

Theory and Practice of Competition Advocacy at the FTC

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I. Introduction

This fall marks the Thirtieth Anniversary of a pivotal moment in the establishment of the modern advocacy program at the FTC, Chairman Lewis Engman's speech on the economic burden that inefficient transportation regulation policies were imposing on the American economy.¹ Although the FTC has been involved in advocacy activities since its founding,² Engman's speech symbolized a new aggressiveness on the part of the FTC in using its expertise to work with other governmental actors at all levels of the political system and in all branches of government to design policies that further competition and consumer choice.

Notwithstanding the beneficial impact that advocacy activities have had on the economy, the fortunes of the advocacy program have waxed and waned over time. In part, these mixed fortunes may reflect a lack of fundamental grounding of advocacy within the core mission of the

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

² 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). The legal basis for the Advocacy Program stems, in large part, from Section 6 of the Federal Trade Commission Act, which empowers the Commission to gather a broad range of information on business organization, conduct, practices, and management and to report it to the public. This authority has for years been interpreted to authorize the presentation of economic or legal analyses on issues affecting the operation of markets and the competitive process. For a 1982 vintage analysis of the legal basis for the program, See McChesney et al. (1982, pp. 2-7). McChesney, Fred, Robert Rogowsky, et al. (1982) "Competition and Consumer Advocacy: Policy Review Session," Federal Trade Commission, released June 9, (May 24, 1982 transmittal letter from Executive Director and Bureau Directors Bruce Yandle, Timothy Muris, Thomas Campbell, and Robert Tollison to the Commission).

In addition to Section 6 authority, in the 1970s the Congress passed several laws requiring that other federal agencies (ITC on unfair imports, DOT on deepwater ports, ICC on railroad rate bureau agreements, and DOI on OCS oil/gas leases) consult with the FTC regarding the effects of certain regulations, giving added legitimacy to a federal-level advocacy program. See Celnicker (1989, p. 382, note 21.) Celnicker, Arnold C. (1989) "The Federal Trade Commission's Competition and Consumer Advocacy Program," 33 *St. Louis University Law Journal*, 379-405.

FTC. The advocacy program, moreover, often has been politically controversial, exposing the Commission to criticisms from special interests, Congress, and other governmental actors.

This article explores the theory and practice of competition advocacy, with the goal of explaining why the advocacy program should be recognized as a core element of the Commission's mission. Advocacy can be used in conjunction with many of the FTC's other tools, and in many situations the judicious use of advocacy can provide a low-cost and effective alternative to other enforcement options. The remainder of this paper is organized as follows. Part II presents the theoretical basis for why advocacy provides a valuable tool for furthering the Commission's competition and consumer protection missions. Part III explores the history of competition advocacy activities at the FTC. By examining the variation in advocacy activities, including the changes in internal Commission support, this Part of the article aims to draw historical lessons about the how the advocacy program can be best implemented to accomplish its goals. Part IV explores some of these lessons and part V concludes.

II. The Theory of Advocacy

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 ability to organize political support relative to consumers, consumer interests often are subservient to industry interests in the regulatory process.³ Because it is too costly for consumers to organize, anticompetitive

³ As Peltzman has noted, "[a] common, though not universal, conclusion has become that, as between the two main contending interests in the regulatory processes, the producer interest tends to prevail over the

regulations are likely to go politically unopposed. The *Noerr-Pennington* and state action doctrines, moreover, may accord antitrust immunity to attempts by industry to procure favorable regulation, as well as actions taken pursuant to such regulation if enacted.

Just as the FTC uses enforcement to challenge anticompetitive conduct by private parties, its Congressionally-mandated mission also justifies challenging regulations that reduce consumer welfare by placing unwarranted restrictions on competition. Indeed, because misdirected regulation can have just as pernicious effects on consumer welfare as the most egregious cases of price fixing, there does not appear to a reasoned justification for differentiating between privately and publicly created restraints on competition.⁴ As Chairman Miller's staff concluded:

[I]njury to consumers can arise from the actions of parties in both the private and public sectors. Where consumer welfare is reduced by unwarranted regulatory restrictions imposed on the market by public agencies, fair and impartial efforts by the FTC to improve consumer welfare should actually lead it to challenge those restrictions. . . . [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. Ultimately, the basic goals, methods of analysis, cost-benefit calculations guiding the decision to intervene, and general procedures for intervening follow clearly and logically from the existing competition and consumer protection missions already developed in the FTC.⁵

consumer interest.” Sam Peltzman, *Toward a More General Theory of Economic Regulation*, 19 J.L. & ECON. 211, 212 (1976).

⁴ As FTC Chairman Oliver noted in 1986:

It is now convincingly argued that state and local governments create some of the most blatantly anticompetitive combinations to be found in the economy. The anti-consumer results are evidenced by, for example, higher milk prices, and scarce and expensive taxi-cabs, in cites like New York. States issue building codes that exclude competing products. State licensing often creates cartels for doctors and morticians. The list goes on.

