Introduction

The Federal Trade Commission (FTC) has become the primary regulator of online privacy and data security in the United States. This role has developed organically, through the exercise of the various sources of regulatory power – primarily its authority to prevent unfair or deceptive acts or practices. In some cases, this role has developed informally, as with the FTC's early efforts to understand consumer privacy issues that exist online. In other cases, the role has developed through the more deliberate exercises of statutory authority, such as through the development of rules and standards required by specific statutes or authorized by the FTC Act.

Regardless of how it found itself in this role, the agency – given its current structure, resources, and, most important, statutory authority – is ill-suited to this regulatory task. This role has fallen to the Commission largely because of the breadth and ill-defined boundaries of its regulatory statute, combined with some limited authority to regulate privacy and data security issues under existing statutes. Since the advent of the consumer Internet, there has been a palpable regulatory vacuum in these areas – a void that has existed because of uncertainty both over how to regulate and whether regulation in these areas is even needed. But regulationaltos a vacuum – though ill-suited to the task, the FTC has been quick to fill it.

The Commission has been quick to defend its efforts, highlighting the large number of privacy- and data security-related enforcement actions that it has brought and settled since the turn of the millennium. These defenses have increased over the past year, largely in response to sets of related issues. First, there are currently two cases pending that challenge the Commission's data security efforts – previously the targets of the Commission's incursions have settled with the agency. Second, Congress is actively considering new laws for privacy and data security legislation: the contingency for presenting new tools to prevent its existing power and to capture greater power through any new legislation. And, third, on the large number of enforcement actions that the agency has brought and the increasingly clear difficulties of data security, the Commission is arguing for the legitimacy of its approach to date. Indeed, it is using its efforts to date to lobby Congress for greater power.

This article challenges the FTC's approach to data security and related issues. In particular, it raises concerns over the Commission's self-styled "common-law" approach. While the Commission's approach – based in case-by-case enforcement actions – does bear some resemblance to the broad and flexible approach that the common law has taken in the past, it is also true that the common law has not had the same kind of support for its approach as has the FTC. Indeed, the FTC's data security approach is rooted in the relatively new field of data security, and the Commission itself is relatively new to this field.

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for the legitimacy of its approach to date. Indeed, it is using its efforts to date to lobby Congress for greater power.

This article challenges the FTC's approach to data security and related issues. In particular, it raises concerns over the Commission's self-styled "common-law" approach. While the Commission's approach – based in case-by-case enforcement actions – does bear some resemblance to the approach of the common-law courts, it also bears important differences that render the comparison inappropriate. Perhaps most important, common-law courts shape legal norms as a consequence of the common-law process, whereas the FTC sets its enforcement prerogative with the purpose shaping legal norms. While current administrative law principles give agencies like the FTC substantial discretion to choose how they develop legal norms, the FTC has pushed this discretion to – or beyond – its limits by conflating enforcement prerogative with the development of new legal norms.

While few scholars have shared in these concerns, recent developments in the FTC's ongoing enforcement efforts suggest the challenges raised in this article are substantial. As a recent hearing in one case (LabMD), the judge excoriated FTC counsel as "completely unreasonable," "unwilling to accept any responsibility," and criticizing the agency's approach to developing legal norms by saying that they agency "ought to give [regulated parties] some guidance as to what you do and do not expect, what is or is not required. You are a regulatory agency. I suspect you can do that." In another case (Wyndham), Judge Esther Salas has summarized the complaint inquisitorial appeal of her earlier holding that the FTC has authority to regulate firms' data security practices and the FTC has exercised that authority in compliance with the Due Process clause's fair notice requirements. Curiously, while Judge Salas found the law sufficiently uncertain to warrant interlocutory appeal, the FTC bluntly represented her prior holding to the LabMD court as affirming the propriety of its enforcement conduct. And the House Oversight Committee has recently initiated an investigation into the relationship between the FTC and a private security firm that has been integral to the FTC's data security efforts.

This article's critique is framed both by the FTC's recent history of enforcement actions, and also by Solove & Hartzog's (S&H) work in this field. Their recent article, "The FTC's LabMD MTD Brief," is an important contribution (though query whether the text of which they must do is itself a critique of the soundness of this body of law).

It also argues wholeheartedly with the idea that the FTC's approach is woefully undertheorized and underestimated by legal scholars. Indeed, importance of understanding administrative jurisprudence in traditionally non-administrative areas of law (especially antitrust) is a theme central my own recent work. I cannot agree with S&H more emphatically that this is a set of issues to which legal scholars must turn their attention.

The core concerns raised by this article are jurisprudential and procedural. Even if the FTC has managed to craft a coherent set of rules through a common-law-like approach, this does not mean that those rules are jurisprudentially sound. The process by which rules are created gives legitimacy to the substance of those rules. It gives notice to relevant stakeholders, and ensures that the proper stakeholders are subject to those rules. It ensures that other regulatory entities – e.g., Congress, the courts, and other agencies – are able to participate in the process, and that regulatory responsibility is properly apportioned between them. And, more generally, even if the result of the FTC's process in the data security context is sound, permitting use of an illegitimate process in this context gives legitimacy to the use of flawed processes in other contexts.

This Article proceeds in five parts. Part I describes the FTC's approach to developing legal norms to govern data security – the FTC's so-called "common-law" approach – by distilling what the FTC and other commentators mean when they refer to the FTC's "common law." Part II turns to consider the mechanisms by which the common law is ordinarily understood to work, and why these mechanisms are thought to be sound.

Part III situations this discussion in the broader debate about agency choice of procedure. The relative merits of quasi-legislative rulemaking and case-to-case adjudication have been a central issue in administrative law for more than 60 years, during at least to SEC v. Chenery (Chenery II). Decided in 1947, in Chenery II the Supreme Court gave agencies broad latitude in deciding whether to formulate rules through legislation-like rulemaking processes or adjudicative processes. Chenery II is still good law today. But there is a strong view among Administrative Law scholars that over the past decade, the Supreme Court has begun to rein in this discretion, in large part due to the very sort of jurisprudential concerns raised by the FTC's "common-law" approach.

As S&H discuss, legal scholars generally – and in this field in particular – have paid little attention to the jurisprudential aspects to the FTC's approach. This doesn't mean that these jurisprudential questions have not been studied and do not have serious implications for the FTC's
approach. It is unfortunate that some scholars and regulators are flippant about these issues. The Supreme Court is not – if the FTC does act with a sound jurisprudential theory backing its processes, decisions resulting from those processes may well not be long for this world.

