

# THE MODERN EVOLUTION OF U.S. COMPETITION POLICY ENFORCEMENT NORMS

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## I. INTRODUCTION

Perceptions of history routinely inform discussions about federal anti-trust enforcement in the United States. On a number of memorable occasions, historically based narratives have altered the American competition policy system by, for example, molding opinion about the aims of the antitrust statutes<sup>1</sup> or the quality of performance of government enforcement agencies.<sup>2</sup> An important lesson about enforcement policy emerges from this experience: Shape understandings of the past, and you influence views about what the Department of Justice (DOJ) and the Federal Trade Commission (FTC) ought to do in the future.

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<sup>1</sup> One notably influential historical narrative concerning the goals of antitrust policy is Robert Bork's distillation of an efficiency-oriented "consumer welfare" objective from the legislative histories of the U.S. antitrust statutes. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 56-66 (1978) (discussing legislative aims in enacting Sherman, Clayton, and Federal Trade Commission Acts) [hereinafter *ANTITRUST PARADOX*]; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (discussing congressional goals in passing Sherman Act). The influence of Bork's historical narrative is examined in William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1437-39, 1445-51 (1990).

<sup>2</sup> In its 1969 report, the American Bar Association Commission to Study the Federal Trade Commission reviewed the work of previous blue ribbon panels and concluded that the agency since its origin stubbornly had brushed aside numerous earlier recommendations for reform. AMERICAN BAR ASSOCIATION, COMMISSION TO STUDY THE FTC, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 9 (Sept. 1969). Stating its belief that "it should be the last of the long series of committees and groups which have earnestly insisted that drastic changes were essential to recreate the FTC in its intended image," the ABA panel proposed that the agency be disbanded "if change does not occur." *Id.* at 3. The ABA group's narrative of past evaluations of the FTC resonated powerfully with Congress and added considerable force to its recommendations. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 82 (Robert MacKay et al. eds., 1987) (describing how ABA panel's negative assessment of past FTC antitrust programs helped stimulate reforms of the agency);

One common narrative of U.S. antitrust history depicts federal enforcement policy since 1960 as a swinging pendulum. In this narrative, federal antitrust enforcement swings through three phases: too active in the 1960s and 1970s, too passive in the 1980s, and properly moderate in the 1990s. To borrow the classification scheme introduced in the famous children's story, federal enforcement policy goes from too hot to too cold to just right.<sup>3</sup>

Commentators who embrace the pendulum narrative and its interpretation of modern antitrust history typically tell the story in a reassuring manner. The sanguine view is most evident in the accounts of DOJ and FTC officials who formulated the "just right" enforcement policies of the 1990s. One representative assessment authored in 1999 by an FTC insider observes:

Antitrust enforcement in the past seven years has been particularly pragmatic, well focused and balanced. . . . The antitrust agencies have charted a prudent middle course, bringing sound, limited enforcement actions, attempting to clarify the law to facilitate the ability of firms to compete, and focusing on real world results rather than ideological battles.<sup>4</sup>

In the spirit of the children's fable, the antitrust story suggests a happy ending. After suffering "ideological" excesses, federal antitrust enforcement policy becomes "pragmatic, well focused and balanced" and reaches a wise technocratic equilibrium—a "prudent middle course."

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William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 630–31, 643 & n.270 (1982) (same).

<sup>3</sup> In *The Story of the Three Bears*, Goldilocks makes an uninvited visit to the house of the Three Bears. The bears have taken a walk in the woods, leaving their house unoccupied. Goldilocks enters, sees three bowls of porridge on a table, and samples the food:

First, she tasted the porridge of the Great Big Bear, and that was too hot for her. Next she tasted the porridge of the Middle-sized Bear, but that was too cold for her. And then she went to the porridge of the Little Wee Bear, and tasted it, and that was neither too hot nor too cold, but just right, and she liked it so well, that she ate it all up, every bit!

*The Story of the Three Bears*, in THE ILLUSTRATED TREASURY OF CHILDREN'S LITERATURE 9, 70 (Margaret E. Martignoni ed., 1955).

<sup>4</sup> David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J.L. & PUB. POL'Y 61, 132 (1999). The architects of the "just right" policies of the 1990s foreshadowed this theme before assuming leadership of the federal enforcement agencies. See *Interview: Dean Robert Pitofsky*, ANTITRUST, Winter 1988, at 24, 24:

ANTITRUST: Do you believe there will be a change of direction in antitrust policy even if another Republican is elected to succeed Ronald Reagan?

PITOFSKY: Yes, I expect that antitrust enforcement will pick up regardless of who wins the election. I do not expect that we would return to the aggressive, anti-bigness, populist approach of the fifties and sixties. But I also doubt we will see a continuation of the very lenient enforcement posture of the Reagan

The pendulum narrative is unmistakably popular.<sup>5</sup> Business journalists often recite the narrative and accept its easily accessible summary of U.S. competition policy. Scholars embrace the narrative as an accurate account of modern enforcement and endorse its interpretation of how federal officials have used their authority. Retold so often and so confidently, the pendulum narrative has become the conventional wisdom about federal antitrust enforcement in the past four decades.

Examined closely, the pendulum narrative ought to cause discomfort within the competition policy community. Taken on its own terms, the pendulum narrative casts doubt upon the stability and legitimacy of U.S. antitrust enforcement. For example, the narrative's dominant image of merger policy in the 1960s through the 1980s is a system out of control. Federal enforcement, the narrative says, "careened from one extreme to another."<sup>6</sup> Despite its assurance that the U.S. antitrust system came to its senses in the 1990s,<sup>7</sup> the narrative does not explain why the "prudent middle course" of the 1990s will endure. More than any other factor, the narrative suggests that appointees to high office in the federal enforcement agencies determine whether policy is guided by an almost mindless "ideology" (the 1960s, 1970s, and 1980s) or "prudence" (the 1990s). In this framework, erratic variations in policy would seem to be only a presidential election away.<sup>8</sup> Students of antitrust enforcement,

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Administration. I would expect some sort of enforcement program that falls between those poles, regardless of which party wins the election.

<sup>5</sup> The popularity of the pendulum metaphor as a tool of analysis and interpretation is not limited to the field of competition policy. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 1-7 (1995) (criticizing the "pendulum swing" vision of the intellectual history of American jurisprudence); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 670 & n.144, 707 (2001) (describing use of the pendulum analogy to describe public procurement reform initiatives in the United States).

<sup>6</sup> Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 196 (1992) (from 1960s through 1980s, U.S. merger enforcement policy "careened from one extreme to another"); see also Milton Handler, *Introduction*, 35 ANTI-TRUST BULL. 13, 21 (1990) ("With the advent of the Reagan administration, a 180-degree change in merger enforcement policy occurred. . . . The pendulum swung from one extreme to another. . . .").

<sup>7</sup> See Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 586 (2002) (by end of 1990s, U.S. antitrust enforcement "stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust").

<sup>8</sup> By this logic, some observers warned in 2001 that the DOJ and the FTC under George W. Bush would repudiate the Clinton administration's antitrust policies and might simply cease enforcement. See John B. Judis, *Trust Walk*, THE NEW REPUBLIC ONLINE, June 11, 2001 ("You've probably never heard of Charles James or Tim Muris. Maybe not even Michael Powell. . . . Together they herald a radical shift in the enforcement of America's antitrust laws: Under the Bush administration, *there may not be any.*") (emphasis added), available at <http://www.thenewrepublic.com/061101/judis061101.htm>; see also Albert A.

particularly foreign observers seeking guidance about the proper design of competition policy, understandably might withhold respect for a system of law whose content and application can shift so dramatically at the polls.<sup>9</sup>

The more basic difficulty with the pendulum narrative is the obstacle it creates to understanding how antitrust policy is made and should be formulated. The narrative supplies an unacceptably inaccurate representation of modern U.S. antitrust experience.<sup>10</sup> The pendulum narrative attains its force by artificially accentuating the swings in enforcement activity across periods.<sup>11</sup> With repeated recitals, the narrative flattens out discordant facts that might suggest important elements of continuity or progressive, cumulative improvement. Predictable, set-piece analyses of multi-faceted phenomena obliterate troublesome complexities. To highlight the prudence of the middle course of policy in the 1990s, the pendulum narrative imbues policy makers in the 1960s/1970s and the 1980s with heavy doses of irrationality and economic primitivism. Lost in this caricature is the type of reliable positive analysis that is necessary to devise sound normative propositions about public enforcement policy.

This article seeks to improve upon the pendulum narrative. The article argues that the pendulum narrative misrepresents and misinterprets modern U.S. antitrust history and provides an unsuitable basis for understanding how public institutions exercise their discretion to enforce antitrust laws. The article's interpretation of modern antitrust experience examines enforcement patterns and underscores how enforcement programs are shaped by the evolution of antitrust "norms"—consensus views of what public competition authorities ought to do. The article uses U.S.

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Foer, *Antitrust in Peril*, RUTLAND HERALD DAILY, June 20, 2001 ("State attorneys general are prepared to expand the consumer watchdog if the FTC and the Justice Department's Antitrust Division abandon the field.") (emphasis added), available at <http://www.antitrustinstitute.org/recent/128>.

<sup>9</sup> See Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 106 (2002) (criticizing the pendulum interpretation of modern U.S. antitrust experience and observing: "How much credence could be given to merger policy if it really were so susceptible to change, depending on the outcome of Presidential elections?").

<sup>10</sup> See Andrew I. Gavil, *Teaching Antitrust Law in Its Second Century: In Search of the Ultimate Antitrust Casebook*, 66 N.Y.U. L. REV. 189, 217 n.177 (1991) (as a tool for interpreting developments in modern antitrust policy, "[t]he metaphor of the pendulum leaves much to be desired").

<sup>11</sup> This is a common trait of commentary using the pendulum metaphor. Compare DUXBURY, *supra* note 5, at 2 (in using pendulum imagery to describe relationship between legal formalism and legal realism in U.S. history, "writers in American jurisprudence have tended to develop certain themes . . . in an over-emphatic, sometimes over-dramatic, fashion").

experience since 1960 to analyze how enforcement norms evolve and become generally accepted standards in a competition policy system. In treating the issue of norms, the article addresses an important issue for new and old competition policy systems, alike: how should public competition authorities behave?

Compared to the pendulum narrative, the article's interpretation of modern antitrust experience more strongly emphasizes elements of continuity and the cumulative nature of public antitrust enforcement. The article acknowledges differences across eras, but offers a richer analysis of the differences and their sources. In particular, the article seeks to avoid the exaggerations that reinforce the pendulum narrative's delineation of sharply defined, self-contained enforcement periods and support the stark juxtapositions essential to the narrative's "before and after" description of policy making. Among other points, the article suggests that the outputs of federal enforcement agencies in the 1990s in key respects coincide with norms established during the 1980s.<sup>12</sup> The "essential stability" that recent scholarship has found in federal merger policy across the 1980s and 1990s<sup>13</sup> also characterizes core elements of non-merger enforcement. In particular, such stability would have been unattainable had the norms embraced by the DOJ and the FTC in the 1980s generally lacked durable intellectual and institutional foundations and merely reflected aberrant, doctrinaire preferences of incumbent officials.

This article examines the evolution of modern antitrust enforcement norms in five parts. Part II presents the basic ingredients of the pendulum narrative. Part III describes the concept of norms in the context of public antitrust enforcement and introduces the concept of constrained continuity as an alternative to the pendulum narrative. Part IV uses data on federal enforcement from 1961 to 2000 to examine the evolution of DOJ and FTC enforcement norms in specific areas of antitrust policy. This section focuses attention on important enforcement phenomena

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<sup>12</sup> Lawrence White's recent assessment of Clinton administration antitrust policy captures this perspective. Professor White writes that during Bill Clinton's presidency

[T]here was a new activism. Cases were brought that probably would not have been initiated during previous regimes. But the elements of continuity were strong as well. There certainly was no revolutionary overturning of major directions of the previous regimes, and there was no return to the populism and enthusiasm for protecting small business that had sometimes colored antitrust policy before the 1980s.

Lawrence J. White, *Antitrust Activities During the Clinton Administration*, in *HIGH STAKES ANTITRUST—THE LAST HURRAH?* 11, 12 (Robert W. Hahn ed., 2003).

<sup>13</sup> See Leary, *supra* note 9, at 111–36 (documenting similarities in federal merger enforcement in 1980s and 1990s).

that the pendulum narrative flattens into obscurity. Part V explains why many popular and scholarly commentaries have embraced the pendulum narrative, despite its doubtful representation of actual experience. Part VI discusses institutional implications of U.S. experience for the development of competition policy programs within individual antitrust systems and across jurisdictions. Better appreciation for how enforcement norms have evolved in the United States can illuminate approaches for the domestic and international competition policy communities to improve the quality of antitrust enforcement systems over time.

## II. THE PENDULUM NARRATIVE

Metaphors and storytelling are powerful tools of discourse and analysis in U.S. antitrust policy.<sup>14</sup> No metaphor-based story is more potent or commonplace in the discussion of modern federal enforcement than the narrative of the swinging pendulum. Enforcement officials and scholars often use pendulum imagery, or close substitutes, to describe adjustments in federal policy,<sup>15</sup> and business journalists frequently use versions of

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<sup>14</sup> The foremost treatment of the role of metaphors in antitrust law appears in Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395 (1986). The role of narrative as a tool in antitrust litigation is analyzed in Joshua Newberg's study of the federal and state government lawsuits against Microsoft. Joshua A. Newberg, *The Narrative Construction of Antitrust*, 12 S. CAL. INTERDIS. L.J. 181 (2003).

<sup>15</sup> See Balto, *supra* note 4, at 62–64 (using the pendulum metaphor to describe federal antitrust enforcement from 1970s through 1990s; observing that “[a]ntitrust enforcement is often described in terms of ideological swings.”); George Bittlingmayer, *The Antitrust Emperor's Clothes*, 25 REGULATION, Fall 2002, at 46, 52 (“The antitrust pendulum has swung back since the late 1980s, and a new bipartisan consensus has emerged under the Clinton and the two Bush administrations.”); Eddie Correia, *Antitrust Policy After the Reagan Administration*, 76 GEO. L.J. 329, 329 (1987) (“The results of the 1980 election . . . led to a broad-scale attack on almost every aspect of antitrust enforcement. The next Administration should pull the pendulum back toward the center.”); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1129 (1987) (identifying “swing of the pendulum within the executive and judicial branches . . . to the extreme of finding conduct per se lawful without regard for the values embodied in the antitrust laws or for the facts of particular disputes”); *Klein Spurs Consumer Action to Address Challenges of Information Age, Globalization*, 76 ANTITRUST & TRADE REG. REP. (BNA) 559 (May 20, 1999) [hereinafter *Klein Consumer League Speech*] (quoting Joel Klein, Assistant Attorney General for Antitrust, as using pendulum metaphor to describe trends in antitrust policy since 1960); W. John Moore, *Antitrust Comeback*, NAT'L J., Nov. 6, 1993, at 2666 (“‘It’s fair to say that we have now completed a swing of the pendulum,’ with the Clinton Administration aggressively looking for cases, said Joe Sims, a Washington lawyer . . . .”); Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 17 BERKELEY J. INT’L L. 197, 208 (1998) (“So the pendulum swung. With Baxter, Ginsburg, and even Rill, with Scalia, Bork, Easterbrook and Posner, the Chicago ideology came to ascendancy throughout the enforcement agencies and to some extent in the courts.”); Pat Wechsler, *The Pendulum Is Swinging Back on Antitrust Law*, NEWSDAY, Oct. 23, 1988, at 67 (quoting

the pendulum narrative to discuss DOJ or FTC antitrust enforcement.<sup>16</sup> As mentioned above, the pendulum narrative depicts DOJ and FTC antitrust activity as swinging through essentially three phases from 1960 to 2000. The discussion below uses pendulum narrative commentary to describe each era.

#### A. TOO HOT: THE ERA OF UNDUE ACTIVISM

In the pendulum narrative, federal antitrust enforcement reached an extreme of exuberant intervention in the 1960s. The DOJ and the FTC viewed a broad range of business conduct with suspicion and exercised their power to prosecute indiscriminately.<sup>17</sup> One representative account of developments in federal antitrust enforcement and judicial analysis from the 1960s through the early- to mid-1970s observes: “The antitrust pendulum had swung too far. Too many business practices were disallowed. Critics could show that some antitrust enforcement prevented firms from acting in the consumers’ interests.”<sup>18</sup> For most pendulum narrators, the overheated policy impulses of the 1960s persisted through the 1970s,<sup>19</sup> though there is general recognition that the federal agencies moderated their enforcement programs in some areas by the late 1970s, if only because the federal courts had begun to narrow the zone of liability established by the jurisprudence of the post-World War II era.<sup>20</sup>

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Dean Robert Pitofsky’s description of antitrust enforcement during the Reagan administration: “The pendulum had swung too far to the right.”)

<sup>16</sup> See Tamara Lytle, *It Takes Much Paperwork to Make the Mergers Work*, ORLANDO SENTINEL, Dec. 13, 1998, at G1 (“During the years, enthusiasm for antitrust regulation has swung like a pendulum.”); Jeffrey Silva, *Bush Picks for DOJ, FTC Bode Well for Telecom*, RCR WIRELESS NEWS, Mar. 12, 2001, at 9 (“There has been a pendulum swing in antitrust policy the past two decades.”); Richard Wolfe, *The New Rules of Competition*, FIN. TIMES (USA Edition), Oct. 10, 1998, at 6 (“If [Joel] Klein loses his headline-grabbing cases, some scholars forecast that the pendulum may swing back to the laissez faire approach of the 1980s.”); Laurence Zuckerman, *How the Antitrust Wars Wax and Wane*, N.Y. TIMES, Apr. 11, 1998, at B7 (“The Bush and Reagan Administrations . . . rarely invoked the antitrust laws. In the most recent swing of the pendulum, the Clinton Administration has stepped up antitrust enforcement.”).

<sup>17</sup> See *Klein Consumer League Speech*, *supra* note 15, at 560 (quoting Joel Klein, Assistant Attorney General for Antitrust, as saying that in the early 1960s the government antitrust agencies had “challenged everything”).

<sup>18</sup> See Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944 (1987).

<sup>19</sup> See Janet L. McDavid & Robert F. Leibenluft, *What Impact Will Bush Have?*, NAT’L L.J., Feb. 5, 2001, at B8 (federal antitrust enforcement during Carter administration featured “extraordinary activism”).

<sup>20</sup> For example, by the late 1970s it was evident that the federal courts were backing away from some applications of the structural presumptions that had animated Supreme Court merger jurisprudence in the 1960s. See ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 41–45 (1986).

Many versions of the pendulum narrative depict the architects of federal enforcement in the 1960s and 1970s as unthinking fanatics or economic primitives.<sup>21</sup> Substituting “zealotry” for analysis, enforcement officials routinely ignored (or could not understand) efficiency considerations, distrusted all mergers, and actively sought opportunities to dismantle large firms.<sup>22</sup> Undiluted “populism,” undisciplined by prevailing concepts of proper economic analysis, routinely motivated the decision to prosecute.<sup>23</sup> Enforcement officials approached all commercial phenomena with the simplifying assumption that “bigness is bad.”<sup>24</sup>

#### B. TOO COLD: THE ERA OF INEXCUSABLE RETRENCHMENT

As told by the pendulum narrative, federal enforcement programs swung dramatically toward nonintervention in the 1980s. Ronald Reagan’s appointees to the Justice Department and the FTC are said to have moved antitrust enforcement “radically to the right.”<sup>25</sup> In doing so,

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<sup>21</sup> See Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution*, 66 N.C. L. REV. 931, 939 (1988) (calling officials who designed federal merger enforcement policy in the 1960s “the government antitrust witchdoctors”).

<sup>22</sup> See Lytle, *supra* note 16, at G1 (“Before Ronald Reagan, who was elected president in 1980, bigness was considered bad. Antitrust laws were zealously enforced.”); *The New Enforcers*, THE ECONOMIST, Oct. 7, 2000, at 79, 80 [hereinafter *New Enforcers*] (calling federal enforcement officials “trust-busting zealots of the 1960s who saw evil in every big company or merger”); Charles Rule, Deputy Assistant Attorney General for Antitrust, *Deregulating Antitrust: The Quiet Revolution*, Speech Before the 19th New England Antitrust Conference 10 (Nov. 8, 1985) (antitrust analysis “need not be very sophisticated, of course, to determine that such antitrust notions as ‘no fault monopolization’ have little economic merit and can be explained merely as a knee-jerk reaction to economic success and a suspicion of capitalism”).

<sup>23</sup> See Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL’Y 239, 253 (1999) (federal antitrust enforcers in the 1960s were “excessively intrusive Populists”).

<sup>24</sup> Compare Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 822 (1987) (noting “the mythology on which some 1960’s-style antitrust depended—the notions that big is bad and that small is somehow beautiful”).

<sup>25</sup> Peter Behr, *Wave of Mergers, Takeovers Is a Part of Reagan Legacy; Next Presidency Will Be Test of Regulatory Policy Success*, WASH. POST, Oct. 30, 1988, at H1 (discussing likely impact of 1988 presidential election on antitrust policy; quoting Dean Robert Pitofsky: “The [Reagan] administration has moved radically to the right. The pendulum will swing back somewhat regardless of whether George Bush or Michael Dukakis is elected.”); Martha Middleton, “New Antitrust” Era Takes Shape, NAT’L L.J., Jan. 13, 1986, at 1 (quoting Dean Robert Pitofsky: “The pendulum has swung radically further to the right.”).



Reagan's antitrust appointees undertook a "minimalist" enforcement program<sup>26</sup> and "trivialized" the nation's antitrust laws.<sup>27</sup>

In the pendulum narrative's treatment of the 1980s, images of federal government inactivity abound. The Reagan DOJ and FTC engaged in an "almost total abandonment of antitrust policing"<sup>28</sup> and produced "the most lenient antitrust enforcement program in fifty years."<sup>29</sup> During the Reagan years, "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free."<sup>30</sup> Under Reagan, the federal government's civil nonmerger enforcement program was "all but extinguished,"<sup>31</sup> "U.S. federal merger enforcement ground to a halt,"<sup>32</sup> and, more generally, "[e]nforcement

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<sup>26</sup> See, e.g., Edward D. Cavanaugh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 *FORDHAM L. REV.* 51, 74 (1988) (discussing impact of "the government's minimalist enforcement policies" on private antitrust litigation during Reagan era); Eleanor M. Fox, *Antitrust, Trade and the Twenty-First Century—Rounding the Circle*, 48 *REC. ASS'N OF BAR OF N.Y.* 535, 542 (1993) (recounting Reagan antitrust policy; observing that, in 1980s, "The United States had reached the age of antitrust minimalism."); Milton Handler, *Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in Its National Policy?*, 10 *CARDOZO L. REV.* 1933, 1934–35 (1989) (statutory increase in 1987 of criminal fines applicable to antitrust offenses "is rather ironic because the enactment comes at a time of minimalist enforcement"); Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 *GEO. L.J.* 169, 170 n.3 (2002) [hereinafter *Remedies*] (Reagan administration antitrust program was "remarkably mild" and provided "minimal levels of enforcement"); Robert Pitofsky, *First Annual Miles W. Kirkpatrick Antitrust Lecture*, *Georgetown Law* (Fall 2002) at 7 ("By the time we reached the 1980s, the Reagan years, you had minimalist antitrust . . . ."); Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 *ANTITRUST L.J.* 217, 217 (1993) [hereinafter *Antitrust Policy*] ("During the eight years of the Reagan Administration, the country witnessed about as minimal an antitrust program as can be imagined.").

<sup>27</sup> Eleanor M. Fox & Robert Pitofsky, *The Antitrust Alternative*, 62 *N.Y.U. L. REV.* 931, 931 (1987).

<sup>28</sup> Joanna Ramey, *Clinton Seen Putting Muscle in Antitrust*, *WOMEN'S WEAR DAILY*, Feb. 26, 1993, at S42.; see also Silva, *supra* note 16, at 9 (federal antitrust enforcement took "a hands-off approach during the Reagan administration").

<sup>29</sup> Robert Pitofsky, *Does Antitrust Have a Future?*, 76 *GEO. L.J.* 321, 321 (1987); see also Moore, *supra* note 15, at 2666 (quoting Robert Pitofsky as saying antitrust "was sluggish if not dead in the mid-1980s").

<sup>30</sup> Milton Handler, *Foreword*, 75 *CAL. L. REV.* 787, 788 (1987); see also Handler, *supra* note 26, at 1935 (calling Reagan administration's antitrust record one of "vigorous and effective non-enforcement") (emphasis in original); Pitofsky, *supra* note 29, at 326 (criticizing Reagan administration's antitrust "nonenforcement").

<sup>31</sup> Balto, *supra* note 4, at 63; see also Pitofsky, *Antitrust Policy*, *supra* note 26, at 217 (during Reagan administration, "[e]nforcement at the federal level was exclusively against cartel behavior and some few horizontal mergers of enormous size").

<sup>32</sup> Eleanor M. Fox, *Can We Control Merger Control?—An Experiment*, in *POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW* 79, 84 (Global Competition Review: Special Report by the Global Forum for Competition and Trade Policy 1999). Compare Cananaugh, *supra* note 26, at 72 (during Reagan administration, "[t]he Antitrust Division has shown . . . only token interest in merger enforcement").

ceased.”<sup>33</sup> Even if absolute disengagement were unattainable, the administration’s goal was evident: “Reagan clearly intended to take government officials out of the business of antitrust enforcement.”<sup>34</sup>

In the pendulum narrative, default by the Reagan antitrust agencies brings the United States to the brink of an antitrust apocalypse. By the late 1980s, “underenforcement” by the federal agencies had “reached a crisis point, threatening the American competition system.”<sup>35</sup> As federal prosecutions reached “a low ebb,” only an increase in activity by state governments “kept alive” public antitrust enforcement.<sup>36</sup> Pendulum narrators occasionally concede that the Reagan antitrust agencies brought some cases in the 1980s, but the few instances of DOJ or FTC enforcement are said to have displayed no imagination, relied on pedestrian applications of existing doctrine, or lacked commercial significance.<sup>37</sup>

The main characters in the pendulum narrative’s history of the 1980s are the heads of the federal enforcement agencies. The most charitable versions of the pendulum narrative simply dismiss Reagan’s antitrust

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<sup>33</sup> Sullivan & Fikentscher, *supra* note 15, at 206.

<sup>34</sup> Keith Conrad, *Media Mergers: First Step in a New Shift of Antitrust Analysis?*, 49 FED. COMM. L.J. 675, 690 (1997) (discussing merger enforcement).

<sup>35</sup> Fox & Pitofsky, *supra* note 27, at 931; *see also* Pitofsky, *supra* note 29, at 327 (“The United States economy is so vigorous and dynamic that it is doubtful that the past seven years of minimal enforcement [1981–1987] will do much permanent harm. . . . A continuation of this level of nonenforcement is likely to change profoundly the nature of competition in this country.”); Louis B. Schwartz, *Some Additional Safeguards for the Newly Liberated Marketplace*, 75 CAL. L. REV. 1049, 1051 (1987) (“We stand at the very nadir of antitrust; it is such a dead letter that I am at a loss as to what to teach my students except that ‘anything goes.’”); William G. Shepherd, *Bust the Reagan Trustbusters*, FORTUNE, Aug. 4, 1986, at 225 (saying “[t]oday antitrust is in deep trouble”; adding that “the Reagan Administration has returned to the dark years of pro-monopoly antitrust under Harding and Coolidge”; concluding: “It may not be too late to turn back from this road to serfdom by reviving the case for antitrust, but the odds aren’t favorable.”).

<sup>36</sup> Harry First, *Antitrust’s Goals: Theories of Antitrust in the United States and Japan*, in COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM 175, 180–81 (C.A. Jones & M. Matsushita eds., 2002); *see also* Harry First, *Theories of Harmonization: A Cautionary Tale*, in COMPARATIVE COMPETITION LAW: APPROACHING AN INTERNATIONAL SYSTEM OF ANTITRUST LAW 17, 24 (Hanns Ullrich ed., 1998) (“[T]here is a good argument to be made that antitrust was kept alive in the United States during the 1980s through articulation of antitrust policy by state government enforcers (who disagreed with the federal government’s laissez faire approach) and through private litigation . . .”).

<sup>37</sup> *See* Cavanaugh, *supra* note 26, at 72–73 (during Reagan era, “[n]either the Antitrust Division nor the Federal Trade Commission has demonstrated much effort in developing and implementing novel theories of antitrust liability”); Pitofsky, *supra* note 24, at 819 (discussing cartel policy and observing: “To a large extent, [the Reagan] administration has only brought the same case over and over again—a long series of challenges to interrelated regional and local conspiracies in the construction industry. It has shown little inclination to use its considerable economic sophistication to develop innovative ways to detect non-construction industry cartels.”); Schwartz, *supra* note 35, at 1051 (“Only trivial and obvious horizontal price agreements provoke government action.”).

appointees as “extremists” or “ideologues.”<sup>38</sup> Like the “zealots” of the 1960s and 1970s, the Reagan antitrust policy makers were guided by an unthinking commitment to a system of belief rather than reason or thoughtful analysis.<sup>39</sup> Raw political power, not any force of ideas, enabled them to effectuate change. Thus, their success in altering antitrust policy was “largely a political victory, not an intellectual or legal one.”<sup>40</sup>

In other instances, the pendulum narrative’s explanation for the behavior of Reagan’s antitrust officials is less generous. Harsher variants of the narrative portray the Reagan appointees with images of intellectual and moral decay.<sup>41</sup> In a speech before the American Bar Association’s Section of Antitrust Law in 1987, Senator Howard Metzenbaum, the Chairman of the Judiciary Subcommittee on Antitrust, Monopoly, and Business Rights, called the Reagan antitrust leaders a “garbage barge of ideologues.”<sup>42</sup> At an FTC hearing in 1995, Lloyd Constantine, who in the 1980s had led the antitrust unit in the New York Attorney General’s Office and had headed the Multistate Antitrust Task Force of the National Association of Attorneys General, said the Reagan antitrust agencies

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<sup>38</sup> See Fox & Sullivan, *supra* note 18, at 945 (describing role of William Baxter, Reagan’s first Assistant Attorney General for Antitrust, in altering federal enforcement policy in 1980s: “It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done.”); *New Enforcers*, *supra* note 22, at 79, 80 (discussing federal antitrust enforcement trends and referring to “the laissez-faire ideologues of the Reagan years”).

<sup>39</sup> See Willard F. Mueller, *Market Power and Its Control in the Food System*, in ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY 23, 35 (Robert L. Wills et al. eds., 1987) (Reagan antitrust agencies “are headed by individuals imbued with a laissez-faire philosophy of capitalism that would make Adam Smith shudder at what he wrought”; in adopting “laissez-faire radicalism,” Reagan antitrust officials are guided by “blind faith in the efficacy of competitive rivalry”); Correia, *supra* note 15, at 329 (“[The Reagan] Administration, often substituting conservative political philosophy for realistic market analysis, has refused to intervene in numerous cases that present serious competitive problems.”); Flynn & Ponsoldt, *supra* note 15, at 1130 (“Current implementation of the antitrust laws, both by enforcement agencies and in many judicial decisions, exemplifies a breakdown in the common law analytical process. Judicial and executive reluctance to realistically evaluate vertical distribution restraints in light of governing legislation represents the subservience of law to ideology.”).

<sup>40</sup> Fox & Sullivan, *supra* note 18, at 947.

<sup>41</sup> See Louis B. Schwartz, *Owen J. Roberts Memorial Lecture: Justice, Expediency, and Beauty*, 136 U. PA. L. REV. 141, 161 (1987) (“The Reagan Administration has carried to absurd lengths the identification of expediency with justice in antitrust cases. In this field, expediency goes by the name of efficiency . . . .”); Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L.J. 337, 337 (1987) (“We have sold the soul of competition to the devil, no question about that. As for the devil, there are several to choose from: the Chicago School, certain opinions of the Supreme Court, and [the Reagan] Administration’s antitrust policies are chief among them.”).

