

# THE FEDERAL TRADE COMMISSION AS CONVENOR: DEVELOPING REGULATORY POLICY NORMS WITHOUT LITIGATION OR RULEMAKING

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## INTRODUCTION

The study of economic regulatory agencies focuses principally on two forms of activity: the prosecution of cases and the promulgation of rules. In academic scholarship, political debate, and popular discourse, the volume and economic significance of these policy outputs supply the chief measures of a regulatory agency's worth. Nothing exceeds the attention devoted to big litigation and rulemaking events.<sup>1</sup>

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1. Google's antitrust encounters with the European Union over its search practices provide a good current example of how litigation-related activity claims top billing on blogs and in coverage of business news. *See, e.g.*, Tom Fairless, *Google Must Improve Search Settlement or Face Charges, EU's Almunia Says*, WALL ST. J. (Sept. 23, 2014, 8:27 AM), [online.wsj.com/articles/google-must-improve-search-settlement-or-face-charges-eus-almunia-says-1411462097](http://online.wsj.com/articles/google-must-improve-search-settlement-or-face-charges-eus-almunia-says-1411462097) (discussing status of settlement negotiations between the European Commission's Directorate for Competition and Google). On the propensity of regulators to be

Modern discussions about economic regulation display a healthy reconsideration of widely held views of what regulatory agencies should do. There is an emerging awareness that case- and rule-centric tests to evaluate regulatory agencies are badly incomplete.<sup>2</sup> Other dimensions of agency performance—for example, investments in better administrative infrastructure and outlays for the regulatory agency equivalent of research and development—are essential to sound policy making.

A regulatory agency proficient only in bringing cases and promulgating rules is likely to find itself ill suited to the demands of the contemporary policy environment. Many of today's pressing regulatory policy problems—for example, competition law and privacy—do not fit neatly within the domain of a single substantive legal discipline, a single regulatory authority, or a single jurisdiction. The hardest economic regulation issues often arise at the intersection of two or more policy areas (e.g., antitrust and intellectual property), implicate legal authority shared by various public bodies at all levels of government, feature the extensive involvement of non-government “co-producers” (such as academic research centers, advocacy groups, and industry self-regulatory bodies), have substantial cross-border elements, and occur in commercial settings undergoing rapid technology change.<sup>3</sup>

These characteristics have major implications for regulatory agencies. One of the most important involves the framework for policymaking. To operate effectively, regulators must build structures that enable coordination among a multiplicity of regulatory actors at home and abroad, and facilitate cooperation with external co-producers. These policy structures are the equivalent of physical infrastructure on which policy developments travel. Among other functions, this policy infrastructure is a valuable means for norms development—the creation of common understandings within and across jurisdictions about the appropriate content of public policy. These norms ordinarily are not binding obligations, yet they can be (and sometimes are) precursors of such duties.<sup>4</sup> Effective participation in norm development requires not

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measured by their initiation of visible enforcement events, *see* William E. Kovacic et al., *How Does Your Competition Agency Measure Up?*, 7 EUROPEAN COMP. J. 25 (2011).

2. *Interview with FTC Commissioner Maureen Ohlhausen*, FED. CIV. ENFORCEMENT COMMITTEE NEWSLETTER (Am. Bar Assoc. Section of Antitrust Law, Chicago, Ill.), May–June 2012, *available at* [http://www.ftc.gov/sites/default/files/documents/public\\_statements/interview-ftc-commissioner-maureen-ohlhausen/2012fcec.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/interview-ftc-commissioner-maureen-ohlhausen/2012fcec.pdf) (recounting benefits of regulatory strategy that involves application of law enforcement and non-law enforcement policy tools and focuses attention on substantive policy outcomes rather than regulatory inputs).

3. I am grateful to Professor Allan Fels for introducing me to the concept of “co-producers” whose work supplements the contributions of the regulator.

4. On the capacity of voluntary norms to provide a foundation for establishing more

only an enabling infrastructure but also an investment, by individual regulatory agencies, in activities such as policy research that build a base of knowledge essential to the formation of sensible norms.

