

Federal Trade Commission Seminar

Professor Timothy J. Muris

Syllabus (Fall 2023): Thursdays, 8:10 pm

We will study the FTC as an institution, as an enforcement agency, and as an advocacy and research agency. For the third time in 50 years, new FTC leadership in 2021 embarked on “change,” rejecting the work of the agency it inherited. The earlier efforts, beginning in 1970 and 1981, are discussed in detail in Harris and Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies* (Oxford, 2nd Ed. 1996). The articles below contain some justifications for the change, as well as critiques, and many more can be found in speeches from the new leadership, especially by the Commissioners at FTC.gov. Three Commissioners no longer at the agency, one a Democrat, Rohit Chopra, the other two Republicans, Noah Phillips and Christine Wilson, also made important speeches about the last few years at the FTC.

Grades will be based upon a paper, which will be due the last class period, Thursday, November 16th. I will circulate a list of topics, from which you can choose to write your paper, or we can mutually agree on another topic. We will have individual meetings on the topics on September 14th. I will circulate a sign-up sheet on September 7th.

An outline, of at least 4-5 double spaced pages, will be due on September 27th via email: tmuris@gmu.edu. Individual meetings with me on the outlines will be on September 28th. I will circulate a sign-up sheet on September 21st.

Class sessions other than the final class and the individual meetings will cover:

- Overview of the Agency
- FTC History
- Implementing change at the FTC
- Antitrust: Non-Mergers
- Antitrust: Mergers
- Rulemaking
- Consumer Protection: Privacy
- Consumer Protection: Non-privacy Issues and Proposals for Reform
- Advocacy and Research

Although I may supplement this list from time to time, following are relevant materials:

Overview:

- *More than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*
72 *Antitrust Law Journal* 773 (2005)
- Douglas H. Ginsburg & Eric M. Fraser, *The Role of Economic Analysis in Competition*

Law, in GETTING THE BALANCE RIGHT: INTELLECTUAL PROPERTY, COMPETITION LAW AND ECONOMICS IN ASIA (2011).

- Marc Winerman & William E. Kovacic, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527 (2012).
- William E. Kovacic & Marc Winerman, *The Federal Trade Commission As an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).
- Daniel A. Crane, *FTC Independence after Seila Law*, CSAS Working Paper (2022), available at <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2022/03/Crane-FINAL.pdf>.
- Axon Enterprise, Inc. v. FTC, 598 U.S. 175 (2023)
- Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *cert denied*, 22-991, 2023 WL 4278466 (U.S. June 30, 2023), and *cert. granted*, 22-859, 2023 WL 4278448 (U.S. June 30, 2023)

Competition

- Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 46 (2002)
- In Re: *In the Matter of Polygram Holding, Inc.*, Docket No. 9298 <https://www.ftc.gov/enforcement/cases-proceedings/polygram-holding-inc-decca-music-group-limited-et-al-matter> (7/24/03), Affirmed D.C. Circuit (7/22/05)
- *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*
2 Columbia Business Law Review 359 (2003)
- *Principles For a Successful Competition Agency*
72 University of Chicago Law Review 165 (2005)
- *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*
78 Antitrust Law Journal 147 (2012)
- *Tools of Reason: Truncation Through Judicial Experience and Economic Learning*
28 Antitrust Magazine 46 (Summer 2014)
- *Bazaarvoice: Protecting Consumers by Silencing the Customer*
CPI Antitrust Chronicle, March 2014 (1)
- Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017)