<sup>42</sup> *ABA Annual Meeting Emphasizes Competitiveness, International Trade*, 53 Antitrust & Trade Reg. Rep. (BNA) 311, 315 (Aug. 20, 1987) (remarks of Sen. Metzenbaum).

epitomized “lawlessness.”<sup>43</sup> In a lecture in 1990, Professor Robert Pitofsky likened Reagan’s appointees to a film noir character who is comfortable with ethical compromise and expediency. Describing the DOJ and FTC antitrust program of the 1980s, Pitofsky said: “The enforcement agencies’ motto could have been the world-weary remark of ex-cop Jake Gittes, the Jack Nicholson character in Chinatown. When asked what he did to enforce the law when assigned to Chinatown, he said: ‘As little as possible.’”<sup>44</sup>

The pendulum narrative’s treatment of the late 1980s and early 1990s comes in two versions. One version sees the antitrust policies of Ronald Reagan and George Bush as indistinguishably permissive.<sup>45</sup> By this view, the Bush enforcement officials suffered from the same, limiting ideological perspectives as their Reagan predecessors, or worse.<sup>46</sup> Other observers

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<sup>43</sup> Lloyd Constantine, Remarks Concerning How Antitrust Should Assess the Role of Imports in Market Definition 1, 1 (Oct. 19, 1995) (statement at FTC Hearings on Global and Innovation-Based Competition), available at <http://www.ftc.gov/opp/global/speech.htm>; see also Handler, *supra* note 26, at 1946 (“Reagan Justice Department’s antitrust enforcement program constituted “subversion of the rule of law”); Mueller, *supra* note 39, at 35 (“The unprecedented failure [of Reagan’s antitrust officials] to execute faithfully the laws of the Congress and the decisions of the courts would raise cries for impeachment if the laws involved private criminal behavior rather than powerful corporate interests.”).

<sup>44</sup> Robert Pitofsky, The Renaissance of Antitrust 1, 4, Tenth Annual Milton Handler Lecture, Delivered Before the Association of the Bar of the City of New York (Oct. 4, 1990). Professor Pitofsky recently seems to have upgraded one Reagan antitrust official to a status more energetic than “doing as little as possible.” See Eric Lichtblau, *Justice Department’s Antitrust Chief Is Leaving for Chevron Texaco*, N.Y. TIMES, Oct. 4, 2002, at C6 (reporting resignation of Charles James as Assistant Attorney General for Antitrust; quoting Robert Pitofsky’s comparison of James and William Baxter, who led the Antitrust Division from 1981 to 1983: “Baxter’s rhetoric was hostile to antitrust enforcement but in fact he brought many important cases.”).

<sup>45</sup> See J. Neil Lombardo, Note, *Resuscitating Monopoly Leveraging: Strategic Business Behavior and Its Implications for the Proper Treatment of Unilateral Anticompetitive Conduct Under Federal Antitrust Laws*, 41 ST. LOUIS U. L.J. 387, 387 (1997) (recent economic learning casts doubt upon “the ‘hands off’ approach to antitrust enforcement advocated by the Chicagoans and openly embraced by the Reagan and Bush Administrations”); Ramey, *supra* note 28, at S42 (“One area the Clinton administration will likely leave its mark on is enforcement of the nation’s merger, price-fixing and other antitrust laws, a departure from the Republican hands-off approach during the last 12 years, according to antitrust observers.”); James Vicini, *Antitrust Enforcement Tougher Under Clinton*, CHI. SUN-TIMES, Nov. 6, 1994, at 2 (Antitrust Division “dwindled in importance under the Reagan and Bush Administrations”); see also *infra* note 52 and accompanying text (commentary treating Reagan and Bush enforcement policies as similar and crediting Clinton’s antitrust leadership with reviving “moribund” federal agencies).

<sup>46</sup> In the early 1990s, DOJ sued various universities for colluding to set financial aid packages offered to commonly admitted students. See *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (describing content and resolution of Justice Department’s challenge to university agreements on financial aid). One commentator endorses the view that the Antitrust Division’s prosecution of the arrangements in question was undertaken as a conscious effort to advance a larger campaign by the Bush administration’s Justice Department to suppress racial minorities. See Elbert L. Robertson, *Antitrust as Anti-Civil Rights?*

distinguish between the Reagan and Bush antitrust enforcement programs and detect greater activism during the Bush administration.<sup>47</sup> At least one Clinton antitrust official has said the Clinton antitrust program substantially followed a path created by the Bush agencies.<sup>48</sup>

### C. JUST RIGHT: THE SENSIBLE MODERATION

Many commentators whose stories mesh with the pendulum narrative saw a silver lining in the gloomy clouds of federal antitrust policy in the

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*Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University*, 20 YALE J. L. & POL'Y REV. 399, 402–03 (2002) (observing that Judge A. Leon Higginbotham called the *Brown University* case “part and parcel of a conservative Republican Administration’s ‘anti-civil rights’ agenda”; stating the author’s agreement with Judge Higginbotham’s view “regarding the Bush Justice Department’s motivation in bringing this action”).

<sup>47</sup> See Balto, *supra* note 4, at 64 (“During the Bush Administration . . . the pendulum swung back in the other direction, and there was an attempt to bring antitrust enforcement to a more even keel.”); Peter C. Carstensen, *While Antitrust Was Out to Lunch: Lessons from the 1980s for the Next Century of Enforcement*, 48 S.M.U. L. REV. 1881, 1911 (1995) (“In the late 1980s, the pendulum did begin to swing back toward a less aggressively passive attitude toward the role of government. Starting with the Bush administration, there has been a return to a mildly activist antitrust stance . . . .”); Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1036 (2001) (“Enforcement activity revived in the elder-Bush administration under Jim Rill.”); McDavid & Leibenluft, *supra* note 19, at B8 (“The Reagan administration reined in antitrust enforcement after the extraordinary activism of the Carter administration. . . . Under President Bush, the pendulum swung back to the center. . . . New leadership at the agencies . . . revitalized antitrust enforcement . . . . The Clinton administration enforcement record was built on this Bush administration base.”); Jeffrey N. Neuman, Comment, *Through a Glass Darkly: The Case against Pilkington plc Under the New U.S. Department of Justice International Enforcement Policy*, 16 NW. J. INT’L L. & BUS. 284, 296 (1995) (“During the Bush administration . . . the pendulum began to swing back toward meaningful antitrust enforcement in a whole range of substantive areas that had been abandoned during the Reagan years.”); Evan P. Schultz, *Too Many Patents?*, LEGAL TIMES: IP, Mar. 4, 2002, at 11, 12 (“After years of relative stagnation during the Reagan administration, antitrust enforcement was reinvigorated under the first President George Bush.”); Skitol, *supra* note 23, at 253 (“President Bush appointed enforcers who were believers in mainstream antitrust policy—neither excessively intrusive Populists as in the 1960s nor excessively permissive Chicagoists in the 1980s. James Rill, the new Chief of the Antitrust Division, and Janet Steiger, the new Chair of the FTC, began a revival of federal antitrust enforcement policy that won a broad degree of bipartisan support.”).

<sup>48</sup> See *Legends in the Law: Robert F. Pitofsky*, WASH. LAW., June 2002, at 30, 35 (interview with Robert Pitofsky):

When Bush was elected in 1988, the administration decided to take more of a middle ground. The commission didn’t go back to the overly activist period, but they weren’t going to do a minimalist number. They devised an antitrust program that was somewhere between those two. Many areas of antitrust that had not been enforced during the Reagan years were back on the agenda. Clinton antitrust was just a continuation of the Bush policies. The difference between antitrust in the Reagan and Bush years was much greater than the difference between Bush and Clinton.

See also Pitofsky, *Remedies*, *supra* note 26, at 169 (describing elements of continuity between Bush and Clinton antitrust programs).

1980s. Perhaps the Reagan Administration was a nightmare from which the country would awaken with a new commitment to enforce the anti-trust laws properly.<sup>49</sup> In 1983 one practitioner raised the possibility that the Reagan antitrust program was a jarring but predictable aberration:

I suggest to you that, like Halley's Comet, once in every 100 years, when the moon is full, we all take a binge on free market theories.

But, history tends to suggest also that we quickly are restored to some sense and to the mainstream traditions, rooted in the firm belief that our antitrust laws and similar legislation are not based only on simplistic notions about frictionless or static theories of markets . . . .<sup>50</sup>

Later in the decade, at the close of the Reagan presidency, two academics took consolation in the possibility that the Reagan antitrust program unintentionally might inspire the restoration of wise competition policy:

[T]here is reason for optimism. Eight mocking years of worshipping the golden calf, eight frenetic years of following the Wall Street ticker, eight frustrating years of government prestidigitation may yet prove to have been salutary. At times, and in a perverse way, the best way of demonstrating the foolishness of a policy is to let it hold sway—at least for a while.<sup>51</sup>

In the pendulum narrative, the anticipated renaissance comes to pass. As the narrative tells it, the Clinton administration revived the “dormant,” “moribund,” or “almost moribund” antitrust programs of the DOJ and the FTC.<sup>52</sup> The DOJ and the FTC abandoned their preoccupation with

<sup>49</sup> See Handler, *supra* note 26, at 1946 (“Let me end by expressing my confidence that a better day is ahead because the American people cherish the free enterprise system and are unwilling to have it replaced by a highly concentrated robber baron type of economy, replete with covert collusion.”).

<sup>50</sup> Stephen M. Axinn, *A Lawyer's Response*, 52 ANTITRUST L.J. 643, 643 (1983).

<sup>51</sup> Walter Adams & James W. Brock, *Reaganomics and the Transmogrification of the Merger Policy*, 33 ANTITRUST BULL. 309, 359 (Summer 1988). Not all critics of Reagan antitrust policies saw a silver lining. See Louis B. Schwartz, *Cycles of Antitrust Zeal: Predictability?*, 35 ANTITRUST BULL. 771, 796 (1990) (“The pendulum is unlikely to swing back in the years immediately ahead. Rolling back antitrust was a high priority of the Reagan administration. . . . It will be many years before the Reagan sabotage of the antitrust laws can be undone.”).

<sup>52</sup> See Thorold Barker & Hillary Durgin, *FTC Stymies BP Amoco for Bigger Slice of the Pie: US Authorities Say “Enough Is Enough,”* FIN. TIMES, Feb. 3, 2000, at 26 (“Barry Carter, a professor of law at Georgetown University, says: ‘Under the Republicans, particularly Ronald Reagan, antitrust law was almost moribund. Now it’s a renaissance of antitrust enforcement.’”); John M. Broder, *F.T.C. Rejects Deal to Join Two Giants of Office Supplies*, N.Y. TIMES, Apr. 5, 1997, at § 1, p. 1 (FTC attack on Staples/Office Depot merger “reflects a growing aggressiveness in antitrust enforcement by the F.T.C., which was relatively passive during the Bush and Reagan Administrations”); Al Kamen, *In the Loop*, WASH. POST, Aug. 4, 1993, at A15 (Robert Litan’s selection to be Deputy Assistant Attorney General for Antitrust called part of effort “to reinvigorate the long-moribund antitrust operation after the pro-trust years”); Sharon Walsh, *Antitrust Head Bingaman to Leave Post by Nov. 15*, WASH. POST, Aug. 2, 1996, at A19 (Anne Bingaman is “credited with reviving the once-moribund antitrust division of the Justice Department”); *Administration's “Hot Jobs,” Part II*, WASH.

insignificant matters and began prosecuting cases with major economic and doctrinal stakes.<sup>53</sup> As reported in *The Economist*, the pendulum came to rest at a wise equilibrium by the decade's end:

It helps that [DOJ Assistant Attorney General Joel] Klein and his counterpart at the FTC, Robert Pitofsky, have been deliberately low-key in talking about their activities, claiming that they are modest and in the mainstream of legal thought and economics. They concede that they have been more interventionist than the laissez-faire ideologues of the Reagan years, but they say they are nothing like the trust-busting zealots of the 1960s who saw evil in every big company or merger.<sup>54</sup>

Unencumbered by the ideological blinders of their predecessors and drawing upon a fresher, more sophisticated conception of industrial organization economics, the federal agencies traveled a thoughtful middle path that avoided the excesses of the 1960s, the 1970s, and the 1980s.<sup>55</sup>

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Post, Nov. 11, 1996, at A27 ("Under Anne K. Bingaman, the once moribund Antitrust Division became a hive of activity in bringing major cases against corporate giants.")

<sup>53</sup> See Balto, *supra* note 4, at 71 ("Many transactions challenged during the 1980s involved relatively small markets, or small transactions. The cases challenged in the last seven years include some of the largest mergers in history, including Staples/Office Depot, Lockheed/Martin Marietta, and SBC/Ameritech.")

<sup>54</sup> *New Enforcers*, *supra* note 22, at 80.

<sup>55</sup> See Balto, *supra* note 4, at 71; Robert Pitofsky, Chairman, Federal Trade Commission, *An Antitrust Progress Report for the FTC: Past, Present, and Future*, Remarks Before the Antitrust 1996 Conference of Business Development Associates Inc. 2 (Mar. 4, 1996) ("The Commission of the 1990s has tried to strike a middle ground between what many people believe was an excessively active enforcement in the 1960s and the minimalist enforcement of the 1980s."), available at <http://www.ftc.gov/speeches/pitofsky/speech4.htm>; Andy Ho, *Competition Laws Enhance the Magic of the Market*, STRAITS TIMES (SINGAPORE), May 31, 2001, at 16 ("From its inception in 1890 right through the 1970s, the US government challenged everything . . . ; in the 1980s, the government allowed too much consolidation to occur; and, from the 1990s, the pendulum has swung back to the middle . . ."); Skitol, *supra* note 23, at 1 (modern antitrust policy has moved "from the ultra-intrusive 'Populist School' of the 1960s and 1970s to the ultra-minimalist 'Chicago School' of the 1980s to the newly-invigorated and fresh-thinking 'Post-Chicago School' of the 1990s"); Klein *Consumer League Speech*, *supra* note 15, at 560 (reporting that Joel Klein "expressed belief that the antitrust 'pendulum' on his watch had swung back to the 'middle,' where 'big was not necessarily bad' but government prudently cracked down on anti-consumer deals and practices"); James Toedtman, *Ball Is in His Court*, NEWSDAY, June 7, 1998, at F8 (quoting Joel Klein, Assistant Attorney General for Antitrust: "The pendulum is in the middle.")

*But compare* John Bigness, *Market Applauds WorldCom; Stock Rises Amid Optimism on Deal*, CHI. TRIB., Oct. 3, 1997, Business Section, at 1 (quoting Walter Adams: "From the 1980s on . . . the regulatory agencies have behaved like tabby cats. We have antitrust laws on the books, but who the hell is enforcing them?"); Daniel Gross, *Merge & Purge*, CFO, Oct. 2000, at 98, 104 (quoting James, Love, director of the Consumer Project on Technology: "I'd say that when it comes to antitrust, the FTC has been weak."); Bitlingmayer, *supra* note 15, at 46 ("Little has changed. The antitrust experts may be having fun, but the clothes they have draped on the emperor are threadbare at best."); Jeffrey H. Birnbaum, *Washington's Most Dangerous Bureaucrats*, FORTUNE, Sept. 29, 1997, at 118, 124 ("Charles Rule, a former head of the Justice Department's antitrust division under Reagan, considers

D. DOUBTING THE CONVENTIONAL WISDOM: TOWARDS A BETTER  
INTERPRETATION OF ANTITRUST HISTORY

Astute students of antitrust history recognize that key factual assumptions of the pendulum narrative are demonstrably incorrect. For example, public enforcement in the 1960s and 1970s stemmed from considerably more than brute populism.<sup>56</sup> Many measures undertaken in the 1960s and 1970s that later were criticized as simple-minded assaults upon corporate size employed what their sponsors viewed in good faith to be mainstream economic thinking.<sup>57</sup> At no time in the 1980s did federal merger enforcement “grind to halt,”<sup>58</sup> nor was the federal government’s civil nonmerger enforcement program during the Reagan Administration “all but extinguished.”<sup>59</sup> It is a fabrication to say that federal antitrust enforcement in the 1980s “ceased.”<sup>60</sup> By themselves, the pendulum narrative’s empirical failings and unacceptably selective chronology of enforcement activity deny it interpretative validity.<sup>61</sup>

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Pitofsky’s vigorous antitrust actions ‘a swing back to what was going on in the 1960s and 1970s.’”)

<sup>56</sup> See Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, ANTI-TRUST, Spring 2003, at 61 (describing efforts during Donald Turner’s tenure as Assistant Attorney General for Antitrust from 1965–1968 to improve economic foundations of DOJ antitrust enforcement).

<sup>57</sup> 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).

<sup>58</sup> Fox, *supra* note 32, at 84. For a contemporary account documenting federal merger enforcement activities from 1981 to 1986, see Ronald W. Davis, *Antitrust Analysis of Mergers, Acquisitions, and Joint Ventures in the 1980s: A Pragmatic Guide to Evaluation of Legal Risks*, 11 DEL. J. CORP. L. 25 (1986). Well-known, doctrinally significant merger cases prosecuted by the Reagan administration include such matters as *FTC v. PPG Industries*, 798 F.2d 1500 (D.C. Cir. 1986), and *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986).

<sup>59</sup> Balto, *supra* note 4, at 63. Well-known, doctrinally significant civil nonmerger cases prosecuted by the Reagan administration include *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). See also *Interview with Timothy J. Muris*, ANTI-TRUST, Spring 1989, at 6 (describing FTC’s civil nonmerger enforcement program in the 1980s).

<sup>60</sup> Sullivan & Fickentscher, *supra* note 15, at 206.

<sup>61</sup> No historical narrative can be utterly comprehensive. The narrator inevitably “must simplify ‘reality’ by designating some elements as salient and omitting many more as not significant.” Tim Büthe, *Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence*, 96 AM. POL. SCI. REV. 481, 487 (2002). Nonetheless, systematic selectivity that seriously distorts the course of past events is the mark of an inadequate narrative:

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

*Id.* at 488.



The outright errors are so apparent to the experienced eye that one might be tempted to ignore them and assume that competition policy specialists and other constituencies properly discount them as rhetorical overstatement. At least two considerations suggest otherwise. First, it is not apparent that the necessary discounting regularly takes place. The pendulum story and its factual predicates are repeated so frequently, so currently, and with such assurance, often by leading figures in the competition policy field, that one must conclude the narrative commands a wide following. Not only does the pendulum narrative appear to be broadly accepted within the United States, it increasingly informs the views of foreign observers who are less likely, owing to more limited familiarity with U.S. antitrust history, to spot the narrative's fractured facts or question its interpretation. There is good reason to think that the pendulum narrative has become the lens through which the world's competition community understands the modern U.S. antitrust experience.

Because the narrative is accepted as an accurate positive statement of modern antitrust experience, it has genuine power to shape views about future policy making.<sup>62</sup> This power is undeserved. It is bad enough that the narrative distorts actual enforcement experience to accentuate the pendulum's movements. Worse, by obscuring the actual path of policy, the pendulum narrative impedes our understanding of how federal antitrust enforcement has developed and of what antitrust agencies must do to improve the quality of competition policy in the future.

### III. NORMS AND ANTITRUST ENFORCEMENT

What accounts for the content of federal antitrust enforcement policy? The pendulum narrative explains policy outcomes chiefly in terms of appointments to key positions in DOJ and the FTC. Virtually everything hinges on the choice of leadership. Pick a "zealot" or an "ideologue," and the antitrust system predictably generates zealous or ideologically driven results. Choose "prudent" leaders, and the agencies act sensibly. A policy-making process that conforms to this model is inherently unstable where the parties vying for control of the government have significantly different views about the correct form of antitrust enforcement and other types of public intervention in the economy. Dramatic policy adjustments are possible whenever the White House changes party hands.

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<sup>62</sup> The capacity of frequently told narratives to influence public policy despite their empirically dubious foundations is examined in David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L. REV. 797 (1998).

Setting aside the influence of competing political philosophies on public antitrust enforcement, the pendulum model raises questions about the ability of any president, Democrat or Republican, to choose wise antitrust officials. In rough terms, the pendulum narrative suggests that the federal antitrust agencies in three of the past four decades—the 1960s, 1970s, and 1980s—either indulged intemperately in intervention or inexcusably stepped aside. If federal enforcement became prudent in the 1990s simply due to success in making good appointments, how lasting is the enlightenment likely to be? How did Bill Clinton achieve the insight into good antitrust appointments that, says the pendulum narrative, escaped John Kennedy, Lyndon Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, and George Bush? Can the insight that motivated Bill Clinton's choices be transferred to other presidents? Or are the 1960s, 1970s, and 1980s more representative of the types of appointments, and more indicative of the types of antitrust outcomes, the U.S. system is likely to produce?

As documented in the literature on U.S. competition policy, presidential appointments unquestionably play a major part in shaping the federal antitrust enforcement agenda.<sup>63</sup> Yet, appointees to the DOJ and the FTC do not set policy in isolation. A variety of forces, other than the appointee's own preferences, shape the choice of enforcement matters. Among other factors, appointees are attentive to standards that have been developed by their predecessors and to the constraints imposed by external institutions, such as the courts and the Congress. Individual agency leaders can alter the agency's direction, but the degree and durability of changes introduced by any one official depend upon more than the preferences of the official's successor.

The pendulum narrative's greatest methodological weakness is its refusal to come to grips with the complex phenomena that often shape enforcement agency behavior. To understand how policy changes over time requires more than the pendulum narrative's mechanistic, appointment-centric analysis of agency decisions. It requires a fuller appreciation of the larger range of forces that influence the evolution of antitrust enforcement norms.

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<sup>63</sup> See RICHARD A. HARRIS & SIDNEY M. MIKLIS, *THE POLITICS OF REGULATORY CHANGE* 140–224 (2d ed. 1996) (describing impact of appointments to Federal Trade Commission in 1980s).

### A. THE CONCEPT OF NORMS

“Norms” are consensus views about how members of a group ought to behave.<sup>64</sup> By contrast to commands embodied in formal legal rules, norms consist of customs or standards that members of a group develop voluntarily and apply to themselves. Modern scholarship has identified many instances in which an understanding of norms can yield valuable insights about the operation of a legal regime.<sup>65</sup>

The concept of norms has useful applications to competition policy. Antitrust systems operate within a framework of statutory commands, but the legislature’s formal mandates usually give considerable discretion to other institutions to implement the formal rules. In adopting the principal U.S. antitrust laws, for example, Congress created general statutory commands and gave the federal courts responsibility for interpreting their operative terms and adjusting the content of doctrine over time.<sup>66</sup> In the U.S. system and in many other jurisdictions, enforcement agencies play a central role in determining how the commands will be applied to specific behavior. Statutes and judicial decisions (formal legal rules) define the outer boundaries of the agencies’ operations, but the agencies often develop policies or principles that lack the force of law (norms) to decide how to execute their prosecutorial discretion. The discussion below considers how enforcement norms develop and change in the U.S. antitrust system.

### B. FORCES SHAPING ANTITRUST ENFORCEMENT NORMS

Norms in antitrust enforcement take two forms. The first consists of views about the types of enforcement outputs an enforcement agency should pursue. The second consists of views about the processes by which the enforcement agencies should determine how to expend resources and identify subjects for prosecution.

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<sup>64</sup> This paraphrases the definition of norms in Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215, 218 (1994). An excellent survey of the modern legal and economic literature on norms appears in Lawrence E. Mitchell, *Understanding Norms*, 49 U. TORONTO L.J. 177 (1999).

<sup>65</sup> See David A. Hyman, *Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust “Reposed in the Workmen”*, 30 J. LEGAL. STUD. 531 (2001) (using concept of norms to examine efforts to correct fraud in U.S. health care system); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (discussing role of norms in determining how public decision makers enforce legal commands).

<sup>66</sup> See William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 295 (1992) (describing congressional delegation of interpretational authority to the courts in U.S. antitrust laws).

Norms change over time. The formulation and adjustment of norms are influenced by a variety of internal and external forces. The membership of the relevant group can change, and new members may bring with them new views about what the norms should be. Existing members of the relevant group may choose to depart from the existing norms and attempt to establish new norms as focal points for activity. Forces outside the group, such as a change in social preferences, can induce the group to change its norms.

### 1. *Forces External to the Enforcement Agencies*

A variety of external forces affects an antitrust agency's development of enforcement norms.<sup>67</sup> In the U.S. competition policy system, four sources of external influence stand out.

#### a. Congress

Congress most directly shapes agency perceptions about how to enforce the law by amending the antitrust statutes or imposing requirements through authorization and appropriations laws. Both the specific terms and larger intent of these legislative measures help define the views of enforcement officials about the types of cases and other initiatives they should pursue. Congress also conveys its views through measures falling short of statutory mandates. Congress confirms appointees to be FTC commissioners and to be the Assistant Attorney General for Antitrust and uses the appointments process to indicate its competition policy preferences. Oversight hearings and routine interaction between committees and enforcement agency leadership provide other tools for Congress to suggest what the antitrust authorities should do and should not do.<sup>68</sup>

#### b. President

The president influences the development of agency enforcement norms through the nomination of leadership for the enforcement authorities. New appointees can bring views that catalyze changes in an agency's existing internal enforcement norms. The executive also affects agency enforcement norms by preparing the budget. Increases

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<sup>67</sup> See Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 90–92 (1990) (describing institutional forces that shape enforcement agency behavior); see also JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997) (discussing external influences that affect decisions by administrative agencies).

<sup>68</sup> See William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869 (1989) (discussing influence of Congress in shaping views of FTC officials about how to exercise antitrust enforcement authority).

or decreases in outlays can affect the choice of enforcement priorities and, more generally, cause a reassessment of what the agency should be trying to accomplish.<sup>69</sup> The president's nomination of federal judges helps determine how the courts will set the doctrinal boundaries within which the agencies must operate. Note that all three of these policy instruments—agency appointments, budgeting, and judicial appointments—involve the exercise of functions shared with Congress.

### c. Judiciary

The courts play a central role in informing agency perceptions about how to exercise enforcement responsibilities. In some instances, the courts affect agency views by defining doctrine. For example, the adjustments in federal enforcement policy in the 1980s took place against a backdrop of judicial decisions that retreated from broad application of per se rules and narrowed the zone of liability involving dominant firm behavior, mergers, and vertical restraints. In key respects the agency enforcement norms advanced by William Baxter at the DOJ and James Miller at the FTC responded to trends in antitrust jurisprudence that had begun to unfold in the 1970s well before their appointments.<sup>70</sup> Before Baxter and Miller took their posts in 1981, the federal agencies

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<sup>69</sup> For example, in the 1980s the budgets for antitrust enforcement by the DOJ and the FTC fell by roughly half. See William E. Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration*, 33 ANTITRUST BULL. 467, 485 (1988). Particularly at the FTC, this coincided with the conclusion of the major campaign of abuse of dominance cases the FTC had initiated in the 1970s. Commentators have pointed to these cuts as evidence of the Reagan administration's disregard for competition policy. Assessing the wisdom of the budget reductions in the 1980s requires evaluating the desirability of the types of cases to which the expanded resources of the 1970s had been applied. The budget cuts may seem less sinister if viewed as part of a general reassessment of the agencies' role in dealing with dominant firm issues.

<sup>70</sup> See Richard M. Steuer, *The Turning Points in Distribution Law*, 35 ANTITRUST BULL. 467, 467–68 (1990):

Afficionados of antitrust know that what commonly is called the Reagan Revolution in antitrust really began years before President Reagan took office. A shift in philosophy first appeared in the mid-1970's, in some pivotal decisions of the United States Supreme Court and the lower federal courts. These decisions, notably *General Dynamics* in the field of mergers, and then *Sylvania* in the field of distribution, signaled an end to the "go-go" era of antitrust that had begun in the 1960's.

See also Terry Calvani & Michael L. Sibarium, *Antitrust Today: Maturity or Decline*, 35 ANTITRUST BULL. 123, 174 (1990) ("Both supporters and critics of the Reagan years have attributed the dramatic changes in antitrust to the policies ushered in by the 1980 change in administrations. . . . [T]he most significant changes have been in the case law . . . , much of which predates the Reagan era."); Skitol, *supra* note 23, at 248 ("[W]hile the 'Populist School' of antitrust thinking was in ascendency at both the Supreme Court and the enforcement agencies throughout the 1960s, and remained very much alive at the agencies throughout the 1970s, something quite different was taking hold at the Supreme Court as the 1970s unfolded.").

had begun to reconsider prevailing enforcement norms that the judicial loosening of liability standards had called into question.<sup>71</sup>

The courts affect agency norms other than by redrawing formal doctrinal boundaries. The overall tone and philosophy of specific decisions can reveal judicial preferences as much as the technical holding of a case. In 1977, two memorable Supreme Court decisions announced, respectively, that the antitrust laws protect “‘*competition*, not *competitors*’”<sup>72</sup> and said that departures from rule of reason analysis must be based on “demonstrable economic effect.”<sup>73</sup> The statements embodied a formal legal rule and a norm of decision making. In *Brunswick*, the admonition about “competition, not competitors”<sup>74</sup> articulated the antitrust injury requirement (the formal legal rule) and told courts and enforcement agencies to be skeptical about claims that seem to equate harm to a single firm with injury to the competitive process (the norm). In *Sylvania*, the “demonstrable economic effect” language<sup>75</sup> helped anchor the Court’s holding that a reasonableness standard governed nonprice vertical restraints (the formal legal rule) and indicated that the inquiry in antitrust cases must focus on microeconomic analysis in resolving antitrust disputes (the norm).

Another category of important non-doctrinal judicial pronouncements consists of statements that reflect the view of courts about the capability and quality of antitrust enforcement institutions. One cannot assess the redirection of federal enforcement policy in the 1980s without accounting for the doubts that courts in the 1970s and 1980s had expressed about the institutional capability of the FTC. A number of appellate decisions in FTC cases in the late 1970s and early 1980s demonstrated an evident lack of deference to the Commission’s decision making,<sup>76</sup> especially when the agency invoked Section 5 of the FTC Act to

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<sup>71</sup> See Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 707–07 (1990) (adjustments in DOJ enforcement policy in 1970s “led quite naturally into the somewhat broader efforts of William Baxter and his successors”).

<sup>72</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 320 (1962)).

<sup>73</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977).

<sup>74</sup> *Brunswick*, 429 U.S. at 488.

<sup>75</sup> *Sylvania*, 433 U.S. at 58–59.

<sup>76</sup> See, e.g., *Fruehauf Corp. v. FTC*, 603 F.2d 345 (2d Cir. 1979) (overturning FTC decision to block vertical merger); *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982) (overturning FTC decision to block merger based on potential competition theory); *Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256 (8th Cir. 1983) (overturning FTC effort to confine reach of *Colgate* exception to per se ban on resale price maintenance).

extend the frontiers of antitrust doctrine.<sup>77</sup> No FTC official could have read the words and the “music” of appellate oversight of the Commission in this period without noticing that something was seriously wrong and required correction if the agency was to remain a credible force in the adjudication of antitrust disputes.

In the late 1970s and the 1980s, the courts less frequently called DOJ’s judgment into question. Yet there are notable instances in this period in which judges not only rejected DOJ’s technical analysis but also belittled the Antitrust Division. It was surprising enough that a court of appeals would issue a decision so laden with ridicule as *United States v. Syufy Enterprises*.<sup>78</sup> It was still more striking when a unanimous panel of the D.C. Circuit, including future Supreme Court Justices Ruth Ginsburg and Clarence Thomas, later concluded its opinion in *United States v. Baker Hughes, Inc.*<sup>79</sup> by quoting with approval one of *Syufy*’s most pointed jabs at the government.<sup>80</sup> These were signals that enforcement officials could not, and did not, ignore in deciding how to execute their duties.<sup>81</sup>

#### d. Commentary

The development of public enforcement policy depends in part on the interaction of enforcement agencies with various external observers who comment upon the work of the federal agencies. These observers include academics, bar associations, business groups, and consumer organizations.<sup>82</sup> Commentary from non-government outsiders can affect the

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<sup>77</sup> See, e.g., *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980) (overturning FTC decision using Section 5 of FTC Act to ban firm with monopoly power in one market from unjustifiably discriminating in treatment of firms in separate market); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (overturning FTC decision using Section 5 to proscribe noncollusive, parallel adoption of delivered pricing formula); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (overturning FTC decision using Section 5 to ban parallel, noncollusive adoption of various facilitating practices).

<sup>78</sup> 903 F.2d 659 (9th Cir. 1990). The Ninth Circuit’s opinion in *Syufy* portrays DOJ’s decision to prosecute as being virtually irrational. See *id.* at 672 (“It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources.”).

<sup>79</sup> 908 F.2d 981 (D.C. Cir. 1990).

<sup>80</sup> *Id.* at 992 & n.13 (quoting *Syufy*).

