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Constraining the Federal Trade Commission: The Case of Occupational Regulation

KENNETH W. CLARKSON* AND TIMOTHY J. MURIS**

Finding that much of state regulation of occupations restricts entry into the market and thereby limits the choices that consumers can make for themselves, the authors examine FTC efforts to change this regulation. The authors consider the Commission itself, the Congress, and the courts to analyze the likely outcome of the FTC's efforts. Because the FTC has had a long history of hostility toward market forces, the authors find the agency likely to impose some new rules upon occupations. After arguing that Congress' power to control FTC action is ineffective, absent the rare situation of a hostile political environment, the authors state that a "new administrative law" is developing that provides increased judicial scrutiny of agency rulemaking. This more stringent judicial review makes deregulation easier because it facilitates removal of licensure programs and makes imposition of new regulation more difficult. The authors urge that the courts end anti-consumer rulemaking by requiring that the benefits from actions mandated by agency rules exceed their costs, thereby achieving the actual goal of the FTC: bettering the welfare of the consumer.

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This is an expanded and revised version of a paper delivered at the American Enterprise Institute Conference on Occupational Regulation in February, 1979 ["The Federal Trade Commission and Occupational Regulation," in *Occupational Licensure and Regulation* (Washington, D.C.: A.E.I., 1980)]. This article builds on, and applies to a specific example, the analytical framework developed in K. Clarkson & T. Muris, *The Federal Trade Commission since 1970: Economic Regulation and Bureaucratic Behavior* (Cambridge, Mass.: Cambridge University Press, 1981).

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I. INTRODUCTION

The division of the American government into three branches constrains the power of each branch. In the twentieth century, administrative agencies, in effect a fourth branch, have grown in power. How effectively the other branches constrain these agencies is one of the great issues of modern public policy. This article investigates the constraints on an administrative agency¹ by focusing on the occupational licensure program of the Federal Trade Commission (FTC). We chose this focus because of its ability to test the limits of FTC power. Historically, licensed occupations have used powerful lobbies in state legislatures to ward off attacks and to create new restrictions. Having asserted that it can preempt state law, the Commission could reshape the legal environment affecting licensed occupations. Whether the Commission will succeed depends in significant part on how effectively the environment within which the Commission operates constrains its choice of programs.

Section II of this article provides the background for the theoretical underpinnings of the FTC's occupational regulatory effort by briefly stating the economic case against occupational regulation. Section III outlines the occupational licensure program of the

1. We emphasize the constraints created from within the Commission, from Congress, and from the judiciary. We will treat the executive branch and nongovernmental constraints more briefly within the context of the executive and judicial constraints. For a detailed discussion of the relationship between the FTC and the executive branch, see *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* (K. Clarkson & T. Muris ed. 1981) [hereinafter cited as CLARKSON & MURIS]. Chapter 15 elaborates on the thrust of FTC action as a whole but does not dwell on specific programs such as occupational licensure. See also note 3 *infra*.

FTC. Sections IV through VI discuss three institutions—the Commission itself, the Congress, and the judiciary—to determine the likelihood of success of the occupational licensure program. Before examining constraints from external sources, however, we determine whether the Commission will use its preempting power primarily to deregulate existing state requirements or, instead, to impose new federal regulations.² As for Congress, we analyze how congressional opposition or support influences a particular agency program—in this case, occupational licensure. These sections conclude by analyzing the important constraint of judicial review upon agency action, assuming *arguendo* that the FTC can preempt relevant state law.

II. THE ECONOMIC CONSEQUENCES OF OCCUPATIONAL REGULATION

Occupational regulation can reduce the welfare of consumers both by limiting entry into a particular business and by restricting certain forms of competition (such as advertising and solicitation) for those permitted to compete.³ The effects of regulation come in many forms, including higher prices and restricted choice of goods. Regulation reduces the welfare of consumers through the exclusion or curtailment of lower-cost producers, such as paralegals in law, nurses in medicine, dental hygienists in dentistry, and apprentices in the electrical, plumbing, and other trades. Regulations that bar technically qualified individuals from foreign countries from competing in the United States because of non-participation in a certified educational training program in the United States represent additional losses to consumer welfare. Occupational regulation also limits the activities that already certified members may engage in, again at a cost to consumers. For example, until recently most professions prohibited advertising despite the fact that information about the availability, product quality, and price of services is of value to consumers.

In the past decade economists have produced considerable evi-

2. To simplify analysis, we define “deregulation” as the elimination of existing legal requirements and “regulation” as the imposition of new legal requirements. Of course, not all deregulation benefits consumers, nor does all regulation harm them. *See, e.g.*, text accompanying note 16 *infra*.

3. *See, e.g.*, E. RAYACK, *PROFESSIONAL POWER AND AMERICAN MEDICINE: THE ECONOMICS OF THE AMERICAN MEDICAL ASSOCIATION* (1967); Benham, *The Effects of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972); Benham & Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421 (1975); Kessel, *The A.M.A. and the Supply of Physicians*, 35 L. & CONTEMP. PROB. 267 (1970); Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & ECON. 187 (1978).

dence that occupational regulation often harms consumers. George Stigler found that the median earnings of people engaged in licensed occupations were fifty percent greater than the median earnings of those engaged in unlicensed occupations.⁴ Further, partially licensed occupations had median earnings about fourteen percent higher than unlicensed occupations.⁵ The Bureau of Economics of the FTC found that television repair prices were higher in areas with occupational licensure than in areas with mere registration systems or no regulation at all.⁶ Lee Benham and John Cady found that laws prohibiting advertising by sellers of eyeglasses raised prices to consumers.⁷ In sum, the effects of some regulations are similar to those of successful cartelization.⁸ Unlike strictly private cartels, however, which often do not have reliable methods of controlling competition, occupational regulation can effectively restrict competition through the power of the state. This more powerful mechanism of enforcement makes the consequences of occupational regulation potentially more adverse than those of cartels.⁹

One argument often advanced to justify occupational regulation that restricts competition is that it raises quality.¹⁰ Increased quality, however, will not always justify such regulation. If a regulation raises quality and prices, it may injure consumers because the higher price may more than offset the benefit of increased quality. In addition, a regulation that limits the range of quality available to consumers will deny some consumers access to goods or services that they would consider adequate given the lower price that would exist without regulation. In any event, regulation does not invariably raise quality. Over twenty years ago, Walter Gell-

4. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3, 17 (1971).

5. *Id.* at 17.

6. Phelan, *Regulation of Television Repair Industry in Louisiana and California: A Case Study* (FTC Bureau of Economics, 1975).

7. J. CADY, *DRUGS ON THE MARKET: THE IMPACT OF PUBLIC POLICY ON THE RETAIL MARKET FOR PRESCRIPTION DRUGS* (1975); Benham, *supra* note 3.

8. Plott, *Occupational Self-Regulation: A Case Study of the Oklahoma Dry Cleaners*, 8 J.L. & ECON. 195, 221-22 (1965).

9. Private cartels are inherently unstable because of the ability of cartel members to cheat. In occupational regulation, the power of the state supplies more effective monitoring to prevent cheating.

10. See, e.g., Arrow, *Uncertainty and the Economics of Medical Care*, 53 AM. ECON. REV. 941, 966 (1963); Lerner, *Licensure: Facing the Real Problem*, 91 J. AM. DENTAL ASS'N 742 (1975); Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUNDATION RESEARCH J. 179, 181-82 n.7.

horn showed that increased occupational requirements do not necessarily lead to increased quality.¹¹ More recently, case studies have indicated that some regulations may actually reduce quality. For example, the FTC study of television repair found that fraud through the unnecessary replacement of parts was higher with licensure than without licensure.¹² In addition, a study of a legal firm that advertised heavily found lower prices and, at least on some services, significantly better quality.¹³

The relatively unregulated marketplace has significant advantages in allocating resources and promoting consumer welfare.¹⁴ The market tends to minimize waste by permitting continuous individual balancing of economic costs and benefits by consumers and producers. In addition, greater productive efficiency and more innovation result from the reliance on market incentives. Competitive markets also reduce the need for central collection of information; their price signals allow producers and consumers to respond quickly to change. Finally, competitive markets tend to decentralize power and make decisions that are fair in the sense of being impersonal. For these reasons, reliance on the market should be the norm. The FTC has admitted as much:

The public policy of this country favors the existence of free markets to the maximum extent possible. While the complexity of the modern economy often necessitates a departure from free market organization, as a general proposition a market-perfecting solution to a perceived problem is preferable. There should be a heavy burden of proof on those who would opt for a different form of organization.¹⁵

We do not assert that all government intervention in the market is unjustified. The antitrust rules prohibiting price-fixing and mergers leading to monopoly are among regulations widely believed to produce net benefits, as are rules against fraud and duress. Further, the FTC television repair study found that random government purchases of repair services to check for parts fraud reduced such fraud.¹⁶ In general, the nature of government involve-

11. W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956).

12. Phelan, *supra* note 6. This study compared the television repair industry in Louisiana, which has licensure, to that in California, which does not have licensure.

13. Muris & McChesney, *supra* note 10.

14. See, e.g., Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 *HARV. L. REV.* 549, 552-53 (1979).

15. 43 *Fed. Reg.* 24,001 (1978).

16. Phelan, *supra* note 6.

ment in the production of goods and services is what separates beneficial from harmful forms of regulation. Government involvement designed to penalize prescribed behavior—for example, governmental random tests, purchases defining property rights, and other checks to penalize fraud—is likely to be beneficial. Government involvement attempting to specify performance through control over specific components of the production process, such as who can compete, usually increases the net costs of resource use and hence is harmful.

In summary, economic analysis indicates that too much occupational regulation exists. Occupational regulation decreases competition and increases prices by limiting both entry and the terms on which those who enter can compete. The sometimes dubious claim of increased quality does not justify limiting the range of quality and prices available to consumers. Given the problems that occupational regulation causes, efforts to curtail it deserve encouragement. The sections that follow investigate one such effort, the occupational licensure program of the FTC.

III. THE FTC'S OCCUPATIONAL LICENSURE PROGRAM

In early 1974, an intra-agency task force formed to develop recommendations concerning the prescription drug market. Headed by Wesley J. Liebeler, newly appointed director of the office of Policy, Planning and Evaluation, the task force reported that the major problem at the retailing level was state prohibition of advertising, which raised prices.¹⁷ The task force's recommendation that the Commission should preempt the offending state laws led to the FTC's first foray into occupational regulation, the proposal of a preemption rule in June of 1975.¹⁸

Following the Commission's warm reception of the drug report in July of 1974, Liebeler proposed creation of a more general occupational licensure program. The memorandum supporting this proposal presented the economic case against occupational regulation

17. First Report of the Prescription Drug Task Force: Retailing (May 15, 1974). This report led to *PRESCRIPTION DRUG PRICE DISCLOSURES, STAFF REPORT TO THE FEDERAL TRADE COMMISSION* (1975), which proposed trade regulation rules governing retail price disclosures of prescription drugs.

18. 40 Fed. Reg. 24,031, 24,032 (1975). The trade regulation rule proposal would have preempted state laws prohibiting advertisement of drug prices. The FTC abandoned the proposed rule after a United States Supreme Court decision that protected drug advertising under the first amendment of the United States Constitution. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

designed to control entry as well as various types of competition such as advertising. In its deliberations concerning the fiscal year 1976 budget, conducted during the summer of 1974, the Commission approved the proposal.¹⁹

The program lay dormant, however, until January 1975 when Chairman Lewis Engman created a new task force. In a flurry of activity, principally involving employees of the FTC's regional offices, the Commission selected several industries for more detailed investigation. Although many of these investigations have since terminated, industries in which investigations continue include those providing ophthalmologic, legal, dental, and real estate services.²⁰ Of these investigations, only the one involving optometrists has produced action overturning occupational regulations, with the promulgation in mid-1978 of a rule primarily preempting state laws that forbade advertising of ophthalmic goods and services.²¹

The Commission is also involved with regulation of the health care and the funeral industries.²² The Commission began to consider occupational regulation under the health care program in 1975, and has thus far produced cases or investigations against the American Medical Association, the American Dental Association, Blue Cross-Blue Shield, and other major entities involved in the regulation of health care.²³ The Commission's funeral industry rulemaking involves both industry self-regulation and government regulation, including restraints on advertising.

The economic foundation of this attack on regulation—at least those parts that have reached conclusion—is simple: Prohibiting advertising raises prices. This conclusion and the resulting case against state laws restricting advertising are products of the theoretical work of George Stigler and the empirical work of Lee Benham and others.²⁴ Remove the anti-competitive laws, the Commission apparently argues, and the market will work to lower prices. Thus, the thrust of this part of the Commission's occupational li-

19. See 16 C.F.R. § 456 (1980).

20. FTC Budget Justification to Congress, Fiscal Year 1981, Occupational Licensing Program. See *FTC 1981 Budget Request: Hearings Before the House Subcomm. on the Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies, 97th Cong., 2d Sess.* (1980).

21. See 16 C.F.R. § 456 (1980); *But see* notes 188-90 and accompanying text *infra*.

22. See 40 Fed. Reg. 39,901 (1975) (Funeral Industry rulemaking).

23. See American College of Obstetricians & Gynecologists, 88 F.T.C. 955 (1976); American Academy of Orthopaedic Surgeons, 88 F.T.C. 968 (1976); F.T.C. Budget Justifications to Congress 1975-81.

24. See authorities cited note 3 *supra*.

censure program is deregulatory, exuding considerable confidence in the ability of the market to maximize consumer welfare.

The legal foundation of the program, however, is neither simple nor clearly sound, particularly on the issue whether the FTC will eventually prevail in preempting state law. Supreme Court decisions regarding the applicability of the Sherman Act to anti-competitive activities authorized by state governments raise unresolved questions concerning the Commission's power to preempt state law under the Federal Trade Commission Act.²⁵ A major issue is whether the "state action" exemption to the Sherman Act outlined in *Parker v. Brown*²⁶ will shield state occupational licensure programs from attack by the FTC.

Of the recent Supreme Court decisions concerning the scope of the "state action" exemption to the Sherman Act,²⁷ *Bates v. State Bar of Arizona*²⁸ is the most troubling for the Commission. In *Bates*, the state bar charged two lawyers with violating the state supreme court's disciplinary rules prohibiting media advertising. Although the lawyers prevailed under a first amendment theory, the court found that the *Parker* exemption precluded an antitrust attack. Thus, this decision exempts from the Sherman Act a clearly anti-competitive state law of the very kind targeted by the FTC's occupational licensure program. Application of the Sherman Act standard to the Federal Trade Commission Act would substantially reduce the ability of the FTC to attack state occupational regulation.²⁹

25. 15 U.S.C.A. §§ 41-77 (West Supp. 1980).

