SYMPOSIUM EDITOR'S ESSAY: BUILDING A BETTER U.S. COMPETITION POLICY CORRIDOR

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INTRODUCTION

Three enduring questions confront a jurisdiction seeking to establish or sustain a competition law system:

- What are the system's goals?
- What policies will best achieve the system's stated aims?
- What institutional mechanisms facilitate effective policy implementation?

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In the United States, the first two questions tend to eclipse the third. "What to do" has proven to be a more compelling topic than "how to do it."[1]

The allure of big substantive policy issues creates a persistent implementation blindside.[2] Legislators embrace soaring goals and regulators launch ambitious programs to accomplish them without thinking hard enough about implementation obstacles that obstruct "the path between preferred solution and actual performance of the government."[3] Inattention to implementation obstacles that stand between policy goals and their realization in practice is a continuing source of disappointment in competition law and other policy domains.[4]

In some ways, the U.S. competition policy system resembles the passenger rail transportation network between Washington, D.C. and Boston, Massachusetts. A state-of-the-art rail system ought to cover the distance between Washington, D.C., and New York City in 60 minutes or so. The actual journey on the fastest passenger train takes about three hours. Rolling stock for an hour-long journey is readily available, but inadequate roadbeds and cramped tunnels force modern trains to slow to a relative crawl at several points. Infrastructure weaknesses degrade system performance.

There is no shortage in the United States of high-powered substantive policy proposals for antitrust enforcement, yet these measures must run on the institutional equivalent of the existing Northeast Corridor rail infrastructure. From time to time, the United States has carried out major upgrades of its competition policy institutional framework.[5] Despite these measures, and the occasional blue ribbon panel report,[6] there has been an intriguing contentment with the U.S. institutional regime and its complex architecture. Where some

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[1] *See* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT xi (2011) ("Institutions . . . are a critical and underappreciated driver of an antitrust policy that interacts in many subtle ways with substantive antitrust rules and decisions.").

[2] *See generally* Alison Jones & William E. Kovacic, *Antitrust's Implementation Blindside: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. 227 (2020) (discussing the tendency of commentators to overlook difficulties associated with carrying out ambitious competition law enforcement programs).

[3] *See* GRAHAM T. ALLISON, THE ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 268 (1971).

[4] *See* ERIC. M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS *AFTER* MAJOR POLICY REFORMS ARE ENACTED 3 (2008) (identifying obstacles to successful policy implementation and cautioning that "sustaining reforms against the threats of reversal and erosion may be even tougher than winning the reforms' adoption in the first place").

[5] *See, e.g.*, Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified in various sections of 15 U.S.C.); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in various sections of 15 U.S.C.).

[6] *E.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007), govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf

see a distressing lack of coherence, others revel in the system's extraordinary multiplicity and fragmentation.

Several forces may disturb the contentment. The first is the federal judiciary, which seems inclined to revisit longstanding assumptions about the administrative state. In several cases now in litigation, the Federal Trade Commission faces formidable challenges to its structure and operations.[7] This is a moment of peril for the FTC. One or more of the pending litigation matters may make its way to a Supreme Court, whose recent decisions foreshadow a tough look at the FTC's institutional framework and the larger U.S. system of regulatory agencies.

The second force is congressional consideration of proposals to create new regulatory commands that would alter the functions of the Department of Justice Antitrust Division and the FTC and create additional public bodies to oversee large technology enterprises.[8] Congress also might adopt a major overhaul of the nation's privacy framework.[9] Enactment of comprehensive federal privacy legislation will require consideration of where to situate the data protection portfolio—in the FTC or in a new standalone privacy agency. Assigning the role to the FTC probably would entail a major expansion of the agency's privacy workforce and provide an occasion to move the agency's competition portfolio to DOJ, leaving the FTC to serve as a consumer protection and privacy body.

The third influence comes from ongoing reforms in the regulatory frameworks of other nations. Since 2000, China, France, Portugal, Spain, and the United Kingdom have retooled their competition law systems to consolidate all enforcement functions in a single institution.[10] Other jurisdictions (e.g., the European Union and Germany) have established new regulatory frameworks to address competition policy issues involving large information-services platforms.[11] Some have developed and refined networks to coordinate

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[7] *See, e.g.*, Petitioners' Brief at 16–26, Illumina, Inc. v. FTC, No. 23-60167 (5th Cir. June 5, 2023); Dan Papscun, *Illumina's Appeal Poses 'Biggest' Attack Yet on FTC (1)*, BLOOMBERG L. (June 8, 2023), news.bloomberglaw.com/antitrust/illumina-attacks-ftc-structure-leaders-in-constitutional-appeal (describing Illumina's appeal, which challenges the constitutionality of FTC procedures and structure).

[8] These are summarized in Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893 (2022).

[9] *See* William E. Kovacic, *The Durability of the Biden Administration's Competition Policy Reforms*, 29 GEO. MASON L. REV. 945 (2022); David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1117 (2018).

[10] *See* William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMP. J. 527, 528 (2012).

[11] *See, e.g.*, Council Regulation 2022/1925, Digital Markets Act, 2022 O.J. (L 265) 1; Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Competition Act], Jan. 18, 2021, BGBl I, last amended July 19, 2022, BGBl I, art. 2; *see also* Inge Graef, *Future-Proofing Plural Antitrust*

and integrate policymaking across various public institutions with shared or related policy mandates. These and other experiences in jurisdictions abroad might inspire some curiosity in the U.S. antitrust community about the desirability of changes to the American institutional framework.

Finally, a substantial modern literature has condemned U.S. competition policy for failing, since roughly the late 1970s, to arrest trends toward concentration in many commercial sectors and, in particular, for tolerating the emergence of dominant enterprises in high-technology industries.[12] The accusation of catastrophic failure invites consideration of what happened and how the claimed lapses took place. The critical literature often assigns responsibility to an identifiable group of individuals in academia, the business community, the enforcement agencies, and various advocacy groups. This begs basic questions about the U.S. competition law regime. Did individuals capture (and, it often is said, corrupt) enforcement institutions? Have the implementation institutions lacked the ability to learn from experience and make timely policy adjustments? Is institutional design an important determinant of policy (and a source of needed policy correction), or does everything depend on who leads the agencies?

