# FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY

CHRIS JAY HOOFNAGLE

CAMBRIDGE

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The Federal Trade Commission, a US agency created in 1914 to police the problem of "bigness," has evolved into the most important regulator of information privacy – and thus innovation policy – in the world. Its policies profoundly affect business practices and serve to regulate most of the consumer economy. In short, it now regulates our technological future. Despite its stature, however, the Agency is often poorly understood by observers and even those who practice before it. This volume by Chris Jay Hoofnagle – an internationally recognized scholar with more than fifteen years of experience interacting with the FTC – is designed to redress this confusion by explaining how the FTC arrived at its current position of power. It will be essential reading for lawyers, legal academics, political scientists, historians, and anyone who is interested in understanding the FTC's privacy activities and how they fit in the context of the Agency's broader consumer protection mission.

Chris Jay Hoofnagle is adjunct full professor at the University of California, Berkeley, School of Information, and faculty director of the Berkeley Center for Law & Technology at the School of Law. He teaches about the regulation of technology, focusing on computer crime law, cybersecurity, internet law, privacy law, and consumer protection law. Licensed to practice in California and Washington, DC, Hoofnagle is of counsel to Gunderson Dettmer LLP, a firm focused solely on advising global venture capital and emerging technology companies. He is an elected member of the American Law Institute.

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CHRIS JAY HOOFNAGLE
University of California, Berkeley

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*For my parents*

The spectacle presents itself as a vast inaccessible reality that can never be questioned. Its sole message is: "What appears is good; what is good appears."

*Guy Debord*

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# Introduction

At the Pennsylvania Avenue entrance to the Federal Trade Commission (FTC) headquarters in Washington, DC, one encounters a statue of a powerful man wrestling an enormous, elegant horse. The beast has a sinister look. Its ears turned back, it is about to bite the man. The man's exaggerated brawn is not enough to bridle the menace, as the horse's positioning is dominant. While titled Man Controlling Trade, the work suggests that trade is an irrational evil that will escape man's control.

Just around the corner, on Constitution Avenue, stands an accompanying work. But in this work, the man appears sinister, a vengeful punisher of the horse. He has a powerful hold upon a more sympathetic animal. The man has bridled the horse.

In crafting these two works, Michael Lantz (1908–1988) captured the ambivalence many have about the regulation of trade. Businesses are a driver of wonderful innovations and conveniences, and an engine of American power. But at the same time, without some control, business can run wild, serving only itself.

The statuaries also serve as a metaphor for supporters and critics of the FTC, now a 100-year-old institution. Some see it as a misguided, even harmful, burden to business, while others view any discipline it can muster against business as a good.

This book will explain these tensions through the lens of the FTC as a primary regulator of information privacy. Its activities, often in the form of public settlement agreements with companies, form the most important regulation of information privacy in the United States. Given the political economy of online regulation, Congress is unlikely to take action on online privacy. For the immediate future, the FTC will be the most important institution shaping the course of the information economy.

## THE FTC AND PRIVACY

The FTC (also "Agency" or "Commission") has a colorful 100-year-long history. It is a complex agency. Practice before the Agency has suffered because of a lack of familiarity with its broad powers and with its diverse responsibilities in commerce.

For instance, the FTC is responsible for over seventy laws, concerning fraud in college scholarships, false labeling of "dolphin-free" tuna, health warnings on cigarettes, the labeling of furs and wool products, and even the sanctioning of boxing matches. Thus, privacy is just a small part of the Agency's efforts, but other areas of concentration inform how the FTC handles privacy matters. For the purposes of this book, privacy is defined broadly as the FTC's consumer protection activities relating to regulation of data about people. Thus, for this work, privacy includes both informational interests (how data are collected, used, and secured) and access to self-interests (how businesses contact or gain the attention of consumers).