Part IV situates the FTC’s “common-law” approach in the broader context of current and historic administrative law debates. It then offers a critique of the FTC’s approach, arguing both that the jurisprudential value of its approach falls well below that of judicial common law and that its approach runs contrary to contemporary trends in administrative law.

Despite this Article’s criticisms, the FTC is likely to continue to develop legal norms through adjudication – and also that the adjudicatory approach is appropriate in many cases. Part V looks at the circumstances under which such an approach may or may not be reasonable. It then explains how the FTC use adjudication in ways that capture the virtuous aspects of the common law method while avoiding the jurisprudential concerns raised earlier.

I. The FTC’s “Common Law”

The FTC has long relied primarily on case-by-case adjudication to fulfill its statutory mandate.16 In its approach to antitrust – shaped by interactions between the FTC, Department of Justice, state attorneys general and private plaintiffs in court cases – has long been referred to as a “common law.”17 But only most recently has the FTC begun to refer to its approach to consumer protection in such terms, despite the notable absence of consumer protection litigation. The first

16 To be clear, this is not a charge levied against S&H. Others, however, have been implicitly or explicitly dismisses of these concerns. Chairman Ramirez’s characterization of the common-law is undermined at best, demonstrating a diminishing lack of concern for the jurisprudential task that it has charge. And in more recent Congresional testimony, Paul Ohlin has described those concerns as a “false choice.” Paul Ohlin’s written testimony before House E&C Comm., Feb 28, 2014.) That view is not unfamiliar. But as any Administrative Law, Civil Procedure, or Constitutional Law

17 S&H @ 23.

26 S&H @ 69.


Here, as with privacy, the central concern related to how online intermediaries—firms hosting or handling sensitive consumer information—protected consumers interests. The FTC deemed existing laws, both federal and state, insufficient to the task of protecting consumers against lax data security practices. But, as with privacy, the FTC’s UDAP authority offered the breadth and flexibility needed to reach these practices.

This, however, the Commission’s approach was more enforcement-oriented. It was not yet under the rubric of common law. In other words, its evolving policy was being formed primarily through adjudicatory enforcement actions (and settlements) through informal information gathering and dissemination. This was in part because the Commission’s authority and expertise in the area was buttressed by its (accused, acquired) role as privacy regulator, and in part because data security concerns presented far clearer and more pressing consumer harms than did privacy cases. By mid-decade, concern was beginning to focus about the FTC’s approach. 39

It was becoming clear that the Commission was developing a substantial new area of law in the shadow of its UDAP authority. Both the authority and the sufficiency of the Commission’s approach raised concern for many in the bar. These concerns, however, were justifiedly overshadowed for most by the pressing need to address data security concerns—even for those concerned by the FTC’s approach, uncertainty over how to proceed justified some reliance on the FTC’s approach as a stopgap measure.

By the turn of the decade, these concerns were beginning to spill over from the bar into policy makers’ and from there into the academic debates that we are beginning to have today. As Skid note, the Commission’s activity in this area proceeded with minimal academic attention for 10-15 years.32

In the same timeframe, many Commissioners and commentators have begun pressing for the Commission to embrace a broader understanding of its authority to proscribe “unfair methods of competition” (UMC).33

This urged expansion results from the perceived inadequacy of the (judicially-defined) antitrust laws to address a range of competition-related concerns.34 The Commission’s UMC authority is widely understood to embrace, but be broader than, the antitrust laws.35 In the decades prior to 2010, the Commission had been reluctant to push in UMC authority beyond the scope of the antitrust laws,36 but that reluctance has been giving way—as at least in the Commission’s rhetoric—to the FTC’s general willingness to be more aggressively set, and push, the boundaries of existing legal norms.

39 [There’s a good law review article writing such concerns c. 2007]

32 The merit of these concerns are beyond the scope of this article, to address, but an excellent by the very public confrontation between the DOJ and FTC over the proper scope of Section 2 of the Sherman Act. During the Bush administration, the DOJ and FTC co-authored a joint report on Section 2.[JTPC] Almost immediately upon the nomination of the Obama administration, DOJ withdrew support for this report. Rather than capturing a difference between the DOJ and FTC, this disagreement captures the palpable disagreement over the proper scope of Section 2.

33 See supra Note 31. See also Ramirez, GME LAW 191

34 See supra. See also Hurwitz, Chevron and the Limits of Administrative Authority.

Moreover, shortly after the beginning of this Congressional investigation, Judge Salas—who had previously affirmed the FTC’s authority and approach to developing data security norms—certified questions relating to this approach to the Third Circuit for interlocutory appeal. While commentators had read Judge Salas’s opinion as overbroad vindication of the FTC’s practices—the FTC represented the opinion’s holding without qualification to the court in the LabMD hearing—Judge Salas offered a more cautious understanding, explaining that Wyndham’s “statutory authority to proceed under Section 5 and the common-law doctrine upon which this approach is based confers upon the FTC the discretionary authority and broad discretion to approach the issue in a manner that is consistent with the standards of reasonableness and prudence.”

The FTC’s preference for semi-precedential public opinions as an approach to developing data security norms is an improper way for an administrative agency to develop binding legal norms. They argue that the FTC has failed to provide notice or otherwise promulgate any data security standards, such that the Commission cannot take an enforcement action against firms for data security breaches.37 The Commission responds that its past enforcement actions are well known within the bar and result in published consent decrees that provide notice and effectively promulgate its data security expectations.

40 Ramirez (“That brings me to the second topic I would like to address today: the process the Commission uses to develop Section 5 guidance.”). But the real common law results from the practice that the FTC has adopted to develop data security standards by means of rulemaking, not enforcement actions. To discover and apply objectively identifiable principles. They were discovering and applying a legal approach that was consistent with the common law—rather, judges were dipping into a great reservoir of legal and practical knowledge to develop the law of the case.41

Here, the FTC’s policed approach to developing its data security standards began to tarnish. During a hearing to consider LabMD’s motion, Judge Williams S. DuBay, Jr., addressed FTC counsel:

No wonder you [FTC counsel] can’t get this resolved, because if [you in 20 year old] open the sliding door, even I would be outraged, or at least I wouldn’t be very receptive to it if that’s the opening bid. You have been completely unreasonable about this. And today you are not willing to accept any responsibility . . . . I think that your security standards from the FTC. You kind of take them as they come and decide whether somebody’s practices were or were not within what’s permissible from your eyes.

