

KEEPING SCORE: IMPROVING THE POSITIVE FOUNDATIONS FOR ANTITRUST POLICY

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INTRODUCTION	50
I. THE AMBIGUOUS, DISPUTED SIGNIFICANCE OF DATA ON ANTITRUST ENFORCEMENT	60
II. HOW THE QUALITY OF POSITIVE ANALYSIS AFFECTS OUR UNDERSTANDING OF THE OPERATION OF THE U.S. ANTITRUST REGIME	67
A. Excessive and Misdirected Enforcement Activity: Two Narratives from the Late 1970s	70
B. The Inadequate and Misdirected Enforcement Activity Narrative	86
C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime	95
III. HOW THE QUALITY OF POSITIVE ANALYSIS AFFECTS ANTITRUST ENFORCEMENT AGENCY PERFORMANCE	101
A. Building Historical Awareness: The FTC in the 1970s	102
IV. HISTORICAL DATA-BASED ANALYSIS FOR ANTITRUST AGENCIES: FOCAL POINTS.....	108
A. Determining What Happened	109
B. Using Positive Data to Make Normative Assessments	110
C. Improving Agency Historical Awareness	112
D. Historical Analysis: Gains from Fuller Application	119
E. Case Reconstructions	121
F. Institutional Methods	129
V. CONCLUSION	130

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INTRODUCTION

At the start of class in a new academic term, students often ask their instructors, “What is the basis for the grade in this course?” In 2001, after fifteen years of fielding that question in university classrooms, I became a senior official at the Federal Trade Commission (“FTC”). On many occasions, a variant of my students’ perennial query came to mind: What is the basis for the grade in *this* course? How should my agency’s performance be evaluated?¹

The question that occupied my thoughts at the FTC attracts vigorous debate today as a growing body of commentators and elected officials calls for dramatic changes in the U.S. competition policy regime.² Reform advocates have proposed a fundamental reorientation of federal antitrust enforcement, a major redesign of the competition statutes, and the creation of new tools to regulate dominant firms, especially large information services platforms.³ Not since the early-to mid-1970s has the mood reflected in public debate and legislative deliberations so welcomed a thorough overhaul of the U.S. competition law system.⁴

1. See William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009) [hereinafter *Rating the Competition Agencies*] (offering reflections on criteria for assessing performance of public antitrust authorities).

2. See Daniel A. Crane, *The New Crisis in Antitrust (?)*, 83 ANTITRUST L.J. 253 (2020) (discussing modern debate about U.S. antitrust policy); A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269 (2020) (same).

3. These proposals are summarized in Alison Jones & William E. Kovacic, *Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. 227 (Issue 2, 2020) [hereinafter *Implementation Blind Side*].

4. In the early-to mid-1970s, Congress pressed the federal antitrust agencies to initiate cases to deconcentrate large segments of the U.S. economy. See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1126–27 (1989) [hereinafter *Failed Expectations*] (describing congressional encouragement in 1970s for federal antitrust agencies to undertake cases to restructure concentrated industries). The exhortations of legislators drew upon scholarly work and the findings of expert panels that recommended expansive efforts to break up dominant firms and tight oligopolies. *Id.* at 1136–37. The federal agencies responded to this guidance by bringing an ambitious collection of cases challenging single-firm misconduct and collective dominance. *Id.* at 1119–20. In this same period, Congress enacted major reforms to the U.S. antitrust laws. In 1974, it raised the status of the criminal antitrust offense from a misdemeanor to a felony and boosted fines and prison terms for infringements. Antitrust Procedures and Penalties Act, P.L. 93-528, 88 Stat. 1706 (1974). In 1976, Congress renovated the merger control mechanism by requiring

The contemporary reform proposals seem to be having a genuine effect. The calls for expanded enforcement already seem to have moved the federal antitrust authorities, the FTC and the Department of Justice (“DOJ”), to adopt a more aggressive posture.⁵ On October 20, 2020, the DOJ and eleven state attorneys general filed a complaint charging Google with illegal monopolization in various markets related to search.⁶ There are also indications that Congress will give serious attention to bills to amend the antitrust laws and alter the competition policy institutional framework.⁷

A predicate for the reform demands is the view that the DOJ and the FTC have failed miserably in performing their law enforcement duties in the

advance notification to the antitrust agencies of certain proposed mergers and imposing a suspensory period in which the agencies could gather information to review such deals. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

5. Since 2019, the DOJ and the FTC have been investigating possible antitrust violations involving the country’s leading information technology firms. See Jones & Kovacic, *Implementation Blind Side*, *supra* note 3, at 237–38.

6. U.S. v. Google LLC, Case 1:20-cv-03010 (Oct. 20, 2020) [hereinafter DOJ Google Complaint], available at <https://www.justice.gov/atr/case-document/file/1329131/download> [<https://perma.cc/7SM5-EDYG>]. A number of other state attorneys general appear to be preparing to file a monopolization complaint against Google that alleges a broader range of anticompetitive conduct. Diane Bartz, *Google’s antitrust legal woes far from over if Biden wins*, Reuters (Oct. 22, 2020), <https://www.reuters.com/article/usa-election-google-biden-idUSL1N2HA1ZP> [<https://perma.cc/GLX5-PPU7>] (reporting comments by Colorado Attorney General Phil Weiser, who indicated that various state attorneys general will conclude their investigation of Google “in the coming weeks”). The FTC is reported to have met recently to discuss the status of its inquiry into Facebook and the possibility of bringing a case against the social media giant. Tony Room, *FTC said to huddle privately to discuss Facebook antitrust probe, signaling advanced stage*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/technology/2020/10/22/facebook-ftc-antitrust/> [<https://perma.cc/BXD6-FGR7>].

7. On July 29, 2020, the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law held hearings to take testimony from the chief executive officers of Amazon, Apple, Facebook, and Google. During the proceedings, the panel’s Chair (Rep. David Cicilline) and several of his colleagues called for new legislation to strengthen the existing antitrust laws to control dominant technology platforms. *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google Before the Subcomm. on Antitrust, Com., and Admin. L. of Just. Of the H. comm. On the Judiciary*, 116th Cong (2020)(statement of Rep. David Cicilline). On October 6, 2020, the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law released a majority staff report calling for sweeping changes to the U.S. antitrust system, including the creation of new regulatory mechanisms to oversee leading digital platforms. *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, Subcommittee on Antitrust, Commercial and Administrative Law, House Committee on the Judiciary 376-405 (2020) [hereinafter Majority Staff Report], available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [<https://perma.cc/Z7JL-KKZV>] (presenting antitrust and regulatory reform recommendations).

modern era, a period that, in critical commentary, begins in 2000 and sometimes extends back to roughly 1980.⁸ The critiques are razor sharp. The federal agencies are said to be cowardly or slothful in executing their mandates,⁹ captured by commercial interests,¹⁰ and corrupted by a revolving door culture that imbues agency leaders and staff with tolerant attitudes toward big business.¹¹ A frequent claim is that the DOJ and the FTC have brought too few lawsuits to attack improper conduct by dominant firms, and their meagre caseload is top-heavy with assaults upon individual entrepreneurs who collaborate to gain just wages.¹² While the agencies cast their nets for commercial minnows, immense corporate sharks swim freely and devour everything in their path. This policy default is said to endanger not only the nation's economy and vital social institutions, but also to

8. Jonathan Tepper writes: "Antitrust authorities once fought against monopolies, but for the last four decades they have given a green light to merger after merger. The guardians who were meant to protect competition have become the principal cheerleaders for monopolies." Jonathan Tepper, *Why Regulators Went Soft on Monopolies*, THE AMERICAN CONSERVATIVE 26, 31 (Jan. 9, 2019) [hereinafter *Regulators*]. For similar critiques, see Barry C. Lynn, *Liberty from All Masters: The New American Autocracy vs. the Will of the People* 191–217 (2020) (describing intellectual and political forces that spurred relaxation of U.S. antitrust policy from 1980 to present); ZEPHYR TEACHOUT, BREAK 'EM UP – RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 211–12 (2020) [hereinafter *BREAK 'EM UP*] (attacking federal antitrust enforcement policy from early 1980s to the present); MATT STOLLER, *GOLIATH – THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* 407–39 (2019) [hereinafter *GOLIATH*] (criticizing federal antitrust policy from late 1970s to present); TIM WU, *THE CURSE OF BIGNESS – ANTITRUST IN THE NEW GILDED AGE* 108 (2018) [hereinafter *CURSE OF BIGNESS*] (stating that during the presidency of George W. Bush, "the anti-monopoly provisions of the Sherman Act went into a deep freeze from which they have never really recovered").

9. JONATHAN TEPPER & DENISE HEARN, *THE MYTH OF CAPITALISM – MONOPOLIES AND THE DEATH OF COMPETITION* 116 (2019) [hereinafter *MYTH OF CAPITALISM*] ("Dozens of industries are so egregiously concentrated that it begs the question as to what the authorities are doing with their time. We don't know. We know for a fact that workers at the Securities and Exchange Commission spent their time watching porn while the economy crashed during the financial crisis. We would hate to speculate about the Department of Justice and the Federal Trade Commission.").

10. THOMAS PHILIPPON, *THE GREAT REVERSAL – HOW AMERICA GAVE UP ON FREE MARKETS* 259–78 (2019).

11. DAVID DAYEN, *MONOPOLIZED – LIFE IN THE AGE OF CORPORATE POWER* 282–85 (2020) [hereinafter *MONOPOLIZED*].

12. Sandeep Vaheesan, *How Robert Bork Fathered the New Gilded Age*, PROMARKET BLOG (Sept. 5, 2019), <https://promarket.org/2019/09/05/how-robert-bork-fathered-the-new-gilded-age/> [https://perma.cc/D9Q9-TRF2] [hereinafter *New Gilded Age*] ("[T]he Department of Justice and the Federal Trade Commission today mostly leave Google, Walmart, and other powerful businesses across the economy alone and seek to suppress the collective action of workers in the service economy.").

threaten democracy itself.¹³

The evaluation of agency performance sketched above has what academics would call a *positive* dimension and a *normative* dimension. The positive element focuses on what happened: What law enforcement programs did the DOJ and the FTC undertake with the resources and powers entrusted to them, and why did they act as they did? In examining the agencies' law enforcement activities, a positive inquiry seeks to determine which cases the agency initiated, determine how the cases were resolved, and identify the rationales that guided the selection and disposition of cases.

The normative dimension of evaluation takes the positive record and judges the quality of the agency's program. In simple terms, it asks whether the agency did a good job with what it had. A normative assessment has two ingredients. One element focuses on the quality of *what* the agency did: Did the agency initiate matters – bring cases, promulgate rules, issue reports – that made society better off? Did it bring enough cases? Did it stand down when it should have intervened? Did it bring the right cases – confronting, rather than ducking, difficult problems of urgent public concern? Taken as a whole, did the full portfolio of agency projects deliver the best possible return on society's investment?

The second element of the normative assessment evaluates *how* the agency carried out its responsibilities: Did it apply its authority fairly? Did it form organizational structures to set priorities and select projects wisely and devise operational methods to deliver projects effectively? Has the agency improved by learning over time – for example, by subjecting its decisions to probing assessment after the fact, carrying forward what it did well, and correcting deficiencies?

In older and more recent debates about the adequacy of federal antitrust enforcement, perceptions about the positive record supply the foundation for normative assessments of the quality of the U.S. competition law system.¹⁴

13. Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (Washington, D.C., June 29, 2016), available at https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [<https://perma.cc/AL27-U5TP>] (“[T]oday in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.”). See also THOM HARTMANN, THE HIDDEN HISTORY OF MONOPOLIES – HOW BIG BUSINESS DESTROYED AN AMERICAN DREAM 91–147 (2020) [hereinafter HIDDEN HISTORY] (describing how increasing concentration of economic power has undermined the U.S. economy and the country's democratic institutions); BINYAMIN APPLEBAUM, THE ECONOMISTS' HOUR – HOW THE FALSE PROPHETS OF FREE MARKETS FRACTURED OUR SOCIETY 158 (2019) [hereinafter ECONOMISTS' HOUR] (“Corporate concentration also is taking a toll on democracy.”).

14. For example, in February 2008, during the primaries to select the Democratic

Understandings of what happened in the past shape views about what should happen in the future. Today the perceived inadequacies in the amounts and types of DOJ and FTC law enforcement activity figure prominently in contemporary indictments of these agencies and supply important evidence for the case for reform.¹⁵ The reform-oriented normative assessments derive considerable analytical and rhetorical power from recitals about the positive record of the what the agencies did and what they did not do.

This article makes the case for commentators and policymakers to devote more attention to the positive dimension of competition agency performance. It makes two arguments for building better positive foundations regarding past agency activity. The first is that developing an accurate positive account of what antitrust agencies have done in the past is vital to forming sound normative judgments about the future design and operation of a competition policy system. The Article shares the premise, expressed fifty years ago by Richard Posner, that “the collection and analysis of statistical data of legal institutions is a fruitful and practicable undertaking for students of those institutions.”¹⁶ If the positive assumptions in policy analysis are infirm, the normative assessments may topple. In a striking number of instances in debates about U.S. antitrust policy, in earlier times and today, the positive account of what the FTC and DOJ have done (and why they have acted as they did) is unreliable as a basis for policy making.¹⁷

The second reason to focus on the positive dimension of policy analysis is that better understanding of past activity and, more generally, closer attention to institutional issues of design, organization, and operations can be valuable sources of continuous policy improvement for a competition agency.¹⁸ By reason of their longevity (130 years for the DOJ and 105 years

Party’s candidate to run for the presidency, Barack Obama said “the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half-century.” Campaign Statement from Senator Barack Obama, *Statement for the American Antitrust Institute* (Feb. 20, 2008) [hereinafter *AAI Statement*]. Senator Obama’s normative assessment (“may be the weakest record”) presumably rested upon a comparison of positive data regarding enforcement from the end of the Eisenhower administration (the “half-century” period mentioned in the statement would have begun in 1958) through the end of the George W. Bush administration.

15. Tepper, *Regulators*, *supra* note 8, at 27 (“Antitrust law is not so much dormant as it is actively sabotaged by the very people who should enforce it. The DOJ and the FTC’s policies today are best described as aggressive do-nothingism.”).

16. Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 365 (1970).

17. See *infra* notes 170-209 and accompanying text (discussing flaws in the depiction of record of federal enforcement in commentary and debates about U.S. antitrust policy).

18. Modern scholarship on antitrust and other areas of economic regulatory policy reflects a growing awareness of the links between institutional arrangements and the

for the FTC),¹⁹ the federal antitrust agencies have accumulated vast experience in conducting investigations, prosecuting cases, implementing remedies, and applying other policy instruments. This body of experience has yielded what might be called “antitrust big data.”²⁰ If studied and mined effectively, antitrust big data can supply valuable insights into the appropriate path for future policy development. Learning from experience has enabled the DOJ and the FTC to make significant improvements over time.²¹ This Article argues that the U.S. agencies can derive still greater benefits from learning by assembling and studying better data sets on past activity and by developing a deeper understanding of the history of antitrust enforcement generally. This consideration would be a good reason to improve the positive foundations for policy making even if the United States were not in the midst of a grand debate about the future of its antitrust system.

A better understanding of the positive record of antitrust enforcement has at least three implications relevant to modern policy making. First, for advocates of basic change in U.S. antitrust enforcement, better historical awareness of what the DOJ and the FTC have done can illuminate lessons useful in prosecuting new cases, especially initiatives that challenge the

performance of public agencies. See THE DESIGN OF COMPETITION LAW INSTITUTIONS – GLOBAL NORMS, LOCAL CHOICES (Eleanor M. Fox & Michael J. Trebilcock eds., 2012) (analyzing antitrust enforcement across the globe and concluding that there are common norms despite disparate institutional arrangements); Oliver Budzinski & Annika Stöhr, *Competition Policy Reform in France and Germany – Institutional Change in the Light of Digitization*, 15 EUROPEAN COMPETITION J. 15 (2019) (discussing whether or not European competition policy should emulate German reforms and thereby improve its institutional framework); DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011) (examining origins and performance of US antitrust enforcement institutions); David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014) (examining the costs and benefits of the design choices made by the architects of the Consumer Financial Protection Bureau); Alison Jones & William E. Kovacic, *The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms* (Apr. 17, 2020) (commenting on the investigation by the House Judiciary Committee into the state of competition in the digital marketplace).

19. The country’s first national antitrust law, the Sherman Act, was adopted in 1890. Congress enacted the Federal Trade Commission Act in 1914, and the FTC began operations in March 1915.

20. This concept is introduced in William E. Kovacic, Robert C. Marshall & Michael J. Meurer, *Serial collusion by multi-product firms*, 6 J. ANTITRUST ENF’T 296 (2018) [hereinafter *Serial Collusion*].

21. See, e.g., William E. Kovacic & David A. Hyman, *Consume or Invest? What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295, 313–15 (2016) [hereinafter *Consume or Invest*] (discussing development of FTC competition programs involving health care and pharmaceutical sectors).

market positions and practices of dominant enterprises. Second, better historical awareness can increase the capacity of the federal agencies to improve programs, such as enforcement against cartels, that tend to command approval from antitrust traditionalists and reform advocates, alike. Third, a better understanding of what the federal antitrust agencies have done, and what considerations motivated the design of their law enforcement programs, can inform enhancements of regulatory policy making and public administration. In all of these respects, the seemingly straightforward exercise of collecting and disclosing accurate data on agency activity can support efforts to tackle longstanding public policy challenges of implementation – to cross the gap between ambitious policy aims and their effective realization in practice.²²

Several perspectives inform the Article's approach. The first is my experience working inside competition agencies. From 1979 into 1983, I was a junior attorney in one of the FTC's planning units and for nine months was an attorney advisor to a commissioner. I served as the FTC's General Counsel from June 2001 through September 2004 and as a commissioner from January 2006 through September 2011.²³ From 2014 to the present, I have been a Non-Executive Director of the United Kingdom's Competition and Markets Authority (CMA). Since 1990, I have advised competition authorities in over fifty countries on matters involving organization and management. Collectively, these experiences have highlighted for me how much competition agency effectiveness depends on the availability and

22. See GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 267–68 (1971) (“If analysts and operators are to increase their ability to achieve desired policy outcomes, . . . we shall have to find ways of thinking harder about the problem of ‘implementation,’ that is, the path between preferred solution and actual performance of the government.”); see also ERIC M. PATASHNIK, *REFORMS AT RISK – WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED* 3 (2008) [hereinafter *Reforms at Risk*] (“General interest reforms are frequently adopted with great fanfare, but their success simply cannot be taken for granted. . . . Indeed, sustaining reforms against the threats of reversal and erosion may be even tougher than winning the reforms’ adoption in the first place.”).

23. My periods of service at the FTC largely coincided with eras in which commentators have argued that the FTC, and the U.S. federal antitrust enforcement system generally, performed badly. Although I am not particularly fond of the condemnation sometimes visited upon the U.S. regime and the FTC in particular, I welcome a deeper examination of decisions the Commission took during these and other periods. In this Article, I do not argue the merits of the modern normative assessments of U.S. antitrust enforcement or the wisdom of proposals for reform. Instead, I focus on the soundness of the positive assumptions that run throughout the modern debate, and I point to respects in which the agencies themselves could benefit from better data collection and analysis, regardless of how the process of reform unfolds.

application of reliable data about past enforcement activity. In a number of places, the Article draws directly upon those experiences.²⁴

The second perspective comes from my experience as an academic researcher. I have worked on a variety of projects that required the preparation of data sets on enforcement activity.²⁵ I have seen first-hand the difficulties associated with developing a basic positive account of what competition agencies such as the DOJ and the FTC have done over time. Gaps and inconsistencies in how competition agencies report activity abound, and it can be treacherous to simply rely on aggregate data or broad generalizations that appear in other papers and not to examine the underlying material that provides the basis for such data or general claims about enforcement activity.²⁶ Consequently, I usually have found it necessary to construct data sets largely from scratch, using an agency's reported data as a starting point but supplementing it with a variety of additional research techniques. Since 2011, I have been involved in a research project to document major institutional characteristics for the world's national competition agencies.²⁷ This project also has revealed extraordinary challenges in acquiring reliable information on what would seem to be, at first glance, fairly basic matters of agency design. I have benefitted enormously from conversations with other researchers with similar interests,²⁸ and I am inspired by the exceptional results that some research

24. See especially *infra* Section III (describing author's experiences in the late 1970s and early 1980s as a junior attorney in the Planning Office of the FTC's Bureau of Competition).

25. In 2003 I published an article that examined trends in federal antitrust enforcement from 1960 to the early 2000s. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003) [hereinafter *Modern Evolution*]. The study required building data sets on DOJ and FTC activity largely from scratch.

26. In an article published thirty years ago, I confidently wrote: "From 1981 to 1988, the Reagan enforcement agencies brought no cases enforcing legal prohibitions against price and nonprice vertical restraints." William E. Kovacic, *Comments and Observations*, 59 ANTITRUST L.J. 119, 125 (1990). I based the claim on statements that had appeared in other academic papers and not on my own examination of the federal agencies' enforcement record. The statement was incorrect, as I later discovered in studying DOJ and FTC activity that took place during the early 1980s. The FTC had issued five vertical restraints consent decrees during the Reagan administration – not a large number, but an amount unmistakably greater than "no cases." Kovacic, *Modern Evolution*, *supra* note 25, at 460–61.

27. For a description of these project and initial presentation of results, see William E. Kovacic & Mariana Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 LAW & CONTEMP. PROBS. 85 (2016) [hereinafter *Lifecycles*] (discussing institutional designs and predicates that facilitate effective competition law implementation).