<sup>81</sup> See Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189 (2003) (discussing how 1992 DOJ and FTC Merger Guidelines responded to developments in courts and commentary); David T. Scheffman, *Ten Years of Merger Guidelines: A Retrospective Critique, and Prediction*, 8 REV. INDUS. ORG. 173, 177 (1993) (federal government’s losses in merger cases in 1980s “had a sobering effect on the [Antitrust] Division and on the FTC, leading them to review the extent of their reliance on concentration”).

<sup>82</sup> See ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 61–69 (2002)

exercise of enforcement discretion by the federal agencies and influence the views of other bodies, including Congress, the courts, and the Executive Branch, about the appropriate content of competition policy.<sup>83</sup>

### 2. *Forces Internal to the Enforcement Agencies*

The content of agency enforcement norms also is a function of measures that do not involve commands or proposals by external bodies and are best described as internally generated. An agency's norms might change owing to research that the agency has performed about the execution and effects of past enforcement measures. For example, by studying the consequences of past antitrust intervention, an agency might change its views about what types of remedial aims and techniques it should use in future cases.<sup>84</sup> Other adjustments in norms can take place by reason of changes in institutional design that affect the agency's outputs by magnifying or reducing the contributions of specific constituencies inside the agency. The elevation within the Antitrust Division and the FTC in the 1970s of the role of economists in the decision to prosecute has exerted important effects over time in the agencies' conception of how they should use their enforcement powers.<sup>85</sup>

## C. EVOLUTIONARY QUALITY OF ENFORCEMENT NORMS

Whatever the exact process of change, antitrust enforcement norms are certain to change over time. This flows inexorably from the inherently

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(discussing influence of views of different schools of economic commentary on public enforcement and judicial decision making).

<sup>83</sup> See *infra* notes 247–48 and accompanying text (views of academics about appropriate antitrust response to economic concentration influenced federal antitrust enforcement norms of 1970s, including prosecution of shared monopoly and monopolization cases); see also Jonathan B. Baker, *Policy Watch: Developments in Antitrust Economics*, 9 J. ECON. PERSP. 181, 181 (1999) (observing that “During the late 1970s and 1980s, the federal courts transformed antitrust rules and the federal enforcement agencies altered their case selection criteria in response to theories developed by industrial organization economists.”; reviewing how federal enforcement policy in 1990s reflected subsequent developments in antitrust economics); John DeQ. Briggs & Stephen Calkins, *Antitrust 1986–87: Power and Access (Part I)*, 32 ANTITRUST BULL. 275, 326 (1987) (“Developments in academia made possible the ‘Reagan Revolution’ in antitrust . . .”).

<sup>84</sup> Examples include the FTC's impact evaluations of various competition cases from the 1970s and its study in the 1990s of remedies imposed in merger cases. These and other initiatives are discussed in William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 853–54 (2001).

<sup>85</sup> The pendulum narrative tends to disregard antitrust agency institutional developments in the 1970s that foreshadowed and facilitated enforcement adjustments in the 1980s. Pendulum narrators often speak of the Reagan era as a self-contained period with no connection to the previous decade. See Sullivan & Fikentscher, *supra* note 15, at 206 (“Change—indeed a revolution in enforcement policy—began with the election of President Reagan in 1981.”). This interpretation overlooks institutional changes in the 1970s



evolutionary character of competition policy.<sup>86</sup> Whatever their specific institutional design, most competition systems share a basic characteristic that entails inevitable adjustments in policy over time. To a degree unmatched in other fields of economic regulation, the elaboration of antitrust doctrine draws upon the contributions of economic theory. In antitrust practice, economic analysis plays a central role in resolving such key antitrust issues as delineating the relevant market and assessing the efficiency consequences of various forms of business behavior.<sup>87</sup>

The history of industrial organization economics has featured considerable change and refinement in the understanding of commercial phenomena.<sup>88</sup> Advances in economic learning can alter formal legal doctrines and enforcement policies. Empirical research, including the analysis of past antitrust cases, has spurred developments in industrial organization theory and adjustments in antitrust doctrine and enforcement policy.<sup>89</sup> The evolutionary character of competition policy means that views about what constitutes a good public enforcement program will change over time as understanding about the operation of the economy grows.

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that supplied an important foundation for the redirection of enforcement in the 1980s. See MARC A. EISNER, *ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE* 119–83 (1991) (describing importance of institutional changes at DOJ and FTC in 1960s and 1970s that gave economists more prominent role in the agencies' decision making).

<sup>86</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (describing Supreme Court's distinctive role under antitrust statutes "in recognizing and adapting to changed circumstances and the lessons of accumulated experience"); *PolyGram Holding, Inc.*, FTC Docket No. 9298, at 13 (July 24, 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf> (courts and FTC have refined operational content of antitrust laws over time "to account for insights gained from adjudication experience and from developments in economic and legal learning"); see also Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 981 (1987) ("The weakness of the common law approach to antitrust is its uncertainty; its strength is its adaptability and thus survivability.").

<sup>87</sup> See Jonathan B. Baker, *Preface to Post-Chicago Economics*, in *POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW* 60 (Antonio Cucinotta et al. eds., 2003) (analyzing process by which developments in economic learning are absorbed into antitrust jurisprudence and enforcement policy); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000) (describing influence of economic analysis on development of antitrust legal doctrine since 1890 in the United States).

<sup>88</sup> See Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659, 680 (2001) ("[A]s the literature in economics shows, economists often take decades to understand certain business practices.").

<sup>89</sup> See *State Oil*, 522 U.S. at 15–18 (reviewing how "a considerable body of scholarship discussing the effects of vertical restraints" influenced judicial reassessment of the per se ban on maximum resale price maintenance); see also Timothy J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 903–07 (2001) (describing impact of developments in industrial organization economics on federal merger enforcement policy).

As the state of economic knowledge improves, one would expect adjustments in enforcement policy. In some instances, such adjustments inevitably will involve exercises of prosecutorial authority that either seek to extend the reach of existing doctrine or decline to make full use of enforcement possibilities presented in judicial precedent. In discussing the rationale for refusing to enforce overinclusive liability rules, Donald Turner, who served as Assistant Attorney General for Antitrust from 1965 to 1968, has observed:

[I]t is a proper approach of government enforcement agencies not to bring cases solely on the basis that they would be upheld because of past precedents, but on the basis that they should be upheld because they rest on interpretations of antitrust law that reflect a clearly sound economic analysis of the competitive pros and cons of the conduct in question.<sup>90</sup>

Good enforcement practice requires continuing reassessment of the economic foundations of specific interpretations of the antitrust statutes. It is unremarkable that the mix of enforcement outputs would change over time.

In a very rough and aggregate manner, the evolution of enforcement norms can be observed in Appendix A, which tabulates all FTC nonmerger enforcement cases from 1961 through July 2003. From 1961 through the mid-1970s, the FTC nonmerger enforcement program emphasized distribution practices (Robinson-Patman Act and vertical restraints cases) and monopolization and attempted monopolization cases. Beginning in the late 1970s and continuing to the present, horizontal restraints cases assume preeminence. In general terms, this reflects the influence of judicial doctrine and commentary that endorsed a norm grounded in Chicago School perspectives about the appropriate focus (horizontal restraints) for competition policy. In the 1990s, the FTC adds more vertical and Section 2 claims to the mix, but the baseline of activity does not depart significantly from the approach that began to emerge in the late 1970s and is accentuated in the 1980s.

#### D. CONSTRAINED CONTINUITY MODEL FOR THE EVOLUTION OF NORMS

The development of U.S. antitrust policy does not fit the pendulum narrative's simple pattern of mechanical swings between extremes of activity and inactivity followed by a (largely unexplained) attainment of a "centrist" balance. The U.S. experience since 1960 instead is the prod-

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<sup>90</sup> Donald F. Turner, *The Virtues and Problems of Antitrust Law*, 35 ANTITRUST BULL. 297, 297-98 (1990).

uct of more complex patterns of thinking and activity. Focusing more carefully on the often multi-faceted patterns of policy affords a better sense of how federal antitrust enforcement has unfolded and of the intellectual developments behind the policies.

In many areas of federal enforcement, the evolution of norms has proceeded through incremental adjustment rather than dramatic swings. This suggests a model of constrained continuity. The constrained continuity model is more faithful to actual data on enforcement activity, examined below in Section IV, and better accounts for the constraints identified above. In particular, the model accounts for the “equilibrating tendencies” by which forces inside and outside the antitrust agencies motivate and moderate changes in the content of U.S. competition policy.<sup>91</sup> Compared to the pendulum narrative, the constrained continuity model has several identifying characteristics.

#### a. Cumulative Versus Discontinuous Policy Making

In the pendulum narrative, norms change abruptly from period to period. Discontinuities typically are attributed to changes in political ideology that are imparted to the agencies through each president’s appointments to leadership positions at the DOJ and the FTC.

The constrained continuity model depicts policy development as ordinarily being cumulative and progressive. Dramatic adjustments sometimes take place, but they ordinarily are not followed by dramatic changes that entirely or largely restore the status quo ante. Where major discontinuities are observed, the constrained continuity model considers explanations that go beyond changes in political leadership alone. Among other factors, the constrained continuity model considers whether a notable change in policy reflects constraints imposed by forces outside the enforcement agency or reflects learning obtained from enforcement experience in an earlier period.

In this model, new ideas or theories can modify, sometimes dramatically, an existing intellectual framework, but the “new” idea often has antecedents in earlier thinking. The intellectual status quo at any moment usually reflects a synthesis of older and newer thinking rather than a wholesale displacement of earlier perspectives.<sup>92</sup> Even ideas that

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<sup>91</sup> The concept of “equilibrating tendencies” and its application to U.S. competition policy originate in the work of Stephen Calkins. See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

<sup>92</sup> See Gavil, *supra* note 10, at 217–18 (“Antitrust is not a ‘pendulum’ swinging to and fro between polar ideologies. . . . Instead, antitrust advances in cycles, with each cycle building upon the strengths and tempering the excesses of preceeding cycle.”).

appear discredited by new learning may reemerge in the future, perhaps reformulated in some fashion.<sup>93</sup> The evolution of antitrust enforcement does not feature a simple, clean, pendular movement from one method of analysis to another. Rather, we are likely to observe a number of patterns—some that coincide, others that diverge.<sup>94</sup>

#### b. Understanding Policy Developments in Context

The pendulum model often attributes seemingly extremist policy outcomes to irrational decision making. In the 1960s and 1970s, stringent controls on mergers and active prosecution of deconcentration lawsuits are said to stem from an atavistic fear of corporate size. In a similar vein, federal enforcement approaches in the 1980s are said to be driven by an unthinking, nonintervention ideology and blind faith in the efficacy of market processes.

The constrained continuity model treats these characterizations suspiciously. The constrained continuity approach is particularly wary of the pendulum narrative's tendency to depict the enforcement choices of antitrust officials as being so contrary to sensible practice that they appear to be irrational. Too often the pendulum narrative substitutes stereotypes and strawmen for a serious effort to consider the context in which decisions were taken or to understand the rationale for individual policy choices. By offering simple-minded caricatures, the pendulum narrative "fails to capture the intellectual development which actually occurred."<sup>95</sup> As one business historian has observed, "[i]ndividual regulatory experiments and episodes must be judged against a standard true to the particular historical moment."<sup>96</sup>

#### c. Big Cases Versus Small Cases

With its emphasis on dramatic adjustments in policy and apparently spectacular enforcement events, the pendulum narrative tends to measure accomplishments in terms of "big cases"—matters that either involve major challenges to large, well-known business enterprises or result in high-profile remedies, such as the recovery of large monetary

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<sup>93</sup> See DUXBURY, *supra* note 5, at 2–3 ("Ideas—along with values, attitudes and beliefs—tend to emerge and decline, and sometimes they are revived and refined. But rarely do we see them born or die. History is not quite like that.").

<sup>94</sup> Compare *id.* at 3 (describing how use of "pendulum swing vision of American jurisprudential history" mistakenly describes developments in U.S. thought in terms of a "fairly simple pattern"; arguing that American jurisprudence since 1870 "does not conform to this pattern but displays a variety of patterns").

<sup>95</sup> *Id.* at 5.

<sup>96</sup> THOMAS K. McCRAW, *PROPHETS OF REGULATION* 308 (1984).

penalties or the restructuring of large firms. This perspective generally regards cases brought against smaller firms as unimportant.

Due to its emphasis on the cumulative, progressive nature of policy making, the constrained continuity model is more cautious in discounting the significance of the “small case.” In the constrained continuity model, big cases and small cases both can play important roles in achieving a key goal of antitrust policy—effective deterrence of violations. Cases brought against smaller commercial interests can serve valuable ends. The “small” case can be a platform for testing a legal theory that makes “big” law or facilitates the prosecution of a “big” case. Even when it does not yield a noteworthy adjustment in antitrust doctrine, a collection of smaller cases can help develop political and social acceptance for certain types of future enforcement.

#### d. Sensitivity to Institutional Capability

The pendulum narrative explicitly and implicitly tends to measure enforcement effectiveness by the number of high-profile matters pursued by the federal agencies. The corollary is that a relative paucity of high-profile matters can be explained only as a function of ideological rigidity or frail political will.

The constrained continuity model measures enforcement effectiveness in part by assessing the extent to which enforcement agencies avoid substantial mismatches between prosecutorial commitments and their institutional capability to execute cases competently. As a rough rule of thumb, the constrained continuity model holds that it is better for an agency to do a smaller number of cases well than to do a large number of cases poorly.<sup>97</sup>

#### e. Attention to Long-Term Consequences

The pendulum narrative tends to explain enforcement in any single period as the consequence of policy choices by incumbent decision makers. Enforcement periods are treated as watertight compartments in which visible outputs in any one period—cases won or cases lost—are attributed to the efforts of incumbent managers.

The constrained continuity model emphasizes how the decisions of incumbent managers influence policy outputs in future periods. Incumbent managers have considerable ability to impose positive and negative

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<sup>97</sup> 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) (examining institutional capability explanations for variations in antitrust enforcement levels).

externalities upon their agencies in the future. An incumbent manager can impose positive externalities upon her successors by investing in institution building and case development efforts that facilitate policy success in future periods. Incumbent officials can impose negative externalities by initiating cases whose announcement generates favorable publicity for the incumbent—such as raising the incumbent’s professional visibility or enhancing a reputation for activism—but saddles future officials with matters that are likely to fail in the courts or yield indeterminate results. A normative proposition that emerges from the constrained continuity model’s concern with long-term consequences is that incumbents be evaluated by their propensity to invest in activities that maximize positive externalities for their agencies and minimize negative externalities.

Encouraging public officials to give proper attention to the long-term consequences of their acts is a considerable challenge. To emphasize the distinctiveness of one’s tenure, a public official might be inclined to invest in activity that generates immediate, appropriable returns. As George Hay has observed, it is not a well-developed norm of public administration that an official should take satisfaction in the diligent stewardship of measures initiated by one’s predecessor:

No one likes to give speeches without having something to say, and a speech which simply says “business as usual,” or even “we are going to work hard and do an even better job on the usual matters,” is not likely to make the evening news, however reassuring such a pronouncement might be to the audience or the business community at large.<sup>98</sup>

The constrained continuity model predicts that the overall quality of public enforcement will improve when government officials are encouraged to embrace a norm that approves resistance to the impulse that Professor Hay describes.

#### f. Experimentation

The pendulum narrative derives its power from depicting extremes in activity and changes from one state to another. As suggested above, it attributes adjustments almost exclusively to changes in political leadership.

The constrained continuity model recognizes that antitrust policy making has a substantial experimental quality—that officials identify the “right” mix of cases over time by experimenting with different theories

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<sup>98</sup> George A. Hay, *Innovations in Antitrust Enforcement*, 64 ANTITRUST L.J. 7, 7 (1995).

and enforcement methods.<sup>99</sup> Experimentation sometimes involves bringing cases of a sort not previously prosecuted; in other instances, the experiment entails withholding prosecution for a matter that might have been challenged in the past. The constrained continuity model accepts the necessity of ongoing experimentation as a means of calibrating policy.

g. Ex post Assessment

The pendulum narrative tends to focus on the decision to prosecute as the measure of enforcement activity. Agencies are credited or criticized according to the number and type of cases they prosecute rather than the consequences of such cases.

The constrained continuity model pays greater attention to prosecutorial outcomes. The model seeks to assess the agency's success in attaining successful doctrinal and remedial outcomes. As a normative matter, the constrained continuity model places greater weight upon investments in effort to evaluate outcomes after the fact. A program of conducting routine evaluations of past enforcement measures provides an essential ingredient for deciding which policies to pursue in the future.

#### IV. THE DEVELOPMENT OF MODERN U.S. ANTITRUST ENFORCEMENT NORMS: 1961 TO 2000

This section examines U.S. federal antitrust enforcement activity from 1961 to 2000. The period for discussion coincides with the period featured in the pendulum narrative. The treatment of enforcement activity is organized by areas of enforcement.

A key methodological question requires consideration at the outset: How should enforcement activity be measured? By raw counts of cases? By some measure of actual consequences—in effects on doctrine or on market performance—of cases prosecuted? By some evaluation of the effects of decisions not to prosecute? Are cases prosecuted the only suitable measure of enforcement activity? Should a recital of activity include a survey of how the federal agencies used non-litigation instruments (e.g., advocacy filings before other government authorities, hearings, guidelines, reports) to shape policy? What about the amount and quality of agency investments in institutional improvements that facilitate

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<sup>99</sup> In discussing the remedy the FTC accepted in 1975 to resolve its monopolization case against Xerox, Willard Tom uses the language of experimentation. After recounting the origin of the remedy, Tom asks: "What are we to make of this naked, but apparently highly successful, experiment in social engineering?" Willard K. Tom, *The 1975 Xerox Consent Decree: Ancient Artifacts and Current Tensions*, 68 ANTITRUST L.J. 967, 979 (2001).

the successful prosecution of future cases? A proper assessment of agency performance would employ all of the quantitative and qualitative criteria suggested in these questions.

This article focuses mainly on the initiation of nonmerger cases in discussing the evolution of antitrust enforcement norms. It is important to underscore five basic limitations of using this measure of activity.<sup>100</sup> First, raw case counts say little about the qualitative effects of individual decisions to prosecute or not prosecute. It is difficult to evaluate performance without knowing the actual economic impact of cases initiated, or the likely economic consequences of foregoing prosecution (e.g., allowing a merger to proceed without challenge) in specific instances.

Second, for a number of enforcement matters it can be difficult to allocate responsibility across administrations. A case filed by an incumbent antitrust official may have originated in an investigation commenced years earlier by the predecessor administration. This is most evident in the counting of cases filed soon after a new president takes office but before the president appoints new leadership at the DOJ or the FTC.<sup>101</sup> The circumstance also occurs in matters involving lengthy, pre-complaint investigations that span two presidential administrations.<sup>102</sup> A fully accurate profile of case-related activity would need to identify not only the date on which cases were filed but also the date on which the agency decided to initiate the inquiry that led to the decision to prosecute. Moreover, the litigation of a number of matters crosses administration boundaries. Several cases discussed in this article, such as the DOJ prose-

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<sup>100</sup> On the problems associated with using the number of cases filed or litigated as a measure of the adequacy of antitrust enforcement, see White, *supra* note 12, at 12–14; Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Survey*, 17 REV. INDUS. ORG. 75 (2000); Leary, *supra* note 9, at 121–26; Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970).

<sup>101</sup> One example of this type of matter is *United States v. Kentucky Utilities Co.*, [1980–1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,081 (D. Ky. filed Feb. 26, 1981). This § 2 matter was filed following Ronald Reagan's inauguration but before the arrival of William Baxter as Reagan's first appointee to head the DOJ's Antitrust Division. In a technical sense, this is a "Reagan administration" case, but the decision to prosecute did not reflect any contribution by the policy maker (Baxter) most closely associated with Reagan's antitrust program.

<sup>102</sup> How, for example, should one assign responsibility for the federal government's monopolization case against Microsoft? The Justice Department brought two § 2 matters involving Microsoft in the 1990s. At least the first of these matters originated in an FTC inquiry that led to a 2–2 deadlock on the Commission in 1993 concerning the filing of a complaint against the computer software company. See Jim Erickson, *Justice Picks Up Microsoft Case; The FTC Closes Its Investigation*, SEATTLE POST-INTELLIGENCER, Aug. 21, 1993, at B4.



cution of AT&T for illegal monopolization, involved major contributions from several administrations.<sup>103</sup>

Third, case counts alone tell us little about the external and internal dynamics that might account for changes in enforcement norms that guide the choice of matters. For example, the pendulum narrative suggests that the federal antitrust agencies severely reduced the number of new monopolization and attempted monopolization cases in the 1980s simply because Chicago School teaching discouraged such matters. This explanation overlooks the possibility that, at least to some degree, the reluctance to bring such cases also was a reasonable response to developments in the courts, including adverse results in a number of government Section 2 matters initiated in the 1970s.<sup>104</sup>

Fourth, the level of merger enforcement affects the level of effort devoted to nonmerger matters. For example, the merger wave of the 1990s required the federal agencies to commit considerable resources to merger control. Had transactions proceeded at a slower pace, it is possible that the Clinton appointees to the DOJ and the FTC might have focused more resources on cases involving conduct—e.g., vertical contractual restraints—that the Reagan administration seldom intervened to challenge.

Finally, a methodology that focuses on the initiation of cases invariably assumes that cases prosecuted constitute the best measure of a competition policy agency's effectiveness. By this calculus, engaging in non-litigation strategies, such as advocacy and research, might be seen as an inherently inferior use of resources. An advocacy project that saves consumers large sums by forestalling the adoption of a statute that would restrict entry might be worth, in total social welfare terms, as much as bringing a new case, but a case-oriented evaluation methodology would ignore such contributions. Likewise, a long-term investment in building institutional capacity that would increase the agency's ability to pursue good cases and other competition policy initiatives might fall through the cracks of a system that only measures the number of new cases.

Though this article does not present a comprehensive portrait of agency performance, it does try to look behind raw case totals to consider the qualitative results of enforcement policy and to explain adjustments

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<sup>103</sup> See *infra* notes 287–91 and accompanying text (discussing the prosecution and resolution of the AT&T case).

<sup>104</sup> See *infra* Part IV.D.1 (discussing possible institutional explanations for reduction of government § 2 cases in 1980s).

over time. The discussion below identifies four basic patterns in federal antitrust enforcement norms from 1961 through 2000: progressive contraction (Robinson-Patman matters), progressive expansion (criminal and civil horizontal restraints), contraction followed by stabilization (mergers), and contested norms (abuse of dominance and vertical contractual restraints). In none of these areas, I argue, does enforcement policy conform to the pendulum narrative's pattern of wild, irrational swings to extremes from the 1960s through 1980s before a sensible moderation sets in during the 1990s. Even variations in enforcement in areas characterized by what I call contested norms, if studied carefully, either do not involve wild swings in activity or have explanations other than the simple displacement of one tunnel-visioned ideology by another.

#### A. ENFORCEMENT NORMS ILLUSTRATING PROGRESSIVE CONTRACTION: ROBINSON-PATMAN ACT

The Robinson-Patman Act (RP) forbids various forms of price discrimination.<sup>105</sup> Since enactment of the measure in 1936, the statute and its enforcement have attracted greater hostile commentary than any other substantive command in the U.S. competition policy system.<sup>106</sup> Despite intense criticism, Congress has not repealed the statute or seriously considered doing so.

Though the statute has remained essentially the same since its adoption in 1936 and throughout its subsequent implementation, federal enforcement activity has fallen dramatically over the past forty years. The progressive contraction of activity does not conform to the "U"-shaped curve usually featured in the pendulum narrative. Some versions of the pendulum narrative have recited the reduction in federal RP enforcement activity in the 1980s as one item of proof showing excessive permissiveness by the Reagan antitrust agencies.<sup>107</sup> Yet the Clinton FTC initiated fewer RP cases (one) from 1993 through 2000 than the federal authorities had begun in any eight-year period since 1936. Federal RP activity did not swing between vastly different levels of enforcement, but instead declined steadily from 1970 to 2000.

Table 1 below presents the number of Robinson-Patman Act cases filed by the FTC from 1961 to 2000.<sup>108</sup> The table records the number of

<sup>105</sup> The Robinson-Patman Act's principal provisions are codified at 15 U.S.C. §§ 13-13a.

<sup>106</sup> See Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 770-72 (1991) (describing scholarly views of aims and effects of government Robinson-Patman enforcement).

<sup>107</sup> See Pitofsky, *supra* note 44.

<sup>108</sup> The Justice Department has brought no RP cases since initiating a small number of RP matters in the early 1960s. See Kauper, *supra* note 67, at 99 (during Kauper's tenure

complaints issued in the period indicated. Some matters took the form of consent decrees; others were litigated on the merits.

**Table 1**  
**FTC Robinson-Patman Act Enforcement Actions—1961 to 2000**<sup>109</sup>

<i>President</i>	<i>Number of Complaints Issued</i>	<i>Matters Per Year</i>
Clinton (1993–2000)	1	0.125
Bush (1989–1992)	0	0
Reagan (1981–1988)	5	0.625
Carter (1977–1980)	8	2.0
Nixon/Ford (1969–1976)	41	5.125
Kennedy/Johnson (1961–1968)	518 (134)	64.75 (16.75)

Counting RP cases requires several judgment calls. Perhaps the most important is whether to treat selected, industry-wide enforcement projects as one case, or to treat all consent decrees or other enforcement actions taken pursuant to the industry-wide project as separate enforcement events. During the Kennedy and Johnson administrations, the FTC undertook major industry-wide initiatives involving the citrus and apparel industries. One citrus initiative yielded 45 consent decrees, and the Commission conducted apparel industry sweeps that yielded batches consisting of 163 matters, 27 matters, 33 matters, and 56 matters. If one treats each large grouping of consents as one matter, one generates the total of 134 RP cases for the period. If one treats each consent as a separate event, the number of matters is 518.

The matters presented in Table 1 are organized by presidential administration. The grouping of matters does not track the tenure of Reagan appointees at the FTC. Reagan's first appointee to the Commission, James C. Miller III, did not begin his term as FTC chairman until September 30, 1981. Between Ronald Reagan's inauguration in January 1981 and Miller's arrival at the FTC, the Commission accepted consent orders in two RP matters<sup>110</sup> and initiated a matter that was resolved by a settlement in 1983.<sup>111</sup> Table 1 includes all of these matters in the Reagan totals,

as Antitrust Division head in 1970s, "the Division used its understanding with the FTC that the latter would be responsible for government enforcement of the Robinson-Patman Act to avoid any involvement under a statute it thought economically unwise"). Table 1 presents data only involving the FTC, which has provided the federal enforcement presence since the early 1960s.

<sup>109</sup> The data for Table 1 are derived from the CCH Trade Regulation Reporter looseleaf service and transfer binders on *FTC Complaints, Orders, Stipulations* for 1961 through 2000.

<sup>110</sup> Miles Labs., Inc., 98 F.T.C. 29 (1981); YKK (U.S.A.) Inc., 98 F.T.C. 25 (1981).

<sup>111</sup> Gillette Co., 102 F.T.C. 1351 (1983).

even though Miller was not involved in accepting the consent orders in 1981 nor in commencing the third matter that ultimately was settled during his tenure.

However one resolves issues of classification, the enforcement data from 1961 to 2000 reveal a striking change in the FTC's norm for enforcing the Robinson-Patman Act. After a robust period of activity in the 1960s, FTC enforcement declines progressively over the next three decades. The Nixon and Ford FTC shifted resources away from RP enforcement and increased scrutiny of dominant firm behavior, vertical restraints, and some horizontal behavior. During Jimmy Carter's presidency, the agency initiated an average of two RP matters per year. The Commission announced five matters during the Reagan administration, including a much-publicized action involving the book publishing sector<sup>112</sup> issued during the chairmanship of Daniel Oliver. The FTC issued no RP cases during the chairmanship of Janet Steiger, who was appointed by George Bush in 1989, and continued as Chair until Bill Clinton's first appointee to that post, Robert Pitofsky, took office on April 12, 1995. Under Pitofsky's chairmanship, the FTC initiated one new RP matter (*McCormick*<sup>113</sup>), a consent decree accepted in 2000, and dismissed the RP case begun during the Oliver chairmanship. Thus, from the initiation of the book publishing case in 1989 until the consent decree in *McCormick* in 2000, the Commission issued no RP matters.

This history illustrates how an antitrust enforcement norm changes over time. The acceptance of a norm of limited activity can be inferred not only from enforcement patterns, but also from the statements of FTC leaders indicating that the antitrust community should not regard the amount of contemporary federal RP enforcement outputs as remarkable.<sup>114</sup>

Why did the RP enforcement norm change within the FTC? Congress did not alter the relevant statute, and there is no observable evidence that Congress or its committees told the FTC that the Commission could

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<sup>112</sup> Harper & Row Publishers, Inc., 122 F.T.C. 113 (1996) (dismissing complaint charging six of the largest U.S. book publishers with unlawful price discrimination).

<sup>113</sup> McCormick & Co., [FTC Complaints & Orders 1997–2001 Transfer Binder], Trade Reg. Rep. (CCH) ¶ 24,711 (2000).

<sup>114</sup> Soon after the Commission announced its *McCormick* settlement in 2000, the agency's first RP complaint since 1989, FTC Chairman Robert Pitofsky gave a tongue-in-cheek explanation for the decision to prosecute: "I only voted for that case," Pitofsky explained during a panel discussion at the Annual Spring Meeting of the American Bar Association's Section of Antitrust Law, "because I couldn't bear to come back here for a fifth year and say that Robinson-Patman enforcement was imminent. Some of you might have said I was losing credibility." *Roundtable Conference with Enforcement Officials*, 68 ANTITRUST L.J. 581, 611 (2000).

dispense with RP enforcement. Several phenomena explain the change of the FTC's enforcement norm:

- (1) *Consensus of Commentators*. Extensive, repeated criticism of the RP statute and enforcement patterns through the 1960s suggested that the consensus within the larger community of antitrust academics and practitioners favored retrenchment.<sup>115</sup>
- (2) *Consensus of Key Agency Appointees*. Beginning with the selection of Miles Kirkpatrick as FTC Chair in 1970, presidents from Richard Nixon through Bill Clinton appointed leaders who either doubted the value of robust RP enforcement or believed that other applications of the agency's enforcement resources promised greater returns. At the Commission level and in the agency's operating bureaus, the injection of new members into the agency's policy-making group caused the group to reconsider the RP enforcement norm that had prevailed in the 1960s.
- (3) *Judicial Interpretation*. The formal rulings and the perspective of contemporary court decisions forced FTC leadership to reassess the RP enforcement norm. The federal courts in the 1970s and 1980s imposed greater burdens on plaintiffs seeking to establish liability under the RP statute. Courts toughened standards that plaintiffs must satisfy to prevail,<sup>116</sup> and the Commission's own experience in defending RP administrative decisions in the 1980s showed the agency that future orders would have to survive review by an increasingly skeptical judiciary.<sup>117</sup>
- (4) *Private Enforcement Alternative*. Private enforcement of the RP statute continued at substantial levels, providing some assurance that

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<sup>115</sup> See Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save it Let it Go*, 48 EMORY L.J. 1057 (1999) (proposing interpretation of statute's competitive injury requirement that is more consistent with modern competitive injury standards under Sherman Act jurisprudence); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 143-44 (2000) (stating preference that Congress repeal the Robinson-Patman Act; proposing that courts "interpret the statute so as to condemn differential prices only when a true injury to competition . . . is likely"); Pitofsky, *supra* note 24, at 829-30 ("FTC and private enforcement of the Robinson-Patman Act has often ignored defendants' claims of efficiency. . . . I do not believe that price or term discrimination can never yield anticompetitive effects, but cases should be selected carefully with a lively regard for the kind of competition called for by the Sherman Act.")

<sup>116</sup> See Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective*, 100 MICH. L. REV. 1867, 1874 (2002) (Robinson-Patman Act "has been significantly curtailed through judicial interpretations contracting expansionary decisions of the sixties").

<sup>117</sup> See *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd*, 837 F.2d 1127 (D.C. Cir. 1988), *on remand*, 113 F.T.C. 956 (1990).

the Act's commands would be implemented, albeit by private rather than public prosecutors.<sup>118</sup>

These and other factors suggest how the RP federal enforcement norm accepted a progressive reduction in the number of cases initiated. The change in the RP enforcement norm over time is evident, and the reasons for the transformation are probably not in dispute. This leaves open the question of whether the transformation is appropriate. Recall that the adjustment occurred without alternations in the underlying statute or some other form of dispensation from Congress. If a drop in federal enforcement matters from 518 (or 134) from 1961–1968 to a total of one case from 1990–2000 without a statutory amendment is acceptable, on what basis can one object to a reduction in activity in other enforcement areas, such as scrutiny of other distribution practices? Is it appropriate to rely upon adjustments in a public agency's enforcement norm to calibrate public enforcement activity to match an apparent consensus within the competition policy community about suitable levels of activity?

