

Feel Good Antitrust

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I. INTRODUCTION

A similar story occurs if your favorite musician is in town, or you need lunch delivered to your office. You open your favorite app, select your item, see the price, and add it to your cart. You go to check out, and a list of fees applies. Delivery, service, and convenience fees raise the total cost by 10–15%. You might feel annoyed or frustrated,¹ but you accept the fees and move on. After all, you’ve already gotten this far. When does a business

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1. Interview with Alex Lewis, Senior Articles Ed., J. Corp. L., in Iowa City, Iowa (Aug. 28, 2024).

practice move from an annoyance to a legally cognizable harm? This Note contends that drip pricing does not meet the standards to be regulated under section 5 of the FTC Act. The negative effects of drip pricing are unclear at worst and nonexistent at best. It is clear, however, that drip pricing is unpopular with consumers. The regulation of behaviors that consumers dislike but are not significantly harmful is what this Note describes as ‘Feel Good Antitrust’.

This Note contends that ‘Feel Good Antitrust’ is not new or uncommon. In 2025, antitrust has already been used as a political tool to bully businesses that the current administration does not favor.² This Note also contends that antitrust regulators need to be careful, exacting, and precise when using academic research to support their actions.

This Note also will argue that the regulation of drip pricing is the first in a long list of unilateral business behaviors that could apply to the new FTC enforcement power through its broader reading of section 5 of the FTC Act.³ Drip pricing created an opportunity for the Biden administration and antitrust regulators to get an optical win due to its unpopularity among consumers. This furthers the trend of populist trends in antitrust, which have been increasingly common in the last two administrations but are not new to antitrust generally.⁴ Given the goals listed in Project 2025, populist antitrust is clearly on the table for the second Trump administration as well.⁵

Regulations on drip pricing and similar business practices will either be unworkable for firms and unsustainable for the FTC, or enforcement will be insufficient in reducing the consumer harm that drip pricing may create.⁶ This Note argues that the ability to reach drip pricing expands the regulatory power wielded by the FTC. The outcome of this expansion could lead to the FTC being able to regulate many unilateral business behaviors. This concern has been stated by antitrust experts.⁷

When considering the speculative harms that drip pricing creates, the countervailing consumer desires—despite their willingness to admit it, difficulty in enforcement, and the business responses that would circumvent regulations—many signs point to regulators not moving forward with drip pricing enforcement under section 5. Evidence from behavioral economics suggests that regulating drip pricing is a low-or-no-benefit endeavor for regulators or consumers.

Antitrust enforcement is constrained by funds, time, and reality. Unfortunately, for antitrust regulators, drip pricing provides an opportunity to provide ‘Feel Good Antitrust’ to some consumers with an outcome that they outwardly prefer—even if this is unsupported

2. Herbert Hovenkamp, *The Future of Antitrust Populism* 1 (Uni. Pa. Inst. L. & Econ. Rsch. Paper No. 24-16, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4784733.

3. Khan, *infra* note 60 (noting the changes in FTC’s reading of the FTC Act).

4. *See generally* Hovenkamp, *supra* note 2.

5. THE HERITAGE PROJECT, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE PROJECT 869–81 (2023) (discussing blocking ESG initiatives as anticompetitive, regulating cancel culture as an unfair trade practice, and questioning whether the FTC should even continue to exist).

6. *See infra* Part VI (concluding that drip pricing regulation will be prohibitively inefficient or unworkable).

7. Steven Salop & Jennifer Sturiale, *The FTC Should Quickly Issue New Section 5 Enforcement Guidelines*, PROMARKET (July 26, 2022), <https://www.promarket.org/2022/07/26/the-ftc-should-quickly-issue-new-section-5-enforcement-guidelines/> [<https://perma.cc/7X2B-P65S>].

by experiential studies. This enforcement attempts to provide regulators a win against ‘big business’—even though the underlying consumer harm that was prevented is little to none. The next wave of antitrust during the second Trump administration looks like it will continue the fight against big business and tech, but this time with an ‘anti-woke’ flavor.

II. BACKGROUND

A. Drip Pricing: Defined and Clarified

Drip pricing is “a pricing technique in which firms advertise only a part of a product’s price and reveal other charges later as consumers go through the buying process.”⁸ These additional charges can be upgrades, add-ons, or fees.⁹ To understand what drip pricing looks like, we can look at a recent example provided by the White House.¹⁰ Imagine purchasing a resale general admission ticket for an upcoming concert in your area. You decide to check two commonly used ticketing applications—Vivid Seats and SeatGeek, and both tickets are listed for \$87. You would think there is no difference in price between the tickets, and the consumer would expect to spend around \$90, near the face price.¹¹ However, the ticket from SeatGeek would cost \$128 after taxes and fees, while the Vivid Seats ticket would cost \$124.¹² The addition of fees, taxes, and other costs is the practice of drip pricing.¹³

Table 1: Vance Joy Concert Tickets, Washington DC on March 25, 2023

Vendor	Vivid Seats	SeatGeek
Base Ticket	\$87	\$87
Service Fee	\$27.60	\$34
Sales Tax and Delivery	\$9.38	\$0
Tax	\$0	\$7.26
Advertised Price	\$87	\$87
Total	\$123.98	\$128.26

8. *The Economics of Drip Pricing*, FTC (May 21, 2012), <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing> [<https://perma.cc/XG7T-AWVK>].

9. *Id.* This Note will argue the definition of drip pricing (and junk fees discussed later) encompasses such a broad range of business behavior that defining it this broadly makes regulation difficult. Upgrades and fees are intuitively different from other fees. This Note will helpfully distinguish these later as value-added or non-value-added drips. *See infra* Part IV.C–D.

10. White House Couns. Econ. Advisors, *How Junk Fees Distort Competition*, THE WHITE HOUSE (Mar. 21, 2023), <https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/> [<https://web.archive.org/web/20250108192440/https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/>].

11. *Id.*

12. *Id.*

13. *Id.*

In other scenarios, both hotel or food delivery fees are added after the consumer chooses a product.¹⁴ One common scenario where a consumer may see drip pricing is in airline ticketing, especially for ultra-low-cost carriers (ULLC).¹⁵ When purchasing a ticket on an ULLC, after a base fare is chosen, consumers are given the option to select a specific seat, carry-on and checked luggage, and priority boarding.¹⁶ After fees, add-ons, and federally mandated taxes, the total price can easily be 2–3 times the advertised base fare price.¹⁷

Over the last decade, drip pricing has received attention from consumers,¹⁸ academics,¹⁹ consumer protection experts,²⁰ and a President.²¹ Although considered to be extremely unpopular by both consumers and politicians, the actual costs to consumers of drip pricing and the benefits of requiring other pricing methods are not well understood, and defining them has been difficult for regulators.²² Further complicating these issues is the fact that the practice of drip pricing also lands in a unique area of consumer protection law. The Biden administration did not differentiate the concept of ‘drip pricing’ from ‘junk fees’.²³ Drip pricing has also been included in a larger grouping of business practices called ‘junk fees’.²⁴ President Biden has addressed drip pricing on social media on many occasions, stating that drip pricing is a “junk fee[] that rip[s] consumers off.”²⁵ This Note will purposefully separate the more complex practice of drip pricing from other ‘junk fees’ that

14. *Id.*

15. Channing Reid, *The UK is Taking Aim at Low-Cost Airline Pricing*, SIMPLE FLYING (Sept. 5, 2023), <https://simpleflying.com/uk-action-low-cost-airline-pricing/> [<https://perma.cc/H4PR-X7WV>].