28. I am especially grateful to Professor Tim Bütte, who has been instrumental in

teams have achieved as a result of diligent, persistent efforts over the course of several years to prepare data sets on competition agency activity.²⁹

A third and related perspective comes from researchers who have used interdisciplinary approaches to improve understanding of what competition agencies have done and to enhance the interpretation of their work. Two areas of endeavor stand out. The first is a growing effort to incorporate historical analysis into the formulation of contemporary regulatory policy. This is hardly a new subject of interest for academics and policy makers.³⁰ In recent years, there have been a number of notable efforts to bring together professional historians and legal scholars in collaborative efforts to understand antitrust and other forms of regulatory policy in their historical context, and ultimately, to engage public officials more intensively in a process that Professors Richard Neustadt and Ernest May call “thinking in time-streams” by “imagining the future as it may be when it becomes the past—with some intelligible continuity but richly complex and able to surprise.”³¹ The current generation of multi-disciplinary research projects and events (drawing not only on history and law, but also economics, political science, and public administration) has the promise to strengthen

drawing the attention of the academic community to the need to develop better data reporting standards for competition law enforcement.

29. The most impressive of these efforts is Columbia Law School’s Comparative Competition Law (“CCL”) program, headed by Professor Anu Bradford. The Columbia project has assembled highly useful data sets on enforcement work by over 100 competition agencies and generously has placed these data sets into the public domain at [comparativecompetitionlaw.org](https://perma.cc/AP8R-GJFC) [https://perma.cc/AP8R-GJFC]. Professor Bradford and various colleagues have authored a number of informative publications that present results from the CCL project. See, e.g., ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020) (detailing how EU remains influential in shaping the world through the “Brussels Effect,” its unilateral power to regulate global markets). Dean Theodore Kovaleff’s studies of federal antitrust enforcement provide other examples of how painstaking efforts to assemble a good data set can improve the assessment of policy making. For example, in his study of DOJ Antitrust Division enforcement during the Eisenhower administration, Dean Kovaleff examined each merger reviewed by the Antitrust Division from 1953 through 1960. His published account of the Antitrust Division’s program in this period includes an appendix with digests of all merger decisions. THEODORE PHILIP KOVALEFF, *BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT* 169–270 (1980).

30. See Edward J. Balleisen & Elizabeth K. Brake, *Historical Perspective and Better Regulatory Governance: An Agenda for Institutional Reform*, 8 *REG. & GOVERNANCE* 222 (2014) (exploring how a more sustained historical perspective might improve regulatory decision-making).

31. RICHARD E. NEUSTADT & ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS* 253–54 (1986).

the government's formulation of competition policy.³²

A second area is the application of the tools of operations research and data analytics to the development of public antitrust enforcement programs.³³ Among other techniques, these disciplines study past experience to identify and understand important phenomena. Insights gained from operations research and data analytics can be applied, in turn, to refine existing programs and devise new strategies for addressing observed problems. As noted below,³⁴ the broader application of operations research and data analytics to antitrust big data could provide competition agencies with a stronger basis to set priorities and choose specific projects to accomplish their aims – for example, in the development of programs to detect, prosecute, and deter cartels.³⁵

The Article is organized as follows. Part I presents the strengths and weaknesses of using data on law enforcement as a measure of the quality of competition agency performance. Part II discusses recurring weaknesses in the positive assumptions that have supported normative assessments about U.S. antitrust enforcement since the late 1960s, when the federal antitrust agencies last began a litigation program to deconcentrate major sectors of the U.S. economy.³⁶ This part also reviews how weaknesses in positive analysis can distort decisions about what antitrust agencies should do in the future. Part III considers how an antitrust agency's inadequate awareness of what it has done previously can diminish its effectiveness. This part presents a case study based upon my experiences as a junior attorney at the FTC in the late 1970s and early 1980s. Part IV proposes an approach for keeping score regarding the enforcement of competition laws. It draws upon the

32. A small sample of relevant activities include the Tobin Foundation's research program on Antimonopoly and American Democracy and workshops convened by the Harvard Business School on the history of economic regulation.

33. A particularly instructive example is the work of Professors Robert Marshall and Leslie Marx. See ROBERT C. MARSHALL & LESLIE M. MARX, *THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS* (2012) (examining collusive behavior; exploring what it is, why it is profitable, how it is implemented, and how it might be detected). In this volume, Professors Marshall and Marx derive informative observations about the formation and operation of cartels from their study of the published decisions of the European Commission in cartel prosecutions.

34. See *infra* Section IV.D (examining how better data analytics and operations research can improve antitrust agency priority-setting and project selection)

35. See, e.g., Kovacic et al., *Serial Collusion*, *supra* note 20, at 301–13, 339–48 (identifying persistent patterns of collusive behavior by certain multi-product firms and deriving policy recommendations for improving detection and deterrence).

36. This program is described in Kovacic, *Failed Expectations*, *supra* note 4, at 1119–20 (describing antitrust initiatives between late 1960s and early 1980s for federal antitrust agencies to undertake cases to restructure concentrated industries).

observations of Parts I-III to identify the types of data collection and information management that could improve modern policy debates and strengthen agency decision making. This part also draws upon previous work that proposes improvements in data reporting by competition agencies.³⁷ Part V examines specific institutional measures that the FTC, the DOJ, and other competition agencies could adopt to improve policy making by strengthening data sets on past activity. This part includes a discussion of how the reconstruction of past enforcement decisions can provide a useful basis for guiding DOJ and FTC decisions in the future. This part sets out practical steps that an agency can take to apply the framework suggested in this Article. Part VI concludes.

I. THE AMBIGUOUS, DISPUTED SIGNIFICANCE OF DATA ON ANTITRUST ENFORCEMENT

Discussions about the adequacy of public antitrust enforcement often turn at some point to the numbers. Assessments of the programs of the DOJ Antitrust Division, the FTC, and other competition authorities often invoke data on the volume and type of cases the agencies have brought in a given period, as well as data on the monetary sanctions imposed on corporate offenders.³⁸

A major illustration of the centrality of enforcement data to the assessment of competition agencies appears in the annual rankings of competition agencies published by the *Global Competition Review* (“GCR”).³⁹ First issued in 2001, the GCR survey evaluates the world’s leading competition agencies (roughly 40 agencies out of a global total of about 130 jurisdictions today)⁴⁰ chiefly by reference to how the authorities

37. William E. Kovacic, Hugh M. Hollman & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25 (2011) [hereinafter *Measure Up*].

38. See, e.g., William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 698–702 (2014) [hereinafter *Politics and Partisanship*] (describing use of enforcement data by commentators to evaluate different periods of federal antitrust enforcement); Kadhim Shubber, *Antitrust prosecutions in US fall to lowest level since 1970s*, FIN. TIMES, Nov. 29, 2018, at 4 (discussing trends in Justice Department enforcement).

39. The GCR is a United Kingdom-based organization that provides coverage of competition policy news, publishes reports, and organizes conferences. Global Competition Review, <https://globalcompetitionreview.com> [https://perma.cc/592P-VY4P] (last visited Oct. 15, 2020).

40. Anu Bradford, Adam S. Chilton, Christopher Megaw & Nathaniel Sokol, *Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Data Sets*, 16 J. EMPIRICAL LEGAL STUD. 411 (2019); Kovacic & Lopez-

have enforced their competition laws during the previous year.⁴¹ The survey's results depend heavily on the volume of cases initiated, success or failure achieved in litigation, and the type of remedies attained, with an emphasis on the total amount of monetary sanctions imposed.⁴² The *GCR* staff also issues a survey that asks each competition agency to describe its enforcement accomplishments during the ranking period, and the magazine interviews lawyers and economists for their views about how the competition agencies in their jurisdictions have performed.⁴³ Before publication, the agencies receive a draft of the assessment and have an opportunity to discuss the tentative results and, in some cases, argue for a better grade.

The *GCR* survey is the preeminent rating of competition agency performance. It strongly influences the views of academics, enforcers, and practitioners about the quality of individual competition systems.⁴⁴ Competition agencies often grumble about the survey results and, at least internally, criticize the *GCR*'s findings, yet they (and their governments) take the *GCR* ratings seriously and sometimes use them as a performance benchmark.⁴⁵

In its most recent annual survey, issued in August 2020, the *GCR* evaluated 41 of the world's competition agencies.⁴⁶ Following its customary practice, the publication assigned stars to each agency – five for “elite” agencies and one for the merely adequate. Since the survey first appeared in 2001, only one competition agency has received the elite, five-star rating

Galdos, *Lifecycles*, *supra* note 27, at 85–86.

41. On its website, the Global Competition Review notes, “We scrutinise information and data supplied by the competition authorities and from our daily reporting, while also speaking with lawyers and economists for an additional steer on the quality of an agency’s work in their jurisdiction.” Available at <https://shop.globalcompetitionreview.com/products/rating-enforcement-2020> [<https://perma.cc/X9TA-G6BN>]. With greater frequency over the past decade, the *GCR* assessments of individual agencies have included some discussion of how the agencies have used non-litigation tools, such as market studies, to make competition policy. GLOBAL COMPETITION REVIEW, RATING ENFORCEMENT 2020, <https://globalcompetitionreview.com/survey/rating-enforcement/2020> [<https://perma.cc/Y5RU-WQE>], (last visited Oct. 15, 2020).

42. *Id.*

43. *Id.*

44. I cannot offer a rigorous proof for this assertion. I base it mainly upon my conversations over the past twenty years with academics, practitioners, and government officials whose competition authorities the *GCR* survey has rated. I have followed the survey results with particular interest during by time at the FTC from 2001–2004 and 2006–2011 (the period in which the survey first appeared) and since 2014 as a Non-executive Director with the United Kingdom’s Competition and Markets Authority.

45. I base this observation on many conversations I have had with agency leaders since the *GCR* first published its rankings in 2001.

46. GLOBAL COMPETITION REVIEW, RATING ENFORCEMENT 2020, *supra* note 41.

every year: the FTC.⁴⁷ Once again, in the August 2020 survey, the FTC received the elite five-star rating.⁴⁸ As in the past, the *GCR*'s most recent annual assessment of the FTC was not uniformly laudatory (the August 2020 evaluation offers a number of criticisms and cautions),⁴⁹ but the overall grade is the highest available, and the FTC's performance since the survey's inception has been unmatched.⁵⁰ One might infer from the *GCR* annual rankings, viewed in isolation, that the FTC is the world's best-performing competition agency in this century and certainly at least as good as any other.

The FTC is one half of the U.S. federal antitrust enforcement partnership that includes the DOJ Antitrust Division.⁵¹ Though not as stellar as the FTC's ranking, the DOJ's *GCR* ratings often have placed the Department among the five-star elite institutions and never worse than the "very good" second category of four stars.⁵² *GCR* does not assemble a composite grade to compare the U.S. federal antitrust enforcement system to the regimes of other jurisdictions, such as the European Union. Devising a composite U.S. grade that combined the *GCR*'s separate evaluations of the DOJ and the FTC, one might reasonably infer from the *GCR* rankings, seen in isolation, that the U.S. federal enforcement system would rank no worse than tied for first among all jurisdictions over the past twenty years. Notwithstanding the *GCR*'s admonitions to both U.S. agencies about areas for improvement, there would be no question that the U.S. federal enforcement system on the whole performs at an exceptionally high level.

As suggested above,⁵³ that is not how everybody perceives the status quo today. One notable, influential strand of commentary denounces the FTC as a badly deficient institution. In frequently harsh terms, commentators scorn the agency for not using its competition mandate more

47. This observation is based on the author's review of each *GCR* Rating Enforcement survey published from 2001 onward.

48. Three other agencies also received five stars for the latest rating period: The European Commission's Competition Directorate, France's Autorite de la Concurrence, and German's Bundeskartellamt. GLOBAL COMPETITION REVIEW, RATING ENFORCEMENT 2020.

49. GLOBAL COMPETITION REVIEW, RATING ENFORCEMENT 2020, *supra* note 41.

50. This observation is based on the author's review of each *GCR* Rating Enforcement survey from 2001 to the present.

51. See William E. Kovacic, *Antitrust in High Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097 (2012) (describing the allocation of tasks and relationship between the two federal antitrust agencies).

52. This observation is based on the author's review of the *GCR*'s annual rankings from 2001 to the present.

53. See *supra* notes 8 and 15 and accompanying text (collecting contemporary commentary that argues U.S. federal antitrust enforcement is seriously inadequate).

aggressively.⁵⁴ Their assessment of the DOJ is no more favorable.⁵⁵ Where the *GCR* sees two decades of superior performance, contemporary criticism of the U.S. antitrust agencies perceives a persistent pattern of grievous policy lapses dating back to the late 1970s.⁵⁶ In its strongest form, the overarching proposal of the modern critique is not to tamper with the system at the edges, but to carry out a “root and branch reconstruction.”⁵⁷

What accounts for these drastically divergent assessments of the performance of the DOJ and the FTC? To some extent, the divergence reflects opposing views of the proper purposes of U.S. antitrust enforcement. The severely negative assessment often comes from commentators who believe that mainstream U.S. antitrust policy adheres to a cramped vision that regards the interests of consumers to be paramount in the interpretation and application of the antitrust laws.⁵⁸ For such observers, law enforcement faithful to the egalitarian aims of the antitrust statutes would seek to safeguard the interest of citizens not only as purchasers of goods and services but also as workers, owners of small and medium enterprises, and participants in the democratic process.⁵⁹ By this view, a program premised on protecting consumer interests to the exclusion of other objectives is inherently deficient.

The divergent perspectives about the goals of the U.S. antitrust system, sketched above, are an important source of difference in modern debates

54. *Id.* Various observers have offered similarly negative assessments of the FTC’s exercise of its consumer protection and privacy powers. See, e.g., MAURICE E. STUCKE & ARIEL EZRACHI, *COMPETITION OVERDOSE – HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS* 217-18 (2020) (criticizing the FTC for lenient fines and punishment against big tech firms for their privacy violations).

55. See STUCKE & EZRACHI, *supra* note 54, at 232 (criticizing DOJ and FTC for challenging forms of collaboration that would assist Uber and Lyft drivers “to secure fair wages”); TEPPER & HEARN, *MYTH OF CAPITALISM*, *supra* note 9, at 162 (“the Department of Justice now essentially works to serve the interests of companies”).

56. See *supra* notes 8-13 and accompanying text (describing criticism of modern U.S. antitrust enforcement as badly inadequate).

57. Vaheesan, *New Gilded Age*, *supra* note 12.

58. See DAYEN, *MONOPOLIZED*, *supra* note 11, at 285 (“The antitrust apparatus -- in government, in academia, in the establishment -- has built a fortress around itself, a cloistered world where nothing is inherently wrong with the economy, where there’s been no rampant inequality, stunting of innovation, degradation in quality of service, or concentration in political power, and where there aren’t even any monopolies around that could have possibly instigated such bad outcomes.”).

59. See Russell Brandom, *The Anti-Monopoly Case Against Google: A Conversation with Open Markets’ Barry Lynn*, *THE VERGE* (Sept. 5, 2017, 2:55pm EDT), <https://www.theverge.com/2017/9/5/16243868/google-monopoly-antitrust-open-markets-barry-lynn> [<https://perma.cc/NX35-DBJH>] (arguing that the purposes of antitrust laws are not only to protect consumers, but also to protect democratic institutions and communities).

about competition policy. At the same time, the competing groups of policy advocates share a common methodology: the competing assessments of agency performance often draw inferences from the positive record of DOJ and FTC activity. Commentators often point to data on the volume and types of enforcement, and the remedies obtained through litigation or settlement, to support their normative conclusions.⁶⁰

Two things stand out in assessments of the U.S. antitrust system that rely upon the positive record of DOJ and FTC enforcement. First, there appears to be no common understanding among commentators about what the federal agencies have done, nor is there agreement about the doctrinal or policy importance of individual enforcement efforts.⁶¹ The academics and practitioners whose views are influential in the *GCR* survey and the commentators who berate the DOJ and the FTC today seem to make dissimilar assumptions about what enforcement activities the federal agencies have undertaken and why they have exercised their prosecutorial discretion as they have⁶² – not a good starting point for a well-informed discussion about the quality of agency performance.

The extensive reliance on positive data about enforcement activity raises a second important question. Are the volume of cases and the amount of fines imposed good measures of agency performance? The amount of antitrust enforcement activity can be both meaningful and meaningless. Sustaining some baseline level of enforcement activity is important if the agency is to be seen as credible to business managers and legitimate in the eyes of elected officials who adopt the laws and supply public resources to implement them.⁶³ In deciding whether to comply with the law, business decision makers are apt to ask their advisors what happens if they fail to comply, and how vigorously do the public authorities enforce the legal command at issue. In the absence of periodic, well-publicized episodes of enforcement, the sense of urgency to abide by the law diminishes.⁶⁴ The

60. See *infra* notes 174-183 (describing critical commentary that invokes data on federal enforcement involving mergers and single-firm conduct)

61. See *infra* notes 171-185 (discussing divergent understandings of what the federal antitrust agencies have done in the modern era and the motivations that guided the exercise of the power to prosecute).

62. As indicated in Section II.B. below, there are remarkable gaps in the knowledge of competition law specialists and business law commentators regarding the cases that the DOJ and the FTC have filed and what types of economic harms the agencies sought to rectify.

63. See William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 *Geo. Mason L. Rev.* 237, 247-48 (2015) (“At least in some areas of antitrust law, a minimum level of activity may be vital to preserve the credibility and reputation of the competition agency.”).

64. See D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners*

failure to enforce the law sufficiently leaves victims exposed to injury and undermines deterrence. As discussed in more detail in Section III below, the maintenance and study of accurate data sets on an agency's positive enforcement record can enable public officials to make better judgments about prioritization and project selection, and can facilitate meaningful monitoring by external observers, such as legislative bodies, media organizations, advocacy bodies, and academic researchers.⁶⁵

At the same time, activity levels cannot confidently be taken as proxies for effectiveness.⁶⁶ Speeches by competition agency leaders often will say their agencies have been "very busy" in bringing cases and imposing fines.⁶⁷ The desired implication is that activity is a good measure of accomplishment. Yet the real question, often difficult to answer, is whether the agency has been productive in improving economic performance to the benefit of society.⁶⁸

Recitals of the numbers of cases filed and the volume of fines imposed – especially large fines levied on well-known large firms – are widely accepted tests of effectiveness, yet they often provide little insight into the impact of an agency's work or the wisdom of its resource allocation decisions. An agency that runs up large numbers of total cases may be pursuing insignificant cases, or it may be making commitments that greatly exceed its capacity to bring matters to a successful conclusion. Big fines, even multi-billion dollar penalties, may be impressive at first glance, but they

Really Think About Enforcement, 78 ANTITRUST L.J. 201, 203 (2012) ("In the individual cartelist's cost-benefit calculation, the lack of public awareness of cartels and lack of corresponding moral outrage for cartel crimes reduces the cost of participation in a cartel.").

65. See William E. Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness*, 13 COMPETITION L. REV. 9 (June 2018) (exploring how the competition agencies can implement policy more effectively by raising their skills at prioritization and project selection).

66. See William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5(1) COMPETITION POL'Y INT'L 129, 131–33 (Spring 2009) [hereinafter *Horizontal Merger Enforcement*], available at <https://lawprofessors.typepad.com/files/kovacic.final.pdf> [<https://perma.cc/94PH-UL9N>] (arguing that activity level is a feeble proxy to assess effectiveness of antitrust oversight; instead, criteria including whether the policies improve economic performance, whether the competition system minimizes implementation cost, and whether the system has committed to reassessment and improvement, should be adopted).

67. Kovacic et al., *Measure Up*, *supra* note 37, at 27–28.

68. Kovacic et al., *Measure Up*, *supra* note 37, at 27–28.

68. In his inaugural address in 2009, President Obama put the point this way: "The question we ask today is not whether our government is too big or too small, but whether it works." President Barack Obama, *U.S. Presidential Inaugural Address* (2009), available at http://media.washingtonpost.com/wp-srv/politics/documents/Obama_Inaugural_Address_01_2009.html [<https://perma.cc/M2XH-ZRXX?type=image>].

may not make much of a dent in the incentives that shape behavior of firms that net billions in profits in a single month.⁶⁹ A preoccupation with bringing high-profile cases against larger enterprises also can lead an agency to forego smaller cases that can serve as valuable prototypes for advancing analytical or doctrinal concepts that, if endorsed in judicial decisions, expand enforcement possibilities for the future.⁷⁰

The single-minded focus on litigation as the central instrument of policy making also can blind an agency to the possibility in some instances that lawsuits are inferior to other policy making strategies. Non-litigation policy instruments such as rulemaking or the filing of reports that advocate changes in the existing policy framework can yield valuable results that would be unattainable through lawsuits alone.⁷¹ Moreover, an agency driven to lift

69. Some firms may regard the seemingly large fine as an acceptable price to pay for the gains that flow from the challenged conduct. Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 424–25 (2011) (“deterrence is likely to be highly inadequate when large overcharges occur since fines will be less than the firms’ profits”). For example, this concern has arisen in connection with monetary sanctions the European Commission imposed upon participants in a cartel to raise the price of heavy trucks. Kovacic et. al., *Serial Collusion*, *supra* note 20, at 314–15 (discussing EC fines against participants in heavy trucks cartel). The issue also has clouded the \$5 billion settlement achieved by the FTC to resolve alleged violations by Facebook of a privacy consent decree that the FTC entered against the company in 2012. Margaret Harding McGill & Nancy Scola, *FTC approves \$5B Facebook settlement that Democrats label “chump change”*, Politico (July 12, 2019), <https://www.politico.com/story/2019/07/12/facebook-ftc-fine-5-billion-718953> [<https://perma.cc/7ME6-STNA>].

