

Prepared Testimony of

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on

***Legislative Hearing on 17 FTC Bills***

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Considering that rules of the Commission may apply to any act or practice “affecting commerce”, and that the only statutory restraint is that it be unfair, **the apparent power of the Commission with respect to commercial law is virtually as broad as the Congress itself. In fact, the Federal Trade Commission may be the second most powerful legislature in the country....** All 50 State legislatures and State Supreme Courts can agree that a particular act is fair and lawful, but the five-man appointed FTC can overrule them all. **The Congress has little control over the far-flung activities of this agency short of passing entirely new legislation.**<sup>2</sup>

*Sens. Barry Goldwater & Harrison Schmitt, 1980*

Within very broad limits, the agency determines what shall be legal. Indeed, the agency has been “lawless” in the sense that it has traditionally been beyond judicial control.<sup>3</sup>

*Former FTC Chairman Tim Muris, 1981*

**The FTC’s investigatory power is very broad and is akin to an inquisitorial body.** On its own initiative, it can investigate a broad range of businesses without any indication of a predicate offense having occurred.<sup>4</sup>

*Prof. Chris Hoofnagle, 2016*

## Summary

Congressional reauthorization of the FTC is long overdue. It has been twenty-two years since Congress last gave the FTC a significant course-correction and even that one, codifying the heart of the FTC’s 1980 Unfairness Policy Statement, has not had the effect Congress expected. Indeed, neither that policy statement nor the 1983 Deception Policy Statement, nor the 2015 Unfair Methods of Competition Enforcement Policy Statement, will, on

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<sup>2</sup> S. Rep. No. 96-184, at 18 (1980), *available at* <http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=417102>.

<sup>3</sup> Timothy J. Muris, *Judicial Constraints*, in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR*, 35, 49 (Kenneth W. Clarkson & Timothy J. Muris, eds., 1981).

<sup>4</sup> Chris Jay Hoofnagle, *Federal Trade Commission Privacy Lawz & Policy* 102 (2016).

their own, ensure that the FTC strikes the right balance between over- and under-enforcement of its uniquely broad mandate under Section 5 of the FTC Act.

These statements are not without value, and we support codifying the other key provisions of the Unfairness Policy Statement that were not codified in 1980, as well as codifying the Deception Policy Statement. In particular, we urge Congress or the FTC to clarify the meaning of “materiality,” the key element of Deception, which the Commission has effectively nullified.

But a shoring up of substantive standards does not address the core problem: ultimately, that the FTC’s *processes* have enabled it to operate with essentially unbounded discretion in developing the doctrine by which its three high level standards are applied in real-world cases.

Chiefly, the FTC has been able to circumvent judicial review through what it calls its “common law of consent decrees,” and to effectively circumvent the rulemaking safeguards imposed by Congress in 1980 through a variety of forms of “soft law”: guidance and recommendations that have, if indirectly and through amorphous forms of pressure, essentially regulatory effect.

At the same time, and contributing to the problem, the FTC has made insufficient use of its Bureau of Economics, which ought to be the agency’s crown jewel: a dedicated, internal think tank of talented economists who can help steer the FTC’s enforcement and policymaking functions. While BE has been well integrated into the Commission’s antitrust decision-making, it has long resisted applying the lessons of law and economics to its consumer protection work.

The FTC is, in short, in need of a recalibration. In this paper we evaluate nine of the seventeen FTC reform bills proposed by members of the Commerce, Manufacturing and Trade Subcommittee, and suggest a number of our own, additional reforms for the agency.

Many of what we see as the most needed reforms go to the lack of economic analysis. Thus we offer detailed suggestions for how to operationalize a greater commitment to economic rigor in the agency’s decision-making at all stages. Specifically, we propose expanding the proposed requirement for economic analysis of recommendations for “legislation or regulatory action” to include best practices (such as the FTC commonly recommends in reports), complaints and consent decrees. We also propose (and support bills proposing) other mechanisms aimed at injecting more rigor into the Commission’s decisionmaking, particularly by limiting its use of various sources of informal or overly discretionary sources of authority.

The most underappreciated aspect of the FTC’s processes is investigation, for it is here that the FTC wields incredible power to coerce companies into settling lawsuits rather than litigating them. Requiring that the staff satisfy a “preponderance of the evidence” standard for issuing consumer protection complaints would help, on the margin, to embolden some defendants not to settle. Other proposed limits on the aggressive use of remedies and on the

allowable scope of the Commission's consent orders would help to accomplish the same thing. Changing this dynamic even slightly could produce a significant shift in the agency's model, by injecting more judicial review into the FTC's evolution of its doctrine.

Commissioners themselves could play a greater role in constraining the FTC's discretion, as well, keeping the FTC focused on advancing consumer welfare in everything it does. Together with the Bureau of Economics, these two internal sources of constraint could partly substitute for the relative lack of external constraint from the courts.

We are not wholly critical of the FTC. Indeed, we are broadly supportive of its mission. And we support several measures to *expand* the FTC's jurisdiction to cover telecom common carriers and to make it easier for the FTC to prosecute non-profits that engage in for-profit activities. We enthusiastically support expansion of the FTC's Bureau of Economics. And we recommend expansion of the Commission's competition advocacy work into a full-fledged Bureau, so that the Commission can advocate at all levels of government — federal, state and local — on behalf of consumers and against legislation and regulations that would hamper the innovation and experimentation that fuel our rapidly evolving economy.

But most of all, Congress should not take the FTC's current processes for granted. Ultimately, the FTC reports to Congress and it is Congress's responsibility to regularly and carefully scrutinize how the agency operates. The agency's vague standards, sweeping jurisdiction, and its demonstrated ability to circumvent both judicial review and statutory safeguards on policy making make regular reassessment of the Commission through biennial reauthorization crucial to its ability to serve the consumers it is tasked with protecting.