This symposium considers how the United States might build a better competition policy corridor. It focuses attention on the institutional arrangements that underpin the operation of the U.S. competition law system. This essay introduces the symposium by identifying issues crucial to the future success of the U.S. regime. It frames five questions about the design and operation of the U.S. implementation institutions, identifies sources of insight that can inform judgments about institutional design and implementation, and concludes by introducing the contributions to the symposium. The symposium papers shed light on how to complete the often-treacherous journey between policy aspirations and their successful accomplishment in practice.

I. FIVE POLICY IMPLEMENTATION ISSUES IN THE UNITED STATES

To design a competition policy system framework, a jurisdiction must address a number of issues about the mechanism for implementation.[13] This Part addresses five issues with special significance for the modern development of the U.S. regime.

Enforcement Models: Lessons from the United States and the European Union, *infra* this issue, 85 ANTITRUST L.J. 339, 342–43 & nn.7–8 (2023).

[12] *See, e.g.*, William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, ANTITRUST, Summer 2021, at 46, 46–47, 53 n.1.

[13] *See generally* Kovacic & Hyman, *supra* note 10.

A. ENFORCEMENT MULTIPLICITY

In creating a competition-policy system, a jurisdiction must decide who can enforce the law. The United States has answered that question with unmatched multiplicity. Two federal agencies (the DOJ and the FTC) share authority to enforce the national antitrust laws. State governments have power to enforce the federal antitrust laws as well as their own state antitrust laws. Sectoral regulators have competition policy mandates that incorporate concepts from the federal antitrust laws. Uniquely powerful private rights of action enable customers, suppliers, and rivals to enforce the federal laws regardless of whether public authorities intervene.

With one major qualification discussed below, this essay accepts the existing configuration of enforcement agents as given and, perhaps, immutable. It assumes that the justifications usually offered for diversification—increased deterrence, mobilization of more enforcement resources, or an antidote to failure by any single public enforcer—are valid. Suppose that the existing distribution of prosecutorial authority is unchanged; could the existing framework perform more effectively in delivering good policy results? Are there unintended consequences of diversification which, unless addressed, will frustrate the attainment of the aims that motivated the original system design?

1. *The Federal Enforcement Duality*

The United States stands alone in the world in maintaining two significant national antitrust enforcement authorities. The DOJ and the FTC are enforcement complements and substitutes. The FTC's administrative adjudication process and its information gathering and reporting powers complement the DOJ's prosecutorial enforcement process. On notable occasions, the FTC has used its research and reporting function to create foundations for important DOJ enforcement programs.[14] In other instances, the FTC has used its administrative process to accomplish important doctrinal principles that may have been more difficult for DOJ to establish relying solely on federal court litigation.[15]

The overlapping policy mandates of the two institutions also make them competitors. The rivalry inherent in the dual enforcement design has been a

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[14] For example, an FTC study of the international petroleum industry provided the foundation for the DOJ's prosecution of a number of petroleum firms for cartelizing the international crude oil market. *See* William E. Kovacic, Standard Oil Co v United States *and Its Influence on the Conception of Competition Policy*, 11 COMPETITION L.J. 89, 95–97 (2012) (describing the DOJ's investigation and prosecution of the international petroleum cartel).

[15] *See* William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1033–34 (2012) (describing some of the FTC's distinctive administration adjudication accomplishments in antitrust law).

continuing source of interagency tension since the FTC's creation in 1914.[16] They compete for public attention, funding, and personnel. Each is acutely aware of changes in the stature of the other. The FTC's elastic competition mandate enables it, in principle, to establish competition norms beyond the reach of interpretations of the Sherman and Clayton Acts. The FTC's consumer protection and privacy mandates give it the ability, in principle, to achieve more complete solutions to problems that implicate several policy domains. The DOJ has viewed these powers warily out of concern that the FTC's application of its distinctive powers could displace the DOJ's enforcement program, with the exception of its criminal enforcement mandate.

Despite the historical tensions between the agencies, improvements in performance of the duality requires fuller integration of effort between the two agencies. The DOJ and the FTC already cooperate in major respects, perhaps most visibly in the formulation of common agency guidelines. A greater integration of effort could realize more completely the benefits of complementarities and learning across the agencies. Focal points for cooperation should include:

Formulation of common strategies and priorities: What are the shared aims of the agencies, and what priorities will best serve to accomplish them?

Common approach to project selection: What mix of policy tools promise the best results in realizing the agencies' shared priorities? When would litigation in the FTC's administrative process offer the best prospects of achieving desired doctrinal or remedial results? When should reporting and rulemaking supplement, or replace, litigation as the policymaking approach?

Development of a common research agenda: What applications of the FTC's research and reporting powers would best inform DOJ and FTC decisions about the setting of priorities and the development of specific policy measures?

Enhanced cooperation in shared areas of law enforcement: Will the agencies create working groups to share knowledge acquired in the application of shared enforcement activity? The rollout of new DOJ and FTC merger guidelines is an excellent opportunity to form a joint working group that combines the knowledge acquired in each agency in the application of the guidelines. More broadly, what is the FTC learning in the application of its consumer protection and privacy mandates that might inform the DOJ's analysis of mergers and other types of conduct?

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[16] *See* William E. Kovacic, *Antitrust in High Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097, 1104–06 (2012).

The approach sketched above relies on agreement rather than consolidation to achieve greater policy integration. This approach assumes that the existing duality in the federal enforcement mechanism is durable. That assumption is not free from doubt. Recent developments could catalyze basic changes. Two stand out.

First, respondents in FTC cases are challenging key elements of the agency's institutional framework.[17] The most serious challenge is an attack upon the constitutionality of the FTC based on the integration of prosecutorial and adjudication functions in the same institution.[18] A successful challenge would force Congress to consider how to overcome due process concerns related to confirmation bias. This shock could provoke a far-reaching examination of the rationale for and functions of the FTC.

