authority to prescribe general privacy regulations was also reaffirmed in the 2019 version of the Privacy & Data Security Update.

⁹⁷ Jessica L. Rich, Former Director, Bureau of Consumer Protection, Testimony before the Subcommittee on Information Technology and the Subcommittee on Health, Benefits, and Administrative Rules of the Oversight and Government Reform Committee, United States House of Representatives, (March 22, 2016).

⁹⁸ FTC Testifies before House Energy and Commerce Subcommittee about Agency’s Work to Protect Consumers, Promote Competition, and Maximize Resources, available at <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-testifies-house-energy-commerce-subcommittee-about-agencys>.

⁹⁹ Remarks of Commissioner Rebecca Kelly Slaughter, FTC Hearing #12 The FTC’s Approach to Consumer Privacy, April 10, 2019.

To better equip the Commission to meet its statutory mission to protect consumers, the FTC has also called on Congress to enact comprehensive privacy and data security legislation, enforceable by the FTC. The requested legislation would expand the agency's civil penalty authority, provide the agency with targeted rulemaking authority, and extend the agency's commercial sector jurisdiction to non-profits and common carriers as well.¹⁰⁰

Despite the FTC's repeated calls for notice-and-comment rulemaking power, most of them have fallen on deaf ears on Capitol Hill. Congress declined to pass legislation that would allow the FTC to promulgate general privacy rules under section 553 of the APA. Consequently, the FTC cannot make privacy rules in accordance with the less burdensome notice-and-comment rulemaking, except for a limited scenarios discussed in the previous section.

III. Regulating Privacy through Enforcement Actions

Regardless of the FTC's attempts to obtain rulemaking powers, it is enforcement actions that serve as the Commission's primary strategy in regulation information privacy. The FTC's privacy enforcement dates to the 1970s, when Congress enacted the FCRA. In the past two decades, the FTC has developed a distinctive approach to privacy and security issues through its use of enforcement actions. It utilizes enforcement actions, often packaged in the form of specific disputes, as a vehicle for its policy announcements that go beyond what are necessary to dispose of the cases. Collectively, these enforcement actions create a set of legal norms about information privacy that is functionally equivalent to privacy rules.

1. An Enforcement-Centric Agenda

¹⁰⁰ Fed. Trade Comm'n, 2019 Privacy and Data Security Update, 1 (2019).

In the most part of the FTC's history, the Commission has acted primarily as a law enforcer, the role that it also played in regulating information privacy. The FTC's privacy enforcement goes back to the 1970s, when Congress passed the FCRA and gave it the enforcement authority regarding credit reporting issues. Though Congress later transferred most of rulemaking powers to the CFPB, the FTC has retained the enforcement authority under the FCRA. In the five decades since the FCRA, the FTC has brought more than 100 cases against companies for violating the statute, collecting more than \$40 million in civil penalties.¹⁰¹ The FTC's first settlement in the information privacy area also involves violations of FCRA: it charged Bruno's Inc. of failing to inform consumers of the source and use of their information in consumer reports under the FCRA, and the company agreed to disclose to consumers in its subsequent denial of employment application that the information contained in consumer reports was used to make the adverse action.¹⁰²

The FTC's first privacy-related case in the Internet environment is *In re GeoCities*.¹⁰³ In 1998, the FTC charged GeoCities with misrepresentation regarding its information collection and use. GeoCities claimed that it would only use the personal identifying information to provide the specific advertising offers and products or services requested by members, and that it would not release the "optional" information to third parties without the member's consent, both of which were not followed by GeoCities. In addition, *GeoCities* was an early case involving children's privacy after the passage of COPPA, where the company misrepresented the entity that collected

¹⁰¹ Id. at 7.

¹⁰² Bruno's, Inc. FTC MATTER/FILE NUMBER: 962 3086/DOCKET NUMBER: C-3760 (1997).

¹⁰³ FTC Press Release, Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case, (August 13, 1998), available at <https://www.ftc.gov/news-events/press-releases/1998/08/internet-site-agrees-settle-ftc-charges-deceptively-collecting>.

and maintained children’s information. GeoCities agreed to adopt a “clear and prominent” privacy policy, and obtain parental control before gathering information from children. Later in early 2000s, the FTC began to bring cases against companies for data security reasons. At first, the FTC addressed data security cases on the ground of deceptive acts and practices. For example, it charged a group of online pharmacies falsely representing that consumer information was encrypted and the transmission of that information was through an SSL secure connection.¹⁰⁴ Similarly, in *In re Microsoft Corp.*, the FTC accused that the company falsely represented that “it maintained a high level of online security by employing sufficient measures reasonable and appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers in connection with the Passport and Passport Wallet services.”¹⁰⁵

Later, the FTC included allegation of unfair practices into its data security cases. In *In re BJ’s Wholesale Club, Inc.*, the FTC brought an unfairness action against the company for inadequate data security measures, which included failing to encrypt collected information, anonymous access to stored information, failure to limit wireless access by adopting readily available security measures, failure to detect unauthorized access, and keeping the information longer than what is necessary.¹⁰⁶ Both *FTC v. Wyndham* and *LabMD, Inc. v. FTC*, two cases that rendered so far the most important judicial opinions with respect to the FTC’s privacy regulation, also involved the application of unfairness theory to data security cases.

The FTC’s role as a long-time law enforcement agency is supplemented by considerable flexibility of its enforcement authorities. To begin with, unlike other sector-specific agencies, the

¹⁰⁴ *FTC v. Rennert, et al.*, No. CV-S-00-0861-JBR (D. Nev. July 12, 2000) (complaint for permanent injunction and other equitable relief).

¹⁰⁵ *Microsoft Corp.*, FTC File No. 012 3240, No. C-4069 (2002) (complaint).

¹⁰⁶ *BJ’s Wholesale Club, Inc.*, FTC File No. 042 3160 (2005) (complaint).

FTC can investigate a wide range of businesses except those excluded from Section 5, such as common carriers and certain financial institutions. The Commission can initiate investigations as a result of consumer complaints directly made to the Consumer Sentinel or forwarded by congressional members, of exposure of wrongdoings by competitors, or the observations of its staff attorneys in the interaction with the businesses. Notably, though consumers and competitors can signal the FTC about the wrongdoings, there is no formal procedure for them to initiate investigations.¹⁰⁷

Once an investigation starts, the FTC has several options to obtain information from the businesses. The agency may request information by sending a voluntary “access letter” to the investigatory target. A failure to properly respond to the access letter may signal potential wrongdoings to the FTC staff attorneys. The FTC can also gather information through compulsory processes. Under the commission’s procedural rules, its primary vehicle for investigating deceptive or unfair trade practices is civil investigative demands (CIDs).¹⁰⁸ By issuing CIDs, the FTC can compel a variety of information from the investigatory target or third parties, which, among others, include documentary materials, tangible things, reports, and oral testimony. Other forms of compulsory processes available to the FTC range from subpoenas and access orders to investigational hearings and depositions. Though investigatory targets may file a petition against these compulsory processes, the authority to review the petition is within the hand of the Commission.

¹⁰⁷ 16 C.F.R. § 2.2.

¹⁰⁸ Id. § 2.7.

At the end of the investigation, the FTC may either bring actions before a federal judge as “cases,”¹⁰⁹ or before an administrative law judge (ALJ) as “matters.”¹¹⁰ While judicial proceedings enhance the legitimacy of FTC enforcement and allow the agency to obtain enforceable remedies in a timely manner, administrative proceedings also have strengths. For example, the Commission’s finding of facts in administrative proceedings is conclusive, to which a reviewing court should give considerable deference. In addition, an administrative proceeding permits the FTC to “target and ‘fence in’ a large scope of the respondent’s practices” than a judicial one does.¹¹¹

2. Settling Privacy Disputes

A notable feature of the FTC’s regulatory approach to information privacy is that most of its enforcement actions have been either abandoned in the investigatory stage or settled. As mentioned in the previous section, the FTC reach the first privacy-related settlement with Bruno’s, Inc. in 1997. In the ensuing two decades and more, a majority of FTC enforcement actions are settled in form of consent orders, with only three exceptions. These three enforcement actions have made it to court, resulting in two opinions upholding the FTC’s authority to police information privacy,¹¹² and one that invalidated the Commission’s cease-and-desist order.¹¹³

¹⁰⁹ The FTC may bring suit in a district court to enjoin any such act or practice “violating, or is about to violate, any provision of law enforced by the [FTC].” 15 U.S.C. Sec. 53(b).

¹¹⁰ 16 C.F.R. § 3.

¹¹¹ See Hoofnagle, *supra* note 86, at 111.

¹¹² See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1193-95 (10th Cir. 2009) (holding that Section 5 “enables the FTC to make action against unfair practices that have not yet been contemplated by more specific laws.”); *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3rd Cir. 2015).

¹¹³ *LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018) (holding that the Commission’s cease and desist order to overhaul LabMD’s data security program on the basis that the security requirements contained in the order were not specific enough to be enforceable.).

A consent order, in essence, is a settlement that resolves a dispute between the FTC and a company being investigated, in which the company promises to take remedial measures in exchange for the drop of complaints. There are several factors that would motivate the business to settle the charges with the FTC. First, by settling the charges, a company does not need to walk through the muddy water of litigations. Therefore, settlements would save a company from a huge amount of time and resources in challenging the FTC's allegations. Second, in settling the charges, a company does not concede nor deny the liabilities, which prevents potential loss of reputation. Finally, in some extreme cases, fighting against an agency either before the court or an administrative judge will result in a surprising outcome, so a company would rather settle the case to ensure some degree of certainty.

Despite the incentives that motivate the business to settle disputes, the FTC takes consent orders as its favored strategy in policing information privacy issues. Its preference for consent orders is largely attributed to some practical considerations. To begin with, the FTC can benefit from the high efficiency of a consent order by eliminating the cost of time and resources required by formal proceedings. If the FTC proceeds the case before an administrative law judge, then it should follow the formal adjudication procedures defined in the APA and afford particular procedural safeguards to the respondent. These procedural safeguards include, among others, a trial-like hearing and a written record upon which the final decision is based.¹¹⁴

However, nothing in the APA specifies procedural requirements for issuing consent orders. The consent order procedure is defined in the FTC's Procedures and Rules of Practice.¹¹⁵ The procedural rule allows any person or entity under investigation can submit a proposed consent

¹¹⁴ See 5 U.S.C. § 554.

¹¹⁵ 16 C.F.R. § 2.31-34.

agreement.¹¹⁶ In practice, the bureau director can authorize staff attorneys to negotiate a settlement with the company being investigated. Once staff attorneys and the company reach an agreement, the agreement would be submitted to the Commission. The Commission should accept it before publicizing it for public comment. After the public comment period, the Commissioners will vote for the settlement. Further approval by the judges is required if a settlement is reached in a judicial proceeding. Compared to litigations and the trial-like proceeding of formal adjudication, consent order procedure avoids “the expense of lengthy negotiation and pretrial preparation and litigation.”¹¹⁷

By expediting the resolution of the disputes, the reliance upon consent orders also enhances the FTC’s capacity for privacy enforcement. The primary body within the FTC that is responsible for privacy enforcement is the Division of Privacy and Identity Protection (DPIP), which enforces sectoral privacy statutes like the FTRA, GLBA, and COPPA, as well as Section 5. In 2006, the DPIP has “more than 30 staff members with expertise” in information privacy issues.¹¹⁸ Though the number of DPIP staff members has steadily increased over the years, it is still relatively small.¹¹⁹ Sometimes, staff members in the Commission’s regional offices may also be involved in privacy matters.¹²⁰ The small number of personnel that is available to the FTC in enforcing privacy laws has constrained the number of its enforcement actions to a modest level.

¹¹⁶ 16 C.F.R. § 2.31.

¹¹⁷ Stephanie W. Kanwit, Federal Trade Commission, § 12:4 (2013). However, “negotiations of a consent in a particular difficult case may also be lengthy, and the FTC may not accept an order until months (or years) after it is signed.”

¹¹⁸ Jon Lerbowitz, Prepared Statement of the Federal Trade Commission on “Social Security Numbers in Commerce: Reconciling Beneficial Use with Threats to Privacy” 1 (May 11, 2006).