One response is that the evolution of a more permissive federal enforcement norm is less important if other prosecutorial agents (consumers, injured firms, or state governments) are able to increase their activity. Suppose, however, that the intuition supporting the federal enforcement norm is substantively correct in its doubts about the social benefits of RP enforcement. In such circumstances, the performance of the competition policy system suffers if other prosecutorial agents can pursue matters that contradict the sensible federal enforcement norm. If the federal prosecutorial norm is wise, one might prefer that federal prosecutors take measures to promote broader acceptance of the norm.

This may suggest the value of fuller efforts by the federal prosecutors to engage the competition policy community in a discussion that permits public officials to explain transparently why the federal agencies have embraced a different norm for a specific area of enforcement over time. If the federal agencies have discovered that there are instances in which enforcement of the formal legal command undermines consumer interests, perhaps it is best to identify areas in which enforcement is beneficial. At any one time, the aim should be to make the actual enforcement norm transparent to outsiders and to promote consideration about how

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<sup>118</sup> In explaining why it dismissed the *Harper & Row* complaint, the FTC said one factor was the existence of a private RP suit challenging the conduct at issue in the FTC's case. See *Harper & Row Publishers*, 122 F.T.C. at 114 (“[T]he American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.”).

the formal legal command and relevant doctrine might be conformed to the enforcement norm.

B. ENFORCEMENT NORMS ILLUSTRATING PROGRESSION EXPANSION:  
HORIZONTAL RESTRAINTS

Since the Sherman Act's earliest days, the prosecution of trade restraints imposed by the concerted action of direct competitors has supplied the core of federal antitrust enforcement.<sup>119</sup> The mix of horizontal restraints matters in the total federal enforcement caseload has varied over the past 110 years, particularly since the establishment of a pre-merger notification regime under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>120</sup> Nonetheless, beginning with formative cases, such as *United States v. Trans-Missouri Freight Association*<sup>121</sup> and *United States v. Addyston Pipe & Steel Co.*,<sup>122</sup> through the recent prosecutions of the vitamins and art auction cartels, federal enforcement officials have abided by a norm that accords primacy to horizontal restraints.

The continued prominence of horizontal restraints on the modern federal enforcement agenda fits awkwardly into the pendulum narrative. Two themes concerning modern horizontal restraints enforcement appear regularly in commentary that embraces the pendulum narrative. One theme depicts federal criminal enforcement in the 1980s as being substantial in volume but unimportant in its doctrinal and economic significance. By this view, it is only in the 1990s that the federal agencies focus on truly important targets and generate meaningful remedies. For example, the striking increase in DOJ's recovery of criminal fines in the 1990s is presented as a development unique to its own decade without any connection to enforcement developments in earlier decades.

The second theme suggests that the federal government abandoned, or nearly abandoned, civil horizontal restraints enforcement in the 1980s. The dismissal of the Reagan civil enforcement program sometimes is subsumed in statements that federal non-merger civil cases virtually disappeared.<sup>123</sup> A milder variant of the narrative is that the Reagan antitrust agencies brought some civil horizontal restraints cases, but they lacked significance. Both strands of the pendulum narrative converge on a

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<sup>119</sup> See Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941.

<sup>120</sup> 15 U.S.C. § 18a.

<sup>121</sup> 166 U.S. 290 (1897).

<sup>122</sup> 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1898).

<sup>123</sup> See Balto, *supra* note 4, at 63 (during Reagan administration, "the government's civil antitrust enforcement program was all but extinguished").

common conclusion by depicting federal policy in the 1990s as restoring worthy horizontal restraints matters to the civil enforcement agenda.

A sounder interpretation is to view modern federal enforcement for criminal and civil horizontal restraints as reflecting the evolution of norms that press in the direction of a more activist government presence. The trend of enforcement is progressive expansion. Progress was cumulative: accomplishments in any one period depended significantly on enforcement contributions from earlier periods. Enforcement across periods was not identical, but the trend was outward. The discussion below separately treats the evolution of modern federal enforcement norms for criminal and civil horizontal restraints.

### 1. *Criminal Enforcement*

In the pendulum narrative, federal criminal antitrust enforcement displays a sharp discontinuity between the 1980s and the 1990s. The pendulum narrative depicts the DOJ's work during the Clinton administration as a startling break from past practice, manifest most clearly in the recovery of massive fines from participants in global cartels.<sup>124</sup> By contrast, the pendulum narrative views the Reagan criminal antitrust program as commercially unimportant<sup>125</sup>—a pedestrian exercise in bringing the same comparatively trivial case repeatedly.<sup>126</sup> To magnify the achievements of the Clinton Justice Department, the pendulum narrative seems compelled to denigrate or slight the Reagan criminal enforcement program.<sup>127</sup>

The DOJ's achievements in criminal enforcement in the 1990s unmistakably *were* remarkable. The Justice Department recovered vast, unprecedented sums for injury to the domestic market. The successful

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<sup>124</sup> See *id.* at 65 (“The greatest single change in antitrust enforcement policy [during the Clinton administration] has probably come in the area of criminal enforcement.”).

<sup>125</sup> See *id.* at 65 (“The Clinton Administration dramatically refocused [the criminal enforcement] program, switching the attention of the criminal antitrust enforcers from relatively small domestic conspiracies to much larger international cartels.”); Skitol, *supra* note 23, at 252 (“The federal agencies during [the] Reagan years devoted considerable resources to the pursuit of naked cartels. Their targets, however, tended to be rather small-scale . . . .”); compare Steven Labaton, *The World Gets Tough on Price Fixers*, N.Y. TIMES, June 3, 2001, § 3, at 1 (“The antitrust division, once a small and sleepy backwater of the Department of Justice, has become a power center against white-collar crime.”).

<sup>126</sup> See *Interview: Dean Robert Pitofsky*, ANTITRUST, Winter 1988, at 24, 24 (Robert Pitofsky: “I do think the first years of the Reagan Administration could be characterized as having brought the same case over and over. They attacked a series of bid-rigging conspiracies in the construction industries. Often, one defendant would implicate others in the cartel, and they then turned in the members of an adjacent cartel. It really wasn't much of an enforcement program.”).

<sup>127</sup> See Balto, *supra* note 4, at 62–63.



prosecution of the food additives and vitamins cartels captured the attention of the world's competition community and catalyzed a global trend toward enhancing national and regional efforts to detect and punish supplier collusion. The high-profile DOJ criminal matters of the 1990s have accelerated the development of comprehensive global efforts to oppose cartels.

The pendulum narrative properly applauds the accomplishments of U.S. criminal antitrust enforcement in the 1990s as extraordinary. The narrative stumbles in its apparent assumption that, to credit the results of the 1990s adequately, it must depict criminal enforcement in the 1980s as insignificant. The perceived imperative to diminish the significance of enforcement in the 1980s gets in the way of understanding how modern U.S. criminal enforcement evolved. It understates the contributions of criminal enforcement in the 1980s and obscures how the 1990s' breakthroughs built upon contributions that extend back through the 1980s and the 1970s.

The latter weakness is the most noteworthy. By overlooking the progressive enhancement of the U.S. antitrust system's criminal enforcement regime from 1970 to 2000, the pendulum narrative overlooks a vital phenomenon in competition policy—that progress toward a given level of enforcement occurs (and, sometimes, can best be pursued) incrementally rather than in a single leap. This is particularly true for matters such as criminal enforcement, where the durability and success of a program may require deliberate, cumulative efforts to test the technical and political efficacy of one legal command, investigative technique, or sanction before adding others. A narrative that ignores interdependencies across time and seeks to rub out elements of continuity misapprehends how legal regimes grow.

#### a. Building a Criminal Enforcement Program

Several challenges confront a competition policy system that denominates antitrust offenses as crimes and sanctions culpable individuals with imprisonment.<sup>128</sup> Among other tasks, the government antitrust agency must:

- Develop an internal norm that encourages employees to treat certain acts as extremely grave offenses worthy of aggressive investigation.
- Persuade external constituencies—legislators, business officials, the bar, and the broader society (including potential jurors)—to respect

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<sup>128</sup> The discussion below is adapted in part from William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766 (2001).

an enforcement norm that deems certain antitrust violations to be worthy of criminal condemnation.

- Convince courts and juries that wrongdoers deserve conviction and stout punishment.
- Clearly delimit the category of offenses that will elicit criminal prosecution to avoid the fact or perception of unfair surprise in the application of the law.
- Accumulate evidence that provides a confident basis for prosecution and conviction.
- Ensure that sanctions are sufficient to accomplish remedial and deterrence goals.

It is unlikely that an antitrust enforcement agency will establish an effective criminal enforcement program overnight. Social and political acceptance for robust criminal antitrust enforcement will vary from nation to nation depending on each country's legal framework and sensibilities.

As described below, U.S. experience indicates that the development of a successful criminal antitrust program is a cumulative process through which individual enforcement techniques are tested, implemented, and refined. The effect of criminal enforcement upon the incentive of firms to comply with the law depends on three principal factors: the likelihood that misconduct will be detected, the frequency with which the government prosecutes the relevant transgressions as crimes (rather than resorting to civil actions), and the severity of sanctions for violators. U.S. policy since 1960 has involved a collection of measures to address all three factors.

#### b. The Progressive Development of U.S. Criminal Antitrust Enforcement

The Justice Department's prosecution of criminal antitrust violations progressed through several phases in the second half of the 20th century. A pivotal development in the late 1950s and early 1960s was the successful prosecution of cases against producers of turbine generators and other electrical equipment used in the production and transmission of electricity.<sup>129</sup> The electrical equipment cases yielded prison terms for a number of culpable company executives and took an important step toward

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<sup>129</sup> The Justice Department's prosecution of the electrical equipment conspiracies is documented in JOHN G. FULLER, *THE GENTLEMAN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY* (1962); JOHN HERLING, *THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY* (1962).

building a broader awareness in the business community and in the public at large that horizontal price fixing was a gross transgression of competition law and suitable grounds for incarceration.

The second phase of key steps took place in the 1970s. In 1974, Congress raised the status of a Sherman Act criminal offense from misdemeanor to felony; increased the maximum prison sentence for individuals from one year to three; and boosted the maximum fine from \$50,000 to \$100,000 for individuals and from \$50,000 to \$1 million for corporations.<sup>130</sup> In the mid-to-late 1970s, the DOJ urged courts to apply the enhanced penalties vigorously and pressed to make the imprisonment of culpable individuals a routine sanction.<sup>131</sup> As Table 2 indicates, the actual number of criminal cases also increased over levels prevailing in the 1960s.

**Table 2**  
**Justice Department Criminal Horizontal**  
**Restraints Cases—1961 to 2000<sup>132</sup>**

<i>Calendar Years</i>	<i>Number of Cases Initiated</i>	<i>Cases per Year</i>
1961 to 1970	128	12.8
1971 to 1980	281	28.1
1981 to 1990	802	80.2
1991 to 2000	622	62.2

The 1980s featured further enhancements to sanctions for hard-core violations. In this decade the Reagan administration recommended increases in statutory sanctions and sentencing policy reforms that would raise the average prison term served by individuals guilty of antitrust offenses. In 1984, Congress created a new mechanism for calculating criminal fines that permits the Sherman Act fine for corporations and individuals to be set at twice the loss suffered by victims or twice the gain realized by the offender.<sup>133</sup> The double-the-loss, double-the-gain

<sup>130</sup> Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended in various sections of 15 U.S.C.).

<sup>131</sup> See Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001) (describing evolution of U.S. criminal enforcement scheme).

<sup>132</sup> The data here are assembled from the CCH Trade Regulation Reporter.

<sup>133</sup> 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.

mechanism would supply the basis for the eight- and nine-figure recoveries in the food additives, graphite electrodes, vitamins, and art auction cartel cases in the 1990s.<sup>134</sup> In 1987, new federal Sentencing Guidelines took effect and increased the likelihood that individuals convicted of Sherman Act offenses would serve longer prison terms.<sup>135</sup> In 1990, Congress raised the maximum Sherman Act fine for individuals to \$350,000 from \$100,000 and for corporations to \$10 million from \$1 million.<sup>136</sup>

Enforcement activity since 1970 increased in parallel with enhancements in the formal system of sanctions. Beginning with the stewardship of Thomas Kauper and continuing during the tenures of Donald Baker and John Shenefield, the Antitrust Division in the 1970s expanded efforts to prosecute collusion criminally. The Justice Department in the 1980s and early 1990s augmented the criminal enforcement initiatives begun in the 1970s. From 1981 through 1988, the DOJ initiated more criminal prosecutions than the total of government criminal antitrust cases from 1890 to 1980. As in the 1970s, the DOJ in this period emphasized imprisonment as the punishment for individual offenders.<sup>137</sup> In the late 1980s and early 1990s the DOJ also pioneered the use of criminal actions to prosecute certain invitations to collude.<sup>138</sup>

By the end of the Bush Administration in 1992, the legislative and policy adjustments of the previous two decades had accomplished several important ends. The augmentation of penalties significantly had raised the risks to violators, including a growing likelihood of imprisonment

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<sup>134</sup> 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. WASH. L. REV. 745 (2001) (discussing impact of double-the-loss, double-the-gain fine calculation formula).

<sup>135</sup> The antitrust provisions of the Sentencing Guidelines are analyzed in ABA SECTION OF ANTITRUST LAW, SENTENCING GUIDELINES IN ANTITRUST (Robert E. Hauberg, Jr. et al. eds., 1999). The basic Sentencing Guidelines for antitrust offenses appear at U.S.S.G. § 2R1.1 (2000). The rationale for the increases in sanctions in the Sentencing Guidelines for hard-core antitrust crimes is analyzed in Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guidelines: Is the Punishment Worth the Costs?*, 27 AM. CRIM. L. REV. 331 (1989).

<sup>136</sup> Antitrust Amendments Act of 1990, Pub. L. No. 101-588 (1990), 104 Stat. 2880 (codified at 15 U.S.C. §§ 1, 2).

<sup>137</sup> See Baker, *supra* note 131, at 695–96, 705–07 (describing expansion of criminal enforcement in 1970s and 1980s); *60 Minutes with Charles R. Rule, Acting Assistant Attorney, Antitrust Division*, 57 ANTITRUST L.J. 257, 259–61 (1988) (reviewing increase in DOJ Antitrust Division grand jury proceedings); *60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 59 ANTITRUST L.J. 45, 60 (1990) (same).

<sup>138</sup> See *United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) (per curiam) (upholding convictions for wire fraud and attempted wire fraud resulting from defendant's attempt to arrange bid-rigging scheme by telephone).

for guilty individuals, and increased the government's capacity to impose truly severe fines on violators. The aggressive prosecution of cartel schemes served to establish the social and political legitimacy and regularity of severe criminal sanctions for cartels. By the early 1990s, the fact of routine prosecution and severe punishment had become accepted elements of the nation's competition policy.

Many commentaries that expressly or implicitly embrace the pendulum narrative question the economic significance of the matters prosecuted in this twelve-year period.<sup>139</sup> It does not detract from the impressive accomplishments of enforcement in the 1990s to acknowledge the economic utility of the cases pursued in the 1980s and 1990s. Three elements of the criminal prosecutions of the 1980s warrant caution in concluding that the cases of the 1980s were somehow insignificant.

First, enforcement from 1980 to 1992 included numerous matters involving the construction or improvement of major infrastructure assets, such as airports, electric power plants and transmission lines, highways, telephone networks, and port facilities. The frequency and broad geographic distribution of these cases suggests that a wide range of projects essential to the U.S. communications, energy, and transportation sectors were the subject of cartel overcharges. It is not readily apparent why it is unimportant for a competition system to accord high priority to rooting out cartels that increase the cost of building and maintaining important infrastructure assets.<sup>140</sup>

Second, many criminal antitrust cases of the 1980s and early 1990s focused on abuses in public procurement. Suppose that a competition enforcement authority desires to build broad social and political acceptance for the idea that cartels should be condemned strictly and that individuals engaged in misconduct should be imprisoned. One way to build such acceptance—to socialize the notion of strict criminal penalties for supplier collusion—is to target activities that society is likely to regard as contemptible. Theft from the public treasury in the form of bid rigging is unquestionably is such an offense.

This is a noteworthy instance in which the pendulum narrative's denigration of the DOJ criminal antitrust program of the 1980s has strong

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<sup>139</sup> See *supra* notes 125–27 and accompanying text; see also Balto, *supra* note 4, at 63 (discussing Reagan administration criminal enforcement program; observing that “[m]ost of these cases involved relatively local conspiracies, and the impact on commerce of these enforcement actions was modest at best”).

<sup>140</sup> See Douglas H. Ginsburg, *Rationalizing Antitrust: A Rejoinder to Professor Armentano*, in 2 THE ANTITRUST IMPULSE 933, 947 (Theodore P. Kovaleff ed., 1994) (summarizing estimates of savings that 1980s bid-rigging prosecutions generated for federally assisted highway construction projects).

potential to mislead transition economy competition officials who are considering how to build effective enforcement programs. Foreign officials could distill from the pendulum narrative the lesson that they should not “waste” resources on prosecuting cartels involving construction or collusion against the government because such matters are trivial. Not only is this “lesson” a misreading of actual U.S. experience, but it also is sure to be bad policy for the emerging market competition regimes.<sup>141</sup>

The third element involves building broad acceptance for a norm favoring harsh treatment of cartels. The prosecutions of the 1980s expanded efforts begun in the 1970s to use criminal sanctions as the tool of choice to redress hard-core horizontal collusion and to imprison culpable individuals. Repeated, well-publicized prosecutions not only made clear the government’s determination to attack cartels criminally but also served to persuade courts, legislators, business leaders, and the public generally that cartel activity warranted severe sanctions. Embedding this norm in the regulatory environment and the political economy, even through the prosecution of comparatively smaller enterprises, can promote deterrence more generally.

The 1990s brought further important innovations in criminal enforcement. The most important of these concerned the detection of offenses. Since the early 1980s, federal enforcement officials had pursued a number of initiatives to increase their ability to obtain direct evidence of collusion. The DOJ resorted more frequently to investigation techniques such as wire tapping and electronic surveillance and broadened cooperation with other law enforcement entities and government bureaus.<sup>142</sup> These steps increased the likelihood that efforts by competitors to coordinate their behavior through a direct exchange of assurances would be detected.

In 1993 and 1994 the DOJ expanded leniency programs that provide incentives for cartel participants to inform the government about episodes of collusion.<sup>143</sup> Agreements with foreign governments and the U.S. immigration authorities increased the DOJ’s capacity to gather

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<sup>141</sup> See William E. Kovacic, *Institutional Foundations for Economic Law Reform in Transition Economies: The Case for Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 294–95 (2001) (discussing benefits to transition economy competition systems of challenging collusion involving public procurement).

<sup>142</sup> See Judy Whalley, *Priorities and Practices—The Antitrust Division’s Criminal Enforcement Program*, 57 ANTITRUST L.J. 569, 571–72 (1988) (describing expansion in DOJ’s use of wiretaps and other surveillance techniques to gather evidence of illegal collusion).

<sup>143</sup> U.S. Dep’t of Justice, Antitrust Div., Corporate Leniency Policy (1993), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,113; U.S. Dep’t of Justice, Antitrust Div., Individual Leniency Policy (1994), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,114.

information from overseas jurisdictions and induce foreign citizens to subject themselves to the U.S. criminal process. The strengthening of tools for detection and sanctions for violations converged to yield major enforcement breakthroughs in the 1990s.<sup>144</sup> From 1995 through 2000 the DOJ collected more fines for antitrust crimes than it had obtained from 1890 to 1994. From the vitamins cartel alone, the DOJ has obtained hundreds of millions of dollars in criminal fines from the participating companies<sup>145</sup> and gained prison terms for individual offenders (including foreign nationals who subjected themselves to the jurisdiction of the U.S. judicial process).<sup>146</sup>

### c. Summary

Modern U.S. experience with criminal enforcement presents a pattern of progressive, cumulative development of competition policy. Beginning at least with the electrical equipment prosecutions of the late 1950s and early 1960s and carrying forward to the present, the DOJ's criminal enforcement program has completed each decade in stronger condition than it was at the decade's start.

The pendulum narrative correctly appreciates the importance of the criminal enforcement program of the 1990s, but it comprehends little else about the modern history of U.S. efforts to treat antitrust offenses as crimes. In striving to underscore the work of the 1990s, the pendulum narrative wrongly treats the 1980s as insignificant. Even if the 1980s are examined in isolation, it is difficult to sustain the claim of insignificance when one considers the content of the specific matters undertaken, including numerous cases involving the construction of important infrastructure assets and the overcharging of public purchasing authorities.<sup>147</sup>

<sup>144</sup> See Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798 (2001) (describing DOJ's criminal enforcement accomplishments of the 1990s).

<sup>145</sup> Hoffman-LaRoche and BASF paid criminal fines of \$500 million and \$225 million, respectively, to resolve DOJ's claims. See *United States v. F. Hoffmann-LaRoche Ltd.*, CR No. 99-LR-124-R (N.D. Tex. May 20, 1999) (entering Hoffman-LaRoche plea agreement), available at <http://www.usdoj.gov.atr/cases/12400/hoffman.pdf>; *U.S. v. BASF Aktiengesellschaft*, CR No. 99-CR-200-R (N.D. Tex. May 20, 1999) (entering BASF plea agreement), available at <http://www.usdoj.gov.atr/cases/12400/basf.pdf>.

<sup>146</sup> Several foreign nationals, including a leading executive of Hoffmann-LaRoche, agreed to serve prison terms in the United States. See *United States v. Dr. Kuno Sommer*, Crim. No. 3:99-CR-201-R (N.D. Tex. May 20, 1999) (entering plea agreement between DOJ and Kuno Sommer, former director of worldwide marketing for Roche's Vitamin and Fine Chemicals Division), available at <http://www.usdoj.gov.atr/cases/12400/sommer.pdf>; see also Harry First, *The Vitamins Case: Cartel Prosecution and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 716-18 (2001) (describing guilty pleas by foreign nationals in U.S. prosecution of vitamins cartel).

<sup>147</sup> At a minimum, one would want to see the assertion of insignificance rest upon rigorous empirical testing rather than the unverifiable intuition of the pendulum narrators.

The more serious failing of the pendulum narrative is its obliviousness to how antitrust enforcement norms develop over time. The progressive enhancement and increasingly successful implementation of DOJ's criminal enforcement program built upon a commonly held belief about the competition policy role of criminal prosecutions. Particularly after 1974, when Congress upgraded the offense level and raised penalties, the Antitrust Division's leadership embraced the norm that criminal prosecution should be DOJ's highest competition policy priority. Each decade's accomplishments rested upon the contributions of previous decades. For example, had Thomas Kauper, Donald Baker, John Shenefield, and Sanford Litvack not bolstered grand jury activity and encouraged courts to impose tougher sentences, William Baxter, Paul McGrath, Douglas Ginsburg, Charles Rule, and James Rill could not have expanded the scope and increased the effectiveness of criminal enforcement in the 1980s and early 1990s.

The pendulum narrative also obscures the combination and sequencing of measures that permitted the United States to strengthen its criminal antitrust program. The methodology of enhancement involved a mixture of statutory improvements and policy experiments. An accurate view of the contributions of each initiative is necessary to see how the U.S. system developed, to appreciate the interaction of factors affecting compliance (frequency of prosecution, likelihood of detection, severity of sanctions), and, more generally, to identify what a country must do to build a successful criminal enforcement program. The DOJ rolled out new enforcement approaches, tested the policy "prototypes," assessed the results, expanded the use of successful techniques, and pursued necessary modifications in Congress or by means committed to the Department's discretion.<sup>148</sup>

The pendulum narrative either treats policy developments in the 1980s as insignificant or downplays the role of Reagan antitrust officials in helping prepare a foundation for the remedial successes of the 1990s. Drawing upon its experience in the preceding decades, the Reagan Justice Department advocated the enhancement of sanctions for antitrust crimes. This advocacy played a major part in the establishment of tougher sentencing standards and creation of the double-the-loss, double-the-gain approach to calculating fines. Without these enhanced sanctions and without the continued routinization of criminal prosecution as the norm for hard-core offenses in the 1980s and early 1990s, the spectacular

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<sup>148</sup> See, e.g., *60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division*, 55 ANTITRUST L.J. 255, 260 (1986) (comments by Assistant Attorney General Ginsburg discussing Reagan Administration's support for sentencing reforms that would increase prison terms served by individuals guilty of price fixing).



recoveries of the 1990s could not have come to pass.<sup>149</sup> The 1990s' enforcement program added a crucial ingredient to the enforcement mix (greater detection through a stronger leniency program), but its success cannot be understood without appreciating the contributions of policy making in earlier decades, including the 1980s.<sup>150</sup>

Historical analysis untethered by the pendulum narrative also might provide a richer understanding of how enforcement against cartels has affected compliance within the business community over the past four decades. One hypothesis to be considered is that business awareness of and compliance with the stricture against cartels has proceeded in phases.<sup>151</sup> The electrical equipment prosecutions of the late 1950s and the 1960s may have created a general awareness within the U.S. business community about the dangers of engaging in cartels, and enforcement in the 1970s and 1980s made clear that the Justice Department would use criminal sanctions aggressively to punish corporate and individual violators alike. A distinctive feature of the high-profile cartel prosecutions in the 1990s is the extensive participation by non-U.S. firms. Perhaps the U.S. enforcement program of the 1990s, coupled with the expansion of efforts by foreign competition authorities to prosecute cartels, will make foreign companies attentive to compliance responsibilities, and the hazards of misconduct, in the same way that U.S. enforcement from the late 1950s through the early 1990s brought the message home to American companies.

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<sup>149</sup> The value of sequential testing, evaluation, and refinement to improve programs—the methodology that characterizes the DOJ criminal enforcement program of the past forty years—has parallels in other areas of government policy making. The DOJ's criminal enforcement program could no more have leapfrogged the initiatives of the 1980s and achieved the results of the 1990s than NASA could have reached the moon in 1969 by skipping the Gemini series of flights and commencing the Apollo missions immediately after Project Mercury came to a close.

<sup>150</sup> Professor Pitofsky's analysis of antitrust remedies during the Clinton administration illustrates the pendulum narrative's tendency to understate the link between current policy achievements and past enforcement initiatives and to write the Reagan administration out of the progression toward more effective criminal enforcement. Professor Pitofsky observes that criminal enforcement was one area where the Clinton Justice Department initiated "some radically new remedies." Pitofsky, *Remedies*, *supra* note 26, at 171. The size of recoveries in the 1990s was radically larger than in previous decades, though the instrument for calculating the massive fines (the double-the-loss, double-the-gain mechanism) was a 1980s innovation. Professor Pitofsky acknowledges the value to the prosecutions of the 1990s of sentencing reforms and fine enhancements and says "[a] good deal of the credit for this change in criminal enforcement belongs to Congress." *Id.* at 173. His account does not mention the role of the Reagan Administration and the DOJ Antitrust Division in putting improvements in criminal antitrust sanctions on the policy agenda and helping shape specific reforms.

<sup>151</sup> This concept is suggested in Jonathan B. Baker, *New Horizons in Cartel Detection*, 69 GEO. WASH. L. REV. 824 (2001).

## 2. Civil Enforcement

Table 3 presents data on FTC civil enforcement involving horizontal restraints from 1961 through 2000.<sup>152</sup> The FTC data presented here and in Appendix A indicate that, beginning in the last years of the Carter Administration, the Commission devoted substantial attention to non-merger civil enforcement concerning horizontal restraints. The pendulum narrative's suggestion that civil enforcement nearly vanished or ceased in the 1980s overlooks the FTC's experience. Comments about a sharp reduction in civil nonmerger enforcement would be accurate if limited to the Justice Department during Ronald Reagan's second term.<sup>153</sup>

**Table 3**  
**Federal Trade Commission Horizontal Restraints**  
**Enforcement—1961 to 2000**

<i>President</i>	<i>FTC Matters</i>	<i>Matters per Year</i>
Clinton (1993–2000)	61	7.625
Bush (1989–1992)	25	6.25
Reagan (1981–1988)	56	7.0
Carter (1977–1980)	22	5.5
Nixon/Ford (1969–1976)	12	1.5
Kennedy/Johnson (1961–1968)	21	2.625

The data presented in Table 3 include two types of horizontal restraints matters. The first and largest subset of matters includes cases alleging that competitors have engaged in *direct, formal coordination* of output or other dimensions of rivalry. Here the rival firms unmistakably have agreed to coordinate their actions, and the resolution of the government's case focuses on the arrangement's economic effect and justifications. In some matters, the defendants argue that their behavior enjoyed antitrust immunity by reason of the state action doctrine, the *Noerr* doctrine, or statutory exemptions. The second category of cases involves more subtle scenarios in which the firms are alleged to have *collectively or unilaterally adopted practices to facilitate coordination*.

### a. Direct Formal Coordination Cases

In the 1960s the government pursued a number of important civil cases involving collaboration with competitors. Perhaps the FTC's most

<sup>152</sup> These data are collected from the CCH Trade Regulation Reports.

<sup>153</sup> See Douglas H. Ginsburg, *Comment—The Goals of Antitrust Revisited*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 24, 28 (Mar. 1991) (reporting that in Fiscal Year 1989, DOJ brought one nonmerger civil case).

noteworthy contribution from this period was its successful challenge to an effort by direct rivals to determine the inputs each would use to make their end product.<sup>154</sup> The best known of the Justice Department's civil horizontal matters in this era is the *Topco* case, which the Supreme Court decided in 1972.<sup>155</sup>

In the 1970s the government undertook a variety of significant initiatives to address horizontal restraints matters involving the professions. Major landmarks included the DOJ case against the National Society of Professional Engineers<sup>156</sup> and the FTC's case against the American Medical Association.<sup>157</sup> In this period, the Commission also issued the complaint involving a group boycott by the Indiana Federation of Dentists. These and related matters established the principle that competition policy, including traditional antitrust enforcement, had a substantial role to play in the professions. For the Commission, the cases marked the beginning of the agency's modern health care antitrust program—an undertaking which more than any other endeavor since 1914 arguably has best realized the FTC's competition policy potential.

In the 1980s the FTC increased civil enforcement involving concerted horizontal behavior.<sup>158</sup> Commentaries that employ the pendulum narrative of modern antitrust history tend to dismiss this activity in one of two ways—either to assert that federal civil enforcement dwindled in the 1980s or to suggest that the activity in question was insignificant.

By what measure of significance are we to judge the importance of matters prosecuted? Consider the FTC's case in *Indiana Federation of Dentists (IFD)*.<sup>159</sup> An index of importance that focused on the total volume of commerce affected probably would not give much weight to a challenge to a concerted refusal by dentists in Indiana to provide the x-rays of their patients to insurers. In that sense, *IFD* is a comparatively insignificant matter—a small case. Evaluated by its effect on doctrine, the small case made big law. The Supreme Court's decision in *IFD* helped shape modern jurisprudence governing the rule of reason and the proof of

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<sup>154</sup> Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965).

<sup>155</sup> United States v. Topco Assocs., 405 U.S. 596 (1972).

<sup>156</sup> Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

<sup>157</sup> AMA v. FTC, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

<sup>158</sup> See James L. Langenfeld & Louis Silvia, *The Federal Trade Commission's Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L.J. 653 (1993) (examining FTC horizontal restraints cases from 1980 to 1992).

<sup>159</sup> *IFD* was initiated in the late 1970s, and the appeals in the case were concluded in the 1980s.

anticompetitive effects.<sup>160</sup> Among other results, *IFD* provided a doctrinal foundation for the Justice Department's prosecution of Microsoft.

*IFD* highlights another important feature of modern federal enforcement history. It demonstrates how some of the chief accomplishments of the federal agencies have resulted from initiatives pursued continuously across presidential administrations. The FTC initiated *IFD* in 1978 during Michael Pertschuk's chairmanship, a unanimous Commission found liability in an opinion authored by Commissioner Pertschuk during James Miller's chairmanship in 1983,<sup>161</sup> and the Miller FTC pursued the matter to a successful conclusion before the Supreme Court,<sup>162</sup> which reversed the Seventh Circuit's refusal to enforce the agency's order.<sup>163</sup> Without a longstanding commitment to an enforcement norm favoring active engagement with health care problems, the result in *IFD* could not have come to pass.