16. *See, e.g., Optional Services & Fees*, ALLEGIANT AIR, <https://www.allegiantair.com/popup/optional-services-fees> [<https://perma.cc/644S-BHY7>].

17. *See, e.g., id.* (advertising a base price of roughly \$175 for a flight, which can exceed \$500 after adding baggage, a preferred seat and boarding, and additional required government fees).

18. Shelle Santana, Steven Dallas & Vicki Morowitz, *Consumer Reactions to Drip Pricing*, 39 MKTG. SCI. 188 (2020).

19. Tom Blake et al., *Price Salience and Product Choice*, 40 MKTG. SCI. 619, 632–33 (2021).

20. Michael Baye, Professor, Ind. Univ., Speech at FTC Conference on The Economics of Drip Pricing (May 21, 2012).

21. Joe Biden, President of the United States, Remarks at the Third Meeting of the White House Competition Council (Sept. 26, 2022).

22. David Adam Friedman, *Regulating Drip Pricing*, 31 STAN. L. & POL’Y REV. 51, 54–55 (2020).

23. *See* Brian Deese, Neale Mahoney & Tim Wu, *The President’s Initiative on Junk Fees and Related Pricing Practices*, THE WHITE HOUSE BRIEFING ROOM BLOG (Oct. 26, 2022), <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices> [<https://web.archive.org/web/20250108232128/https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/>] (referring to “junk fees” to encompass a broad range of business practices: drip pricing, overdraft fees, delivery fees for tickets, fees and taxes for airfare, and deceptive pricing practices in the automotive industry).

24. Press Release, FTC, FTC to Hold Virtual Informal Hearing on April 24, 2024, as Part of its Review of the Proposed Rule Prohibiting Junk Fees (Mar. 21, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-hold-virtual-informal-hearing-april-24-2024-part-its-review-proposed-rule-prohibiting-junk-fees> [<https://perma.cc/A35G-R7QN>].

25. President Biden (@joebiden), TWITTER (Mar. 2, 2024), <https://x.com/POTUS/status/1763972642602700967> [<https://perma.cc/HBY4-L62Y>]; President Biden (@joebiden), TWITTER, (Apr. 24, 2024), <https://x.com/POTUS/status/1783188473903566915> [<https://perma.cc/G2RR-WW68>].

run much more closely with fraud. For example, some ‘junk fees’ mentioned by the Biden Administration are fees charged to renters that were not in the lease and were charged after a long-term lease was signed. It is not surprising that drip pricing gets lumped into more harmful and deceptive practices when discussed by regulators to gain favor for their regulation. In a similarly imprecise way, the analysis provided by the Biden Administration has been deceptive in overstating the negative impacts of drip pricing.²⁶

B. Price Anchoring

The impact of drip pricing on consumer behavior and welfare has been a topic of study for both behavior economists and marketing academics.²⁷ Research on drip pricing can be traced to the work of Daniel Kahneman and Amos Tversky, who used the term “anchoring” to describe the difficulty of adjusting our internal calculations once we are exposed to—anchored to—the initial value shown.²⁸ In drip pricing, anchoring is implicated as a consumer is first shown an initial lower price before additional fees or costs are added.²⁹ When consumers see the base price, they ‘anchor’ their expectations of the total price to that of the base price, consumers fail to sufficiently compensate for the surcharges and other fees and end up internally underestimating the total price, even though they are made aware of the total price at the end of the transaction.³⁰ The price feels cheaper than it is, even when you are fully conscious of the actual price.

Current research on drip pricing focuses on three areas. Researchers attempt to determine the difference in total spending between dripped models and “all-in” pricing models.³¹ Researchers are attempting to quantify the increased search and transactional costs for consumers.³² Researchers are attempting to understand how drip pricing impacts consumer sentiment in current and future transactions.³³

C. Impacts on Consumer Spending

In a White House statement on drip pricing, a cited study supported the assertion that drip pricing caused consumers to pay roughly 20% more on tickets.³⁴ However, this study looked at both the “quality” and “quantity” effects caused by drip pricing. When ticket

26. For an example of the Biden Administration inappropriately misrepresenting economic analysis, see *infra* Part II.C. For a discussion of populist antitrust generally, see *infra* Part V.E.

27. See *infra* Part II.C–F (reviewing the literature on drip pricing impacts).

28. Daniel Kahneman, Paul Slovic & Amos Tversky, *Judgement Under Uncertainty: Heuristics and Biases*, 185 *Sci.* 1124, 1128 (1982).

29. *Id.* at 1129.

30. Gorkan Ahmetoglu, Adrian Furnham & Patrick Fagan, *Pricing Practices: A Critical Review of Their Effects on Consumer Perceptions and Behaviour*, 21 *J. RETAILING CONSUMER SERVS.* 696, 699 (2014).

31. Shannon White, *When Shrouded Prices Signal Transparency: Consequences of Price Disaggregation* 108–10 (June 2020) (Ph.D. dissertation, The University of Chicago) (ProQuest).

32. See, e.g., Alexander Rasch, Miriam Thöne & Tobias Wenzel, *Drip Pricing and Its Regulation: Experimental Evidence*, 176 *J. ECON. BEHAV. & ORG.* 353, 363 (2020).

33. Thomas Robbert, *Feeling Nicked and Dimed – Consequences of Drip Pricing*, 25 *J. SERV. THEORY & PRAC.* 621, 631 (2015).

34. See White House Couns. Econ. Advisors, *supra* note 10.

quality is equal, the researchers expect drip pricing to, at most, increase business revenue by 15% in an observational setting.³⁵

Other studies have found similar results, finding that drip pricing, when compared to Bertrand competition,³⁶ leads to higher prices and lower consumer surplus.³⁷ Drip pricing was found to have a roughly 10% increase in prices in an experimental setting.³⁸ Other research supports that banning drip pricing makes consumers worse off unless the drip charge is sufficiently high.³⁹ The consumer benefits from banning drip pricing can be attributed to the fact that lower upfront prices may offset the dripped fees.⁴⁰

D. Impacts on Search Costs

Businesses can generate more revenue from consumers in drip pricing scenarios due to the increase in search costs.⁴¹ When a consumer realizes that prices have been dripped into the transaction, they must determine whether the time to find other offers is worth the expected savings they would receive by looking for a better price.⁴² Further exacerbating this issue for consumers is that they underestimate the amount of money that they can save through additional searching.⁴³ In reality, it would be worth it for the consumer to continue searching, but they inaccurately assume that it is not. Consumers also wrongly assume that all firms charge similar additional fees. This leads to consumers often paying more than they otherwise would have due to many different misconceptions on how easy it will be to find a similar product at a lower total price.