Businesses and governments can use information to increase efficiencies, build new products and services, and enhance security. But privacy advocates have valid concerns about these practices, as privacy rights are about allocations of power, and these allocations are often "zero sum." A business or government right to use data about someone can come at a personal or societal cost. Often, uses of information for security simply shift risk, sometimes making the risk systemic (consider business adoption of the Social Security number to decrease business and credit risk and the concomitant rise of identity theft) rather than reducing it. The FTC's task is to chart a path acknowledging these competing values and risks. The need for an expert agency to elucidate these values and risks is more important today than ever. The FTC approach assumes that once options are elucidated, competition will help consumers come to a privacy outcome that is consistent with their preferences.

The FTC was founded during a time of widespread public concern about monopoly and trusts. The nation was primarily agrarian, and most people probably felt the

FIGURE I.1. Michael Lantz's *Man Controlling Trade*: the Pennsylvania Avenue version. Photo credit: Rachel Lincoln.

FIGURE I.2. Michael Lantz's *Man Controlling Trade*: the Constitution Avenue version. Photo credit: Rachel Lincoln.

effects of industrialization without understanding them. New businesses and opportunities arose much too quickly for existing law to police abuses or to serve as a check on massive concentration of industries.

A hundred years later, our society is facing serious economic change and uncertainty as a result of the information industry. Today the FTC is as relevant as it was in 1915 as an arbiter of fairness and a check on "bigness" and efficiency. For this reason, more academics have started writing about the FTC. In particular, Professors Daniel J. Solove and Woodrow Hartzog have written an important article explaining the FTC as creating a law of privacy through a common law approach.[1] This book agrees with and builds on the Solove and Hartzog observations through an extensive history of the FTC, an analysis of it as an agency, and a survey of all of its privacy activities.

This book argues that the FTC is among the best alternatives for regulation of privacy. It has matured into a careful, bipartisan, strategic, and incrementalist policy actor. It has shaped the marketing of internet services by establishing early in its enforcement actions that companies needed a justification to claim that their services were more private or secure. It also brought cases to establish the proposition that clear disclosures and affirmative consent are necessary when technologies monitored people in an invasive way or inside the home. The FTC is well informed by economics, while not allowing economic theory to supplant the reality of consumer experiences. Despite its moderate approach, the FTC is pilloried by

[1] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 144 COLUM. L. REV. 583 (2014).

organized business interests. This book gives context to the FTC's actions and explains the flaws of attacks on the FTC. Now more than ever, the FTC needs a defense, because attacks on it are calculated to blunt the inventiveness and efficacy of consumer protection law.

## THE FTC AS AN AGENCY

This book explores several threads about the FTC itself as an administrative agency. First, the FTC was a radical innovation; it was unlike anything else when it was created. As Professor Gerald Berk argues, the Agency was a product of "creative syncretism." Berk explains: "those who built regulated competition were successful precisely because they reached across historical, institutional, and cultural boundaries to find resources, which they creatively recombined in experiments in business regulation, public administration, accounting and trade associations."[2] The result was an entity with many different tools that could be emphasized, deemphasized, or arranged differently to address new problems in the economy. Indeed, in the privacy field, the FTC's many tools and jurisdictional breadth are used to fashion different approaches and different compromises to privacy problems.

Second, the Commission has extraordinary powers. For a small agency, it has a tremendous effect on business. The FTC's powers, its structure, and the Agency's broad range of activities throughout its history are little understood. This book elucidates the FTC's privacy activities by situating it in its broader context and in the context of the history of consumer protection. It will broaden the understanding of privacy scholars and lawyers unfamiliar with the Agency's role in other areas of consumer protection.

Third, much FTC scholarship attempts to hang a public choice garb on the Agency. But the FTC is a public choice anomaly. Congress granted it a broad but vague mandate and then empowered it greatly over the last century. Yet, throughout its history, it has taken up the challenge of regulating new problems, such as cigarettes, "green" marketing, and, today, information privacy. It is an innovative agency that has avoided reification. The FTC has not fallen victim to capture, and, in fact, it seems to deliberately target the biggest actors in relevant markets. The FTC has also been much less swayed by partisan changes than its sister agencies. While it is true that its privacy activities changed focus under Republican Party leadership, the FTC is not a tool to discipline party loyalty among industries, nor do its privacy activities cease under Republican leadership. In recent years, competition for jobs at the Agency has been fierce, with partner-level lawyers applying for work. The Agency's leaders – both staff and commissioners – often act selflessly, for far less money than can be earned in the private sector. They also take on matters that cause enmity in industry and foreclose future opportunities for private-sector work. Public

[2] GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009).

choice theory narratives of self-interest do not fit the Agency well, but we shall see that they fit better when public choice scholars run the Agency.

