Data Security and the FTC's UnCommon Law

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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 agency's various sources of regulatory power – primarily its authority to proscribe 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 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 it organic statute, combined with some limited authority to regulate privacy and data security issues under cognate 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 regulation abhors 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 three sets of related issues. First, there are currently two cases pending in federal court that challenge the Commission's data security efforts – previously, the targets of the Commission's investigations have settled with the agency. Second, Congress is actively considering the need for privacy and data security legislation: the FTC seeks to defend its record both to preserve its existing power and to capture greater power through any new legislation. And, third, in light of the large number of enforcement actions that the agency has brought and the increasingly clear difficulties of data

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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 legitimacy of the FTC's approach to data security and related issues. In particular, it raises jurisprudential 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 common-law courts, it also bears important differences that render the comparison jurisprudentially inapposite.

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 and the New Common Law of Privacy*, is the key scholarly treatment of the FTC's approach to date, and their ongoing work, *The Scope and Untapped Potential of FTC Privacy and Data Security Regulation*, argues strongly for more expansive efforts by the Commission. Obviously this Article disagrees with this optimism – but with the hope that our disagreement can lead to better and more jurisprudentially sound approaches to dealing with what are undoubtedly some of the most important issues facing the online economy.

As this Article responds in large part to S&H's arguments, some prefatory note about the scope of this disagreement bears note. Their prior work makes two primary contributions. First, they argue that the FTC is doing something common-law-like, that this has not been well theorized or understood by legal scholars, and that this is problematic. And second, they argue that this process has led to a substantive "common law of privacy" and articulate the contours.

This Article agrees wholeheartedly with this second point: regardless its jurisprudential merits, the FTC has clearly created a body of law governing online privacy – and, to a lesser extent, data security. Articulating their understanding of this law is an important contribution (though query whether the fact that they must do so is itself a critique of the soundness of this body of law).

It also agrees wholeheartedly with the idea that the FTC's approach is woefully undertheorized and underappreciated 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.[1] 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 regulating 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.

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[1] Hurwitz, *Administrative Antitrust*. Hurwitz, *Chevron and the Limits of Administrative Antitrust*.

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, dating at least to *SEC v. Chenery (Chenery II).*[2] 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 common-law-like adjudicative processes.[3] *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.[4] The Supreme Court is not[5] – if the FTC doesn't 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.

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4 To be clear, this is not a charge we levy against S&H. Others, however, have been implicitly or explicitly dismissive of these concerns. Chairwoman Ramirez's characterization of the common-law is undertheorized at best, demonstrating a disturbing lack of concern for the jurisprudential task that is her charge. And in recent Congressional testimony, Paul Ohm has described these concerns as a "side show." [Paul Ohm written testimony before House E&C CMT, Feb 28, 2014.] That view is not unfamiliar. But as any Administrative Law, Civil Procedure, or Constitutional Law professor will attest, procedure is at least as important as substance. Those who would regulate would do themselves (and, more, those whom they would regulate) well to remember that our system of law is based in procedure. [Cite Chadha]

5 In recent years the Court has shocked the Tax and Immigration worlds by rejecting their long-standing, field-specific, practices in favor of normalizing them with the Court's administrative jurisprudence.

I. The FTC's "Common Law"

The FTC has long relied primary on case-by-case adjudication to fulfill its statutory mandate.[6] 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."[7] But only more 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 such reference of which we are aware came in an April 2012 speech by Commissioner Julie Brill, citing back to academic work from 2010 and 2011.[8]

This timing is likely not an accident, as it coincides with a notable expansion in the FTC's use of unfairness and a more expansive view of deception under Chairman Jon Leibowitz. Previous chairman had made more limited use of unfairness to pursue a line of data security cases beginning in 2005 and, based on deception, in 2002. Otherwise, the FTC had essentially foregone the use of its unfairness powers since a 1980 confrontation with Congress over the scope of those powers forced the FTC to finally issue the 1980 Unfairness Policy Statement, followed in 1983 by the Deception Policy Statement.

But as time passes, institutional memory fades. Today, nearly thirty-four years after that crisis, the FTC has learned that it can push the bounds of both its substantive authority and the procedural mechanisms by which it exercises that authority – without provoking Congressional reaction. Our focus here is on the latter: the agency's turn from viewing itself as primarily an enforcement agency to an agency actively directly the development of law through a self-styled "common law" approach – without the courts.

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[6] It is one of two agencies treated in the Administrative Law literature as distinctive in their primary reliance on adjudication instead of rulemaking. The other is the NLRB. The NLRB typically drives discussions about the merits (and dangers) of this approach – the NLRB's jurisprudence has been overtly political, changing as the political composition of its board changes. The FTC, on the other hand, has avoided much of this controversy. This is in part because it has historically constrained its enforcement actions to existing, judicially-defined, legal norms (e.g., enforcing unfair methods of competition violations under judicially-defined understandings of the Sherman and Clayton Acts), and in part because of its sordid history with rulemaking. *Cite literature from 70s/80s rulemakings; "National Nanny"; Congressional action.*

[7] See, e.g., See Frank H. Easterbrook, Workable Antitrust Policy, 84 MICH. L. REV. 1696, 1705 (1986) ("The Sherman Act set up a common law system in antitrust.") *See also* Remarks of Commissioner Thomas Rosch at the George Mason Law Review 11th Annual Antitrust Symposium, *The Common Law of Section 2: Is It Still Alive and Well?*, Washington, D.C. October 31, 2007, http://www.ftc.gov/sites/default/files/documents/public_statements/common-law-section-2-it-still-alive-and-well/071031gmlr.pdf

[8] Remarks of Commissioner Julie Brill at 12th Annual Loyola Antitrust Colloquium, *Privacy, Consumer Protection, and Competition*, April 27, 2012, http://www.ftc.gov/sites/default/files/documents/public_statements/privacy-consumer-protection-and-competition/120427loyolasymposium.pdf. Her footnote bears repetition here in full: "See Christopher Wolf, Targeted Enforcement and Shared Lawmaking Authority As Catalysts for Data Protection in the United States, BNA Privacy and Security Law Report, Oct. 25, 2010, (FTC consent decrees have "created a 'common law of consent decrees,' producing a set of data protection rules for businesses to follow") and see Kenneth A. Bamberger & Deirdre K. Mulligan, Privacy on the Books and on the Ground, 63 STAN. L. REV. Vol. 63, January 2011, (discussing how chief privacy officers reported that "state-of-the-art privacy practices" need to reflect both established black letter law, as well as FTC cases and best practices, including FTC enforcement actions and FTC guidance)."

a. What is the FTC's "Common Law"?

