THEORY AND PRACTICE OF COMPETITION ADVOCACY AT THE FTC

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This past fall marked the 30th anniversary of a pivotal moment in the establishment of the modern competition advocacy program at the FTC, Chairman Lewis Engman's speech on the economic burden that inefficient transportation regulation policies were imposing on the U.S. economy.[1] Competition advocacy, broadly, is the use of FTC expertise in competition, economics, and consumer protection to persuade governmental actors at all levels of the political system and in all branches of government to design policies that further competition and consumer choice. Competition advocacy often takes the form of letters from the FTC staff or the full Commission to an interested regulator, but also consists of formal comments and amicus curiae briefs.[2] Although the FTC has been involved in competition advocacy activities since its founding, Engman's speech symbolized a new aggressiveness on the part of the FTC.[3]

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[1] Lewis A. Engman, Address at the 1974 Fall Conference of the Financial Analysts Federation (Oct. 7, 1974) (discussing regulatory excess and anticompetitive regulations; proposing vigorous antitrust enforcement as a substitute for regulation in certain industries).

[2] Currently, the FTC's Office of Policy Planning is responsible for coordinating competition advocacy, and performs much of the substantive work as well, along with the Bureau of Economics (BE).

[3] The legal authority for competition advocacy is found in Section 6 of the FTC Act, which allows the FTC to "gather and compile information" that concerns persons subject to the FTC Act, and "to make public from time to time such portions of the information obtained" that are "in the public interest." 15 U.S.C. § 46(a), (f). *See* Fred McChesney et al., Federal Trade Commission, Competition and Consumer Advocacy: Policy

The economic theory of regulation (ETR) posits that because of relatively high organizational and transaction costs, consumers will be disadvantaged relative to businesses in securing favorable regulation.[4] This situation tends to result in regulations—such as unauthorized practice of law rules or per se prohibitions on sales below-cost—that protect certain industries from competition at the expense of consumers. Competition advocacy helps solve consumers' collective action problem by acting within the political system to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens. Furthermore, advocacy can be the most efficient means to pursue the FTC's mission, and when antitrust immunities are likely to render the FTC impotent to wage ex post challenges to anticompetitive conduct, advocacy may be the only tool to carry out the FTC's mission.

Notwithstanding its potential as a low-cost—and in some cases, the only—vehicle to carry out the FTC's core mission of promoting consumer welfare, the importance of the advocacy program relative to other components of the FTC markedly declined during the 1990s following its zenith in the mid-1980s. Only since Timothy Muris's Chairmanship has the advocacy program begun to enjoy a resurgence. In part, these mixed fortunes may reflect a lack of advocacy's fundamental grounding within the core mission of the FTC. The advocacy program, moreover, often has been politically controversial, exposing the Commission to criticism from special interests, Congress, and other governmental actors.

I. HISTORY OF MODERN COMPETITION ADVOCACY AT THE FTC

The use of the advocacy program has varied over time. Although imperfect, the number of annual advocacy filings (shown in Figure 1)

REVIEW SESSION 2–7 (June 9, 1982) (May 24, 1982, transmittal letter from Executive Director and Bureau Directors Bruce Yandle, Timothy Muris, Thomas Campbell, and Robert Tollison to the Commission); Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379, 381–82 (1989). Celnicker also notes that the House of Representative originally created the FTC only to gather and disseminate information, and that President Woodrow Wilson described the proposed FTC as "an indispensable instrument of information and publicity." *Id.* at 380 (citation omitted). Further, Celnicker points out that during the 1970s Congress increasingly required government agencies to obtain the FTC's views on the competitive impact of certain agency actions. *Id.* at 382.

[4] *See, e.g.*, W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 313–35 (3d ed. 2000).

provides a rough proxy for the vigor of the advocacy program over the past two decades.[5]

From 1980 to 2004, the twenty-five years for which reasonably comparable data exist, the FTC issued about 708 comments, an average of 28 per year. As readily seen in Figure 1, however, this average masks substantial swings in the Commission's use of advocacy over the years. The advocacy program has focused on competition, consumer protection, and regulatory fronts over the years, changing some with the public policy issues of the day. Several topic areas remained active over fairly

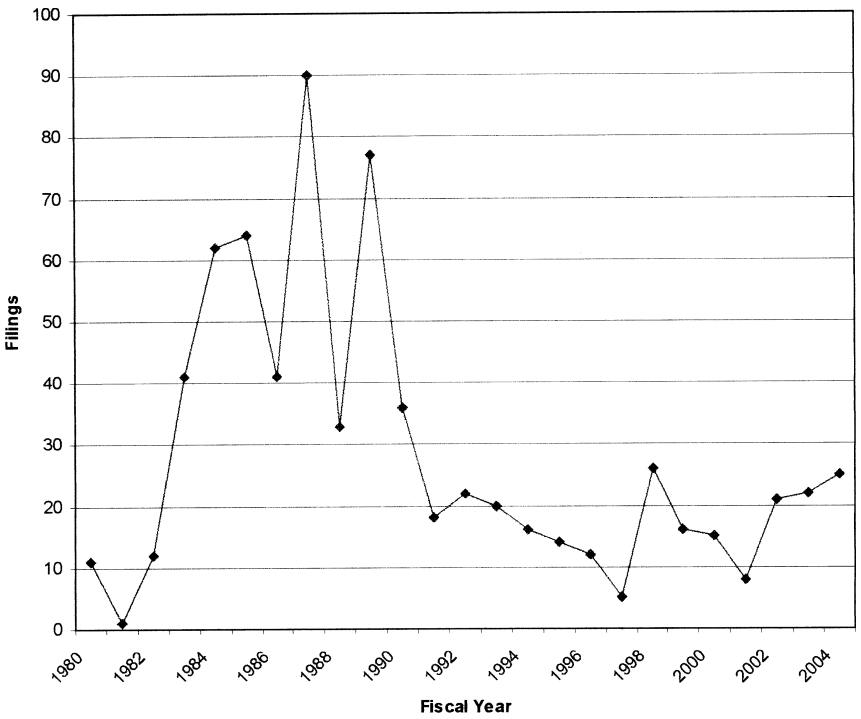

Figure 1
FTC Advocacy Filings 1980–2004

[5] A list of post-1994 advocacy filings may be found on the FTC Web site at www.ftc.gov/be/advofile.htm. Lists and descriptions of these and earlier filings can be found at the back of the FTC's Annual Reports, at least through 2000. Unless otherwise noted, all counts of advocacy filings are from the data underlying Figure 1.

long periods of time.[6] Certain other narrow topic areas generated significant advocacy action for only a year or so.[7]

