Book Review
Putting Privacy into Context

Chris Hoofnagle
Federal Trade Commission Privacy Law and Policy
Cambridge University Press 2016

Reviewed by Aaron Burstein

The title of Chris Hoofnagle’s *Federal Trade Commission Privacy Law and Policy* radically understates its scope. The book comprehensively explores the FTC’s privacy program, but its singular contribution to the burgeoning literature on the FTC and privacy lies in how it connects the FTC’s privacy program to the agency’s history and broader role in consumer enforcement.

Hoofnagle has been in and around privacy debates for nearly two decades—about as long as the FTC’s privacy enforcement record under Section 5 of the FTC Act—beginning as a staff attorney at the Electronic Privacy Information Center. Hoofnagle is now an adjunct professor at the University of California, Berkeley School of Information and School of Law. His record of scholarship includes empirical studies of identity theft, technical studies of tracking mechanisms on websites, and commentary on economic analyses of privacy. With Professor Daniel Solove, Hoofnagle started the Privacy Law Scholars Conference, the premier venue in the United States for discussing privacy works-in-progress. Hoofnagle is also of counsel to Gunderson Dettmer, LLP, where he counsels companies on consumer privacy issues.

In *FTC Privacy Law and Policy* Hoofnagle approaches his subject with a pronounced point of view. He clearly admires the FTC and comes close to lionizing the agency and its staff. He advocates greater use of economics by the FTC, but he criticizes rational choice theory because it takes an unrealistic view of consumer decision making. Hoofnagle is skeptical of many of the business community’s arguments against privacy regulation as well as arguments in favor of “innovation” in the abstract. In his assessment the FTC is doing its job well but should go further.

Perhaps having one foot in practice and another in academia helped Hoofnagle identify the value to scholars and practitioners of a history of FTC privacy. Hoofnagle devotes nearly 40 percent of the substantive portion of his book—all of Part I—to FTC history, structure, and organization. The result is a richly detailed, thoroughly researched institutional study that begins with the debates over the FTC’s creation and follows the ensuing decades of debate over the appropriate

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1. See Chris Hoofnagle, *Federal Trade Commission Privacy Law and Policy* 146 (2016) (hereinafter Hoofnagle, FTC Privacy Law and Policy) (stating that rational choice theory involves the “assumptions that individuals are the most important decision makers, and that they are informed and empowered to take good decisions to protect privacy”).
2. Id. (stating that “growing psychological and economic research undermines the assertions of rational choice theory”).
3. Id. at 118 (“The FTC could create a privacy rule, but a strong consensus holds that it would be too difficult and it would take too long to do so. Thus, FTC lawyers have pursued a policy-making enforcement agenda. For the foreseeable future, FTC privacy will be a series of complaints and settlement agreements that lawyers must decode when counseling clients.”).
role of government in protecting consumers. Those debates have never really been settled, so much as positions have risen and fallen with political tides. The 2016 election has certainly made fundamental questions of regulatory philosophy salient, but they were part of the day-to-day dynamic within the agency and among FTC practitioners long before then.

Devoting the time and attention to the details of Part I offers three major rewards for practitioners. First, Hoofnagle masterfully distills and concentrates the major steps in the development of the FTC’s consumer protection authority. Hoofnagle draws these details from an impressively diverse and scattered set of primary sources, including FTC reports, legislative materials, and decades of secondary materials. This is a serious work of historical scholarship. A practitioner can find accounts, for example, of how the FTC ended up with its Magnuson-Moss rulemaking authority, or of the events that led to the Unfairness Policy Statement.

A second reason that practitioners should pay attention to the history in Part I is that past events have left a deep mark on the FTC’s culture. Learning about, or re-familiarizing oneself with, reports on the FTC by Ralph Nader and the ABA in the late 1960s, and the “KidVid” controversy of the 1970s, will help shed light on the FTC leadership’s celebration of its incremental, case-by-case approach. An understanding of the FTC’s past should help inform views of how it relates to other agencies—particularly the Federal Communications Commission—that are active on privacy issues.

Finally, the historical portion of Hoofnagle’s book is simply a delight to read. Hoofnagle moves briskly through the legal, legislative, and administrative forces that shaped the FTC over the past century. Seeing this history laid out in a concise and linear fashion is impressive and tells a coherent story. Woven into this history are episodes involving some of the more colorful characters—both defendants and Commissioners—from the past. Readers of this book might feel they are walking among old friends the next time they visit FTC headquarters, where portraits of all but the most recently serving Commissioners adorn the first floor corridors. “Page turner” isn’t a label that fits many histories of federal agencies, but FTC Privacy Law and Policy has earned it.