26. 317 U.S. 341 (1943). *Parker* concerned the validity of a state law enacted to maintain the price of raisins by restricting the supply that private growers could sell. Although the scheme of the California law violated the principles of the Sherman Act, the Court refused to apply the Act because "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351.

27. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

28. 433 U.S. 350 (1977).

29. Of course, the FTC could still attack state regulation when the level of state action was insufficient to invoke *Parker*. See P. AREEDA & D. TURNER, 1 ANTITRUST LAW 58-221 (1978). One commentator has suggested that a recent decision, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), which refused to exempt local governments under *Parker*, will "open up" occupational licensure to attack under the Sherman Act. Sims, *Antitrust Comes to City Hall*, 3 REGULATION 35 (1979). If this is true, the FTC could strike down occupational regulation, even if Sherman Act standards apply to the agency. Under *Lafayette*, however, it appears easier to sue a locality than a licensing board, because the latter could more successfully assert a state policy "to displace competition with regulation." See 435 U.S. at 413 (*Lafayette* test for state action). In any event, the decision has added to

Others have fully addressed elsewhere the issue of whether the "state action" doctrine of *Parker* carries over to the Federal Trade Commission Act,³⁰ and therefore we will not discuss it in detail here. Suffice it to say that the commentators and the FTC have found strong support for the assertion of preemption power.³¹ The FTC has shown confidence in this conclusion by making a commitment, despite the legal uncertainty, of considerable funds to the program, including nearly \$1.5 million in fiscal year 1979 alone.³²

Throughout the remainder of the paper we assume that the FTC possesses the authority to preempt anti-competitive state laws and regulations. This assumption will permit us to focus on how the Commission itself, the Congress, and the courts might influence the results of FTC preemption efforts. An examination of this influence will bring into serious question the wisdom of granting the FTC such a potent weapon.³³

IV. THE FUTURE WITHIN THE AGENCY

Despite large budget allocations, the FTC has obtained few results in the six years that it has been scrutinizing occupational regulations, except for the attack on advertising restrictions and some progress in its health care program. The legal uncertainty of the Commission's power to preempt seems unlikely to account for the lack of progress, since other innovative Commission programs have

the already considerable confusion over the contours of the *Parker* exemption.

30. See, e.g., Federal Trade Commission, Report of the State Regulation Task Force (1978); Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225; Note, *The State Action Exception and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976). All three conclude that the agency can preempt. But see Young and Troy, *Federal Trade Commission Preemption of State Regulation: A Reevaluation*, 12 SUFFOLK L. REV. 1248 (1978), arguing for a more limited preemption power. As these articles suggest, although with varying degrees of detail, it is not clear that state action, which is an exemption, is directly relevant to the question of whether Congress intended preemption.

31. The legislative history of Title II of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2193 (1975) (codified in 15 U.S.C. §§ 45-52 (1976)), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702 (1974), may provide evidence of Congressional intent to preempt. See generally Verkuil, *supra* note 30, at 235-40.

32. See Budget of the Federal Trade Commission, Fiscal Year 1979.

33. Regardless of the wisdom of Congress's action, if the Congress intended the FTC to have preemptive power, the agency has the legal authority. If, however, Congressional intent is unclear, a showing that the use of preemption power could be unwise might cause a court to conclude that preemptive activities are unsupported without a clearer Congressional mandate.

proceeded vigorously under similar legal uncertainty.³⁴

At least three additional reasons exist for the inactivity in the occupational licensure program. First, throughout the history of the program, the individuals ostensibly authorized to control the program, or one of its parts, have sometimes lacked effective control of the resources assigned to the program. Second, considerable potential opposition has existed. As we will see in Section V, however, this opposition has been largely ineffective. Third, and perhaps most important, a fundamental inconsistency has persisted between the program as originally conceived and many of the other FTC activities that reflect the Commission's long history of skepticism towards the unfettered market and the consumers who operate there. Rather than impose a "heavy burden of proof" in favor of the market, as the agency itself has stated should be the case,³⁵ the FTC has regulated on the slightest pretext. Illustrations of such activity before 1970 include the FTC's heavy enforcement of the Robinson-Patman Act, which penalizes large firms for their efficiency, and its advertising regulations, which assumed that many consumers were incapable of making choices in a market without substantial government assistance.³⁶ The agency's denigrating view of these consumers is at the heart of the defense for much occupational regulation. As one commentator described the FTC's view of certain consumers:

General stupidity is not the only attribute of the beneficiary of FTC policy. He also has a short attention span; he does not read all that is to be read, but snatches general impressions. He signs things he has not read, has marginal eyesight, and is frightened by dunning letters when he has not paid bills. Most of all, though, he is thoroughly avaricious.³⁷

As the FTC moved away from trivial cases in the 1970's toward those with a potentially large impact, its preference for regulation increased, particularly in the Bureau of Consumer Protection, which supervises the occupational licensure program. The Commission's proposed rules would substantially alter the existing methods of doing business in many largely unregulated industries.

34. For example, the Commission vigorously pursued enforcement of its advertising substantiation requirement for well over a year before it was given approval by the courts. Further, the agency is attempting to deconcentrate certain industries despite a lack of clear judicial support for the FTC's theory of liability.

35. See text accompanying note 15 *supra*.

36. See CLARKSON & MURIS, *supra* note 1, at chs. 1, 6, 13.

37. G. ALEXANDER, HONESTY AND COMPETITION 8 (1967).

Several scholars have shown that many of these proposals appear harmful to consumers as a class.³⁸ For example, in attempting to improve the quality of products, the agency has proposed rules that would raise costs more than the corresponding benefits.³⁹ The notion that consumers are often inept persists, particularly in proposals to rewrite consumer contracts, which in part presuppose that consumers will sign away rights without considering the consequences.⁴⁰ Finally, the proposals openly disregard the cost-benefit trade-offs that occur in the market. For example, to justify part of a proposed rule that would require credit contracts to eliminate or restrict certain remedies that creditors now use, the FTC staff argued that the agency should adopt the proposal "regardless of cost considerations."⁴¹

The FTC's preference for regulation and its corresponding distrust of the market affect the occupational licensure program in at least two ways. First, these attitudes may in part explain the hesitancy in attacking regulation. Most of the program to date has dealt with advertising bans, now commonly accepted as anticompetitive. The Commission approaches other forms of occupational regulation very cautiously, particularly restrictions on who can compete, perhaps because proponents of these regulations often justify them with the same health, quality, and paternalistic reasons that the Commission finds so persuasive in other areas.⁴² Second, the occupational licensure program has potentially more dangerous consequences than other FTC programs. If the Commission

38. See Ellis, *Legislative Powers: FTC Rulemaking*, in CLARKSON & MURIS, *supra* note 1, at ch. 10; OFFICE OF POLICY PLANNING & EVALUATION, FTC, MID-YEAR REVIEW (1975-1976), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 723, special supplement (1975), and in ANTITRUST & TRADE REG. REP. (BNA) No. 758, at A-6, H-1 (1976). For a further example, see De Alessi, *Regulating Post Purchase Relations: Mobile Homes*, in CLARKSON & MURIS, *supra* note 1, at ch. 12. These sources, and those cited in notes 40-42, elaborate in great detail the conclusions stated in the text here.

The Administrative Conference of the United States recently proposed that the FTC use information from disciplines other than law in determining whether to propose rules. See ANTITRUST & TRADE REG. REP. (BNA) No. 903, at A-15 (1979). This recommendation implicitly includes a condemnation of the agency for ignoring such disciplines, particularly economics.

39. De Alessi, *supra* note 38.

40. Peterson, *Rewriting Consumer Contracts: Creditors' Remedies*, in CLARKSON & MURIS, *supra* note 1, at ch. 11.

41. For a compilation of this and similar statements, see T. Muris, *Evaluation of Proposed Creditors' Remedies Rule* (Nov. 1974) (on file as part of rulemaking record) (available from the authors).

42. For evidence that the Commission is showing increased concern that deregulation will reduce quality, see ANTITRUST TRADE & REG. REP. (BNA) No. 922, at A-9 (1979).

has the power to preempt state law, it may substitute its own regulatory regime. Although the effect of state regulation is often bad, the performance of the Commission could be worse. For example, the available empirical and theoretical evidence indicates that in preempting numerous state laws the creditors' remedies rule has harmed consumers, particularly poor ones.⁴³ Moreover, the "eye-glass rule" reveals that new regulatory requirements are already appearing in the occupational licensure program. A major part of that rule would preempt state laws prohibiting advertising,⁴⁴ thus tending to reduce regulation. Another provision, however, imposes a new regulation designed to separate eye examination from the dispensing of ophthalmic goods by requiring doctors to furnish to their customers a copy of the prescription immediately after the examination.⁴⁵

This "separation rule" not only tends to confirm the prediction that new regulations will emerge from the preemption process, it also reflects the Commission's propensity to regulate without adequate justification. The Bureau of Consumer Protection report,⁴⁶ upon which the Commission relied heavily in support of the rule, argues that consumers otherwise would not be able to gain from any increase in advertising.⁴⁷ In states that have allowed advertising, however, the Commission's own findings indicate that prices are lower,⁴⁸ even though in at least some of these states examination and dispensing are not separated.⁴⁹ If consumer gains from advertising require the separation of dispensing and examination, then it is unclear why observations reveal lower prices in states that allow advertising but do not require the separation of these two services.

The Bureau of Consumer Protection report also argues that opticians, who do not examine eyes, but merely fill prescriptions,

43. Peterson, *supra* note 40.

44. Advertising of Ophthalmic Goods and Services, 16 C.F.R. § 456.3 (1980).

45. *Id.* § 456.7.

46. BUREAU OF CONSUMER PROTECTION, FTC, ADVERTISING OF OPHTHALMIC GOODS AND SERVICES AND PROPOSED TRADE REGULATION RULE (1977). [hereinafter cited as OPHTHALMIC GOODS.]

47. *Id.* at 259.

48. *Id.* at 120. We do not mean the analysis in the text to be an exhaustive empirical evaluation. It does suggest, however, that the explanation of the Commission is, at least, too facile.

49. Indeed, the Commission noted that "[i]n virtually every instance in which practicing optometrists were surveyed . . . it was found that in excess of 50% imposed some restriction on the availability of the patient's prescription." 43 Fed. Reg. 23,998 (1978) (footnote omitted).

would suffer competitive injury without the separation rule.⁵⁰ This argument is similarly weak. Unless opticians provide lower cost or higher quality services compared to other dispensers of ophthalmic goods, their demise would be of no moment to consumers. If, on the other hand, opticians are in some sense superior to other dispensers, they could easily avoid the problem of being unable to examine eyes by combining with eye examiners. Large chain stores, using advertising to become increasingly prominent sellers of ophthalmic goods, could combine examination by optometrists with dispensing by the lower cost (or higher quality) opticians, thereby producing the best possible package for many consumers.⁵¹

The "separation rule" is not only unjustifiable according to the Commission's arguments, but it may actually cause harm. Some consumers and producers may benefit when firms examine and dispense from one source, and the rule may frustrate realization of these benefits. For example, because a consumer who receives a detectably inferior product may have difficulty determining whether fault lies with the examiner or the dispenser, each of these suppliers will want to protect himself against unfounded accusations of poor quality by controlling the actions of the other. Integration of the two functions into a single firm provides this protection, and integration may also reduce production costs. Additionally, the costs to the consumer of searching for suitable firms to provide each function separately may be higher when the rule requires separation.

If the "separation rule" illustrates the propensities of the FTC in the preemptive occupational licensure program, then the result of the licensure program will not simply be the elimination of burdensome state regulations. Rather, we can expect the FTC to bring forth a new set of federal regulations with burdens of their own.⁵²

50. OPTHALMIC GOODS, *supra* note 46, at 264.

51. If the problem is that ethical or other restrictions prevent opticians and examiners from combining, then the FTC should attack these restrictions.

An additional fact of the separation rule is noteworthy. Even if separation of examination from dispensing is necessary for advertising to result in greater price competition, the separation requirement would presumably become unnecessary once competition had set in. Accordingly, the FTC could have written a sunset provision into the rule, allowing the separation requirement to expire after a period of time. Failure to include such a provision is further evidence of the FTC's distrust of market forces.

52. The development of a theory adequate to explain FTC behavior is beyond the scope of this article. We cannot, therefore, predict the agency's future actions with the confidence such a theory would allow. To the extent that past attitudes of the FTC toward regulation are a trustworthy basis for prediction, however, it appears likely that most future FTC preemption rules will mandate new regulations, not just eliminate those of the states. *See*

Having seen how the occupational licensure program might fare within the agency, we examine in the next sections what impacts the Congress and the judiciary are likely to have on FTC regulatory action.

V. THE FTC AND THE CONGRESS

The Congress appears to be a major force in constraining the Commission because of its many methods of control. In this section, we consider whether that appearance accurately reflects reality. We divide Congressional authority over the FTC into four major categories. First, Congress can shape the agency through the annual authorization and appropriation process. Second, Congress can engage in overall oversight or surveillance of the agency through questionnaires, investigations, and hearings. Third, Congress may focus at any time on specific questions, a process referred to here as "ad hoc monitoring." Finally, Congress may change the legislative authority that governs the Commission's programs.

A. Congressional Authorization and Appropriation

Some scholars contend that congressional control over the agency's budget is the most effective constraint on agencies.⁵³ By this view, Congress influences agencies by adjusting the total funds appropriated to the agency and by allocating expenditures within various agency programs. For example, Congress may encourage particular policies by "earmarking" funds, or it may discourage other policies by limiting the use of funds or the number of agency personnel. Specific examples of this form of control include congressional earmarking of separate funds for FTC truth-in-lending enforcement in fiscal years 1969 and 1970, and for the FTC study of the oil industry following the energy crisis of 1973-1974.

Congress has not, however, significantly used this controlling power to constrain agency action. Since 1970 Congress has signifi-

CLARKSON & MURIS, *supra* note 1, at ch. 15 (developing in general terms the framework for a theory of FTC behavior). Among the conclusions relevant to the occupational licensure program are that the existence of even partially deregulatory rules is consistent with resolution of internal conflicts in the FTC, and that deregulatory and regulatory rules bear the common thread of preemption. Such preemption represents a significant increase in FTC power. Increases in FTC power increase the future wealth of nongovernment lawyers who specialize in FTC work, a position to which most FTC attorneys aspire.

53. See, e.g., R. FENNO, JR., *THE POWER OF THE PURSE* (1966). See also *THE POLITICS OF THE BUDGETARY PROCESS* (1964).

cantly increased the FTC budget, despite frequent opposition to many FTC policies. Table I⁶⁴ shows that in each year since fiscal year 1970, FTC budget requests have been equal to or below the

54.