## **Introduction**

Only by the skin of its teeth did the Federal Trade Commission survive its cataclysmic confrontation with Congress in 1980. Today, the Federal Trade Commission remains the closest thing to a second national legislature in America. Its jurisdiction covers nearly every company in America. Its powers over unfair and deceptive acts and practices (UDAP) and unfair methods of competition (UMC) remain so inherently vague that the Commission retains unparalleled discretion to make policy decisions that are essentially legislative. The Commission increasingly wields these powers over high tech issues affecting not just the high tech *sector*, but, increasingly, every company in America. It has become the *de facto*

Federal *Technology* Commission — a moniker we coined,<sup>5</sup> but which Chairwoman Edith Ramirez has embraced.<sup>6</sup>

For all this power, either by design or by neglect, the FTC is also “a largely unconstrained agency.”<sup>7</sup> “Although appearing effective, most means of controlling Commission actions are virtually useless, owing to lack of political support and information, lack of interest on the part of those ostensibly monitoring the FTC, or FTC maneuvering.”<sup>8</sup> At the same time, “[t]he courts place almost no restraint upon what commercial practices the FTC can proscribe....”<sup>9</sup>

The vast majority of what the FTC does is uncontroversial — routine antitrust, fraud and advertising cases. Yet, as the FTC has dealt with cutting-edge legal issues, like privacy, data security and product design, it has raised deep concerns not merely about the specific cases brought by the FTC, but also that the agency is drifting away from the careful balance it struck in its 1980 Unfairness Policy Statement (UPS)<sup>10</sup> and its 1983 Deception Policy Statement (DPS).<sup>11</sup>

We applaud the Commerce, Manufacturing & Trade Subcommittee for taking up the issue of FTC reform, and for the seventeen bills submitted by members of both parties. Even if no legislation passes this Congress, active engagement by Congress in the operation of the Commission was crucial in the past to ensuring that the FTC does not stray from its mission of serving consumers. But active congressional oversight has been wanting for far too long.

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<sup>5</sup> Berin Szóka & Geoffrey Manne, *The Second Century of the Federal Trade Commission*, TECHDIRT (Sept. 26, 2013), available at <https://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml>; see also *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission*, Report 1.0 of the FTC: Technology & Reform Project, 3 (Dec. 2013), available at [http://docs.techfreedom.org/FTC\\_Tech\\_Reform\\_Report.pdf](http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf).

<sup>6</sup> Kai Ryssdal, *The FTC is Dealing with More High Tech Issues*, MARKETPLACE (Mar. 7, 2016), available at <http://www.marketplace.org/2016/03/07/tech/ftc-dealing-more-high-tech-issues>.

<sup>7</sup> *Part I: The Institutional Setting*, in THE FEDERAL TRADE COMMISSION SINCE 1970, *supra* note 3 at 11.

<sup>8</sup> *Id.* at 11–12.

<sup>9</sup> Timothy J. Muris, *Judicial Constraints*, in *id.* 35, 43.

<sup>10</sup> *Letter from the FTC to the House Consumer Subcommittee*, appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1073 (1984) [“Unfairness Policy Statement” or “UPS”], available at <http://www.ftc.gov/ftc-policy-statement-on-unfairness>.

<sup>11</sup> *Letter from the FTC to the Committee on Energy & Commerce*, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) [“Deception Policy Statement” or “DPS”], available at <http://www.ftc.gov/ftc-policy-statement-on-deception>.

Not since 1996 has Congress reauthorized the FTC,<sup>12</sup> and not since 1994 has Congress actually substantially modified the FTC's standards or processes.<sup>13</sup>

The most significant thing Congress has done regarding the FTC since 1980 was the 1994 codification of the Unfairness Policy Statement's three-part balancing test in Section 5(n). But even that has proven relatively ineffective: The Commission pays lip service to this test, but there has been essentially none of analytical development promised by the Commission in the 1980 UPS:

The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, **subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time.**

The Commission no doubt believes that it has carefully weighed (1) substantial consumer injury with (2) countervailing benefit to consumers or to competition, and carefully assessed whether (3) consumers could “reasonably have avoided” the injury, as Congress required by enacting Section 5(n). But whatever weighing the Commission has done in its internal decision-making is far from apparent from the outside, and it has not been done by the courts in any meaningful way. As former Chairman Tim Muris notes, “the Commission’s authority remains extremely broad.”<sup>14</sup>

The situation is little on better on Deception — at least, on the cutting edge of Deception cases, involving privacy policies, online help pages, and enforcement of other promises that differ fundamentally from traditional marketing claims. Just as the Commission has rendered the three-part Unfairness test essentially meaningless, it has essentially nullified the “materiality” requirement that it volunteered in the 1983 Deception Policy Statement. The Statement began by presuming, reasonably, that express *marketing* claims are always materi-

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<sup>12</sup> Federal Trade Commission Reauthorization Act of 1996, Pub. L. 104-216, 110 Stat. 3019 (Oct. 1, 1996), available at <http://uscode.house.gov/statutes/pl/104/216.pdf>.

<sup>13</sup> Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, 108 Stat. 1691 (Aug. 26, 1994) available at <http://uscode.house.gov/statutes/pl/103/312.pdf>.

<sup>14</sup> Statement of Timothy J. Muris, Hearing on Financial Services and Products: The Role of the Fed. Trade Commission in Protecting Customers, before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation, 111th Cong. 2 (2010), 28, available at [http://lawprofessors.typepad.com/files/muris\\_senate\\_testimony\\_ftc\\_role\\_protecting\\_consumers\\_3-17-101.pdf](http://lawprofessors.typepad.com/files/muris_senate_testimony_ftc_role_protecting_consumers_3-17-101.pdf).

al, but the Commission has extended that presumption (and other narrow presumptions of materiality in the DPS) to cover essentially *all* deception cases.

