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The FTC as Internet Privacy Norm Entrepreneur

*Steven Hetcher**

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I. INTRODUCTION

This symposium explores the economic approach to intellectual property law. This Article concerns a particular type of intellectual good—personal data. Personal data is an increasingly important topic because of its connection to the issue of Internet privacy, which has recently taken center stage in the public policy arena.¹

Boiled down to its core, the Internet privacy debate is a debate about who should control personal data—Internet users (data subjects) or websites. The scope of website data collection practices is expanding dramatically, due in large part to technological advances such as cookies, Web-crawlers, and Web-cams.² If Internet

* I wish to gratefully acknowledge the expert research assistance of Kimberly Gilman, Janet Hirt, and Catherine Hora. I wish to thank Erin O'Hara and Robert Rasmussen for helpful discussion of ideas contained in the Article.

1. See *P3P: Just a Start*, EWEEK FROM ZDWIRE, July 17, 2000, available at 2000 WL 18178259 ("There's no disputing that privacy has emerged as a leading issue of the Internet age.").

2. An industry has emerged to market a variety of software products designed to assist websites in collecting and analyzing visitor data and in providing targeted advertising. See, e.g.,

users are unable to exert control over this growing use of their data by commercial entities, their personal privacy will be increasingly diminished.

One proposed solution to the growing privacy problem is to grant people intellectual property rights in their personal data. Rights of this sort would, however, create tension with other principles of intellectual property law.³ Furthermore, property rights in personal data also raise First Amendment concerns.⁴

Thus far, new attempts to regulate personal data have stopped short of granting property in this data. Instead, the Federal Trade Commission ("FTC"), the leading regulator of personal data up to the present time, has proceeded by means of protecting user control, as opposed to ownership, of the user's personal data.⁵ In particular, the FTC has attempted to provide visitors to websites with greater control over the circumstances under which their data is collected and used by websites. The FTC's main means to accomplish this is to promote the use of so-called "privacy policies" or

Rivka Tadjer, *Following the Patron Path*, ZD INTERNET MAGAZINE, Dec. 1997, at 95; Thomas E. Weber, *Software Lets Marketers Target Web Ads*, WALL ST. J., Apr. 21, 1997, at B1.

3. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991) (holding that bits of data are uncopyrightable unless they are selected, coordinated, or arranged in an original way). Law regarding personal data, indeed all data, is at sea. Some commentators have argued for heightened intellectual property status for personal data as a means to greater privacy protection. See Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1, 78 (1996) (advocating statutory recognition of property rights in a "persona" consisting of personal information about the individual); Kenneth C. Laudon, *Markets and Privacy*, COMMS. ACM, Sept. 1996, at 92, available at 1996 WL 9011971 (suggesting property rights in personal data as a way to protect privacy).

4. Courts have recognized that the sale of personal information to third parties is accorded the same level of protection as "commercial speech." See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 & n.5 (1985) (plurality opinion); *Trans Union Corp.*, FTC, No. 9255, slip op. at 33-37 (Feb. 10, 2000), available at <http://www.ftc.gov/os/2000/03/trans-unionfinord.htm>. For a discussion of the First Amendment and privacy, compare Paul M. Schwartz, *Free Speech vs. Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559 (2000), with Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

5. The tension between privacy and free speech can be avoided if data-subject control, as opposed to ownership, of personal data, can be protected. A trend leading in an opposite direction from heightened intellectual property protection is "copyleft," which argues that the Internet radically undermines ownership concepts for intellectual goods in the online world. See Ira V. Heffan, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 STAN. L. REV. 1487, 1491-92 (1997). See generally DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998) (arguing that personal data should be subject to open access rules).

“privacy statements” by websites.⁶ The FTC has met with a fair degree of success in encouraging websites to adopt privacy policies. In the past few years, the percentage of websites that offer privacy policies has gone up significantly.⁷

Nevertheless, the FTC's efforts have been met with skepticism from the well-organized, public-interest advocacy community that is active in promoting greater electronic privacy protection.⁸ The main thrust of the criticism is that the FTC's approach is doomed because privacy policies are not an adequate means to accomplish the task of protecting website visitors from the invasive

6. Privacy policies are written statements of company practices with respect to the treatment of personal data of website visitors. Privacy policies are usually posted as a link from a website home page and from subsequent pages where data is requested.

7. See FTC, *PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE, A REPORT TO CONGRESS 10-11 (May 2000)*, available at <http://www.ftc.gov/reports/privacy2000/privacy2000.pdf> [hereinafter *FAIR INFORMATION PRACTICES*] (discussing FTC empirical studies of the use of privacy policies by websites). The FTC reports:

The results of the 1999 GIPPS Report showed a significant increase over the previous year in the percent of Web sites posting at least one privacy disclosure—i.e., either a unified privacy policy or a discrete information practice statement (such as, “This is a secure order form”). Sixty-six percent of Web sites in the GIPPS random sample, compared with 14% of Web sites in the Commission's 1998 Comprehensive Sample, had such disclosures. This year, the Commission's Survey findings demonstrate continued improvement on this front, with 88% of Web sites in the Random Sample posting at least one privacy disclosure. Of sites in the Random Sample that collect personal identifying information, 90% post at least one privacy disclosure. All of the sites in the Most Popular Group post at least one privacy disclosure, compared with 93% of the sites in Professor Culnan's 1999 survey of the 100 busiest sites, and 71% in the Commission's 1998 Most Popular Sample. The weighted analysis figure is 96%.

The percent of sites displaying a privacy policy (as opposed to a discrete information practice statement) has also continued to increase. Sixty-two percent of sites in the Random Sample (compared with 44% in the 1999 GIPPS survey) and 97% of sites in the Most Popular Group (compared with 81% in the 1999 OPA survey) post a privacy policy. The weighted analysis figure is 82%. Figure 1 demonstrates the progress Web sites have made in posting any disclosures about their information practices since the Commission's 1998 Report was issued.

Id. at 10.

8. See *Communications Privacy: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Marc Rotenberg, Director, Electronic Privacy Information Center), available at 1998 WL 18089917. According to the congressional testimony of Marc Rotenberg:

To be effective, Fair Information Practices must be enforced and must provide redress. It is not enough to say what a policy is without providing a means to enforce the policy. That is why voluntary guidelines, professional standards, and codes of conduct that are based on Fair Information Practices do not necessarily provide significant privacy protection . . .

