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The FTC at 100:
The Need for Improvement in Advertising and Privacy Regulation

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The FTC at 100: The Need for Improvement in Advertising and Privacy Regulation

J. Howard Beales III[1]

I. INTRODUCTION

The FTC's consumer protection mission is closely related to the Commission's role in protecting competitive markets, because markets organize and drive our economy. Consumer protection policy can profoundly enhance the vast economic benefits of competition by strengthening the market, or it can reduce these benefits by unduly hampering the competitive process. The FTC has a special responsibility to protect and speak for the competitive process, to combat practices that harm the market, and to advocate against policies that reduce competition's benefits to consumers.

By and large, the Commission has done an excellent job in its consumer protection mission. As the agency approaches its 100th anniversary, however, there are key areas in which it is harming consumer welfare. Recognizing the Commission's generally strong performance, this article highlights some areas where improvements are needed.

II. THE COMMISSION'S RECENT APPROACH TO ADVERTISING REGULATION HARMS CONSUMER WELFARE

First, and most importantly, the Commission has lost its way in its approach to advertising regulation. For decades, the FTC recognized and promoted the central role of advertising in a market economy.[2] It challenged private restrictions on advertising, and spoke out forcefully against FDA restrictions that limited consumers' ability to learn about the relationship between diet and health. In its own enforcement activities, it recognized not only the costs of mistakenly allowing false claims to continue, but also the costs of mistakenly restricting the flow of truthful information. It recognized the difficulties of mass communication, and the reality that even most carefully crafted advertisement is likely to be misunderstood by some consumers. As former Chairman Robert Pitofsky wrote, it engaged in "a practical enterprise to ensure the existence of reliable data," rather than "a broad theoretical effort to achieve Truth."[3]

The Supreme Court has consistently held that the First Amendment does not protect deceptive speech.[4] That conclusion is straightforward when speech deceives most of those who

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[2] For a fuller discussion of these benefits *see* J. Howard Beales, Timothy J. Muris, & Robert Pitofsky, *In Defense of the Pfizer Factors*, THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION, pp. 83-108 (James C. Cooper, ed. 2013).

[3] Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 681–83 (1977).

[4] Cent. Hudson Gal & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

hear it, but it is inherently more problematic when speech accurately informs most, but misleads a few. For example, for any performance claim, roughly half of purchasers will experience results that are worse than the average, but information about the average or expected result is likely extremely valuable to consumers. If the government maintains that providing the average is deceptive because "too many" consumers believe they will actually achieve that result, consumers would lose valuable information entirely.

Virtually any communication is subject to misinterpretation, and advertising is no exception. However straightforward the message and however careful the execution, some consumers are likely to misinterpret it. In academic studies of brief communications, 20 to 30 percent of the audience misunderstood some aspect of both advertising and editorial content.[5]

To address this problem, the 1983 Deception Policy Statement focused on the meaning of an advertisement to the "average listener," or "the general populace," or the "typical buyer."[6] A footnote acknowledges that [a]n interpretation *may* be reasonable even if it is only shared by a significant minority of consumers." [7]

In the Commission's recent POM opinion,[8] the footnote swallows the standard. The most the Commission claims is that the advertisement conveys a challenged claim to "*at least* a significant minority of reasonable consumers."

The Commission relied entirely on its own reading of the advertising. When balancing protection of a minority of consumers against the interest of others who would like to learn about emerging scientific evidence, however, the need for extrinsic evidence is acute. There is no reasonable way to strike that balance without some sense of roughly how many consumers fall into each group. Moreover, it is essential to determine that the "significant minority" is greater than the 20 to 30 percent who are likely to miscomprehend *any* message. Good survey research can address precisely this question.

More fundamentally, however, what is needed is deeper appreciation of the fact that consumers who correctly interpret a message are harmed when the Commission prohibits claims that some misunderstand. The Commission's approach to "up to" claims is a case in point. Although most reasonable consumers surely understand that saving "up to" a certain amount is different from saving "at least" that amount, the FTC issued warning letters to window

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[5] Regarding televised messages, *see* JACOB JACOBY ET AL., MISCOMPREHENSION OF TELEVISED COMMUNICATIONS (1980). Regarding print communications, *see* JACOB JACOBY & WAYNE D. HOYER, THE COMPREHENSION AND MISCOMPREHENSION OF PRINT COMMUNICATIONS (1987). Both studies compare advertisements with excerpts of editorial content designed to be roughly equal in length, and find no significant differences in the extent of miscomprehension.

[6] F.T.C. Policy Statement on Deception (1983) at notes 24-28, appended to Cliffdale Assoc., 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm ("Deception Policy Statement).

[7] *Id.*, note 20 (emphasis added).

[8] In the Matter of POM Wonderful LLC et al., January 16, 2013, Docket Number 1344, *available at* http://www.ftc.gov/enforcement/cases-proceedings/082-3122/pom-wonderful-llc-roll-global-llc-successor-interest-roll.

manufacturers[9] asserting that the two claims are exactly the same. An "up to" claim is only allowed if all or almost all consumers experience the result.

The FTC points to a copy test showing that if an ad mentions savings of 47 percent, 22 to 28 percent of consumers say that "all or almost all" consumers will save that much, whether the claim is "save 47 percent," "save up to 47 percent," or also discloses the average savings, even though "up to" is right next to the 47 percent, in the same size type and emphasis. This is a test of how many consumers will play back the proper interpretation of numerical claims after a brief, artificial exposure. Not surprisingly, many do not. Consumers who seriously contemplate spending hundreds or thousands of dollars on new windows are likely to consider the investment more carefully than consumers who are paid $5 to participate in a mall survey.

Importantly, the survey did not find that there was a less misleading way to convey information about savings. Like the academic literature, some consumers misinterpreted all tested versions of the advertisement. Sound regulatory policy, however, cannot deny information to all consumers just because some consumers might misunderstand.

Second, the Commission is requiring excessive amounts of evidence to substantiate advertising claims. The core principle of substantiation has always recognized the uncertainty surrounding many claims, and balanced the benefits of truthful claims against the costs of false ones.

Consider, for example, Kellogg's 1984 claims for All Bran cereal about the relationship between diets high in fiber and the risk of cancer. The science, which was based largely on epidemiology rather than human clinical trials, was uncertain. Citing these uncertainties, the FDA threatened to seize All Bran as an unapproved new drug. When the FTC and the NCI defended Kellogg, the FDA changed course, launching a review of its policy.

The FTC's defense of Kellogg was based on the core notion of balancing the risks of mistakenly prohibiting truthful claims against the risk of mistakenly allowing false claims to continue. If the claim is true, insisting on clinical trials would impose substantial costs on consumers, who would lose important information about the likely relationship between fiber consumption and cancer risk. On the other hand, if the claim is false, the consequences to consumers are only giving up a better tasting cereal, or paying a little more for a higher-fiber product. Because the far more serious error is mistakenly to prohibit truthful claims, the FTC argued that Kellogg's claims were substantiated, despite the remaining uncertainty.

Unfortunately, the Commission's recent cases have departed from this principle, requiring two randomized, placebo controlled, double blind clinical trials ("RCT"s) to substantiate claims about the relationship between nutrients and disease. This more rigid standard is modeled on the FDA's drug approval process. The model itself is inappropriate for claims about diet and disease. The potentially large public health impact of mistakenly allowing dangerous drugs on the market means that more is at stake in approving new drugs than in deciding whether to allow diet and health claims. The potential consequences of mistaken

[9] *See* FTC Press Release, *FTC Warns Replacement Window Marketers to Review Marketing Materials; Energy Savings Claims Must Be Backed by Scientific Evidence*, August 29, 2012, *available a*t http://www.ftc.gov/news-events/press-releases/2012/08/ftc-warns-replacement-window-marketers-review-marketing-materials.

decisions about what to eat, or whether to take a safe dietary supplement, are not remotely comparable to the potential consequences of mistaken decisions about prescription drugs.

Congress made that judgment about dietary supplements when it enacted the Dietary Supplements and Health Education Act, which removed supplements from the rigorous requirements of the drug approval process, and allowed claims about the relationship between nutrients and the structure or function of the body if they are supported by a "reasonable basis." The FTC's recent orders threaten to reverse this Congressional decision, restoring the rigors of the drug approval process in everything but name.

The requirement for two clinical trials is excessive in most cases, and is likely to deprive consumers of valuable, truthful information. There are ways of learning about the world other than clinical trials. There are, for example, no randomized trials of parachutes, [10] but few would jump out of an airplane without one. Nor are there randomized trials establishing the adverse effects of tobacco consumption. Indeed, much of what we know about the relationship between diet and disease is based on epidemiology, not randomized trials.

Moreover, any trial takes time. As one group of authors noted, "waiting for the results of randomized trials of public health interventions can cost hundreds of lives, especially in poor countries with great need and potential to benefit. If the science is good, we should act before the trials are done."[11] "Good science" they suggest "is taking the research to the problem rather than conducting the research in the tallest ivory tower the investigator can find."[12]

Even as it builds the ivory tower ever taller, the Commission contends that nothing has changed. It defends the requirement for two clinical trials as "fencing in" relief that imposes special requirements on proven violators. Initially, there is no sound reason to require anyone to meet this higher burden to substantiate the likely truth of their claims. Rather than "fencing in" potential violations, the requirement "walls off" truthful claims that would likely prove valuable to many consumers.

Although formally limited to an individual company, the standard will likely apply more generally. It signals to others what the Commission expects. This is especially true when the Commission is also asserting the authority to obtain financial relief in cases where there is a dispute about substantiation among scientific experts.[13] Moreover, the reason the Commission offers for this requirement in its POM decision is universally true—a second test might yield a different result.

In fact, the two clinical test requirement will more likely suppress truthful claims than prevent deceptive ones. If a statistical test that finds a significant difference between two products

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[10] Gordon C.S. Smith & Jill P. Pell, *Parachute Use to Prevent Death and Major Trauma Related to Gravitational Challenge: Systematic Review of Randomized Controlled Trials*, 327 B.M.J. 1459 (2003).

[11] Malcolm Potts et al., *Parachute Approach to Evidence Based Medicine*, 333 B.M.J. 701 (2006).

[12] *Id.* at 702.

[13] The Commission's use of Section 13(b) to obtain redress in substantiation cases is wrong as a matter of law, troubling as a matter of policy, and threatens to undermine the operation of the fraud program, which has proven critical to the FTC's consumer protection mission. *See* Beales & Muris, *Striking the Proper Balance: Redress Under Section 13b) of the FTC Act*, 79 ANTITRUST L. J. 1 (2013).

at the conventional 95 percent confidence level, there is a 5 percent chance that the result is due solely to the peculiarities of the particular sample, but a peculiar sample may also fail to detect a relationship that actually exists. As a practical compromise between their greater ability to detect differences and the greater costs of larger trials, sample sizes are frequently chosen to have an 80 percent chance of detecting a difference (of a specified size) if it really exists.[14] Thus, 20 percent of the time a test will fail to detect a real difference. Repeating the test will raise the probability that at least one of the two tests will fail to find a difference from 20 percent to 36 percent.[15] Requiring the second test is therefore much more likely to reject truthful claims than to detect a result that only arose in the first place because of chance.[16] Thus the requirement of two RCT's, rather than one, increases the likelihood that truthful claims will be suppressed.

Finally, in practical day-to-day decision making, knowing that precisely one clinical trial supports an important health-related claim is highly valuable to consumers. The requirement for a second clinical trial appears unnecessary to insure truthful, useful claims. The Commission should return to its traditional balancing test.

III. THE COMMISSION SHOULD RESTRICT ITS PRIVACY ENFORCEMENT ACTIONS TO PRACTICES THAT CAUSE REAL CONSUMER HARMS.

In 2001, the FTC adopted a new approach to privacy, based on the consequences of information use and misuse. Among other things, that approach led to the National Do Not Call Registry and a series of information security cases.

The consequences-based approach to privacy regulation explicitly recognizes that in an information economy, a key driver of value creation for consumers and for the economy is, not surprisingly, information. Unless there is real harm to consumers, seeking to protect privacy by restricting the flow of information threatens to destroy the value that information creates, without offering consumers anything in return.

The stakes are high. A recent study of auction markets for online advertising examined the impact of information exchange on the price that publishers receive for their advertising availabilities. The study used data from two companies that conduct online auctions, with a sample of roughly one million transactions from one company and three million from the other. It found that the exchange of information substantially increased the price of advertising. If there was any cookie at all, even one that was only one day old, the price of an impression was roughly triple the price of an impression with no cookie available. Moreover, the longer the cookie had

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[14] The probability of detecting a difference that actually exists is known as the power of the test. "The ideal power for any study is considered to be 80%." K.P. Suresh & S. Chandrashekara, *Sample Size Estimation and Power Analysis for Clinical Research Studies*, 5 J. HUM. REPROD. SCI. 7 (2012), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3409926/.

[15] When there is a real difference, the chance of finding the difference statistically significant is .8. The chance of finding it significant in both tests is .8 times .8, or .64. The likelihood that both tests find a significant difference when in fact there is no difference is .05 times .05, or .0025.

[16] A second test is more likely to reject truthful claims even if the chances of failing to detect a difference are the same as the chances of mistakenly finding one. If the chance of either mistake (significance when there is no difference or failure to find significance when one exists) is 5 percent, the chance that both tests will find the difference is 90.25 percent (i.e., .95 times .95). Thus, there is almost a 10 percent chance of mistakenly rejecting a truthful claim. With only one test, there was only a 5 percent chance of mistakenly allowing a false one.

been in place, the greater the value of the impression. For one company, a cookie that was 90 days old raised the price to seven times the price without a cookie; for the other, the increase was smaller but still significant.[17]

The study also used data from Adomic to examine the extent to which different websites are dependent on advertising sales through advertising networks and online exchanges. Adomic regularly visits websites and examines the advertisements they serve to determine whether the ad is coming from the website itself or from some third party. The data reveal that smaller sites are more dependent on third-party advertising sales. Even large websites sell about half of their impressions through these channels, but smaller sites depend on third-party channels to sell roughly two thirds of their impressions.[18] Thus, impairing information exchange, with its substantial adverse impact on the price of an advertising impression, is a particular threat to the smaller websites that are a key part of making the internet the vibrant experience that we all enjoy.

Although the Commission has not abandoned the consequences-based approach to privacy entirely, and cannot, given the statutory constraints under which it operates, it has adopted a new "privacy framework" based on what the Commission views as "best practices." The framework urges "privacy by design," "simplified choice," and "greater transparency." The Commission Report recognizes that some of the practices it urges go "beyond existing legal requirements," but provides little guidance on the contours of the practices it believes are subject to challenge under the FTC Act.

More problematically, the framework seeks to expand the concept of harm. As the preliminary report noted in 2010, "for some consumers, the actual range of privacy-related harms is much wider and includes … the fear of being monitored or simply having private information 'out there.'"[19] Consumers may also feel harmed when information is used "in a manner that is contrary to their expectations," and may have "discomfort with the tracking of the online searches and browsing."[20] Some have summarized these kinds of harms as "creepiness."[21]

Injury to consumers is a necessary element of a Section 5 violation. Harms are also actionable even if they are difficult to monetize directly. Damage to a reputation or intrusion into private places are not concrete harms in the same sense as the risk of physical or economic injury, but they are real harms nonetheless, widely recognized in tort law.[22] From the beginning, the harm-based approach to privacy addressed such harms. Indeed, the Commission's first information security case was against Eli Lilly for inadvertent disclosure of sensitive information:

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[17] J. Howard Beales & Jeffrey A. Eisenach, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content*, *available at* http://www.aboutads.info/resource/fullvalueinfostudy.pdf (2014).