Table I

Budget Requests, Appropriations, and Actual Expenditures, Fiscal Years 1970-1980
(millions of dollars)

Fiscal year	Maintaining competition	Consumer protection	Economic activities	Administration, executive direction, and other expenditures	Total
1970					
Request	\$ 7,795 ^a	\$10,853 ^{a,b}	—	\$1,282	\$19,940
Appropriation	8,720 ^a	11,050 ^{a,b}	—	1,230	21,000 ^c
Actual expenditure	8,389 ^a	10,294 ^c	—	2,103	20,786
1971					
Request	8,968 ^{a,b}	10,915 ^{a,b}	—	1,492	21,375
Appropriation	8,658 ^a	10,995 ^a	—	2,277	21,930 ^c
Actual expenditure	7,689 ^a	12,729 ^a	—	2,052	22,470
1972					
Request	9,430 ^a	12,151 ^a	—	2,345	23,926
Appropriation	8,466 ^a	13,307 ^a	—	3,319	25,092
Actual expenditure	5,609	12,131	2,266	5,986	25,092
1973					
Request	9,660 ^a	14,538 ^a	—	2,875	27,073
Appropriation	7,006 ^a	14,865 ^a	3,425	5,134	30,430
Actual expenditure	6,149	13,694	2,533	7,829	30,205
1974					
Request	7,335	13,838	3,671	5,246	30,090
Appropriation	8,332	14,394	3,995	5,619	32,340 ^c
Actual expenditure	9,427	15,217	2,557	5,122	32,334
1975					
Request	9,900	16,436	4,770	6,998	38,104
Appropriation	12,382	17,702	3,402	5,512	38,998 ^c
Actual expenditure	12,296	16,981	3,003	6,648	38,983
1976					
Request	15,511	19,878	4,135	6,125	45,649
Appropriation	17,672	19,061	4,074	6,284	47,091 ^c
Actual expenditure	15,968	18,739	3,745	6,618	47,199
1976 Transition quarter					
Appropriation	4,418	4,765	1,019	2,219	12,421 ^c
Actual expenditure	4,153	4,878	974	2,541	12,543
1977					
Request	23,309	18,685	4,197	6,642	52,833
Appropriation	23,293	19,714	3,953	7,720	54,680 ^c
Actual expenditure	25,893 ^d	22,284 ^d	5,299 ^d	1,204	54,680
1978					
Request	24,327	22,936	4,156	8,124	59,543
Appropriation	29,030 ^d	27,357 ^d	5,763 ^d	—	62,150 ^c
Actual expenditure	26,488 ^d	27,019 ^d	5,129 ^d	652	62,100
1979					
Request	29,746 ^d	30,932 ^d	5,807 ^d	—	66,485
Appropriation	31,189 ^d	29,539 ^d	6,022 ^d	0.1	66,750
Actual expenditure	29,100 ^d	28,854 ^d	5,381 ^d	3,965	65,300
1980					
Request	32,510 ^d	30,347 ^d	6,164 ^d	0.1	69,021
Appropriation	31,427 ^d	36,854 ^d	5,342 ^d	—	67,756 ^d
Actual expenditure	—	—	—	—	—

a—includes economic activities.

b—includes truth in lending.

c—includes supplemental.

d—includes administration and executive direction.

Source: The Budget of the United States Government, App. A, fiscal years 1970 through 1980.

amount that Congress authorized except for fiscal years 1979 and 1980.⁵⁵ In fiscal year 1979, although the Congress appropriated less for consumer protection than the Commission requested, the total appropriation for all activities exceeded the total requested. In fiscal year 1980, when the Commission was under serious attack, its total appropriations were only 1.8% below the amount requested. Congress has often approved supplemental appropriations, making the actual spending levels higher than originally appropriated. For example, the estimated fiscal year 1980 supplemental appropriation for FTC personnel costs was \$2,456,000.⁵⁶

An investigation of direct program expenditures on occupational licensure and related activities yields similar conclusions. In recent years, planned occupational licensure program expenditures have been growing both absolutely and relatively (when compared with total consumer protection spending, of which occupational licensure is a part). Thus, in fiscal year 1976 the request was \$580,000, or 3.5% of the consumer protection mission.⁵⁷ In fiscal year 1977 the occupational licensure program's requested planned expenditures had grown to \$787,000, or 5.1% of the consumer protection mission.⁵⁸ By fiscal year 1978 the expenditure requested was \$1,197,000, or 6.1% of the consumer protection mission,⁵⁹ and in fiscal year 1979 it was \$1,480,000, or 7.2% of the consumer protection mission.⁶⁰

55. A measure that focuses on the difference between the OMB-approved request and congressional appropriation may be crude because the FTC could modify its request to OMB or OMB could modify its allowance (the offered request to Congress) to meet expected congressional action. Despite these problems the measure provides useful evidence about relations between the FTC and Congress when the congressional appropriation is above or below the official request to Congress. More important, the change in congressional appropriations over time has been positive.

56. BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1981, H.R. DOC. NO. 247, 96th Cong., 2d Sess. 1114 (1980). The initial estimated fiscal year 1980 appropriation for the FTC was for \$65,300,000, in 1980.

57. *FTC 1976 Budget Request: Hearings Before the House Subcomm. on the Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies*, 94th Cong., 1st Sess. 31 (1975) (statement of Lewis A. Engman).

58. *FTC 1977 Budget Request: Hearings Before the House Subcomm. on the Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies*, 94th Cong., 2d Sess. 1651 (1976) (statement of Richard E. Wiley).

59. *FTC 1978 Budget Request: Hearings Before the House Subcomm. on the Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies*, 95th Cong., 1st Sess. 34 (1977) (statement of Calvin J. Collier).

60. *FTC 1979 Budget Request: Hearings Before the House Subcomm. on the Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies*, 95th Cong., 2d Sess. 854 (1978) (statement of Michael Pertschuk).

Using the overall budget level to reward and punish the FTC is a very crude means of control. Although Congress can effectively control the FTC's overall budget, it is significantly limited in shaping the direction and substance of FTC programs. The Commission's budget is divided among consumer protection, maintaining competition, and other activities (economic support, compliance, and administration compose most of this category).⁶¹ Within the two major missions—consumer protection and maintaining competition—there are hundreds of activities.⁶² Congress could not stop or expand a particular activity by dictating the Commission's total budget or its budget by mission. Instead, Congress would have to address the specific activity at issue. Obtaining and digesting the voluminous information necessary to judge the merits of individual Commission activities is so complicated and costly that close congressional supervision of specific FTC projects is unlikely. And even when knowledge about specific programs is available and understandable, Congress would need to update it continually.

Thus, if we assume that Congress overcomes the first hurdle, acquiring adequate information about the hundreds of individual FTC activities, it could specify actual resource levels of both dollars and personnel to each activity. Nevertheless, circumstances change. Unless Congress has continued access to information necessary to modify Commission activities accurately, misallocation of public resources is unavoidable. Most important, these powers would transform Congress into an administrative agency, a transformation that would be extremely costly, if not impossible.

There are exceptions to the rule that the Congress is ineffective in changing specific FTC resource allocations. In 1975, when the Commission curtailed its investigations of the condominium industry, Congress forced continued Commission effort by appropriating resources specifically for condominium law enforcement.⁶³ But until very recently, this effort stood virtually alone, and it involved resources of less than two-tenths of one percent of the

61. See CLARKSON & MURIS, *supra* note 1, at ch. 15.

62. *Id.* at chs. 10-14.

63. *Condominium Consumer Protection Act of 1975: Hearings on § 2273 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975)*. See also *Federal Trade Commission Condominium Decision and Operations: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations, 94th Cong., 1st Sess. (April 30, 1975)*; *Condominium Development and Sales Practices: Hearings Before the Subcomm. on General Oversight and Renegotiation of the House Comm. on Banking, Currency and Housing, 94th Cong., 2d Sess. (Feb. 18, 19, May 19, 22, 1976)*.

FTC's total budget.⁶⁴

Because Congress lacks complete information, the agency has the power to reallocate (or "reprogram") its resources to meet changing economic and social conditions. Thus, when a new problem arises the Commission may divert resources from one or more existing cases to combat the new problem. Reprogramming is clearly within the scope of Commission alternatives. The actual appropriation language is extremely general, permitting great flexibility. In fiscal year 1979, for example, the initial authorization of the FTC was "for necessary expenses of the Federal Trade Commission" and amounted to \$64,750,000.⁶⁵ Moreover, the Comptroller General of the United States has stated that he was "not aware of any statute or regulation which requires committee approval of reprogramming by the FTC."⁶⁶ Some members of Congress have attempted to prevent the agency from shifting funds from one activity to another. In fiscal year 1975, for example, the appropriations committee stated that "except as provided in existing law, funds provided in the act shall be available only for the purpose for which they were appropriated."⁶⁷ The attempt to limit the Commission's fund-shifting ability failed, however, and the reprogramming power of the FTC remained intact and frequently exercised.

B. Oversight

Besides the budget process, Congress also oversees the FTC through the General Accounting Office (GAO) and congressional committees. An examination of the record since 1970 reveals no evidence that Congress has effectively used these methods to constrain the FTC.

Although several GAO inquiries have resulted in reports,⁶⁸

64. Calculated from the data given in text accompanying note 61 *supra*.

65. 92 Stat. 1040 (1978).

66. Letter from the Comptroller General of the United States to John E. Moss, Chairman, House Subcommittee on Commerce and Finance (July 24, 1974) (copy available from the authors upon request).

67. H.R. REP. No. 1120, 93d Cong., 2d Sess. 12 (1974).

68. A letter supplied by GAO to the authors identified 15 documents issued between 1970 and 1977 that dealt with the FTC. Nine of the 15 documents were letters sent by GAO to the FTC or Congress members, dealing with topics such as the Flammable Fabrics Act, government procurement, the line-of-business program, information search and copy fees, and the monitoring of the oil industry. The other six documents dealt with fees and charges of regulatory agencies, the advertisement substantiation program, the Webb-Pomerene Act, the energy industry, and GAO's responsibilities under the Federal Reports Act (copies are on file with the authors). Based on a survey of official documents and interviews with previ-

Congress has not undertaken to resolve identified problems. The most obvious example occurred in 1974, when Congress directed the GAO to work with the FTC to resolve some important problems associated with the Commission's line-of-business program.⁶⁹ Congress apparently ignored the report of the GAO made in March 1975 to the Committee on Appropriations concerning problems in the management program of the FTC.⁷⁰ Subsequent congressional hearings indicated that the only questions concerning the line-of-business program focused on total expenditures and the confidentiality of the data.⁷¹ The congressional hearings made no reference to criticisms by the GAO of the line-of-business program and, as a result, the Commission did not alter its program.⁷² No evidence indicates any substantial lessening in FTC line-of-business activities resulting from outside pressures, including pressure from those who sought to use Congress to abolish or reduce the scope of the program.

As for congressional committees, in 1975 and 1978 two detailed questionnaires were sent to the Federal Trade Commission from the Government Operations Committee of the Senate.⁷³ The answers to the 1975 questions (ninety-six in all) filled approximately two regular file drawers. Although the agency spent considerable time in carefully answering these questions, they were more a nuisance than an effective check on FTC action. Our investigations revealed no changes in FTC substantive actions because of this oversight activity.⁷⁴

Although the oversight committee occasionally holds hearings on the Commission,⁷⁵ its greatest concern seems to be why there is

ous and present FTC commissioners and officials, the effects of the GAO inquiries were minimal.

69. Letter from the Comptroller General of the United States to John Moss, Chairman, House Subcommittee on Commerce and Finance (July 24, 1974) (copy available from authors upon request).

70. Letter from the Comptroller General of the United States to the Chairman of the House Committee on Appropriations (March 5, 1975) (copy available from authors).

71. *Id.*

72. *Id.*

73. H.R. Doc. No. 95-134, 95th Cong., 1st Sess. (1976) (hereinafter called the 1975 Moss questionnaire). In 1978 another questionnaire was submitted to the FTC and returned to the committee (hereinafter called the 1978 Moss questionnaire). The results were not published but are in the authors' files. They are available upon request.

74. See generally CLARKSON & MURIS, *supra* note 1, at ch. 3.

75. See, e.g., *FTC 1976 Budget Request: Hearings Before the House Subcomm. on Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies*, 94th Cong., 1st Sess. (1975).

delay in certain cases or rules.⁷⁶ For example, in 1976, oversight hearings examined FTC effectiveness in eliminating unfair and deceptive advertising practices. The testimony presented by FTC officials amounted to a mere description of FTC progress and a report on expenditures.⁷⁷ Other hearings revealed a similar pattern of questioning.

Part of the problem is that members of the oversight committee face the same information problems that confront members of the appropriations committee. Even if the committee members acquire information about a program, the Commission can pool several experts on the subject, who in total (and often individually) know more about the topic than do the committee members or their staffs. These experts can usually derail congressional inquiries that may reveal program weaknesses. In sum, one cannot expect the oversight committee to constrain the FTC effectively.

C. *Ad Hoc Monitoring*

Ad hoc monitoring involves informal contacts with the Commission, formal hearings, and congressional inquiries. Although little is known about informal contacts between members of Congress and the Commission, FTC officials treat members of Congress and other individuals with the deference that their positions deserve. The influence upon FTC programs of individual members of Congress acting outside their official capacity, however, appears limited. Of course, a politically powerful member of Congress with a close relationship to one or more commissioners or top staff members has an increased probability of influencing some Commission decisions. This kind of influence, however, is not limited to congressional members. Anyone who has influence with one of these FTC officials could similarly influence the agenda of the FTC. These informal contacts become particularly important only in periods of general political hostility toward the Commission, a condition discussed at more length in Part D of this Section. Chairpersons of the FTC oversight and appropriations committees, as well as other members of Congress influential in legislation affecting

76. Letter from the Comptroller General of the United States to the Chairman of the House Committee on Appropriations (Mar. 5, 1975) (copy available from authors upon request).

77. *Oversight Hearings into the Federal Trade Commission—Bureau of Consumer Protection (Delays in Rulemaking—Regulation of Advertising): Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Governmental Operations*, 94th Cong., 2d Sess. (1976).

the FTC, possess unusual influence in such periods and accordingly receive unusual deference from the FTC.