35. Blake et al., *supra* note 19. When consumers are given a drip pricing scenario, they see an initial lower ticket price. This leads to consumers choosing slightly higher quality tickets at a price they feel comfortable paying. Then fees and additional charges are added raising the total price. The study found that roughly at least one third of the increase in revenue caused by drip pricing is due to consumers originally deciding to higher quality tickets, while two-thirds of the increase in spending is related to the anchoring and effects of price obfuscation in the transaction. If you look specifically at individuals who purchased the same ticket, you expect to see a roughly 15% increase in consumer spending due to the drip pricing.

36. Bertrand Competition is a model of economic competition where firms set prices and customers then purchase quantities at the given prices set for a homogenous good. See Mirjam Sarah Salish, *Bertrand Competition*, INOMICS (Jan. 5, 2021), <https://inomics.com/terms/bertrand-competition-1504578> [<https://perma.cc/KKA7-BEF2>]. Bertrand markets are a useful model in this context as there is no functional difference between general admission tickets and price is likely the largest factor in determining whether a consumer purchases.

37. Blake et al., *supra* note 19, at 632–33.

38. Rasch, Thöne & Wenzel, *supra* note 32, at 363.

39. David De Meza & Diane Reyniers, *Every Shroud Has a Silver Lining: The Visible Benefits of Hidden Surcharges*, 116 ECON. LETTERS 151, 151 (2012).

40. *Id.* at 152–53 (considering the potential benefits of drip pricing with the extremely high costs of enforcement, a “hands-off” approach to regulating drip fees might be best).

41. Rasch, Thöne & Wenzel, *supra* note 32, at 358.

42. *Id.* at 363.

43. Santana, Dallas & Morowitz, *supra* note 18, at 188.

E. Consumer Sentiment

Researchers have also attempted to determine whether drip pricing is a viable long-term strategy for companies or whether drip pricing dissuades consumers from purchasing in the future. This area is unclear, with some researchers finding that additional fees and price obfuscation hurt perceptions of brands that use it.⁴⁴ These studies did not create a business cost-benefit scenario comparing the reputational harms from using drip pricing to the additional revenue created by drip pricing.⁴⁵

Another difficulty in determining the actual effects of drip pricing is determining who is most impacted by drip pricing. Some researchers have theorized that wealthier consumers are most impacted by hidden fees⁴⁶ due to their increased ability to pay. Others have found that “myopic”—or unsophisticated—consumers are most likely to be harmed as they do not anticipate the drips and do not find substitutes for the dripped-in items.⁴⁷

Drip pricing, on its own, impacts consumers in many ways. Further complicating the analysis is the research showing consumers prefer more complicated pricing methods, like drip pricing, as they believe businesses are more transparent about their pricing.⁴⁸ It also appears that drip pricing affects those familiar and informed about the practice in similar ways to individuals who are not as familiar with the use of the practice.⁴⁹

F. Drip Pricing Conclusion

Economic research suggests that drip pricing increases consumer spending by roughly 10–15% when comparing non-dripped purchases of similar products.⁵⁰ Consumers are willing to take on this additional cost as they do not believe that searching further will be valuable and are anchored to the lower original price. Consumers knowledgeable of drip

44. Bennett Chiles, *Shrouded Prices and Firm Reputation: Evidence from the U.S. Hotel Industry*, 67 *MGMT. SCI.* 964, 964 (2021).

45. *Id.* at 980.

46. Geoffrey A. Manne & Todd J. Zywicki, *Uncertainty, Evolution and Behavioral Economic Theory*, 10 *J.L. ECON. & POL'Y* 555, 574 (2014) (noting that higher-end hotels are more likely to drip in more hidden fees as high-end accommodations have customers with more inelastic demands, while “budget” hotels give free amenities to attempt to capture price-conscious consumers).

47. See Shelanski et al., *Economics at the FTC: Drug and PBM Mergers and Drip Pricing*, 41 *REV. INDUS. ORG.* 303, 312–14 (2012) (stating that sophisticated consumers find substitutes for pricey add-ons, while myopic consumers purchase the expensive add-ons, therefore partially subsidizing the cost for sophisticated consumers who have a higher level of economic literacy); See also Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 *Q. J. OF ECON.* 505, 505 (2006) (adding that it is difficult to lure consumers to nonexploitative firms).

48. White, *supra* note 31 (noting that consumers prefer a complex price disclosure as a signal of transparency, while in reality the complicated price disclosures increase costs for consumers); see also Katja Seim, Maria Ana Vitorino & David Muir, *Do Consumers Value Price Transparency?*, 15 *QUANTITATIVE MKTG & ECON.*, 305, 335 (2017) (finding that some consumers are willing to pay significantly more for price transparency, but these preferences are heterogeneous).

49. See Rasch, Thöne & Wenzel, *supra* note 32 (finding that when consumers are well informed about drip pricing, the overall prices are still higher, even when knowledgeable consumers are acting optimally, and consumers who are not aware of drip pricing are even worse off compared to scenarios when all-in pricing is used).

50. *Id.*

pricing appear to spend more, but unknowledgeable consumers experience an even larger impact.⁵¹ However, these impacts can be difficult to untangle, as wealthier consumers may be more willing to pay drips due to their ability to pay. Further complicating this issue is the contradictory beliefs that consumers have; where some find drip pricing to be frustrating, others find drip pricing to be a signal of price transparency.⁵²

III. REGULATION OF DRIP PRICING

A. FTC Act Section 5

The statutory authority through which regulation of drip pricing has been enforced has been section 5 of the FTC Act.⁵³ In a notice published by the FTC in October 2022, where the FTC looked for public comments on drip pricing and so-called junk fees, it was stated that “[t]his authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).”⁵⁴ To best understand how section 5 of the FTC Act fits into current legislation on drip pricing, it is helpful to understand the current text of the statute:

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. (2) 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.⁵⁵

The powers granted by the FTC Act and by section 5 have been in question from the beginning⁵⁶, most likely due to the vagueness of its terminology. Some senators believed that the Act only applies to competitors, stating that the act “covers every practice and method between competitors upon the part of one against another that is against public morals.”⁵⁷ Others believed it was to protect the public from any “vicious practice or method . . . that has a tendency to affect the people of the country or to be injurious to their welfare.”⁵⁸ Others believed the FTC Act to apply to acts that violate the Sherman Act, those that may lead to monopoly or restraint of trade, and “all other acts which interfere with efficiency.”⁵⁹ Current readings of the statute also vary, which is unsurprising when considering the longstanding difficulty in determining the meaning of the statute.

51. *Id.*

52. White, *supra* note 31.

53. 15 U.S.C. § 45.

54. Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87 Fed. Reg. 67413 (Nov. 8, 2022) (to be codified at 16 C.F.R. pt. 464).

