Posner on the Federal Trade Commission: Why the Change of Heart?

Rebecca Haw Allensworth

In 1969, less than a year into his academic career, Richard Posner published a scathing takedown of the Federal Trade Commission.1 In what would become classic Posner style, he pulled no punches, despite himself being an alum of the agency. Having just served on the ABA's Blue Ribbon Commission, created at the request of President Nixon to study the performance of the FTC, he built on what he described as a long tradition of disparaging the agency. But he parted ways with previous critics by avoiding a "dubious, and largely unexamined assumption[]" that the very idea of having an agency to address consumer fraud and competition concerns was sound in the first place.2 He examined this proposition and found it lacking, concluding: “On the evidence we have, the costs of having a federal trade commission appear to exceed the benefits.”3

More than three decades later he was invited to again appraise the FTC’s performance at a celebration of the agency’s 90th anniversary.4 His assessment here was a good deal rosier, although not without its barbs. He described the agency’s improvements since his last assessment to be “considerable,” but expressed a hope that “it will not become complacent and cease striving to contribute to the nation’s prosperity.”5

What accounts for this change of attitude? Posner identifies one important factor and implies another. A third—inferred from the arc of his career and the evolution of his scholarship between 1969 and 2005—is argued here. In particular, I speculate that his later experience as a judge led him to a more realistic view of various legal institutions, and to a judicial philosophy that accepted less-than-perfect regulatory solutions. In other words, although at least some of Professor Posner’s objections to the FTC remained in 2005, to Judge Posner, it was close enough for government work.

Posner on the FTC

Posner was the only dissenting member of the Blue Ribbon Commission, which was tasked with studying the FTC’s performance.6 In his dissent, he asserted that while he largely agreed with the majority, he would go further.7 His position, which he elaborated in a later law review article, was

2 Id. at 48.
3 Id. at 89.
5 Id. at 771.
6 David A. Hyman & William E. Kovacic, Can’t Anyone Here Play This Game—Judging the FTC’s Critics, 83 GEO. WASH. L. REV. 1948 (2015).
that where the majority identified internal dysfunction and poor management as the principal flaws of the agency, Posner saw the problem as more fundamental. The very enterprise of combining lawmaking, enforcement, and adjudication in an agency made sense only if the result was something better than the sum of its parts. As a traditional law enforcement agency, the Department of Justice was superior to the FTC in its ability to identify, investigate, and prosecute cases. Additionally, the theoretical advantages of “continuity, expertise, focus, and initiative” ascribed to agency decision-making were more apparent at the DOJ than at the FTC. As a court, the generalist federal courts were superior in deciding cases and controversies, in part because Article III courts were able to attract more talented and diligent judges by virtue of being more prestigious. Combining these functions in one agency did not add anything; in fact, it was worse. Combining adjudication and enforcement meant that the same entity prosecuted and judged the same case. As Posner explained, “It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place.”

Other supposed advantages of the FTC over the DOJ and private enforcement included its ability to bring cases under the FTC and Clayton Acts. Both statutes were thought to go further than the Sherman Act—the FTC Act because it more broadly prohibits “unfair competition,” and the Clayton Act because it prohibited specific anticompetitive practices. Posner argued that any significant anticompetitive conduct is within the ambit of the Sherman Act and that “novel extensions of antitrust doctrine such as we owe to section 5 [of the FTC Act] seem in general highly questionable.” And the specific prohibitions of the Clayton Act “were never significant sources of monopoly.” Thus, in his view the FTC offered no special tools to antitrust enforcement.

Posner also identified the agency’s “independence” as a flaw. Without significant oversight from the President, the FTC was largely under the thumb of Congress, a supervisor that Posner thought inferior. Congress, he explained, was largely designed to vindicate parochial interests, while the President, through the DOJ, could more reliably pursue policies that served unorganized interests, such as that of the consumer. Posner saw the protectionist tendencies of Congress repeated at the FTC. At a more granular level, Posner criticized the incentive structure of the bureaucrats at the agency who were rewarded more for doing less than for making waves with creative or far-reaching enforcement policies. Posner was unflinching in his criticism: “To many, its comparative inefficiency will seem scandalous, but one could regard it as the agency’s saving grace.”