Moving past the FTC’s founding and early history, Hoofnagle next provides an overview of the agency’s internal organization and procedures and a review of the legal machinery—the doctrines of unfairness and deception—that it uses in most of its privacy (and data security) cases. Hoofnagle argues that Congress deliberately chose these general terms “because business practices and technology were constantly evolving, causing new problems that Congress could not quickly act to remedy.” Hoofnagle defends the FTC against the charge of being “rudderless” or “not strategic” in its Section 5 case selection, noting that the FTC’s “100 years of cases,” the Policy Statement on Unfairness, and the Policy Statement on Deception, provide sufficient guidance for companies and their lawyers. This account not only discusses the political and legal forces that led to the two Policy Statements but also seeks to connect the decades of development in advertising and fraud cases to the younger field of privacy. Specifically, Hoofnagle predicts that the substantiation doctrine—the FTC’s standards for determining whether companies have a “reasonable basis” for factual claims they make in advertisements—will play an increasingly important role as companies offer products and services for which they claim privacy- or security-enhancing benefits.

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4 Id. at 120.
5 Id. at 121.
Having laid the foundations of FTC privacy enforcement and policy in Part I, Hoofnagle turns in Part II to an examination of different branches of the agency’s privacy record. His chapter on online privacy covers the most territory. Drawing on the history established in Part I, Hoofnagle notes that “the privacy cases flow from the Agency’s decades-long experience and precedent in enforcing false advertising cases,” building not only on the law of deception but also looking to self-regulatory standards that can be “tweaked into broader protections.” It took a confluence of events to get these cases flowing: the rise of the commercial Internet, the widespread resistance to adopting privacy policies to avoid making representations that could be the basis of a deception action, advocacy campaigns that aimed to spur the FTC to act, and the need to develop a U.S. response to the European Union’s Data Protection Directive. With a 20-year record of cases to examine, Hoofnagle provides an assessment that weaves together theoretical perspectives and statements of black-letter law. Readers seeking in-depth treatment of either theory or hornbook law will be disappointed, but that is not Hoofnagle’s project. Instead, Hoofnagle wants to illustrate the various forces that have pushed and pulled the FTC’s privacy program over the years, from changes in control of the agency, to technological and business developments that challenge the effectiveness of privacy policies in informing consumers about companies’ personal data practices, to alternative frameworks for regulation and privacy governance within companies (e.g., privacy by design).

Hoofnagle also addresses information security, a topic that complements privacy and is a high consumer protection priority for the FTC. This discussion appropriately emphasizes the importance of the FTC’s unfairness authority—under which the FTC has developed its “reasonable security” standard—to its data security program. Again, Hoofnagle ably explains how this doctrine developed, pulling some of the major lessons from past cases. Payment card breaches were a significant focus of early data security cases, but the FTC has not brought a case involving an actual payment card data breach for several years. The FTC’s attention has shifted to breaches of other kinds of sensitive data and to the discovery of vulnerabilities in devices and services. This trend suggests a few questions that go beyond the discussion in the book. What kinds of information are sensitive enough to give rise to a “substantial injury” to consumers when misused, exposed, or lost? And at what point—if any—does an injury become “likely” before a completed breach and concrete injury to consumers? These questions are at the center of the FTC’s case against LabMD, which is currently under review by the Eleventh Circuit, and the outcome in that case could have profound implications for the FTC’s data security program.

More specialized issues are also discussed: children’s privacy; email marketing; telemarketing; malware; and financial privacy. Many of the cases discussed arise under statutes that address specific practices or technologies, such as the Children’s Online Privacy Protection Act, the Telemarketing Sales Rule, and the Fair Credit Reporting Act. These discussions provide a reminder of how far privacy concerns stretch across the FTC’s jurisdiction. For example, Hoofnagle’s discussion of the Fair Debt Collection Practices Act highlights how issues of financial (and even physical) vulnerability can follow from the ways in which information is collected and used.

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6 Id. at 146.


The FTC's role in privacy extends beyond U.S. borders, and the international privacy activities described by Hoofnagle provide a good point from which to examine the broad challenges and opportunities that lie ahead for the FTC's privacy program. The centerpiece of Hoofnagle's international discussion is the U.S.-EU Safe Harbor Framework, which provided a voluntary, FTC-enforceable structure to allow companies to transfer personal data from Europe. Safe Harbor has been invalidated and replaced since *FTC Privacy Law and Policy* went to press. The replacement, known as the EU-U.S. Privacy Shield, works in much the same way: companies certify that they meet a set of agreed-upon standards, subject to FTC enforcement, and they are presumed to provide personal data protections that are "adequate" under the EU Data Protection Directive. The documents that surround the Privacy Shield principles, and the FTC's own commitments under Privacy Shield, put the FTC in somewhat unfamiliar company. These documents include letters from the Office of the Director of National Intelligence, the Department of Justice, and the State Department, all explaining controls and oversight mechanisms that the United States has in place to regulate how intelligence and law enforcement agencies may obtain personal data. The presence of these statements in a commercial data transfer framework is a sign of the economic importance of privacy protections. It is also a testament to the results and the recognition that the FTC has earned in the international arena. The survival of Privacy Shield may well depend on continuing coordination among these agencies, including the FTC. Specifically, the FTC will need to maintain a delicate balance between working with its federal government partners while keeping its credibility with the European Commission and Member State data protection authorities as an independent regulator.