70. Small cases can make big law. An examination of the evolution of antitrust enforcement programs reveals a number of instances in which cases involving smaller defendants and smaller volumes of commerce generated doctrine that paved the way for successful pursuit of cases involving large defendants and massive economic stakes. A noteworthy example is *Lorain Journal Co. v. U.S.*, 342 U.S. 143 (1951). The DOJ’s successful prosecution of the *Lorain Journal* case in the late 1940s and early 1950s yielded precedent that provided the foundation for the theory of harm in the *Microsoft* monopolization case in the late 1990s. *U.S. v. Microsoft Corp.*, 253 F.2d 34 (D.C. Cir. 2001) (*per curiam*). See also ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY* (2014) (discussing the significance of *Lorain Journal* to the formulation of the theory of harm in *Microsoft*). Another important example is *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973). The government’s victory in *Otter Tail* supplied a crucial basis for the DOJ to undertake its challenge against AT&T in the 1970s for illegal monopolization. PETER TEMIN, *THE FALL OF THE BELL SYSTEM* 108–90 (1987). The AT&T litigation resulted in a settlement in 1982 that required the break-up of nation’s leading telecommunications company. STEPHEN COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* 172–89, 211–53, 291–323 (1986).

71. Notable FTC successes in the 2000s in applying non-litigation policy tools include the Commission’s publication of studies involving entry by generic drug producers, the competitive effects of the patent rights-granting process, and competition in health care. William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and*

case counts is prone to underinvest in the policy research and development that sets the foundation for strong cases and other regulatory interventions.⁷²

II. HOW THE QUALITY OF POSITIVE ANALYSIS AFFECTS OUR UNDERSTANDING OF THE OPERATION OF THE U.S. ANTITRUST REGIME

Since the late 1960s, debates about the appropriate direction of federal antitrust policy have been shaped by two narratives anchored in depictions about the history, more recent and more distant, of the law enforcement programs of the DOJ and the FTC. As discussed in Section II.B. below, the excessive and misdirected enforcement activity narrative portrays federal enforcement as out of control in its tendency to mount mindless assaults on socially beneficial business behavior and devote too few resources to meritorious cases. The inadequate and misdirected enforcement activity narrative scorns the agencies for doing too little to curb harmful business conduct and bringing too many cases that damage small businesses and individual entrepreneurs.

Both narratives frequently have supported their arguments about the quality of federal enforcement policy with two types of positive analysis. The first type consists of express or implied references to enforcement data.⁷³ The commentary invokes enforcement data much in the way that enthusiasts of sport recite statistics when debating the merits of individual performers or teams. The second type of positive analysis describes the motives that animated the enforcement choices of the DOJ and the FTC. The discussion of motives might be dismissed as mere surmise -- a speculative interpretation of agency actions rather than a verifiable statement of why agencies acted as they did. In a number of cases, however, commentators present matter-of-fact statements that assign motives with a degree of assurance that invites the reader to conclude that the motives attributed to the agencies indeed guided their decisions.⁷⁴ In short, the excessive enforcement and inadequate

Investments in Competition Policy Research and Development, 72 ANTITRUST L.J. 861 (2005) [hereinafter *Measuring What Matters*].

72. Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 182 (2005).

73. See, e.g., APPLEBAUM, *ECONOMISTS' HOUR*, *supra* note 13, at 157 (quoting George Stigler as saying "antitrust laws do far more harm than good and that we would be better off if we didn't have them at all"; adding that "Public policy has moved in that direction over the last two decades. Regulators brought a dwindling number of enforcement actions; courts kept chipping away at the law.").

74. For example, following the Justice Department's recent complaint against Google for illegal monopolization, Professor Tim Wu observed "Others may urge us to trust that

enforcement narratives rely extensively on positive statements about what the agencies did and why they did it.

In a striking number of instances, the two narratives make positive statements that diverge materially from actual experience or require elaborate qualifications that, if presented, would reduce the force of the narratives' normative case for change. In some cases, the recital of enforcement history is manifestly contrary to fact. In others, the historical story contains a degree of exaggeration that renders it misleading and erodes the positive foundation on which the narrator's normative recommendations stand. Both narratives suffer from their tendency to stretch or spin past events in search of what Professor Daniel Ernst has called "a useable past."⁷⁵

The focus in the discussion below is on advertent or inadvertent misrepresentations of the positive record of federal antitrust enforcement. Erroneous portrayals of what happened can come in two forms: an affirmative presentation of data that is contrary to fact, or the omission of material information that makes a statement misleading.⁷⁶ The analysis here does not take issue with statements of opinion that rest upon an accurate portrayal of the positive record. Thus, the article does not quarrel here with

large companies like Google are fundamentally well-intentioned. That view became dominant among antitrust officials during George W. Bush's administration and has now prevailed for 20 years." Tim Wu, *Google, You Can't Buy Your Way Out of This*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/opinion/google-lawsuit-antitrust.html> [<https://perma.cc/HJ4R-TQFV>]. For what it's worth, I served as a senior official at the FTC in seven of the eight years of the George W. Bush administration (from 2001-2004 as General Counsel and 2006-2009 as a member of the Commission). In that period, I attended hundreds of meetings inside the agency on antitrust enforcement matters. I never heard an FTC employee, including its most senior leaders, assert that the agency should decline to initiate an investigation or bring a case because the companies in question were "fundamentally well-intentioned." Nor, in the course of numerous conversations did I hear a DOJ official say that enforcement was inappropriate, in specific case or as a general guide to policy making, because the firms at issue were "fundamentally well-intentioned." I do recall intense deliberations with the FTC and debates with DOJ officials about whether the business conduct in question damaged competition without regard to the subjective state of mind of the commercial actors.

75. Daniel R. Ernst, *The New Antitrust History*, 35 N.Y. L. SCH. L. REV. 879, 883 (1990).

76. The omission of relevant information can present a false image of an organization's work. Years ago in London's West End, I visited a store that specialized in books and memorabilia involving transportation. I recall seeing a poster that celebrated the history of the Cunard cruise line and its predecessor companies. In the center of the poster was the image of one of Cunard's famous modern ships, and the border contained images of famous liners from the earlier days of Cunard and companies, such as the White Star Line, that Cunard had absorbed. The gallery of great vessels on the border had two noteworthy omissions: the *Lusitania* and the *Titanic*. It is difficult to tell the history of the Cunard family of cruise lines without mentioning these tragic steamships.

a commentator who correctly describes an agency's record of cases involving claims of illegal monopolization and concludes that the agency's program involving dominant firms was deficient because the agency should have prosecuted more of these cases. Statements of opinion that assert or assume inaccurate representations of the positive record are the subject of criticism here – for example, a conclusion that makes an erroneous claim about agency activity to support a conclusion that the agency performed badly or successfully.⁷⁷ Thus, the analysis emphasizes positive statements that are contrary to fact or normative conclusions that rely upon erroneous positive statements.

The discussion here also focuses on what might be called material misrepresentations of the positive record. Some degree of simplification is inevitable in all narration; absolute precision is unattainable, even through the exercise of scrupulous care. As Professor Tim Büthe observes:

[I]t is more meaningful to endorse a good narrative work as “plausible,” “persuasive,” or “compelling” – as seems to be the practice among historians – rather than “true” or “right,” though we certainly may find some narrative work that is poor and even plain “wrong,” such as when its interpretation is marred by logical inconsistencies or makes incorrect assertions about the chronology of events.⁷⁸

This Article comes down hard on imprecision where the narrative makes categorical and incorrect statements of positive activity as a way of building a case for strong statements about the quality of competition agency performance in a specific period. It is not overly concerned with inaccuracies that appear in accounts that carefully qualify their representations about the positive world and note potential frailties in the assembly and presentation of data.

77. Roughly speaking, the Article employs a distinction that the FTC uses in its regulation of commercial advertising. See Federal Trade Commission, *FTC Policy Statement on Advertising Substantiation* (Nov. 23, 1984), available at <https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation> [<https://perma.cc/8TAA-566D>] (stating policy guidelines regarding advertising substantiation) *Thompson Medical Company Inc. v Federal Trade Commission*, 791 F.2d 189 (D.C. Cir. 1984). The FTC generally will not challenge a firm for making what is plainly a statement of opinion (“puffery”) about the quality of its product, such as a restaurant that claims to serve “Philadelphia’s Best Cheesesteak.” The FTC gets involved when the firm asserts a factual basis for its claim, as when the restaurant declares “Rated by Philadelphians as the City’s Best Cheesesteak.”

78. Tim Büthe, *Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence*, 96 AM. POL. SCI. REV. 481, 488 (2002).

A. Excessive and Misdirected Enforcement Activity: Two Narratives from the Late 1970s

From the mid- to late 1930s through the early- to mid-1970s, the reach of the U.S. antitrust system expanded dramatically.⁷⁹ The courts endorsed relatively expansive interpretations of the antitrust laws,⁸⁰ and the federal agencies undertook a number of ambitious enforcement programs.⁸¹ In the late 1970s, the extension of intervention in the courts and in the agencies attracted strong criticism from observers whose normative assessments rested upon strong claims about what the antitrust system had done. The discussion below considers two important examples.

ROBERT BORK'S ANTITRUST PARADOX

In 1978, in his formative critique of the U.S. antitrust system, Robert Bork wrote that “[o]ne of the uses of history is to free us of a falsely imagined past.”⁸² Judge Bork’s treatise often invoked history to make the case for a sweeping retrenchment of antitrust policy.⁸³ He argued that “[t]he conventional indicia of legislative intent overwhelmingly support the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare”⁸⁴ to the exclusion of other aims, such as the maintenance of an egalitarian business environment in which smaller enterprises could prosper.⁸⁵ To Judge Bork, the congressional endorsement of “consumer welfare” as the single-minded aim of antitrust

79. See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 49 (2000); see also Barak Orbach, *The Present New Antitrust Era*, 60 WILLIAM & MARY L. REV. 1439, 1450 (2019) (describing this period as “the Fairness Era”).

80. Notable landmark decisions that extended the zone of antitrust liability in this period included *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

81. Among the most significant federal enforcement programs was the effort by the DOJ and the FTC from the late 1960s through the 1970s and into the early 1980s to deconcentrate major sectors of the economy. See *infra* notes 97-99, 116 and accompanying text (describing federal enforcement measures from 1969 through the 1970s to dissolve single-firm monopolies and tight oligopolies).

82. ROBERT H. BORK, *THE ANTITRUST PARADOX – A POLICY AT WAR WITH ITSELF* 15 (1978) [hereinafter *ANTITRUST PARADOX*].

83. See, e.g., *id.* at 50-89 (describing goals of Congress in adopting the antitrust laws and judicial interpretation of those goals).

84. *Id.* at 71.

85. *Id.* at 60-61.

law meant that judges should evaluate the legality of business behavior under the Sherman Act,⁸⁶ the Clayton Act (as amended by the Celler-Kefauver Act),⁸⁷ and the Federal Trade Commission Act⁸⁸ according to its effect on allocative efficiency.⁸⁹

Since the early 1980s, numerous academics in fields such as history and law have retraced Judge Bork's historical argument about the original congressional intent behind the antitrust statutes and disputed its positive account of the legislative deliberations leading to adoption of the Sherman, Clayton, and Federal Trade Commission Acts.⁹⁰ A large body of historically-oriented scholarship regards the consumer welfare thesis (and its implication that allocative efficiency is all that counts in antitrust law) as unsupportable.⁹¹ An important strand of analysis demonstrated how Judge Bork's positive account of the origins of the U.S. antitrust statutes ignored key elements of context that are necessary to understand the aims of Congress from 1890 (when the Sherman Act was adopted) to 1914 (when the Clayton and FTC Acts were passed).⁹² As Professor James May has observed, if one considers the enactment of the antitrust laws in their fuller

86. 15 U.S.C. §§1-7.

87. 15 U.S.C. §§ 12-27.

88. 15 U.S.C. §45 (proscribing "unfair methods of competition").

89. BORK, ANTITRUST PARADOX, *supra* note 82, at 90-115.

90. An especially influential beginning of this critical literature was Robert Lande's study of the legislative histories of the antitrust statutes. Professor Lande demonstrated that the legislative debates displayed no overriding concern with "consumer welfare" and instead advanced a variety of other policy objectives, including the attainment of important wealth distribution aims. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65,93 (1982) (concluding that the chief congressional aim in adopting the antitrust laws was not to safeguard allocative efficiency but rather to prevent unfair transfers of wealth from consumers to producers).

91. In a representative assessment authored less than a decade after the ANTITRUST PARADOX appeared, Professor Herbert Hovenkamp observed that "the legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency." Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 249 (1985).

92. For an early, influential treatment of this point, see James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 395 (1989) [hereinafter *Formative Era*] (offering a caution relevant to Bork and other commentators who scan the legislative debates for supportive passages and overlook the larger context in which these deliberations took place). Professor May observed that efforts to use historical analysis to guide contemporary policy development must stand upon sound positive foundations constructed from "[T]he formulation and application of an approach reasonably faithful to the animating economic, moral, and political concerns of [the] initial period of antitrust legislation and adjudication." *Id.* at 395.

historical context, one sees that the formative legislation emerged from “a powerful, widely-shared vision of a natural, rights-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom.”⁹³

While many researchers have exposed (and continue to attack) the frailties of the positive claims supporting Judge Bork’s interpretation of the original antitrust statutes,⁹⁴ another doubtful positive basis for the *Antitrust Paradox*’s reform prescriptions has received less attention. Judge Bork argued that serious failures in the institutions responsible for the formation and implementation of antitrust policy – academia, the Congress, the courts, the federal enforcement agencies, the business community and their agents in the antitrust bar – had rendered the system dysfunctional and sent it out of control.⁹⁵ “[M]odern antitrust law,” he wrote, “has so decayed that the policy is no longer intellectually respectable. Some of it is not respectable as law; more of it is not respectable as economics; and . . . a great deal of antitrust law is not even respectable as politics.”⁹⁶

Judge Bork seemed to perceive that his argument for sweeping change

93. May, *Formative Era*, *supra* note 92, at 391.

94. Bork’s consumer welfare argument continues to attract criticism from scholars who initiated the challenge to this interpretation in the 1980s, and it is the focus of critical inquiry by a new generation of researchers. *See, e.g.*, Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253, 2255 (2013); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 *NOTRE DAME L. REV.* 191 (2008). Modern advocates of far-reaching antitrust reforms perceive that continued adherence to Bork’s consumer welfare vision by courts and enforcement agencies is a formidable obstacle to the transformation of the U.S. competition policy system. *See, e.g.*, Lina Khan, *The ideological Roots of America’s Market Power Problem*, 127 *YALE L.J. FORUM* 960 (2018); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontent*, 11 *HARV. L. & POL’Y REV.* 234, 269–72, 277–79 (2017); Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, ROOSEVELT INSTITUTE (Dec. 11, 2017), <http://www.rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory> [<https://perma.cc/AGW4-V77G>]. Senator Elizabeth Warren has drafted legislation that repudiates the consumer welfare standard as proposed by Professor Bork and applied by the federal courts. Senator Elizabeth Warren, *Anti-Monopoly and Competition Restoration Act* (Dec. 9, 2019) (draft legislation on file with author). The recent report by the Majority Staff of the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law also proposed that Congress adopt legislative reforms that would declare its intent that the antitrust laws encompass the interests of citizens beyond their role as consumers. Majority Staff Report, *supra* note 7 at 391.

95. William E. Kovacic, *Out of Control? Robert Bork’s Portrayal of the U.S. Antitrust Enforcement System in the 1970s*, 79 *ANTITRUST L.J.* 855, 857 (2014) [hereinafter *Out of Control*].

96. BORK, *ANTITRUST PARADOX*, *supra* note 82, at 418.

might not be persuasive unless he fully discredited the regime as it stood in 1978. His apocalyptic narrative was supported with positive descriptions of what the institutions of antitrust law had done and failed to do. With few exceptions, the courts had ignored efficiency considerations and moved doctrine in recklessly interventionist directions.⁹⁷ The antitrust agencies likewise had brushed aside valid efficiency justifications for challenged practices and craved power for its own sake, advancing enforcement theories that gave the DOJ and the FTC ever greater power over the economy.⁹⁸ Judge Bork said Congress seemed poised to adopt new legislation that would deconcentrate various American industries and inflict massive damage on the U.S. economy.⁹⁹ The business community, lacking a sense of common cause to respond forcefully to these dangers, had offered feeble resistance to FTC and DOJ expansionism.¹⁰⁰ Abetted by interventionist legislators and pliant courts, and unchecked by effective business resistance, the well-focused and self-aggrandizing leadership and staff of the DOJ and the FTC appeared destined to conquer new enforcement terrain without restraint. In Judge Bork's portrayal, the expansion of antitrust intervention had no apparent boundaries.

Judge Bork's dismal depiction of the U.S. regime omitted developments that fit poorly with his depiction of institutions in crisis.¹⁰¹ To look more carefully at contemporary trends would have forced a rethink of the notion that the system was moving inexorably toward ever greater intervention in the affairs of business. Judge Bork acknowledged that some court decisions of the 1970s seemed tentatively to suggest a more cautious judicial mood. He omitted discussion of other cases that, considered as a group, would have indicated that momentum for increasingly broad, pro-intervention interpretations was dissipating.¹⁰² He also overlooked changes in Congress that made the enactment of new legislation to restructure American industry unlikely.¹⁰³ The business community, which Judge Bork depicted as timid and passive, instead had mounted a formidable campaign – in litigation, advocacy before Congress, and in funding research that highlighted the efficiency rationales of challenged conduct – to oppose the

97. Kovacic, *Out of Control*, *supra* note 95, at 860–62.

98. *Id.* at 862–64.

99. *Id.* at 859–60.

100. *Id.* at 864.

101. Daniel Crane, *The New Crisis in Antitrust (?)*, 83 ANTITRUST L.J. 253 (2020); Kovacic, *Out of Control*, *supra* note 95, at 866–75.

102. Kovacic, *Out of Control*, *supra* note 95, at 868–72.

103. *Id.* at 867–68.

ambitious de-concentration program of the federal agencies.¹⁰⁴ In case after case, the federal agencies faced powerful opposition from defense teams consisting of the premier private law firms and economic consultants; in many instances, the defendants tied the government in procedural knots or achieved litigated victories on the merits.¹⁰⁵ By accounting for developments in the courts and in the academic commentary, the federal agencies also had made moves to rein in their enforcement programs or to initiate the types of cases, in some instances, that Judge Bork seemed to approve.¹⁰⁶ By the late 1970s, the putatively invincible federal antitrust agencies, said to be bent on acquiring power for its own sake and destined to expand the zone of antitrust enforcement without limit, had begun a major retreat.

All of these developments were observable in 1978, especially for an astute student of the U.S. antitrust system such as Robert Bork. Accounting for them would have required Judge Bork to temper his catastrophe narrative by acknowledging phenomena within the system that moderated expansionism. After addressing the fuller body of developments – presenting a more complete positive account of the state of the antitrust regime – Judge Bork probably still would have concluded that major changes in U.S. enforcement policy and jurisprudence were necessary. Yet these policy prescriptions likely would have lacked the force provided by a positive analysis that likened the U.S. antitrust institutions to a runaway train filled with explosives.

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters.¹⁰⁷ Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices.¹⁰⁸ Many matters involved powerful economic interests,¹⁰⁹ and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of

104. *Id.* at 875.

105. *Id.* at 870–72.

106. *Id.* at 872–73.

107. See generally William E. Kovacic, “*Competition Policy in Its Broadest Sense*”: Michael Pertschuk’s Chairmanship of the Federal Trade Commission 1977-1981, 60 WILLIAM & MARY L. REV. 1269 (2019) [hereinafter *Broadest Sense*] (describing the FTC’s pursuit of competition and consumer protection matters during the late 1960s through the 1970s).

108. *Id.* at 1283–86, 1303.

109. *Id.* at 1287–88.

intellectual property.¹¹⁰ In 1974, the agency also initiated a program that required certain large firms to provide “line-of-business” data concerning a range of performance indicators.¹¹¹

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.¹¹² Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements.¹¹³ The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.¹¹⁴

As a group, the FTC’s competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency’s actions in court and before Congress.¹¹⁵ The complaints of industry resonated with a large, powerful bipartisan coalition of legislators¹¹⁶ who criticized the Commission’s activism, proposed various measures to curb the agency’s authority,¹¹⁷ and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980

110. *Id.* at 1287.

111. *Id.* at 1284–85; FTC Resolution Requiring Annual Line of Business Reports from Corporations, Aug. 2, 1974, 39 Fed. Reg. 30, 377 (1974). The development of the FTC’s line of business program is examined in Note, The FTC’s Annual Line-of-Business Reporting Program, 1975 DUKE L.J. 389.

112. Kovacic, *Broadest Sense*, *supra* note 107, at 1288–91.

113. Federal Trade Commission (F.T.C.), *Special Reports Relating to Advertising Claims*, 36 FED. REG. 12058 (June 24, 1971); Pfizer, Inc., 81 F.T.C. 23 (1972).

114. Kovacic, *Broadest Sense*, *supra* note 107, at 1288–91; William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 953 & n.57 (2005).

