



**United States of America
Federal Trade Commission**

**Free Markets, Regulation, and Legislation:
A Place for Everything, and Everything in Its Place**

Christine S. Wilson*
Commissioner, U.S. Federal Trade Commission

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisors, Thomas Klotz and Robin Rosen Spector, for assisting in the preparation of these remarks.

Good morning. I am delighted to be here for this Twelfth Annual Telecom Policy Conference. The topic of this year's conference, Broadband Beyond 2020: Competition, Freedom and Privacy, is timely. But of course, the issues of competition, freedom, and privacy are of perennial importance.

In October 2019 I gave a talk in Brazil on free enterprise, free markets, and free people. Under President Bolsonaro, Brazil is throwing off its yoke of socialism and moving rapidly toward privatization and deregulation of its economy. This trend has been welcomed by the Brazilian people, and in particular by Brazilian small business owners, who now have the freedom to decide their own hours of operation and to set their own prices for the goods and services they offer. But these developments abroad stand in marked contrast to trends here at home, when 43% of our population professes support for socialism and one of the Democrat front runners for the presidency is a self-avowed Democratic Socialist. In light of these competing trends, the issue of how best to organize our economy is top of mind in the public debate.

Spoiler alert — I'm a big proponent of free markets and competition. I support wholeheartedly the Free State Foundation's mission "to promote, through research and educational activities, understanding of free market, limited government, and rule of law principles . . . to advocate laws and policies true to these principles." In keeping with this theme, my remarks today will begin with the benefits of free markets, competition, and deregulation. Next, I will discuss the restoration of the FTC's jurisdiction over broadband, where competition laws, and not regulations, now appropriately provide the primary safeguards for consumers. And finally, I will turn to privacy and discuss the market imperfections and other imperatives that I believe drive the need for federal privacy legislation.

Before I begin, I must give the standard disclaimer: The views I express today are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Benefits of Free Markets

Ever since I traveled behind the Iron Curtain in 1984, and saw the misery and deprivation imposed by command and control economies, I have been an avid proponent of free markets. Competitive markets ensure that resources are allocated to their highest valued uses and create the greatest benefits for consumers. Government intervention, in contrast, causes distortions of market forces that can create inefficiencies. Heavy-handed regulatory regimes designed to benefit consumers can, ironically, harm them greatly.

Two examples from our nation's history illustrate the danger. Begun with the best of intentions, extensive regulation of railroads and airlines inhibited innovation, protected rivals at the expense of consumers, and kept prices high. It's worth taking a moment to walk down Memory Lane at a time when proponents of elaborate regulatory regimes — for industries ranging from Big Tech to healthcare — abound. As George Santayana said, “[t]hose who cannot remember the past are condemned to repeat it.”

First, let's talk about railroads. To address the concerns of dissatisfied shippers, Congress created the Interstate Commerce Commission and required railroads to charge rates that were “reasonable and just.”¹ Over time, when new forms of transportation began to compete with the railroads, like trucking and barges, Congress granted the ICC the authority to regulate most of

¹ Pub. L. 49-104, 24 Stat. 379, § 1 (1887) (“All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.”).

them, as well.² Unfortunately, the ICC's regulatory efforts worked against consumers. In the 1950s and 1960s, U.S. railroads introduced innovations, like new kinds of train cars, that reduced their operating costs significantly. Consequently, the railroads wanted to reduce their prices to reflect their lower costs, but they had to petition the ICC for approval. In several famous cases, the ICC denied the attempts of the railroads to reduce their prices.³ The rationale? The ICC was attempting to protect a competing but less efficient form of transportation – barges.⁴ The ICC's refusal to reduce shipping rates is particularly ironic because, as I mentioned, the ICC was created and designed to protect shippers.

The story of airline regulation in the United States is much the same. In 1938, Congress created a special regulator just for airlines; the Civil Aeronautics Board was born. Like the ICC, the CAB was directed to place other “public interest” values ahead of competition.

Unfortunately, that regulatory structure served to limit output. For instance, once one airline served a given route, such as Chicago to Memphis, the CAB typically refused to allow any other carriers to fly the same route on the grounds that the competition was not necessary to develop that route.⁵ Even when multiple airlines were allowed to compete on the same route, the CAB rarely allowed the carriers to cut their prices and the carriers rarely asked.⁶ These high prices depressed demand, and airlines often flew planes that were less than 60 percent full.⁷

² See, e.g., Motor Carrier Act of 1935, 74 Cong. Ch. 498, 49 Stat. 543 (1935).

³ See Christine S. Wilson, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech, Address at the British Institute of International and Comparative Law, London, UK, June 28, 2019, at 9, https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiicl_6-28-19.pdf (discussing the *Big John* and *Ingot Molds* cases).

⁴ *Id.*

⁵ See Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Board*, 41 J. AIR L. & COM. 607, 614-15 (1975) (reprinting the Summary of Report of the Senate Subcommittee on Administrative Practice and Procedure) (describing how “entry into the industry has been effectively blocked” by the CAB’s route entry policy).

⁶ ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 210-11 (1971, reprinted 1988).

⁷ *Id.* at 212 (citing RONALD E. MILLER, *DOMESTIC AIRLINE EFFICIENCY: AN APPLICATION OF LINEAR PROGRAMMING* 108-114 (1963)).

