How History Informs Practice – Understanding the Development of Modern U.S. Competition Policy

Prepared Remarks of

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*The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

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Introduction

Many of us practice antitrust law for reasons beyond economic need. We may have

[1]*Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[2]*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

implications of modern U.S. experience for making competition policy in the years ahead.

My presentation has three specific aims. The first is to describe how federal enforcement activity has evolved since 1961. In documenting adjustments in the mix of enforcement outputs, I will emphasize what Tom Leary has called the "essential stability" of U.S. competition policy since 1981. My second goal is to assess why enforcement patterns evolved as they have – to go beyond a simple recital of enforcement activity to identify strengths and weaknesses in agency decision making. My third objective is to suggest how modern experience can inform future practice in making competition policy. A careful assessment of the past provides a richer understanding of how government agencies should act.

This paper is organized in three parts. The first reviews patterns in modern federal enforcement activity. The second derives lessons about policymaking from antitrust

[6]Timothy J. Muris,

departing from 1980s practice.

These assumptions explain the responses to my continuity prediction. If you believe that U.S. competition policy is prone to dramatic swings in activity, and that Reagan-era policy was an aberrational, inexcusably permissive departure from sensible enforcement, it follows that the appointment by a Republican president of an FTC chairman who helped shape Reagan-era policies might foreshadow the end of the Commission's antitrust activity. If you believe that enforcement policy takes shape in watertight compartments defined by each administration without significant links to or contributions from its predecessors, then the Clinton FTC retained little of the policies of the Reagan administration. In this framework, it is reasonable to assume that no one who conceived or endorsed the Reagan antitrust program could embrace so much of the Clinton antitrust agenda.

Each of these assumptions is faulty. Because the Goldilocks story depends on all of them, it is bankrupt for interpreting the development of modern competition policy. The balance of this section shows that modern experience does not feature dramatic, mechanistic swings in antitrust enforcement across periods from 1961 through 2000. Instead, there has been a paradigm shift in antitrust. The key phase of the transformation, led mainly by the academy and the courts, took place with the absorption of Chicago School perspectives into the mainstream of antitrust policy in the 1970s and 1980s.[11] Although the government agencies were the last to get

[11] *See* Terry Calvani & Michael L. Sibarium, *Antitrust Today: Maturity or Decline*, 35 ANTITRUST BULL. 123, 174 (1990) (concluding that modern antitrust law's "most significant changes have been in the case law, influenced by work done in the academy in the fields of law and industrial organization economics, much of which predates the Reagan era"); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 52-53 (2000) (discussing influence of Chicago School perspectives on antitrust jurisprudence in 1970s).

the message, even the agencies took some steps before the 1980s to begin developing many of the sensible policies of today. There was a dramatic departure in 1981 from much of previous government policy, but enforcement across eras displays significant degrees of cumulative development. Closer to the present, enforcement in the 1990s reveals considerable similarity to norms endorsed in the 1980s. Indeed, this similarity caused Ralph Nader to observe during the 2000 presidential campaign that "[b]oth parties are terrible on antitrust."[12] The elements of continuity and the institutional forces that account for the continuity explain why the U.S. competition policy system has escaped the mistakes of its past as well as built on prior successes.

B. Federal Enforcement Activity Reconsidered: 1961-2000

A common approach to evaluating federal competition policymaking is to examine the filing of new cases. This section examines enforcement trends over the past four decades. As a preliminary matter, one must recognize that the commencement of enforcement matters provides a rough, but highly imperfect, impression of agency activity. Even if one assumes that case filings are a suitable proxy for the quality of enforcement, many difficult methodological issues confront the identification and classification of cases. For example, many complaints or settlements represent the culmination in one administration of activity (such as the initiation or pursuit of an investigation) that began in previous administrations. Moreover, raw case counts

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[12]Ralph Nader, *CNN Burden of Proof*, Aug. 9, 2000, Transcript No. 00080900V12, at 6. Nader continued:

> Look, we have Boeing now, one aircraft company, manufacturer after the McDonnell Douglas merger. They've allowed mergers under Clinton of the giant HMOs, the giant hospital chains, the giant telecommunication companies. Their one bright light is . . . Microsoft.

Id.

also say little about the doctrinal or economic significance of specific matters, or their actual market impact.

[13]*See* Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>.

[14]Noteworthy examples include Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), *available at* <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; Federal Trade Commission, Office of Policy Planning, *Report of the State Action Task Force* (Sept. 2003), *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>; Federal Trade Commission Staff Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace* (May 1996), *available at* <http://www.ftc.gov/opp/global/report/gc_v1.pdf>.

[15]*See* Federal Trade Commission, *A Positive Agenda for Consumers: The FTC Year in Review* 21-22 (Apr. 2003) [hereinafter *2003 Year in Review*] (describing FTC advocacy filings involving the unauthorized practice of law and proposals to restrict the sale of replacement contact lenses).

Table 1 below provides an aggregate overview of FTC nonmerger enforcement activity by presidential administration from 1961 through 2000:

Table 1: Average Number of FTC Antitrust Nonmerger Cases Per Calendar Year – 1961 through 2000[16]

[16]Table 1 is derived from data collected from the CCH Trade Regulation Reporter. The averages are rounded to the nearest tenth of a case.

[17]Table 2 is derived from data collected from the CCH Trade Regulation Reporter. The averages are rounded to the nearest tenth of a case.

[21]Pivotal developments in this progression included cases initiated in the 1970s by the DOJ and the FTC, respectively, against the National Society of Professional Engineers and the American Medical association.

each issued an average of one vertical restraints case per year.