A. COMPETITION ADVOCACY FROM 1974–2004

One can argue that the advocacy program (known internally as the "intervention" program in the 1970s and 1980s) dates back to the earliest days of the Commission, when the FTC submitted comments to the Fuel Administration (on coal pricing) and the War Industries Board (on steel). If we do not want to ascribe the origins of a program to distant and idiosyncratic events, a more representative date for the beginning of the program, and certainly for the program's "modern era," would be October 7, 1974, when Chairman Louis Engman spoke about the broader use of antitrust policy as an alternative to the regulation of markets. In referring to the nation's macroeconomic problems—in 1974 the U.S. economy was suffering from stagflation—he argued that burdensome federal transportation regulations contributed to the problem of slow economic growth and that aggressive antitrust enforcement could be a substitute for regulation of certain industries. Because it presented competition policy as a novel alternative to deal with pressing economic problems, the speech received substantial coverage in the press—including a front-page story in *The New York Times*.[8]

Regardless of the precise starting point for the program, a competition-based advocacy program was in full swing by June 1980 when Alfred

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[6] These hardy perennials and the years when they were most active included: restraints on international trade (1975–1990), restraints on health care advertising and commercial practices (1978–1994), horizontal restraints and erection of entry barriers via legislation (1980–2003), regulation issues in airline, rail, and truck transportation (1980–1993), comments regarding regulatory reform in telecommunications, broadcasting, and cable TV (1983–1995), regulation of food claims in advertising and labeling (1987–1993, 2000, 2003), and, most recently, restructuring of the electricity generation, transmission, and distribution industry (1995–2003). Several filings concerning various postal regulation issues appeared between 1981 and 1989.

[7] For example, in 1993, and later in 2004, there were many comments about "any willing provider" laws, as pharmacy groups and others were lobbying state legislatures for protection against the anticipated effects of health care reforms. Most of these health care-related comments have been requested by and issued to state and local legislatures and other government bodies. In 1987 the FTC staff filed over a dozen comments with states regarding potentially anticompetitive aspects of attorney ethics codes.

[8] Robert Metz, *F.T.C. Chief Calls Role of Agencies Inflationary*, N.Y. TIMES, Oct. 8, 1974, at A1. This timing for the start of the program would be generally consistent with Scherer's argument that the regulatory intervention program had its origins as the result of several 1970s economic reports documenting the costs imposed by clumsy government policies (e.g., petroleum pricing, optician regulation, and occupational licensing). F.M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 471 (1990); *see also* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 649 (1982).

Dougherty, Bureau of Competition Director under Chairman Pertschuk, wrote that "the intervention program played an important role in advancing the Commission's competition goals."[9] Under Pertschuk, the Commission and its staff presented comments to numerous federal level agencies[10] on a wide range of issues, including international trade,[11] health professions,[12] and transportation.[13]

Chairman James Miller (September 1981–October 1985) further emphasized and formalized the advocacy program by providing a public rationale and plan for the program and placing coordination of the program in the Bureau of Consumer Protection.[14] The program under Miller also included a new-found emphasis on state level activity, in addition to the federal level activity that had previously been the mainstay of the program.[15] The program was further bolstered by complementary Bureau of Economics research on restraints involving transportation, telecommunications, healthcare, licensure, and international trade.[16]

As Figure 1 indicates, at least in numbers of filings, the program grew significantly from 1982 through 1987, when the program reached its apex with ninety comments.[17] The number of filings increased during this period for a least three reasons: (1) there was a greater emphasis on the program generally, and thus more opportunities were pursued; (2) there was an increase in the already broad range of the issues covered (e.g., postal practices and taxicab regulation); and (3) there were certain policy issues that were playing out in many states simultaneously, resulting

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[9] Celnicker, *supra* note 3, at 384 (citing Memorandum from Alfred F. Dougherty, Jr., Director of the Bureau of Competition, to the Commission 5 (June 30, 1980)).

[10] From 1977 to 1982 comments would have been filed with almost every agency of the federal government including the CAB, ICC (both now defunct), DOE, DHEW (now DHHS), FCC, ITC, and USDA. McChesney et al. provide a listing of numerous advocacy filings produced between 1977 and 1982. MCCHESNEY ET AL., *supra* note 3, at app.

[11] There were many filings with the International Trade Commission from 1975–1982. *See id.* at 38–42, A27–A28.

[12] *See* FTC ANNUAL REPORT 1978 at 9; FTC ANNUAL REPORT 1979 at 9.

[13] *See* FTC ANNUAL REPORT 1979 at 7–9.

[14] *See* MCCHESNEY ET AL., *supra* note 3; Robert D. Tollison, *Antitrust in the Reagan Administration: A Report from the Belly of the Beast*, 1 INT'L J. INDUS. ORG., 211, 217–18 (1983). The program was to be based on longer term empirical research that would be the foundation for multiple comments, and procedures were set up to allow a one-week turnaround for comments.

[15] The ratio of state-to-federal filings rose steadily from 1982 to a peak in 1988, when state filings outnumbered federal filings by 4 to 1. Thereafter, except for the outlier year of 1993, relative state level activity fell to a level roughly equal to federal activity.

[16] Such filings were a staple of the 1970s and 1980s advocacy program with about 51 individual filings (in dozens of product categories) from 1982 to 1989. *See* Figure 1.

[17] From 1983–1989, 56 comments were filed in an average year.

in a large number of advocacy opportunities on a single issue (e.g., attorney ethics codes, professional advertising, gasoline marketing, retail dealer protections, optometry retailing, etc.).

The annual number of annual filings from 1990–2001 fell markedly compared to the 1980s. As part of the winding down, various categories of filings were avoided altogether; comments to the Postal Service and most comments on international trade issues ended in 1990, under Chairman Janet Steiger (August 1989–April 1995).[18] One of her major goals was to improve relationships with various state agencies. De-emphasizing the advocacy program was one means of achieving that goal.[19] As the regional offices responded to the new Chairman's agenda, that traditional source of leads on state-level issues dried up and advocacy activity waned. Further, after 1995, under Chairman Robert Pitofsky (April 1995–May 2001), advocacy positions were much more closely coordinated with other government agencies (e.g., DOJ, FCC, FERC, DOT) to ensure consistency of viewpoint and a generalized executive department consistency.[20]

By early 2000, the FTC's program of regulatory comment was small and mostly unidimensional, focusing very heavily on the restructuring of the electricity generation and distribution industry. The program produced scattered comments on other substantive issues (e.g., comments to FDA on food advertising or drug regulation issues, comments to various states on entry restraints), but they were few compared to the

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[18] Steiger previously had been Chairman of the Postal Rate Commission and saw little need for continued comments in that area. International trade advocacy work had produced more than its share of conflict over the years and abandoning that particular area of endeavor was quite consistent with the effort to minimize inter-agency conflict in the future.

[19] For a discussion of Chairman Steiger's goal of federal/state cooperation, see Janet Steiger, Chairman, FTC, Address Before the 23d New England Antitrust Conf. 2 (Nov. 3, 1989). The early phase of the decline in advocacy from 1989 to 1990 resulted in the reduction in both advocacy filings (49%) and resources used in the program (20%) over that period. The decline continued throughout the 1990s. From 1991–1994 few resources were allocated to the effort by the two legal bureaus and the regional offices, although the residual momentum of the program resulted in a continuing stream of filings. This is not to say that advocacy disappeared. Indeed, several substantial federal filings were done to the FCC (Apr. 20, 1990; Dec. 21, 1990; Mar. 25, 1991; Nov. 26, 1991) and to the FDA (Jan. 5, 1990; Feb. 25, 1992), many based on earlier work done in the regulatory studies program.