In my view, privacy in the information age means both the extension of Fair Information Practices to new information environments and the active promotion of techniques, often based on encryption, to protect the disclosure of personal information. This is the fundamental policy goal.

Id.

practices of websites. Yet, the FTC persists in promoting privacy policies as its primary instrument of reform. This raises a puzzle as to why the FTC would focus its efforts so heavily on privacy policies when they may be of dubious value.

The suspicion is naturally raised that the Agency is either incompetent or is in the pocket of the increasingly powerful online industry. Indeed, some critics have charged that talk of the ethos of self-regulation of the Internet is simply a ruse whereby this powerful industry will come to completely dominate the personal data of the consuming public, with the result that individual informational privacy will completely disappear.⁹ This important charge calls for a closer look into the FTC's efforts to promote online privacy by means of privacy policies. In the following analysis, a public choice approach will be used to model the FTC's activities, with the hope of better understanding what may really be motivating their policy choices.¹⁰

Public choice theory models government agencies as if they were businesses, and key government actors as if they were entrepreneurs. Whereas typical businesses seek to maximize their profit, agencies seek to maximize their power, size, and prestige.¹¹ There are different activities an entrepreneur can engage in. In his classic study, Richard Posner analyzed the FTC as a provider of preferential treatment to important members of Congress who serve on committees that oversee the agency.¹² This typically involves fa-

9. See LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE 142-63 (1999) (describing how private interests will propertize computer code, leading to privacy threat by e-commerce).

10. Beginning with Richard Posner's early work based on his experiences working at the FTC, the Agency has received a good deal of attention from public choice theorists. See *generally* PUBLIC CHOICE & REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 4 (Robert J. Mackay et al. eds., 1987) [hereinafter PUBLIC CHOICE & REGULATION] (providing a collection of articles focusing on "systematic influence on the agency's behavior of external factors such as Congress, the executive branch, and interest groups—[on the one hand,] and internal forces—such as organizational structure and incentives" on the other hand); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969). With the more traditional approach, the so-called "bureaucratic" approach, agencies such as the FTC are considered to be independent of the legislature. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766-67 (1983) [hereinafter Weingast & Moran, *Bureaucratic Discretion*]; see also Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, in PUBLIC CHOICE & REGULATION, *supra*, at 30-55.

11. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 47 (1982). But see Jerry L. Masbaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 90 (1985).

12. See Posner, *supra* note 10, at 82-83. Posner observed that each member of Congress seeks to protect and further the interests of the citizens of his district or state and that these

voring those industries or companies found in the Committee members' districts or states.¹³ Bureaucrats may engage in selective enforcement or they may engage in non-enforcement. Others have argued that the Agency seeks to curry favor with the executive branch, which controls the power of appointment with regard to key agency posts, as well as having a role in the budgetary process.¹⁴ The present question is, what is the FTC seeking to promote when it promotes privacy policies? Is it promoting the interests of some companies located in the district of important committee members, or something else?

It is increasingly true for many businesses that they either develop an Internet business strategy or risk extinction. While it is unlikely that the FTC would cease to exist, nevertheless, it too must adapt to the emerging Internet economy.¹⁵ I will argue that the FTC's recent actions are revealingly viewed as its attempt to develop a business model that encompasses the Internet.

Purportedly out of its sensitivity to the Internet ethos of self-regulation, the FTC has thus far attempted to guide self-regulatory efforts by the website industry rather than issuing a detailed set of rules to precisely control industry behavior.¹⁶ In particular, the FTC

interests will often conflict with the overall public interest. *See id.* Because the power to influence the FTC is unevenly distributed among members of Congress, a member of a committee that oversees the FTC may exert "a great deal of power to advance the interests of businesses located in his district, however unimportant the interests may be from a national standpoint." *Id.* at 83.

13. *See* Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 336-37, 340-41 (1982) (providing an empirical study of FTC case-bringing activity demonstrating that favorable decisions tend to be non-randomly concentrated on firms headquartered in the home districts of those members of the House of Representatives who are on committees and subcommittees with budgetary and oversight responsibilities over the FTC).

14. *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE & REGULATION, *supra* note 10, at 63, 76 ("The [P]resident and Congress share responsibility for selecting commissioners, but the President has historically been the dominant force in choosing the FTC's leadership."). In addition to the appointment process, the executive branch can influence the FTC's activities through the budget process. *See id.* at 108-09 n.126.

15. In an incident that has been frequently discussed in the public choice literature, the FTC did practically stop functioning for a time, due to the fact that Congress, displeased with the Agency's enforcement activities, dried up its funding. *See* Weingast & Moran, *Bureaucratic Discretion*, *supra* note 10, at 775.

16. *See* FTC, SELF REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 6, 12-14 (July 1999), available at <http://www.ftc.gov/os/1999/9907/privacy99.pdf> [hereinafter SELF REGULATION]. The Federal Trade Commission has stated that, "self-regulation is the least intrusive and most efficient means to ensure fair information practices, given the rapidly evolving nature of the Internet and computer technology." *Id.* at 6. Numerous commentators have taken the view that since the Internet is growing so rapidly and successfully, it is sensible to be cautious before adopting any significant regulatory measures that might curtail this development. *See, e.g.,* I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993,

has sought to incentivize the industry to adopt more respectful privacy norms of online behavior.¹⁷ Thus, the FTC can be described as a website privacy "norm entrepreneur."¹⁸ I will argue that there is a good public choice explanation for the FTC's actions, which is that promoting privacy policies allows the Agency to sink its jurisdictional hooks more firmly into the Internet privacy debate, and therefore the Internet.

Part Two below presents a brief account of the FTC's recent actions to promote privacy policies, seeking to explain the Agency's norm-shaping behavior in informal game-theoretic terms. Part Three offers a public choice explanation for the Agency's demonstrated preference for privacy policies, as the preferred means to shape website privacy norms. Finally, Part Four concludes with a consideration of the normative implications of the positive analysis, specifically, whether the FTC's actions are best viewed as serving the public interest, as an instance of pork barrel politics, or as something else altogether.