(H)'ow does any company in the United States operate when [it says], “well, tell me exactly what we are supposed to do,” and you say, “you are not supposed to do what you did.” (H)’ow ought to give some guidance as to what you do and do not express, what is or is not required. You are a regulatory agency. I suspect you can do that.

Judge DuBay ultimately denied LabMD’s motion on procedural grounds—because the FTC’s enforcement action was ongoing, LabMD’s challenge to the agency action in federal court was unripe.

The LabMD case, however, has since been suspended pending a Congressional inquiry into the FTC’s tactics in investigating and taking action against LabMD. The relationship between the FTC and the security firm with which the FTC would identify and pursue as a case agent LabMD is currently under investigation, along with allegations by an employee of that firm that FTC Commissioners lied to Congress about the LabMD investigation.

36 The procedural posture in the LabMD case is quite different from that in the Wyndham case. Wyndham is being litigated in federal court. LabMD is being litigated before an FTC Administrative Law Judge in an administrative proceeding.

37 Final Transcript, LabMD v. FTC (N.D. Ga., May 7, 2014).

38 Priest, Stearns.

41 This argument applies where a firm has not affirmatively indicated to consumers that it abides by specific data security standards. Where such statements are made, the FTC can proceed under its deception authority— and there is little question that such enforcement actions are appropriate. Where, however, no affirmative assurances have been made, the FTC proceeds under an unfairness theory.
not making it.46 Modern understandings of common law tend to eschew this declaratory theory for more realist understandings of the law and role of precedent.47

Whatever of the theory, both declaratory and more recent theories of common law create – and, to some extent, value – a stable body of precedent. This is captured in the well-known idea of stare decisis. Under a declaratory theory, more judicially-conceived law will stay. The danger is the jurisprudence of stare decisis: a doctrine that does not change.48 More recent theories tend to value stability as a good in itself. Therefore, they value precedent to avoid the mischief that unnecessary change may cause.

Importantly, while contemporary understandings of the common law recognize that judges do in fact “make” law, they do not embrace this function warmly.49 Rather, it results from the realist understanding that cases are brought to the court because there is an otherwise irreconcilable conflict. It is the judge’s job to reconcile this conflict, even where the law offers no clear answer. It is for this reason that various rules exist – statutory, constitutional, and customary – that restrict the scope of a judge’s discretion. Judges do not select cases to hear they take the cases that come to them; judges cannot hear any case; the parties must have standing, the case must represent an actual case or controversy, the issues must be ripe; and judges should decide cases narrowly: decisions are generally limited to the facts of the case and to the legal issues needed to address the case or controversy.50

These restraints highlight the role of the adjudicator in common law. Common law cases are heard by an adjudicator who is independent from the facts and parties and who must take cases and render decisions upon them. Each of these aspects is necessary to the common law mechanism – especially under modern understandings. Under a declaratory theory, case selection, decision, and independence are of less concern (provided that judges can be disciplined for clear improprieties). But where we understand that judges make law, involving the adjudicator in the case selection process implicitly influences the outcome of that process.48 The reasons for this should be obvious:

46 For contemporary discussions, see Allan Behr, The Declaratory Theory of Law, 53 Or. L. Rev. 421 (2013); Michael Sanders, President, League of Professors, 14 Geo. Mason L. Rev. 761 (2007). (Cite various & exhaustive Blackstone, Holmes, & others. One standard reference was offered in FTC v. Adbakel (1972). “There is, in fact, no such thing as a judge-making law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritative.”)

47 Lord Kinkel (1969) (“There was not a more exciting controversy than that upon the question whether a judge makes law. Of course he does. How else can he do it?”)

48 Importantly, and somewhat counter-intuitively, judges operating under this theory would not hesitate to reject prior decision when they be better treated to a new case. The prior decisions, being final and not actual law, and therefore are not entitled to any precedential value. Under the declaratory model, post-decision is a result of the declaratory process, not one of the mechanisms.)

49 Schacht.

50 Eisen; Stavros, Krentorovich; Schacht.

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the setting parties’ incentives are not aligned with the socially-beneficial further development of the law.

b. There’s nothing common about the FTC’s “Common Law”

Once we move beyond the superficial understanding of the common law as being merely a series of semi-precedential decisions, it becomes difficult to maintain an analogy of the FTC’s approach to the common law. Most fundamentally, the FTC is not operating in a domain of convergence; it is operating in a domain of modal policies. This will be considered as part of the next subsection’s treatment of the FTC’s approach as compared to rulemaking. But first, let us consider separately the roles of adjudicator and litigant.

The FTC is not an independent adjudicator; it is a party to the enforcement actions it brings. And instead of taking and deciding whatever cases come to it, it has discretion to hear what cases it wants; its cases as they come, to avoid path manipulation.

See infra at ___.

51 Schacht.

52 Schacht.

53 Eisen.

54 Eisen.

55 Eisen.

56 See Rossi (describing how mismatching incentives undermine the precedential value of settlements of administrative FTC cases).

The FTC’s common law is not a common law in any sense the term is used in its enforcement discretion is apparent in the case it brings. Most of the cases the FTC brings each year are clear cut. It almost always brings cases in which the proof of deceptive or unfair conduct is overwhelming. To reject these cases is easy; on the contrary, many are quite complex. But the FTC tends to focus on cases with a significant impact on consumer protection, avoiding marginal cases that put the envelope uncleanly.)

57 DeKoven.

58 Wright, Bailey, Crane.

59 [As is the Ford-Wright study] Explain how that FTC complaint counsel can initially bring cases through administrative adjudication, in which case it is heard by an ALJ and the Commissioners, or can initially bring these cases in district court.

60 See infra at ___.

61 Roest (describing how mismatching incentives undermine the precedential value of settlements of administrative FTC cases).

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issues and to do so narrowly. This is a central theme that eases to the heart of the argument in favor of the FTC’s approach: courts, unlike agencies, decide cases because they must; agencies, unlike courts, can engage in quasi-legislative rulemaking. Recall that in Ginsberg if the Court started its analysis by saying that “Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct.”