Congress cannot fix these problems simply by telling the FTC to dust off its two bedrock policy statements and take them more seriously (as it essentially did in 1994 regarding Unfairness). Instead, Congress must fundamentally reassess the *process* that has allowed the FTC to avoid judicial scrutiny of how it wields its discretion.

The last time Congress significantly reassessed the FTC's *processes* was in May 1980, when it created procedural safeguards and evidentiary requirements for FTC rulemaking. These reforms were much needed, and remain fundamentally necessary (although we do encourage the FTC to attempt a Section 5 rulemaking for the first time in decades in order to provide a real-world experience of how such rulemakings work and whether Congress might make changes at the margins to facilitate reliance on that tool).

But these 1980 reforms failed to envision that the Commission would, eventually, find ways of exercising the vast discretion inherent in Unfairness and Deception through what it now proudly calls its “common law of consent decrees”<sup>15</sup> — company-specific, but cookie-cutter consent decrees that have little to do with the facts of each case (and always run for twenty years). These consent decrees are bolstered by the regular issuance of recommended best practices in reports and guides that function as quasi-regulations, imposed on entire industries not by rulemaking but by the administrative equivalent of a leering glare. Together, these new tactics have allowed the FTC to effectively circumvent not only the process re-

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<sup>15</sup> “Together, these enforcement efforts have established what some scholars call ‘the common law of privacy’ in the United States.” Julie Brill, Commissioner, Fed. Trade Comm’n, *Remarks to the Mentor Group Forum for EU-US Legal-Economic Affairs Brussels, April 16, 2013*, 3 (Apr. 16, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/remarks-mentor-group-forum-eu-us-legal-economic-affairs-brussels-belgium/130416mentorgroup.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-mentor-group-forum-eu-us-legal-economic-affairs-brussels-belgium/130416mentorgroup.pdf) (citing Christopher Wolf, *Targeted Enforcement and Shared Lawmaking Authority As Catalysts for Data Protection in the United States* (2010), available at [http://www.justice.gov.il/NR/rdonlyres/8D438C53-82C8-4F25-99F8-E3039D40E4E4/26451/Consumer\\_WOLFDataProtectionandPrivacyCommissioners.pdf](http://www.justice.gov.il/NR/rdonlyres/8D438C53-82C8-4F25-99F8-E3039D40E4E4/26451/Consumer_WOLFDataProtectionandPrivacyCommissioners.pdf) (FTC consent decrees have “created a ‘common law of consent decrees,’ producing a set of data protection rules for businesses to follow.”)). FTC Chairman Edith Ramirez said roughly the same thing in a 2014 speech:

I have expressed concern about recent proposals to formulate guidance to try to codify our unfair methods principles for the first time in the Commission’s 100 year history. While I don’t object to guidance in theory, I am less interested in prescribing our future enforcement actions than in describing our broad enforcement principles revealed in our recent precedent.

Quoted in Geoffrey Manne, FTC Commissioner Joshua Wright gets his competition enforcement guidelines, TRUTH ON THE MARKET (Aug. 13, 2015), available at <https://truthonthemarket.com/2015/08/13/ftc-commissioner-joshua-wright-gets-his-competiton-enforcement-guidelines/> (speech video available at <http://masonlec.org/media-center/299>).

forms of May 1980 but also the substantive constraints volunteered by the FTC later that year in the Unfairness Policy Statement and, three years later, in the Deception Policy Statement.

Such process reforms are the focus of this paper. The seventeen bills currently before the Subcommittee would begin to address these problems — but only begin. In this paper we evaluate nine of the proposed bills in turn, offer specific recommendations, and also offer a slate of our own additional suggestions for reform.

Our most important point, though, is not any one of our proposed reforms, but this: The default assumption should not be that the FTC continues operating indefinitely without course corrections from Congress.

Justice Scalia put this point best in his 2014 decision, striking down the EPA’s attempt to “rewrite clear statutory terms to suit its own sense of how the statute should operate,” when he said: “We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery.”<sup>16</sup> The point is more, not less, important when a statute like Section 5 has been “deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion”: trusting the FTC to follow an “evolutionary process” *requires* regular, searching reassessments by Congress. This need is especially acute given that the “underlying criteria” have *not* “evolve[d] and develop[ed] over time” through the “judicial review” expected by both Congress and the FTC in 1980 — at least, not in any analytically meaningful way.

Reauthorization should happen at regular two-year intervals and it should never be a *pro forma* rubber-stamping of the FTC’s processes. Each reauthorization should begin from the assumption that the FTC is a uniquely important and valuable agency — one that can do enormous good for consumers, but also one whose uniquely broad scope and broad discretion require constant supervision and regular course corrections. Regular tweaks to the FTC’s processes should be expected and welcomed, not resisted.

The worst thing defenders of the FTC could do would be allowing the FTC to drift along towards the kind of confrontation with Congress that nearly destroyed the FTC in 1980.

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<sup>16</sup> Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014).



## The FTC's History: Past is Prologue

It is no exaggeration to say that the 1980 compromise over unfairness saved the FTC from going the way of the Civil Aeronautics Board, which Congress began phasing out in 1978 under the leadership of Alfred Kahn, President Carter's de-regulator-in-chief. President Carter signed the 1980 FTC Improvements Act even though he objected to some of its provisions because, as he noted, "the very existence of this agency is at stake."<sup>17</sup> Those reforms to the FTC's rulemaking process, enacted in May 1980, were only part of what saved the FTC from oblivion.