Consequences for consumers are even more dire when government pushes business out of the market entirely. Bureaucrats simply cannot gather and assess all of the information it takes for markets to run efficiently, and cannot swiftly adjust their plans to reflect new data as it becomes available. Consider comparator countries in which one country has replaced free markets with command and control. As of the year 2000, the average life expectancy for men in South Korea is 8.1 years longer than for men in North Korea, and the average life expectancy for women in South Korea is 11.2 years longer than for women in North Korea.⁸ Similarly, even 30 years after the fall of the Berlin Wall, people in the former East Germany earn 86 percent of the after-tax income of their West German counterparts, East German per capita GDP is 75 percent of West German per capita GDP, and Germans in both regions say living standards in the former East Germany have not caught up with those in the former West Germany.⁹

Against this backdrop, it becomes clear that limited government intervention in the market creates significant benefits for consumers. Given not only the experience of the United States, but the compelling examples of other countries around the world during the 20th and 21st centuries, I strongly support President Trump's deregulatory agenda. In particular, I applaud his Executive Order requiring that, for every new regulation created, two must be eliminated.¹⁰ This reform has helped significantly slow the growth of new federal regulations. One study shows that the federal government under President Trump is issuing roughly *half* as many new regulations as it did under President Obama.¹¹ Consider one rough measure of the magnitude of

⁸ See H.J. Kim, Y.S. Ahn, & S.G. Lee, *Health Development Experience in North and South Korea*, 13 Asia Pac. J. Public Health S51 (2001).

⁹ See John Gramlich, *East Germany has narrowed economic gap with West Germany since fall of communism, but still lags*, Pew Research Center FactTank (Nov. 6, 2019), <https://www.pewresearch.org/fact-tank/2019/11/06/east-germany-has-narrowed-economic-gap-with-west-germany-since-fall-of-communism-but-still-lags/>.

¹⁰ Executive Order 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

¹¹ Susan E. Dudley, Geo. Wash. Univ. Regulatory Studies Center, *A Two-Year Lookback on Trump's Deregulatory Record*, July 15, 2019, <https://regulatorystudies.columbian.gwu.edu/two-year-lookback-trump's-deregulatory-record>

regulations. In the United States, all regulations are contained in the U.S. Code of Federal Regulations (CFR). At the end of President Reagan's second term, the CFR ran to 122,000 pages. At the end of President Obama's second term, it had reached a staggering 186,000 pages. In 2018, President Trump succeeded in *reducing* the length of the CFR.¹²

I am pleased that the FTC has contributed to this laudable trend. In recent years, the FTC has rescinded several Rules and Guides.¹³ Some of these efforts stem from the FTC's longstanding practice of conducting regular review of its Rules and Guides on a rotating basis. These systematic reviews are thorough: we seek comment on whether regulations remain necessary; their costs and benefits to businesses and consumers; and the effect, if any, that changes in relevant technological, economic or environmental conditions should have on them. The Commission seeks to be receptive and responsive to comments from stakeholders, often making regulatory revisions to address changing market forces.

I support these deregulatory efforts but believe the Commission can and should do more. In my time as a Commissioner, several of my dissents have highlighted misguided attempts to expand regulatory constraints¹⁴ or missed opportunities to roll back needlessly prescriptive

¹² Geo. Wash. Univ. Regulatory Studies Center, Reg Stats, <https://regulatorystudies.columbian.gwu.edu/reg-stats>. The FTC repealed the Picture Tube Rule, which the Commission determined was no longer necessary to prevent deceptive claims regarding the size of television screens. <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21803.pdf>. The FTC revised the Jewelry Guides, removing outdated provisions as well as lifting restrictions that required marketers of man-made gemstones to use only certain specified labels to describe the stones. https://www.ftc.gov/system/files/documents/public_statements/1393857/g71001_jewelry_guides_statement_of_basis_and_purpose_final_8-8-18.pdf, 94-95. And, just last year, the FTC rescinded the Nursery Guides, rules governing the sale of outdoor plants, because they served little purpose for industry or consumers. <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-approves-proposal-rescinding-nursery-guides>.

¹⁴ See Separate Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part Concerning FTC v. Avant, LLC (April 15, 2019), <https://www.ftc.gov/public-statements/2019/04/separate-statement-commissioner-christine-s-wilson-concurring-part>; Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson – Regulatory Review of Safeguards Rule (March 5, 2019), <https://www.ftc.gov/public-statements/2019/03/regulatory-review-safeguards-rule-dissenting-statement-commissioner-noah>; see also Concurring Statement of Commissioner Christine S. Wilson and Commissioner Noah Joshua Phillips (Feb. 28, 2020) (Public Workshop Examining Information Security for Financial Institutions and

obligations.¹⁵ I will continue to work with the FTC staff and my colleagues at the Commission on a deregulatory agenda.

Consistent with my dim view of regulations, and of interest to this audience, I applaud the repeal of the Open Internet Order and the passage of the Restoring Internet Freedom Order. The histories of the ICC and CAB foreshadow the beneficial results following elimination of net neutrality. For example, following numerous blunders, the rail and trucking industries were significantly deregulated starting in the late 1970s, and the ICC was disbanded entirely in 1996. As a result, railroads optimized their networks. They pared unproductive routes and reduced labor costs, increasing efficiency markedly on their remaining routes.¹⁶ Rail rates eventually fell across the board,¹⁷ and declines were particularly steep for bulk commodities like grain, lumber, and coal that could be moved much more effectively using methods that ICC regulations had previously discouraged.¹⁸

Information Related to Changes to the Safeguards Rule), <https://www.ftc.gov/public-statements/2020/02/concurring-statement-commissioners-christine-s-wilson-noah-joshua-phillips>.