¹¹⁹

¹²⁰ William E. Kovacic. FTC, The Federal Trade Commission at 100: Into Our 2nd Century, available at https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

Without recruiting more personnel, consent orders address privacy-related cases in a cost-efficient way, thus permit the FTC to investigate more potential privacy violations.

Finally, consent orders are likely to increase compliance by the businesses. An adjudicated order represents the view of the regulator, so there is no guarantee that the regulated party will obey it. By contrast, a consent order is a compromise mutually agreed by both the FTC and the company that is investigated. Therefore, the requirements defined in a consent order are at least workable for the company, and compliance with a consent order is aligned with the company's interest. Therefore, a company is more likely to abide by the consent order that it enters into than an adjudicated order.

Given the advantages of consent orders, there is no surprise that the FTC relies heavily on consent orders in policing information privacy. Consent orders allow the FTC to effectively regulate privacy-related issues with limited resources. Over two and a half decades, the Commission has made more than 270 consent orders, which becomes the Commission's primary regulatory tool.

3. Enforcement as Regulation

Once a consent order is final, the company that enters a settlement with the FTC is obligated to carry out the obligations defined in the order. The enforceability of consent orders is guaranteed by law. Since consent orders fall into the category of "order" defined by the FTC Act, any violation of a consent order will trigger Section 5(l) of the FTC Act. Section 5(l) authorizes the FTC to impose civil penalties on "[a]ny person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect."¹²¹ Currently, the

¹²¹ 15 U.S.C. § 45(l).

FTC can issue a civil penalty of up to \$16,000 for each violation of a consent order.¹²² Usually, the FTC should ask the Department of Justice to bring actions for civil penalties on its behalf; only when the Department of Justice fails to act in 45 days can the FTC sue the violator in its name.

Google is the first company that was fined for failing to obey a prior consent order. In 2011, the FTC charged the Internet giant with engaging in deceptive acts and violating its privacy promises as well as the U.S.-EU Safe Harbor Framework when it launched Google Buzz social network. To settle these charges, Google agreed to not make any privacy misrepresentation in the future.¹²³ However, Google later made misrepresentations to Safari users about the placement of advertising tracking cookies and serving of targeted advertisements. The FTC alleged that Google's misrepresentation violated the 2011 Google Buzz settlement, which prohibited Google from misrepresenting the extent to which consumers can control the collection of personal information. In response, Google agreed, among others, to pay a \$22.5 million civil penalty for its alleged violation of the prior consent order. Later the Google Safari settlement containing the \$22.5 million civil penalties was approved by federal judges.¹²⁴

The most recent case of civil penalty is the stipulated order against Facebook in 2019. In wake of the Cambridge Analytica scandal, the FTC initiated a year-long investigation against Facebook and found that Facebook repetitively used deceptive tactics to allow the company to share its user's personal information with third-party apps. Facebook's recurrent deceptive conducts violated a prior consent order that the FTC approved in 2012, which barred the company from

¹²² Press Release, Commission Approves Federal Register Notice Adjusting Civil Penalty Amounts, available at <https://www.ftc.gov/news-events/press-releases/2008/12/commission-approves-federal-register-notice-adjusting-civil>.

¹²³ *Google, Inc.*, FTC File No. 102 3136 (2011).

¹²⁴ *U.S. v. Google Inc.*, No. CV 12-04177 SI (N.D.Ca. 2012).

misrepresenting the extent to which Respondent makes or has made covered information accessible to third parties.

In calculating the range of civil penalties, the FTC first decided that Facebook was liable for a penalty of approximately \$5.56 per alleged violation. In terms of the number of offenses, Section 5(l) provided that each separate violation of an FTC order constitutes a separate offense; in case of continuing failure or neglect to comply with a final order, each day of continuous violation is a separate offense. In the *Facebook* case, the FTC found that each view of Facebook web pages containing misrepresentations about information privacy constituted an alleged violation of the 2012 order.¹²⁵ Since there were nearly 900 million views of the pages, the FTC required Facebook to pay a \$5 billion civil penalty for its violation of the 2012 order. The civil penalty against Facebook is the largest one ever imposed worldwide on anyone for violating consumers' privacy and data security.

Commenting on the civil penalty against Google, Jon Leibowitz, then-Chairman of the FTC noted that “[t]he record setting penalty . . . sends a clear message to all companies under an FTC privacy order: [n]o matter how big or small, all companies must abide by FTC orders against them and keep their privacy promises to consumers, or they will end up paying many times what it would have cost to comply in the first place.”¹²⁶ Though the number of cases that the FTC obtained civil penalties for failure to obey a consent order is limited, the availability of civil penalty in the Commission's toolbox guarantees the enforceability of consent order by deterring anyone who enters into a settlement with the FTC from violating the order.

¹²⁵ *U.S. v. Facebook Inc.*, Case No. 19-cv-2184 (D.C. 2019).

¹²⁶ Fed. Trade. Comm'n., Press Releases, Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser (August 9, 2012).

Though FTC settlements often concentrate on resolving specific disputes between a company and the FTC and only bind both parties of the settlement, they have a considerable impact on similarly situated companies as well as a broad community of privacy practitioners. Privacy lawyers treat FTC settlements as though they have “precedential weight” and read these settlements in a way similar to their reading of judicial decisions. When privacy lawyers prepare to advise their clients on information privacy issues, they consult FTC enforcement actions and other online resources that summarize prior consent orders, and attempt to extract a general rule that will predict future enforcement practices. Privacy practitioners often send their clients alerts right after a new FTC decision.

Privacy practitioners’ acknowledgment of FTC settlements as a source of law is largely attributed to the regulatory void left by sectoral privacy statutes. There is no comprehensive information privacy/data protection law in the United States; rather, different federal statutes regulate information collection, use, and disclosure by private actors on the basis of industry sectors. Even though Congress has enacted dozens of privacy laws since the 1970s, many industry sectors fall outside of these privacy laws.

The difficulty to pin down by reference to a clear set of legal rules forces privacy practitioners to shift their attention to FTC enforcement actions. FTC enforcement actions not only “signal the agency’s view of the applicable law,” but also “inform regulated parties as to the agency’s view of how the law applies to a discrete and identified set of facts.”¹²⁷ For example, in data security cases, whether a company provides “reasonable security to consumers’ personal information” is a decisive factor in determining its acts constitute unfair trade practices under Section 5. In contrast to the statutory language that does not explain the definition of reasonable security, FTC

¹²⁷ See Daniel J. Solove, and Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 622 (2014) (quoting the transcript of interview with David Vladeck).

settlements have established a relatively clear standard. In the action against BJ's Wholesale Club, the FTC identified several practices that made BJ's data security measures unreasonable, including (1) failing to encrypt consumer information; (2) storing information for up to 30 days, which violated bank security rules and often unnecessary; (3) using commonly known default user IDs and passwords for accessing stored personal information; (4) failing to use readily available security measures to prevent unauthorized wireless connections to its networks; and (5) failing to use measures sufficient to detect unauthorized access.¹²⁸ Other cases also identify practices that lead to a finding of failure to provide reasonable security. By carefully observing these enforcement actions, privacy practitioners can draw inferences and help their clients adjust avoid potential FTC investigations.

The impact of enforcement actions on similarly situated companies and privacy practitioners is an outcome of the FTC's deliberate choice. The FTC takes several measures to ensure the involvement of stakeholders, especially those companies in the same industry or committing similar practices, in consent order procedures. First, the FTC publicizes consent orders along with complaints and other supporting materials. Settlements reached in the context of litigation often remain secret so that parties can avoid publicity. By contrast, the FTC voluntarily posts complaints and proposed consent agreements on the public record as well as its websites. It warns stakeholders about the practices identified in the investigation as well as corresponding sanctions and remedies.

Second, the FTC offers other stakeholders a period of public comment before finalizing the consent agreement. The procedure for public comment is articulated in the FTC's Procedures and Rules of Practice. The FTC should place on the public record "the order contained in the consent

¹²⁸ *BJ's Wholesale Club*, *supra* note 106.

agreement, the complaint, and the consent agreement,” and the interested person can submit their comments.¹²⁹ Following the public comment period, the Commission can withdraw its acceptance of the consent agreement. In practice, the FTC often accompanies the proposed consent order with an analysis to aid public comment, and after the public comment period, sends letters directly to commenters to address their concerns.¹³⁰

On occasions, commissioners who vote on the proposed agreement also write concurring and dissenting statements. In wake of a series of investigations against false and misleading advertisements, including two data security cases, all five commissioners submit their statements that express their views.¹³¹ These statements help stakeholders to obtain a better perception of the FTC’s position and make predictions.

In addition, since the weight of FTC settlements on relies upon their consistency, the FTC has taken two strategies in keeping the consistency of FTC settlements. One is the Commission’s discretion in case selection. In policing information privacy issues, the FTC does not randomly select which cases to investigate. Instead, its staff attorneys follow a structural case model, where they study an industry or a range of practices to make strategic policy changes.¹³²

On the other hand, although the FTC doesn’t cite consent orders as legal precedent in its formal adjudicatory proceedings, it occasionally referenced previous consent orders in negotiations of settlements, statements accompanying final orders, and other informal communications. For example, in a letter to commenter John Hale as part of *In re Twitter, Inc.*, the FTC referenced two prior consent orders, those of *In re Educ. Research Ctr. of America, Inc.* and *In re Microsoft*

¹²⁹ 16 C.F.R. § 2.34.

¹³⁰ Twitter, Inc., FTC File No. 092 3093 (2011).

¹³¹ See GeneLink, Inc., FTC File No. 112 3095, No. C-4456 (2014), and Foru Int’l Corp., FTC File No. 112 3095, No. C-4457 (2014).

¹³² See, Hoofnagle, *supra* note 86, at 103.

*Corp.*¹³³ In fact, the FTC’s staff “often blur the lines between consent and adjudicated orders in citing cases as precedent.”¹³⁴

To summarize, FTC enforcement actions have an impact on not only the company being investigated but also other similarly situated and the community of privacy practitioners. On the one hand, those that enter a settlement with the FTC are bound by consent orders and should abide by the requirements contained in the order. Otherwise, they will be subject to the sanction of civil penalties. For businesses in the same industry or engaging in similar practices, consent orders send them a clear message that the practices identified in the complaint violate the FTC Act and other privacy laws, and will put them on the radar of FTC investigations. In this process, the FTC uses a limited number of cases to develop a body of legal norms that provides baseline privacy protection in the nation.

Conclusion

Two decades ago, Steven Hetcher, when justifying the FTC’s promotion of privacy policies, once observed that the FTC would like to expand its power, and privacy policies increased the FTC’s “jurisdictional grasp” on online privacy without explicit legislative mandate.¹³⁵ His observation still holds today. As a regulator, the FTC would like to expand its regulatory authority, especially the authority to prescribe regulations, if possible. However, Congress has formalized the FTC’s rulemaking authority by imposing the Magnuson-Moss procedures, and only permitted the FTC to issue sector-specific rules pursuant to the notice-and-comment rulemaking. Given the inability of making a privacy rule with general applicability, we witness a

¹³³ Letter from Donald S. Clark, Sec’y, FTC to John Hale (March 2, 2011).

¹³⁴ See Solove and Hartzog, *supra* note 127, at 624 (quoting the transcript of interview with Joel Winston, former Associate Director of Division of Privacy & Identity Protection, FTC).

¹³⁵ Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 *Vand. L. Rev.* 2041 (2000).

“squeeze the balloon” effect: instead of following the time-consuming hybrid rulemaking required by Congress, the FTC has invented a new regulatory approach based on enforcement actions. The case-by-case approach, combined with consent orders, gives the FTC considerable procedural flexibility, which meets the need to regulate information collection and use in a fast-changing environment.

CHAPTER 6 EVALUATING ENFORCEMENT-AS-REGULATION

Chapter 5 reveals that the FTC, in the face of practical hurdles, has developed the enforcement-as-regulation (EAR) model to regulate information privacy. The EAR model is built upon the accumulation of *ad hoc* enforcement actions and regulatory settlements, which fall into the category of informal adjudication. Despite its effectiveness in policing private companies and protecting consumers, the use of such informal adjudication concerns scholars and commentators. They worry that the EAR model permits the FTC to evade the constitutional due process safeguards, especially the fair notice requirements. By contrast, they take rules as a superior vehicle for regulating information privacy, and suggest that FTC should shift its focus from bringing enforcement actions against private companies and reaching settlements to issuing privacy rules.