See address by Daniel Oliver, Chairman of the FTC, *Antitrust Reform: Staying Alive?* 5 (Nov. 15, 1986)

⁵ Competition & Consumer Advocacy: Policy Review Session at 7-8 (May 24, 1982).

A. The Economic Theory of Regulation and the Need for Advocacy

Regulatory intervention can be an appropriate response to a market failure. Beginning with the seminal work of Stigler (and later more formally developed by Peltzman and 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).⁶ 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, regulators⁷ 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 their demand for a policy preference into political pressure is the one most likely to achieve their desired outcome.⁸

Building on the work of scholars like Anthony Downs and Mancur Olson, ETR has recognized that information and organizational costs will limit the size of effective interest

⁶ See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGM'T SCIENCE 3 (1971); Peltzman, *supra* note __; Gary Becker, *A Theory of Competition Among Pressure Groups*, 98 Q.J. ECON. 371 (1983).

⁷ In this paper "politician" and "regulator" are used interchangeably.

⁸ An important insight from Peltzman, *supra* note __, 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 received a vast amount of empirical support. For example, several studies have shown a strong statistical relationship between campaign contributions and congressional voting. See, e.g., James B. Kau & Paul H. Rubin, *Voting on Minimum Wages: A Time Series Analysis*, 86 J. POL. ECON. 337 (1978); James B. Kau & Paul H. Rubin, *Self Interest, Ideology, and Logrolling in Congressional Voting*, 21 J. LAW & ECON. 365 (1979); Kau *et al.*, *A General Equilibrium Model of Congressional Voting*, 97 Q.J. ECON. 271 (1982); Henry W. Chappell, *Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models*, 36 PUBLIC CHOICE 301 (1981); Henry W. Chappell, *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STATISTICS 77 (1982).

groups.⁹ 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 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.”¹⁰ 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 one’s self 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 of the contributions of others. As an interest group grows in size, at some point the resources devoted to attenuating the free-rider problem become greater than the prospective benefits derived from the preferred regulatory outcome. Moreover, diseconomies with regard to mounting political pressure are likely to set in at some scale.

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.¹¹ Indeed, one readily can see how consumer interests give way to the interests of a small industry in the

⁹ See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

¹⁰ Stigler, *supra* note __, at 11.

¹¹ See Peltzman, *supra* note __, 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.”).

regulatory process. Beyond a certain point, per capita benefits from a preferred regulatory outcome are diluted such that it becomes irrational to become involved 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 for example Stigler’s observation with regard to occupational licensing:

If an occupation deals with the public at large, the costs which licensing imposes upon any one customer or industry will be small and it will not be economic for that customer or industry to combat the drive for licensure. . . . Thus, a small occupation employed by only one industry which has few employers will have difficulty in getting licensure; whereas a large occupation serving everyone will encounter no organized opposition.¹²

These insights shape both the necessity for and nature of advocacy. ETR suggests that it is useful to identify a public entity tasked with the responsibility of representing dispersed consumers and competition as an end in itself in the political process. Concentrated interests can always hire lobbyists and experts to explain why their industry is “different” and thus should be exempt from the discipline of the market process. Having a premier competition authority, expert in understanding the competitive process, can explain to the public and to generalist political actors whether these calls for industry-specific regulation will really further the public good. Advocacy also can inform consumers of their interests in a regulation, perhaps spurring the desire to organize politically to oppose a regulation that will result in higher prices and less choice. As the 1989 “Kirkpatrick Report” observes:

¹² Stigler, *supra* note __, at 14.

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.¹³

In addition, the use of advocacy as a response to systematic failures in the political process also structures the nature of FTC intervention and places a limiting principle on its activities. Just as the FTC intervenes in response to market failures (such as monopoly or information asymmetries that harm consumers), the FTC also can intervene to correct failures in the political market. But just as the FTC does not pick market winners or losers or otherwise choose the outcomes of the economic market, the FTC's advocacy program does not attempt to pick winners and losers in the political market. The FTC carries out its advocacy activities by bringing information to the table, not by telling political actors what to do. The FTC can identify and illuminate the costs associated with the imposition of an anticompetitive regulation, but it cannot tell a state legislature whether or not to enact the law. In the end, the appropriate official might still decide to restrict competition, but at the very least the decision will be informed by the costs that will accompany it.¹⁴

The theory of political economy can also help to explain why it is uniquely appropriate to have a federal and independent agency tasked with carrying out the advocacy function. First, the FTC's advocacy activities are often criticized as an improper "meddling" in the affairs of state

¹³ Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of Federal Trade Commission, Antitrust and Trade Regulation Report, Vol. 56, Bureau of National Affairs Special Supplement (April 6, 1989) at S-23.