55. 15 U.S.C. § 45.

56. Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

57. *Id.* at 21 (quoting Senator Newlands).

58. *Id.* at 24 (quoting Senator Cummins).

59. *Id.* at 29 (quoting Senator Hollis) (emphasis omitted).

The interpretation of section 5 of the FTC Act by former FTC Chair Lina Khan supports what this Note contends as a broad reading of the statute.⁶⁰ Khan posits a “straight-forward” reading of the statute, which believes that Congress tasked the FTC with identifying the scope of unfair methods.⁶¹ Khan posits the statute was meant to fill gaps left by the Sherman Act and is flexible by refusing to list specific types of conduct but rather providing a framework allowing the FTC to determine which cases to bring.⁶²

The current regulatory understanding of section 5 was created through shifts in reasoning made in the 1970s and 1980s. In the 1970s, standalone section 5 cases were common, but in the 1980s, the FTC lost three section 5 cases, and then the agency turned on bringing standalone cases in section 5.⁶³ The last of these cases is the often-referenced *Ethyl* case. In this case, the FTC was not able to meet the burden to show that the questioned business practices were significantly lessening competition.⁶⁴ In *Ethyl*, the firms were giving notice of price increases, adopting “most favored nation” clauses,⁶⁵ and giving uniform pricing, which included transit costs.⁶⁶ The court stated that the FTC had the authority to forbid business practices that lessen competition, but the FTC did not meet that standard.⁶⁷ Although this case chilled the FTC in bringing section 5 cases, former Chair Khan has claimed that this does not reduce section 5 power and that recent settlements in section 5 issues show that it still has teeth.⁶⁸

The stance of Chair Khan’s FTC regarding the scope of section 5 can be summed up in 3 points. (1) The point of section 5 was to create prohibitions far beyond the previously enacted antitrust laws, with the flexibility to determine what was “unfair competition.”⁶⁹ (2) For unfair competition to exist, there must be a method of competition rather than a condition of the marketplace;⁷⁰ creating impediments to competition is illegal but being in a market that has high barriers to entry is not.⁷¹ (3) The method of competition must be unfair beyond competition on the merits.⁷² When determining if competition is unfair, the FTC will consider: (a) if the conduct is coercive or exploitative among others⁷³—or importantly for the case of drip pricing—(b) the conduct is unfair beyond competition on the

60. See Lina M. Khan, *Section 5 In Action: Reinvigorating the FTC Act and the Rule of Law*, 11 J. ANTITRUST ENF. 149, 150 (2023) (explaining that the Supreme Court intended for an open-ended interpretation).

61. *Id.*

62. See *id.* at 152 (stating the policy statement provides guidelines and factors to allow the commission to determine whether a business practice is an unfair method of competition).

63. See *id.* at 151 (summarizing the changes in Section 5 case law).

64. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 141 (2d Cir. 1984).

65. Most favored clauses refer to a business agreement where the price given to a consumer is equal to the lowest price that it gives to any other consumer. *Id.* at 130.

66. *Id.* at 133–34.

67. *Id.* at 142.

68. Khan, *supra* note 60.

69. FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission, FTC Act Comm’n File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [<https://perma.cc/UP6F-RU2U>].

70. *Id.* at 8.

71. *Id.*

72. *Id.*

73. *Id.* at 9.

merits if it tends to reduce competition or “otherwise harm consumers.”⁷⁴ “Harm” was further explained as conduct that tends to generate negative consequences, like raising prices, reducing output, or reducing competition.⁷⁵

Along with former Chair Khan’s discussion on section 5, we can also use the FTC Policy Statement to understand how section 5 of the FTC Act is going to be enforced. It is important to note that this broad reading brought forward by Khan and the FTC policy statement is not unanimous, even at the FTC, but does represent a majority belief. In dissent, Commissioner Christine S. Wilson agreed that consumers need to have sufficient information to be informed and are not charged for products they did not agree to under the current scheme.⁷⁶ Commissioner Wilson also listed many issues that she had with the proposed rulemaking: First, it may duplicate or contradict existing law and rules; second, it relies on vague definitions and flawed assumptions; and third, it ignores the impacts on competition and the waste of scarce resources.⁷⁷ It will be interesting to see what stance the FTC takes under the second Trump Administration. It may even be the case that drip pricing is not considered in favor of other policies and concerns.

B. FTC Junk Fee Rule

In December 2024, the FTC announced a rule on junk fees through the “Trade Regulation Rule on Unfair or Deceptive Fees.”⁷⁸ The goal of the act was to provide transparency to prices and to prevent consumers from being “saddled with mysterious fees” according to Chair Khan.⁷⁹ Using section 18 and section 5 of the FTC Act, the FTC will make illegal “conduct that is inherently deceptive or unfair, including (1) offering prices that do not include all mandatory fees or charges and (2) misrepresenting the nature, purpose, amount and refundability of fees or charges.”⁸⁰ The FTC rule and this Note relied on much of the same analysis regarding the impacts of drip pricing on consumers. Both cited the same studies on the consumer harms of drip pricing, the impact of price anchoring, and search costs on consumers. However, this Note argues that the FTC was incorrect when it stated that these price schemes have “no benefit to competition” and that the FTC overstates the negative impact of drip pricing schemes.⁸¹

74. FTC Policy Statement, *supra* note 69.

75. *Id.* at 10.

76. Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87 Fed. Reg. 67413 (proposed Nov. 8, 2022) (to be codified at 16 C.F.R. pt. 464) (Wilson, Comm’r., dissenting).

77. *Id.*

78. FTC Trade Regulation Rule on Unfair or Deceptive Fees, 16 C.F.R. § 464 (2024).

79. Press Release, Federal Trade Commission Announces Bipartisan Rule Banning Junk Ticket and Hotel Fees (Dec. 17, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees> [<https://perma.cc/27HB-BRDV>].

80. FTC Trade Regulation Rule on Unfair or Deceptive Fees, 16 C.F.R. § 464, 42 (2024).

81. *Id.* at 49.

IV. ANALYSIS

A. Differentiating Drip Pricing from Junk Fees

To better understand how drip pricing should be regulated, we must consider other business practices that are more clearly harmful to consumers.⁸² Unlike junk fees for ticket delivery or upcharges for functionally identical products,⁸³ drip pricing creates a unique problem for regulators. Drip pricing both obfuscates price—through the existence of price anchoring—but also makes the price more transparent to consumers—through the consumer’s ability to see the cost of each of the elements of a purchase.⁸⁴ This is especially true for companies like ULLC airlines, who provide many extras where cost-conscious consumers can identify whether each new offer for the deal is worth the cost.⁸⁵

B. Cost-Benefit Analysis

When attempting to identify whether regulation of drip pricing is beneficial from a simple cost-benefit analysis, one could begin by looking at the cost to consumers that drip pricing creates and compare it with the benefits consumers receive from drip pricing.⁸⁶ As found in the literature, drip pricing appears to increase consumer spending by 10–15% when looking at situations where we control the quality of the item purchased.⁸⁷

Researchers have also attempted to quantify the price premium that consumers were willing to pay for price transparency.⁸⁸ They have found that consumers are willing to pay significant price premiums for detailed price information.⁸⁹ Holding all elements constant, it was found that customers were willing to pay roughly 8% more in cases where total prices with some of the components of price were listed compared to an all-in price structure.⁹⁰ The study also found that moving to even more transparent prices, where all components of the price were listed, could further increase the consumer’s willingness to pay by over 15% of the price.⁹¹ In experimental settings, consumers were willing to pay 11%

82. See Friedman, *supra* note 22, at 68–71 (noting that drip pricing often gets lumped in with a variety of business practices that seem on its face to be more predatory and anticompetitive).