The significance of the norms development function (and the creation of an enabling policy infrastructure) is evident in the work of Federal Trade Commission (FTC). The FTC is perhaps the country's most intriguing experiment in the design of regulatory agencies. In the Federal Trade Commission Act of 1914, Congress created an extraordinarily adaptable and scalable platform to perform the norms development function that 21<sup>st</sup> century policymaking now demands.<sup>5</sup> Among other vital features, Congress gave the FTC capacity to serve as a *convenor*—to engage in a diverse array of activities that facilitate norms development.<sup>6</sup> The 1914 mandate enabled the Commission to build policymaking networks,<sup>7</sup> to engage in public consultations,<sup>8</sup> to collection industry information unrelated to the prosecution of cases,<sup>9</sup> to conduct

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formal and more binding obligations, *see* Thomas Buergenthal, *Note and Comment: Louis B. Sohn (1914–2006)*, 100 AM. J. INT'L L. 623, 625–26 (2006) (discussing work of international law scholar Louis Sohn and describing how Sohn showed that progress toward international agreements often involved taking smaller, incremental steps through a process of long-term engagement).

5. 38 Stat. 717, 15 U.S.C. §§ 41–58 (2012). On the adoption of the Federal Trade Commission Act, *see* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

6. A vital foundation for the agency's capacity to function as a convenor was its authority, established in the 1914 legislation, to collect information and to publish reports unrelated to the immediate purposes of investigating possible law violations and preparing cases. 15 U.S.C. §§ 46, 49. From its inception, the Commission used this authority to conduct studies of individual industries, sometimes at the request of Congress and on other occasions acting on its own initiative. *See* Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 195–200 (2010) [hereinafter *Outpost Years*] (describing preparation of studies by FTC in its formative era); W.H.S. Stevens, *The Federal Trade Commission's Contribution to Industrial and Economic Analysis: The Work of the Economic Division*, 8 GEO. WASH. L. REV. 545 (1939–1940) (discussing origins and application of FTC's data collection and reporting functions); Beginning in the 1920s, the Commission convened trade practice conferences to solicit industry views about appropriate norms of commercial behavior. *See* Sumner S. Kittelle & Elmer Mostow, *A Review of the Trade Practice Conferences of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 427 (1940) (discussing origins and operation of the FTC's trade practice conference procedure).

7. For example, early FTC efforts to build relationships with foreign government institutions took the form of a study in the 1920s to examine foreign experience with the establishment of agricultural cooperatives. *See* FED. TRADE COMM'N, COOPERATION IN FOREIGN COUNTRIES (1925).

8. The most significant application of this capability took place in the late 1920s and early 1930s when, upon direction from the Senate, the Commission undertook an extensive of electric and gas public utilities. *See* Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 ANTITRUST L.J. 701, 729–30 (2011) [hereinafter *Humphrey-Myers Years*] (describing origins and content of FTC's public utility inquiry).

9. In the agency's first decade, FTC studies of this type yielded reports on agriculture,

research related to policy development and to prepare reports that set out directions for future policy<sup>10</sup>—by what we now call “soft law” measures (e.g., self-regulatory standards, proposed guidelines)<sup>11</sup> and “hard law” initiatives (e.g., new legislation).<sup>12</sup> The Commission also had power to bring cases (notably, through its own administrative process) and to promulgate rules.<sup>13</sup>

This Article uses the FTC’s experience to study the role of regulatory agencies as convenors in the process of developing policy norms at home and abroad. It underscores the significance of the convenor function in modern regulatory policymaking and highlights the types of investments an agency must make to perform this function effectively. The Article emphasizes that case-centric or rule-centric conceptions of what a regulatory agency ought to do ignore the importance of the convenor function. As such, case and rule centrism impedes effective policy making at home and abroad by discouraging investments that facilitate norms development.

The Article begins by identifying formative conditions of the modern policy environment. The Article then describes problems that confront regulatory agencies in seeking to perform the convenor function. The final section of the paper describes the FTC’s contributions as a convenor to the development of regulatory policy norms.

## I. ECONOMIC REGULATION AND NORMS DEVELOPMENT: FORMATIVE CONDITIONS

This section identifies the context in which regulatory policy making occurs today. These conditions both serve to create a need for

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coal, meatpacking, petroleum, and home furnishings. *See Outpost Years*, *supra* note 6, at 196–99.