Another test of the FTC's privacy approach is more clearly foreshadowed in *FTC Privacy Law and Policy*. Hoofnagle asserts that the "FTC simply lacks the resources to cover the privacy and security issues for the entire 21st century economy" and argues that the FTC "should welcome" the involvement of the FCC and other agencies. The FCC's decision in 2015 to reclassify broadband Internet access service as a common carrier service set the stage for the FCC to issue a privacy rule that applies to ISPs, which the FCC did just days before the 2016 election and over the objections of the two Republican Commissioners.

The FTC was less welcoming than Hoofnagle of the FCC's taking a larger role in privacy. The FTC's Acting Chairman, Maureen Ohlhausen, is openly critical of the rule, citing the potential that imposing different rules on ISPs will confuse consumers and favor non-ISPs in the digital economy. The FTC staff also filed a comment on the proposed rule, which criticized substantive inconsistencies between the proposal and FTC law as "not optimal."

Now that the opponents of the privacy rule hold the majority at the FCC, the pendulum is swinging rapidly back to an FTC-style framework. The FCC recently stayed part of the rule while it considers petitions for reconsideration. In connection with the partial stay, FCC Chairman Ajit Pai and FTC Acting Chairman Ohlhausen announced that they "still believe that jurisdiction over broadband providers' privacy and data security practices should be returned to the FTC, the nation's antitrust source www.antitrustsource.com April 2017

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10 HOOFNAGLE, FTC PRIVACY LAW AND POLICY, supra note 1, at 336.
11 Id.
expert agency with respect to these important subjects.”¹³ Exactly what that framework will look like remains to be seen. Part of the difficulty is due to a Ninth Circuit decision that held—in a case unrelated to the FCC’s reclassification of broadband—that the common carrier exception to Section 5 is not limited to common carrier services but rather applies to any entity that provides a common carrier service.¹⁴ This decision casts doubt on whether the FTC could resume its former role as a privacy enforcer for broadband ISPs, even if the FCC removes broadband service from common carrier regulation. In the meantime, Chairman Pai and Acting Chairman Ohlhausen committed to “work together on harmonizing the FCC’s privacy rules for broadband providers with the FTC’s standards for other companies in the digital economy.”¹⁵

Seen in the perspective provided by FTC Privacy Law and Policy, the FTC’s role in the ongoing tussle over the FCC’s privacy rule would seem a welcome reversal in fortune for the FTC. Hoofnagle’s concluding argument on “the need to defend the FTC” notes that “[t]he FTC is under constant attack from the business community” and asserts that “[t]his continuous browbeating is a tactic to weaken the Agency and to blunt its efforts to protect consumers.”¹⁶ During the FCC’s rulemaking, however, the FTC’s privacy framework became the flexible, innovation-friendly counterpoint to the FCC’s proposal.

This favorable attention is unlikely to be permanent or to lead to broader support for the FTC to expand its more controversial privacy actions and policy initiatives of the past few years, but the fact that the FTC has received such attention serves as recognition that it has developed a sustainable privacy program. Hoofnagle’s proposals to push the FTC privacy enforcement into closer alignment with more abstract conceptions of privacy seem to face slim odds in the near term. Through its involvement in issues like Privacy Shield and the FCC’s privacy rules, however, the FTC may end up strengthening its role among federal agencies. These issues are also politically charged. The substantive expertise and political sense that the FTC has developed in the course of its privacy program—and its much longer history as a consumer protection agency—should help the agency to navigate these challenges. Anyone looking to get up to speed on this history would be well served by starting with FTC Law and Policy.


¹⁴ See FTC v. AT&T Mobility LLC, 835 F.3d 993, 998 (“We conclude, based on the language and structure of the FTC Act, that the common carrier exception is a status-based exemption and that AT&T, as a common carrier, is not covered by section 5.”).

¹⁵ Ohlhausen and Pai Joint Statement, supra note 12.

¹⁶ HOOFNAGLE, FTC PRIVACY LAW AND POLICY, supra note 1, at 351.