Driven largely by outrage over the FTC's attempt to regulate children's advertising, Congress had allowed the FTC's funding to lapse, briefly shuttering the FTC. As Howard Beales, then (in 2004) director of the FTC's Bureau of Consumer Protection, noted, "shutting down a single agency because of disputes over policy decisions is almost unprecedented."<sup>18</sup> In the mid-to-late 1970s, the FTC had interpreted "unfairness" expansively in an attempt to regulate everything from funeral home practices to labor practices and pollution. Beales and former FTC Chairman, Tim Muris, summarize the problem thusly:

Using its unfairness authority under Section 5, but unbounded by meaningful standards, in the 1970s the Commission embarked on a vast enterprise to transform entire industries. Over a 15-month period, the Commission issued a rule a month, usually without a clear theory of why there was a law violation, with only a tenuous connection between the perceived problem and the recommended remedy, and with, at best, a shaky empirical foundation.<sup>19</sup>

When the FTC attempted to ban the advertising of sugared cereals to children, the Washington Post dubbed the FTC the "National Nanny."<sup>20</sup> This led directly to the 1980 FTC Improvements Act — the one Sens. Goldwater and Schmitt endorsed in the quotation that opens this paper.

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<sup>17</sup> Jimmy Carter, *Federal Trade Commission Improvements Act of 1980 Statement on Signing H.R. 2313 into Law* (May 28, 1980), available at <http://www.presidency.ucsb.edu/ws/?pid=44790>.

<sup>18</sup> J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 8 n.32 (2004), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf).

<sup>19</sup> J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(B) of the FTC Act*, 79 ANTITRUST L. J. 1, 1 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2764456](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764456).

<sup>20</sup> Editorial, WASH. POST (Mar. 1, 1978), reprinted in MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION*, 69–70 (1982); see also Beales, *supra* at 8 n.37 ("Former FTC Chairman Pertschuk characterizes the Post editorial as a turning point in the Federal Trade Commission's fortunes.").

In early 1980, by a vote of 272-127, Congress curtailed the FTC's Section 5 rulemaking powers under the 1975 Magnuson-Moss Act, imposing additional evidentiary and procedural safeguards.<sup>21</sup> But the FTC refused to narrow its doctrinal interpretation of unfairness until Congress briefly shuttered the FTC in the first modern government shutdown. In December, 1980, the FTC issued its Unfairness Policy Statement, promising to weigh (a) substantial injury against (b) countervailing benefit and (c) to focus only on practices consumers could not reasonably avoid. Last year, the FTC finally adopted a Policy Statement on Unfair Methods of Competition that parallels the two UDAP statements.<sup>22</sup>

In 1994, in Section 5(n), Congress codified the core requirements of the UPS, and further narrowed the FTC's ability to rely on its assertions of what constituted public policy. This was the last time Congress substantially modified the FTC Act — meaning that the Commission has operated since then without course-correction from Congress.<sup>23</sup> This is itself troubling, given that independent agencies are supposed to operate as creatures of Congress, not regulatory knights errant. But it is even more problematic given the extent of the FTC's renewed efforts to escape the bounds of even its minimal discretionary constraints.

## The Inevitable Tendency Towards the Discretionary Model

To paraphrase Winston Churchill on democracy, the FTC offers the “worst form of consumer protection and competition regulation — except for all the others.” Democracy, without constant vigilance and reform, will inevitably morph into the unaccountable exercise of power — what the Founders meant by the word “corruption” (literally, “decayed”). When Benjamin Franklin was asked, upon exiting the Constitutional Convention of 1787, “Well, Doctor, what have we got — a Republic or a Monarchy?,” he famously remarked “A Republic, if you can keep it.”<sup>24</sup>

The same can be said for the FTC: an “evolutionary process... subject to judicial review,”<sup>25</sup> *if we can keep it*. Any agency given so broad a charge as to prohibit “unfair methods of com-

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<sup>21</sup> Federal Trade Commission Act Improvements Act of 1980, Pub. L. 96-252, 94 Stat. 374 (May 28, 1980), available at <http://uscode.house.gov/statutes/pl/96/252.pdf>.

<sup>22</sup> Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act* (Aug. 13, 2015) [“UMC Policy Statement”], available at [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf).

<sup>23</sup> The 1996 FTC reauthorization was purely *pro forma*.

<sup>24</sup> Benjamin Franklin, *quoted in* Respectfully Quoted: A Dictionary of Quotations, BARTLEBY.COM (last visited May 22, 2016), <http://www.bartleby.com/73/1593.html>

<sup>25</sup> UPS, *supra* note 10.

petition... and unfair or deceptive acts or practices..." will inevitably tend towards the exercise of maximum discretion.

This critique is of a dynamic inherent in the FTC itself, not of particular Chairmen, Commissioners, Bureau Directors or other staffers. The players change regularly, each leaving their mark on the agency, but the agency has institutional tendencies of its own, inherent in the nature of the agency.

The Commission itself most clearly identified the core of the FTC's institutional nature in the Unfairness Policy Statement, in a passage so critical it bears quoting in full:

The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time. As the Supreme Court observed as early as 1931, the ban on unfairness "belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"<sup>26</sup>

In other words, Congress delegated vast discretion to the Commission from the very start because of the difficulties inherent in prescriptive regulation of competition and consumer protection. The Commission generally exercised that discretion primarily through case-by-case adjudication, but began issuing rules on its own authority in 1964,<sup>27</sup> setting it on the road that culminated in the cataclysm of 1980.

