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ARTICLE

Adaptable Platforms for Platform Regulation: The Role of the Federal Trade Commission

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Discussions about government oversight of large information services platforms have raised questions about the appropriate institutional framework for policy implementation. Effective regulation requires a regulatory platform that is well-informed about the commercial phenomena over which it has supervisory duties, agile and adaptable to respond to an

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often complex and dynamic industry environment, and able to draw upon multiple policy disciplines to formulate good solutions to observed problems. In concept, a regulatory body well suited to perform this role is the Federal Trade Commission. The Commission enjoys the advantages of having a flexible, scalable mandate, a multi-function configuration that combines competition, consumer protection, privacy, and research tools that enable it to gain the knowledge necessary to meet the analytical challenges posed by Big Tech firms. Since its creation in 1914, the Commission often has struggled to realize the full potential inherent in its institutional design. After identifying the ideal characteristics of an information platform regulator, the Article benchmarks the Commission against these traits and examines obstacles that would impede the agency's ability to bring its nominal strengths to bear in this sector if its regulatory role were to be enhanced. The Article offers suggestions about how the agency can realize in practice the potential inherent in its institutional design.

INTRODUCTION

Modern debates over U.S. competition policy have focused heavily on whether U.S. antitrust enforcement, especially since 2000, failed to address problems associated with the rise of powerful firms in the information services and technology sectors. With varying degrees of intensity, numerous academics, advocacy groups, elected officials, and journalists have

concluded that U.S. antitrust oversight in this era was too weak.[1] A common theme is that permissive antitrust jurisprudence and inadequate enforcement by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) allowed firms such as Amazon, Apple, Meta (Facebook), and Google to amass vast market power and use improper tactics to crush or chasten firms that might unseat them.[2]

Critical scrutiny of the substance of policy inevitably raises a number of questions about the quality of the public institutions (notably, the DOJ and the FTC) entrusted with enforcing the U.S. antitrust laws. Were the institutions, and their leaders, up to the task of correctly diagnosing competitively harmful behavior, devising sound remedies, and implementing suggested cures? Does recent experience provide guidance about the mechanism needed to provide effective oversight of information services firms and the tech sector generally? What is the ideal regulatory platform for platform regulation?

This Article addresses these questions by considering the design of regulatory frameworks to address competition policy issues involving information services platforms. The Article treats the topic in four parts. It begins in Part I by describing the desirable characteristics of a regulatory mechanism for big tech platforms. Part II then sets out the original plan for the FTC as Congress envisioned it in 1914 and discusses the strengths and

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[1] *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 14–17 (2019) (summarizing weaknesses in antitrust enforcement that have contributed to increases in market power in the United States); *see also* THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 151, 288–89 (2019) (stating that "[m]ost US domestic markets have become less competitive, and US firms charge excessive prices to US consumers" and attributing this result to abandonment of pro-competition policies, including strong antitrust enforcement); *see also* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14–22 (2018) (describing modern centralization of economic power in the United States and identifying inadequate antitrust enforcement as a cause).

[2] *See, e.g.*, MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND POPULISM ch. 18 (2020) (recounting how weak antitrust enforcement has enabled today's technology giants to acquire and maintain monopoly power); JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION 160–61 (2019) (arguing that "since Reagan, no president has enforced the spirit or the letter of the Sherman and Clayton Acts" and that "[t]he recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.").

weaknesses of the original institutional design. Part III of the Article examines the FTC's suitability to serve as the lead U.S. agency for information services platform regulation in the future. This Part also discusses the FTC's existing ability to serve this function and its possible role as host for a new *ex ante* regulatory mechanism, should Congress choose to enact one, and presents options for employing the FTC, as now configured or as enhanced, in a new program of oversight for large platforms. Part VI concludes by emphasizing the importance of institutional design in decisions about the future of regulatory policy for information services and high technology firms.

A major premise of the Article is that, regardless of the regulatory platform ultimately chosen, continuing assessment and refinement of regulatory institutions is necessary to respond to developments in the high-tech sector and in other complex, dynamic fields of commerce. Dynamism and innovation in commerce require dynamism and innovation in regulatory design if public institutions are to play an effective oversight role.

I. THE PLATFORM REGULATORY MECHANISM: DESIDERATA

The determination of an optimal institutional framework for big tech platform regulation requires the resolution of two major questions. The first question involves the choice of policy tools to protect competition. Modern discussions about platform regulation have drawn attention to the relative merits of enforcement of traditional statutory controls on mergers and dominant firm conduct,[3] the use of market studies,[4] the application of broad scalable mandates (such as the prohibition in section 5 of the Federal Trade

[3] Over the past five years, the U.S. antitrust agencies have used traditional litigation to challenge mergers and exclusionary conduct involving large technology firms such as Amazon, Google, Meta, and Microsoft. *See* William E. Kovacic, *Antitrust, Transformation, and Enduring Policy Change*, 49 J. CORP. L. 321, 340–41 (2024) (describing recent DOJ and FTC enforcement initiatives).

[4] *See* Competition & Mkts. Auth., *Online Platforms and Digital Advertising: Market Study Final Report* (July 1, 2020) https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [https://perma.cc/33SN-76EX] (detailing a noteworthy example of a recent market study involving big tech and information services platforms).

Commission Act against "unfair methods of competition"[5] and the remedial powers contained in the United Kingdom's markets investigation regime[6]), the adoption of prescriptive trade regulation rules,[7] and the establishment of new "ex ante" regulatory mechanisms, such as the European Union's Digital Markets Act.[8] The second question involves institutional design. What institutional arrangements will provide the best mechanisms for implementing policies to achieve more robust oversight of large information services platforms?[9]

There is considerable experimentation globally as numerous jurisdictions seek answers to these questions. No clearly superior regulatory framework or application of policymaking tools has emerged. Nonetheless, four general considerations seem appropriate as criteria for guiding the choice and

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[5] 15 U.S.C. § 45(a); *see also* Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, No. P221202 (FTC Nov. 10, 2022) (setting out principles for the application of Section 5).

[6] *See* Competition & Mkts. Auth., *Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach* (July 2017) https://assets.publishing.service.gov.uk/media/65cdfc4f130549000c867a9f/A._cma3-markets-supplemental-guidance-updated-june-2017.pdf [https://perma.cc/XT67-HQXV] (describing UK market investigation system purposes and process); *see also* MARKET INVESTIGATIONS: A NEW COMPETITION TOOL FOR EUROPE? (Massimo Motta, Martin Peitz & Heike Schweitzer eds., 2021) (discussing possible adoption by European Union of a UK-style market investigations regime).

[7] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020) (arguing that exclusive reliance on case-by-case litigation has failed to deliver a predictable, efficient, or participatory antitrust regime and that rulemaking under section 5 of the FTC Act should supplement antitrust adjudication).

[8] *See* Eur. Comm'n, *The DMA: Ensuring Fair and Open Digital Markets*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en [https://perma.cc/766D-66CS] (last visited Apr. 9, 2024) (describing the DMA); *see also* PABLO IBÁÑEZ COLOMO, THE NEW EU COMPETITION LAW (2023) (discussing the DMA and its place in the framework of European Union competition policy).

