WILL THE FTC'S SUCCESS CONTINUE?

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INTRODUCTION

The Federal Trade Commission ("FTC") has enjoyed great success for decades, and this Article addresses multiple issues relevant to that topic. First, what durable success means for an agency like the FTC. Then, the vision that former Chairman Robert Pitofsky and I shared, reflected in the second Kirkpatrick report,[1] that has helped lead to the agency's durable success.[2] Next, this Article considers recent challenges to that vision, in both competition and consumer protection, from two "p's": paternalism in consumer protection and populism in antitrust. Because both of these "isms" once dominated FTC work, particularly in the 1970s, this Article discusses some historical lessons. I lived through the 1970s, first working in the FTC's Los Angeles regional office in 1974 while a student at the University of California, Los Angeles, before moving to headquarters after graduation. The decade was disastrous for the FTC, and nostalgia for it, expressed in recent literature—sometimes explicitly—is misplaced. I have no desire to relive it, and neither should readers. Finally, this Article debunks the shibboleth that an economic cult based in the University of Chicago somehow dominates FTC thinking, particularly in antitrust.

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[1] *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43 (1989).

[2] *See* Timothy J. Muris, *Robert Pitofsky: Public Servant and Scholar*, 52 CASE W. RES. L. REV. 25 (2001) (discussing Robert Pitofsky's extraordinary contributions to the FTC, including a discussion of both Kirkpatrick reports).

I. DEFINING SUCCESS

Success must be built on more than today's headlines.[3] A less ephemeral definition for agency success recognizes that a successful agency needs a clear understanding of and support for its core mission among its constituents: the agency staff, the legitimate businesses it regulates, the courts, its peers in government, and the academy. Also, this core mission must derive from a vision clearly shared among and respected by those constituents, not just today, but over long periods and enduring through electoral cycles. Over time—perhaps decades—stakeholders adjudge favorably the core mission of successful agencies. Thus, the Civil Aeronautics Board's core mission of tight regulation failed with massive evidence that the regulation's costs exceeded its benefits.[4] The FTC's core competition mission for over thirty years—enforcement of the Robinson-Patman Act[5]—failed by the 1970s when the academy, most practitioners, and multiple court decisions considered this enforcement to be harming consumers.

Finally, besides a clear and respected long-term understanding of its core mission, a successful public institution needs a coherent strategy for exercising its authority. The agency should publicize its positive agenda, the measures to accomplish its core mission. The positive agenda must direct the institution at all levels, from line staff to managers to agency leaders. For the staff, an articulated positive agenda focuses on how best to fulfill the institution's mission. Without a general strategy and positive agenda, an agency is merely reactive.

II. THE FTC'S POSITIVE AGENDA

The FTC has such a positive agenda: the work of many people over many years. The heart of this agenda is to attack practices that harm consumers by hampering the competitive process and violating the basic rules that govern exchange. The FTC's success, in large part, reflects this shared vision of the agency's core mission, which has evolved for decades through several administrations.

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3 *See* Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 166 (2005).

4 *See* Robert M. Hardaway, *Transportation Deregulation (1976–1984): Turning the Tide*, 14 TRANSP. L.J. 101, 140 (1985) (arguing that airline deregulation has succeeded on all fronts by both proving false the fears raised of those in favoring regulation and substantially improving the industry for consumers and competitors alike).

5 Robinson-Patman Anti-Price Discrimination Act, 15 U.S.C. §§ 13a–13b, 21a (2012).

A. *Antitrust*

Until recently, antitrust enjoyed bipartisan cooperation. Although disagreements existed in close cases, there was widespread agreement that antitrust should protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, were the mainstays of enforcement.[6] Moreover, under this view antitrust law helps organize our economy. A freely functioning market, subject to antitrust rules, provides maximum consumer benefits. Antitrust law, in effect, competes with other regulatory forms and, in most instances, makes direct regulation unnecessary. Antitrust, however, is not intrusive, and it prescribes neither command-and-control regulation nor detailed rules of conduct.

Regarding which cases to bring, I once heard Robert Bork remark that firms either make war on each other, or they make peace.[7] This "peace–war" framework reflects the consensus that the most harmful practices occur when firms stop competing vigorously, making peace to benefit themselves at the expense of consumers.[8] Horizontal mergers in which anticompetitive effects are likely are one fertile area for firms to make peace and harm consumers. Most mergers are efficient or benign, but a few are appropriately stopped or restricted.[9]

Firms also make peace through a wide variety of non-merger conduct. As with mergers, collaboration is not itself sufficient to assess consumer welfare. Many collaborations benefit consumers; for example, manufacturer–distributor relationships can enhance efficiency, as does an industry's adoption of a standard that facilitates product development or provides useful information to consumers. By contrast, the peace-making of most concern lacks offsetting efficiency gains, so-called naked horizontal agreements such as pure price fixing, naked output restraint, market divisions, and bans on advertising.[10] The Commission has pioneered development of the law here,

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6 *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

7 *See* Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401, 401–02 (1965).