II. THE FTC AS PRIVACY POLICY NORM ENTREPRENEUR

In 1995, the FTC was asked by Congress to investigate the privacy risks associated with computer databases. The Agency has been increasingly involved with electronic privacy issues ever since. It has held workshops to bring industry participants together with privacy advocates in an attempt to encourage self-regulation.¹⁹ It has set up a website to provide consumers with information on industry data-gathering practices, and to instruct consumers on

1054 (1994) (contending that rules of conduct in cyberspace should be governed by a presumption of decentralization, and noting that because the Internet is changing so rapidly, "the first answer to how a legal problem in cyberspace should be solved is to do nothing"); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 419-20 (1997) (contending that as a general rule "self-governance is desirable for electronic communities").

17. See *infra* text accompanying notes 29-33.

18. A norm entrepreneur is simply an individual or entity that seeks to promote or change a norm. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996). In its everyday use, the word "entrepreneur" applies to someone in business, usually a principal in the business. By the lights of economic analysis, all actors are entrepreneurs in the sense that all actors seek to maximize something, whether it be a private firm seeking to maximize profit or a public-interest privacy advocate seeking to maximize the aggregate level of individual privacy throughout society.

19. See FAIR INFORMATION PRACTICES, *supra* note 7, at 5.

measures they may take to be proactive about protecting their individual privacy.²⁰

By far, however, the greatest amount of attention has been toward promoting the emergence of an industry-wide practice of establishing website privacy policies. The FTC has made the website industry aware that the Agency views privacy policies as a key element of self-regulation.²¹ In 1998, the FTC threatened to recommend to Congress that it enact privacy legislation, if more respectful industry customs and usages were not forthcoming through industry self-regulation.²² The threat was highly credible because of the Commission's recent success in influencing privacy legislation with respect to the collection of personal data from children.²³ This threat appears to have had a tremendous impact on the website industry, causing many firms to alter their behavior. In its 1999 Report to Congress, the FTC notes that the number of sites offering privacy policies has jumped significantly.²⁴ This is particularly true for larger, more-visited sites.²⁵

In modeling the rational structure of the website practices that the FTC seeks to influence, there are three relevant time periods to consider: (1) the time prior to the FTC's threat, (2) the time after the FTC's threat, and (3) the time after the large websites threaten the small websites. The strategic structure of each of these time periods will be modeled in the following three game payoff matrices below. The goal is to demonstrate that the FTC has been relatively successful in raising the level of industry provision of privacy policies.

20. See FTC, *Privacy Initiatives*, <http://www.ftc.gov/privacy/index.html> (n.d.) (providing FTC's Online Privacy Protection information) [hereinafter *Privacy Initiatives*].

21. See FAIR INFORMATION PRACTICES, *supra* note 7, at 5-6.

22. See FTC, PRIVACY ONLINE: A REPORT TO CONGRESS 43 (June 1998), available at <http://www.ftc.gov/reports/privacy3/priv-23a.pdf> [hereinafter PRIVACY ONLINE].

23. See *id.* at 4-6. In 1998, after finding self-regulation of children's online privacy to be inadequate, the FTC recommended to Congress that it enact legislation, which Congress quickly did, enacting the Children's Online Privacy Protection Act. See 15 U.S.C. §§ 6501-6506 (1994 & Supp. IV 1998). On October 21, 1998, the President signed into law the Children's Online Privacy Protection Act of 1998 ("COPPA"). See *id.* The stated goals of the Act are: "(1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) . . . to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to . . . limit[] the collection of personal information from children without parental consent." 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

24. See SELF REGULATION, *supra* note 16, at 7-8.

25. See FAIR INFORMATION PRACTICES, *supra* note 7, at 5. The 1999 Georgetown University Privacy Policy Survey examined the most heavily trafficked and busiest sites on the World Wide Web, and found significant improvement in the frequency of privacy disclosures. See *id.*

Figure 1 represents the strategic structure of the situation faced by the various members of the website industry. The south-east cell represents the situation in which no websites are providing privacy policies. Note that each website does better in this circumstance than where all websites are providing privacy policies (northwest cell), that is, each website receives an outcome of 2 rather than 3.²⁶

		Website Industry	
		Privacy Policy	No Privacy Policy
Firm A	Privacy Policy	3,3	4,1
	No Privacy Policy	1,4	2,2

Figure 1: Website Industry Before Threat

When the non-cooperative outcome, 2,2, is obtained, each website can change its practices regarding personal data at will without worrying about breaching obligations to website users. This is a significant benefit to websites not providing privacy policies. It is surely not outweighed by an amorphous and speculative promise of greater consumer willingness to participate in electronic commerce, as is sometimes claimed.²⁷

The next payoff matrix represents the situation in which the FTC begins its attempt to incentivize the website industry to adopt privacy policies.

26. The numbers 1-4 in the matrices represent the ordinal preferences of the players, with 1 being the most preferred outcome and 4 being the least preferred outcome. With each pair, the left-hand number is the payoff for the row player, and the right-hand number is the payoff for the column player.

27. In its 1999 Report to Congress, the FTC stated that, "[t]he Commission's efforts have been based on the belief that greater protection of personal privacy on the Web will not only benefit consumers, but also benefit industry by increasing consumer confidence and ultimately their participation in the online marketplace." SELF REGULATION, *supra* note 16, at 3. In his recent testimony before Congress, Marc Rotenberg made a similar assertion: "Users of web-based services and operators of web-based services have a common interest in promoting good privacy practices. Strong privacy standards provide assurance that personal information will not be misused, and should encourage the development of on-line commerce." *Electronic Communications Privacy Policy Disclosures: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Marc Rotenberg, Director, Electronic Privacy Information Center), available at <http://www.house.gov/judiciary/rote0527.htm>.

		Large Websites	
		Privacy Policy	No Privacy Policy
Small & Medium Web-sites	Privacy Policy	3,1	4,2
	No Privacy Policy	1,1	2,2

Figure 2: Website Industry Practices at T2 with Four Fair Practice Principles

Figure 2 represents the situation in which the FTC has promulgated the fair information practice principles (“FIPPS”), which require the adoption of privacy policies for their implementation.