[9] *See* Jacques Crémer, David Dinielli, Paul Heidhues, Gene Kimmelman, Giorgio Monti, Rupprecht Podszun, Monika Schnitzer, Fiona Scott Morton & Alexandre de Streel, *Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust*, 11 J. ANTITRUST ENFORCEMENT 315 (2023) (discussing institutional arrangements for the implementation of the European Union's Digital Markets Act); William E. Kovacic, *Symposium Editor's Essay: Building a Better U.S. Competition Policy Corridor*, 85 ANTITRUST L.J. 217, 218–20 (2023) [hereinafter Kovacic, *Competition Policy Corridor*] (discussing competition policy institutional design issues in the United States).

refinement of regulatory solutions.

First, platform regulatory bodies should be experts in the substantive disciplines whose application is necessary to understand the evolution and operation of the commercial markets, to diagnose problems accurately, and to select effective remedies. The regulatory mechanism's required base of knowledge must be multidisciplinary—drawing upon expertise not only in economics and law but also upon fields such as anthropology, computer science, engineering, history, political science, public administration, and sociology.

Second, the regulatory mechanism must account for the wide variety of legal commands that may be relevant to the solution of observed problems. Problem-solving for information platforms can require a regulator to consider, among other legal domains, the fields of competition, consumer protection, intellectual property, and privacy.[10] The application of these disciplines can be achieved either by giving a single agency a mandate to act in all of these domains or by enabling a single-function agency (e.g., a competition agency) to collaborate with regulators in other domains. To borrow the language developed in discussions of the theory of the firm, the public policy integration can take by "ownership" (i.e., the formation of a multi-function body) or by "contract" (permitting single-function institutions to cooperate in solving problems).[11]

Third, the regulator must upgrade its base of knowledge regularly. Essential "policy research and development"[12] tools include the power to

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[10] *See* Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647 (2021), http://www.yalelawjournal.org/forum/the-new-antitrustdata-privacy-law-interface [https://perma.cc/AL3J-EK4N] (describing connections between antitrust law and data protection law).

[11] *See* Kovacic, *Competition Policy Corridor*, *supra* note 9, at 225–26 (describing networked policymaking employed in United Kingdom to link different government units in common efforts to address digital markets issues); *see also* David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1497 (2014) (discussing whether policy integration will need to take place by "contract" or "ownership").

[12] *See, e.g.*, William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295, 318–20 (2016) [hereinafter Kovacic & Hyman, *Consume or Invest*] (discussing the importance of investments in knowledge that inform policy development); *see also* William E. Kovacic, *Antitrust in High*

conduct market studies, to carry out assessments of past policy initiatives, and to convene events that assemble experts to address new developments in the sector. Without an active policy R&D program, an agency will lack the capability to perform its oversight functions effectively.

Fourth, the regulators must be agile and flexible in their capacity to respond effectively to apparent problems and to intervene in a timely manner.[13] Agility and flexibility can be attained by giving the regulator a scalable substantive mandate that allows it to respond to new phenomena as they emerge. The regulator should have the ability to draw upon a wide array of policy instruments to carry out this mandate. These include the power to perform policy research and development tasks (mentioned above), bring cases, promulgate trade regulation rules, and issue guidelines.

II. THE ORIGINAL DESIGN AND EVOLUTION OF THE FTC

Congress created the FTC amid an economic upheaval that seemed no less bewildering to contemporary observers than the tech-driven economic transformation does today.[14] In roughly a thirty-year period, from the late 19th century to the early 20th century, revolutions in communications (the telephone, the wireless, the radio, and moving pictures), energy (the deployment of alternating current electric power distribution systems), and transportation (the automobile, the airplane, and major improvements in locomotive and steamship technology) converged to shake the world economy to its core by spurring the introduction of new products, services, and forms of business organization.[15]

Technology Industries: Improving the Federal Antitrust Joint Venture, 19 GEO. MASON L. REV. 1097, 1101 (2012) [hereinafter Kovacic, *Federal Antitrust Joint Venture*] (underscoring the importance of building upon past agency experience).

[13] *See* NAT'L ACAD. OF PUB. ADMIN., AGILE REGULATION: GATEWAY TO THE FUTURE (June 2022) (developing the concept of agile regulation).

[14] *See* Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 156 (2010) [hereinafter Winerman & Kovacic, *Outpost Years*] (describing how the FTC was created in the shadow of World War I where wartime mobilization required broad economic regulation which blurred the antimonopoly tradition during the 1920s).

[15] CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 1–2 (1999) (discussing the dramatic technological advancements in information technologies occurring at the beginning

A. *The 1914 Design*

In adopting the Federal Trade Commission Act in 1914 (FTC Act), Congress sought to create a regulatory platform well-suited to address competition policy challenges in the new economic order.[16] Several characteristics of the new agency stand out.

Scalable Substantive Mandate. With its grant of authority to prohibit "unfair methods of competition,"[17] Section 5 of the FTC Act was a direct instruction to the Commission to create new, binding principles of competition law through the resolution of individual cases.[18] This "norms creation" function, as Professor Daniel Crane has aptly described it,[19] gave the Commission power to reach beyond existing interpretations of the Sherman Act to ban behavior not yet deemed to be illegal.[20] Section 5 by its own terms and legislative intent was an unmistakable mandate to stretch the boundaries of competition law outward.[21] When pressed by some legislators to explain why Section 5 lacked operational criteria, the statute's sponsors explained that the open-ended elasticity was needed to respond to new conditions and to counteract the inevitable tendency of firms to devise ways

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of the twentieth century which drastically altered business models of the past, comparing them to the modern technological boom of the twenty-first century and subsequent economic response). Issues involving many of these emerging technologies came before the FTC in its first decades. *See* Winerman & Kovacic, *Outpost Years*, *supra* note 14, at 157–58.

[16] *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) (describing the origins of the FTC).

[17] 15 U.S.C. § 45.

[18] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930 (2010) [hereinafter Kovacic & Winerman, *Application of Section 5*].

[19] *See* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 131–33 (2011) (describing the FTC's optimal design as an antitrust norm maker rather than norm taker).

[20] *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, 239–40 (1980) (discussing how the FTC has enforcement power under the FTC Act to eradicate unfair practices not reached by the Sherman Act).

[21] Some commentators have warned that the broad mandate may be an improper delegation of legislative authority. Corbin Barthold, *A Path Forward on Nondelegation*, WLF LEGAL PULSE (Jan. 31, 2022), https://www.wlf.org/2022/01/31/wlf-legal-pulse/a-path-forward-on-nondelegation/ [https://perma.cc/A7PL-J2QD].

to work around any specific prohibitions that might be set out in Section 5.[22] The creation of the broad, scalable mandate came with important limits on the remedies available to the Commission for Section 5 infringements. The Commission could issue "cease and desist" orders to prevent the continuation of prohibited conduct; consistent with its norms creation vision for the agency, Congress made no provision for the Commission to impose monetary sanctions, nor did the statute provide an express power to issue divestiture orders in Section 5 matters. Broad norms creation powers were combined with relatively light-touch remedies.