115. William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 895-97 (1988) [hereinafter *Congress and the Federal Trade Commission*]. See also *The Escalating Struggle Between the FTC and Business – Executives Openly Challenge the Actions and Policies of the Newly Activist Agency*, BUS. WK. 52, 53 (Dec. 13, 1976) (describing the swelling of business opposition to the FTC’s program of the early-to mid-1970s).

116. Most of the events described here took place from 1977 through 1980, when the Democratic Party held the presidency (under the tenure of Jimmy Carter) and controlled both houses of Congress. In the November 1980 elections, the Republicans gained the White House and the Senate.

117. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 93-94 (Robert MacKay, James C. Miller III & Bruce Yandle eds., 1987)(describing the restrictions on the FTC’s powers various members of Congress proposed during this period); see also Michael Denger, *The Unfairness Standard and FTC Rulemaking: The Controversy over the Scope of the Commission’s Authority*, 49 ANTITRUST L.J. 53 (1981)(same).

(FTC Improvements Act).¹¹⁸ In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations.¹¹⁹ Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.¹²⁰

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources.¹²¹ Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit.¹²² As Congress considered bills in 1979 to limit the Commission's powers, Congressman

118. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified in various sections of 15 U.S.C.).

119. In 1980, the Commission ceased operations on May 1 owing to a lapse in its funding. Merrill Brown, *FTC Temporarily Closed in Budget Dispute*, WASH. POST, May 1, 1980, at B1. During debates that led up to the congressional impasse over the Commission's funding, Representative Jimmy Quillen underscored the antipathy of many legislators toward the agency, saying "the way to kill a rattlesnake is to cut its head off. That is what we ought to do today." 126 CONG. REC. H2196 (daily ed., Mar. 26, 1980) (statement of Rep. James Quillen).

120. See *FTC Commissioners Foresee Budget Cuts as Instant Doom for Competition Programs*, ANTITRUST & TRADE REG. REP. (BNA), Feb. 19, 1981, at A1 (describing the Stockman budget proposal). Within weeks, OMB withdrew the proposal. *Budget Cuts Won't Scrap FTC's Competition Mission*, ANTITRUST & TRADE REG. REP. (BNA), Mar. 5, 1981, at A4.

121. William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 589-91, 664-68 (1982) [hereinafter *Congressional Oversight*].

122. During debate over the measure ultimately adopted as The Federal Trade Commission Improvements Act of 1980, the principal Senate sponsors of the Act said the FTC had failed to heed the policy guidance of Congress. 126 CONG. REC. S5676 (Daily Edition, May 21, 1980) (statement of Sen. Wendell Ford); 126 CONG. REC. S5681 (daily ed., May 21, 1980) (statement of Sen. Howard Cannon). See also 121 CONG. REC. S15687 (daily ed., Dec. 16, 1981) (statement of Senator James McClure) (stating "In recent years, we have seen unprecedented efforts by the Commission to expand its activities into areas well beyond those charted by Congress. It is time for Congress to curb these actions.").

William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.¹²³

The Commission, Frenzel concluded, was "a rogue agency gone insane."¹²⁴

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."¹²⁵

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, ". . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."¹²⁶

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of

123. 125 CONG. REC. 466 (1979). To the same effect, *see, e.g.*, 126 CONG. REC. E1536 (daily ed. Mar. 26, 1980) (statement of Rep. Ashbrook)(calling the FTC a "renegade agency"); 126 CONG. REC. H2196 (daily ed. Mar. 26, 1980) (statement of Rep. Quillen) (describing the FTC as a "bureaucratic agency that is out to destroy free enterprise.").

124. 125 CONG. REC. 466 (1979) (statement of Rep. William Frenzel).

125. 126 CONG. REC. 11, 917 (1980).

126. *Impact of OMB-Proposed Budget Cuts For the Federal Trade Commission, Hearing Before a H.R. Subcomm. On Gov't Operations, 97th Cong., 1st Sess., 168 (1981)* (statement of David Stockman, Director, Office of Management and Budget).

1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases.¹²⁷ This was a shot across the bow of the FTC's pending "shared monopoly"¹²⁸ cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition.¹²⁹ Congress did not adopt the Heflin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.¹³⁰

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but

127. *Federal Trade Commission – Divestiture: Hearing Before the Subcomm. for Consumers of the Senate Comm. On Commerce, Science, and Transp.*, 96th Cong., 2d Sess. 1-5 (1979) [hereinafter *FTC Divestiture Hearings*].

128. The concept of shared monopoly and its application in DOJ and FTC cases are examined in George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 *Cornell L. Rev.* 439, 468–80 (1982).

129. See Kellogg Corp., [1970-1973 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 19,898 (No. 8883, Apr. 26, 1972) (alleging in the complaint shared monopolization and maintenance of a noncompetitive market structure; requesting divestitures and compulsory trademark licensing as remedies); Exxon Corp., [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶20,388 (No. 8934, July 17, 1973) (alleging in the complaint shared monopolization and maintenance of a noncompetitive market structure and seeking divestiture as remedy). See also *FTC Divestiture Hearings*, *supra* note 127, at 9–16 (statement by FTC Commissioner Robert Pitofsky)(describing how enactment of the Heflin amendment would endanger FTC's prospects of obtaining requested structural relief in *Kellogg* and *Exxon* cases.).

130. Mondale told a political rally that "it is inconceivable to me and to many independent experts that divestiture would be pursued. Neither President Carter nor I would support such an action." (emphasis removed). He added that, if reelected, he and President Carter "certainly would" support legislation to ban the FTC from seeking a divestiture remedy in the cereal case. *Id.* The Washington Post's account of Mondale's promise reported that the Republican presidential candidate, Ronald Reagan, also had castigated the FTC for its prosecution of the case against Kellogg and the other leading producers of breakfast cereals. Merrill Brown, *Candidates Hit FTC Action*, WASH. POST, Nov. 4, 1980, at A7.

crazy (“insane”), as well.¹³¹ Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, “is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.”¹³² David Stockman’s initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC “is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”¹³³

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC’s activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively.¹³⁴ Leading members of Congress demanded that the agency

131. See 125 CONG. REC. 466 (1979) (remarks of Rep. William Frenzel; calling the FTC “a rogue agency gone insane”).

132. 125 CONG. REC. H10,757 (daily ed. Nov. 14, 1979) (statement of Rep. William Frenzel).

133. James Worsham & Bill Neikirk, *FTC Not Needed, Budget Chief Says*, CHI. TRIB., Feb. 23, 1981, at A1.

134. Two reports issued in 1969, one sponsored by Ralph Nader and the other prepared by a committee convened by the American Bar Association, severely criticized the FTC’s performance and recommended fundamental reforms. Edward F. Cox et al., “THE NADER REPORT” ON THE FEDERAL TRADE COMMISSION (1969); Am. Bar Ass’n, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); see also David A. Hyman & William E. Kovacic, *Can’t Anyone Here Play This Game? Judging the FTC’s Critics*, 83 GEO. WASH. L. REV. 1948, 1953-64 (2015) [hereinafter *FTC’s Critics*] (reviewing findings of ABA and Nader studies); Kovacic, *Congressional Oversight*, *supra* note 121, at 593-602 (same). Congress echoed the demands for reforms presented in the Nader and ABA studies and threatened to abolish the Commission if sweeping improvements were not forthcoming. See, e.g., *Federal Trade Commission Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., Pt. 1, at 110 (1969) (statement of Sen. Edward Kennedy, Chairman, Senate Jud. Subcomm. on Administrative Practice and Procedure: “The subcommittee hopes . . . to see to it that the proposals we have received [from the ABA Report] do not merely become grist for the mill of future students of the FTC. . . . Surely, 45 years after [Gerard] Henderson’s landmark work on the FTC, first exposing many of the same problems we see today, the time has come either to do something about them, or . . . to consider abolishing the agency and starting it from the ground again.”).

transform its competition and consumer programs or face extinction.¹³⁵

Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects—to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings.¹³⁶ During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well."¹³⁷ In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash—including from Congress—that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."¹³⁸

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blue-ribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks.¹³⁹ In his appearances as FTC chair before

135. Kovacic, *Congressional Oversight*, *supra* note 121, at 631–35. Kovacic, *Congress and the Federal Trade Commission*, *supra* note 115, at 869–71.

136. *Id.*

137. *Nomination of Caspar W. Weinberger to be Chairman of the Federal Trade Commission: Hearings Before the Senate Comm. on Commerce*, 91st Cong., 5 (1970) (statement of Sen. Warren Magnuson, Chairman, Senate Commerce Committee).

138. *Id.* In his memoirs, Weinberger observed that he received similar guidance from President Richard Nixon, who nominated him to serve as the Commission's chairman. Weinberger wrote: "There had been complaints that the FTC coddled big business and neglected consumer complaints. President Nixon clearly wanted to change that. When I was sworn in, the president said, 'Business had better look out now!'" Nixon added that, on the basis of what Weinberger had done as a senior advisor to California's governor (Ronald Reagan), "he'll make life difficult for them." CASPAR W. WEINBERGER, *IN THE ARENA – A MEMOIR OF THE 20TH CENTURY* 179 (2001).

139. *See supra* note 134 and accompanying text (describing American Bar Association Commission to Study the Federal Trade Commission); *see also* Hyman & Kovacic, *FTC's Critics*, *supra* note 134, at 1969–70 (describing doctrinal, programmatic, and political risks inherent in the ABA panel's recommendations).

congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .¹⁴⁰

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States."¹⁴¹ Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require."¹⁴² McGee closed the proceedings with

140. *Agric.—Env't and Consumer Prot. Appropriations for Fiscal Year 1972: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 92d Cong., 2673 (1971) (statement of Sen. Gale McGee, Chairman, Senate Appropriations Subcommittee). Senator McGee closed out the hearing by telling Kirkpatrick: "We have considerable dependence on your initiative . . . to stay on top of the great bulk of these bothersome areas that are easily forfeited through neglect and we would like to encourage you to jump at rather than from." *Id.* at 2699.

141. *Agriculture—Environmental and Consumer Protection Appropriations for Fiscal Year 1973: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 92d Cong., 1483 (1972) (statement of Sen. Gale McGee, Chairman, Senate Appropriations Subcommittee).

142. *Id.* at 1490.

militant instructions:

“Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing.”¹⁴³

Kirkpatrick served as the FTC’s chair for just over twenty-nine months. The Commission’s new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman’s confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.¹⁴⁴

With evident approval, Moss recounted how the FTC had “stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise.”¹⁴⁵ The members of the Senate Commerce Committee, Moss concluded, “consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal.”¹⁴⁶ Member after member of the Commerce Committee echoed Moss’s message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, “I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned.”¹⁴⁷

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying “to make the most of that other resource given to us by Congress

143. *Id.* at 1507.

144. *Nomination of Lewis A. Engman, To Be a Comm’r, Fed. Trade Comm’n: Hearings Before the Senate Comm. on Com.*, 93d Cong., 4 (1973) (statement of Sen. Frank Moss, Member, Senate Commerce Committee).

145. *Id.* at 4.

146. *Id.* at 5.

147. *Id.* at 31.

– our statutory powers.”¹⁴⁸ Weinberger said the Commission had “encouraged the staff to make recommendations to us which will probe the frontiers of our statutes,” had made progress in “[p]robing the outer limits” and “exploring the frontiers” of the agency’s authority, and had shown it “is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices.”¹⁴⁹ In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was “moving into ‘high gear’ in the task of preserving and promoting competition in the American economy.”¹⁵⁰ He said he and his fellow board members “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.”¹⁵¹

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal¹⁵² and petroleum refining industries.¹⁵³ With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies.¹⁵⁴ The Joint Committee’s chairman, Senator William Proxmire, told Engman “the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence.”¹⁵⁵ Perhaps astonished to hear that cases to break up the nation’s leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, “The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition.”¹⁵⁶

148. Letter from Caspar W. Weinberger, Chairman, *Fed. Trade Comm’n, to Sen. Edward M. Kennedy, Chairman, Senate Judiciary Subcomm. on Admin. Prac. and Proc.* (July 20, 1970) (reprinted in *Hearing on the Nomination of Miles W. Kirkpatrick to be Chairman of the Fed. Trade Comm’n Before the Senate Comm. on Com.*, 91st Cong., 133–34 (1970)).

149. *Id.* at 135.

150. William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 876 (1988) (quoting Federal Trade Commission, ‘43 Grad Transforms Agency into a ‘Growling Watchdog,’ U. PA. L. ALUMNI J., Fall 1971, at 9).

151. *Id.*

152. See *supra* note 129 and accompanying text (noting the shared monopolization complaint against Kellogg and other leading producers of breakfast cereals).

153. See *supra* note 129 and accompanying text (noting the shared monopolization complaint against Exxon and other leading petroleum refiners).

154. Market Power, *the Federal Trade Commission, and Inflation: Hearing Before the Joint Economic Committee*, 93d Cong. (1974). Engman’s prepared statement and testimony appear at pages 31–78 of the published proceedings.

155. *Id.* at 59.

156. *Id.*

Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies.¹⁵⁷ Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors.¹⁵⁸ The Commission's decision to file the *Exxon* shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands.¹⁵⁹ In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry.¹⁶⁰ Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems.¹⁶¹ In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.¹⁶²

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC

157. Kovacic, *Congressional Oversight*, *supra* note 121, at 637–39.

158. *Id.* at 638.

159. William E. Kovacic, *Standard Oil Co. v. United States and Its Influence on the Conception of Competition Policy*, 11 COMPETITION L.J. 89, 97-98 (2012) (describing congressional pressure in early 1970s to bring antitrust case against the leading integrated petroleum companies); Timothy J. Muris & Bilal K. Sayyad, *The Long Shadow of Standard Oil: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. Cal. L. Rev. 843, 859-63 (2012) (same).

160. Kovacic, *Congressional Oversight*, *supra* note 121, at 636–37.

161. *See supra* note 129 and accompanying text (describing the initiation of the *Kellogg* shared monopolization case).

162. Kovacic, *Congressional Oversight*, *supra* note 121, at 643–49.

should do and how it should do it. As described below in Section IV.D.,¹⁶³ that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.¹⁶⁴

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel.¹⁶⁵ As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases).¹⁶⁶ The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.¹⁶⁷ In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

163. *Infra* notes 296-301.

164. Kovacic, *Broadest Sense*, *supra* note 107, at 1315-17, 1332; Kovacic, *Congress and the Federal Trade Commission*, *supra* note 115, at 889-97.

165. Kovacic, *Congressional Oversight*, *supra* note 121, at 643-51, 658-64.

166. *See infra* notes 201-231 and accompanying text (describing organizational reforms that improved FTC's knowledge base); *see also* Kovacic, *Broadest Sense*, *supra* note 107, at 1306-07 (describing major Commission research projects in late 1970s); William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property Law*, 30 *Seattle L. Rev.* 319, 332-35 (2007) [hereinafter *Importance of History*] (describing historically-oriented research programs originating at the FTC in the late 1970s); William E. Kovacic, *Using Ex Post Evaluation to Improve the Performance of Competition Policy Authorities*, 31 *J. CORP. L.* 502, 524-27 (2006) (describing formation of FTC impact evaluation program in late 1970s).

167. 15 U.S.C.A. §18A (2012). On the FTC's implementation of the premerger notification regime, *see* William E. Kovacic, *HSR at 35: The Early U.S. Premerger Notification Experience and Its Meaning for New Systems of Competition Law*, in *NEW COMPETITION INSTITUTIONS—SHAPING POLICIES AND BUILDING INSTITUTIONS* 9 (Richard Whish & Christopher Townley eds., 2012); Malcolm R. Pfunder, *Premerger Notification After One Year: An FTC Staff Perspective*, 48 *ANTITRUST L.J.* 1487 (1979).

Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures.¹⁶⁸ Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.¹⁶⁹

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration – a period characterized by what one journalist described as an “almost total abandonment of antitrust policy.”¹⁷⁰ In 1987, in discussing Reagan-era

168. These failures are recounted in Kovacic, *Modern Evolution*, *supra* note 25, at 449–52; Hyman & Kovacic, *Consume or Invest*, *supra* note 21, at 309–11; William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 942–43 (2010) (describing how the FTC can develop cases premised on Section 5 principles instead of the Sherman Act).

169. See *infra* Section III (discussing how weak historical awareness helped undermine FTC programs initiated in the 1970s)

170. Joanna Ramey, *Clinton Seen Putting Muscle in Antitrust*, WOMEN'S WEAR DAILY,

federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced “the most lenient antitrust enforcement program in fifty years.”¹⁷¹ Professor Milton Handler remarked that in the Reagan era “a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free.”¹⁷² Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, “enforcement ceased.”¹⁷³

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party’s nomination for the presidency, Barack Obama said the George W. Bush administration “has what may be the weakest record of antitrust enforcement of any administration in the last half-century.”¹⁷⁴ The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.¹⁷⁵

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe.¹⁷⁶ After noting that for most of the 20th century “antitrust enforcement waxed or waned depending on the administration in office,” Professor Robert Reich recently wrote that “after 1980 it all but

Feb. 26, 1993, at S42.

171. Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321, 321 (1987).

172. Milton Handler, *Forward*, 75 CAL. L. REV. 787, 788 (1987); see Milton Handler, *Is Antitrust’s Centennial a Time for Obsequies or Renewed Faith in Its National Policy?*, 10 CARDOZO L. REV. 1933, 1935 (1989) (calling Reagan administration’s federal antitrust program “vigorous and effective *non-enforcement*”).

173. Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 17 BERKELEY J. INT’L L. 197, 206 (1998). See also HARTMANN, *HIDDEN HISTORY*, *supra* note 13, at 3 (“Monopoly . . . is why working people’s pay has not gone up since 1982, when President Ronald Reagan’s Federal Trade Commission and Department of Justice stopped enforcing the anti-monopoly laws.”).

174. Obama, *AAI Statement*, *supra* note 14.

175. APPLEBAUM, *ECONOMISTS’ HOUR*, *supra* note 13, at 157.

176. See, e.g., HARTMANN, *HIDDEN HISTORY*, *supra* note 13, at 126 (“What has changed so much in America in the past 40 years? Simple. Reagan and the Supreme Court put Robert Bork’s theories into effect, and our formerly diverse and competitive corporate landscape has been wiped out, replaced by a few hundred giant corporations that control nearly every aspect of our economy – and our politics.”); STOLLER, *GOLIATH*, *supra* note 8, at 407–39.

disappeared.”¹⁷⁷ He added that Presidents Bill Clinton and Barack Obama “allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated.”¹⁷⁸

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s.¹⁷⁹ A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.¹⁸⁰

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC.¹⁸¹ The Reagan administration

177. ROBERT B. REICH, *THE SYSTEM – WHO RIGGED IT, HOW WE FIX IT* 115 (2020). *See also* TEACHOUT, *BREAK ‘EM UP*, *supra* note 8, at 210 (“Then came Ronald Reagan, and the beginning of four decades of a new antitrust vision and weak enforcement.”).

178. Reich, *supra* note 177, at 162. *Compare* APPLEBAUM, *ECONOMISTS’ HOUR*, *supra* note 13, at 156 (“The merger wave of the Clinton years was surpassed by the merger wave of the Bush years, which was surpassed by the merger wave of the Obama years.”); TEACHOUT, *BREAK ‘EM UP*, *supra* note 8, at 211–12 (“Clinton, Bush, and Obama all presided over an ongoing merger wave that would have horrified any 1960s judge.”).

179. William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 *CHI. L. REV.* 459 (2020) [hereinafter *Chicago Obsession*]; *see also* HARTMANN, *HIDDEN HISTORY*, *supra* note 13, at 81 {“In 40 short years, America has devolved from being a relatively open market economy and a functioning democracy into a largely monopolistic economy and a monopolist-friendly political system. One of the principal architects of that transformation was Robert Bork.”}; DAYEN, *MONOPOLIZED*, *supra* note 11, at 6 (noting that Bork published his *ANTITRUST PARADOX* “at the right moment, when Democrats were abandoning the New Deal and Republicans were coalescing around corporate conservatism. Within a couple of years of publication, Ronald Reagan would win election and put Bork’s theories into practice. And the rest is history.”).

180. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *COLUM. BUS. L. REV.* 1 (2007) [hereinafter *Double Helix*].

181. HARTMANN, *HIDDEN HISTORY*, *supra* note 13, at 3; TEACHOUT, *BREAK ‘EM UP*, *supra* note 8, at 210–12; APPLEBAUM, *ECONOMISTS’ HOUR*, *supra* note 13, at 152–53;

is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally.¹⁸² Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.¹⁸³

Areeda and Turner encouraged courts to forego reliance on non-economic goals in deciding antitrust cases.¹⁸⁴ The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action.¹⁸⁵ The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms.¹⁸⁶

Kovacic, *Modern Evolution*, *supra* note 25, at 384–89.