Fourth, Congress did not place traditional common law elements in the Federal Trade Commission Act. Yet, the specter of the common law still haunts the Agency. Today, commission critics emphasize the need for the FTC to prove that a practice "harmed" consumers, but this requirement does not exist anywhere in Title 15. More broadly, this book makes it clear that effective policing of information wrongs requires deviation from nineteenth-century limits on cases. It may even be the case that modern information problems cannot even be policed by an enforcement agency, and that, instead, supervisory oversight is needed.

## OUTLINE OF THIS BOOK

Part I of this book explores the history, procedure, and basic powers of the FTC. Chapter 1 recounts the history of the FTC's founding and its consumer protection mission. The FTC was a product of intensely felt anxiety concerning changes in the economy, and its first mandate was to prevent "unfair competition." The FTC faced major challenges in its early years: World War I, courts that tried to cabin the Commission's powers of policing common law wrongs, and mediocre leaders who made it difficult for the Agency to be effective. Still, the Agency strived to be innovative and relevant. For instance, the Agency's first matters involved technology and false advertising as a form of unfair competition.

With a historical lens in place, Chapters 2 and 3 present modern controversies surrounding the FTC's role. Chapter 2 guides the reader through several tests of the Commission – from industry attempts to clip the wings of the Agency to highlights of its interventions. This history helps situate the modern FTC and gives context for how and why the Agency acts. It also shows that the FTC transcended many of its early challenges, finding acceptance by the courts, empowerment by Congress, and support from both Republican and Democratic executives. Chapter 3 recounts the FTC's turn to electronic commerce and privacy. The FTC brought its first internet case in 1994, long before most Americans were online. It began privacy saber rattling in 1995, and shortly thereafter, it brought matters involving children's privacy.

Chapters 4 and 5 are primarily descriptive, focusing the broad-ranging powers and jurisdiction of the Commission. Chapter 4 explains that the FTC can investigate and sue almost any entity. Its investigatory powers are important to understand, as the Agency tends to probe dozens of industry players before choosing investigation and enforcement actions that will promote its policy goals. Its organizational structure shields the Agency from the winds of political change and, as a practical matter, gives staff attorneys great autonomy and discretion in matter selection.

Chapter 5 focuses on the FTC's unfair and deceptive trade practices authority, known as "Section 5." The FTC's authorities are broad and largely undefined. Thus, this portion of the book discusses how political efforts to define or rein in Section 5

have generally been resisted, as the Agency has needed great flexibility to deal with new forms of noxious business practices. It also shows that much of Section 5's precedent is driven by advertising cases, which have dynamics that may not be appropriate for regulation of privacy.

Part II (Chapters 6–11) of this book dives deeply into the FTC's authorities in the context of specific privacy issues: online privacy, children's privacy, information security, anti-marketing and malware, financial privacy, and international privacy efforts. Each of these chapters presents a description of the doctrine of FTC law, but then continues to discuss and critique these doctrines normatively.

The discussion of online privacy in Chapter 6 traces how third-party information sharing and concerns about online advertising have shaped much of the privacy debate. This has skewed our understanding of privacy problems, with the public at times focusing on relatively innocuous uses of data and away from more fundamental issues such as the power of dominant social networking and search platforms, and the problem of automated decision systems that are fed by surveillance networks deployed for advertising purposes.

Chapter 7 discusses the FTC's efforts to protect children online. Because there is a broad social agreement that protecting children is important, the FTC's efforts in children's privacy are particularly strong. At the same time, Congress' emphasis on parental consent to collecting personal information about children is a burdensome requirement that drives services to avoid embracing child-oriented status and the resulting obligations. Perhaps counterintuitively, children's privacy would be better protected with weaker statutory protections for it.