8 *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 185–86 (1978).

9 *See* Bork, *supra* note 7, at 410.

10 *See* Polygram Holding, Inc., 136 F.T.C. 310, 325–44 (2003) (discussing the FTC's heightened concern for certain categories of horizontal restraints).

especially among the professions,[11] trade associations,[12] generic drugs,[13] and the methodology for initially screening collaboration.[14]

In rare instances, a single firm with market power can use exclusionary practices to harm consumers. Cases such as the 2001 Microsoft decision[15] are important to any antitrust program. An especially fruitful category of troubling single-firm conduct involves the abuse of government process. Misuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition, and such strategies are not limited to single firms, of course. If businesses want to exclude competition, using government allows "cheap exclusion" in the felicitous phrases of two Directors of the Bureau of Competition and their colleagues.[16]

Big government is a permanent part of modern society, growing to over one-third of our GDP.[17] We know some of this growth harms consumers, reflecting rent seeking—the socially costly pursuit of wealth transfers.[18] Antitrust is not a cure for rent seeking, but it can make important contributions to addressing the problem. To do so, we must interpret properly the antitrust immunities that protect not only legitimate government activity, but also rent seeking.

Two antitrust immunities help protect and foster regulatory growth: *Noerr-Pennington*[19] and the state-action doctrine.[20] Some courts have interpreted these immunities broadly, and for over forty years, the FTC has sought to circumscribe both doctrines, with three Supreme Court victories involving state action among the most notable achievements.[21] On *Noerr*, the agency

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11 For development of the issues in the context of one the few FTC Court defeats, see Timothy J. Muris, California Dental Association v. Federal Trade Commission*: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265, 293 (2000) (describing the development of the antitrust laws in the context of professionals).

12 *E.g.*, Nat'l Ass'n of Teachers of Singing, Inc., Matter No. 1310127, at 3 (Oct. 10, 2014), https://www.ftc.gov/system/files/documents/cases/1410natsdo.pdf.

13 *E.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 157 (2013).

14 *E.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36–37 (D.C. Cir. 2005).

15 *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

16 *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 990–91 (2005).

17 *See OECD Data: General Government Spending*, ORG. FOR ECON. CO-OPERATION & DEV., https://data.oecd.org/gga/general-government-spending.htm (last visited Aug. 22, 2019) (listing total government expenditures as 37.9% of GDP as of 2015).

18 *See* Jagdish N. Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. POL. ECON. 988, 997 (1982); Anne O. Kreuger, *The Political Economy of the Rent Seeking Society*, 64 AM. ECON. REV. 291, 302 (1974).

19 Noerr-Pennington refers to the doctrine of antitrust immunity for protected petitioning created by two 1960s Supreme Court cases. *See* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139–40 (1961).

20 Antitrust state-action immunity began with *Parker v. Brown*, 317 U.S. 341, 351–52 (1943). For a discussion on the FTC's role in limiting these immunities, see Muris, *supra* note 11, at 265.

21 N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114–15 (2015); FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225–27 (2013); FTC v. Ticor Title Ins., 504 U.S. 621, 635–36 (1992).

has also pursued several cases, with the Unocal case saving California consumers billions at the gas pump,[22] and a major settlement against Bristol Meyers Squibb having significant benefits for pharmaceutical consumers.[23]

B. *Consumer Protection*

The vision for FTC consumer protection is identical to antitrust. In our economy, competition spurs producers to benefit consumers because the market disciplines most sellers who disappoint consumers by shifting sales to producers who better satisfy consumers. These same competitive pressures encourage producers to provide useful, truthful information. Markets cannot always discipline deceptive sellers, however, as when product attributes are difficult to evaluate, or sellers are unconcerned about repeat business.

When competition alone cannot punish or deter dishonesty, private legal rights provide basic rules for interactions between producers and consumers to mitigate these problems.[24] Government develops the common law of property, tort, and contract, including default rules to apply when parties do not (or cannot) specify terms. By reducing the consequences of problematic exchanges, these rights and default rules alleviate some of the market's weaknesses. Nevertheless, private legal rights may not deter seller misbehavior, as when enforcement is impractical or economically infeasible.