A second occasion for fundamental change would be the adoption of omnibus national privacy legislation to replace the existing patchwork of federal privacy safeguards. One option for the implementation of a new privacy statute would be to give enforcement responsibility to the FTC, which already serves as the principal U.S. federal data protection authority. It is easy to imagine that Congress could decide to make the FTC a consumer protection and data protection authority and move the agency's competition portfolio to DOJ. If the FTC wishes to preserve its competition mandate, it must construct persuasive arguments about how the combination of functions (competition, consumer protection, privacy) in one house yields important benefits in theory and in practice.

2. *States, Sectoral Regulators, and Networked Policymaking*

State governments and sectoral regulators at the national and state levels play important competition policy roles. States have competence to enforce the Sherman and Clayton Acts and their own antitrust laws, which can impose obligations beyond those established in judicial interpretations of the federal courts. In addition, sectoral regulators exercise important merger control functions in fields such as communications,[19] energy,[20] finance,[21] and transporta-

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[17] *See supra* note 7 and accompanying text.

[18] *See* Petitioners' Brief at 16–26, Illumina, Inc. v. FTC, No. 23-60167 (5th Cir. June 5, 2023).

[19] *See* 47 U.S.C. §§ 151, 314 (Federal Communications Commission authority over mergers or acquisitions of "cable or wire telegraph or telephone line or system").

[20] *See* 42 U.S.C. § 7133(a)(7) (Department of Energy authority over competition in the energy industry).

[21] *See*, e.g., 12 U.S.C. § 1828(c)(2) (Federal Deposit Insurance Corporation authority over mergers and consolidations involving an insured depository institution); 12 U.S.C. § 1467a(e) (Federal Reserve System Board of Governors authority over savings and loan mergers and acquisitions); 12 U.S.C. § 1828a (Comptroller of the Currency regulation of banks).

tion.[22] Decisions taken by the federal antitrust authorities typically do not oust the jurisdiction of state governments or sectoral regulators. For example, state governments and sectoral regulators have competence to intervene in mergers when the federal antitrust agencies take no action or to seek relief more demanding than the DOJ or the FTC have obtained.

The states and the sectoral regulators participate in a number of cooperative relationships, including with the DOJ and the FTC. There is considerable room to strengthen these collaborations with the aim of making more effective use of resources by, for example, developing common strategies with respect to various business practices.

One such strategy is found in President Joseph Biden's July 2021 executive order, which called for the creation of a "whole-of-government" approach and sought to engage a wide range of public institutions in adopting policies to promote competition.[23] The executive order set out over 70 policy prescriptions to be carried out by a variety of federal agencies. To implement the executive order, the president established the White House Competition Council consisting of the heads of federal agencies and chaired by the president.[24] The council has met every six months, and the president has chaired the meetings.

This executive order has drawn considerable attention to competition policy at the federal level. Affected agencies have taken a number of steps to carry out its directives and recommendations. This is a good start toward realizing possibilities for competition policy improvements by engaging agencies beyond the federal antitrust authorities. The longer-term effectiveness of this initiative will be a function of, among other factors, the resources the White House commits to monitoring implementation and developing new recommendations for additional steps. The creation and early operation of the network depended chiefly on the effort of a single official (Professor Timothy Wu) who headed the competition policy program of the National Economic Council. Beyond appointing a successor to Professor Wu, it is unclear whether the White House intends to build a secretariat to support the Compe-

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[22] *See, e.g.*, 49 U.S.C. § 11322(a) (Surface Transportation Board authority over railroad mergers); 49 U.S.C. § 41712 (Department of Transportation authority over unfair and deceptive practices and unfair methods of competition in air transportation).

[23] *See* Promoting Competition in the American Economy, Exec. Order No. 14,036, 3 C.F.R. 609, 612 (2022) ("[A] whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy."). It might be more accurate to refer to this executive order as endorsing a "some-of-government" approach to competition policy. Major omissions stand out. For example, the order has nothing to say about domestic content policies that suppress competition from goods or services sourced outside the United States. *See id.*

[24] *See White House Competition Council*, THE WHITE HOUSE, www.whitehouse.gov/competition.

tition Council to prod federal agencies to cooperate in carrying out recommendations and assist in devising new projects. Without a strong supporting secretariat within the White House, it is difficult to see how the whole-of-government program can be sustainable.

As noted here, President Biden's whole-of-government initiative focuses on federal agencies alone. There is no network that systematically engages the federal antitrust agencies with their state government counterparts in a common effort to coordinate law enforcement or, more ambitiously, to identify policy priorities and to devise a strategy for accomplishing them. To be sure, the federal agencies and the states cooperate on a number of individual enforcement matters. Though helpful, this falls short of a broader ongoing discussion about enforcement priorities and strategy.

Experience outside the United States points to useful possibilities for improving interagency collaboration on competition policy. In 2003, to implement its directive to decentralize certain law enforcement functions, the European Union created the European Competition Network (ECN).[25] The ECN has provided a valuable mechanism for the European Commission's Competition Directorate (DG Comp) and the national competition authorities of the member states to coordinate enforcement activity and, increasingly over time, to formulate a common approach for addressing various policy issues. The creation of a comparable mechanism in the United States likely would improve interstate coordination functions now carried out by the Multistate Task Force of the National Association of Attorneys General and, more important, establish a better platform for federal and state cooperation.

Foreign jurisdictions also are several steps ahead of the United States in creating networks that join up planning and operations by regulators at the national level. In 2014, the United Kingdom launched the Competition and Markets Authority (CMA), which consolidated two predecessor institutions, the Office of Fair Trading and the Competition Commission. When it began operations in April 2013, the CMA joined a number of UK sectoral regulators in creating the United Kingdom Competition Network (UKCN) to provide a platform for cooperation in many areas in which the CMA and its counterparts had shared or similar policy duties.[26] The UKCN has supplied a valuable mechanism for the CMA to improve cooperation and to devise solutions for problems arising in fields such as energy, finance, and telecommunications.