10. For an early application of this capability, *see* FED. TRADE COMM’N, REPORT ON RESALE PRICE MAINTENANCE, H.R. DOC. NO. 66-165 (1st Sess. 1918) (FTC report proposing policy approaches for dealing with resale price maintenance agreements).

11. The Commission’s first experiments with “trade practice submittals” (later known as “trade practice conferences”) constituted an early effort to rely on industry self-regulation to adjust business behavior. *Outpost Years*, *supra* note 6, at 200.

12. From its first decade, Commission reports provided the foundation for new legislation. In 1916, the FTC published a report on foreign trade. FED. TRADE COMM’N, REPORT ON COOPERATION IN FOREIGN EXPORT TRADE (1916). The report led to adoption in 1918 of the Webb-Pomerene Act, which created an antitrust exemption for certain export trade activities by producer associations. Webb-Pomerene Export Trade Act, ch. 50, § 1, 40 Stat. 516 (1918), (current version at 15 U.S.C. § 61 (2014)).

13. *See Outpost Years*, *supra* note 6, at 176 (describing congressional aims in giving FTC capacity to conduct administrative adjudication). The agency’s law enforcement mandate in the 1914 legislation appears in Section 5, which gave the agency power to proscribe “unfair methods of competition.” 15 U.S.C. § 45 (2014). On the purpose and application of this measure, *see* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010).

effective norms development and impede its accomplishment. Most important among all trends is a growing fragmentation of policy making, both within the United States and across nations.<sup>14</sup> To an ever-greater extent, attaining a desired policy result requires navigating an archipelago whose many islands are inhabited by individual regulators.

#### A. Multiple Policy Agents

Policymaking authority within a single substantive regulatory domain is often shared by a multiplicity of public actors. Competition law illustrates this phenomenon. The United States has two federal antitrust agencies—the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—with substantial areas of shared authority.<sup>15</sup> In some industries, such as telecommunications, sectoral regulators have competence to review the competitive effects of mergers.<sup>16</sup> Thus, for the proposed merger between Comcast and Time Warner, both the DOJ and the Federal Communications Commission (FCC) are reviewing the transaction's likely competitive effects.<sup>17</sup> State governments also have authority to enforce the federal antitrust laws.<sup>18</sup> The decision of any one of these public enforcement agents does not preclude another agent from seeking more stringent relief.<sup>19</sup>

A second noteworthy example involves privacy. The FTC is the principal data protection/privacy agency in the United States.<sup>20</sup> The FTC

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14. See, e.g., William E. Kovacic, *Toward a Domestic Competition Network*, in COMPETITION LAWS IN CONFLICT (Richard A. Epstein & Michael S. Greve eds., 2004) (describing fragmentation of policymaking in competition law within the United States); Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current, and Future Role*, 20 MINN. J. INT'L L. 274, 280 (2011) (describing fragmentation of policy making in competition law internationally).

15. On the dualism of the federal enforcement mechanism, see DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 27–48 (2011).

16. On the shared competence of the DOJ and the Federal Communications Commission to assess the competitive effects of mergers, see Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L. J. 167 (2008).

17. On the FCC inquiry, see Ted Johnson, *FCC Pauses Comcast-TW Cable, AT&T-DirecTV Merger Reviews*, VARIETY (Oct. 22, 2014, 9:28 AM), <https://variety.com/2014/biz/news/fcc-pauses-comcast-tw-cable-att-direcTV-merger-reviews-1201336426/>. On the DOJ inquiry, see Diane Bartz & Alina Selyukh, *Deal Talk: U.S. DOJ Digs Into Comcast's Internet Reach in Merger Review*, REUTERS (Oct. 18, 2014, 1:29 AM), <http://in.reuters.com/article/2014/10/17/comcast-tim-wrn-cab-antitrust-idINKCNOI628Q20141017>.

18. On the capacity of states to enforcement the federal antitrust laws, see AM. BAR ASSOC., STATE ANTITRUST PRACTICE AND STATUTES 3–21 (3d ed. 2004).

19. In addition to public enforcement of competition mandates, the U.S. antitrust system provides a powerful mechanism for private enforcement. On the U.S. system of private rights of action, see Crane, *supra* note 15, at 163–87.