In contrast to the view that adjudication should be subordinated to rulemaking, this chapter explores justifications for the FTC's EAR model under the current legal framework. First and foremost, the FTC appears to have authority to announce its policies through adjudication since the power to choose between adjudication and rulemaking is within the agency's legal authority. In addition, the EAR model arguably satisfies the constitutional due process requirements and affords sufficient procedural protections to the regulated parties. Last but not the least, the EAR model fits into the broader picture of information governance. Relying on a non-coercive, cooperative manner, it promotes the flow of regulatory information between stakeholders, including the regulators, the regulated entities and beyond, and improves the rate of actual compliance without stifling innovation.

I. Choosing Appropriate Procedures

Although adjudication and rulemaking are different types of law making, they both can be used to create standards of conduct, and each procedure has its own strengths. For example, rulemaking can guarantee greater notice and participation, result in rules with greater clarity and uniformity, be more efficient, for the agency could choose more flexible informal rulemaking and generally applicable rules saved the agency from reexamining the same issues again and again.¹ By contrast, adjudication has its own strengths. It can avoid procedural complexity in both issuing new rules and amending existing ones. It also minimizes conflicts between different rulings, and avoid over-inclusiveness and under-inclusiveness of the legal standards.² The current law leaves administrative agencies with broad discretion in terms of choosing appropriate procedures for the formulation of agency policy. Under the current law, the FTC is entitled to announce its policies on information privacy through adjudication.

1. The *Chenery* Principle

The different treatments of adjudication and rulemaking date to the early administrative law cases of *Londoner v. Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization*. The drafters of the APA acknowledged the adjudication/rulemaking distinction and prescribed different sets of procedures, but they did not provide specific guidelines as to which procedure an agency should utilize in each context. From a historical perspective, it was common that administrative agencies made major regulations through formal adjudication in the 1950s and

¹ Richard K. Berg, Re-Examining Policy Procedures: The Choice between Rulemaking and Adjudication, 38 Admin. L. Rev. 149, 163 (1986).

² Jeffery S. Lubbers, A Guide to Federal Agency Rulemaking, 144-45 (6th ed. 2019).

1960s, while notice-and-comment rulemaking later became a more popular vehicle for agency policymaking.³

The Supreme Court did not address the issue of agency choice of administrative procedures until *SEC v. Chenery Corp (Chenery II)*.⁴ In *Chenery II*, the Securities Exchange Commission (SEC), disapproved a utility corporation's reorganization plan that would benefit its directors who had purchased the corporation's stock during the reorganization period. When the case first came before the Supreme Court, the Court struck down the SEC's decision.⁵ On remand, the SEC issued another order, reaffirming its refusal to approve the reorganization plan, which was upheld by the Supreme Court.

In deciding the propriety of the process the SEC used, the majority of the Court, in the words of Justice Murphy, held that the choice between adjudication and rulemaking "lie[d] primarily in the informed discretion of the administrative agency."⁶ In particular, Justice Murphy laid out three scenarios where agency's choice of adjudication would be justified: (1) the agency could not reasonably foresee the problem but should solve the problem without a rule, (2) the agency might lack sufficient experience "to warrant rigidifying its tentative judgment into" a rule, and (3) the nature of the problem might be incompatible with the rulemaking.⁷ In these cases, the restraining agency's use of adjudication would hamper the effectiveness of the administrative process. Therefore, in *Chenery II*, even though the SEC could make a rule in advance, it was not prohibited from establishing a new legal standard through adjudicatory proceedings.

³ See, Todd D. Rakoff, The Choice between Formal and Informal Modes of Administrative Regulation, 52 Admin. L. Rev. 159, 163 (2000); Magill, M. Elizabeth, Agency Choice of Policymaking Form, 71 Univ. Chi. L. Rev. 1383, 1384-85 (2004).

⁴ 332 U.S. 194 (1947).

⁵ *SEC v. Chenery Corp*, 318 U.S. 80 (1943).

⁶ 332 U.S. 194, 203.

⁷ See *id.* at 202-03.

The broad discretion that *Chenery II* afforded to administrative agencies would require further clarification, and the Supreme Court did that at the end of the 1960s when it decided *NLRB v. Wyman-Gordon Co.*⁸ As an agency, the National Labor Relation Board (NLRB) was well known for its consistent preference for adjudication in setting new policies. In *Wyman-Gordon Co.*, the Board sought to enforce a rule it had established in a previous adjudicatory process, *Excelsior Underwear, Inc.*,⁹ which would require employers to provide lists of employees to unions in elections. However, instead of enforcing the new rule against Excelsior, the Board announced that it would only apply the rule prospectively. Wyman-Gordon argued that the prospective effect of the *Excelsior* rule converted the NLRB's prior adjudication into a *de facto* rulemaking, which failed the rulemaking requirements under the APA. The lower court agreed with the company, holding that the NLRB's new rule should have been promulgated through the rulemaking process.

The *Wyman-Gordon* Court reversed the lower court's decision in a highly fractured way. On the validity of the *Excelsior* rule, Justice Fortas, writing for the plurality opinion, found that the nature of *Excelsior* process was rulemaking, and invalidated the rule for failing to comply with the rulemaking requirements.¹⁰ At the same time, the plurality opinion also upheld the NLRB's direction that Wyman-Gordon should disclose a list of employees, since the Board had the authority to impose such requirement in an adjudicatory proceeding, regardless of the validity of the *Excelsior* rule. By contrast, Justices Black, Brennan, and Marshall, who concurred the plurality opinion in result, would have upheld both the *Excelsior* rule and the order against Wyman-Gordon,¹¹ while two dissenters, Justices Douglas and Harlan, took the position that the

⁸ 394 U.S. 759 (1969).

⁹ 156 N.L.R.B. 111 (1966).

¹⁰ 394 U.S. 759, at 764.

¹¹ See *id.*, 769-75 (Black, J., concurring in result).

Court should invalidate the order against Wyman-Gordon on the ground that the *Excelsior* rule was void.¹² Therefore, the *Wyman-Gordon* decision was a mixed bag: the majority of the *Wyman-Gordon* Court condemned the Board's action in the *Excelsior* case but sustained the order against Wyman-Gordon, which was only supported by the *Excelsior* rule.¹³

Five years later, another NLRB order reached the Supreme Court. The pending review order involved a test for "covered employees" that the NLRB established in a previous adjudication against North Arkansas Electric Cooperative, Inc. By affording protection to "managerial employees," the Board changed its longstanding definition of the types of workers protected by the National Labor Relations Act, which had precluded employees associated with the management claiming statutory protection.¹⁴ Then the NLRB applied the conflict-of-interest test in reaching the determination that a group of purchasers for Bell Aerospace would be within the protection of the NLBA. The Court of Appeals refused to enforce the NLRB's order on two grounds: first, it was not certain that the Board's decision rested on a factual determination that the buyers were not true "managerial employees" rather than on its new and erroneous holding that the Board was free to treat all managerial employees as covered by the Act unless their duties met the conflict of interest touchstone, and second, the Board was required to proceed by rulemaking rather than by adjudication in deciding the status of the purchasers as "managerial employees."¹⁵

In *NLRB v. Bell Aerospace Co.*, the Supreme Court overturned the NLRB's decision and remanded the case to the Board.¹⁶ When reviewing whether the Board should only resort to

¹² See *id.* at 775-81 (Douglas, J., dissenting); *id.* at 781-83 (Harlan, J., dissenting).

¹³ William D. Araiza, Agency Adjudication, the Importance of Facts, and the Limitations of Labels, 57 Wash. & Lee L. Rev. 351, 361 (2000).

¹⁴ See, *North Arkansas Electric Cooperative, Inc.*, 185 N.L.R.B. 550 (1970).

¹⁵ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 273 (1974) (quoting *Bell Aerospace Div. of Textron, Inc. v. NLRB*, 475 F.2d 485, 494-95 (2d Cir.1973)).

¹⁶ *Id.* at 274-90.

rulemaking procedures in determining the status of the buyers, the Court reaffirmed the *Chenery* decision that the choice between rulemaking and adjudication was entirely within the agency's discretion. Given the variety of the buyers' situation across different companies and industries, the Court noted that it was unlikely to frame "any generalized standard" whose utility was greater than marginal.¹⁷ Rather, *ad hoc* adjudication could better serve the purpose in this context. Furthermore, the Court noted that *Bell Aerospace* did not involve any situation that the Board's use of adjudication would constitute an abuse of discretion.¹⁸ Therefore, the Board was entitled to "proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the [fact]."¹⁹

Bell Aerospace has remained the Supreme Court's current law on agency selection of policymaking tools, that is, an agency's decision to use a particular procedure for policymaking deserves great judicial deference. Where Congress does not specify which procedure that an agency should follow, the general rule is that an agency can either pursue *ex ante* rules through rulemaking or announce new policies or modify existing policies in a manner incident to adjudications.

2. Limitations on Agency Choice

Despite that the Supreme Court recognized the broad power of administrative agencies to choose appropriate procedural vehicles for their policymaking, it also warned that such power was not unbounded. Rather, the use of adjudication might be an abuse of discretion under some

¹⁷ Id. at 294.

¹⁸ Id. at 294-95.

¹⁹ Id. at 294.

circumstances. The *Chenery II* Court, for example, injected a balancing test between the retroactive effect of adjudication and the harm prevented by adjudication:

such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.²⁰

Although the retroactivity of adjudicative proceedings might be unfair, in *Chenery II* the Court found that the dangers inherent in inside trading outweighed the retroactive effect of the SEC's order. As a result, the Court rejected the argument of retroactivity in the pending case.²¹

Wyman-Gordon suggested that agencies could not make a *de facto* rule in the disguise of adjudication. This rule was implied in the framework of the APA. By carving out "rules" from the universe of agency actions, the APA set some limits on agency discretion to choose adjudication when its policy was essentially legislative.²² As reasoned by the *Wyman-Gordon* Court, the procedures adopted by agencies and the pure prospective effect of the agency action could convert it to a *de facto* rulemaking.

The *Bell Aerospace* Court also identified several factors that could render the use of adjudication an abuse of discretion. One of these factors was detrimental reliance. The Court noted that if "the adverse consequences ensuing from a party's reliance on past decisions were so substantial, then the agency should be precluded from utilizing adjudicative proceedings."²³ Another factor was new liabilities. If an agency sought to impose new liability on individuals for their past actions,

²⁰ *Chenery*, *supra* note 4, at 203.

²¹ *Id.*

²² See, *Araiza*, *supra* note 13.

²³ See *Bell Aerospace*, *supra* note 15, at 295.

then it should also do so in a rulemaking proceeding.²⁴ Similarly, the Court suggested that the imposition of fines or damages should also be done through rulemaking.²⁵ However, unless such circumstances arise, the agency could proceed in a case-by-case manner rather than through a generalized rulemaking process, just as the NLRB did in *Bell Aerospace*.

Federal appellate courts, which were obliged to apply a rule from the Supreme Court's trilogy of cases, attempted to constrain agency discretion to choose between rulemaking and adjudication. The most aggressive approach was the Ninth Circuit's "anti-circumvention rule." The anti-circumvention rule outlawed the use of adjudication for policymaking in two scenarios: first, an agency could not announce new law during adjudication if it imposed "undue hardship" on those who have relied on past policy, and second, an agency could not "use adjudication to circumvent the Administrative Procedure Act's rulemaking procedures."²⁶ Especially, where the agency was involved in rulemaking before or at the time of adjudication, the subsequent use of adjudication to establish standards signaled a violation of the anti-circumvention rule.²⁷

Recognizing the potential sweeping effect of the anti-circumvention rule and the need to preserve the flexibility of the administrative process, the Ninth Circuit later sought to narrow the applicability of the rule by comparing the legal standards applied in adjudication to the language of the rule:

Adjudication allows an agency to apply a rule to particular factual circumstances and to provide an interpretation of the required conduct in light of those circumstances. An adjudicatory restatement of the rule becomes an amendment,

²⁴ Id.