[18] *Id.*

[19] Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change*, 20, *available at* http://www.ftc.gov/os/2010/12/101201privacyreport.pdf.

[20] *Id.*

[21] Adam Thierer, *The Pursuit of Privacy in a World Where Information Control is Failing*, 36 HARVARD J. L. & PUBLIC POL'Y 409 (2013).

[22] Restatement (Second) of Torts §559 Defamatory Conduct Defined, §652B Intrusion Upon Seclusion, and §652D Publicity Given to Private Life.

the email addresses of a group of Prozac users.[23] Such information is sensitive because of the risk of damage to reputations.

Of course, some consumers may have subjective preferences to avoid practices they find "creepy," even without injury in the usual sense. Similarly, some have preferences for products that are kosher. I term these types of preferences subjective, because not all consumers agree that the attribute is important, and because there is no way for an outside observer to measure the magnitude of the injury if they are violated.

The Commission should protect such preferences when they are manifested in marketplace choices. A company promising "no information sharing," or no tracking, or kosher, must deliver. Critical to protecting subjective preferences, however, is the notion that consumers have made a choice based on the promise that a provider will deliver. It does not follow that because some consumers have a preference, the Commission should require all sellers to satisfy that preference. That argument is simply wrong. Assuring the accuracy of claims that a product is kosher enhances consumer sovereignty—it lets consumers choose what matters to them and what does not. Consumers who believe keeping kosher is important can do so, but they must face the cost of paying attention and finding a seller who promises to provide kosher products. Consumers who think kosher is irrelevant are not burdened in any way.

The Commission should not, however, require all sellers to satisfy such preferences. Requiring all sellers to avoid practices that some find "creepy" would impose the costs of an admittedly real preference on many who do not share it. The FTC Act is about preserving consumer choice, not about substituting the preferences of the Commissioners for those of consumers.

Moreover, for the Commission to protect such subjective preferences, they must be preferences that are actually reflected in marketplace behavior. That is the only reliable indication that these preferences are real. They cannot be sensibly inferred from survey results where consumers can express a preference without confronting the costs of satisfying it. Just as competitive markets satisfy consumer preferences for a wide range of other subjectively important characteristics, there is every reason to believe they will satisfy privacy preferences.

The modern information economy is built on data collection and analysis. Especially as the Commission examines new issues, such as the "internet of things," a focus on harm is essential. It is easy to speculate about the potential privacy problems, but regulation based on speculative problems is far more likely to chill useful innovations than it is to prevent real harms.

The principle of avoiding the most serious mistake that should be central to advertising substantiation is equally applicable to privacy regulation. Regulation or enforcement that is too stringent may reduce the risk of the particular privacy harms to which it is addressed, but it increases the risk of precluding innovations that would make everyone's life better. Too little enforcement may facilitate innovation, but it also increases the risk of real and concrete privacy harms. The question is one of balance, and should be asked about every potential privacy

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[23] *See* Complaint at 3, Eli Lily and Company, No. 123214 (Jan. 18, 2004), *available at* http://www.ftc.gov/os/2002/01/lillycmp.pdf.

enforcement action. Is the more serious error failing to regulate, or is overly burdensome regulation the greater risk?

For example, when Congress and the Commission first began considering online privacy issues in the late 1990s, few would have imagined that literally billions of consumers would want to post many of the details of their personal lives online for all to see. Facebook and other social media have created tremendous value for consumers by enabling exactly that practice. Regulation based on what some might still consider "creepy" could easily have prohibited a valuable innovation.

As the defender of consumers' right to choose for themselves, the Federal Trade Commission has a special responsibility to ensure that its actions enhance competitive markets, rather than hindering their performance. In advertising regulation, it has strayed from that role. By pursuing advertising interpretations that are not reliably distinguishable from the background noise in any communication, and insisting on a standard of scientific certainty in areas where certainty does not exist, the Commission is reducing the flow of information that is essential to guide competitive markets. Its retreat from the consequences-based approach to privacy regulation threatens to substitute its own judgment that some practices are "creepy" for the preferences consumers reveal in the market. In both areas, the Commission has retreated from its historic role as a defender of consumer sovereignty.

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The Unrealized Congressional Vision for the FTC and Its Historic Performance as a Law Enforcement Agency

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The Unrealized Congressional Vision for the FTC and Its Historic Performance as a Law Enforcement Agency

Daniel A. Crane[1]

I. INTRODUCTION

The subject of the FTC's history in its first century and its potential for modernization are broad topics, and I will not be able to do them justice given constraints of time and space.[2] I hope, however, that reflection on the unrealized Congressional vision for the FTC and its historic performance as a law enforcement agency will set the stage for consideration of reforms that may be appropriate to consider on the Commission's 100th birthday.

Let me say, finally by way of introduction, that my expertise as a scholar and practitioner primarily concerns the FTC's competition and antitrust portfolio, not its consumer protection portfolio. Hence, my thoughts are primarily about the FTC's original and continuing mandate to promote competition.

II. CONGRESS' UNREALIZED VISION FOR THE FTC

A. History and Congressional Vision

Like all agencies, the FTC was a product of its times, in this case the Progressive Era. The backdrop to the passage of the FTC and Clayton Acts in 1914 can be summarized briefly as follows. During the Gilded Age of the late nineteenth century, a series of events including the second industrial revolution, the liberalization of state corporate law, and the growth in scale of business organizations led to popular demand for federal legislation to control the power of the "trusts." Congress responded in 1890 with the Sherman Act, which remains to this day our foundational antitrust law.

However, during its first two decades, the Sherman Act was not used as effectively as Progressives of the early twentieth century would have liked. The law was turned more often against labor combinations than capital and was perceived as being too weak. Also, the Progressives were frustrated with a model of antitrust enforcement that depended on the Justice Department bringing lawsuits before federal judges. The Progressives believed that a specialized commission with broad investigatory and remedial powers would be preferable to the litigation model of antitrust enforcement.

The debates over the appropriate model of antitrust enforcement crystallized in the 1912 Presidential election between Theodore Roosevelt, William Howard Taft, and Woodrow Wilson. Roosevelt argued vigorously for the creation of a new federal agency with broad supervisory power over corporations. Roosevelt wanted to replace the prosecutorial and judicial model of

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[2] My perspectives are more fully set out in my book THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (Oxford University Press 2011).

antitrust with an expert commission model. Taft, by contrast, pointed to recent prosecutorial successes by his administration against U.S. Steel, American Sugar, General Electric, the meat packers, and the transcontinental railways in arguing in favor of a continuation of the prosecutorial and judicial model. Wilson came in somewhere between Taft and Roosevelt, arguing in favor of the creation of a new commission, but one that would still be accountable to the courts.

Following Wilson's victory, Congress turned first to banking reform, passing the Federal Reserve Act of 1913, and then to antitrust reform, passing the FTC and Clayton Acts of 1914. The design of the FTC reflected the Progressive Era belief in regulation by technocratic experts insulated from direct political pressures. In its 1935 decision in *Humphrey's Executor*,[3] a decision that legitimized the constitutionality of independent regulatory agencies, the Supreme Court described the technocratic features that made the FTC a distinctive type of governmental organization.

According the Court, the FTC is "a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without leave or hindrance of any other official or any department of the government."[4] "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality."[5] "It is charged with the enforcement of no policy except the policy of the law."[6] "Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative."[7] "Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"[8]

This independent agency, technocratic conception of the FTC contrasted with the prevailing common law model of antitrust enforcement by prosecutors before judges. The question thus arose of what should be the relationship between the FTC and the Justice Department, to which the Sherman Act had delegated the primary responsibility for enforcing the antitrust laws. Here, the FTC Act's legislative history evidences a Congressional intent that "[f]ar from being regarded as a rival of the Justice Department . . . the [FTC] was envisioned as an aid to them."[9]

The FTC Act contains several mechanisms for collaborative antitrust enforcement between the two agencies, in particular on questions of remedy. Section 6(c) of the Act calls for the Commission to monitor compliance with antitrust decrees obtained by the Justice Department.[10] Section 6(e) allows the attorney general to request that the FTC "make recommendations for the readjustment of the business of any corporation alleged to be violating the Antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."[11] Section 7 of the Act allows

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[3] *Humphrey's Ex'r v. U.S.*, 295 U.S. 602 (1935).
[4] *Id.* at 625–26.
[5] *Id.* at 624.
[6] *Id.*
[7] *Id.*
[8] *Id.* (citation omitted).
[9] *FTC v. Cement Inst.*, 333 U.S. 683, 692–93 (1948).
[10] 15 U.S.C. § 46(c).
[11] 15 U.S.C. § 46(e).

district courts to refer Department of Justice antitrust cases to the FTC to sit as a "master of chancery" and determine the appropriate form of relief.[12]

To summarize, the original Congressional design contemplated that the FTC would have the following characteristics:

1. non-partisanship and independence from the political branches of government,
2. superior expertise,
3. primarily legislative and adjudicatory responsibilities, and
4. a cooperative partnership with the Justice Department.

For better or for worse, almost none of this vision has been realized.

B. Failure of the Congressional Vision

1. Political Independence

Congress designed the FTC to be independent from the political branches of government. The *Humphrey's Executor* case sealed this independence by preventing the President from removing Commissioners from office for political reasons. The Commission thus enjoys a high degree of independence from the executive branch of government. However, this does not mean the Commission is politically independent as a general matter.

To the contrary, empirical evidence suggests that the Commission yields to the will of Congress, and, particularly, of the oversight committees with funding responsibility.[13] For example, a study by Roger Faith, Donald Leavens, & Robert Tollison found that case dismissals at the FTC were non-randomly concentrated on defendants headquartered in the home districts of congressmen on committees and subcommittees with budgetary and oversight jurisdiction over the FTC.[14] Bill Kovacic, who later went on to become the FTC's chair, found that the FTC has consistently chosen policy programs that follow the expressed will of the FTC's oversight committees in Congress.[15]

To say that the FTC responds to the will of Congress is not necessarily to criticize the FTC for being a "political" institution. In a democracy, having a politically accountable agency may be desirable. However, it is important to acknowledge that the Progressive Era vision for technocratic independence and a non-political character is largely illusory.

2. Superior Expertise

The Progressive Era agency model was largely based on the assumption that regulatory commissions would be run by people with superior expertise to that of ordinary law enforcement officials—in this case, that the FTC would have superior expertise on competition issues to the Justice Department. In the early years, the FTC may have had an expertise advantage over the Justice Department. In 1914, the FTC inherited the Economic Department (later transformed into the Economic Division and then the Bureau of Economics) of its predecessor—the Bureau of

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[12] 15 U.S.C. § 47.

[13] *See* PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION (Robert J. Mackay, James C. Miller III, & Bruce Yandle, eds. 1987).

[14] Roger L. Faith, Donald R. Leavens, & Robert D. Tollison, *Antitrust Pork Barrel*, *in* Mackay et al., *id.* at 15–29.

[15] William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, *in* Mackay, et al., *id.* at 63.

Corporations.[16] The Justice Department's Antitrust Division did not hire its first economist or create an economics unit until 1936.[17] Until the early 1970s, economists played a relatively small role in the division—mostly in data gathering and statistical litigation support.[18] The FTC's economics unit, by contrast, enjoyed earlier influence within the agency.[19]

Today, however, there is little distinction between the agencies on this score. At the Antitrust Division, a deputy assistant attorney general for economics—usually a prominent academic economist—heads a staff of approximately 60 Ph.D.-level economists.[20] At the FTC, the Bureau of Economics features about 70 Ph.D.-level economists (although they spend about a quarter of their time on consumer protection issues).[21] The bureau director is also usually a prominent academic economist, and it is typical to have an economist among the commissioners. Although there have been exceptions, including on the present commission, the commissioners historically have not been leading experts in their fields when appointed and have not stayed at the Commission long enough to acquire expertise.[22] In terms of overall expertise, there is no substantial difference between the FTC and Antitrust Division.

3. Legislative and Adjudicatory Character

As noted earlier, the key features that justified the independence of the FTC from the executive branch were supposedly that it was not merely another law enforcement agency, but that it instead had a legislative and adjudicatory character. However, this vision has been largely unrealized.

First, the FTC has never been an antitrust rule maker. Although the Commission has promulgated influential rules on the consumer protection side—the Cigarette Rule and the Do Not Call Registry, for example—it has published almost no antitrust rules.[23] Indeed, it has been discouraged from doing so. A 1989 ABA report on the FTC concluded, "we are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions on specific types of business conduct."[24]

Second, although the Commission may adjudicate matters internally, it more often chooses to litigate in court instead. During the 1990s, for example, the FTC brought slightly more injunctive actions in district court than it did administrative actions.[25] Thus, while the FTC enjoys the flexibility of choice, it often chooses the conventional law enforcer route—in which capacity it is essentially identical to the Antitrust Division.

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[16] Lawrence J. White, *Economics, Economists, and Antitrust: A Tale of Growing Influence*, NYU Law and Economics Research Paper No. 08-07, *available at* http://www.aeaweb.org/annual_mtg_papers/2008/2008_180.pdf.

[17] R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 ALB. L. REV. 787, 791 n. 12 (2005).

[18] White, *supra* n. 16 at 11.

[19] *Id.*

[20] *Id.* at 13.

[21] *Id.*

[22] *See* Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L. J. 761, 768 (2005).

[23] A 1989 ABA report found only one instance of the FTC promulgating an antitrust rule. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L. J. 43, 91 n.103 (1989).

[24] *Id.*

[25] According to a tally from the FTC's annual reports, during the 1990–1998 period, the FTC brought 31 administrative complaints and 33 district court actions.

Further, it is unclear how much real adjudication is happening in administrative proceedings at the FTC—if we assume that adjudication means a true contest over evidence before an impartial tribunal. The FTC's enforcement staff enjoy tremendous success in adjudication at the Commission level. One study found that between 1983 and 2008 the staff won all 16 cases adjudicated by the Commission.[26] This does not necessarily translate into ultimate victory for the Commission, since the courts of appeal have not been shy about reversing Commission decisions. The Commission faces better prospects on appeal if it has won in a district court proceeding than if it has found liability through an administrative proceeding, which explains the Commission's preference to litigate cases in court.

4. Cooperative Partnership with Justice Department

Finally, despite Congress's intention that the two agencies collaborate in antitrust enforcement, the statutory provisions encouraging such collaborations have been seldom used. In a 1962 letter to the chairman of the FTC, referring a decree matter to the FTC under Section 6(c), the Attorney General stated the section had been "virtually unused since its enactment in 1914,"[27] and the neglect of 6(c) has continued since that time.

The antitrust agencies collaborate to the extent of figuring out how to divide responsibility and issuing joint guidelines on certain topics, but they do jointly enforce the antitrust laws on the same matters, as contemplated by Congress.

III. THE FTC AS A LAW ENFORCEMENT AGENCY

Despite the original Congressional design, on competition matters the FTC is not a legislative body, is not primarily an adjudicatory body, is not uniquely expert on antitrust matters, and does not play the collaborative role with Justice Department that Congress wrote into the FTC Act. Rather, the FTC is primarily a law enforcement agency that enforces antitrust norms created by the courts on equal terms with the Justice Department, state attorneys general, and private plaintiffs.