83. Deese, Mahoney & Wu, *supra* note 23 (combining the practice of drip pricing with other, more clearly harmful business practices, like fraudulent fees).

84. Blake et al., *supra* note 19, at 620.

85. See ALLEGIANT AIR, *supra* note 16.

86. Cost-Benefit Analysis (CBA) has been maligned by some consumer advocates however, looking at the opportunity costs of ineffective consumer protection can be extremely important since consumer protection often happens in “one-shot.” Furthermore, when analyzing consumer protection, it is important to understand the expected behaviors of all actors to understand the impacts of regulation. See Jeff Sovern, *Can Cost-Benefit Analysis Help Consumer Protection Laws? Or at Least Benefit Analysis?*, 4 U.C. IRVINE L. REV. 1241, 1245 (2014) (“While some consumer protection laws help consumers even if consumers are unaware of them, others depend on consumer actions for their effectiveness, and if consumers do not take these actions, then the protections do not work.”).

87. Blake et al., *supra* note 19; Rasch, Thöne & Wenzel, *supra* note 32.

88. Seim, Vitorino & Muir, *supra* note 48, at 331.

89. *Id.*

90. *Id.*

91. *Id.*

more for price transparency compared to scenarios where they were given only one price.⁹² This research also points to the fact that younger consumers place more value on price transparency.⁹³ This could be a sign of more efficient searching— younger customers are better at searching, therefore decreasing their search cost *vis-à-vis* the general population— or this could be explained by these consumers being less skilled at attempting to compare prices, so they value transparency more.⁹⁴

The fact that consumers both appear to prefer the transparency of different price elements but are also affected by price anchoring makes analyzing the harm from drip pricing difficult. One of the commonly argued problems created by drip pricing is that it obfuscates the all-in price. However, the amount of price obfuscation depends on the type of product and the type of drips used. In the case of event ticketing, the amount of service fees, delivery fees, and tax obfuscates the price in a significant but reasonably expected manner.⁹⁵ For ULLC airlines, on the other hand, drips still obfuscate the total price, but the dripped-in products (like selecting a specific seat or the need for a carry-on) are not as ‘baked-in’ compared to delivery or service fees.⁹⁶

This dichotomy has led academics and regulators to consider whether any consumer value has been added by the drip to determine whether it is problematic.⁹⁷ On its face, this distinction of whether the value has been added neatly separates the more clearly problematic ticket delivery fee, compared to the ability to bring a checked bag on a flight, for a fee on top of the cost of the ticket.⁹⁸

C. Value-Added Drip Pricing Framework

The distinction—whether a drip has added value to the consumer or not—has been successful for consumers fighting in state courts against late added surcharges at restaurants or in situations where a cash-only price is advertised.⁹⁹ However, analysis of whether a drip is a ‘value-added drip’ has its difficulties.

First, whether a drip provides value is a difficult question. When analyzing the delivery and service fees in online ticketing, the delivery of the ticket and the online process

92. *Id.*

93. Seim, Vitorino & Muir, *supra* note 48, at 331.

94. *Id.* One important underlying concept in this cost-benefit analysis is who is primarily receiving the costs versus the benefits. It is possible that a net positive regulation on its face could have negative impacts if, for example, most of the costs burdened one group disproportionately and the benefit was similarly placed on one group. See Aaron Klein, *America’s Poor Subsidize Wealthier Consumers in a Vicious Income Inequality Cycle*, BROOKINGS (Feb. 6, 2018), <https://www.brookings.edu/articles/americas-poor-subsidize-wealthier-consumers-in-a-vicious-income-inequality-cycle/> [<https://perma.cc/CN9K-XFUM>] (noting a scenario where a facially neutral policy can have a negative effect based on who is positively or negatively affected).

95. See White House Couns. Econ. Advisors, *supra* note 10; Santana, Dallas & Morowitz, *supra* note 18 (stating how price drips can still impact consumer behavior even when it is anticipated).

96. Robbert, *supra* note 33, at 631.

97. Friedman, *supra* note 22, at 81–82.

98. See *id.* at 82 (discussing this concept in the world of hotel fees, where a hotel room mini bar is a good example of a value-added drip, while an exorbitant parking fee not disclosed until arrival would appear more coercive).

99. *Id.* at 83–84. The cause of action in these cases is violations of state unlawful trade practices. *Id.*

provide at least some value to the consumer. The more accurate framing of this issue is whether the consumer assumed the dripped-in price was included in the price.

In event ticketing cases, from a consumer perspective, it may be difficult to expect that an online ticket can be purchased, but an additional fee would be required for online delivery. This practice of being notified of the drip later in the process appears to be a good way to capture the harm that drip pricing creates. At this point of a late added drip, consumers only see the full price near checkout and need to consider whether the cost that the drip adds is worth the need to search for other options.

D. Applying the Value-Added Drip Pricing Framework

When applying the value-added framework to drip pricing scenarios like those seen in the DoorDash and Uber Eats examples,¹⁰⁰ the businesses will likely be able to successfully argue that the drips are providing a valuable amount of price transparency to the consumer due to the ever-changing prices of service and delivery fees.¹⁰¹

One difficulty in analyzing the drip pricing of delivery and service fees is the fact that they are often based uniquely on the specific order, the delivery address, the location of the restaurant, and the average cost of orders for the restaurant.¹⁰² Delivery apps, like DoorDash or Uber Eats, are constantly changing these algorithms to attempt to create a pricing structure that better meets their company goals.¹⁰³ This type of pricing framework necessarily requires a “last-minute” calculation of the delivery and service fees of the order, as the number of available drivers is constantly changing.¹⁰⁴

The timing of drip pricing further complicates the analysis. When an item is selected, the next screen is typically where the price drips are added.¹⁰⁵ In these scenarios, drip pricing is a very efficient way for the seller to provide transparency of the total price of the item, matching consumer preferences.¹⁰⁶ This transparency of the total price is done by listing the price of the item selected, delivery and convenience charges, a subtotal, and a total after a selected tip is added.¹⁰⁷ In a White House blog post, the drip pricing framework was directly stated to be harming consumers.¹⁰⁸ In this post, it was argued that drips for taxes, delivery, and service fees obfuscate the price for the consumer.¹⁰⁹ In this scenario, a single food item from a single restaurant was delivered by three delivery apps, where the

100. See White House Couns. Econ. Advisors, *supra* note 10 (providing an example of how drip pricing may be used in food delivery apps; See Part II.A (discussing this example)).