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[25] *See European Competition Network*, EUR. COMM'N, competition-policy.ec.europa.eu/european-competition-network_en.

[26] *See UK Competition Network*, GOV.UK, www.gov.uk/government/groups/uk-competition-network.

The UKCN also provided a testbed for the developing of additional networks, including the UK's Digital Regulation Cooperation Forum (DRCF), which includes the CMA, the Office of Communications Regulation, the Financial Conduct Authority, and the Information Commissioner's Office.[27] The formation of the DRCF reflected the early awareness of its members that systematic, sustained operation among the agencies was essential to address digital economy phenomena that implicated multiple policy domains. Among other steps, the DRCF was instrumental in developing the framework for the CMA's Google Privacy Sandbox settlement, an experimental initiative that addresses a mix of competition, consumer, and privacy concerns.[28] The UKCN and the DRCF are worthy of emulation in the United States.

Several considerations should induce American regulatory authorities to improve the mechanisms for interagency cooperation and greater reliance on networked policymaking. First, it is evident that a growing number of regulatory issues involve the application of two or more policy fields. Second, responsibility for the relevant policy domains often resides in multiple agencies. Thus, government agencies need to establish the public policy equivalent of networks that facilitate commerce in a variety of areas of the economy. Third, improvements in public policy—in the diagnosis of observed behavior, the selection of treatments, and the assessment of outcomes—likely will be accelerated if the learning that occurs within individual agencies can be pooled and shared within the public sector. Fourth, by pooling resources, common initiatives have potential to achieve policy results that are unattainable through single-agency initiatives.

3. *Private Enforcement*

The United States has a singularly powerful system of private rights of action. Though incorporated into the original design of the federal antitrust system in 1890, the fuller realization of their enforcement possibilities dates back only to the late 1950s. One decisive development was the DOJ's prosecution of the electrical equipment cartels.[29] These cases constituted a major milestone in the treatment of cartel offenses as crimes under the Sherman Act. No less important, the government's cartel cases inspired numerous follow-on private suits that succeeded in obtaining unprecedented damage recoveries.

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[27] *See Digital Regulation Cooperation Forum*, INFO. COMM'R'S OFF., ico.org.uk/about-the-ico/what-we-do/digital-regulation-cooperation-forum.

[28] *See* Competition & Markets Authority, *Investigation into Google's 'Privacy Sandbox' Browser Changes*, GOV.UK, www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes (last updated July 27, 2023). As a non-executive director at the CMA, the author observed the contributions of the DCRF to the formulation of the Privacy Sandbox settlement.

[29] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 418–19 (2003).

The private cases proved to be a training ground for a new generation of law firms and practitioners who would specialize in private treble-damage litigation.

A second formative development in the U.S. regime of private rights was the 1966 amendment to Federal Rule of Civil Procedure 23, which increased the availability of class actions as mechanisms for aggregating the claims of a broad range of victims.[30] This procedural reform increased the potency of private rights by confronting defendants in antitrust cases with much larger claims for damages than they had previously experienced.

The third notable change in the enforcement environment involved doctrine. From the late 1930s into the early 1970s, the Supreme Court expanded the application of per se rules to condemn behavior subject to Section 1 of the Sherman Act and broadened the definition of improper exclusion under Section 2 of the Sherman Act and under the Robinson-Patman Act.[31] The broader availability of rules of per se illegality reduced the burdens that plaintiffs faced in challenging distribution practices and subjected more dominant firm conduct to challenge.[32]

A fourth major development has been the establishment, since the late 1970s, of a robust mechanism under state law for the recovery of damages by indirect victims of misconduct. In 1977 in *Illinois Brick Co. v. State of Illinois*, the Supreme Court ruled that indirect purchasers did not have standing to sue wrongdoers for damages.[33] Numerous state governments adopted "*Illinois Brick* repealer" statutes that granted standing to indirect purchasers. The Supreme Court has upheld the legality of these state measures,[34] and a formidable private bar has emerged to represent indirect purchaser claimants. Defendants in antitrust suits often confront an array of direct purchaser claims under the federal antitrust statutes and indirect purchaser claims under state law. There is a longstanding debate over proposals to repudiate *Illinois Brick*,

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[30] *See* Andrew I. Gavil, *Private Enforcement Under US Antitrust Law: Origins and Contemporary Context*, *in* RESEARCH HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE EU 52, 61, 68–71 (Barry J. Rodger et al. eds., 2023); Brian T. Fitzpatrick, *The Ironic History of Rule 23* (Vand. Univ. L. Sch., Working Paper No. 17-41, 2017), papers.ssrn.com/sol3/papers.cfm?abstract_id=3020306.

[31] *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY 129–39, 437–93, 579, 932–33 (4th ed. 2022).

[32] Of course, this trend was reversed in later cases. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (holding that maximum price controls are not per se illegal); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007) (holding that minimum price controls are not per se illegal).

[33] 431 U.S. 720 (1977).

[34] *See* California v. ARC Am. Corp., 490 U.S. 93 (1989).

and the Supreme Court recently has weighed in on the interpretation of its 1977 decision.[35]

The attention to the direct/indirect purchaser question obscures another important dimension of the private rights regime. The growing power of the private rights system has had significant, unanticipated doctrinal side effects. From the late 1970s onward, the federal courts began to express concerns about the competitive impact of private rights. These concerns were reflected in a process that Professor Stephen Calkins has called "equilibration" – the tendency of courts to adjust liability rules, evidentiary standards, and procedural requirements to counteract what they perceive to be overreaching in a feature of the antitrust system.[36]

A visible formative influence in the equilibration decisions has been the modern Harvard School scholarship of Phillip Areeda and Donald Turner.[37] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[38] the Court relied upon Professor Areeda's argument that competitors claiming damages in private challenges to mergers should be limited to recoveries from harms caused by a reduction in competition.[39] The *Brunswick* Court formulated the "antitrust injury" screen that emerged over time to become an important limit on claims for damages or injunction relief in private antitrust cases.