Chapter 8 canvasses the FTC's many information security matters. Here again, a broad social agreement about the importance of security has given the FTC political support for bringing enterprising cases against insecurity. Security is a public good and a victim of a tragedy of the commons. Viewed in that light, the Agency's attention should be focused on structural problems that lead to identity theft and other products of insecurity.

Chapter 9 presents the "anti-marketing" laws. These are statutes and regulations that specify how technologies can be used to contact the consumer. They do little to establish information privacy rights. Yet, they demonstrate how technologically specific regulations paired with enforcement can shape consumers' privacy expectations and reduce interruptions in their lives. Anti-marketing laws complicate the narrative that regulation should be "technology-neutral" and, at the same time, they sometimes mask problematic information uses, so long as those uses do not involve contacting the consumer.

Chapter 10 turns to financial privacy, an area where the FTC now shares jurisdiction and responsibilities with the Consumer Financial Protection Bureau. Perhaps half of all Americans do not qualify for the best credit terms, meaning that many have to use financial services offered by those operating at the margins of legitimacy. The FTC's role is thus critical, as it has jurisdiction over the

most fly-by-night actors in the field. More generally, the Agency's activities in financial consumer protection are important because the relevant laws also protect interests in equity, inclusion, and fairness. Approaches learned from financial privacy matters may be helpful in resolving tensions arising from "big data" and algorithmic decision-making systems.

Chapter 11 provides an overview of how the FTC addresses international consumer protection problems. With the advent of spam and internet telephony, fraudsters can target Americans from afar. Congress granted the FTC strong new powers to address this problem in 2006. This chapter also summarizes European data protection law and explains how the FTC has acted as a champion of the American approach to privacy while, at the same time, moving the United States to a more European approach.

Finally, Part III (Chapter 12) assesses the FTC and suggests a path for it to intensify its pro-privacy posture. The FTC has impressive jurisdictional and enforcement powers, but its internal organization has blunted its privacy efforts. Specifically, the FTC must make its Bureau of Economics part of the pro-privacy team and update its methods for assessing consumer detriment and remedies for the internet age. The FTC must also stand up to its critics who try to impose nineteenth-century common law requirements on the Agency's cases. These critics are part of an ideological movement intent on disassembling the administrative state. While supported by the business community, these critics are more radical than their sponsors understand, and they are casting a pall on the FTC's activities.

As a society, we are always subject to changes that new technologies bring us. But today we stand at a precipice that is not well understood by the public or policymakers. Current debates about privacy almost always focus on whether there is "harm" from activities such as behavioral advertising (marketing that is targeted based on one's past behavior). This narrative does not capture the aspirations of technology entrepreneurs. At its core, Silicon Valley has dreams of perfect control and efficiency.

The mechanisms that are being trained on one's internet clicks and decisions in order to pitch advertising today could be used for very different purposes in the future. These include technologies designed to manipulate others, to selectively make disclosures to them, and to make decisions about consumers in ways they cannot comprehend or even perceive. Someday soon, the amount of time you wait on hold to speak with a customer service representative will be keyed to your overall value to the company, whether you are likely to cancel your account, and so on. The prices you see on the Web may be set by your propensity to comparison-shop, or by your perceived desperation to get a product. Because these decisions are part of a technological system, we may not recognize the values that these systems propagate. We may also fail to understand that as a society we can choose the values that these systems propagate.

Consumers will need more than just the common law to address these kinds of inequities, if indeed we are even able to understand the problem and its provenance. Consumers will need institutions too. This final part of the book suggests interventions that the FTC could take to protect the digital citizen.

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The author also owes thanks to the University of California. Fiat Lux!

The photographs of the Federal Trade Commission building and of the *Man Controlling Trade* statuary are by Rachel Dawn Lincoln, http://lincoln.photography/.

It is difficult to create a visual metaphor for privacy, yet, the cover image, known as "12 Men in a Row Looking into Binoculars," features many elements of modern privacy problems. The modern internet is similar to a one-way mirror. The user,

often in physical seclusion, is being silently watched by many different kinds of people – small and large businesses, governments, law enforcement, and perhaps even some scam artists. It is practically impossible to understand exactly why they are watching. Perhaps most of us know that we are being watched, but few can block their gaze.