These structural problems translated to a very poor record in the antitrust arena, as cataloged by Posner. Posner used as a sample the approximately 250 restraint-of-trade cases brought by

---

8 Posner, supra note 1, at 53.
9 Id. at 51.
10 Id. at 52.
11 Id. at 53.
14 Posner, supra note 1, at 52.
15 Id. at 49.
16 Id. at 82–84.
17 Id. at 87.
18 Id. at 54–61.
the agency in 1963. The vast majority of these were brought under the Robinson-Patman Act, which forbids manufacturers from price discriminating when selling to distributors. In none of these cases did the agency identify market power at the manufacturer or distributor level—a prerequisite, according to Posner—for any anticompetitive effect. He observed that the remainder of the cases are divided between cases brought under the “brokerage clause” of the Robinson-Patman Act, the Clayton Act, and the FTC Act, most also lacking the allegation of market power that would suggest anticompetitive conduct was afoot. The record, according to Posner, was dismal. He concluded that his sample “contains none that seems justified on economic or any other grounds save (a) one merger case . . . and (b) the conspiracy cases that should have been brought, if at all, by the Department of Justice.”

Posner’s critical stance on the FTC was likely influenced by his own experience at the agency, where he served as assistant to Commissioner Philip Elman. In fact, his boss and mentor was himself a staunch critic of the agency. The former Commissioner wrote an article in 1971 that faulted the agency for its aimlessness, reactivity, secrecy, lack of accountability, and, above all else, poor quality personnel. One can only imagine that these criticisms were frequently discussed between Posner and Elman during their time at the agency.

More than three decades later, in 2005, Posner considered the agency’s progress since his 1969 observation that the FTC’s costs outweighed its benefits. Looking back with over 20 years of experience as a federal judge, Posner had a different perspective than as a 30-something law-and-economics theorist. One positive change that he identified was acceptance of the 1969 ABA Report’s suggestion that the President appoint more qualified commissioners, fulfilling the hope that “the quality of the staff would improve” from the top down. The change had been so dramatic, said Posner, that he believed “Philip Elman, were he alive today, would be pleased with the improvement in the agency’s quality.”

The most important change at the FTC, according to Posner, was that it “underwent an ideological makeover, becoming a champion of free markets rather than a throwback to Progressive Era collectivism.” This change meant fewer actions brought under Robinson-Patman’s price-discrimination provisions and more actions targeted at conduct where actual market power was in play. He particularly praised the “imaginative use of statistics in the Office Depot merger case” and also singled out “the Intel consent decree, the Commission’s actions against online scams, and the Commission’s investigation of pharmaceutical patent abuses.” He identified the FTC’s role as a “gadfly, spurring legislative action; a catalyst.”

But Posner was not all positive, even if his stance against the FTC had softened. The role of catalyst, as he observed, is limited. The agency, in his view, could go further in driving antitrust policy through its litigation role. He also suggested that the quality of the agency could be improved
even more, by finding more expert Commissioners and staff. Finally, he observed that many of the
ostensible improvements to the Commission had been to remake it in the form of a traditional law
enforcement agency, which raised the question of what it added to the DOJ.

**Posner’s Change of Heart**
Posner explicitly identifies changes at the FTC as the reason why he was “duly chastened”\(^27\) in
2005. It is no wonder that the agency reacted strongly to the 1969 Report—the Report implicitly
gave the agency a “shape up or ship out” mandate. Its personnel, from Commissioners down to
line-level staff, were far more expert in 2005 than they were in 1969. Today, the agency employs
about 70 Ph.D.-level economists,\(^28\) and has had several Commissioners with an Economics Ph.D.
The agency also changed by being more aggressive in its enforcement, chastened by criticisms
of being defanged. As Professor David Hyman and Former Commissioner William Kovacic have
put it, “Admonished to attain stratospheric results, the FTC embarked on a program in the 1970s
that sought to hit 800-foot home runs.”\(^29\) These efforts may have resulted, according to the
authors, in “too many outs,”\(^30\) but they also resulted in the kinds of actions—like the *Office Depot*
merger and *Intel* decree—that Posner praised in 2005. Finally, the FTC did attempt to use the
broad language of Section 5 of the FTC Act to challenge conduct that was thought beyond reach
of the Sherman Act.\(^31\)

Posner implies a second reason for his change of heart: the substantive changes to antitrust
law between 1969 and 2005. During this time, courts largely adopted the position of law-and-econo-

mics scholars like Posner and Robert Bork, and remade antitrust in the image of economics.