182. Kovacic, *Chicago Obsession*, *supra* note 179, at 474; Kovacic, *Double Helix*, *supra* note 180 at 35.

183. *Id.*

184. Kovacic, *Chicago Obsession*, *supra* note 179, at 473–74.

185. Kovacic, *Double Helix*, *supra* note 180, at 41–71.

186. Binyamin Applebaum's account of the inadequacy of modern federal antitrust enforcement and the undue retrenchment of economic regulation generally discusses the role of Stephen Breyer as an academic, a member of a Senate committee staff, and as a federal judge. APPLEBAUM, *ECONOMISTS' HOUR*, *supra* note 13, at 150, 168–69, 171. Applebaum does not mention Justice Breyer's Harvard Law School colleague, Philip Areeda, who informed Justice Breyer's antitrust thinking. In one passage, Applebaum describes Justice Breyer, in an article he authored as a member of the U.S. Court of Appeals for the First Circuit, as striving to incorporate Robert Bork's insights into the resolution of antitrust disputes: "Judges wanted to believe Bork, too. They were struggling to deal with increasingly complex antitrust cases, and the "Chicago School" approach of [Aaron] Director and his disciples offered a clear and consistent standard, even for more liberal jurists. Stephen Breyer, the future Supreme Court justice, wrote in 1983, while serving on the First Circuit Court of Appeals, that economics "offers objectivity – terra firma – upon which we can base decisions." *Id.* at 150. The policy prescription in Justice Breyer's comment likely was inspired by the teaching of Areeda and not Chicago School academics. Kovacic, *Double Helix*, *supra* note 180, at 41–51. To read Applebaum's account of Breyer's work, one would not know that Areeda existed or influenced Breyer substantially.

This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.¹⁸⁷

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots.¹⁸⁸ More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.¹⁸⁹

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their

See also TEACHOUT, BREAK 'EM UP, *supra* note 8, at 173–74 (discussing retrenchment of doctrine controlling predatory pricing; making no mention of Areeda and Turner).

187. *See infra* Section II.C. (describing how understanding the modern Harvard School's distinctive influence on antitrust jurisprudence can help plaintiffs construct successful litigation arguments).

188. For example, Binyamin Applebaum's account of James Miller's chairmanship of the FTC observes that Miller "didn't go after doctors." APPLEBAUM, ECONOMISTS' HOUR, *supra* note 13, at 153. As FTC chair, Miller actively opposed congressional efforts in the early 1980s to withdraw the FTC's jurisdiction over the learned professions. JAMES C. MILLER III, THE ECONOMIST AS REFORMER: REVAMPING THE FTC, 1981–1985 (1989). Miller joined the FTC's unanimous opinion (authored by Michael Pertschuk) finding liability in the agency's horizontal restraints case against the Indiana Federation of Dentists, *Indiana Federation of Dentists*, 101 F.T.C. 57 (1983), and he supported the Commission in its successful appeal of an adverse court of appeals decision to the Supreme Court. *Indiana Federation of Dentists v. FTC*, 476 U.S. 447 (1986).

189. *Supra* notes 107–130 and accompanying text; Kovacic, *Congress and the Federal Trade Commission*, *supra* note 115, at 870–71.

resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Foroohar, a journalist who covers the tech sector, stated: “But monopoly policy in America is currently driven by “Chicago School” thinking, which espouses the idea that as long as consumers aren’t paying too much for a good or service, all is well.”¹⁹⁰ In August 2020, Joshua Brustein, a business journalist, said: “For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action.”¹⁹¹

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases.¹⁹² Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors¹⁹³ and transactions

190. Rana Foroohar, *America’s New Antitrust Agenda*, FIN. TIMES (Feb. 3, 2019) <https://www.ft.com/content/c27a517a-2631-11e9-8ce6-5db4543da632> [<https://perma.cc/JL4D-NUBF>].

191. Joshua Brustein, *Democrats are the Hipsters of Antitrust*, BLOOMBERG (Aug. 19, 2020), <https://www.bloomberg.com/news/newsletters/2020-08-19/the-hipsters-of-antitrust> [<https://perma.cc/4UJF-35AZ>].

192. The importance of innovation concerns in DOJ and FTC law enforcement is analyzed in RICHARD J. GILBERT, INNOVATION MATTERS – COMPETITION POLICY FOR THE HIGH TECHNOLOGY ECONOMY 139–218 (2020).

193. See, e.g., *Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry* (Apr. 12, 2016) (“In the defense industry, the Agencies are especially focused on ensuring that defense mergers will

in the health care sector.¹⁹⁴

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that “during the Reagan years, there was no enforcement whatsoever” against attempts to monopolize and monopolization.¹⁹⁵ At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency “there has been no enforcement” of Section 2 of the Sherman Act.¹⁹⁶

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.¹⁹⁷

In May 2018, Senator Richard Blumenthal and Professor Tim Wu

not adversely affect short- and long-term innovation crucial to our national security. . . .”); Daniel L. Rubinfeld & John Haven, *Innovation and Antitrust Enforcement*, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department’s challenge to Lockheed Martin’s effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, *Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX*, 27 GEO. MASON L. REV. 863, 867–68, 899–900 (2020) [hereinafter *Competition Policy Retrospective*] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers).

194. See FTC, Press Release, *FTC Seeks to Block Cytoc Corp.’s Acquisition of Digene Corp.* (June 24, 2002) (announcing FTC decision to seek injunction to bar merger of two firms in the market for cervical cancer screening products), available at <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytc-corps-acquisition-digene-corp> [https://perma.cc/U3D6-TMPE]. The FTC press release quotes Joseph Simons, Director of the FTC’s Bureau of Competition, as saying: “The merger as proposed raises serious competitive concerns within the highly concentrated market for this important diagnostic tool. As a result of the proposed acquisition, it is likely that prices would increase, product innovation would suffer, and ultimately, patient care would be compromised.” *Id.*

195. Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN’S L. REV. 583, 587 (2002) [hereinafter *A View from the Middle*].

196. *ABA Antitrust Chair’s Showcase Probes Effects of Faltering Economy on Enforcement*, 96 ANTITRUST & TRADE REG. REP. (BNA) No. 2395 (Apr. 3, 2009) [hereinafter *Chair’s Showcase*] (quoting Professor Harvey Goldschmid).

197. TEPPER & HEARN, MYTH OF CAPITALISM, *supra* note 9, at 161.

authored an op-ed piece that recited similar statistics: “Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three.”¹⁹⁸

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases¹⁹⁹ involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called “no enforcement whatsoever”.²⁰⁰ The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called “no enforcement.”²⁰¹ From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year – a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu (“about 15 cases each year”) and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).²⁰²

198. Richard Blumenthal & Tim Wu, *What the Microsoft Antitrust Case Taught Us*, N.Y. TIMES (May 18, 2018) [hereinafter *Microsoft Antitrust Case*], <https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html> [<https://perma.cc/U9J8-W3S3>].

199. This paper uses “many” in a relative sense. The number of relevant cases during the eight years of the Reagan presidency (a total of four cases) was notably smaller than the number of such cases prosecuted by the federal agencies in the period from 1969 through 1980 (a total of 32 cases). Kovacic, *Modern Evolution*, *supra* note 25, at 449, 460.

200. Pitofsky, *A View from the Middle*, *supra* note 195, at 587. The DOJ and the FTC each brought two cases involving attempted monopolization or monopolization during the Reagan presidency. Kovacic, *Modern Evolution*, *supra* note 25, at 449. The most notable matter was the DOJ’s successful prosecution of American Airlines for attempted monopolization after American’s CEO (Robert Crandall) invited his counterpart at Braniff (Howard Putnam) to collude in reducing capacity and raising prices on city pairs in and out of the Dallas-Fort Worth International Airport. *United States v. Am. Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

201. Chair’s Showcase, *supra* note 196 (quoting Professor Harvey Goldschmid) The FTC’s attempted monopolization and monopolization cases (a total of seven matters) initiated during the George W. Bush presidency are described in Kovacic, *Rating the Competition Agencies*, *supra* note 1, at 911, 913. These cases included the FTC’s unsuccessful prosecution of Rambus for illegal monopolization. *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir 2008).

202. Blumenthal & Wu, *Microsoft Antitrust Case*, *supra* note 198; TEPPER & HEARN, MYTH OF CAPITALISM, *supra* note 9, at 166. I am unable to replicate the data presented in the Blumenthal/Wu op ed article and the Tepper/Hearn book. In *Myth of Capitalism*, the authors cite Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* (Aug. 31, 2017), <https://ssrn.com/abstract=2612047> [<https://>

INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that “U.S. federal merger enforcement ground to a halt.”²⁰³ In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was “no enforcement at all against vertical or conglomerate mergers during the Bush Administration.”²⁰⁴ In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration “did not block any major mergers.”²⁰⁵

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt.²⁰⁶ The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the “no enforcement at all” amount claimed by Professor Pitofsky, Professor

perma.cc/M3DQ-LQK9] for the proposition that the DOJ and the FTC collectively brought 15.7 Sherman Act Section 2 cases per year from 1970 through 1999. The paper subsequently was published as Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 2019 REVIEW OF FINANCE 697. In both the 2018 version of the SSRN paper and the REVIEW OF FINANCE version, Professor Grullon and his coauthors say “we find in untabulated results that the number of cases filed by the Department of Justice under Section 2 of the Sherman Act has weakened since early 2000.” *Id.* at 734. Neither paper provides statistics to support this observation, nor do the authors appear to include FTC Section 2 activity across these periods. It is unclear whether the 2017 version of the Grullon paper posted on SSRN provided the back-up data, or whether Professor Grullon gave a spoken presentation in which he presented data on slides. In the early 2000s, I studied DOJ and FTC enforcement activity involving single-firm conduct and “shared monopoly” cases. My count of total DOJ and FTC attempted monopolization, single-firm monopolization, and shared monopolization cases yielded the following results: 27 cases from 1969 through 1976 (3.375 cases per year); 5 cases from 1977 through 1980 (1.25 cases per year); 4 cases from 1981 through 1988 (0.5 cases per year); 0 cases from 1989 through 1992 (0 cases per year); and 11 cases from 1993 through 2000 (1.375 cases per year). Kovacic, *Modern Evolution*, *supra* note 25, at 448–49.

203. Eleanor M. Fox, *Can We Control Merger Control? – An Experiment*, in *Policy Directions for Global Merger Review* 79, 84 (Global Competition Review: Special Report for the Global Forum for Competition and Trade Policy 1999).

204. ROBERT PITOFSKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, *TRADE REGULATION: CASES AND MATERIALS* 1075 (6th ed. 2010).

205. WU, *CURSE OF BIGNESS*, *supra* note 8, at 108–09.

206. See, e.g., Ronald W. Davis, *Antitrust Analysis of Mergers, Acquisitions, and Joint Ventures: A Pragmatic Guide to Evaluation of Legal Risks*, 11 DEL. CORP. L.J. 25, 25–27 (1986) (reviewing and presenting data on federal merger enforcement activity from 1981 through 1984).

Goldschmid, and Judge Wood.²⁰⁷ During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production)²⁰⁸ and United Airlines/US Airways (airline transportation services).²⁰⁹ Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as “major” mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that “antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally.”²¹⁰ The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.²¹¹

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement

207. See FEDERAL TRADE COMMISSION, A POSITIVE AGENDA FOR CONSUMERS: THE FTC YEAR IN REVIEW 8 (2003) (describing FTC challenge to proposed merger of Cytac and Digene and decision of companies to abandon the transaction); *United States v. Premdor, Inc.*, 2002 WL 1816981 (D.D.C. Apr. 5, 2002) (alleging in complaint that, inter alia, adverse competitive effect from vertical features of Premdor’s acquisition of Masonite).

208. *U.S. v. General Dynamics Corp. & Newport News Shipbuilding Inc.*, Civ. No. 1:01CV02200 (Filed Oct. 23, 2001), available at <https://www.justice.gov/atr/case-document/verified-complaint-3> [<https://perma.cc/W58P-VRPU>].

209. See Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Merger Enforcement at the Antitrust Division 2-3 (Sept. 27, 2002) (KMPG/Chicago Graduate School of Business Mergers and Acquisitions Forum), available at <https://www.justice.gov/atr/speech/merger-enforcement-antitrust-division-0> [<https://perma.cc/5VTP-XMQY>].

210. Crane, *Antitrust Law and Its Critics*, *supra* note 2, at 253.

211. See, e.g., Blumenthal & Wu, *Microsoft Antitrust Case*, *supra* note 198.

policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period²¹² and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.²¹³

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp.²¹⁴ The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service.²¹⁵ The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity."²¹⁶ Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed

212. Two notable merger enforcement actions involved the petroleum sector. In December 1981, the FTC voted to authorize the agency's staff to file a complaint in federal district court to seek an injunction barring Mobil Corporation from purchasing Marathon Oil Company. Robert Cole, *F.T.C. Fights Mobil Bid on Marathon*, N.Y. TIMES (Dec. 9, 1981), available at <https://www.nytimes.com/1981/12/09/business/ftc-fights-mobil-bid-on-marathon.html> [<https://perma.cc/2WU7-B6W9>]. In a separate action in the same month, Marathon obtained an injunction against the merger. *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1982). In 1982, the Commission authorized its staff to seek an injunction to prevent Gulf Oil Company from buying Cities Service Company. The parties abandoned the transaction. Kovacic, *Modern Evolution*, *supra* note 25, at 444.

213. Successfully litigated government challenges to mergers in this period include *FTC v. PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986); *FTC v. Warner Communs.*, 742 F.2d 1156 (9th Cir. 1984).

214. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986).

215. *Hospital Corp. of Am.*, 106 F.T.C. 361, 455 (1985) (Opinion by the Commission, Calvani, Commissioner).

216. *Hospital Corp.*, 807 at 1385.

the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.²¹⁷

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the *Calvani Hospital Corp.* decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases²¹⁸ – the first time the Commission had won three straight cases before the high court since the 1960s – or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008.²¹⁹ An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytoc and Digene.²²⁰ The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored

217. In its 105-year history, the FTC has not always fulfilled its intended adjudication role as the expositor of widely emulated interpretations of the antitrust statutes. Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1856-69 (2015). In *Hospital Corp.*, it did so with distinction.

218. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *FTC v. Phoebe Putney Hospital Sys., Inc.*, 568 U.S. 216 (2013); *N.C. State Bd. of Dental Exam'rs. v. FTC*, 574 U.S. 494 (2015).

219. See *supra* note 204 and accompanying text (quoting Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood).

220. See FTC, Press Release, *FTC Seeks to Block Cytoc Corp.'s Acquisition of Digene Corp.* (June 24, 2002), <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytoc-corps-acquisition-digene-corp> [<https://perma.cc/U3D6-TMPE>] (describing FTC decision to block merger of Cytoc and Digene).

innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors.²²¹ The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.²²²

Diagnosing the Obstacles to Litigation Success and Overcoming Them.

A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful *Rambus* case,²²³ the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision (*NYNEX Corp. v. Discon, Inc.*²²⁴) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits.²²⁵ The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build

221. Kovacic, *Competition Policy Retrospective*, *supra* note 193, at 899–900.

222. RICHARD J. GILBERT, INNOVATION MATTERS – COMPETITION POLICY FOR THE HIGH-TECHNOLOGY ECONOMY 139–66 (2020); Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919 (2005).

223. *Rambus Inc. v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008).

224. *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

225. The Supreme Court's discussion of overdeterrence concerns in *Discon* appears at 525 U.S. at 137. The D.C. Circuit's application of *Discon* to the Commission's theory of harm in *Rambus* appears at 522 F.3d at 464. See also Richard Dagen, *Rambus, Innovation Efficiency, and Section 5 of the FTC Act*, 90 B.U. L. REV. 1479, 1488–93 (2010) (analyzing the D.C. Circuit's application of *Discon* in *Rambus*).

upon litigation successes such as *McWane, Inc. v. FTC*,²²⁶ where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases.²²⁷ If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study *McWane* – to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions.²²⁸ It is doubtful that what Professor Melamed calls two largely disconnected “conversations”²²⁹ can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student’s work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive

226. *McWane, Inc. v. F.T.C.*, 783 F.3d 814 (11th Cir. 2015).

227. See *Schering-Plough Corp. v. FTC*, 402 F.3d 1058 (11th Cir. 2005) (denying enforcement of F.T.C. administrative decision finding liability in reverse payment case).

228. Melamed, *supra* note 2.

229. *Id.* at 286–92.

Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers²³⁰ and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails.²³¹ The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.²³²

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority.²³³ Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes – for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes.²³⁴ In short, one loses the ability to develop a

230. Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution*, 66 N.C. L. REV. 931, 939 (1988) (officials who designed federal merger enforcement policies in the 1960s were “the government antitrust witchdoctors”); *The New Enforcers*, THE ECONOMIST 125, Oct. 7, 2000 at 125 (depicting federal enforcement officials as “trust-busting zealots of the 1960s who saw evil in every big company or merger”).

231. See Kovacic, *Broadest Sense*, *supra* note 107, at 1308–10 (discussing pejorative portrayal of Pertschuk).

232. Kovacic, *Modern Evolution*, *supra* note 25, at 385–89 (discussing critique of Reagan-era antitrust officials).

233. William E. Kovacic, *Formula for Success: A Formula One Approach to Understanding Competition Law System Performance*, in RECONCILING EFFICIENCY AND EQUITY – A GLOBAL CHALLENGE FOR COMPETITION POLICY 312, 321–23 (Damien Gerard & Ioannis Lianos eds. 2019) (describing importance of agency leadership to agency performance).

234. In the case of perceived or actual policy failures, there is a temptation to seek out a scapegoat for vilification rather than engage in the laborious task of considering how institutional design and culture may have accounted substantially for observed results. Kovacic, *Broadest Sense*, *supra* note 107, at 1309–10. There is a tendency in the literature

better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

Setting Realistic Expectations. By portraying federal enforcement as prone to horrible lapses, the inadequate activity narrative can warp perceptions about what the federal agencies are capable of achieving if they apply maximum effort in carrying out their duties. Consider, again, the Blumenthal/Wu and Tepper/Hearn statements that federal monopolization case filings fell from an average of roughly fifteen cases per year from 1970 to 1999 to an average of three cases per year afterwards.²³⁵ These comparisons might give one the impression that the DOJ and the FTC have the institutional capacity to bring far more than three monopolization cases per year and should do so. But what if the peak annual output of DOJ and FTC monopolization cases since 1970 was an average of three and one-third cases per year from 1969 through 1976, and the total number of such cases initiated between 1969 and 1980 was 47? Using the faulty data set to establish a performance benchmark (i.e., fifteen cases per year) will create unrealistic targets whose pursuit will cause a large mismatch between agency commitments and capabilities.²³⁶

III. HOW THE QUALITY OF POSITIVE ANALYSIS AFFECTS ANTITRUST ENFORCEMENT AGENCY PERFORMANCE

The discussion above has considered how a flawed grasp of the positive record of enforcement can distort the competition policy community's assessment of the performance of the U.S. antitrust system. The discussion in this section looks at the quality of positive analysis from another perspective and asks how weaknesses in positive accounts of enforcement activity affect the operations of the enforcement agencies themselves. An important reason to improve the reporting of DOJ and FTC activity is that

about the FTC to portray the agency's selection of programs as woefully inadequate and to embrace explanations based on aberrant leadership or general allegations of agency irrationality to explain deficient policy performance. It is evident that, upon closer study, the FTC's program selection in the relevant eras was a good deal better than claimed, and its performance shortcomings stemmed more from weaknesses in institutional design and management systems rather than in the quirks of its leaders. Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 ANTITRUST L.J. 145 (2010).

235. See *supra* notes 200-205 and accompanying text (analyzing claims of drastic changes in federal prosecution of monopolization cases from 1970 to present).

236. Hyman & Kovacic, *FTC's Critics*, *supra* note 134, at 1965-67, 1972-73.

good data opens possibilities for the agencies to make valuable improvements in enforcement policy. As noted above, caution is warranted in using levels of activity, in isolation, as measures of agency performance.²³⁷ At the same time, accurate data sets on agency activity can serve to improve antitrust policymaking and enrich discussions – in academic fora, in professional societies, in legislative hearings, and in popular discourse – about competition law.

Among other ends, better collection, disclosure, and analysis of antitrust enforcement data could improve our interpretation of agency action and inaction; strengthen efforts to address the vital, elusive question of how antitrust enforcement affects economic performance; enhance agency processes for initiating projects, especially by placing proposed projects in the context of an existing portfolio of commitments and to make better informed judgments regarding the potential gains and risks associated with each new measure; help illuminate the conditions that increase or reduce the likelihood that an agency will execute litigation programs successfully; identify conceptual connections that link what sometimes are treated as discrete, self-contained areas of antitrust policy; facilitate effective monitoring of agency operations by legislators and external commentators; and permit useful comparisons of enforcement policy across jurisdictions.

Better antitrust data can accomplish many of these ends without great expense. Investments in these activities resemble outlays for operations research that makes an institution wiser in its selection and execution of programs. My modest claim is that, in today's great debate about the future of the U.S. antitrust system, a stronger foundation of activity-related data can put the antitrust community in a better position to make sensible normative judgments about competition policy going forward.

This part presents a case study based upon my experiences as a junior attorney at the FTC in the late 1970s and early 1980s. This was the first of three tours for me at the FTC, and I use the experience to highlight some of the problems and possibilities associated with the creation and maintenance of good data sets on agency activity. Section IV below distills some of the observations into a more formal framework for collecting and applying information about agency activity into agency decision making and the assessment of agency performance.

A. Building Historical Awareness: The FTC in the 1970s

I joined the FTC for the first time in the fall of 1979. At the time, the

237. Kovacic, *Rating the Competition Agencies*, *supra* note 1.

agency's Bureau of Competition had two policy groups that worked closely together – a Planning Office headed by John (Jack) Kirkwood, and an Office of Special Projects led by Albert (Bert) Foer.²³⁸ Both offices played a major role in showing how the Commission could improve its performance by establishing a more complete understanding of its positive record of activity and analyzing data on past programs.