Administrative Adjudication. The statute's designated means for applying the uniquely scalable Section 5 mandate was administrative adjudication. The Commission would function as a trade regulation tribunal whose decisions not only would determine the application of Section 5 but also inform judicial decisions that elaborated standards under the Sherman Act. Decisions of the Commission were appealable by the respondent to any court of appeals in a region in which the respondent did business. The 1914 statute gave the Commission no independent litigating authority to prosecute cases directly in federal district court, including cases to enforce the newly adopted Clayton Act, for which the FTC shared enforcement authority with the DOJ.

It also appears that Congress intended administrative adjudication to be the only mechanism at the Commission's disposal to compel changes in business conduct. The language of the 1914 statute and the legislative deliberations that preceded its adoption do not indicate that Congress intended the FTC to have power to issue substantive trade regulation rules. The reference to rulemaking contained in Section 6(g) of the statute appears to refer to the formulation of procedural rules related to the management of the agency, especially the execution of its market studies powers.[23] Had

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[22] S. REP. NO. 63-597, at 3910 (1914) (explaining how the Senate Committee on Interstate Commerce thought it best to leave it to the FTC to determine what practices were unfair as there too many unfair practices to define). Senator Francis Newlands, one of the chief sponsors of the FTC Act, observed during the legislative debates that if Congress were to specify illegal acts more completely in the statute, firms would simply devise new improper business techniques that evaded the language of the text. *See* 51 CONG. REC. 11,090 (1914) (describing remarks of Sen. Newlands).

[23] 15 U.S.C. § 46(g). *See* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277, 298–99 (2023) (explaining how the absence of

Congress in 1914 meant to give the agency power to issue substantive rules, one might have expected extensive articulation of this purpose in spelling out the legislative vision for the agency's contributions to competition law. Instead, administrative adjudication and the research/reporting function in Section 6(b), described below, received detailed discussion as the agency's policymaking tools. The agency plainly would have power to impose new obligations upon businesses–by the development of new norms through administrative adjudication.

Governance by Multimember Board. The 1914 plan assigned the governance of the FTC to a five-member board. No more than three of its members could be appointed from the same political party. Appointees would bring outstanding professional accomplishments and expertise to the fulfillment of their duties. The legislative history underscores that Congress anticipated a great deal of professional, as well as political, diversification, with the board containing a mix of lawyers, economists, people with business experience, and "publicists."[24] The collective expertise of the board would inform the selection of matters (including the choice of cases for prosecution before the internal administrative tribunal) as well as the issuance of decisions applying Section 5 of the FTC Act. The continuing vulnerability of this arrangement, and the source of nearly perennial debate, is whether the vertical integration of decision-making functions, that unifies the role of prosecutor and adjudicator in the same body (the board), violates constitutional protections of due process.[25]

Research and Analysis Capability. In Section 6(b) of the FTC Act, Congress gave the new Commission authority to require companies to produce business records and to respond to surveys. The agency could apply this power outside the context of a specific law enforcement matter. The 6(b)

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any provision for enforcement actions based on the rules made under Section 6 combined with the placement of the rulemaking power in Section 6—which authorizes investigations and reports but not substantive regulation—serves as evidence that these rules are intended to be procedural or housekeeping in nature).

[24] *See* 51 CONG. REC. 11,083 (1914) (remarks of Sen. Newlands) ("It is expected that the trade commission will be composed not only of eminent lawyers but of eminent economists, business men of large experience, and publicists . . .").

[25] *See* Kovacic, *Competition Policy Corridor*, *supra* note 9, at 235 (speaking to the recent cases coming to courts attacking the integration of the adjudication and prosecutorial functions of the FTC on the basis of due process).

studies would serve several purposes: to educate the agency about new commercial phenomena, to prepare reports for Congress and the public at large, and to develop law enforcement programs.[26] A crucial foundation for the application of this power was the incorporation of the former Bureau of Corporations into the Commission. Among other accomplishments, the Bureau of Corporations had prepared a study of the Standard Oil Company that informed the DOJ in developing its epochal monopolization case against the firm and its affiliates.

Resource for DOJ and the Courts. Congress anticipated that the FTC would use its accumulated expertise to assist the DOJ in prosecuting Sherman Act cases and to guide the federal courts in formulating remedies in Section 2 monopolization cases. Section 7 of the FTC Act authorized the FTC to serve as a master in chancery in federal district court cases to provide advice on remedies.[27]

B. *Notable Trends in the Implementation of the Original Vision*

Several notable trends stand out from the FTC's experience in seeking to realize the vision of the 1914 legislation.

Scalability Realized. In important respects, Section 5 of the FTC Act has proven to be an adaptable, scalable mandate, but not always in ways that Congress and the Courts would approve. As designed in 1914, Section 5 was conceived as a competition policy command. Immediately after the FTC started operations in March 1915, the agency received complaints from firms which alleged that rivals were using dishonest claims to attract customers. The dishonesty in advertising was depicted as an unfair method of

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[26] *See* Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902, 1908 (2015) (describing studies done by the FTC based on industries facing significant change due to emerging technologies); *see also* William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2093 (2015) (detailing how the information-gathering and reporting provisions of the FTC Act help the FTC give policy guidance and conduct investigations).

[27] 15 U.S.C. § 47. *See* Kovacic, *Federal Antitrust Joint Venture*, *supra* note 12, at 1114 (discussing how the FTC was granted special power to assist the federal courts in their formulation of remedies).

competition warranting condemnation under Section 5.[28] The FTC accepted this theory of competitive harm; in its first decade, almost half of its docketed matters involved allegations of misrepresentation.

This trend began what we today would call the Commission's consumer protection mission – the prosecution of false or misleading claims about product characteristics or performance. In a way unanticipated in the 1914 legislative debates, Section 5 provided the foundation for the agency's evolution as the nation's federal consumer protection body. In a similar way, the FTC in the 1920s began to address claims that firms were issuing securities based upon misrepresentations about their financial condition. Rivals to the issuers said that the falsehoods gave their wrongdoers a competitive advantage by diverting capital away from honest enterprises.

In 1938, Congress codified the FTC's regulatory "stretching" regarding misrepresentation by amending Section 5 to add a prohibition on "unfair or deceptive acts or practices" (UDAP).[29] This amendment eliminated the requirement established in several court cases that the FTC must prove that a misrepresentation had an adverse competitive effect in order for the practice to be actionable as an unfair method of competition. The reformulated mandate itself has proven to be scalable, demonstrated most clearly by the FTC's use of its UDAP authority since the 1990s to become the nation's principal federal privacy authority.

Scalability Constrained. Two forces have imposed important limits on the FTC's application of Section 5 to address new commercial phenomena and to proscribe conduct not already condemned under the Sherman Act. The first is judicial skepticism. From its earliest years, the FTC encountered resistance in the courts when seeking to create new business norms through Section 5 administrative adjudication. In 1920 in *FTC v. Gratz*, the Court ruled that Section 5 did not give the FTC authority to ban behavior not previously recognized as contrary to business morals or generally accepted standards of good behavior.[30] *Gratz* opened the door for the agency to invoke

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[28] *See* Winerman & Kovacic, *Outpost Years*, *supra* note 14, at 193–94 (explaining how despite not having a separate power to challenge unfair or deceptive acts or practices, which would come later in 1938, the FTC used its authority to challenge unfair methods of competition to target deception aimed at consumers).