The question thus arises as to why maintain the FTC's antitrust enforcement role. More specifically, why should the federal government continue to fund two separate antitrust agencies that perform essentially the same executive law enforcement function? In recent years, the trend in other countries (like Brazil, France, and Portugal, for example) has been toward consolidating antitrust enforcement in a single agency, and thus eliminating the duplication costs, jurisdictional battles, and uncertainty for the business community that can arise from multiple agencies.

In 2007, the bipartisan, congressionally appointed Antitrust Modernization Commission released an evaluative report on the entire gambit of modern antitrust law. Among other things, the twelve members of the Commission considered whether dual federal enforcement should continue. Three of the twelve—including two former heads of the Antitrust Division—voted to recommend abolishing the FTC's antitrust enforcement authority and vesting responsibility for

[26] A. Douglas Melamed, *The Wisdom of Using the "Unfair Methods of Competition" Prong of Section 5*, COMPETITION POL'Y INT'L (Nov. 2008). The study Melamed cites found that the respondents won 4 of the 16 cases before the Administrative Law Judge, but then lost those cases before the Commission.

[27] *U.S. v. Int'l Nickel Co. of Can.*, 203 F.Supp. 739 (S.D.N.Y. 1962).

all antitrust enforcement with the Justice Department.[28] But the majority recommended retaining the dual-enforcement structure.

The reasons for retaining dual enforcement are largely conservative and prudential. Although the FTC may not be functioning as the agency that Congress designed it to be, it is by and large an effective law enforcement agency today. One cannot be sure what would happen if antitrust enforcement were consolidated in a single agency, and since there is no pressing problem with federal antitrust enforcement, its basic structure should be retained. To put it colloquially, if it ain't broke, don't fix it.

The one hundredth anniversary of the FTC is an opportune time for reflecting on whether this conservative and prudential wisdom is sound, or whether it is simply the path of least resistance. However, since there appears to be little political appetite for a wholesale reexamination of the institutional structure of antitrust enforcement, I will close by suggesting four relatively modest measures that could be implemented to better integrate the modern functioning of the FTC and Antitrust Division in light of the FTC's law enforcement role. The first could be accomplished without Congressional intervention. The next three would likely require new legislation.

IV. FOUR MODEST RECOMMENDATIONS FOR MODERNIZATION

A. Promulgating Guidelines for Section 5 Enforcement

In recent years, the scope of the FTC's power to enjoin "unfair methods of competition" under Section 5 of the FTC Act has been one of the most frequently discussed and controversial topics with respect to the FTC's competition mission. The Supreme Court has held that Section 5 reaches all conduct prohibited by the Sherman Act and goes even further to allow the FTC to reach conduct not yet illegal under the Sherman Act but nonetheless posing a threat to competition.[29] Despite this recognition of the FTC's prophylactic authority under Section 5, there are few, if any, litigated cases in the last several decades in which the FTC has successfully invoked Section 5 as to conduct not covered by the Sherman Act.

Several Commissioners and many antitrust practitioners have recently raised the need for the Commission to issue guidelines concerning the scope of Section 5. In my view, the Commission should issue such guidelines, although not necessarily for the reasons suggested by others. Some commentators have suggested that the Commission should issue guidelines in order to provide greater notice and predictability for the business community. Although such guidance might be provided on particular types of competitive practices (such as patent settlements or participation in standard-setting organizations), I am skeptical that the kinds of broad guidelines under consideration would help businesses better to plan their activities.

Rather, the value of such guidelines would obtain primarily from enhancing judicial review of Commission decisions. Although guidelines issued by the Commission may not be legally binding, they can provide a set of principles that can be invoked initially before the

[28] Antitrust Modernization Commission, Report and Recommendations II.A at 129 (footnote).

[29] *FTC v. Brown Shoe Co.*, 348 U.S. 316, 322 (1966).

Commission and ultimately in court to limit the Commission's discretion.[30] Given that the FTC acts principally as a law enforcement agency rather than as a legislative or judicial body, it is important that it be constrained by principles announced in advance that can be fairly contested in litigation and ultimately resolved by the courts.

B. Aligning the Preliminary Injunction Standard in Merger Cases

Under Section 13(b) of the FTC Act, the FTC receives greater deference than the Justice Department when seeking to block a merger in district court in order thereafter to initiate administrative proceedings. Courts have interpreted Section 13(b) as creating a presumption that the Commission will be accorded a preliminary injunction so long as it raises "serious, substantial, difficult, and doubtful" issues about the merger.[31] By contrast, in order to secure a preliminary injunction against an anticompetitive merger, the Justice Department must meet the traditional preliminary injunction standard, including proving a substantial likelihood of success on the merits and irreparable harm.

Solicitude to the FTC's position as an independent agency with "quasi-adjudicatory" powers might make sense if the FTC had a fundamentally different role than the Justice Department in merger cases, but it does not. Both agencies act functionally as law enforcement agencies executing legal rules created by Congress and the courts. Whether a merger case ends up before the Justice Department or FTC has nothing to do with the complexity of the case or whether it has features making it particularly suitable for administrative or executive handling. It turns on whether the Justice Department or FTC happens to be the usual custodian of the relevant industry. For example, if the relevant industry is computer software the Justice Department takes charge but if it is computer hardware the FTC takes charge. There is no logical reason that the FTC should have an easier time getting a preliminary injunction in a hardware case than the Justice Department does in a software case.

Given that preliminary injunctions are often dispositive in merger challenges, this difference in the preliminary injunction standard means that the FTC has an arbitrary advantage in blocking mergers in the industries over which it holds sway. Congress could remedy this anomaly by passing legislation establishing a single preliminary injunction standard for both the FTC and Justice Department.

C. Allowing Formal Division of Authority

As noted earlier, the idea that the agencies will play a cooperative role in investigating and prosecuting antitrust cases has not materialized. Instead, the agencies informally allocate enforcement based on their experience with particular industries. It is often not obvious in advance which agency will end up taking a particular case. Particularly in the merger context, where the Hart-Scott-Rodino Act's premerger notification clock is running, delay in identifying which agency will be responsible for reviewing a merger can be costly.

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[30] For example, courts frequently rely on the Horizontal Merger Guidelines in assessing FTC and Justice Department merger challenges. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

[31] *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (citation omitted).

In 2002, the FTC and Justice Department entered into a formal Memorandum of Agreement allocating merger enforcement by industrial segment.[32] Thus, for example, the FTC was to investigate computer hardware, energy, health care, retail stores, pharmaceuticals, and professional services, and the Antitrust Division was to investigate agriculture, computer software, financial services, media and entertainment, telecommunications, and travel. Unfortunately, the agencies ultimately had to withdraw their agreement under pressure from Congress.[33] An opportunity for greater clarity and transparency in the allocation of authority between the two agencies was lost.

Although the agencies do not require statutory authority to allocate their workload informally, given that Congressional pressure was responsible for the collapse of their 2002 agreement, some Congressional involvement in encouraging the agencies to undertake such an effort again is desirable.

D. Preventing Appellate Forum Shopping by Defendants

Under the current appellate review statute, which dates back to the Commission's founding in 1914, a losing defendant may appeal the Commission's order "within any circuit where the method of competition or act or practice in question was used or where such person, partnership, or corporation resides or carries on business."[34] What this unique appellate review statute means, in effect, is that a large corporate defendant doing business throughout the United States can choose any of the twelve federal courts of appeal (not including the specialized Court of Appeals for the Federal Circuit) in which to lodge its appeal. This means that large corporate defendants always have the advantage of litigating in the shadow of the most sympathetic appellate court in the nation and can shape their defenses accordingly.

The appellate forum shopping that this creates is particularly problematic in light of the fact that the Supreme Court has been relatively uninterested in antitrust cases, in general, and FTC cases, in particular, in the last four decades. During the 1960s, the FTC sought certiorari on substantive antitrust issues fifteen times, and the Supreme Court granted certiorari in eleven of those cases. Since the 1960s, the FTC has filed thirteen certiorari petitions in antitrust cases and has been granted Supreme Court review only six times.

Given current odds, the FTC knows that it is likely that the appellate court selected by the defendant will have the final say in the case. This problem could be addressed by a statutory reform requiring the defendant to lodge its appeal in a particular court—for example the U.S. Court of Appeals for the D.C. Circuit or in jurisdiction of the defendant's principal place of business.

[32] *See* Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (March 5, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf.

[33] Lauren Kearney Peay, *Note*, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1333-38 (2007).

[34] 15 U.S.C. § 45(c).

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Should Section 5 Guidelines Focus on Economic Efficiency or Consumer Choice?

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Should Section 5 Guidelines Focus on Economic Efficiency or Consumer Choice?

Robert H. Lande[1]

I. INTRODUCTION

Commissioner Wright is right that it would be desirable for the Commission to issue Section 5 antitrust guidelines.[2] This article will demonstrate, however, that the best way to formulate Section 5 guidelines is to focus them on the goal of protecting consumer choice, rather than to embrace Commissioner Wright's proposal to neuter the FTC Act by confining it in an economic efficiency straightjacket. Only if Section 5 guidelines were formulated appropriately would they improve consumer welfare during the Commission's second century.

When Congress enacted the FTC Act it intended this law to be more expansive than the Sherman Act.[3] Even though the Sherman Act was law, Congress decided that additional legislation was needed. The FTC Act's legislative history makes it clear that Section 5 was intended to prohibit not only every violation of the Sherman Act, but also (i) incipient violations of this law, (ii) conduct violating the spirit of the Sherman Act, and (iii) conduct violating recognized standards of business behavior.[4] The Supreme Court has explicitly adopted this interpretation of the nature of the FTC Act,[5] as Commissioner Wright observed.[6]

However, the Supreme Court case law verifying Congress' intent is relatively old.[7] There is no guarantee today's more conservative[8] Court would interpret Section 5 in the same expansive manner. If the Commission were to attempt to articulate Section 5 guidelines that were vague, were insufficiently bounded, or that gave the Commission undue discretion—as it did in its

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[2] *See. e.g.,* Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission's Section 5 Unfair Methods of Competition Authority*, (4) CONCURRENCES: COMPETITION L.J. at 1-2 (2013).

[3] *See* Neil W. Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, passim (1980).

[4] *Id*. at 299-300.

[5] *See, e.g.*, F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 239-240 (1972).

[6] *See* Wright, *supra* note 2, at 4.

[7] *Id.* The Supreme Court's most recent expansive interpretation of Section 5 of which I am aware was a generation ago in *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986), where the Court characterized Section 5 as including traditional antitrust violations and also "practices that the Commission determines are against public policy for other reasons."

[8] *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 6, tbl.3 (Univ. of Chicago John M. Olin Law & Economics, Working Paper No. 404, 2008), *available at* http://ssrn.com/abstract=1126403 (documenting that a very large proportion of the most conservative Supreme Court justices of recent decades are serving on the Court today).

Opinion in the *N Data* case[9]—reviewing courts might well make Section 5 co-terminous with the other antitrust laws despite the clear Congressional intent.[10] Fortunately, the Commission has an easy way to minimize the risk of reversal on appeal.

II. THE CONSUMER CHOICE FRAMEWORK FOR SECTION 5 GUIDELINES

The Commission should promulgate Section 5 antitrust guidelines that properly but prudently reflect this expansive Congressional intent. The best (perhaps the only) way to accomplish this is to frame these guidelines in terms of the fundamental idea that the FTC Act should focus upon "consumer choice."[11]

The choice framework would impose a threshold requirement that conduct only can constitute a Section 5 antitrust violation[12] if it significantly impairs the choices that free competition would bring to the marketplace.[13] Antitrust law prevents restraints on the competitive array of options in the marketplace, ensuring consumer choices are undiminished by such artificial restrictions as price-fixing or anticompetitive mergers. (The converse, however, is not correct. It is not true that everything that reduces consumer choice is an antitrust violation.

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[9] An example of the kind of expansive approach a reviewing court would be unlikely to uphold was the standard promulgated by the FTC in its *N Data* opinion. The Commission declared it has the power to ban practices it found to be "unjust, inequitable, or... contrary to good morals." *See Negotiated Data Solutions, LLC.*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

[10] Former FTC Chair William Kovacic warned that as a practical matter courts won't allow a broader interpretation of Section 5 unless it is constrained and articulated in a relatively predicable manner. Kovacic colorfully, but accurately, stated: "In case after case, the courts have said, 'I might be with you on this one. But tell me how far it goes. Are we going to the moon? Are we going to the end of the solar system? Is it the universe and all it contains? I'd like to have some idea of what the boundaries are.'" *See, Ex-FTC chief: Google could beat an 'unfair competition' suit*, *available at* http://www.cnet.com/news/ex-ftc-chief-google-could-beat-an-unfair-competition-suit/

[11] For a detailed explanation of the consumer choice approach to antitrust law, *see* Neil W. Averitt & Robert H. Lande, *Using the "'Consumer Choice" Approach to Antitrust Law,* 74 ANTITRUST L. J. 175 (2007), *available at* http://ssrn.com/abstract=1121459.

[12] Section 5 prohibits conduct that constitutes "unfair methods of competition" (which this article will refer to as Section 5 antitrust violations) as well as conduct that constitutes "unfair or deceptive acts or practices" (which this article will refer to as Section 5 consumer protection violations). *See* 15 U.S.C. § 45.

[13] *See* Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175, 182 (2007) [hereinafter *Using the "Consumer Choice" Approach*]; *see also* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust And Consumer Protection Law*, 65 ANTITRUST L.J. 713, 718-20 (1997) [hereinafter *Consumer Sovereignty*]. The choice framework also would impose the requirement that conduct only can constitute a Section 5 consumer protection violation if it significantly impairs consumers' ability meaningfully to choose from among the options the market provides. Construed this way, the two halves of Section 5, operating together, ensure that consumers have the two ingredients needed to exercise effective sovereignty—a competitive array of options and the ability to choose meaningfully from among those options. Consumer protection law ensures that consumers are able to make an informed and rational selection from among the options on the market, unimpeded by artificial constraints, such as deception or the withholding of material information. In this way the two halves of Section 5 together protect a free market economy.

What is true is simply that everything that is an antitrust violation significantly reduces or distorts the choices on the market.) [14]

It should be stressed that "choice" considerations would simply be a threshold for a Section 5 violation, a method of weeding out non-meritorious cases and focusing decision-makers' attention. Only if a practice significantly reduces the options in the market would the practice be evaluated more closely (under a rule of reason approach that will be discussed at the end of Section III *infra*).

Under a consumer choice standard, factors such as innovation, variety, perspectives,[15] quality, and safety would in effect be moved up from the footnotes—where they are all too often forgotten—into the text, where they would play a more prominent role in the antitrust evaluation. When antitrust law is construed and applied within the consumer choice framework, rather than an economic efficiency framework, it would change some outcomes because it would give greater emphasis to such short-term issues as quality and variety in competition, and to such long-term issues as competitive innovation, ideas, and perspectives.[16] The choice approach to antitrust, instead of a price or efficiency approach,[17] also has the advantage of explaining accurately, simply, and intuitively—in a way that is easy to understand—why antitrust is good for consumer welfare.[18]

The consumer choice framework would make a difference in several broad categories of cases where a price or efficiency approach to antitrust often can lead to the wrong result.[19] The first category involves conduct in markets with little or no price competition, as may occur as a result of certain types of regulation. In these situations, no avenues exist for properly assessing consumer welfare without focusing explicitly on non-price issues. For markets without price competition, or with only minimal price competition, a price standard would be inadequate because our main concern should be artificially diminished consumer choice.[20]

A second general category of cases for which the consumer choice approach would work better involves conduct that increases consumers' search costs or otherwise impairs their decision-making ability. Such conduct tends to cause consumers to obtain products or services less suited to their needs, as well as to produce adverse effects on price. There are a large number of case examples in this category, including advertising restriction cases and similar cases that involve collusion to raise consumer search costs.[21]

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[14] It also is true that every consumer protection violation reduces or distorts consumers' ability to choose from among the options the market provides. *See* Averitt & Lande, *Consumer Sovereignty*, *id.* at 715-22.