With the agency weighing the costs of both litigant and adjudicator, it is also unsurprising that the Commission has an unprecedented success rate in its adjudications. It is well documented in recent literature; earlier this year, the FTC’s complaint counsel (administrative prosecutor) had a 98% success rate in deciding the Commission’s case. The results of this study are particularly remarkable given that FTC matters initially prosecuted before the Commission are more, not less, likely to be overturned by the courts of appeal than FTC matters initially prosecuted in district court. 1.3 This plain fact runs in the face of justifying deference to administrative agencies because of their supposedly greater expertise.

These statistics raise clear questions about the FTC’s impartiality as adjudicator, an important difference between the FTC’s “common law” and real common law. They also highlight another important difference. Given the costs, both in terms of time and money, of bringing a case before the Commission to decision, parties have substantial reason to settle cases. This is compounded by the reputational damage that parties are likely to face if an FTC complaint does get adjudicated – settlement offers the opportunity to resolve complaints with minimal publicity. As we shall see, how much that reputational damage discourages companies from litigating in court is significant where the conduct at issue is not the kind of clear fraud or deception by bad actors on which the FTC has traditionally focused. However, the FTC’s process gives it little or no incentive to resolve disputes by seeking favorable outcomes. This significant difference between the FTC’s process and any other forum is a key reason why the FTC has such a high success rate.

But as discussed above, development of the common law is a positive externality that results from private incentives having an incentive to see cases through to decision. Where this is not the case, parties’ private incentives do not align with the public development of the law. While the various public documents relating to an FTC enforcement action provide some understanding of FTC policy, it is disingenuous to describe the resulting policy in common law terms.

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The FTC’s “common-law” analog also fails on multiplicity grounds. Multiplicity – especially of multiple adjudicators deciding similar cases – helps adjudicators find the margins along which the law needs to develop and to identify the directions in which it may develop. The FTC’s approach – especially where the Commission proceeds by identifying high-impact cases that address broad issues – assumes the conclusion. Unlike the common law, the Commission begins with an idea of the high-impact case in which it wants the law to develop, and then proceeds to take the case along that path. This robs the Commission of the benefit offered by hearing many perspectives, and robs the public of the better policies that such perspectives would allow the Commission to craft. (Both of these are, of course, things that formal rulemaking is designed to produce.)

A final difference between the Commission’s approach and that of the common law is that there is no reason to believe that the Commission’s jurisprudence will be stable over time. Administrative agencies are not bound by principles of stare decisis. They are free to change their policies, even to create direct conflicts with prior policies, almost at will – the only constraint is that whatever policy they adopt reasonably be within the ambit of the agency’s statutory authority.46 Indeed, agencies are even free to adopt policies that contradict previous judicial constructions of their statutes.47 Simply stated: stare decisis does not constrain administrative decisionmaking.

Many of the commentators who have discussed the Commission’s “common-law” approach have recognized this, at least to some extent.48 They respond that the Commission has approached its development of the law with an eye to consistency. While this may be historically true, it is a leap to compare 10-15 years of consistency from the FTC with the common law’s hundreds of years of consistency. Institutional leadership changed. The Commission has been developing these areas of law under the stewardship of only three Chairs, and it has not been until recently that the Commission has begun thinking of itself as operating in a “common-law”-like manner. Indeed, looking at the closing letters offered by the Commission in its data security investigations, it is apparent that the Commission is providing parties significantly less guidance under the stewardship of Chairwoman Ramirez that it did previously.49

III. Rulemaking vs. Adjudication in Administrative Law

The issues underlying concern about the FTC’s “common-law” approach are not new. Indeed, they lie at the heart of the separation of powers framework underpinning our Constitution – concerns about consolidating the role of rulemaking, enforcement, and adjudication – and concerns that if we created an agency to do the work of judges, we would have concerns central to basic questions about the legitimacy of and best practices for the administrative state. Judges and scholars have been debating the relative merits of administrative rulemaking compared to case-by-case adjudication for decades. These questions have become necessary context for understanding the appropriateness of the FTC’s “common-law” approach.50

46 Fox L.
47 Brand X.
48 S&H.
49 Cits to TP/FOIA request.
51 Magill, 71 U. Chi. L. Rev. 1383, 1441; see also 91 Georgetown L.J. 757.
52 Manning, 72 GWU L. Rev. 893, 909 (“Although scholars have also periodically tackled the central issue of complying rulemaking obligations, such efforts have not gained traction. Nor could they, in my view. Whatever one thinks of the risks of rulemaking versus adjudication, I think it is absurd to doubt the possibility of devising a [readily manageable standard for triggering mandatory rulemaking].”)
54 See, e.g., S&H. These arguments necessary to define the stakes and educate the agency. It tends to approach broad policy questions from a formality that is quite different.
55 The choice made between proceeding by rulemaking, the relationship between rulemaking (legislation) and adjudication (execution) and the role of the judiciary.
56 The answer, as unsatisfying as it has been persistent, is judicial administrability: determining whether, given the existence of circumstances that lead to the initiation of a proceeding or succession of proceedings. Other methods of intervention or amicus curiae filings. To the extent it excludes such parties, it also excludes the information and arguments necessary to define the stakes and educate the agency. It tends to approach broad policy questions from a formality that is quite different.
57 See INS v. Chadha
58 W.R. Bressman summarizes many of the concerns with adjudication nicely: “Yet, adjudication, as a general matter, has been judicially manageable standard for triggering mandatory rulemaking.”
59 Id.
60 See supra note 6.
61 See supra note 6.
62 Administrative law process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that does not presently in the informed discretion of the administrative agency.
63 The italicized portions are the genesis of the modern rule that agencies have broad discretion in their choice of procedure, generally limited only by an abuse of discretion standard.52 We include this passage here both because this is the operative language in the debates over rulemaking vs. adjudication – the basic rationale for adjudication are routinely cited today – as well because this passage contains language that is likely appealing to those who favor the FTC’s “common-law” approach. We will return to this language in due course.
64 This standard is, on the Court’s own terms, a bit puzzling: the Court says outright that agencies are ‘regulating by guidance’ – much as much as possible, ad hoc litigation is one that does not presently in the informed discretion of the administrative agency.
65 Mr. Justice Cardozo’s statement that “Law as a guide to conduct is reduced to the level of mere
66 The choice made between proceeding by rulemaking, the relationship between rulemaking (legislation) and adjudication (execution) and the role of the judiciary.
67 Administrative law process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that does not presently in the informed discretion of the administrative agency.
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or when it is appropriate for an agency to use one procedure over another requires a court to assess
facial gradations to a degree beyond the meaningful resolution of judicial process.64

c. Wyman-Gordon, Bell-Aerospace, and the Failed Challenge to Discretion

Chevron II prompted the development of a substantial, and generally critical academic
literature.65 This literature sought to develop administrable standards for agency choice of procedure,
with a strong preference for rulemaking over adjudication.