101. Eugene Manuilov, *New Delivery Fee Structure*, UBER BLOG (Aug. 6, 2019), <https://www.uber.com/en-AU/blog/new-delivery-fee-structure/> (on file with the *Journal of Corporation Law*); Uber Eats, *Surge: Make More Money When It's Busy*, UBER BLOG (Mar. 13, 2019), <https://www.uber.com/blog/courier-surge-intro/> (on file with the *Journal of Corporation Law*).

102. *Id.*

103. *Id.*

104. Uber Eats, *supra* note 101.

105. See, e.g., DOORDASH, <https://www.doordash.com/> [<https://web.archive.org/web/20240926160821/https://www.doordash.com/>].

106. See Part II.E (discussing consumer preferences for price transparency).

107. *Id.*

108. White House Couns. Econ. Advisors, *supra* note 10.

109. *Id.*

base price for the item was essentially identical across apps.¹¹⁰ However, each delivery app charges a different amount of tax, service fees, and delivery fees.¹¹¹ This allegedly made it difficult for consumers to compare prices between apps.¹¹² However, at most, the cheapest and most expensive apps were 8% apart in total price.¹¹³ The closest scenarios had a 1% difference in the total price of the item between the apps.¹¹⁴

This Note contends that the White House made an error in their analysis of drip pricing. The argument brought forward is that the existence of drip pricing greatly increases search costs,¹¹⁵ while the increase in search costs can simply be attributed to the existence of a consumer needing to use separate apps for food delivery. After adding the item to the cart, it only takes one to two seconds to go from the order to the order summary, where service and delivery fees are added. The real, significant costs to the consumers are the time to create an account for each app, provide an address and payment information, and then select the restaurant and items. Selecting an item and adding it to the cart to see the final price only takes seconds, while making an account for the app can take minutes.¹¹⁶

When we consider that the increase in search costs may be due to needing an account rather than determining the price, the overall effects of drip pricing on search costs seem small. Additionally, a blanket ban on late-added drips would likely create significant menu costs for restaurants.¹¹⁷ In this case, the most efficient solution is likely to allow surcharges if the consumer has been made sufficiently aware before they order.

When applying whether the drip pricing in the DoorDash and Uber Eats example is ‘value-added,’ the current framework is unhelpful. The distinction of whether the drip is value-added is dependent on how the transaction is framed. From a business perspective, the drip is value-added, as it gives transparency to the consumer on the constantly changing driver network to provide the delivery service. The consumer protection regulators of the Biden administration framed this transaction differently.¹¹⁸ From their perspective, the late addition of service and delivery fees obfuscates the price and reduces competition. Additionally, the firms should increase the prices upfront to be most transparent and competitively fair.¹¹⁹

However, because the service fees and delivery fees are calculated based on real-time demand for the goods, it would be more likely that not a court would consider these drips to be “value-added.” Courts that have held against businesses for late added fees have decided these cases narrowly, focusing on fees and additional expenses, which are much more

110. *Id.*

111. *Id.*

112. *Id.*

113. White House Couns. Econ. Advisors, *supra* note 10.

114. *Id.*

115. *Id.*

116. DOORDASH, *supra* note 105.

117. Will Kenton, *What Are Menu Costs? Definition, How They Work and Example*, INVESTOPEDIA (July 3, 2023), <https://www.investopedia.com/terms/m/menu-costs.asp> [<https://perma.cc/8ELE-LSTX>].

118. White House Couns. Econ. Advisors, *supra* note 10.

119. *Id.*

flagrant than the current drip pricing schemes that firms like delivery apps and ULLCs are using.¹²⁰

E. Litigating the Prima Facie Case

1. Theory of Harm

The theory that drip pricing is exploitative has its strongest case within the theory that drip pricing causes consumers to price anchor to a lower price and creates higher prices since consumers are unable to adjust their price heuristics.¹²¹ The FTC would likely argue that the use of drip pricing has been found to increase consumer spending by upwards of 20% compared to non-drip scenarios.¹²² However, when accounting for the quality of items purchased, it has been found that, in reality, this increase is closer to a 10–15% increase in overall spending.¹²³ In a *per se* sense, it can be argued that this price increase caused by drip pricing hurts consumers by reducing consumer surplus.¹²⁴ Most often, the place where the analysis of whether an increase in price needs to be prevented is in the merger context. For example, in *FTC v. Swedish Match*, the FTC won an injunction on a merger because the proposed merger would allow Swedish Match to increase prices by 11–21% depending on the specific product.¹²⁵ At first glance, this appears to show the FTC finding those price increases to be sufficient consumer harm. However, because this was in the merger context, the FTC was able to block the merger rather than attempting to block unilateral business conduct.

When considering drip pricing, the FTC does not have the same recourse as merger cases by enjoining the business behavior. However, they likely have made the prima facie case that drip pricing would fall under a broader reading of section 5, which states that the conduct reduces competition or otherwise harms consumers.¹²⁶ The next two Parts will address the types of arguments that both the FTC and defendants would use to argue the merits of drip pricing regulation if the FTC made a prima facie case.

2. Price Anchoring

For the FTC to win on a price anchoring theory of harm for drip pricing, it would have to contend that this 15% increase in prices from drip pricing caused sufficient harm to consumers. The standard of consumer surplus as a creation of harm to consumers is

120. Friedman, *supra* note 22, at 83–84. Also, note that these cases were decided under state laws that attempted to reach unfair business practices. However, these regulations are very similar in language and objectives to the recent announcement by the FTC of expanding power under Section 5. *See generally* FTC Policy Statement, *supra* note 69.

121. Kahneman, Slovic & Tversky, *supra* note 28.

122. Blake et al., *supra* note 19.

123. Rasch, Thöne & Wenzel, *supra* note 32.

124. The area under the demand curve is made up of consumers who would be willing to pay a higher price but enjoy a benefit at the current market price. In a traditional supply-demand analysis, a price increase creates a reduction in consumer surplus that is captured by an increase in consumer surplus.

125. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000).