The rate of vertical restraints activity during the Clinton administration exceeded enforcement levels during the Reagan administration and the Bush I program at the DOJ. Nonetheless, the average number of total DOJ and FTC cases per year (two) from 1993 through 2000 paled in comparison to levels of enforcement that prevailed before 1981. Total federal vertical restraints cases averaged roughly 6.4 per year in the Kennedy/Johnson era, nearly 14 per year in the Nixon/Ford administrations, and 7 per year during the Carter presidency. As will be discussed below,[24] the failure of the government agencies before 1981 to absorb the new

[24]*See infra* Section II.A.2.

[25]*See infra* Section II.A.1.

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the future. Sanford M. Litvack,

Section 2 enforcement. The relatively limited place of these matters in the entire federal enforcement mix in the 1980s ought not obscure the value of DOJ's devising and implementing the AT&T divestiture, one of the government's few successes among the roster of ambitious Section 2 cases that began in the late 1960s and continued throughout the 1970s. Moreover, *American Airlines*[36] had a significant impact on subsequent attempted monopolization and horizontal restraints policy, and the concept explored in *AMERCO,*[37] that certain abuses of government processes should be treated as unlawful exclusion, has great utility.

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[36]*United States v. American Airlines, Inc*., 743 F.2d 1114 (5th Cir. 1984).

[37]*AMERCO*, 109 F.T.C. 135 (1987).

[38]*See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693 (2000).

[39]The government prevailed on some issues and lost on others in *United States v. Microsoft Corp*., 253 U.S. F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). The court rejected the government's claims in *United States v. AMR Corp*., 335 F.3d 1109 (10th Cir. 2003); *United States v. Dentsply Int'l*, 2003 U.S. Dist. LEXIS 14139 (D. Del. Aug. 8, 2003).

sparingly.[40]

2. Modern Federal Merger Enforcement

Merger enforcement features a pattern of contraction followed by stability. The merger enforcement profile has two basic phases. The first is a period of expansive federal enforcement activity – highly aggressive in the early to mid-1960s, with a noteworthy but modest effort, via the 1968 DOJ guidelines, by Don Turner to prevent further extensions. The 1970s, owing to General Dynamics (1974) and various lower court decisions, did not feature further efforts to broaden the reach of merger prohibitions. Nonetheless, the agencies neglected to retreat materially from flawed analytical approaches. This is evident in the FTC's faltering record in federal court merger challenges in the late 1970s/early 1980s. The indifference or hostility to efficiency considerations contributed to the Commission's increasing difficulty in federal court litigation involving mergers. Between 1977 and 1983, in federal court merger cases the FTC won only 8 of 22 cases.[41]

The second phase is a significant retrenchment in the 1980s that sets a norm sustained, in large part, through the 1990s. As Tom Leary's excellent article details, Bill Baxter's 1982 guidelines have become the established norm for evaluating mergers, widely accepted not only in the United States, but around the world. To be sure, the cumulative experience under the Guidelines has stimulated an evolution in enforcement patterns and modest changes in the

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[40]The Commission's recent dominant firm matters are recounted in Federal Trade Commission, *2003 Year in Review*, at 3-5.

[41]*See* Carol T. Crawford et al., *Federal Trade Commission Law Enforcement in the 1980s: A Progress Report on the First Three Years of the Reagan Administration Leadership October 1981 to October 1984* 41 (Oct. 1984). The cases for which final judicial decisions were issued had commenced before 1981.

Guidelines. Such an evolution should be expected, of course, and reflects neither ideological nor personnel shifts.

Table 4: Merger Challenges as a Percentage of Hart-Scott-Rodino Filings

By Tenure of Agency Head

Steiger	1990-1995 (FTC)	1.51%
Klein	1997-2000 (DOJ)	1.03%
Miller	1982-1985 (FTC)	.96%
Bingaman	1994-1996 (DOJ)	.92%
Baxter, et.al.	1982-1985 (DOJ)	.84%
Rill	1990-1993 (DOJ)	.75%
Pitofsky	1996-2000 (FTC)	.75%
Calvani / Oliver	1986-1989 (FTC)	.70%
Ginsburg / Rule	1986-1989 (DOJ)	.39%

I do not claim that ideology and personality have *no* effect. Table 4 recasts by agency head Tom Leary's statistics about the number of mergers challenged as a percentage of Hart-Scott-Rodino filings. Although this is an admittedly crude statistic, three features of merger enforcement patterns stand out. First, a close look at the data bears out Tom Leary's conclusion about the essential stability of post-1981 U.S. merger policy. Within this general pattern there is only one noteworthy peak (during Janet Steiger's FTC chairmanship) and one major valley (the tenures of Doug Ginsburg and Rick Rule as Assistant Attorney General for Antitrust), as well as some anomalies in the volume of enforcement events attributable to adjustments in regulatory

policy that significantly altered the type of transactions that the antitrust agencies reviewed.[42]

The Goldilocks story incorrectly treats all federal merger enforcement during the Reagan administration as homogeneous. This is perhaps a consequence of the unfortunate tendency of DOJ and FTC leadership during Ronald Reagan's second term to emphasize the types of cases they would not bring and to mute their positive enforcement intentions.[43] The pendulum narrative also fails to note that under an FTC chairman appointed during Bush I federal activity far exceeded that under President Clinton's appointees.

A second, related point is that merger policy from 1981 through the 1990s evolved to gradually give business managers greater freedom to complete mergers. The merger guidelines have evolved since 1982, with amendments adopted in 1984, 1992, and 1997. At least part of that evolution directly contradicts those who would argue that antitrust enforcement toughened in the 1990s. I served as Director of the Bureau of Competition during the first few years under the 1982 guidelines. In that period, the numerical thresholds were given more credence. For example, in 1984, the Reagan FTC successfully challenged a merger involving music distribution that would have reduced the number of significant competitors from 6 to 5.[44] When

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[42]The communications sector provides several examples. DOJ reviewed a significant number of radio mergers in the 1990s and demanded remedies in some of these transactions. The increase in radio mergers stemmed from a loosening of regulatory controls governing the number of stations a single firm could own in a particular service area. During the same decade, changes in statutes and implementing regulations likewise increased the ability of telecommunications service providers to merge their operations.