[29] FTC Act Amendments of 1938 (Wheeler-Lea Act), Pub. L. No. 75-447, 52 Stat. 111.

[30] *See* FTC v. Gratz, 253 U.S. 421, 427–28 (1920) ("The [FTC] act was certainly not

norms located in extrinsic sources (e.g., embodied in other statutes), but it precluded what seemed to be a major aim of the 1914 statute – to reach conduct not previously seen as improper and to declare it to be an unfair method of competition.

Later judicial decisions – notably, *FTC v. Sperry & Hutchinson Co.* in 1972 – adopted a more generous view of the FTC's authority under Section 5.[31] Nonetheless, in more distant and more recent times, the Commission has enjoyed strikingly little success in achieving litigated victories in Section 5 cases that rely entirely on reaching beyond prevailing interpretations of the Sherman Act. The number of FTC litigation victories in standalone Section 5 case since 1915 can be counted comfortably on two hands – not much to show for nearly 110 years of effort.

Congress also has proven to be an obstacle to important efforts to stretch existing legal standards using Section 5. In a number of painful cases, Congress has attacked the Commission for prosecuting behavior using standalone Section 5 theories of harm. Some of these cases, such as *FTC v. Cement Institute*, involved major FTC litigation victories.[32] Others, such as the FTC's shared monopolization cases against the breakfast cereal and petroleum industries in the 1970s, involved matters that the Commission dismissed in the course of its administrative process.[33] These episodes indicate that the application of an expansive, scalable mandate can set in motion a political feedback loop through which business respondents implore

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intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade").

[31] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (holding that the FTC is not acting contrary to law if in determining whether an act violates Section 5 it considers public values that goes beyond those "enshrined in the letter or encompassed in the spirit of antitrust laws").

[32] *See* 333 U.S. 683, 691–93 (1948) (holding that Section 5 of the FTC embraces conduct within the ambit of the Sherman Act; upholding FTC decision condemning basing-point pricing system).

[33] *See* William E. Kovacic, *"Competition Policy in Its Broadest Sense": Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977–1981*, 60 WM. & MARY L. REV. 1269, 1308, 1315–17 (2019) [hereinafter Kovacic, *Broadest Sense*] (describing several cases brought within the FTC trying to extend the frontiers of antitrust enforcement that were ultimately dismissed by the commission itself after political backlash).

Congress to subdue the FTC.[34] The instances of powerful legislative intervention also suggest that intrusive legislative oversight may be the inevitable price to pay for a broad, scalable mandate that, to some degree, delegates lawmaking power to a regulatory authority.[35]

Pursuit of Rulemaking Authority or Its Equivalents. It did not take the Commission long to conclude that rulemaking had considerable advantages over case-by-case litigation as a norms-creation device. The agency chafed at the lack of a clear mandate to issue substantive rules, and it experimented with alternative approaches to achieve rulemaking results. In the 1920s and 1930s, the agency convened many "trade practice conferences" at which industry representatives proposed codes of behavior.[36] In a number of instances, the agency embraced the proposed codes and said it would treat violations of such codes as prima facie evidence of an unfair method of competition. In the early 1960s, the FTC issued its proposed rule on cigarette advertising, a measure premised on the Section 6(g) authority discussed above.[37] Here, Congress intervened and told the agency to stand down as Congress considered, and ultimately approved, legislation that required health warnings on cigarette packages (the warnings were much less

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[34] Kovacic & Winerman, *Application of Section* 5, *supra* note 18, at 943 (discussing the politics involved when the FTC tries to go beyond the bounds of the Sherman Act or the Clayton Act and how respondents in those cases accuse the agency of encroaching on Congress's power, thus leading to hostile legislative response).

[35] During the legislative debates in 1914 over the FTC Act, Senator Albert Cummins suggested that exacting legislative scrutiny would accompany the grant of a highly scalable mandate. "I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people," Cummins observed. "If we find that the people are betrayed either through dishonesty or through mistaken opinion, the omission is always subordinate to Congress. . . . Congress can always destroy the Commission; it can repeal the law that creates it . . .." 51 CONG. REC. 13,047–48 (remarks of Sen. Albert Cummins).

[36] *See* Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 ANTITRUST L.J. 701, 713–14 (2011) (describing the FTC's trade practice conferences where it would hold meetings with industry participants to help adopt rules and standards).

[37] On the history of the FTC's Cigarette Advertising Rule, *see* William MacLeod, Elizabeth Brunins & Anna Kertesz, *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 946–50 (2005) (explaining how the FTC's Cigarette rule led Congress to adopt legislation that required tobacco companies to place health warnings on packages for cigarettes).

emphatic than those proposed in the FTC's rule).

In 1975, Congress gave the FTC an express mandate to issue rules prohibiting unfair or deceptive acts or practices by enacting the Magnusson-Moss Warranty Act.[38] The Commission's ambitious program in the 1970s to promulgate rules under the 1975 law led Congress to threaten severe limits on the agency's powers and budget. Congress converted few of the proposed restrictions into legislation, but the threatened retribution caused the FTC to issue statements on unfairness and deception.[39] Congress in 1994 incorporated core principles of the unfairness policy statement into the FTC Act.[40] This experience also indicates that the effectiveness of a scalable mandate may require the inclusion of limiting principles into the organic statute that contains the mandate. Without such limiting principles, the regulator will be exposed to debilitating political attacks inspired by firms that claim the agency's application of the scalable mandate is misguided.

Earlier in the 1970s, the U.S. Court of Appeals for the District of Columbia issued a decision that upheld an FTC effort to use Section 6(g) to fill a gap in its competition policy portfolio. In *National Petroleum Refiners' Association v. FTC*, the D.C. Circuit concluded that 6(g) gave the FTC power to issue substantive competition rules.[41] Advocates of greater FTC recourse to competition rulemaking interpret congressional deliberations concerning the 1975 Magnusson-Moss legislation as indicating the legislature's intent that the new statute did not displace authority that the *Petroleum Refiners*

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[38] Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975, 15 U.S.C. § 57.

[39] *See* Kovacic, *Broadest Sense*, *supra* note 33, at 1315–17 (detailing Congress's hostile attitude toward to expansion of power by the FTC and how at one point the agency had to close shop for a few days because Congress allowed its funding to lapse); *see also* Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911, 925–27 (2005) (describing how the FTC's consumer protection mission had run aground for failure to respond more sensitively to the political climate of the time).

[40] *See* MacLeod, Brunins & Kertesz, *supra* note 37, at 961–62 (explaining how the Unfairness Policy Statement issued by the FTC in 1980 laid out a three-part test to determine whether a practice that causes consumer injury is unfair, which became binding via a later case law and Congress's codification of the policy in 1994).