PART I

# The history, powers, and procedure of the Federal Trade Commission

# 1

# History of the Federal Trade Commission

## INTRODUCTION

How did a small, independent antitrust agency come to be among the most important forces in consumer protection and privacy law? This chapter explains the founding of the Federal Trade Commission (FTC, "Agency," or "Commission"), how it quickly pivoted to handle false advertising issues, and how its role and powers grew even while it was subject to periodic, withering criticism. Several themes emerge: First, the FTC has cycles where it is criticized for inactivity, but when it takes an activist posture, Congress sometimes punishes it. Second, until recently, the FTC has been plagued by mediocre appointments. Its reputation has improved greatly as a result of better appointments. Third, compromises in the passage of the FTC's organic act (the Federal Trade Commission Act, or "FTC Act") caused broad disagreements about the purpose of the Agency. Today, we see this as conflicts between those who want the FTC to help businesses comply with laws versus those who want it to strongly enforce laws. Fourth, the FTC was a revolutionary concept at its time, breaking away from the strictures imposed by the common law. Modern agency critics have never quite accepted the rationale for departing from the common law and seek to reimpose common law elements to cabin the Commission's activities. Finally, the FTC's genesis in antitrust and false advertising matters profoundly shapes how it handles all consumer protection issues, including privacy. Familiarity with FTC precedents in policing false advertising provides context for how the Agency addresses privacy.

The FTC was created in 1914 to address the problem of monopoly and of trusts – large, powerful business conglomerates. These organizations posed economic and social problems that became a major social concern.[1] The FTC did not formally have a consumer protection mission until the passage of the Wheeler–Lea Amendments in 1938. However, the FTC's first reported matters concerned false

[1] For an early-twentieth-century summary of the trust problem, *see* JEREMIAH WHIPPLE JENKS, JR., THE TRUST PROBLEM (1903).

advertising.[2] The FTC's early foray into advertising regulation came at the request of the advertising industry itself.[3] These were matters where a deception, sometimes made directly to a consumer, harmed competition.

The 1938 amendments dramatically increased the power and jurisdiction of the FTC, as did the rise of the administrative state, subsequent amendments to the FTC Act, and judicial deference to the Agency.

The Agency's roots in the trust problem and the characteristics of the powers it needed to address it shed light upon the FTC's modern consumer protection mission. Similarly, the special dynamics of advertising regulation embedded in the FTC Act help inform its current efforts to police privacy.

## THE PROBLEMS OF MONOPOLY AND TRUST

Business became "big" after the Civil War. A wave of consolidation and growth among companies triggered a public debate concerning "bigness." Through gentlemen's agreements, issuance of stock, and pooling arrangements, companies could fix prices and outputs, effectively stopping competition and raising prices for the consumer.[4] Concerns were so intense that the period saw a break with dominant ideologies. The nineteenth century was the last period of a laissez-faire business environment. But the perceived unfairness and fears raised by consolidation caused even price controls to be considered as a remedy for heavily concentrated industries. The Progressive Era reflected an unparalleled antibusiness sentiment,[5] and perhaps never in history has it been as intense as at the turn of the century.

This antibusiness sentiment was driven by a substantial number of mergers that gave control over key industries to small groups of businesses. Where companies did not merge, other arrangements could have the same effect of combination.[6] Conglomerates controlled most or almost all of the relevant industries that produced

[2] *See FTC* v. *Yagle et al.*, 1 F.T.C. 13 (1916); *FTC* v. *Muenzen*, 1 F.T.C. 30 (1917). "In 1925, for example, the percentage of cases directed primarily to the protection of customers against deceptive trade practices constituted 70 percent of the whole number of complaints issued, as against the average of 59 percent for the preceding decade." Myron W. Watkins, *The Federal Trade Commission: A Critical Survey*, 40(4) Q. J. Econ. 561 (1926). The emphasis on false advertising only increased, according to Watkins. By 1932, 91 percent of cases concerned false advertising. Myron W. Watkins, *An Appraisal of the Work of the Federal Trade Commission*, 32(2) Columbia L. Rev. 272 (1932).