While the FTC has not presented a well-developed jurisprudential theory of its "common-law" approach, it appears to be defined by a few essential characteristics: a case-by-case approach addressing specific cases that produces memorialized outcomes (complaints, settlements, &c) that other parties can scrutinize to infer understandable rules that they can reasonably expect will be applied to them in the future, and which operates in such a way as to make the evolution in doctrine consistent, predictable and non-arbitrary.

FTC Chairwoman Edith Ramirez recently explained that "common law is best understood by reading and analyzing the leading decisions. … At FTC, that means decisions, complaints, statements analyses associated with enforcement actions."[9] Similarly, Paul Ohm (Professor of Law and former Senior Policy Advisor in the Commission's Office of Policy Planning) has recently explained that "With every settlement, the FTC approves and publishes a complaint, a consent order, and a press release, which lay out in some detail the theory of the case. … What makes [the FTC's common-law approach] work is the cadre of lawyers scrutinizing these documents."[10]

Solove and Hartzog (S&H) identify similar characteristics, though, to their credit, they take a more nuanced view. They describe the FTC approach as the "functional equivalent of common law," and note that the analogy "has its limits."[11] In addition to recognizing the same characteristics – case-by-case adjudication with published outcomes that provide notice and some level of precedent[12] – they make two additional observations. First, they explain that "In the most traditional form of common law, judges develop the legal rules."[13] While these rules may later be codified into statutes, treatises, restatements, &c., they are developed in the first instance by judges. We will return to this point – it is an important difference between judicial and FTC common law – for now, it is important to recognize it as a characteristic of the FTC's approach.[14] Second, they recognize that FTC adjudications are not strictly precedential: the Commission is not bound to be consistent in its construction of the law, though as a practical matter (over the short period during which it has developed this body of law) it has attempted to be consistent.

S&H are right to dub this a "functional equivalent" of common law and to recognize that the analogy is limited. But as we take up below,[15] even calling it the "functional equivalent" goes too far. There are essential differences between what the FTC is doing and the judicial common-law approach. These differences call into question the basic jurisprudential legitimacy of the FTC's approach. Indeed, the differences are so significant that one could ask whether the FTC's approach, and description of it, could be viewed as a deceptive act or practice under the FTC Act (not, of course, in a literal sense, but conceptually).

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9 Edith Ramirez keynote, GMU LEC and Law Review FTC@100 Conference.

10 Ohm, House E&C CMT Testimony (citing S&H @ 24-27).

11 S&H @ 23.

12 Id. See also S&H2, at 20 ("In a common law system – or any system where matters are decided case-by-case and there is an attempt at maintaining consistency across decisions …").

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14 See also Edith Ramirez ("Of course, it is useful to compile a restatement and it's helpful to have good law review articles and treatises. But the real guidance rests with the primary sources.")

15 Part I.C

b. The genesis of the FTC's "Common Law"

The Commission's turn to the rhetoric of common law is of relatively recent vintage. The underlying jurisprudential approach, however, is anything but new, dating in the U.S. tradition to at least 1947. We will turn to the jurisprudential history in a moment.[16] A brief discussion of the Commission's recent use of the "common law" terminology is helpful in placing that FTC's current approach in the broader jurisprudential history.

Fundamentally, the FTC is, and always has been, engaged in a process of developing legal rules and norms. This is one of many functions played by administrative agencies -- and it is a function that can be carried out through many means. These various means each of offer (or require) different levels of formality, and in turn offer (or require) different levels of discretion or judicial review.

Since a series of high-profile losses, both in courts of law and of public (and Congressional) opinion, in the 1970s, the Commission largely retreated from its norm-setting role. Instead, it focused on enforcement of well understood legal norms.[17] In the mid-1990s, however, the Commission began playing an informal role in consumer privacy cases. This role evolved organically, both in scope and formality. The Commission had relevant, if discrete, statutory authority in cognate areas, which made it a natural host for a series of privacy-related workshops, and its authority over "unfair or deceptive acts or practices" (UDAP) proved sufficient to take action against poor privacy-related practices.[18]

Over time, the FTC came to be recognized as the primary privacy regulator in the United States. This happened in part because the FTC was filling an important regulatory vacuum and in part as mere historical accident – it was not a reflection of any specific Congressional intent or design. While the FTC's role in privacy is widely recognized today, both the fact and sufficiency of the FTC's authority to address privacy related matters are far from uncontroversial.[19]

During this early period (beginning around 1997), the FTC did not characterize its role in establishing legal norms relating to privacy in common-law terms. Rather, the Commission was viewed (and viewed itself) as participating in the traditional administrative back-and-forth of information gathering and dissemination through informal processes, punctuated by enforcement actions in extreme cases. Internet law in general was yet young, and its trajectory uncertain – the Commission had no expectation at that time that it was taking upon itself the twain role of privacy legislator and enforcer.

Rather, there was at the time (and still is today) ample discussion about the need for Congressional action to address evolving privacy concerns. In 1998, the Commission issues a report to Congress concluding that "The federal government currently has limited authority over the

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16 Part I.B.

17 UDAP as captured by the Congressionally-codified understanding of the Commission's policy statements; UMC as understood through judicially crafted antitrust law.

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collection and dissemination of personal data collected online."[20] The Report recommended that Congress pass legislation specific to children's privacy, setting in motion what became the Children's Online Privacy Protection Act.[21] But even as it concluded that "industry has had only limited success in implementing fair information practices and adopting self-regulatory regimes with respect to the online collection, use, and dissemination of personal information,"[22] the FTC declined to recommend broader legislative changes. In 2000, the Commission *did* call for broader legislative authority.[23] When Congress declined to pass such legislation, the Commission began bringing enforcement actions regarding data security, initially focused on deception cases,[24] and in 2005, cases premised on unfairness as well.[25]

Here, as with privacy, the central concern related to how online intermediaries – firms hosting or handling sensitive consumer information – protected consumer 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 time, however, the Commission's approach was more enforcement-oriented. It was not yet using the rhetoric of common law to describe what it was doing – but its evolving policy was being formed primarily through adjudicatory enforcement actions (and settlements) than through information gathering and dissemination. This was in part because the Commission's authority and expertise in the area was buttressed by its (accidentally 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 foment about the FTC's approach.[26] 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 sufficiency of the Commission's approach raised concern for many in the bar. These concerns, however, were justifiably 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 debates – and from there into the academic debates that we are beginning to have today. As

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[20] [Cite] 1998 Report at 40, http://www.ftc.gov/sites/default/files/documents/public_events/exploring-privacy-roundtable-series/priv-23a.pdf

[21] *Id.* at 42.