20. See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of*

performs this function through its authority under Section 5 of the FTC Act to condemn “unfair or deceptive acts or practices”<sup>21</sup> and pursuant to a variety of statutes that establish privacy protections by sector or for specific classes of individuals.<sup>22</sup> Because Congress has exempted various sectors from the FTC’s jurisdiction<sup>23</sup> and has given other federal institutions privacy-related duties, the Commission is only one of a number of federal agencies with a mandate to protect privacy.<sup>24</sup> In addition to the federal privacy regime, state governments routinely enact their own privacy legislation (e.g., measures governing data protection breaches).<sup>25</sup> Given the size of their economies, states such as California have the ability, in the course of adopting their own laws, to set what amount to national privacy standards.<sup>26</sup>

The sketch of regulatory multiplicity above covers the United States alone. The expansion of cross-border commerce, the emergence of new regulatory authorities abroad, and widely accepted notions of extraterritoriality mean that many forms of conduct are subject to control by more than one jurisdiction. Roughly 125 jurisdictions now have competition laws,<sup>27</sup> and a growing number of authorities play a significant role in reviewing the behavior of firms engaged in cross-border trade. Privacy protection likewise is an important priority for many jurisdictions outside the United States. For example, privacy and data protection in the European Union (EU) features a complex interaction of community-wide law and restrictions imposed by individual member states.<sup>28</sup> The application of EU and member state law

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*Privacy*, 114 COLUM. L. REV. 583 (2014) (discussing the FTC’s preeminent role as U.S. privacy law enforcement body).

21. 15 U.S.C. § 45(a)(1) (2006).

22. See A.B.A. SEC. ANTITRUST L., *Consumer Protection Law Developments*, 82–91, 165 (2009) (hereinafter *Consumer Protection Law Developments*) (discussing FTC’s privacy responsibilities under the CAN-SPAM Act, the Children’s Online Privacy Protection Act, the Fair Credit Reporting Act, and the Gramm-Leach-Bliley Act).

23. On the limitations to FTC jurisdiction, including an exemption for certain activities of common carriers, see A.B.A. SEC. ANTITRUST L., *Antitrust Law Developments*, 659 (7<sup>th</sup> ed. 2012).

24. See Peter Swire, *Why the Federal Government Should Have a Privacy Policy Office*, 10 J. TELECOMM. & HIGH TECH. L. 41, 46–47 (2012) (discussing the dispersion of privacy-related functions across the federal government).

25. See *Consumer Protection Law Developments*, *supra* note 22, at 70–75 (discussing state privacy laws).

26. *Id.* at 71–75, 157 (discussing obligations imposed under California law concerning the posting and content of privacy notices and reporting of data security breaches).

27. See generally INT’L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org> (last visited November 12, 2014) (identifying competition agencies which are ICN members); GEORGE WASHINGTON UNIV. COMPETITION LAW CTR, <http://www.gwclc.com> (last visited November 12, 2014) (collecting data on design of implementation mechanisms in jurisdictions with competition laws).

28. See ORG. FOR ECON. COOPERATION AND DEV., *Report on Cross-Border*

has a major impact on the behavior of multinational firms doing business in Europe.

In antitrust, privacy, and other policy domains, individual jurisdictions have the capacity to set global standards through the unilateral enforcement of their own rules. The magnitude of these cross-border regulatory spillovers gives the United States a large stake in what happens abroad, as decisions taken in other nations can have decisive effects on domestic U.S. commerce. International regulatory interdependencies mean that national regulatory bodies are devoting increasing effort to various initiatives—bilateral, regional, and global<sup>29</sup>—to coordinate enforcement work and to promote progress toward acceptance of superior procedural and substantive norms.<sup>30</sup>

### *B. Interaction between Different Regulatory Policy Areas*

A number of important policy issues implicate more than one body of law. Competition law, for example, interacts regularly with sector-specific regulatory regimes for energy,<sup>31</sup> health care,<sup>32</sup> and communications.<sup>33</sup> The intersection of antitrust and intellectual property (IP) law figures prominently in the modern analysis of standard setting organizations, standard essential patents, non-practicing entities, reverse-payment agreements between branded and generic pharmaceutical manufacturers, and remedies for the infringement of IP rights. There is a growing recognition among competition agencies that the first-best solution to observed competitive problems involving the acquisition or

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*Enforcement of Privacy Laws*, (2006), <http://www.oecd.org/internet/ieconomy/37558845.pdf> (describing the EU Privacy Directive and the privacy regimes of the EU member states); On importance of EU privacy requirements for cross-border trade, see Natasha Singer, *Data Protection Laws, an Ocean Apart*, N.Y. TIMES, Feb. 3, 2012, at 3; Somini Sengupta, *Europe Weighs Tough Law on Online Privacy*, N.Y. TIMES, Jan. 24, 2012, at B1.