²⁵ Id.

²⁶ See *Cities of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984).

²⁷ See e. g. *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980) (vacating the INS's order seeking to apply the job-creation requirement, which was withdrawn from the agency's proposed regulation but obscurely added in the dicta of a later adjudication); see also, *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981) (striking down an FTC's order against a dealership's credit practices, which was part of the agency's pending trade regulation rule).

however, if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct.²⁸

Relying upon the interpretation/amendment distinction, the Ninth Circuit distinguished subsequent cases from *Ford Motor* on their facts. In *Cities of Anaheim v. FERC*, the court found that unlike *Ford Motor*, which involved an FTC's order would have created a national interpretation" of the Uniform Commercial Code and changed long-standing credit practices in the auto industry,²⁹ the FERC's statement in the previous adjudication was "a minor adjustment, a fine tuning of doctrine that d[id] not require rulemaking unless it impose[d] severe hardship or circumvents existing rules."³⁰ Consequently, the Ninth Circuit had seldomly invalidated agency orders on the basis of the anti-circumvention rule since *Ford Motor*.

Other federal circuit courts, however, refused to follow the Ninth Circuit's lead and adopt similar rules. Rather, they held agencies to rulemaking procedures when agency action could be seen as making a generally applicable rule. For example, in *First Bancorporation v. Board of Governors*, the Tenth Circuit found that the Federal Reserve "abused its discretion by improperly attempting to propose legislative policy by an adjudicative order."³¹ In reaching the conclusion that the agency's order was legislative instead of adjudicative, the court relied upon the fact that the agency had "examined no specific facts" but made a "broad conclusion" about restricting the private party's acts.³² In a similar vein, the Eleventh Circuit, in *American Trucking Association v. U.S.*, treated as a rule a decision made by the ICC's decision to revoke all "special permission

²⁸ *Montgomery Ward Co., Inc., v. FTC*, 691 F.2d 1322,1329 (9th Cir. 1982).

²⁹ *Ford Motor*, *supra* note 27, at 1010.

³⁰ *Cities of Anaheim*, *supra* note 26, at 659.

³¹ *First Bancorporation v. Board of Governors*, 728 F.2d 434, 438 (10th Cir. 1984).

³² *Id.*

authorities” to trucking rate bureaus.³³ The court emphasized the general applicability of agency action, which rendered it a regulation.³⁴

In short, in spite that courts generally defer to agency decision about the propriety of policymaking tools, they may strike down the choice of adjudicative procedures on the ground of abuse of discretion. In determining whether an agency has abused its discretion, the court would weigh the harm that adjudication could avoid against the retroactive effect, identify the hardship to private parties created by the adjudicative order, and consider whether the legal effect of the order has converted adjudication to rulemaking.

3. Assessing the FTC’s Choice

When evaluating the propriety of the FTC’s decision to use case-by-case enforcement actions for policymaking, the most important factor is congressional intent. If Congress, explicitly or implicitly, intends that the FTC should resort to its rulemaking authority for regulating information privacy issues, then the FTC’s use of the EAR model is illegitimate. Back in *National Petroleum*, the D.C. Circuit, finding no specific intent, concluded that the general intent motivating the framers of the FTC Act was that Congress authorized the FTC to exercise rulemaking authority.³⁵ Later, the Magnuson-Moss Warranty Act formally granted rulemaking authority to the FTC. A briefly review of this history arguably suggests that Congress prefers the FTC to prescribe rules in regulating privacy-related issues.

However, as suggested by the previous chapters, congressional intent later had changed dramatically and became critical of FTC rulemaking, especially in furthering consumer

³³ *American Trucking Association v. U.S.*, 688 F.2d 1337 (11th Cir. 1982).

³⁴ See *id.* at 1348.

³⁵ 482 F.2d 672 (D.C. Cir. 1973).

protection goals. The FTC's aggressive intervention by promulgating trade regulation rules in the 1970s made Congress skeptical of the agency's rulemaking power. As a result, Congress passed the Magnuson-Moss Warranty Act as well as the FTC Improvement Act to significantly increase the burden of FTC rulemaking. In addition, Congress' skepticism was also reflected in the two-House veto introduced by the FTC Improvements Act. Due to the lack of expertise and the highly political nature of Congress, the two-House veto could be remarkably difficult to exercise, and Congress had rarely conducted such oversight over agency rulemaking prior to the enactment of the Congressional Review Act. Where most agency rulemaking escaped congressional notice unless there was a notable court decision, the close oversight on the FTC rulemaking implied Congress' unease with the agency's use of rulemaking power.

Were Congress, realizing the difficulties that the FTC confronts in issuing rules (including privacy rules) pursuant to the Magnuson-Moss procedures, to intend the FTC to issue general privacy rules, it should unequivocally mandate the agency to do so. In contrast to explicit authorization, Congress had repeatedly refused the FTC's request for general notice-and-comment rulemaking power and been reluctant to give the agency new rulemaking power to make privacy rules except for those in particular sectors. Without further direction from Congress, it is within the FTC's discretion that it uses adjudication to formulate its policies on information privacy.

Next, it is not an abuse of discretion that the FTC prefers to use adjudicative procedures as its policymaking tool in regulating information privacy. The factors that the Supreme Court identified in *Chenery II*—the fact-specific nature of the issue, the need to gain expertise before converting a principle into a rule, and the call for rapid response to unpredictable problems—could also justify the FTC's selection of adjudication. First, FTC enforcement actions and

subsequent consent orders are fact-specific. While many consent orders contain similar elements, the standards embodied in a particular consent order are closely related to the fact of the pending enforcement action. For example, in *In re Facebook, Inc.*,³⁶ the FTC reaffirmed an important part of its unfairness jurisprudence, that is, retroactive changes to privacy policies would amount to unfair trade acts or practices. In its complaint, the FTC charged Facebook with retroactively applying material changes to how user profile information would be used. In return, Facebook agreed to “clearly and prominently disclose” these changes and “obtain the user’s affirmative express consent.”³⁷

Second, the case-by-case adjudicative approach allows the FTC’s understanding of information privacy issues to evolve. When the FTC first began to police data security issues, it lacked sufficient knowledge and only resorted to broken promises. In *In re Eli Lilly & Co.*, one of FTC’s early data security cases, the Commission charged Eli Lilly with deception when the company would take “security measures in place, including the use of industry standard security socket layer encryption, to protect the confidentiality of [their consumer information].”³⁸ Over the years, the FTC has gradually turned unfairness theory and developed baseline standards for data security. For example, following the massive Equifax data breach in 2017, the FTC alleged that the credit bureau’s failure “to provide reasonable security for the massive quantities of sensitive personal information collected, processed, maintained, or stored within [its] computer network” amounted to unfair acts or practices under Section 5.³⁹ As the FTC has been equipped with more expertise, it can police data security issues even without invoking broken promises.

³⁶ See, Complaint, *Facebook, Inc.*, FTC File No. 092 3184, at 9 (2012).

³⁷ Decision and Orders, *Facebook, Inc.*, FTC File No. 092 3184 at 4 (2012).

³⁸ *Eli Lilly & Co.*, 133 F.T.C. 763, 765 (2002) (complaint).

³⁹ Complaint for Permanent Injunction and Other Relief at 19, *Fed. Trade Comm. v. Equifax, Inc.*, FTC File No. 172 3203 (N. Ga. 2019).

Third, the rapidly changing environment and emerging problems also justify the FTC’s use of adjudication. Information technology has been revolutionized in the past decades. The innovative technologies that feature the current world, such as cloud computing, the Internet of Things, and artificial intelligence, are far beyond the imagination of a regulator two decades ago when the FTC jumped into the privacy field. These technologies, while improving the living standard of our life, also pose new threats to information privacy that are different from traditional harms to privacy. On the other side, the call for protecting consumer privacy is pressing. The pervasiveness of information processing makes personal information more vulnerable to be compromised. In the year 2014 alone, it was estimated that 17.6 million U.S. residents had experienced some form of identity theft.⁴⁰ Average persons will not want to take full advantage of new technologies unless they are certain that their information privacy will be protected. The efficiency and flexibility associated with *ad hoc* adjudication make it a good candidate for addressing emerging privacy harms in a timely manner, as each time the issues and parties confronting the FTC are limited.

Last but not the least, the EAR model is not a *de facto* rulemaking. The standards announced in FTC enforcement actions bind only the party to that enforcement action. The lack of general applicability distinguishes the FTC’s EAR model from the failed *Excelsior* rule or rules involved in *First Bancorporation* or *American Trucking*. The fact that FTC consent orders may have some kind of precedential value on similarly situated parties does not make the standards derived from the EAR model generally applicable. Rather, such an effect was recognized as permissible under certain circumstances by the Supreme Court in *Wyman-Gordon*. In *Wyman-Gordon*, the plurality reasoned that “adjudicated cases . . . generally provide a guide to action that the agency may be

⁴⁰ See, 17.6 Million U.S. Residents Experienced Identity Theft in 2014, available at <https://www.bjs.gov/content/pub/press/vit14pr.cfm>.

expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents.”⁴¹ To this extent, the FTC “has not been engaging in rulemaking in disguise any more than a court when interpreting a statute over time is in engaging in judicial legislation.”⁴²

Therefore, regardless of the benefits of rulemaking claimed by those who advocate that the FTC should promulgate privacy rules, there is no legal basis for prioritizing one administrative procedure (rulemaking) over another (adjudication). Rather, since Congress does not require the FTC to issue any general privacy rule—and arguably even prohibits the FTC from doing so, the Commission is entitled to rely on adjudication for formulating its policies on information privacy, and the way it uses adjudication, in form of the EAR model, is not an abuse of discretion.

II. Procedural Fairness of Enforcement-as-Regulation

Despite that under the current law, the FTC’s choice of adjudication in implementing the EAR model deserves great judicial deference, some commentators still reject the EAR model on the ground of procedural fairness. As the *Chenery II* Court suggested, agency adjudication may be vulnerable to the charge of imposing unfairly retroactive liability.⁴³ The same concerns exist when the FTC adopts the EAR model. By setting new legal standards in adjudication and applying them against the target’s past conduct, the FTC would deprive the party’s right to know the applicable legal standards, giving rise to a claim of fair notice. From a procedural

⁴¹ *Wyman-Gordon*, 394 U.S. 759, 765-66.

⁴² Woodrow Hartzog and Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 *Geo. Wash. L. Rev.* 2230, 2263 (2015).

⁴³ Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 *Wash. & Lee L. Rev.* 351, 372 (2000).

perspective, the EAR model can only survive judicial review if it affords fair notice to the regulated parties.

1. The Principle of Fair Notice

The principle of fair notice derives from the Due Process Clauses of the Fifth and Fourteenth Amendments. The Due Process Clauses guarantee that all government bodies operate within the law and that no one would be “deprived of life, liberty or property [] without due process of law.”⁴⁴ At a minimum level, due process requires (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal.⁴⁵ The requirement for fair notice is also incorporated in the APA, which provides that “Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted.”⁴⁶

The Supreme Court’s fair notice doctrine has a criminal law origin. The Court has construed the constitutional due process protection in the context of criminal procedures as the requirement that a penal statute should not leave individuals “to speculate as to the meaning of [it],” who are “entitled to be informed as to what [the law] commands or forbids.”⁴⁷ The law should define the offense with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁴⁸ Criminal statutes that fail to give fair notice are often held “void for vagueness.”⁴⁹

Later, the Supreme Court extended the protection under the fair notice doctrine to private parties in civil procedures. The notice concerns had surfaced in administrative law cases as early as the

⁴⁴ U.S. Const. amend. V & XIV. For the purpose of this discussion, due process only refers to the procedural aspect of due process, leaving out substantive due process.

⁴⁵ *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

⁴⁶ 5 U.S.C. § 554(b)(3).