[22] *Id.* at 43.

[23] http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf

[24] [Cite]

[25] [Cite]

[26] [There's a good law review article voicing such concerns c. 2007]

S&H note, the Commission's activity in this area proceeded with minimal academic attention for 10-15 years.[27]

In this 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).[28] This urged expansion results from the perceived inadequacy of the (judicially-defined) antitrust laws to address a range of competition-related concerns.[29] The Commission's UMC authority is widely understood to embrace, but be broader than, the antitrust laws.[30] In the decades prior to 2010, the Commission had been reluctant to push its UMC authority beyond the scope of the antitrust laws,[31] but this reluctance has been giving way – at least in the Commission's rhetoric – to the FTC's general willingness to more aggressively set, and push, the boundaries of existing legal norms.

This changing understanding of its UMC authority tracks the Commission's embrace of its "common law" role. This is perhaps best captured in remarks by Chairwoman Ramirez, in which she articulated that the Commission's UMC authority is well established to be broader than the traditional antitrust laws and that she favors a common-law approach to developing that authority.[32]

Today, Commissioners and commentators increasingly describe the Commission's approach to all three areas – privacy, data security, and UMC – in common-law terms. This rhetorical device has evolved along with criticism of the Commission's approach to developing legal norms. It is not entirely unwarranted – courts and scholars have long described agency use of case-by-case adjudication as common-law-like. But that language is generally used by those explaining the nature of agency decisionmaking: it *is* similar to common-law.

But while the FTC's approach is indeed similar, it is not the *same* as common law. Rather, the Commission's self-styled description of what it is doing as "common-law" is a rhetorical flourish. As will be seen in the next two Parts of this article, there are important differences between the FTC's approach and the common law approach, and these differences suggest the FTC's approach is jurisprudentially deficient. The Commission's increasingly common allusions to the common law are not based on a well-theorized jurisprudential understanding of the common law or the differences between administrative adjudication and the common law. Rather, the Commission is free-riding on the reputational legitimacy of the common law in the judicial context in a (likely unintentional) effort

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29 The merits of these concerns are beyond the scope of this article to address, but are well captured by the very public disagreement 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. [CITE] Almost immediately upon the transition to the Obama administration, DOJ withdrew support for this report. Rather than capturing a difference between the DOJ and FTC, this disagreement captures widespread disagreement over the proper scope of Section 2.

30 *Sperry & Hutchinson*. See also Ramirez GMU LEC keynote.

31 See *supra*. See also Hurwitz, *Chevron and the Limits of Administrative Antitrust*.

32 Ramirez ("That brings me to the second topic I would like to address today- the process the Commission uses to develop Section 5 doctrine. I favor the common law approach which has been a mainstay of American antitrust policy since the turn of the 20th century.").

to avoid confronting questions of the jurisprudential legitimacy of its approach by analogizing it to something understood to be jurisprudentially sound.

II. The FTC's "Common law" is not Common Law

The FTC's "common-law" approach described above bears some resemblance to common-law rulemaking – but it also is different in important ways. The discussion in the Part starts with a brief discussion of the ideas underlying the common law approach – a subject that has been sorely lacking in prior presentations of the FTC's "common-law" approach. This background provides a benchmark against which we can more rigorously compare the FTC's approach to traditional understandings of the common law. Finally, treating the FTC's "common-law" moniker as a short-hand substitute for case-by-case adjudication, this section critiques the Commission's preference for adjudication and presents the contrary argument – which has been largely lacking from scholarly and policy discussion – that the Commission should rely primarily on rulemaking over adjudication.

a. What is Common Law?

Those advocating for the FTC's "common-law" approach analogize this approach to the common law primarily because the Commission is engaging in a series of case-by-case adjudications that produce various forms of semi-precedential documents (complaints, settlement, statements by Commissioners, aids for public comment, press releases, *etc.*). But the real common law results from more than just a series of semi-precedential public opinions. Several aspects of the common law are considered below, including the domain in which the common law operates, the mechanism by which it operates, the role of the adjudicator in common law cases, and the role of the cases and litigants.

The common law operates in a domain of convergence: Over time, the decisions of common-law judges will tend to converge to a common set of principles. Common law will not yield satisfactory results where the resulting rules will not converge over time to a stable set of principles.

But while the common law operates in a domain of convergence, it does not assume that it is converging on any specific outcome.[33] Early theories of the common law posited that judges were not *making* law – rather, judges were dipping into a great reservoir of legal and practical knowledge to discover and apply objectively identifiable principles. They were discovering and *declaring* the law – not making it.[34] Modern understandings of common law tend to eschew this declaratory theory for more realist understandings of the law and role of precedent.[35]

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[33] Priest; Stearns.

[34] For contemporary discussions, see Allan Beever, *The Declaratory Theory of Law*, 33 Ox. J. Leg. Studs. 421 (2013); Michael Sinclair, *Precedent, Super-precedent*, 14 Geo. Mason L. Rev 363 (2007). Cite generally & discuss Blackston, Hale, Esher, &c. One standard exposition was offered in *Willis v. Baddeley* (1892): "There is, in fact, no such thing as judge-made 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 authoritatively laid down that such law is applicable."

[35] Lord Radcliffe (1968) ("there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?")

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-announced law will tend to be stable because it is announcing objective law that does not change.[36] 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.[37] Rather, it results from the realist understanding that cases are brought to the court because there is an otherwise irreconcilable conflict.[38] 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.[39] Judges do not select cases to hear: they take the cases that come to them;[40] judges cannot hear any case: the parties must have standing, the case must represent an actual case or controversy, the issues must be ripe;[41] 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.[42]

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 must 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 do make law, involving the adjudicator in the case selection process implicitly influences the outcome of that process.[43] The reasons for this should be obvious: case selection drives the issues addressed by the common law process. If the judge (or any other party) is responsible for case selection decisions, their selection directly influences the path in which the law evolves.[44]

This brings us to a final factor to consider: the value of a multiplicity of cases being decided both in sequence and in parallel.[45] The value of this approach is familiar to those in the U.S. system: appellate courts are most likely to hear cases that present conflicts between lower courts. Cases and controversies fuel the common law system. Cases and controversies arise at the margin of existing

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[36] Importantly, and somewhat curiously, judges operating under this theory would not hesitate to reject prior decision were they to be ill-suited to a new case. The prior decisions, being flawed are not actually law, and therefore are not entitled to any precedential value. Under the declaratory model, *stare decisis* is a result of the declaratory process, not one of its mechanisms.