The FTC justifies its promotion of privacy policies because they promote these second-order privacy norms while also allowing scope for self-regulation.²⁸ The FIPPs are: “(1) Notice/Awareness; (2) Choice/Consent; (3) Access/Participation; (4) Integrity/Security; and (5) Enforcement/Redress.”²⁹

Many large websites do better for promoting the fair practice principles than for not respecting them, regardless of what the small or medium websites do. They receive 1, representing their most preferred outcome, in the northwest and southwest cells. They

28. See SELF REGULATION, *supra* note 16, at 3. The agency's explanation of its actions can be treated with the same skepticism as the public explanations offered by any business for its actions. Such explanations are meant to maximize profit, not candor, and should be treated accordingly. See PUBLIC CHOICE & REGULATION, *supra* note 10, at 3-4.

29. SELF REGULATION, *supra* note 16, at 3. The FTC considers:

The Notice/Awareness principle [to be] the most fundamental: consumers must be given notice of a company's information practices before personal information is collected from them. The scope and content of the notice will vary with a company's substantive information practices, but the notice itself is essential. The other core principles have meaning only if a consumer has notice of an entity's information practices and his or her rights with respect thereto.

. . . The Choice/Consent principle requires that consumers be given options with respect to whether and how personal information collected from them may be used. The Access/Participation principle requires that consumers be given reasonable access to information collected about them and the ability to contest that data's accuracy and completeness. The Integrity/Security principle requires that companies take reasonable steps to assure that information collected from consumers is accurate and secure from unauthorized use. Finally, the effectiveness of the foregoing privacy protections is dependent upon implementation of the Enforcement/Redress principle, which requires governmental and/or self-regulatory mechanisms to impose sanctions for noncompliance with fair information practices.

Id. at 3-4.

receive the same payoff in each of these boxes, indicating their relative indifference to the actions of the small and medium websites. It is enough for the large sites that each of them benefits individually from conforming. This rationale is plausible. These sites are very prominent and they would run the risk of coming under FTC scrutiny were they to fail to make a respectable effort to show respect for user privacy as dictated by the fair information practice principles.

In contrast, the small and medium websites have a dominating preference to not provide privacy policies. They receive a more preferable outcome in either of the southern cells (1 over 3 in the western cells, or 2 over 4 in the eastern cells, respectively). The small and medium websites are not neutral as to what the large websites do. Rather, it is plausible to suppose that they prefer that the major sites conform to privacy respecting practices, as this will be conducive to favorable conditions for the smaller sites, since there will both be less public clamoring for greater privacy protection, and more personal data available for the taking, due to fewer takers and a more trusting public. Accordingly, they receive their more preferred outcome in the southwest as compared to the southeast cell, that is, 1, as compared to 2. Note that the southwest cell is an equilibrium for both the large sites and the small and medium sites; that is, given the choices of others, no one could unilaterally do better.³⁰

Consider next the situation in which the FTC issues a threat to the website industry. The major websites are no longer indifferent to the actions of the smaller sites, for the failure of these sites to adopt privacy respecting practices might lead to privacy legislation that would adversely affect all websites, but particularly the large sites, as they have the most to lose from onerous legislative requirements. This situation is represented by the following payoff matrix.

30. When it is possible for at least one player to do better and no one to do worse, the changed situation would be Pareto superior.

		Large Websites	
		Privacy Policy	No Privacy Policy
Small & Medium Websites	Privacy Policy	3,1	4,3
	No Privacy Policy	1,2	2,4

Figure 3: Website Industry Practices After Threat

Note that there is no longer a stable equilibrium in this situation. Large sites most prefer the northwest cell while small and medium sites prefer the southwest cell. In contrast to the previous situation in Figure 2, the large sites now prefer that the small and medium sites respect privacy. This is because the FTC has made it clear that it expects industry-wide improvement and that if this is not forthcoming, a statute will be. Faced with this situation, large sites have devised means to bring small and medium sites into conformity with more respectful data-collection practices. Most important, large sites are threatening to withhold advertising from sites that do not respect privacy.³¹

In the case of the threat by large websites to withhold advertising, there is no dependence on repeat interaction. Even if the small websites only interact once with Microsoft or IBM, they will typically prefer that this interaction allow for advertising rather than that it not. The bestowing of advertising is functioning like a "selective incentive" that rewards cooperative behavior on an individual basis.³²

The threat of these large sites is having the desired result, as an increasing number of small and medium sites are offering privacy policies.³³ Indeed, as indicated by the FTC's 1999 and 2000

31. See SELF REGULATION, *supra* note 16, at 12-13 ("Companies like IBM, Microsoft and Disney, which have recently announced, among other things, that they will forego advertising on sites that do not adhere to fair information practices are to be commended for their efforts, which we hope will be emulated by their colleagues.")

32. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS, 51, 133-34 (1971). Selective incentives allow the party seeking to incentivize conformity to be able to provide incentives to individuals in order to elicit their conformity. This is in contrast to the collective good itself, which, by definition, has the feature that the good is public, that is, when provided for one, it is provided for all, and thus is open to free riding. See *id.* at 98-102.

33. See FAIR INFORMATION PRACTICES, *supra* note 7, at 10-11. The FTC writes: "These types of business-based initiatives are critical to making self-regulation meaningful because they

Reports to Congress, website provision of privacy policies has gone up dramatically. The Commission's 2000 Survey examined the change in frequency of Privacy Disclosures on websites from 1998 to 2000.³⁴ The results showed that in 1998, 14 percent of randomly sampled websites had privacy policies as compared to 88 percent in 2000.³⁵ In a survey of the most popular websites, 71 percent had privacy policies in 1998 compared to 100% in 2000.³⁶ We see, then, that the FTC is able to indirectly promote its goal of data privacy by getting large websites to do its bidding.