[41] *See* 482 F.2d 672, 693 (D.C. Cir. 1973) ("Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose . . . .").

decision had found the Commission to possess.[42] Confident that Petroleum Refiners and congressional guidance provide the requisite authority, the Commission in April 2024 issued a final rule that prohibits noncompetition clauses in a wide range of employment contracts.[43] Various business trade associations immediately sued in federal district court to block the rule's implementation.[44]

Transformation of the Commission's Litigation Program. When the Supreme Court issued its decision in *Humphrey's Executor v. United States* in 1935, the Court relied heavily on its assessment of the nature of the FTC's program in concluding that the president could not remove Commission members except for good cause.[45] The Court emphasized that the FTC mainly served as an administrative tribunal and prepared reports and conducted hearings useful for Congress in formulating legislation.[46] The agency seldom, if ever, functioned as a prosecutorial body that brought cases in federal court. The lack of a prosecutorial function meant that the agency, in the Court's

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[42] *See* Chopra & Khan, *supra* note 7, at 378–79 (claiming that the Magnuson-Moss Warranty Act's heightened procedural requirements only applied to unfair or deceptive acts or practices not to the agency's power to prescribe rules with respect to unfair methods of competition). This view is not universally accepted. *See* Merrill, *supra* note 23, at 305–15 (concluding that the enactment of the Magnuson-Moss Warranty Act cannot be construed as a ratification of the D.C. Circuit's view in *National Petroleum Refiners*); *see also* Richard J. Pierce Jr, *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?* (Geo. Wash. L. Rsch. Paper No. 2021-42, 2021) (supporting a narrower reading of the FTC's Section 6(g) powers on the grounds that the Supreme Court has never embraced the language of *National Petroleum Refiners* and the reasoning of the D.C. Circuit's decision is inconsistent with the principles of separation of powers); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 554–57 (2002) (criticizing the *National Petroleum Refiners* decision).

[43] Fed. Trade Comm'n, *Noncompete Rule* (Apr. 23, 2024), https://www.ftc.gov/legal-library/browse/rules/noncompete-rule [https://perma.cc/77BD-8XTE]; *see also* Press Release, Fed. Trade Comm'n, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/7R9S-TRDN].

[44] *See* J. Edward Moreno, *Business Groups Sue to Stop F.T.C. from Banning Noncompete Clauses*, N.Y. TIMES (Apr. 24, 2024), https://www.nytimes.com/2024/04/24/business/lawsuit-ftc-noncompete-ban.html [https://perma.cc/3EZR-8BQZ] (reporting filing of lawsuits by U.S. Chamber of Commerce and other organizations to challenge FTC noncompete rule).

[45] 295 U.S. at 632 (discussing the limited executive power of removal).

[46] *Id.* at 624.

eyes, was not performing a role that warranted direct presidential control, including an unrestrained removal power.[47]

In the decades after *Humphrey's Executor*, the FTC's roles changed dramatically in their relative importance. The gradual expansion of the Commission's consumer protection role highlighted the weaknesses of the agency's remedial tools, especially in prosecuting fraud. Administrative adjudication could and did serve a useful part in establishing norms of conduct – such as the obligation to substantiate factual claims made in advertising – that changed the business world.[48] Nonetheless, prohibitory injunctions obtained at the close of lengthy administrative proceedings were no solution to serious fraud.[49] The ability to get immediate interim relief in district court actions would be crucial if the agency were to serve as an effective consumer protection agency. Thus, the scaling up of the agency's substantive program placed pressure on the institution to diminish reliance on administrative adjudication and seek recourse directly in federal court.

By the 1970s, a growing body of scholarship also cast doubt upon the effectiveness of government merger enforcement, either through DOJ actions in federal court or through FTC administrative adjudication.[50] Commentators argued that the government needed the ability to obtain preliminary relief before mergers were consummated, lest the parties assimilate the assets and complicate the problem of unraveling a transaction after a finding of liability had been achieved. Here, as well, the FTC would continue to make important contributions to merger jurisprudence through administrative adjudication

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[47] *See* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1843–44 (2014) (discussing assumptions about FTC's role that led Supreme Court in *Humphrey's Executor* to conclude that the president could remove FTC commissioners only for good cause).

[48] *See* Pfizer, Inc., 81 F.T.C. 23 (1972) (finding that for establishment claims, advertisers must possess a level of proof sufficient to satisfy the relevant scientific community of the claim's truth).

[49] *See* Howard Beales, III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2174–77 (2015) (discussing how the FTC would need to freeze assets pending a final determination in the merits to prevent a target from hiding its money before being ordered to pay redress).

[50] *See* ANDREW I. GAVIL, WILLIAM KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 738–40 (4th ed. 2022) (discussing weaknesses in the merger enforcement process before enactment of the Hart-Scott-Rodino reforms in 1976).

despite the ability of parties to close their transactions well before the administrative process had concluded.[51] Yet the FTC understood that the power to go directly to federal court and obtain an interim ban on transactions often was necessary for effective enforcement.

1973 brought about a major enhancement in the FTC's ability to pursue matters in federal court. In Section 408(b) of the Trans-Alaska Pipeline Authorization Act, Congress gave the FTC independent litigating authority to bring claims for injunctive relief directly in federal court.[52] This paved the way for a basic overhaul of the FTC's litigation program, with an ever-expanding amount of resources dedicated to bringing federal court actions in competition and consumer protection matters. The adoption of the Hart-Scott-Rodino Antitrust Improvements Act in 1976, with its premerger notification obligation and mandatory waiting periods, made federal court the venue of choice for most FTC merger enforcement actions.[53]

The developments sketched here have dramatically elevated the Commission's role as a law enforcement prosecutor. If the day comes when the Supreme Court reconsiders its ruling in *Humphrey's Executor*, the Court is likely to notice that relatively few FTC law enforcement actions are adjudicated in the agency's administrative process. When used, the administrative process can be important, as indicated by the recent court of appeals decision in *Illumina/Grail v. FTC*. In *Illumina/Grail*, the 5th Circuit largely validated the FTC's theory of harm and evaluation of the evidence.[54] The court of appeals also brushed aside four challenges that the merging parties had raised about the constitutionality of the FTC's structure and operations. The court remanded the matter to the FTC for reconsideration of the framework for assessing the proposed remedies that the companies had

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[51] *See, e.g.*, Illumina, Inc. v. FTC, 88 F.4th 1036, 1036 (5th Cir. 2023) (concluding the Commission had demonstrated substantial evidence that the merger threatened competition); Polypore Int'l v. FTC, 686 F.3d 1208 (11th Cir. 2012); Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008). *See* Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986) (demonstrating the FTC's important contributions to merger jurisprudence through administrative adjudication).

[52] Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 576.

[53] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1394 (codified at 15 U.S.C. § 18A (1976)).

[54] Illumina, Inc. v. FTC, 88 F.4th 1036, 1036 (5th Cir. 2024) (finding substantial evidence that supported the Commission's conclusions regarding failure to rebut anticompetitive effects of the merger).

offered before the FTC commenced its suit. The *Illumina/Grail* outcome is important, yet it highlights how relatively infrequently the Commission uses this element of its mandate.