Indeed, given the essential nature of bureaucracies, it was probably only a matter of time before the FTC reached this point. It is no accident that it took just three years from 1975, when Congress affirmed the FTC's claims to "organic" rulemaking power (implicit in Section 5), until the FTC was being ridiculed as the "National Nanny." In short, the 1975 Magnuson-Moss Act created a monster, magnifying the effects of the FTC's inherent Section 5 discretion with the ability to conduct statutorily sanctioned rulemakings. If it had not been then-Chairman Michael Pertschuk who pushed the FTC too far, it probably would have, eventually, been some other chairman. The power was simply too great for any gov-

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<sup>26</sup> UPS, *supra* note 10.

<sup>27</sup> Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

ernment agency to resist using without some feedback mechanism in the system telling it to stop.

In that sense, we believe the rise of the Internet played a role analogous to the 1975 Magnuson-Moss Act, spurring the FTC to greater activity where it had previously been more restrained.<sup>28</sup>

After 1980, the FTC ceased conducting new Section 5 rulemakings. Between 1980 and 2000, the FTC brought just sixteen unfairness cases, all of which fell into narrow categories of clearly “bad” conduct: “(1) theft and the facilitation thereof (clearly the leading category); (2) breaking or causing the breaking of other laws; (3) using insufficient care; (4) interfering with the exercise of consumer rights; and (5) advertising that promotes unsafe practices.”<sup>29</sup> Just how easy these cases were conveys in turn just how *cautious* the Commission was in using its unfairness powers — not only because it was chastened by the experience of 1980 but also because of Congress’s reaffirmation of the limits on unfairness in its 1994 codification of Section 5(n). In a 2000 speech, Commissioner Leary summarized the Commission’s restrained, “gap-filling” approach to unfairness enforcement over the preceding two decades:

The overall impression left by this body of law is hardly that policy has been created from whole cloth. Rather, the Commission has sought through its unfairness authority to challenge commercial conduct that under any definition would be considered wrong but which escaped or evaded prosecution by other means.<sup>30</sup>

Yet even then Commissioner Leary noted his concerns about the burgeoning unfairness enforcement innovation in two of the Commission’s then-recent cases: *Touch Tone* (1999)<sup>31</sup> and *ReverseAuction* (2000). Tellingly, his concern was over the Commission’s failure to properly assess the substantiality of the amorphous privacy injuries alleged in those cases. Still, he concluded on a note of optimism:

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<sup>28</sup> Of course, we also recognize that other societal forces were at work, such as the Naderite consumer protection movement of the 1970s, and the growing privacy protection movement of the 1990s and 2000s. But the analogy still offers some value.

<sup>29</sup> Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1962 (2000).

<sup>30</sup> Thomas B. Leary, Former Commissioner of the Fed. Trade Comm’n, *Unfairness and the Internet*, II (Apr. 13, 2000), available at <http://www.ftc.gov/public-statements/2000/04/unfairness-and-internet>.

<sup>31</sup> *Id.* at II-C (“The unfairness count in *Touch Tone* also raised interesting questions about whether an invasion of privacy by itself meets the statutory requirement that unfairness cause “substantial injury.” Unlike most unfairness prosecutions, there was no concrete monetary harm or obvious and immediate safety or health risks. The defendants’ revenue came, not from defrauding consumers, but from the purchasers of the information who received exactly what they had requested.”).

The extent of the disagreement should not be exaggerated, however. The majority [in *Reverse Auction*] did not suggest that all privacy infractions are sufficiently serious to be unfair and the minority did not suggest that none of them are. The boundaries of unfairness, as applied to Internet privacy violations, remain an open question.

The Commission has so far used its unfairness authority in relatively few cases that involve the Internet. These cases, however, suggest that future application of unfairness will be entirely consistent with recent history. Internet technology is new, but we have addressed new technology before. I believe that the Commission will do what it can to prevent the Internet from becoming a lawless frontier, but it will also continue to avoid excesses of paternalism.

The lessons of the past continue to be relevant because the basic patterns of dishonest behavior continue to be the same. Human beings evolve much more slowly than their artifacts.<sup>32</sup>

The Commission began bringing cases in 2000 alleging that companies employed unreasonable data security practices. While these early cases alleged that the practices were “unfair *and* deceptive,” they were, in fact, pure deception cases.<sup>33</sup> In 2005, the FTC filed its first pure unfairness data security action, against BJ’s Warehouse. Unlike past defendants, BJ’s had, apparently, made no promise regarding data security upon which the FTC could have hung a deception action.<sup>34</sup> Since 2009, we believe the Commission has become considerably more aggressive in its prosecution of unfairness cases, not just about data security, but about privacy and other high tech issues like product design.

Yet it would be hard to pinpoint a single moment when the FTC’s approach changed, or to draw a clear line between Republican data security cases and Democratic ones. And this is precisely a function of the first of the two crucial attributes of the modern FTC with which we are concerned: Legal doctrine continues to evolve even in the absence of judicial decisions, its evolution just becomes less transparent and more amorphous. As Commissioner Leary remarked in a footnote that now seems prescient:

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<sup>32</sup> *Id.*, at III-IV.

<sup>33</sup> See, e.g., *FTC v. Rennert*, Complaint, FTC File No. 992 3245, <http://www.ftc.gov/os/2000/07/iogcomp.htm> (2000); *In re Eli Lilly*, Complaint, File No. 012 3214, <http://www.ftc.gov/os/2002/05/elililycmp.htm> (2002).

<sup>34</sup> Complaint, *In the Matter of BJ’s Wholesale Club, Inc.*, a corporation, Fed. Trade Comm’n Docket No. C-4148, available at <http://www.ftc.gov/enforcement/cases-proceedings/042-3160/bjs-wholesale-club-inc-matter>.