[37] Chadha

[38] Schauer.

[39] Elliot; Stearns; Kontorovich Schauer

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[43] Chadha

[44] Stearns

[45] Stearns; Rubin

doctrine, where new facts challenge existing precedent or multiple precedents apply to existing facts.[46]

[Add para discussing different role of path dependence & manipulation for appellate and lower courts; per Stearns, using Social Choice tools, appellate courts should have greater ability to control their docket, provided that they are selecting from the closed number of cases/controversies presented by lower courts. Lower courts, on the other hand, (to which the FTC is akin) should take their cases as they come, to avoid path manipulation.]

Cases – and the parties bringing them – play an even more important role in the development of the common law than the judges who adjudicate them. This is in part a simple function of volume. A well-known economic understanding of the common law mechanism results from simple multiplication.[47] Assuming that judges are, on average, more likely than not to decide any given case correctly, the process of deciding a large number of cases over time results in constant refinement and incremental developing of increasingly "correct" laws.[48]

But cases and their litigants play an even more important role in this process: development of the law is a public good.[49] Parties that litigate cases to a judicial decision generate a positive externality, a social benefit beyond that which is reflected in their private gains from litigation. Where the law is unsettled, private litigants' incentives are aligned with the public's interest in developing the law. The more cases that judges decide, subject to the constraint that the litigants' incentives are aligned with this public benefit, the more the public benefits from these positive externalities.

But where settlement is possible, these private incentives are not aligned with the public's larger interest in building jurisprudence. In such cases, the law is sufficiently developed, such that private litigants' incentives are to invest resources in maximizing the rents they extract from bargaining range within which they are operating. This bargaining range is defined by the law. This explains both why the law prefers settlements and why settlements do not have precedential value – the settling 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.

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[46] Priest-Kelin

[47] Rubin; Priest.

[48] Cite. Note that this model does not assume the existence of an objectively "correct" body of law, but merely the possibility of a body of law that is stable as compared to its alternatives.

[49] Priest; Stearns.

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 will. Those familiar with the FTC's process describe this as advantageous, allowing the Commission to select cases that allow it to craft rules as needed.[50] Whatever the benefits of such an approach, it is a clear departure from the common law. While in some cases firms and individuals may be able to initiate their own action against the FTC,[51]even where this is possible the unlikelihood that the FTC will take action against any given party little reason to incur such costs.[52]

And, while this may be advantageous to the FTC in allowing it to craft the rules that it wants to develop, such benefit accrues to the agency in its capacity as a rule maker, not as a rule enforcer. The common law approach works well where adjudicators hear a large number of cases presenting issues at the margins of existing law. Indeed, easy cases may well make bad law, because judges are not required to address narrow issues.[53] Where the FTC selects cases that allow it to shape the broad contours of the law,[54] it is misusing the adjudicatory mechanism – and decisions that result from such a process will be overbroad, made without the benefit of facts that would tend to be considered more seriously in a legislative or formal rulemaking process. (Indeed, many of the safeguards of formal rulemaking are intended to force precisely that kind of consideration, especially those added by the FTC's Magnuson-Moss authority beyond what the APA requires.)

The contract between this approach and that of a common law court is stark. Courts decide cases because they must, and in rendering decisions they are careful to address only the relevant issues and to do so narrowly. This is a central theme that cuts 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 *Chenery II* 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."[55]

With the agency wearing the hats of both litigant and adjudicator, it is also unsurprising that the Commission has an unprecedented success rate in its adjudications. This is well documented in recent literature: until earlier this year, the FTC's complaint counsel (administrative prosecutor) hadn't lost a case adjudicated before the Commission (on appeal from the Administrative Law

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[50] Ohm.

[51] For instance, by seeking a declaratory action against an agency rule, or by challenging the procedures by which a given rule was adopted. But these approaches are difficult even where the agency has issued a rule through notice-and-comment rulemaking – courts often require parties to wait until an agency brings action against them before allowing a party to challenge an agency rule. This is to ensure that there is an actual case or controversy that is ripe for adjudication by a party with standing.

[52] See Ohm (noting that the FTC selects cases from more than 2 million complaints received a year).

[53] Schauer

[54] Id. ("The FTC's wise use of its enforcement discretion is apparent in the cases 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 undeniable, cases in which the defendant's conduct falls well below standards of reasonableness.3 This is not to say that these cases are 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 push the envelope unnecessarily.") See also S&H, @ 26.

[55]

Judge) in nearly 20 years.[56] Excluding cases in which the full Commission dismissed some claims, that winning streak goes back 30 years.[57] This outstanding success rate is 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.[58] 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 litigating 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 increases significantly where the conduct at issue is not the kind of clear fraud or deception by bad actors on which the FTC has traditionally focused, but the kinds of business decisions about how to design products or how much to protect security or privacy, given a host of trade-offs, to which the Commission has increasingly turned its focus.[59]

But as discussed above, development of the common law is a positive externality that results from private litigants 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 may provide some understanding of FTC policy, it is disingenuous to describe the resulting policy in common-law terms.[60]

The FTC's "common-law" analogy 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 direction in which it wants the law to develop, and selects cases that allow it to proceed along this 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

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[56] [McWane]

[57] Wright; Balto; Crane.

[58] [Cite to Josh Wright study]. Explain here 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 those cases in district court.

[59] See infra at ___.

[60] See Rossi (describing how mismatching incentives undermine the precedential value of settlements of administrative complaints).

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.[61] Indeed, agencies are even free to adopt policies that contradict previous judicial constructions of their statutes.[62] 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.[63] 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.[64]

III. Rulemaking vs. Adjudication in Administrative Law

The issues underlying concern about the FTC's "common law" approach are not new. Indeed, they tie into the separation of powers framework underlying our Constitution – concerns about consolidating the roles of rulemaking, enforcement, and adjudication – and concerns that framework was meant to protect against. In the modern era, these concerns are 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 debates provide necessary context for understanding the appropriateness of the FTC's "common law" approach.

Roughly simultaneous with the FTC's development of its "common law" model, administrative law has been undergoing seismic shifts relating to agency discretion and choice of procedure.[65] While current precedent strongly supports granting deference to the FTC developing substantive legal norms through "common-law"-like case-by-case adjudication rather than formal rulemaking, the Supreme Court's general trend has been increasingly hostile to approaches such as these. The FTC's current approach is arguably the most aggressive use of adjudicatory procedures to develop a substantive area of law that any agency has embraced in the modern era of administrative law – which is, perhaps, unsurprising given the FTC's clash with Congress (then heavily Democratic), culminating in 1980.