29. See Hollman & Kovacic, *supra* note 14 at 274–311 (describing array of international cooperation mechanisms to promote cooperation and convergence in competition law); *International Competition and Consumer Protection Cooperation Agreements*, FTC (last visited Nov. 10, 2014) [www.ftc.gov/policy/international/international-cooperation-agreements](http://www.ftc.gov/policy/international/international-cooperation-agreements) (listing the FTC’s international relationships for competition law and consumer protection).

30. The author’s experience at the FTC provides one example. In the late 1970s, when the author served as a junior case handler in the agency’s Bureau of Competition, the agency had a total of approximately 1800 employees and had a single attorney assigned to work on international affairs. Today, the FTC has approximately 1300 employees, and a team of 25 employees staffs its Office of International Affairs.

31. On the intersection of competition law with energy law in the United States, see A.B.A. SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS*, VOL. II 1366–98 (7th ed. 2012).

32. On the intersection of competition law with health care law in the United States, see *id.* at 1412–60.

33. On the intersection of competition law with telecommunications law in the United States, see *id.* at 1326–65.

use of IP rights may reside in improvements in the rights-granting process, rather than the prosecution of antitrust cases.<sup>34</sup>

The awareness of the policy interdependences that arise from interactions among different regulatory systems has inspired greater consultation, and efforts at common policy development, across disciplines. These measures include expanded coordination between antitrust agencies and intellectual property rights-granting authorities.

### C. *Technological Dynamism*

Rapid technological change has three important effects upon the regulatory archipelago. Some technological changes produce convergence across industries and create products or services that straddle existing jurisdictional boundaries, which previously delineated the domains of separate regulators. The development of broadband, for example, has generated intense disputes over the line of demarcation between the authority of the FCC under the Telecommunications Act, and the powers of the FTC as an antitrust agency.<sup>35</sup>

A second consequence of technological change is to create the equivalent of regulatory terra nova, whose occupation attracts the attention of one or more existing regulators. The modern information services revolution in data collection and storage has created new and staggering policy challenges concerning data protection and privacy. In the absence of comprehensive national privacy legislation, various public agencies in the United States have moved to assert authority to address business practices concerning the collection, use, and protection of consumer information.<sup>36</sup> The FTC has accomplished the most extensive (though hardly exclusive) occupation of the new privacy regulatory terrain through an evolution which begins with the enforcement of credit practice statutes, such as the Fair Credit Reporting Act.<sup>37</sup> The FTC's

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34. This trend is examined in Andreas P. Reindl & William E. Kovacic, *An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy*, 28 *FORDHAM. INT'L L. J.* 1062 (2005).

35. See *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?*, Testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, House Committee on the Judiciary, 113th Cong. (June 30, 2014) (Joshua D. Wright, Commissioner, Federal Trade Commission), available at [www.ftc.gov/system/files/documents/public\\_statements/409571/140620antitrusttestimony.pdf](http://www.ftc.gov/system/files/documents/public_statements/409571/140620antitrusttestimony.pdf) (discussing debate over FCC and FTC jurisdiction).

36. Compare DEP'T OF COMMERCE, INTERNET POLICY TASK FORCE, COMMERCIAL DATA PRIVACY AND INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK (Dec. 2010) (laying out Commerce Department vision of future U.S. privacy policy) with FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE – RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (Mar. 2012) (presenting FTC vision for future U.S. privacy policy).