¹⁴ For example, the Commission's advocacy filings will often suggest alternative regulatory means of accomplishing the desired regulatory end with less harm to the competitive process. Thus, even if the anticompetitive restraint is imposed, the FTC's intervention will often reduce the harm that the restraint imposes on consumers and competition.

governments.¹⁵ But if failures in local political markets are what drive FTC intervention, it is evident that this criticism misses the mark. 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, while a particular interest group may be especially concentrated or strong in a special state, they may have undue influence in the political process of that state. In addition, these anticompetitive regulations may have major spillovers, or other externalities that impose burdens on national markets.¹⁶ 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.¹⁷

It also is important to recognize that 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

¹⁵ As will be discussed below, this criticism is fundamentally misplaced, as the Commission has followed a general long-standing policy of filing advocacy filings with state officials only where public comments are invited or when expressly invited by an appropriate state official.

¹⁶ These spillovers may occur in many different ways. For instance, regulations on the ability of in-state consumers to receive direct shipment of wine from out-of-state wineries has been called “the single greatest barrier to e-commerce in wine.” See Wine Report. In addition, so-called “sales below cost” laws that prohibit the sale of gasoline below certain minimum prices and thereby have the likely effect of chilling aggressive competition and likely raise 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.

¹⁷ 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.

opposition because the FTC cannot provide political support in the form of votes or campaign contributions.¹⁸ What's more, the FTC is itself a regulatory body and may be subject to political pressure from interest groups in much the same manner as state agencies or legislatures. For instance, some studies have found a relationship between the preferences of congressional oversight members' constituencies and FTC policy.¹⁹

B. Immunities

A second theoretical justification for the FTC's advocacy capability flows directly from the agency's duty to enforce the antitrust laws. Because of several statutory and nonstatutory exemptions from the antitrust laws, much activity with an anticompetitive effect that is exempt from the review of the antitrust laws. This includes the broad, judicially-created State Action²⁰ and *Noerr-Pennington* doctrines,²¹ as well as more narrow but pernicious statutory exemptions, such as the Capper-Volstead exemption (which has been recently interpreted to authorize world-

¹⁸ However, to extent that analysis exposing regulation as harming consumers is publicized, it may increase political costs of such regulation by informing consumers of their stake in the regulatory outcome.

¹⁹ Weingast and Moran, for example, provide some empirical evidence that FTC enforcement priorities – as measured by Robinson-Patman, textiles, and credit caseloads -- tracks the preferences of the Congressional committees that oversee the FTC. Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policy Making at the Federal Trade Commission*, 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. Faith *et al.*, *Antitrust Pork Barrel*, 25 J. LAW & ECON. 329 (1982). Future Chairman Muris – then head of BCP – responded to Weingast and Moran's paper. He conceded that "Congress can, and often does, exert considerable influence over an agency such as the FTC." Muris, however, expressed skepticism that the 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. Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884 (1986).

²⁰ See Report of the State Action Task Force.

²¹ *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

wide cartels in agricultural commodities).²² In general, these exemptions are welfare-reducing, in that they allow narrow interests to seek rents by imposing restraints on competition.

The *Noerr-Pennington* doctrine is grounded in the First Amendment right to petition the government for a redress of grievances. In *Eastern Railroad Presidents Conference v. Noerr*,²³ and later in *United Mine Workers v. Pennington*,²⁴ the Supreme Court held that attempts to lobby government for even anticompetitive regulation was immune from antitrust challenge. In subsequent cases, such immunity was accorded to other types of government petitioning, including proceedings before administrative agencies and courts.²⁵ In *Parker v. Brown*, the Supreme Court first articulated what has become known as the state action doctrine, which 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.²⁶

If a statutory or nonstatutory exemption is triggered, the application of the exemption shields the exemption from the reach of the antitrust laws. Once an anticompetitive behavior goes behind the exemption wall, the competition authority is largely powerless to deal with its negative effects on competition and consumers. At that point, the only controlling authority is that which granted the exemption in the first place. For instance, if a state bar is authorized to

²² *Ocean-Spray* case.

²³ 365 U.S. 127 (1961).

²⁴ 381 U.S. 657 (1965).

²⁵ CITE.

²⁶ 317 U.S. 341 (1943). See the Report of the State Action Task Force for a discussion of the problems that have arisen with respect to over broad 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)

regulate the practice of law within a state, as long as the restriction is properly imposed and executed, consumers' only recourse is to appeal to the very body that imposed the anticompetitive restraint in the first place. The FTC cannot intervene unless the bar's regulation either goes beyond what is clearly articulated and actively supervised by the state, and then can do so only through expensive and time-consuming litigation with a high burden of proof.²⁷

This impotence in the face of the operation of antitrust exemptions provides the second rationale for a vigorous competition advocacy program. Advocacy can prevent or modify anticompetitive restraints *before* they are imposed, thereby preventing or ameliorating the harm caused by the anticompetitive regulation. In addition, it will generally be much easier and less-expensive to prevent the harm from being imposed in the first place than to challenge it later. Once a regulation is imposed that generates economic rents for interested parties, they will be willing to invest to prevent the repeal of the regulation, and the vagaries of the American system of bicameralism and presentment make it more difficult to repeal previously-enacted legislation than to enact new legislation.²⁸ Alternatively, the competition authority can try to sue in the narrow set of circumstances where the regulation falls outside the protected scope of activity. In general, however, courts have applied exemptions to the antitrust laws in an unduly expansive manner, thereby limiting the effectiveness of this course of action.²⁹ Moreover, litigation is inherently expensive and often effectively limits the possibility of compromise.