*IFD* is part of a lengthy roster of noteworthy civil horizontal restraints matters from the 1980s. In a span of under two years, from December 1983 through October 1985, the Commission issued complaints in *Detroit Auto Dealers*,<sup>164</sup> *Massachusetts Board of Registration in Optometry*,<sup>165</sup> *Ticor*,<sup>166</sup> and *Superior Court Trial Lawyers*<sup>167</sup> and accepted a consent agreement in *American Society of Sanitary Engineering*.<sup>168</sup> *Detroit Auto Dealers*, *Ticor*, and *Trial Lawyers* have made major contributions to substantive horizontal restraints doctrine and the scope of immunity conferred by the state action and *Noerr* doctrines. *Ticor* was one of several matters in which the Commission sought to limit recourse to public intervention as a means for private cartelization. *Mass. Board* played an important part in stimulating debate within the antitrust community about the proper structure and application of the rule of reason in horizontal restraints cases. Consider

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<sup>160</sup> Not all commentators count *IFD* as a positive accomplishment for the antitrust system. See Schwartz, *supra* note 51, at 793 (decision of FTC and Supreme Court to evaluate conduct at issue in *IFD* by Sherman Act standards alone, rather than invoking broader reach of § 5 of FTC Act, constituted "a crabbed approach to the administrative power" that "has ominous implications for the health of antitrust as the administrative agencies become predominantly staffed with conservative Republican appointees").

<sup>161</sup> 101 F.T.C. 57 (1983).

<sup>162</sup> 476 U.S. 447 (1986).

<sup>163</sup> 745 F.2d 1124 (7th Cir. 1984).

<sup>164</sup> *Detroit Auto Dealers*, FTC Docket No. 9189 (Dec. 20, 1984), 117 F.T.C. 417 (1989), *aff'd in part and remanded in part*, 955 F.2d 457 (6th Cir. 1992).

<sup>165</sup> *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

<sup>166</sup> *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

<sup>167</sup> *Superior Ct. Trial Lawyers Ass'n*, 107 F.T.C. 510 (1986), *enforcement denied and remanded*, 856 F.2d 226 (D.C. Cir.), *rev'd*, 493 U.S. 441 (1990).

<sup>168</sup> 106 F.T.C. 324 (1985).

the question of significance this way: Is there a government civil enforcement initiative involving horizontal restraints from the 1990s that will have as great a doctrinal impact as *IFD*? As *Trial Lawyers*?

*American Society of Sanitary Engineering* also illustrates the cumulative nature of enforcement. Here the FTC addressed efforts by a standard-setting organization (ASSE) to suppress technological innovation. ASSE had refused to adopt a standard permitting the introduction of a new toilet tank fill valve, despite evidence that the valve promised to improve performance. The producer of the new valve held a patent on the product, and ASSE's members seemed reluctant to approve an innovation unless they were assured of manufacturing it. In effect, the owners of the incumbent technology used the standard-setting process to defeat the introduction of a new, competing technology. In *ASSE*, the FTC established a principle that would become important in later matters addressing the use of standards to restrain innovation.<sup>169</sup>

In the 1990s, the agencies continued the practice of the previous two decades in challenging direct horizontal restraints conduct. A number of matters involved health care institutions and other professional groups. The FTC initiated the *California Dental Association* matter in 1993 and defended its finding of liability through the appellate process. The Supreme Court upheld the FTC's interpretation of its authority to oversee activities of not-for-profit bodies, but rejected the agency's finding of liability.<sup>170</sup> Among other noteworthy matters, the DOJ undertook a number of significant cases outside the professions. The Antitrust Division achieved a substantial settlement involving the operation of the NASDAQ securities exchange<sup>171</sup> and successfully challenged features of the bylaws of the Visa and Mastercard credit card networks.<sup>172</sup>

#### b. Facilitating Practices and Other Less Direct Forms of Coordination

In the 1960s and 1970s, the federal agencies pursued a number of cases involving behavior at the boundary between illegal coordination and acceptable unilateral behavior. In *United States v. Container Corp.*<sup>173</sup>

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<sup>169</sup> See David Balto & Robert Pitofsky, *Antitrust and High-Tech Industries: The New Challenge*, 43 ANTITRUST BULL. 583, 596–603 (1998) (discussing *American Society of Sanitary Engineering* as part of evolution of modern antitrust policy concerning standard-setting bodies and innovation).

<sup>170</sup> *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

<sup>171</sup> *United States v. Alex. Brown & Sons*, 963 F. Supp. 235 (S.D.N.Y. 1997) (entering consent decree), *aff'd*, 153 F.3d 16 (2d Cir. 1998).

<sup>172</sup> *United States v. VISA U.S.A., Inc.*, 334 F.3d 229 (2d Cir. 2003).

<sup>173</sup> 393 U.S. 333 (1969).

the DOJ successfully attacked agreements to share competitively sensitive information or engage in other forms of collaboration that might facilitate coordination of pricing and output decisions. Other DOJ cases in the early 1970s challenged episodes of signaling and other less direct forms of coordination in the automobile and electrical equipment sectors.<sup>174</sup>

The FTC in the 1970s also pursued several major matters concerning facilitating practices. In *Boise Cascade*, the Commission challenged the parallel adopting of base point pricing formulas. In *Ethyl*, the Commission used Section 5 to attack the unilateral but parallel adoption of most favored nations clauses. In each instance the court of appeals denied enforcement of the FTC's order, severely questioned the quality of the Commission's analysis, and displayed little deference to the agency's judgment.

During the Bush administration, the two agencies expanded efforts to deal with subtle forms of coordination among rivals. The DOJ initiated the *Airline Tariff Publishing* case, which resulted in a settlement involving signaling and the use of electronic databases.<sup>175</sup> The agencies also brought several civil cases involving invitations to collude. The invitation to collude cases pursued concepts that had been established in the Justice Department's *American Airlines* case in the mid-1980s.<sup>176</sup>

### C. NORM FEATURING SEQUENCE OF CONTRACTION AND STABILIZATION: MERGERS AND JOINT VENTURES

The pendulum narrative of modern antitrust history figures prominently in discussions of federal merger policy. The narrative depicts this dimension of the U.S. antitrust system as prone to dangerous, extreme variations in policy. The narrative's dismal portrait of merger policy from 1960 through the 1980s emerges in the following account:

American antitrust policy has tried to balance possible threats to competition against merger benefits, but remarkably, has careened from one extreme to another in this balancing process. For example,

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<sup>174</sup> *United States v. Westinghouse Elec. Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,661 (E.D. Pa. 1977); *United States v. General Elec. Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,660 (E.D. Pa. 1977); *United States v. General Motors Corp.*, 1974-2 Trade Cas. (CCH) ¶ 75,253 (E.D. Mich. 1974).

<sup>175</sup> *See United States v. Airline Tariff Publ. Co.*, 836 F. Supp. 9 (D.D.C. 1993) (consent decree).

<sup>176</sup> The invitation to collude cases included *Quality Trailer Prods.*, [FTC Complaints & Orders—1987–1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,247 (Nov. 5, 1992). The concept of using the antitrust laws to attack a unilateral invitation to collude was introduced in *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

the United States had by far the most stringent antimerger policy in the world in the 1960s, striking down mergers among small firms in unconcentrated markets. By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors.<sup>177</sup>

Here merger policy is not informed by thoughtful deliberation. Instead, it “careens” across the landscape as though guided by inebriated public officials.

In this chaotic policy environment, the narrative’s heaviest criticism is visited on the 1980s. The pendulum story levels two attacks upon Reagan administration merger policy. One critique suggests that the 1980s were a period of abject inaction or at least so permissive that antitrust lawyers could responsibly counsel their clients that “‘there’s no merger not worth trying.’”<sup>178</sup> Enforcement in the Bush administration gets better grades, but it is only in the 1990s that the DOJ and the FTC restore a sensible balance.

The second critique acknowledges some federal enforcement activity in the 1980s, but deems it to be utterly deficient. This perspective depicts 1980s practice as a “radical” relaxation of federal enforcement<sup>179</sup> that

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<sup>177</sup> Pitofsky, *supra* note 6, at 196; *see also* Handler, *supra* note 6, at 21 (in merger policy from 1960s through 1980s, “[t]he pendulum swung from one extreme to another”).

<sup>178</sup> Thomas L. Greaney, *Merger Mania Has Gone Too Far*, ST. LOUIS POST-DISPATCH, Feb. 27, 1991, at 3B:

At the height of the Reagan administration’s permissiveness toward corporate mergers, a former assistant attorney general with the Carter administration summarized the advice he was giving clients: “I simply tell them that there’s no merger not worthy trying.” And indeed, many corporate combinations that would have been unthinkable during previous administrations escaped challenge under the antitrust laws during the 1980s.

*See also* Austin, *supra* note 21, at 947 (“Chicago was mainstreamed into antitrust enforcement by William Baxter, . . . who practiced his convictions as the Justice Department’s Antitrust Division chief. . . . Following the Chicago decree that mergers are neutral or procompetitive, Clayton 7 was mothballed.”); Handler, *supra* note 6, at 21 (during Reagan administration, “[t]he Celler-Kefauver amendment was . . . converted from an anticoncentration to a proefficiency measure, and the public was given the feeling that anything goes”); *Interview with Robert Abrams, New York State Attorney General, ANTITRUST*, Summer 1990, at 14, 15 (Attorney General Abrams: “Our biggest disappointment with the federal government on mergers was that they were not enforcing the law; they were not enforcing their own merger guidelines.”); Thomas G. Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 228 (1988) (“Our experience has been that the U.S. business community has read the enforcement actions of the Reagan Administration as an invitation to everyone to merge with anyone.”); Shepherd, *supra* note 35, at 225 (discussing Reagan antitrust policy; stating that “[a]lmost any merger is acceptable now”).

<sup>179</sup> *See, e.g.*, Robert Pitofsky, *New Definitions of the Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1809 (1990) (“The 1980s witnessed a radical relaxation of

played an important part in triggering a massive increase in merger activity in the 1980s.<sup>180</sup> As with the “no enforcement” variant of the pendulum narrative, the “radical relaxation” story often notes that the DOJ and the FTC increased scrutiny of mergers somewhat from 1989 to 1992. Nonetheless, the establishment of sensible merger policy does not take place until the 1990s, when the federal agencies began challenging substantial mergers and prevailed more often in court.

The complete nonenforcement and near-nonenforcement variants of the pendulum narrative offer similar lines of proof to document the inadequacies of federal policy in the 1980s:<sup>181</sup> a reduction from the 1970s to the 1980s in the percentage of all transactions challenged; an increase in overall merger activity that is said to have resulted from weak federal antitrust oversight; and the consummation, albeit sometimes with settlements, of transactions of unprecedented size involving critical industry sectors, such as automobiles and petroleum. The pendulum narrative tends to praise the analytical framework embodied in the Justice Department’s 1982 Merger Guidelines,<sup>182</sup> but it argues that government agencies

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government enforcement in the merger area.”); see also William A. Lovett, *Theory and Practice of Antitrust*, in ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY 41, 56 (Robert L. Wills et al. eds., 1987) (“The Justice Department promulgated new merger guidelines (1982 and 1984) that greatly relaxed previous guidelines and limited only some large horizontal mergers. Hardly any mergers have been challenged since the new guidelines went into effect.”); Adams & Brock, *supra* note 51, at 309 (“The Reagan Administration’s most conspicuous antitrust achievement was its emasculation of the nation’s merger policy.”); Skitol, *supra* note 23, at 250 (as applied, analytical approach of 1982 DOJ Merger Guidelines “resulted in an exceptionally permissive merger policy throughout the 1980s”).

<sup>180</sup> See Peter W. Rodino, Jr., *The Future of Antitrust: Ideology vs. Legislative Intent*, in 2 THE ANTITRUST IMPULSE 1051, 1067 (Theodore P. Kovaleff ed., 1994) (discussing Reagan administration antitrust policy; observing that “[t]he current relaxed policy toward mergers and acquisitions has helped to stimulate a record-breaking surge in merge[r]s and acquisitions.”); Handler, *supra* note 26, at 1940 (“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.”); Pitofsky, *supra* note 29, at 326 (“A more vigorous, pragmatic antitrust enforcement policy should be restored. The most pressing area is merger nonenforcement—far more permissive these days than the Administration’s own guidelines—where failures to act and loose rhetoric have contributed to a foolish and wasteful surge of giant consolidations.”); Pitofsky, *supra* note 6, at 198 (“Few would argue that the lax antitrust enforcement of the 1980s was the principal cause of the surge of merger activity, but it was surely a significant contributing factor.”); Susman, *supra* note 41, at 343 (“It always surprises me that those who lament the rise in unfriendly mergers, greenmail, and securities abuses like those of Ivan Boesky do not even mention that much of the blame should be laid to rest on the promerger mania created by [the Reagan] Administration.”).

<sup>181</sup> For a representative catalogue of these and other much-repeated measures of lax Reagan administration merger enforcement, see Adams & Brock, *supra*, note 51, at 310–15; Krattenmaker & Pitofsky, *supra* note 178, at 225–32.

<sup>182</sup> See Pitofsky, *supra* note 24, at 819 (calling DOJ’s 1982 and 1984 Merger Guidelines “considerable intellectual achievements”). Some pendulum narrators have said the DOJ



in practice employed enforcement thresholds above the nominal boundaries set out in the Guidelines.<sup>183</sup>

1. *Contraction and Stabilization: The Historical Progression*

As reflected in administrative and judicial decisions, federal enforcement in the 1960s<sup>184</sup> and early 1970s established four basic principles:

- Quantitative tests, in the form of concentration data in horizontal mergers and foreclosure percentages in vertical transactions, controlled outcomes. Merger jurisprudence in this period recognized the possibility that defendants could rebut inferences based on market share or foreclosure data, but rebuttals were unavailing in practice.<sup>185</sup>
- For horizontal mergers, the courts concluded that post-acquisition market shares of 4.49 percent could sustain an inference of illegality,<sup>186</sup> though the enforcement agencies, as discussed below,<sup>187</sup> did not treat this threshold as defining the acceptable upward boundary for horizontal transactions.
- For vertical mergers, foreclosure on the order of 2–3 percent could sustain an inference of illegality.<sup>188</sup>
- The courts and enforcement agencies distrusted or disregarded efficiency rationales for individual transactions. Some decisions

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merger guidelines of the 1980s wrongfully repudiated Supreme Court and congressional views that merger enforcement should ignore efficiency considerations. See Robert Abrams, *Developments in State Antitrust Enforcement*, 62 N.Y.U. L. REV. 989, 995 (1987) (“In defiance of the clear intention of section 7 of the Clayton Act and the Supreme Court rulings in *Procter & Gamble*, *Brown Shoe*, and others, the Department of Justice has in recent years presumed that most mergers will increase efficiency and benefit consumers.”).

<sup>183</sup> See Krattenmaker & Pitofsky, *supra* note 178, at 228 (“[I]n the midst of an unprecedented wave of mergers, [the Reagan] Administration has challenged extremely few of them. Equally troublesome is the undeniable fact that the Reagan Administration has administered tests of legality that are not only more lenient than those of any other administration since Herbert Hoover, but are substantially more permissive than those the Administration itself professes to enforce.”); Pitofsky, *Antitrust Policy*, *supra* note 26, at 219 (“In the merger and joint venture area, the guidelines would be enforced [by the Clinton administration] as written (certainly not the case during the Reagan years) . . .”).

<sup>184</sup> The modern era of merger control began in 1950 with enactment of the Celler-Kefauver amendment to § 7 of the Clayton Act. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), a case DOJ initiated in the 1950s, supplied the Supreme Court’s first interpretation of the 1950 statute.

<sup>185</sup> See Areeda, *supra* note 86, at 975 (“the Supreme Court embarked upon a relentless condemnation of mergers during the 1960’s and early 1970’s—often with little analysis of whether competition was likely to be impaired”).

<sup>186</sup> *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

<sup>187</sup> See *infra* notes 192–96 and accompanying text.

<sup>188</sup> In *Brown Shoe*, the condemned vertical foreclosure was 3.1% or less. 370 U.S. at 327.

suggested that efficiency claims were, at best, irrelevant.<sup>189</sup> Others counted efficiencies against specific mergers.<sup>190</sup> Still others acknowledged that the merger in question might increase efficiency, but subordinated the attainment of efficiency to realizing social and political benefits of preserving a more decentralized economic structure.<sup>191</sup>

These developments gave the federal antitrust agencies formidable tools to block horizontal and vertical mergers. Some federal officials regarded the zone of potential liability to be excessive. In 1968, under the leadership of Donald Turner, the Justice Department issued Merger Guidelines that retreated from the most expansive enforcement possibilities the Supreme Court had recognized in reviewing the Department's merger challenges.<sup>192</sup> Turner's decision sought to alter a government enforcement norm that had pressed toward expanding controls on mergers and increasing the discretion of federal agencies to challenge mergers. This move attracted something less than universal praise within the Antitrust Division. Why, many asked, would the DOJ surrender any terrain won through cases before the federal courts?

Embodied in Turner's guidelines were two important antitrust enforcement norms that departed from past agency practice. The first is that policy makers should be willing to decline to exercise the full range of enforcement power permitted by judicial decisions when it becomes apparent that developments in economic learning warrant self-restraint. The second is that antitrust officials voluntarily should issue guidelines that reveal their enforcement intentions, even if such guidelines inevitably reduce their freedom of action in the future. Turner later described his exercise in self-restraint and transparency in modest terms, but the norms he embraced have influenced future policy making at the federal agencies.

Federal enforcement in the 1970s operated against a backdrop of a judicial loosening of restrictions on mergers. Key developments included the Supreme Court's decisions in cases, such as *United States v. General Dynamics Corp.*<sup>193</sup> and *United States v. Marine Bancorporation*,<sup>194</sup> and court

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<sup>189</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>190</sup> *E.g.*, *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1080-81 (1962), *modified*, 67 F.T.C. 282 (1965).

<sup>191</sup> *See Brown Shoe*, 370 U.S. at 344.

<sup>192</sup> On the development and purposes of the 1968 Guidelines, see Edwin M. Zimmerman, *Section 7 and the Evolving Role of Economics*, 35 ANTITRUST BULL. 447, 453-55 (1990).

<sup>193</sup> 415 U.S. 486 (1974).

<sup>194</sup> 418 U.S. 602 (1974).

of appeals decisions that emphasized the importance of supply substitution in defining relevant markets and measuring market power.<sup>195</sup> In selecting cases in the 1970s, the federal agencies retreated from the more intervention-oriented approaches that had guided DOJ and FTC merger policy in the 1960s.<sup>196</sup>

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 gave the DOJ and the FTC a more expansive regulatory role in merger control by requiring advance notice of specific transactions and imposing mandatory waiting periods to enable the federal agencies to evaluate the likely effects of proposed transactions. As realized in the 1980s and 1990s, the HSR regime created greater possibilities for negotiation and the resolution of competitive problems by measures short of blocking entire transactions.

Federal enforcement policy in the 1980s accelerated the loosening of controls that had begun in the later half of the 1970s. The conceptual foundation for this adjustment was the promulgation of new Justice Department Merger Guidelines in 1982.<sup>197</sup> The 1982 Guidelines raised the enforcement thresholds established in the 1968 Guidelines and incorporated consideration of qualitative factors identified by courts and commentators as important considerations in merger analysis. It is difficult to capture the impact of this development. Rivalled only by a few major cases, such as the *AT&T* monopolization matter, the 1982 Merger Guidelines are the most significant contribution by the federal agencies to non-criminal competition policy analysis in the modern era. The Guidelines not only changed the way the U.S. courts and enforcement agencies examine mergers, but they also supplied an influential focal point for foreign competition authorities in the formulation of their own merger control regimes.<sup>198</sup>

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<sup>195</sup> See Baker, *supra* note 87 (describing significance of court of appeals decisions involving supply substitution).

<sup>196</sup> See Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 807 (1987) ("Recognizing the undue severity of the case law and the 1968 Guidelines, the government began to relax enforcement standards in the 1970's, giving more attention to efficiency claims and other factors, such as easy market entry and indications that market share figures overstated the competitive potential of one or both of the merging firms."); Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 276 (1987) ("That economics arguments influenced the enforcement process in the 1970s and today play an even larger role is a gradualist outcome which many consider beneficial. Arguably, this is the way antitrust enforcement should work.").

<sup>197</sup> The content and logic of the 1982 Merger Guidelines are examined in William B. Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5 (2000).

<sup>198</sup> See, e.g., Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003) (documenting the influence in the United States and abroad of the Guidelines' hypothetical monopolist paradigm).

The 1982 Guidelines, as amended in 1984, relaxed but did not abandon restrictions on corporate consolidations. The 1980s featured a number of noteworthy DOJ and FTC enforcement events.<sup>199</sup> The FTC successfully litigated challenges in cases involving Elders Grain,<sup>200</sup> Hospital Corporation of America (HCA),<sup>201</sup> PPG,<sup>202</sup> and Warner Communications.<sup>203</sup> As mentioned above, matters such as PPG and HCA yielded precedents that have become mainstays of government prosecutorial efforts in subsequent years. In a number of other instances, defendants prevailed in cases that showed how the lower federal courts were inclined to reduce the zone of liability established in Supreme Court decisions in the era leading up to *General Dynamics*.<sup>204</sup> Most notably, the D.C. Circuit's opinion in *Baker Hughes* showed that the government's prospects of success depended on its capacity to go beyond concentration data in establishing a case for illegality. These and other cases made clear how poorly the government would have fared had it chosen to challenge mergers with the same analytical tools and at the same concentration trigger points commonly employed in the 1970s.

Federal merger enforcement in the 1980s also involved more expansive use of new remedies, such as "fix it first." Beginning with the solution achieved by the Justice Department in the DuPont/Conoco transaction in the early 1980s, the federal agencies demonstrated a greater willingness

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<sup>199</sup> The best documentation of this point appears in a paper published midway through Ronald Reagan's second term in office. See Davis, *supra* note 58. Writing in 1986, Ronald Davis reported that from 1981 through 1984, DOJ and the FTC issued a total of 254 "second requests" and intervened to block or modify 51 of those transactions. *Id.* at 37. In introducing his research, Davis addressed the suggestion that the federal government had decided to give a free pass to all mergers:

The conventional wisdom today is that antitrust enforcement with respect to mergers, acquisitions, and joint ventures is dead, and, in the vernacular, that "anything goes." In reality, these widespread reports of the death of antitrust law are greatly exaggerated.

There is, of course, not doubt that the current Administration has adopted a more relaxed antitrust merger and acquisition (M&A) policy than its predecessors. Nor is there any doubt that corporations have become more prone to taking antitrust risks. Nevertheless, M&A deals between major competitors continue to present material legal risks. Consequently, those planning corporate and business and legal strategy without regard for such antitrust risks invite disaster.

*Id.* at 25–27. See also David Scheffman et al., *Twenty Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 71 ANTITRUST L.J. 277 (2003) (reviewing FTC merger enforcement experience since 1982).

<sup>200</sup> *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

<sup>201</sup> *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986).

<sup>202</sup> *FTC v. PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986).

<sup>203</sup> *FTC v. Warner Communs., Inc.*, 742 F.2d 1156 (9th Cir. 1984).

<sup>204</sup> *E.g.*, *United States v. Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984) (relying on ease of entry to reject DOJ challenge to merger).

to accept cures short of outright disapproval to address competitive problems. The Bush presidency featured refinements of the Reagan-era merger enforcement program, including issuance of the 1992 DOJ/FTC Horizontal Merger Guidelines, which foreshadowed closer scrutiny of unilateral effects and direct measurement of market power in merger analysis.<sup>205</sup>

The Clinton antitrust agencies gave greater scrutiny to vertical relationships and relied more extensively on settlements entailing substantial, continuing oversight of the merged party to ensure nondiscriminatory access to specific inputs and the use of “firewalls” to ensure that the merged party does not use its control over the sale of one input to obtain information that it can use to compete against purchasers of the input. In 1997 the federal agencies amended the treatment of efficiencies under the Merger Guidelines and continued the trend begun in 1982 of expanding the tools that merging parties can use to justify transactions.

## 2. *Characterizing the Federal Merger Enforcement Norms of the 1980s*

Should federal merger enforcement norms of the 1980s be deemed “radical” or inexcusably permissive? The answer depends on the baseline for comparison. The federal agencies’ enforcement norms of the 1980s dramatically narrowed the zone of liability established in norms that DOJ and the FTC had embraced in the 1960s. Yet, in at least one crucial respect, it is misleading to say that policy norms in the 1980s had no connection to policy norms established in the 1960s. The 1960s yielded a far-reaching policy innovation—the DOJ’s issuance of enforcement guidelines emphasizing self-restraint and transparency. Donald Turner’s 1968 Merger Guidelines, assailed by those who wanted federal enforcement carried to the frontiers of existing Supreme Court merger jurisprudence and beyond, established the process norm that supported promulgation of William Baxter’s Merger Guidelines in 1982.

Compared to practice in the 1970s, DOJ and FTC merger enforcement norms in the 1980s also shrank the set of transactions that would elicit challenge.<sup>206</sup> Even if Jimmy Carter had gained a second term as president, some contraction from 1970s’ enforcement norms almost certainly would have occurred in the 1980s. It had become clear to the federal agencies

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<sup>205</sup> U.S. Dep’t of Justice & Federal Trade Comm’n, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

<sup>206</sup> In his 1986 study of federal merger enforcement, Ronald Davis found that from January 1981 through December 1985 the FTC and DOJ rarely challenged transactions yielding a market share below 15–20%. Davis concluded that risk of challenge “increases substantially” when the post-acquisition market share exceeds 20%. Davis, *supra* note 58, at 31.

as the 1970s progressed that the tide of judicial enthusiasm for ever bolder merger control had subsided after *General Dynamics*, and lower court decisions were making further retrenchment inevitable. The 1982 Baxter Guidelines may well have pulled in the enforcement boundaries more than a second-term Carter Justice Department would have, yet the effectiveness and acceptance of the Baxter Guidelines stemmed from their general fidelity to perspectives that had gained broad currency in the decisions of the lower courts.<sup>207</sup>

For a further point of reference, we can compare federal enforcement norms of the 1980s to enforcement norms of the 1990s. DOJ and FTC enforcement norms in the 1980s cannot properly be called “radical” or excessively permissive compared to federal enforcement practice in the 1990s. Consider first the case of horizontal mergers. Commissioner Thomas Leary has documented how the federal enforcement agencies in the 1980s established a level of intervention that generally has continued to the present. Using government interventions as a percentage of HSR filings, enforcement rates since 1981 have remained relatively stable.<sup>208</sup>

Other features of federal horizontal merger enforcement in the 1980s and 1990s also reveal important degrees of commonality in norms. One aspect of commonality involves the response of the federal enforcement agencies to the merger waves of the 1980s and 1990s, respectively. The pendulum narrative frequently links the relaxation of merger enforcement in the 1980s to the merger wave of the same decade.<sup>209</sup> This strand of the narrative posits that a sharp increase in mergers is a certifying sign of inadequate federal enforcement.

Such logic creates a problem for those seeking to depict the 1990s as the period, compared to the 1980s, of sensible enforcement moderation. Merger activity in the 1990s surpassed levels attained in the 1980s, as

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<sup>207</sup> See Blumenthal, *supra* note 197, at 15–16 (describing substantial degree to which 1982 guidelines used analytical approaches derived from existing case law).

<sup>208</sup> See Leary, *supra* note 9, at 121–42. Other studies presenting data generally consistent with Commissioner Leary’s findings include Malcolm B. Coate, *Merger Enforcement at the Federal Trade Commission in Three Presidential Administrations*, 45 ANTITRUST BULL. 323 (2000); Paul A. Pautler, *Evidence on Merger and Acquisitions*, 48 ANTITRUST BULL. 119 (2003).

<sup>209</sup> See *supra* note 180 and accompanying text (linking relaxed antitrust enforcement to merger wave of 1980s); Adams & Brock, *supra* note 51, at 310 (“[I]n a manner reminiscent of its Harding-Coolidge-Hoover predecessors, the Reagan Administration created a hospitable environment for one of the most voracious corporate feeding frenzies and mass ‘corpocide’ movements in American history.”); Pitofsky, *supra* note 29, at 326 (Reagan administration’s “failures to act and loose rhetoric have contributed to a foolish and wasteful surge of giant consolidations”).

multi-billion dollar transactions became commonplace.<sup>210</sup> Enforcement officials, who in the late 1980s and early 1990s had cited lax merger enforcement as a cause of the 1980s merger wave, now found themselves presiding over a still greater wave of consolidations.<sup>211</sup> The anomaly drew the attention of some commentators who had scorned merger policy in the 1980s as being excessively permissive and now lamented that Clinton's antitrust officials had failed to arrest the 1990s merger wave.<sup>212</sup> If the pendulum narrative correctly identified weak merger enforcement as a significant cause of the 1980s merger wave, it would seem that lax DOJ and FTC policies deserved no less responsibility for contributing to the wave of mergers in the 1990s.

As the pace of consolidations accelerated in the 1990s, the Clinton antitrust officials attempted to distinguish their merger wave from the Reagan merger wave. DOJ and FTC authorities said the mergers of the 1980s generally added little value to the economy while the mergers of the 1990s were more likely to have genuine economic merit. "Unlike the mergers of the 1980s, which were frequently motivated primarily by financial concerns," said one Clinton FTC official, "today's mergers are based on a desire to strengthen competitive position."<sup>213</sup> The 1980s, observed another Clinton FTC official, was the decade of "leveraged buyout hostile takeover junk bond activities" motivated by "financial considerations or stock market manipulation"; in the 1990s, by contrast,

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<sup>210</sup> See James W. Brock, *Antitrust, the "Relevant Market," and the Vietnamization of American Merger Policy*, 46 ANTITRUST BULL. 735, 735-36 (2001) ("[T]he annual value of mergers and acquisitions in the U.S. skyrocketed 1200% over the years 1991-1999, totaling a cumulative \$6.6 trillion for the period. . . . This monumental merger-mania has dramatically shaken—and profoundly altered—virtually every sector of the economy, as fusions among the very biggest firms accelerated, and grew ever more massive and far reaching."); Paul M. Sherer, *The Lesson from Chrysler, Citicorp and Mobil: No Companies Nowadays Are Too Big to Merge*, WALL ST. J., Jan. 4, 1999, at R8; G. Pascal Zachary, *Let's Play Oligopoly!*, WALL ST. J., Mar. 8, 1999, at B1.

<sup>211</sup> See Stephen Labaton, *Oligopoly*, N.Y. TIMES, June 11, 2000, at Sec. 4, p.1 ("[A] major legacy of the Clinton administration will be that it encouraged one of the greatest periods of industrial concentration in American history, affecting old and new sectors ranging from oil and pharmaceuticals, to telecommunications, broadcasting and the Internet. Call it the Age of Oligopoly.").

<sup>212</sup> See Brock, *supra* note 210, at 794-95:

[A] monomaniacal fixation on "relevant market" analysis at the antitrust agencies has gutted section 7 of its core purposes and goals. It has blinded the agencies to the merger-induced buildup of economic concentration which it was Congress's intent to prevent; it has led them to approve that which it was Congress's purpose to prohibit, and to sanction that which Congress sought to proscribe. . . . [I]n the larger battle against corporate mergers, economic concentration and market power, the agencies seem to have been declaring victory by abandoning the field.

<sup>213</sup> David Balto, *Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies*, 69 GEO. WASH. L. REV. 952, 953 (2001).

“a large portion of the mergers . . . appear to be motivated by a legitimate response to fast changing business conditions.”<sup>214</sup> In terms that resembled the comments of their Reagan predecessors in the previous decade, the Clinton antitrust leaders reminded observers that mergers were generally benign or procompetitive and that only a relatively few transactions required enforcement intervention.<sup>215</sup>

There is reason to doubt the proposition that the merger wave of the 1990s was generally “a legitimate response to fast-changing business conditions” and the merger wave of the 1980s stemmed mainly from “financial considerations or stock market manipulation.” The claims about the relative quality of mergers in the 1980s and 1990s typically are offered without systematic evidence demonstrating that transactions in the two periods varied significantly in their economic aims and consequences.<sup>216</sup> The substantiation presented with the frequent recitals of this hypothesis generally consists of the speaker’s undocumented intuition.