[15] Competition in terms of perspectives arises most meaningfully in the media contest. *See id.* at 206-12.

[16] *See* generally Averitt & Lande, *supra* note 11.

[17] For specific differences between the consumer choice, price, and efficiency approaches, *see* Averitt & Lande, *id.* at 185-89.

[18] The choice framework should also be applied to Sherman Act and Clayton Act cases. Fortunately, there is reason to believe that all antitrust jurisprudence is slowly evolving in this direction. *Id.* at 263-64.

[19] *Id.* at 201-22.

[20] *See id.* at 196-99.

[21] *Id.* at 199-201. *See* also the cases cited in the sources cited in footnote 26 *infra*.

Finally, there are cases involving markets in which firms compete primarily through independent product development and creativity, rather than through price. Examples of these markets include high-tech innovation or editorial independence in the news media.[22] In all these situations non-price competition is likely to be paramount.

Even though expansive Commission opinions such as the *N Data* decision came to the right result, the majority opinion's overall articulation of its "unfairness" standard risks attack as being unduly indefinite and for giving the Commission too much discretion.[23] This construction also could be criticized as not providing sufficient notice to businesses as to what specific conduct is likely to be illegal. By contrast, guidelines employing the consumer choice articulation would simply, succinctly, and clearly declare that conduct that does not significantly reduce the choices that otherwise would come onto the market could not violate the FTC Act.

III. COMMISSIONER WRIGHT'S SECTION 5 GUIDELINES PROPOSAL

FTC Commissioner Joshua Wright has proposed that the Commission adopt Section 5 Guidelines that only consider the economic efficiency effects of practices.[24] Unfortunately, his proposal contains a fatal flaw: It directly contradicts Congressional intent.

Despite his acknowledgement of Congress' desire that Section 5 be broader than the other antitrust laws, his proposal—astonishingly—reaches less anticompetitive conduct than the other antitrust laws His proposed central test of illegality is whether a practice "generates harm to competition as understood by the traditional antitrust laws *and* generates no cognizable efficiencies."(emphasis added)[25]

This test is much narrower than current law. The prevailing test of legality under the Sherman Act balances a practice's efficiency and market-power effects under a rule of reason.[26] The existing law most certainly does not follow Commissioner Wright's suggestion to immunize any conduct that leads even to a significant amount of monopoly power simply because it results in a cognizable efficiency. Almost every corporate action leads to some efficiencies.[27] The crucial legal question is—and should be—whether these efficiencies are outweighed by the harm caused by these practices. Thus, Wright's proposed interpretation would not apply the FTC Act to a considerable amount of conduct that currently violates the Sherman Act—the opposite of the

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[22] *Id*. at 201-22.

[23] The Commission noted: "The legislation history from the debate regarding the creation of the Commission is replete with references to the types of conduct that Congress intended the Commission to challenge... [including conduct that is] unjust, inequitable or... contrary to good morals...." *See* Negotiated Data Solutions LLC, Case No. 0510094 (Fed. Trade Comm'n Sept. 22, 2008), 2008 WL 4407246, at 1-2. (citations omitted)

[24] *See. e.g.*, Wright, *supra* note 2, at 3.

[25] *Id*. at 3.

[26] For a discussion of the rule of reason in various contexts *see* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211-33 & 240-43 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113927; *See also* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134820&download=yes.

[27] For examples of rule of reason cases involving anticompetitive conduct that would be immunized from Section 5 scrutiny by this proposal, *see* the cases discussed in the two sources cited *id.*

broader prohibition Congress intended the FTC to become. Because his proposal directly contradicts Congressional intent it should be rejected.

Commissioner Wright appears to have proposed an unduly restrictive interpretation of Section 5 because he believes defendants are unfairly treated at the Commission, as evidenced by the fact that the staff wins at the Commission level almost all the time.[28] He contrasts this with the much lower success rate of plaintiffs in Federal Court.[29] However, there are five benign explanations for why we should expect the FTC staff to have an extremely high batting average, and a much higher batting average than private plaintiffs in federal court:

1. The FTC staff has much better judgment and experience as to what the five commissioners are likely to do. The staff studies them carefully and is unlikely to file cases they can't win. More than 600 federal judges are much harder for private plaintiffs to predict.
2. At the FTC economic experts usually are consulted before a complaint is issued and this often results in a complaint not being issued. By contrast, private attorneys usually decide to file their case and then offer outside economists perhaps $300 to $1000 per hour to help them win their case. Private attorneys are much less likely to use economists as a filter.
3. The Commission tries to be a bipartisan body, and only issues three to two complaints reluctantly.[30] By contrast, if even one of countless potential plaintiff lawyers wants to file a complaint, they can.
4. Government lawyers are usually more risk averse then plaintiff lawyers. It is not obvious why government lawyers should fear losing cases more, but this often is true. Perhaps this occurs because many plaintiff lawyers, by nature, are gamblers who are more likely to roll the dice even if they have only a modest probability of winning their case.
5. The FTC has much better research and data collection powers than private entities. This makes the staff less likely to make mistakes, less likely to be surprised, and less likely to lose than plaintiff lawyers.

In addition, there is a unique or almost unique statute that permits defendants who lose at the Commission level to appeal in any of 12 circuits they choose.[31] Defendants' ability to forum shop is an unfair advantage for defendants, which would offset any unfair advantage the FTC staff may have.

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[28] *See* Wright, *supra* note 2, at 2. Ironically, the FTC staff recently lost just such a case. *See* FTC:WATCH, *Commissioners hand FTC staff its first defeat in 19 years*, McWane Inc. (February 17, 2014) for unlawfully maintaining its monopoly in the domestic iron pipe fittings market.

[29] *See* Wright, *supra* note 2, at 2.

[30] The Commissioners prefer to issue complaints unanimously. When they vote out a complaint three votes to two, this signifies that the situation is likely to be more controversial.

[31] *See* discussion and analysis in Prepared Remarks of Professor Daniel Crane, Before the United States House of Representatives House Energy and Commerce Committee, Subcommittee on Commerce, Manufacturing, and Trade at a Hearing entitled, "The FTC at 100: Views From the Academic Experts." Rayburn House Office Building, Washington, D.C., February 28, 2014. *available at* http://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-CraneD-20140228.pdf at 14.

Commissioner Wright has called for an unbalanced rule of reason, one that gives an absolute preference to efficiencies compared to market power effects. Any cognizable efficiency, no matter how small, would trump any amount of market power—no matter how large.[32] Congress, however, wanted a standard close to the reverse of this. Congress wanted competitive price options for consumers, and condemned practices that would raise consumer prices to supra-competitive levels.[33]

As a practical matter, the way to ensure that prices will not rise is to give greater weight to market power effects than to efficiencies.[34] In other words, a practice's efficiencies would have to be so large that they would prevent any price increases. This would mean that some of the efficiencies would accrue to consumers or, at a minimum, that consumers wouldn't pay higher prices just so the firm acquiring the market power could attain a cost savings.

The efficiencies required to prevent price increases are much higher than the efficiencies required to neutrally offset the inefficiency effects of market power.[35] Depending upon a large number of factors, the required efficiency savings would be perhaps four times as large under a price standard as they would be under an efficiency standard.[36] Under other plausible assumptions the required efficiencies would be ten times as large if a "price to consumers" standard were used rather than a net efficiencies standard.[37]

Commissioner Wright, however, proposes to give efficiencies infinitely more weight than market power effects! Any cognizable efficiency would justify any monopoly or cartel, no matter how high the firm or firms involved might raise prices! This is close to the opposite of what Congress intended.

Under the Choice standard's rule of reason, practices that are likely to raise prices significantly should be deemed anticompetitive. And, as noted earlier, practices that significantly reduce the current or future non-price options should be similarly condemned.

IV. EXAMPLES OF PURE SECTION 5 CASES THAT COULD BE BENEFICIAL

As noted above, Section 5 Guidelines should limit FTC Act antitrust violations to conduct that significantly impairs the choices that free competition would bring to the marketplace.[38] There are a number of specific ways the FTC could carry out this Congressional intent that

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[32] *See* Wright, *supra* note 2, at 3.

[33] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, passim (1982); *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065413. *See also* Alan A. Fisher, Frederick I. Johnson, & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 806, 816 (1989), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134826.

[34] *Id. at* 806, 816 (1989). Commissioner Wright does not consider this possibility. *See* Wright, *supra* note 2, at 3.

[35] Fisher, Johnson, & Lande, *supra* note 32, at 806, 816.

[36] *Id.*

[37] *Id.* The conditions include the relevant elasticities and assumptions concerning whether the probability of successful collusion will increase.

[38] *See* both articles by Averitt & Lande, *supra* note 13.

would be clear, predictable, and administrable, and also would be in the public interest. This article will very briefly discuss three specific categories of appropriate cases.[39]

A. Invitations to Collude

Invitations to collude can violate Section 2 of the Sherman Act.[40] However, for enforcers to prove any type of Section 2 Sherman Act violation they must undertake a large number of formidable tasks, including proving a relevant market, a complex and time-consuming undertaking. Then the enforcers must prove that the challenged conduct was anticompetitive and that it would result in either the respondents achieving or maintaining monopoly power or the "dangerous probability" of achieving monopoly power. Lastly, claimed efficiencies associated with the practices would have to be litigated. Therefore, like every successful Section 2 action, invitation to collude cases would be complex, lengthy, and costly.[41]

By contrast to Section 2 violations, naked collusion cases are much less complicated to prove. The enforcers do not have to define markets, prove difficulty of entry into the market or any form of market power, litigate efficiencies, or establish actual anticompetitive effects. Invitation to collude cases should be as easy to prove as collusion cases. The same jurisprudential reasons that permit the enforcers to dispense with the complex, costly, and lengthy market definition and market power issues in collusion cases also apply to invitations to collude cases. As the Commission has concluded, they should violate Section 5 of the FTC Act.[42]

B. Incipient Exclusive Dealing and Tying Cases

There currently is substantial uncertainty over the minimum market share required to establish a tying violation and the amount of foreclosure necessary for an exclusive dealing violation.[43] Regardless of how high these requirements are under the Sherman Act, they should be relaxed whenever the case involves a defendant with a significantly larger market share than those of its victims. In these "incipient" tying or exclusive dealing situations incumbents often will be able to significantly disadvantage smaller competitors and potential market entrants because of their relatively larger market shares, and thereby cause significant harm to consumer choice. This is true even in cases where the incumbents do not hold a large enough market share to trigger a traditional Sherman Act violation.[44]

Suppose, for example, a company introduces a new brand of super-premium ice cream. Suppose also that an existing seller of super-premium ice cream has 30 percent of this market as well as another 30 percent of the premium and non-premium ice cream markets. Then suppose the incumbent firm tells supermarkets they have to choose between the established firm's products and the newcomer's products. No efficiencies would arise if the established firm's demands were met. Suppose also that the supermarkets agree to the incumbent firm's demands.

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[39] Each of the three brief examples discussed in this article is discussed in more detail in Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using 'Consumer Choice' Analysis,* 8 (3) ANTITRUST SOURCE, 1 (Feb. 2009) *available at* http://ssrn.com/abstract=1287218.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

These facts, including in particular the incumbent's 30 percent market share, would be unlikely to be found to constitute either an unlawful tying agreement or an unlawful exclusive dealing agreement under the Sherman Act.[45] However, if the incumbent's exclusionary strategy succeeded, then consumer choice in terms of varieties of ice cream on the market would be diminished and prices would be likely to increase. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement.

C. Cases Similar to N-Data.

The FTC's action in the *Negotiated Data Solutions* (*N-Data*) case should be applauded, and the Commission commended, for condemning the opportunistic behavior at issue and affirming that this conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act.[46]

The facts of this case are exceptionally complicated, and it is not clear that the conduct at issue would have violated the Sherman Act.[47] One could argue that the conduct only constituted the exploitation of intellectual property rights, in which case it might not have violated the Sherman Act. It could also be argued that the case did not clearly involve an act of monopolization in violation of Section 2 of the Sherman Act because the original patent holder adhered to its agreement and the successor holder was just exploiting its newly acquired parent rights rather than taking improper steps to acquire or maintain monopoly power.

In light of this uncertainty it is fortunate the Commission was able to use Section 5 of the FTC Act to challenge the anticompetitive conduct at issue. As noted above, however, it would have been much better if the Commission's opinion had been written using a "choice" articulation, rather than the amorphous, unbounded language it employed.

IV. AREAS FOR INCREASED FTC SCRUTINY

If Section 5 of the FTC Act were interpreted to have a consumer choice focus this would have a number of advantages in addition to providing a sound, clear, and predictable basis for Section 5 antitrust guidelines. There are a number of areas that would be affected, including:

- Media consolidations and joint ventures: These should receive increased scrutiny to determine whether they affect consumer choice, especially in the area of non-price options. This analysis should be undertaken in addition to the traditional antitrust concerns over the effects of media transactions on prices. A media sector transaction that would significantly reduce the variety and types of choices available to consumers, or the potential for innovation, should be challenged even if it does not result in price increases.
- Health care consolidations and joint ventures: These also should receive enhanced scrutiny to determine whether they affect consumer choice, including non-price options. (Price effects should of course continue to be crucial considerations because price is a

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[45] *Id.*

[46] *See Negotiated Data Solutions, LLC.*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

[47] *See* Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using 'Consumer Choice' Analysis,* 8 ANTITRUST SOURCE, no. 3, Feb. 2009, at 1, *available at* http://ssrn.com/abstract=1287218.

dimension of competition that consumers value highly.) It is certainly possible that the arrival of Obamacare will lead to an increased number of anticompetitive consolidations and joint ventures in this sector, especially in cases involving hospital mergers and hospitals purchasing physician practices. These transactions should be analyzed carefully for both price and non-price effects on consumers.

- Food and agricultural industry consolidations, collusion, joint ventures, and exclusionary conduct: These should also merit similarly higher levels of FTC attention.[48] These are areas where the practices in question might not rise to the level where they constitute monopsony or monopoly, or give rise to a traditional Sherman Act violation. For the reasons given above as to why Section 5 should enable the Commission to more beneficially scrutinize incipient exclusive dealing and tying situations, Section 5 also might be used appropriately to guard against a variety of incipient anticompetitive practices in the food and agricultural sectors.

V. CONCLUSIONS

Commissioner Wright is correct that it could be desirable if the FTC issues comprehensive Section 5 antitrust guidelines. As he points out, guidelines could help increase business certainty and enhance the predictability of government enforcement actions.[49] FTC antitrust guidelines that utilize the consumer choice framework could do all of this successfully.

However, bad guidelines would be much worse than no guidelines at all. By analogy, years ago the United States wanted to negotiate an arms control agreement with the Soviet Union. A good arms control agreement would have had many benefits. However, an agreement that would have forced the United States to disarm unilaterally would have been far worse than no agreement at all.