THE KIRKWOOD PLANNING OFFICE

A number of assignments in the Planning Office required me to examine the Commission's more recent and distant past. Under Kirkwood's leadership, the BC Planning Office focused on three interrelated functions: research projects to support policy development in litigation and non-litigation projects at the FTC; consultation with Bureau of Competition litigation teams on existing and proposed antitrust cases; and management of projects to evaluate the impact of completed FTC antitrust cases. The intuition supporting this combination of activities was that the Planning Office could inform policy development most effectively if hands-on experience with real cases and impact evaluations informed its research about the development and application of the FTC's mandate.

As noted above, from the late 1960s through the 1970s, the FTC carried out an ambitious antitrust and consumer protection program.²³⁹ By 1979-1980, the Commission was besieged on several fronts.²⁴⁰ The agency achieved some litigation success, but many of its antitrust cases were struggling. Some matters that sought to extend doctrinal frontiers faced stout resistance from the courts of appeals; others plodded laboriously through the agency's administrative process, where the best of the nation's competition bar and economic experts confronted FTC teams that had great enthusiasm but considerably less litigation experience.²⁴¹

Moreover, a Congress that earlier in the decade had demanded boldness turned against the agency.²⁴² Most of the legislative attacks focused on the FTC's consumer protection program, but there were serious threats to withdraw the agency's jurisdiction in matters involving professional services and to bar the Commission from seeking structural relief in cases premised

238. At the time, the FTC also had a separate Office of Policy Planning headed by Robert Reich, and the agency's Bureau of Economics had a policy team led by Steven Salop.

239. Kovacic, *Broadest Sense*, *supra* note 107, at 1282–92, 1303–07.

240. *Id.* at 1308.

241. Kovacic, *Broadest Sense*, *supra* note 107, at 1318–19.

242. See *supra* notes 99-154 and accompanying text (describing political backlash to activist FTC programs of the 1970s).

on Section 5 of the FTC Act.²⁴³ In 1980 Congress allowed the FTC's funding to lapse, requiring the agency to send its employees home for a day.²⁴⁴ As an indication of the Commission's precarious political position, Vice-President Walter Mondale, on the day before the presidential election in November 1980, told a political rally in Battle Creek, Michigan that, if reelected, he and President Jimmy Carter would seek legislation to bar the FTC from imposing structural relief upon Kellogg and other breakfast cereal manufacturers which the FTC had challenged under Section 5 for exercising collective dominance.²⁴⁵

As the roof was caving in on the agency, there was an intense internal demand for research to convince courts that the agency's cases stood on solid doctrinal and policy ground. In seeking to respond to external attacks, it was evident inside the FTC that the agency had a weak understanding of what it had done in the past and why its programs had evolved as they did. Among other gaps, the agency lacked:

- Data that showed how many monopolization or attempted monopolization cases it had filed, litigated, or settled since its creation.
- Data that recorded how often the agency had achieved structural relief as a remedy for antitrust violations in merger and nonmerger matters.
- Data that showed which and how many of its cases had relied mainly or entirely on the distinctive reach of Section 5 of the FTC Act.
- Data that showed the resolution of the FTC's Section 5 cases on appeal.
- Data that showed overall trends in the types of violations the agency had prosecuted since its creation.

Nor did the agency have a well-formulated statement of the content and scope of its authority to prevent unfair methods of competition. In many meaningful respects, there was surprisingly little systematic institutional knowledge of what the agency had done and why it had done so. Major gaps included

- The absence of policy statements regarding the FTC's interpretation of its authority to bar unfair methods of competition or unfair and deceptive acts or practices;
- The absence of systematic records to identify the Commission's most important achievements in the application of its distinctive collection

243. Kovacic, *Congressional Oversight*, *supra* note 121, at 664–67.

244. *See supra* note 119 and accompanying text (describing lapse in FTC funding).

245. *See supra* note 130 and accompanying text (describing Vice-President Mondale's promise that the Carter administration would seek legislation to block structural relief in FTC cereal shared monopoly case if Jimmy Carter was elected to serve a second term as President).

of policy instruments: administrative adjudication, the collection of business data and the preparation of studies, the promulgation of rules and guidelines, and the provision of policy advice to Congress and the Executive Branch; and

□ The absence of agency historical studies that analyzed obstacles to the effective application of the FTC's powers and identified methods for surmounting them.

The Foer and Kirkwood offices worked actively in the late 1970s and early 1980s to fill these gaps. Nearly all of the Planning Office attorneys wrote and published papers that explored the foundations for the Commission's antitrust enforcement program. Neil Averitt authored a remarkable trilogy of papers on the foundations of the FTC's authority; these consisted of studies of the meaning of the agency's competition law and consumer protection mandate under Section 5 of the FTC Act and the availability of structural remedies to cure antitrust violations under the same statute.²⁴⁶ Robert Lande wrote his famous paper interpreting the aims of Congress in adopting the Sherman, Clayton, and FTC Acts.²⁴⁷ Donald Clark published a paper on facilitating practices.²⁴⁸ James Hurwitz and I published a survey of the legal and economic literature on predation as an improper exclusionary device.²⁴⁹ Ross Petty performed research, published after he left the FTC, on product innovation as an exclusionary strategy.²⁵⁰ Each of these projects sought to support FTC antitrust cases underway.²⁵¹

The Planning Office research program also sought to demonstrate to Congress that the FTC was not, as Representative William Frenzel asserted in 1979, "a king-sized cancer on the economy" or "a rogue agency gone insane."²⁵² In addition to the papers noted above, the office prepared papers

246. Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980); Neil W. Averitt, *Structural Remedies in Competition Cases Under the Federal Trade Commission Act*, 40 OHIO ST. L. REV. 781 (1979).

247. Lande, *supra* note 90.

248. Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 WIS. L. REV. 887.

249. James D. Hurwitz & William E. Kovacic, *Current Legal Standards of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982).

250. Ross D. Petty, *Antitrust and Innovation: Are Product Innovations Ever Predatory?*, 22 SUFFOLK L. REV. 997 (1988).

251. For example, Neil Averitt's research served to clarify the foundations for the legal theory and claims for relief in the FTC's shared monopoly cases in the breakfast cereal and petroleum sectors. The Hurwitz/Kovacic predation research supported the development of the legal theory in the Commission's ongoing predatory pricing cases.

252. 125 CONG. REC. H10,757-58 (daily ed. Nov. 14, 1979).

on the history of FTC antitrust enforcement and supervised projects by academics to evaluate the effects of previous FTC cases. I wrote a history of congressional oversight of FTC antitrust enforcement and showed that the FTC's programs of the 1970s were faithful to congressional guidance about how the agency should allocate its antitrust resources.²⁵³ I also oversaw Timothy Bresnahan's evaluation of the FTC's *Xerox*²⁵⁴ monopolization case,²⁵⁵ while Robert Lande supervised the preparation and publication of studies of FTC vertical restraints cases.²⁵⁶ In addition to these assignments, I worked extensively with the Bureau of Competition team responsible for the agency's shared monopoly case against the country's eight leading petroleum refiners.²⁵⁷

THE FOER OFFICE OF SPECIAL PROJECTS

In the fall of 1979, the Office of Special Projects organized a program of "Economic History Seminars" for the FTC's staff. To prepare the agenda and recruit presenters, Bert Foer enlisted the Harvard Business School historian Thomas McCraw, who was in the midst of writing *Prophets of Regulation*.²⁵⁸ For the FTC seminars, McCraw persuaded Alfred Chandler, Bob Cuff, Louis Galambos, and Ellis Hawley to join him in examining the changing conceptions of competition law and economic regulation in the United States since the late nineteenth century.

At the time, the Congress and the courts were shoving back hard at the FTC for its efforts to carry out an ambitious agenda of competition and consumer protection programs.²⁵⁹ Among other features, the seminars recounted the sobering difficulties that the Commission had encountered since its creation in 1914 in seeking to fulfill its mandate to ban "unfair

253. Kovacic, *Broadest Sense*, *supra* note 107.

254. *Xerox Corp.*, 86 F.T.C. 364 (1975).

255. Timothy Bresnahan, *Post-Entry Competition in the Plain Paper Coper Market*, 75 AM. ECON. REV. (PAPERS AND PROC.) 2 (1985).

256. FED. TRADE COMM'N, IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES (Ronald N. Lafferty, John B. Kirkwood, & Robert H. Lande eds., 1984).

257. *See supra* note 129 and accompanying text (describing FTC's *Exxon* shared monopolization case).

258. THOMAS K. MCCRAW, *PROPHETS OF REGULATION* (1984). The seminar was one of a number of steps that Bert took to try to inject a greater degree of learning from the agency's history into current policymaking. On Bert Foer's contributions, *see* William E. Kovacic, *Antitrust in Context: Creating Historical Awareness for Competition Agencies*, 60 ANTITRUST BULL. 83 (2015) (detailing how Boer engaged business historians to provide context for the formation of modern antitrust policy).

259. Kovacic, *Broadest Sense*, *supra* note 107, at 1316–17, 1319–20.

methods of competition”²⁶⁰ and to apply its exceptional information gathering powers to study business behavior.²⁶¹ It would have been most helpful for the agency’s leadership to have attended such a seminar at the beginning of the decade as the Commission was deciding which programs to launch to carry out congressional demands for a sweeping transformation of the agency.²⁶² In the course of the seminar and extensive discussions on the margins of the formal sessions, it became apparent that the senior leadership of the agency, and most of the members of the Commission, knew little about the origins, aims, and evolution of the institution. One had the impression that nearly seven decades of knowhow had evaporated, and the agency was relearning hard lessons all over again.

LESSONS FROM THE COMMISSION’S EXPERIENCE IN THE 1970S

I have several lasting impressions of these experiences. Many concern the collection and presentation of data, and the quality of earlier scholarship on the history of the FTC’s competition programs. The research projects of the Bureau of Competition Planning Office and Office of Special Projects revealed a surprising lack of systematic data sets on the FTC’s past cases. The agency did not have a data set, retrievable manually or by the agency’s nascent electronic records system, that presented the full agenda of existing cases or a roster of matters going back even a single decade. Under the supervision of the Office of Special Projects, a Bureau of Competition data set was compiled from scratch.

The absence of comprehensive, reliable data sets hindered good decision making by the Commission and its operating units. Throughout the 1970s, the agency added one significant competition or consumer protection matter after another without a clear idea of the magnitude of existing commitments and their resource implications and a coherent plan for how each newly proposed initiative would be carried out.²⁶³ These knowledge gaps created an imbalance between the demands imposed by the execution of the complex, difficult litigation matters under consideration and the

260. 15 U.S.C. § 45.

261. 15 U.S.C. § 46.

262. The seminar turned out to be a one-off, though the Commission produced an edited transcript of the 1979 proceedings. See NATIONAL COMPETITION POLICY: HISTORIANS’ PERSPECTIVES ON ANTITRUST AND BUSINESS RELATIONSHIPS IN THE UNITED STATES (Fed. Trade Comm’n ed., 1981). Each new generation of FTC leadership should study that transcript. Newly appointed leaders at the FTC and other economic regulators also would benefit significantly from a short course that addressed the enduring themes of the 1979 seminars.

263. Kovacic, *Broadest Sense*, *supra* note 107, at 1317–25.

capacity of the agency to carry them out skillfully. Without the ability to study the full portfolio of agency matters in a systematic way, the agency lacked necessary context in assessing the doctrinal, litigation, and political risks associated with the entire portfolio. The FTC added far-reaching new matters to its litigation agenda without concern for the critical mass of business and political opposition the agency's programs were catalyzing, or the demands that the agenda was placing upon the relatively small number of agency personnel with considerable experience and proficiency in litigating complex antitrust cases or promulgating trade regulation rules. Though not the only cause of the political grief and judicial rebukes that the agency received, the lack of an informative, comprehensive data set diminished the agency's ability to make good judgments about which projects to undertake, and how many projects it could land successfully.

These experiences inspired lasting improvements in data collection and analysis, yet there is room today for further enhancements. By reason of their effort and longevity, the U.S. agencies have an unparalleled base of experience that constitutes antitrust big data. The agencies have not realized the full potential benefits, in selecting and performing new projects, that deeper analysis of that data could yield. At a more general level, the agencies have done less than they might to examine past experience to identify the characteristics of successful programs and to understand the causes of program failures. In these and other ways, past experience is an underexploited resource for policy makers.²⁶⁴ The discussion in Section IV suggests ways to achieve the benefits that better historically oriented data collection and analysis can offer.

IV. HISTORICAL DATA-BASED ANALYSIS FOR ANTITRUST AGENCIES: FOCAL POINTS

Antitrust agencies can help strengthen the positive foundations for policy development and debate by disclosing a larger amount of useful information about what they have done and why they have acted as they have. I make this claim here while recognizing the hazards of suggesting that certain techniques have broad, or even global, applicability. The intuition here is that, regardless of where agencies are situated, they stand a better chance of making future progress toward fulfilling the objectives that inspired their creation if they have an accurate idea of where they are today

264. See Balleisen & Brake, *supra* note 30 (advocating for improvements to regulatory decision-making through increased historical analysis).

and how they got there.²⁶⁵ The discussion below outlines what a fuller data collection and disclosure program might entail.

A. Determining What Happened

From scholarly papers, popular commentary, congressional hearings, judicial decisions, and conversations with specialists in the field, one can distill myriad criteria with which to answer the question posed at the outset of this Article: on what basis should the performance of competition agencies be evaluated? Data useful to answering this question would include: the number of matters initiated by the agency; the significance of the companies targeted for lawsuits; the economic impact of agency interventions; litigation success rates; the impact of agency initiatives upon legal doctrine; the introduction of useful innovations in policy implementation; the pursuit of measures to improve procedural fairness; the extent of the agency's influence upon global standards; the capability of agency leaders and senior managers and their standing in the eyes of their competition agency peers, elected officials, and the general public; legislative approval for higher budgets and more authority, favorable public perceptions of effectiveness; good news coverage; and high rankings in external surveys. For a competition agency, performing well on all or most of these criteria likewise creates an aura of high quality and reputation for competent public administration.

The measurement of agency performance also should examine whether the agency is making investments in capacity-building and institutional development that determine its ability to select projects wisely and carry effectively. Success in policy making requires that leadership achieves a balance between “consumption” in the form of cases and rules initiated and “investment” in expenditures to accumulate knowledge and build administrative and physical infrastructure that enhance the agency's ability to implement programs successfully.²⁶⁶ In any single budget cycle, the agency should report on what investments it has made to support the

265. One must be cautious about making strong claims about what is broadly applicable or appropriate. Professors Edward Iacobucci and Michael Trebilcock make the important point that the choice and application of evaluative criteria must take account of the goals of a jurisdiction's competition regime and the economic, legal, political, and social environment in which the regime is implemented. Edward M. Iacobucci & Michael J. Trebilcock, *Evaluating the Performance of Competition Agencies: The Limits of Assessment Methodologies and Their Policy Implications*, in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 327 (Damien Gerard & Ioannis Lianos eds., 2019).

266. Hyman & Kovacic, *Consume or Invest*, *supra* note 21.

development of future programs – much in the way that a company reveals to investors the scope of research and development efforts as a sign of its capacity to compete in the future.

B. Using Positive Data to Make Normative Assessments

An important aim of collecting positive data is to put the agency (and external observers) in a good position to evaluate the effects of agency interventions. An ex post evaluation regime for a competition authority can enable the agency to improve its diagnosis and treatment of commercial behavior,²⁶⁷ as in analyzing the likely competitive consequences of a merger.²⁶⁸ Ex post normative evaluations generally seek to address three major issues:

□ *Substance of policy making*: Did the agency do the right things: did it apply its resources wisely? Did its programs achieve good substantive results? By which criteria should the quality of its resource allocation and the substantive results of its efforts be assessed?

□ *Process of Policy Making*: Did the agency do things the right way: did it use sound processes, in its internal deliberations and in its engagement with external groups? By which criteria should its processes be assessed?

□ *Useful Policy Making Reforms*: What adjustments are suggested by past experience?

This type of ex post analysis is facilitated if the agency, at the time of the decision to intervene, asks the following seven questions and documents its answers:²⁶⁹

□ What gains did the agency expect to achieve—such as doctrinal advances, favorable effects on economic performance—if it succeeded?²⁷⁰

267. William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Agencies*, 31 J. CORP. L. 503 (2005).

268. See Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy*, 22 ANTITRUST 39 (2008) (explaining that value of ex post assessment is to improve accuracy of prospective analysis of proposed mergers).

269. These are derived from Hyman & Kovacic, *Consume or Invest*, *supra* note 21, at 320-21; Kovacic, *Prioritization Principles*, *supra* note 65, at 21-24.

270. For example, in a merger review, one important indication of the anticipated benefit from intervention is the estimate of competitive harm from the proposed transaction. Nicolas Kreisle, *Merger Policy at the Margin: Western Refining's Acquisition of Giant Industries 2* (Fed. Trade Comm'n, Working Paper No. 319, 2013, available at <https://www.ftc.gov/sites/default/files/documents/reports/merger-policy-westn-refinings-acquisition-giant-industries/wp319.pdf>) [<https://perma.cc/KKU2-X9VW>] (to be meaningful, ex post evaluations of mergers “can only take place when the antitrust authority has precisely stated its forecast of any post-merger anticompetitive effect”).

What risks (e.g., litigation risk, political backlash) does the matter entail, and how might the agency mitigate them? What might be the adverse effects for the agency (e.g., establishment of unfavorable doctrine, reputational harm) if its initiative fails (e.g., the agency is defeated in court)?

Who will perform the project for the agency, and what is the quality of that team?

How much will the project cost to complete?

How long is the project likely to take?

By what signs will the agency know that the project is working well or poorly?

How does the project fit within the agency's existing portfolio of projects (and how does the proposed project affect the distribution of risk within the portfolio)?

Focusing on these questions has value that goes beyond the assessment of completed matters. These queries also assist the agency in making good management decisions about pending matters—especially in determining whether there is a good fit between its commitments and its capabilities—both for the specific project at hand and for its entire portfolio. This helps prevent major mismatches between the agency's promises and its ability to keep them. Identifying gaps between commitments and capabilities helps guide an agency in making adequate investments in building capability and serves as a partial deterrent on the part of incumbent managers to make commitments (whose initiation elicits approval for the incumbent) that are unlikely to be carried out successfully due to resource or other limitations (an event that causes harm to the institution over the long term). By this approach, managers have greater incentives to see that project take-offs are followed by safe landings.²⁷¹

The approach described above also can place an agency in a better position to identify potential political risks of proceeding with specific matters and to mitigate such risks. In the 1970s and early 1980s, many FTC matters that enjoyed strong political support when initiated subsequently faced powerful political opposition. A significant number of major cases and trade regulation rules took years to develop, and the delays exposed the Commission to political attacks as the membership of the Congress grew more hostile to regulatory intervention in the economy.²⁷² Awareness of how changes in congressional membership can create resistance to ambitious

271. Hyman & Kovacic, *Consume or Invest*, *supra* note 21, at 304–13.

272. Kovacic, Congressional Oversight, *supra* note 121, at 652–53 (describing changes in Senate membership from 1976 to 1980 that created less hospitable environment for ambitious FTC competition and consumer matters begun earlier in the 1970s).

enforcement or rulemaking initiatives can focus the agency's attention on how much the successful pursuit of such measures depends upon sustained political support. An understanding of how political moods change, and change swiftly, also suggests the importance of discipline in designing programs to bring them to a conclusion as quickly as possible while a supportive political coalition holds power.

C. Improving Agency Historical Awareness

What does a system of regulation gain by trying to answer these questions and apply historical knowledge to contemporary decision making? Perhaps it establishes systematic approaches to do what Professors Neustadt and May term "thinking in time streams"?²⁷³ This section suggests how historical awareness can improve regulatory agency performance. The discussion also presents the limitations of historical research, including methodological obstacles and behavioral phenomena that require care in assessing the reliability of individual historical studies.

BENEFITS AND LIMITATIONS OF LEARNING

As noted above, learning is a vital source of proficiency for any institution, including regulatory bodies. I came to see the value of institutional learning vividly in three years with a law firm working for clients in the aerospace and defense industry. From 1983 to 1986, I worked extensively on projects for the McDonnell Douglas Corporation, and I spent many hours with engineers who designed and built aircraft and space launch vehicles. Many of my counterparts had been with the company since the early 1950s; they had worked on several aircraft programs that had long production runs. One of my closest professional acquaintances had worked on each of the programs that had made McDonnell Douglas a major supplier to the U.S. Department of Defense and to armed forces around the world: The F-101, the F-4, the F-15, and the F-18.²⁷⁴

My McDonnell Douglas colleagues emphasized two points. First, the careful assessment of experience, good and bad, informed decisions about the next project. By studying what worked and what did not, the company achieved steady (and often spectacular) improvements in performance from one generation of aircraft to the next. The second point concerned the development of better institutional judgment. One colleague told me that, in

273. NEUSTADT & MAY, THINKING IN TIME, *supra* note 31, at 247–70.

274. The history of these programs is recounted in BILL YENNE, MCDONNELL DOUGLAS—A TALE OF TWO GIANTS (1985).

contemplating a new aircraft design, the company had well-proven solutions to ninety percent of the problems it would confront. The crucial issue was whether the design and production team could solve the ten percent of problems for which no immediate solution was apparent. For example, could the company achieve full scale production of an experimental light-weight material that, if eventually available in large quantities and at acceptable cost, would dramatically reduce weight and enable the company to extend the range and payload of a new aerospace system? Past experience provided an invaluable guide to answer the question, both in terms of suggesting technical methods to reduce and resolve uncertainties, and in sharpening a more intangible institutional intuition about whether problems could be overcome.