[20] It is interesting that the original conception of the formal advocacy program indicated that if the comments were redundant with those of other agencies, the program would be less valuable. *See* MCCHESNEY ET AL., *supra* note 3, at 13. In a broader context, coordination with the DOJ on advocacy and competition policy fronts increased continually over the 1990s and 2000s. This enhanced coordination occurred on both international and domestic competition policy. On the other hand, in some situations, such coordination can also increase the difficulty and delay in producing comments.

heyday of advocacy activity and virtually none were supported by empirical work because by that time the agency did little research on regulatory issues.[21]

With Timothy Muris as Chairman (June 2001–August 2004) came a renewed emphasis on the FTC's advocacy program. There were twenty-one filings in 2002, a level that has risen slightly since then. Further, the program sought to expand beyond electricity into areas that were familiar ground in the 1980s—restraints on entry in local markets and governmental restrictions on competition. Although the general regulatory research that had been used to support the program in the 1980s was no longer an ongoing project, the comment topics became more diverse, including, for example, comments on the retail marketing of gasoline, wine distribution, licensure, and the unauthorized practice of law.

B. Explaining Variation in the Volume of Advocacy Comments

1. *Political and Economic Developments*

Developments unrelated to decisions made within the Commission may explain some of the changing fortunes of the advocacy program over time. In the late 1970s and 1980 regulation of several inherently competitive industries, such as certain transportation markets, were obvious targets for advocacy efforts. By the mid-1990s, however, most of those de-regulation targets were gone, as regulation of transportation, certain utilities, and telecommunications had been altered significantly or eliminated. Thus, there may have been somewhat less need for an advocate for rational analysis of federal regulatory and competition issues than there was in the 1970s and 1980s.

Other political and legal developments may also generate increases or decreases in advocacy activity. In recent years a series of important decisions regarding commercial speech and product health claims has generated an overhaul of the FDA's regulation of these claims.[22] Given the FTC's expertise in this subject area, the FTC has filed a series of comments on topics ranging from the scope of the First Amendment,[23]

[21] The electricity comments were not based on research done at the FTC. Substantive empirical work on those issues is done by the state regulators, private parties, and academics. The FTC did, however, hold a conference on electricity regulation in Summer 1997 and compiled a report on state retail electricity regulation in 2001. The large number of state-specific electricity filings in 1998 (17 filings) accounted for the bump-up in filings that year.

[22] *See* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999); Whitaker v. Thompson, 248 F. Supp. 2d 1 (D.D.C. 2002).

[23] Staff of Bureau of Economics, Bureau of Consumer Protection, and Office of Policy Planning, FTC, In the Matter of Request for Comment on First Amendment Issues, Docket

to qualified health claims[24] and regulatory responses to the obesity epidemic.[25]

The development of the Internet and e-commerce has also been a stimulus for advocacy filings because the Internet creates a new form of competition to established businesses. Various existing laws that have been used to limit competition and consumer choice have now been extended to block competition from the Internet. In areas such as direct shipment of wine,[26] Internet casket sales,[27] contact lenses,[28] and other industries, renewed efforts have been made by entrenched interests to block this new form of competition. In many situations, moreover, the beneficiaries of anticompetitive regulations are in-state merchants, whereas many Internet sellers do a modest amount of business in many states. As a result, in-state merchants have the incentive and influence to lobby effectively for protection, whereas out-of-state sellers lack the ability to compete as effectively in the political market as in the economic market.

2. *Lack of Internal/External Political Support*

The advocacy program was controversial from its inception because it could not avoid offending someone on each issue it pursued. Some

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No. 02N-0209 (Sept. 13, 2002) (comments before the FDA), *available at* http://www.ftc.gov/os/2002/09/fdatextversion.pdf.

[24] *See* Staff of Bureau of Economics, Bureau of Consumer Protection, and Office of Policy Planning, FTC, In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling; Consumer Research to Consider Nutrient Content and Health Claims and Possible Footnote or Disclosure Statements; Reopening of the Comment Period, Docket No. 03N-0076 (Apr. 15, 2004) (comments before the FDA), *available at* http://www.ftc.gov/os/2004/04/040416foodlabeling.pdf; Staff of Bureau of Economics, Bureau of Consumer Protection, and the Office of Policy Planning, FTC, In the Matter of Food Labeling: Health Claims; Dietary Guidance, Docket No. 2003-0496 (Jan. 26, 2004) (comments before the FDA, *available at* http://www.ftc.gov/os/2004/01/040126fdacomments.pdf.

[25] Staff of Bureau of Economics, the Bureau of Consumer Protection, and Office of Policy Planning, FTC, In the Matter of Obesity Working Group; Public Workshop: Exploring the Link Between Weight Management and Food Labels and Packaging, Docket No. 2003N-0338 (Dec. 12, 2003) (comments before the FDA), *available at* http://www.ftc.gov/be/v040003text.pdf; *see also* Todd J. Zywicki, Debra Holt & Maureen Ohlhausen, *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979 (2004).

[26] *See* Letter from Susan Creighton, Director of the Bureau of Competition, FTC, et al. to Assemblyman William Magee et al. (Mar. 29, 2004) [hereinafter New York Letter], *available at* http://www.ftc.gov/be/v040012.pdf.

[27] *See* Brief Amicus Curiae of the Federal Trade Commission, *Powers v. Harris,* No. CIV 01-445-F (W.D. Okla. Aug. 29, 2002), *available at* http://www.ftc.gov/os/2002/09/okamicus.pdf.

[28] *See* STAFF OF THE FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 29, 2004) [hereinafter CONTACT LENS REPORT], *available at* http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf.

of the animosity toward the program was likely based on disputes over specific policy suggestions, while more general objections may have arisen regarding the proper role (if any) of a federal agency in providing suggestions regarding competition or regulatory policies to a state legislature or regulatory body. Additionally, certain Congressional critics also argued that the advocacy program's use of resources kept the Commission from aggressively pursuing predation and other nonmerger antitrust activities.[29] As discussed above, in an effort to reduce tensions between the FTC and other state and federal regulators, Chairman Janet Steiger began to de-emphasize the advocacy program in 1989, as Figure 1 clearly shows.[30]

3. *Internal Resource Constraints*

One additional factor that might explain the lack of more advocacy activity in the late-1990s is the merger wave of that era. Although the advocacy program itself required a relatively small resource commitment, the FTC efforts in dealing with the merger wave may have had an indirect effect on the advocacy program. The need to examine the large number of mergers may have drawn off Bureau of Economics resources from the primary research necessary to generate effective advocacies, as well as taxed the small staffs of the individual Commissioners. Thus, there are various chokepoints in the advocacy production pipeline that can be affected by resource constraints that are not captured simply by noting the relatively small size of the program.