Professors Areeda and Turner also urged caution in the formulation of liability standards and evidentiary tests in private cases, especially in claims premised on Section 2 of the Sherman Act. In a number of cases since the late 1970s, the Supreme Court has elevated the proof that private plaintiffs must present to succeed in monopolization cases.[40] In doing so, the Court often has pointed to what it fears to be the excessive deterrence that might flow from the presentation of large treble damage claims before juries. The Court's modern jurisprudence reflects the Court's evident belief that the existing private rights regime poses a serious danger of discouraging legitimate business conduct. So long as judges distrust the private treble damage mechanism as now configured, courts are unlikely to embrace theories of harm whose application would expand the zone of antitrust enforcement.

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[35] *See* Richard M. Brunell & Andrew I. Gavil, *Editors' Note*, 84 ANTITRUST L.J. 309 (2022); Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

[36] *See* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1067 (1986).

[37] *See generally* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459 (2020); 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 Kovacic, *Double Helix*].

[38] 429 U.S. 477 (1977).

[39] *See* Kovacic, *Double Helix*, *supra* note 37, at 54–61.

[40] *See id.* at 62–71.

The constraining influence of the Court's jurisprudence has spilled beyond private cases. In cases involving claims of illegal single-firm conduct, the equilibrating decisions designed initially to screen out infirm private cases established doctrinal concepts that encumber the federal-agency plaintiffs as well. This places a considerable drag on the federal agencies' efforts to enforce Section 2 of the Sherman Act.

In lieu of legislation that might adjust doctrine created by the Court's equilibration decisions, there are essentially two ways to address the equilibration that has hindered private claims and obstructed federal agencies. The first is to examine the assumptions on which the Supreme Court has premised its modern jurisprudence. Scholars and public agencies could develop a research agenda that seeks to measure the contributions of private enforcement to the antitrust system and to determine systematically whether private actions create tendencies for overdeterrence that the Supreme Court believes to be significant.

A second moderating strategy is for presidents to appoint more judges who have significant experience representing private plaintiffs in antitrust case or in other matters where private rights are part of the enforcement mix. The presence of additional judges recruited from the plaintiffs' bar would provide a partial check upon assertions that equilibration is necessary to filter out overreaching cases.

B. THE RELATIONSHIP OF ANTITRUST AGENCIES TO THE POLITICAL PROCESS

Commentary on the design of competition policy systems often states that antitrust agencies should be independent from politics. This prescription is unhelpful in two important respects. The first is that few, if any, agencies are isolated in practice from the political process. The label of "independent" inaccurately describes how agencies such as the FTC actually function and ignores important mechanisms by which the legislature and the executive branch influence agency operations.[41] The Senate confirms nominees to the FTC and regularly reminds nominees that the agency is not independent of Congress but rather an extension of it. Congress approves the agency's budget, which is the agency's sole source of funding. In what sense is an agency that must ask Congress each year for its funding to be considered to be independent from it? Indeed, Congress imposes important controls on how appropriated funds can be spent and exercises routine oversight over the agency's policy choices.

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[41] *See generally* William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).

In 1935 in *Humphrey's Executor v. United States*,[42] the Supreme Court ruled that the president cannot remove FTC commissioners except for good cause. However, the executive branch exercises significant tools to influence the agency. Presidents nominate commissioners and can renominate incumbents. Presidents can designate the chair from among existing commissioners; simply by signing a letter, the president can elevate a commissioner to the position of chair and demote a chair to the status of a mere commissioner. The FTC's budget requests are not submitted directly to Congress; rather, the agency presents its requests to the Office of Management and Budget, which formulates the president's budget request to Congress. Various FTC rules and information requests must be submitted to the Office of Information and Regulatory Affairs. Moreover, this roster of formal control mechanisms omits the informal means of persuasion that the chief executive can bring to bear on the FTC.

The sketch of congressional and executive branch control above indicates that independence in the sense of isolation from political involvement is a fiction, in practice. As a normative matter, complete isolation from political involvement is unattainable and unwise. Three competing values are in place. Some degree of autonomy is vital for effective agency operations. The requisite autotomy must take the form of protection from interference in the decision to investigate or prosecute or, in the case of the FTC, in the adjudication of disputes. Both the DOJ and the FTC ultimately must answer to the courts in their exercise of authority. A crucial basis for seeking deference to their policy choices is confidence on the part of judges that the agencies are acting on the basis of good judgment grounded in superior expertise. A court that senses that prosecutorial decisions were taken by reason of political duress will not listen to agency pleadings that seek deference or give the benefit of the doubt based on superior technical knowledge.

A second value to be achieved is accountability. An agency that receives substantial public funding and exercises significant regulatory powers reasonably can be expected to account for its policy choices. The legitimacy of its operations depends upon making informative disclosures about its priorities, its implementation strategies, and the outcomes of its interventions.

The third value is effectiveness. Agencies periodically must seek enhancements in their funding and in their powers. Having an active, constructive relationship with the relevant gatekeepers is necessary to have these requests received favorably. Agencies also play valuable roles as advisors to legislators and political appointees about contemplated legislation and policy initiatives taken by other government departments. Here, as well, members of Congress

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[42] 295 U.S. 602 (1935).

and the heads of other departments are less likely to listen and heed an antitrust agency's advice in the absence of a continuing relationship.