[3] Commission minutes show an informal conference between all five commissioners and representatives of four advertising self-regulatory groups in November 1915. This attention to deceptive advertising came in part from requests from advertiser self-regulatory groups such as the Associated Advertising Clubs of the World and the Vigilance Committee, which urged the Agency to consider false advertising as a form of unfair competition. Jack Crespin, A History of the Development of the Consumer Protection Activities of the Federal Trade Commission 112 (1975)(Ph.D. dissertation, New York University). *See also* Daniel Pope, *Advertising as a Consumer Issue: An Historical View*, 47(1) J. Soc. Issues 41 (1991).

[4] Francis W. Hirst, Monopolies, Trusts and Kartells (1905).

[5] Richard Hofstadter, The Paranoid Style in American Politics and Other Essays (1964).

[6] *See* Louis D. Brandeis, *How the Combiners Combine*, 58 Harper's Weekly, November 13, 1913.

household necessities. Goods used in production were also the products of highly concentrated trusts, such as the United States Steel Corporation and the International Paper Company. Concerns about industrialization and a changing economy, with shifting norms for personal lives, triggered a popular antitrust movement.

By 1888, both the Republican and Democratic parties included measures to address trusts in their party platforms. States began to regulate trusts through railroad commissions, and by 1890 Congress enacted the Sherman Act to address the trusts. In enacting it, Congress prohibited "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[7] Congress took a broad approach, similar to the strategy it applied almost twenty-five years later in creating the FTC. Nevertheless, mergers continued and even accelerated. United States Steel became the first billion-dollar corporation, and by 1900, this single company produced most steel in the nation. Increased concentration was attributed to the Sherman Act's provisions (which were so broad that they invited judges to evaluate the reasonableness of restraints of trade), to inadequate prosecutorial resources, to a prosecutorial concentration on the biggest trusts, and to the powerful economic factors that caused firms to merge.[8]

THE PROGRESSIVE PARTY PLATFORM OF 1912

We believe that true popular government, justice and prosperity go hand in hand, and so believing, it is our purpose to secure that large measure of general prosperity, which is the fruit of legitimate and honest business, fostered by equal justice and by sound progressive laws.

We demand that the test of true prosperity shall be the benefits conferred thereby on all the citizens not confined to individuals or classes and that the test of corporate efficiency shall be the ability better to serve the public; that those who profit by control of business affairs shall justify that profit and that control by sharing with the public the fruits thereof.

We therefore demand a strong National regulation of inter-State corporations. The corporation is an essential part of modern business. The concentration of modern business, in some degree, is both inevitable and necessary for National and international business efficiency. But the existing concentration of vast wealth under a corporate system, unguarded and uncontrolled by the

[7] Sherman Antitrust Act, 26 Stat. 208 (1890).

[8] See generally GERALD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1924); Huston Thompson, *Highlights in the Evolution of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 257 (1939). For an exhaustive overview of antitrust challenges of the time, see JOSEPH E. DAVIES, TRUST LAWS AND UNFAIR COMPETITION (1916).

> Nation, has placed in the hands of a few men enormous, secret, irresponsible power over the daily life of the citizen – a power insufferable in a free government and certain of abuse.
>
> This power has been abused, in monopoly of National resources, in stock watering, in unfair competition and unfair privileges, and finally in sinister influences on the public agencies of State and Nation. We do not fear commercial power, but we insist that it shall be exercised openly, under publicity, supervision and regulation of the most efficient sort, which will preserve its good while eradicating and preventing its evils.
>
> To that end we urge the establishment of a strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations engaged in inter-State commerce, or such of them as are of public importance, doing for them what the Government now does for the National banks, and what is now done for the railroads by the Inter-State Commerce Commission.
>
> Such a commission must enforce the complete publicity of those corporation transactions which are of public interest; must attack unfair competition, false capitalization and special privilege, and by continuous trained watchfulness guard and keep open equally to all the highways of American commerce.
>
> Thus the business man will have certain knowledge of the law, and will be able to conduct his business easily in conformity therewith; the investor will find security for his capital; dividends will be rendered more certain, and the savings of the people will be drawn naturally and safely into the channels of trade.
>
> Under such a system of constructive regulation, legitimate business, freed from confusion, uncertainty and fruitless litigation, will develop normally in response to the energy and enterprise of the American business man.[9]