²⁷ See Report of the State Action Task Force; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

²⁸ Cite McChesney, Money for Nothing.

²⁹ Further a special interest that is powerful enough to capture a regulatory board and impose an anticompetitive restraint is also often powerful enough to also capture the legislature that imposes the restraint, thereby acquiring express authorization for the regulation that is later imposed.

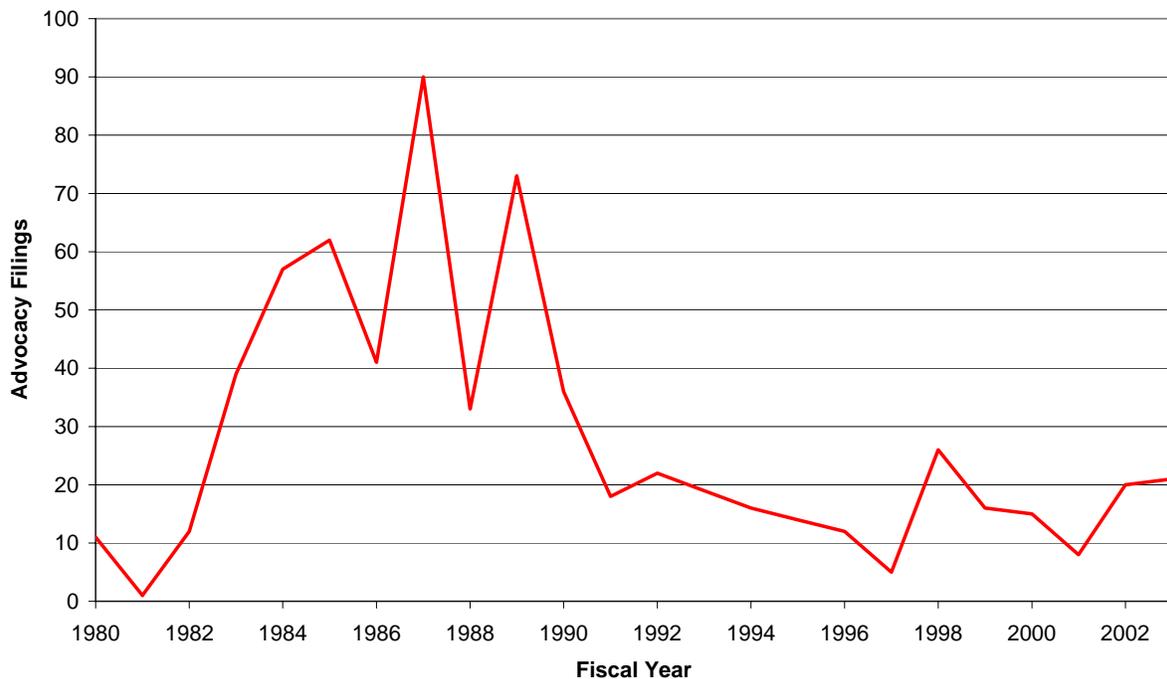
The effective use of advocacy can be seen as an effort to balance the goals of the antitrust laws with those protected by the exemptions, rather than being an all or nothing grant of authority to engage in anticompetitive activity. Moreover, *ex ante* advocacy is much less expensive than *ex post* litigation and allows for the possibility of compromise and tailoring of the regulation to ameliorate the unintended consequences of the regulation. Advocacy to prevent the imposition of welfare-reducing exemptions to the antitrust laws is especially appropriate with respect to exemptions that flow directly from the operation of the political process, such as the state action doctrine and *Noerr*.

As long as rent-seeking interests use the political process to impose restraints on competition and the FTC is unwilling to combat these efforts, the scope of protected activity will inevitably grow and the scope of conduct subject to the antitrust laws will inevitably shrink. Indeed, if the FTC is reluctant to participate in the political process that generates these exemptions, it is fighting the war against anticompetitive conduct with one hand tied behind its back.

III. History of Advocacy

Despite its obvious value in protecting consumer interests – the core mission of the FTC – the fortunes of the advocacy program have waxed and waned over time. Although imperfect, the number of annual advocacy filings (shown in Figure 1) provides a rough proxy for the vigorosity of the advocacy program over time.

Total FTC Advocacy Filings 1980-2003



From 1980 to 2003, the 24 years for which reasonably comparable data exist, about 667 comments were issued, 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 focused on competition, consumer protection, and regulatory fronts over the years, changing some with the public policy issues of the day.³⁰ Several topic areas survived over fairly long periods of time. 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

³⁰ 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.

