

Summary

“The power to determine whether the practices of almost any American business are “unfair” makes the Federal Trade Commission (FTC) uniquely powerful. This power allows the FTC to protect consumers from truly harmful business practices not covered by the FTC’s general deception authority. But without effective enforcement of clear limiting principles, this power may be stretched beyond what Congress intended.

In 1964, the Commission began using its unfairness power to ban business practices that it determined offended “public policy.” Emboldened by vague Supreme Court dicta comparing the agency to a “court of equity,” *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), the Commission set upon a series of rulemakings and enforcement actions so sweeping that the *Washington Post* dubbed the agency the “National Nanny.” The FTC’s actions eventually prompted Congress to briefly shut down the agency to reinforce the point that it had not intended the agency to operate with such expansive authority.

But in the last nine years, the unfairness power has risen again as the Commission has increasingly grappled with consumer protection questions raised by the accelerating pace of technological change brought by the Digital Revolution. Today, unfairness is back—but without the limiting principles that Congress agreed were essential to properly restraining the FTC’s power...”

“Denying the motion to dismiss will vindicate the FTC’s enforcement of Section 5 through poorly plead complaints that fail to satisfy the statutory requirements for the FTC’s use of its unfairness authority. The questions raised below are not questions about the adequacy of Wyndham’s data security practices in particular, or even whether they could conceivably be declared unfair upon a full analysis of the facts and proper development of limiting principles. Instead, this brief speaks to the fundamental problems of vagueness and due process raised by the FTC’s routine enforcement actions prior to adjudication by any court.,,”