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[61] Fox I.

[62] Brand-X.

[63] S&H.

[64] Cite to TF/ICLE FOIA request.

[65] See, e.g., Wright & Koch, *Evolution of Administrative Law as a Legal Discipline*, 3 2 Fed. Prac. & Proc. Judicial Review § 8113 (1st ed., updated April 2013) ("For over a decade, the US has experienced a reevaluation of the administrative state Ironically, the recent attempts to rein-in the active government have increased the impact of the discipline. … The application of administrative law has at once become more complex and more fruitful.").

To give a flavor or the Court's evolving sentiment, consider the following views expressed by leading administrative law scholars: Lisa Schultz Bressman explains that "It should therefore come as no surprise … that the Supreme Court has recently begun to pare back the deference it accords to agency choice of procedures."[66] Elizabeth Magill similarly tells us that "Courts appear to be increasingly concerned about the oft-repeated charge that agencies are 'regulating by guidance'" – a category that generally unadjudicated enforcement actions.[67] John Manning offers a more skeptical take, arguing that it is jurisprudentially impractical for the Court to develop a strong preference for rulemaking over case-by-case adjudication.[68] But he does suggest that the Court may turn instead to other doctrines, such as fair notice, to meet the same end[69] – and, indeed, the Court has since done just that.[70]

While perhaps not as engaging as the substantive concerns that the Commission seeks to address with its "common law" approach, one ignores these procedural and jurisprudential concerns at their own risk. It is a grave mistake to dismiss them as a "side show,"[71] or even just to proceed without an understanding of the broader historical – and shifting contemporary – context. The rest of this section briefly sketches this historical context.

a. The broad context of choice of procedure

[This section draws from *INS v. Chadha* to discuss the role of separation of powers in rulemaking, the relationship between rulemaking (legislation) and adjudication (execution) and the role of the judiciary, &c

- Generally, separation of powers; inefficiency is deliberate

- Separate executive from legislative, judiciary makes sure of this

- To avoid tyranny of shifting majority [FN describing FTC as changing]

- Agencies blur executive/judicial/legislative functions, so harder

- Sine qua non is judicial review [settlements make this difficult]

- longstanding debates over agency choice of procedure]

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[66] Bressman, 78 NYU L. Rev. 461

[67] Magill, 71 U. Chi. L. Rev. 1383, 1441; see also 91 Georgetown L.J. 757.

[68] Manning, 72 GWU L. Rev. 893, 909 ("Although scholars have also periodically tried to devise general standards for triggering rulemaking obligations, such efforts have not gained traction. Nor could they, in my view. Whatever one thinks of the relative merits of rulemaking versus adjudication, I think it safe to doubt the possibility of devising a judicially manageable standard for triggering mandatory rulemaking.")

[69] Id.

[70] *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (*Fox II*) ("A 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.")

[71] See Ohm, *supra*.

b. *Chenery II* and Agency Choice of Procedure

All that follows is built on *Chenery II*, the 1947 case in which Supreme Court held that administrative agencies have broad discretion to choose whether to develop legal norms through either *ex ante* formal rulemaking or *ex post* informal case-by-case adjudication.[72] In this case, one of the cornerstones of American administrative law, the SEC had adopted a new interpretation of its statute in the course of an adjudication. The Commission's decision was challenged on the grounds that new rules could only be promulgated through a rulemaking procedure. The Court rejected this position in a passage that bears quotation at length:

> 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 within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. *But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.* Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. *In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.*
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative 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 lies primarily in the informed discretion of the administrative agency.*[73]

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.[74] We include this full passage here both because this is the operative language in the debate over rulemaking vs. adjudication – the basic rationale for adjudication are routinely cited today – as well because this

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[72] SEC v. Chenery Corp., 332 U.S. 194 (1947).

[73] Id. at 202 (emphasis added).

[74] See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

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.

This standard is, on the Court's own terms, a bit puzzling: the Court says outright that *ex ante* rulemaking should be used "as much as possible." This view was commonly held at the time, and has been prominent since.[75] As captured by Justice Jackson's dissent:

> The truth is that in this decision the Court approves the Commission's assertion of power to govern the matter without law … . The reasons which will lead it to take one course as against the other remain locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words: "The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties...." This seems to me to undervalue and to belittle the place of law, even in the system of administrative justice. It calls to mind Mr. Justice Cardozo's statement that "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable."[76]

We will turn momentarily to consider these and other concerns about the Court's decision – and its subsequent history. But first, why did the Court adopt the approach that it did? In particular, why did it commit the decision of which procedure to use so fully to the agency's sole discretion? The answer, as unsatisfying as it has been persistent, is judicial administrability: determining whether, or when it is appropriate for an agency to use one procedure over another requires a court to assess factual gradations to a degree beyond the meaningful resolution of judicial process.[77]

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[75] Bressman summarizes many of the concerns with adjudication nicely: "Yet, adjudication, as a general matter, has serious shortcomings for formulating policy. It applies new rules retroactively to the parties in the case. It also excludes other affected parties in the development of policy applicable to them, unless included through the venues 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 narrow perspective--only as necessary to decide a case – which decreases the comprehensiveness of the resulting rule and increases the risk that bad facts will make bad law. Similarly, it elaborates policy in a narrow manner – on a case-by-case basis – which decreases predictability and opportunities for planning. It also announces policy in the form of an order rather than codifying it in the Federal Register, thus decreasing accessibility. And, it depends for all of this on the existence of circumstances that lead to the initiation of a proceeding or succession of proceedings. Other methods for formulating general policy … fare even worse." Bressman, at 542–543.

[76] [Cite]

[77] See Manning, 909–915. This is unsatisfying to many because courts often are required to make such assessments. See, e.g., Bressman (arguing for the development of such standards to determine choice of procedure questions).