When market forces are insufficient and common law is ineffective, a public agency, such as the FTC, may help preserve competition and protect consumers. Consumer protection and antitrust naturally complement each other by protecting consumers without restricting their market choices or their ability to obtain truthful information. Under the FTC's positive agenda, robust competition in a strong market is the primary bulwark protecting consumers. Thus, the Commission acts on multiple fronts: promoting competition and the free exchange of accurate and non-misleading information and attacking conduct that undermines competition, impedes the exchange of

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22 *See* Agreement Containing Consent Order, Union Oil Co. of Cal., No. 0110214, at 2, 3 (June 10, 2005), https://www.ftc.gov/sites/default/files/documents/cases/2005/06/050610agreement9305.pdf; Opinion of the Commission, Union Oil Co. of California, No. 0110214, at 37–42 (July 7, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/07/040706commissionopinion.pdf; *see also* Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 389–96.

23 Final Judgment, FTC v. Bristol-Myers Squibb Co., No. 1:09-cv-00576-EGS (D.D.C. filed Apr. 1, 2009) (enforcing the 2003 consent order), https://www.ftc.gov/sites/default/files/documents/cases/2009/03/090327bristolmyersjdgmt.pdf; Agreement Containing Consent Order, Bristol-Myers Squibb Co., No. 0110046 (Mar. 7, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/03/bristolmyersconsent.pdf.

24 *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 95–97 (9th ed. 2014).

accurate information or otherwise threatens consumers.[25] The FTC's role is crucial, but as a referee in the economy it is not the star player.

The agency's systematic attack on fraud, begun in 1981, replaced the failed rulemakings of the 1970s, discussed below, as the core of FTC consumer protection.[26] Fraud is the consumer protection analog to price fixing in antitrust, and is essentially theft, which both distorts market forces and limits the ability of consumers to make informed choices. Fraud reduces the value of truthful advertising and thereby raises costs for legitimate competitors, who must offer more assurances of performance to overcome consumers' wariness.[27]

Relying on Section 13(b) of the FTC Act, and working with other federal and state agencies, and more recently agencies abroad and against fraudsters in Spanish-language media, the Commission has brought hundreds of cases, stopped myriad frauds, returned large sums of money to consumers, and helped sister enforcers jail the worst offenders.[28] The FTC has used, and in some cases has pioneered, modern investigative techniques to catch fraudsters; it also manages a Consumer Response Center that evaluates consumer complaints in real time, providing access to law-enforcement partners in other agencies to help fight fraud.[29]

Moreover, the agency has long evaluated advertising by legitimate businesses, recognizing the centrality of truthful information to a market economy and the FTC's limited, but still important, role in policing deception.[30] In this century, the FTC's privacy role has become significant with the National Do Not Call Registry, one of the most popular government initiatives in history. But yesterday's success has become today's challenge, with other regulators using different, more intrusive privacy models and robocalls threatening to overwhelm our phones. The FTC has been both aggressive and

25 *See e.g.*, *Introduction* to FED. TRADE COMM'N, 2018 ANNUAL HIGHLIGHTS REPORT (2019), https://www.ftc.gov/system/files/documents/reports/annual-highlights-2018/2018_annual_highlights_report.pdf.

26 *See* 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, 3 n.8 (2013).

27 *See id.* at 37–38.

28 *Id.* app. at 44–45; *see also* FTC, Memorandum of Understanding on Mutual Enforcement Assistance in Commercial Email Matters Between the Federal Trade Commission of the United States of America and the Agencia Espanola de Proteccion de Datos (Feb. 24, 2005), https://www.ftc.gov/system/files/documents/cooperation_agreements/050224aepdmou.pdf.

29 *See* FED. TRADE COMM'N, *Decrypting Cryptocurrency Scams* (June 25, 2018), https://www.ftc.gov/news-events/events-calendar/2018/06/decrypting-cryptocurrency-scams (describing an FTC workshop addressing new cryptocurrency frauds); *see also* FED. TRADE COMM'N, *Division of Consumer Response & Operations*, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-consumer-response (last visited Aug. 4, 2019).

30 *See* Mary L. Azcuenaga, *The Role of Advertising and Advertising Regulation in the Free Market*, FED. TRADE COMM'N (Apr. 8, 1997), https://www.ftc.gov/public-statements/1997/04/role-advertising-and-advertising-regulation-free-market (transcribing a public statement made by former FTC commissioner during a conference).

ingenious against robocalls.[31] Ultimately, robocalls are like spam, which once threatened to overwhelm our email. The FTC has appropriately continued to prosecute scams perpetrated through spam, and the most important solution to unclogging our inboxes was Internet Service Providers perfecting tools to reduce greatly the amount of spam delivered to consumers. Like spam, the most important robocall solution will be when the companies delivering phone services and others develop the legal and technical tools to block unwarranted calls.