Suppose the Soviet Union's opening position on an arm's control issue was 50 and the position of the United States was initially 100. Suppose the parties might have had a chance of compromising at somewhere between 70 and 80. Then, suppose the Soviet Union offered proposed guidelines that were at the level of only 30. The United States would have been justified in concluding that the Soviet Union was not negotiating seriously.

Yet, this is what Commissioner Wright has done. His proposal would disarm the FTC by restricting Section 5 to an enforcement program narrower than that of the Sherman Act. For this reason his proposal cannot be taken seriously by anyone who wants to carry out Congress's desire that the FTC Act be construed more broadly than the Sherman Act. It does not even contain token concessions towards Congress' preferred position.

Commissioner Wright apparently wishes Section 5 prohibited "inefficient methods of competition." However, Congress did not choose to word the statute this way, and Commissioner Wright can hardly expect the others commissioners to help him re-write it

[48] For example, *see Letter from the American Antitrust Institute to the FTC concerning the proposed merger of Sysco and U.S. Foods* (Am. Antitrust Inst., Washington, D.C.), Feb. 25, 2014, *available at* http://www.antitrustinstitute.org/sites/default/files/AAISyscoUSFoodsMergerLetter_0.pdf

[49] *See* Wright, *supra* note 2, at 1-2.

administratively. He cannot expect his proposal to neuter Section 5 to receive serious consideration other than by those already in his camp.

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Bringing Antitrust's Economic and Institutional Limits to the FTC's Consumer Protection Authority

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Bringing Antitrust's Economic and Institutional Limits to the FTC's Consumer Protection Authority

Geoffrey Manne[1]

I. INTRODUCTION

In 1914 Congress gave the U.S. Federal Trade Commission ("FTC") sweeping jurisdiction and broad powers to enforce flexible rules to ensure that it would have the ability to serve as the regulator of trade and business that Congress intended it be. Much, perhaps even the great majority, of what the FTC does is uncontroversial and is widely supported, even by critics of the regulatory state. However, both Congress and the courts have expressed concern about how the FTC has used its considerable discretion in some areas.

Now, as the Commission approaches its 100th anniversary, the FTC, courts, and Congress face a series of decisions about how to apply or constrain that discretion. These questions will become especially pressing as the FTC uses its authority in new ways, expands its authority into new areas, or gains new authority from Congress.

The FTC oversees nearly every company in America. It polices competition by enforcing the antitrust laws. It tries to protect consumers by punishing deception and practices it deems "unfair." It's the general enforcer of corporate promises made in privacy policies and codes of conduct generated by industry and multi-stakeholder processes. It's the *de facto* regulator of the media, from traditional advertising to internet search and social networks. It handles novel problems of privacy, data security, online child protection, and patents, among others. Even net neutrality may soon wind up in the FTC's jurisdiction.

A. The Federal Technology Commission

But perhaps most importantly, the Federal Trade Commission has become, for better or worse, the Federal *Technology* Commission, and technology creates a special problem for regulators.

Inherent limitations on anyone's knowledge about the future nature of technology, business, and social norms caution skepticism as regulators attempt to predict whether any given business conduct will, on net, improve or harm consumer welfare. In fact, a host of factors suggests that even the best-intentioned regulators may tend toward overconfidence and the

[1] Executive Director, International Center for Law & Economics. The paper is based largely on testimony given before the United States House of Representatives' Committee on Energy and Commerce hearing on *The FTC at 100: Views from the Academic Experts* (February 28, 2014), *available at* http://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-ManneG-20140228.pdf. A longer, more detailed version of this paper was submitted as an attachment to the written testimony and is available at http://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-ManneG-20140228-SD002.pdf.

erroneous condemnation of novel conduct that benefits consumers in ways that are difficult for regulators to understand.[2]

At the same time, business generally succeeds by trial-and-error more than theoretical insights or predictive power,[3] and over-regulation thus risks impairing experimentation, an essential driver of economic progress. As a consequence, doing nothing may sometimes be the best policy for regulators, and limits on regulatory discretion to act can be of enormous importance.[4]

One thing is certain—a top-down, administrative regulatory model of regulation is ill-suited for technology, and this technocratic model of regulation is inconsistent with the regulatory humility required in the face of fast-changing, unexpected—and immeasurably valuable—technological advance:

> Technocrats are "for the future," but only if someone is in charge of making it turn out according to plan. They greet every new idea with a "yes, but," followed by legislation, regulation, and litigation.... By design, technocrats pick winners, establish standards, and impose a single set of values on the future.[5]

B. Economics at the FTC

The most important, most welfare-enhancing reform the FTC could undertake is to better incorporate sound economic- and evidence-based analysis in both its substantive decisions as well as in its process.

While the FTC has a strong tradition of incorporating economic analysis in its antitrust decision-making, its record in using economics in other areas is mixed. Meanwhile, a review of some recent FTC decisions suggests that the Commission is perhaps becoming even less consistent in its application of economic principles.

Joshua Wright, the first JD/Econ PhD appointed to the FTC, has produced in his first year at the Agency a set of speeches, statements, and dissents that offers a steadfast baseline of economic analysis against which to assess the Commission's recent work. For Wright:

> [E]conomics provides a framework to organize the way I think about issues beyond analyzing the competitive effects in a particular case, including, for example, rulemaking, the various policy issues facing the Commission, and how I weigh evidence relative to the burdens of proof and production. Almost all the

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[2] *See*, *e.g.*, Ronald H. Coase, *Industrial Organization: A Proposal for Research*, *in* ECONOMIC RESEARCH: RETROSPECT AND PROSPECT VOL. 3: POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION (Victor R. Fuchs, ed. 1972), *available at* http://www.nber.org/chapters/c7618.pdf; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

[3] *See* Armen Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950).

[4] As Nobel Laureate economist Ronald Coase put it, "direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm. But equally there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency…. There is, of course, a further alternative which is to do nothing about the problem at all." Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 18 (1960).

[5] VIRGINIA POSTREL, THE FUTURE AND ITS ENEMIES 16 (1998).

> decisions I make as a Commissioner are made through the lens of economics and marginal analysis because that is the way I have been taught to think.[6]

In what follows I discuss Commissioner Wright's work at the FTC and its relentless economic approach extensively. Congress should work to ensure that the rest of the Agency follows his lead.

II. THEMES

In assessing the FTC, three themes emerge as being crucial to the Agency's continued success: humility, institutional structure, and economic rigor. Together these three elements serve the essential function of restraining this powerful Agency's discretion.

A. Humility

It's hard enough to predict what the future will look like as a descriptive matter. It is another matter entirely to assess what the net competitive effects will be of the unpredictable interplay of innumerable (and often unknowable) forces in a complex economy. Regulators should be reluctant to intervene in markets—and well-designed regulatory systems will constrain their discretion to do so. When they do intervene they should do so only where clear economic evidence indicates actual competitive harm or its substantial likelihood.

In competition cases the FTC generally follows this prescription, and the interplay between the Commission and the courts (among other things) serves to restrain regulators' sometimes irresistible urge to "just do something." But there are exceptions. The FTC's consent agreement in the recent *Nielsen/Arbitron* merger is a striking example. And among consumer protection cases, the FTC's recent *Apple* case stands out for its hubris in substituting the FTC's judgment for that of a private firm's design decisions.

Regulatory restraint and economic rigor are closely linked: In many instances appropriate economic analysis will demonstrate the counter-productivity of intervention—and in others the absence of clear economic justification for intervention will preclude it. Respect for the power of the economic tools used in the FTC's daily practice leads inexorably to respect for the limits of the regulator's knowledge.

Of course restraint is not the regulator's natural condition. Rather, the regulator's inclination—in fact, his very job—is to regulate. This inclination on the regulator's part is compounded by the fact that, as the Nobel laureate economist, Ronald Coase, explained:

> If an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.[7]

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[6] Interview with Joshua Wright, FTC Commissioner, ABA Antitrust Section, Economic Committee Newsletter, Winter 2014, vol. 13, p. 6, *available at* http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at308000_newsletter_2014winter.authcheckdam.pdf.

[7] Coase, *Industrial Organization*, *supra* note 2, at 67.

In this way economics is not without limits, of course, which is why humility—restraint—is so important.

And, to be sure, the FTC could no doubt undertake a plethora of ill-advised, unrestrained actions from which it, instead, actually forebears. In this regard the Commission has set the bar fairly high. But several recent examples of regulatory overreach—of Agency action in the face of clear economic evidence counseling against it, or in the absence of economic justification in its favor—may signify a surfeit of hubris and may portend a less-restrained Commission.

1. The *Nielsen/Arbitron* Merger Review

In *Nielsen* Commissioner Wright wrote a powerful and important dissent[8] from the FTC's 2 to 1 decision[9] to impose conditions on the acquisition. Essential to Wright's dissent was the absence of any actual, existing relevant market supporting the Commission's challenge:

> The Commission thus challenges the proposed transaction based upon what must be acknowledged as a novel theory—that is, that the merger will substantially lessen competition in a market that does not today exist.
>
> [W]e…do not know how the market will evolve, what other potential competitors might exist, and whether and to what extent these competitors might impose competitive constraints upon the parties.[10]

Commissioner Wright's straightforward statement of the basis for restraint stands in marked contrast to the majority's decision to impose antitrust-based limits on economic activity that hasn't even yet been contemplated. Such conduct is directly at odds with a sensible, evidence-based approach to enforcement, and the economic problems with it are considerable, as Commissioner Wright notes:

> [I]t is an exceedingly difficult task to predict the competitive effects of a transaction where there is insufficient evidence to reliably answer the[] basic questions upon which proper merger analysis is based.
>
> When the Commission's antitrust analysis comes unmoored from such fact-based inquiry, tethered tightly to robust economic theory, there is a more significant risk that non-economic considerations, intuition, and policy preferences influence the outcome of cases.[11]

As Wright suggests, facts are essential—but they are not enough. Particularly when predicting future economic effects, proper, restrained application of economic analysis to the facts is also essential. And, as noted above, this entails a recognition of the limits of the regulator's ability not only to describe the future, but also to understand its competitive significance.

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[8] In the Matter of Nielson Holdings N.V. and Arbitron, Inc. (Sep. 20, 2013), http://www.ftc.gov/os/caselist/1310058/130920nielsenarbitron-jdwstmt.pdf (Commissioner Wright, dissenting) [hereinafter "*Nielsen* Dissent"].

[9] Complaint & Consent, In the Matter of Nielson Holdings N.V. and Arbitron, Inc. (Jan. 24, 2014), http://www.ftc.gov/os/caselist/1310058/index.shtm.

[10] Wright, *Nielsen* Dissent, *supra* note 8, at 5-6.

[11] *Id.* at 2, 3.

Compare in this regard Commissioner's Wrights words about *Nielsen* with those of Deborah Feinstein, the FTC's current Director of the Bureau of Competition:

> The Commission based its decision not on crystal-ball gazing about what might happen, but on evidence from the merging firms about what they were doing and from customers about their expectations of those development plans. From this fact-based analysis, the Commission concluded that each company could be considered a likely future entrant, and that the elimination of the future offering of one would likely result in a lessening of competition.[12]

Instead of requiring rigorous economic analysis of the facts, for Feinstein, the FTC fulfilled its obligation in *Nielsen* by considering the "facts" alone (not economic evidence, mind you, but customer statements and expressions of intent by the parties) and then, at best, casually applying to them a simplistic, outdated structural presumption—the conclusion that increased concentration would lead inexorably to anticompetitive harm.

This mode of analysis underestimates the fragility of factual predictions about the future and elevates the resulting, faux-descriptive clarity when it should be emphatically questioning it with more, not less, rigorous economic analysis.

2. The *Apple* Case

The FTC's recent complaint and consent agreement with Apple highlights these issues, and, again, Commissioner Wright's powerful dissent ably identifies where and how the Agency deviated from sensible restraint.

The application of Section 5's "unfair acts and practices" prong (the statute at issue in *Apple*) is circumscribed by Section 45(n) of the FTC Act, which, among other things, proscribes enforcement where injury is "not outweighed by countervailing benefits to consumers or to competition."[13]

The majority in the *Apple* decision, although tasked with applying 45(n)'s "countervailing benefits" balancing test, failed to do so, instead assuming without proof that the benefits of Apple's challenged conduct was $0:

> T]he Commission effectively rejects an analysis of tradeoffs between the benefits of additional guidance and potential harm to some consumers or to competition from mandating guidance…. I respectfully disagree. These assumptions adopt too cramped a view of consumer benefits under the Unfairness Statement and, without more rigorous analysis to justify their application, are insufficient to establish the Commission's burden.[14]

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[12] Deborah L. Feinstein, *The Forward-Looking Nature of Merger Analysis*, Speech given at Advanced Antitrust U.S. (2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-mergeranalysis/140206mergeranalysis-dlf.pdf.

[13] 15 U.S.C. § 45 (2012), *available at* http://www.law.cornell.edu/uscode/text/15/45.

[14] Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Apple, Inc., FTC File No. 1123108, at 14 (Jan. 15, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/cases/140115applestatementwright_0.pdf [hereinafter "Wright *Apple* Dissent"].

That such a balancing was absent from the majority's decision in *Apple* reflects not only a dereliction of a legal obligation by the Commission, but also the subversion of sensible economic analysis. As Commissioner Wright says in his dissent:

> The Commission… substitutes its own judgment for a private firm's decisions as to how to design its product to satisfy as many users as possible, and requires a company to revamp an otherwise indisputably legitimate business practice. Given the apparent benefits to some consumers and to competition from Apple's allegedly unfair practices, I believe the Commission should have conducted a much more robust analysis to determine whether the injury to this small group of consumers justifies the finding of unfairness and the imposition of a remedy.[15]

What's particularly notable about the *Apple* case—and presumably will be in future technology enforcement actions predicated on unfairness—is the unique relevance of the attributes of the conduct at issue to its product. Unlike past, allegedly similar, cases, Apple's conduct was not aimed at deceiving consumers, nor was it incidental to its product offering. But by challenging the practice, particularly without the balancing of harms required by Section 5, the FTC majority failed to act with restraint and substituted its own judgment, not about some manifestly despicable conduct, but about the very design of Apple's products. This is the sort of area where regulatory humility is more—not less—important.

In failing to observe common sense limits in *Apple*, the FTC set a dangerous precedent that, given the Agency's enormous regulatory scope and the nature of technologically advanced products, could cause significant harm to consumers:

> Establishing that it is "unfair" unless a firm anticipates and fixes such problems in advance—precisely what the Commission's complaint and consent order establishes today—is likely to impose significant costs in the context of complicated products with countless product attributes. These costs will be passed on to consumers and threaten consumer harm that is likely to dwarf the magnitude of consumer injury contemplated by the complaint.[16]

B. Institutional Structure and the Role of the Courts

The FTC's tradition of applying sound economics didn't come solely from within the Agency. Rather, its emergence as the touchstone of antitrust enforcement and adjudication was a product in significant part of the influence of courts on the Agency (as well as the influence of a few exceptional former FTC Chairmen). As judges became increasingly sophisticated about economics, they began to demand such sophistication of the parties that appeared before them, including the FTC. This interplay between the courts and the Agency is essential to imparting valuable information to both the FTC and the courts alike—and, perhaps more significantly, to the business community. And thus the oft-repeated claims that the FTC's data security or privacy consent orders, for example, amount to a "common law" miss the mark in several crucial respects.