[43]*See Report of the ABA Antitrust Law Section Task Force on the Antitrust Division of the Department of Justice*, *reprinted in* 58 ANTITRUST L.J. 735, 745 (1990) (urging DOJ to "articulate and garner public support for a positive enforcement agenda" and recommending that the Division end "non-enforcement rhetoric").

[44]*FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984).

a 6 to 5 merger involving the same sector took place in the Clinton administration, the transaction cleared the FTC without a second request.[45] Moreover, the Reagan administration's analysis of gasoline distribution, carried out less than two years after the issuance of the1982 guidelines, applied a tighter numerical threshold than that of the 1990s. In mergers such as Chevron/Gulf, there were many wholesale overlaps, with a range of post-merger Herfindahls from highly concentrated to unconcentrated. Rather than perform a separate, detailed investigation in each geographic market,[46] the Commission applied a rule of thumb for requiring divestitures. Presumptively, divestitures were sought when the Herfindahls exceeded 1000 – the beginning of the guidelines' mid-range of concentration – and the delta exceeded 100. Since that time, the agencies have not obtained relief in markets with such a low HHI.

Fealty to the guideline numerical levels was abandoned as the agencies gained experience. Particularly in 1992, the guidelines were amended to codify the existing practice of

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[45]Charles Piller, *Seagram Gets U.S. Ok to Buy Polygram*, L.A. TIMES, July 11, 1998, at D2.

[46]The merging parties were anxious to close the transaction and did not desire such investigations.

[47]The 1982 guidelines denominated markets with a post-merger HHI of 1800 or more as "highly concentrated." The significance of the HHI thresholds employed in the 1982 guidelines thresholds is examined in ABA Antitrust Section, Monograph No. 12, *Horizontal Mergers: Law and Policy* 196-97 (1986).

[48]Compare the language of the 1982 and 1984 Merger Guidelines to the language of the 1992 Horizontal Merger Guidelines. In 1982, the guidelines stated that, for mergers that would result in a post merger HHI above 1800, the Department of Justice was "likely to challenge mergers ... that produce an increase in the HHI of 100 points or more." United States Dep't of Justice, *Merger Guidelines* (June 14, 1982), *reprinted in* 4 Trade Reg. Rep (CCH) ¶ 13,102 at § 3.A.1. In 1984, the Department of Justice made it clear that, even at the 1800/100 level, other factors, such as ease of entry, the financial condition of firms, and changing market conditions, would be considered in determining whether an enforcement action was warranted. However, only in "extraordinary cases w[ould] such factors establish that the merger is not likely to substantially less competition." United States Dep't of Justice, *Merger Guidelines* (June 14, 1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103 at § 3.11.

The 1992 Horizontal Merger Guidelines went much further to limit the importance of concentration statistics, indicating only that there was "a presumption" that mergers at the 1800/100 level "are likely to create or enhance market power or facilitate its exercise". "[T]he presumption [could] be overcome" by a showing that other factors, such as entry, make it unlikely that the merger will have an anticompetitive effect." United States Dep't of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at § 1.51.

[49]Commentaries that identify lax merger enforcement as a stimulus for the merger wave of the 1980s include Milton Handler, *Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in Its National Policy?*, 10 CARDOZO L. REV. 1933, 1940 (1989) ("Hardly a day passes without news accounts of massive mergers or takeovers of dubious legality which go unchallenged and which produce a chain reaction in stimulating waves of new acquisitions."); Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321, 326 (1987) ("A more

[50]*FTC v. Indiana Fed'n of Dentists*

unrelated to periods before and after. In baseball terms, individual administrations do not always pitch "complete games" in prosecuting cases or pursuing other initiatives. Matters begun in one administration often spill over into another. The contributions of two or more administrations frequently determine the outcome of the entire initiative. If baseball kept track of pitching statistics in a manner comparable to the pendulum narrative, it would count the total number of starts without counting saves.

II. Understanding the Development of Modern Federal Enforcement Policy

A fundamental reason to review past experience is to improve our understanding about how to formulate sensible competition policies. This section identifies a number of lessons from our experience over the past four decades.

A. The Need for Continuous Reassessment

There is a temptation to attribute policy choices that we know ex post to be misguided to the irrationality of individual decision makers or institutions. To say that organizations or agency officials are irrational can be appealing, but it hardly explains the problem of bad policy

1. Dominant Firm Misconduct

From the late 1960s until Ronald Reagan's election in 1980, the DOJ and the FTC

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[52] *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, 1136-41 (1989) (discussing intellectual foundations for antitrust deconcentration initiatives pursued in the late 1960s and in the 1970s).

[53]One highly influential scholarly work in this period was Carl Kaysen's and Donald Turner's *Antitrust Policy: An Economic and Legal Analysis*, which appeared in 1959. Kaysen and Turner wrote that "The principal defect of present antitrust law is its inability to cope with market power created by jointly acting oligopolists." *Id.* at 110. They urged Congress to adopt new legislation compelling the deconcentration of various sectors of the economy. *Id.* at 110-19, 261-66. In 1969, a blue ribbon presidential task force headed by Dean Phil Neal of the University of Chicago recommended deconcentration variants of the Kaysen and Turner proposals. *See White House Task Force Report on Antitrust Policy*, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11, 14-15, 65-76 (1968-69). Task force members who endorsed the deconcentration measure included such prominent academics as Dean Neal, William Baxter, William K. Jones, Paul MacAvoy, James McKie, Lee Preston, and James Rahl.