The Supreme Court's 1911 decision in *Standard Oil* v. *United States* was a watershed moment for the creation of the FTC. In *Standard Oil*, the Court applied a "rule of reason" to Sherman Act cases, in effect holding that the government could not prevent all activities in restraint of trade. Instead, courts would evaluate the context and fairness of contracts. Unreasonable restraints of trade violated the Sherman Act, and judges would ultimately decide what was reasonable and what was not. Presumably, conservative judges would find trusts acceptable, leading to a general unraveling of antitrust policy.

A rule of reason for antitrust meant the death of the Sherman Act to some, and for different reasons, both businesses and individuals clamored for intervention.[10] Businesses were concerned that the economic theories of the Supreme Court and

[9] Platform of the Progressive Party, August 7, 1912.
[10] Dow Votaw, *Antitrust in* 1914: *The Climate of Opinion*, 24 ABA ANTITRUST SEC. 14 (1964).

inferior tribunals could result in no or unpredictable enforcement. Additionally, prosecution of the Sherman Act, if left to the attorney general, could become too political, and thus it needed to be cared for by an independent agency.

Others thought the prevention of unlimited economic power animated the Sherman Act, and whether this power resulted in unreasonable restraints of trade was beside the point. Economic power itself had to be checked. Thus a rule of reason that parsed out efficient versus inefficient arrangements did not serve the political end of ensuring liberty against market power. For instance, declaring "the trusts have won," William Jennings Bryan devoted seven pages of critique and analysis of the decision in his weekly progressive newspaper, *The Commoner*, eleven days after the decision was released.[11]

THE DEMOCRATIC PARTY PLATFORM OF 1912

A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States.

We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.

We condemn the action of the Republican administration in compromising with the Standard Oil Company and the tobacco trust and its failure to invoke the criminal provisions of the antitrust law against the officers of those corporations after the court had declared that from the undisputed facts in the record they had violated the criminal provisions of the law.

We regret that the Sherman antitrust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.[12]

The concern about economic power occupied a central role in political debates, with critics of "bigness" arguing that concentration was an affront not only to household economics but also to political freedom itself.[13] The word "tyranny"

[11] Williams Jennings Bryan, *The Trusts Have Won*, 11(20) THE COMMONER, May 26, 1911.
[12] Democratic Party Platform of 1912, June 25, 1912.
[13] Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L. J. 285 (1988–1989); RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS (1964).

was invoked to describe the problem not of government power but of economic concentration.[14] Far from its agrarian roots, the country had evolved to a nation of employees, as then antitrust advocate (and sometimes lawyer to trusts)[15] Louis D. Brandeis put it. Brandeis published an eleven-part series of editorials in *Harper's Weekly* castigating the trusts for their "curse of bigness" and calling them "inefficient oligarchs." The spirit of these skeptics of bigness is reflected today in advocates calling for the FTC to police the powers gained from aggregation of personal information.

THE REPUBLICAN PARTY PLATFORM OF 1912

The Republican party is opposed to special privilege and to monopoly. It placed upon the statute-book the interstate commerce act of 1887, and the important amendments thereto, and the antitrust act of 1890, and it has consistently and successfully enforced the provisions of these laws. It will take no backward step to permit the reestablishment in any degree of conditions which were intolerable.

Experience makes it plain that the business of the country may be carried on without fear or without disturbance and at the same time without resort to practices which are abhorrent to the common sense of justice. The Republican party favors the enactment of legislation supplementary to the existing antitrust act which will define as criminal offences those specific acts that uniformly mark attempts to restrain and to monopolize trade, to the end that those who honestly intend to obey the law may have a guide for their action and those who aim to violate the law may the more surely be punished. The same certainty should be given to the law prohibiting combinations and monopolies that characterize other provisions of commercial law; in order that no part of the field of business opportunity may be restricted by monopoly or combination, that business success honorably achieved may not be converted into crime, and that the right of every man to acquire commodities, and particularly the necessaries of life, in an open market uninfluenced by the manipulation of trust or combination, may be preserved.