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

Chenery II prompted the development of a substantial, and generally critical academic literature.[78] 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 revolt against *Chenery 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.[79] In their dissents, both Justices argued that the NLRB should have been required to issue the new rule through a notice-and-comment process.[80]

These dissents suggested that the Court may have had the appetite to revisit the strong holding in *Chenery II*. Judge Friendly, himself friendly to the argument that agencies should face a judicially enforced preference for rulemaking procedures, distilled from the plurality and dissents a test that would require new rules of general applicability to be announced through rulemaking procedures.[81] Unfortunately for the cause, the Supreme Court granted *cert* in Judge Friendly's test case, *Bell Aerospace*, and emphatically endorsed its own prior holding in *Chenery II*.[82] 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."[83]

d. From Chevron to Mead

Following *Bell Aerospace*'s re-affirmation of *Chenery II* in 1974, concern over agency choice of procedure cooled and the focus of administrative law jurisprudence shifted from procedural to substantive discretion. 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 concern over the growth, of the regulatory state in the 1970s;[84] it was also driven in part by the Court's administrative law jurisprudence, as exemplified by *Chenery II*.

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[78] Magill, fn 69. ("There is an important, if now dated, literature focusing on agency choices 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 its goals through one or the other. … To say that there was a debate, however, implies more diversity of opinion than can be found in that literature. … [T]he drift of these articles was fairly uniform: agencies should use rulemaking more often than they did.").

[79] *Wyman-Gordon v. NLRB*; Manning.

[80] *Wyman-Gordon dissents*; Manning.

[81] Manning, 908.

[82] *Bell Aerospace*. Manning, 908.

[83] Id, 908–909.

[84] See, e.g., Commissioner Thomas Leary, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Leary2_26f.authcheckdam.pdf ("The 1970s were characterized not only by civil unrest over an unpopular war but also by the (hopefully) high-water mark of an intellectual movement that was profoundly skeptical about a market system driven by consumer sovereignty. This essentially paternalistic view, prominently associated with celebrities like John Galbraith and Ralph Nader, obviously had a strong influence on the

In the earlier era, the courts had struggled with the basic questions of how agencies operate. Those questions largely answered, the courts now found themselves facing a new set of questions around the relationship between the agencies and the courts themselves.

These questions came along several dimensions. The best known, and most relevant for our consideration, was addressed in *Chevron v. NRDC*.[85] This case gave us the well-known *Chevron* doctrine, which requires courts to defer to reasonable agency constructions of ambiguous statutes.[86] One of the many questions that *Chevron* has raised over its 30 years is: What constitutes an agency construction of a statute? That is, is any agency statement interpreting an ambiguous statute entitled to *Chevron* deference, or is deference only afforded to constructions arrived at through more formal processes? And is this a binary question, such that an agency construction of a statute either is or is not entitled to deference; or is it there a sliding scale, such that a construction of a statute arrived at through rulemaking is entitled to more deference than constructions arrived at through less formal processes such as adjudication?

These questions were addressed by the Court in *United States v. Mead*, a 2001 case considering whether "ruling letters" used by the Customs Service to set tariff classifications merit *Chevron* deference.[87] The Court held that they did not – that constructions of an ambiguous statute only receive *Chevron* deference if arrived at through procedures by which the agency is authorized to issue rules that have the force of law.[88]

e. The Post-Mead era's new challenge to discretion

The next step in this history should be apparent: *Mead* ties the level of deference that an agency receives to the level of procedural formality it uses in interpreting statutes. This raises the obvious and, for the FTC, important question: Are agency determinations arrived at through adjudication entitled to the same level of deference as those arrived at through rulemaking? *Mead* raises questions beyond this, but in the context of the relative merits of rulemaking and adjudication, *Mead* brings us full circle.

Bressman, arguing for greater accountability in agency choices of procedure, explains the significance of the decision: "*Mead* moves in the right direction. The case begins a partial weaning from *Chenery II* and unlimited choice of procedures."[89]

Bressman's views of agency choice of procedure – which largely echo the concerns of the pre-*Wyman-Gordon* era – are representative of current concerns about the FTC:

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leadership of the Federal Trade Commission at the time. ....There was a perception that the Commission had been co-opted by the counter-culture, was out of control, and was suspicious of the private sector. Members of Congress were made aware of these concerns".)

[85] *Chevron.*

[86] Id.

[87] *Mead.*

[88] Id.

[89]

> The place to start is with the advantages of notice-and-comment rulemaking for making general policy. Notice-and-comment rulemaking, by its nature, facilitates the participation of affected parties, the submission of relevant information, and the prospective application of resulting policy. As a result of the reasoned-decisionmaking requirement that accompanies it, notice-and-comment rulemaking fosters logical and thorough consideration of policy. To the extent notice-and-comment rulemaking issues 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.[90]

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 view that "agencies must assume responsibility for those choices [of basic regulatory policy]. Otherwise, there is no assurance that they will exercise their authority in a manner that reflects reasonableness rather than arbitrariness. … Thus, agencies must supply the standards that discipline their discretion under delegating statutes."[91]

Writing in the period after *Mead*, others were not as optimistic as Bressman that *Mead* marked an era of increased scrutiny over agency choice of procedure.[92] While the Court has not embraced Bressman's direct proposal, subsequent Supreme Court cases do suggest that the Justices are responsive to these concerns. Addressing a change in FCC policy relating to the broadcast of indecent material, the Court rejected claims brought by the FCC against Fox and other broadcasters. In *Fox I*, the Court noted that firms may be have a viable challenge to new rules "when [the] prior policy has engendered serious reliance interests that must be taken into account."[93] In *Fox II* (decided on a second *cert* after *Fox I* was remanded), the Court held that the FCC's changed policy could not be applied to conduct that occurred prior to that change on notice grounds: "A 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."[94]

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[90] Bressman, 542.

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[92] See, e.g., Manning, *supra*.

[93] Fox v. FCC, 556 U.S. 502, 514–516 (2007).

[94] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012)

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.[95] With these cases – especially *Fox II* – the court appears to have embraced this approach.

IV. The Commission's administrative Jurisprudence[96]

Under current administrative law, the FTC has the discretion to proceed in an adjudicatory, "common-law"-like matter, rather than using its rulemaking authority to issues formal *ex ante* rules under Section 5. And it must be emphasized that the FTC has clear rulemaking authority for both UDAP and UMC.[97] But the FTC chooses adjudication over rulemaking against the tide 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 shutter 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 *Chenery II*, the flexibility it offers certainly can be helpful in many circumstances where it is difficult to formulate specific rules *ex ante*. Unquestionably, there are strong arguments for adjudication in fast-moving area 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, *how* it does so may 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 law 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 free-riding 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 applies the discussion above of agency choice of procedure to the FTC's adjudicatory approach to developing its data security jurisprudence.

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[95] Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355-74 (1964) (codified at 16 C.F.R. 408 (2000)).

[96] Add to this section discussion of Leoni, *Freedom and Law*.