[54] It also drew heavily from studies indicating that a deconcentration program was unlikely to sacrifice significant scale economies or other efficiencies. Kovacic, *Failed Expectations,* at 1136, *citing* Leonard Weiss, *The Concentration - Profits Relationship and Antitrust, in*

crumbling. The more accurate and sobering characterization of the FTC's mistake in pursuing this initiative, which consumed vast agency resources, was that the Commission launched and expanded it in the face of growing evidence that the program's analytical basis was losing intellectual support.

The shared monopoly and other theories used in the 1970s to attack concentration became discredited. The FTC's motivation to reassess the validity of these enforcement approaches did not come from independent, internal reassessment. Instead, the imperative to change came from developments taking place within the federal courts in the mid- to late-1970s. The decision of the court of appeals in *Berkey Photo*[57] punctuated the judiciary's attitude about antitrust policy toward dominant firms. In the course of exonerating Eastman Kodak of liability for monopolization, the Second Circuit stated:

> A large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity – more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth.[58]

The caution expressed in *Berkey* and other judicial decisions was reinforced by economic research indicating that deconcentration might actually raise prices and lower quality because many firms gained larger market share through lower costs or higher quality, rather than through practices that harmed consumers. A harbinger of the distintegration of the intellectual basis for

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[57]*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

[58]*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

deconcentration of the economy was the 1974 Airlie House conference on "the new learning" about industrial concentration. Structured as a debate about deconcentration policy, this conference supplied a forum for opponents to synthesize and highlight the literature that challenged the underlying economic assumptions of deconcentration policies.[59] Among the most important themes of the "new learning" was that, contrary to the conventional view of bigness, superior performance not only could, but typically did, account for large firms achieving and maintaining large market shares over time.[60] The Airlie House conference and subsequent academic attacks on the structural model and its policy proposals severely weakened the intellectual support for deconcentration.[61]

Despite the growing evidence of the flaws in the deconcentration program, the agencies not only continued their misguided efforts, they expanded them. Two initiatives are especially noteworthy. The first was the FTC's automobile investigation. Formally begun in the Summer of 1976, the effort was built upon the agency staff's endorsement of the horizontal and vertical dismemberment of the industry leader (General Motors) and its belief that the second and third members of the American "Big Three" (Chrysler and Ford) could be worthy candidates for divestiture as well.

The auto industry investigation collapsed of its own weight and marketplace realities in

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[59]*See* Kovacic, *Failed Expectations*, at 1138.

[60]*See, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX 163-97 (1978).

[61]*See, e.g.*, Paul Pautler, *A Review of the Economic Basis for a Broad-Based Horizontal Merger Policy*, 28 ANTITRUST BULL. 571 (1983) (reviewing relevant literature).

[64]1 *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* viii-ix (1979) (hereinafter *NCRALP Report*).

[65]*See NCRALP Report*, at 152 & n. 34 (reporting that FTC submitted statement endorsing no-fault monopolization concept and recommending passage of legislation to permit no-fault causes of action); Robert Pitofsky, Commissioner, Federal Trade Commission, *In Defense of 'No Fault Monopoly' Proposals*

percent.[69] Calling the structure of the shoe industry "significant," the Commission expressed alarm that "[o]f the approximately 1,000 shoe manufacturers in 1959, the top 70 manufacturers accounted for approximately 54 percent of the shoe production."[70] The five largest producers, the Commission added, produced 24 percent of shoes made in 1959.[71] Responding to Brown Shoe's argument that its exclusive dealing contracts improved the performance of the firm's production and marketing operations, the Commission said that efficiency considerations were irrelevant to evaluate the legality of the arrangements.[72]

The Justice Department in the 1960s was no less enthusiastic about attacking such restrictions. It was the Antitrust Division's case, *United States v. Arnold, Schwinn & Co.*,[73] that

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[69]The distribution program at issue in *Brown Shoe* affected 766 of the 70,000 U.S. stores classified as retail shoe outlets. *Brown Shoe Co.*, 62 F.T.C. 697, 711-12 (1963). The economic conditions of the shoe industry at the time of the case are examined in detail in John Peterman, *The Federal Trade Commission v. Brown Shoe Company*, 18 J.L. & ECON. 361 (1975).

[70]*Brown Shoe*, 62 F.T.C. at 717-18.

[71]*Id.*

[72]The Commission observed:

> We need not concern ourselves here with the arguments of respondent and counsel supporting the complaint about the intrinsic economic merits of line concentration against the advantages of selecting only the best items from several lines in the same price and style ranges. . . .
>
> The economic justification, if any, of line concentration is irrelevant to the issues presented to us here. While line concentration itself may or may not be economically justifiable, there is no economic justification for making the adherence to this doctrine the subject of agreement between buyer and seller and enforcing the agreement to the latter's advantage.

Id. at 709.

[73]388 U.S. 365 (1967).

[74]*Id.* at 376-82.

[75]433 U.S. 36 (1977).

[76]Thomas Kauper, who headed the Antitrust Division from 1974 to 1976, has described DOJ's thinking at the time:

> [I]n the years I served as Assistant Attorney General, vertical territorial restrictions were per se illegal, according to the Supreme Court's decision in *United States v. Arnold, Schwinn & Co.* The rule made no economic sense. We brought no such cases, explaining that the conduct was overt, that those allegedly harmed knew that they were "victims" and had all the facts necessary for application of a per se rule at their disposal, that a private remedy was readily available and there was therefore no reason to expend the Division's resources on such cases.

