

Federal Trade Commission Seminar

Professor Timothy J. Muris

Syllabus (Fall 2024): 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). Howard Beales and I recently discussed the three efforts to implement change in Timothy J. Muris & J. Howard Beales, *Achieving Change at the Federal Trade Commission*, CEI (May 2024) available at <https://cei.org/studies/achieving-change-at-the-federal-trade-commission/>.

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. Today’s Commissioners put virtually all of their written work on their individual pages on ftc.gov, including statements on official matters, testimony, and speeches. A few are listed below, and students should sample others for a sense of the dialogue within the first closely divided Commission in decades.

Grades will be based upon a paper, which will be due the last class period, Thursday, November 14th. I will circulate a list of topics, from which you can choose to write your paper, or we can mutually agree on another topic. I will circulate a sign-up sheet on September 5th. We will have individual meetings on the topics on September 19th.

An outline, of at least 4-5 double spaced pages, will be due on October 2nd via email: tmuris@gmu.edu. Individual meetings with me on the outlines will be on October 3rd. I will circulate a signup 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 will likely supplement this list from time to time, following are relevant materials:

Overview:

- Daniel A. Crane, *FTC Independence after Seila Law*, CSAS Working Paper (2022), available at <https://administrativestate.gmu.edu/wp-content/uploads/2022/08/Crane-FINAL.pdf>.
- William E. Kovacic & Marc Winerman, *The Federal Trade Commission As an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).
- Marc Winerman & William E. Kovacic, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527 (2012).
- 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)
- *More than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 Antitrust Law Journal 773 (2005)
- *S.E.C. v. Jarkesy*, 144 S. Ct. 2117 (2024)
- *Axon Enterprise, Inc. v. F.T.C.*, 598 U.S. 175 (2023)

Competition

- [Non-compete Clause Rule](#). 16 C.F.R. § 910 (2024)
- Remarks of Commissioner Rebecca Kelly Slaughter Supporting the Final Rule Banning Noncompete Agreements, Fed. Trade Comm’n (2024), available at <https://www.ftc.gov/news-events/news/speeches/remarks-commissioner-rebecca-kelly-slaughter-supporting-final-rule-banning-noncompete-agreements>
- Oral Statement of Commissioner Alvaro M. Bedoya on the FTC’s Issuance of the Non-Compete Clause Rule, Fed. Trade Comm’n (2024), available at <https://www.ftc.gov/news-events/news/speeches/oral-statement-commissioner-alvaro-m-bedoya-ftcs-issuance-non-compete-clause-rule>
- Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule*, Fed. Trade Comm’n (2024), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-melissa-holyoak-joined-commissioner-andrew-n-ferguson-matter-non>
- Dissenting Statement of Commissioner Andrew N. Ferguson, joined by Commissioner Melissa Holyoak, *In the Matter of the Non-Compete Clause Rule*, Fed. Trade Comm’n (2024), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-matter-non>
- Remarks by Chair Khan at the 2024 AELP Anti-Monopoly Summit, (May 2024), available at <https://www.ftc.gov/news-events/news/speeches/remarks-chair-khan-2024-aelp-anti-monopoly-summit>
- Remarks by Chair Lina M. Khan as Prepared for Delivery at Harvard Center for Labor and a Just Economy, (Feb. 2024), available at <https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-prepared-delivery-harvard-center-labor-just-economy>
- Remarks of Commissioner Rebecca Kelly Slaughter: SEPs, Antitrust, and the FTC, (Oct. 2021), available at <https://www.ftc.gov/news-events/news/speeches/remarks-commissioner-rebecca-kelly-slaughter-seps-antitrust-ftc>
- “Returning to Fairness” - Prepared Remarks of Commissioner Alvaro M. Bedoya at the Midwest Forum on Fair Markets, (Sept. 2022), available at <https://www.ftc.gov/news-events/news/speeches/returning-fairness-prepared-remarks-commissioner-alvaro-m-bedoya-midwest-forum-fair-markets>
- Remarks of Commissioner Holyoak at the Competitive Enterprise Institute’s

Annual Summit, (May 2024), available at <https://www.ftc.gov/news-events/news/speeches/remarks-commissioner-holyoak-competitive-enterprise-institutes-annual-summit>