II. THE ECONOMIC THEORY OF REGULATION

Although regulation sometimes is needed to correct a market failure, it also can be used to restrict competition in order to transfer wealth from consumers to a favored industry. It has long been recognized that because of industry's superior efficiency in political organization relative

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[29] But, as Celnicker notes, FTC leadership purposely had chosen to avoid enforcement in these areas because they were likely to be welfare-reducing; the resources that the advocacy program consumed were never sufficient to significantly constrain the Commission from pursuing other activities. Celnicker, *supra* note 3, at 399. Advocacy consumed about 3–4% of FTC staff resources (30–40 workyears) at the 1987 zenith. *See* Memorandum from James M. Giffin, Associate Executive Director, to Andrew J. Strenio, FTC Commissioner (July 28, 1987), *cited by* Celnicker, *supra* note 3, at 399. Advocacy resources were about 2% of FTC resources in 1989 and by 1994 had fallen to less than 0.5% of FTC resources (4–5 agency workyears). By 2000 the percentage was so small that the program was virtually invisible—a maximum estimate regarding agency-wide advocacy resources would have been two workyears. (The data for that year, such as they are, indicate that less than one workyear was devoted to advocacy across the agency.) As of 2002, the total agency workyears devoted to advocacy might have been closer to five.

[30] *See, e.g.*, *Cutler Hangs Up FTC Armor Again,* FOOD & DRINK DAILY, May 1993, at 2.

to consumers, consumer interests often are subservient to industry interests in the regulatory process.[31] Beginning with the seminal work of Stigler (and later more formally developed by Sam Peltzman and Gary Becker), however, the notion that regulation is produced in a black box to maximize social welfare has given way to what has become known as the economic theory of regulation (ETR).[32] The foundation of ETR is that politicians and constituents are rational economic actors. As such, constituents demand favorable regulation and politicians use the state's coercive power to supply it in return for political support. When adopting a policy, regulators[33] weigh the political support from those who stand to gain against political opposition from those who stand to lose. The interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome.[34]

Building on the work of scholars like Anthony Downs and Mancur Olson, ETR explains why information and organization costs will limit the size of effective interest groups.[35] As a threshold matter, individuals must expend resources to gain enough information to recognize their interests. As Stigler notes, "[t]he costs of comprehensive information are higher in the political arena [than the marketplace] because information

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[31] As Peltzman noted, "[a] common, though not universal, conclusion has become that, as between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest." Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976).

[32] *See* Gary Becker, *A Theory of Competition Among Pressure Groups*, 98 Q.J. ECON. 371 (1983); Peltzman, *supra* note 31; George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM'T SCI. 3 (1971).

[33] In this paper "politician" and "regulator" are used interchangeably.

[34] An important insight from Peltzman, *supra* note 31, was that regulation would never provide industry with the monopoly outcome because at very high levels of wealth transfer, marginal consumer opposition is likely to be greater than marginal industry support for the regulation. ETR has generated a vast amount of empirical literature confirming the theoretical model. For example, several studies have shown a strong statistical relationship between campaign contributions and congressional voting. *See, e.g.*, Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425 (1996); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); James B. Kau et al., *A General Equilibrium Model of Congressional Voting*, 97 Q.J. ECON. 271 (1982); Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STAT. 77 (1982); Henry W. Chappell, Jr., *Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models*, 36 PUB. CHOICE 301 (1981); James B. Kau & Paul H. Rubin, *Self Interest, Ideology, and Logrolling in Congressional Voting*, 21 J.L. & ECON. 365 (1979); James B. Kau & Paul H. Rubin, *Voting on Minimum Wages: A Time Series Analyis*, 86 J. POL. ECON. 337 (1978). Viscusi et al., however, note that although several empirical studies are consistent with ETR, taken as a whole the empirical support for ETR is "mixed." VISCUSI ET AL., *supra* note 4, at 330–31.

[35] *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

must be sought on so many issues of little or no direct concern to the individual, and accordingly he will know little about most matters before the legislature."[36] Holding constant the size of a wealth transfer, the larger the interest group size, the smaller the per capita benefit; as per capita benefits diminish, the less likely it is that informing oneself on the impact of a regulation makes economic sense.

Second, once individuals recognize their interest in the outcome of the regulatory process, they must organize to translate their demand for policy into political pressure. Because the benefits from acquiring a desired regulatory outcome is a public good for members of an interest group, however, each member has an incentive to shirk his obligation to the group and free ride on the contributions of others.

The important implication of this insight is that policies that reduce the welfare of a majority for the benefit of a minority are within the set of feasible outcomes.[37] Indeed, one readily can see how consumer interests give way to the interests of a small industry in the regulatory process. Beyond a certain point, per capita benefits from a preferred regulatory outcome are diluted such that it becomes irrational to take part in the political process. A practical consequence of this is that small groups with similar interests—like members of a particular industry—can organize political support more effectively than large diffuse groups—like consumers generally. Thus, the equilibrium outcome of the political process is likely to be regulation that harms consumers by protecting a favored industry from competition.

Take the example of unauthorized practice of law (UPL) rules, which prohibit anyone other than a licensed attorney from performing those tasks that courts, bar associations, and/or legislatures have deemed to be the practice of law. By protecting attorneys from having to compete against nonattorneys, UPL restrictions raise the prices for legal services. When these restrictions provide consumers with no cognizable benefits in terms of increased protection from fraud or incompetence, consumers unambiguously lose. But consumers are unlikely to mount a challenge to even the most clearly harmful UPL restrictions (e.g., prohibitions on nonattorneys performing routine real estate settlement tasks, such as title searching and closings). First, bar associations often promulgate these rules, and state supreme courts adopt them, through processes of which only members of the bar are likely to have knowledge.[38] Second,

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[36] Stigler, *supra* note 32, at 11.

[37] *See* Peltzman, *supra* note 31, at 213 ("In consequence the numerically large, diffuse interest group is unlikely to be an effective bidder, and a policy inimical to the interest of a numerical majority will not be automatically rejected.").

[38] For example, in Massachusetts a task force of the Massachusetts Bar Association proposes a definition of the practice of law to the Massachusetts Bar Association House

even if consumers become aware of the costs associated with a proposed UPL restriction, organizing to fight it would be difficult, given the expense involved and the collective action problems discussed above.