There is an active debate today, raised in commentary, legislative deliberations, and litigation, about the adequacy of measures that now seek to give the FTC a needed level of autonomy while preserving adequate mechanisms for accountability, especially to the White House. A number of observers describe the FTC as "unaccountable."[43] Such observations disregard the constraining measures, described above, that give Congress and the president important means for influencing the FTC's decision-making. The claim of FTC unaccountability is especially bizarre when made with respect to Congress, which has the measures for control mentioned above and has shown its willingness to use them, often with powerful effect, since the FTC opened for business in 1915.[44]

The most important question at the moment, however, is the durability of *Humphrey's Executor*. Recent Supreme Court decisions have hinted at the possible inclination of some members of the Court to revisit *Humphrey's Executor* and the assumptions that led the Court to restrict the power of the president to remove commissioners.[45] Litigants and advocacy groups in a number of recent FTC matters have relied upon these indications to invite the lower courts to repudiate *Humphrey's Executor*, or at least to tee the issue up for possible Supreme Court review.[46]

As Professor Daniel Crane has documented, a central issue for consideration in revisiting *Humphrey's Executor* is the Court's interpretation of the roles that Congress originally intended for the FTC upon its creation in 1914 and the functions that the FTC was performing when the case came to the Court in the 1930s.[47] The *Humphrey's Executor* Court emphasized the extent to which fact gathering and reporting for Congress and administrative adjudication dominated the FTC's agenda. Notably, in 1935, the FTC had no independent litigating authority that would permit the agency to bring actions directly in federal district court.[48]

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[43] *See, e.g.*, Sen. Josh Hawley, *Overhauling the Federal Trade Commission*, JOSH HAWLEY, www.hawley.senate.gov/overhauling-federal-trade-commission (stating that the FTC "is woefully unaccountable").

[44] *See generally* William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869 (1989); *see also Our History*, FED. TRADE COMM'N, www.ftc.gov/about-ftc/history ("The FTC opened its doors on March 16, 1915.").

[45] *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

[46] *See* Petitioners' Brief at 19–22, Illumina, Inc. v. FTC, No. 23-60167 (5th Cir. June 5, 2023).

[47] *See* Daniel A. Crane, *Debunking* Humphrey's Executor, 80 GEO. WASH. L. REV. 1835 (2014).

[48] *Id.* at 1864–65.

The reconsideration of *Humphrey's Executor* in the lower courts and the Supreme Court will hinge considerably on the judgment of these tribunals about whether the agency's legislative and adjudicative functions today are so significant that they require insulation from removal by the president except for good cause. Since 1935, the FTC has continued to issue reports and policy recommendations to Congress. There are important modern examples of how this type of guidance has influenced congressional lawmaking.[49] In many instances, the FTC has issued trade regulation rules pursuant to its authority under the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act and under specific statutes dealing with matters such as financial disclosure, privacy, and telemarketing. The FTC's modern experience also has featured the adjudication of cases through its administrative process that have yielded important contributions to doctrine in the fields of competition law and consumer protection. Indeed, one of the FTC's most recent appearances in an antitrust case before the Supreme Court involved the agency's successful defense against an appeal from an FTC administrative decision.[50]

Though the FTC's roles in providing guidance to Congress and serving as an administrative adjudication body have remained important, its role in prosecuting cases directly in federal court has increased dramatically. Two statutory enactments in the 1970s catalyzed this development. In the Trans-Alaska Pipeline Authorization Act of 1973, Congress gave the FTC independent litigating authority to bring cases for injunctions in federal court.[51] In the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress created a premerger notification mechanism for transactions above certain size threshold.[52]

These changes had major implications for the FTC's competition and consumer protection programs. After the implementing rule for the Hart-Scott-Rodino premerger notification mechanism took effect in 1978, the FTC began to bring a larger number of merger challenges in federal district court. In these matters, the agency sought to obtain injunctions to suspend the consummation of mergers once the second-request waiting period had expired. After 1978, the FTC occasionally prosecuted mergers through its administrative process, and some of these cases yielded decisions that gained affirmance from the courts of appeals and created important principles for merger control. Nonetheless, the preliminary injunction action in federal court became the agency's

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[49] *E.g.*, Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066.

[50] N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494 (2015).

[51] Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 591–92 (codified as amended at 15 U.S.C. § 53(b)).

[52] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390–94 (1976) (codified as amended at 15 U.S.C. § 18a).

preferred technique for opposing transactions it believed to be anti-competitive.

A still more profound change took place in the field of consumer protection. Before the early 1970s, FTC administrative adjudication served as an effective mechanism for establishing new norms for advertising, marketing, and related forms of business practice.[53] The administrative mechanism was not an effective tool for gaining effective relief against consumer fraud. The agency had no authority to go to court to seek immediate prohibitions against continuation of a fraudulent scheme. Beginning in the mid-1970s, the FTC developed an expansive program of bringing 13(b)[54] anti-fraud cases in federal district court. The FTC continued to bring administrative cases with norms-creation features, but federal district court litigation became the dominant instrument of FTC consumer protection law enforcement.

The diminished role for administrative adjudication from the 1970s onward raised some concerns within the FTC, but not for the reason that has emerged in modern debates about *Humphrey's Executor*. The anxiety that emerged from time to time stemmed from the possibility that greater reliance on federal court litigation would raise questions about the rationale for the FTC's multimember (multicomissioner) governance structure and its continued existence as a competition policymaker. Congress in 1914 chose the multimember governance mechanism chiefly because the FTC would serve as an adjudication tribunal, with the prosecution and resolution of administrative cases serving as a vital mechanism for establishing rules for business behavior. Declining numbers of administrative competition cases could raise questions about the rationale for continuing the FTC's competition mandate. A serious drop in the total volume of administrative adjudication generally (competition and consumer cases) might create doubts about the logic of the agency's multimember governance structure.

The durability of *Humphrey's Executor* did not enter into internal discussions about the future of administrative adjudication. This is likely because the FTC and its staff regarded the principle of *Humphrey's Executor* to be an unshakable pillar of U.S. administrative law. The 13(b) independent litigating authority established in 1973 had proven to be such an effective and integral part of the FTC's program to attack consumer fraud and to challenge mergers that agency officials did not recognize that expanded reliance on this tool might undermine a major premise of the holding in *Humphrey's Executor*. Perhaps the FTC perceived that the benefits of expanded federal court litigation were so strong and widely recognized that courts would disregard argu-

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[53] *See,* e.g., Pfizer, Inc., 81 F.T.C. 23, 37 (1972) (establishing the requirement of a "reasonable basis" for advertising claims).

[54] 15 U.S.C. § 53(b).

ments that the increasing reliance on this policy instrument endangered the principle of *Humphrey's Executor*.