- Essays on the Trump Administration (February 2017)
https://www.antitrustsource.com/antitrustsource/February_2017
- Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019)
- Timothy J. Muris & Jonathan E. Nuechterlein, *Generic Drugs, Used Textbooks, and the Limits of Antitrust Liability for Product Improvements*, 4 Criterion J. on Innovation (2019)
- Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 Univ. Chi. L. Rev. 357 (2020)
- C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879 (2020)
- Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 Criterion J. on Innovation 29 (2020)
- Fed. Trade Comm’n, *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act* (2022)
- Timothy J. Muris, *Neo-Brandesian Antitrust: Repeating History’s Mistakes*, American Enterprise Institute (2023)
- *FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997)
- *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998)
- *United States v. Microsoft*, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (en banc) (per curiam)
- *FTC v. Whole Foods Mkt.*, 548 F.3d 1028 (D.C. Cir. 2008)
- *FTC v. Laboratory Corp. of America*, 2011, US District Court, CD Cal. 2011 WL 3100372 (C.D. Cal.)
- *FTC v. Lundbeck*, D Minn. Aug 31, 2010 2010 WL 3810015 (D. Minn)
- *Realcomp v. FTC*, 635 F.3d 815 (6th Cir. 2011)
- *FTC v. Promedica Health Systems*, Mar. 29, 2011 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011)

- Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012)
- Motorola Mobility LLC, No. 121-0120, 2013 WL 124100 (F.T.C. Jan. 3, 2012)
- FTC v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003 (2013)
- FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013)
- FTC v. AbbVie Inc., No. 14-5151, 2015 U.S. Dist. LEXIS 59115 (E.D. Penn. May 6, 2015)
- N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015)
- FTC v. Sysco Corp, No. 1:15-cv-00256, 2015 U.S. Dist. LEXIS 83482 (D.D.C June 23, 2015)
- FTC v. Staples, Inc., No. 1:15-cv-02115, 2016 U.S. Dist. LEXIS 64909 (D.D.C. May 10, 2016)
- FTC v. Penn State Hersey Medical Center (9-2-16 3d Cir.)
- FTC v. Advocate Healthcare (10-31-16 7th Cir.)
- Fed. Trade Commn. v. Meta Platforms Inc., 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023)
- Fed. Trade Commn. v. Microsoft Corp., 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023)

Consumer Protection

- Fed. Trade Comm'n, FTC Policy Statement on Deception (1983), available at: <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.
- *The Interface of Competition and Consumer Protection*
Fordham University School of Law, International Antitrust Law & Policy Chapter 2
(2002 Corporate Law Institute)
- *Choice or Consequences: Protecting Privacy in Commercial Information*
75 University of Chicago Law Review 1 (2008) (with
Howard Beales)
- J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1 (2013).

- J. Howard Beales III, Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash. L. Rev. 2157 (2015)
- Dissenting Statement of Commissioner Rohit Chopra, In re Facebook, Inc. FTC File No. 1823109 (July 24, 2019), available at: https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.
- Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. Pa. L. Rev. 71 (2021)
- Statement of Chairman Joe Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson, In re Facebook, Inc., FTC File No. 1823109 (July 24, 2021), available at: https://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf.
- Timothy J. Muris & J. Howard Beales, *Back to the Future: How Not to Write a Regulation*, American Enterprise Institute (2022)
- AMG Capital Management, LLC v. FTC, 141 S. Ct. 1341 (2021).
- POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015)
- FTC v. Shire ViroPharma, Inc., 917 F.3d 147 (3d Cir. 2019).
- United States v. Bayer Corp., Civil Action No. 07-01(JLL), 2015 U.S. Dist. LEXIS 134321 (D.N.J. Sep. 24, 2015)
- FTC v. Garden of Life, Inc., 845 F. Supp. 2d 1328 (S.D. Fla. 2012)
- Basic Research, LLC v. FTC, No. 2:09-cv-0779 CW, 2014 U.S. Dist. LEXIS 169043 (D. Utah Nov. 25, 2014)
- FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015)

Advocacy & Research

- www.ftc.gov/opa/2002/09/icnnaples.htm
- <https://www.ftc.gov/policy/reports> (Patents)
- <https://www.ftc.gov/policy/reports> (Healthcare)

Learning Outcomes:

The American Bar Association requires that this syllabus describe what the ABA calls “learning outcomes.” For this course, the

learning outcomes include one that has been designated by the faculty: “Students will exercise the professional skills expected of members of the legal profession.” We will discuss the modern FTC in numerous scenarios that practicing attorneys may face.