Thomas E. Kauper,

suit against Cuisinarts for minimum RPM.[77]

In contrast to the DOJ's experience, the FTC's vertical restraints program remained vigorous throughout the 1970s.[78] The Commission prosecuted numerous vertical matters, with many involving products– such as stereo equipment, hearing aids, ski bindings, and firearms – that require the production of some information or demonstrations at the point of sale to aid consumers in making informed purchasing decisions. To avoid free-riding on the information or services provided by the resellers, manufacturers restricted distribution to allow their resellers to reap a return on their efforts. The principal effect of FTC orders in a significant number of these cases was probably to force manufacturers to use less efficient means for providing point of sale information or services.

As noted above, in 1977 the Supreme Court reversed *Schwinn* in *Sylvania*, bowing to "the great weight of scholarly opinion critical of [*Schwinn*]" and requiring plaintiffs to demonstrate the anticompetitive effect of vertical restraints, particularly their effect on interbrand competition.[79] The FTC, however, refused to abandon its attack on nonprice vertical restraints. In a 1978 decision involving soft drinks, the Commission stubbornly ignored the new learning endorsed in *Sylvania* the year before. The Commission had brought administrative complaints in 1971 against manufacturers of concentrate for carbonated soft drinks (including Coca-Cola, Pepsi-Cola, and their bottlers) to eliminate the use of exclusive vertical territories in the

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[77]The matter was resolved with a consent decree. *United States v. Cuisinarts, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. 1981).

[78]*See* Liebeler, *Antitrust Enforcement Activities*, at 74.

[79]*Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 57-58 (1977).

[80]Similar complaints were also issued against Crush International, Beverages International, Dr Pepper Co., Seven-Up Co., Royal Crown Cola Co., National Industries, Inc., and Cott Corporation. On March 13, 1972, similar complaints also were issued against Canada Dry and Norton Simon, Inc.

[81]*See*

The Commission's unwillingness to acknowledge a basic shift in commentary and doctrine also was evident in its case against Russell Stover Candies, Inc.[83] In July 1980, the Commission sought to extend the reach of the per se ban on resale price maintenance first established in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*[84] Specifically, the *Russell Stover ca*se was consciously designed to overturn the rule in *United States v. Colgate & Co.*[85]

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was special federal legislation to protect the exclusive territories of carbonated soft drink bottlers. *See* Soft Drink Intrabrand Competition Act, 15 U.S.C. § 3501 (1986).

[83]*Russell Stover Candies, Inc*., 100 F.T.C. 1 (1982) (finding liability), *enforcement denied*, 718 F.2d 256 (8th Cir. 1983).

[84]220 U.S. 373 (1911).

[85]250 U.S. 300 (1919).

[86]*Id.* at 307. The initial decision of the administrative law judge in *Russell Stover* documents that the Commission intended the case as a frontal assault on *Colgate*. *Russell Stover*, 100 F.T.C. at 7 (initial decision) (observing that "[c]omplaint counsel have come up with a test case which has as its purpose a direct challenge to the continued viability of *Colgate*").

[87]*Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 57-59 (1977).

[88]FTC Chairman James C. Miller III dissented from the Commission's finding of liability and repudiation of *Colgate*. *Russell Stover*, 100 F.T.C. at 50-53.

[89]*Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256 (8

3. Merger Efficiencies

As Tom Leary discussed in his remarks before this Forum last year,[92] before the dramatic shift in antitrust thinking affected policy, efficiencies were ignored or treated as an aggravating, rather than a mitigating, factor. Consolidation was felt to be inherently undesirable in the quest to preserve numerous small businesses. Exacerbating this state of affairs was the difficulty the enforcement agencies and the courts had in recognizing the existence of efficiencies other than economies of scale. Commissioner Leary pointed to academic work that connected Ronald Coase's 1937 article on *The Nature of the Firm*[93] to antitrust analysis as a harbinger of change for the importance of efficiencies as a positive factor in merger analysis.[94] Other economists, courts, and eventually antitrust enforcement officials eventually embraced this new learning on efficiencies.

The enforcement pendulum has not swung back against efficiencies.[95] Neither is this a static development. Instead, our understanding about the types and impacts of efficiencies continues to evolve. Historically, what is striking is the extent to which the "efficiency is bad" view or the more indifferent "efficiencies do not count" perspective prevailed at the FTC in merger analysis well into the 1970s. One survey of FTC decisions taken from 1970 to 1977 shows that the administrative law judge or the Commission made arguments that efficiencies

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[92]*See* Thomas B. Leary, Commissioner, Federal Trade Commission, *Efficiencies and Antitrust: A Story of Ongoing Evolution*, Remarks Before the ABA Section of Antitrust Law 2002 Fall Forum (Nov. 8, 2002).

[93]R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[94]Oliver E. Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

[95]*See* Leary, *Essential Stability*, at 118-19.

created by a merger should count against its legality or that the absence of such efficiency creation should weigh in favor of legality in 8 of the 18 cases litigated to disposition at the Commission level.[96] None of the 18 cases *even considered* the possibility that increased efficiency should count in favor of the merger's legality. As was the case with dominant firm and distribution restraints cases, the agency lagged the courts in aligning merger enforcement with the new economically-oriented literature that called for a realignment of policy.

B. Matching Commitments to Capabilities

Too often, the effectiveness of federal antitrust policy in any one period is measured by the number and visibility of cases that the government pursued. Special credit is given to matters that capture broad public attention. Contributions from "smaller" cases or from an agency's application of non-litigation policy instruments are largely disregarded. A subsidiary principal is that a failure to generate a significant number of high profile cases indicates ideological rigidity or a paucity of political fortitude.

Our experience with modern antitrust policy shows that these critiques ignore the need to evaluate an agency's competition policy commitments in light of its institutional capabilities. In this regard, there are at least two blind spots. First, the cramped view of what activity matters – principally litigation – discourages careful consideration of the full range of capabilities an agency might use to address a competition policy problem. A case-centric perspective, with its emphasis on attention-grabbing prosecutions, at least implicitly discourages an agency's efforts to consider how best to apply other tools within its control.