As the preceding discussion has shown, then, the FTC has played an important role as a privacy policy norm entrepreneur. This result is a vindication of Cass Sunstein's well-known argument that the government may play a pivotal role as a norm entrepreneur.³⁷ There is a larger political point in Sunstein's characterization of governmental actors as norm entrepreneurs, which is that doing so serves to highlight the potential role of the state in what Sunstein refers to as "norm management."³⁸ This itself is a reaction against a libertarian strain in norms theory, which highlights the possibility that informal social norms may emerge through basically private social processes, thereby making the state's role peripheral. Sunstein, who is a bigger believer in the power of the state to do good than is Robert Ellickson,³⁹ is intent to show that even in the context of informal social norms, the state may nevertheless play a productive role as a norm entrepreneur, undertaking to manage norms. With Internet privacy norms, the story is a complex interplay of informal ordering forces of a sort Ellickson favors, and governmental forces of a sort Sunstein favors.⁴⁰

can extend the reach of privacy protection to small and medium-sized businesses where there is great potential for e-commerce growth." SELF REGULATION, *supra* note 16, at 13.

34. See FAIR INFORMATION PRACTICES, *supra* note 7, at 10-11.

35. See *id.* at 11.

36. See *id.* In the FTC's 1999 Report, it stated "[t]he results of two new surveys of commercial Web sites suggest that online businesses are providing significantly more notice of their information practices than they were last year. In addition, several significant and promising self-regulatory programs, including privacy seal programs, are underway." SELF REGULATION, *supra* note 16, at 6; see also *supra* note 7.

37. See Sunstein, *supra* note 18, at 913.

38. See *id.* at 907.

39. See ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 138-47 (1991).

40. Elsewhere, I develop a three-stage emergence account of these norms, the second stage of which is the role played by the FTC. I argue that the FTC has succeeded in effectuating a "norm shock" to the equilibrium of privacy-related website practices. The reverberations of the FTC's norm shock are still being felt by the website industry. We are in the midst of a "norm cascade," caused by the norm shock. The result is that more respectful privacy practices among

III. PUBLIC CHOICE EXPLANATION FOR THE FTC'S NORM ENTREPRENEURSHIP

As discussed in Part Two, the FTC claims to promote privacy policies because they are the best concrete means to instantiate the fair information practice principles. In considering these principles, one might fairly wonder why they are characterized as "fair" information principles. The FTC is seemingly engaged in persuasive definition, as it is certainly not obvious that fairness is the abstract normative term that unites these various second-level norms. The FTC says nothing of a substantial nature to explain how each of the principles promotes fairness. Other privacy norm entrepreneurs have not, in general, conceived of the debate in terms of fairness.

The explanation very likely has something to do with the fact that Section 5 of the FTC Act allows the FTC authority over "unfair" trade practices.⁴¹ By setting out the website privacy issue in terms of fairness, the Agency puts itself in a position to determine whether websites are acting fairly by the lights of the fair information practice principles. While the Agency may in general promulgate rules for website activities and may bring enforcement actions,⁴² it has apparently chosen not to issue specific rules for website activities. Instead, the Agency has outlined the fair information practice principles listed above, which are more general in scope than agency rules. The FTC explicitly left room for websites to promote these second-order principles in a manner individually tailored by the website to its specific situation.⁴³

The Agency has provided very little information, however, which would indicate the standards of fairness the Agency intends

websites are becoming an option for the Web surfing consumer, due to the software industry's efforts to fill a new market niche for so-called "privacy solution" software, which has in part opened up due to the FTC's activities. See Steven Hetcher, *Self-Regulation of Privacy: The FTC's Trojan Horse*, 19.1 J. MARSHALL L. REV. (forthcoming 2000).

41. See 15 U.S.C. § 45(a)(2) (1994) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

42. See *id.* § 45(b) (authorizing the agency to bring enforcement proceedings without providing further guidelines).

43. See PRIVACY ONLINE, *supra* note 22, at 41.

The Commission has encouraged industry to address consumer concerns regarding online privacy through self-regulation. The Internet is a rapidly changing marketplace. Effective self-regulation remains desirable because it allows firms to respond quickly to technological changes and employ new technologies to protect consumer privacy. Accordingly, a private-sector response to consumer concerns that incorporates widely-accepted fair information practices and provides for effective enforcement mechanisms could afford consumers adequate privacy protection.

Id.

to apply in determining which websites might fall below an acceptable level. Websites thereby have had little guidance as to how much is required of them in terms of providing notice, data security, data access, and determining what constitutes consent.

As Part Two discussed, privacy policies have been the FTC's primary response to the problem of invasion of informational privacy by websites. As the discussion indicated, the Agency has been relatively successful in its effort to bring an increase in the percentage of sites that offer privacy policies. One might expect that privacy advocates would have been cheering the FTC along in its efforts. However, this has not been the case. Instead, privacy advocates have criticized the FTC for focusing too much attention on privacy policies. Leading privacy advocates have instead advocated for a statute that would function to strictly control entities that collect and use data, as does the European Union's Privacy Directive.⁴⁴

By the Agency's lights, its promotion of the fair practice principles should satisfy privacy advocates, as the fair information practice principles are derived from pre-existing norms of the advocacy community. Public interest advocates contend to the contrary, however, that privacy policies ill serve their aspirational privacy norms.⁴⁵ They argue that privacy policies are typically not read by website users.⁴⁶ They are written in legalese such that even if people read them, they will not understand them.⁴⁷ Hence, they do not provide notice and thus cannot lead to consent. In addition, there is evidence that many sites do not adhere to their own policies.⁴⁸ The

44. See PETER P. SWIRE & ROBERT E. LITAN, *NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE* 22, 45-49 (1998); see also Fred H. Cate, *The EU Data Protection Directive, Information Privacy, and the Public Interest*, 80 IOWA L. REV. 431, 438, 441-42 (1995).

45. See Daniel Tynan, *Privacy 2000: In Web We Trust?*, PC WORLD, Jun. 1, 2000, at 103, available at 2000 WL 9395250. A research manager at International Data Corporation in Framingham, Massachusetts stated that "[s]ix months ago, just having a privacy policy was considered pretty honorable . . . [but] [t]oday, most policies are pretty worthless." *Id.*

46. See Lawrence Lessig, *Common Ground*, MSN Slate Book Club, Jan. 19, 2000 at ¶ 13, available at <http://slate.msn.com/code/BookClub/BookClub.asp?Show=1/19/00&idMessage=44-15&idBio=139>.

47. According to the third annual "Surfer Beware" report from the Electronic Privacy Information Center ("EPIC"), "the privacy policies available at many Web sites are typically confusing, incomplete and inconsistent." Doug Bedell, *Government Will Examine Internet Privacy Concerns*, PORTLAND OREGONIAN, Mar. 27, 2000, at C01, available at 2000 WL 5389584.