¹⁵ See Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018), <https://www.ftc.gov/public-statements/2018/12/dissenting-statement-commissioner-christine-s-wilson-notice-proposed>.

¹⁶ James M. MacDonald & Linda C. Cavalluzzo, *Railroad Deregulation: Pricing Reforms, Shipper Responses, and the Effects on Labor*, 50 ILR REV. 80, 90 (1996) (concluding that because of deregulation, “shippers switched to low-cost methods of transport, productivity measures grew sharply, shipping rates fell, and carrier profits grew”).

¹⁷ Wesley W. Wilson, *Market-Specific Effects of Rail Deregulation*, 42 J. INDUS. ECON. 1, 20 (1994) (“The evidence suggests that the majority of commodities prices initially rose under deregulation, reflecting greater market power and modest cost savings. By 1988, however, deregulation produced lower prices in most commodity classifications and did not increase prices in other classifications, suggesting that advances in productivity have dominated any adverse market power effects. . . . With price decreases and cost savings from deregulation, welfare gains from deregulation are likely positive.”).

¹⁸ See James M. MacDonald & Linda C. Cavalluzzo, *supra* note 15, at 83 (“Railroads moved aggressively in the post-Staggers era to offer volume discounts, and particularly large discounts to unit trains, to shippers of ‘bulk’ products, such as grain, lumber, coal, and other minerals. Because shippers must invest in specialized loading and storage facilities for unit trains, they will not do so without lower rates or improved services.”); RICHARD D. STONE, *THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY*, at 52 (1991) (“Other ICC rate policies forced the railroads to postpone the use of unit trains (a whole trainload of cars permanently coupled and shuttling back and forth from producer to consumer – most frequently from coal mines to power plants) in the East for years.”).

Perhaps not surprisingly, a similar result arose for the CAB and the airline industry. When the public could no longer bear the inefficiencies created by the CAB, President Carter appointed Alfred Kahn as CAB Chairman and Kahn pushed for radical deregulation. With the passage of the Airline Deregulation Act of 1978,¹⁹ supported by Democrats and Republicans alike, the CAB ceased to exist.²⁰ Following elimination of the CAB, air travel prices fell and output increased. By 1990, twelve years after deregulation, economists estimated that airline deregulation was already increasing U.S. consumer surplus by more than \$6 billion *per year*, which is \$20 billion annually in 2019 dollars.²¹

Consistent with the effects of deregulation in other industries, the repeal of net neutrality regulation has already proven to be a boon for businesses and consumers. After falling in 2015 and 2016, the FCC reports that broadband investment increased by \$1.5 billion in 2017 and \$3 billion 2018.²² Since the FCC adopted its Restoring Internet Freedom Order in December 2017,

¹⁹ Pub. L. 95-504, 92 Stat. 1705 (1978).

²⁰ See, e.g., Bradley Behrman, *Civil Aeronautics Board*, in *THE POLITICS OF REGULATION* 75 (James Q. Wilson ed., 1980) (“Few regulatory agencies – if any – have ever altered their policies as rapidly or radically as did the Civil Aeronautics Board (CAB) between 1974 and 1978.”).

²¹ Steven A. Morrison & Clifford Winston, *The Dynamics of Airline Pricing and Competition*, 80 *AM. ECON. REV.* 389, 390 (1990) (“On average, deregulated fares are lower than regulated fares by 18 percent, amounting to an average annual savings to travelers of roughly \$6 billion (1988 dollars).”).

²² See U.S. Broadband Capex Growth Propels Deployment (July 31, 2019), <https://www.ustelecom.org/u-s-broadband-capex-growth-propels-deployment/>; see also Remarks of FCC Chairman Ajit Pai at the Hawaii International Conference on Science Systems (Jan. 10, 2020), <https://www.fcc.gov/document/chairman-pai-remarks-digital-divide-hawaii> (explaining that “by almost every meaningful metric, America’s broadband networks have been expanding and improving”); Statement of Chairman Ajit Pai, Federal Communications Commission, Hearing on Oversight of the Federal Communications Commission, U.S. Senate Commerce Committee on Commerce, Science and Transportation (Aug. 16, 2018), <https://www.fcc.gov/document/fcc-chairman-pai-remarks-restoring-internet-freedom>; <https://www.fcc.gov/document/chairman-pai-testimony-senate-commerce-committee> (noting that in the 67 days since the repeal of the utility-style Internet regulations, a Vermont company committed \$4 million to purchase equipment and services to upgrade its systems and the FCC commitment to provide up to \$2 billion over the next decade to bring broadband to unserved areas); Remarks of Chairman Ajit Pai on Restoring Internet Freedom (Nov. 2017), <https://www.fcc.gov/document/fcc-chairman-pai-remarks-restoring-internet-freedom> (discussing that when the Open Internet Order was in place broadband network investment declined by \$3.6 billion in two years).

mobile Internet speeds have increased 51% and fixed broadband up 70%.²³ In addition, Internet providers have built more than 400,000 route miles of fiber in 2019 – a new annual record and enough to wrap around the Earth 18 times.²⁴ There is no question that consumers have benefitted from the repeal of this heavy-handed regulatory regime.