The Pursuit of More Powerful Remedies. As suggested above and discussed in more detail below, the Commission has migrated away from the norms creation function that inspired its creation. It came to believe that the lighter touch remedies – prohibitory injunctions achieved through administrative litigation – authorized in the original statute were inadequate for the agency to play a robust competition policy role. Most important, the agency perceived that the fulfillment of the newly developed consumer protection role required the ability to disgorge wrongdoers of gains from fraud.[55] In the competition arena, the agency concluded that conduct prohibitions must be supplemented with the ability to obtain structural relief and to obtain monetary relief in the form of disgorgement.[56]

For a time, Section 13(b) of the 1973 Pipeline Act provided an effective mechanism for obtaining monetary relief – first in consumer protection cases and later in competition matters. As the size of attempted monetary recovers increased, so did business resistance. In *AMG Capital Management LLC v. FTC*, the Supreme Court unanimously concluded that equitable monetary relief was not encompassed within the grant of authority in Section 13(b) for the Commission to obtain "injunctions."[57] The Court's opinion by Justice Stephen Breyer (perhaps the Justice with the greatest understanding of and sympathy for the FTC's roles) rejected all of the Commission's arguments about the need for a flexible interpretation of the statutory text. This is not encouragement for efforts by the FTC (or other regulatory agencies) to stretch the application of existing laws to address admittedly urgent policy needs.

Diminishing Significance of the Norms Creation Role. As noted above, the expansion of FTC federal court litigation has coincided with a reduction in recourse to administrative adjudication. The agency's norms creation work has taken two forms: a small number of standalone Section 5 UMC cases and

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[55] *See* Beales & Muris, *supra* note 49, at 2174–75.

[56] *See* Neil W. Averitt, *Structural Remedies in Competition Cases Under the Federal Trade Commission Act*, 40 OHIO ST. L.J. 781 (1979) (discussing importance of structural remedies to FTC's mandate under Section 5 of the FTC Act); *see also* Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79 (2009) (discussing FTC efforts to obtain disgorgement for antitrust violations).

[57] 593 U.S. 67 (2021).

a larger number of cases that seek to refine analytical methods or concepts applied in the context of applications of the Sherman Act and the Clayton Act (especially Section 7, the merger control provision).

The Commission has achieved settlements in administrative adjudication matters filed as standalone Section 5 claims (or largely predicated on standalone Section 5 claims). These include the monopolization settlement with Xerox (1975)[58] and a series of invitation to collude matters initiated in the 1990s.[59] The most recent case premised substantially on a standalone Section 5 theory and litigated to a conclusion in the administrative process was the breakfast cereal shared monopoly case dismissed in 1982.[60]

The agency more frequently has adjudicated matters involving the interpretation of the Sherman and Clayton Acts. As affirmed in whole or in part by the courts of appeals or decided without further appeals from FTC decisions, these cases have yielded noteworthy additions to the jurisprudence involving merger control,[61] horizontal restraints,[62] monopolization,[63] and state action immunity.[64]

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[58] Xerox Corp., 86 F.T.C. 364 (1975).

[59] *See* Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1, 18–19 (2014) (discussing FTC invitation to collude cases under Section 5 of the FTC Act).

[60] Kellogg Co., 99 F.T.C. 8 (1982) (dismissing complaint).

[61] *See supra* note 51 (collecting cases).

[62] *See, e.g.*, FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 422–25, 431–36 (1990) (concluding that group boycott at issue constituted a per se violation of the antitrust laws; declining to require the boycott be analyzed under a fuller rule of reason analysis on ground that the boycott's expressive content implicated important First Amendment values); Realcomp II, Ltd. v. FTC, 635 F.3d 815, 846–47 (6th Cir. 2011) (upholding FTC's application of the rule of reason to ban horizontal restraint); *see also* N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362–72 (5th Cir. 2008) (upholding FTC's application of quick-look analysis to prohibit challenged horizontal restraint); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36–40 (D.C. Cir. 2005) (endorsing FTC's formulation of the quick look analytical framework; upholding FTC's finding that challenged horizontal restraint was unlawful); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935–38 (7th Cir. 2000) (upholding FTC's finding that challenged hub-and-spoke conspiracy was unlawful).

[63] *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 842 (11th Cir. 2015) (upholding FTC's decision that challenged exclusive dealing arrangements constituted illegal monopolization).

[64] *See, e.g.*, N.C. State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 511–12 (2015) (applying the active supervision requirement from *California Retail Liquor Dealers Association. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and upholding FTC's decision

It is interesting to note how often the Commission in recent practice has declined to use administrative adjudication to litigate matters that generally involved ambitious applications of existing Sherman Act concepts or contained some possibility of introducing standalone Section 5 theories of harm. Over the past decade, the FTC has brought all of its cases premised in whole or in major part on claims of illegal monopolization cases directly in federal district court.[65] Regardless of what strategic or institutional considerations led to these choices, the repeated modern use of federal court litigation for such cases suggests a lack of confidence (or interest) in using the policy mechanism – administrative adjudication – whose creation was a central aim in the adoption of the FTC Act in 1914 and an essential rationale for the creation of a multimember governing board.[66] In any future congressional deliberations concerning the FTC's continued role as a

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that the state failed to exercise adequate supervision of the challenged restraint); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (applying the *Midcal* requirements and upholding FTC challenge to horizontal restraint); S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 440–47 (4th Cir. 2006) (discussing the three situations in which the doctrine of state action immunity from *Parker v. Brown*, 317 U.S. 341 (1943), may apply; rejecting defendant's request for interlocutory appeal from FTC decision that defendant was not entitled to *Parker* immunity); Ky. Household Goods Carriers Ass'n v. FTC, 199 Fed. Appx. 410, 410–11 (6th Cir. 2006) (upholding FTC's decision to deny state action immunity).

[65] Since 2010, the FTC has filed the following cases with claims of monopolization or attempted monopolization directly in federal district court: Complaint at 5, FTC v. Amazon.com, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Sept. 26, 2023); Complaint at 1–2, FTC v. Anesthesia Partners, Inc., No. 4:23-cv-03510 (S.D. Tex. Sept. 21, 2023); Complaint at 2, FTC v. Syngenta Corp., No. 22-cv-828 (M.D.N.C. Sept. 29, 2022); Complaint at 1, FTC v. Facebook, Inc., No. 20-cv-3590 (D.D.C. Dec. 9, 2020); Complaint at 1, FTC v. Surescripts, LLC, Civ. No. 19-1080 (JDB) (D.D.C. Apr. 17, 2019); Complaint at 2, FTC v. Qualcomm, Inc., No. 17-cv-00220-LHK (N.D. Cal. Jan. 17, 2017).

[66] Since 2009 until recently, the FTC has had a single administrative law judge (ALJ). Earlier this year, the FTC appointed Dania Ayoubi and Jay Himes to serve as ALJs. Press Release, Fed. Trade Comm'n, FTC Announces Appointment of Dania L. Ayoubi as New Administrative Law Judge (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-appointment-dania-l-ayoubi-new-administrative-law-judge [https://perma.cc/HZY7-TZ7H]; *see also* Press Release, Fed. Trade Comm'n, FTC Announces Appointment of Jay L. Himes as New Administrative Law Judge (Mar. 12, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-announces-appointment-jay-l-himes-new-administrative-law-judge [https://perma.cc/K7AC-65LN]. These appointments indicate that the Commission may be preparing to rely more heavily on administrative adjudication to carry out its competition law program in the future.

competition policy agency, this trend will not serve the Commission well.