III. COMPETITION ADVOCACY: REPRESENTING CONSUMER INTERESTS IN THE POLITICAL SYSTEM

ETR suggests that because consumers will be relatively ineffective at representing their interests in the political system, political outcomes may tend to restrict competition more than they otherwise would. Tasking a public entity with the responsibility of representing dispersed consumers by promoting the principle of competition in the political process is a way to correct this political market failure.[39] Indeed, because anticompetitive regulation that results from a political market failure can have just as pernicious effects on consumer welfare as private conduct that harms competition, there does not appear to be a reasoned justification for the FTC to police the former but not attempt to ameliorate consumer harm from the latter.[40]

By representing consumer interests in the political process, the FTC is able to affect political outcomes through three, nonmutually exclusive channels. First, to the extent that a comment informs consumers of the way a proposed regulation is likely to affect them, it can spur political action and thus increase the political costs associated with supporting

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of Delegates. If the House of Delegates approves the definition, it will recommend that the Massachusetts Supreme Court adopt the definition as part of the ethics rules that govern the practice of law. Outside of the legal community in the state, such efforts rarely receive any publicity despite their potential to exact large costs on consumers. *See* Letter from the Federal Trade Commission and the United States Justice Department to the Massachusetts Bar Association (Dec. 16, 2004), *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf.

[39] As the 1989 *Kirkpatrick Committee Report* observes:

> The FTC's competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion. Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget.

REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FTC, 58 ANTITRUST L.J. 43 (1989) (KIRKPATRICK COMMITTEE REPORT).

[40] *See* MCCHESNEY ET AL., *supra* note 3, at 7 ([T]he Commission should allocate its resources to the areas where net consumer benefits are greatest, regardless whether the injuries arise from restrictions by private parties or public agencies."); *see also* Daniel Oliver, Chairman of the FTC, Antitrust Reform: Staying Alive?, Address at the 20th New England Antitrust Conf. 5 (Nov. 15, 1986) (available from FTC) ("It is now convincingly argued that state and local governments create some of the most blatantly anticompetitive combinations to be found in the economy.").

anticompetitive regulation. In this manner, competition advocacy can move the political equilibrium towards one that is more favorable to competition. Similarly, an FTC comment can provide "political cover" for politicians to take a position against favored industry; regardless of whether an FTC comment increases the political cost to supporting anticompetitive regulations, a politician can claim that he or she has an excuse for not supporting a favored industry. Finally, a comment simply may persuade a politician to oppose regulation by presenting a compelling case that a certain regulation restricts competition more than is necessary to promote some consumer protection goal and therefore is not in the public interest.[41]

ETR also can help to explain why it is uniquely appropriate to have a federal agency charged with carrying out the advocacy function. As noted by James Madison in *Federalist 10,* state and local governments are often the most prone to the sort of factions and interest-group activity that generates anticompetitive regulation. Thus, a particular interest group may be especially concentrated or strong in a particular state, and that group may have undue influence in the political process of that state. In addition, the anticompetitive regulations of one state may have major spillovers, or other externalities, that impose burdens on national markets.[42] As a result, it is appropriate for the advocacy function to rest with a national actor that will be less prone to capture by parochial interest groups, but instead will be attenuated from some local political pressures and will be able to look out for the national goals of preserving robust economic market competition. In addition, the FTC's status as a bipartisan independent agency may also increase its effectiveness on advocacy issues. Because critics often will characterize FTC interventions as "taking sides," the Commission's status as a bipartisan expert agency may insulate it from some of the attacks that might otherwise be leveled at its advocacy activities.[43]

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[41] As discussed *infra*, the strength of this effect is likely to vary directly with the degree of insulation a politician has from constituency interests. *See* Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990).

[42] These spillovers may occur in many different ways. For instance, restrictions on the ability of in-state consumers to receive direct shipment of wine from out-of-state wineries have been called "the single largest regulatory barrier to expanded e-commerce in wine." *See* STAFF OF THE FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3 (July 2003) [hereinater WINE REPORT]. In addition, so-called "sales below cost" laws prohibit the sale of gasoline below certain minimum prices and have the likely effect of chilling aggressive competition and potentially raising prices to consumers. By affecting out-of-state consumers who purchase gas in states with such restrictions, the impact of the anticompetitive law is felt in interstate commerce.

[43] The FTC's advocacy activities are often criticized as an improper "meddling" in the affairs of state governments. This criticism, however, is fundamentally misplaced, as the Commission has followed a general longstanding policy of pursuing advocacy filings with

Despite these justifications for an advocacy program, there are some inherent limits on the benefits that advocacy can provide. For example, although advocacy provides regulators with information concerning the likely economic consequences of a policy choice, the FTC is not a constituent. FTC opposition to a protectionist piece of legislation, therefore, is not the same as constituent opposition because the FTC cannot provide political support in the form of votes or campaign contributions. In addition, FTC advocacy only can inform the debate and suggest appropriate action; it cannot compel that action.

Another important consideration is that the FTC is itself a regulatory body and may be subject to political pressure from interest groups in much the same manner as federal or state agencies or legislatures. As Timothy Muris, who has served as Chairman and Bureau Director, has observed, "Congress can, and often does, exert considerable influence over an agency such as the FTC."[44] Indeed, some studies have found a relationship between the preferences of congressional oversight members' constituencies and FTC policy.[45] And due to constituent complaints, in the late 1980s, moreover, Congress attempted to cripple, if not totally eliminate, the advocacy program.[46]

That the FTC is an independent and bipartisan agency, however, is likely to limit the ability of an industry to capture it. Almost uniformly, the Commission gives unanimous approval for comments. Because one industry would be unlikely to effectively capture all Commissioners, the views put forth in advocacy comments are highly unlikely to have resulted from interest-group pressure. Further, the FTC deals with a wide range of industries, making it less likely than agencies that serve only one or a few industries to be subject to capture by any single interest group.

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state officials only where public comments are invited or when expressly invited by an appropriate state official.

[44] Timothy J. Muris, *Regulatory Policymaking at the FTC: The Extent of Congressional Control*, 94 J. POL. ECON. 884 (1986).

[45] Weingast and Moran, for example, provide some empirical evidence that FTC enforcement priorities—as measured by Robinson-Patman, textiles, and credit caseloads—track the preferences of the Congressional committees that oversee the FTC. Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the FTC*, 91 J. POL. ECON. 765 (1983). Similarly, Faith et al., find that the FTC is statistically significantly less likely to challenge a merger that involves the district of an FTC oversight committee member. Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982). In a response to Weingast and Moran's paper, future Chairman Muris expressed skepticism that their evidence was sufficient to prove that point. In particular, he noted the authors' failure to consider forces other than Congress—such as staff, the courts, and the White House—that also shape FTC policy. *See* Muris, *supra* note 44.

[46] *See* Celnicker, *supra* note 3, at 393-400.

IV. ASSESSMENT OF THE COMPETITION ADVOCACY PROGRAM

One of the FTC's core goals is to prevent anticompetitive business practices. Competition advocacy furthers this goal by attempting to prevent government action that restricts competition. Important to determining the cost-effectiveness of the advocacy program is examining its efficiency in preventing anticompetitive regulations versus that of FTC enforcement.

A. FACTORS AFFECTING THE SUCCESS OF COMPETITION ADVOCACY

The value of competition advocacy should be measured by (1) the degree to which comments altered regulatory outcomes and (2) the value to consumers of those improved outcomes. For all practical purposes, however, elements (1) and (2) are impossible to determine with any degree of certainty. Although certain advocacy comments almost surely had some effect on final outcomes, and others clearly did not, there is no reliable way to determine the impact of a particular comment. For example, when regulators act in a manner advocated by the FTC, in most cases there is no means to measure a comment's marginal impact in the decision-making process. Moreover, even if decision makers later indicate that they relied on particular evidence or arguments, one can never be sure that such statements are not just after-the-fact justifications.