More visible forms of ad hoc monitoring involve formal hearings and other official congressional inquiries that focus on particular issues. Several such inquiries took place during the 1970's. Chairman Collier's confirmation hearings, for example, focused extensively on his expected enforcement (or lack of enforcement) of the Robinson-Patman Act.⁷⁸ Several members of Congress, backed by small business groups, strongly favored continuation of Robinson-Patman cases.⁷⁹ Despite their extensive questioning on this issue, and the existence of a special committee to pressure the FTC,⁸⁰ enforcement of the Robinson-Patman Act remained minimal after Collier's appointment as Chairman of the Commission.⁸¹

Congress has recently attempted to monitor the Commission more closely. The number of Federal Trade Commission appearances before the Congress in the first half of the 1970's was relatively constant and below thirty per year.⁸² Beginning in 1975, however, the number of congressional hearings increased by more than one-third. These hearings greatly increased the time and effort expended by the Commission in responding to congressional inquiries and thus had a potential constraining effect upon the Commission. Nonetheless, only rarely have these hearings affected a Commission decision about whether to bring a case or promulgate a rule.

The hearings involving the funeral rule are an example of the Commission's spending increased time before Congress without appreciably diminishing its investigative and rulemaking activity. Industry representatives appearing before Congress were generally funeral directors who were also officers in industry organizations. They objected to FTC interference and rulemaking, and claimed such actions were unnecessary because few consumers complained about the funeral industry.⁸³ Industry representatives asserted that

78. *Nominations: Jan.-Apr. Hearings Before the Senate Commerce Committee*, 94th Cong., 2d Sess. 84-107 (1976).

79. *Id.*

80. See generally CLARKSON & MURIS, *supra* note 1, ch. 1 n.24.

81. *Id.*

82. We estimated the number of hearings per year by examining the listings for the FTC in the annual index of the *Congressional Information Service*. See *Congressional Information Service, Annual Index*, (1970-1979) (each year is a separate volume).

83. See, e.g., *Regulations of Various Federal Regulatory Agencies and Their Effect on Small Business: Hearings Before the Subcomm. on Activities of Regulatory Agencies of the House Comm. on Small Business, Part III*, 94th Cong., 1st Sess. 64-373 (1975); *id.* Part IV, 94th Cong., 2d Sess. 3-67 (1976).

the rule would not only increase the cost of funerals but also reduce the number of funeral homes by twenty-five percent, driving smaller homes out of business.⁸⁴ They also questioned the authority of the FTC to preempt state law, alleging that certain practices in the Commission's rulemaking proceeding were unfair.⁸⁵ Furthermore, the funeral directors claimed that the FTC action aroused suspicion toward even reputable funeral homes.⁸⁶

Openly hostile toward the agency, the members of Congress focused on FTC expenditures of \$450,000 to develop a program that the Commission had initiated when it had received fewer than a dozen complaints about the funeral industry.⁸⁷ The committee members were also upset because the Commission had consulted very few state officials.⁸⁸ They expressed concern that the Commission had wasted money, particularly because there were many Robinson-Patman complaints to which it had not responded.⁸⁹

As with an increasing number of industries under FTC scrutiny, the funeral industry and the small business managers who wanted more Robinson-Patman enforcement had sought to restrain the agency through Congress. In both cases, well-organized groups generated enthusiastic support in some quarters of Congress to apply extreme pressure on the Commission. Even though such pressure forced the Commission to expend resources to defend itself,⁹⁰ the pressure did not appreciably constrain its choice of which industries to pursue. Indeed, because Congress lacks the motivation and the means to check the agency, and because the FTC has cultivated supporters in Congress for its activities, even its most controversial programs meet little resistance there. The Commission's efforts to regulate the funeral industry, children's advertising, and line-of-business reporting demonstrate Congress's inability to deter FTC action through the various methods already discussed.

At times, however, congressional opposition may effectively constrain the Commission. Until late 1977, the political environment in which the FTC operated decreased the likelihood of congressional control over the FTC through new legislation—the most

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 67-68.

89. *Id.* at 61.

90. The agency must respond in good faith to congressional inquiries to avoid congressional attacks on its authority and budget unrelated to the substance of FTC programs.

effective constraint available to Congress. By late 1977 and early 1978, however, the political support for the Commission had significantly diminished. By late 1979, new legislation limiting the power of the FTC appeared likely, and the FTC began responding to this change in the political environment. It is ultimately the threat of new legislation, rather than the oversight function (with its attendant "grilling" of the agency staff and occasional unfavorable publicity), that appears most likely to constrain the Commission.

D. *Legislative Authority*

Legislation, although generally limited as a tool in constraining FTC decisionmakers, is the most powerful tool available to Congress. Through legislation, Congress can exempt industries from FTC rules, stop new programs, or remove general rulemaking power from the agency. The most severe restriction on legislative control is a political environment "favorable" to the Commission. Even when many members of Congress strongly oppose FTC actions, the environment will still be favorable as long as enough members support, or merely accept, Commission activity to prevent effective legislative constraint.

Assuming an unfavorable political environment, Congress has two major devices to constrain the FTC effectively: massive budget cuts and legislation reducing or eliminating FTC powers (either general powers, such as rulemaking, or authority over particular industries). The environment must be so unfavorable, however, that legislation will pass both houses and be signed by the President. The more likely the legislation is to constrain the Commission, the less likely it is to pass, given the ability of the Commission to manipulate the political environment.⁹¹ Thus, the FTC does not require extensive influence or support in Congress before congressional controls over the agency become, as a practical matter, ineffective.

The impact of the hostility toward the FTC in the last few years indicates the difficulty of constraining the agency. The controversial activities of the FTC in consumer protection and anti-trust throughout the 1970's eventually aroused a reaction in Congress. An early indication that the pendulum was swinging away from support for Commission activity came in 1977, less than two years after the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act had given the Commission expanded pow-

91. For one such scenario, see [1979] 85 FTC WATCH 8.

ers. When the FTC requested certain reforms (such as improved methods of enforcing subpoenas and recognition for private enforcement of its rules) not only did Congress refuse the reforms, but the House also tried to insist on a legislative veto.⁹² For three years before the passage of the 1980 authorization bill, the FTC had no actual authorization, subsisting instead on a series of continuing resolutions. In 1980, the authorization of the Commission ran out before Congress renewed it, resulting in a brief shutdown of the agency.⁹³ While thus begging the FTC, Congress was considering a variety of proposals to limit the Commission's powers.

Heavy lobbying by business interests contributed to this "backlash" against the FTC, which reached a peak in late 1979. Many people felt the Commission had greatly exceeded its mandate and was raging uncontrolled. The Senate version of the 1980 appropriations bill illustrates the results of this lobbying. The bill would have restricted FTC activities in insurance sales, safety standards for consumer products, and television advertising aimed at children.⁹⁴ Moreover, the House bill would have ended the funeral industry investigation, the Sunkist monopoly case, and the challenge to the Formica trademark.⁹⁵

The FTC's attacks on state occupational regulations also attracted the attention of the agency's critics. In a committee hearing on the FTC, the American Medical Association's representative cited the eyeglasses rule as an example of the FTC's having "gone too far."⁹⁶ An amendment to the Senate bill that would have prohibited the FTC from using funds for investigation or rulemaking concerning any "State-regulated legal, dental, medical, or other health-related profession,"⁹⁷ was narrowly defeated, 45-47.⁹⁸

Despite all of the hostility, the Federal Trade Commission Im-

92. ANTITRUST & TRADE REG. REP. (BNA) No. 942, at A-6 (1979).

93. ANTITRUST & TRADE REG. REP. (BNA) No. 963, at A-13 (1980); [1980] 95 FTC WATCH 5.

94. An amendment to the Senate bill proposed by Senator Heflin would have denied the power of the FTC to require divestiture as a remedy in cases not involving merger. The Heflin amendment failed, and the eventual compromise version of the bill retained only a few of these features, in watered-down form.

95. Washington Post, March 23, 1980, § E, at 1, 6, col. 1.

96. ANTITRUST & TRADE REG. REP. (BNA) No. 931, at A-25 (1979).

97. 126 CONG. REC. (daily ed., Feb. 6, 1980).

98. *Id.* at § 1116. Opponents of the amendment argued that state regulation of these occupations was often more friendly to practitioners than to the public, and that letting the FTC regulate health professions would actually reduce the number of restrictions imposed, since the FTC would preempt many state rules.

provements Act of 1980 left most FTC programs intact.⁹⁹ A few industries did win special protection from FTC authority, but most controversial FTC programs continued unabated. Moreover, the budget of the Commission continues to grow. Given the hostility, the FTC Improvements Act of 1980 contained surprisingly generous authorizations of seventy million dollars for fiscal year 1980, seventy-five million dollars for fiscal year 1981, and eighty million dollars for fiscal year 1982. The Act also failed to resolve fundamental issues regarding the Commission, particularly the agency's lack of constraints.¹⁰⁰ Even the procedural changes appear to have minimal impacts on the Commission. In fact, some commentators have argued that the FTC did very well in responding to the congressional assault.¹⁰¹

A further limitation that inhibits an unfavorable environment from effectively constraining the Commission is that it is not likely to be a continuous and pervasive constraint. FTC history indicates that any highly unfavorable environment will probably be of short duration. Further, serious informational problems remain that limit the Congress's ability to constrain the Commission, except for a few highly visible programs.

Finally, the nature of the legislative process itself limits the ability of Congress to impose constraints on the FTC, even with new legislation. Explicit legislative authority or prohibitions may harm all parties involved because the final legislation may be the product of compromise resulting in provisions that no single member of the Commission or Congress desires. For example, in 1977 Congress rejected proposed amendments to the FTC Act designed to increase FTC power by giving the Commission additional procedural rights and permitting private enforcement of FTC trade regulation rules in cease and desist orders.¹⁰² Over the FTC's opposition, the amendments also included a one-house veto power. The House and the Senate disagreed over various sections of the bill, and it never became law.¹⁰³

E. *Congressional Incentives and Control of the FTC*

Despite the increased time it has spent monitoring the FTC,

99. See Conference Report on Federal Trade Commission Improvements Act of 1980, ANTITRUST & TRADE REG. REP. (BNA) No. 963, at Special Supp. (1980).

100. *Id.* at 7.

101. See, e.g., ANTITRUST & TRADE REG. REP. (BNA) No. 962, at A-13 (1980).

102. See ANTITRUST & TRADE REG. REP. (BNA) No. 835, at A-2 (1977).

103. See ANTITRUST & TRADE REG. REP. (BNA) No. 883, at A-5 to A-7 (1978).

because of the absence of an unfavorable political environment, Congress has had little impact on directing or redirecting resources within the Commission since 1970. This lack of influence is largely the product of the structure of Congress itself.

First, Congress has organized most of its work by committees.¹⁰⁴ Because appointments to committees that deal with the Federal Trade Commission are not those most sought by members of the House or the Senate,¹⁰⁵ committee members often come from the ranks of lower seniority and often include newly elected Congress members. The lower status of committees monitoring the FTC and the lower level of experience of members of Congress on those committees reduce the effectiveness of congressional control of the Commission.

Second, a number of competing interest groups, including bureaucrats, businesses, consumers, and taxpayers, make demands on Congress.¹⁰⁶ Interest groups affect Congress in two important ways. The very nature of an interest group dictates that its lobbying and other political resource activities will focus on options that benefit its members as opposed to the population as a whole. In addition, the personal incentives of members of Congress are similar to those of the interest groups. Constituents who receive aid will often credit their representative for delivering the benefits. In return, politicians receive rewards in the form of electoral support and campaign contributions.¹⁰⁷

The existence of interest groups has important consequences for these incentives and the ability of Congress to control the Federal Trade Commission. Various groups seek differing objectives, resulting in a variant of the "voters' paradox." For example, a coalition of interest groups may prefer policy A over policy B, and another prefer B over policy C, and a third prefer C over A.¹⁰⁸ Thus, if no single position commands a majority and the interest groups have similar strength, Congress will have considerable free-

104. See generally C. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* (1964).

105. One may confirm this observation by examining the choice of committees by senior members of Congress.

106. In our discussion, we will assume that the groups organize themselves for well-defined purposes. It is beyond the scope of this study to investigate the free rider and other problems associated with group activity. See, e.g., M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971); Stigler, *Free-Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 *BELL J. ECON.* 359 (1974).

107. M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977).

108. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); J. BUCHANON & M. FLOWERS, *THE PUBLIC FINANCES: AN INTRODUCTORY TEXTBOOK* (4th ed. 1975).

dom in choosing among alternative policies because the combination of any two coalitions forms a majority to support any one of the three policies. Thus, the incentive to challenge the Commission directly on certain decisions diminishes.

A further implication of interest group politics is that the information and complaints that Congress and the Commission receive may fail to reflect accurately the concerns of the population as a whole. In an empirical investigation of consumer participation in Federal Trade Commission proceedings, LaBarbera found that consumers who actually communicated with the Commission came from groups that contained more older, better educated, and relatively affluent whites than did the public at large. Furthermore, these consumers also viewed the marketplace more negatively than did the public at large and correspondingly favored more government regulation to "protect" the consumer.¹⁰⁹ Thus, it is a mistake to treat these individuals as representing all consumers, as the Commission sometimes does.

A third significant aspect of the relationship between the structure of Congress and control over the FTC is that the incentive of individual members of Congress to monitor the FTC is less than their incentive to monitor many other agencies. The budget of the FTC is relatively small, and the agency does not hand out subsidies, resource rights, or other direct benefits that individual groups seek. Of course, FTC decisions do impact upon producing and consuming groups, some of which provide major political support to members of Congress. Absent Congress's narrowing the range of actions available to the FTC, however, it is harder to turn these impacts into a form of political pressure leading to control over the agency than it is to use direct monetary subsidies to the various groups for the same purpose.