As Howard Beales, former Director of the Bureau of Consumer Protection, and I have argued, the Obama FTC deviated from its predecessors in some advertising and privacy enforcement.[32] Nevertheless, compared to the paternalistic vision of the Consumer Financial Protection Bureau ("CFPB"), discussed next, the Obama FTC was a paragon of virtue. Moreover, the judiciary checked the worst excesses: rejecting efforts to impose Food and Drug Administration–style substantiation;[33] finding against the agency in a series of cases involving disputes between experts over substantiation;[34] and questioning the agency's expansive interpretation of "unfairness."[35]

Finally, regarding the agenda so important for FTC success, led by Chairman Pitofsky's example, the agency also has continued interest in policy research and development.[36]

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31 *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. (2018) (statement of Lois Greisman, Assoc. Dir. of the Div. of Mkt. Practices, Bureau of Consumer Prot., Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1366628/p034412_commission_testimony_re_abusive_robocalls_senate_04182018.pdf (discussing the FTC's robocall cases and four public contests to spur the development of technological solutions to help stop robocalls).

32 J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2228 (2015); *see also* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 150 n.140 (2015); J. Howard Beales III & Timothy J. Muris, *The Obama FTC Departed from Its Predecessors to the Detriment of Consumers*, ANTITRUST MAG., Summer 2017, at 67. *See generally* Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216 (2012).

33 *See, e.g.*, POM Wonderful, LLC v. FTC, 777 F.3d 478, 491–92 (D.C. Cir. 2015).

34 *See, e.g.*, FTC v. Garden of Life, Inc., 516 F. App'x 852, 857 (11th Cir. 2013); United States v. Bayer Corp., No. 2:07-cv-00001, 2015 U.S. Dist. LEXIS 134321, at *59 (D.N.J. Sept. 24, 2015); Basic Research, LLC v. FTC, No. 2:09-CV-0779, 2014 U.S. Dist. LEXIS 169043, at *43 (D. Utah Nov. 25, 2014).

35 *See, e.g.*, LabMD, Inc. v. FTC, 894 F.3d 1221, 1236–37 (11th Cir. 2018).

36 Robert Pitofsky and I published a joint article in 2005 discussing this non-case role. *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005).

III. THE RETURN OF THE TWO P'S

This positive agenda is under challenge. As Section A of this Part discusses, the FTC's market-policing vision for consumer protection differs dramatically from the paternalism of the recently created CFPB that relies on a more aggressive regulatory approach. Section B discusses how, in antitrust, populists on both the left and right of the political spectrum want protection of noneconomic values and are suspicious of bigness per se. As discussed below, both paternalism and populism have been prominent in consumer protection and antitrust in the FTC before, especially in the 1970s when an out-of-control agency was widely criticized.

A. *Paternalism*

In consumer protection, the market-oriented, cop-on-the-beat vision of the modern Federal Trade Commission discussed above replaced the more expansionist agency of the 1970s.[37] That earlier FTC "sought to become the second most powerful legislature in Washington," proposing over one fifteen-month stretch more than a rule a month to transform major industries into the vision of the young regulators then in charge.[38] As proposed, most of these rules were market supplanting, not market reinforcing, usually with adverse consequences to consumers.[39] An exchange in the final report of the National Commission on Consumer Finance debating whether lower- and middle-income families could be trusted to borrow money to purchase color televisions in emulation of wealthier consumers illustrates the paternalistic attitude of the era.[40] This vision for the FTC collapsed from flaws in both conception and implementation; modern FTC consumer protection grew from the ashes.

Paternalism has returned with a vengeance at the Consumer Financial Protection Bureau, recently renamed the Bureau of Consumer Financial Protection.[41] Procedurally, the CFPB's design makes it the most powerful and least accountable regulatory agency in history—an independent agency inside another independent agency: the Federal Reserve.[42] The CFPB is insulated from any effective control by the President, Congress, or the Federal

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37 *See generally* Beales & Muris, *supra* note 26.

38 *Id.* at 1.

39 *See* Timothy J. Muris, *Rules Without Reason: The Case of the FTC*, REGULATION: AEJ J. ON GOV'T AND SOC'Y, Sept.–Oct., at 20 (1982).

40 NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 229, 243–44, (1972) (statement of Professor Robert W. Johnson).

41 Because this section discusses the original version of the agency, the article uses the original name here; that original version can return with the next change in administration.

42 12 U.S.C. § 5491(a) (2012).