This literature found some allies on the Supreme Court and D.C. Circuit in a short-lived revival of
Chevron II. In Wyman-Gordon, Justices Harlan and Douglas dissented from a plurality opinion
relating to the NLRB’s use of adjudication to issue a new rule.66 In their dissents, both Justices argued
that the NLRB should have been required to issue the new rule through a notice-and-
comment process.67

These dissents suggested that the Court may have had the appetite to revisit the strong
holding in Chevron II, Judge Friendly, himself friendly to the argument that agencies should face a
judicially enforced preference for rulemaking procedures, distillled from the plurality and dissents a
vote that would require new rules of general applicability to be announced through rulemaking
procedures.68 Unfortunately for the cause, the Supreme Court granted cert in Judge Friendly’s test
case, Bell-Aerospace and, optimistically endorsed its own prior holding in Chevron II.69 As explained by
Manning: “Bell-Aerospace thus decisively rebuffed the efforts of Justices Douglas and Harlan and
Judge Friendly to devise a generally enforceable line between proper rules and improper
adjudications.”70

d. From Chevron to Mead

Following Bell-Aerospace’s re-affirmation of Chevron II in 1974, concern over agency choice of procedure
cracked and the focus of administrative law jurisprudence shifted from procedural to substantive
discussion. This era began the explosive growth of the administrative state into its
current form. This growth was driven in part by general regulatory attitudes – the growth,
and

64 See Manning, 508-515. This is unsatisfying to many because courts often are required to make an assessment. See, e.g., Bressman (arguing for the development of such standards to determine choice of procedure questions).

65 Magli, 2016. (“This is an important, if now faded, interest focusing on agency choice between adjudication and rulemaking that develops a normative take on the choice between those two policymaking tools. Authors debated the relative merits of rulemaking and adjudication as policymaking tools and attempted to identify when an agency should pursue one path over the other. . . . To say that there was a debate, however, implies more diversity of opinion than can be found in that literature.” ([This shift of these articles too unfairly aligns agencies should use rulemaking more often than they did.”]).

66 Wyman-Gordon v. NLRB, Manning. 67 Wyman-Gordon dissent, Manning.

68 Manning, 908. 69 Manning, 908. 70 Manning, 908.

71 Id.; 908-909.

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Bressman, arguing for greater accountability in agency choices of procedure, explains the
significance of the decisions: “Mead moves in the right direction. The case begins a partial
weaning from Chevron II and unlimited choice of procedure.”71

Bressman’s views of agency choice of procedure – which largely echo the concerns of the pre-
Wyman-Gordon era – are representative of current concerns.

The place to start is with the advantages of notice-comment rulemaking for making general policy.
Notice-comment rulemaking, by its nature, facilitates the participation of affected parties, the submission of relevant information, and
the prospective application of revoking policy. As a result of the reasoned
decisionmaking requirement that accompanies it, notice-comment rulemaking
fosters logical and thorough consideration of policy. To the extent notice-comment
rulemaking insures general rules that rely for their enforcement on further
proceedings, it also promotes predictability. At a minimum, it allows affected parties,
who participate in the formulation of the rule, to anticipate the rule and plan
accordingly.

Now compare formal adjudication. Agencies, like the NLRB, have shown that
adjudication may serve as a policymaking tool. Yet, adjudication, as a general
matter, has serious shortcomings for formulating policy. Other methods for
formulating general policy, whatever those might look like after Mead, fare even
worse.72

For commentators like Bressman, Mead offers an appealing opportunity: to peg an agency’s
substantive discretion inversely to its procedural discretion. The more stringent a process it uses to
arrive at a given outcome, the more weight courts will give to that outcome. This comports with the
fundamental principle in our legal system is that laws which regulate persons or entities must give
fair notice of conduct that is forbidden or required.”73

Lower courts and scholars have long considered arguments such as these as possible avenues to challenge an agency’s inappropriate use of adjudication over rulemaking.74 With these cases – especially Fox II – the court appears to have embraced this approach.

IV. The Commission’s administrative Jurisprudence

Under current administrative law, the FTC has the discretion to proceed in an adjudicatory,
“common-law”-like manner, rather than using its rulemaking authority to issue formal ex ante
rules under Section 5. And it must be emphasized that the FTC has clear rulemaking authority for both
UDAP and UMC.75 But the FTC chooses adjudication over rulemaking against the risk of the
Court’s recent jurisprudence, and therefore at its own risk. No matter the current state of precedent,
the practical fact is that if the Commission acts too aggressively, it risks the ire of the courts or
Congress. We should not forget – though as an institution the Commission largely has – that its
over-reach brought Congress to usher the agency in 1980 and seriously damaged the agency’s funding
and reputation, causing the agency not to be reauthorized for fourteen years, and not to be
reauthorized since.

Adjudication is in many ways “common-law” like – and, as seen Clenero II, the flexibility it
offers certainly can be helpful in many circumstances where it is difficult to formulate specific rules
ex ante. Unfortunately, there are strong arguments for adjudication in fast-moving areas like privacy
and data security. But there are also strong arguments in favor of relying instead on, or in
conjunction with, rulemaking. And, importantly, even where the FTC does take an adjudicatory
approach, fear does not in any matter as much as, or more than, the choice between adjudication and
formal rulemaking: at one end of the spectrum, the FTC retains broad discretion to direct the course
of the rule with no effective judicial oversight or other discipline to require analytical rigor, while at
the other end, as in antitrust, the law evolves through an ongoing dialectic between the FTC and
courts, forcing careful analysis of both law and the trade-offs, economic and otherwise, inherent in
the FTC’s statutory standards.