37. 15 U.S.C. §§ 1681–1681x (1970).



occupation of this policy domain has since extended to the use of its Section 5 authority to police the Department of Commerce safe harbor program,<sup>38</sup> and to address company data protection and use practices.<sup>39</sup> Essential to this policy progression was the availability of the broad, flexible policy mandate of Section 5.<sup>40</sup>

A third effect of technological change upon the regulatory ecology is to unify previously discrete, localized markets into broader national and international markets. Advances in communications and transportation technologies have provided two especially significant periods of upheaval—the development of rail transport and telegraphy in the second half of the Nineteenth Century,<sup>41</sup> and the expansion of electronic commerce and mobile telephony today.<sup>42</sup> A byproduct of these and related phenomena has been to make business actors accountable to a larger number of regulatory regimes and thus to create the policy interdependencies described earlier.

Much (perhaps most) technological change strains the base of knowledge that informs regulatory policy makers.<sup>43</sup> Increased complexity in some instances means that regulators must depend more extensively on knowledgeable outsiders to explain the importance of specific developments and to implement policy changes. Regulators must expend additional efforts to seek the views of outsiders to understand

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38. See EDITH RAMIREZ, CHAIRWOMAN, FED. TRADE COMM'N, PROTECTING CONSUMERS AND COMPETITION IN A NEW ERA OF TRANSATLANTIC TRADE 5–9 (Oct. 29, 2013) (Keynote Address before the Trans Atlantic Consumer Dialogue, Brussels) (discussing FTC enforcement of Safe Harbor program).

39. See Solove & Hartzog, *supra* note 20 (analyzing FTC use of Section 5 of FTC Act to establish common law of privacy).

40. *Id.*; see also David A. Hyman & William E. Kovacic, *Competition Agencies With Complex Policy Portfolios: Divide or Conquer?*, 1-2013 CONCURRENCES 9 (2013) (describing scalability of Section 5 to meet new challenges).

41. The significance of the dramatic advances in communications and transportation in the second half of the 19<sup>th</sup> century to the development of the modern business enterprise in the United States is documented in ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS, 145–205 (1977).

42. See FED. TRADE COMM'N, BEYOND VOICE: MAPPING THE MOBILE MARKETPLACE (2009), available at <http://www.ftc.gov/sites/default/files/documents/reports/beyond-voice-mapping-mobile-marketplace-federal-trade-commission-staff-report/mobilemktgfinal.pdf> (developments in mobile telephony have transformed communications services and the marketing and sale of goods and services); See also FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (2004), available at [www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-federal-trade-commission/040329clreportfinal.pdf](http://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-federal-trade-commission/040329clreportfinal.pdf) (describing how electronic commerce enables contact lens suppliers to circumvent traditional marketing channels and made direct sales to consumers).

43. On the challenges that technologically dynamic industries pose for competition agencies, see William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097, 1100–02 (2012).

various technologies and appreciate their effects.

*D. Diffuse Community of Non-Government Organizations*

The complexities of government regulation are mirrored in the multiplicity and growing diversification of non-government organizations (NGOs). The very complexity of the regulatory and lawmaking process has spurred the development of NGOs to serve as expert intermediary bodies to influence policymaking. In the United States, in each important policy domain, one observes a broad array of actors.<sup>44</sup> Consider the example of privacy. The task of consulting all interested groups would not easily be simplified by searching for a few “representative” spokespersons or institutions. Although these groups, or subsets of these groups, might align on specific issues, there are many points for which one would observe significant differentiation (deliberate or inadvertent) by groups that would seem to share common cause.

The diversity and multiplicity of the NGO community complicates decisions about how to solicit views about specific policy issues. One approach is to gather likeminded constituencies to address specific topics as a group. This permits the convenor to canvass the views of a particular constituency, but has the disadvantage of encouraging a discussion that lacks the element of challenge and disagreement that comes from having conflicting constituencies represented in the same session. Where interested groups are numerous and have cross-cutting interests, the only way to survey a broad range of opinions may be to have numerous consultations and use formats that encourage discussion among the group.

A further issue involves whether to hold discussions before a larger public audience (via dial-in telephone or with), or in small groups in a more intimate seminar-like setting. The large public gathering has the benefit of real and symbolic openness, and expands the possibilities for participation to individual citizens who lack intermediary organizations to represent them. The large public gathering, however, is not always ideally suited to a direct and constructive discussion of differences. Among other flaws, large public gatherings lend themselves more readily to arid forms of posturing and credit-claiming that seldom advance the understanding of an issue, much less the formation of consensus.