One study that attempted to assess the advocacy program's impact on regulatory outcomes between 1985–1987 found that 40 percent of comment recipients reported that the comments were at least "moderately effective," meaning that "the governmental entity's actions were totally or in large part consistent with all of the FTC's recommendations, and that any action taken was largely or partly because of those recommendations."[47] The author concedes, however, that this "does not establish that the FTC effect on those decisions improved them; that is what cannot be measured."[48]

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[47] *Id.* at 391. Another 11% of the survey respondents found the comments to be "slightly effective," meaning that "the governmental entity's actions were to a small degree consistent with at least some of the FTC recommendations, and that any action taken was largely or partly because of those recommendations." *Id.* Additionally, the author found that 47% of respondents gave the comments "substantial weight because it came from the FTC." *Id.* at 392. In 1989 a virtually identical survey was sent by the Director of the FTC's Advocacy Office to recipients of comments dated June 1, 1987 through June 2, 1989. The responses to this second survey were consistent with those from the first. (Results on file with authors.)

[48] *Id.* at 400.

With these caveats in place, we note four factors—two of which flow directly from ETR—that appear to play a role in the likelihood that comments will influence the regulatory outcome. First, comments before federal regulators have tended to meet with more success than those before state legislators. For example, comments to the FCC,[49] NHTSA,[50] FERC,[51] FAA,[52] FDA,[53] and CFTC[54] all appear to have positively affected regulatory outcomes. At the same time, the track record with state regula-

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[49] Comments to the FCC regarding the relative merits of price-cap regulation versus rate-of-return regulation in 1987 provided the basis for the FCC action. The Chairman of the FCC, Dennis R. Patrick, cited these results as the basis of the FCC policy choice. *See* Letter from Dennis R. Patrick, Chairman of the FCC, to John D. Dingell, U.S. Representative (Jan. 25, 1988).

[50] The National Highway Traffic and Safety Administration based its 1986 and l988 decisions not to raise its automobile fuel efficiency standard on analyses provided by FTC staff. *See* Comments of the FTC Staff to the National Highway Traffic Safety Administration (Mar. 24, l986).

[51] Recently, FTC efforts to highlight the competition issues in electricity industry restructuring had an impact, as one leading researcher in the area cited the FTC's arguments to make the point that open access to transmission grids would only work if sellers truly trusted the independence of the grid operator. Bill Hogan, PUB. UTIL. FORT., July 1, 1999, 19–20. In addition, one FERC Commissioner used FTC staff advocacy comments as a principal basis for his speech material. *See* William L. Massey, On the Brink of a Pro-Competitive Grid Regionalization Policy, Address at the Total ISO Solution Conference (Oct. 6, 1998) (transcript on file with authors).

[52] A November 15, 1991, FTC staff comment to the FAA regarding "use or lose" rules for airport landing slots convinced the FAA to revise its proposed rules governing the sale and transfer of the right to take off or land at one of the four high-density airports. On August 18, 1992, the FAA published its Final Rule increasing the "use-or-lose" usage rate from 65% to 80% on a weekly basis. In explaining its decision to adopt an 80% "use or lose" rule, the FAA cited prominently to the FTC staff comment, which reported that slot usage by the major slot-holders already exceeded 90%. *See* Comment of the Staff of the Bureau of Economics of the FTC, In the Matter of High Density Traffic Airports: Slot Allocation and Transfer Methods, FTC Docket No. 25758 (Nov. 15, 1991) (on file with the FTC's Public Reference Branch (faaslots)).

[53] Empirical work showed that rules proposed by the FDA would disallow health claims for large classes of arguably healthy food, such as fish and lean meats. As a result of the work, the FDA altered the rules to allow better versions of "bad" foods to tout their superior characteristics. *See* Comments of the Staffs of the Bureaus of Economics and Consumer Protection of the FTC, In the Matters of Nutrition Labeling; Nutrient Content Claims; Health Claims; Ingredient Labeling; Proposed Rules, Docket Nos. 91N-0384, 84N-0153, 85N-0061, 91N-0098, 91N-0099, 91N-0094, 91N-0096, 91N-0095, 91N-0219 (Feb. 25, 1992) (on file with the FTC's Public Reference Branch (V920001 and V920008) (FDAFOOD)); 21 C.F.R. §§ 20–21 (1993) (esp. p. 2493). Further, an attorney for an advertisers' trade association indicated (three years after the fact) that the FTC staff filing to FDA on direct-to-consumer drug advertising in early 1996 "turned the tide" toward allowing information to flow to consumers regarding drug therapy options. See Comments of the Staff of the Bureau of Consumer Protection and the Bureau of Economics, FTC, In the Matter of Direct-to-Consumer Promotion, Public Hearing Before the FDA (Jan. 11, 1996) (Docket No. 95N-0227).

[54] In the CFTC's approval of the application of U.S. Futures Exchange to open a futures trading market in the United States, one CFTC Commissioner also expressly referred to the analysis of the FTC in assisting in his decision to approve the application. Walter L.

tors appears less successful. For example, although the FTC's efforts to allow entry into taxicab services in the latter 1980s achieved certain successes, for the most part, cities chose not to follow the FTC's advice that free entry in conjunction with fare competition would likely provide a better outcome for consumers. These observations are consistent with ETR, which predicts that regulators who are insulated from direct political influence are more likely to act independently based on policy considerations rather than constituent interests.[55] This insight offers an explanation as to why comments may have more effect before nonelected federal regulators rather than elected state legislators.

Second, in situations where one industry (or a subgroup within an industry) is attempting to secure regulation that would hinder competition by favoring it at the expense of a rival industry (or group), competition advocacy is likely to be more successful. This prediction follows from ETR because comments supporting a position taken by another industry rather than by consumers alone are more likely to be successful given industry's superior political organization ability. Casual empiricism provides some support for this hypothesis.[56] For example, recent FTC comments opposing legislation that would have regulated pharmacy benefit managers' (PBMs) contractual relationships with health plans and pharmacies have appeared to have had an impact.[57] PBMs and major health plans, which have powerful lobbies, opposed such legislation as

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Lukken, CFTC Commissioner, Statement Before USFE Designation Hearing (Feb. 4, 2004), *available at* http://www.cftc.gov/opa/speeches04/opalukken-07.htm.

[55] *See e.g.,* Kalt & Zupan, *supra* note 41; Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy Making*, 12 J.L. ECON. & ORG. 119 (1996); Thomas H. Hammond & Gary J. Miller, *The Core of the Constitution*, 81 AM. POL. SCI. REV. 1155 (1987).