It is possible that describing the FTC’s approach as “common-law” like is mere rhetorical
flourish – that the FTC is just engaging in ordinary administrative adjudication and using the
“common law” analogy as shorthand for those unfamiliar with administrative jurisprudence. As
discussed above, this shorthand is inaccurate. It amounts to first-ringing on the jurisprudential
legitimacy of the common law instead of examining the jurisprudential merits of the FTC’s
adjudicatory approach. Let us look now at those jurisprudential merits. The discussion that follows

72 Bressman, 542.

73 See, e.g., Manning, supra.


76 Statement of Basis and Purpose of Trade Regulation Rules. Unfair or Disruptive Advertising and Labeling of
(2000)).

77 Add to this section discussion of Leoni, Freedom and Law.

78 Decision Memorandum for USAP, NAR/Potential Rule for UMC. See also Harroun, Clenero and Limits of Administrative
applies the discussion above of agency choice of procedure to the FTC’s adjudicatory approach to developing its data security jurisprudence.

a. The rulemaking vs. adjudicatory mindset

It should be noted that the rhetoric matters, especially when it reflects (or influences) the mindset of its users. The Commission has long viewed itself as primarily a law enforcement agency. In such a role it is responsible for enforcing legal norms, not setting them. The mindset of rule-maker is fundamentally different from that of rule-enforcer – the former focuses on means, the latter on ends. This is precisely why, in the common law system, the role of the two is separated, ensuring the role of rule-making to a party whose interests are independent from the outcome of the case.

If the FTC is to have legitimacy as a rule-maker, it must view that as its primary role – or at least as coequal with its enforcement function. This view must be held throughout the Commission, from the attorneys selecting and investigating cases to the Commissioners and AJs hearing them. Those involved with the Commission’s rulemaking and enforcement functions should be separated – both institutionally and structurally – from those guiding its rulemaking processes.

This is more true for the FTC than for other agencies, because of the sheer breadth of the Commission’s statutory authority. No other agency has general authority to regulate commercial practices economy wide – no other agency has been described as the “second most powerful legislative body in the country.” The breadth of the FTC’s statutory authority makes the both the potential for abuse and potential consequences of such abuse particularly great. We should insist upon those wielding such power to have and to exercise the highest levels of discretion and sophistication.

But the concerns for the Commission’s preference for adjudication over rule-making (or rulemaking through adjudication) are more general than this. There are longstanding debates in administrative law about the proper role of agencies adjudicating matters when they have the power to develop and to issue rules instead. It is arguably incorrect to characterize this as a debate, so strong is the consensus that agencies should prefer rulemaking processes over adjudication wherever possible.116

To understand this, let’s take a more general look at the jurisprudence of administrative adjudication.

b. The FTC’s Rulemaking Domain

Perhaps most fundamentally, whereas the common law operates in a domain of policy convergence, administrative law operates in a domain of policy modality. Congress statutorily

conducts investigations and prepare reports for (and at the behest of) Congress, the Department of Justice, and the President. Its role was to provide information needed in order to develop legal norms to those expected to develop legal norms. While the Commission was granted more power to bring civil actions and seek injunctions on its own over time, these were generally viewed as enforcement functions. The Commission was not viewed as playing a role in developing legal norms, by itself or others.117

In the 1960s and 70s, the Commission did undertake a substantial rule-making role – and it was thoroughly rebuffed for having done so.118 As a result, Congress enacted the Magnaon-Moss Act (Mag-Moss) in the 1970s.119 Among other things, Mag-Moss imposed cumbersome new procedural requirements on the Commission’s rulemaking powers.

From an administrative law perspective, this should be damning to the Commission’s development of legal norms through adjudication. Congress has expressly imposed heightened procedural burdens on the FTC’s rulemaking powers. The Commission should not be able to avoid those burdens simply by naming to adjudication instead. Doing so avoids and negates Congressional intent.

c. Other concerns: Fair Notice

There are other, more general, reasons to be concerned about the Commission’s approach as well, which should be part of any discussion about an agency’s choice of rulemaking or adjudication.

The best known of these concerns emanate from Constitutional requirements that parties have fair notice of the laws that will apply to them. Fair notice concerns over agency use of adjudication are not new, courts and litigants have made use of them – with varying degrees of success – for decades. In the aftermath of the short-lived FPC/FTC/Great revolts against Clylon II, fair notice was raised as the remaining protection against agency abuse of discretion in preferring adjudication over rulemaking.120

Fair notice presents a facial challenge to legal rules that impose penalties upon regulated parties but leave [to fail] to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless (that it authorizes or encourages seriously discriminatory enforcement).120 It is meant to protect against at least two types of harm: providing regulated parties notice of the rules to which they are subject, and ensuring that those making the rules “do not act in an arbitrary or discriminatory way.”121 Critically, the standard is objective: whether the entity establishing legal norms is doing so in a manner that provides sufficient notice to regulated parties – fair notice does

defines the policy-space in which an agency can operate, and the agency is empowered – indeed, expected – to say “what the law is” within this space. As discussed above, there is no expectation of consistency over time – agencies are not bound by stare doctis.122 Rather, the courts recognize that the policy outcome is a political question – not a legal one – that is to be answered by political processes.123

This demonstrates one of the key aspects of the common law discussed above: courts decide cases because they must. It is a key reason administrative law has developed to give agencies substantive discretion and deference is because doing so provides an opportunity for courts to avoid deciding cases without reason. Where Congress has acted – either directly by passing a law or indirectly by empowering an agency to set legal norms – courts will not interpose the common law approach.

This suggests that Skiff’s analogy is apt where they say that “The FTC has not been engaging in rulemaking in disguise any more than a court when interpreting a statute is engaging in judicial legislation.”124 Given the availability of rulemaking, common law courts emphatically avoid engaging in common law adjudication. So strong is this preference that courts will even decline to engage in common law adjudication where some regulatory agency has authority to issues rules but has not exercised that authority.125

An important, and reasonable, response to this is that Congress gave the FTC broad authority because Congress lacked the expertise and dedicated resources needed to regulate dynamic and fast-moving areas of the economy. Unlike other agencies, where the statutory policy space defines the boundaries of permissible regulatory outcomes with no expectation that policy outcomes will converge or be stable over time, the FTC’s policy space is broad so that it will have the flexibility to develop legal norms that Congress is ill-equipped to develop on its own. And an important aspect of this delegation is that such legal norms are difficult to establish using ex ante, legislative-style, rulemaking processes – rather, any rules need to be developed with the flexibility and responsiveness afforded by case-by-case adjudication. To the extent that this is true, and it is to some extent true, it is responsive to the critique that agencies generally should prefer rulemaking over adjudication – the FTC, under this explanation, was granted precisely because rulemaking proved unable to the areas that the Commission was entrusted to regulate.