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[15] *Id.* at 14.

[16] *Id.* at 16.

For the most part, and generally in competition issues, the FTC's model is an evolutionary, rather than regulatory, one.[17] The FTC learns from, and adapts to, the ever-changing technological and business environments. While the Commission's own information gathering and analytical resources and talents are prodigious, the ongoing give and take with the courts is central to this dynamic and to ensuring that the Agency furthers this evolution rather than impedes it.

At the same time the FTC's internal constraints—from guidelines to interpersonal relationships to reputational concerns—can impose important limits on the Agency's broad discretion.

1. Guidelines: Unfair Methods of Competition ("UMC")

Among the FTC's activities, the issuing of guidelines, policy statements, advisory letters, and the like regarding its own authority is unique in that these tend to restrain the scope of the Agency's discretion rather than expand it. Other than increased judicial oversight (or legislated jurisdictional limitations), such guidance may be the most effective procedural tool for cabining Agency discretion.

But Section 5 enforcement standards in the unfairness context are essentially nonexistent.

Former Chairman Leibowitz and former Commissioner Rosch, in particular, have, in several places, argued for an expanded use of Section 5, both as a way around judicial limits on the scope of Sherman Act enforcement, as well as an affirmative tool to enforce the FTC's mandate.[18] But it's hard not to see in this argument an effort to expand the scope of the Agency's discretion. "In practice…, the scope of the Commission's Section 5 authority today is as broad or as narrow as a majority of the commissioners believes that it is."[19]

Similarly, as Commissioner Ohlhausen put it in her dissent in *In re Bosch*, "I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases…the Commission should fully articulate its views…. Otherwise, the Commission runs a serious risk of failure in the courts and a possible hostile legislative reaction….."[20]

Commissioner Wright's Proposed Statement on UMC enforcement attempts to remedy these defects, and, in the process, explains why the Commission's previous, broad applications of the statute are not, in fact, appropriate. His draft statement, along with the policy speech in

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[17] *See* Berin Szoka & Geoffrey Manne, *The Second Century of the Federal Trade Commission*, TECHDIRT (Sep. 26, 2013), *available at* http://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml

[18] *See, e.g.,* In the Matter of Negotiated Data Solutions LLC., Statement of the Commission at 3, *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

[19] Joshua Wright, *Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority* (Jun. 19, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-definingfederal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf.

[20] In the Matter of Robert Bosch GmbH, FTC File No. 121-0081 (Commissioner Ohlhausen, dissenting), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissionermaureen-ohlhausen/121126boschohlhausenstatement.pdf at 3-4.

which he introduced it,[21] present a compelling and comprehensive vision for Section 5 UMC reform at the Commission.

In much of its consumer protection practice, the Commission hasn't developed a predictable set of legal doctrines because that's what courts do—and the FTC has managed to convince dozens of companies to settle out of court, even when the challenged conduct was novel and/or the Agency's case thin. Instead,

> [t]he Commission must formulate a standard that distinguishes between acceptable business practices and business practices that constitute an unfair method of competition in order to provide firms with adequate guidance as to what conduct may be unlawful. Articulating a clear and predictable standard for what constitutes an unfair method of competition is important because the Commission's authority to condemn unfair methods of competition allows it to break new ground….[22]

What some at the FTC call its "common law of consent decrees" is really just a series of unadjudicated assertions. That approach is just as top-down and technocratic as the FCC's regulatory model, but with little due process and none of the constraints of detailed authorizing legislation or formal rulemakings.

2. Data Security Cases

Through a string of more than 50 Unfair or Deceptive Acts or Practices ("UDAP") enforcement actions over the last decade, the FTC has policed how American companies protect user data. And while the courts have been adjudicating similar (and sometimes the same) cases in parallel, the two have rarely had occasion to meet.

Although some have argued that the FTC's data security complaints, consent orders, speeches, and Congressional testimony collectively provide sufficient guidance to business, the lack of more-formal guidelines is notable.[23] Moreover, this set of guiding materials is notably lacking any direct discussion of the reasons data security investigations are closed (and none are likely to appear in the near future given a relatively new, informal policy strongly disfavoring such explanations).[24]

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[21] *See* Wright, *Section 5 Recast*, *supra* note 19.

[22] Joshua Wright, *Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, at 9 (Jun. 19, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissionerjoshua-d.wright/130619umcpolicystatement.pdf.

[23] Some have further argued, in fact, that that the threat of action through speeches, reports and the like is preferable to more concrete statements or guidelines because they are even more flexible. *See, e.g.*, Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1506&context=dlj.

[24] The FTC has issued very few closing letters on data security issues. None of them is particularly helpful. *See* FTC FOIA Request Response <on file with author>. Some of the letters are completely devoid of useful information. *See, e.g.*, Michaels Closing Letter (Jul. 26, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/michaels-storesinc./120706michaelsstorescltr.pdf. To the best of my knowledge, this was only "closing letter" regarding data security since 2009. That letter provides no details on the nature of the investigation or the reasons why it was closed. At the same time, some of the letters do, if briefly, lay out the FTC's basic reasoning, providing somewhat more helpful guidance. *See, e.g.,* Dollar Tree

To the extent that the FTC's approach has, in fact, become a "strict liability" rule, presuming that any loss of data is *per se* proof that a company's data security practices are unreasonable, there is no evidence that the inherent trade-offs this entails between increased administrability and economic rigor, or between preventing consumer injury and imposing costs on businesses that are ultimately born by consumers, is actually desirable. How the FTC weighs those trade-offs may be as important as the substantive conclusion of that process.

In practice, the FTC brings data security cases (under both Deception and Unfairness) based on the alleged "unreasonableness" of a respondent's security practices. But it does so without addressing the actual Section 5 elements (materiality, substantial injury, etc.) and even without connecting them to the unreasonableness standard that the FTC employs in lieu of the statutory language.

There are further problems. In cases where the Agency does act, the FTC's complaints describe numerous potential problems but offer few insights into which ones were particularly important to the FTC's decision to bring an enforcement action. Such lack of guidance could even violate judicial requirements that agencies must, to satisfy constitutional standards of due process, provide "fair notice" of their policies.[25]

Thus unmoored from the traditional oversight of our legal system, the FTC's data security cases, and the enforcement rationales behind them, represent the Agency acting with little restraint. To the Commission's credit, no doubt its conduct could be much worse. But odds are we've yet to see the full extent of the FTC's exercise of its discretion in this area.

3. Consent Decrees

The Commission is able to ignore the statutory language, and can render decisions in data security cases with essentially no analysis, because its decisions are, as a practical matter, un-reviewed and un-reviewable by the courts.

In some areas of law, most notably privacy, data security, and high-tech product design, the FTC operates almost entirely by settling enforcement actions in consent decrees. Consent decrees (with remarkably consistent 20-year terms that are seemingly unjustified by the equally inconsistent characteristics of the companies they govern) are also increasingly becoming a tool for informal policymaking, allowing the Commission to require individual companies to agree to things that are not required by law. This is particularly true in the high-tech sector and on evolving issues like privacy.

It is unclear what institutional limits exist on the FTC's discretion in setting the terms of its settlements—and thus on its ability to make policy via consent decree. Examples of such policies include requiring "privacy by design" or "security by design" or, in the case of Apple, "industrial design by the FTC's design."

Letter Closing Letter (Jun. 5, 2007), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/dollar-tree-storesinc./070605doltree.pdf.

[25] *See* Amici Curiae Brief of TechFreedom, International Center for Law and Economics & Consumer Protection Scholars at 6-12, FTC v. Wyndham Worldwide Corp., No. 2:13-cv-01887 (D.N.J. Jun. 17, 2013), *available at* http://docs.techfreedom.org/Wyndham_Amici_Brief.pdf [hereinafter "Wyndham Amicus Brief"].

The problem of the excessive use of consent decrees at the FTC is exacerbated by its administrative procedures, which create a fundamental imbalance between the Commission and the businesses it regulates, leading to heightened incentives for parties to settle. As Commissioner Wright highlighted in his *Nielsen* dissent:

> Whether parties to a transaction are willing to enter into a consent agreement will often have little to do with whether the agreed upon remedy actually promotes consumer welfare….
>
> Because there is no judicial approval of Commission settlements, it is especially important that the Commission take care to ensure its consents are in the public interest.[26]

The pseudo-common law of un-adjudicated settlements, lacking any doctrinal analysis developed under the FTC's unfairness authority, simply doesn't provide sufficient grounds to separate the fair from the unfair.[27]

Perhaps most significantly in this regard, the FTC's so-called "common law" decisions identify, at best, only what conduct in specific instances violates the law; they do not identify what conduct does not violate the law. Real common law, by contrast, provides insights into both—offering guidance to firms regarding not only specifically proscribed conduct but also the scope of conduct in which they may operate without fear of liability. Consent decrees tell us, for example, that "invitations to collude" and "deception in standard setting" are violations of Section 5. And thus they are potentially useful guidance for that conduct. But they tell us nothing to very little about the next type of conduct that will be prosecuted under Section 5.

Chairwoman Ramirez has claimed that "Section 5 of the FTC Act has been developed over time, case-by-case, in the manner of common law. These precedents provide the Commission and the business community with important guidance regarding the appropriate scope and use of the FTC's Section 5 authority."[28]

But settlements (and testimony summarizing them) do not in any way constrain the FTC's subsequent enforcement decisions. They cannot alone be the basis by which the FTC provides guidance on its consumer protection authority because, unlike published guidelines, they do not purport to lay out general enforcement principles and are not recognized as doing so by courts and the business community.

Moreover, because, as written, they are largely devoid of analysis, and because there is no third-party assessing the appropriateness of the FTC's process or substance, there is often no way to tell from this alleged "common law" whether the Agency is even acting within the bounds of

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[26] Wright, *Nielsen* Dissent, *supra* note 8, at 6-7.

[27] *See* Wyndham Amicus Brief, *supra* note 25, at 6-7.

[28] Ramirez Questions for the Record, *Hearing before the S. Comm. on the Jud. Subcomm. on Antitrust, Competition Pol'y and Consumer Rights: "Oversight of the Enforcement of the Antitrust Laws"* (Apr. 16, 2013), *available at* http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/041613Q FRs-Ramirez.pdf. *See also Hearing before S. Comm. on the Jud. Subcomm. on Antitrust, Competition Pol'y and Consumer Rights: Standard Essential Patent Disputes and Antitrust Law* (statement of Federal Trade Commission, Jul. 30, 2013), *available at* http://www.judiciary.senate.gov/pdf/7-3013MunckTestimony.pdf.

its authority. The *Apple* decision raises serious concerns in this regard, and it is apparent that the requisite economic analysis was simply absent in the majority's holding in that case.

Without Article III court decisions developing binding legal principles, and with no other meaningful form of guidance from the FTC, the law will remain vague—perhaps even unconstitutionally so.[29]

In the end:

> [w]here the Commission has endorsed by way of consent a willingness to challenge transactions where it might not be able to meet its burden of proving harm to competition, and which therefore at best are competitively innocuous, the Commission's actions may alter private parties' behavior in a manner that does not enhance consumer welfare.[30]

In important ways the real work in Wright's Proposed Statement is done by the further limitation on UMC enforcement in cases where the complained-of practice produces cognizable efficiencies. In his framing it is not a balancing test or a rule of reason. It is a safe harbor for cases where conduct is efficient, regardless of its effect on competition otherwise.[31] In this way it represents an impressive (proposed) codification of error cost analysis, appropriately foreclosing entirely the riskiest and most costly mistakes of over-enforcement without foreclosing the availability of enforcement where it's more likely beneficial.

With Chairman Ramirez' recent speech at the George Mason Law Review Symposium on Antitrust Law, even she has essentially endorsed a "rule of reason" approach to Section 5 that requires a showing of harm to competition and a balancing of harms against benefits: "Our most recent Section 5 cases show that the Commission will condemn conduct only where, as with invitations to collude, the likely competitive harm outweighs the cognizable efficiencies. This is the same standard we apply everyday in our investigations."[32]

While perhaps this admission doesn't go far enough, now four of the FTC's five Commissioners have at least partially endorsed the idea of enumerated standards for Section 5 built on a fundamentally "rule of reason" approach. There is hope.

C. The Constraints of Economic Rigor

One of the important lessons of economics in antitrust is that economic tools are uniquely capable (although still imperfectly so) of distinguishing competitive from anticompetitive conduct—the perennial challenge of (non-cartel) antitrust enforcement and adjudication. Non-economic evidence (so-called "hot docs" for example) can be counter-productive and can obscure rather than illuminate the competitive significance of challenged

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[29] *See* Wyndham Amicus Brief, *supra* note 25, at 6-12.

[30] Wright, *Nielsen* Dissent, *supra* note 8, at 6-7

[31] See *id.* at 10.

[32] Edith Ramirez, Keynote, 17th Annual George Mason Law Review Symposium on Antitrust Law: "The FTC: 100 Years of Antitrust and Competition Policy" (2014), *available at* http://vimeo.com/86788312. *See also See also* Erica Teichert, *FTC Commissioners Spar Over Section 5 Guidance Boundaries*, LAW360 (Feb. 13, 2014), http://www.law360.com/articles/509894/ftccommissioners-spar-over-section-5-guidance-boundaries.

conduct. A rigorous adherence to economic principles and economic reasoning is essential if the FTC is to ensure that its interventions actually benefit consumers.

And, once again, the FTC (at least in competition enforcement) has generally followed these principles. But not always. The Commission's recent *McWane* case, as well as a good deal of its conduct in data security and other cases arising out of its UDAP authority, are essentially unmoored from sensible economic principles.

The basic approach to analyzing competition concerns at the FTC is the "error cost" framework. Such a framework seeks to balance the potential harms of false positives (erroneous intervention) and negatives (erroneous restraint)—Type I and Type II errors—against the potential benefits of correct judgments.[33] The error cost approach has come to dominate antitrust over the past 40 years. There is, however, constant pressure for antitrust law to take a more aggressive stance towards potentially harmful conduct. Where greater aggression is applied to potentially bad conduct, it is in the resolution of the conduct's potentiality that the relaxing of economic constraints on enforcement is felt.

While the FTC's antitrust cases and Guidelines have generally embraced sensible economic reasoning, the Agency has also frequently based its competition enforcement decisions not on economic evidence pointing to harmful outcomes, but on "hot docs" that purport to evince nefarious motives for challenged conduct—but that do not necessarily shed any light on actual competitive effects.

> This approach has a "the light's better over here" feel to it. It is undoubtedly easier to "discover" anticompetitive behavior and relevant markets by inferences from business language than it is to deduce it from rigorous economic analysis. [But] it is not clear that this type of business rhetoric bears much relationship to economic reality....[34]

Section 5 itself actually incorporates sensible economic limiting principles:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair **unless the act or practice causes or is likely to cause substantial injury to consumers** which is **not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition**.[35]

The core requirements (that injury be substantial, that it not be reasonably avoidable by consumers, and that it not be outweighed by countervailing benefits) serve to impose an error cost approach on unfairness questions, limiting both the likelihood and harm of erroneous over-enforcement. "To justify a finding of unfairness, the Commission must demonstrate the allegedly unlawful conduct results in net consumer injury."[36]

As I will discuss, however, the absence of significant institutional constraints from the courts has diluted the effect of these provisions in certain cases.