Would it make much of a difference in the work of the FTC if the Supreme Court revisited *Humphrey's Executor* and ruled that commissioners were subject to removal at the will of the president? From one perspective, the impact on the agency's operations might be small or modest, at most. As noted above, the executive already can (and does) exercise important mechanisms of control over agency decision-making. While the for-cause removal restriction adds a useful element of protection for FTC commissioners, its significance is not so great as one might think when one considers the constraining power of the executive's other controls. A president who sees value in the FTC's mission—and understands that political intervention that seeks in an obvious way to influence case selection or adjudication decisions will damage the agency's stature before the judiciary—likely will hesitate to use the removal power.

There are scenarios in which unrestricted removal power could alter the FTC's operations dramatically. A president who disagrees with the agency's mission may have little inhibition to take measures that disable it, including the removal of all commissioners who embrace the agency's mission. In an extreme case, a president could dismiss all of the commissioners; such a president might decline to appoint replacements or might advance only nominees who would do whatever the executive wishes. In this type of presidential administration, the absolute power to remove commissioners would be significant.

The considerations described here for the low-impact and higher-impact scenarios if the Supreme Court overruled *Humphrey's Executor* would apply not to the FTC but also to other federal regulatory bodies such as the Federal Communications Commission. The Supreme Court soon will consider a dispute that raises this issue in connection with the operations of the Securities and Exchange Commission.[55] A sensible resolution of the removal question requires the Court to acknowledge the doubtful conceptual and empirical claims that support the unaccountability hypothesis and examine the full set of powers that the executive branch can and does exercise to influence agency behavior.

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[55] The U.S. Supreme Court recently granted certiorari in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023). The Court granted certiorari on two issues relevant to the FTC: (1) whether statutory provisions that authorize the SEC to enforce securities laws through agency adjudication instead of filing actions in fedral district court violate the nondelegation doctrine and (2) whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

C. GOVERNANCE: BOARD OR EXECUTIVE

The leading method of governance among the world's competition agencies is supervision by a multimember board. An important minority of competition authorities vest governance responsibility in a single executive. Some agencies use a hybrid mechanism that confers policy oversight upon a board but delegates most law enforcement decisions to a chief executive.

The United States has one national competition unit (DOJ's Antitrust Division) governed by a single executive and one national body (the FTC) governed by a multimember board (the commissioners). For several reasons, the future of this configuration is most uncertain.

The first consideration involves dispute resolution. The federal law enforcement mechanism includes a prosecutorial enforcement option and an administrative enforcement option. The DOJ operates exclusively with the prosecutorial model and brings all of its cases in federal courts, which are courts of general jurisdiction. The FTC can avail itself of the prosecutorial option by going directly to federal court or the administrative option by using its adjudication capability.

There is no evident basis to assume that a multimember body has greater capacity than a single-executive agency to decide when to prosecute cases in federal court. The logic of the FTC's multimember configuration depends crucially on the performance of the FTC's role as an adjudication tribunal. The expected use of administrative adjudication to create rules of business behavior was vital to the agency's creation. If administrative adjudication is not front and center in the FTC's program, the rationale for multimember governance fades.

One vulnerability for the FTC is the relative infrequency with which the agency in the modern era has performed its "norms creation" function through administrative adjudication. In the late 1970s, the FTC had no fewer than seven or eight administrative law judges. Today there is one. Since the late 1970s, the FTC has made important contributions to competition policy through its administrative adjudication process. At the same time, federal court litigation has become the favored enforcement strategy for the FTC in competition and consumer matters.

The more serious reason for concern is a recent series of cases in which FTC respondents are attacking the legitimacy of the agency's decision-making processes, including its administrative adjudication mechanism. Litigants are responding to signals from the federal courts that appear to welcome a reexamination of the administrative process. Among other challenges, recent cases have raised due process objections to the integration of prosecutorial and adjudication functions. There is a strong likelihood that the Supreme

Court ultimately will weigh in on these issues, either in a case involving the FTC or in matters involving other federal agencies with a configuration similar to the FTC's. Nothing in the Supreme Court's modern jurisprudence concerning the FTC or other regulatory bodies suggests that the Court will approach these issues with sympathy for the FTC.[56]

D. Policymaking Powers

The impact of a competition regime depends heavily on the tools the legislature has provided for policymakers to achieve the goals of the legislation. The menu of possibilities includes authority to bring cases, to issue rules, and to gather information and publish reports. In defining the agency's prosecutorial powers, the legislature must decide what sanctions—injunctions, civil damages, criminal penalties—are available to remedy violations.

Two recent developments have drawn attention to the policymaking instruments of the federal antitrust agencies. The first is the commitment of the FTC to issue trade regulation rules to address competition policy problems. The agency is now considering whether to issue a rule to prohibit certain noncompetition covenants in employment contracts.[57] The issuance of such a rule likely will elicit challenges on two grounds: that the agency lacks legislative authority to issue competition rules, and that the proposed rule on employment contracts poses "major questions" that can be addressed only if the congressional delegation of rulemaking power clearly gives the agency power to promulgate such a rule.[58]

The second development involves the application of the DOJ's criminal enforcement authority. Since its passage in 1890, the Sherman Act has provided that Sections 1 and 2 may be prosecuted as crimes; but until very recently, the DOJ has not pursued criminal liability under Section 2 for decades.[59] In 2022, the DOJ announced its intention to return to its older practice of bringing criminal charges to challenge violations of Section 2 of the

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[56] *See, e.g.*, AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021) (holding, unanimously, that the FTC lacks authority under Section 13(b) of the FTC Act to obtain equitable monetary relief).

[57] *See* Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[58] *See generally* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277 (2023).

[59] *See* Mark Rosman et al., *DOJ Obtains First Criminal Guilty Plea for Monopolization Conduct in Decades*, JDSUPRA (Nov. 8, 2022), www.jdsupra.com/legalnews/doj-obtains-first-criminal-guilty-plea-1358152; Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment*, 84 ANTITRUST L.J. 753 (2022).