But this understanding proves too much. If anything, the same concerns that gave Congress the authority to create the FTC should give the FTC pause in its development of legal norms. While case-by-case adjudication may in some cases be necessary, and can serve as an input into more structured and deliberative rulemaking processes, the Commission should rely primarily on notice-and-comment rulemaking to develop legal norms.

The agency’s history offers support for this view. Indeed, as initially envisioned, the FTC was primarily serve an informational function: in its first instantiation in its primary power was to

not ask whether regulated parties actually had knowledge, but whether the regulator was conducting itself in a manner sufficient to meet basic Constitutional principles of Due Process.126

The basic principles of Fair Notice have been long- and well-established. How they apply in the administrative context, however, is an area that is still under development by the Court127 and that raises a number of unanswered questions. For instance, whether regulated parties face fines or other penalty for non-compliance. It is unclear how, or whether, courts will view regulatory and regulatory compliance costs in the context of fair notice. This is particularly important in the context of the FTC, because the Commission has only limited ability to assess fines for violation of its rules.128 Of course, it must be noted that the Commission is actively seeking greater authority to issue civil fines,129 It has specifically articulated a need for such authority in privacy and data security areas.130

Another open question, again of salience to the FTC’s current efforts, is how compliance with industry norms affects the fair notice analysis.131 While a party is acting in accordance with industry customs or standards, courts are unlikely to find that a regulated party had fair notice of a regulation that conflicts with those practices.132 In the data security realm, the FTC is actively trying to develop new industry norms, shifting away from historically lax practices. While historic practices are certainly unsatisfactory, they are also widespread – the scale and scope of contemporary data security problems, including among extremely sophisticated and resource-rich parties – raises serious questions about the legitimacy of the Commission’s efforts to shape industry norms through adjudications. The response, such as offered by Skiff, that privacy and data security practitioners are able to dissuade from the Commission’s actions a coherent set of privacy and data security principles is unconvincing, especially in the data security realm. Almost every business in the U.S. maintains electronic records – it is connected to the Internet – only a miniscule number of these businesses have the benefit of legal counsel, let alone of legal counsel with expertise in a subcategory area of law. This is compounded by the existence of myriad state privacy and data security laws.133 Where a business does have the sophistication necessary to seek out and comply with legal guidance for its electronic systems, it is more likely to turn to state law than federal regulation.

It must be noted that there is an important difference between situations in which a business has a stated policy relating to privacy or data security and situations in which it does not. Where a state policy is involved, the FTC can proceed directly from its deception authority instead of its unfairness

116 This view was recently expressed by Oliner: “Many employees of the FTC see the agency first and foremost as a civil law enforcement agency. Of course the agency also promulgates regulations and guidance and engages in research and consumer education, but those roles are second in priority for many at the FTC.”

117 See Hearings at notes 117.

118 See supra notes 115-120.

119 See Manning.

120 See Wyman-Gordon.

121 See Fox II.

122 See Skiff.

123 See supra notes 116-120.

124 See Wyman-Gordon.

125 See supra note 116.

126 See supra notes 116-120.

127 See supra notes 116-120.

128 See supra notes 116-120.

129 See supra notes 116-120.

130 See supra notes 116-120.

131 See supra notes 116-120.

132 See supra notes 116-120.

133 See supra notes 116-120.
authority. In such cases the Commission relying on a more clearly established body of precedent, one that is more intuitively obvious to a person of ordinary intelligence. Fair notice issues are far more likely when then agency chooses, or needs, to act under its unfettered authority. 

There is a final aspect to be considered about the role of industry customs and standards in the FTC’s development of legal norms while compliance with industry practices may buttress a fair notice claim against the Commission, deviation from industry norms does not necessarily suffice to establish liability. 

Consider Procter & Shalala, in which the DC Circuit rejected the FDA’s refusal to allow health claims for which there was not “significant scientific agreement.” 41 Although rejecting the challenger’s First Amendment arguments, the D.C. Circuit found that the FDA’s incorporation of a “significant scientific agreement” test to determine the permissibility of health claims was improper, in violation of Constitutional Due Process requirements. The court explains that “proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action” and continues. 

Importantly, this case arose in the context of rulemaking, not adjudication. As the court notes: 

That is not to say that the agency was necessarily required to define the term in its initial general regulation—or indeed that it is obliged to issue a comprehensive definition at all once; the agency is entitled to proceed by case or, more accurately, sub-regulation by sub-regulation, but it must be possible for the regulated class to perceive the principles which are guiding agency action. Accordingly, on remand, the FDA must explain what it means by significant scientific agreement or, at minimum, what it does not mean. 

Thus we see that in the context of Fair Notice, use of an industry’s customs and standards is asymmetric. A party can use the fact of its compliance with such practices to argue that a regulator did not meet the Constitutional requirements of Fair Notice – even if the party had actual notice of the regulations. But the regulator may not be able to use the fact of a party’s non-compliance with industry customs and standards to demonstrate that its regulation provided sufficient notice that such non-compliance was actionable. 


128. But see discussion of supra notes, supra note 135. 

129. Compare these with the incentives faced by the parties that the FTC investigates. The Commission often conflict with those of Congress and the President. There is substantial literature examining agencies' three key incentives to acquire power, independence, and resources. At times these incentives may be aligned with faithful execution of the law; at other times they are not. Regardless, all three have been on display in the FTC's recent discussions of privacy and data security legislation: according to the Commission, Congress should give it clear power to more forcefully use its discretion to develop legal norms relating to privacy and data security. 

130. In doing so, Congress should also give the agency more resources, both in terms of personnel and money, and also in terms of the legal tools available to it. 

131. Compare these with the incentives faced by the parties that the FTC investigates. The Commission tours its settlements both as a source of the agency’s “common law,” and also as a demonstration of the soundness of its approach. But the incentives faced by both the parties and the Commission suggest that the meaning of this high settlement rate is, at best, indeterminate. Really, all that it tells us is that the costs of settling for the parties is less than the expected cost of litigation. This is one of the reasons that settlements are not viewed as contributing to the development of the common law. On the other hand, there is reason to suggest that the parties’ incentives undermine the value of settlements. 