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 1989.³¹ Certain other narrow topic areas would survive only a year or so.³²

A. Periods of Differing Emphasis on Advocacy

1. 1970s and Beginning of Modern Era

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). But if we do not want to ascribe the origins of a program to distant and idiosyncratic events, a better date for the beginning of the program might be October 7, 1974 when Chairman Louis Engman spoke about the broader use of antitrust policy as an alternative to the regulation of markets. Tying the nation’s macroeconomic problems – in 1974 the U.S. economy was suffering from stagflation -- he argued that burdensome federal transportation

³¹ See comments on U.S. Postal System entry into the electronic mail business in 1983, and Postal Rate Commission evidence issues in the later 1980s regarding Express Mail. The last of the filings was warmly praised by the PRC Commissioner Crutcher, who invited further FTC participation. (Hilke memo to Daniel and Pautler, March 21, 1990.)

³² For example, in 1993 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.

regulations contributed to the problem of slow economic growth. 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.³³

Regardless of the precise starting point for the program, a competition-based advocacy program was in full swing by June 1980 when Alfred Dougherty, Bureau of Competition Director under Chairman Pertschuk, wrote that "the intervention program played an important role in advancing the Commission's competition goals."³⁴ Under Pertschuk, the Commission or its staff presented comments to numerous federal level agencies³⁵ on a wide range of issues, including international trade,³⁶ health professions, and transportation.³⁷

³³ 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). Scherer, F. M. (1990) "Sunlight and Sunset at the Federal Trade Commission," *Administrative Law Review*, Vol. 142, Fall, 461-487. Kovacic (1982, p. 649) discusses the mid-1970s activity in competition advocacy. Kovacic, William E. (1982) "The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement," *Tulsa Law Journal*, Vol. 17, 587-671.

Engman's October 7, 1974 speech concerned regulatory excess and generally urged that aggressive antitrust enforcement could be a substitute for regulation of certain industries. That speech did not, however, propose any process for FTC intervention in the regulatory machinery. The 1975 FTC Annual Report (pp. 7, 15) is the first such document to discuss activities that resembled advocacy, discussing mainly occupational licensure and health maintenance organizations. The first listing of "interventions" occurred in 1980 (p. 81-85), but it is clear that many federal level advocacy activities occurred in the intervening years. For example, see the 1978 Annual Report (pp. 2, 10-13, 24-25) and 1979 Report (pp. 7-9) discussing support and advice to both states and sister federal agencies.

³⁴ Celnicker (1989, p. 384) citing Alfred F. Dougherty Jr. memorandum to the Commission, June 30, 1980. Celnicker (1989) provides a history and evaluation of the Advocacy program.

³⁵ From 1977 to 1982 comments would have been filed with almost every alphabet agency of the federal government including the CAB, ICC (both now defunct), DOE, DHEW (now DHHS), FCC, ITC, and USDA. McChesney et al. (1982, Appendix) provides a listing of 327 advocacy-like products produced between 1977 and 1982. The count includes many items that might not be counted today (e.g., speeches, testimony, reports); but regardless of what one counts, the list is impressively long.

³⁶ There were many filings with the International Trade Commission from 1975 to 1982; see McChesney et al. (1982, pp. 38-42, A27-A28). Such filings were a staple of the 1970s and 1980s advocacy program with about 51

2. *The Buildup Under Miller and Continuation in the 1980s*

Chairman James Miller 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.³⁸

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 90 comments.³⁹ 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 variety 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 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 program under Miller also included a somewhat sharper focus on governmentally imposed barriers and a new-found emphasis on state-level activity in addition to federal level activity that had previously been the mainstay of the program.⁴⁰ The program was further

individual filings (in dozens of product categories) from 1982 to 1989. Three such filings occurred in 1990 and one final outlier filing was done in September 1994. (Based on Pautler count in advocacy subject index, 2001, pp. 28-31; count on 7-16-04).

³⁷ FTC Annual Report 1979, pp. 7-9.

³⁸ See McChesney, et al. (1982) and Tollison (1983, pp. 217-18). Tollison, Robert D. (1983) "Antitrust in the Reagan Administration: A Report from the Belly of the Beast," *International Journal of Industrial Organization* 1, 211-221. The program was to be based on longer term empirical research that would be the basis for multiple comments, and procedures were set up to allow 1 week turnaround for comments.

³⁹ From 1983-1989, 56 comments were filed in an average year.

⁴⁰ 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.

bolstered by complementary Bureau of Economics research on restraints involving transportation, telecommunications, healthcare, licensure, and international trade.