II. Application of Competition and Consumer Protection Principles to Net Neutrality Concerns

The repeal of the Open Internet Order returned to the FTC jurisdiction over broadband services, the second topic I will discuss today. As many of you know, the FTC Act exempts common carriers from the scope of the FTC’s authority. But the Ninth Circuit confirmed in an *en banc* decision in 2018 that common carriers can be subject to FTC enforcement for non-common carrier activities.²⁵ This decision, in conjunction with the Restoring Internet Freedom Order, makes it clear that the FTC has authority to protect consumers when internet service providers (ISPs) offer non-common carrier services like cable and video.

Before the Open Internet Order was implemented, the FTC used its authority under Section 5 of the FTC Act to investigate and bring enforcement actions against ISPs and other entities for anticompetitive conduct and unfair or deceptive practices. Now that the Open Internet Order has been repealed, the FTC is once again on the lookout for conduct that harms consumers in this arena. The replacement of the FCC’s extensive regulatory framework with the FTC’s broad and flexible Section 5 principles will protect consumers while also facilitating investment and innovation.

²³ Compare Ookla SPEEDTEST <https://www.speedtest.net/global-index/united-states#fixed>; with past Ookla SPEEDTEST <https://web.archive.org/web/20170812155126/https://www.speedtest.net/global-index/united-states>.

²⁴ See Fiber Broadband Association Research (Dec. 2019), <https://www.fiberbroadband.org/blog/fiber-broadband-association-research-shows-record-fiber-broadband-growth-in-north-america>

²⁵ FTC v. AT&T Mobility LLC, 883 F.3d 848, 863-64 (9th Cir. 2018).

Section 5 of the FTC Act prohibits unfair methods of competition. Its scope is viewed as roughly coterminous with the Sherman Act, our country's main antitrust law. Through the competition provisions of Section 5, the FTC can effectively address the types of conduct that have concerned net neutrality advocates. Although the Commission has not specifically challenged ISPs regarding these practices, it has sued companies for foreclosing rival content in an exclusionary or predatory manner.²⁶ The Commission also has challenged anticompetitive access,²⁷ discrimination,²⁸ pricing,²⁹ and bundling practices.³⁰ In addition, the FTC investigates whether vertical mergers would foreclose competition in upstream or downstream markets,³¹ and, where appropriate, imposes obligations to maintain competition post-merger.³²

To address these types of practices in the technology space, the Commission is actively strengthening its existing expertise in technology and broadband markets. A year ago, the Commission launched a Technology Task Force, which has now become a permanent division

²⁶ See, e.g., Realcomp II Ltd., FTC File No. 061-0088, <https://www.ftc.gov/enforcement/cases-proceedings/061-0088/realcomp-ii-ltd-matter> (challenging conduct and issuing order that forbids real estate multiple listing service from discriminating against listings from discount real estate brokers when transmitting listing information to websites).

²⁷ See, e.g., McWane, Inc., and Star Pipe Products, Ltd, FTC File No. 101-0080b, <https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter> (order prohibiting exclusive dealing policy that prevented distributors from purchasing from new competitor).

²⁸ See, e.g., America Online, Inc. and Time Warner Inc., FTC File No. 001-0105, <https://www.ftc.gov/enforcement/cases-proceedings/0010105/america-online-inc-time-warner-inc>. (imposing conditions to permit merger that included prohibiting discrimination on basis of affiliation with merged firm in the transmission of content).

²⁹ See, e.g., Polygram Holding, Inc.; Decca Music Group Limited; UMG Recordings, Inc.; and Universal Music & Video Distribution Corp. (Three Tenors), FTC File No. 001-0231, <https://www.ftc.gov/enforcement/cases-proceedings/0010231/polygram-holding-inc-decca-music-group-limited-umg-recordings> (issuing order prohibiting agreements not to discount).

³⁰ See, e.g., Toys R Us, Inc. FTC File No. 091-0082, <https://www.ftc.gov/enforcement/cases-proceedings/091-0082/toys-r-us-inc>. (issuing order that included prohibition of vertical agreements requiring sales of bundled products when selling to competitors).

³¹ See, e.g., Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson, Sycamore Partners II, L.P., No. 181-0180, Jan. 28, 2019

³² See, e.g., General Electric Company, FTC File No. 131-0069, <https://www.ftc.gov/enforcement/cases-proceedings/131-0069/general-electric-company-matter>.

within the Bureau of Competition. The Technology Enforcement Division is comprised of antitrust attorneys and technologists charged with monitoring U.S. technology markets, including the internet ecosystem. I can assure you that they are incredibly busy.

We've touched on competition; let's turn to consumer protection. Section 5 of the FTC Act also prohibits unfair or deceptive acts or practices. Using this consumer protection authority, the FTC has addressed a variety of unlawful practices undertaken by ISPs. Our enforcement actions have addressed misleading representations, throttling, blocking, and privacy and data security practices. For example, the FTC settled charges brought against AT&T in 2014 alleging that the carrier promised consumers unlimited data but then reduced speeds – in some instances by nearly 90% — for those with unlimited data plans.³³ AT&T must pay \$60 million to consumers harmed by these practices. The FTC also addressed throttling practices in an enforcement action against TracFone Wireless, Inc.³⁴ There, we challenged deceptive advertising that promised unlimited data to consumers but failed to disclose that TracFone slowed service by 60 to 90 percent after users exceeded certain data thresholds. The FTC reached a settlement with the company that included injunctive relief and \$40 million in consumer redress.