Between 1969 and 2005, the Supreme Court removed the per se prohibition on resale restric-
tions\(^32\)—thereby subjecting them to an economic analysis—created an economic test for preda-
tory pricing,\(^33\) and asserted that market power, defined economically, was a predicate to liability
in a range of contexts.\(^34\) For their part, the agencies established merger guidelines based almost
entirely on economic considerations.\(^35\) Indeed, the changes to antitrust law toward economic
analysis during this time have been so dramatic that some refer to it as a “revolution.”\(^36\)

These changes likely made Posner more optimistic about the use of a technocratic agency like
the FTC to administer antitrust law. Combined with the influx of expert personnel at the agency,
substantively technocratic law helped address some of the objections Posner raised in 1969. It
gave focus to the goals of the agency, curbing some of the aimlessness of its actions. And hav-
ing what many (not including myself) view as a singular, relatively technical regulatory goal likely

\(^27\) Id. at 765.


\(^29\) Hyman & Kovacic, * supra* note 6, at 1966.

\(^30\) Id.

\(^31\) Unfortunately, these attempts were often “quashed” by courts. See *Crane*, * supra* note 28, at 136.


left Posner feeling less troubled by the possibility of political influence from Congress or the President. Indeed, Posner himself identified this feature in his 2005 article when he observed that “antitrust and consumer protection have so far lost their traditional ideological coloration that the FTC has become effectively bipartisan, in the sense that changes from administration to administration in the policies of the Commission are incremental rather than radical.”

But more changed between 1969 and 2005 than the FTC itself and substantive antitrust law. In 1969, Posner was in the first year of his academic career. By 2005, he had been a federal appeals court judge for 24 years. He spent his early academic career—between his 1969 critique and his appointment to the bench in 1981—urging courts and agencies to apply economic analysis to the law. His vision was for a more rigorous accounting of how rules influence individual, social, and firm behavior, with an eye towards optimizing efficiency. During this time, he applied economic analysis to countless areas of law, including antitrust, property, health care, torts, securities, privacy, anthropology, criminal law, and, perhaps most controversially, child adoption.

Most relevant to this comment is Posner’s economic analysis of the antitrust agencies. Writing just one year after his scathing account of the FTC, Posner analyzed the performance of the FTC and the DOJ. He reported the number of cases each agency brought over time, the length of time each case took to be resolved, the win/loss record, the kinds of cases brought, the identities of the parties involved, among many other variables. His conclusions were not particularly flattering, as one might expect, but his conclusions are less interesting than his methodology, about which he wrote extensively.

He explains that statistical analysis of enforcement is necessary to understand what is broken with the antitrust system because agencies should evaluate their achievements systematically. He lamented the fact that

[the people who manage the antitrust agencies—who, not incidentally, are lawyers—do not view antitrust enforcement as a means, but as an end. They do not view it as a “business” whose “output” is reductions in monopoly power and whose “inputs” are the legal and related activities (private as well as public) employed in bringing about such reductions.]

In other words, not only can economic analysis be fruitfully applied to substantive law, but also it can be used to improve the process of law.

The articles from this decade—on the economic analysis of the substance as well as the process of law—were variations on a theme: law should be purposive, and should effect that purpose with as much information about human and market behavior as possible. During this period, Professor Posner’s principal source of information about behavior was supplied by theoretical models epitomizing the thinking of 1960s “Chicago School” economists. These articles were hyper-rational, unflinching (especially the infamous “baby-selling” article), and simple in their view of the world. That is not to say that Professor Posner did not acknowledge that the real world was more complicated. But the simplicity of the models is what made them useful because they could be applied across different contexts by generalist judges.