[56] This may be the case because organized industry groups are able to publicize FTC comments to achieve maximum effect. It may also be because an industry group is more likely than consumers to mount successful opposition to a regulation regardless of FTC intervention.

[57] *See* Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, FTC, et al., to North Dakota Senator Richard L. Brown (Mar. 9, 2005), *available at* http://www.ftc.gov/os/2005/03/050311northdakotacomnts.pdf; Letter from Susan Creighton, Director, Bureau of Competition, FTC, et al., to Greg Aghazarian, Assemblyman of California (Sept. 7, 2004) [hereinafter California Letter], *available at* http://www.ftc.gov/be/V040027.pdf. Letter from Todd R. Zywicki, Director, Office of Policy Planning, FTC, et al., to Patrick C. Lynch, Attorney General of Rhode Island (Apr. 8, 2004) [hereinafter Rhode Island Letter], *available at* http://www.ftc.gov/os/2004/04/ribills.pdf. Governor Schwarzenegger cited an FTC comment explaining how a law that would require would be likely to increase the cost of pharmaceuticals in his veto message. *See* Letter from Arnold Schwarzenegger, Governor of California, to Members of California State Assembly (Veto of Assembly Bill 1960), *available at* http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

well.[58] Comments and amicus briefs opposing UPL restrictions that would bar nonattorneys from performing certain real estate settlement tasks (e.g., title searching, performing closings) have been relatively successful, perhaps in part because the title company industry is affected directly by these restrictions.[59] The lack of organized opposition to restraints on competition may also offer a partial explanation for the lack of success in taxicab advocacies. Those who might gain from taxi deregulation are unorganized consumers and small, would-be taxi entrepreneurs. The FTC's relative impotence in affecting trade policy, moreover, may be due in part to the fact that trade barriers are the quintessential example of restrictive regulations that provide substantial benefits to specific industries and impose smaller per capita costs widely upon consumers and other industries.

Third, empirical substantiation for a position is important; if a comment can point to careful empirical work demonstrating that the regulation in question is likely to harm consumers, it is likely to be more persuasive. This may be why comments with a substantial empirical component appear to have met with success.[60]

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[58] Retail pharmacies and unions were the primary proponents of this legislation. Aetna, Blue Cross of California, the California Association of Health Plans, and Pacificare opposed the bill. *See Pharmacy Benefits Management: Analysis of A.B. 1960 Before the Senate Health and Human Services Committee*, 2003–2004 Sess. (Cal. Jun. 14, 2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1951-2000/ab_1960_cfa_20040614_134801_sen_comm.html.

[59] *See, e.g*, Brief Amici Curiae of the Federal Trade Commission and the United States of America, McMahon v. Advanced Title Serv. Co. of West Virginia, 607 S.E.2d 519 (W. Va. 2004) (No. 31706), *available at* http://www.ftc.gov/be/V040017.pdf; Letter from Charles A. James, Assistant Attorney General, Department of Justice, the FTC et al., to John B. Harwood, Speaker of the House of Representatives of Rhode Island et al. (Mar. 29, 2002), *available at* http://www.ftc.gov/be/v020013.pdf; Letter from Charles A. James, Assistant Attorney General, Department of Justice, the FTC et al., to North Carolina State Bar Ethics Committee (Dec. 14, 2001), *available at* http://www.ftc.gov/be/V020006.htm. Efforts to persuade the Georgia Supreme Court not to adopt a rule that would bar nonattorneys from providing real estate settlement services, however, were unsuccessful. *See* Brief Amici Curiae of the United States of America and the Federal Trade Commission, On Review of UPL Advisory Op. 2003-02, 588 S.E.2d 741 (Ga. 2003) (No. S03U1451), *available at* http://www.ftc.gov/os/2003/07/georgiabrief.pdf; Letter from R. Hewitt Pate, Acting Assistant Attorney General, Department of Justice, FTC et al., to State Bar of Georgia (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.htm.

[60] Comments containing original empirical research on specific regulatory issues were filed with many agencies, including the FCC, the DOT, and the FDA. These filings tended to be the most convincing work of the program because the empirical work made the filings more valuable and more credible than they might otherwise be. *See, e.g.*, Reply Comments of the Bureaus of Competition, Consumer Protection, and Economics of the FTC, In the Matter of Amendment of Section 73.3555 of the Commission's Rules, Broadcast Multiple Ownership Rules, MM Docket No. 87-7 (July 15, 1987); Comments of the Bureaus of Economics, Competition, and Consumer Protection of the FTC, Massport's Program for Airport Capacity Efficiency (Feb. 29, 1988); Comments of the Staff of the Bureau of

Finally, comments involving consumer protection appear to be more successful. The Commission's dual expertise in competition and consumer protection will often enable it to speak with great force and credibility on those issues.[61] In these areas, the FTC's input can be especially valuable in debunking consumer protection rationales for anticompetitive regulations. Notably, in most debates on trade restraints, competition and consumer welfare play little or no role.[62]

Of these factors, organized political opposition to an anticompetitive regulation may the most important. For example, in trade policy, although the FTC staff undertook extensive investigations of trade restraints from the mid-1970s through the early 1990s—and many of the filings contained new empirical and conceptual work—two decades

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Economics of the FTC, In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, MM Docket No. 88-140, RM-5416, RM-5472 (Jan. 23, 1989); Comments on FCC's financial interest and syndication rule, which restricted ownership of the rights to re-run TV shows (3 filings in 1990–1991); Comment on FCC's Must-Carry Rules for Network TV (Nov. 26, 1991); Reply Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the FTC, In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket No. 90-4 (Nov. 15, 1991); Comment of the Staff of the Bureau of Economics of the FTC, In the Matter of Study of the High Density Rule, Docket No. 27664 (Nov. 23, 1994); Comment of the Staffs of the Bureaus of Economics and Consumer Protection of the FTC, In the Matters of Nutrition Labeling; Nutrient Content Claims; Health Claims; Ingredient Labeling; Proposed Rules, Docket Nos. 91N-0384, 84N-0153, 85N-0061, 91N-0098, 91N-0099, 91N-0094, 91N-0096, 91N-0095, 91N-0219 (Feb. 25, 1992). Empirical work done by a BE economist and the Commission's report on competition in the health care industry have complemented advocacy filings on "any willing provider" laws involving retail pharmaceutical sales in Rhode Island and California legislation that would impose disclosure requirements on PBMs. *See* Michael G. Vita, *Regulatory Restrictions on Selective Contracting: An Empirical Analysis of "Any-Willing-Provider" Regulations*, 20 J. HEALTH ECON. 955 (2001); STAFF OF THE FEDERAL TRADE COMMISSION & THE DEPARTMENT OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf; Rhode Island Letter, *supra* note 57; California Letter, *supra* note 57. The staff report on barriers to online sales of wine also proved useful in an advocacy filing concerning legislation that would allow direct shipment of wine in New York. *See* New York Letter, *supra* note 26.