- James Burnham & Andrew Ferguson, *Open Minds with Andrew Ferguson and James Burnham*, THE FEDERALIST SOCIETY (Jun. 2024), available at <https://fedsoc.org/commentary/podcasts/open-minds-with-andrew-ferguson-and-james-burnham>.
- Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 Admin. L. Rev. 277 (2023)
- Timothy J. Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, AMERICAN ENTERPRISE INSTITUTE (Jun. 2023), <https://www.aei.org/research-products/report/neo-brandeisian-antitrust-repeating-historys-mistakes/>.
- Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2022)*, available at <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>
- 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)
- Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 Univ. Chi. L. Rev. 357 (2020)
- 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)
- Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017)
- Dennis W. Carlton, et al., *Essays on the Trump Administration* (February 2017), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/feb17_full_source.pdf.

- Timothy J. Muris & Brady P.P. Cummins, *Tools of Reason: Truncation Through Judicial Experience and Economic Learning*, 28 Antitrust Magazine 46 (2014)
- Timothy J. Muris & Christine Wilson, *Bazaarvoice: Protecting Consumers by Silencing the Customer?* CPI Antitrust Chronicle, March 2014 (1)
- Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century* 78 Antitrust Law Journal 147 (2012)
- Timothy J. Muris, *Principles For a Successful Competition Agency* 72 University of Chicago Law Review 165 (2005)
- Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2 Columbia Business Law Review 359 (2003)
- Amended Complaint, *FTC v. Amazon, Inc.* (2024), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/1910129-1910130-amazoncom-inc-amazon-ecommerce>
- *F.T.C. v. Microsoft Corp.*, 681 F. Supp. 3d 1069 (N.D. Cal. 2023)
- *F.T.C. v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023)
- *F.T.C. v. Advoc. Health Care Network*, 841 F.3d 460, (7th Cir. 2016)
- *F.T.C. v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016)
- *F.T.C. v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016)
- *F.T.C. v. AbbVie Inc.*, 107 F. Supp. 3d 428 (E.D. Pa. 2015)
- *N. Carolina State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494 (2015)
- *F.T.C. v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015)
- *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013)
- *F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013)
- *Polypore Int'l, Inc. v. F.T.C.*, 686 F.3d 1208 (11th Cir. 2012)
- *Motorola Mobility LLC*, 2013 WL 124100 (F.T.C. Jan. 3, 2012)

- *F.T.C. v. Lab'y Corp. of Am.*, 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011)
- *Realcomp v. F.T.C.*, 635 F.3d 815 (6th Cir. 2011)
- *F.T.C. v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011)
- *F.T.C. v. Lundbeck, Inc.*, 2010 WL 3810015 (D. Minn. Aug. 31, 2010), aff'd, 650 F.3d 1236 (8th Cir. 2011)
- *F.T.C. v. Whole Foods Mkt.*, 548 F.3d 1028 (D.C. Cir. 2008)
- 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)
- *United States v. Microsoft*, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (en banc) (per curiam)
- *F.T.C. v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998)
- *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997)

Consumer Protection

- Timothy J. Muris & J. Howard Beales, *Back to the Future: How Not to Write a Regulation*, American Enterprise Institute (2022), available at <https://www.aei.org/research-products/report/back-to-the-future-how-not-to-write-a-regulation/>.
- 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.
- 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.
- 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)
- 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).
- *Choice or Consequences: Protecting Privacy in Commercial Information* 75 University of Chicago Law Review 1 (2008) (with J. Howard Beales)
- *The Interface of Competition and Consumer Protection* Fordham University School of Law, International Antitrust Law & Policy Chapter 2 (2002 Corporate Law Institute)
- Fed. Trade Comm'n, FTC Policy Statement on Deception (1983), available at: <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.
- *F.T.C. v. Amazon.com, Inc.*, 2024 WL 2723812 (W.D. Wash. May 28, 2024)
- *AMG Capital Management, LLC v. F.T.C.*, 593 U.S. 67 (2021)
- *F.T.C. v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019)
- *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478 (D.C. Cir. 2015)

- *United States v. Bayer Corp.*, 2015 U.S. Dist. LEXIS 134321 (D.N.J. Sep. 24, 2015)
- *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015)
- *Basic Research, LLC v. F.T.C.*, 2014 U.S. Dist. LEXIS 169043 (D. Utah Nov. 25, 2014)
- *F.T.C. v. Garden of Life, Inc.*, 845 F. Supp. 2d 1328 (S.D. Fla. 2012)

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.