⁴⁷ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁴⁸ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

⁴⁹ *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

1960s when the Warren Court revolutionized the due process doctrine. In *Goldberg v. Kelly*, a seminal ruling on due process, the Supreme Court made clear that in case of discontinuing welfare benefits, “[due process] principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination.”⁵⁰ Though the Court found that neither the form nor the content of the seven-day notice given by the New York state was constitutional inadequate *per se*, it ordered the state to provide the welfare recipient a pre-termination hearing with timely and adequate notice and an effective opportunity to cross-examine.⁵¹

The Court’s current leading case of fair notice is *Federal Communication Commission v. Fox Television Stations, Inc.*⁵² *Fox* involved Federal Communication Commission (FCC)’s new standard for indecency against Fox and ABC. For decades the FCC had only made repeated, not isolated, broadcasts of indecent materials actionable. Following three incidents of so-called “fleeting expletives”—that is, brief obscenity or nudity—by Fox and ABC in 2002 and 2003, the FCC issued the 2004 Golden Globes Order that banned fleeting expletives for the first time. Then it applied the new standards to Fox and ABC broadcasts and found them punishable. Fox brought both First Amendment and Due Process challenges against the FCC’s standards. The Supreme Court invalidated the FCC’s standards on the ground of fair notice. Justice Kennedy, writing for the majority, stated that it was a fundamental principle that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”⁵³ In contrast, if a law failed to give “a person of ordinary intelligence” fair notice of what actions the law prohibits or what facts must be proven under the regulation, then the law would be

⁵⁰ *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

⁵¹ 397 U. S. 266-270.

⁵² *Fed. Comm'n Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

⁵³ *Id.* at 253.

impermissibly vague.⁵⁴ In *Fox*, there was no regulation or guideline as to whether fleeting expletives were actionable at the time when three broadcasts occurred; rather, the FCC only changed its position after the broadcasts. Finding that the FCC did not give the networks fair notice prior to the incidents of fleeting expletives, the Court concluded that the standards as applied to the broadcasts were vague.⁵⁵

In *Christopher v. SmithKline Beecham Corp.*, the Court also refused to defer to the Department of Labor (DOL)'s interpretation of the Fair Labor Standards Act, partly on the ground of lacking fair notice.⁵⁶ One of the issues in *Christopher* was whether the Court should afford judicial deference to the DOL's interpretation of "outside salesmen." The Court found that prior to the DOL's interpretation, which was made multiple years after the respondent's offense, "nothing in the statutory or regulatory text or the DOL's prior guidance plainly" prohibited the pharmaceutical industry from treating detailers as exempt outside salesmen.⁵⁷ In addition, that the DOL had not initiated any enforcement action against the industry's long-standing practices reinforced the finding of an unfair surprise to the industry.⁵⁸ Therefore, it would "seriously undermine principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"⁵⁹

Prior to *Fox* and *Christopher*, appellate courts had already struck down agency policymaking failing to provide fair notice. For instance, in *Hill v. Federal Power Commission*,⁶⁰ the Fifth Circuit was asked to review a ratemaking proceeding by the Federal Power Commission. In this proceeding, the Commission, applying a standard established in a previous adjudication, rejected

⁵⁴ Id.

⁵⁵ Id. at 258.

⁵⁶ *Christopher v. SmithKline Beecham Corp.*, 567 U. S. (2012).

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ *Hill v. Fed. Power Comm.*, 335 F.2d 355 (5th Cir. 1964).

the rates proposed by the natural gas producers for not using appropriate factors in calculating the cost. The court reversed the Commission's decision. It concluded that "the [Commission's] standards to be applied were neither evolved nor announced until the decision holding them unsatisfied," which failed to provide a sufficiently clear legal standard to guide the petitioner's acts.⁶¹

Additionally, appellate courts would also reverse agency retroactive policymaking by resorting to the reliance interests articulated in *Bell Aerospace*. Were a newly established legal standard applicable to the past conducts of the regulated, it would impermissibly injure their reliance interests, because they would use existing agency policies to guide their future conducts. In *United Gas Pipe Line Company v. FERC*, for instance, the Fifth Circuit struck down the FERC's application of the ratemaking order, in which the agency changed its position as to the recoverability of the funds that pipeline companies advanced to gas producers.⁶² The court reasoned that the retroactive imposition of the new law would not only deny the pipeline companies the opportunity to recover substantial costs incurred "in reliance on past Commission decisions," but also frustrated the Commission's very purpose for instituting the [cost recovery] program."⁶³ Therefore, the Commission's new requirement fell within the *Bell Aerospace* exception and was invalid.

The Supreme Court and lower court decisions have made clear that the principle of fair notice, which is deeply rooted in the U.S. legal system, guarantees that private parties will be given fair notice of the law when they face potential punishment imposed by an agency. Failure to provide fair notice would result in the invalidation of agency action.

⁶¹ Id. at 362.

⁶² 597 F.2d 581 (5th Cir. 1979).

⁶³ Id. at 588.

2. Reconciling *Wyndham* and *LabMD*

Procedural fairness serves as a common basis on which the regulated parties often challenge the FTC's enforcement actions. In two out of three cases litigated in court, judges were confronted with fair notice challenges. In *FTC v. Wyndham Worldwide Corp.*, the Third Circuit found that the EAR model satisfied the requirements for fair notice,⁶⁴ while in *LabMD, Inc. v. FTC*, the Eleventh Circuit struck down the FTC's cease-and-desist order for vagueness.⁶⁵ As the two appellate courts reached opposing conclusions, the procedural fairness of the EAR model needed further elaboration.

After three data breaches happened to Wyndham Worldwide in 2008 and, the FTC filed suit against the hospitality company, alleging that it failed to maintain reasonable and appropriate data security for consumers' sensitive personal information, which constituted unfair and deceptive acts or practices under § 45(a). In response, Wyndham filed a motion to dismiss, and based its claim on two grounds: first, the FTC lacked the authority to regulate cybersecurity issues under the unfairness prong of § 45(a); and second, it was entitled to know with "ascertainably certainty" of the FTC's interpretation on the types of specific cybersecurity practices that could fall short of § 45(a), which the FTC failed to provide.

After reviewing the facts, the Third Circuit's answer to both arguments was negative. The court first addressed the authority of FTC, concluding that § 45(a) authorized the agency to prohibit cybersecurity practices as unfair acts or practices. On the second claim, it found that the appropriate question was not whether Wyndham was entitled to know with "ascertainably certainty" of the FTC's interpretation, but "whether Wyndham had fair notice that its conduct

⁶⁴ 799 F.3d 236 (3rd Cir. 2015).

⁶⁵ 891 F.3d 1286 (11th Cir. 2018).

could fall within” the meaning of unfair practices under Section 5,⁶⁶ and reviewed it as an as-applied challenge. The court found that Wyndham’s as-applied challenge failed on two grounds: first, the FTC charged Wyndham of using no, instead of weak, security measures; and second, Wyndham had suffered from data breaches on three occasions. Based on these facts, Wyndham should “reasonably foresee that a court could construe its conduct as falling within the meaning of [unfair acts or practices].”⁶⁷

The allegations that the *Wyndham* court found as sufficiently notifying the regulated party later turned out to be vague to the Eleventh Circuit in *LabMD*. In *LabMD*, the FTC alleged that LabMD, a medical laboratory, failed to

- (1) develop, implement, or maintain a comprehensive information security program . . .
- (2) use readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities on its networks . . .
- (3) use adequate measures to prevent employees from accessing personal information not needed to perform their jobs . . .
- (4) adequately train employees to safeguard personal information . . .
- (5) require employees, or other users with remote access to the networks, to use common authentication-related security measures, such as periodically changing passwords, prohibiting the use of the same password across applications and programs, or using two-factor authentication . . .
- (6) maintain and update operating systems of computers and other devices on its networks . . .; and

⁶⁶ Id. at 255.

⁶⁷ Id. at 256.

(7) employ readily available measures to prevent or detect unauthorized access to personal information on its computer networks.⁶⁸

The complaint resulted in a cease-and-desist order against LabMD, in which the FTC required the medical laboratory to implement several compliance measures.

The Eleventh Circuit concluded that the charges against LabMD were too vague to be enforceable. It found that the allegations contained in the FTC complaint did not “specific acts or practices that LabMD engaged in,” but “set forth a number of data-security measures that LabMD failed to perform.”⁶⁹ In essence, the FTC used the data breach that occurred at LabMD “as an entry point to broadly allege that LabMD’s data-security operations are deficient as a whole.”⁷⁰ But this strategy did not meet the standard of specificity. By failing to specify which act or practice was wrong, the FTC “command[ed] LabMD to overhaul and replace its data security program to meet an indeterminable standard of reasonableness.”⁷¹ For LabMD, it would be a denial of due process, which rendered the cease-and-desist order unenforceable.

On its face, the *LabMD* court’s opinion on fair notice was contrary to that of the *Wyndham* court, but *LabMD* is distinguishable by its facts. The *LabMD* case originated from an alleged breach of personal information. The lab’s billing manager installed LimeWire, a peer-to-peer file-sharing software on the computer, which inadvertently made a 1718-page file (the 1718 File) containing the personal information of 9,300 consumers available for download. Tiversa, a data security company, downloaded the 1718 File from LimeWire, and for the sake of marketing its remediation services, notified LabMD of the compromise of the 1718 File with falsified reports that the file had been accessed by known identity thieves. After LabMD refused Tiversa’s

⁶⁸ *LabMD*, *supra* note 65, at 1290, note 8.

⁶⁹ *Id.* at 1290.

⁷⁰ *Id.* at 1294.

⁷¹ *Id.* at 1300.

services, Tiversa sent the 1718 File, along with the falsified reports to the FTC, which filed a complaint against LabMD.

However, in the hearing before FTC Chief Administrative Law Judge Michael Chappell, evidence showed that no one, including identity thieves claimed by Tiversa, had ever possessed the 1718 File, and that Tiversa had manipulated the results to make it appear that the file had been downloaded from multiple locations.⁷² The very fact that no alleged data breach had occurred at all made *LabMD* different from *Wyndham*. In *Wyndham*, the multiple times of data breaches were a key factor signaling that the company should reasonably anticipate the culpability of its conduct. By contrast, as personal information contained in the 1718 File had not been accessed by anyone but Tiversa, FTC complaint against LabMD was “based only on an unspecified and theoretical ‘risk’ of future data breach and identity theft injury,” which failed to demonstrate the likeliness of substantial consumer injury.⁷³

A congressional investigation further weakened the factual basis of the FTC action against LabMD. Since 2014, the House Oversight Committee began investigating the relationship between the FTC and Tiversa. The investigation was initiated after a former employee of Tiversa claimed that the company manipulated evidence of data breaches and used the threat to report the falsified data breaches to the FTC as a strategy for marketing its security consulting services.⁷⁴ The former employee was also a key witness at the evidential hearing before Chief ADJ Chappell, whose testimony discredited the evidence from Tiversa, upon which the LabMD complaint was built. Under this circumstance, allowing the FTC’s order to stand in *LabMD* would lead to an extremely unfair outcome.

⁷² Initial Decision at 57-59, *LabMD, Inc.*, FTC File No. 102 3099, No. 9357 (2015).

⁷³ *Id.* at 81.

⁷⁴ See Hurwitz, *supra* note 23, at 977; see also, Raffi Khatchadourian, A Cybersecurity Firm’s Sharp Rise and Stunning Collapse, *The New Yorker* (Oct. 28, 2019).

Despite the critique against the vagueness of the FTC order, the *LabMD* court did not question the FTC's authority to prohibit unfair cybersecurity practices. Rather, it suggested that “[h]ad the complaint stopped at [alleging that the installation of LimeWire was installed in defiance of violated LabMD policy and caused consumer injury], a narrowly drawn and easily enforceable order might have followed, commanding LabMD to eliminate the possibility that employees could install unauthorized programs on their computers.”⁷⁵ To the extent that the FTC specified the allegations, the *LabMD* court was likely to uphold the FTC's regulatory acts, just as the *Wyndham* court did.

3. Fair Notice Analysis of the EAR Model

By striking down an FTC order, the Eleventh Court in *LabMD* arguably has opened the door for future FTC defendants to challenge the agency's EAR model in court. But the EAR model can still meet the requirements for fair notice.