[61] On such matters as occupational licensing, for instance, the FTC has over time developed great expertise on the interrelationship of competition and consumer protection goals. *See, e.g.*, FTC BUREAU OF ECONOMICS, THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980); UPL Comments, *supra* note 59; WINE REPORT, *supra* note 42; CONTACT LENS REPORT, *supra* note 28; STAFF OF THE FEDERAL TRADE COMMISSION, THE STRENGTH OF COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (Feb. 2005), *available at* http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf.

[62] The FTC had focused its main trade advocacy efforts on cases at the ITC that allowed a somewhat broader view of the effects of trade restraints—Section 337 (unfair competition) and Section 201 (escape clause) cases. Many trade restraints take the form of antidumping and countervailing duty cases (Sections 701 and 731), where the ITC is less able to consider the broad effects of their actions.

of work did not observably alter policy or individual decisions. [63] Alternatively, FTC advocacy against laws that prohibit retailers from selling gasoline at prices below a defined measure of cost have met with a modest degree of success despite the concentrated parochial support that these laws enjoy from local gas station owners.[64] Although there is no local industry that is organized to resist below-cost-sales regulations, these regulations primarily are targeted at warehouse stores, such as Costco and Sam's Club, which are able to effect local political opposition.

B. Efficiency of Competition Advocacy Versus Enforcement

Although it is difficult to measure with any precision the impact of advocacy comments on regulatory outcomes, it is almost certainly the case that competition advocacy is a more cost-effective means than enforcement to attack state-imposed barriers to competition. The *Noerr-Pennington* doctrine immunizes certain attempts to lobby government for even anticompetitive regulation from antitrust challenge,[65] and the state action doctrine shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is (1) in furtherance of a clearly articulated state policy, and (2) actively supervised by the state.[66] Thus,

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[63] There were many filings with the International Trade Commission from 1975 to 1982; *see* McChesney et al., *supra* note 3, at 38–42, A27–A28. *See, e.g.*, Prehearing Brief of the FTC, Stainless Steel and Alloy Tool Steel No. TA-203-16 (Mar. 27, 1987). This was one of a long line of advocacy filings focusing on international trade restraints on products ranging from softwood lumber to DRAM computer chips. Almost all empirical FTC staff analyses of trade restraints found that the benefits obtained from trade restraints (in terms of jobs "saved," if indeed any jobs were saved in long-run equilibrium) were overwhelmed by the costs to consumers. But those benefits were very specific to the workers and industries, and the costs were widely dispersed, so trade restraints remain popular despite their negative net impact.

[64] For successes in opposing below-cost-sales laws, *see, e.g.*, Letter from Todd J. Zywicki, Director, Office of Policy Planning, FTC, et al., to Michigan State Representative Gene DeRossett (June 17, 2004), *available at* http://www.ftc.gov/os/2004/06/040618staff commentsmichiganpetrol.pdf; Letter from Susan A. Creighton, Director, Bureau of Competition, FTC, et al., to Kansas State Senator Les Donovan (Mar. 12, 2004), *available at* http://www.ftc.gov/be/v040009.pdf; Letter from Joseph J. Simons, Director, Bureau of Competition, FTC, et al., to Daniel G. Clodfelter, North Carolina State Senator (May 19, 2003), *available at* http://www.ftc.gov/os/2003/05/ncclsenatorclodfelter.pdf. For letters that were ineffective see, e.g., Letter from Susan Creighton, Director, Bureau of Competition, FTC, et al., to Demetrius Newton, Alabama State Representative (Jan. 29, 2004), *available at* http://www.ftc.gov/be/v040005.htm; Letter from Susan Creighton et al., Director, Bureau of Competition, FTC, to Shirley Krug, Wisconsin State Representative (Oct. 15, 2003), *available at* http://www.ftc.gov/be/v030015.htm.

[65] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961);United Mine Workers v. Pennington, 381 U.S. 657 (1965); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[66] *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Parker v. Brown, 317 U.S. 341 (1943). *See also* Office of Policy Planning, FTC,

FTC enforcement may be unable to reach some anticompetitive regulations, leaving advocacy as the only tool available to prevent consumer harm.

Even for cases where a court finds immunities not to apply, the high costs and inherent uncertainty of litigation and the extremely small amount of resources needed for advocacy suggest that advocacy is a more efficient vehicle than enforcement to attack state restrictions on competition. Further, by preventing or ameliorating anticompetitive restraints *before* they are imposed, advocacy can avoid, or at lease attenuate, consumer harm. Finally, to a greater extent than litigation—which often can involve idiosyncratic issues—the FTC often can amortize the cost of advocacy activities over subsequent comments on similar issues; once the fixed costs of analyzing a restraint have been incurred, the marginal cost of each subsequent filing on the same or similar topics is often minimal.[67]

V. CONCLUSION

The FTC is charged by Congress with protecting competition and consumer welfare, and the advocacy program is a unique and cost-effective tool for carrying out this mission. Because consumers face a higher cost/benefit ratio vis-à-vis industry in the political arena, they are unlikely to overcome this disadvantage and organize opposition to anticompetitive regulation. Antitrust immunities, moreover, sometimes put anticompetitive regulation beyond the reach of traditional enforcement. By providing a means for the FTC to represent consumers' interests directly in the policy-production mechanism, the advocacy program can overcome these two hurdles and provide protection for consumers at relatively low cost. It thus should be recognized as one of the prime tools in the FTC's arsenal, and one that should be supported notwithstanding the fact that it will often generate controversy.

REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf, for a discussion of the problems that have arisen with respect to overbroad application of the state action doctrine to immunize anticompetitive actions. Similar to the state action doctrine, federal legislation that conflicts with federal antitrust laws is said to enact an "implied repeal" of the antitrust laws. *See* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

[67] *See* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 486 (1999) (noting tendency of state legislatures to "copy" legislative enactments from one state to another, often with minimal debate or study). For instance, the frequency of legislation involving below-cost gasoline sales and regulation of PMBs, and attempts by state bars to promulgate restrictive UPL rules has made initial investments in advocacy in these fields very productive.

A review of the practice of competition advocacy suggests that advocacy filings that contained a substantial empirical component complementing the FTC staff's research capabilities in competition and consumer protection issues tended to meet with more success. While both litigation and merger review are inherently reactive and generally proceed on the FTC's timetable, advocacy must be proactive: the FTC must be ready to respond quickly when an opportunity presents itself. Thoughtful and thorough empirical work, however, requires more time than the typical lead time (normally from two weeks to three months) involved in advocacy comments. Therefore, those responsible for advocacy need to identify issues that are likely to spawn anticompetitive regulation and that primary research must already be underway when concrete opportunities for advocacy present themselves.

Further, ETR predicts, and casual empiricism suggests, that advocacy is likely to meet with more success when anticompetitive regulation protects one industry (or a subgroup within an industry) from its marketplace rivals. Thus, the resources assigned to advocacy may be most efficiently used to comment on these types of regulations. Absent industry-versus-industry circumstances, however, a cost/benefit approach may justify the use of advocacy when regulation is likely to impose substantial costs on consumers.