The second failing is to ignore the consequences of prosecutorial commitments that

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[96] *See* Liebeler, *Antitrust Enforcement Activities*, at 94.

significantly outrun an agency's capability. A given litigation program can create a serious problem either by taking on so many matters that the agency lacks the human capital to execute them well or by pursuing cases that enjoy respectable theoretical support but involve implementation issues likely to prove overwhelming in the prosecution of actual matters.

[97] *See* William E. Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 RES. L. & ECON. 173, 182-92 (1989) (discussing how limits on an antitrust agency's institutional capacity constrain its ability to prosecute cases successfully).

policy tools that should be part of a comprehensive strategy for addressing complex competition questions.

1. The FTC Antitrust Policy in the 1970s: Many Bridges Too Far

To consider the pitfalls of overextension, consider the FTC's antitrust agenda of 25 years ago involving dominant firms. Table 5 indicates the monopolization or attempted monopolization cases the FTC had initiated and was pursuing as of November 1978:

Table 5: FTC Dominant Firm Cases and Industry-Wide Inquiries Pending (Nov. 1978)

Matter	Complaint Issued
Kellogg	1972
Exxon	1973

[98]Although it is the only nonlitigation matter on the list, the automobile investigation involved a major resource commitment.

[99]Matters on this list in which the Commission sought divestitures or mandatory licensing of intellectual property include Exxon, Kellogg, ReaLemon, Sunkist, and DuPont.

that contemplated a third (automobiles)? If you thought it was important for the FTC to develop a case to explore predatory pricing doctrine (ITT), was it wise to add two more resource-intensive and analytically demanding cases of the same type (General Foods and ReaLemon)? And what about supplementing the list with two novel cases testing the boundary of exclusionary practices doctrine (OAG and DuPont), and a matter involving important and sensitive competition concerns in the agricultural cooperative field (Sunkist)?

We know how this chapter of FTC history ended. The outcome of these attacks on "dominance" raised pervasive doubts about the institutional capabilities of the Commission to handle them successfully. As a group, the deconcentration-minded cases were so ambitious and sweeping in their economic aims that the agencies' capabilities were dramatically overtaxed.[100] In the 1970s, the FTC would have been far better off had it accepted an enforcement norm to choose a smaller number of matters and handle them well. Is it any surprise that, given the discouraging results of the 1970s program and out of concern about the capability of the institution, the Reagan FTC reevaluated its commitment to dominant firm matters?

The Reagan Justice Department's approach to dominant firm cases was quite different. Bill Baxter asked which of the cases he inherited were worth continuing. Making *AT&T* the center of attention and committing the resources needed to design and implement an effective remedy were sensible. Asking fundamental questions about the causes of failure of so many mainstays of the dominant firm campaign of the 1970s was responsible. Diagnosing the reasons for failure and reassessing the capabilities of the federal agencies were appropriate steps before

[100]The DOJ's dominant firm program in the late 1960s and in the 1970s was as ambitious. From 1969 to 1974, the DOJ committed itself to restructuring the world's leading computer producer, the country's two leading tire producers, and the world's largest telephone system.

beginning new dominant firm initiatives.

Another perspective on the fit between commitments and capabilities is to review the number of FTC cases in the 1970s that involved what could be called novel or high risk areas of the law. These include the facilitating practices cases (*Boise Cascade* and *Ethyl*), shared monopoly (*Exxon*loggCgade

[101]For example, in *Fruehauf*, the Second Circuit held that the Commission's finding was based on "speculation rather than fact" and that its legal conclusion was a "*non sequitur*" that "flies in the face of undisputed contrary evidence." *Fruehauf Corp. v. FTC*, 603 F.2d 345, 355,

Our most influential law and economics scholars have realized a fundamental principle concerning the link between economic analysis and competition policy. The insights of economics have their greatest impact on antitrust law and policy when contained in workable rules and analytical techniques for evaluating business conduct. The suitability of an economic hypothesis for shaping antitrust doctrine must include whether the hypothesis lends itself to standards that courts and enforcement agencies can administer effectively. The importance of administrability is evident for those who have played a central role in shaping antitrust doctrine and policy in my professional lifetime. Many of the strongest contributions have come from scholars who realized the importance of translating economic concepts into practical rules and analytical techniques that courts and enforcement agencies could apply successfully.[102]

2. Pressures for Expanding the Enforcement Agenda

As argued above, the commencement of cases, rather than the actual ability of an agency to execute the matters skillfully, has counted too much in the assessment of agency performance. This enforcement norm is one of multiple forces that press toward more extensive enforcement. In recent years, an increasing number of parties also have pushed hard for expansions of antitrust. Included in the group are certain businesses. There was once a general impression that business generally favored limited rather than expanded enforcement. Nevertheless, many businesses have since found that use of the government, rather than the market, can assure them

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359 (2d Cir. 1979).

[102] *See* William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5, 19-20 (2000) (discussing importance of administrability to success of DOJ 1982 Merger Guidelines); William E. Kovacic, *The Influence of Economics on Antitrust Law,* 30 ECON. INQUIRY 294, 298-99 (1992) (describing influence of economically sophisticated commentators who distilled economic concepts into operational legal rules).

success against their competitors, actual or potential. It was perhaps inevitable that this activity – called "rent seeking" by economists – would spread to antitrust. And so it has. During the last decade, prominent antitrust lawyers – including some who earlier had made major contributions in support of the new economic learning – increasingly have undertaken the representation of firms seeking to block or restructure transactions of their competitors. Although competitors can occasionally provide useful information to the government, particularly in Section 2 cases, this development poses a considerable danger for antitrust's future. Given that extensive incentives for expanded enforcement already exist, it threatens to nudge antitrust back to an emphasis on the welfare of individual competitors rather than the welfare of consumers.