The *Wyndham* court, in dicta, examined whether guidelines,⁷⁶ complaints, and consent orders the can provide fair notice to the regulated parties as to what constituted unfair data security practices. To begin with, FTC guidelines can, to some extent, inform the regulated of the requirements of the law. In particular, the court in *Wyndham* cited an FTC guidebook issued prior to the first data breach that occurred to Wyndham, which “counsel[led] against many of the specific practices” that Wyndham had committed.⁷⁷ The guidebook, *Protecting Personal Information: A Guide for Business*, advised that companies should encrypt sensitive information, use firewall and strong passwords, and implement a breach response plan, to name a few.⁷⁸

⁷⁵ *LabMD*, *supra* note 65, at 1294.

⁷⁶ It is notable that agency guidelines are different from rules, and not susceptible to *Chevron* deference.

⁷⁷ *LabMD*, *supra* note 65, at 1294.

⁷⁸ *Wyndham*, *supra* note 64, at 256-57.

Wyndham could use these suggestions as a reference in determining the culpability of its cybersecurity practices.

Additionally, the *Wyndham* court recognized the utility of complaints, along with consent orders,⁷⁹ in notifying the regulated parties about the legal standards. Unlike Michael Scott, who claimed that FTC complaints and consent orders “provide[d] limited guidance as to what a company should do (or not do) to avoid being the target” of an FTC enforcement action,⁸⁰ the *Wyndham* court asserted that FTC complaints and consent orders could help similarly situated companies to “apprehend the possibility that their cybersecurity could fail as well.”⁸¹ As discussed in the previous chapter, the FTC publishes all complaints and consent orders on its websites, along with other materials, which, in theory, will notify the business about the specific legal requirements. The court found that individual allegations against Wyndham also existed in past FTC cybersecurity-related complaints. In particular, the court identified a past complaint, which contained allegations that were materially similar to those in the complaint against Wyndham.⁸² Although these complaints did not specify which allegation formed the necessary and sufficient conditions of an alleged § 45(a) violation, they, read as a whole, would give Wyndham notice of specific requirements.

Most importantly, the FTC EAR model meets the constitutional requirements for fair notice by focusing on industry practices. Industry practices have been a critical consideration in deciding

⁷⁹ However, the Third Circuit denied that consent orders alone can provide fair notice. See *Wyndham*, at 257 n. 22 (“we agree with Wyndham that the FTC’s cybersecurity consent orders, which admit no liability and which focus on imposing prospective requirements on the defendants, were of little use to ascertaining the specific requirements imposed by § 45(a).”).

⁸⁰ Michael Scott, *The FTC, the Unfairness Doctrine and Data Security Litigation: Has the Commission Gone Too Far?*, 60 Admin. L. Rev. 127, 183 (2008).

⁸¹ *Id.* at 257.

⁸² *Id.* at 258.

whether a reasonable person could have predicted what the law or regulation proscribed.⁸³ In *Drabik v. Stanley-Bostitch, Inc.*, the Eighth Circuit held that “[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind. . . .”⁸⁴ On the other hand, were the legal standard to be incompatible with industry practice, the regulated party is not likely to get sufficient notice.

Industry practices have played a critical role in the FTC’s law enforcement activities. For instance, in proving a trade practice is unfair, the FTC should show that the conduct violates public policy as it has been established by statute, common law, industry practice, or otherwise.⁸⁵ When the FTC brings an enforcement action, it will also “look at the company’s conduct and see to what extent it measures up to industry standards writ large.”⁸⁶ In *In re Eli Lilly & Co.* case, one of the company’s wrongdoings the FTC alleged was the failure to adopt an industry standard of secure socket layer encryption.⁸⁷ So long as the EAR model is firmly rooted in industry practices, the concern for lack of fair notice is alleviated.

Therefore, regardless of cases like *LabMD* where the facts are extremely unfair to the regulated parties, by making its guidance and past cases public and insisting on the role of industry guidance, the FTC’s EAR model can provide the constitutionally required notice to the regulated parties.

III. Enforcement-as-Regulation as Information Governance

⁸³ See, Theodore .J. Boutrous, Jr. and Blaine H. Evanson, The Enduring and Universal Principle of “Fair Notice”, 86 S. Ca. L. Rev. 193, 199 (2013).

⁸⁴ 997 F.2d 496, 510 (8th Cir. 1993).

⁸⁵ FTC Policy Statement on Unfairness.

⁸⁶ Daniel J. Solove and Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 627 (2014) (quoting interview by Vladeck).

⁸⁷ *Eli Lilly & Co.*, 133 F.T.C. 763, 765 (2002) (complaint).

Information privacy law is undergoing a “governance turn.”⁸⁸ Influenced by the political science literature on governance, the recent emergence of information governance is a response to the inefficacy of the bureaucratic model of information privacy law. Information governance focuses on the creation of “a legislative interface through which [stakeholders in information processing] can collaboratively foster a culture of compliance without stifling innovation.”⁸⁹ Through the lens of information governance, the FTC’s EAR model is justified as it increases the compliance rate with the businesses without sacrificing technology innovations.

1. The (re-)Rise of Information Governance

The framework of governance, as proposed by Elinor Ostrom and her colleagues, is an attempt to transcend traditional solutions, namely privatization and governmental regulation, to collective action problems. According to Ostrom, community members, without the intervention by an external agent, could self-organize and overcome collective action problems. Such a governance system is polycentric, as “many independent elements are capable of mutual adjustment for ordering their relationships with one another within a general system of rules.”⁹⁰ In order to operate, a self-organized governance system should follow a set of design principles, which include:

1. clearly defined boundaries;
2. congruence between appropriation and provision rules and local conditions;
3. collective-choice arrangements;
4. monitoring;

⁸⁸ Jane K. Winn, *The Governance Turn in Information Privacy Law*, SSRN available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418286.

⁸⁹ *Id.* at 4.

⁹⁰ Vincent Ostrom, *Polycentricity (Part I)*, in *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis 73* (Michael D. McGinnis ed. 1999).

5. graduated sanctions;
6. conflict-resolution mechanisms;
7. minimal recognition of rights to organize; and
8. nested enterprises.⁹¹

The recent rise of information governance echoes a report drafted by the Secretary's Advisory Committee of the Department of Health, Education, and Welfare in 1973 (hereinafter the 1973 HEW report). Titled *Records, Computers, and the Rights of Citizens*, the 1973 HEW report proposed the world's first fair information practices principles (FIPPs), which, in modern terms, consisted of "transparency, use limitation, access and correction, data quality, and security."⁹² More importantly, the 1973 HEW report re-defined the concept of personal privacy in record-keeping on the basis of a concept of mutuality. Rejecting the idea that information privacy was an individual right of unilateral control over information processing, the 1973 HEW report argued that individuals and institutions should "share rather than monopolize control over" personal information.⁹³ It was so because "[information processing] usually reflect and mediate relationships in which both individuals and institutions have an interest, and are usually made for purposes that are shared by institutions and individuals."⁹⁴

The 1973 HEW report laid the foundation for information governance. By insisting on the concept of mutuality, it proposed to establish a governance process that "assure[d] the individual a right to participate in a meaningful way in decision about [information collection and use]."⁹⁵

⁹¹ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, 90 (1990).

⁹² Fred Cate, *The Failure of Fair Information Practice Principles*, in *Consumer Protection in the Age of the Information Economy*, 346 (2006).

⁹³ Department of Health, Education and Welfare, *Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens*, 40 (1973).

⁹⁴ *Id.*

⁹⁵ *Id.*

Such a process arguably would restore the balance between the interests of individuals and those of organizations and the general public in how personal information was processed. The FIPPs contained in the 1973 HEW report would insure the operation of the governance process. But this early idea of information governance was short-lived. The political consensus on mutuality began to collapse after the Privacy Act of 1974, replaced by a polarized debate between a market-oriented approach and direct government intervention.⁹⁶

However, in the past decade, there has been an ongoing trend towards self-organized governance in the privacy field. Kenneth Bamberger and Deirdre Mulligan identified an ongoing professionalization in the field of personal information protection. On both sides of the Atlantic Ocean, a growing number of firms have appointed “Chief Privacy Officers (CPOs)” or “Data Protection Officers (DPOs)” to deal with issues on personal information protection.⁹⁷ CPOs and DPOs distinguish themselves from in-house counselors in that they usually do not sit in the legal department, but are senior officers with the ability to report to the executives, who often defer to the expertise and independence of CPOs/DPOs in personal information protection. CPOs/DPOs are also involved in the corporation’s decision-making processes, which helps the corporation to take into account protecting their consumers’ personal information from the design stage, instead of treating it as *ex post* remedies after injuries occur.

The rise of CPOs/DPOs has also changed the regulatory landscape by catalyzing organizations specialized in personal information protection. The most prominent organization of this type is International Association of Privacy Professionals (IAPP). Established in 2000, IAPP is a non-profit organization that provides a platform for privacy experts from different countries to learn

⁹⁶ Winn, *supra* note 88, at 10.

⁹⁷ See, Kenneth Bamberger and Deirdre Mulligan, *Privacy on the Ground: Driving Corporate Behavior in the United States and Europe* (2015).

and communicate and exchange their experiences. In addition, a community of professionals with a specialty in personal information protection is formed on the ground of CPOs and DPOs. The community of professionals consists of not only CPOs and DPOs, but also relevant civil rights groups, consumer rights groups, government officials, scholars, and many others. Platforms including IAPP annual meetings, *Computers, Freedom and Privacy Conference*,⁹⁸ and *Privacy Law Scholars Conference*,⁹⁹ provide a channel for the community members to learn from each other. The information sharing within the community accelerates the widespread of best practices, which, to some extent, coordinates the actions of different information processors and improves the level of personal information protection.

Along with the revival of information governance is the renaissance of public trust in information privacy law. A growing number of scholars began to frame information privacy issues in terms of public trust. For example, Ari Waldman argues that a breach of information privacy is a breach of trust.¹⁰⁰ Neil Richards and Woodrow Hartzog urge that privacy law should “take trust seriously,” because the handling of personal information creates “information relationships, in which information subjects are “trustees,” who make themselves vulnerable by disclosing personal information to information processors, and information processors are “entrustees,” who bear the duties of fiduciary and confidentiality.¹⁰¹ Jack Balkin and Jonathan

⁹⁸ The Computers, Freedom and Privacy Conference (CFP) is an annual academic conference held in the United States or Canada about the intersection of computer technology, freedom, and privacy issues. Founded in 1991, the CFP has held 25 meetings by 2015.

⁹⁹ Privacy Law Scholars Conference (PLSC) is an annual conference organized jointly by BCLT and the George Washington University Law School. The PLSC assembles privacy law scholars and practitioners across the world to discuss current issues and foster greater connections between academia and practice.

¹⁰⁰ Ari Ezra Waldman, *Privacy as Trust*, 69 U. Miami. L. Rev. 559, 598 (2015).

¹⁰¹ Neil M. Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 Stan. Tech. L. Rev. 431, 449-50 (2016).

Zittrain take one step further and suggest that private companies should be treated as “information fiduciaries,” who should bear the duties of care and loyalty.¹⁰²

In light of trust, the purpose of information governance is to preserve consumer trust. Trust between consumers and companies can be either reinforced or weakened, depending upon their interactions. But Dennis Hirsch points out that there is a “tragedy of trust commons” problem associated with information processing. That is, private companies, for the sake of their own interests, tend to over-collect or misuse personal information, or adopt inadequate data security measures, to name a few, which would impair the interests of consumers and cause the decline of consumer trust. The tendency to abuse consumer trust happens to small businesses and industry leaders alike, as they are trapped by collective action problems. Analogizing to Garret Hardin’s “tragedy of commons” metaphor, every market player is locked into “a system that compels him to [exploit the limited consumer trust] without limit. . . and [r]uin is the destination toward which all men rush, each pursuing his own best interest.”¹⁰³

The loss of trust poses a system risk to the digital economy. It has drawn the attention of recent initiatives like the Uniform Personal Data Protection and Information System Security Act (the Uniform Act).¹⁰⁴ Submitted to the Uniform Law Committee for discussion in July 2020, the Uniform Act explicitly states that it “safeguards consumer trust.”¹⁰⁵ Consumer trust makes information collection and use possible, but it is jeopardized by the wide adoption of information technology that collects and uses personal information. To restore the trust between consumers and companies, the Uniform Act distinguishes itself from previous personal information laws in

¹⁰² Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 UC Davis L. Rev. 1183, 1209 (2016).