II. THE FTC AS A CONVENOR

As suggested above, Congress in 1914 gave the FTC capabilities

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44. The range of interested groups includes academic research centers, think tanks, trade associations, business coalitions, and advocacy groups active in privacy matters.

that have enabled the agency to perform the role of convenor throughout its history.<sup>45</sup> Today this design enables the FTC to play a major part in the establishment of networks that facilitate the process of forming consensus about superior policy approaches and gaining their adoption.

As developed from the agency's earliest days, the convenor function at the FTC has several dimensions. One is to serve as a forum for policy discussion. By the end of the 1920s, the Commission had developed the use of "trade practice conferences" to elicit views of individual commercial sectors about business practices in general or about specific topics which the FTC had singled out for discussion.<sup>46</sup> Though admirable for its effort to engage in broad scale consultation and to build the agency's knowledge about industry conditions, the trade practice conference device suffered from a lack of participation by those who might contest industry perspectives, and a sometimes too-credulous acceptance by the FTC of complaints about the rigors of competition and of the need for "stability" that could be provided by codes that, for example, forbade price cutting or discounting off of listed prices.<sup>47</sup>

Another important FTC device was to convene formal hearings (taking testimony under oath) to discuss specific forms of conduct or industry developments.<sup>48</sup> The agency initiated some hearings at the request of Congress, conducted some at the request of the president, and began others on its own accord.<sup>49</sup> A number of the FTC's hearings yielded policy proposals that led to the enactment of new legislation, such as the Public Utility Holding Company Act of 1935.<sup>50</sup>

Especially over the past 20 years, the FTC has used informal hearings (without use of compulsory process or the taking of testimony under oath) to explore issues of pressing policy concern. A modern starting point for these public consultations was an elaborate set of hearings in the mid-1990s to exemplify the significance of developments in high technology innovation and international commerce for the

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45. See 15 U.S.C. §§ 46, 49 (2006).

46. See Kittelle & Mostow, *supra* note 6 and accompanying text.

47. See *Humphrey-Myers Years*, *supra* note 8, at 742–45 (discussing development of trade practice conference device); *Outpost Years*, *supra* note 6, at 200.

48. See *Outpost Years*, *supra* note 6, at 195–200 (discussing early developing of FTC's reporting function).

49. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L. REV. 587, 623–25 (describing congressional involvement in FTC economic studies).

50. See *Summary Report of the Federal Trade Commission to the Senate of the United States Pursuant to Senate Resolution No. 88 70<sup>th</sup> Congress, 1<sup>st</sup> Session on Economic, Financial, and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities*, S. Doc. No. 70-92, Pt. 73-A, at 59-76 (1st Sess. 1935) (recounting history of FTC study of electric and gas utilities and presenting conclusions and policy recommendations).

agency's competition and consumer protection programs.<sup>51</sup> Subsequent hearings have dealt with subjects such as the patent system,<sup>52</sup> new forms of communication technology and their impact on data protection and privacy,<sup>53</sup> and public sector impediments to the expanded use of electronic commerce.<sup>54</sup>

In addition to these forms of public consultations, the FTC has used its research capabilities to study industry phenomena and prepare reports that have advanced the development of policy norms. Landmarks of this type include the FTC's research on entry by generic drug producers pursuant to incentives created by the Hatch-Waxman Act.<sup>55</sup> More recently, the FTC has undertaken a study of patent accumulation and enforcement by patent assertion entities.<sup>56</sup>

Several lessons can be distilled from these and other FTC public consultation initiatives. The agency's success in using these proceedings to improve understanding, build consensus, and supply focal points for norms development has been greatest when the Commission prepares reports based on its proceedings. The most influential studies—such as the FTC's work of the past 15 years on the patent system—have drawn upon the public proceedings and related literature to crystalize important policy disputes, identify areas of consensus, and propose approaches to carry policy development forward. In this way, the reports serve not only to restate key elements of the public deliberations, but also to place them in the context of current thinking in literature about business, economics, and law.

A second aspect of many of the most successful FTC proceedings is

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51. See *More Than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 774–75 (2005) [hereinafter *Muris-Pitofsky Dialogue*] (comments by former FTC chairman Robert Pitofsky: describing the FTC's hearings in the mid-1990s on innovation and globalization).

52. *Id.* at 806 (comments by former FTC chairman Timothy Muris; discussing FTC hearings on the patent system).