Considered on its substantive merits, each element of the “80s bad, 90s good” merger wave hypothesis deserves skepticism. A number of researchers have advanced a plausible alternative interpretation of merger activity in the 1980s—namely, that the relaxation of merger controls during the Reagan administration facilitated a needed restructuring of U.S. industry and helped position American firms for stronger performance in the global economy in the 1990s.<sup>217</sup> For example, Louis

<sup>214</sup> Robert Pitofsky, Chairman, Federal Trade Commission, *Staples and Boeing: What They Say About Merger Enforcement at the FTC 1* (Sept. 23, 1997), available at <http://www.ftc.gov/speeches/pitofsky/STAPLESpc.htm>. The federal enforcement agencies routinely gave the same explanation to congressional committees that inquired about the 1990s merger wave. In a House Judiciary Committee hearing in 1997, for example, the DOJ and FTC leadership made the same comparison of mergers in the 1980s and 1990s. Joel Klein, the Assistant Attorney General for Antitrust, observed: “As opposed to the last merger wave of the 1980s, which was primarily motivated by financial considerations, today’s mergers are primarily strategic in nature.” *The Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission, Hearings Before the House Committee on the Judiciary*, 105th Cong., 1st Sess. 8, 11 (1997) (written statement of Joel Klein). FTC Chairman Robert Pitofsky testified: “Unlike the conglomerate merger wave of the late 1960s, and the leveraged buyout, hostile takeover junk bond activities of the 1980s, the current wave of mergers does not seem to be mainly motivated by financial market considerations. Rather, a larger percentage of these transactions appears to be a strategic response to changes in the world economy.” *Id.* at 17, 17 (written statement of Robert Pitofsky).

<sup>215</sup> See Labaton, *supra* note 211, at 1 (quoting FTC Chairman Robert Pitofsky: “We live in perhaps the most dynamic economy in a generation or more. There are many firms trying to adjust to new economic circumstances and global competition. That’s all fine with us. It’s the relatively few mergers that present problems.”).

<sup>216</sup> For example, the sources cited *supra* notes 213–14 offer no data or other documentation to support their comparison of mergers in the 1980s and 1990s.

<sup>217</sup> Louis Galambos, *The Monopoly Enigma, the Reagan Administration’s Antitrust Experiment, and the Global Economy* (Johns Hopkins University, Department of History,



Galambos, the business historian, observes that during the 1980s and 1990s “the U.S. business system experienced the most formidable transformation in its history.”<sup>218</sup> Less-stringent antitrust oversight of mergers, Professor Galambos finds, was important to the “[r]eengineering, restructuring, spinning off, deconglomerating, combining” that fueled the transformation.<sup>219</sup>

Even if one rejects the alternative hypothesis about the 1980s, the “90s good” part of the story seems infirm. Measured by the impressionistic standards used to criticize the 1980s merger wave, claims that the mergers of the 1990s were inspired by higher motives or promised superior efficiencies seem quaint as disclosures of corruption and mismanagement come forth about Enron, Tyco, WorldCom, and other firms that used acquisitions as a key means to grow in the 1990s.<sup>220</sup> Criticisms leveled against the merger wave of the 1980s—that “vast wealth transferred into the hands of business organizers and their banking and legal advisors,” that mergers yielded “an increasing presence of financial manipulators at the heads of corporations, rather than people trained to produce better products at lower prices,” that corporate managers seeking to protect their jobs “were forced . . . to emphasize short-term over long-term profits”<sup>221</sup>—seem no less applicable to the merger wave of the 1990s.

Despite efforts to distinguish it, the merger wave of the 1990s fits awkwardly into the pendulum narrative’s thesis that enforcement in the 1990s achieved a wise moderation compared to extremist, permissive policies that had fueled the merger wave in the 1980s. If the pendulum narrative is correct in asserting that inadequate merger control helps spur merger waves, then federal enforcement policy in the 1990s was at least as feeble as DOJ and FTC policy in the 1980s. If the benchmark of inadequacy is the completion of massive transactions subject, at most, to limited conditions, the 1990s are no less breathtaking in their amenability to consolidation than the 1980s. The “radical” willingness of policy makers in the 1980s to contemplate higher levels of post-merger

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July 31, 2001) (mimeo; copy on file with author); Scheffman, *supra* note 81, at 175 (“The merger wave of the 1980s was driven by basic changes in the domestic and world economy (globalization of markets, deregulation, technological change, innovations in capital markets that facilitated the extraction of inefficient management, etc.).”).

<sup>218</sup> Galambos, *supra* note 217, at 22.

<sup>219</sup> *Id.*

<sup>220</sup> See *Scandal Scorecard*, WALL ST. J., Oct. 3, 2003, at B1 (recounting status and investigations and trials of corporations and individual executives involved in “corporate scandals that rocked Wall Street, shattered reputations, and cost investors hundreds of billions of dollars”).

<sup>221</sup> Pitofsky, *supra* note 6, at 198.

concentration and allow massive deals to proceed subject to divestitures had become routine practice in the 1990s.<sup>222</sup>

3. *Similarity of Merger Enforcement Norms in the 1980s and 1990s:  
Two Industry Examples*

Experience with consolidation in the petroleum and aerospace/defense sectors underscores how federal merger enforcement norms established in the 1980s persisted through the 1990s. The discussion below does not criticize the policy outcomes achieved in the transactions in question; instead, it assumes that the federal agencies achieved sensible policy results in reviewing these mergers. The transactions are presented to invite consideration of how the competition policy community would have responded to the enforcement decisions taken by the DOJ and the FTC in the 1990s if such decisions had been made in the 1980s. Would decisions of the 1990s, had they been issued in the 1980s, have been denounced as evidence of Inexcusable Retrenchment, or would commentators have called the outcomes part of a desirable, necessary repositioning of federal merger policy?

a. Petroleum

Describing federal merger policy in the petroleum sector in the 1990s, one commentator has written that the federal antitrust agencies “presided over a feeding frenzy in the nation’s oil industry so voracious as to resurrect the specter of the kind of structural domination not seen since the court-ordered breakup of the Standard Oil monopoly a century ago.”<sup>223</sup> In the 1990s, the FTC permitted Exxon to buy Mobil, British Petroleum to purchase Amoco, and BP Amoco to purchase Arco. Each transaction was conditioned on the requirement that the parties undertake substantial divestitures. As explained below, it is highly unlikely that Exxon would have attempted to acquire Mobil *on any terms* in the 1980s.<sup>224</sup> Nor is it likely that BP would have sought to absorb both Amoco and Arco *on any terms* in the 1980s. As ultimately approved by the FTC,

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<sup>222</sup> See Stephen Labaton, *Despite a Tough Stance or Two, White House Is Still Consolidation Friendly*, N.Y. TIMES, Nov. 8, 1999, at A22 (observing that “Mr. Clinton and his administration will go down in history as encouraging the largest number of business mergers—and in some industries the greatest concentration of economic power—in many years; quoting Professor John Shepard Wiley Jr.: “We’re in the greatest merger wave in history, and yet we are hardly in the greatest litigation wave. There has been a sea change in attitudes toward large mergers.”).

<sup>223</sup> Brock, *supra* note 210, at 773.

<sup>224</sup> See *id.* at 779 (noting that, in 1999, “the FTC permitted the hitherto unthinkable combination of Exxon and Mobil”).

these mergers were possible only because the Commission in the 1990s embraced enforcement norms established in the 1980s.<sup>225</sup>

A brief historical tour underscores the change. Since Congress passed the Sherman Act in 1890, the petroleum industry has spent more time under the antitrust microscope than any sector of the U.S. economy. The evolution of U.S. antitrust policy can be taught by focusing on the petroleum sector alone. It was the Justice Department's case against Standard Oil that broke up John D. Rockefeller's empire in 1911 and established the rule of reason as the basic tool of antitrust analysis.<sup>226</sup> Mobil, then known as Socony-Vacuum, was the lead defendant in the DOJ case that led the Supreme Court in 1940 to forbid price fixing by competitors.<sup>227</sup> Standard of California's distribution practices elicited another Antitrust Division challenge and spawned a formative Supreme Court decision in 1949 that curbed exclusive dealing.<sup>228</sup>

In the 1960s and early 1970s, the FTC took several steps that would make the Commission the principal federal antitrust agency for petroleum industry matters. In the 1960s, the FTC persuaded the Supreme Court to curb efforts by the major refiners to force retailers to carry their lines of tires, batteries, and accessories, and in 1973, the FTC sued the country's eight leading petroleum refiners, including Exxon and Mobil, with violating Section 5 of the Federal Trade Commission Act by maintaining a noncompetitive market structure.<sup>229</sup>

Legislative concerns about the petroleum industry also sharpened in the 1970s. Congress set price controls for domestic oil production and held numerous hearings to examine competition in the industry and throughout the energy sector. Antitrust-related bills concerning the energy sector received extensive attention, including measures to vertically restructure the leading U.S. producers and refiners, to divest large oil firms of ownership of non-petroleum energy sources such as coal, and to limit purchases of businesses outside the energy sector.<sup>230</sup>

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<sup>225</sup> Compare JOHN E. KWOKA, JR. & LAWRENCE J. WHITE, *THE ANTITRUST REVOLUTION* 3 (4th ed. 2004) ("[M]ost students of antitrust are at some time led through cases of the 1960s that endorsed the populist objective of protecting small business and that prohibited mergers between companies with small market shares. By the 1980s and 1990s, by contrast, mergers of huge petroleum companies were approved with only minor modification . . .").

<sup>226</sup> *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911).

<sup>227</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>228</sup> *Standard Oil Co. of California v. U.S.*, 337 U.S. 293 (1949).

<sup>229</sup> The FTC's "TBA" cases from the 1960s included *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968). The complaint and disposition of the shared monopoly refining case is reported in *Exxon Corp.*, 98 F.T.C. 452 (1981).

<sup>230</sup> See, e.g., S. REP. NO. 94-1005, *The Petroleum Industry Competition Act of 1976*, Report of the Senate Committee on the Judiciary, 94th Cong., 2d Sess., Pt. 1 (1976) (discussing

As the 1970s closed and the 1980s began, the major oil companies operated under the close scrutiny of Congress and the antitrust enforcement community. In 1981, the Reagan FTC opposed Mobil's effort to acquire Marathon Oil, a substantial but second-tier refiner and producer of crude oil. The Commission considered resolving the matter with a divestiture, but even this gesture attracted criticism for demonstrating the agency's willingness to consider anything other than an absolute prohibition.<sup>231</sup> In 1982 the Commission blocked Gulf's efforts to acquire Cities Service. Later in the decade, the FTC approved a number of oil mergers—including Texaco/Getty and Chevron/Gulf—subject to the type of divestiture requirements that became common conditions of approving the oil industry deals in the 1990s.

What made the Exxon/Mobil, BP/Amoco, and BP Amoco/Arco mergers possible in the 1990s, subject to significant divestitures? Three developments with roots in the 1980s stand out. One is a growing acceptance that federal enforcement policy should take fuller account of efficiency considerations in applying merger rules. The second phenomenon is a change in analytical perspective that attaches less importance to structural industry conditions in determining competitive vigor. Since 1982, the federal Horizontal Merger Guidelines have de-emphasized concentration data and given more weight to qualitative factors that afford a fuller basis for deciding whether increased concentration will enable the merging parties to exercise market power unilaterally or coordinate conduct with the remaining industry participants. The third shift is the increased willingness of the antitrust agencies to specify competitive concerns and entertain remedies short of outright prohibition to solve such concerns.

#### b. Aerospace and Defense

The 1990s witnessed dramatic consolidation in the aerospace and defense sectors. For the most part, the consolidation process was an inevitable consequence of reductions in defense expenditures from the

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proposed legislation to vertically restructure the nation's leading integrated petroleum firms).

<sup>231</sup> See Fox & Sullivan, *supra* note 18, at 949:

The Reagan Administration's merger enforcement has been characterized as well by affirmative government efforts to facilitate mergers. When Mobil Corporation, the nation's second largest oil company and avowed supplier to brand-name resellers only, tried to take over Marathon Oil Company, the leading independent oil company and seller to nonbranded resellers (price cutters), the FTC reluctantly and belatedly filed a complaint against Mobil. It simultaneously published a blueprint showing how Mobil could proceed with the acquisition and cure all competition problems by dismembering Marathon.

mid-1980s to the early 1990s. In some instances the federal enforcement agencies opposed deals completely; in others they insisted on significant remedies. Yet the federal agencies in the 1990s allowed a number of major mergers to proceed with limited modifications and permitted others to go forward with no adjustments.<sup>232</sup>

The most striking episode of nonenforcement involved Boeing's purchase of the McDonnell Douglas Corporation (MDC) in 1997.<sup>233</sup> The merger reduced from three to two the number of the world's producers of large commercial aircraft and combined two of the largest suppliers of aerospace products to the U.S. Department of Defense. The FTC allowed the transaction to proceed without intervention,<sup>234</sup> and the European Commission subsequently imposed certain limits on the conduct of the merging parties.<sup>235</sup> The merger involved a number of difficult issues.<sup>236</sup> Had the merger been blocked, might MDC, with its back pressed against the wall, have found a way to survive independently as an important fringe producer of commercial airliners? Should Boeing have been permitted to absorb a source of some of the country's most innovative weapons designs of the post-World War II era? Did not the merger present innovation issues comparable to those that moved the Justice Department in 1998 to oppose Lockheed Martin's purchase of Northrop Grumman?<sup>237</sup>

Another example from this period involves consolidation in the market for air-to-air tactical missiles. In the 1990s, the DOJ permitted mergers

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<sup>232</sup> See William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, 44 ANTITRUST BULL. 421 (1999) (describing U.S. antitrust policy toward defense mergers in 1990s).

<sup>233</sup> The FTC and European Commission reviews of the Boeing/McDonnell Douglas merger are discussed in William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001). The author advised McDonnell Douglas concerning the transaction.

<sup>234</sup> Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of Boeing Company/McDonnell Douglas Corporation, FTC File No. 971-0051 (explaining FTC decision not to prosecute), available at <http://www.ftc.opa/1997/9707/boeingsta.htm>.

<sup>235</sup> Commission decision of 30 July 1997 declaring a concentration compatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.877-Boeing/McDonnell Douglas), 1997 O.J. (L. 336) 16.

<sup>236</sup> See GAVIL ET AL., *supra* note 82, at 17-21 (discussing competition policy issues posed by Boeing's purchase of McDonnell Douglas).

<sup>237</sup> See Robert Kramer, Chief, Litigation II Section, U.S. Dep't of Justice Antitrust Div., *Antitrust Considerations in International Defense Mergers* 3, Speech Before the American Institute of Aeronautics and Astronautics (May 4, 1999) (discussing importance of innovation-related effects in DOJ's decision to oppose Lockheed Martin's purchase of Northrop Grumman), available at <http://www.usdoj.gov/atr/public/speeches/2649.htm>.

that collapsed U.S. capacity to produce these weapons into a single firm. The various steps of the consolidation of this sector were subject to regulatory undertakings. The final stage of this process, Raytheon's acquisition of Hughes Aircraft in 1997, was a two-to-one merger.

These are not the only examples one could cite from the 1990s.<sup>238</sup> The evaluation of these and other aerospace and defense mergers forced the DOJ and the FTC to make extraordinarily difficult judgments and address some of the most difficult problems in antitrust analysis. In each case, good arguments could be made to permit the transactions at issue to proceed in the fashion ultimately chosen. The antitrust agencies and their colleagues at the Department of Defense at all times have been aware of the serious consequences that would flow from allowing transactions that seriously diminished military R&D rivalry in a nation whose defense strategy places a premium on maintaining qualitative superiority in weapon systems.

What would have happened if the aerospace and defense industry transactions described above had taken place in the 1980s? It is impossible to know. Industry conditions relevant to analyzing mergers in the aerospace and defense sectors were not identical in the 1980s and 1990s. The late 1970s and first half of the 1980s featured substantial increases in outlays for weapon systems and related research and development. After 1986, expenditures for hardware and R&D declined. As the 1980s drew to a close, it was evident that declining demand could not sustain existing levels of capacity—the condition that would spur the major consolidation moves in the 1990s.

The DOJ and the FTC confronted relatively few aerospace and defense transactions in the 1980s and early 1990s. In a noteworthy number of instances, the agencies' review of these transactions resulted in intervention. In 1981, the Reagan FTC sued to block LTV's purchase of Grumman,<sup>239</sup> a merger that would have reduced from seven to six the number of U.S. suppliers of combat aircraft and from three to two the number of producers of carrier-suitable fighters. In the mid-1980s the FTC blocked a

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<sup>238</sup> In 1999, the FTC decided not to block BF Goodrich's purchase of the only other U.S. producer of heavy landing gear systems. The Commission allowed the deal to proceed on the assumption that it was a three-to-two rather than a two-to-one merger. Commercial aircraft producers and the U.S. Department of Defense regarded a European firm (Messier-Douty) as an acceptable alternative source with capability to compete against Goodrich.

<sup>239</sup> FEDERAL TRADE COMMISSION, ANNUAL REPORT FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1982, at 25 (1982) (describing FTC effort to seek preliminary injunction to bar LTV's purchase of Grumman due to adverse competitive effects in carrier-based aircraft industry).

four-to-three acquisition (*PPG*) involving producers of cockpit transparencies. In 1989 the FTC sued to bar a two-to-one acquisition involving suppliers of night vision devices,<sup>240</sup> and in 1992 obtained an injunction halting the combination of the country's two remaining manufacturers of tank ammunition.<sup>241</sup>

In comparing federal merger policy in the 1980s and 1990s, one can pose the same question raised in considering enforcement norms and petroleum industry transactions. If Boeing/MDC or Raytheon/Hughes had arisen under similar facts in the 1980s and the Reagan agencies had allowed them to proceed on the same terms deemed acceptable to the Clinton antitrust officials, how would the competition policy community and other observers have received such decisions? Would such decisions have been taken as certifying proof of the pendulum narrative's thesis—that the Reagan agencies endorsed dangerously radical policies favoring non-intervention or unacceptably light-handed control? Assuming hypothetically that the Reagan officials confronted industry conditions similar to those prevailing in the 1990s, would the reasoning advanced by the federal agencies in the 1990s to defend the outcomes have been condemned as threadbare rationalizations in the 1980s? Without providing definitive answers to those questions, it is reasonable to say that the outcomes of the 1990s are regarded today as legitimate and supportable policy choices largely because the federal merger policy enforcement norms of the 1980s had durable analytical foundations and were not ideological aberrations.

### c. Summary

The petroleum and aerospace/defense sectors are not the only examples one could use to discredit the pendulum narrative. The 1990s witnessed other mergers that dwarfed the biggest deals of the 1980s. Some proceeded following divestitures or the acceptance of regulatory controls. Others took place without challenge by the federal antitrust agencies. How would some of the other major consolidation events, and the federal agencies' response to them, from the 1990s have been viewed in the 1980s? Would the shrinking of the number of Regional Bell Operating Companies from seven to four, as qualified by various settlements with the Justice Department and the Federal Communications

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<sup>240</sup> *FTC v. Imo Inc.*, 1992-2 Trade Cas. (CCH) ¶ 69,943 (D.D.C. 1989).

<sup>241</sup> *FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9 (D.D.C. 1992).

Commission,<sup>242</sup> have been deemed acceptable? Would Daimler's unchallenged purchase of Chrysler have provoked an outcry?

The pendulum narrative of antitrust history often speaks of federal enforcement in the 1980s as taking serious risks with competition in the U.S. economy. Measured by the standards for permissiveness that the pendulum narrative employs, it is difficult to see how the risks assumed in the 1980s exceeded, or perhaps even matched, the risks taken in examining a number of mergers that transpired in the 1990s. That is not to say that the risks taken in the 1990s were unwise or the competitive effects of the relevant transactions were anything other than benign or procompetitive. It is only to say that, compared to merger control in the 1960s or 1970s, federal enforcement in the 1990s itself could be said to have featured a "radical" relaxation of policy. Many of the outcomes achieved by the DOJ and FTC in the 1990s, in aerospace, defense, petroleum, and other sectors, could not have come to pass without acceptance by the federal agencies of norms that the DOJ and the FTC had embraced in the 1980s.

#### D. CONTESTED NORMS: DOMINANT FIRMS AND VERTICAL CONTRACTUAL RESTRAINTS

The apparent discontinuities in modern U.S. antitrust enforcement seem most dramatic in two areas of competition policy: the control of dominant firm behavior and the control of vertical contractual restraints, such as exclusive dealing, resale price maintenance, and tying arrangements. Measured by numbers of enforcement interventions, the disparities in federal activity in these areas across the last three decades are more pronounced and most resemble the distribution of activity over time presented in the pendulum narrative. Although the pendulum narrative correctly identifies notable differences in the number of cases initiated, it falters in explaining why federal enforcement policy changed across these periods and, in so doing, obscures our understanding of the evolution in enforcement norms.

##### 1. *Dominant Firms*

Table 4 presents the total number of new monopolization and attempted monopolization cases initiated by the Department of Justice under Section 2 of the Sherman Act and by the FTC under Section 5 of the FTC Act from 1961 through 2000:

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<sup>242</sup> See Stephanie N. Mehta, *In Phones, the New Number Is Four*, WALL ST. J., Mar. 8, 1999, at B1 (describing consolidation in telecommunications sector in 1990s).



**Table 4**  
**DOJ and FTC Monopolization/Attempted**  
**Monopolization Cases—1961 to 2000<sup>243</sup>**

<i>President</i>	<i>DOJ Cases</i>	<i>FTC Cases</i>	<i>Total</i>	<i>Cases/Year</i>
Clinton (1993–2000)	7	4	11	1.375
Bush (1989–1992)	0	0	0	0
Reagan (1981–1988)	2	2	4	0.5
Carter (1977–1980)	2	3	5	1.25
Nixon/Ford (1969–1976)	17	10	27	3.375
Kennedy/Johnson (1961–1968)	13	8	21	2.625

The pendulum narrative frequently identifies the treatment of dominant firm exclusionary behavior as a major illustration of the swings in federal antitrust enforcement. Enforcement involving dominant firms is said to have been excessive in the 1960s and 1970s.<sup>244</sup> The narrative portrays federal policy in the 1980s as grossly inattentive to possible attempted monopolization and monopolization matters and wrongly indifferent to possibilities identified in the new economic literature for attacking exclusionary pricing conduct.<sup>245</sup> Repeated recitations of the pendulum narrative over time have tended to make the Reagan administration's few cases simply disappear.<sup>246</sup> In the 1990s, the abuse of dominance case assumes its proper role in the federal enforcement mix.

<sup>243</sup> These data are collected from the CCH Trade Regulation Reporter.

<sup>244</sup> See Pitofsky, *supra* note 29, at 324 & n.10 (observing that “[i]ndustry-wide investigations and cases were initiated under section 2 with no clear theory of what constituted monopolizing behavior” and adding that “[t]he most extreme examples were the FTC investigations of the oil and auto industries, initiated in 1973 and 1976 respectively”).

<sup>245</sup> See *id.* at 322 (“[W]hile price predation is theoretically an anticompetitive business strategy, the enforcement agencies just cannot seem to find an instance of this type of illegal behavior worth challenging.”).

<sup>246</sup> See *id.* at 321 (“[A]lthough section 2 of the Sherman Act still outlaws monopolization, the [Reagan] Administration has not brought a single case in seven years.”); Pitofsky, *supra* note 7, at 587 (“[D]uring the Reagan years there was no enforcement whatsoever against non-horizontal mergers and joint ventures, boycotts, minimum resale price maintenance, exclusive dealing contracts, tie-in sales, attempts to monopolize, and monopolization.”); Pitofsky, *First Annual Miles W. Kirkpatrick Antitrust Lecture*, *supra* note 26, at 7, 8 (During the Reagan administration, “the federal government brought no cases challenging . . . attempt to monopolize, or monopolization”); Pitofsky, *Remedies*, *supra* note 26, at 170 (during Reagan Administration, “there was an absence of enforcement against . . . monopolization and attempts to monopolize (at least after the Department of Justice settled the earlier challenge to AT&T by supervising a breakup of the telephone monopoly”). From 1981 through 1987, the FTC brought two matters involving allegations of illegal monopolization. See *AMERCO*, 109 F.T.C. 135 (1987) (Commission decision finding liability for illegal monopolization); *Western Gen. Dairies, Inc.*, 99 F.T.C. 433 (1982) (consent order resolving claim of illegal monopolization). In the same period, the Justice Department brought two Sherman Act § 2 matters, including the invitation to collude prosecution in *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

A standard criticism of antitrust policy in the era following *Alcoa* through the late 1950s was that the federal agencies had dealt timidly with concentrated industries.<sup>247</sup> Concern with traditional horizontal restraints enforcement was said to show a lack of imagination and institutional courage. Despite occasional government victories, this criticism persisted in the 1960s and culminated in the recommendation of the Neal Commission in 1969 that Congress and the enforcement agencies adopt a new norm that promoted enforcement to attack abusive conduct by dominant firms and, in many instances, to deconcentrate major sectors of the economy.<sup>248</sup> Beginning in 1969 and continuing through the 1970s, the federal agencies accepted the new dominant firm enforcement norm. They responded to this criticism by initiating a series of monopolization and attempted monopolization cases unmatched in number or scope since the Justice Department's Section 2 cases from 1905 to 1920.

From 1969 to 1980, the DOJ used Section 2 concepts to attack dominant firms and oligopolies, and the FTC invoked Section 5 of the FTC Act to attack concentrated market structures. The ambitiousness, and risk, of this program are difficult to overstate. As a group, the targets of the cases accounted for a remarkable range and amount of commercial activity. It would have been a noteworthy accomplishment for a competition policy authority in the course of a decade to challenge and restructure any two or three of the following: the world's leading computer producer (IBM),<sup>249</sup> the world's leading producer of photocopiers (Xerox),<sup>250</sup> the world's largest telephone system (AT&T),<sup>251</sup> the world's two leading producers of tires (Firestone and Goodyear),<sup>252</sup> the eight largest U.S. petroleum refiners,<sup>253</sup> or the four largest suppliers of breakfast cereal.<sup>254</sup> The DOJ and the FTC sued them all. In doing so, the federal

<sup>247</sup> Kovacic, *Failed Expectations*, *supra* note 57, at 1136.

<sup>248</sup> *See id.* at 1136 (discussing work of Neal Commission).

<sup>249</sup> *United States v. IBM Corp.*, [1961–1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. filed Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization).

<sup>250</sup> *Xerox Corp.*, 86 F.T.C. 364, 367–68 (1975) (complaint alleging monopolization, attempted monopolization, and the maintenance of a highly concentrated market structure).

<sup>251</sup> *United States v. AT&T Co.*, [1970–1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,074 (D.D.C. filed Nov. 20, 1974) (complaint alleging monopolization, attempted monopolization, and conspiracy to monopolize).

<sup>252</sup> *United States v. Goodyear Tire & Rubber Co., & United States v. Firestone Tire & Rubber Co.*, [1970–1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073 (N.D. Ohio filed Aug. 9, 1973) (complaint alleging attempted monopolization).

<sup>253</sup> *Exxon Corp.*, 98 F.T.C. 453, 456–59 (1981) (complaint alleging agreement to monopolize and maintenance of a noncompetitive market structure).

<sup>254</sup> *Kellogg Co.*, 99 F.T.C. 8, 11–16 (1982) (complaint alleging maintenance of a highly concentrated, noncompetitive market structure, and shared monopolization).

agencies sometimes relied on theories that pressed at the boundaries of economic learning and legal doctrine.<sup>255</sup> As late as 1979, top officials at the FTC were recommending the application of “no fault” theories of liability to restructure dominant firms that had enjoyed a substantial period of monopoly power unattributable to superior efficiency.<sup>256</sup>

Some matters in the federal government’s campaign against dominant firms from the late 1960s through 1980 yielded substantial remedies. This group would include the settlements achieved in *AT&T*, *Eli Lilly*,<sup>257</sup> *Hercules*,<sup>258</sup> *Sunkist*,<sup>259</sup> and *Xerox*<sup>260</sup> and the litigated victory in *Otter Tail*.<sup>261</sup> The actual impact of these matters on economic performance is difficult to measure, and the more prominent of them (*AT&T* and *Xerox*) have stimulated an active debate. For purposes of this discussion, I treat them as remedial successes. *Borden (ReaLemon)* yielded a victory on liability, but ultimately ended in a light-handed settlement.<sup>262</sup> The *ReaLemon* matter provided an opportunity for the Commission to influence the then-turbulent debate over the contours of predatory pricing doctrine, but the principal opinion for the FTC advanced so open-ended a standard that it disappeared from sight.

The dominant legacy of the federal campaign involving concentrated industries is failure in the form of litigated defeats on the merits (*DuPont*,<sup>263</sup> *General Foods*,<sup>264</sup> *ITT*,<sup>265</sup> *Kellogg*,<sup>266</sup> and *OAG*<sup>267</sup>) and dismissals

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<sup>255</sup> See Fox & Sullivan, *supra* note 18, at 943 (“During the 1960s and the early to mid 1970s, some individuals pushed to its limits the policy implications of the theory that high concentration lessens competition. The symbolic high point came when the Federal Trade Commission . . . sought a test case for a breakup of the principal firms in a concentrated industry. The FTC identified the ready-to-eat cereal market as its target . . .”).

<sup>256</sup> See Robert Pitofsky, Commissioner, Federal Trade Commission, In Defense of “No-Fault Monopoly” Proposals, Presentation Before the 20th Annual Law Symposium of the Columbia University Law School (Mar. 31, 1979) (copy on file with author) (defending no fault monopolization theory).

<sup>257</sup> *Eli Lilly & Co.*, 95 F.T.C. 538 (1980) (entering consent order).

<sup>258</sup> *U.S. v. Hercules, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,968 (D.N.J. 1981) (entering consent decree)

<sup>259</sup> *Sunkist Growers, Inc.*, 97 F.T.C. 443 (1981) (entering consent order).

<sup>260</sup> *Xerox Corp.*, 86 F.T.C. 364 (1975) (entering consent order).

<sup>261</sup> *United States v. Otter Tail Power Co.*, 410 U.S. 366 (1973).

<sup>262</sup> *Borden, Inc.*, 92 F.T.C. 669, 802–09 (1978) (finding liability), *aff’d*, 674 F.2d 498 (6th Cir. 1982), *order modified*, 102 F.T.C. 1147 (1983).

<sup>263</sup> *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653, 751 (1980) (dismissing complaint).

<sup>264</sup> *General Foods Corp.*, 103 F.T.C. 204, 364–68 (1984) (dismissing complaint).

<sup>265</sup> *Int’l Tel. & Tel. Corp.*, 104 F.T.C. 280, 451 (1984) (dismissing complaint).

<sup>266</sup> *Kellogg Co.*, 99 F.T.C. 8, 269 (1982) (dismissing complaint).

<sup>267</sup> *Reuben H. Donnelley Corp.*, 95 F.T.C. 1 (1980) (finding liability), *enforcement denied sub nom. Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980).

before trial (*Exxon*<sup>268</sup> and the *Firestone* and *Goodyear* cases<sup>269</sup>). Some matters generated important jurisprudence about the treatment of dominant firm conduct.<sup>270</sup> For the most part, the failed abuse of dominance cases raised doubts about the institutional capacity of the agencies to handle these types of cases successfully. The duration of some matters (*Exxon*, *General Foods*, *IBM*, *ITT*, and *Kellogg*)<sup>271</sup> suggested that the enforcement agencies were not skilled at managing complex litigation involving difficult exclusionary conduct questions. The analytical foundations for the agencies' cases in many instances were theories of coordination and exclusion that failed to account for recent developments in industrial organization economics.<sup>272</sup> By the close of the Carter administration, criticism of the federal agencies' handling of abuse of dominance cases was bipartisan and widespread.<sup>273</sup>

From the beginning of Ronald Reagan's presidency to the close of George Bush's presidency, the federal agencies settled the *AT&T* case

<sup>268</sup> *Exxon Corp.*, 98 F.T.C. 453, 461 (1981) (dismissing complaint).

<sup>269</sup> *United States v. Goodyear Tire & Rubber Co. and United States v. Firestone Tire & Rubber Co.*, [1970–1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073, at 53,542 (N.D. Ohio filed Mar. 2, 1976) (dismissing complaints).

<sup>270</sup> See, e.g., *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653 (1980) (FTC decision dismissing complaint alleging that DuPont illegally attempted to monopolize the market for titanium dioxide); see also F.M. Scherer, *Antitrust, Efficiency, and Progress*, 62 N.Y.U. L. REV. 998, 1007 (1987) (“[F]ear of a monopolization suit could conceivably inhibit scale-enhancing growth by dominant firms—or, at least, it might have until the recent DuPont titanium dioxide case extracted some of the law’s fangs.”).