Because this case was settled, I cannot be sure that the other Commissioners agreed with this rationale.<sup>35</sup>

Indeed, this is the crucial difference between the FTC's pseudo common law and *real* common law. There is an observable directedness to the evolution of the real common law, which rests on a sort of ongoing conversation among the courts and the economic actors that appear before them. The FTC's ersatz common law, however, has little of this directedness or openness, and the conversations that do occur are more like whispered tête-à-têtes in the corner that someone else occasionally overhears.

But the second point is actually the more important, although the two are related: In this institutional structure, how often individual Commissioners dissent and how much rigor they demand matters far, far less than the structure of the agency itself. There is only so much an individual can do to divert the path of an already-steaming ship.

This leads back to the point made above: that we should expect regulatory agencies, over time, to expand their discretion as much as the constraints upon the agency allow. In this, regulatory agencies resemble gases, which, when unconstrained, do not occupy a fixed volume (defined by a clear statutory scheme, as in the Rulemaking Model) but rather expand to fill whatever space they occupy. What ultimately determines the size, volume and shape of a gas is its container. So, too, with regulatory agencies: what ultimately determines an agency's scale, scope, and agenda are the external constraints that operate upon it.

The FTC has evolved the way it has because, most fundamentally, Section 5 offers little in the way of prescriptive, statutory constraints, and because the FTC's processes have enabled it to operate case-by-case with relatively little meaningful, ongoing oversight from the courts.

We distinguish this from two other models of regulation: (1) the **Rulemaking Model**, in which the agency's discretion is constrained chiefly by the language of its organic statute, procedural rulemaking requirements and the courts; and (2) the **Evolutionary Model**, in which the agency applies a vague standard case by case, but is constrained in doing so by its ongoing interaction with the courts.<sup>36</sup> By contrast, we call the FTC's current approach the

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<sup>35</sup> Leary, *Unfairness and the Internet*, *supra* note 30, n.50.

<sup>36</sup> We derive the term "evolutionary" from the Unfairness Policy Statement itself, *supra* note 10:

*The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore*

(cont.)

**Discretionary Model**, in which the agency also applies a vague standard case-by-case, but in which it operates without meaningful judicial oversight, such that doctrine evolves at the Commission’s discretion and with little of the transparency provided by published judicial opinions. (Dialogue between majority and minority Commissioners seldom approaches the analysis of judicial opinions.)

We believe there is an inherent tendency of agencies that begin with an Evolutionary Model — which is very much the design of the FTC — to slide towards the Discretionary Model, simply because all agencies tend to maximize their own discretion, and because the freedom afforded by the relative lack of statutory constraints on substance or the agency’s case-by-case process enables these agencies to further evade judicial constraints. The only way to check this process, without, of course, simply circumscribing its discretion by substantive statute (i.e., amending section 5(a)(2)), is regular assessment and course-correction by Congress — not with the aim of its own micromanagement of the agency, but rather with the aim of invigorating the ability of the courts to exert their essential role in steering doctrine.

This is not to be taken as an admission of defeat or a condemnation of the Commission. There is no reason to think that the FTC was in every way ideally constituted from the start (or in 1980 or in 1994), that its model could perform exactly as intended and perfectly in the public interest no matter what changed around it. Rather, limited, thoughtful oversight by Congress is simply in the nature of the beast. As Justice Holmes said (of the importance of free speech):

That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.<sup>37</sup>

That, in a nutshell, is why regular reauthorization is critical for agencies like the FTC. As President Carter said, “[w]e need vigorous congressional oversight of regulatory agencies.” This is more true for the FTC — with its vast discretion, immense investigative power, and all-encompassing scope — than any other agency. As we wrote in the precursor to this report:

Thus, while the Congress of 1914 intended to create an agency better suited than itself to establish a flexible but predictable and consistent body of law governing

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assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time.

<sup>37</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

commercial conduct, the modern trend of administrative law has relaxed the requirement that an agency's output be predictable or consistent.

The FTC has embraced this flexibility as few other agencies have. Particularly in its efforts to keep pace with changing technology, the FTC has embraced its role as an administrative agency, and frequently sought to untether itself from ordinary principles of jurisprudence (let alone judicial review).<sup>38</sup>

## The Doctrinal Pyramid

One of the chief reasons the FTC has come to operate the way it does is that the vocabulary around its operations is deeply confused, particularly around the word "guidance" and the term "common law." In an (admittedly first-cut) effort to introduce some concreteness, we view the various levels of "guidance" as steps in a Doctrinal Pyramid that looks something like the following, from highest to lowest degrees of authority:

1. **The Statute:** Section 5 (and other, issue-specific statutes)
2. **Litigated Cases:** Only these are technically binding on courts, thus they rank near the top of the pyramid, even though they are synthesized in, or cited by, the guidance summarized below. There are precious few of these on Unfairness or the key emerging issues of Deception
3. **Litigated Preliminary Injunctions:** Less meaningful than full adjudications of Section 5, these are, unfortunately, largely the only judicial opinions on Section 5.
4. **High-Level Policy Statements:** Unfairness, Deception, Unfair Methods of Competition
5. **Lower-Level Policy Statements:** The now-rescinded Disgorgement Policy Statement, the (not-yet existent) Materiality Statement we propose, *etc.*
6. **Guidelines:** Akin to the several DOJ/FTC Antitrust Guidelines, synthesizing past approaches to enforcement into discernible principles to guide future enforcement and compliance
7. **Consent Decrees:** Not binding upon the Commission and hinging (indirectly) upon the very low bar of whether the Commission has "reason to believe" a violation occurred, these provide little guidance as to how the FTC really understands Section 5
8. **Closing Letters:** Issued by the staff, these letters at times provide some limited guidance as to what the staff believe is *not* illegal
9. **Reports & Recommendations:** In their current form, the FTC's reports do little more than offer the majority's views of what companies should do to comply with Section 5, but carefully avoid any real legal analysis

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<sup>38</sup> Consumer Protection & Competition Regulation in a High-Tech World, *supra*, note 5.