126. FTC Policy Statement, *supra* note 69.

relatively straightforward but may be a hard standard to uphold to generalist judges where the harm created appears speculative and theoretical. However, antitrust regulators have argued that consumer surplus could be a standard for regulating harm.¹²⁷

A possible, more likely, and more permissive standard for harm relating to drip pricing would be the theory that drip pricing has done enough harm to be considered unfair, rather than using a *per se* consumer welfare standard. Although the situations are not completely analogous, looking at unilateral price increases in monopoly or oligopoly situations could be valuable in understanding how drip pricing regulation could be successful. The existence of concentrated market power is not a cause of action.¹²⁸ However, if it is successfully argued that delivery apps are wielding their market power through drip pricing to harm consumers, a clear course of action exists.¹²⁹

Defendants in these cases will likely have to argue that drip pricing causing increases in consumer spending is not illegal as it provides benefits for consumers through the increases in price transparency.¹³⁰ As previously discussed, if consumers prefer more complicated pricing schemes, even to their detriment, no harm is being created by drip pricing.¹³¹ The price increase would be considered as a price premium for the ability to better understand the exact pricing.¹³² Lastly, firms can argue that even though drip pricing may increase consumer spending over more basic pricing, the firms do not have sufficient market power for the action to be anti-competitive. In the DoorDash example,¹³³ the three largest food delivery services all use drip pricing models for their fees, but if a firm wanted to compete on a different pricing model to attract consumers who might prefer the lack of transparency for the ability to only see one price, that should be an avenue for firms to compete and differentiate if they prefer. In these scenarios, the apps may also just prefer drip pricing to better account for differences in price due to demand, driver availability, and local taxes and fees.

3. Increasing Search Costs

When considering the two theories of harm caused by drip pricing, the increase in cost due to price anchoring is more easily enforceable for antitrust regulators. However, they can argue that drip pricing increases search costs unfairly, and firms use drip pricing to obfuscate price competition.

From an evidentiary perspective, the ability of regulators to quantify the amount of harm created by search costs will only be highly speculative.¹³⁴ Additionally, what makes

127. Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, DEP'T OF JUST. ANTITRUST DIV. (2007), <https://www.justice.gov/atr/consumer-surplus-appropriate-standard-antitrust-enforcement> [<https://perma.cc/24UU-QLBT>].

128. *Monopoly Defined*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> [<https://perma.cc/VN8Q-ABXV>].

129. *Id.*

130. Seim, Vitorino & Muir, *supra* note 48.

131. *See supra* Part II.E. (discussing consumer preferences around price transparency).

132. *See* Seim, Vitorino & Muir, *supra* note 48 and accompanying text.

133. *See supra* Part IV.D (explaining the DoorDash model for drip pricing).

134. *See supra* Part II.D (discussing consumers' difficulty quantifying the time cost in searching for deals).

this theory difficult to pursue is the persuasive counterarguments that exist. This counterargument would reason that although drip pricing increases search costs, it also makes consumers more aware of the actual cost of each item in a transaction.¹³⁵ Finally, the analysis of the increase in search costs as a method of harm for consumers is difficult to argue. This is because search costs are internalized and felt by the consumer but are not physically paid like other price increases that are typically represented in antitrust cases involving increasing costs to consumers.¹³⁶

V. RECOMMENDATION

A regulation conundrum exists. The hard-to-pin-down harms that drip pricing creates, the difficulty of regulating, the ease of businesses to circumvent the regulation, and the small effects that banning drip pricing will create, all suggest that regulators will not move forward with drip pricing cases under section 5 even if their rulemaking supports it. Drip pricing presents the dilemma of whether consumer protection regulators and antitrust experts should be saving consumers from their preferences. Although recent announcements by the White House and FTC (both under the Biden Administration) claim that drip pricing and late-added fees are “highly unpopular,”¹³⁷ the actual benefits of banning drip pricing might not go beyond a simple populist win against big business.

If drip pricing structures were successfully regulated by the FTC, one likely strategy by firms would be to simply raise prices to account for the revenue lost from a ban on drip pricing.

From a firm’s perspective, selling a ticket with a higher total price is no different than selling a ticket with an equivalent base and drip price model. This response to drip pricing by firms would not decrease the benefit to the consumer by the size of the drip that is regulated, but rather only to the decrease in overall all-in price. Requiring firms to show an all-in price at the beginning of the transaction will create the benefits of reduced-price obfuscation and more efficient searching. However, the method by which firms choose to display their new prices will instead reduce the benefit of regulation to consumers’ overall well-being.

If firms are allowed to show an all-inclusive price but also allowed to show line-item pricing later in the transaction, many consumers will often still end up paying more due to this pricing scheme.¹³⁸ Imagine this scenario based on your understanding of consumer reactions to price transparency: A consumer sees two price totals, one that shows only the total price but also one with a total price with the cost of the individual pieces that make up the total transaction. We would expect that many will pay a price premium and be more satisfied with the pricing model, the one that appears to give more transparency.¹³⁹ The

135. Kahneman, Slovic, & Tversky, *supra* note 28.

136. *See supra* Part IV.F (discussing the difficulty of translating the price anchoring theory of harm into a consumer welfare standard).

137. White House Couns. Econ. Advisors, *supra* note 10.

138. White, *supra* note 31, at 111–12.

139. Seim, Vitorino & Muir *supra* note 48, at 305.

simplest way to avoid this issue of price transparency causing increases in consumer spending would be to only allow firms to display and sell one price for a product.

However, this solution seems unworkable for firms and undesirable for many consumers who prefer high amounts of price transparency. Additionally, this method would not be workable for many products where the customizability of a product is available. Only listing one price for a phone model, for example, would not be easily done if there were options for different colors, finishes, sizes, and internal components like storage. This phone example is only one of the many examples where creating a pricing structure that does not allow for anchoring or price drips prevents clear communication in the prices of differentiated products between firms and consumers.

A. *Regulating Junk Fees: Not Drip Pricing*

The simplest, cheapest, and most efficient option for regulators is to not consider drip pricing in its attempt to conquer “junk fees” across ticketing, food delivery, and, most recently, retirement accounts.¹⁴⁰ The decision to not consider drip pricing in the current junk fee would allow antitrust regulators to focus on areas where the economic harm is clearer. Unfortunately, deciding not to crack down on drip pricing would remove a large portion of the otherwise popular plan to crack down on anticompetitive behavior and other unfair methods of competition.

The FTC’s more aggressive stance of stating that both drip pricing and junk fees are legally cognizable harm to consumers has already had what can be potentially pro-competitive effects without litigation. Many firms that would be impacted by regulation on drip pricing have already committed to eliminating drip pricing schemes and will show all-inclusive prices to consumers.¹⁴¹ National companies like SeatGeek and AirBnB, along with smaller music venues like Iowa-based xBk, are “going first” and eliminating drip pricing or at least providing an all-inclusive option for consumers to use.¹⁴² Firms that decided to act inconsistently with the industry norms of drip pricing have not only gotten positive coverage from President Biden and the media, but they have also increased their revenues while doing so.¹⁴³ This practice has also been adopted by sports teams. The barnstorming Savannah Bananas baseball team moved toward fee-less pricing as a signal of transparency and goodwill to its consumers.¹⁴⁴ The team uses the phrase “no hidden fees,

140. Joseph R. Biden, President of the United States, Remarks by President Biden on Protecting Americans’ Retirement Security (Oct. 31, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2023/10/31/remarks-by-president-biden-on-protecting-americans-retirement-security/> [https://perma.cc/TY6P-5WEN].