Fourth, the general inability of Congress to monitor individual FTC programs implies that Congress will neither seek complete information nor engage in excessive questioning during FTC hearings. Although it is impossible to specifically test this hypothesis, an examination of appropriation hearings from fiscal years 1970 through 1979 generally confirms this prediction. The official records suggest that members of Congress used incomplete information in reviewing the proposed budget. For example, an exami-

109. P. LaBarbera, *An Empirical Investigation of Consumer Participants in Federal Trade Commission Consumer Protection Rule-Making Procedures* (1976) (unpublished Ph.D. dissertation, Michigan State University); see also *ANTITRUST & TRADE REG. REP.* (BNA) No. 663, at D-1 (1973) for an example of consumer group activity.

nation of hearings during the entire 1970's reveals that beyond the brief FTC budget summaries, the agency rarely provided information about FTC programs to either the Senate or the House, presumably because neither body requested it.¹¹⁰

Even more revealing are the number and types of questions that members of Congress asked the Commission during the hearings. A reading of the congressional questions for each of the hearings from fiscal years 1970 through 1979 suggests a definite pattern.¹¹¹ Members asked few questions, and those questions sought general information, such as the amount allocated for enforcement of the textiles and fur acts, or the number of cases instituted under Section 7 of the Clayton Act. Members also asked the Commission to explain certain processes, such as rulemaking and case selection, or to provide status reports for particular programs. Although the Congress may use its power to influence the Commission's agenda, such monitoring places few, if any, constraints on the agency.¹¹²

Finally, an examination of FTC hearings during the 1970's reveals that Congress occasionally used the hearings to duck issues rather than to monitor the Commission. For example, in 1974 the FTC, at congressional urging, spent a substantial amount of time investigating the putative shortage of canning lids.¹¹³ This investigation, which produced no cases, finally ended after public pressure subsided, permitting the Commission to redirect its resources to other tasks. The canning lids experience does illustrate one influence of Congress: an ability to convince the Federal Trade Commission to investigate a particular practice. Although Congress may use its power to influence the agenda of the Commission, starting an investigation does not make FTC law enforcement mandatory or even likely, particularly when the agency decides merely to study the problem and report its findings to Congress.

In sum, we conclude that in addition to limitations on Congress's power to control particular programs of the Commission, individual members of Congress, faced by numerous competing interests, will lack the incentive to control most FTC activities. Thus, unless some interest groups have influence greatly in excess

110. See *FTC Budget Justifications at House and Senate Appropriations Comm. Hearings, 1970-1979*.

111. *Id.*

112. See CLARKSON & MURIS, *supra* note 1, at 29-32.

113. *Shortage of Home Canning Equipment: Hearing Before the Subcomm. on Commodities and Services of the Subcomm. on Activities of Regulatory Agencies of the House Comm. on Small Business, Part V, 94th Cong., 2d Sess. 61 (1976)*.

of others, as producer groups appeared to have in late 1979, Congress will not exercise extensive control over the Commission.

F. *Modifying Congressional Controls: The Legislative Veto*

One of the more contested provisions of the recently enacted Improvements Act was the proposed legislative veto,¹¹⁴ a device avidly sought by some members of Congress.¹¹⁵ Some found the legislative veto a promising form of congressional control:

While a legislative veto requires routine submission of rules to

114. The one-house provision is in H.R. 2313, (94th Cong., 1st Sess. (1979), the original House version of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 393 (codified in scattered sections of 7, 15 U.S.C.). Because President Carter threatened to veto the legislative veto provision, and because only the House favored the stronger one-house veto, the bill that passed was a compromise, allowing for a two-house veto.

The Act provides the targets of FTC rulemaking proceedings with extra procedural protections and increases the participation of Congress in FTC rulemaking. Sections 3, 4, and 14 of the Improvements Act impose restrictions on the release by the FTC of confidential information the agency obtains during its investigations. If the information obtained by the agency is either a trade secret or financial or commercial information that is privileged or confidential, the agency may reveal it after receiving the consent of those persons interested in the item. If the interested persons do not consent to the release of the information, the FTC may release it only to law enforcement agencies for official law enforcement purposes, to Congress after giving notice to the interested party, to an attorney for the interested party, as necessary in judicial proceedings to which it is a party, or when a statute requires the release. Section 15 of the Improvements Act requires the FTC to publish a regulatory analysis of each rule with its notice of proposed rulemaking and with the publication of the final rule in the *Federal Register*. The regulatory analysis must contain an estimate of the economic costs and benefits of the rule and an explanation of the alternatives the agency considered. Other important procedural protections in the Improvements Act include a requirement in section 9 that hearing officers independent of the main FTC hierarchy conduct rulemaking proceedings and a requirement in section 12 that the agency put a verbatim transcript of relevant ex parte consultations by its officers into the public record of any rulemaking proceedings.

Provisions of the Improvement Act increase the participation of Congress in FTC rulemaking proceedings. Section 8 requires the agency to give advance notice of proposed rulemaking proceedings to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Interstate and Foreign Commerce. Section 21 provides for the legislative veto of final FTC rules.

The Improvements Act contains a few prohibitions on FTC activity in specific substantive areas. The form of most of these prohibitions is a command to the FTC not to use any of its appropriations for fiscal 1980, 1981, and 1982 to continue with pending rulemaking proceedings in the prohibited areas or to start substantially similar proceedings. The areas in which Congress has told the FTC to suspend rulemaking include children's television advertising and the funeral industry. Section 19 of the Improvements Act does contain a detailed description of a funeral industry rule that Congress would approve. Section 20 of the Improvements Act prevents the FTC from investigating or prosecuting cases involving agricultural marketing orders.

115. See Bruff & Gelhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

Congress for review, in its absence oversight committee hearings occur sporadically and thus do not provide a regular opportunity to negotiate the substance of rules with agency personnel. . . . In contrast with these traditional oversight techniques, review under a legislative veto scheme is specifically and narrowly focused on the substance of proposed rules. Thus, the veto, unlike any of the traditional oversight techniques, permits regular and systematic examination of the substantive details of an agency's program.¹¹⁶

Others find that the veto would invite "political review" of the Commission, and would give lobbyists and members of interest groups additional leverage in influencing agency behavior.

The current popularity of the legislative veto indicates that other methods of controlling the FTC have not been effective. But even though the veto would increase the constraining power of Congress—particularly when one interest group is much more powerful than its competitors—not even this measure would effectively constrain the Commission. First, the veto will only occasionally be an effective tool. The volume of rules that the Commission passes will likely be so great, the information necessary to evaluate them so vast, and the political pressures surrounding the rules so diverse that continuous, close, and effective scrutiny of the agency remains unlikely. Although a few Commission rules might be politically sensitive, Congress, even with its large support staff, is unlikely to muster the capacity or interest to comprehend the dozens of rule provisions that the FTC will pass.

Second, because the legislative veto will place more direct responsibility on the Congress, it would increase the difficulty of solving (or ducking) problems by referring them to an agency. It is not clear that Congress wants to exercise such controversial responsibility. Third, the necessity in Congress for compromise may well dilute the effectiveness of the legislative veto as a constraint. Also, there is conflict over the wisdom of vetoing a particular rule. Thus, even when many members of Congress actively oppose an FTC rule, the legislative veto would by no means be a surefire way to stop the occupational licensure program. Although professions have considerable political power, advocates of deregulation and some consumer groups would oppose a legislative veto of deregulatory rules. In short, there may be enough controversy over occupational regulation rules that a legislative veto would not be auto-

116. *Id.* at 1422-23.

matic. A final limit on the effectiveness of the veto is that, given congressional procedures, each regulation will probably be treated in combination with other measures by means of logrolling. Some members of Congress will find a veto less attractive when it is linked with a proposal they do not favor.¹¹⁷

For these reasons, direct control of Commission behavior by the legislative veto does not have a high probability of success. Thus, the legislative veto is unlikely to provide direct and consistent control over Commission resource allocation.¹¹⁸ In sum, Congress has only a limited ability to monitor individual FTC activities effectively. Its most effective tools are budget cutting and restrictive legislation. Yet these tools are most difficult to employ regularly, and require an intense political climate that is historically rare and usually brief. Even with its most effective tools, Congress can redirect resources into or away from specific programs only after detailed analysis at a level beyond the institutional competence of Congress, except for, at most, an occasional project. Producer and consumer groups often exert pressure through Congress and occasionally force hearings or even investigations. Absent widespread political support, however, pressure groups are usually unsuccessful in redirecting FTC resources. Oversight and ad hoc monitoring seldom influence Commission activities, although they do cause the Commission to expend valuable resources in responding to them.

VI. THE COMMISSION AND THE COURTS

Assuming that the FTC can preempt state law, the crucial

117. See, e.g., FIORINA, *supra* note 107.

118. An additional problem with the veto is that even when the legislative veto influences the FTC, consumers will not always benefit. This problem stems from the divergence between the influence and nature of producer and consumer interests. Producer interests tend to be more influential in Congress because they are more concentrated, and the effect of this influence on FTC rules varies. When FTC rules are harmful both to businesses and to consumers as a class, successful producer lobbying would benefit consumers. In other rules, producer and consumer interests may differ, as in occupational licensing. Because some of the FTC rules most beneficial to consumers involve industries with influential members in every congressional district in the United States—professions, for example—this conflict will be serious.

In addition, the veto will not always benefit consumers because consumer interests differ from those of consumerists to the extent that the latter are not representative of consumers as a class. For example, consumerists with a higher-than-average preference for quality may effectively lobby the Congress not to veto rules that reflect this preference. Another reason why the veto is not desirable is that business leaders and legislators tend to look upon the legislative veto as "the solution" to the problem of the FTC. This quick-fix attitude decreases the possibility of enacting potentially more effective reforms.

question becomes whether and how the courts will influence the occupational licensure program of the Commission. To answer this question, one must consider to what extent the courts limit the substantive powers of the FTC.¹¹⁹ Specifically, the issue is whether the Commission or the courts determine the standard for legality of a form of occupational regulation challenged by the Commission.¹²⁰ A further issue is the extent of the burden the Commission should bear when demonstrating the ill effects of occupational regulation. A final consideration is the degree of deference courts give to the Commission's judgment when the FTC seeks to promulgate regulations for various occupations.

This section begins with a discussion of the traditional relationship between the courts and the FTC. It then considers whether in recent years the relationship between courts and agencies, including the FTC, is changing and how any such changes might affect the occupational licensure program. Finally, it discusses the effect that requiring the FTC to employ cost-benefit analysis would have on its rules and on its relationship with the courts.

A. *The Traditional Relationship Between the Courts and the Federal Trade Commission*

Initially, the courts attempted to limit the Commission's freedom to act. During the Commission's first sixteen years, three Supreme Court cases indicated that the judiciary would not give the agency wide freedom.¹²¹ In these decisions, judicial review of FTC

119. Treated as substantive is the question of what evidence the FTC must prove to persuade a court to sustain its findings. We will limit our focus to substantive cases brought under § 5 of the Federal Trade Commission Act. While some recent cases have indicated a greater willingness to limit FTC orders, *see, e.g.*, cases in notes 175-86 and accompanying text *infra*, we will not discuss these problems separately here. For a more detailed discussion of the enforcement of FTC orders see CLARKSON & MURIS, *supra* note 1, at 42-3.

120. To put the issue differently: Assuming that no dispute arises over the facts, will the courts routinely allow the FTC to decide whether those facts constitute illegality under the FTC Act? Although our focus will be on the FTC's freedom to define what practices are illegal, we do not assert that there is an easily discernible line between questions of law and questions of fact.

121. In *FTC v. Gratz*, 253 U.S. 421 (1920), the Commission alleged that the respondent engaged in what was in effect a "tying" arrangement, illegal under § 3 of the Clayton Act and § 5 of the FTC Act. When the Commission argued that the practices were unfair because they hurt other firms, the Second Circuit Court of Appeals reversed, stating that the practices "must be at least such as are unfair to the public generally." 258 F. 314, 317 (2d Cir. 1919). On appeal, the Supreme Court considered whether the courts or the Commission would determine what methods of competition are unfair, deciding that "[i]t is for the courts, not the commission, ultimately to determine as a matter of law what they [unfair

actions went beyond deciding if the facts indicated that the alleged practices took place. These decisions reversed the Commission on important policy issues such as whether a practice was illegal or whether its prohibition was in the public interest.

Beginning in the mid-1930's the courts began a shift towards almost total deference to the FTC.¹²² One example involves cases brought because of allegedly deceptive acts or practices. In a 1937 decision the Supreme Court found a representation violative of the FTC Act despite a lower court conclusion that the representation would deceive only "fools."¹²³ As time passed, no matter how stupid the FTC apparently believed consumers to be or how beneficial to consumers the challenged representation might be, the courts refused to curtail agency action. For example, in 1965, the Supreme Court upheld a Commission finding that the continual offering of paint on a "buy one, get one free" basis was deceptive, although the practice apparently benefited consumers by

methods] include." 253 U.S. at 427. In what eventually became the majority position of the Court, Justice Brandeis dissented, arguing basically that the FTC should decide what is fair. *Id.* at 429, 436 (Brandeis & Clark, JJ., dissenting). In *FTC v. Klesner*, 280 U.S. 19 (1929), the respondent was, in effect, telling consumers that his products were those of another proprietor. The Supreme Court found that the filing of the complaint was not in the public interest, in part because "[w]hatever confusion the alleged deception may have caused had been largely dissipated before the Commission first took action." *Id.* at 29. As for FTC power, the Court stated more generally that "the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial." *Id.* at 28. Two years later the Court decided *FTC v. Raladam*, 283 U.S. 643 (1931). The Commission had charged that the respondent had misled consumers in representing an "obesity cure." In considering whether the challenged practices were "unfair methods of competition" within the meaning of § 5 of the FTC Act, the Court again denied the FTC the power to define legality:

It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public.

Id. at 649.

122. It is not the primary purpose of this article to determine the reasons for such judicial deference. Whether the courts acted out of agreement with the FTC's substantive positions, a feeling that the problems before the Commission were too trivial for judicial concern, a determination that issues such as deception were inherently factual and hence more appropriate for agency fact-finding, or for some other reason, the result was that the FTC was free from effective judicial constraint in deciding which practices were illegal.

123. *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937).

encouraging price competition.¹²⁴ Further, when an advertiser claimed that a hair application could "color permanently," the Commission ruled that the claim was illegal because some people might believe the product would color hair that had not yet grown out of their scalp.¹²⁵ The Second Circuit Court of Appeals, constrained by the Supreme Court's command to defer to the FTC, affirmed.¹²⁶

As to the standard of deception, the courts eased the burden of proof required of the FTC by conceding that the agency need not show actual deception, but only a tendency or capacity to deceive.¹²⁷ Coupled with the standard for judicial review of Commission actions—the court would affirm a commission finding if supported by substantial evidence on the record¹²⁸—this test made it virtually impossible to reverse Commission findings of deception.

If this deference were not enough to show the freedom of the Commission in the area of deception, the courts have also stated that interpreting the meaning of an advertisement is a matter committed to the discretion of the FTC.¹²⁹ As one author has stated, "this modest sounding rule is a principal reason that the Commission has managed to prevail in the appellate courts in the overwhelming majority of its [deception] decisions that have been appealed."¹³⁰ Moreover, the Commission can determine the meaning of an advertisement without even sampling public opinion.¹³¹

124. *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965); see Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 687-89 (1977).

125. *Clairol, Inc.*, 33 F.T.C. 1450 (1941).

126. *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944).

127. For a detailed discussion, see G. ALEXANDER, *supra* note 37, at 69.

128. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 591-95 (1976).