<sup>271</sup> *Exxon* and *IBM* became the two most frequently cited symbols of prosecutorial incapacity. The Commission filed its *Exxon* complaint in 1973 and dismissed it following eight years of discovery and other pretrial proceedings. The Commission order dismissing the case said “both complaint counsel and respondents agree that the completion of discovery is at least several years away.” *Exxon*, 98 F.T.C. at 460. The Justice Department’s *IBM* case spanned thirteen years. The number of trial days reached 700, and the trial transcript exceeded 104,000 pages. See *Post-Mortem on IBM Case Provides Forum for Conflicting Perspectives*, 42 Antitrust & Trade Reg. Rep. (BNA) 310–11 (1982). Other matters attracted less attention but also took a considerable time to resolve. The time between the filing of the complaint and the decision by the FTC was eight years in *General Foods*, ten years in *ITT*, five years in *ReaLemon*, and ten years in *Kellogg*.

<sup>272</sup> The government launched a number of its most prominent matters, such as *IBM*, *Kellogg*, and *Exxon*, at a time of considerable ferment in economic research concerning the relationship between concentration and economic performance. This development was captured most famously in what became known as the Airlie House conference on “the new learning.” The major papers and part of the proceedings of the conference were published as *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid et al. eds., 1974).

<sup>273</sup> Some of the federal agencies' cases gained unusual prominence as subjects of vilification in the electoral arena. On the day before the presidential elections in November 1980, Vice President Walter Mondale appeared before a rally in Battle Creek, Michigan, and assured the audience that the Carter administration would not permit the FTC to pursue structural relief in the *Kellogg* shared monopoly case. Merrill Brown, *Candidates Hit FTC Cereal Action*, WASH. POST, Nov. 4, 1980, at A7.

with a consent decree that restructured the telecommunications giant, and they issued four abuse of dominance cases.<sup>274</sup> This is the smallest number of government dominant firm cases initiated in any comparable period since passage of the Sherman Act in 1890. In addition to cases filed, the Bush administration initiated the FTC investigation that established part of the evidentiary basis for the Clinton DOJ's investigation of Microsoft and decision to accept a consent decree in 1995.<sup>275</sup> The pendulum narrative depicts this record as decidedly inadequate, especially by comparison to the abuse of dominance cases involving firms, such as American Airlines, Intel, Microsoft, and Mylan, that the federal agencies undertook in the 1990s.

There is no scientific calculus for identifying the appropriate level of attempted monopolization or monopolization enforcement activity. Nonetheless, several considerations warrant caution in treating the pendulum narrative as a suitable interpretation of modern federal enforcement involving dominant firm conduct.

The first observation concerns our measures of significance. Of the abuse of dominance matters initiated by the federal antitrust agencies from 1969 through 1980, which matter had the greatest impact on antitrust doctrine? I suggest that *Otter Tail* is the most influential. *Otter Tail* spawned a large jurisprudence on the duty of dominant firms in regulated industries to provide access to rivals and, as explained below, played a formative role in spurring the development of the *AT&T* case. *Otter Tail* is the perfect example of a small case that made big law.

The unexpected contributions of *Otter Tail* to antitrust policy can be seen by considering the context in which the case originated. The year 1969 was a turning point in federal antitrust policy concerning dominant firms. On the last day of Lyndon Johnson's presidency in January 1969, the Justice Department accused IBM of illegal monopolization by means

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<sup>274</sup> The FTC issued its *AMERCO* complaint in 1985 and resolved the matter in 1987. *AMERCO*, 109 F.T.C. 135 (1987). The Commission also accepted a consent decree involving monopolization in the dairy industry in 1982. *Western General Dairies, Inc.*, 99 F.T.C. 433 (1982). FTC Chairman Miller did not participate in *Western General Dairies*. The DOJ brought a monopolization case in the electric utility industry soon after Ronald Reagan's inauguration in 1981. *United States v. Kentucky Utils. Co.*, [1980–1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,081 (D. Ky. filed Feb. 26, 1981). As noted previously, see *supra* note 101, the *Kentucky Utilities* case, though technically a "Reagan administration" case, was filed before William Baxter's arrival at the Antitrust Division in 1981. The DOJ filed its complaint involving attempted monopolization in 1983. *United States v. American Airlines, Inc.*, 570 F. Supp. 654 (N.D. Tex. 1983) (dismissing complaint), *rev'd*, 743 F.2d 1114 (5th Cir. 1984).

<sup>275</sup> During the Bush presidency, the FTC reached a 2–2 deadlock on whether to issue a complaint against Microsoft. The entry of the DOJ consent decree was ordered in *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

of predatory pricing, product development, and promotional tactics.<sup>276</sup> By the time the Antitrust Division under William Baxter sought dismissal of the case in 1982,<sup>277</sup> the IBM prosecution had consumed vast resources and become a singular symbol of prosecutorial failure—in Robert Bork’s words, “the Antitrust Division’s Vietnam.”<sup>278</sup>

The year 1969 also featured what at the time was a much lesser known prosecutorial event. The DOJ’s target was the Otter Tail Power Company, a utility that supplied electricity to 465 towns in Minnesota and the Dakotas. The Justice Department argued that Otter Tail had monopolized the sale of electricity by refusing to sell wholesale power to towns that sought to displace Otter Tail with municipally-owned distribution companies and by declining to wheel power to those localities over its transmission lines. With a small staff, the DOJ prevailed at trial and successfully defended the lower court’s decision before the Supreme Court in 1973.<sup>279</sup>

Taken together, the *IBM* and *Otter Tail* cases catalyzed major adjustments in monopolization doctrine and enforcement policy. *IBM* inspired many private challenges to IBM’s conduct, most of which ended in decisions giving firms in unregulated markets broad discretion to choose pricing, product development, and promotion strategies.<sup>280</sup> In the public enforcement arena, the experience with DOJ’s *IBM* litigation, coupled with the FTC’s handling of the *Exxon* and *Kellogg* monopolization cases, raised enduring concerns about the competence of the federal authorities to handle “the big case.”<sup>281</sup>

As the *IBM* litigation and related private suits narrowed antitrust policy’s horizons, *Otter Tail* expanded them. *Otter Tail* catalyzed the modern emergence of the essential facility doctrine. The doctrine had antecedents in earlier cases, such as *Terminal Railroad Association*<sup>282</sup> and *Associated*

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<sup>276</sup> The history of the *IBM* case and its disposition are examined in detail in John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145 (2000).

<sup>277</sup> *In re IBM Corp.*, 687 F.2d 591, 593 (2d Cir. 1982) (affirming dismissal of government’s § 2 case against IBM).

<sup>278</sup> Judge Bork’s comment is quoted in Donald I. Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898, 899 n.13 (1986).

<sup>279</sup> *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971), *aff’d*, 410 U.S. 366 (1973). For a comprehensive description of *Otter Tail*, see Andrew N. Kleit & Robert J. Michaels, *Antitrust, Rent-Seeking, and Regulation: The Past and Future of Otter Tail*, 34 ANTITRUST BULL. 689 (1994).

<sup>280</sup> See Kovacic, *supra* note 57, at 1431–32 (describing IBM’s success in repulsing most of the private lawsuits brought against it in the 1970s).

<sup>281</sup> See *id.* at 1108–09 & n.20 (describing failure of most DOJ and FTC deconcentration cases filed in late 1960s and in the 1970s).

<sup>282</sup> *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912).

*Press*,<sup>283</sup> but *Otter Tail* supplied the modern point of departure for court and enforcement agency efforts to define antitrust principles governing access to commercial bottlenecks. *Otter Tail* also marked the full entry of federal enforcement policy into the arena of heavily regulated enterprises. *Otter Tail* strengthened the DOJ's resolve to sue AT&T,<sup>284</sup> and it motivated private plaintiffs to raise essential facility claims in a variety of regulated industry settings.<sup>285</sup> Since *Otter Tail*, the intersection of antitrust and traditional regulated industries has stimulated an extraordinarily important expansion of competition policy concepts in the United States and abroad.<sup>286</sup>

*Otter Tail* suggests a related point about an enforcement process norm. An agency can take several paths to a specific enforcement policy result, especially when it is attempting to explore new enforcement terrain. It can immediately pursue the visibly big case, or it can begin with lesser litigation prototypes that test the validity of the concepts in question and progress toward more visibly significant enforcement matters. The agency cannot dictate the unfolding of commercial scenarios that provide enforcement occasions, but it can consider the prototyping model—the progressive elaboration of an enforcement principle—as a process norm in assessing how to respond to new commercial conditions or to develop case generation projects.

A second qualification to the pendulum narrative involves analyzing the significance of federal enforcement activity involving dominant firms in the 1980s. There is a tendency in discussing the 1980s to say that the government *just* settled the *AT&T* case and initiated a small number of new matters. *Just* settling *AT&T* was no small achievement. William Baxter formulated the basic outlines of the ultimate divestiture—emphasizing the separation of competitive from regulated activities—and drove home the resolution of the case.<sup>287</sup>

<sup>283</sup> *United States v. Associated Press*, 326 U.S. 1 (1945).

<sup>284</sup> See PETER TEMIN, *THE FALL OF THE BELL SYSTEM* 108–90 (1987) (discussing *Otter Tail*'s importance in the Justice Department's decision to sue AT&T). For several years, DOJ's litigation team was headed by the same attorney (Kenneth Anderson) who tried *Otter Tail* for the government. STEPHEN COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* 22–23 (1986).

<sup>285</sup> For example, William McGowan, the Chairman of MCI, appears to have grasped *Otter Tail*'s importance soon after the Supreme Court issued its decision and used the ruling in devising MCI's strategy to gain access to AT&T's local distribution network. See COLL, *supra* note 284, at 22–23 (describing *Otter Tail*'s impact on MCI's antitrust litigation strategy).

<sup>286</sup> On *Otter Tail*'s antitrust progeny in the regulated industries field, see Stephen P. Mahinka, *Antitrust Analysis of Exclusionary Conduct*, 57 *ANTITRUST L.J.* 751 (1989).

<sup>287</sup> Baxter's crucial role in designing and negotiating the restructuring of the Bell System is recalled in COLL, *supra* note 284, at 172–89, 211–53, 291–323.

Nor can one underestimate the importance of designing and successfully implementing the restructuring mandated by the 1982 Modified Final Judgment.<sup>288</sup> Can one imagine the consequences for U.S. and global competition policy if the execution of the *AT&T* remedy had been a shambles? A broad perception of failure in designing and implementing the Bell System's restructuring may have discredited antitrust policy in fundamental ways.<sup>289</sup> There were no guarantees that the divestitures would proceed relatively smoothly or generate the desired competitive results. From an *ex ante* perspective, the resolution of the *AT&T* case involved considerable risks.<sup>290</sup> Managing these risks well must be regarded as a major accomplishment.<sup>291</sup> The *AT&T* experience also underscores the cumulative nature of policy development and enforcement norms. Thomas Kauper formulated the *AT&T* case, and his successors, including William Baxter, brought the matter to a successful conclusion. Without a series of progressive contributions across administrations, the outcome would not have been attainable.

In examining the significance of the new dominant firm matters initiated from 1981 through 1992, one also should hesitate to dismiss the new initiatives as being unimportant. One case (*AMERCO*)<sup>292</sup> sought to impose limits on the ability of private parties to use government processes to impose competitive disadvantages on rivals. The second matter (*American Airlines*)<sup>293</sup> established the much debated principle that certain invitations to collude by one firm to its rival could be sanctioned as attempted monopolization under the Sherman Act. The *American Airlines* decision provided an important impetus for future DOJ and FTC efforts to prose-

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<sup>288</sup> See Wernhard Möschel, *The Goals of Antitrust Revisited*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 7, 12 (Mar. 1991) (“[T]he AT&T break-up, which as far as its effect is concerned, is probably the most important antitrust decision ever reached.”).

<sup>289</sup> Donald Baker underscored this point in an article published in 1986:

Another variable in the Section 2 equation will be the public's longer run perception of the Bell System break-up. This is obviously a major event in American industrial history and it has “antitrust” written all over it. If the public (however wrongly) comes away feeling that the whole thing was a major disaster, the resulting political reaction may exact political barriers to future section 2 cases requiring divestiture remedies.

Baker, *supra* note 278, at 926.

<sup>290</sup> The magnitude of the risks, and the adverse public reaction that initially greeted the Bell System's restructuring, are recounted in COLL, *supra* note 284, at 365–68.

<sup>291</sup> See Skitol, *supra* note 23, at 250 (“The separation of the Ma Bell empire into seven independent local exchange carriers and a ‘new’ AT&T focused on long-distance telephone service and equipment manufacturing came to be seen as an act of courage that Baxter's successors heartily applauded even while sharply criticizing his policy directions in other respects.”).

<sup>292</sup> 109 F.T.C. 135 (1987).

<sup>293</sup> *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).



cute invitations to collude and served as a significant legal foundation for the attempted monopolization component of the DOJ's 1998 case against Microsoft.<sup>294</sup>

One other consideration helps explain the pattern of federal enforcement outputs involving dominant firms from 1969 to 1992. In the late 1960s and throughout the 1970s, the federal agencies embraced an enforcement norm that emphasized the prosecution of matters involving single-firm and multi-firm monopolization and attempted monopolization. To a large extent, the agencies accepted a norm that measured their worth by the number and power of cases involving concentrated industries. Not only were the agencies committed to bringing cases against big firms and high profile industries, they often pressed for powerful remedial solutions, such as divestiture and compulsory licensing of intellectual property.

One line of commentary that supports the pendulum narrative's portrayal of the period as Undue Activism depicts the dominant firm enforcement program of the late 1960s and the 1970s as resting on an intellectual framework no more robust than the belief that "big is bad." This is an unsupportable characterization. The cases were premised on an industrial organization framework, popularized in the aftermath of *Alcoa* through the 1950s and the 1960s, that assumed high levels of concentration inevitably facilitated effective industry-wide coordination on pricing or output, that superior performance rarely explained a firm's market supremacy, and that efforts to disassemble large firms into smaller constituent parts seldom would sacrifice important efficiencies. It is important to recall that this vision of competition policy motivated an impressive roster of scholars to support the Neal Commission's recommendations in 1969<sup>295</sup> and, through the late 1970s, to endorse proposals for no-fault monopolization measures.<sup>296</sup>

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<sup>294</sup> *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (sustaining attempted monopolization claim based on invitation to collude), *aff'd, rev'd, and remanded in part*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

<sup>295</sup> The Neal Commission's deconcentration proposals appear in the *White House Task Force Report on Antitrust Policy*, reprinted in 2 ANTITRUST L. & ECON. REV. 11, 14–15, 65–76 (1968–69). The Neal Commission members who endorsed these proposals included William Baxter, who recanted his position years later.

<sup>296</sup> In 1979, the National Commission for the Review of Antitrust Laws and Procedures (NCRALP) recommended that Congress consider amending the Sherman Act to create a no-fault monopolization cause of action. 1 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES viii–ix (1979). In the decade or so leading up to the NCRALP report, an impressive group of scholars had endorsed the no-fault concept in various forms. Noteworthy academic treatments in this period included 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶¶ 614–23 (1978); Oliver Williamson, *Dominant Firms and the Monopoly*

More accurate and sophisticated criticism of the dominant firm matters of the late 1960s and early 1970s can be leveled on two fronts. The first deals with the intellectual foundation on which the enforcement agencies pursued the abuse of dominance cases. The agencies did not give effect to a simple-minded belief that large firms were a menace. Their model was more sophisticated and had a number of respected adherents in the competition policy community. The problem was that the model on which the agencies relied decisively was in the process of crumbling. The more accurate and sobering failing of the FTC in bringing the cereal and petroleum shared monopoly cases was that they were launched in the face of growing evidence that their analytical basis was losing intellectual support. The theoretical assumptions supporting these and other matters were decaying, and the enforcement agencies failed to account for this development.

The second criticism deals with institutional capability. As a group, the deconcentration-minded cases were so ambitious and sweeping in their economic aims that the agencies' capabilities were dramatically overtaxed. In a five-year period, from 1969 to 1974, the DOJ and the FTC committed themselves to achieving massive restructurings involving the nation's four largest cereal producers, its eight largest petroleum refiners, the world's leading computer producer, the country's two leading tire producers, the largest U.S. producer of bread, the world's largest telephone system, and the world's largest producer of photocopiers. In a number of quarters, these initiatives were viewed as merely a good start. Instead, the collection of Section 2 matters created a serious mismatch between enforcement objectives and institutional capability. The federal agencies would have been better off had they accepted an enforcement norm that emphasized choosing a smaller number of matters and handling them well.

Even if Jimmy Carter had won a second term as president in 1980, federal enforcement policy involving dominant firms was certain to undergo a fundamental reassessment in the 1980s. Whatever their identities, the heads of the federal agencies in early 1981 would have known of the litigation defeats in the *DuPont* and *Official Airline Guides* matters, the dismissals of the *Firestone* and *Goodyear* cases, and the disarray in the *Exxon*, *Kellogg*, and *IBM* prosecutions. The new managers also would have to sort out their remedial plans in *AT&T* and decide how best to continue the prosecution of three cases (*RealLemon*, *ITT*, and *General Foods*) involv-

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*Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1527-30 (1972); see also Alfred Dougherty et al., *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83, 84 (1980) (collecting academic authorities who had supported no-fault monopolization concept).

ing a theory of liability (predatory pricing) for which the appellate courts were imposing increasingly demanding standards for plaintiffs to satisfy.

For the Reagan enforcement agencies, it was not unreasonable to ask which of the existing inventory of cases were worth fighting for. Making *AT&T* the center of attention and committing the resources needed to design and implement an effective remedy in the telecommunications case was a sensible step. Asking fundamental questions about the causes of failure of so many mainstays of the dominant firm campaign of the 1970s was a responsible act. Diagnosing the reasons for failure and reassessing the capabilities of the federal agencies in this field were appropriate measures before adding new dominant firm initiatives to the list.

As noted above, the Clinton Administration increased resources devoted to abuses of dominance. Most notably, the DOJ brought cases against Dentsply, Microsoft, and American Airlines, and the FTC's challenged monopolization by Intel. The government achieved a settlement in *Intel*<sup>297</sup> and prevailed on a number of liability issues in *Microsoft*,<sup>298</sup> with proceedings on remedy yet to be completed. American Airlines obtained summary judgment against the DOJ's claims,<sup>299</sup> and Dentsply defeated the government's allegations before the trial court.<sup>300</sup>

The enforcement norm of the 1990s reflected greater confidence in the capacity of the federal agencies to handle such matters. Although the full remedial effect of the litigation program in the 1990s remains uncertain, the federal agencies demonstrated their capacity to manage major monopolization matters more effectively than they had in the 1970s and, in matters such as *Microsoft*, to prevail on key issues of liability. The point does not lend itself to rigorous proof, but it seems reasonable to assume that business operators were more conscious of potential exposure to federal prosecutions for monopolization or attempted monopolization in 2000 than they had been in 1992. The program of the 1990s was more modest in its aims and better disciplined in its choice and prosecution of liability theories than the Section 2 program of the late 1960s and the 1970s. Perhaps one could say that the norm of the 1990s was sensitive to the possibilities of overextension reflected in

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<sup>297</sup> Intel Corp., 1999 FTC LEXIS 145 (Aug. 3, 1999) (entering consent order).

<sup>298</sup> United States v. Microsoft Corp., 753 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

<sup>299</sup> United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001), *aff'd*, 335 F.3d 1109 (10th Cir. 2003).

<sup>300</sup> United States v. Dentsply Int'l, Inc., 2003 U.S. Dist. LEXIS 14139 (D. Del. Aug. 8, 2003).

the norm of the 1980s and sought to incorporate best practices from past experience and to avoid the worst.

## 2. Vertical Contractual Restraints

Table 5 below presents the total number of new DOJ and FTC vertical restraints cases from 1961 to 2000.

**Table 5**  
**DOJ and FTC Vertical Restraints Cases—1961 to 2000<sup>301</sup>**

<i>President</i>	<i>DOJ Cases</i>	<i>FTC Cases</i>	<i>U.S. Total</i>	<i>Cases/Year</i>
Clinton (1993–2000)	8	8	16	2.0
Bush (1989–1992)	0	4	4	1.0
Reagan (1981–1988)	0	5	5	0.625
Carter (1977–1980)	5	23	28	7.0
Nixon/Ford (1969–1976)	52	59	111	13.875
Kennedy/Johnson (1961–1968)	32	19	51	6.375

The pendulum narrative holds out vertical restraints as a major example of how federal enforcement progressed from excessive activity in the 1960s and 1970s to a drought in the 1980s and to a sensible restoration in the 1990s. Essential to the narrative is the theme that the 1980s featured a disastrous policy default by the DOJ and the FTC. The narrative's treatment of the 1980s has two strands. The first is to accentuate artificially the swing toward nonintervention.<sup>302</sup> The second is to suggest that

<sup>301</sup> These data are collected from the CCH Trade Regulation Reporter.

<sup>302</sup> Obliterating inconsistent data is a central tool in the pendulum narrative's methodology. In a symposium in 1987, the Attorney General of the State of New York stated that "[i]n the area of vertical restraints, there has not been a single federal enforcement action in the last six years." Abrams, *supra* note 182, at 990; see also Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 43 & n.50 (1997) ("With Chicago School advocates heading both the Antitrust Division of the Department of Justice and the FTC in the 1980s, the federal government did not bring a single vertical case for a period of twelve years."); Pitofsky, *supra* note 29, at 321 (through 1987, Reagan administration "has not brought a single case" involving either resale price maintenance or nonprice vertical restraints).

From 1981 through 1987, the FTC issued consent agreements in five vertical restraints matters. Great Dane Distribution Council and Great Dane Trailers, Inc., 102 F.T.C. 1315 and 102 F.T.C. 1307 (1983) (related cases involving vertical allocation of territories; counted here as one matter); Onkyo U.S.A. Corp., 100 F.T.C. 59 (1982) (resale price maintenance); Germaine Monteil Cosmetics Corp., 100 F.T.C. 513 (1982) (same); Palm Beach Co., 98 F.T.C. 51 (1981) (same); Pillsbury Co., 97 F.T.C. 354 (1981) (exclusive dealing). Two of these matters (*Palm Beach* and *Pillsbury*) were concluded after Ronald Reagan's inauguration in January 1981 but before James Miller's arrival as Reagan's first appointee to the Commission. The other matters were concluded after Chairman Miller's tenure began, although the investigations that originated the matters almost certainly began during the Carter administration. The FTC during the Bush administration accepted consent orders in four matters. Sandoz, 115 F.T.C. 625 (1992) (tying); Nintendo of Am.,

any retreat from aggressive enforcement of existing legal rules, especially the rule of per se illegality for minimum resale price maintenance, is illegitimate.<sup>303</sup> As with its treatment of dominant firm activity, the pendulum narrative overlooks some noteworthy features of modern experience in this area.

In the 1960s both federal agencies had active programs involving distribution practices. The federal enforcement officials embraced a norm that treated vertical contractual restraints with severe skepticism. Two representative symbols of the agencies' vertical restraints efforts in this decade stand out. In the *Brown Shoe* exclusive dealing case, the Commission sustained a challenge to an exclusive dealing arrangement that resulted in vertical foreclosure of less than one percent.<sup>304</sup> The Justice Department prosecuted the *Schwinn* case, which generated a Supreme Court decision subjecting all nonprice vertical restraints to per se condemnation.<sup>305</sup> In the first half of the 1970s both agencies dramatically increased the prosecution of vertical contractual restraints, with the FTC becoming the leading source of new matters.<sup>306</sup>

There is some evidence that the DOJ altered its enforcement norms in response to the emerging economic and legal literature that had criticized existing legal rules for condemning all vertical restraints as illegal per se. The norm of reassessment and self-restraint that was evident in merger policy in Donald Turner's 1968 Merger Guidelines appears to have affected the Antitrust Division's choice of nonprice vertical restraints cases in the years leading up to the Supreme Court's *Sylvania* decision in 1977. The new economics of vertical relationships apparently caused the DOJ to use its discretion not to bring cases that *Schwinn* might have permitted.<sup>307</sup>

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Inc., 114 F.T.C. 702 (1991) (resale price maintenance); *Kreepy Krauly USA, Inc.*, 114 F.T.C. 777 (1991) (same); Gerald S. Friedman, 113 F.T.C. 625 (1990) (tying).

<sup>303</sup> Correia, *supra* note 15, at 330 (observing that the Reagan administration "too often has simply been willing to ignore the law if it does not comport with its own biases about what the law should be" and stating that "[t]he most striking example is the failure to enforce the per se rule against resale price maintenance"); Pitofsky, *Antitrust Policy*, *supra* note 26, at 219 ("It has always struck me that the nullification of enforcement against resale price maintenance, despite support for the per se rule in the Supreme Court and in Congress, was the most indefensible prosecutorial decision in the last twelve years.").

<sup>304</sup> *Brown Shoe Co.*, 62 F.T.C. 679 (1963), *rev'd*, 339 F.2d 45 (8th Cir. 1964), *rev'd*, 384 U.S. 316 (1966).

<sup>305</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

<sup>306</sup> These included a number of matters that relied heavily on the per se ban against all nonprice vertical restraints, such as a series of FTC matters involving the use of exclusive territories in the soft-drink bottling industry. *See, e.g.*, *Coca Cola Co.*, 91 F.T.C. 517 (1978) (finding liability), *remanded for dismissal*, 642 F.2d 1387 (D.C. Cir. 1981).

<sup>307</sup> Thomas Kauper, who served as Assistant Attorney General for Antitrust from 1973 to 1975, has described Antitrust Division practice during his tenure:

*Sylvania* induced some caution in the FTC's analysis of nonprice restraints. In its *Beltone* decision in 1982,<sup>308</sup> the FTC dismissed its complaint and issued an opinion that announced a more tolerant approach for exclusive dealing. In response to a legislative request, the FTC also undertook a series of ex post evaluations to assess the impact of recent Commission cases involving price and nonprice restraints.<sup>309</sup> In other areas, however, the FTC and the DOJ sought to expand the application of the element of per se illegality that survived *Sylvania*—the ban on resale price maintenance. In 1980, the Justice Department initiated a criminal prosecution of RPM involving Cuisinart.<sup>310</sup> In the late 1970s the FTC initiated an unsuccessful effort, in the *Russell Stover* case,<sup>311</sup> to retrench the *Colgate* doctrine and facilitate the prosecution of resale price maintenance.

The Reagan antitrust agencies issued consent orders in five vertical restraints matters that appear to have originated as investigations during the Carter administration.<sup>312</sup> During the tenure of Reagan's appointees, it does not appear that the DOJ or the FTC initiated an investigation that led to the issuance of a vertical restraints complaint.<sup>313</sup> The Reagan DOJ also issued vertical restraints guidelines that sought to define a narrow ambit of enforcement for nonprice restrictions.<sup>314</sup> The Bush administration brought four vertical restraints cases, including two matters challenging resale price maintenance.<sup>315</sup>

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[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.

Kauper, *supra* note 67, at 99.

<sup>308</sup> *Beltone Elecs. Corp.*, 100 F.T.C. 68 (1982).

<sup>309</sup> FEDERAL TRADE COMMISSION, *IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES* (John B. Kirkwood et al. eds., 1984).

<sup>310</sup> *United States v. Cuisinarts, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. 1981).

<sup>311</sup> *Russell Stover Candies, Inc.*, 100 F.T.C. 1 (1982) (finding liability), *enforcement denied*, 718 F.2d 256 (8th Cir. 1983).

<sup>312</sup> See *supra* note 302 (collecting consent orders issued during Reagan Administration).

<sup>313</sup> See William E. Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration*, 35 FED. BAR NEWS & J. 244, 245 (1988) (distinguishing among enforcement matters undertaken during Reagan Administration based on the date of the commencement of the investigation that gave rise to the enforcement matter); Kovacic, *supra* note 69, at 481-82 (same).

<sup>314</sup> U.S. Department of Justice, *Vertical Restraints Guidelines*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Jan. 23, 1985). Anne Bingaman withdrew these Guidelines soon after becoming Assistant Attorney General for Antitrust in 1993.

<sup>315</sup> See *supra* note 302 (collecting Bush administration vertical restraints cases).

During the Clinton administration, the DOJ and the FTC increased vertical restraints enforcement activity, prosecuting a total of sixteen matters. One prominent initiative originally cast as a vertical restraints matter ultimately was defended on appeal on a group boycott theory. In *Toys “R” Us*, the FTC opposed efforts by a leading toy retailer to extract agreements from toy producers to stop selling certain toys to discount warehouse clubs. The Seventh Circuit sustained the FTC’s finding of liability, but relied on a group boycott theory and the *Interstate Circuit* hub-and-spoke conspiracy concept to do so.<sup>316</sup> Some FTC matters, such as the Hale/Waterous exclusive dealing cases, invoked the deterrence of horizontal collaboration as a rationale for intervention. In the *Sony* MAP cases, FTC used both per se and rule of reason theories to oppose the behavior. Both agencies also filed an amicus brief in *State Oil v. Khan*<sup>317</sup> that urged the Supreme Court to treat maximum resale price maintenance with a rule of reason.

The actual output of vertical restraints matters reflected differing views about the correct enforcement norm. The Clinton enforcement program generated, on average, two cases per year—more than the less than one-case-per-year output of the Reagan administration and one-per-year rate of the Bush administration, but well below the seven cases per year total achieved in the Carter administration. Vertical restraints played a more prominent role in the enforcement mix in the 1990s than they had in the 1980s, but did not approach their level of significance in the 1970s.<sup>318</sup>

The evolution of federal enforcement policy since 1961 has taken place against a backdrop of extensive scholarly debate about the competitive significance of distribution restraints. With notable exceptions, this

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<sup>316</sup> *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

<sup>317</sup> 522 U.S. 3 (1997).

<sup>318</sup> Some observers who had been architects of federal enforcement in the late 1970s envisioned in the late 1980s that future federal enforcement levels—regardless of changes of party in the White House—would not depart dramatically from enforcement levels in the 1980s. In a symposium in 1987, Sanford Litvack, who headed the Antitrust Division in the last years of the Carter administration and was the last Assistant Attorney General to bring a criminal case against resale price maintenance, offered the following assessment:

Nor do I believe that government enforcement is going to change materially in the area of vertical restraints. First, it is important to recognize there has not been a great deal of government enforcement in the vertical restraints area for the last twenty years. Second, government resources are increasingly going to be stretched, and hence vertical enforcement will necessarily take a back seat.

Sanford M. Litvack, *The Future Viability of the Current Antitrust Treatment of Vertical Restraints*, 75 CAL. L. REV. 955, 956 (1987). Litvack’s impression of past government enforcement patterns was inaccurate—government enforcement from 1967 through 1977 had been robust—but he was correct in his assessment that changes in judicial doctrine in the 1970s and 1980s were likely to cause government officials to accept a more cautious enforcement norm for vertical restraints.

literature has disfavored legal rules that categorically prohibit distribution restraints. Scholars, who at different times have urged strict prohibition of practices such as minimum resale price maintenance, have tended to acknowledge the rationale for permitting limited exceptions to the rule of per se condemnation.<sup>319</sup> As suggested above, the vertical restraints enforcement norm followed by federal officials in the 1990s often reflected concerns about expansive enforcement.

#### E. THE EVOLUTION OF PUBLIC ENFORCEMENT OBJECTIVES: ACCEPTANCE OF AN EFFICIENCY NORM

The pendulum narrative overlooks the degree to which the federal agencies over the past four decades have accepted an enforcement norm that accords primacy to microeconomic analysis and efficiency concerns in antitrust analysis. In a paper published in 1999, two commentators with extensive experience as enforcement officials identified the modern adjustment in the objectives and methods of federal enforcement:

Federal antitrust enforcement has changed considerably since the early 1970s. The main shift in focus has been that rigorous economic analysis of markets and competition has become the norm for both the agencies and the courts. Scholarly research, much of it initiated by the "Chicago School," exposed the inconsistencies and sloppiness of some prior antitrust thinking. Today, courts and antitrust enforcers rely much less on structural presumptions and more on the consumer welfare standard of anticompetitive harm. A case will not be filed unless there is a compelling anticompetitive justification.

The result is a body of law that relies on certain core principles of neoclassical economic theory and that has widespread political support.<sup>320</sup>

Consistent with these observations, it is difficult to identify over the past twenty years enforcement actions that the FTC or the Justice Department predicated upon the achievement of goals other than the enhancement of economic efficiency.