132. A final consideration related to incentives is based in the FTC’s structure as an independent agency. As an independent agency, it is governed by a five-member, politically balanced, Commission, member of which are only removable for cause. The sole authority direct political oversight stems from the President’s role in nominating members to the Commission, and his power to select the Commission’s Chair. The majority of the Commission will always be made up of members belonging to the President’s political party, which may exert some level of political influence. 

Paul Ohm, however, argues that “Political accountability exerts [a] structural check on the agency’s enforcement decisions.” Were that this were the case, it would respond to many of the incentive concerns. But independent agencies are structured as they are precisely to insulate agencies from political oversight. The court may not be able to use the fact of a party’s non-compliance with industry customs and standards to demonstrate that its regulation provided sufficient notice that such non-compliance was actionable.

b. Other concerns: Conflicting incentives 

A final set of concerns to consider relate to the incentives facing an agency and the parties it regulates. 

While it is certainly hoped that agencies will be the faithful servants of Congress and the President, it is well understood that agencies – and the individuals that make up agencies – face their own incentives. These incentives often conflict with those of Congress and the President. There is substantial literature examining agencies’ three key incentives to acquire power, independence, and resources. At times these incentives may be aligned with faithful execution of the law; at other times they are not. Regardless, all three have been on display in the FTC’s recent discussions of privacy and data security legislation: according to the Commission, Congress should give it clear power to more forcefully use its discretion to develop legal norms relating to privacy and data security. In doing so, Congress should also give the agency more resources, both in terms of personnel and money, and also in terms of the legal tools available to it. 

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radios to the shipping trade, likening them to the captain's ears. Indeed, the value of shipboard radio was well understood, having been the basis for regulation of the radio spectrum starting twenty years earlier, and given the ongoing discussion of reforming the Federal Radio Commission.

The real issue that data security poses for consumers, industry, and the FTC is the need for education and better technology. The scope of the data security problem is far beyond the FTC's current ability to address – a fact which FTC Commissioners themselves recognize. Sources about significant vulnerabilities or breaches are in the news almost daily. These vulnerabilities affect every class of computer user, from ordinary consumers, to small businesses, to large business, and even to large technology specialists. And breaches are often traced back to ordinary employees engaging in behavior that is hard to audit or protect against, short of implementing business-debilitating procedures.

This issue is compounded by the fact that no matter how the FTC views itself, most consumers and businesses do not naturally think of it as a data security regulator – let alone as the nation's primary source of data security protections. The nexus between the FTC's consumer protection mission and privacy is relatively clear to the ordinary consumer and businesses: when a firm discloses a consumer's information, it is natural to think that the firm has done something inappropriate and harmful to the consumer. When a firm experiences a data breach, however, both consumers and firms are unlikely to turn to the FTC for guidance. Businesses are unlikely to seek out the guidance of the FTC for how to handle consumer data. Both are sure that the FTC's efforts to date have yielded a coherent body of legal norms that are familiar to data security practitioners.

This also raises concern about the efficacy of the FTC's efforts to define data security norms. To the extent that they turn to anyone for data security guidance, businesses are unlikely to seek out the guidance of the FTC for how to handle consumer data. Both are sure that the FTC's efforts to date have yielded a coherent body of legal norms that are familiar to data security practitioners. But few law firms have data security practices – especially among firms outside of Washington's sphere of influence or without significant regulatory practices.

Rather, to be effective data security guidance needs to be available to and come from sources that firms will seek out organically. These sources include, primarily, state level business and corporate law, and industry specific regulators.

In light of these concerns it is useful to return to the language of Cheney II that gives agencies discretion to choose whether to proceed by rulemaking or adjudication. As discussed previously, Cheney II gives agencies broad discretion in their choice of rulemaking procedure. But the language does include some limitations – even if today those limitations are vestigial. The Court explained that there is "a very definite place for the case-by-case evolution of statutory standards," for instance for "problems which must be solved despite the absence of a relevant general rule." But with data security the FTC is doing something beyond developing "statutory standards" – the FTC is expanding the scope of its unfairness authority, not merely developing the statutory standards governing its authority. And while the problem that it is seeking to address is one that "must be solved," it is unclear whether the FTC can, let alone must, be the entity to solve it.

b. Effective Adjudication

Regardless of the FTC's use of adjudication, the agency will surely continue to develop legal norms through adjudication. And despite the critique offered in this article, there surely are instances where it is appropriate – even wise – for the agency to proceed through adjudication instead of rulemaking. The common-law critique offers guidance for how the Commission should proceed when using adjudication to develop legal norms.

Perhaps the most important, and most general, thing to keep in mind is the purpose of the FTC's efforts. To the extent the agency is working to develop new legal norms – that is, to develop a "common law" of privacy, data security, or any other body of law – the Commission is working to develop rules. This is the idea that Commissioners and commentators mean to capture when referring to the Commission's work as common law–like. If the Commission is to be effective in these efforts, it must approach its work from a rulemaking perspective – it must escape the biases and motivations that come with it's typical enforcement perspective. Chief among these, its goal must be to craft jurisprudentially sound rules – and its goal must not be simply to obtain successful verdicts.

With this in mind, the Commission should next recall that the meaningful availability of judicial review of agency action is the sine qua non of the common law process. This is true as a statutory matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA. It is true as a Constitutional matter: it is required by the APA.

Related to this, the Commission should pursue those cases that are least likely to settle. This approach differs from that which Paul Ohm describes the Commission as using. Cases that are unlikely to settle are more likely to represent matters at the margin of legal norms. These are the issues that need focus and refinement, and therefore are the issues that should be subject to the Commission's efforts. And, because these are the cases that present the most challenging issues, the Commission should expect to lose many of them. Litigation losses should be viewed as confirmation that the Commission is pursuing a positive rulemaking agenda.

141 Id. (The radio “is the ears of the tug to catch the spoken word, just as the master’s binoculars are her eyes to see a ship’s signal aloft.”)

142 The federal government began licensing and regulating wireless spectrum in 1912 directly as a result of the sinking of the Titanic. Had ship-to-ship radio been standard technology at the time, nearly ship could have been alerted to the Titanic tragedy and hundreds of lives saved.

143 The FRC was the immediate precursor to the FCC, which was reorganized and merged with the FCC by the 1934 Communications Act.

144 Cite Sveden, Target, LabMD, Windham, etc.