Federal Trade Commission

In the enforcement and administration of Federal Laws governing interstate commerce and enterprises impressed with a public use engaged therein, there

[14] At this same time, Americans were awakening to the idea that the power of private actors created problems for personal privacy. *See* David J. Seipp, *The Right to Privacy in American History* (July 1978) (Ph.D. dissertation, Harvard University).

[15] The Washington Post, Brandeis the Reformer, July 26, 1912 (attacking Brandeis for trust-busting activities while representing the Western Shoe Trust).

> is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure.[16]

## DYNAMICS OF SOLVING THE TRUST PROBLEM

To address the trust problem, Congress chose to endow an agency with a number of different attributes. Later in 1938, when Congress explicitly gave the FTC a consumer protection mission, these attributes shaped how the Agency dealt with consumer problems. The attributes are well suited for the FTC's modern role in policing privacy.

### *The need for expertise*

In 1903, Congress created the Bureau of Corporations to help document and understand the trust problem. Empowered to investigate and make recommendations about the regulation of almost all industries, it served an information forcing and investigatory role against the trusts.[17] As a component of the then Department of Commerce and Labor, the Bureau of Corporations was partisan and subject to control of the ruling executive. The Bureau of Corporations reported on several industries and the Agency's investigative activity helped focus the antitrust enforcement of the attorney general.

### *The need for certainty*

After the 1911 *Standard Oil* decision, a number a factors militated toward the creation of some entity more powerful than the Bureau of Corporations. Supporters of greater antitrust enforcement felt that the Bureau's investigation and publicity functions were inadequate. The business community felt that the Sherman Act was too broad and that it provoked too much uncertainty.[18] Business leaders also thought that it was unfair to be sued by the attorney general for violation of its terms, given its breadth. The business community wanted to avoid the chill of the Sherman Act by having options to obtain advice and even clearance and immunity from prosecution when that advice was followed.[19] There was also a great concern that

[16] Republican Party Platform of 1912, June 18, 1912.
[17] Act Establishing the Department of Commerce and Labor, Pub. L. No. 57–87, § 6, 32 Stat. 825 (1903).
[18] Danny A. Bring, The Origins of the Federal Trade Commission Act: A Public Choice Approach (1993) (Ph.D. dissertation, George Mason University).
[19] Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies, January 20, 1914 ("The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing

judges would apply their own economic ideas about trusts in Sherman Act cases, and that an expert body should make these decisions.

### *The need for flexibility*

The legislative process revealed the many limitations of laws that banned specific business wrongdoing. The kinds of unfair behavior were too numerous to enumerate, and legislative prohibitions of them invited businesses to engage in practices that fell though minor loopholes.[20] To address the trust problem, Congress eventually took both the specific prohibition (in the Clayton Act) and the broad prohibition approach in the FTC Act.

### *The need for quick, preventative action*

The Sherman Act approach tended to focus prosecution on industries that had already consolidated. There was a need for an agency to focus on incipient concentration and on smaller trusts. Joseph Davies, who then directed the Bureau of Corporations, recommended to President Wilson that the FTC have a quasi-judicial role. Under Davies' proposal, which was largely adopted, the FTC could make findings and formal recommendations to companies to take effect in sixty days, thereby aiding the courts and providing a quick remedy.[21]

### *The need for compromise*

The trust problem invoked strongly held beliefs that went to the core of individuals' political identity. A product of compromise, the FTC Act's vagueness allowed different political actors to ascribe different and conflicting purposes for the Agency. The FTC Act's legislative process gave the Agency two functions:

antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain [. . .] And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.")

[20] Eugene R. Baker & Daniel J. Baum, Section 5 *of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962).

[21] Joseph E. Davies, Memorandum of Recommendations as to the Trust Legislation by Joseph E. Davies, Commissioner of Corporations, *in* ARTHUR S. LINK, THE PAPERS OF WOODROW WILSON, Vol. 29, pp. 78–85 (1979).