The current state of modern industrial organization economics contributes to the ability of the rent seekers to campaign for ever greater use of antitrust. One can find theoretical support for virtually any case in some aspect of modern I.O.[103] Because this literature largely lacks the empirical support necessary for sound antitrust policy and because it rarely allows courts and agencies to develop workable rules to guide enforcement and business conduct, the impact on antitrust has so far been minimal.

Those who wish to expand enforcement in ways that would retard the progression in recent decades toward sensible substantive and institutional norms now have an organization dedicated to that end, the American Antitrust Institute (AAI). The group's leaders call for enforcement that would disregard the prudent limitations observed in recent decades.

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[103] *See* Timothy J. Muris, Chairman, Federal Trade Commission, *Improving the Economic Foundations of Competition Policy*, Remarks at the George Mason University Law Review's Winter Antitrust Symposium, Washington, D.C. (Jan. 15, 2003), *available at*, <http://www.ftc.gov/speeches/muris/improveconfoundatio.htm>.

[104]Brief of *Amicus Curiae* American Antitrust Institute, In Support of Plaintiffs-Appellees Urging Affirmance of the Grant of Partial Summary Judgment in Favor of Plaintiffs, *Abbott Labs, Geneva Pharms., Inc. v. Louisana Wholesale Drug Co., Inc.*, Case No. 02-12091-J (11th Cir. 2002), *available at* <http://www.antitrustinstitute.org/recent2/193.pdf>.

[105]*See, e.g.*, Warren S. Grimes, *GTE Sylvania and the Future of Vertical Restraints Law*

enactment of their enforcement agenda would shatter that consensus, and return antitrust to its pre-1981 imperialism.[112]

Of course, there also are those who argue against modern antitrust or any antitrust at all.[113] Such arguments have existed for decades, and enforcement officials have no trouble ignoring them.

3. Accounting Correctly for Non-Litigation Capabilities

A sound view of competition policy requires enforcement officials not only to identify their appropriate substantive priorities, but also to decide how to accomplish the agency's substantive ends.[114] The FTC has become more proficient over time in applying its collection of policy instruments in a systematic, coordinated way to accomplish its substantial aims. Examples include the FTC's work in the pharmaceuticals sector (studies, advocacy, and litigation) and the Commission's initiatives to address government restraints on competition (litigation, workshops, studies, and advocacy). The agency should always press itself to consider both its substantive goals and the tools available to achieve its ends.

One of Bob Pitofsky's keenest insights was his rediscovery of hearings and workshops as

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[112]This group has attracted a large advisory board, including many whom I doubt support the agenda just listed. Yet, AAI's founder asserts that the board is "more likely than not going to be informed by AAI circulations and be inclined to take positions that are consistent with what the AAI would say." Foer, *The American Antitrust Institute: The First Five Years*, at 14. It was in part this inevitable association with the group's expansive agenda that led former Assistant Attorney General Jim Rill to resign from the board last year.

[113]DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (2nd ed. 1990); Holman Jenkins, *FTC Screams for Antitrust*, WALL ST. J., Mar. 12, 2003, at A19.

[114] *See* Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 363 (2003).

policymaking instruments. We are using the intuition that moved Chairman Pitofsky to hold hearings and issue reports to realize the FTC's institutional comparative advantage. We are also expanding reliance on administrative litigation and are also devoting considerable attention to seeking synergies and policy lessons in the integration of our competition and consumer policies.

A full assessment and application of institutional capabilities provides a more complete insight into the causes of competitive distortions. Consider the case of supplier collusion and facilitating practices. Originating with George Stigler's research on coordination among competitors,[115] we understand that suppliers take several steps to collude effectively: reach consensus on terms of their collaboration, detect cheating, punish cheaters, and cope with entry. One way for a competition agency to attack collusion is to chose policy approaches that make it harder for firms to perform each of these tasks.

A great deal of attention has been devoted to "facilitating practices." One approach that the agencies used to address this was litigation at the fringes of Section 1 doctrine.[116] There is another way to conceptualize the problem. One phenomenon that facilitates collusion is government regulation and legislation that curbs entry or the forms of competition. Agency advocacy to remove artificial barriers to entry and competition are every bit as valuable to an anti-collusion program as bringing cases.

A proper understanding of what causes or contributes to trade restraints is necessary to decide how best to allocate resources. The Reagan administration implemented a substantial "facilitating practices" agenda that continues today – in the form of challenging (sometimes by

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[115] *See* George Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

[116] *E.I. du Pont de Demours & Co. v. FTC,* 729 F. 2d 128 (2d Cir. 1984).

offender's gain.[118] This double-loss/double-gain mechanism supplied the basis for the huge recoveries in the 1990s.[119] The enhancement in penalties continued, with changes to sentencing guidelines and increases in fines.[120] The development of federal criminal antitrust enforcement reveals progressive, cumulative development of competition policy. DOJ's criminal enforcement program has completed each decade in stronger condition than at the decade's start.

The cumulative nature of competition policy requires that each enforcement official recognize the contributions of predecessors and understand how choices today affect performance in the long term. It is a Washington aphorism that policy makers pick the low-hanging fruit. It is less common to hear exhortations about the need to plant trees. Without a norm that accounts for long-term effects of current decisions, incumbent officials may be tempted to invest too heavily in activities that result in immediate opportunities for credit. As one who has observed the evolution of the FTC over 30 years, I appreciate the need to invest in the long-term.

D. Experimentation: Extensions of Policy and Self-Limiting Principles

Modern experience shows that competition agencies periodically experiment at the boundaries of doctrine – either seeking extensions or exercising restraint. Donald Turner's 1968

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[118] 18 U.S.C. § § 3571(d) (1994). Congress first enacted this provision in the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3143, and reenacted the measure in the Criminal Fine Improvements Act of 1987, Pub.L.No. 100-185, 100 Stat. 1279.