¹⁰³ Garrett Hardin, Tragedy of the Commons, 162 Science 1243, 1244 (1968).

¹⁰⁴ The Uniform Act will not become a federal statute. Rather, once the bill is approved by the Committee, it will guide future legislation on information privacy at the state level.

¹⁰⁵ Uniform Law Committee, The Uniform Personal Data Protection and Information System Security Act (Draft), Prefatory Note.

two ways. First, the “covered entity” under the Uniform Act is limited to one who “collects personal data from a consumer, in connection with a relationship with the consumer.”¹⁰⁶ If a company obtains the information from someone other than the information subject, then there exists no trust between the parties. Since it is the relationship of trust that the Uniform Act protects, information processors handling personal information in absence of a trust relationship should be excluded from the requirements of the FIPPs.

Second, the Uniform Act substitutes notice-and-consent with “compatibility.” A compatible use of personal information is information processing “that is sufficiently related to the original purpose for which the personal data was collected.”¹⁰⁷ Because a consumer’s consent can be reasonably implied in the context of compatible uses, the requirement for getting additional consent from the consumer is waived.¹⁰⁸ The underlying reason is that a relationship of trust is mutually beneficial. Therefore, information processing is aligned with consumer interest. By introducing the concept of compatibility, the Uniform Act encourages information processors to reasonably use personal information, so that consumer trust can be restored or built.

2. Governing Information Privacy by the EAR Model

The transition to information governance has an implication on regulatory reinvention. On the implementing level, Ostrom articulated the protocol requirements for achieving adaptive governance, including:

¹⁰⁶ Id. Sec. 2(3)(A).

¹⁰⁷ Id. Sec. 2(1).

¹⁰⁸ Id. Sec. 4(a).

- (1) achieving accurate and relevant information, by focusing on the creation and use of timely scientific knowledge on the part of both the managers and the users of the resource;
- (2) dealing with conflict, acknowledging the fact that conflicts will occur, and having systems in place to discover and resolve them as quickly as possible;
- (3) enhancing rule compliance, through creating responsibility for the users of a resource to monitor usage;
- (4) providing infrastructure, that is flexible over time, both to aid internal operations and create links to other resources; and
- (5) encouraging adaption and change to address errors and cope with new developments.¹⁰⁹

In terms of administrative law, information governance would require regulators to explore innovative regulatory tools instead of relying on the command-and-control regulation. These innovative regulatory strategies fall into a broad category of “second-generation regulation.”¹¹⁰ Second-generation regulations encourage “the regulated parties themselves to choose the means by which they will achieve [] performance goals” leading to “more cost-effective and adaptable” strategies.¹¹¹

The FTC’s adoption of the EAR model is in line with the far-reaching transition from the command-and-control regulation to governance. At the heart of the EAR model is its promotion of voluntary consensus standards related to information privacy. In contrast to industry self-regulation where businesses unilaterally decide what safeguards are appropriate, voluntary consensus standards are the outcome of more stringent process that supposed to represent

¹⁰⁹ See Elinor Ostrom, *The Challenge of Common-Pool Resources*, 50 *Environment: Science and Policy for Sustainable Development* 8 (2008).

¹¹⁰ Rubinstein, *supra* note 91, at 383.

¹¹¹ Hirsch, *supra* note 94, at 8.

interests of all stakeholders. The FTC considers these standards, in name of best practices, “though deep and ongoing engagement with all stakeholders.”¹¹² Once the FTC identifies appropriate standards, it encourages businesses to adopt these voluntary standards in negotiating consent orders. By exempt those adopting voluntary standards from admitting liabilities, the FTC confers a *de facto* safe harbor status on the voluntary standards.¹¹³

Technically speaking, the information privacy standards recognized by the FTC resemble “management system standards” or “quality management standards.” These standards require private companies to “create governance frameworks that employees can be trained to follow and that independent third parties can use to audit an organization’s compliance with its own internal governance framework.”¹¹⁴ Such requirements can readily be found in FTC consent orders. For example, the FTC has required in consent orders the creation and maintenance of a comprehensive privacy or security program as part of remedial measures. Such programs shall contain administrative, technical, and physical safeguards appropriate to the company’s size and complexity, the scope of its activities, and the sensitivity of personal information. Despite the variations, these safeguards often include the designation of a coordinator of the program, employee training, risk assessment, and regular evaluation of the program.¹¹⁵ Later, the record-breaking 2020 Privacy order with Facebook includes a requirement so remarkable that would directly change the company’s internal governance framework. The requirement asks Facebook to create an Independent Privacy Committee for the sake of carrying out the Privacy and Compliance Baseline Requirements articulated in the order.¹¹⁶

¹¹² Solove and Hartzog, *supra* note 86, at 627.

¹¹³ Winn, *supra* note 88, at 21.

¹¹⁴ *Id.* at 21.

¹¹⁵ See, e.g. *Microsoft Corp.*, FTC File No. 012 3240 (2002).

¹¹⁶ *Facebook*, FTC File No. 182 3109, No. C-4365, 14-16 (2020).

Meanwhile, external assessments are another common feature of the FTC's standards. In many consent orders, the companies agree to have a qualified, objective, independent third-party professional who will biennially assess the effectiveness of their information security programs.¹¹⁷ The duration of biennial assessments varies and can be as long as 20 years. In this period, companies should retain the assessments and promptly send a copy of each assessment to the FTC.

Among strengths of the FTC's voluntary consensus standards is its high compliance rate. The EAR model represents a shared problem-solving process rather than an ordering activity.¹¹⁸ As discussed in previous chapters, the EAR model is built on complaints and consent orders. After the FTC commences an enforcement action, a company may choose to negotiate a settlement with the FTC by admitting the charges and taking remedial acts; if a settlement is reached, the FTC will drop the case in return for a company's promise to improve privacy protection standards. Because the company agrees with the viability of the obligations in consent orders, it is more likely to comply with them.

Another advantage associated with the EAR model is its responsiveness. Coined by Ian Ayres and John Braithwaite, responsive regulation asks the regulators to listen to the claims of stakeholders, including the regulated parties, and choose appropriate tools based upon the stakeholders' action.¹¹⁹ The idea of responsiveness is also incorporated in Ostrom's design principles for governance, which requires sanctions for violators to be graduated.¹²⁰ In case of the EAR model, the FTC can impose more severe sanctions on the regulated companies if they

¹¹⁷ See, e.g., *Twitter, Inc.*, FTC File No. 092 3093 (2011).

¹¹⁸ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1, 28-30 (1997).

¹¹⁹ Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press (1992).

¹²⁰ Elinor Ostrom, *supra* note 91.

later violate the consent order. For instance, the FTC entered a consent order in 2012 with Facebook for its violation of privacy policies and other misconducts, but the consent decree did not include any financial sanction.¹²¹ However, when Facebook violated the 2012 consent decree because of the Cambridge Analytics scandal, the FTC made a second consent decree that imposed a civil penalty of 5 billion dollar on Facebook.¹²² The FTC's ability to escalate sanctions not only increases the compliance rate, but also allow the Commission to distinguish companies with different intent, rewarding the good-faith while punishing the bad-faith. The standards derived from the EAR model can adapt to challenges over time. The command-and-control regulation is retrospective in that regulators can only makes rules that are based on existing practices, which prevents the regulators and the regulated from discovering better regulations. By the time of formal adoption, the rules are highly likely to be obsolete. In contrast to the command-and-control regulation, the EAR model allows the industry to take the lead in exploring appropriate standards. Regulatory tasks are best carried out at the level closest to those affected by them.¹²³ Therefore, private companies are in a better position in obtaining regulatory information than regulators like the FTC. The regulatory information is later transmitted to the FTC through direct communication and information sharing taking place in as public as workshops and conferences, and as private as negotiation for a settlement. Especially, the FTC would incorporate best practices of the industry as part of its legal standard. By getting the regulated parties involved in the policy-making process, the EAR model reveals the full potential of the regulated and keeps the agency's privacy regulation up to date.

¹²¹ *Facebook, Inc.*, FTC File No. 092 3184, No. C-4365 (2012).

¹²² Order Modifying Prior Decision and Order, Facebook, *supra* note 116.

¹²³ Robert K. Vischer, Subsidiarity as A Principle of Governance: Beyond Devolution, 35 *Ind. L. Rev.* 103, 104 (2001).

In the system of information governance, the formal use of traditional, coercive powers like rulemaking or formal adjudication is not necessary. Built on mutually beneficial agreements like consent orders, the EAR model reaches the regulatory goals on the ground of direct communication, information sharing, and stakeholders' acknowledgement of the effectiveness of the measures.¹²⁴ In this process, the FTC acts as a facilitator instead of a regulator and controller.

Conclusion

Although the FTC's EAR model poses challenges to the existing theories of administrative law, which seeks to prohibit abuse of agency discretion by procedural safeguards and judicial review, it can still be justified within the current legal system. On the one hand, the FTC is entitled to use adjudication to set up new policies under the *Chenery/Bell Aerospace* principle. On the other hand, the FTC's *ad hoc* approach to information privacy satisfies the constitutional requirement of fair notice. Moreover, the EAR model fits into the emerging trend of governance. It provides a framework within which regulators, private organizations, and individuals can collaborate to develop and enforce standards. This pioneering effort has given rise to an information governance framework that can address existing and future information privacy issues.

¹²⁴ Hirsch, *supra* note 94, at 8.

CHAPTER 7 CONCLUSION

Following the 2020 presidential election, the FTC has welcomed its new Chair, Lina Khan, who holds an expansive view of the FTC rulemaking authority. With the change of leadership, there is a growing momentum within the FTC that embraces the use of the agency's rulemaking power as a solution for emerging information privacy issues. For example, Commissioner Rebecca Slaughter, the former acting chair, argued that despite the burden of Magnusson-Moss rulemaking, "it [was] imperative for the FTC to take all action within its authority right now to protect consumers," which included rulemaking authority.¹ Similarly, Commissioner Rohit Chopra also signaled his support for FTC rulemaking on consumer privacy-related issues.² Most recently, one of the FTC's Republican Commissioner, Christine Wilson, expressed her openness to the issuance of new privacy rules.³ Though Commissioner Wilson did not take rulemaking as her "first or second choice" or "even the third best option," she "reluctantly [came] to consider whether [the FTC] should begin a privacy rulemaking proceeding."⁴

Influenced by this pro-rulemaking momentum, the FTC has recently taken substantive steps to reinvigorate its rulemaking procedures. On July 1, 2021, the FTC, in a 3-to-2 vote, approved amendments to its Rule of Practices related to setting new rules for unfair or deceptive trade practices under Section 18 of the FTC Act. A crucial change was the elimination of the administrative law judge's role in presiding over FTC rulemakings, who would oversee public

¹ Rebecca Kelly Slaughter, Remarks on Algorithms and Economic Justice, UCLA School of Law, (January 24, 2020).

² Rohit Chopra, Responses to Written Questions Submitted by Honorable John Thune ("Granting the FTC the authority to issue data security rules in accordance with the Administrative Procedure Act would allow the Commission to issue timely and appropriate rules that keep pace with technological development and seek civil penalties if companies violate them.").

³ Christine Wilson, Remarks at FTC Rulemaking: A Solution for Federal Privacy Regulation, IAPP (Jun. 23, 2021).

⁴ Republican FTC Commissioner Agrees to Privacy Rulemaking, available at <https://www.jdsupra.com/legalnews/republican-ftc-commissioner-agrees-to-4931752/> (July 5, 2021).

hearings and determine the factual record behind the rule. The revised rules would shift the responsibility of oversight from an ADJ to the FTC chair or a presiding officer chosen by the chair. Other changes included the elimination of the requirement that the FTC should publish a staff report containing an analysis of the rulemaking record and recommendations as to the form of the final rule for public comment.⁵ The goal of these amendments was to remove the “self-imposed” requirements so that the FTC could utilize rulemaking to better protect consumers from corporate misconducts, including those in the field of information privacy. These changes may arguably pave the way to the FTC’s comprehensive privacy rule.