In my time at the FTC, I saw this phenomenon at work in the agency's competition and consumer protection programs. One notable illustration concerned the agency's introduction, in 2003, of the Telemarketing Sales Rule, known as the Do-Not-Call (DNC) rule.²⁷⁵ The introduction of the DNC regime required the FTC to surmount three significant obstacles: to overcome objections that the DNC rule, which enabled consumers to enlist the FTC's assistance in blocking unwanted telemarketing calls, impermissibly restricted commercial speech; to devise a system that could accurately register large numbers of telephone numbers (the DNC registry today includes roughly 229 million numbers); and to withstand severe political opposition generated by lobbying from telemarketing service providers and their principal trade associations. The successful resolution of these issues stemmed significantly from the careful application of twenty years of experience with consumer protection rulemaking, with litigation involving the compatibility of FTC antitrust and consumer protection orders with First Amendment free speech guarantees; and with repeated encounters with Congress over specific applications of the Commission's mandate.²⁷⁶ Learning did two things: it showed the agency how to solve problems the FTC could readily anticipate in promulgating the DNC rule, and it gave the Commission confidence that it could cope successfully with uncertainties that would arise as the DNC was implemented.

Reflection on its rulemaking experience also indicated to the

275. 16 C.F.R. § 310 (2003); *see also* *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (rejecting challenges to implementation of FTC Telemarketing Sales Rule).

276. Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 *ANTITRUST L.J.* 911, 927-38 (2005); William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 *ANTITRUST L.J.* 943, 964-67 (2005).

Commission what steps it would have to take to issue an effective DNC rule. Perhaps the most important measure was the assignment of an extraordinarily capable manager, Lois Greisman, to lead the project. Greisman had extensive experience working in the Bureau of Consumer Protection and as the chief of staff to two FTC chairmen, Robert Pitofsky and Timothy Muris. Under Greisman's leadership, the agency assembled a team of its best professionals and technicians from across the agency – the Bureau of Consumer Protection, the Executive Director's office, the Office of the General Counsel, the Office of Congressional Relations, and the Office of Public Affairs – to formulate, implement, and defend the rule. A sophisticated understanding of the strengths and weaknesses of earlier FTC rulemaking projects informed all aspects of the DNC endeavor.

In setting out the benefits of learning, it is necessary to identify problems that impede effective learning. Even a regulatory institution dedicated to make the fullest possible use of historical awareness confronts serious difficulties in determining what happened in the past, knowing why it happened, understanding its effects, and forming a judgment about whether past practice made things better or worse. These tasks involve often tricky questions associated with the collection and interpretation of information.

The modern literature on behavioral economics and psychology has highlighted forces that can distort historical analysis and render it meaningless, or harmful.²⁷⁷ Here are just a few complications. The willing student of the past may be overwhelmed with information, even for a single regulatory agency. To take one example, there is an immense body of information about the Federal Trade Commission—agency decisions, orders, guidelines, speeches, rules, oral histories, collections of papers of key agency officials and influential outsiders, and an Everest of commentary on the institution.²⁷⁸ Even before facing hard questions of interpretation, the researcher can despair at the difficulty of creating a data set that consistently and accurately tracks the agency's activity over time. And these efforts, focusing solely on the FTC, do not take the additional useful step of comparing the Commission to other regulatory institutions at home or abroad.

One common response to information overload is to resort to badly

277. James Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J. L. ECON. & POL'Y 779 (2012); James Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Agency Behavior*, 41 J. REG. ECON. 41 (2012).

278. See William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1034–35 (2012) (noting volume of attention devoted by commentators to the FTC).

imperfect rules of thumb (heuristics).²⁷⁹ The historical inquiry can flounder because the chosen methodological rules of thumb distort data collection terribly and yield unreliable interpretations. Confirmation bias can induce the researcher or the user of historical analysis to ignore or deemphasize information and interpretations that contradict a preferred hypothesis.²⁸⁰ Proponents of historical research as a guide to regulatory decision making must acknowledge the frequency with which papers that invoke history to support policy prescriptions are seeking to create what Professor Ernst has called a “historically usable past,”²⁸¹ a form of brief-writing that showcases favored authorities and sidesteps contrary or inconsistent decisions.

Even when researchers and the users of historical analysis try their best to control for confirmation bias, other behavioral phenomena can get in the way. Availability bias can cause the regulator to attach undue significance to a very salient adverse event, such as the loss of a major case in court.²⁸² Rather than engaging in a dispassionate assessment of what went wrong and devising solutions to do better the next time, the agency may recoil from a specific line of endeavor entirely and pass up valuable opportunities to intervene more wisely and effectively in the policy arena in which things turned out badly the last time.

HISTORICAL RESEARCH AND POLICY INTEGRATION

There is no single history of regulatory events, no single accounting of what the agency did, no single interpretation of the agency’s behavior, and no single assessment of the worth of the agency’s work. An agency exhorted to take fuller account of history might properly ask, “Which history?”

In no particular order, here are some of the difficulties associated with examining the past to guide future policy development. First, although a good data set can raise provocative questions about why an agency has reallocated enforcement resources over time, the relevant data about what happened may be badly incomplete or not readily accessible. For example, data on the federal government’s enforcement of the Robinson-Patman Act

279. See James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REG. ECON. 41, 44–46 (2012) (describing concept of heuristics and applying it to regulatory agency behavior).

280. *Id.* at 47 (describing concept of confirmation bias).

281. Ernest, *supra* note 75, at 883.

282. *Id.* at 45 (describing concept of availability bias). In reflecting on my time at the FTC in the late 1970s and early 1980s, I am aware that the experience of working on failed competition cases, and observing the cascade of opprobrium from courts, legislators, and commentators that swamped the agency in that period, imbued me with caution about taking major doctrinal risks in the development of new cases or rules.

since 1960 presents a picture of dramatic change in enforcement policy -- a decline from dozens of FTC cases per year in the 1960s to a total of two cases over the past twenty years, and none since 2000.²⁸³ Constructing a reliable data set on federal R-P enforcement requires a laborious examination of press releases and professional publications that compile digests of federal enforcement actions.²⁸⁴

Competition agencies vary dramatically in how they collect and present data on activity.²⁸⁵ Some agencies give more complete information for litigation matters (citations and links to the event that began a case, reports of decisions taken by the agency, and decisions issued by appellate bodies); others simply report aggregates of activity (e.g., in calendar year 2017, the agency commenced 11 matters involving vertical restraints).²⁸⁶ Aggregate statistics can be intriguing, but they are terribly incomplete if not backed up with tables that indicate what matters are included in the aggregate numbers. Researchers who wish to obtain an accurate idea of what lies behind the aggregate numbers often must attempt to assemble the supporting information on cases from the ground up – e.g., by reading agency press releases and external news accounts. A poverty of good data, and the general absence of widely accepted reporting norms, seriously impede good historical research regarding economic regulation.

What can we say about the state of antitrust data, and our understanding of what happened, if leading agencies in the field report activity in this sketchy manner? Competition agencies could take a useful first step toward better disclosure simply by revealing their data-reporting methodology more

283. See D. Daniel Sokol, *Analyzing Robinson Patman*, 83 GEO. WASH. L. REV. 2064 (2015) (presenting data on federal Robinson-Patman enforcement and providing interpretations for policy adjustments since early 1960s).

284. See Kovacic, *Modern Evolution*, *supra* note 25, at 407–10 (discussing methodological issues associated with preparing a profile of enforcement activity).

285. Kovacic et al., *Measure Up?*, *supra* note 37, at 40–43.

286. An example is the DOJ's Ten-Year Workload Statistics, which compile aggregate data on investigations and case filings. These are available at <https://www.justice.gov/atr/division-operations> [<https://perma.cc/3FPE-C9J9>]. The Workload Statistics for fiscal years 1970-1979 report that the Department filed 62 cases involving oligopolies and monopolies. <https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1970-1979> [<https://perma.cc/RW2E-KC86>]. These are presented without a table of cases that shows what matters are included in the tabulations. My own research, which involved reading each DOJ press release issued during this period and reviewing case digests published in commercial reporting services, indicates that the number of DOJ cases from fiscal years 1970-1979 that were based mainly on claims of Sherman Act Section 2 violations was fewer than twenty. Kovacic, *Modern Evolution*, *supra* note 25, at 449. A researcher who has not retraced the Department's steps in this manner could hardly be blamed for thinking the relevant number of cases is closer to sixty than to twenty.

completely. My minimum proposition here is that better data reporting by the antitrust agencies would provide a more certain basis for tracking activity and for discussions, inside the agency and by the external competition policy community, about what the agency has done.

A second consideration related to data is how the agencies use data at their disposal to refine their enforcement programs. In the area of cartel enforcement, one could imagine that the DOJ would do reconstructions of cartel episodes to identify how the cartel was formed and managed: Who took the decision to form the collusive scheme? Did top management instruct subordinates to form the cartel, or send less direct signals that lower level managers should do whatever it takes to meet profit expectations? What mechanisms (such as resale price maintenance) did the firm put in place to implement the cartel's plans? It appears that the chief imperative for a cartel prosecutor is to prove the fact of agreement and then move to the calculation of punishment levels. The reconstruction of the cartel's origins and operations does not appear to be a priority.²⁸⁷

Better data sets could give agencies a stronger sense of the size of the inventory of litigation matters an agency must maintain if it wishes to shape doctrine through the courts. Data analysis can help show how many of agency's matters settle or make their way through an initial decision and appeals. An aim of the FTC in the early 2000s was to use administrative and district court litigation to adjust doctrine.²⁸⁸ At the peak, the Commission had approximately nine competition matters on its part III administrative litigation docket.²⁸⁹ The intuition of agency leadership was that this inventory of matters was necessary to ensure that there would be a relatively steady stream of cases making their way to the court of appeals.

Looking at proposed matters in their historical context also can give an agency a better sense of the difficulty it will face in persuading courts to endorse its view of the evidence and the law. Today some commentators have proposed that litigation applying Section 5 of the FTC act be a principal vehicle for policing business conduct, especially single-firm behavior, more

287. Kovacic et al., *Serial Collusion*, *supra* note 20, at 340–42.

288. *More Than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 834–35 (2005) (comments by former FTC Chairman Muris regarding Commission's efforts to use administrative litigation in competition cases in early 2000s).

289. The relevant matters include three horizontal restraints cases (Polygram, Schering, and North Texas Specialty Physicians), three cases involving consummated mergers (Chicago Bridge & Iron, Evanston Hospital, and MSC Software), one case involving state action immunity (South Carolina State Board of Dentists), and two monopolization cases (Unocal and Rambus).

closely.²⁹⁰ Since its creation over a century ago, the FTC has yet to prevail in the Supreme Court in a case alleging monopolization, attempted monopolization, or collective dominance.²⁹¹ The data leads one to pose a difficult question: why has the agency not achieved better results, and why will its prospects improve in the future?

These are but a few areas for the development of what one might call antitrust analytics – the detailed study of an agency’s experience base as a way of guiding future enforcement. The increasing attention to ex post evaluation is an encouraging manifestation of the agencies’ interest in documenting initial expectations before the enforcement event and matching those expectations against observed marketplace behavior after enforcement takes place.²⁹²

Even if data were perfect, a good deal of the result of a historical inquiry would turn upon interpretation and assessment. These processes can be highly subjective and influenced by the narrator’s own policy preferences and experiences.²⁹³ Commentators who have worked inside an agency, for example, probably have a better understanding of what agencies do and why they do it, compared to a researcher with no experience inside a regulator. Current or former insiders also may have information about cases or other projects that is inaccessible to external observers. Agency insiders also may be inclined to recite events in a way that depicts the insiders’ term of office favorably. The interpretation offered, therefore, may not be entirely (or even partly) reliable.

Severe bias can arise from sources other than professional experience inside an agency. The narrator may have a strong policy preference arising from the representation of clients before the regulator, or from previous research in which the commentator has staked out a position and thus may feel the need to justify positions already taken. Here, too, the narrative may

290. Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”*: *The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 684–88 (2017).

291. This observation is based upon a review that Marc Winerman and I performed of all periodic compilations that the FTC has prepared since its creation of cases litigated in the federal courts.

292. One noteworthy and laudable example is the series of papers on merger control organized by FTC economist Malcolm Coate and written by Coate and various co-authors. The papers are collected at FTC, Economic Issues Papers *available at* <https://www.ftc.gov/policy/reports/policy-reports/economics-research/issue-papers> [<https://perma.cc/NC9U-Y2P8>].

293. See William E. Kovacic, *Review of Antitrust Stories* (E. Fox & D. Crane eds, Foundation Press 2007), 4 COMPETITION POLICY INTERNATIONAL 241, 257–63 (No. 1, Spring 2008) (discussing biases that can affect a first-person narrator’s version of events).

not reflect an entirely sound or reliable interpretation or assessment of events.

The skills of a professional historian – either an employee of an agency or an academic consultant – may be necessary to assist the agency in deciding what weight to give to historical commentary. The historian also may be in a position to identify strands of thought that are often repeated but demand a rethink. Because of their lack of professional training and their uneven grasp of the relevant literature, economists and lawyers who write historically oriented pieces may take at face value views that a professional historian would treat with more skepticism.²⁹⁴

One sees this phenomenon in the drafting of blue-ribbon commission studies, where lawyers are pressed into service to provide historical context for the regulatory scheme in question.²⁹⁵ Owing to the need to complete work in a relatively short time, the drafter of a blue ribbon study may take short cuts that a historian would abhor – for example, reading a handful of unrepresentative treatments of the subject, or emphasizing the views of a writer who has a bias that is unknown to the author but recognized by the historian.

The 1969 *Report of the American Bar Association to Study the Federal Trade Commission* is an example of this tendency.²⁹⁶ The report was prepared in barely five months, and the authors seem to have skimmed the historical literature on the FTC, giving decisive effect to one work that was strong in some areas but weak in others.²⁹⁷ The resulting study gave a highly influential, but badly flawed, account of the agency's earlier work and missed important explanations, beyond timidity, incompetence, and sloth, for the agency's seemingly weak performance from 1915 to the late 1960s.²⁹⁸

D. Historical Analysis: Gains from Fuller Application

This section describes how regulators, sometimes working alone and sometimes in affiliation with external partners such as university research centers, can improve the base of historically relevant knowledge for policy

294. For example, professional historians are more deeply versed in methodological techniques that enable a researcher to identify and canvass relevant materials and to give appropriate weight to each piece of historical evidence. Research that involves a collaboration between professional historians and laypersons can overcome this difficulty.

295. Hyman & Kovacic, *FTC's Critics*, *supra* note 134, at 1967–69.

296. Hyman & Kovacic, *FTC's Critics*, *supra* note 134, at 1967.

297. *Id.* at 1867–69.

298. *Id.*

making.²⁹⁹ One starting point is for regulators to make greater use of data analytics based on information within the agency's own walls. The insights derived from the agency's own research can be augmented by studying the experience of similar institutions globally.

Another frontier for analysis is to study the causes of policy success and failure more carefully. Such an examination likely would point more clearly to institutional design and capability as determinants of project outcomes. This direction for research would provide a valuable counterpoint to critical accounts that portray the DOJ and the FTC as lacking courage, rationality, or imagination in exercising their powers.³⁰⁰ These narratives overlook the extent to which underinvestment in institutional capacity can doom agency projects.³⁰¹ The dismal accounts of the U.S. experience also emphasize philosophy as a crucial influence on system performance; everything hinges on the political preferences of agency appointees.³⁰² In all of these accounts, the role of institutional arrangements gets inadequate attention, and the extent to which good agency programs have built upon long periods of incremental investment and testing is slighted.³⁰³

An analytical approach more attuned to the formative influence of institutional considerations would show, I believe, that the FTC's antitrust program of the 1970s was not irrationally interventionist, but that the agency failed grievously to match its commitments to its capabilities.³⁰⁴ The contributions of some leaders who have served at the DOJ and the FTC in the past forty years would receive greater recognition when their significance is seen in the context of the agency's larger history. Anne Bingaman's stock would rise by reason of her establishment of the modern DOJ leniency program in 1993 and her creation of the productivity-enhancing honors paralegal program.³⁰⁵ William Baxter would receive additional credit for

299. Universities are one group of institutions whom Professor Allan Fels, the former chairman of the Australian Competition and Consumer Commission, has termed co-producers. By cooperating with co-producers, competition agencies can increase their effectiveness.

300. See *supra* Section II (discussing critiques that attack the FTC for inadequate and excessive enforcement, respectively).

301. Kovacic, *Broadest Sense*, *supra* note 107, at 1333 (describing how institutional weaknesses, including failures to ensure a good fit between program commitments and administrative and professional infrastructure undermined FTC programs).

302. William E. Kovacic, *The United States and Its Influence on Global Competition Policy*, 22 *GEO. MASON L. REV.* 1157, 1171–83 (2015) (criticizing personality-driven interpretations of competition agency performance)

303. *Id.* at 1183–90.

304. Kovacic, *Broadest Sense*, *supra* note 107, at 1309–10, 1317–25.

305. Assistant Attorney General Bingaman described her honors paralegal program in her first appearance as AAG before the Annual Spring Meeting of the American Bar

bringing the AT&T monopolization case to a successful end; Baxter brought a few Section 2 cases of his own. Nonetheless, he conceived the remedial solution in the AT&T matter – a result so important for the future of the information services and equipment sector – that eluded his immediate predecessors.³⁰⁶

*E. Case Reconstructions*³⁰⁷

The inadequate enforcement narrative of modern US antitrust policy often is anchored upon decisions taken by the FTC regarding Google over the past fifteen years.³⁰⁸ In 2007, Google purchased DoubleClick, and in 2009 the company bought AdMob.³⁰⁹ The FTC reviewed both transactions and challenged neither.³¹⁰

Perhaps the event most often identified as a missed opportunity for intervention is the Commission's decision in January 2013 to close a monopolization investigation of Google, focused on the company's search practices ("Google Search").³¹¹ The FTC's inquiry had attracted

Association's Section of Antitrust Law. *60 Minutes with Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 63 ANTITRUSTE L.J. 323, 325 (1994). At the same meeting, she described the introduction of the Department's enhanced leniency program. *Id.* at 329–30.

306. Kovacic, *Modern Evolution*, *supra* note 25, at 455–56.

307. The discussion here is adapted in part from William Kovacic, *Roads Not Taken: The Federal Trade Commission and Google*, Concurrentialiste (Mar. 9, 2020), available at [leconcurrentialiste.com/William-kovacic-ftc-google](https://perma.cc/J8LP-DVNL) [https://perma.cc/J8LP-DVNL].

308. See, e.g., SALLY HUBBARD, MONOPOLY SUCKS 89-91 (2020) (criticizing FTC failure to challenge Google's acquisitions of DoubleClick and Admob and for decision in 2013 not to bring a monopolization case against Google).

309. Louise Story & Miguel Helft, *Google Buys DoubleClick for \$3.1 Billion*, N.Y. TIMES (Apr. 14, 2007), <https://www.nytimes.com/2007/04/14/technology/14DoubleClick.html> [https://perma.cc/CE6C-KUWG]; Rob Hof, *Google Buys Admob to Boost Mobile Ads*, BLOOMBERG (Nov. 9, 2009), <https://www.bloomberg.com/news/articles/2009-11-08/google-buys-admob-in-bid-to-boost-mobile-ads> [https://perma.cc/X6UD-6HSW].

310. Federal Trade Commission, *Press Release, Federal Trade Commission Closes Googler/DoubleClick Investigation* (Dec. 20, 2007), available at <https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation> [https://perma.cc/4A6N-BWDY]; Federal Trade Commission, *Press Release, FTC Closes its Investigation of Google Admob Deal* (May 21, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/05/ftc-closes-its-investigation-google-admob-deal> [https://perma.cc/N3M5-TD6Z].

311. Federal Trade Commission, *Press Release, Google Agrees to Change its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, games, and Tablets, and in Online Search* (Jan. 3, 2013), available at <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> [https://perma.cc/E55H-EPRN].

considerable public attention, in part because the agency had assembled a team of prominent experts to help develop and support the prosecution of a possible case.³¹² On January 3, 2013, the FTC closed its search inquiry and announced that Google had submitted a letter in which it promised to amend some aspects of its conduct.³¹³ By accepting Google's letter and not insisting that Google's commitments be embodied in a consent order, the Commission in effect used a much-criticized method of using an assurance of voluntary compliance to resolve concerns about business behavior.³¹⁴ Scolding his colleagues for not incorporating Google's promises in an enforceable order, Commissioner J. Thomas Rosch said the agency had promised an elephant and instead "brought forth a couple of mice."³¹⁵

The FTC decisions not to prosecute in DoubleClick, AdMob, and Google Search attracted, and continue to elicit, severe criticism.³¹⁶ Commentators today argue that the DoubleClick and AdMob episodes exemplify feeble merger control and demonstrate the disregard of federal antitrust authorities to the competitive dangers of vertical deals.³¹⁷ Many observers contend that the FTC's agency's retreat in the Google Search matter and its failure to oppose mergers by Google and other tech giants reveal the indifference of the US antitrust system to dominant firm misconduct.³¹⁸

312. One of the most notable figures to join the agency at this time was Professor Tim Wu, who portrayed his own arrival as a way to inject needed vigor into an underperforming antitrust program. In an interview soon after he was appointed to join the FTC as an advisor on competition policy issues, Professor Wu said the FTC had been "quieted during the [George W.] Bush years almost to the point of nonexistence." Marc Perry, *Tim Wu Tries to Save the Internet*, CHRONICLE OF HIGHER EDUCATION (Mar. 20, 2011), www.chronicle.com/article/Can-Tim-Wu-Save-the-Internet-/126756/ [<https://perma.cc/HJ4R-TQFV>].