Reserve Board.[43] Its regulations are not subject to review by the Office of Information and Regulatory Affairs, the CFPB's budget is guaranteed and drawn directly from the Federal Reserve's operating revenues, rather than accountable to Congress's appropriations process.[44] A single director appointed for a five-year term, removable only for cause, wields this immense power rather than a bipartisan agency or a leader accountable to the President.[45]

Substantively, the CFPB has broad, ill-defined powers to regulate every consumer credit product, adding "abusive" to the now better-defined FTC concepts of "unfair" and "deceptive."[46] "Abusive" has unfortunate echoes to the FTC's use of unfairness in the 1970s that led the agency to assert unprecedented and ultimately destructive power. Despite the vagueness of "abusive," the Bureau has refused to define the term, instead using broad discretion. Moreover, because millions of small businesses use personal credit to start and grow their businesses, the CFPB has become the de facto regulator of small-business credit.[47]

The CFPB's paternalistic attitude is reflected in its impact on consumer credit. For example, the "Qualified Mortgages" rule "slowed the recovery of the housing market, and fears of government liability . . . caused even large lenders to lend cautiously, especially to riskier borrowers."[48] Federal Reserve Chair Janet Yellen stated:

> [B]anks, at this point, are reluctant to lend to borrowers with lower FICO [credit] scores. They mention in meetings with us consistently their concerns about putback risk, and I think they are—it is difficult for any homeowner who doesn't have pristine credit these days to get a mortgage. I think that is one of the factors that is causing the housing recovery to be slow.[49]

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43 *See id.*

44 *See id.* § 5497; *see also* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace*, 81 GEO. WASH. L. REV. 856, 872–73 (2013).

45 12 U.S.C. § 5491(b).

46 *See id.* § 5493(g)(1).

47 On the CFPB, see generally Zywicki, *supra* note 44.

48 Todd Zywicki, *The Dodd-Frank Act Five Years Later: Are We More Stable?* 5 (George Mason Univ. Law & Econ. Research Paper No. 15-28, 2015); *see also* Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408, 6408–09 (Jan. 30, 2013) (to be codified at 12 CFR pt. 1026) (discussing requirements imposed on lenders by Dodd-Frank).

49 Janet Yellen, Chair, Fed. Reserve Bd., Press Conference Following Federal Open Market Committee Quarterly Meeting (June 18, 2014). S*ee generally* Zywicki, *supra* note 48, at 5–6 (discussing the impact of CFPB rules on lending). The reduction of available credit by the CFPB is highlighted in a 2013 Federal Reserve Board report, which found that twenty-two percent of consumers who borrowed to buy a home in 2010—one out of every five borrowers—would not have met the underwriting requirements for a "Qualified Mortgage" as defined under Dodd-Frank pursuant to a recent rule adopted by the CFPB and other financial regulators. Neil Bhutta & Glenn B. Canner, *Mortgage Market Conditions and Borrower Outcomes: Evidence from the 2012 HMDA Data and Matched HMDA–Credit Record Data*, 99

CFPB's regulatory costs fall particularly heavy on smaller and community banks. For example, one study found that seventy-one percent of small banks stated that the CFPB affected their business activities,[50] with sixty-four percent reporting changes to their mortgage offerings because of Dodd-Frank, and fourteen percent either exited or were considering exiting residential mortgage markets entirely.[51] Nearly sixty percent of small banks reported that the CFPB and the Qualified Mortgages rule significantly impacted their mortgage operations negatively and the same percentage said that the CFPB had a significant negative effect on bank earnings.[52]

Those who support more interventionist policy sometimes raise behavioral economics, a growing influence on economic analysis that adds insights from psychology to the economist's tool kit.[53] Used properly, behavioral insights can positively influence public policy. For example, the FTC's cooling-off rule, which provides time to reconsider a decision made outside of a seller's regular place of business, is a frequently recommended behavioral remedy.[54] More generally, in their book *Nudge*, Professors Cass Sunstein and Richard Thaler recommend modest changes in public policy, such as reordering default rules to influence behavior positively.[55]

Nevertheless, in the name of behavioral economics, some recommend significant changes in public policy based on the notion that decision-making errors are consistently biased in a particular direction.[56] People make mistakes, even with perfect foresight, and sometimes decide contrary to their own interest.[57] Government intervention would be unwarranted if these errors

FED. RES. BULL., at 40 (2013). The Federal Reserve found that the CFPB's "Qualified Mortgage" rule (QM) would have an even bigger effect on minority borrowers, with thirty-four percent of the African-American borrowers and thirty-two percent of the Hispanic borrowers who borrowed in 2010 unable to meet the forty-three percent debt-to-income ratio requirements but for the temporary GSE-backed loan exemption built into the rule by the CFPB. *Id.* at 37. Once this exemption expires, rather than protecting borrowers, the Bureau's "Qualified Mortgage" rule would exclude these borrowers from the mortgage market. Despite the rule's burden, it did not address down payments, one of the most important risk factors for mortgage foreclosures, and a far less paternalistic way to regulate.

50 Hester Peirce, Ian Robinson & Thomas Stratmann, *How Are Small Banks Faring Under Dodd-Frank?* 47 (Mercatus Ctr., Working Paper No. 14-05, 2014).

51 *See id.* at 49, 63.

52 *See id.* at 51, 56.