48. See Tynan, *supra* note 45. "A study of 21 health advice sites . . . sponsored by the California Healthcare Foundation found that many sites share sensitive information, despite privacy policies against the practice." *Id.* Its key finding was that, "[o]n a number of sites personally identified information is collected through the use of cookies and banner advertisements by third

policies are subject to change when companies merge, such that one company's policy is likely to go unheeded. Finally, very few privacy policies guarantee security or enforcement.⁴⁹ Thus, the provision of a privacy policy by a website does not automatically promote the fair practice principles.

Despite these problems, the FTC has strongly endorsed privacy policies. This raises a puzzle as to why the Agency should do so, given the severe criticism privacy policies have received. Why, for instance, is the FTC not coming out in support of the creation of a new agency to oversee privacy protection? A number of countries have begun to create positions of privacy director or agencies to oversee privacy.⁵⁰ Recently the Office of Management and Budget ("OMB") created a privacy oversight position with privacy law scholar Peter Swire occupying the position.⁵¹ Why isn't the FTC insisting that OMB's privacy-related responsibilities be enlarged?

There is a public choice answer as to why the Agency has promoted privacy policies, despite their problems (and despite the fact that they do not appear to promote the interests of any industry groups whose favor the FTC might be seeking). It is through privacy policies that the FTC is gaining jurisdiction over the commercial Internet. Jurisdiction is power. In other words, the FTC acts as if it has a plan to migrate its activities to the Internet, and privacy policies have been at the core of this plan. Following is the reason why the FTC has been able to obtain a more secure jurisdictional foothold by means of privacy policies.

First, the intellectual property status of personal data must be taken into account. The key legal fact is that data gathering and use of the sort widely complained about is legal. Personal data is data. In general, data is not subject to ownership.⁵² This means that

parties without the host sites disclosing this practice. There are also instances where personally identified data is transferred to third parties in direct violation of stated privacy policies." *Id.*

49. See Bedell, *supra* note 47 (arguing that because privacy is not being adequately protected, federal intervention to enforce legal standards may be necessary). According to EPIC, "[n]ot one of the companies [surveyed] adequately addressed all the elements of fair information practices." *Id.*

50. See William J. Scheibal & Julia Alpert Gladstene, *Privacy on the Net: Europe Changes the Rules*, BUSINESS HORIZONS, May 1, 2000, at 13, available at 2000 WL 20177264. "Each country is required to create or designate at least one public authority to monitor and enforce its privacy laws. As this is written, at least four EU countries—Greece, Italy, UK, and Belgium—have passed the appropriate legislation, and the others must do so within six months." *Id.*

51. See Mo Krochmal, *Privacy Czar Warns Regulation Is Still Possible*, CMP TECHWEB, Mar. 5, 1999, available at 1999 WL 2493752.

52. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348, 359-60 (1991); Mell, *supra* note 3, at 27; Laudon, *supra* note 3. This is true despite the fact that as a matter of the reigning social norms of the situation, such data gathering activities are morally suspect at

the FTC will find it problematic to enforce against websites for merely gathering and processing personal data, however unfair such practices may seem. The Agency has a good deal of discretion with regard to the enforcement actions it brings.⁵³ Thus, in principle, it could bring enforcement actions against websites merely on the basis of "unfair" practices.⁵⁴

There are two problems in doing so, however, a practical problem and a political problem. The practical problem is one of over-inclusion. The FTC had defined "fair" information practices so broadly that many thousands of websites—most commercial websites, in fact—would be subject to enforcement actions under the FTC's definition of unfair information practices.⁵⁵ The political problem is that, in general, the mood in Washington, both with the Republican Congress and the Democratic administration, has been in favor of governmental non-interference with the Internet.⁵⁶ Thus,

best and violations of human rights at the worst. "[T]he right to be left alone [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also Maureen S. Dorney, *Privacy and the Internet*, 19 HASTINGS COMM. & ENT. L.J. 635, 639 (1997) (explaining that because the Constitution primarily regulates government action, it does not "generally restrict" private party collection and use of personal information).

53. See generally Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999) (raising concerns about exercise of unreviewable discretion).

54. The FTC prosecutes "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce" under Section 5 of the Federal Trade Commission Act ("FTCA"). 15 U.S.C. § 45(a)(1) (1994). Section 13(b) authorizes the prosecution of actions to enforce Section 5. See *id.* § 57b(a). Section 18 permits the FTC to create rules to prohibit deceptive or unfair practices prevalent in certain industries. See *id.* § 57a(a).

55. See FAIR INFORMATION PRACTICES, *supra* note 7, at ii. The FTC's 2000 Survey analyzed the nature and substance of privacy disclosures in light of the fair information practice principles of Notice, Choice, Access, and Security. "It found that only 20% of Web sites in the Random Sample that collect personal identifying information implement, at least in part, all four fair information practice principles . . . [T]he percentage of Web sites that state that they are providing protection in the core areas remains low." *Id.*

56.

As outlined in his Directive on Electronic Commerce, President Clinton instructed the Department of Commerce and the Office of Management and Budget to lead the Administration's privacy efforts and to encourage private industry and privacy advocacy groups to adopt effective self-regulatory approaches to protect privacy on the Internet. . . . [The Clinton Administration, has expressed concern that] the nature of the Internet makes legislative and regulatory privacy protections less effective on-line.

Internet Privacy and Electronic Communications: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998) (statements of David L. Aaron, Under Secretary, International Trade Administration, Dep't. of Commerce), available at 1998 WL 8993806. David L. Aaron stated:

[o]n the World Wide Web, new sites appear and others disappear at an astonishing rate. Congress could certainly pass a law mandating privacy protections on-line, for example, but enforcement of such a law, even if possible, might re-

the FTC would have been well advised to demonstrate circumspection in regulating this popular new industry.