The growing likelihood that the FTC will set its comprehensive privacy rules is, to some extent, consistent with the findings of this dissertation. That is, behind the wax and wane of the FTC’s authority is political sentiment for consumer protection. In the past, the three waves of consumer movement had seen the expansion of the FTC’s authority. During the first wave of consumer movement against monopolies in the market, Congress created the FTC on the basis of an investigatory agency, the Bureau of Corporations, whose staff and ongoing investigations were taken by the FTC. Congress granted the Commission the power to prohibit unfair competition, which, in turn, would protect consumers from monopolies. Later, the FTC’s authority extended from anti-competition to consumer protection amid the second wave of consumer movement. By passing the Wheeler-Lea Act in 1938, Congress officially conferred to the FTC the authority to prescribe unfair and deceptive trade practices that would cause consumer injuries. Finally, the third wave of consumer movement revitalized the FTC. Equipped with newly recognized rulemaking authority, the FTC had aggressively prosecuted false advertising in the entire 1970s.

⁵ 16 CFR Parts 0 and 1: Rules of Practice: Revisions to Parts 0 and 1, 86 FR 38542. See also, Fed. Trade Comm., Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 1, 2021).

Arguably, American society is witnessing the fourth wave of consumer movement, the main theme of which is to address concerns associated with the emerging information technology. Though some issues, like fraudulent contracts, are no longer a hot topic as the market works out new solutions that keep volume of fraudulent contracts down to the level that are perceived as tolerable, others, including harms to consumer privacy, persist and raise massive concerns. Congress has enacted a series of sectoral-specific statutes to address the privacy harms relating to health information, children's online information, financial information, and genetic information. States like California take the lead in passing comprehensive information privacy laws. Consumer groups and civil society also push for more federal regulations on information privacy issues. As information privacy becomes a hot topic of consumer privacy in the last two decades, it is reasonable to expect that the FTC's power will expand again and announce privacy-related policies through rulemaking.

However, as illustrated in the early part of this research, political atmosphere can also work against the agency. When the FTC aggressively prosecuted and sanctioned TV advertising, especially advertising directed at children, in the 1970s, advertisers and business groups strongly opposed the agency's regulatory attempt. The backlash from the industry was so large that it pushed Congress to significantly cut the FTC's funding and pass the FTC Improvements Act of 1980.

One of the legislation's profound impacts was to curtail the FTC's rulemaking authority. Prior to the enactment of the FTC Improvements Act of 1980, the rulemaking procedures that the FTC ought to follow were already burdensome, because the Commission was a few federal agencies that should follow hybrid rulemaking procedures, which place considerable procedural burdens in addition to those required by the notice-and-comment rulemaking. The FTC Improvements

Act made FTC rulemaking procedures even more stringent. It demanded the FTC, for instance, to publish advance notice of proposed rulemaking and conduct regulatory analyses at the stage of issuing a proposed rule as well as a final rule. Following these additional procedural obligations cost the FTC years, even decades, before promulgating a rule. Consequently, the FTC has shied away from rulemaking in the post-FTC Improvement Act era.

It is against this background that the FTC's Enforcement-as-Regulation model has emerged. At the time the FTC jumped into the field of information privacy, rulemaking, as a practical matter, was not a feasible regulatory tool. Despite the agency's repeated call for relaxing procedural safeguards on its rulemaking authority so that it could issue comprehensive privacy rules, Congress only authorized the FTC to conduct notice-and-comment rulemaking in limited areas. In response, the FTC turned to adjudicatory procedures and brought enforcement actions against violations of Section 5 of the FTC Act as well as sectoral privacy statutes. The accumulation of these enforcement actions on privacy-related issues laid the foundation for the EAR model, through which the FTC set agency policies on a case-by-case basis.

A couple of factors have contributed to the FTC's adoption of the EAR model. First, the FTC is a long-time law enforcement agency. It has enforced sectoral privacy statutes since the 1970s. In the last two decades, the FTC has brought more than 200 privacy-related enforcement actions against private companies in different industry sectors. Second, the FTC enjoys considerable flexibility in exercising its enforcement authority. Though the FTC Improvements Act of 1980 ossified its rulemaking authority, the agency's enforcement power remains intact. Equipped with a large range of regulatory tools, the FTC can quickly identify and sanction law violations. Especially, the use of consent orders allows the FTC to save its limited resources. Finally, unlike rulemaking, FTC enforcement actions are less likely to be politicized. Except for some high-

profile cases like those against LabMD or Facebook, most enforcement actions fly under the radar, protecting the FTC from the crossbow of Congress. To this extent, the FTC has invented the EAR model due to the practical need.

Those who cannot remember the past are condemned to repeat it.⁶ There is a possibility that the comprehensive privacy rule that the FTC intends to set would put the agency in a position that it was after KidVid crusade. It is so because the debate on privacy rules in specific, and FTC rulemaking in general, is no less politically controversial than that in the 1970s and 1980s. The FTC's recent adoption of revisions to the Section 18 rulemaking procedures was approved along party lines, with two Republican commissioners voting against the proposal and filing dissenting statements. They argue that

What the changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record. . . . [T]he reforms undercut the independence of those charged with conducting evidentiary hearings, limit valuable input from the public, and reverse decades of practice regarding agency transparency.⁷

In addition to political backlash, the FTC also suffered court losses in the 1980s, and the judicial resistance against the FTC's regulatory enthusiasm still exists. Most recently, the Supreme Court unanimously rejected the FTC's authority to obtain restitution and disgorgement for deceptive trade practices. To offset its inability to directly issue civil penalties, the FTC used to broadly construe Section 13(b) and claimed that the reference to "permanent injunctions" entitled the agency to impose "equitable monetary relief to remedy past violations."⁸ However, in AMG

⁶ George Santayana, *The Life of Reason*, 1905.

⁷ Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021).

⁸ Overview of the FTC Authority.

Capital Management, LLC v. FTC, the Supreme Court rejected the FTC’s claim for equitable monetary relief, holding that Section 13(b) did not authorize the Commission to obtain restitutions directly from the federal courts.⁹

To avoid the kind of political and judicial backlash that occurred in the 1970s and 1980s, the FTC should be cautious in its efforts to issue a comprehensive privacy rule. In the meantime, the EAR model will continue to serve as one of the agency’s main approaches to information privacy, as not only the legal standards rising from enforcement actions will form the basis of the hypothetical FTC privacy rule, but also it will be mechanism to enforce the rule.

Taking one step back, the EAR model is more than an expediency that the FTC utilizes in face of political and legal obstacles. Rather, it has far-reaching impacts on both administrative law and information privacy law. Traditionally, administrative law seeks to contain agency discretion through imposing procedural safeguards subject to judicial review, so that a series of values—such as public participation and transparency—can be preserved. This idea is explicitly embodied in the APA. The APA articulates three major types of administrative procedures, including both formal and informal rulemaking and formal adjudication procedures. Current administrative law jurisprudence favors relatively formal administrative procedures: the more formal a procedure is, the more judicial deference will be afforded to the agency decision.

However, the FTC’s EAR model represents a move away from formal agency policymaking and toward informal one. The EAR model manifests in the prevalence of consent orders, which are regulatory settlements between the regulators and companies. Besides the FTC, other federal agencies also extensively use regulatory settlements. For instance, the SEC often uses deferred prosecution agreements and non-prosecution agreements in resolving disputes. These regulatory

⁹ See *AMG Capital Management, LLC v. FTC*, U.S. (2021) (holding that “Section 13(b)’s ‘permanent injunction’ language does not authorize the Commission directly to obtain court-ordered monetary relief.”).

settlements fall outside the procedures prescribed by the APA. With few procedural safeguards, regulatory settlements are often less transparent and require less inputs from the interested parties and the public. The rise of regulatory settlements challenges existing framework of administrative law.

As suggested by this research, at a minimum, the FTC's EAR model can be justified within the current legal framework. First, the FTC is entitled to announce its privacy-related policies in an ad hoc approach. The current jurisprudence of the Supreme Court affords broad discretion to agencies in policymaking. Agencies can either issue ex ante rules or make ex post policies through adjudication. Congress may explicitly direct agencies to follow a specific procedure like rulemaking, but the fact that Congress has formalized the FTC's rulemaking power suggests its skepticism, instead of support, of FTC rulemaking. In addition, the rapid change of privacy-related issues justifies the FTC's choice of case-by-case approach. Also, FTC enforcement actions are fact-specific and bind only the parties, thus the agency does not engage in rulemaking in disguise of adjudication.

Second, the EAR model satisfies the constitutional requirements of due process. Due process requirements ask agencies to provide fair notice of the law before imposing punishment. The appellate courts have reached opposing conclusions on the fair notice issue, with the Third Circuit, in *FTC v. Wyndham Worldwide Corp.*, upheld the EAR model on the ground of fair notice, and the Eleventh Circuit, in *LabMD, Inc. v. FTC*, struck down the EAR model for vagueness. However, the FTC's case against LabMD is so weak that LabMD is distinguishable from Wyndham. Except in cases like LabMD, the FTC can provide adequate notice to the regulated parties through publicizing its guidance and past enforcement actions as well as incorporating industry practices as part of its standards.

In terms of information privacy law, the EAR model may contribute to the transformation of our existing understanding of information privacy. For decades, the debate on information privacy has been dominated by the right-based approach, which focuses on guaranteeing individual's unilateral control over personal information. The right-based approach leads to an enforcement mechanism that is built upon the traditional, command-and-control regulation. Within the traditional regulation, regulators intervene in markets to impose top-down limits on the collection, use and transfer of information. However, the right-based approach to information privacy, as well as the command-and-control regulation associated with it, becomes increasingly incompatible with privacy-related issues, as it simultaneously fails to effectively protect individuals while it also stifles innovation.

In contrast to the traditional regulation, the EAR model allows stakeholders, including regulators, private organizations, and consumers, to collaborate to develop and enforce standards. As regulatory information continuously flows between the FTC and other stakeholders, the FTC can identify appropriate standards. Unless required by the statutes, the FTC will not substitute these bottom-up standards with its own ideas about consumer preference for information privacy. Then it incorporates the standards into its consent orders and gives them a de facto safe harbor status: complying with the standards saves companies from admitting liability, while violations of the standards would result in subsequent sanctions. The adoption of the standards gives private companies an opportunity to learn to integrate the creation of value for its customers with the mitigation of unacceptable risks to its consumers.¹⁰ In this way, the

¹⁰ Jane K. Winn, *The Governance Turn in Information Privacy Law*, 25, SSRN, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418286.

EAR model can “permit beneficial uses of data while meeting the wide range of consumer preferences for privacy.”¹¹

In a collaborative manner, the EAR model gives rise to a framework of information governance. Originated in the 1970s, the idea of information governance emphasizes on the shared interests between individuals and organizations that process personal information. It urges us to shift the attention to the relationship between individuals and companies. Partly attributed to the FTC’s regulatory approach, the transition to information governance is happening on the ground. But on the implementing level, it is a challenge to design institutions that further the mutual benefits of individuals and companies, as existing institutions only keeps their eyes on the interests of individuals. Effective design requires, among others, successful collective action and self-governing behaviors, and the continual design or evolution of appropriate rules.¹²

Though this research has revealed some implications of the FTC’s EAR model on both administrative law and information privacy law, many more issues are left untouched. For example, how should administrative law react to the prevalence of regulatory settlements like consent orders? Presumably, we can hold an agency accountable by subjecting regulatory settlements to enhanced judicial review or executive oversight. Or we can look for other checks on agency actions that would produce enough accountability. Similarly, we should explore necessary institutions that could promote the information governance. Successful address of these issues would require additional research on not only the FTC’s EAR model, but also many related areas. Until future research is done can we push forward the boundary on both the fronts of information privacy law and administrative law.

¹¹ Maureen K. Ohlhausen, Privacy Challenges and Opportunities: The Role of the Federal Trade Commission, 33 *Journal of Public Policy & Marketing* 4, 7 (2014).

¹² Charlotte Hess and Elinor Ostrom, A Framework for Analyzing the Knowledge Commons, in *Understanding Knowledge as a Commons: from Theory to Practice*, The MIT Press (2005).

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