3. *Storm Clouds and Deemphasis of Advocacy in the 1990s*

The advocacy program was controversial from its inception because it could not avoid offending someone on each issue it pursued. Some of the animus 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.⁴¹ Additionally, certain Congressional critics also argued that the advocacy program was sufficiently resource intensive that it kept the Commission from aggressively pursuing predation and other nonmerger antitrust activities.⁴²

In an effort to reduce tensions between the FTC and other state and federal regulators, Chairman Janet Steiger began to de-emphasized the advocacy program in 1989, as Figure 1 clearly shows.⁴³ The average number of annual filings from 1990 to 2001 was 17, a marked

⁴¹ Staff comments generally are not sent to a state agency or legislature without a specific request for comments by an appropriate governmental official.

⁴² 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 constrain the Commission from pursuing other activities. Celnicker (1989, p. 399). Advocacy consumed about 3 to 4% of FTC staff resources (30 to 40 workyears) at the 1987 zenith (See James Giffin, Associate Executive Director, memorandum to Andrew J. Strenio (FTC Commissioner), July 28, 1987 cited by Celnicker (1989, p. 399)). Advocacy resources were about 2% of FTC resources in 1989 and by 1994 they had fallen to less than ½ of 1% of FTC resources (4 to 5 agency workyears). By 2000, the percentage was so small that the program was virtually invisible - a maximum guesstimate 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.

⁴³ Chairman Steiger's term covered late 1989 to mid-1995. 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. (For a discussion of Chairman Steiger's goal of federal/state cooperation, see "Cutler Hangs up FTC Armor Again," *Food & Drink Daily*, May 1993, p. 2 and Cutler's paper in the NAAG Consumer Protection Report,

decrease from 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 1990.⁴⁴ In addition, state-level advocacy activity waned as the regional offices (who traditionally had been a source of leads on state-level issues) moved out of their advocacy generation role.⁴⁵ Further, after 1995, 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.⁴⁶

By early 2000, the FTC's program of regulatory comment was small and mostly uni-dimensional, focusing very heavily on the restructuring of the electricity generation and distribution industry. The program produced scattered comments on other substantive issues

February 1991, pp. 1-3.) Fairly early in Chairman Steiger's tenure, the regional offices, which handled a good bit of the advocacy generation and production work at the state level, reduced their effort in advocacy work. A few regional office attorneys who had an intellectual interest in the issues handled by the advocacy program continued to do some advocacy work for a time, but it was no longer a valued part of their duties. 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 to 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 and FDA, many based on earlier work done in the regulatory studies program.

⁴⁴ Steiger had previously been a member of the Postal Rate Commission that was charged with overseeing the actions of the U.S. Postal Service.

⁴⁵ In addition to an effort to reduce conflict, another reason for reduced advocacy activity in the 1990 may have been a reduction in the number of important, but easy targets. In the late 1970s and 1980, regulation of several inherently competitive industries made easy targets of many transportation industries for advocacy efforts. By the mid-1990s, however, most of those targets were gone, as regulation of transportation, certain utilities, telecommunications regulation had been eliminated or altered significantly. Thus, there may have been somewhat less need for an advocate for rational analysis of regulatory and competition issues than there was in the 1970s and 1980s.

⁴⁶ 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. (1982, p. 13). In a broader context, coordination with the Department of Justice on advocacy and competition policy fronts increased continually over the 1990s and 2000s. This enhanced coordination occurred on both international and domestic competition policy.

(e.g., comments to FDA on food advertising or drug regulation issues, a privacy/Internet issue, a comment related to a BCP rule, or a state-based horizontal entry restraint of some type), but they were few compared to the heyday of advocacy activity and virtually none were supported by empirical work because by that time the agency did little research on regulatory issues.⁴⁷

4. *Renewed Interest in the Advocacy Program under Muris*

With the Muris Chairmanship came a renewed emphasis on the FTC's advocacy program. There were 20 filings in 2002, a level that has held fairly constant since. 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 used to support the program in the 1980s was not in existence, the topics of comment became more diverse. For example, comments on such topics as the retail marketing of gasoline, wine distribution, licensure, and the unauthorized practice of law became commonplace.

B. Assessment of the Advocacy Program

Overall, it appears that the Advocacy Program has proven successful, especially in light of its modest budget requirements. Two studies have attempted to provide a general assessment of the Advocacy Program's impact. A 1989 Law Review⁴⁸ article conducted a survey of state and local parties that received FTC Advocacy comments dated June 1, 1985 through June 1, 1987. Based on the survey responses, the author concluded that

⁴⁷ The electricity work was 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.

⁴⁸ Celnicker (1989, pp. 400-401).

the FTC provided input that decisionmakers found useful. [I]n only twenty-five percent of the cases did the decisionmakers find the information or perspectives provided by the comment duplicative of other comments, or information already well understood by the decisionmaker. . . . Sixty-five percent of the survey recipients indicated that they either had requested, or plan to request, FTC input on other issues . . . These survey results lead to the conclusion that the FTC comments were of value to the decisionmaking process.