We have also challenged unfair privacy and security practices by ISPs. In one action, we alleged that an ISP engaged in unfair practices through distribution of spam, child pornography, malware, and other harmful electronic content.³⁵ In addition, we have brought cases against two

³³ FTC v. AT&T Mobility, LLC, No. 14-cv-4785-EMC (N.D. Cal. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service>.

³⁴ FTC v. TracFone Wireless, Inc., No. 15-cv-392 EMC (N.D. Cal. Feb. 20, 2015) (consent order), <https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc>.

³⁵ FTC v. Pricewert LLC, et al., No. 09-CV-2407 (N.D. Cal. 2010), <https://www.ftc.gov/enforcement/cases-proceedings/092-3148/pricewert-llc-dba-3fnnet-ftc>. We also investigated Verizon Communication for unreasonably failing to secure its routers and issued a closing letter in 2014. Closing Letter to Dana Rosenfeld, Counsel for

ISPs under the Fair Credit Reporting Act alleging that they imposed less favorable terms on consumers who had negative information on their credit reports, without providing the notices required by law. We obtained a \$1.9 million civil penalty against Time Warner and a \$2.95 million penalty against Sprint.³⁶ And, finally, we have launched a study of Internet broadband providers and related entities to examine how the companies collect, retain, use, and disclose information about consumers and their devices.³⁷

When the Open Internet Order was repealed, many were concerned that competition and consumers would suffer. (There were also dire predictions of near-apocalyptic proportions that, needless to say, have not come to pass.) I can assure you that the FTC is closely monitoring this arena for both competition and consumer protection practices that could violate Section 5. And we will not hesitate to investigate and bring law enforcement actions where appropriate.

III. Privacy Legislation

Although I am a proponent of free markets, I fully recognize that markets do not always function perfectly. Sometimes issues arise because companies engage in conduct prohibited under the antitrust laws, and sometimes issues arise because companies make false or misleading statements. In these one-off instances, law enforcement on a case-by-case basis is appropriate. The business practices of ISPs, which we just discussed, provide a good example of this category.

Verizon Communications, Inc. (Nov. 12, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/verizon-communications-inc>.

³⁶ U.S. v. Time Warner Cable, Inc., No. 122-3149 (S.D.N.Y. 2013); <https://www.ftc.gov/enforcement/cases-proceedings/122-3149/time-warner-cable-inc>; U.S. v. Sprint Corp., No. 2:15-cv-9340 (D. Kansas 2015), <https://www.ftc.gov/enforcement/cases-proceedings/142-3094/sprint-corporation-sprint-asl-program-0>.

³⁷ Press Release, FTC Seeks to Examine the Privacy Practices of Broadband Providers (March 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers>

But in other cases, markets may function imperfectly because of systemic issues. For example, markets do not operate efficiently when consumers lack information about key characteristics of goods and services — in other words, when information asymmetries exist. And markets may also be characterized by inefficiencies when the costs and benefits of a product are not fully borne by its producer and consumers – in other words, when a product creates what economists call externalities.³⁸ I believe both of these market shortcomings arise in the areas of privacy and data security. In the language of economists, both information asymmetries and the presence of externalities lead to inefficient outcomes with regard to privacy and data security. Consequently, even though I have great faith in markets, I have come to believe that federal privacy and data security legislation is necessary. I will focus on privacy for the remainder of these remarks.

Companies have relatively complete information about the characteristics of the goods and services they offer. In a competitive market, competition drives sellers to provide truthful and useful information about their products to consumers.³⁹ Moreover, competition drives companies to fulfill promises to consumers about price, quality, and other material terms.⁴⁰ Dissatisfied buyers can vote with their feet and wallets and go elsewhere.

In the absence of perfect information, though, consumers cannot accurately evaluate the quality and value of those offerings. Numerous studies have analyzed information asymmetries with regard to the privacy characteristics of various products and services.⁴¹ Simply put,

³⁸ ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS 317, 626 (8th ed. 2017).

³⁹ Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. ECON. 502 (1981) (“[S]ellers have a substantial economic incentive to disseminate information to consumers.”).

⁴⁰ J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2163-64 (2015).

⁴¹ See JOSEPH TUROW ET AL., U. PA. ANNENBERG SCH. FOR COMM., THE TRADEOFF FALLACY: HOW MARKETERS ARE MISREPRESENTING AMERICAN CONSUMERS AND OPENING THEM UP TO EXPLOITATION 16 (2015),

consumers do not understand how their data are collected, maintained, and used.⁴² And many consumers lack a basic understanding of the privacy settings available for these products.

Many commentators contend that there is a privacy paradox – that is, an inconsistency between consumers’ expressed preferences and their actual behavior when it comes to privacy.⁴³ These commentators assert that while consumers *say* they value privacy, they readily give it away – so consumers must not be concerned about privacy practices.⁴⁴ I disagree. A growing body of research indicates that information asymmetry and privacy resignation explain the so-called privacy paradox.⁴⁵ I’ll touch on each of these concepts in turn.

As we’ve discussed, the first concept — that of information asymmetry — makes clear that if users do not understand the privacy characteristics of products and services, they cannot make informed decisions about their quality and value. The second concept, that of privacy

https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf; see also, Ginger Zhe Jin & Andrew Stivers, *Protecting Consumers in Privacy and Data Security: A Perspective of Information Economics* 6 (2017), <https://ssrn.com/abstract=3006172> (arguing that a consumer is dependent on the representations made by companies or their vendors because he or she is not in a position to review and assess the privacy policies and actual practices of each company in the opaque networks of entities supporting the consumer’s digital interactions).