129. For a leading discussion on this point, see Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 559 (1969).

130. See Pitofsky, *supra* note 124.

131. See, e.g., *Zenith Radio Corp. v. FTC*, 143 F.2d 29 (7th Cir. 1944). The reasons for this deference to the Commission's determination of meaning are by no means clear. Robert Pitofsky, former director of the Bureau of Consumer Protection and now an FTC Commissioner, has stated:

Why questions of meaning should be submitted to the virtually unreviewable discretion of five commissioners of the FTC has never been articulated. Unlike other instances of deference to regulators as part of the administrative process, there is no reason to believe that commissioners of the FTC have unusual capacity or experience in coping with questions of meaning, nor any indication that successful regulation of advertising requires a balance of related regulatory considerations that commissioners are in a special position to handle.

Pitofsky, *supra* note 124, at 678.

Pitofsky concludes that a possible reason for the deference may be

The most recent Supreme Court case dealing with the substantive powers of the FTC, *FTC v. Sperry & Hutchinson Co. (S & H)*,¹³² illustrates the ability of the FTC to act with the confidence that its judicial support extends beyond issues of deception. Sperry and Hutchinson, the owners of "green stamps," attempted to prevent unauthorized commercial exchangers and redeemers from, among other things, offering discounts in return for stamps without S & H approval. When the Commission held that S & H's practices restrained trade under the principles of antitrust law, the Court of Appeals for the Fifth Circuit reversed,¹³³ holding that the practices did not violate either the letter or the spirit of the antitrust laws. When the case came before the Supreme Court nine years after the proceedings began, however, the Commission shifted its attention from antitrust considerations to focus on a new theory: unfair acts or practices under the FTC Act.¹³⁴ To the Court, whether the FTC could attack S & H's practices as unfair turned on: 1) whether the Act empowered the Commission to proscribe practices as "unfair" that did not violate either the letter or

the administrative inconvenience of alternative approaches. If consumer perception were a litigable issue, survey evidence or testimony by experts on consumer perception would be required. The science of measuring consumer perception is so imprecise that it is understandable that the Commission would want to avoid hosting such controversies. In addition, consumer survey evidence raises many separate evidentiary issues A full exploration of these issues would complicate and delay enforcement proceedings.

Id. at 679 (footnote omitted).

This proposition does not justify the deference of the courts. Although scientific evidence may be imprecise and subject to alternative explanations, it will often be more useful for deciding meaning than is the intuition of individuals who have no special expertise. As Pitofsky himself notes, the Commission has used survey evidence in several cases, thus avoiding complete blindness toward the actual perceptions of consumers. *Id.* Also, the argument that the issue should not be litigable solely on the grounds of administrative convenience is peculiar, unless Pitofsky is implying that the costs of litigating the issue of meaning exceed the benefits when applied to Commission activity before 1970. In this regard the argument has some merit, although not because the Commission made few mistakes. Instead, if the agency deals with such trivia as "buy one, get one free" advertising, and if businesses and consumers can adjust to prohibiting such claims at a small cost, then it is not worth the time of the judiciary to review the work of such an agency. Although this rationale is not one that courts would articulate, it may underlie at least some of the past deference toward the Commission. A further, and probably more important, explanation of court deference to the FTC in questions of meaning (and other areas of legality) is that the courts wrote such decisions as *FTC v. Standard Educ. Soc.*, 302 U.S. 112 (1937), at a time when many courts and scholars had confidence in the wisdom and ability of administrative agencies. Today, such confidence appears to be the exception rather than the rule. In part C of this section, we consider whether this change in attitude will affect the FTC.

132. 405 U.S. 233 (1972).

133. *Sperry & Hutchinson Co. v. FTC*, 432 F.2d 146 (5th Cir. 1970).

134. 405 U.S. at 246.

spirit of the antitrust laws; and 2) whether the Act empowered the Commission to proscribe practices as "unfair" because of their effect upon consumers, regardless of their nature or quality as competitive practices or their effect on competition.¹³⁵ The Court found that the Commission had these powers:

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.¹³⁶

In terms of the relationship between the FTC and the courts, this decision has at least three notable characteristics. First, and probably least important, the case demonstrates one form of judicial check upon the FTC: A reviewing court will not affirm the agency on a theory not relied upon by the Commission in the proceedings. In a very narrow sense, then, *S & H* is a defeat for the FTC. The Court remanded the case to the Commission because the agency had tried it under an antitrust theory, the Fifth Circuit had concluded that the practices did not violate either the letter or spirit of the antitrust laws, and the Commission had not attacked this conclusion of the Fifth Circuit before the Supreme Court.¹³⁷ This check limits the Commission only in that it must be careful procedurally. The substantive areas that the agency can regulate remain broad, given its ability to define freely what commercial acts are illegal. Second, the statement that the Commission can consider public values beyond those encompassed in the antitrust laws may be particularly relevant for the occupational licensure program. At their most basic level, if not always in their specific application, the policies underlying the antitrust laws arise from the same presumption in favor of the market that underlies the criticism of occupational regulation. Thus, the statement that the Commission can go beyond the policies of the antitrust laws may justify rules that substitute FTC regulations for those of the states. Finally, the Court may have given the Commission nearly limitless discretion in defining "unfairness." *S & H* may free the Commission to find "public values" where it will, subject to minimal court review. Because the Commission has only started to test its powers

135. *Id.* at 239.

136. *Id.* at 244 (footnote omitted).

137. *Id.* at 249-50.

under *S & H*, however, it is too early to tell.

Besides the evidence already discussed concerning the freedom of the FTC from judicial interference, some additional information can be gleaned from two sources. The first is the record of the Commission in the Supreme Court on substantive cases. Before 1934 the agency won only four of twelve cases. From 1934 until 1958 it won twelve of twenty-one, and since 1958 it has won each of the seventeen cases before the Court.¹³⁸ Further, of the nine (at least partial) losses since 1934, four involved the Robinson-Patman Act, a traditional area of judicial hostility.¹³⁹ None of the other five held that a practice was within the reach of the Federal Trade Commission Act, yet still lawful; rather, the Commission lost on grounds such as lack of subject matter jurisdiction because the practice was not in interstate commerce, or because another statute exempted the practice from FTC scrutiny.¹⁴⁰

The second source is the Commission's record in recent years. Table 2 summarizes the record of the FTC on substantive cases in the circuit courts of appeals during the first five years of the 1970's. If the court upheld only part of the order, the table lists the case as a partial victory, even if the part reversed was insignificant.

Table 2¹⁴¹

SUBSTANTIVE FTC CASES IN THE COURTS OF APPEALS: 1970-74

<u>Year</u>	<u>Won</u>	<u>Partially Won</u>	<u>Lost</u>
1970	4	2	1
1971	3	1	2

138. MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407, 435 (1973); see *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *FTC v. University-Rundle Corp.*, 387 U.S. 244 (1967); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. Borden Co.*, 383 U.S. 637 (1966); *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *FTC v. Henry Broch & Co.*, 368 U.S. 360 (1962); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385 (1959).

139. MacIntyre & Volhard, *supra* note 138, at 434; see *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958); *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

140. For example, the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1976), prevented FTC authority over insurance company advertising.

141. The source for this list of cases is the annual lists found in FTC STATUTES AND DECISIONS for relevant years (1970-1974).

1972	3	1	0
1973	5	1	0
1974	<u>3</u>	<u>2</u>	<u>1</u>
Totals	18	7	4

Although a partial defeat in 38 percent of the cases might seem to indicate a shift from wide judicial deference to more careful scrutiny, a closer look belies that impression. First, the Commission did not lose (even partially) a single case because the court determined that the practice under question was not an unfair method of competition or an unfair or deceptive act or practice within the meaning of the Act. Further, the courts affirmed an important expansion of Commission authority: the requirement of advertising substantiation.¹⁴² Finally, the Seventh Circuit in 1974 upheld the prohibition of a merchandising claim that probably few, if any, consumers would misunderstand, despite a strong attack by a dissenting judge and a dissenting commissioner that the problem was too trivial for FTC concern and that there was no proof of public injury.¹⁴³

An analysis of three of the four defeats also reveals a lack of judicial constraint. Two involved procedural matters: In one, the Commission lost when it did not follow its own rules and when a commissioner prejudged the matter;¹⁴⁴ in the other, involving a game of chance, the court held that the Commission's action was arbitrary because the FTC regulated the practice in some indus-

142. *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973) (specific advertising claim held deceptive for lack of substantial scientific data support). On the importance of advertising substantiation to the FTC, see CLARKSON & MURIS, *supra* note 1, at 234-44.

143. *Spiegel, Inc. v. FTC*, 494 F.2d 59 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974). In its advertising circulars, Spiegel offered products on 30 days' "free trial" or at a "percentage off." These offers were subject to the customer meeting Spiegel's credit qualifications, a requirement mentioned only in small print and stated in the Spiegel catalogue. *Id.* at 61-62. Moreover, Spiegel required the customer to submit credit-related data with the order. The Commission claimed that the circulars had a capacity to mislead the public because they allegedly created the impression that the offer was unconditional when actually it depended on the customer's credit rating. The court majority agreed with the Commission. *Id.* at 53. Judge Pell, in a convincing dissent, stated that the Commission had found "a detriment to the public interest in the situation of deadbeats being deceived into thinking they are going to receive a free trial of, or discount on, merchandise which they could not realistically purchase on either a cash or a deferred basis." *Id.* at 65 (Pell, J., dissenting). Furthermore, the order form request for credit-related information would certainly inform anyone of reasonable intelligence that Spiegel would send the merchandise only to people with good credit.

144. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

tries but in this case totally banned it.¹⁴⁵ The court reversed a third Commission order because the Commission found a violation based upon a theory neither in the complaint nor before the hearing examiner.¹⁴⁶ The fourth defeat, in which the court held that the Commission lacked the power to order restitution, may reveal a less deferential judicial posture, because the court was unwilling to endorse the Commission's interpretation of the Federal Trade Commission Act.¹⁴⁷ This issue is now of diminished importance, however, because Congress subsequently authorized the Commission to pursue such a remedy.¹⁴⁸

Of the seven cases that the Commission lost in part, two involved Commission failure to try the case on the same theory that the court found underlying the challenged provisions of the order.¹⁴⁹ Two concerned various sections of the Clayton Act, under which the courts traditionally do not totally defer to the Commission in the determination of legality.¹⁵⁰ Two other cases also typify the deference discussed above. In one, the court overturned an order provision as too broad when the Commission gave almost no justification for the provision;¹⁵¹ in the other, part of the order was too vague.¹⁵² The remaining case, involving the first amendment, potentially restricts FTC regulation (although not deregulation) of advertising, but is not directly relevant to any other aspect of the occupational licensure program.¹⁵³

145. *Marco Sales Co. v. FTC*, 453 F.2d 1 (2nd Cir. 1971).

146. *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971).

147. *Heather v. FTC*, 503 F.2d 321 (9th Cir. 1974).

148. Federal Trade Commission (Magnuson-Moss) Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (codified in various sections of 15 U.S.C.).

149. *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882 (9th Cir. 1972) *cert. denied*, 412 U.S. 918 (1973); *Abex Corp. v. FTC*, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970).

150. *Harbor Banana Distrib., Inc. v. FTC*, 499 F.2d 395 (5th Cir. 1974); *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970). When the FTC brings cases under the Sherman or Clayton Antitrust Acts, as well as the Robinson-Patman Act, which is technically an antitrust statute, the courts have not felt themselves bound to defer completely to the Commission in defining illegality. Instead, the courts hold the Commission to the court-made principles of antitrust law when bringing its cases under those principles. See CLARKSON & MURIS, *supra* note 1, at 39-41.

151. *Papercraft Corp. v. FTC*, 471 F.2d 927 (7th Cir. 1973).

152. *National Dynamics Corp. v. FTC*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

153. *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971). As Supreme Court decisions, e.g., *Bates v. State Bar*, 433 U.S. 350 (1977), have given commercial speech some first amendment protection, advertisers have argued that the Constitution curtails the FTC. Thus far, the main constraint has been upon FTC orders, with *Balfour* the first example. The extent of the first amendment protection is unclear, however, and in a recent decision

These cases lead to the conclusion that if the Commission is careful with its procedures, deciding only issues actually litigated, and if it does not frame its orders too broadly or arbitrarily, the courts will generally uphold it.¹⁵⁴ Given this historical deference of the judiciary toward the Commission, congressional impotence to regulate the FTC's substantive programs, the enthusiasm within the FTC for regulating the marketplace, and the perverse consequences of some of the agency's efforts,¹⁵⁵ the concern caused by the FTC's assertion of preemptive power becomes easy to understand. The agency has enormous and, it appears, largely unconstrained power.

As we shall see in the remainder of this section, however, a force may be emerging to check the Commission, at least occasionally. The judiciary is shifting away from its traditional deference toward administrative agencies in general. The next part first considers this shift away from judicial deference towards agencies as a group, and then discusses some of its specific applications to the FTC.

B. *The New Administrative Law*

The traditional view of administrative law reigned supreme until at least 1960.¹⁵⁶ This view focused on limiting an agency to actions authorized by its statutes and on guaranteeing fairness in application of its mandate. Underlying this traditional view was a confidence in the competence of the administrative agency to per-

the Court has retreated from protection of commercial speech. See *Friedman v. Rogers*, 440 U.S. 1 (1979). For a more detailed discussion of the constraining power of the first amendment on the FTC, see CLARKSON & MURIS, *supra* note 1, at ch. 4, § IV A.

154. We are not asserting that the Commission will always find that the practice of respondents violates the law. For a variety of reasons, respondents do win in FTC actions. For example, the staff may be unable to prove the facts as alleged in the complaint, or a majority of the commissioners, often not members until after approval of the complaint, may believe that the facts as proven should not constitute a violation. Our point is not that all companies charged with violating the FTC Act lose, but that the courts have historically had little influence on the substantive grounds determining victory or defeat.

Moreover, we are not asserting that the FTC's discretion is limitless. For example, the FTC under the administration of Chairman Pertschuk has discussed moving against practices of a different nature than those traditionally attacked, including sex discrimination and the hiring of illegal aliens. See, e.g., ANTI-TRUST & TRADE REG. REP. (BNA) No. 892, at A-23 (1978). It seems unlikely that a court would consider that the cases discussed in this section are dispositive of an FTC attack on such practices.