[97] Discuss Mag-Moss for UDAP; *Nat'l Petroleum Refiners* for UMC. See also Hurwitz, *Chevron and Limits of Administrative Antitrust*; FTC "What we do" webpage.

a. The rulemaking vs. adjudicatory mindsets

It should be noted that the rhetoric matters, especially when it reflects (or influence) the mindset of its users. The Commission has long viewed itself as primarily a law enforcement agency.[98] 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, entrusting 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.[99] This view must be held throughout the Commission, from the attorneys selecting and investigating cases to the Commissioners and ALJs 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 rulemaking (or rulemaking through adjudication) are more general than this. There are longstanding debates in administrative law over the propriety 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.[100]

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 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

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[98] This view was recently captured by Ohm: "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 these roles are second in priority for many at the FTC."

[99] Id (describing rulemaking as "second in priority").

[100] See *supra*, at notes [].

consistency over time – agencies are not bound by *stare decisis*.[101] Rather, the courts recognize that the policy outcome is a political question – not a legal one – that is to be answered by political processes.[102]

This demonstrates one of the key aspects of the common law discussed above: courts decide cases because they must. A key reason administrative law has developed to give agencies substantial 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 S&H's analogy is inapt where they say that "The FTC has not been engaging in rulemaking in disguise any more than a court when interpreting a statute over time is engaging in judicial legislation."[103] 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.[104]

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 created precisely because rulemaking proved inapt to the areas that the Commission was entrusted to regulate.

But this understanding proves too much. If anything, the same concerns that gave Congress to create the FTC should give the FTC pause to be haphazard 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 to primarily serve an informational function: in its first instantiation its primary power was to conduct 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

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[102] Why might Congress operate in this way? Discuss various reasons here: uncertainty, expertise, compromise, avoidance, public choice.

[103] S&H2.

[104] *American Electric Power* (holding that the existence of regulatory authority to issue rules in an area displaces federal common law).

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 by others.[105]

In the 1960s and 70s, the Commission did undertake a substantial rule-making role – and it was thoroughly rebuked for having done so.[106] As a result, Congress enacted the Magnusson-Moss Act (Mag-Moss) in the 1970s.[107]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 power. The Commission should not be able to avoid those burdens simply by turning 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.[108] In the aftermath of the short-lived *Wyman-Gordon* revolt against *Chenery II*, fair notice was raised as the remaining protection against agency abuse of discretion in preferring adjudication over rulemaking.[109]

Fair notice presents a facial challenge to legal rules that impose penalties upon regulated parties but "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."[110] 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."[111] 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

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[105] See *supra*.

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[108] See Manning.

[109] Id.

[110] Fox II.

[111] Id.

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.[112]

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 Court[113] and that raises a number of unanswered questions. For instance, fair notice only attaches where regulated parties face fines or other penalty for non-compliance. It is unclear how, or whether, courts will view reputational 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.[114] Of course, it must be noted that the Commission is actively seeking greater authority to issue civil fines.[115] It has specifically articulated a need for such authority in privacy and data security areas.[116]

Another open question, again of salience to the FTC's current efforts, is how compliance with industry norms affects the fair notice analysis.[117] Where 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.[118] 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 S&H, that privacy and data security practitioners are able to distill 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 and 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 subspecialty area of law. This is compounded by the existence of myriad state privacy and data security laws.[119]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 under its deception authority instead of its unfairness

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[112] Cf *infra* at __ (in the pending *Wyndham* litigation the FTC has argued that Fair Notice is a subjective standard, requires discovery as to a defendant's knowledge of legal requirements, and thus cannot be resolved at the Motion to Dismiss stage of litigation).

[113] See supra.

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[117] Boutrous & Evanson.

[118] Id.

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authority.[120] 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 unfairness 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,[121] deviation from industry norms does not necessarily suffice to establish liability.

Consider *Pearson v. Shalala*, in which the DC Circuit rejected the FDA's refusal to allow health claims for which there was not "significant scientific agreement." 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 insufficient to meet 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"[122] and continues:

> To be sure, Justice Stewart once said, in declining to define obscenity, "I know it when I see it," which is basically the approach the FDA takes to the term "significant scientific agreement." But the Supreme Court is not subject to the Administrative Procedure Act. Nor for that matter is the Congress. That is why we are quite unimpressed with the government's argument that the agency is justified in employing this standard without definition[.][123]

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 all at once. The agency is entitled to proceed case 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.

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121 But see discussion of *The TJ Hooper*, infra.

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d. Other concerns: Conflicting incentives

A final set of concerns to consider relate to the incentives faces by 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.[124] 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 need to 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.[125] 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.[126]

Compare these with the incentives faced by the parties that the FTC investigates. The Commission touts its settlements both as a source of the agency's "common law," and also as a demonstration of the soundness of its approach.[127] 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.[128]

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 case. 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. It is the case that the political process does provide some check on the agency – particularly through Congressional oversight. But it is this lack of political accountability that prompted then-Professor Kagan to argue for greater Presidential control over agency

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127 See, e.g., Ohm ("Another measure of the strength of these cases is the rate at which they are settled. In the history of the FTC's work on online privacy, the number of cases that have not led to swift settlement can be counted on one hand.").

128 Rossi. See supra, note [].

decisionmaking;[129] and it is what has prompted scholars like Bressman to argue against *Chenery II*'s permissive approach to agency choice of procedure.

V. The Role of FTC Adjudication in Law Making

The discussion in the previous two Parts of this Article suggests that the FTC's preference to use adjudication instead of rulemaking to develop its data security jurisprudence is problematic. It is, however, the case that current precedent continues to give the agency broad discretion to adopt such a path. And, even to the extent that this is problematic – or that the winds of precedent may be changing direction – there undoubtedly are, or at least may be, some cases where adjudication is an appropriate approach for the Commission to take. The discussion turns now to consider the circumstances in which this course may be more appropriate and how the Commission should be encouraged to proceed when charting such a course.

a. The Need for and challenge of Adjudication

As explained in *Chenery II*, the basic rationale for allowing agencies to develop rules through adjudication is that in some in some instances it is difficult to craft *ex ante* rules. This may be the case, as explained by the Court, where an issue arises that an agency could not have reasonably foreseen, the agency lacks sufficient experience with an issue, or the underlying issues are specialized or varying in nature.[130] These rationale appear to apply generally in areas defined by new or changing technologies. It is unsurprising, then, that these are the areas in which we see the FTC pushing aggressively to rely on adjudication and characterizing its efforts as akin to "common-law."[131]

New and changing technologies have always presented vexing issues for courts, legislatures, and regulators. A full study of the reasons for this is beyond the scope of this article. But some discussion is nonetheless important insofar as it may provide insight into the FTC's preference for adjudication.