⁴² See, e.g., Nathan Malkin et al., *Privacy Attitudes of Smart Speaker Users*, 2019 PROC. PRIVACY ENHANCING TECH. 250, 251 (2019), <https://petsymposium.org/2019/files/papers/issue4/popets-2019-0068.pdf>. A 2014 study conducted by Pew Research found that a majority of Americans (incorrectly) believe that when a company posts a privacy policy, it ensures that the company will not share user data. Aaron Smith, *What Internet Users Know about Technology and the Web*, PEW RESEARCH CTR. (Nov. 25, 2014), <https://www.pewresearch.org/internet/2014/11/25/web-iq/>. Similarly, a 2015 study conducted by researchers at the University of Pennsylvania’s Annenberg School of Communication found that 58% of respondents incorrectly believed and 7% responded “don’t know” to the prompt: “If a website has a privacy policy, it means that the site cannot share information about you with other companies, unless you give the website your permission.” JOSEPH TUROW ET AL., U. PA. ANNENBERG SCH. FOR COMM., *THE TRADEOFF FALLACY: HOW MARKETERS ARE MISREPRESENTING AMERICAN CONSUMERS AND OPENING THEM UP TO EXPLOITATION* 16 (2015), https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf.

⁴³ See Susanne Barth & Menno D.T. de Jong, *The Privacy Paradox – Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behavior – A Systematic Literature Review*, 34 *TELEMATICS & INFORMATICS* 1039-40 (2017); Susan Athey et al., *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk* 17 (Nat’l Bureau of Econ. Research, Working Paper No. 23488, 2017); Luvai F. Motiwalla & Xiao-Bai Li, *Unveiling Consumer’s Privacy Paradox Behavior in an Economic Exchange*, 23 *INT’L J. BUS. INFO. SYS.* 307-29 (2016).

⁴⁴ *Id.*

⁴⁵ Barth and de Jong, *supra* note 43, at 1046, 1049; see also Jorge Padilla, *Privacy and Consumer Coercion: A Review of Economics Literature* 2 (2019) (on file with author).

resignation, reflects the notion that consumers rationally choose to forego expending significant time and effort protecting personal information.⁴⁶ As we all know, it is extremely cumbersome to manage online personal data. For example, a recent article noted that some mobile apps ask users for over two hundred permissions and even the average app asks for about five.⁴⁷ Another article describing a study of smart speakers noted that manually reviewing and deleting thousands of recordings of smart speaker interactions presents an undue burden for users.⁴⁸ Moreover, data breaches routinely expose sensitive consumer data.⁴⁹ Together, these two concepts of information asymmetry and privacy resignation explain the privacy paradox and defy the notion that consumers do not value their privacy.

The bottom line: markets function inefficiently when consumers face significant information asymmetries, including incomplete information about product features and quality.⁵⁰ In the face of documented market failures, government intervention may help protect consumers. This is the situation we face in privacy today. Consumers' data is collected, maintained, shared, and monetized in ways that consumers cannot see and cannot avoid. As demonstrated by the FTC's robust enforcement program, some of these practices cause harm. A privacy law can provide needed transparency so that consumers can begin to make informed choices.

⁴⁶ Hanbyul Choi et al., *The Role Of Privacy Fatigue In Online Privacy Behavior*, 81 COMPUTERS HUM. BEHAV. 42 (2018) (explaining that the “increasing difficulty in managing one’s online personal data leads to individuals feeling a loss of control” and that “[f]requent data breaches may make people feel as though they have no control over personal information, and ultimately drive them into a state of resignation about online privacy.”).

⁴⁷ Woodrow Hartzog & Neil Richards, *Privacy’s Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1, 53 (forthcoming 2020) (citations omitted).

⁴⁸ Nathan Malkin et al., *Privacy Attitudes of Smart Speaker Users*, 2019 PROC. PRIVACY ENHANCING TECH. 250, 262 (2019), <https://petsymposium.org/2019/files/papers/issue4/popets-2019-0068.pdf>.

⁴⁹ Rae Hodge, *2019 Data Breach Hall of Shame: These Were the Biggest Data Breaches of the Year*, CNET (Dec. 27, 2019), <https://www.cnet.com/news/2019-data-breach-hall-of-shame-these-were-the-biggest-data-breaches-of-the-year/>. The article does not mention headline-grabbing data breaches at Waze, Wawa, 7-11, T-Mobile, Quest Diagnostic, Flipboard, Dunkin Donuts, and Ascension.

⁵⁰ PINDYCK, *supra* note 38, at 625-26, 631-56.

Information asymmetry is one important reason for privacy legislation but there are others, including predictability and guidance for businesses. On the domestic front, businesses need clarity and certainty regarding privacy rules of the road. CCPA became effective on January 1, 2020,⁵¹ and other states are seeking to pass their own privacy laws, creating an emerging patchwork of regulatory frameworks.⁵² The result? Burdensome compliance costs and constrained interoperability that undercut the ability of U.S. companies to compete globally. Federal privacy legislation could help avoid this unnecessary burden on businesses while simultaneously providing appropriate protections for consumers.

Privacy legislation also could address the emerging gaps in sector-specific approaches to privacy laws created by evolving technologies. For example, the Health Insurance Portability and Accountability Act (“HIPAA”) applies to certain doctors’ offices, hospitals, and insurance companies, but not generally to cash practices, wearables, apps, or websites like WebMD.⁵³ But sensitive medical information is no longer mostly housed in practitioners’ offices. Your phone and watch now collect information about your blood sugar, your exercise habits, your fertility, and your heart health. Because data is ubiquitous, we need a comprehensive federal privacy law.