In key respects, the modern federal agency enforcement norm reflects the evolution of policy norms in the federal courts. In the 1960s and early 1970s, the Supreme Court issued a number of decisions that displayed solicitude for the well-being of smaller enterprises as an express goal of antitrust policy. The reorientation of the antitrust system's goals structure

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<sup>319</sup> See Turner, *supra* note 196, at 804 (proposing that courts "create one or perhaps more exceptions to the per se rule regarding minimum resale price restrictions").

<sup>320</sup> William J. Baer & David A. Balto, *The Politics of Federal Antitrust Enforcement*, 23 HARV. J.L. & PUB. POL'Y 113, 120 (1999).



did not occur in 1981, with Reagan's appointment of William Baxter to head the Antitrust Division and James Miller to lead the FTC. Rather, it took place at least as early as 1977, when antitrust defendants ran the table before the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>321</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>322</sup> *Illinois Brick Co. v. Illinois*,<sup>323</sup> and *United States Steel Corp. v. Fortner Enterprises, Inc.*<sup>324</sup> The framework shifted again in 1979, as the Supreme Court issued *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*<sup>325</sup> and the Second Circuit decided *Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>326</sup>

Reagan-era moves by the DOJ and the FTC to revise antitrust enforcement norms responded to judicial decisions that made reassessment necessary.<sup>327</sup> Judicial norms do not develop in an intellectual vacuum, and depend partly upon the preferences of individuals appointed to the bench. Although Richard Nixon appointed FTC chairmen (Caspar Weinberger, Miles Kirkpatrick, and Lewis Engman) who collectively are credited with significantly expanding the Commission's antitrust enforcement program, Nixon's appointments to the Supreme Court helped spur a major retrenchment of antitrust jurisprudence.<sup>328</sup> One set of Nixon Administration decisions (appointments to the FTC) pressed antitrust policy boundaries outward in key areas (such as the treatment of dominant firms), while another set of decisions (judicial appointments) contracted those boundaries. It is also evident that the Reagan administration tended to appoint federal judges whose decisions on the bench demonstrated greater skepticism toward antitrust intervention than Jimmy Carter's appointees.<sup>329</sup>

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<sup>321</sup> 433 U.S. 36 (1977).

<sup>322</sup> 429 U.S. 477 (1977).

<sup>323</sup> 431 U.S. 720 (1977).

<sup>324</sup> 429 U.S. 610 (1977).

<sup>325</sup> 441 U.S. 1 (1979).

<sup>326</sup> 603 F.2d 263 (2d Cir. 1979).

<sup>327</sup> See Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 25 (1985) ("[I]t would have been politically impossible for . . . [William] Baxter to have done what he did [as head of the DOJ Antitrust Division], had there not been an intellectual shift in the underpinnings of antitrust.").

<sup>328</sup> Among other appointments to the Court, Nixon nominated Lewis Powell, who played a central role in the reshaping the Court's thinking about a number of antitrust issues. See Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 8.

<sup>329</sup> See William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49 (1991) [hereinafter *Reagan's Judicial Appointees*] (comparing antitrust voting records of Carter and Reagan judicial appointees); William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, ANTITRUST, Spring 1993, at 8 [hereinafter *Judicial Appointments*] (same).

Even, here, however, one must be cautious in attributing too much significance to Reagan judicial appointments. The change in doctrine that began in the 1970s and, with variations, continues to the present has commanded support across a broad spectrum of the judiciary. Jurists generally considered sympathetic to government economic regulation wrote many of the formative, pro-defendant opinions of this era, including *Brunswick* (Thurgood Marshall) and *BMI* (Byron White).<sup>330</sup> President Clinton's Supreme Court appointees (Ruth Ginsburg and Stephen Breyer) authored or joined many court of appeals opinions that endorsed positions consistent with a carefully limited application of antitrust liability rules.<sup>331</sup> As a member of the D.C. Circuit, Justice Ginsburg joined Robert Bork's majority opinion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,<sup>332</sup> which many antitrust commentators who opposed Bork's confirmation condemned as extreme.<sup>333</sup> Justice Ginsburg also was a member of the unanimous panel (along with Clarence Thomas and David Sentelle) that issued *United States v. Baker Hughes Inc.*,<sup>334</sup> which criticized the DOJ for relying excessively on structural tests.<sup>335</sup> As a member of the First Circuit, Justice Breyer wrote influential opinions exonerating defendants in cases dealing with, among other matters, exclusionary pricing,<sup>336</sup> tying,<sup>337</sup> and the relationship between public utility regulation and antitrust oversight.<sup>338</sup> The decisions of these highly respected jurists indicate the broad acceptance within the judiciary in the 1980s of a generally more cautious view of antitrust enforcement.

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<sup>330</sup> Justice Marshall's contributions to the narrowing of antitrust doctrine are analyzed in William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, 42 ANTITRUST BULL. 93 (1997).

<sup>331</sup> See Kovacic, *Reagan's Judicial Appointees*, *supra* note 329, at 95–97 & n.193; Kovacic, *Judicial Appointments*, *supra* note 329, at 11.

<sup>332</sup> 792 F.2d 210 (D.C. Cir. 1986).

<sup>333</sup> See Testimony of Robert Pitofsky, *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on the Judiciary, U.S. Senate, 100th Cong., 1st Sess., Pt. 3*, at 3516 (1987) (*Rothery* opinion “reflects a very aggressive way of deciding cases, and of introducing special views into the law”).

<sup>334</sup> 908 F.2d 981 (D.C. Cir. 1990).

<sup>335</sup> *Id.* at 992, n.13 (“The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery.”).

<sup>336</sup> See *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 482–86 (1st Cir. 1988) (rejecting liability in predatory pricing case); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230–36 (1st Cir. 1983) (same).

<sup>337</sup> See *Grappone, Inc. v. Subaru of New Eng., Inc.*, 858 F.2d 792, 797–800 (1st Cir. 1988) (rejecting liability in tying case).

<sup>338</sup> See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21–29 (1st Cir. 1990) (rejecting claim that electric utility used price squeeze to monopolize local distribution).

### G. SUMMARY

Antitrust enforcement patterns change over time. Some degree of variation is inherent in the institutional design of the U.S. competition policy system. The U.S. antitrust laws contemplate a continuing evolution in doctrine and policy as the understanding of business phenomena increases and as courts and enforcement agencies accumulate experience. Within this framework, continuing adjustment—sometimes, fundamental adjustments—are inevitable and regarded as necessary.

The discussion above challenges the pendulum narrative's notion that changes in the U.S. federal enforcement swung to extremes in the 1960s, 1970s, and 1980s before achieving a sober moderation in the 1990s. Owing to the constraints that influence the direction and durability of change in the U.S. system, the program of the 1990s features important degrees of continuity with policies of the 1980s and, in noteworthy respects, with earlier decades.<sup>339</sup> For example, beginning in the late 1970s and accelerating substantially in the 1990s, horizontal restraints enforcement assumes progressively greater importance in the mix of federal enforcement matters, as attention to dominant firm behavior and vertical restraints diminishes.

The enforcement patterns of the 1980s and 1990s identify interesting areas for further study about the institutional arrangements for U.S. antitrust enforcement. Contrary to the conventional wisdom of the pendulum narrative, the federal government maintained a significant civil nonmerger enforcement program in the 1980s. There were, however, noticeable differences between the DOJ and the FTC, particularly in Ronald Reagan's second term as President. The FTC continued to prosecute significant civil nonmerger matters in this period, whereas the DOJ initiated few such cases. A closer examination of enforcement patterns in both federal agencies and the internal decision-making processes that allocated resources would provide useful insights about the appropriate distribution of competition policy authority among public agencies.

### V. EXPLAINING THE PERSISTENCE OF THE PENDULUM NARRATIVE

The pendulum narrative provides an unreliable account of the evolution of competition policy enforcement norms. Despite its infirmities, the pendulum narrative is a common element of antitrust discourse.

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<sup>339</sup> See also White, *supra* note 12, at 12 (During the Clinton administration, "There certainly was no revolutionary overturning of the major directions of the previous regimes; and there was no return to the populism and small business protection enthusiasm that had sometimes colored antitrust policy prior to the 1980s.").

What accounts for its attraction and popularity? One fundamental reason is the narrative's simplicity. The pendulum narrative supplies an easily grasped account of modern antitrust policy. Likening changes in government behavior to the mechanical swings of a pendulum is an assuredly easier, though often intellectually lazy, alternative to the laborious exercise of carefully identifying the factors that influence public institutions and explaining how such factors account for specific adjustments in policy.<sup>340</sup>

As a second, related factor, the pendulum narrative also facilitates the organization and presentation of academic pieces and popular press accounts, alike. The pendulum narrative appeals to the big-case-centric preoccupation of lawyers, law professors, legislators, and journalists. The pendulum narrative tends to measure enforcement vitality and progress by high-profile matters.<sup>341</sup> It tends to overlook non-obvious contributions to public enforcement. Small cases with important doctrinal implications fall through the cracks, and an agency's investments in the institutional infrastructure that improve performance fall outside the narrative's field of vision.

A third factor is the power of path dependency in shaping the writing of academics and journalists. Having chosen one theme, many authors find it difficult to abandon the theme and adopt a different interpretation. With each recital and endorsement, the narrative becomes more closely associated with the author's thinking and imbued with her personality. The more emphatically a commentator embraces the pendulum narrative, the harder it becomes to leave the narrative's path, even when readily observable patterns in enforcement activity indicate that the path lacks an adequate foundation and a shift to a different path is appropriate.<sup>342</sup>

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<sup>340</sup> I do not deny the allure of this expedient. More than once I have invoked the pendulum or similar images to explain policy phenomena that deserved a more sophisticated and less deterministic explanation. See William E. Kovacic, *Philosophical Perspective: An Introduction*, in 2 THE ANTITRUST IMPULSE 575, 576-78 (Theodore P. Kovaleff ed., 1994) (describing process of change in antitrust enforcement policy in terms of "swings"); Kovacic, *Reagan's Judicial Appointees*, *supra* note 329, at 49, 56 (1991) ("As reinvigorated public and private plaintiffs approach the federal courts, the Reagan-Bush judiciary will play a major role in determining how far the antitrust pendulum swings back to its pre-Reagan equilibrium.").

<sup>341</sup> See Skitol, *Shifting Sands*, *supra* note 23, at 259 ("At this dawn of the 21st Century, antitrust policy has once again captured the attention of the general public as a result of numerous high visibility enforcement actions but none more dramatically than the Justice Department's monopolization suit against Microsoft Corporation.").

<sup>342</sup> Compare Stephen Labaton, *Justice Dept. Said to Be Opposing Satellite TV Merger*, N.Y. TIMES, Sept. 24, 2002, at A1 ("A decision [by the Justice Department] to forbid EchoStar to buy its only rival [DirecTV] would also reflect a rare instance of opposition to a corporate

A fourth reason for the pendulum narrative's popularity is that it can serve the narrator's instrumental ends. Commentators of various perspectives have found value in the vivid contrasts that the pendulum narrative employs. Some commentators who dislike the enforcement policy of the 1960s and 1970s prefer a narrative that accentuates the failings of these decades and portrays the enforcement agencies as recklessly interventionist.<sup>343</sup> The pendulum narrative fills the bill superbly by recounting the irrationalities of the Era of Undue Activism. In his *Antitrust Paradox* in 1978,<sup>344</sup> Robert Bork painted the state of U.S. antitrust policy in dismal terms and cast the federal enforcement agencies in a thoroughly gloomy light. Judge Bork's account understated the redirection of judicial doctrine underway in the 1970s, overstated the enforcement agencies' omnipotence, and slighted the beginnings of policy shifts that the Reagan administration would build upon in the 1980s. To make the case for his suggested reforms in antitrust doctrine, Judge Bork exaggerated the antitrust system's disarray.<sup>345</sup> More-recent works that fear the possibilities of unduly aggressive public enforcement have exaggerated the expansion of DOJ and FTC activity in the 1990s and underestimated the influence of norms established in the 1980s in defining enforcement approaches in the 1990s.<sup>346</sup>

The impulse to accentuate the perceived flaws and understate the virtues of a given period can distort the narrator's judgment. Some Reagan administration antitrust officials in the second half of the 1980s were given to define their own programs in terms of what the federal agencies would not do. Speeches and public comments often dwelled

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merger by the Bush administration."); Paul Meller, *Second European Union Ruling to Block a Merger Is Overturned*, N.Y. TIMES, Oct. 26, 2002, at B1 ("The string of defeats in court for the union's competition commissioner, Mario Monti, comes at a time when the Bush administration has made antitrust enforcement a low priority, leaving Mr. Monti as the principal watchdog on international mergers."), with Yvette Kantrow, *The New York Times Overstates its Case on its DirecTV and EchoStar Story and Martha Stewart Fans Gather on the Web to Cheer Their Hero On*, DAILY DEAL, Sept. 27, 2002 (discussing coverage of DirecTV/EchoStar transaction; observing that "[t]he Times . . . should be more informed than a casual observer, especially when seeking to add page-one heft to an otherwise ordinary story. A quick look at the stats shows that the administration's opposition to corporate mergers has not been as 'rare' as the Gray Lady would have us believe.").

<sup>343</sup> In 1981 during his tenure as Director of the Office of Management and Budget, David Stockman sought to eliminating funding for the FTC's competition program. To make his case for the budget cuts, Stockman in a newspaper interview said the FTC was a "passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy." CHICAGO TRIB., Feb. 23, 1981, at A-1.

<sup>344</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

<sup>345</sup> See Kovacic, *supra* note 1, at 1419-37 (describing how the *Antitrust Paradox* exaggerated the disarray of the U.S. antitrust system).

<sup>346</sup> See generally Bitlingmayer, *supra* note 15.

on the primitivism of the 1960s and 1970s. By stressing what they intended to avoid, the Reagan enforcement authorities deflected attention away from the cases they had brought and intended to begin. Denunciations of the past dimmed the view of present and future enforcement programs.

The pendulum narrative is no less appealing for commentators who have found something to like from the 1960s and 1970s and have regarded enforcement in the 1980s with dismay. For these observers the pendulum narrative provides satisfaction by treating the Reagan administration antitrust program as a wasteland. The pendulum story can help depict the narrator's preferences as sensible and centrist in contrast to the excessive exuberance of the 1960s and the inaction of the 1980s.<sup>347</sup>

## VI. INSTITUTIONAL IMPLICATIONS

The impact of a system of legal commands depends vitally on the qualities of the institutions created to execute them.<sup>348</sup> In the field of economic regulation, the antitrust laws of the United States are unique for their generality. The open texture of many antitrust statutes—such as the Sherman Act's prohibition against contracts in “restraint of trade”<sup>349</sup> and the Federal Trade Commission Act's ban upon “unfair methods of competition”<sup>350</sup>—elevates the importance of the design and capability of institutions assigned to implement them. What norms should guide the evaluation of antitrust agency performance, given the evolutionary and experimental quality of competition policy making and the unique institutional demands placed upon public enforcement officials?

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<sup>347</sup> The theme of wise moderation and the strategy of centrist positioning appear frequently in the writings of Clinton administration competition officials. For example, David Balto speaks of how the federal antitrust agencies in the 1990s “charted a prudent middle course.” Balto, *supra* note 4 and accompanying text. In a paper titled “A View from the Middle,” Robert Pitofsky has portrayed his tenure as FTC Chairman as a period of sensible moderation in which “antitrust enforcement stopped careening from aggressive enforcement based in part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust.” Pitofsky, *supra* note 7, at 586. See also Pitofsky, *Remedies*, *supra* note 26, at 170 (Clinton antitrust enforcement “attempted to carve out a middle ground—between over-enforcement in the 1960s and what many viewed as under-enforcement in the 1980s”).

<sup>348</sup> See Jean-Jacques Laffont, *Competition, Information, and Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1998, at 237 (Boris Pleskovic & Joseph E. Stiglitz eds., 1999) (discussing institutional foundations for successful competition policy systems).

<sup>349</sup> 15 U.S.C. § 1.

<sup>350</sup> 15 U.S.C. § 45.

## A. TRANSPARENCY

A basic principle of the rule of law is that public authorities should make the rationale for public policies and the processes for establishing such policies transparent. Transparency promotes clarity in forming public competition policy, increases the understanding of legal commands by affected parties, and disciplines the exercise of discretion by public officials by subjecting their actions to external review and criticism.<sup>351</sup> Transparent policy-making methods inform external observers (especially business operators) about the content of and rationale for specific decisions and help ensure the regularity and honesty of public administration.<sup>352</sup>

Recognizing how enforcement norms develop and change over time underscores the importance of transparency devices. Policies that commit the agency to reveal information about how it exercises the decision to prosecute help inform the competition policy community about the content of enforcement norms within the agency and permit discussion about whether existing norms are worthy of adjustment.

Antitrust agencies can increase transparency through a variety of measures, including the publication of decisions in law enforcement matters, issuing guidelines, and using speeches to articulate the basis for specific initiatives. In many respects, the most important of these instruments is the use of litigation to establish and clarify legal principles.<sup>353</sup> The pendulum narrative emphasizes the efforts of the DOJ and the FTC in the 1990s to use litigation to shape the law.<sup>354</sup> The narrative's reliance on sharp contrasts typically skips past the extent to which litigation—especially use of the administrative process—was a key instrument of FTC policy making in the 1980s.<sup>355</sup>

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<sup>351</sup> See Shyam Khemani & Mark A. Dutz, *Instruments of Competition Policy and Their Relevance for Economic Development*, in REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 16, 28 (Claudio R. Frischtak ed., 1995) (emphasizing importance of transparent decision-making processes in formulating competition policy).

<sup>352</sup> Weak transparency regimes can undermine the quality of public administration. See Joseph E. Stiglitz, *Knowledge for Development: Economic Science, Economic Policy, and Economy Advice*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 9, 40 (Boris Pleskovic & Joseph E. Stiglitz eds., 1999) (“Governments in many countries have a strong proclivity for secrecy. . . . Secrecy provides more scope for the work of special interest groups, greater cover for corruption, and greater opportunities for hiding mistakes.”).

<sup>353</sup> On the advantages of litigation as a means for clarifying antitrust doctrine, see Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1 (1998).

<sup>354</sup> See Klein, *supra* note 214 (describing Clinton DOJ's emphasis on litigation).

<sup>355</sup> See D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 326 (2003) (discussing FTC administrative litigation achievements in 1980s).

B. EXPERIMENTATION, RISK TAKING, AND MATCHING  
COMMITMENTS TO CAPABILITIES

One focal point for examining the development of antitrust enforcement norms concerns the inherently experimental nature of antitrust enforcement. The process of formulating competition policy frequently requires public antitrust authorities to make difficult judgments amid uncertainty about the competitive significance of various forms of business conduct. Will a merger of two significant rivals retard or increase competition? Are the restrictions that limit the freedom of participants in a joint venture reasonably necessary to ensure the development of a new product? Are the business justifications offered to support a refusal to deal or an exclusive contract genuine or contrived?

Individual government enforcement decisions can be viewed as experiments in which public authorities test the efficacy of different hypotheses about the competitive significance of business behavior. Over time, the public antitrust agencies arrive at a given policy equilibrium by periodically expanding and contracting the zone of enforcement. Testing the validity of different hypotheses involves making enforcement decisions that take chances with either intervening too aggressively or not intervening enough. Without experiments that sometimes intervene too much or sometimes intervene too little, enforcement authorities could not determine the correct mix of policies.

The FTC's decision in 1984 to permit General Motors and Toyota to engage in a production joint venture supplies an instructive example.<sup>356</sup> The FTC's approval of the transaction reflected an understanding that attaining important efficiency gains and productivity advances would require a willingness to loosen, at least on an experimental basis, existing antitrust restrictions on collaboration involving major competitors. At the time of the transaction, a number of observers emphatically said that the Commission had made a catastrophic policy choice.<sup>357</sup> Much of the harshest criticism of the FTC's decision in the GM/Toyota matter was grounded in the view that the Commission had violated an immutable

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<sup>356</sup> See General Motors Corp., 103 F.T.C. 374 (1984) (consent decree permitting General Motors and Toyota to participate in production joint venture, subject to various restrictions).

<sup>357</sup> See Joseph Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1022 (1987) ("Despite the presence of clear anticompetitive risks, the Federal Trade Commission . . . majority decided not to challenge the joint venture, but rather entered a consent judgment modifying the proposed joint venture in several respects. The FTC's decision was based primarily on the finding that the venture would realize important economic efficiencies. . . . The FTC's decision is notable because the presence of such efficiencies would not have induced any prior Commission to have approved a transaction raising such large anticompetitive risks.").



substantive norm by permitting the world's first- and third-largest automobile companies to collaborate on any terms.<sup>358</sup> Subsequent analysis of the GM/Toyota joint venture has suggested that the collaboration provided General Motors with valuable experience in implementing lean production and labor management systems that helped inspire the company's design of its Saturn division.<sup>359</sup> It is doubtful that joint venture had the transforming effect that GM had envisioned. But it is equally clear that the cataclysm predicted by the venture's opponents did not come to pass.<sup>360</sup>

Enforcement agencies inevitably must be willing to take some chances in litigation. Losing cases, by itself, tells one little about the quality of the agency's enforcement program. At the same time, a consistent pattern of failure might well be taken as a sign that something is wrong and requires reassessment. As noted above,<sup>361</sup> the federal agencies in the late 1960s and early 1970s responded to criticism that they had ducked serious competition problems and accepted an enforcement norm that involved greater risk taking. They brought many cases against dominant firms and oligopolies;<sup>362</sup> cases testing the frontiers of facilitating practices

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<sup>358</sup> See, e.g., *General Motors*, 104 F.T.C. at 391, 397 (dissenting statement of Commissioner Patricia Bailey):

[I]f this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will? This is surely the question that potential joint venture partners will be asking themselves. 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 between leading U.S. firms and major foreign competitors that seek to lend a helping hand.

See also Schwartz, *supra* note 41, at 161 ("The most meretricious efficiency claims are taken seriously, as when General Motors and Toyota were authorized to enter into a joint venture to produce small cars in California . . .").

<sup>359</sup> See David Roos, *Automobile Competitiveness: A Report of the MIT International Motor Vehicle Program*, Statement prepared for the Capital Hill Forum on Industrial Competitiveness in September 1995 and submitted with Professor Roos's presentation at the FTC Hearings on Global and Innovation-Driven Competition, Oct. 18, 1995 (describing significance of GM/Toyota joint venture for GM's adoption of production and management innovations).

<sup>360</sup> In the 1990s the FTC vacated the 1984 decree. *General Motors Corp.*, 116 F.T.C. 1276 (1993).

<sup>361</sup> See *supra* notes 244-73 and accompanying text (describing expanded attention to dominant firm matters in late 1960s and during 1970s).

<sup>362</sup> Examples include the claims of monopolization, attempted monopolization, or shared monopolization pursued in DOJ or FTC cases, such as *IBM*, *Firestone/Goodyear*, *Exxon*, *Kellogg*, *Xerox*, *AT&T*, *ITT*, *General Foods*, *Borden (ReaLemon)*, *DuPont* (titanium dioxide), and *Official Airline Guides*.

doctrine,<sup>363</sup> and a test case that tried to expand the reach of the prohibition against resale price maintenance.<sup>364</sup>

Despite occasional successes, the cases designed to extend or redefine doctrine more often than not failed to achieve their aims. It was reasonable for the enforcement agencies in the 1980s to reassess the wisdom of the program that had guided the agencies in the 1970s. In principle, one can conclude that the federal agencies undertook an appropriate level of activity involving dominant firms in the 1980s and the 1990s. The 1980s might be seen as the era in which the federal agencies (a) dispatched matters whose analytical and evidentiary bases no longer commanded respect (e.g., *IBM*, *Exxon*, *General Foods*, *ITT*, and *Kellogg*), (b) achieved and successfully implemented remedies in matters that involved significant risks but enjoyed sound analytical support (e.g., *AT&T*), and (c) extended the frontiers in selected, experimental areas (e.g., *American Airlines* and *AMERCO*). Viewed another way, the federal agencies successfully completed the case (*AT&T*) that involved the greatest economic stakes and was indispensable to the perceived legitimacy of government efforts to address misconduct by dominant firms and made an important addition to Section 2 jurisprudence and policy in *American Airlines*.<sup>365</sup>

The DOJ and FTC dominant firm matters of the 1990s arguably are responsive to some of the policy concerns that motivated caution in the 1980s. The federal agencies rarely sought to develop new doctrinal terrain, and they generally exercised considerable discipline in defining the scope of their claims of liability.

The pendulum narrative implicitly accords approval to a tendency of agencies to bring highly visible cases against large commercial enterprises. The discussion above indicates how small cases can make big law. Many of the cases that have made a major difference in modern antitrust policy—*Otter Tail* and *IFD*—have been “small” cases with major doctrinal effects. One can argue that a lesson of the modern federal experience is the value of prototyping new theories or doctrinal approaches on a limited basis before rolling out theories on a broad scale. Innovative

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<sup>363</sup> Examples of failed FTC prosecutions involving facilitating practices include *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984), and *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

<sup>364</sup> *Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256 (8th Cir. 1983) (denying enforcement of FTC order).

<sup>365</sup> As with other matters discussed in this article, I have characterized matters such as *American Airlines* as being doctrinally important without asking readers to agree that the concepts established in the cases ultimately proved to be legally or economically wise.

concepts perhaps ought to be tested on a smaller scale before being applied expansively.

C. INSTITUTION BUILDING AND CAPABILITY: THE CUMULATIVE NATURE OF ANTITRUST POLICY

Modern U.S. enforcement history indicates that policy success over time depends significantly upon the willingness of any single administration to make long-term investments in administrative capacity and in the enhancement of the reputation of the public enforcement authority. This has several dimensions. One is to embrace and enhance sound programs initiated by one's predecessors. Public officials may not be inclined to define their mission as consisting of the competent execution of programs begun by their predecessors in a previous presidential administration. Appointees to significant government bureaus may feel compelled to identify distinctive accomplishments, especially when political control of the White House shifts to a different party.

A second element is to make investments that may, or likely will, yield returns after the incumbent decision maker leaves office. This requires fidelity to a norm that emphasizes long-term institutional improvement and discourages the inclination to focus chiefly on measures that generate immediately appropriable results.<sup>366</sup> Antitrust policy successes in any one period often depend on contributions made by enforcement officials in an earlier period. In its drive to demonstrate discontinuities in enforcement, the pendulum narrative tends to obscure the degree to which policy in key areas of federal activity reflect the contributions of earlier periods.

Among the most important vehicles for the federal agencies to promote policy improvements is to embrace a norm favoring ex-post assessment of outcomes. There is considerable room for competition agencies to expand their use of ex-post evaluations to evaluate consents and otherwise improve future policy making. One approach is for the agencies to perform internal audits. The agencies would create a routine method for its own personnel to select completed enforcement matters (both litigated cases and consents) and analyze their impact. The results of such analyses could be examined by the agency in internal review sessions. The agencies also should make the results of these sessions available to the public while protecting sensitive business data.

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<sup>366</sup> See Hugh Hecl, *The Spirit of Public Administration*, 35 PS: POLITICAL SCI. & POLITICS 689, 691 (2002) ("Nothing closes so many doors on real opportunity as opportunism. A person who is forever weighing the odds of immediate success can never believe in anything long enough to make it succeed.").

The second approach is to rely on external audits—for example, by outsiders under contract to the agencies (the model used for the FTC's vertical restraints impact evaluations in the late 1970s and early 1980s). External audits would study specific enforcement episodes in detail by examining the agencies' deliberative processes, interviewing respondents, and consulting other parties that participated in the matter. Again, the results of the external audits should be made public.

## VI. CONCLUSION

Good technique in historical interpretation has much in common with sound methodology in navigation. It helps to have a good map that correctly depicts coordinates and distances. Making confident judgments about where to go and how to get there puts a premium on having an accurate idea of where you are and where you have been.

Achieving an accurate understanding of modern federal enforcement experience is a necessary element of good policy making. Developing an accurate narrative of the past illuminates what competition authorities must do to shape sensible programs for the future. Competition policy is a long-running work in progress, and the development of well-conceived initiatives today requires a careful, accurate view of what happened in the past and a commitment to learn why specific measures succeeded or failed.

The pendulum narrative satisfies none of these conditions in recounting U.S. antitrust policy. The pendulum narrative is an unreliable tool for either making a positive diagnosis of past experience or using past experience to formulate normative precepts for future enforcement. By accentuating swings between policy extremes, the pendulum narrative obscures how much enforcement success in any one period often draws heavily upon contributions made by the enforcement agencies in earlier periods. An interpretation better attuned to the cumulative, progressive nature of enforcement in many areas reveals how future policy success requires both an accurate sense of the strengths and weaknesses of public enforcement institutions and the willingness of any single administration to invest resources to improve those institutions.

Accuracy in recounting and interpreting modern antitrust experience also has major implications for the development of global competition policy standards. The U.S. antitrust agencies participate actively in international discussions about competition policy, either through bilateral arrangements with other jurisdictions, in multilateral bodies, or as a

provider of technical assistance to transition economies.<sup>367</sup> Suppose the pendulum narrative accurately described modern U.S. experience. Foreign observers reasonably might distrust the antitrust views of a country that experienced persistent, massive deviations from an accepted mean of proper enforcement in thirty of the past forty years. Without a better informed interpretation of antitrust history, the pendulum narrative, retold as it is often and emphatically, may gain broad acceptance in the international competition policy community as a true representation of U.S. antitrust history and supply a flawed lens for understanding the American experience.<sup>368</sup>

We need not put our faith in the pendulum narrative's fractured account of modern antitrust history. A better reading of U.S. experience acknowledges adjustments in enforcement norms over times but appreciates the importance of continuity. The story of modern U.S. federal enforcement has far more to do with the progressive, cumulative development of policy than with abrupt, discontinuous adjustments in shaping the content of federal agency activity over time.

By seeing how policy actually evolves, we can better understand what agencies must do to improve performance in the future. Activities in any one administration depend on contributions by predecessor and successor administrations. We should measure public officials by their willingness to recognize these interdependencies and make the type of institutional investments that promote quality over the long term. The pendulum narrative suggests that only a foolish manager would make such investments. A more careful reading of federal activity shows they are imperative.

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<sup>367</sup> See Federal Trade Commission & Department of Justice, *The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective* (note submitted for the Global Competition Forum of the Organization for Economic Cooperation and Development, Feb. 2002) (describing DOJ and FTC competition policy technical assistance activities); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOKLYN J. INT'L L. 403, 406–08 (1997) (discussing competition policy technical assistance efforts by nations with older antitrust regimes).

<sup>368</sup> This is not a speculative concern. In my own work with competition authorities in transition economies, I have met a number of officials who understand that the U.S. federal agencies literally discontinued civil enforcement of the antitrust laws in the 1980s and behaved illegally. For support, they cite the work of preeminent competition policy scholars.

## APPENDIX

### Appendix A FTC Antitrust Nonmerger Cases January 1961–July 2003

<i>Year:</i>	<i>HR:</i>	<i>VR:</i>	<i>Dominant Firms:</i>	<i>RP:</i>	<i>Total:</i>
1961	1	1	2	25	29
1962	5	2	2	42	51
1963	2	2	0	14	18
1964	6	2	0	18	26
1965	1	6	1	13	21
1966	3	4	2	7	16
1967	1	1	0	9	11
1968	2	2	1	10	15
1969	1	2	0	7	10
1970	0	6	0	6	12
1971	2	13	1	9	25
1972	0	7	1	2	10
1973	2	10	2	7	21
1974	3	4	2	2	11
1975	2	7	1	2	12
1976	2	10	3	2	17
1977	5	5	1	1	12
1978	2	3	1	3	9
1979	10	9	0	1	20
1980	5	6	1	1	13
1981	0	2	0	3	5
1982	2	2	1	0	5
1983	8	1	0	0	9
1984	11	0	0	0	11
1985	14	0	1	0	15
1986	6	0	0	1	7
1987	3	0	0	0	3
1988	11	0	0	1	12
1989	5	0	0	0	5
1990	7	1	0	0	6
1991	4	2	0	0	6
1992	9	1	0	0	10
1993	12	0	0	0	12
1994	11	1	0	0	12
1995	11	1	0	0	12
1996	2	3	1	0	6
1997	3	1	0	0	4
1998	10	0	3	0	13
1999	6	1	0	0	7
2000	8	1	0	1	10
2001	3	0	0	0	3
2002	8	0	2	0	10
2003 (7/22)	10	0	2	0	12