For the foregoing reasons, we see that the FTC, *qua* enterprise, has good cause to go out of its way to promote privacy policies, despite the fact that they are problematic, in terms of their ability to promote informational privacy. The reason is that the FTC thereby increases its jurisdictional grasp over the activities of online enterprises. Previously, it was on shaky ground to bring enforcement actions under a vague theory of "unfair" trade practices.⁵⁷ But once websites offer privacy policies, the Agency can more readily bring enforcement actions.⁵⁸ Once websites make explicit statements on their websites regarding their informational practices, they are then in a position in which they must either live up to those promises or open themselves up to the charge of engaging in deceptive trade practices.⁵⁹ Making representations to consumers, and then acting contrary to these representations, is apparently the sort of behavior the FTC is more inclined to take action against. The FTC's promotion of privacy policies is instructively viewed as an attempt to cause websites to make quasi-contractual statements in writing. The more contractual these statements are, the more enforceable they will be.

quire enormous resources. We don't want to give Internet users a false sense of security based on an unenforceable law.

Id. Over the past five years, the notion of the self-regulating Internet has received support in the mainstream media as well. "The Online Privacy Alliance, an ad-hoc group of 100 companies that includes America Online, Intel, and Yahoo!, argues that recent laws, "such as the Children's Online Privacy Protection Act [COPPA], . . . [along with] changing industry practices make additional legislation unnecessary." Jennifer Tanaka, *Guarding Online Privacy: Do You Know Who's Watching as You Surf the Web?*, NEWSWEEK, June 5, 2000, at 77, 77, available at 2000 WL 21083216. In addition, the influential first-generation Internet *cognicenti* have been virulently anti-regulation. Such preferences can be expected to filter into the political decision-making process to some extent.

57. See 15 U.S.C. § 57b(a) (1994) ("If any person, partnership, or corporation violates any rule . . . respecting unfair or deceptive acts or practices . . . , then the Commission may commence a civil action . . .").

58. See Weingast & Moran, *Bureaucratic Discretion*, *supra* note 10, at 784 ("One of the key policy instruments available to the FTC is its choice of cases.").

59. See Special Committee to Study the Role of the Federal Trade Commission, *Report of the American Bar Association Section of Antitrust Law*, 58 ANTITRUST L.J. 43, 68 (1989) ("The Commission's unfairness authority has long been a source of controversy. Some, but not all, controversy ended with the Commission issuing its policy statement on its consumer unfairness jurisdiction."). In short, this policy statement says that consumer injury is the central element in a finding of unfairness. The injury must be found to be substantial, not reasonably avoidable by the consumer, and not outweighed by countervailing benefits to consumers or competition. See Letter from FTC to Senators Ford and Danforth (Dec. 17, 1980), available at (FTC Policy Statement on Unfairness) <http://ftc.gov/bcp/policystmt/ad-unfair.htm>.

The Agency has never brought an enforcement action against a website merely for "unfair" trade practices. In the past few years, a number of enforcement actions have been brought, all in situations in which a website had made statements in writing with regard to data collection practices. In its first online privacy enforcement action, the FTC charged Geocities, a site that is home to personal web pages and has over two-million members, with misrepresenting the purposes for which it was collecting personal identifying information.⁶⁰ The FTC's most recent online privacy enforcement action was brought against Toysmart to stop it from violating its privacy policy.⁶¹ The site had represented to consumers that personal information would never be shared with third parties. Once in bankruptcy proceedings, however, the site sought to sell its database of personal information.

Therefore, it is clear that once websites provide privacy policies, the FTC will be in a position to exercise its deceptive practices jurisdiction if those policies are not followed. By encouraging websites to provide privacy policies in the first place, the FTC has created a situation in which it is now able to extend its enforcement jurisdiction onto the Internet.

Consider next the extent to which the website industry, or some subset thereof, may have been the beneficiary of the FTC's promotion of privacy policies. Public choice theorists have observed across a variety of different contexts and industries the manner by which industry interests are served by agencies. Two common scenarios are where large firms are favored over small firms, and where firms from favored political districts are favored over other firms.⁶² In addition, a whole industry may receive preferential treatment.

With regard to websites of different sizes, as we saw, it was the large firms that were most likely to adopt more respectful privacy practices. Large sites would prefer to not have to offer privacy policies. Hence, it is hard to argue that the FTC's actions are geared to promote the interests of large websites over small websites.

60. See FTC, *Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case* (Aug. 13, 1998), <http://www.ftc.gov/opa/1998/9808/geocitie.htm>.

61. See FTC, *FTC Announces Settlement with Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Policy Violations* (July 21, 2000), <http://www.ftc.gov/opa/2000/07/toysmart2.htm>.

62. See PUBLIC CHOICE & REGULATION, *supra* note 10, at 9.

With regard to whether firms from favored political districts are receiving favorable treatment, there is little data from which to draw conclusions. There have been five enforcement actions so far.⁶³ These firms are GeoCities, Liberty Financial, Toysmart, ReverseAuction.com, and Focus Medical Group. These firms are from a number of districts and regions, and accordingly it is hard to draw the conclusion that the FTC is engaged in selective enforcement. Seemingly, no congressional district is receiving special treatment.⁶⁴

The FTC's actions do, however, hurt some sites more than other websites. The firms that will be most adversely affected are those that had previously taken greatest advantage of the free availability of personal data. Thus, while the emergence of a privacy policy norm is neutral on its face, it has a disparate and predictable impact on websites depending on their informational practices. But it does not appear that the set of firms most affected comes from any particular district or region.

Finally, it might be that a whole industry is being shown favor. Failure to regulate can be a form of favor. One might initially observe that this was the case with websites, as the FTC has said much in favor of website industry self-regulation.⁶⁵ Based on what we saw in Part Two, however, it is more accurate to describe the situation as one in which the Agency has talked the talk of self-regulation, all the while moving to exert increasing regulatory control, first, by means of its regulation of privacy policies, and second, by recommending to Congress that it enact a statute that the Agency could then enforce.⁶⁶ Thus, while the FTC did indeed support industry self-enforcement previously, it appears now to have

63. See *Privacy Initiatives*, *supra* note 20 (providing links to information about the online privacy cases).

64. The Commission has presented its Online Privacy Reports to the Committee on Commerce, Science, and Transportation of the United States Senate, and to the Committee on Commerce of the United States House of Representatives. See FTC, *FTC Releases Report on Consumers' Online Privacy* (June 4, 1998), available at <http://www.ftc.gov/opa/1998/9806/privacy2.htm>. Sen. John McCain and Rep. Thomas Bliley chair the two committees, respectively. See *PRIVACY ONLINE*, *supra* note 22, at 45 n.1. Both McCain and Bliley have proven to be active privacy advocates, speaking on the subject at numerous committee hearings. See, e.g., *Internet Privacy: Hearing Before the Senate Comm. on Commerce*, 106th Cong. (2000) (statement of Sen. John McCain, Chairman, Senato Commerce Comm.), available at 2000 WL 19305018.