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.⁴⁹

Certain advocacy comments almost surely had some effect on final outcomes.⁵⁰ A few leading examples include: (1) a comment on an Illinois PPO bill that would have allowed physicians to collectively determine their fees,⁵¹ (2) 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,⁵² (3) the National Highway Traffic and Safety Administration based its 1986 and 1988 decisions not to raise its automobile fuel efficiency standard on an analyses provided by FTC staff,⁵³ (4) the testimony in early 1989 on certificate of need legislation in North Carolina

⁴⁹ Most advocacy comments are reportedly helpful and welcome and many of the comments have a significant influence on decision makers. As noted earlier, the ABA's Kirkpatrick Commission also favorably commented on the FTC's advocacy program in 1989.

⁵⁰ It is very difficult to know whether any particular study or advocacy filing actually affected a decision. Even when 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. Having made this disclaimer, we note a few advocacy filings that appeared to have an impact.

⁵¹ See the June 11, 1986 comment by the CHRO (Bill MacLeod & Tamara Kempf). According to a local newspaper, the FTC comment criticizing the bill was a development critical to the defeat of the bill. See James M. Giffin to FTC, Report on Successful Competition Advocacy Efforts, January 21, 1987, p. 2, (recounting six successes during the previous year.)

⁵² The Chairman of the FCC, Dennis Patrick, cited these results as the basis of the FCC policy choice. See letter from Patrick to U.S. Representative John Dingell, January 25, 1988.

⁵³ See Robert P. Rogers, Comments of the FTC Staff to the National Highway Traffic Safety Administration, March 24, 1986.

was said to have played a key role in the Policy Board recommendation against continuing the entry restraints, (5) a November 1991 comment to the FAA regarding “use or lose” rules for airport landing slots convinced the FAA to alter its rule,⁵⁴ (6) empirical work showed that rules proposed by FDA would disallow health claims for large classes of arguably healthy food, such as fish and lean meats. As a result of the work, FDA altered the rules such that better versions of “bad” foods would be able to tout their superior characteristics,⁵⁵ and (7) 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.⁵⁶

More 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.⁵⁷ Similarly, in the CFTC’s approval of the application of United States Futures Exchange to open a futures trading market in the United States, one CFTC

⁵⁴ On November 15, 1991 the FTC staff (Bruce Kobayashi) filed a comment with the Federal Aviation Administration, which was considering revisions to the 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%.

⁵⁵ See the FTC staff comment (Ippolito and Murphy) to FDA, February 25, 1992; and DHHS: FDA Food Labeling: General Requirements for Health Claims for Foods. *Fed. Reg.* vol 58 (3), January 1993, start p. 2478, esp. p. 2493.

⁵⁶ Staff filing (Jan Pappalardo) to FDA on direct-to-consumer drug promotion V960001 January, 1996 (6-00 comment by advertising attorney).

⁵⁷ Statement by Bill Hogan, *Public Utilities Fortnightly*, July 1, 1999, pp. 19-20. In addition, one FERC Commissioner used FTC staff advocacy comments as a principal basis for his speech material. FERC Commissioner William Massey 1998 speech on Independent System Operators for electricity transmission.

Commissioner also expressly referred to the analysis of the FTC in assisting in his decision to approve the application.⁵⁸

Despite some notable successes, in policy areas where income distribution and rent-seeking factors take precedence, FTC comment is unlikely to influence those who do not place weight on the FTC's agenda. One area where this was clearly true was restraints on international trade. In most debates on trade restraints, competition and consumer welfare play little or no role.⁵⁹ The Commission staff had undertaken extensive investigations of trade restraints issues from the mid-1970s through the early 1990s. Many of the filings contained new empirical and conceptual work.⁶⁰ Two decades of work, however, did not observably alter policy or individual decisions. The trade-related advocacies had offended many politicians (and some ITC commissioners) over the years. Opponents of the FTC's advocacy efforts in this area went so far as to argue that the FTC's advocacy program, which focused on consumer welfare effects of trade restraints, had advocated violations of the law by the ITC because it drew the ITC's attention toward consumer welfare (which the trade laws did not allow them to consider) and away from the distress of the trade-impacted industries.

⁵⁸ Statement of CFTC Commissioner Lukken, February 4, 2004, www.cftc.gov/opa/press04/opausferemarks.htm.

⁵⁹ The FTC had always 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 anti-dumping and countervailing duty cases (sections 701 and 731), where the ITC is less able to consider the broad effects of their actions.

⁶⁰ There were many filings with the International Trade Commission from 1975 to 1982; see McChesney et al. (1982, pp. 38-42, A27-A28). See, for example, D. Tarr before the International Trade Commission on Stainless Steel and Alloy Tool Steel, No. TA-203-16, Prehearing Brief of the FTC, March 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.

IV. Integrating Theory and Practice of Competition Advocacy

This understanding of the theory and practice of competition advocacy suggests some lessons that can inform the future of the program. First, advocacy can be a very powerful and low cost way for the FTC to perform its mission of protecting consumers and competition. It closely complements the FTC's other capabilities, such as litigation and studies. 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.