141. *Id.*

142. *Id.*

143. *Id.* The Pablo Center at the Confluence in Eau Claire Wisconsin has reported a 15% increase in ticket sales since moving toward an all-in ticket pricing model. *Id.* On the Pablo Center website, all-inclusive pricing is also clearly advertised to consumers looking for tickets. *Id.*

144. *Tickets*, SAVANNAH BANANAS, <https://thesavannahbananas.com/tickets/> [https://perma.cc/LD39-CGDH].

no tax, all bananas” to convey this transparency to consumers while selling extremely sought-after tickets.¹⁴⁵

Refusing to ban drip pricing will allow this practice to be an avenue for firms to compete. For regulators, it could be a useful way to attempt to reduce consumer harm without being overly restrictive on which pricing methods are allowed and which are not allowed. This is especially useful as the exact harms related to drip pricing are hard to pin down.¹⁴⁶ If firms can use all-inclusive pricing as a signal for transparency, then regulators can avoid many of the issues that come along with attempting to regulate.

These issues include defining exactly what practices are and are not harmful, how consumer harm fits in the current framework of consumer protection regulation, and the issue of being able to create benefits for consumers without hampering firms from providing partitioned prices to very cost-conscious consumers in industries like ultra-low-cost airlines.

VI. CONCLUSION

The ire of the FTC and White House on unpopular business behaviors is not a new phenomenon. Throughout America’s history of antitrust and consumer protection, its regulators and leaders have used antitrust rules to target firms and behavior that its base has found to be unpopular.¹⁴⁷ A glance at the history of American antitrust illustrates the cyclical nature of wanting to expand and relax policy based on the popular attitudes of the time.¹⁴⁸ It is not surprising that consumer protection regulators are taking a stand against drip pricing at a time when fewer and fewer Americans have high or moderate confidence in “big business.”¹⁴⁹ Scholars in antitrust law have not hesitated to call out what they believe is a priority of “ideology over expertise” in the FTC and throughout the administrations of President Biden and President Trump.¹⁵⁰ Especially worrying are the statements made by experts that are wrong on the economics or are critical of reliance on economic analysis.¹⁵¹

Unfortunately, it is hard to square the policy of the FTC and the Biden Administration’s proposed regulation on drip pricing from their actual goals of protecting consumers.

145. *Id.*; Eric Fisher, *Savannah Bananas Break All the Rules to Hit the Mainstream*, FRONT OFFICE SPORTS, (Sept. 24, 2024), <https://frontofficesports.com/savannah-bananas-break-all-the-rules-to-hit-the-mainstream/> [<https://perma.cc/P78S-BJLP>].

146. *Supra* Part II.F.

147. Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [<https://perma.cc/H3AC-3PLG>].

148. *Id.*

149. *See Big Business*, GALLUP, <https://news.gallup.com/poll/5248/big-business.aspx> [<https://perma.cc/N443-FV5Z>] (discussing polling data showing that more Americans have little or very little trust in big business).

150. D. Daniel Sokol & Abraham L. Wickelgren, *Populism at the FTC Undermines Antitrust Enforcement*, PROMARKET (Dec. 13, 2021), <https://www.promarket.org/2021/12/13/ftc-populism-antitrust-enforcement-sokol-wickelgren/> [<https://perma.cc/6YMZ-4HWV>].

151. *Id.*

It may be the case that the current stance on drip pricing was a bluff to put regulatory and social pressure on the firms to change. I think this is likely. It is more likely that the Biden administration's views on drip pricing are just part and parcel of the type of populist focus on antitrust and consumer protection that we have become accustomed to over the last two administrations and in antitrust regulation generally. When considering the misleading reading of the costs of drip pricing in the White House statement,¹⁵² and the fact it was targeted to inflame consumers,¹⁵³ this belief that regulators are using drip pricing as an easy win against big business seems likely. Even in the case of drip pricing, the study used by the Biden White House to reference the harm of drip pricing was used in a misleading way which "rolled up" all of the impacts of drip pricing to create a figure that made drip pricing appear to be as harmful as possible to consumers, while obfuscating the mechanism by which drip pricing affects consumers.¹⁵⁴ This Note does not support the narrow reading of the FTC's regulation of drip pricing as enigmatic of a failed antitrust regulation under Chair Khan and the Biden administration. Rather, it points out a scenario where a keen eye toward economic research could help understand the realities of the problem at hand.

The second Trump administration will fail to provide respite from populist antitrust. Project 2025, the conservative mandate for Trump's second administration, looks to take on ESG, cancel culture, and other hot-button topics in their antitrust regulation.¹⁵⁵ One example of regulation in Project 2025 is raising antitrust concerns when "banks or internet platforms refuse customers based on political or social views."¹⁵⁶ The implicates, for antitrust concerns, many actions in which essentially anything outside of immediate profit. However, we all intuitively know that "[e]veryone has values that sometimes are more important than profit, especially when . . . the potential profit is quite small relative to other economic values, let alone saving one's soul, promoting the common good, or preserving a functioning ecosphere for the next generation."¹⁵⁷ Instead, the FTC also appears to be ready to "reverse Lina Khan's anti-business agenda", rule against noncompete clauses, block click to cancel regulations, and "fight back against the trans agenda."¹⁵⁸

Finally, consumers are varied and complicated; some value transparency while others seek the best possible deal at the lowest price. The social science principles that underlie drip pricing struggle to separate consumer preferences and price premiums from a predatory behavior that exists solely to raise prices for consumers. Lastly, it is not clear that

152. White House Couns. Econ. Advisors, *supra* note 10 (misreporting the findings of an academic study in a specific way which obfuscated the mechanisms by which prices increase, specifically to make the consumer appear worse off than they were in the transaction).

153. *Id.* "Economic research shows that these types of fees—junk fees—are profitable for firms to employ at the expense of consumers." *Id.* Also, notice the use of "junk fees" to encapsulate many business practices, including "drip pricing" which is the often-used term by researchers. *Id.*

154. *See supra* Part II.B.

155. THE HERITAGE PROJECT, *supra* note 5.

156. *Id.* at 874.

157. Sergio Alberto Gramitto Ricci & Daniel Greenwood, *Total Governance*, 50 J. CORP. L. 353, 355–56 (2025) (internal citations omitted).

158. Shylah R. Alfonso et al., *Insight Into the Upcoming Trump Administration's Antitrust Policy*, PERKINS COIE (Jan. 10, 2025), <https://perkinscoie.com/insights/update/insight-upcoming-trump-administrations-antitrust-policy> [<https://perma.cc/ZBN6-YZ64>].

simply outlawing drip pricing will create significant consumer savings in cases where the harm is the clearest, like online ticket sales. Firms will react to the change and will find new solutions to show transparency to their consumers, further complicating the benefits of potentially banning these business practices. Nevertheless, due to the complications of regulating drip pricing, actions looking to crack down on drip pricing as an unfair method of competition will likely not see great benefits for consumers. Regulators looking to reduce consumer harm may want to look elsewhere other than drip pricing to maximize consumer benefit. Nevertheless, this type of regulation is what many regulators look for. Feel Good Antitrust will continue if regulators care about optics and ideological wins over attempting to scrutinize and outlaw business practices that significantly hurt consumers.