10. **Industry Guides:** Issue-specific discussions issued by staff (*e.g.*, photo copier data security)
11. **Public Pronouncements:** Blog posts, press releases, congressional testimony, FAQs, etc.

In essence, under today's Discretionary Model, the FTC puts great weight on the base of the pyramid, while doing little to develop the top. Under the Evolutionary Model, the full Commission would develop doctrine primarily through litigation, and do everything it possibly could to provide guidance at higher levels of the pyramid, such as by debating, refining and voting upon new Policy Statements on each of the component elements of Unfairness and Deception and Guidelines akin to the Horizontal Merger Guidelines. Instead, the FTC staff issues Guides and other forms of casual guidance. Yet not all "guidance" is of equal value. Indeed, much of the "guidance" issued by the FTC serves not to constrain its discretion, but rather to expand it by increasing the agency's ability to coerce private parties into settlements — which begins the cycle anew.

## Our Proposed Reforms

Seventeen bills have been introduced in the House Energy & Commerce Committee's Subcommittee on Commerce, Manufacturing and Trade aimed at reforming the agency for the modern, technological age and improving FTC process and subject-matter scope in order to better protect consumers. Most of these will, we hope, be consolidated into a single FTC Reauthorization Act of 2016, passed in both chambers, and signed by the President.

With the hope of aiding this process, we describe and assess nine of these proposed bills, focusing in particular on whether and how well each proposal addresses the fundamental issues that define the problems of today's FTC.

Despite our concerns, we remain broadly supportive of the FTC's mission and we generally support expanding the agency's jurisdiction, to the extent that doing so effectively addresses substantial, identifiable consumer harms or reduces the scope of authority for sector-specific agencies. Although the process reforms proposed in these bills are, we believe, relatively minor, targeted adjustments, taken together they would do much to make the FTC more effective in its core mission of maximizing consumer welfare. But these proposed reforms are only a beginning.

Even if all of these reforms were enacted immediately, they would not fundamentally, or even substantially, change the core functioning of the FTC — and the core problem at the FTC today: its largely unconstrained discretion.

The FTC loudly proclaims the advantages of its *ex post* approach of relying on case-by-case enforcement of UDAP and UMC standards rather than rigid *ex ante* rulemaking, especially over cutting-edge issues of consumer protection. And there is much to commend this sort of approach relative to the prescriptive regulatory paradigm that characterizes many other

agencies — again, the Evolutionary Model. But under the FTC’s *Discretionary Model*, the Commission uses its “common law of consent decrees” (more than a hundred high-tech cases settled without adjudication, and with essentially zero litigated cases to guide these settlements) and a mix of other forms of soft law (increasingly prescriptive reports based on workshops tailored to produce predetermined outcomes, and various other public pronouncements), to “regulate” — or, more accurately, to try to steer — the evolution of technology.

The required balancing of tradeoffs inherent in unfairness and deception have little meaning if the courts do not review, follow or enforce them; if the Bureau of Economics has little role in the evaluation of these inherently economic considerations embodied in the enforcement decision-making of the Bureau of Consumer Protection or in its workshops; and if other Commissioners are able only to quibble on the margins about the decisions made by the FTC Chairman. Simply codifying these standards, as Congress codified the heart of the Unfairness Policy Statement in Section 45(n) back in 1994, and as the proposed CLEAR Act would finish doing, will not solve the problem: The FTC has routinely circumvented the rigorous analysis demanded by these standards, and the same processes would enable it to continue doing so.

To address these concerns, we also propose here a number of further process reforms that we believe would begin to correct these problems and ensure that the Commission’s process really does serve the consumers the agency was tasked with protecting.

Our aim is not to hamstring the Commission, but to ensure that it wields its mighty powers with greater analytical rigor — something that should inure significantly to the benefit of consumers. Ideally, the impetus for such rigor would be provided by the courts, through careful weighing of the FTC’s implementation of substantive standards in at least a small-but-significant percentage of cases. Those decisions would, in turn, shape the FTC’s exercise of its discretion in the vast majority of cases that will — and should, in such an environment — inevitably settle out of court. The Bureau of Economics and the other Commissioners would also have far larger roles in ensuring that the FTC takes its standards seriously. But reaching these outcomes requires adjustment to the Commission’s *processes*, not merely further codification of the standards the agency already purports to follow.

We believe that our reforms should attract wide bipartisan support, if properly understood, and that they would put the FTC on sound footing for its second century — one that will increasingly see the FTC assert itself as the Federal Technology Commission.

## Summary of Recommendations

### 1. FTC Act Statutory Standards

#### 1.1. Unfairness

##### 1.1.1. Require a Preponderance of the Evidence Standard for Unfairness

## Complaints

- 1.2. Deception & Materiality
  - 1.2.1. Codify the 1983 Deception Policy Statement
  - 1.2.2. Clarify that Legally Required Statements Cannot Be Presumptively Material
  - 1.2.3. Delegate Reconsideration of Other Materiality Presumptions
  - 1.2.4. Require A Preponderance of the Evidence in Deception Cases
- 1.3. Unfair Methods of Competition
  - 1.3.1. Codify the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under a New Section 5(p) of the FTC Act