Second, the most successful of the advocacy filings seemed to be those that contained a substantial empirical component.⁶¹ Thoughtful empirical work, however, takes too long to allow it to be produced solely for an advocacy (where the lead-time is normally from two weeks to three months). Thus, important issues need to be identified and empirical work done *before* an advocacy opportunity emerges.⁶²

⁶¹ Comments containing original empirical research on specific regulatory issues were filed with many agencies including the Federal Communications Commission, the Department of Transportation, and the Food and Drug Administration. 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.*, Woodbury and Anderson on the Federal Communications Commission's AM/FM Radio and Television Ownership Rules, July 15, 1987; Ogor on Massport's (Boston's airport authority) Program for Airport Capacity Efficiency, February 29, 1988; and Rogers and Woodbury on the FCC's Rules Concerning FM Translator stations, MM Docket 88-140, January 23, 1989; Kobayashi on the FCC's financial interest and syndication rule which restricted ownership of the rights to re-run TV shows, 3 filings in 1990-1991; Vita on the FCC's Must-Carry Rules for network TV (requiring carriage of local broadcast signals by cable systems), November 26, 1991; Kobayashi and Schumann on Federal Aviation Administration regulation of take-off and landing slots at certain airports, November 15, 1991, and November 23, 1994; Ippolito and Murphy on the effects of the Food & Drug Administration's regulation of health claims for food labeling and food identity standards, January 8, 1990; and February 25, 1992.

⁶² For instance, the Commission's report on competition in the health care industry has complemented advocacy filings on "any willing provider" laws involving retail pharmaceutical sales in Rhode Island and California legislation that would impose disclosure requirements on pharmacy benefits managers. *See* letter from Susan Creighton, Director of the Bureau of Competition et al. to Att'y Gen. Patrick Lynch (Apr. 8, 2004), available at <http://www.ftc.gov/os/2004/04/ribills.pdf>; letter from Susan Creighton, Director of the Bureau of Competition et al. to Rep. Greg Aghazarian (Sep. 7, 2004), available at <http://www.ftc.gov/be/V040027.pdf>. 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. Letter from Susan Creighton, Director of the Bureau of Competition et al. to Assemblyman William Magee et al. (Mar. 29, 2004), available at <http://www.ftc.gov/be/v040012.pdf>.

Third, investments in advocacy in one state will often reap benefits in others. As a result, one FTC comment often will spawn further invitations to comment in other states as ideas for protectionist legislation spreads from one state to another. Because the fixed cost in analyzing the restraint has already been incurred, each of these subsequent filings are quite inexpensive. For instance, the frequency of legislation involving below-cost sales in gasoline retailing, or attempts by state bars to monopolize real estate settlement services has made initial investments in advocacy in these fields quite productive.

Fourth, casual empiricism suggests that comments to federal regulators – especially independent agencies – have met with a greater degree of success than similar comments to state regulators.⁶³ This finding is consistent with two aspects of the theory underpinning competition advocacy. First, although decision makers at federal agencies face Congressional oversight and White House pressure, they are more likely to be insulated from direct political pressure than state legislators or regulators. This condition is likely to create “slack” between politicians’ constituencies’ interests and the policy adopted by federal regulators.⁶⁴ Second, that federal rather than state regulators may be more insulated from political forces is consistent with James Madison’s observation in Federalist 10.

Finally, it appears that the Commission’s views may be most appreciated in situations where the regulation in question is facially related to the accomplishment of some consumer

⁶³ See pages 19-22 and accompany notes, *supra*, noting successes with FERC, CFTC, FCC, FAA, FDA, and NTSA.

⁶⁴ See e.g., Kalt, Joseph P. and Zupan Mark A. 1990. The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions. *Journal of Law and Economics* 33 (April): 103-131; Thomas H. Hammond & Jack H. Knott. 1996. Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy Making. *Journal of Law Economics & Organization* 12(April): 119-66; Thomas H. Hammond & Gary J. Miller. 1987. The Core of the Constitution. *American Political Science Review* 81 (December): 1155-74.

protection or other goal. The Commission's dual expertise in competition and consumer protection will often enable it to speak with great force and credibility on those issues. 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. Similarly, on new issues, such as state regulatory barriers to e-commerce, the FTC has developed expertise in such diverse fields as contact lenses, caskets, and direct shipment of wine, and can speak authoritatively to the issues of competition and consumer fraud in those emerging industries. In these areas, the FTC's input can be especially valuable in debunking consumer protection rationales for anticompetitive regulations.

V. Conclusion

The Federal Trade Commission is charged by Congress with protecting competition and consumer welfare. It is important to recognize that the advocacy program is an important and cost-effective tool for carrying out this mission. Because consumers are disadvantaged in the political arena *vis-a-vis* industry, they are likely to be unable to stop anticompetitive regulation on their own. Antitrust immunities, moreover, sometimes put anticompetitive regulation beyond the reach of traditional enforcement. By allowing the FTC to represent consumers' interests directly in the political system, the advocacy program can overcome these two hurdles.