Policy Development without Cases or Rules: Research, Reports, and Hearings. In more than any other area of its 1914 remit, the Commission has fulfilled the original congressional design in its application of research, analysis, and problem-solving tools beyond litigation and rulemaking. There is a historical tendency to equate "competition law' with the enforcement of prohibitions against specific forms of business behavior. When asked to describe their main function, competition agency officials frequently say it is "law enforcement." The prosecution of cases and the imposition of monetary penalties provide the chief benchmarks by which we assess the quality of a competition law system in the United States and in other jurisdictions.[67] It is no surprise that agencies and commentators treat litigation as the chief measure of the quality of a competition system.[68]

The Commission's experience displays an awareness that dynamic, innovation-intensive sectors pose challenges that require regular upgrades in the knowledge base upon which regulatory institutions operate.[69] The FTC's experience with research, reports, and hearings has proven to be a valuable policymaking tool and a useful source of "policy research and development" ("policy R&D") for the Commission, other regulators, and Congress to address these challenges.[70] Reports and competition advocacy before legislatures and other government bodies can discourage the adoption of policies that retard innovation and otherwise degrade economic performance by suppressing business rivalry.[71] Unless supplemented by effective

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[67] *See* William E. Kovacic, Hugh M. Hollman & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25, 27 (2011) (discussing reliance on prosecution of cases as measure of agency quality).

[68] The pressure upon agencies to generate new cases and other visible policy deliverables can discourage investments in capability (such as expenditures for research that increase the base of the agency's knowledge) that improve the quality of the agency's policy outputs. *See* Kovacic & Hyman, *Consume or Invest*, *supra* note 12, at 304–13.

[69] *See* Kovacic, *Federal Antitrust Joint Venture*, *supra* note 12, at 1100 (discussing how the accelerated rate of change in high tech industries can make litigation difficult).

[70] *See* Muris, *infra* note 75, at 774–76 (discussing value of market studies as policy making instruments).

[71] For example, South Korea's competition policy system confers upon the Korea Fair Trade Commission (KFTC) a broad competition advocacy mandate regarding regulatory programs that affect competition. *See* KFTC, A JOURNEY TOWARD MARKET ECONOMY –

advocacy, robust law enforcement against private anticompetitive conduct simply may encourage business decision makers to seek and obtain government intervention that accomplishes the same ends.[72]

The Commission's work has provided an important stimulus for other countries to employ market studies as one way to achieve competition policy goals.[73] The markets regime of the United Kingdom takes the concept further and authorizes the Competition and Markets Authority to obtain remedies to correct competition problems identified through a market study.[74]

Multifunctionality and Policy Integration. In its first century, the FTC evolved from an agency designed to be a single-purpose institution – a competition policy agency – to a regulatory body covering three distinctive policy domains: antitrust, consumer protection, and privacy. Commentators have identified a number of conceptual synapses that link these fields together, a consideration that becomes important in deciding how to solve problems related to large information services platforms.[75] Are these connections important in practice in the Commission's operations? Does the combination of all three functions under one institutional roof generate better

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KFTC'S 23 YEARS OF BUILDING TRANSPARENT AND FAIR MARKET 173–77 (2004) (detailing the competition advocacy work done by the KFTC).

[72] The significant complementarities between law enforcement and competition advocacy are analyzed in James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints of Competition*, 90 B.U. L. REV. 1555, 1558–62 (2010).

[73] *See generally* WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 106–09 (2009) (discussing the work of some agencies that have led the development of market studies).

[74] Competition policy experience abroad has been an underexploited resource for informing possible improvements in the U.S. system. *See* Cooper & Kovacic, *supra* note 72, at 1556; William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHNS L. REV. 361, 363–64 (2000); Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Antitrust Law*, 52 CONN. L. REV. 123, 128–29 (2020) (discussing differences between the competition policies of U.S. and the rest of the world).

[75] *See* Timothy J. Muris, *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 780–81 (2005) (detailing a discussion between the current chair of the FTC and his immediate predecessor about the strengths of FTC's multi-function mandate); *see also* Douglas, *supra* note 10, at 649 (discussing the competition/data protection connection); KATALIN J. CSERES, COMPETITION LAW AND CONSUMER PROTECTION (2005) (discussing the policy links between competition and consumer protection).

policy results than one would realize if the policy domains were assigned to different regulators, and policy integration took place by agreement among the regulators rather than by "ownership" within the FTC?

If the synergies are strong and beneficial in practice, strong arguments could be made for preserving the existing configuration of FTC policy responsibilities and perhaps enhancing them to supervise large information services platforms. If these benefits are now, or soon become, substantial, the FTC could make a strong claim to have the DOJ clear any matter involving big tech to the Commission whenever the FTC wishes to handle such a matter. Such claims would inject additional tension into the relationship between the two agencies. It is no accident that the DOJ has resisted efforts, in a variety of international fora, to examine the benefits of integrating competition and consumer protection functions into the same agency.[76] To see the benefits is to move a larger number of big tech matters (and perhaps to reallocate budgets across the two agencies) into the FTC's basket.

In modern times the Commission has recognized the potential benefits of policy integration across the different domains and occasionally has succeeded in bringing the different fields together in effective programs. For example, the Eyeglasses Rule promulgated in the 1970s drew upon the expertise of the competition and consumer bureaus at the FTC and set in motion a beneficial transformation of the eyewear sector.[77] This experience, however, has been comparatively rare, and there is considerable room for improving the integration of functions in the future. Greater integration arguably is more than a "nice to have" element of the Commission's program.

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[76] On several occasions during the time I served as the FTC's General Counsel (2001–04) and a member of the Commission (2006–11), I participated in conversations in which DOJ officials objected to the inclusion of the competition/consumer interface on the agenda for international meetings of bodies such as the Competition Committee of the Organization for Economic Cooperation and Development. The evident basis for the objection was that the discussion of the topic might draw undue attention to the work of the FTC and suggest in some way that the Commission had superior ability to address competition issues by adding a consumer protection lens to problem-solving.

[77] *See* Ophthalmic Practice Rules (Eyeglass Rule), 16 C.F.R. § 456 (2016) (requiring optometrists and ophthalmologists to provide patients a copy of their prescription after the completion of an eye examination without extra cost); *see also* John E. Kwoka, Jr., *The Federal Trade Commission and the Professions: A Quarter Century of Accomplishment and Some New Challenges*, 72 ANTITRUST L.J. 997, 1003–05 (2005) (discussing the multidisciplinary research program that supported the promulgation of the Eyeglass Rule).

Genuine progress may be essential if the agency is to preserve its authority in the three policy domains now assigned to it.