65. See *SELF REGULATION*, *supra* note 16 and accompanying text.

66. See *FAIR INFORMATION PRACTICES*, *supra* note 7, at 36. "The majority recommends that Congress give rulemaking authority to an 'implementing agency' (presumably the Commission) . . ." *Id.* at 1 (dissenting statement of Commissioner Orson Swindle).

been merely biding its time until conditions became more favorable for extending its jurisdiction.⁶⁷

It is worthwhile to conclude with a brief discussion of the relationship between the FTC's entrepreneurial activities and the public interest. It may be plausible to suppose that the FTC can enhance its jurisdiction by catering to a general public demand for more respectful privacy practices by websites. There must be, however, a causal connection between general consumer preferences and the actions of the FTC. Political entrepreneurs may provide the causal nexus.

One of the functions of political entrepreneurs is to seek to turn informal norms into formal legal rules.⁶⁸ Other things being equal, there will be greater pressure pushing for the formalization of an informal norm the more strongly held the informal norm and the more politically powerful the set of conformers to the norm. With privacy norms, there is a growing public pressure in the direction of greater electronic privacy.⁶⁹ This pressure must manifest itself in some tangible way that can be felt by the FTC. Recently, Congress has been the source of this pressure.

There is growing bipartisan support in Congress for privacy. Members of Congress are entrepreneurs themselves who sometimes find it in their interest to serve the interests of their constituents. There is a growing pressure on them to address online privacy con-

67. See *id.* ("The majority abandons a self-regulatory approach in favor of extensive government regulation, despite continued progress in self-regulation.")

68. See ELLICKSON, *supra* note 39, at 4-6; ERIC A. POSNER, LAW AND SOCIAL NORMS 141-47 (2000).

69. "The Pew Internet & American Life Project surveyed 2,117 Americans, 1,017 of whom are Internet users, . . . about trust and privacy online." See Susannah Fox et al., *Trust and Privacy Online: Why Americans Want to Rewrite the Rules* (Aug. 20, 2000), at 2, <http://www.pewinternet.org/reports/toc.asp?Report=19>. The results of this survey indicate that:

The vast majority of American Internet users want the privacy playing field tilted towards them and away from online companies. They think it is an invasion of their privacy for these businesses to monitor users' Web browsing. By a two-to-one margin they reject the argument made by some firms that Web tracking can be helpful. . . .

86% of Internet users are in favor of "opt-in" privacy policies that require the Internet companies to ask people for permission to use personal information. . . .

54% of Internet users believe that Web sites' tracking of users is harmful because it invades their privacy.

Id. As part of their marketing strategies, firms that sell so-called "privacy solutions," that is, software to protect consumer privacy, are attempting to create moral outrage on the part of consumers over the privacy issue. This increases demand on congressional norm entrepreneurs. See Hetcher, *supra* note 40.

cerns.⁷⁰ Thus, the FTC can feel safer than usual in taking the initiative on privacy as it does not risk alienating either of the political parties. Since both parties are increasingly in favor of privacy, the Agency does not have to worry about aligning itself with a faction that will fall out of the ascendancy.⁷¹

What we see, then, is that public demand for greater informational privacy may be translated into political demand for privacy, and the FTC may be able to harness this demand in order to draw support for its efforts to increase its regulatory grasp over the Internet. Whether the public interest is thereby served is not clear. Serious consideration of this issue is beyond the purview of this Article. Answering this question would require a cost/benefit analysis as to whether the FTC is the least cost provider of online privacy.⁷² What we have seen here is merely that the FTC has contrived to be a provider, not that it is the best provider.

IV. CONCLUSION

This Article considered the FTC's role as a norm entrepreneur. Pursuant to the Federal Trade Commission Act, the FTC regulates unfair and deceptive trade practices. Unfairness, per se, is too uncertain of a standard to seek enforcement actions against websites that take data without notice or consent, however. But once websites are induced to make representations in writing via privacy policies, then it is easier for the FTC to seek enforcement actions for deceptive trade practices. Thus, the public choice explanation of the Agency's promotion of privacy policies is that this activity allows the Agency to increase its jurisdiction.

70. See Richard L. Berke, *What Are You Afraid of? A Hidden Issue Emerges*, N.Y. TIMES, June 4, 2000, § 4, at 1.

71. One of the most dramatic episodes in the FTC's history occurred due to a change in the political winds. The Agency pursued an activist agenda in the 1960s and early 1970s. Subsequently, however, a more conservative Congress took over, cut the FTC's funding, and precipitated a crisis at the Agency. See *supra* note 15.

72. In his dissent to the FTC's 2000 Report to Congress, Commissioner Swindle excoriates the Agency for failing to perform rudimentary cost/benefit analysis prior to recommending significant new legislation. See FAIR INFORMATION PRACTICES, *supra* note 7, at 1-2. He states:

[m]ost disturbing, the Privacy Report is devoid of any consideration of the costs of legislation in comparison to the asserted benefits of enhancing consumer confidence and allowing electronic commerce to reach its full potential. Instead, it relies on skewed descriptions of the results of the Commission's 2000 Survey and studies showing consumer concern about privacy as the basis for a remarkably broad legislative recommendation. It does not consider whether legislation will address consumer confidence problems and why legislation is preferable to alternative approaches that rely on market forces, industry efforts, and enforcement of existing laws.

Id.

This Article considered and rejected the supposition that the FTC's purported efforts to promote industry self-regulation might indicate that the Agency has been captured by industry. While the Agency has seemed to promote industry self-regulation, it has all the while been establishing the predicate for its jurisdictional grasp over website activities. Because the FTC is able to gain a jurisdictional foothold by means of promoting more respected website privacy norms, the Agency is aptly characterized as a privacy norm entrepreneur.