Sherman Act. The DOJ also has been prosecuting no-poaching agreements among competitors as criminal offenses.

An important premise for the restoration of criminal enforcement of Section 2 is that the rule of law demands recourse to this form of sanction.[60] What about Section 3 of the Robinson-Patman Act?[61] In 1977, the DOJ issued a report that attacked the Robinson-Patman Act as misguided policy.[62] Since the issuance of the report, the DOJ has not enforced the statute, leaving the FTC to provide the sole federal presence in that area. The FTC shares responsibility with the DOJ for civil enforcement of the Robinson-Patman Act, but the criminal prosecution authority in Section 3 is exclusively within the DOJ's policymaking duties. Fidelity to the rule of law would seem to call for the DOJ to repudiate the 1977 report and, at a minimum, return the enforcement of Section 3's criminal provisions to the DOJ's active litigation agenda.

E. THE MOTIVATIONS FOR COMPETITION AGENCY POLICY CHOICES

Since the establishment of the U.S. federal antitrust system late in the nineteenth century, several theories have emerged to explain why the federal antitrust agencies (and public agencies generally) behave the way they do in choosing how to use their resources. Five of the most important hypotheses are sketched below.[63]

The public interest explanation: One theory of agency behavior posits that the DOJ and the FTC are faithful agents of Congress. As such, their policy choices are guided by their commitment to execute the mandate set out in the antitrust statutes. In this model, fidelity to congressional will is complicated by the ambiguity with which Congress often states its aims. The process of gaining a critical mass of support for legislation often requires compromises that embed multiple, competing objectives in the law.

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[60] *See, e.g.*, Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers ("[W]hen Congress passed the Sherman Act in 1890, it made Section 2 a crime as it did with Section 1. . . . [T]he Division will not hesitate to enforce the law.").

[61] 15 U.S.C. § 13a. As adopted in 1935, this provision treats certain forms of price discrimination as crimes, including "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." *Id.*; *see also* United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 29, 34–37 (1963) (holding that a criminal prohibition against "predatory" and "unreasonably low prices" was not "unconstitutionally vague").

[62] U.S. DEP'T OF JUST., REPORT ON THE ROBINSON-PATMAN ACT 250–59 (1977) (summarizing the DOJ's assessment of the Robinson-Patman Act).

[63] The framework set out below is derived from James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REGUL. ECON. 41 (2012), and James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL'Y 779 (2012).

The personal interest explanation: A second theory of agency action, often associated with the literature on public choice, emphasizes the desire of public officials to use their tenure in office to increase their own prestige and improve their prospects for future employment. Sometimes, the pursuit of individual acclaim and future financial rewards can press officials to adopt programs that serve the larger public interest, but sometimes they do not. One unfortunate manifestation of this possibility is the tendency of some leaders to engage in activities that create opportunities for credit claiming in the short term but impose long term costs on their agencies and the larger public.

Capture: The capture theory of public administration explains agency actions as the product of successful efforts by interest groups to induce government officials to embrace policies that please the interest groups but undermine public wellbeing. The theory is most often invoked to explore how economic interest groups bend lawmaking and law enforcement to their advantage. The notion of capture applies not only to choices taken in a specific field of law enforcement but also to efforts to imbue public officials with an overriding intellectual framework that favors particular policy approaches.

Behavioral impulses: A fourth body of study uses insights from behavioral economics to explain the conduct of individual agency officials and the larger organizations they lead. This literature focuses on how various psychological biases can determine how individuals and institutions collect, interpret, and act upon information. One of the most important phenomena is confirmation bias, which causes decisionmakers to feel an imperative to uphold their earlier decisions and to refuse using new information to reevaluate earlier choices.

Institutional design. This theory of public administration suggests that the design and organization of public institutions influences policy choices by shaping the menu of options from which decisionmakers can choose. For example, a multimember commission designed by the legislature to serve the legislature's interests may generate different initiatives than an executive branch agency beholden to the executive.

So, which of these theories explain what the federal antitrust agencies do? I suspect the correct answer is, "all of the above." The hard inquiry in reviewing agency behavior is to identify and distinguish between the impulses that are strongest in individual matters versus in the larger development of a program over time.

Much of the modern critical literature on antitrust policy suggests that capture by commercial interests is the dominant force behind agency policymaking since the late 1970s. Today's capture narrative often attributes moral dereliction to the leadership of the agencies and asserts that the consequence has been a catastrophic policy failure. By focusing heavily on the conduct of individual agency leaders, the modern variant of the capture story raises dis-

turbing questions about the integrity of the U.S. competition law system. Do policy outcomes depend entirely on top leadership appointees, or are the institutions structured and organized in a way that provides periodic reflection on past choices and adjustments in light of experience and new learning?

CONCLUSION: THE CONTRIBUTIONS TO THE SYMPOSIUM

Our symposium wrestles with many of the institutional issues described above. Professor Christine Bartholomew examines the existing interaction among all antitrust enforcers and suggests how their relationships could be improved. Professors Luke Froeb, Bruce Kobayashi, and John Yun consider how innovations in enforcement emerge through economic work within the existing framework of enforcement institutions. Professor Inge Graef uses experience in the European Union and the United States to consider enhancements in frameworks that create a multiplicity of enforcement agents. Professor George Hay and Thomas Turgeon study the current generation of Big Tech antitrust cases as focal points for considering the wisdom of the existing distribution of prosecutorial authority and decision-making in the U.S. regime. Keith Klovers offers suggestions for improving the operation of the FTC's administrative adjudication mechanism. Professors Filippo Lancieri, Eric Posner, and Luigi Zingales consider the intellectual and political influences that induced the DOJ and the FTC to retreat from expansive enforcement programs that had prevailed in many areas of antitrust law from the 1940s through the 1970s.

The symposium contributors bring to bear a broad range of experiences and philosophical perspectives about competition law. As a group, their contributions draw upon learning across several disciplines and build upon experience outside the United States. The result is a deeply informative view of the U.S. regime and how American institutions can adapt to perform more effectively in the future.