313. See *supra* note 311 and accompanying text (FTC press release announcing that agency had closed its inquiry into Google's search practices; also announcing that Google had provided FTC with letter indicating that the company would change aspects of its behavior).

314. See Am. Bar Ass'n, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 134, at 1, 22–23, (describing and criticizing FTC's reliance on assurances of voluntary compliance to remedy business misconduct).

315. J. Thomas Rosch, Commissioner, Federal Trade Commission, Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Google's Search Practices, In re Matter of Google, Inc., FTC File No. 111-0163 (Jan. 3, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-and-dissenting-statement-commissioner-j.thomas-rosch-regarding-googles-search-practices/130103googlesearchstmt.pdf [<https://perma.cc/4HTJ-PRC8>].

316. See HUBBARD, MONOPOLY SUCKS, *supra* note 308, at 89 (criticizing FTC failure in 2013 to not prosecute Google for monopolization).

317. *Id.*

318. See, e.g., STOLLER, GOLIATH, *supra* note 8, at 437–38, 445–49 (chastising FTC for

Some modern assessments of US antitrust policy might be more favorable if the FTC had opposed the DoubleClick and AdMob transactions and sued Google for monopolizing search. The FTC would have taken a seemingly tough approach to vertical mergers, and, by bringing the search case, would have been the first competition agency (ahead of the European Commission) to mount a major monopolization challenge to the new generation of tech giants.³¹⁹ In the global competition law arena, the US program probably would have assumed preeminence in the conversation about how antitrust law can address allegations of improper exclusion by giants in the digital economy.

That is not what happened. Instead, the FTC's inaction in the DoubleClick and Admob mergers and its decision not to prosecute in the Google search matter today fuel critiques that ridicule the US federal antitrust enforcement system. The closure of the Google Search inquiry has inspired speculation about why the FTC, after a public relations buildup that signaled intervention, stood down.³²⁰ Discussion has focused on three possible explanations: (1) Based on a sound assessment of the facts and prevailing US doctrine governing dominant firm conduct, the Commission concluded it had no sustainable theory of liability, (2) The Commission had a supportable case but lost its nerve – the antitrust equivalent of what we call choking in sports, or (3) The Commission caved in to political pressure that Google brought to bear through the Congress and the White House.³²¹ My interpretation is that the first of these possible explanations accurately depicts the motivation for the FTC's decision on Google Search: the agency stood down because it believed the case lacked sufficient merit and was destined to fail in court.

I am not a neutral bystander in discussing the events described above. As an FTC commissioner in 2007, I voted not to intervene in the DoubleClick and AdMob mergers.³²² When I left the Commission in early

failure to sue Google for acquisitions that created or reinforced market power); TEACHOUT, BREAK 'EM UP *supra* note 8, at 52–56, 62–64 (same); HUBBARD, MONOPOLY SUCKS, *supra* note 308, at 89–91 (same).

319. The European Commission brought its first exclusionary practices case against Google in June 2017. European Commission, Case AT.39740, Google Search (Shopping) (June 27, 2017), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [<https://perma.cc/JKD6-V2TP>].

320. HUBBARD, MONOPOLY SUCKS, *supra* note 308, at 89; DAYEN, MONOPOLIZED, *supra* note 11, at 284–85.

321. *Id.*

322. For the FTC's closing statement in the Google/DoubleClick transaction, see *Statement of the Federal Trade Commission Concerning Google/DoubleClick* (Dec. 20, 2007), available at https://www.ftc.gov/system/files/documents/public_statements/418081/0

October 2011, the Google Search investigation was underway. A probing evaluation of the FTC's performance in these (and other) matters is entirely appropriate. The discussion below suggests how to advance the debate about the FTC's decisions in DoubleClick, AdMob, and Google Search and, more generally, to understand and evaluate the decisions of the US antitrust agencies.

More Complete Disclosure. When the European Commission closes a matter without taking action, it typically issues a detailed written explanation about why it did not intervene.³²³ US law does not oblige the DOJ or the FTC to issue closing statements. The historical custom of the US agencies generally has been not to explain decisions not to prosecute.³²⁴ On some occasions since the late 1990s the agencies have issued detailed closing statements that provided valuable insights into agency decision making.³²⁵ On most occasions, the agencies have released no explanations for closing investigations or have published largely uninformative comments. When they say nothing, or very little, the US agencies miss opportunities to improve public understanding of, and confidence in, how they formulate antitrust policy.³²⁶

71220googledc-commstmt.pdf [<https://perma.cc/FH2F-5ZWT>] (“The Federal Trade Commission has voted 4-1 to close its investigation of Google’s 1 proposed acquisition of DoubleClick after a thorough examination of the evidence bearing on the transaction.”).

323. William E. Kovacic, Petros C. Mavroidis, and Damien Neven, *Merger Control Procedures and Institutions: A Comparison of EU and US Practice*, 54 ANTITRUST BULL. 59, 89-90 (2014).

324. Warren Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFFALO L. REV. 937, 944 (2003); William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL’Y INT’L 129, 145 (Spring 2009).

325. See, e.g., FTC, *Statement Concerning Royal Caribbean Cruises, Ltd/P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc*, FTC File No. 021 0041 (Oct. 4, 2002) (statement by Commission majority of reasons for closing investigation of cruise lines merger), available at <https://www.ftc.gov/enforcement/cases-proceedings/021-0041/royal-caribbean-cruises-ltdpo-princess-cruises-plc-carnival> [<https://perma.cc/XV8B-9ETS>].

326. From my own experiences in working inside and with government antitrust agencies, I am aware of the reasons why public officials are sometimes reluctant to issue informative closing statements. Preparing a good closing statement consumes staff resources that otherwise could be used in developing other cases. Despite disclaimers in a closing statement, parties in future matters will seek to argue to courts that analytical approaches and conclusions revealed in closing statements constitute binding precedents from which an agency should not be allowed to deviate in the future. And an agency’s candid revelation of the bases for its decision to close a file exposes it to second-guessing from outsiders. I do not believe these reasons justify an agency’s decision to forego meaningful disclosure of its reasoning – at least when it has devoted significant effort to a matter – but it is important to understand the institutional forces that discourage more

A more detailed FTC closing statement in Google Search might have helped persuade external observers that the agency acted in a principled, and not politically expedient, manner. Such a closing statement would have enriched national and global discussions about how to apply monopolization law to dominant platform owners. Instead, the Commission's Google Search closing statement was sketchy and at times almost incoherent. This may reflect the difficulty of distilling different and often conflicting views of a board majority into a single document. As FTC chair from March 2008 to March 2009, I hardly can claim to have met the performance standard that I present here.

In 2015, doubts about the FTC's decision in Google search intensified. In responding to a Freedom of Information Act (FOIA) request, the FTC inadvertently released every other page of an internal memorandum prepared by case handlers on the Google inquiry team.³²⁷ To some observers, the document shows that the Commission foolishly ignored the staff's view that a good monopolization case was there for the taking.³²⁸ The Commission has declined to release the complete staff memorandum or other internal records regarding the agency's decision not to intervene.³²⁹

The harsh questioning of the agency's behavior has diminished the perceived legitimacy of the Commission's decision making. This condition dictates a rethink of the agency's disclosure policy. The FTC should place the full version of the staff memo in the public domain, along with the recommendations to the Commission made by the Bureau of Competition, the Bureau of Economics, and the General Counsel on Google Search.³³⁰ Based on my reading of the materials released to date, my knowledge of the relevant officials (an especially capable group with no predisposition to

complete disclosure.

327. Brody Mullins, Rolfe Winkler & Brent Kendall, *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015), <https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274> [<https://perma.cc/B92G-9GX4>].

328. Kara Swisher, *The Justice Department's Lawsuit Against Google: Too Little, Too Late*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/opinion/google-justice-lawsuit.html> [<https://perma.cc/WAB5-W5M8>].

329. Federal Trade Commission, *Statement of Chairwoman Edith Ramirez and Commissioners Julie Brill and Maureen K. Ohlhausen regarding the Google Investigation* (Mar. 25, 2015), available at <https://www.ftc.gov/public-statements/2015/03/statement-chairwoman-edith-ramirez-commissioners-julie-brill-maureen-k> [<https://perma.cc/Y8XV-44SU>].

330. I acknowledge the administrative law complications of this suggested course of action. If I were reviewing this proposal while acting as the FTC's General Counsel, a position I held from 2001 to 2004, I might not be so fond of the idea. I recommend it in this instance because I regard the benefits of disclosure for public policy, and for the well-being of the FTC, to be greater the potential harms.

avoid enforcement), and my understanding of the agency's norms, I believe the disclosure of these records will not show that the Commission abandoned a compelling case for intervention. Most important, fuller disclosure of materials concerning the Commission's decision would help allay the apprehension of many observers that the political pressure paralyzed the FTC.³³¹

Case Reconstructions. Fuller disclosure of the FTC's Google Search records would be one part of a broader retrospective review of Commission decision-making. One element of this review would be a discussion with FTC officials who participated in the Google Search inquiry and may have insights into the thought processes that led the agency to close the matter in 2013.³³² This assessment might first be done within the agency and then repeated in a public forum. Key subjects for study are the factors the agency considered, the weight assigned to each factor, and, more generally, the benefits and risks that the agency associated with each course of action.

The DoubleClick and AdMob transactions also would be worthy candidates for retrospective case studies. It would be helpful to consult officials from other competition agencies (such as the Competition Directorate of the European Commission) which also reviewed and cleared the transactions. Here, as well, a retrospective study could collect the views academic researchers, advisors to the parties, company executives, complainants who appeared before the FTC, and advocacy group representatives.

These and other case reconstructions can improve future decision-

331. If it chooses to release these materials, the Commission could redact passages that contain proprietary business data or reveal the identities of individuals or firms that provided information to the agency upon a promise of confidentiality.

332. It might be especially helpful to hear from experts, such as Professor Tim Wu, who came to the Commission at the time of the Google search inquiry in the expectation of being part of a significant expansion of antitrust enforcement. Upon his appointment in 2011 to serve as a senior advisor to the Commission, Professor Wu observed that the George W. Bush administration had "quieted" the agency "almost to the point of nonexistence." Perry, *supra* note 312. Wu later defended the agency's resolution of the Google Search investigation. Tim Wu, *Why Does Everyone Think Google Beat the FTC?*, NEW REPUBLIC (Jan. 5, 2013), at <https://newrepublic.com/article/111650/why-does-everyone-think-google-beat-ftc> [<https://perma.cc/LN3B-W6WR>]. More recently, in applauding the Justice Department's filing of a monopolization complaint against Google, Professor Wu observed that the DOJ case "marks return of the U.S. Government to a role that many of us long feared it had abandoned: disciplining the country's largest and most powerful firms." Tim Wu, *Google, you cannot buy your way out of this*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/opinion/google-lawsuit-antitrust.html> [<https://perma.cc/Y2YA-SCUK>]. Professor Wu would be an excellent observer to recount the state of mind that led the agency to back away from a Google case in 2013.

making by illuminating how the agency went about analyzing difficult issues in complex, dynamic commercial sectors. In particular, case reconstructions can identify how agencies account for litigation risk in assessing potential cases. This exercise can be a valuable ingredient in evaluating agency performance. The study of an agency's risk preference looks beyond case counts and won-lost records and instead focuses attention on the standards that should inform judgments about weighing the potential gains and losses from proposed enforcement matters. This perspective also can help an agency determine whether it has the means to pursue proposed cases successfully.

The Google/DoubleClick episode would offer interesting perspectives on how the FTC's evaluation of litigation risks and rewards affected its decision. An ex post study could reconstruct the larger context surrounding the agency's decisions not to intervene and thus would facilitate a more richly informed discussion about whether the agency's assumptions and decision-making calculus were sound. In the nine months before the FTC decided in late December 2007 not to challenge the Google/DoubleClick deal, the FTC had lost three consecutive preliminary injunction actions in federal district court to block mergers: *Western Refining/Giant Industries* (April 2007),³³³ *Equitable Resources/Peoples Natural Gas* (May 2007),³³⁴ and *Whole Foods/Wild Oats* (August 2007).³³⁵ In two of these matters, the FTC achieved some of its remedial aims on appeal, but those more favorable outcomes for the Commission were not entirely foreseeable when the FTC took its decision on Google/DoubleClick.³³⁶ I feared that the Commission would suffer serious institutional damage (notably, the further erosion of its credibility and deterrence as a prosecutor) from a fourth straight defeat in a merger preliminary injunction action. I believed the Commission's prospects of success were weak because the agency would have premised its

333. *FTC v. Foster*, 2007 WL 1793441 (D.N.M. Apr. 29, 2007).

334. *FTC v. Equitable Resources, Inc.*, 512 F. Supp. 2d 361 (W.D. Pa. 2007).

335. *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

336. In the *Equitable Resources/Peoples Natural* Case litigation, the U.S. Court of Appeals for the Third Circuit in late May 2007 granted the FTC's motion for an injunction against the merger pending appeal. *FTC v. Equitable Resources, Inc.*, No. 07-3499, Order at 1 (3d Cir., May 21, 2007). After briefing and oral argument and pending a decision by the court of appeals, the parties abandoned the transaction. In February 2008, the Third Circuit granted the FTC's motion for a suggestion of mootness and its request to vacate the decision of the district court. *FTC v. Equitable Resources, Inc.*, No. 07-2499, Order at 1 (3d Cir. Feb. 5, 2008). In the *Whole Foods/Wild Oats* transaction, the parties consummated their merger after the district court's denial of the preliminary injunction. In July 2008, the U.S. Court of Appeals for the District of Columbia overturned the district court's decision. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

case upon a difficult (though not impossible) vertical theory of harm.³³⁷

Did the Commission make the right call in Google/DoubleClick? Should the Commission have foregone a preliminary injunction action in federal district court and instead brought the merger challenge directly through its administrative process and applied expertise it had gained in analyzing vertical issues in dynamic tech industries? An administrative case would not have enabled the agency to obtain a preliminary injunction, thus forcing the agency, if it found an infringement, to design an effective remedy after the fact. Nonetheless, administrative litigation path would have allowed the FTC to write an influential opinion, either for or against the transaction, similar in quality and doctrinal significance to the Commission's decision in *Hospital Corp. of America* twenty years earlier.³³⁸ Perhaps I and other colleagues attached too much weight to the trilogy of district court preliminary injunction action losses mentioned above and acted in an excessively risk-averse manner.³³⁹ Maybe the agency should have put aside the other defeats and challenged the Google/DoubleClick deal, either in district court or directly in the FTC's administrative process, on the ground that the resulting decision would advance the state of the art of analysis in an important area of antitrust policy.

The questions posed here are worth considering as part of a case reconstruction exercise. It makes sense for any competition agency to assess its analytical methodologies and risk preference. The results of individual case studies, joined up with data sets that show the full portfolio of agency decisions to intervene and to stand aside, can reveal more completely the assumptions and decision-making dynamics that determine what an agency has done and what it chosen not to do. Without such assessments, important patterns of behavior, analytical assumptions, and decision-making

337. For a discussion of how the FTC might have proceeded (emphasizing the application of the agency's distinctive mandate to bar unfair methods of competition under Section 5 of the FTC Act), see *Dissenting Statement of Commissioner Pamela Jones Harbour In the matter of Google/DoubleClick*, F.T.C. File No. 071-0170 (Dec. 20, 2007) (positing that the majority's prediction about the direction of the online advertising market is incorrect), available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf [<https://perma.cc/2T3T-CB85>]. See also Pamela Jones Harbour & Tara I. Koslov, *Section 2 in a Web 2.0 World: An Expanded Version of Relevant Product Market*, 76 ANTITRUST L.J. 769, 783-85 (2010) (elaborating on possible theory of harm for FTC challenge to Google/DoubleClick merger).

338. See *supra* notes 214-217 and accompanying text (discussing FTC's opinion in the *Hospital Corp.* merger case).

339. See Kovacic, *Respected Brand*, *supra* note 63, at 248 (discussing the effect of "queuing" -- how the order in which matters come before an antitrust agency may influence the decision it takes with respect to any single matter).

tendencies may not be apparent, limiting the agency's ability to understand and address the forces that guide its actions.

Finally, case reconstructions can be an important source of legitimacy for the FTC and other regulatory institutions. In the FTC's investigations of Google and in its treatment of other matters (such as the Commission's decision in 2012 not to challenge Facebook's acquisition of Instagram),³⁴⁰ I expect that case studies will show that good faith efforts to analyze difficult problems, and neither the capitulation of the agency's leadership to political interference, nor institutional cowardice or sloth, has guided the FTC. Case reconstructions can be especially valuable transparency mechanisms at a time when elected officials and other observers criticize the Commission for a lack of courage and competence, and express doubts about the motivations that influence antitrust agencies in exercising formidable law enforcement powers.

F. Institutional Methods

To generate better historically relevant data and interpretation does not, by itself, ensure integration into policy making. In some ways, historical awareness already enriches federal antitrust agency decision making. The relevant knowledge tends to reside in three places: (a) individuals who have been with the agency for a significant period of time, (b) policy offices; (c) the office of the general counsel; and (d) external observers (e.g., academic researchers) whose work the agency from time to time draws upon, who join the agency for occasional short-term secondments, or who are retained to give advice on specific matters.

The DOJ Antitrust Division and the FTC do not have official agency historians, although some agency researchers from time to time have performed that role. For example, from the early 2000s until his retirement earlier in this decade, Marc Winerman functioned as the equivalent of an official historian and made major scholarly contributions to the literature on the agency's origins and early history.³⁴¹ The enhancement of the role of

340. FTC, *Press Release, FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program* (Aug. 22, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/facebook-inc-instagram-inc> [<https://perma.cc/A6XX-HHUC>].

341. A notable example is Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003). At the Antitrust Division, an economist, Gregory Werden, did important historically oriented research and continues to publish major commentaries on U.S. antitrust history. Gregory J. Werden, *The Foundations of Antitrust* (2020).

historical analysis in agency decision making could be accomplished by making such a role more formal – by recruiting a researcher to serve as “agency historian” and place the function in a body with responsibility for larger policy development. An agency’s policy units or its general counsel’s office are possibilities due to their deep familiarity with larger agency policy issues and their participation in specific law enforcement matters.

V. CONCLUSION

Eighty years ago, the United States undertook a wide-ranging examination of its competition policy system under the auspices of the Temporary National Economic Committee (TNEC).³⁴² President Franklin D. Roosevelt convened the TNEC to address what were seen to be serious, persistent problems of industrial concentration and the apparent failure of the antitrust system to impose effective corrective measures.³⁴³ Two notable participants in the TNEC deliberations were Walton Hamilton and Irene Till, whose contributions included a monograph titled *Antitrust in Action*.³⁴⁴ The two scholars introduced their study by offering a gloomy assessment of a half-century of federal antitrust experience and by posing questions about the system’s future:

The Sherman Act has been called “a charter of freedom” for American industry. Why has it not been a success? Is the crux of the trouble the congressional failure to implement the law with adequate funds? Or is its weakness due to an insecure foundation? Is a statute enacted in the far-away nineties adequate to the problem of restraint five decades later? Is the machinery for its administration subject to the wear and tear of time, and has it become obsolescent? Can the basic issues industrial government be transmuted into causes of action? Can the process of litigation be made to put an erring trade back on the right track? Have courts the distinctive competence to bring order and justice into the affairs of industry? Can a series of suits be depended upon to hold the national economy true to the competitive ideal? Are the sanctions of the statute of a character to induce compliance? In a

342. Temporary National Economic Committee, Final Report and Recommendations, U.S. Senate, 77th Cong., 1st Sess. (1941).

343. ELLIS HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY – A STUDY IN ECONOMIC AMBIVALENCE 410-419 (1966).

344. WALTON HAMILTON & IRENE TILL, ANTITRUST IN ACTION, MONOGRAPH NO. 16 (Temporary National Economic Committee 1941).

word, can antitrust be made the answer?³⁴⁵

Professor Hamilton and Dr. Till then observed that the nation faced basic questions about the design of its competition policy system, noting that “the Sherman Act is in for close scrutiny” and “[i]ts role in the future is most uncertain.”³⁴⁶ Several paths were possible: “Whether increased ‘power’ is to be put behind the Sherman Act, its provisions are to be modernized, its resort to litigation is to be streamlined, awaits decision. It is even possible that antitrust will give way to some more up-and-coming mode of regulation.”³⁴⁷ The two scholars then suggested how these issues might be sorted out:

The tangle of affairs to which the old, the amended, or the new measure will be applied come straight out of the past. Only from the knowledge of how it has worked can the law be remade and set on its way. The line gives position to the point; the sweep through time endows with meaning a problem of here and now.³⁴⁸

The circumstances that Hamilton and Till described in 1941 strongly resemble our own today. The United States now confronts basic questions about the capacity of its antitrust system to address industrial concentration. A large body of commentary and discourse among elected officials has expressed acute dissatisfaction with the existing antitrust regime and has proposed a number of measures to enhance it or supplement it with new regulatory frameworks.³⁴⁹ Making a wise choice among policy alternatives requires the positive foundation that the two scholars suggested eighty years ago: knowledge of how the system has worked in the past as a guide to how to proceed in the future. A strong positive foundation is the indispensable starting point for choices that now confront the Congress and the federal antitrust agencies.

345. *Id.* at 4.

346. *Id.*

347. *Id.*

348. *Id.*

349. *See supra* note 7 and accompanying text (describing deliberations of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law).