53 *See, e.g.*, Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 39–41 (1980); Daniel Kahneman, *Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice*, 93 AM. ECON. REV. 1449 (2003).

54 *See* Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. § 429.1 (1984).

55 *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

56 *See* Richard E. Hattwick, *Behavioral Economics: An Overview*, 4 J. BUS. & PSYCHOL. 141, 144–45 (1989). *See generally* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1602–03 (2014); Russell Korobkin, *What Comes After Victory for Behavioral Law & Economics,* 2011 U. ILL. L. REV. 1653.

57 J. Howard Beales III, *Consumer Protection and Behavioral Economics: To BE or Not to BE?*, 4 COMPETITION POL'Y INT'L 149, 156 (2008).

were random, but under behavioral economics, these errors can be treated as consistently irrational.[58] For example, some behavioralists argue that consumers exhibit a present bias (hyperbolic discounting), also referred to as "myopia or self-control" problems.[59] Consumers will choose a small reward today over a larger reward later, when choosing immediate gains can produce long-term distress.[60]

Numerous problems exist with using behavioral economics to reshape consumer protection policy. To begin, even enthusiasts about behavioral economics do not have consistent predictions about which biases are relevant in specific situations, making the expected impact of potential government action ad hoc.[61] A second problem is that some behavioralists too often ignore market institutions and the nature of market equilibria that prevent consumer harm. For example, markets can achieve competitive outcomes without fully informed consumers.[62] When an informed minority exists large enough to be worth competing for, competition for these consumers drives sellers to provide product characteristics that the informed buyers value.[63] Even with standard form contracts, these informed consumers drive the terms that all consumers receive.[64]

Consumers make investments, in education, through experience, and elsewhere, to learn how to make decisions.[65] A recent study of consumer choices of credit cards found that most consumers choose optimally, and that among those who make mistakes, those who made the largest mistakes were most likely to change for the better.[66] Thus, where the CFPB regulates, the mix of consumers, consumer learning, and firm responses to consumer choices (or mistakes) will influence the market equilibrium, even if behavioral principles describe some consumers.[67]

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58 *See id.* at 152–56 (discussing systematic perceptual bias).

59 *See id.* at 157.

60 *See id.*; *see also* Brian F. Mannix & Susan E. Dudley, *The Limits of Irrationality as a Rationale for Regulation*, 34 J. POL'Y ANALYSIS & MGMT. 705, 707–09 (2015).

61 *See* Beales, *supra* note 57, at 157–59.

62 *See id.* at 152; *see also* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 630–31, 634–37 (1979).

63 *See* Beales, *supra* note 57, at 152–53; Schwartz & Wilde, *supra* note 62, at 636.

64 *See* Beales, *supra* note 57, at 152–53 (first citing J. Howard Beales III & Timothy J. Muris, *The Foundations of Franchise Regulation: Issues and Evidence*, 2 J. CORP. FIN. 157, 159–60 (1995) (discussing standardized franchise contracts); then citing James R. Barth et al., *Benefits and Costs of Legal Restrictions on Personal Loan Markets*, 29 J.L. & ECON. 357, 379 (1986) (discussing personal loan terms)).

65 Becker and Stigler use the household production model to explore a number of situations in which human capital stocks are important. *See* George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum,* 67 AM. ECON. REV. 76, 89 (1977).

66 Sumit Agarwal et al., *Do Consumers Choose the Right Credit Contracts?*, 4 REV. CORP. FIN. STUD. 239, 242 (2015).

67 In healthcare, with very different market characteristics, there is evidence of more consistent mistakes. Kate Ho, Joseph Hogan & Fiona Scott Morton, *The Impact of Consumer Inattention on Insurer Pricing in the Medicare Part D Program* 10–11 (Nat'l Bureau of Econ. Research, Working Paper No. 21028, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578876.

In any real-world market, some consumers may regret their choices, tempting government regulators to intervene. Any intervention should reinforce, not supplant, the market as some behavioralists recommend. We have little, if any, reliable empirical evidence addressing the benefits and costs of interventions with behavioral principles, and the adverse effects and unintended consequences of even well-intentioned government regulation are legion.[68] Perhaps hearings and similar FTC efforts can continue to develop useful evidence.

Under any sensible economic principles, market outcomes are crucial for consumers. Legitimate companies care about how consumers regard them, counting on repeat business and word-of-mouth to increase sales. By contrast, the commercial thief loses no sleep over the company's standing in the community and is unconcerned about repeat sales. These fraudsters cheat consumers, grab the revenues, and disappear from sight, often to re-emerge in another guise to steal again.

When market forces cannot overcome these threats to consumers because—to take one example—some sellers are unconcerned about repeat business and reputation, or because information asymmetries make deception difficult to detect, private legal rights complement the competitive market and can overcome, or at least mitigate, some of these market problems. And there is an important role for agencies like the FTC to police problems.