⁵¹ Cal. Civ. Code §§ 1798.100-1798.199 (West 2020).

⁵² The National Council of State Legislatures found that privacy bills or bill drafts were introduced or filed in at least 25 states and in Puerto Rico in 2019. Nat’l Council of State Legislatures, *2019 Consumer Data Privacy Legislation* (Jan. 3, 2020), <https://www.ncsl.org/research/telecommunications-and-information-technology/consumer-data-privacy.aspx>; see also Michael Beckerman, *Americans Will Pay a Price for State Privacy Laws: The Modern Data Economy Is Too Big to Regulate at the State Level*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/opinion/state-privacy-laws.html> (“Fourteen states have considered legislation on internet service providers. Twenty-five states and Puerto Rico have considered legislation focused on various aspects of consumer data. All 50 states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands and even some municipalities have their own laws about how to respond to data breaches. All of those laws are subject to change. In 2019, states considered at least 21 measures to amend data breach laws. Over 150 pieces of legislation on consumer data have been considered, and five states passed bills mandating privacy studies to inform future legislation.”).

⁵³ The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d.

On the international front, GDPR came into effect in May 2018.⁵⁴ Some countries are now adopting various GDPR provisions.⁵⁵ Others are striking out on their own.⁵⁶ This growing number of diverging privacy regimes will create incremental hurdles to efficient cross-border data flows. Global data flows have transformed international trade by establishing digital platforms to export goods, improving efficiency and increasing productivity, reducing barriers to market entry, allowing businesses (including small enterprises) to reach vastly larger markets, and improving global value chains. Consistency among regulatory frameworks reduces company costs, promotes international competitiveness, and increases compliance with privacy standards.⁵⁷ Accordingly, a comprehensive U.S. privacy law that enacts a single privacy standard could facilitate global interoperability, helping to bridge the differences between U.S. and foreign privacy regimes.

Having discussed why a free-marketeer like me supports federal privacy legislation, I'd like to highlight the principles and elements I hope to see in a privacy law. Of course, I recognize that the appropriate contours and contents of privacy legislation pose complicated

⁵⁴ General Data Protection Regulation (EU) 2016/679, 2016 O.J. (L119/1).

⁵⁵ For example, Thailand's Personal Data Protection Act takes effect on May 27, 2020. Chusert Supasitthumrong, *The Reach and Liabilities of the Personal Data Protection Act*, BANGKOK POST (Sept. 3, 2019), <https://www.bangkokpost.com/business/1741919/the-reach-and-liabilities-of-the-personal-data-protection-act>. Brazil's legislature passed the General Data Protection Law, which is scheduled to take effect in 2020. Bruno Bioni et al., Int'l Ass'n of Privacy Prof'ls, *GDPR Matchup: Brazil's General Data Protection Law*, IAPP (Oct. 4, 2018), <https://iapp.org/news/a/gdpr-matchup-brazils-general-data-protection-law/>. Argentina, too, is considering amendments to its Personal Data Protection Law. Diego Fernandez, Int'l Ass'n of Privacy Prof'ls, *Argentina's New Bill on Personal Data Protection*, IAPP (Oct. 2, 2018), <https://iapp.org/news/a/argentinas-new-bill-on-personal-data-protection/>.

⁵⁶ Personal Data Protection Act 2012 (No. 26 of 2012) (Sing.), <https://sso.agc.gov.sg/Act/PDPA2012#PIIV-;> Personal Information Protection and Electronic Documents Act (PIPEDA), S.C. 2000, c.5 (Can.), <https://laws-lois.justice.gc.ca/eng/acts/P-8.6/page-1.html>.

⁵⁷ FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 9-10 (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

questions. Consequently, the value judgments around privacy are best left to elected officials entrusted by the American public to make those calls.

But many of us would agree that we have identified principles to guide our approach to privacy legislation. Perhaps most notably, **privacy legislation should incorporate the United States’ traditional harm-focused, risk-based approach to privacy protections.** In its privacy enforcement cases, the FTC has alleged several categories of injuries including physical injury, financial injury, reputational injury, and unwanted intrusion.⁵⁸

Another area of mainstream consensus involves accountability. **Legislation should require accountability for both privacy and data security practices on the part of entities that handle data.** An accountable organization is one that can demonstrate that it has effective internal processes in place to comply with its legal and regulatory obligations. The Centre for Information Policy Leadership (CIPL) has identified elements of organizational accountability: (i) leadership and oversight, (ii) risk assessments, (iii) written policies and procedures, (iv) transparency, (v) training and awareness, (vi) monitoring and verification, and (vii) internal enforcement to address non-compliance.⁵⁹

As noted in the CIPL framework, legislation should also encourage companies to regularly assess and document privacy and data security risks in accordance with written policies and procedures, and to invest in mechanisms to adequately address the identified risks.

⁵⁸ See Fed. Trade Comm’n, Comment to the National Telecommunications & Information Administration on Developing the Administration’s Approach to Consumer Privacy, No. 180821780-8780-01, 8-9 (Nov. 9, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

⁵⁹ CENTRE FOR INFO. POLICY LEADERSHIP (CIPL), ORGANIZATIONAL ACCOUNTABILITY – PAST, PRESENT AND FUTURE 3 (Oct. 30, 2019), https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_-_organisational_accountability_%E2%80%93_past_present_and_future_30_october_2019_.pdf.