53. FED. TRADE COMM'N STAFF REPORT, WHAT'S THE DEAL? AN FTC STUDY ON MOBILE SHOPPING APPS 15–27 (Aug. 2014), available at <http://www.ftc.gov/system/files/documents/reports/whats-deal-federal-trade-commission-study-mobile-shopping-apps-august-2014/140801mobileshoppingapps.pdf> (discussing privacy implications of mobile apps).

54. See FED. TRADE COMM'N STAFF REPORT *supra* note 42 (discussing impediments to electronic commerce sales of contact lenses).

55. FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002), available at [http://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf) (study of generic entry under Hatch-Waxman law).

56. Press Release, Fed. Trade Comm'n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>.

that they have been broad based and expansive in their efforts to ensure fuller participation by interested groups. For example, the FTC's deliberations in the 2000's on competition and health care involved 27 days of informal hearings, and featured over 250 panelists.<sup>57</sup> Not all proceedings need be that elaborate, but the desire to gain a fuller, more representative perspective from affected groups tends to press toward larger rather than smaller proceedings. The larger events can be foreshadowed by or supplemented with smaller group discussions and events.

A third lesson from past experience is that the successful performance of the convener role requires substantial investments. These proceedings require thoughtful planning by researchers who are familiar with the questions to be addressed and have the knowledge needed to obtain the best witnesses and carry out an informative discussion. Superb research, analytical, and writing skills also are necessary to prepare reports that will make a difference. The convener role, to be effective, cannot be carried out on the cheap. Each initiative is judged by the thoughtfulness of its design and the written product that follows it. In this regard, an agency is only as good as its last show.

#### CONCLUSION

In September 2014, the Federal Trade Commission reached the 100<sup>th</sup> anniversary of the statute that brought the agency into being. The capabilities established in the 1914 legislation enabled the FTC to serve as a forum to bring interested groups together to discuss important policy issues and to prepare reports to advance understanding of modern commercial phenomena. Partly by legislative design and partly by the agency's own creative application of its authority, the Commission began to function as a convener. In this role, the FTC has improved understanding of economic developments, increased the body of accessible knowledge about specific business practices, and helped build a consensus about the appropriate direction of future policy.

The establishment of this non-litigation policymaking capability has proven to be an inspired choice. Although the FTC has exercised the convener function throughout its history, the fullest realization of this capability has taken place in roughly the past twenty years. The chairmanships of Robert Pitofsky and Timothy Muris gave renewed emphasis to this policy device and, in doing so, elevated the Commission's ability to make valuable, distinctive contributions to public policy through reports, law enforcement, and advocacy before

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57. *Muris-Pitofsky Dialogue*, *supra* note 51, at 775.

other public institutions. By this device, the agency has improved the analysis of many issues, including the relationship between competition law and the system for granting intellectual property rights, the implications of new information services technologies for data protection and privacy, and the capacity of electronic commerce to create new mechanisms for the provision of goods and services.

The convening function promises to become increasingly important in the future. By regularly soliciting the views of outsiders, the convenor supplies a way for regulators to better comprehend the significance of rapid, technologically driven economic change. The convenor helps build a foundation for achieving policy convergence in the face of ever more complex regulatory commands and an increasing multiplicity of regulatory actors at home and abroad. The convening of fact-gathering proceedings and policy discussions, in smaller or larger formats, provides a possible means to improve upon fractious forms of public discourse that robs the policy making environment of a common understanding of the state of the world.

Performing the conveyor function in a capable way requires the conscious, regular investment of resources to devise and refine methods for public consultation and to prepare reports that collect and analyze the proceedings and related research performed by the regulator-host. The FTC created university-quality teams of researchers to design and carry out its modern public consultations and prepare superior reports. This unmistakably involves a substantial commitment of resources and the diversion of high quality personnel, away from activities by which regulators so often are measured—the development of cases or the promulgation of rules. Despite their cost and the long-term nature of the results they yield, the investments in convening are perhaps best envisioned as one species of the public sector equivalent of the outlays for research and development that enable private firms to achieve future success. Seen this way, the application of resources to performing the role of convenor are not discretionary but vital investments for regulatory bodies that aspire to build the foundations on which better policies and institutional arrangements will stand.