The basic issue in the FTC's data security cases is whether a firm has adopted data security practices sufficient to protect consumer data in the face of evolving technology and threat vectors. Two sets of historic cases are useful to consider by analogy: medical malpractice cases arising in the late 1800s after the advent of diagnostic X-ray technology, and *The TJ Hooper*, which considers the adoption of radio technology by seafaring industry. In both areas the courts, through their common-law method, faulted industry participants for failing to keep apace of changing technologies – these cases present a useful contrast to the argument that the FTC ought not rely primarily on adjudicatory approaches to changing data securty technologies.

The basic story of the diagnostic X-ray cases is simple.[132] Prior to the discovery of x-rays, and the development of technologies that could use x-rays to non-invasively peer inside the human

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[129] Presidential Administration (e.g., at 2377)

[130] See *Chenery II*, discussed at notes [] – [].

[131] See *supra*, discussing the FTC's efforts relating to data security, privacy, and high-tech industries generally, relying on both its UDAP and UMC authorities.

[132] See generally [].

body, doctors had no way to diagnose various internal injuries or ailments. It was rare, therefore, for a doctor to be held liable for an incorrect diagnosis if a proper diagnosis would have required such information. The diagnostic x-ray changed that. The x-ray made it relatively easy for doctors to obtain such information, and the courts were quick to incorporate this new technology into doctor's duty of care. Within a few short years of the advent of this technology, a doctor who failed to properly use diagnostic x-rays in the diagnosis of a patient would likely face liability for any harm that befell that patient as a result.

Similarly, in the classic case of *The TJ Hooper* the owner of the eponymous tugboat was found liable for the loss of cargo at sea. The court found that, had the tug been equipped with commonly available radio technology the cargo likely would not have been lost. In defense, the owner argued that there was no common practice in the industry of equipping boats with radios – the TJ Hooper, therefore was being operated in accord with the industry-standard level of care and therefore was not being operated negligently.

The court rejected this argument, explaining that

> There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence … . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. … Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[133]

These cases offer powerful examples of instances in which entire industries have been required to adopt new technologies through adjudicatory – not legislative – processes. They demonstrate both that such changes can be brought about through adjudication, and also that courts view this as legitimate.

But there are important differences between these cases and the FTC's approach to data security (and to other areas where the FTC is relying on adjudication to develop legal norms). The most fundamental difference is the nature of the new technology. Both x-diagnostic rays and shipboard radios are – and at the time, were – well understood technologies that could be simply and effectively used. There may have been disagreement – or, more simply, inertia – among contemporary practitioners that yielded resistance to the new technology.

Data security isn't about what new technologies firms should use – it's about *how* new technology is used. If anything, the challenge of data security is that firms are adopting complicated technologies without sufficient understanding of how to effectively use them. The FTC's data security cases would be better analogized to hypothetical litigation against doctors for harm caused by X-ray radiation in the early years of the technology, when the effects of radiation and approaches to mitigate those effects were just beginning to be understood. Even that analogy, however, is inapposite – diagnostic X-rays were used exclusively by a group of learned specialists, and were used by those specialists as tools of their trade. The *TJ Hooper* court similarly explains the centrality of

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[133] *TJ Hooper*, at 740.

radios to the shipping trade, likening them to the captain's ears.[134] Indeed, the value of shipboard radio was well understood, having been the basis for regulation of the regulation of radio spectrum starting twenty years earlier,[135] and given the ongoing discussion of reforming the Federal Radio Commission.[136]

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.[137] Stories 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.[138] 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.[139]

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 more likely to blame hackers or insecure technology for the breach.

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. S&H are surely correct 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 *Chenery II* that gives agencies discretion to choose whether to proceed by rulemaking or adjudication. As discussed previously, *Chenery II* gives agencies broad discretion in their choice of rulemaking procedure. But

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[134] 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 storm signal ashore.")

[135] 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, nearby ships could have been alerted to the Titanic tragedy and hundreds of lives saved.

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

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[139] Cite Snowden, Target, LabMD, Wyndham, &c.

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 the wisdom 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 instance 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: principles of Due Process require it. And as discussed in *INS v. Chadha*, it is one of the basic principles underlying our basic Constitutional structure. Over the years, these requirements have been construed generously. Satisfying them requires only that an agency's statutory framework as created by Congress ensures that judicial review of final agency action is available to any party that seeks it. But this is a minimum standard. If the Commission is truly committed to developing jurisprudentially sound legal norms, it should work to maximize litigants' access to judicial review. Indeed, wherever possible, it should choose to argue matters in federal district court in the first instance. Proceedings before administrative law judges or the Commission itself should be reserved to cursory matters that are not expected to – and that will not be treated as – contribute to the establishment of legal norms.

Related to this, the Commission should pursue those case 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 present 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 Commissions 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.

Of course, the Commission should not simply ignore the vast majority of cases that do not present the most difficult legal questions. These are cases that the Commission should investigate and bring before an administrative law judge. But these are also cases that should settle with relative ease and minimal burden. The lesson from the common law tradition in these cases, however, is that they should not be a primary mechanism for developing legal norms. Rather, as applies to the individual targets of these investigations, the Commission should use its enforcement actions only to alter prior behavior: it should not seek sanctions against these businesses, or to put in place a monitoring regime – unless there is some indication that such mechanisms are warranted for some exceptional conduct (e.g., repeat offenses or refusal to alter behavior). In the more general course, the purpose of these investigations should be to gather information and insights necessary either to engage in notice-and-comment rulemaking or to report to Congress about the need to data security legislation.

In a similar vein, the FTC should develop relationships with other, industry-specific, regulators. As discussed above, most businesses are unlikely to turn to the FTC for guidance on data security. They are, however, likely to turn to regulators that focus on their industry. The Commission should provide input to its regulatory peers to ensure that they adopt sound rules specific to their industry and provide sound and relevant guidance to firms that they regulate. [140]

[140] There is a more subtle point to be made in this argument. The courts often prefer specific statutes over general statutes. And, in the common-law context, the Supreme Court in recent years has signaled a strong preference for federal common law to give way to governance by federal agencies. *See* Hurwitz, *Administrative Antitrust*. Although there is little precedent directly on point, it is likely that the same principles would apply in the regulatory context, such that the courts would find the FTC's authority over data security issues is subordinate to the authority of industry-specific regulators. See, e.g., *Multi-Agency Precedents*; *Chevron Step Zero* literature.