## **2. Enforcement & Guidance**

- 2.1. Investigations and Reporting on Investigations
  - 2.1.1. Add Discovery Tools to the Required Reporting
  - 2.1.2. Require the Bureau of Economics to Be Involved
  - 2.1.3. Attempt to Make the FTC Take the Analysis Requirement Seriously
  - 2.1.4. Ensure that the Commission Organizes These Reports in a Useful Manner
  - 2.1.5. Require the FTC to Synthesize Closing Decisions and Enforcement Decisions into Doctrinal Guidelines
  - 2.1.6. Ensure that Defendants Can Quash Subpoenas Confidentially
- 2.2. Economic Analysis of Investigations, Complaints, and Consent Decrees
  - 2.2.1. Hire More Economists
  - 2.2.2. Require BE to Comment Separately on Complaints and Consent Orders
  - 2.2.3. Require BE to Comment on Upgrading Investigations
- 2.3. Economic Analysis in Reports & “Recommendations”
  - 2.3.1. Require Analysis of Recommended Industry Best Practices
  - 2.3.2. Clarify the Bill’s Language to Ensure It Applies to All FTC Reports
  - 2.3.3. Require a Supermajority of Commissioners to Decide What Analysis is “Sufficient”
  - 2.3.4. Codify Congress’s Commitment to Competition Advocacy
- 2.4. Other Sources of Enforcement Authority (Guidelines, etc.)
  - 2.4.1. Clarify that Consent Decrees, Reports, and FTC Best Practices are not Binding
  - 2.4.2. Specify When a Defendant May Raise Evidence of Its Compliance with FTC Guidance
  - 2.4.3. Encourage the FTC to Issue More Policy Statements & Guides

## **3. Remedies**

- 3.1. Appropriate Tailoring of Remedies
  - 3.1.1. Limit Injunctions to the “Proper Cases” Intended by Congress

- 3.1.2. Narrow Overly Broad “Fencing-in” Remedies
    - 3.1.3. Revive the 2003 Disgorgement Policy
  - 3.2. Consent Decree Duration & Scope
    - 3.2.1. Allow Petitions for Appeal of Mooted Consent Decrees
- 4. Other Process Issues**
  - 4.1. Open Investigations
    - 4.1.1. Bar Secret Votes as a Means of Evading the Bill
  - 4.2. Commissioner Meetings
    - 4.2.1. Ensure that Two of Three Commissioners Can Meet
  - 4.3. Part III Litigation
    - 4.3.1. Separate the FTC’s Enforcement & Adjudicatory Functions
    - 4.3.2. Abolish or Limit Part III to Settlements
    - 4.3.3. Allow Commissioners to Limit the Use Part III
  - 4.4. Standard for Settling Cases
    - 4.4.1. Set a Standard for Settling Cases Higher than for Bringing Complaints
- 5. Competition Advocacy**
  - 5.1. Expanding Competition Advocacy
    - 5.1.1. Clarify Section 6(f) & the FTC May File Unsolicited Comments
    - 5.1.2. Create an Office of Bureau of Competition Advocacy with Dedicated Funding
    - 5.1.3. In the Alternative, Reconstitute the Task Force
- 6. Expanding FTC Jurisdiction**
  - 6.1. FTC Jurisdiction over Common Carriers
    - 6.1.1. Pass the Protecting Consumers in Commerce Act to End the Exemption for Telecom Common Carriers
    - 6.1.2. Require the FCC to Terminate Its Privacy Rulemaking
  - 6.2. FTC Jurisdiction over Tax-Exempt Organizations & Nonprofits
    - 6.2.1. Extend Jurisdiction to Tax-Exempt Entities, Including Trade Associations
    - 6.2.2. Extend Jurisdiction to All Non-Profits
- 7. Rulemaking**
  - 7.1. Economic Analysis in All FTC Rulemakings
    - 7.1.1. Require BE to Comment on Rulemakings
  - 7.2. Issue-Specific Rulemakings
    - 7.2.1. Require the FTC to Conduct Section 5 Rulemakings & Report on the Process
    - 7.2.2. Include Periodic Re-Assessment Requirements in Any New Grants

## Conclusion

The letter by which the FTC submitted the Unfairness Policy Statement to the Chairman and Ranking Member of the Senate Commerce Committee in December 1980 concludes as follows:

We hope this letter has given you the information that you require. Please do not hesitate to call if we can be of any further assistance. With best regards,

/s/Michael Pertschuk, Chairman<sup>39</sup>

We believe it's high time Congress picked up the phone.

To be effective, any effort to reform the FTC would require a constructive dialogue with the Commission — not just those currently sitting on the Commission, but past Commissioners and the agency's staff, including veterans of the agency. Along with the community of practitioners who navigate the agency on behalf of companies and civil society alike, all of these will have something to add. We do not presume to fully understand the inner workings of the Commission as only veterans of the agency can. Nor do we presume that the ideas presented here are necessarily the best or only ones to accomplish the task at hand. But reform cannot be effective if it begins from the presumption that today's is the "best of all possible FTCs," or that any significant reform to the agency would cripple it.

Unfortunately, many of those who would tend to know the most about the inner workings of the agency are also the most blinded by status quo bias, the tendency not just to take for granted that the FTC works, and has always worked, well, but to dismiss proposals for change as an attacks upon the agency. It would be ironic, indeed, if an agency that wields its own discretion so freely in the name of flexibility and adaptation were itself unwilling to adapt.

We believe that reforms to push the FTC back towards the Evolutionary Model can be part of a bipartisan overhaul and reauthorization of the agency, just as they were in 1980 and 1994. At stake is much more than how the FTC operates; it is nothing less than the authority of Congress as the body of our democratically elected representatives to steer the FTC.

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<sup>39</sup> Fed. Trade Comm'n, FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

Congress should not, as Justice Scalia warned in 2014 in *UARG v. EPA*, willingly “stand on the dock and wave goodbye as [the FTC] embarks on this multiyear voyage of discovery.”<sup>40</sup>

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<sup>40</sup> Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014).