By 2005, he had a richer set of information about markets and human behavior: his experience as a federal appeals court judge. By that time he had penned about 2000 opinions and sat on

37 Posner, supra note 4, at 764.
39 Id. at 418.
the panels of around three times that many cases. Each controversy gave him a window into the workings of how businesses and individuals conducted their affairs, and resolved (or failed to resolve) conflicts as they arose. It also gave him insight into the limitations of a judge. *Reflections on Judging*, published in 2013, contains a thoughtful discussion of how complexity—both internal and external to the legal system—presents a challenge to judges. He does not despair about a generalist judge’s ability to resolve cases in the face of such complexity, but he does suggest that complexity (and other judicial challenges) makes nonsense of judicial philosophies such as originalism or textualism.

*Reflections on Judging* is an example of how his academic writing shifted in focus from law and economics to legal pragmatism. While his early scholarship focused on rigorous abstractions, his later work called for approximations and good guesses. The two philosophies are certainly not mutually exclusive; in fact, pragmatism can be seen as a practical method for the judicial implementation of law and economic analysis. Both legal pragmatism and law and economics emphasize the purposive nature of law and use rationality to achieve it. Pragmatism parts ways, however, with the theoretically pure law-and-economics conception of law by acknowledging the uncertainty, complexity, and indeterminacy inherent in judging.

Judge Posner’s legal pragmatism seems to admit more of a role for expert agencies, perhaps because of its realistic view of the limitations of judging. Writing in 2011, Posner compared agency and judicial decision making in a book chapter entitled *Regulation (Agencies) vs. Litigation (Courts): An Analytical Framework*. He explained that agencies are more expert, are able to make law *ex ante*, and lack the pressure to be “minimalist” that judges feel because they lack political legitimacy. He also identifies the weaknesses of judicial decision-making, which are mostly the flipsides of an agency’s strengths: “The judges’ lack of specialized knowledge, their limited staffs, limited investigatory resources, cumbersome and to a degree antiquated procedures, commitment to incremental rulemaking, and delay in responding to serious social problems...are impediments to effective regulation, especially of technical subjects.”

Judge Posner by no means suggests that agencies are superior decision makers to courts as a general matter. However, his taxonomy does suggest there are some kinds of law best made by an agency. At least in 2005, antitrust law to Posner qualified as a technical subject, and one that afforded a role for the FTC.

These pragmatic views about the relative strengths and weaknesses of agencies and courts— informed by his own time on the bench—probably contributed to his shifting perspective on the agency. By 2005, he was prepared to say that eliminating the FTC would be “unpragmatic.” And the theoretical flaws that so disturbed Professor Posner in 1969 seemed less urgent to Judge Posner in 2005, who argued that “[o]ne doesn’t urge abolition of an agency because it does not fit into some ideal table of organization.”

---


42 Judicial minimalism, often associated with originalism or textualism, is the theory that judges should merely apply the law mechanically and avoid policy judgments. Posner is critical of “judicial minimalism” and often contrasts it with his pragmatic theory of judging. See, e.g., *Reflections on Judging* 105–31 (2013).

43 Id. at 19.

44 Id. at 20.


46 Id.
Conclusion
Posner’s accounts of the FTC in 1969 and 2005 are not opposites—he was still quite critical in 2005. But there is no doubt that by 2005 some of his hard feelings towards the agency had softened. He identified concrete improvements to personnel and priorities at the agency as the reason for his change of heart. In addition, substantive changes in antitrust law that emphasized consumer welfare and economic analysis probably also further contributed to his optimism in 2005. These changes gave the agency focus and allowed it to make better use of its investigatory and analytical resources. Finally, another reason for the change of attitude had nothing to do with the FTC per se, and everything to do with Posner’s own perspective. In 1969 he was Professor Posner, with a rigorous, yet theoretical, model of human behavior and perhaps an unrealistic view of how courts operate. In 2005 he was Judge Posner, with over two decades on the federal bench. Exposure to judging and the courts led Judge Posner to his pragmatic philosophy of judging, and its acceptance of the good where the perfect is elusive.●