155. See Peterson, note 40 *supra*.

156. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975), from which this paragraph draws heavily. See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958 & Supps. 1970, 1980).

form its assigned tasks without extensive court supervision.¹⁵⁷ The long-standing freedom of the FTC seems partially attributable to the lack of extensive judicial review under this traditional approach. The traditional view is losing much of its force because it cannot reconcile the resulting enormous power and discretion of agencies with the concept that intrusions into the rights of private individuals can be made, if at all, only by the legislature.¹⁵⁸

Courts are now placing more stringent requirements upon agencies, particularly in their rulemaking activities. Recent opinions have closely scrutinized agency decisions to determine precisely the empirical data and analytical processes used by the agencies.¹⁵⁹ Although much of the traditional concern of administrative law is for fairness, these new cases may also be arguing for competence.¹⁶⁰

These recent developments on rulemaking may have a substantial impact on the occupational licensure program. Traditionally, the courts have upheld rules upon finding a plausible hypothesis to support them, with the judges showing extensive deference to agency expertise.¹⁶¹ The court would uphold a rule without a detailed record or a showing of the precise link made between the rule and the record.¹⁶² In contrast, recent cases have required a detailed record that reveals the relevant facts and reasoning that led to the decision. Courts have refused to uphold rules when the facts in the record were inadequate, when the agency failed to respond sufficiently to important comments from parties before it, or when the agency's statement of the basis and purpose for the rule was unduly vague or improperly linked to the record.¹⁶³

The decision of the Supreme Court in *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.*¹⁶⁴ warrants discussion because of its potential impact on the future of judicial review of agency rulemaking and because the result (if not all of the specific reasoning) of the lower court's opinion illustrates

157. Stewart, *supra* note 156, at 1675-76.

158. *Id.* But see J.O. FREEDMAN, *CRISIS AND LEGITIMACY* (1978) (defending much of the traditional view).

159. See DeLong, *Informal Rulemaking and the Integration of the Law and Policy*, 65 VA. L. REV. 257 (1979) (excellent treatment of the "new administrative law").

160. *Id.*

161. See B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 204-38 (1976), and the exhaustive treatment of the subject in 4 K. DAVIS, *supra* note 156, at chs. 29 & 30.

162. See 1 K. DAVIS, *supra* note 156, at ch. 6 (2d ed. 1978).

163. For a discussion of these and other requirements see *id.* at chs. 29 & 30.

164. 435 U.S. 519 (1978) (Blackmun & Powell, JJ., not participating).

the new judicial attitude. Although *Vermont Yankee* may seem to signal the demise, or at least the substantial impairment, of the increased judicial scrutiny of agency rulemaking proceedings characteristic of the "new administrative law,"¹⁶⁵ the decision does not compel such a broad reading.

In considering the application for an operating license for a nuclear reactor at the Vermont Yankee Nuclear Power Station, the Nuclear Regulatory Commission considered the possible environmental risk from the disposal of radioactive waste. Relying on a "vague, but glowing"¹⁶⁶ analysis by one of its staff scientists, the NRC assumed that the risks would be minimal. The scientist's statement contained a very general and conclusory solution to the problem, merely offering reassurances that the problem would eventually be resolved.¹⁶⁷ Ruling on a petition for review of the NRC's proceedings by various public interest groups, the Court of Appeals for the District of Columbia remanded to the NRC, with the majority apparently stressing the inadequacy of the NRC's procedure.¹⁶⁸ Judge Tamm concurred with the remand, expressing concern that the NRC may have "uncritically adopted as its own the undocumented conclusion of a single witness that the waste storage is a nonproblem."¹⁶⁹ He disagreed, however, with what he felt was the majority's requirement of further, more adversarial proceedings. Neither opinion allowed the agency to use its alleged expertise to dismiss objections to its rules. Rather, the court told the NRC to demonstrate that it had handled the waste disposal issue competently.

In an opinion extremely critical of the lower court, a unanimous Supreme Court reversed.¹⁷⁰ Although the opinion of the circuit court is susceptible to different readings, the Supreme Court interpreted the lower court opinion as holding that the NRC pro-

165. See, e.g., Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1978 SUP. CT. REV. 345.

166. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 648 (D.C. Cir. 1976).

167. *Id.* at 648-49.

168. *Id.* at 653-54. Although the majority emphasized procedural inadequacies and, as discussed below, the concurring opinion of Judge Tamm and the opinion of the Supreme Court treated the majority opinion as finding inadequate procedures, the majority was unwilling to rely solely on the need for increased procedures. For example, the majority stated that "the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice." 547 F.2d at 653-54.

169. *Id.* at 658 (Tamm, J., concurring).

170. 435 U.S. 519 (1978) (Blackmun and Powell, JJ., not participating).

cedures were inadequate.¹⁷¹ In reversing, the Court concluded that federal courts may not require federal administrative agencies to use procedures beyond those specified in the Administrative Procedure Act.¹⁷² If one reads the opinion of the Supreme Court to allow agencies to dispose of crucial issues by accepting conclusive, undocumented statements of their staff, the case would be inconsistent with the trend to narrow the agencies' discretion. Thus the judicial constraint upon agency action would remain minimal.

Vermont Yankee does not compel this reading, however, as long as the Court permits review similar to that proposed by Judge Tamm. The Supreme Court's *Vermont Yankee* opinion indicates that it is not tampering with the Tamm view. In remanding the case to determine "whether the challenged rule finds sufficient justification in the administrative proceedings,"¹⁷³ the Court specifically noted that Tamm found that it did not. Further, the Court stated that upon remand the lower court is "entirely free to agree or disagree"¹⁷⁴ with Tamm. Thus, the Court may have held only that the court of appeals could not set aside the rule because of inadequate procedures. As for the extent of deference to agencies, the difference between Tamm's reasoning and that of the majority in the court of appeals (requiring additional proceedings) is slight.¹⁷⁵ There will be more supervision of agency action than was previously customary, whether the courts require more specific procedures or simply demand a more adequate record. Thus, unless the Supreme Court expands *Vermont Yankee*, the "new administrative law" will continue to restrain the substance of agency action.¹⁷⁶

171. *Id.* at 549.

172. *Id.*

173. *Id.*

174. *Id.* at 535, 536 n.14.

175. For the agency, however, the Tamm approach may be preferable, leaving to the agency the decision of what procedures to adopt to make the record "adequate." Because the agency is presumably in a better position than the court to know what procedures are best suited for it, *Vermont Yankee* will be beneficial if read to support the Tamm view. Although the Tamm view thus has distinct advantages, it also implies that the new administrative law has limits that a cost-benefit test would partly overcome. See notes 188-213 and accompanying text *infra*.

176. *Vermont Yankee* indicates that the Court rejects that part of the new administrative law requiring procedures beyond the APA. The Court has not faced up to the full implications of *Vermont Yankee*, however, since the Tamm position also strays beyond the APA. See S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 521-22 (1979). Because the Court not only failed to condemn the Tamm view, but seemed to endorse its general approach, it is unclear how literally one can take the Court's allegiance to the strict letter of the APA. In any event, as indicated in note 175 *supra*, judicial imposition of spe-

C. *The FTC and the New Administrative Law*

What does all of this mean for the FTC in general and for its occupational licensure program in particular? Although many precedents support broad agency discretion, including the recent *S & H* decision,¹⁷⁷ two facts suggest that the changing judicial attitudes towards the administrative process will affect the Commission. First, the Commission is no longer involved with trivia, as it was when the courts decided most of the important cases affecting the relationship between the FTC and the judiciary.¹⁷⁸ Many Commission activities now have enormous potential impact upon consumers and producers. The occupational licensure program, for example, would significantly affect the market place in virtually every state. Second, although it is too early to indicate a trend, recent FTC cases suggest a change in the judicial attitude toward the Commission. Following the discussion of these cases, we will

cific procedures is unnecessary and less preferable than the Tamm position.

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980), provides additional, albeit inconclusive, evidence of the Court's direction regarding rulemaking. Citing *Vermont Yankee*, the Court refused to enjoin the New York City Planning Commission and the Department of Housing and Urban Development (HUD) from constructing low-income housing. In its short per curiam opinion, the Court found the issue to be whether, under the National Environmental Policy Act of 1969 (NEPA), the agency needed to elevate environmental over other concerns, to which the Court held that *Vermont Yankee* provided a negative answer. The Court continued that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences" 444 U.S. at 227.

Justice Marshall dissented, finding that the court of appeals had found HUD's actions arbitrary in addressing the environmental issues, *see Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978), and that the per curiam opinion had retreated from the requirement that the arbitrary and capricious standard of judicial review "prescribes a 'searching and careful' judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner." 444 U.S. at 231. He concluded that the Court had instead substituted the "essentially mindless" requirement of determining whether HUD had considered environmental factors. *Id.* Justice Marshall was quoting from one of the leading cases in the development of the new administrative law, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). If he is correct about the retreat from *Overton Park*—and the Justice himself did not believe that the Court would adhere to its "mindless" standard in a "different factual setting," 444 U.S. at 231—*Strycker's Bay* would be a significant departure from the new administrative law. One is not compelled to conclude that the case is in fact such a retreat, however, given the Court's reading of the circuit court's opinion. The Court found that the lower court had "elevated" environmental concerns and, perhaps more importantly, in a footnote in response to the dissent at the end of its opinion, the Court disagreed with Marshall that the circuit court had found HUD to have acted arbitrarily. 444 U.S. at 231. Thus, the Court avoided a direct clash with the new administrative law as enunciated in cases like *Overton Park*.

177. *Sperry and Hutchinson Co. v. FTC*, 432 F.2d 146 (5th Cir. 1970).

178. For a discussion of FTC focus before 1970 on cases with little or no impact on consumers, *See CLARKSON & MURIS, supra* note 1, ch. 1, and sources cited therein.

consider the application of the "new administrative law" to rulemaking activities such as those in the occupational licensure program.

1. RECENT FTC DECISIONS

From 1975 through 1978, the Commission's record in the courts of appeals included ten victories, ten partial victories, and one defeat. Four of the decisions indicate that the courts may now be taking a hard look at what the Commission does, with one even suggesting that the courts may overrule the Commission on the definition of legality under the Federal Trade Commission Act.

Ger-Ro-Mar, Inc. v. FTC,¹⁷⁹ decided in 1975, was the first of these decisions. The Commission attacked a scheme to merchandise lingerie and similar items through a pyramid selling system. Using a mathematical formula, the FTC argued that the number of people who attempted to sell the goods would quickly reach a level at which there would no longer be enough customers available for all sellers. The court found that although the Commission's abstract principle was correct, it had not considered the realities of the marketplace.¹⁸⁰ More important for our purpose, the court stated that the courts, not the Commission, should decide what unfair competition is, a distinct throwback to the era of the 1920's.¹⁸¹ Although the Commission offered no evidence of harm to consumers except for its formula, the court's deference to the Commission was less than that traditionally shown. The court simply refused to rely upon the Commission's judgment without stronger factual support.

In the 1977 *Chrysler Corporation* case,¹⁸² Chrysler claimed that tests by *Popular Science* magazine had shown that Chrysler's small cars realized greater fuel economy than did the Chevrolet Nova. The court affirmed the Commission's decision that this claim was deceptive, but struck out two paragraphs of the order as overbroad. One paragraph prohibited Chrysler from representing the results of tests unless the "representation fully and accurately reflects the test results and unless the tests themselves were so devised and conducted as to completely substantiate each representation concerning any characteristic tested."¹⁸³ The court said that

179. 518 F.2d 33 (2d Cir. 1975).

180. *Id.* at 38-39.

181. *Id.* at 38. See generally cases cited note 121 *supra*.

182. *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977).

183. *Id.* at 362 n.2.

this provision was potentially limitless, and found that another provision, prohibiting petitioners from "[m]isrepresenting in any manner . . . the purpose, content or conclusion of any test"¹⁸⁴ was limitless. Because the FTC conceded that the violations were unintentional and isolated, confined to only two out of fourteen advertisements, the court found no rational justification for such sweeping provisions. Thus, the court applied its own standard to the provisions, rather than leaving the establishment of criteria entirely to the Commission's discretion.

The other two cases also note that the violation was unintentional. In both cases, the court struck out part of the FTC orders as too broad, citing the lack of bad faith on the part of the business.¹⁸⁵ Further, the decision in *Standard Oil Co. of California* questioned the agency's freedom to determine the standard for deception. The Commission had found that advertisements for a gasoline additive, F-310, were deceptive because they allegedly implied that the additive would completely reduce pollutants. The court disagreed, stating that it did "not think that any television viewer would have a level of credulity so primitive that he could expect" complete reduction.¹⁸⁶ Finding that the record did support "the Commission's interpretation of the meaning the commercial would have to the average viewer,"¹⁸⁷ the court affirmed the agency's other theories of why the ads were deceptive. Nevertheless, an average-viewer standard is harder for the FTC to meet than a test designed to protect only fools.

2. RULEMAKING

Thus far, only one court has ruled on the substantive merits of an FTC rule, in *Katherine Gibbs School, Inc. v. FTC*.¹⁸⁸ The Court

184. *Id.* at 364.

185. *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977); *Standard Oil Co. v. FTC*, 577 F.2d 653 (9th Cir. 1978).

186. 577 F.2d at 657.

187. *Id.* at 659.

188. 612 F.2d 658 (2d Cir. 1979). In *American Optometric Ass'n v. FTC*, 626 F.2d 896 (D.C. Cir. 1980), the court remanded all but one section of the "eyeglass rule," discussed at notes 44-52 and accompanying text *supra*, because Supreme Court decisions on commercial protection of free speech and the reaction to those cases had altered the basis for the rule. See note 14 and accompanying text *supra*. Thus, the court did not base the remand on substantive review of the conditions upon which the FTC relied. For a discussion of the one section of the rule that the court did affirm, see notes 202-04 and accompanying text *infra*. In one important sense, however, substantive review did occur. Despite the redundancy of FTC laws in light of the first amendment protection, the Commission argued that the states might still pass laws rendering advertising ineffective by, for example, requiring advertise-

of Appeals for the Second Circuit found unlawful a rule designed "to alleviate currently abusive practices against vocational and home study school students and prospective students."¹⁸⁹ Although part of the opinion focused on procedural defects,¹⁹⁰ the court did indicate that judicial review of substantive provisions of FTC rules would be more stringent than pre-1975 reviews of FTC matters.

For example, the court struck down a provision requiring schools to provide the following disclosure form to individuals who had just signed an enrollment contract, but who, under another part of the FTC rule, could still cancel the contract without financial obligation:

Since we made job placement or earnings claims in promoting this course, we have prepared our record in these areas for your review. As the Graduation Record pointed out, 50 students graduated from this course — to —. We found that 38 or 76% of these graduates got jobs in the field of — within 4 months of their graduation.¹⁹¹

A school could include no other information concerning job placement in the same material, except for a general statement to the effect that the placement percentage might be understated.¹⁹² The school, then, could not disclose such information as how many students did not respond, how many did not seek jobs, or how many were self-employed.

ments to include affirmative disclosures so burdensome as to deter advertising. The court refused to support the rule on this basis because the Commission's argument lacked evidentiary support and relied largely on speculation. 626 F.2d at 912-13.