B. *Populism*

The second "p," populism, is reflected in calls on the left and right of the political spectrum to dismantle the modern, highly successful tech companies, or at least regulate them as public utilities.[69] Such attacks are misguided on numerous grounds. For one, any distinction between physical and digital or tech companies has become largely meaningless. Of course, there are new technologies such as cloud computing, machine learning, and robotics, but they are diffusing throughout the economy in both "new" and "old" industries. Moreover, the highly successful companies we associate with Silicon Valley that have transformed our lives for the better have different positions in the market, with some having large shares, the prerequisite for antitrust concern, and others lacking such dominance in any antitrust market of interest to the populists.

Equally important, we have travelled the populist road before, with disastrous consequences for consumers and our economy. Jon Nuechterlein and

68 *See, e.g.*, W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 798–802 (4th ed. 2005) (giving as examples the unintended consequences of seatbelt requirements and of medicine "safety cap" packaging).

69 Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of* United States v. A&P, 54 REV. INDUS. ORG. 651, 652 (2019).

I discuss some of this history in a new article.[70] Before Wal-Mart and Amazon, another company used scale, vertical integration, and innovation to transform retailing, becoming America's largest retailer by giving consumers a wider range of products than the competition, at lower prices, and whose very success prompted calls for radical changes to the antitrust laws. That company was the now-defunct Great Atlantic and Pacific Tea Company, or A&P, to those who remember it. A&P was the largest American retailer for more than forty years, pioneering the large retail chain and later the supermarket.[71] A&P was such a fixture in mid-twentieth-century America that the young John Updike used an A&P store as the setting for his iconic short story of that name.[72]

All consumers benefited from the A&P, especially the less affluent, with lower prices, greater variety, and the possibility of improved nutrition. Those benefits did not go unpunished. A&P's very popularity triggered a backlash from its competitors, and the government responded, pursuing the company relentlessly for two decades.[73]

Congress first enacted the populist Robinson-Patman Act in 1936 to help inefficient small business against competition from A&P and other chain stores by imposing wildly overbroad prohibitions on "discrimination."[74] This legislation has embarrassed the antitrust community ever since because it makes little economic sense and explicitly subordinates the interests of consumers to those of inefficient competitors. The Act's anticompetitive effects were mitigated only after decades of excellent analysis from academics and practitioners and decisions from the nation's antitrust authorities and courts.[75]

Yet mere legislation was not enough for A&P's adversaries. The Department of Justice ("DOJ") separately prosecuted the company and its senior executives *criminally* for offering consumers too good a deal.[76] Having secured their convictions, DOJ then filed *another* case to break up the largest and most innovative retailer in American history.[77] That case was settled, and the long war of attrition against A&P led the company to concentrate on fending off the government, while new retailers —not so burdened—ultimately eclipsed it.[78] The proposal to attack success makes no more sense today than the similar justifications for Robinson-Patman made in 1936.

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70 *See id.* at 666–67.

71 *Id.* at 655–57.

72 John Updike, *A & P*, NEW YORKER, July 22, 1961, at 22.

73 *See* Muris & Nuechterlein, *supra* note 69, at 657.

74 15 U.S.C. § 13(a) (2012) (effective June 19, 1936); *see* Muris & Nuechterlein, *supra* note 69, at 657–58.

75 *See* Muris & Nuechterlein, *supra* note 69, at 658–60.

76 *See* United States v. N.Y. Great Atl. & Pac. Tea Co., 67 F. Supp. 626, 629–30 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

77 *See* Muris & Nuechterlein, *supra* note 69, at 663.

78 *See id.* at 663–64.

It is true that the FTC largely abandoned Robinson-Patman in the 1970s, but in that decade the agency pursued another favorite of the modern populists: predatory pricing. The agency filed three major cases, the coffee case illustrative, involving alleged predatory pricing by General Foods ("GF") against Proctor & Gamble ("P&G"). P&G, then the most feared marketer of consumer goods in the world, had purchased a strong regional brand, Folgers, which it sought to expand nationwide. When it entered the heartland of the strongest eastern firm, GF's Maxwell House, an all-out price war erupted, to the enormous benefit of consumers. The FTC sued GF for *responding*,[79] and the staff originally proposed the truly extraordinary remedy of mandatory trademark licensing, ignoring the adverse implications on GF's property rights. The Commission rejected that remedy but filed the case in 1976 after an internal staff struggle requiring four formal Commission meetings. The Reagan Commission rejected the complaint in 1984.[80]