III. FUTURE PLATFORM REGULATION: THE FTC'S ROLE

There has been an extensive debate about the appropriate legal framework for future regulation of large information services platforms. One approach is to rely on existing laws – and the scalable mandate of provisions such as Section 5 of the FTC Act – to address new conditions and practices. Another approach is to adopt new legislation to establish new regulatory tools. Possibilities include the adoption of a variant of the *ex ante* platform regulation approach embodied in the European Union's Digital Markets Act.[78] Congress has considered, but has yet to adopt, measures of this type. Another possibility for major legislation is the enactment of an omnibus data protection act that would replace the existing patchwork of national laws with a comprehensive privacy scheme.[79]

Decisions about the future role of the FTC in platform regulation take place against a backdrop of uncertainty about the future design and operation of federal regulatory agencies. The Supreme Court soon will clarify whether *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[80] retains vitality as a principle of analysis when courts review administrative agency interpretations of their statutes.[81] The Court also is poised to consider how

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[78] *See generally* IBÁÑEZ COLOMO, *supra* note 8 (discussing the DMA and its place in the framework of European Union competition policy); *see also* Jacques Cremer, Gregory S. Crawford, David Dinieli, Amelia Fletcher, Paul Heidhues, Monika Schnitzer & Fiona M. Scott Morton, *Fairness and Contestability in the Digital Markets Act*, 40 YALE J. ON REGUL. 973 (2023) (generally discussing the DMA).

[79] *See* Press Release, House Comm. on Energy & Commerce, House of Representatives, Committee Chairs Rodgers, Cantwell Unveil Historic Draft Comprehensive Data Privacy Legislation (Apr. 7, 2024), https://energycommerce.house.gov/posts/committee-chairs-rodgers-cantwell-unveil-historic-draft-comprehensive-data-privacy-legislation [https://perma.cc/UVW7-QESM]; see also David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1117, 1147–49 (2019) (discussing potential institutional arrangements through which an omnibus privacy law may be administered).

[80] 467 U.S. 837 (1984).

[81] *See* Amy Howe, *Supreme Court Likely to Discard* Chevron, SCOTUSBLOG (Jan. 17,

much discretion agencies enjoy in deciding which dispute resolution channel they may choose to adjudicate complaints for violations of the statutes they enforce.[82] In *Seila Law LLC v. Consumer Financial Protection Bureau*,[83] the Court suggested its possible receptivity to a reconsideration of whether appointees to regulatory commissions (such as the FTC) enjoy protection against removal except for cause. Finally, in recent challenges to the FTC's design and operations, litigants have urged the courts (without success) to rule that the Commission's vertically integrated combination of decision functions (prosecution plus adjudication) is an unconstitutional infringement of due process rights.[84] One expects that these and a myriad of other attacks upon the agency's legitimacy and constitutionality will continue in the courts.

The experience summarized above in Part I has important implications for the possible exercise by the FTC of an expanded role as an adaptable regulatory platform for oversight of information services platforms, either with existing tools or with major or minor legislative enhancements.

First, broad scalable mandates of the type found in Section 5 of the FTC Act are unlikely to be sustainable without congressional efforts to provide more specific operational criteria for their application. The congressional reforms of 1984, which incorporated the criteria of the FTC's 1980 Unfairness Policy Statement directly into the FTC Act, suggest how greater specificity can improve the agency's prospects of successful implementation without attracting severe judicial and legislative resistance.

Second, Congress will need to provide the Commission with an express grant of authority to engage in competition rulemaking and to obtain

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2024, 6:58 PM), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ [https://perma.cc/CA8T-5FKE] (discussing Supreme Court oral arguments in *Loper Bright Enterprises v. Raimundo* and *Relentless, Inc. v. Department of Commerce* and their effect on the *Chevron* doctrine)

[82] Ronald Mann, *Justices divided over SEC's ability to impose fines in administrative proceedings*, SCOTUSBLOG (Nov. 30, 2023, 7:28 AM), https://www.scotusblog.com/2023/11/justices-divided-over-secs-ability-to-impose-fines-in-administrative-proceedings/ [https://perma.cc/6WA8-ZFVG] (discussing oral argument in *SEC v. Jarkazy*).

[83] 591 U.S. 197, 251 (2020) (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part).

[84] *See* Illumina, Inc. v. FTC, 88 F.4th 1036, 1061–62 (5th Cir. 2023) (rejecting this objection and three other challenges to the agency's constitution raised by Illumina in its appeal of an FTC administrative decision that banned Illumina's acquisition of Grail).

equitable relief beyond injunctions in federal court actions brought under Section 13(b). The clear grant of competition rulemaking authority will resolve uncertainties posed by applications of Section 6(g) and strengthen the agency's ability to defend rules in the face of objections premised on the major questions doctrine.

Third, the Commission will need to be prepared to indicate the benefits that come from the continued combination of competition, consumer protection, and privacy functions in the same agency. Among other causes, this issue could arise as Congress considers the enactment of omnibus privacy legislation and determines where enforcement responsibility should reside.

Fourth, the Commission should consider how it will function if the protection of *Humphrey's Executor* falls by the wayside. The agency's insulation from destructive executive branch influence may depend on its ability to demonstrate more clearly the quality of its policy analysis as a way of discouraging harmful intervention in its operations.

Fifth, the Commission should assess how reforms to its administrative adjudication process might diminish due process concerns about the integration of prosecutorial and adjudicative functions within the board. One modest step would be to abandon de novo review of all fact findings of the administrative law judge and to treat such findings as conclusive unless clearly erroneous.[85] The administrative law judge framework also could be improved by experimenting with the United Kingdom system that creates a pool of experts to serve as adjudicators on certain matters before the Competition and Markets Authority.

Sixth, as part of a broader public consultation, the Commission should examine the future of its administrative adjudication role generally. The gradual diminution of administrative adjudication as an instrument for FTC policymaking, and the greater recourse to litigation in the federal courts, raise a basic question about the value of having the Commission continue to serve as an expert trade regulation tribunal. It is telling that the FTC monopolization cases initiated over the past decade all have been prosecuted in federal court. Is it worth the effort to maintain an administrative adjudication competition policy role that is used so infrequently? To put it

[85] This proposal is set out in Keith Klovers, *Three Options for Reforming Part 3 Administrative Litigation at the Federal Trade Commission*, 85 ANTITRUST L.J. 409, 425–30 (2023).

another way, what minimum level of activity is necessary to justify the continuation of this role?

Seventh, substantial investments in the Commission's policy research functions continue to be vital to support the agency's litigation, rulemaking, and advocacy activities, and to gain deference from reviewing courts. Deep knowledge of markets and individual commercial practices is a key determinant of the Commission's reputation and an important basis for the agency to obtain deference for its views before courts, legislators, and other government departments.[86] The FTC's experience since its creation suggests that such deference cannot simply be claimed but must be earned.

CONCLUSION

Discussions about the future of regulation for information services platforms and for high tech enterprises generally will inevitably lead to a reexamination of existing regulatory institutions, including the Federal Trade Commission. At a distance, the FTC has a number of institutional attributes that might make it a good candidate for expanded responsibilities in this policy realm. Actual experience with the application of the policy instruments established in 1914 and augmented over time provide a complicated picture of the effectiveness in practice of the original congressional vision and the implications of creating agencies with deliberately scalable mandates. To succeed, the Commission's current generation of ambitious programs will require continuing innovation and improvement in the agency's design and operations. The discussion above provides a framework for considering next steps.

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[86] *See* William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 238 (2015) (identifying expertise in law and economics as one basis on which regulatory bodies create a strong reputation).