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[33] *See, e.g.*, Manne & Wright, *Innovation*, *supra* note 2.

[34] Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005).

[35] 15 U.S.C. §45 (2012) (emphasis added).

[36] Wright, *Apple* Dissent, *supra* note 14.

1. The *McWane* Case

As noted, the FTC doesn't always meet its analytical burden in its decisions. In particular, where the Agency eschews economic evidence in favor of other, less probative evidence or indirect measures of harm, it risks damaging outcomes.

The FTC's recent administrative collusion and exclusion case against McWane, a manufacturer of iron pipe fittings, is remarkable for the complete absence—even in the testimony of the Commission's economic expert—of economic evidence pointing to the actual anticompetitive outcomes necessary to make a valid case.

Fortunately, the ALJ threw out a significant portion of the case on the grounds that the Commission's evidence was "weak," "unsupported speculation," and that its "daisy chain of assumptions fail[ed] to support or justify an evidentiary inference of any unlawful agreement involving McWane."[37]

On the other hand, a majority of the Commissioners (with Commissioner Wright again dissenting) missed the full significance of the evidence that was lacking at trial and held in favor of the Complaint Counsel on the exclusion count.

As Commissioner Wright noted in his dissent from this portion of the holding, this lapse had significant effect, essentially rewriting the well-accepted standards required to prove a violation of Section 2 of the Sherman Act:

> By concluding that Complaint Counsel need only demonstrate that [McWane's competitor] was foreclosed from some unspecified amount of distributors as a result of the [McWane's exclusive dealing program], without linking that foreclosure to the preservation of McWane's monopoly power, the Commission in effect holds that harm to a competitor without more is sufficient to establish a violation of Section 2.[38]

If there were evidence of actual harm it would have been readily available to the Commission because the conduct challenged in the case had already occurred. Instead, Complaint Counsel (which was authorized by the Commission to pursue the case) made an affirmative choice to forego adducing this economic evidence and to rely instead on "hot" docs rather than "cold" economics.

In accepting this evidence a majority of the Commission produced an outcome unsupported by the evidence and in violation of one of the first, cardinal rules of antitrust: "Because antitrust exists to protect competition, not competitors, an antitrust complainant cannot base a claim of monopolization on the mere fact that its business was injured by the defendant's conduct."[39]

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[37] In the Matter of McWane, Inc., Docket No. 9351, Initial ALJ Decision, at 286, 300, 306-07 (May 8, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/05/130509mcwanechappelldecision. pdf.

[38] In the Matter of McWane Inc., Docket No. 9351, Dissenting Statement of Commissioner Joshua D. Wright at 37 (Feb. 6, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140206mcwanestatement.pdf.

[39] Thom Lambert, *Commissioner Wright's McWane Dissent Illuminates the Law and Economics of Exclusive Dealing*, TRUTH ON THE MARKET (Feb. 17, 2014), http://truthonthemarket.com/2014/02/17/commissioner-wrights-mcwane-dissent-illuminates-thelaw-and-economics-of-exclusive-dealing/.

2. HSR Premerger Notification Amendments

Economic analysis at the FTC should not be confined only to competition policy nor only to substantive decision-making. Instead, it can and should govern the full range of the Commission's decisions. Consumers may be harmed just as much by faulty process as by bad substantive decision-making.

Last year, over Commissioner Wright's dissent, the FTC approved amendments to its HSR Premerger Notification rules to establish procedures for the automatic withdrawal of an application upon announcement of the termination of a transaction.[40] As seemingly innocuous as the amendment is, it is not without likely costs.[41] Here, as in substantive decision-making, cost-benefit analysis can restrain undesirable conduct.

It must be counted a straightforward abdication of sensible principles of economic analysis and good governance that these amendments were adopted without any evidence to support them.

III. SUGGESTIONS FOR REFORM

Instead of asserting what companies should do, the FTC should offer more guidance on what it thinks its legal authority means.[42]

And the Commission can't just ignore or revoke those limiting principles when they become inconvenient.

Meanwhile, a more significant and better-defined role for economics, and thus the FTC's Bureau of Economics, could provide some degree of internal constraint. That's a second-best to the external constraint the courts are supposed to provide. But it could at least raise the cost of undertaking enforcement actions simply because three Commissioners—or a few staff lawyers—think they're helping consumers by crucifying a particular company.

One easy place to start would be by holding a comprehensive workshop on data security and then issuing guidelines. The FTC has settled more than 50 data security cases but has provided scant guidance, even though data breaches and the identity thefts they cause are far and away the top subject of consumer complaints. The goal wouldn't be to prescribe what, specifically, companies should do but how they should understand their evolving legal duty. For example, at what point does an industry practice become sufficiently widespread to constitute "reasonable" data security?

More ambitiously, the FTC could use its unique power to enforce voluntary commitments to kick start new paradigms of regulation. That could include codes of conduct developed by industry or multi-stakeholder groups as well as novel, data-driven alternative

[40] Premerger Notification; Reporting and Waiting Period Requirements, 78 Fed. Reg. 41293 (Jul. 10, 2013), *available at* http://ftc.gov/os/fedreg/2013/06/130628hsrfinalrulefrn.pdf.

[41] Wright Concurrence in Notice of Public Comment for Proposed HSR Rules, http://www.ftc.gov/os/2013/02/130201hsrnprm-jwrightstmt.pdf.

[42] For more suggestions for FTC Reform, see FTC: TECHNOLOGY & REFORM PROJECT, CONSUMER PROTECTION & COMPETITION REGULATION IN A HIGH-TECH WORLD: DISCUSSING THE FUTURE OF THE FEDERAL TRADE COMMISSION (Dec. 2013), *available at* http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf.

models of self-regulation. For example, Uber, Lyft, and other app-based personal transportation services could create a self-regulatory program based on actual, real-time data about safety and customer satisfaction. The FTC could enforce such a model—if Congress finally makes common carriers subject to the FTC Act. The same could work for online education, Airbnb, and countless other disruptive alternatives to traditional industries and the regulators they've captured.

Finally, the FTC could do more of what it does best: competition advocacy—like trying to remove anticompetitive local government obstacles to broadband deployment. The FTC has earned praise for defending Uber from regulatory barriers taxicab commissions urge to protect incumbents. That's the kind of thing a Federal Technology Commission ought to do: stand up for new technology, instead of trying to make it "turn out according to plan."

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The FTC as Guardian of Privacy and Data Security

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The FTC as Guardian of Privacy and Data Security

Paul Ohm[1]

I. INTRODUCTION

In this article, I focus my remarks on the FTC's work on data security and consumer privacy, and especially the privacy of information collected from consumers via the internet. I will not focus on the FTC's important work in other aspects of consumer protection and competition.

Although vital work on privacy protection takes place throughout federal, state, and local governments, were it not for the activities of the FTC, no agency would play the critical roles of leader, central clearinghouse, and backstop. The FTC is the only agency with the authority and expertise to oversee the many industries that are not regulated specifically by statute. It has been recognized as a peer by the community of data protection authorities from other countries for its central role in American privacy policy. The FTC has become the centerpiece of privacy policy in this country, and I encourage Congress to continue to grant it the tools and authorities it needs to continue to do its job well.

At the outset, consider a simple, important fact: The United States boasts the most innovative, dynamic technology industry in the world. The burbling fount of activity and competition and vibrancy in this industry belies any argument that the FTC has sapped the innovative spirit. Indeed, the FTC has demonstrated that consumer protection and technological dynamism can prosperously coexist.

II. THE FTC'S EXERCISE OF ITS ENFORCEMENT DISCRETION

Many employees of the FTC see the agency first and foremost as a civil law enforcement agency. Of course the agency also promulgates regulations and guidance and engages in research and consumer education, but these roles are second in priority for many at the FTC. The beating heart of the FTC reverberates in its investigations, judicial filings, adjudications, settlements, and consent decrees.

In its privacy enforcement activity, the FTC has exercised wise and measured discretion. I will elaborate this point to urge the Subcommittee to focus not on a hypothetical FTC or imaginary FTC, one which wields its power like a sword and presses the envelope of statutory text. It should focus on the actual FTC, one which chooses cases with care.

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The simplest reason why the FTC exercises great discretion in selecting cases is structural: The FTC is a very small agency. It employs only 1,100 civil servants, many of whom are engaged in something other than its consumer protection mission. With such a small workforce, the agency can investigate only a tiny fraction of the many complaints it receives each year.[2]

Political accountability exerts another structural check on the agency's enforcement decisions. The statutorily mandated bipartisan composition of the Commission ensures that more than one political party will influence and cast votes on enforcement actions.[3] In addition, FTC Commissioners and staff meet regularly with members of Congress and Congressional staff and know that they will be held to account for overly aggressive action.

The FTC's wise use of its enforcement discretion is apparent in the cases it brings. Most of the cases the FTC brings each year are clear-cut. It almost always brings cases in which the proof of deceptive or unfair conduct is undeniable, cases in which the defendant's conduct falls well below standards of reasonableness.[4] This is not to say that these cases are easy; on the contrary, many are quite complex. But the FTC tends to focus on cases with a significant impact on consumer protection, avoiding marginal cases that push the envelope unnecessarily.

Another measure of the strength of these cases is the rate at which they are settled. In the history of the FTC's work on online privacy, the number of cases that have not led to swift settlement can be counted on one hand.[5] And many of the cases that have settled have been brought against companies that have litigated privacy lawsuits brought by other plaintiffs tenaciously and relentlessly.[6]

Consider the data security case brought against Wyndham, which is one of the rare cases that did not settle but instead is actively being litigated in federal court.[7] *Wyndham* has attracted the support of some academics and trade associations who have filed friend of the court briefs advancing aggressive and novel (and to my mind, far too creative) challenges to FTC jurisdiction.[8] Almost none of *Wyndham*'s champions have tried to defend the reasonableness of

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[2] For example, the FTC received more than two million complaints to its Consumer Sentinel database in 2012 alone. FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK: FOR JANUARY – DECEMBER 2012 at 3.

[3] 15 U.S.C. § 41.

[4] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. (forthcoming 2014) (manuscript at 19), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312913 ("[T]he Commission also tends to target cases with a high likelihood of success and where companies have no viable defense.").

[5] *Id.* at 18 (finding only two out of more than 150 privacy-related cases that did not lead to settlement).

[6] *Compare* Press Release, Fed. Trade Comm'n, 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), *available at* http://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented *with* Venkat Balasubramami, *Google Wins Cookie Privacy Lawsuit*, TECH. & MARKETING LAW BLOG (Oct. 31, 2013) http://blog.ericgoldman.org/archives/2013/10/google-wins-cookie-privacy-lawsuit.htm.

[7] FTC v. Wyndham Worldwide Corp., No. 2:13-cv-01887 (D.N.J. filed June 26, 2012).

[8] Brief for International Franchise Association as Amicus Curiae Supporting Defendants, Wyndham Worldwide Corp., No. 2:13-cv-01887 (D.N.J. filed May 3, 2013); Brief for Chamber of Commerce of the United States et al. as Amici Curiae Supporting Defendants, Wyndham Worldwide Corp., No. 2:13-cv-01887 (D.N.J. filed May 3, 2013); Brief for TechFreedom et al. as Amici Curiae Supporting Defendants Wyndham Worldwide Corp., No. 2:13-cv-01887 (D.N.J. filed May 3, 2013).

Wyndham's security practices, which appears to have been far below industry standards.[9] I speak not only from my experience as a legal scholar, former FTC official, and former U.S. Department of Justice computer crimes prosecutor but also from my experience as an IT professional who helped defend several large computer networks. Once you move past the jurisdictional sideshow, the *Wyndham* case supports the point I am making: the FTC sued Wyndham because the case was clear-cut and because the harm to consumers was so plain.

III. THE FTC AND EVOLVING STANDARDS

If the only measure of effective agency action were the promulgation of crystal clear, detailed, and highly prescriptive rules, we might worry about the FTC's emphasis on enforcement over rulemaking. This worry seems unfounded, however, because the FTC undertakes its enforcement activities in a way that leads gradually to evolving standards of appropriate conduct—standards most affected companies seem to have little trouble understanding. Two recent law review articles illuminate this point.

First, Daniel Solove & Woodrow Hartzog argue that the FTC's enforcement activities operate as a sort of common law of FTC Section 5 privacy law.[10] With every settlement, the FTC approves and publishes a complaint, a consent order, and a press release, which lay out in some detail the theory of the FTC case. The consent order is the product of active negotiation between the FTC and the defendant, which helps ensure that at least one company's point of view is reflected.

What makes this common law analogy work, according to the authors, is the work of a large and growing cadre of privacy professionals in companies and law firms who give these FTC documents the level of scrutiny that litigators give to appellate decisions in other areas of the law.[11] These professionals seem quite capable of determining the FTC's evolving standards without difficulty, and they give their clients the clear advice needed to avoid FTC scrutiny and enforcement.[12]

Second, Deirdre Mulligan & Kenneth Bamberger have elaborated a theory of "Privacy on the Ground," meaning privacy policy as it emerges from the practices of these same privacy professionals.[13] According to them, we make a mistake if we look only to "privacy on the books," as codified in statute and regulation, because the practices of professionals help build a richer body of privacy protection.[14] They have documented through careful qualitative empirical research how Chief Privacy Officers and other privacy professionals look in particular to pronouncements from the FTC to help them develop and understand privacy on the ground.[15]

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[9] Amended Complaint, FTC v. Wyndham Worldwide Corp., No. 2:13-cv-01887, at 10-12 (D. Ariz. Filed Aug 17, 2012) (alleging "Defendant's Inadequate Data Security Practices").

[10] Solove & Hartzog, *supra* note 4, 15-28.

[11] *Id.* at 24-27.

[12] *Id.*

[13] Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247 (2011).

[14] *Id.* at 251.

[15] *Id.* at 273-75.

We should prefer the FTC's development of evolving standards of privacy law to prescriptive rulemaking. Privacy is complex and contextual. What people expect and worry about can tend to shift with every technological advance. It is very unlikely that this contextual complexity can ever be fixed in a rigid set of promulgated rules. Instead, what is needed is a flexible standard, administered by an expert and independent agency (perhaps one constrained by limited resources and political accountability) which is dedicated to making public the reasoning underlying its enforcement actions. In other words, what is needed is precisely what Congress and the FTC have developed.

IV. THE ROLE OF "SOFT LAW" AT THE FTC

The FTC influences debates over privacy policy through activities that are far less formal than enforcement actions or regulation. Solove & Hartzog refer to these as the "soft law" of the FTC, which take "the form of guidelines, press releases, workshops, and white papers."[16] These activities leverage the expertise, competence, and convening power of the FTC to produce high quality reflections on the state of privacy today.

The high watermark of this activity is perhaps the 2012 report on *Protecting Consumer Privacy in an Era of Rapid Change*.[17] The FTC staff worked on this report for more than a year, holding several well-received workshops featuring many different interested stakeholders, issuing a draft report and receiving public comment, and incorporating that feedback and working with Commissioners to issue the official report.[18]

The report explains that it is "intended to articulate best practices" but not necessarily announce how the agency interprets its authorities or intends to use its discretion.[19] And indeed, the Report does give examples of privacy best practices that go beyond what might be considered deceptive or unfair under Section 5.[20] But some critics seem to forget or distrust this statement of purpose and instead assume that the framework announced in the report reveals the new enforcement agenda of the agency.[21] These critics argue that some of the privacy best practices discussed are in fact outside the agency's authority or at least represent rules the agency would be

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[16] Solove & Hartzog, *supra* note 4, 27.