Another bulwark of 1970s antitrust was reliance on the simple market-concentration doctrine, finding concern in industries with concentration at levels not troubling to economists of any stripe today: four firms having control of fifty percent of a market. This theory was sometimes married to a populist animus toward bigness, leaving the Commission to seek vertical disintegration of the relatively unconcentrated oil industry in 1973[81] and to continue to pursue a deconcentration strategy through 1980, long after the economics profession had abandoned belief in extreme versions of the market-concentration doctrine.[82]

IV. THE ROLE OF THE CHICAGO SCHOOL

One of the many factual inaccuracies of the modern populists is their claim that the Chicago School captured current antitrust policy.[83] This simply misunderstands the role of Chicago. In 2014, current BE Director, Bruce Kobayashi and this author published "Chicago, Post-Chicago, and Beyond: Time To Let Go of the 20th Century," which began, "We come both to praise

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79 *See* Gen. Foods Corp., 103 F.T.C. 204, 207–08 (1984). I was an assistant to the director of the Office of Policy Planning and Evaluation from 1974 to 1976 and worked in opposition to the case.

80 *Id.* at 373.

81 *See* Exxon Corp., 98 F.T.C. 453, 456–57 (1981).

82 The seminal event in changing the view of the profession was a conference in 1973, the proceedings of which were published in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid et al. eds., 1974). For discussion of FTC pursuit of deconcentration through 1980, see Timothy J. Muris, Chairman, FTC, How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy, Remarks to the ABA Antitrust Section Fall Forum 23–28 (Nov. 19, 2003) (transcript available on the FTC's website).

83 *See* Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 167–70 (2012).

and bury the Chicago School of Antitrust."[84] What is most often misunderstood today is that Chicago usually describes policy prescriptions:

> As it began in the 1950s, and through the evolution of the major Chicago texts in the 1960s and 1970s, Chicago had a clear, shared normative agenda, namely rejection of the prevailing orthodoxy. The initial Chicago results, produced primarily through a case-by-case analysis, as well as broad empirical studies on issues such as the deconcentration debate, uniformly challenged the existing pro-plaintiff orthodoxy of antitrust policy.
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> The Revolution succeeded; one only has to read the numerous Supreme Court decisions rejecting the *ancien régime* to understand the triumph of Chicago. But Chicago had not focused on the many details for antitrust policy that would be necessary once the old order was overthrown. There was simply no shared, agreed-upon view regarding the myriad aspects of appropriate doctrine. Moreover, as the continued application of the Chicago methodology moved beyond the initial results, it produced more diverse analyses not easily described or categorized. To list five prominent Chicagoans alphabetically—Baxter, Bork, Bowman, Posner, and Stigler—they disagreed among themselves on, or had not addressed fully, the appropriate policies toward mergers, predatory pricing, tying, rule of reason analysis, and other important issues.
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> . . . Like 1776, Chicago had its revolutionary band of brothers. As the American revolutionaries diverged politically when actually running a government, the Chicago scholars hardly agreed regarding the details of operational antitrust policy. Moreover, when devising rules for antitrust, rules that necessarily have to be enforceable, disagreements about application of the error cost framework are inevitable, especially in the presence of often weak empirical evidence about the presence and magnitude of type I and II errors.[85]

CONCLUSION

With the creation of the CFPB, the FTC has another federal agency performing each mission, an uncomfortable place in some future budget-cutting era. The original CFPB model, mirroring 1970s FTC regulation, is in direct contrast to the modern FTC. Perhaps the regulatory world runs in cycles, but for the sake of consumers one hopes the FTC will not find itself in a future Ground Hog Day, where it awakens each morning to 1975.

For antitrust, consider the effect of the current "reformers" who wish to return antitrust law to focus less on the welfare of consumers and more on protecting less efficient businesses. Imagine how the companies they would now punish would have fared in the legal environment these incumbent-protectors favor. Once the newcomers had grown beyond a certain size, perhaps by the late 1990s, their lawyers would have counseled them to be cautious about expansion, innovation, and price-cutting, lest they face antitrust liability for the disadvantages less efficient rivals faced. Luckily, because this advice would have badly misstated our antitrust law, lawyers never gave it. For the sake of American consumers, such advice should never become sound.

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[84] *Id.* at 147. The fall of the Robinson-Patman Act, discussed above, a major triumph of the modern antitrust consensus, had little to do with Chicago. Chicago scholars supported RP's demise but were not responsible. *See* Muris & Nuechterlein, *supra* note 69, at 658–59.

[85] Kobayashi & Muris, *supra* note 83, at 171.

Rather than condemn innovation, whether in the 1930s or today, we should applaud it. Companies like the so-called "tech giants" have been built from the ground up in the United States rather than in Europe or China largely because the U.S. legal environment is stable, predictable, and uniquely hospitable to vigorous, paradigm-shattering competition by all businesses, large and small. That legal environment is a hallmark of American exceptionalism. Long may it continue.