Processes that create a culture of compliance through documentation of compliance choices usher in welcome consumer safeguards.⁶⁰

Another worthy principle: privacy legislation should embrace the notion that **transparency empowers individuals to make informed choices**. As I discussed when highlighting information asymmetries, consumers need clarity regarding how their data is collected, used, and shared. Only when they understand the privacy characteristics of products and services can they effectively evaluate the value of those goods for themselves.

Importantly, the legislative framework should also consider competition.

Regulations, by their nature, will impact markets and competition. For regulations to succeed in restoring market forces, they must eliminate the market failure in the most narrow and targeted manner possible. Regulatory “fixes” that extend beyond simply correcting the problem may upset the balance of forces in the rest of the market and, ultimately, may harm consumers.⁶¹

GDPR may have lessons to teach us in this regard. Research indicates that GDPR may have decreased venture capital investment and entrenched dominant players in the digital advertising market.⁶² One recent article notes that if laws limit certain types of business activities, the pace of innovation may slow and costs may increase. The authors urge legislators to be intentional and transparent when engaging in tradeoffs between privacy and competition,⁶³

⁶⁰ See Christine S. Wilson, Remarks at the Global Antitrust Institute: FTC vs. Facebook, Antonin Scalia Law School 6, 10 (Dec. 11, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557534/commissioner_wilson_remarks_at_global_antitrust_institute_12112019.pdf.

⁶¹ See, e.g., Howard Beales et al., The Regulatory Transparency Project of the Federalist Society, The Proper Role of Rules in a Gloriously Unruly Economy, Aug. 28, 2019, <https://regproject.org/wp-content/uploads/RegulatoryProcess-The-Role-of-Rules.pdf> (discussing large and unintended consequences of burdensome regulations).

⁶² See Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 25248, 2018), <https://www.nber.org/papers/w25248.pdf>; *GDPR - What happened?*, WHOTRACKSME BLOG (2018), <https://whotracks.me/blog/gdpr-what-happened.html>.

⁶³ Hartzog, *supra* note 47, at 71.

and I agree. While there undoubtedly will be some tradeoffs between privacy and competition, I am confident that Congress can design a privacy bill that provides appropriate protections for consumers while maintaining competition and fostering innovation.

In addition to those high-level principles, I would recommend that privacy legislation include a few additional elements:

- First, the FTC should be the enforcing agency. We have decades of experience in bringing privacy and data security cases, and we have the requisite expertise to tackle any new law effectively.⁶⁴
- Second, any legislation should include civil monetary penalties, which Congress has included in other statutes enforced by the FTC, including COPPA⁶⁵ and the Telemarketing and Consumer Fraud and Abuse Prevention Act.⁶⁶
- Third, the FTC should be given jurisdiction over non-profits and common carriers, which collect significant volumes of sensitive information.⁶⁷
- Fourth, any law should include targeted and narrow APA rulemaking authority. That way, the FTC can enact rules both to supplement legislation and to permit adjustments in response to technological developments.⁶⁸

⁶⁴ See Fed. Trade Comm'n, Media Resources on Privacy and Security Enforcement, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement> (last visited February 7, 2020) (providing links to privacy and security cases, public events, statements, reports, amicus briefs, and testimony).

⁶⁵ Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501-6506 (2018).

⁶⁶ 15 U.S.C. §§ 6101-6108 (2018).

⁶⁷ For many years, the Commission has testified in favor of eliminating the common carrier exemption. Fed. Trade Comm'n, Prepared Statement of the Federal Trade Commission: "Oversight of the Federal Trade Commission," Before the Subcommittee on Consumer Protection and Commerce, United States House of Representatives Committee on Energy and Commerce 17 (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519212/p180101_house_ec_oversight_testimony_may_8_2019.pdf; Fed. Trade Comm'n, Prepared Statement of the Federal Trade Commission: "Oversight of the FTC," Before the Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security of the Committee on Commerce, Science, and Transportation, United States Senate 16 (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423835/p180101_commission_testimony_re_oversight_senate_11272018_0.pdf.

⁶⁸ COPPA provides a good example of the appropriate division of labor between Congress and the FTC. There, Congress made the requisite value judgments. For example, Congress determined it was important for websites targeted to children to obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children. 15 U.S.C. §§ 6502. The FTC was then empowered through rulemaking to outline the mechanics of how websites or online services could obtain verifiable parental consent. Children's Online Privacy Protection Rule, 16 C.F.R. § 312.5.

- Fifth, any law should include preemption. Preemption is key to precluding a patchwork of conflicting state laws that will unnecessarily burden businesses and hinder domestic and international data flows.

And I'll end the list with something a law should not include – a private right of action, which would allow plaintiffs' lawyers rather than expert agencies like the FTC and state attorneys general to establish a sound and consistent national policy.

V. Conclusion

I want to again thank the Free State Foundation for inviting me to speak here today. As I noted at the outset, the topics of competition, freedom, and privacy are of perennial importance. I commend the Free State Foundation for its research and education efforts to support free market principles. Government-controlled markets create toxic outcomes for consumers and citizens. But particularly in this era, when we face an onslaught of proposals to expand the role of government, we unfortunately must commit to a constant struggle against the audacity of bad ideas. We must be alert, fighting each day to defend our free markets, our system of free enterprise, and ultimately our individual freedoms. In the words of President Thomas Jefferson, "The price of freedom is eternal vigilance." Let us all remain vigilant!