[119] *See* Donald I. Klawiter, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, 69 GEO. WAS. L. REV. 745 (2001) (discussing impact of double the loss, double the gain fine calculation formula).

[120] *See, e.g.,* Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*, at Section IV.B.1.b.

Guidelines began the rationalization merger policy, which was becoming completely detached from any sound conception of economics.[121] Though modest in retrospect, Turner's self-limiting guidelines were revolutionary when adopted. They not only refused to push enforcement policy to the limits the courts had established, and they also established the idea that antitrust officials should issue guidelines that reveal their enforcement intentions, even if reducing their freedom of action.

When the Reagan administration began, antitrust law was already changing. As a *Washington Post* editorial later observed, many of the old rules simply were "undermined by observations of how the world works."[122] These changes influenced federal antitrust

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[121]U.S. Department of Justice, *Merger Guidelines* (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101.

[122]Editorial, WASH. POST, Dec. 27, 1983, at A-16.

[123]*See* William Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration,* 35 FED. B. NEWS & J. 244, 245-46 (1988); William Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration,* 33 ANTITRUST BULL. 467, 477-78 (1988).

[124]*See* Kovacic, *Legacy*, 35 FED. B. NEWS

prices; 2) resulted in a car less costly to produce than if GM had to rely on some other production source; 3) offered a valuable opportunity for GM and U.S. industry generally to learn about Japanese manufacturing and management techniques; and 4) enabled Toyota to gain experience with auto manufacturing in the United States before it opened its own plant in Kentucky.

The Commission's decision on the GM-Toyota joint venture seemed daring at the time and was vigorously opposed. One Commissioner dissented bitterly:

> In this decision, the Commission has swept another set of generally recognized antitrust principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this case, the decision results in the blessing of a business proposal that is both breathtaking in its audacity and mind-numbing in its implications for future joint ventures leading U.S. firms and major foreign competitors that seek to lend a helping hand.[125]

These concerns seem quaint today. Indeed, less than ten years later when the parties argued that there was no longer any reason for the consent order, the Commission agreed.[126] The antitrust world barely noticed.

E. Articulating a Positive Agenda

Modern competition policy teaches an important lesson about what competition authorities must do to develop support for their programs. They must work continuously to articulate a positive agenda and to state the assumptions that guide the formulation of the agenda.[127] Thus, I have sought to present in detail my view of what the FTC should do in each

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[125] *General Motors Corp.*, 103 F.T.C. 374, 397 (1984) (dissenting statement of Commissioner Patricia P. Bailey).

[126] *General Motors Corp.*, 116 F.T.C. 1276 (1993).

[127] *See* RICHARD A. HARRIS & SIDNEY M. MIKLIS, THE POLITICS OF REGULATORY CHANGE 187-89 (2d ed. 1996) (emphasizing that James C. Miller III's contributions to

[131]Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* 2 (Oct. 2003), *available at* <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

[132]*See* Timothy J. Muris, Chairman, Federal Trade Commission, *Competition Agencies in a Market-Based Global Economy,* Remarks at the Annual Lecture of the European Foreign Affairs Review, Brussels, Belgium (July, 23 2002), *available at*
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also have underscored our interest in working with other U.S. institutions to formulate a positive cooperative program that improves the overall quality of U.S. competition policy.[134]

III. Improving the Institutional Foundations for Competition Policy

Our modern competition policy experience contains lessons for how competition agencies should operate. This section uses those lessons to identify several steps to improve the quality of competition policy.

<http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

[134] *See* Susan A. Creighton, Director, Bureau of Competition, Federal Trade Commission, *A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates*, Remarks Before the National Association of Attorneys General 2003 Antitrust Seminar, Washington, D.C. (Oct. 1, 2003), *available at* <http://www.ftc.gov/speeches/other/031001naag.htm>.

effects of mergers. Understanding the efficiencies that can arise from mergers and how they are

category of activity that we call competition policy R&D.[135] Using workshops, hearings, studies, and reports, the agency increases its intellectual capital and informs the competition policy community about noteworthy developments. Investments in competition policy R&D are assuming progressively greater importance. In a world of greater economic complexity and institutional multiplicity, building intellectual capital is essential to understand new phenomena and to exercise intellectual leadership. With broadly distributed policymaking authority, the FTC typically cannot impose its will on other competition agencies. It must gain acceptance for its views by persuasion, not fiat. Without strong intellectual capital, such persuasion is impossible.

C. Accounting for Long-Term Institutional Effects

Past experience compels us to inquire how today's policy choices affect tomorrow's competition policy. Is the agency managing its resources to the greatest effect or is it overcommitted? Before we undertake new projects, we need to determine whether we can see them through to completion. Should we test prototypes of initiatives on a limited scale before undertaking full production?

A vital focus of decision making should be how individual resource allocation choices contribute to the long-term success of the agency. While working at the Commission in three of the past four decades, I have seen firsthand how the decisions of any FTC chairman affect the agency's performance for years after the incumbent chairman leaves office. Agency leaders must resist the temptation of eliciting the transient praise that comes from starting projects that

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[135] *See* Muris, *Future Development of Competition Policy*, 2003 Colum. Bus. L. Rev. at 403-404.

look good on take-off but run a serious risk of crashing during a successor's tenure. The goal is to make choices that generate positive, not negative, externalities on the agency and future leadership.

Conclusion

Since 1974, when I began my professional career, I have participated in, lived through, or followed most of the developments described in this paper. As time passes, I become increasingly aware that a growing part of antitrust community, here and abroad, lacks first-hand