189. 612 F.2d at 661 (quoting from the FTC's statement of Basis and Purpose for the rule, *reprinted at* 43 Fed. Reg. 60,795-817).

190. Rather than specifically define the unfair or deceptive acts or practices of the industry, the Commission simply provided that it was an unfair or deceptive act or practice not to comply with the rule. The court found that specific definitions were necessary. *Id.* at 662. As long as courts require the FTC to justify its rule provisions in terms of correcting specifically identified problems in the industry in question, they can carefully review the empirical data and analytical process supporting the rule; thus, this requirement of *Gibbs* will add little to the constraining power of the judiciary over the FTC.

191. *Id.* at 664. The rule required this form only if the school had told the prospective student about the availability of jobs or about the ability of the school's graduates to find jobs.

192. 16 C.F.R. § 438.3(b) (4) provides:

A school may, at its option, include the following statement on the Disclosure Form in the manner shown in Appendices A-C:

In evaluating our record, remember not all of our students took this course to get a job in the field of (school to insert area of training). Also we were unable to reach some of our graduates to see if they got jobs. So, our placement percentage might be understated.

The court found the required disclosures misleading and hence arbitrary and capricious. As the court stated:

Proof in the record shows that adherence to the Commission's Rule would require one school to show a job placement rate of 5.8%, when in fact the true employment success rate of those who responded to the school's inquiry was 54%, or 80%, if those who became self-employed were included. Another school would have to show a placement figure of approximately 67%, although almost 100% of its graduates who sought employment obtained it.¹⁹³

Significantly, a strong dissent, showing great deference to the FTC, argued that the FTC made a reasonable choice among imperfect placement statistics.¹⁹⁴ But the majority was unwilling to give the FTC such deference.

Increased judicial scrutiny of agency rulemaking, of which *Katherine Gibbs* is an example, has at least one crucial implication for the occupational licensure program: based on the recent decisions, it will often be easier to deregulate than to regulate.¹⁹⁵ This conclusion follows from the economic case against occupational regulation, with its powerful theoretical and empirical arguments that the market generally serves the interests of consumers better than government regulation. Thus, the Commission will be able to withstand scrutiny under the recent administrative law decisions if it chooses to promulgate deregulatory rules with records and detailed reasoning.

On the other hand, when the Commission decides that the market produces results that it does not like, such a rule may not be as easy to justify. Because many of these rules will impose costs, opponents may force the Commission either to rebut evidence that the costs exist or to justify their imposition. Particularly when the issue is the economic welfare of consumers, the FTC will often have to overcome theoretical and empirical evidence that its regulation is unwarranted.

Consider the following three FTC rules as examples of possible court review of FTC rulemaking. In the first, the agency

193. 612 F.2d at 665.

194. *Id.* at 680 (Newman, J., dissenting). The dissent also would have interpreted the FTC provision to allow schools to disclose in the same package as the required form other truthful data that would be necessary to prevent information from being misleading. *Id.* at 681. In addition to the placement provision, the majority also struck down the FTC provision on tuition refunds for students who did not finish the course. *Id.* at 664. Again the majority showed less than traditional deference to the agency, particularly in contrast to the dissent, which would have upheld the FTC on this issue. *Id.* at 679.

195. Again, we assume that the courts will permit FTC preemption.

preempts state laws that prohibit advertising of ophthalmic goods and services¹⁹⁶ and bases this deregulatory rule on strong theoretical and empirical support, including refutation of the arguments favorable to advertising bans.¹⁹⁷ At the other extreme is the Commission's rule on creditors' remedies that will rewrite credit contracts.¹⁹⁸ The rulemaking proceedings have included substantial economic testimony, both from FTC and from industry witnesses, that the costs of modifying or eliminating creditors' remedies are substantial relative to the possible benefits.¹⁹⁹ Thus, an FTC justification of this rule as benefiting consumers, particularly poor consumers who will bear the heaviest costs, will be difficult to sustain under recent, more stringent judicial review.²⁰⁰

A third rule presenting an interim case—in that the major problem is its justification, not necessarily its impact—involves that part of the eyeglasses rule designed to separate dispensing and examination.²⁰¹ As explained in Section IV,²⁰² the Commission's justification for the provision—that the removal of the advertising laws will have little impact without separation of dispensing from examination—is questionable, given lower prices in states with advertising but without separation of examination and dispensing. If opponents had developed this point in the rulemaking proceeding, the Commission could ignore it only at its peril in the event of court review.²⁰³

196. 16 C.F.R. § 456 (1980).

197. See Benham, *supra* note 3.

198. See Peterson, *supra* note 40.

199. *Id.*

200. By applying different standards to the evidence of costs than to the evidence of benefits, the FTC's presiding officer for the creditors' remedy rulemaking has reached a different conclusion than the one in the text. See Peterson, *supra* note 40. It remains to be seen, however, whether an appellate court will allow such manipulation to support the agency position. If the Commission adopts the presiding officer's conclusion *and* reasoning and if a court then affirms the FTC, then this would imply that the courts will continue to be a minimal constraint upon the agency.

201. See 43 Fed. Reg. 23,992, 24,007-08 (1978).

202. See notes 36-52 and accompanying text *supra*.

203. The Commission's statement of basis and purpose and the staff report of the Bureau of Consumer Protection do not appear to analyze this point. A theoretical case exists to show that this proposal will have costs, although the Commission's statements on the rule do not discuss this possibility. If opponents of the regulation had seriously argued, using well-developed theoretical and empirical analysis, that the rule's impact would be to raise costs, the agency would only ignore these facts at its peril. In *American Optometric Ass'n v. FTC*, 626 F.2d 896, the court affirmed the separation requirement. According to the court, however, the provision was challenged as harming consumers because opticians could not adequately fit contact lenses, not because of lack of evidence supporting its necessity to allow advertising to function effectively. Based on evidence in the record, the Commission

This is not to say that the courts will force the FTC to conform strictly to economic analysis in its rulemaking process. Without such an analysis, however, the agency may have very broad discretion. When the Commission attempts to justify the rules under an economic analysis, therefore, the judiciary is likely to be a more effective constraint than when the agency uses a less rigorous premise. If, as *S & H* implies, the Commission can promulgate rules on the basis of vague policies and leave their appropriate application largely to FTC discretion, the agency will often avoid close judicial scrutiny.

For example, let us again consider the provision of the eyeglasses rule separating dispensing from examination. The Commission attempts to justify this provision as necessary to allow advertising to function, a proposition susceptible to close empirical scrutiny.²⁰⁴ On the other hand, the Commission might have sought to justify the rule on the basis of the "freedom" of opticians to practice as independent businessmen. If the courts allow the Commission to pursue such policies, what standards apply? What evidence is relevant? What of the examiners' rights? What if the consumer's right to a prescription raises prices? Once the Commission moves beyond economic analysis, the decisional basis may involve only a nebulous, ad hoc balancing.²⁰⁵ The less rigorous the justification that the FTC must give for a rule, the less effective the judicial review, thereby reducing the constraining power of the courts.

D. *Cost-Benefit Analysis*

Given that even recent judicial decisions may allow the Commission to promulgate regulations harmful to consumers, the question arises whether the courts can devise a more effective judicial constraint, assuming that the FTC's rulemaking authority continues. The Fifth Circuit Court of Appeals has recently applied a cost-benefit approach to decisions of certain agencies.²⁰⁶ For example, the Consumer Product Safety Commission (CPSC) promul-

had properly addressed this concern for quality.

204. See notes 46-52 and accompanying text *supra*.

205. Economic analysis does not ignore the claims discussed in the text. A freely operating market would allow individuals to have these "rights" if they desire to pay for them. Underlying our argument for effective judicial scrutiny is the assumption that if someone must make the political choice to impose costs upon consumers without compensating benefits, Congress should make such a choice, not an administrative agency.

206. *American Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *cert. granted*, 440 U.S. 906 (1979); *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978).

gated a "Safety Standard for Swimming Pool Slides," requiring manufacturers to include warning signs on new slides, limiting installation of large slides to water more than four feet deep, and, because of the danger of drowning in the deeper water, mandating a ladder-chain device to warn children to stay off slides. The court held that the CPSC must carefully examine, not only the nature and severity of the risk, but also the potential the standard has for reducing the severity or frequency of the injury and the effect the standard would have on the utility, cost, or availability of the product.²⁰⁷ Given the infrequency of the risk involved, the Commission had to produce evidence that the standard actually promised to reduce the risk. Further, the CPSC did not know whether the required signs would be so explicit and shocking in portraying the risk of paralysis as to deter unnecessarily the marketing of slides.²⁰⁸ Judge Wisdom, in concurrence, aptly summarized the court's opinion on this point:

[T]he balance the Commission draws between the benefits and the costs must have support The benefits from these signs have no reasonable relationship to the costs they will impose. With no evidence on the cost side of the ledger, the Commission's cost-benefit analysis is without substantial evidence for support.²⁰⁹

This case relied upon the applicable agency statute, and it is not at all clear that the court will similarly interpret the FTC Act.²¹⁰ Accordingly, legislation may be necessary to guarantee cost-benefit review. The advantage of this approach to the FTC is that it would focus rulemaking on consumer welfare.²¹¹ Because the Commission acts to protect the consumer,²¹² cost-benefit analysis is the ideal tool to determine whether a rule will in fact serve that

207. 569 F.2d at 844.

208. *Id.*

209. *Id.* at 845 (Wisdom, J., concurring).

210. This case turned upon the interpretation of the Consumer Product Safety Act, 15 U.S.C. §§ 2056(a), 2058(c)(2)(A) (1976), which authorized the CPSC to promulgate safety standards "reasonably necessary" to eliminate or reduce an "unreasonable risk" of injury. The court required the agency to weigh costs against the benefits to determine whether the standard was reasonably necessary. 569 F.2d at 840. It remains to be seen whether the courts will apply similar requirements to FTC rules meant to carry out the Federal Trade Commission Act's mandate to prevent "unfair methods of competition" and "unfair or deceptive acts or practices."

211. Although one might reasonably interpret the FTC Act to require something approaching the cost-benefit standard, one might also reasonably interpret it to allow the Commission to ignore these considerations. See DeLong, *supra* note 158, at 282 n.133.

212. See *id.* at 322-28.

end. Consumers are unlikely to welcome a "protector" who raises costs without producing compensating benefits.

Of course, objections to cost-benefit analysis will arise. Most prominent among them is that one cannot appropriately measure benefits and costs. For various reasons this objection should not bar the proposed reform. First, there is reason to be skeptical about statements that the relevant costs and benefits are not measurable:

If there is a demand for information, the cry goes out that what the organization does cannot be measured. . . . Often times this is another way of saying, "Mind your own business." Sometimes the line taken is that the work is so subtle that it resists any tests. On other occasions the point is made that only those schooled in esoteric arts can properly understand what the organization does and they can barely communicate to the uninitiated. There are men so convinced of the ultimate righteousness of their cause that they cannot imagine why anyone would wish to know how well they are doing in handling our common difficulties. Their activities are literally priceless; vulgar notions of cost and benefits do not apply to them.²¹³

Second, under this approach the FTC would not misdirect its attention to noneconomic criteria (such as distributional effects) that would complicate cost-benefit analysis. The focus would be only on the economic welfare of consumers as a group. Third, the FTC would rarely be involved in resolving great scientific controversies that complicate cost-benefit analysis in subjects such as nuclear power. Fourth, the FTC would not always need to show with certainty that benefits exceed costs. FTC rules should receive approval with an automatic five-year sunset provision when the FTC's evidence failed to prove that the benefits would exceed the costs, but the evidence did show that sufficient benefits were likely but could not be demonstrated at the time of the proceeding. If at the end of the five years, the agency could not show that benefits exceeded costs, the rule would lapse. This procedure would allow the agency to collect "before and after" data to demonstrate the net benefits of its action.

The cost-benefit standard alone would not guarantee an end to anti-consumer regulation. The Commission would still have broad discretion in some cases, particularly when evidence is in se-

213. Wildavsky, *Rescuing Policy Analysis from PPBS*, in *PUBLIC EXPENDITURES AND POLICY ANALYSIS* 461 (R. Haveman & J. Margolis, eds. 1970).

rious conflict. Requiring the FTC to show that its cases produce benefits exceeding costs would at the very least, however, limit FTC discretion to impose costly regulation upon consumers without compensating benefits. Such a requirement would be an important step toward transforming the agency from one not subject to meaningful court review into one based on the appropriate rule of law: the welfare of consumers.

VII. CONCLUSION

At first glance, the FTC's occupational licensure program, based on presumed power to preempt state laws, appears to encourage curtailment of state regulation of occupations. Closer analysis, however, casts considerable doubt upon such a conclusion. The source of this doubt lies within the agency, rather than without. Within, the FTC in many cases is likely to resolve its schizophrenic attitude toward the market in favor of regulation, not deregulation. We do not conclude that the agency will never pursue deregulatory cases and rules, but it would not be at all surprising if most FTC activities preempting state laws were usually regulatory in nature, not deregulatory. Even for advertising, on which the FTC's position has been consistently deregulatory, the FTC's preemption power is now of questionable utility. Although when the occupational licensure program began with attacks on state bans of advertising it promised to be enormously beneficial to consumers, the Supreme Court's protection of commercial speech has reduced the necessity for FTC intervention.²¹⁴

Outside the agency, the picture is somewhat different. Notwithstanding the growing congressional opposition to the FTC's foray against occupational regulation, such opposition is unlikely to cause a curtailment of either the regulatory or the deregulatory aspects of the program unless it gains more political power than it now possesses. Otherwise, Congress can force the agency only to appear before it, explain its actions, and even investigate certain industries. But Congress has limited ability to require or stop specific FTC law enforcement. As for the courts, even if they conclude that the Commission can preempt, they are unlikely to oppose a deregulatory occupational licensure program and are more likely to

214. After *Bates v. State Bar*, 433 U.S. 350 (1977), the unconstitutionality of laws against advertising of ophthalmic goods and services seems clear. Indeed, in a recent case in which a federal district court found such laws to be unconstitutional, those supporting the law did not even appeal that part of the opinion. *Friedman v. Rogers*, 440 U.S. 1 (1978).

constrain new regulation than are the other two institutions that we have studied. Without a cost-benefit review, however, even the courts may all too often be only a limited constraint upon the tendency of the Commission to promulgate regulatory rules that reduce the well-being of consumers.