[17] FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

[18] *Id.* at 2-3.

[19] *Id.* at iii ("These best practices can be useful to companies as they develop and maintain processes and systems to operationalize privacy and data security practices within their businesses. The final privacy framework contained in this Report is also intended to assist Congress as it considers privacy legislation. To the extent the framework goes beyond existing legal requirements, the framework is not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC.").

[20] For example, the report concludes that "affirmative express consent is appropriate when a company uses sensitive data for any marketing," which seems to state advice about best practices rather than a blanket requirement for triggering Section 5 liability. *Id.* at 47.

[21] *E.g.* Thomas M. Lenard & Paul H. Rubin, *The FTC and Privacy: We Don't Need No Stinking Data*, THE ANTITRUST SOURCE (OCT. 2012).

unwise to enforce.[22] Once again, these critics seem to be focusing on a hypothetical FTC rather than the real FTC.

We should celebrate—not castigate—the FTC for taking on this difficult project. The privacy report engages seriously with competing arguments and reflects soberly and wisely on these conflicts. Modern debates about privacy and technology count among some of the thorniest, most complex debates in which we as a society are engaged, and there is always room for rigorous thought leadership of the kind the FTC has provided. The final product has already had great influence on privacy debates, here and abroad, and it promises to enjoy a long, useful shelf life. We should encourage the FTC to conduct more work along these lines.

V. EMPOWERING AN FTC FOR THE NEXT 100 YEARS

Overall, this statement paints an optimistic picture of privacy enforcement at the FTC. I urge Congress not to upset the status quo in any significant way. Still, I offer four smaller proposals for reforms and clarifications Congress could enact that would help the FTC with its privacy mission: clarifying the FTC's Section 5 authority to police data security; amending the definition of "unfair" in Section 5 to keep pace with changing privacy harms; bolstering the FTC's authority to lodge civil penalties; and granting the FTC additional resources, particularly with respect to hiring in-house technologists.

A. Clarifying Data Security Authority

I have already given my thoughts about the FTC's ongoing lawsuit against Wyndham. *Wyndham* presents an easy case for liability for patently unreasonable data security practices. The jurisdictional arguments, while creative, should not carry the day in federal court. Yet the force with which the case has been defended, and the cacophony of supporters who have filed briefs on behalf of Wyndham have cast a small cloud over the FTC's ability to police data security.

Congress might consider making explicit what is already clearly within the broad strictures of Section 5: the FTC has the authority to find violations for unreasonable security practices, meaning practices that unreasonably fail to live up to industry standards. This recommendation would take on greater urgency were any federal court to rule in favor of Wyndham's creative arguments.

I know every member of Congress is well aware that this would be an awful time to weaken the few tools we have to encourage good data security. Every American citizen, it seems, has personally or at least knows someone who has been affected by the attacks that hit American retailers around the holidays. Threats on the internet to sensitive data seem to be increasing in frequency and sophistication.

Although most American companies seem genuinely interested in trying to secure the personal and sensitive information of their customers, too many fall short. Perhaps they are overwhelmed by the significant technical challenges, or maybe they have calculated that their focus and resources are better spent elsewhere. They make these disastrous calculations despite

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[22] *Id.* at 3 ("It is inappropriate for the FTC to call for a massive new regulatory scheme when the only available systematic surveys of the industry are both out of date and suggest significant improvement over time.").

the fact that the FTC has been a cop on the beat. How much worse might things become if the only government agency with a comprehensive, multi-industry responsibility for policing data security is forced to scale back its efforts?

B. Amending the Definition of "Unfair" Acts or Practices

In 1980, the FTC issued a policy statement detailing how it interpreted the word "unfair" in Section 5.[23] At the heart of the policy statement was a harms-versus-benefits balancing test, which Congress largely incorporated into the statute by amendment in 1994.[24]

In my opinion, this definition is unduly narrow and constrained, and Congress should consider amending it to keep up better with the seismic changes that have been wrought by the modern internet, and even more so the changes yet to come. For example, in the 1980 statement, the FTC explained that:

> The Commission is not concerned with trivial or merely speculative harms. In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction. Unwarranted health and safety risks may also support a finding of unfairness. Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers, as has been suggested in some of the comments.[25]

While the Commission should be praised for having the foresight to draft a policy statement that still serves a purpose more than two decades on, several aspects of this passage seem no longer to describe new forms of privacy harm that the internet has wrought. Although it still may be true that privacy injuries "involve[] monetary harm" in "most" cases,[26] it is also true that non-monetary harm abounds online, and the FTC should be empowered to bring cases to redress those harms. As only one example, every person who has spent hours dealing with a stolen credit card number understands the concretely harmful impact of data breach, even if this injury might be difficult to measure in dollars.

Another part of the passage that has not aged well is the way it associates "emotional impact" only with mere offense to "tastes or social beliefs."[27] Many privacy law scholars have documented how privacy harms often affect emotions first and foremost. The FTC itself seems to understand this, because it charged an unfairness count in *Designerware*, a case involving the use by furniture rental stores of hidden software installed on rental laptops that surreptitiously

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[23] Fed. Trade Comm'n, FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness.

[24] 15 U.S.C. § 45(n) (defining unfair acts or practices as those that "cause[] or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition").

[25] FTC Policy Statement on Unfairness, *supra* note 23.

[26] *Id.*

[27] *Id.*

videotaped consumers in their homes.[28] The FTC found consumer harm from the fact that some of the companies used the software to record "images of visitors, children, family interactions, partially undressed individuals, and couples engaged in intimate activities."[29] This was unfair, in part, because "[s]haring these images with third parties can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes."[30] This may have been largely nonmonetary harm, and it seems to have involved primarily harm to emotions, yet the FTC was nevertheless correct to plead this as an unfairness case.

None of this is to argue that Congress or the FTC should redefine unfairness to extend to vague, "trivial or merely speculative harms."[31] On the contrary, as I have suggested in some of my writing, modern privacy harms are often concrete and deeply felt, even if nonmonetary and difficult to quantify. This is especially so if unfairness encompasses, as the Policy Statement says it does, not merely completed harm but also the "significant risk of concrete harm."[32]

The victims of data misuse suffer fear and apprehension. Data gleaned from large databases have been used by stalkers.[33] Modern databases, filled by the ever-proliferating array of sensors that dot our landscape, track our every movement[34] and communication, including the kind of evanescent water-cooler chatter that was once saved nowhere. Newer sensors are detecting our paces, heartbeats and even brain waves.[35] Miniature cameras contain enough storage to snap a photo every moment.[36] And Big Data techniques give companies the power to make inferences from this rich database about our predilections, habits, and desires.[37]

Four years ago, I described this confluence of technologies and business models as creating a "database of ruin," one which holds a secret about every person in America that he or she would not want his or her worst enemy to know.[38] This description seems truer today than then. The database of ruin, when misused, can lead to significant harm, the kind of harm that should support a finding of unfair conduct.

I could direct this appeal at the FTC, which retains the power to revisit the 1980 unfairness statement. But it is also properly directed at Congress, which could amend Section 5

[28] Designerware, LLC, 2013 WL 1684153 (F.T.C. 2013) (complaint, decision and order).

[29] *Id.*

[30] *Id.*

[31] FTC Policy Statement on Unfairness, *supra* note 23.

[32] *Id.* n. 12.

[33] *E.g.* Remsburg v. Docusearch, 149 N.H. 148 (2003).

[34] Noam Cohen, *It's Tracking Your Every Move and You May Not Even Know*, N.Y. TIMES, March 26, 2011 at A1.

[35] Quentin Hardy, *Big Data in Your Blood*, N.Y. TIMES BITS BLOG, Sept. 7, 2012, http://bits.blogs.nytimes.com/2012/09/07/big-data-in-your-blood/.

[36] Duncan Geere, *Logging Life with a Lapel Camera*, MIT TECH. REV., May 10, 2013, http://www.technologyreview.com/news/514361/logging-life-with-a-lapel-camera/.

[37] VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK (2013).

[38] Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1748 (2010).

to make it more responsive to redressing privacy harm in the internet age.[39] I urge Congress to amend the definition of "unfair" to allow it to apply to any harm, monetary or not, including harm with emotional impact, provided the harm is significant and concrete.

C. Enhancing the FTC's Power to Seek Civil Penalties

For the most part, the FTC has made the most of the remedial powers granted to it. Under its power to seek preliminary and permanent injunctions, it has crafted broad and aggressive consent decrees. Under the same authority, it has sought equitable monetary relief to try to recover funds to make victims whole or disgorge ill-gotten gains.

But all too often, and particularly in data security cases, we see companies adopt lax, substandard practices that fall well below reasonable industry standards. It may be that these outliers do not feel deterred by the threat of FTC action. To try to alter that behavior of companies like these, Congress should increase the deterrent effect, by giving the FTC an enhanced authority to seek meaningful civil penalties from courts.

D. Grant Additional Resources to the FTC

It is impressive that the FTC has accomplished as much as it has, despite the relatively small size of its staff and its relatively low operating budget. The agency has done much with little, so imagine what it might do with a little more.

I would emphasize in particular the need to give the FTC more resources devoted to keeping up with rapidly changing technology. The FTC already employs several very talented technologists in its staff, and some of its lawyers are recovering technologists too. But given the decidedly technological turn that the FTC docket has taken in recent years, it needs many more. And these technologists need access to cutting edge technologies for training, investigation, and forensic analysis—technologies that at the agency are currently in short supply.

[39] If Congress is reluctant to amend Section 5, it could exhort the FTC to consider redrafting the 1980 policy statement, which after all was written in response to a letter from the Consumer Subcommittee of the House Committee on Commerce, Science, and Transportation. FTC Policy Statement on Unfairness, *supra* note 23.

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The FTC at 100: The Impact of Globalization and Technology

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The FTC at 100: The Impact of Globalization and Technology

Christopher S. Yoo[1]

I. INTRODUCTION

The issues in antitrust law have long had a timeless quality. Although the legal doctrine and the economic theory underlying them have changed over time, the fundamental issues of cartels, vertical exclusion, market definition, oligopoly pricing, and monopolization that were the focus of antitrust policy when the Federal Trade Commissions was first created continued to be the central focus of the agency's activities during most of its history.

Over the past few decades, however, certain issues have arisen that have begun to raise concerns that are quite different from those that dominated the FTC's first century. Two of the most significant changes are globalization and the growing importance of technology.

II. GLOBALIZATION

When Congress created the FTC in 1914, the vast majority of the economy consisted of local markets. Goods typically traveled only a short distance and rarely crossed state lines. Even as the scope of the economy grew, antitrust remained largely domestic. Indeed, as of the end of the twentieth century, European competition policy authorities had never blocked a merger between two U.S.-based companies.

All of that came to an end in July 2001 when the European Commission blocked the proposed merger between GE and Honeywell. That action was simply a reflection of the fact that commerce had become increasingly international in scope. U.S. companies routinely operate in a wide range of countries. Business practices that once affected only domestic economies now have ramifications that are felt around the globe.

The increasing globalization of the economy places new demands on agencies charged with enforcing the antitrust laws. Not only must they investigate conduct that spans multiple nations; the fact that multiple regulatory authorities have jurisdiction over the same matter can force companies to incur duplicative compliance costs. To the extent that substantive standards differ, companies faced with inconsistent mandates may be forced to reduce their practices to the least common denominator or forsake doing business in a country altogether. As a result, regulatory harmonization has also emerged as a key element of trade policy.

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Towards these ends, the FTC has developed increasingly close relationships with other competition authorities both through bilateral cooperation and through a global organization of competition policy authorities known as the International Competition Network. Such efforts help coordinate and standardize the work of competition authorities and will continue to grow in importance in future years. The trans-Atlantic engagement has encouraged European competition policy to become increasingly focused on consumer welfare, although significant doctrinal differences remain. Countries that have failed to make this shift have seen their influence over European competition policy wane.

III. TECHNOLOGY

The other big change is the increasingly central role that technology plays in the modern economy. Innovation has emerged as a key driver of economic growth. Products and services have become increasingly sophisticated both in their own right and in the extent to which they have become part of a larger and more tightly integrated economic system. Technological change can also be very disruptive, altering old patterns of doing business and creating new business models and market-leading companies in the process. Companies who find themselves disadvantaged by technological change may be tempted to look to the government for relief.

The growing importance of technology will require the FTC to expand its institutional capabilities. One key step in that direction has been the creation of the office of Chief Technologist. This position is only four years old, and the agency is still exploring how it can best contribute to the FTC's mission. In addition, the FTC's usual practice is to require that every major decision be accompanied by an analysis by the Bureau of Economics. The agency has not always adhered to this practice in recent years and would be well advised to make sure to follow this important procedural guideline in the future in every major case.

The FTC will also have to determine what substantive legal principles it will apply to high-tech industries. The problem is that our current understanding of innovation remains nascent and largely unsettled. This creates the risk that enforcement authorities will apply antitrust law without a clear theory or with a multitude of theories in mind. And the past has taught us that unless the antitrust laws are applied with a clear understanding of how innovation affects consumer welfare, antitrust law may be abused to protect specific competitors instead of consumers.

Under these circumstances, the FTC must adhere to the principles that have emerged to guide its conduct since its founding in 1914. These principles require that all decisions must be based on a solid empirical foundation, not speculation, and must protect consumers, not competitors. In particular, the agency should make sure that it does not embroil itself in routine disagreements over price that are everyday occurrences in any market-based economy. Indeed, both the Supreme Court and enforcement authorities have long recognized that antitrust courts are institutionally ill-suited to overseeing prices to make sure they remain reasonable.

Consider, for example, the FTC's growing interest in standard-essential patents. The FTC has waded into the fray by using the merger review process to mandate that the merging parties make their standard-essential patents available on a fair, reasonable, and nondiscriminatory basis

and to forego seeking injunctions as potential remedies.[2] The debate presumes that patents are being asserted in ways that harm consumers by increasing prices without a clear understanding of how government intervention could also harm consumers by discouraging innovation. Moreover, the typical remedy mandates uniform rates despite the fact that economic theory shows that innovation is best promoted when innovators are allowed flexibility in the business models they pursue. Instead of directly overseeing the outcomes of negotiations, the FTC already has ample authority to preserve the integrity of standard-setting processes that are abused in ways that harm consumers.

Finally, some are calling for the FTC to exercise the authority granted by Section 5 of the FTC Act to police unfair methods of competition in ways that go beyond consumer welfare. The past has taught us that attempting to use the antitrust laws to promote goals other than consumer welfare opens the door to a wide range of intrusive government intervention that often harms consumers. Indeed, the FTC's Administrative Law Judge hearing the case against LabMD concurred, ruling that the FTC must reveal the data security standards it intends to use to show that LabMD's data security was so inadequate as to constitute an unfair trade practice.[3]

IV. CONCLUSION

The challenges posed by both globalization and new technologies underscore the importance of adhering to consumer welfare as the guide to antitrust policy. Any other approach opens the door to governmental overreach and allowing the law to be abused so as to benefit individual competitors instead of consumers.

[2] *Motorola Mobility LLC*, 156 F.T.C. No. C-4410 (July 23, 2013); *Robert Bosch GmbH*, 155 F.T.C. 713, 739-40 (2013).

[3] *LabMD, Inc.*, No. 9357 (F.T.C. Off. Admin. Law Judge May 1, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140501labmdordercompel.pdf.