

THE UNITED STATES AND ITS FUTURE INFLUENCE ON GLOBAL COMPETITION POLICY

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INTRODUCTION: FROM MONOPOLY TO DUOPOLY TO OLIGOPOLY

For almost a century after passage of the Sherman Act¹ in 1890, the United States (“U.S.”) was the unmistakable center of the global competition policy universe. The U.S. was not the first nation with a competition law, nor was it alone in enforcing antitrust commands.² Yet, if there were market shares based either upon experience or influence, the U.S. system was the world’s dominant antitrust enterprise.

The story since the late 1980s is a transition from monopoly to duopoly to oligopoly.³ The enhancement of the competition regime of the European Union (“EU”) soon established an EU-U.S. duopoly. Ambitious enforcement programs involving cartels, dominant firm conduct, and mergers propelled the EU’s ascent.⁴ The EU also attained increasing global influence owing, among other factors, to two reasons. First, the compatibility of the EU’s antitrust institutions with civil law states that were new adopters of competition law contributed to its increased influence.⁵ Second, the lure of deeper affiliation with the EU for countries from Northern Africa,

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¹ 15 U.S.C. §§ 1-7 (2012).

² Entitled, “An Act for the Prevention and Suppression of Combinations formed in the restraint of Trade,” Canada’s first competition law was adopted in 1889, one year before passage of the Sherman Act. D. Jeffrey Brown, *Introduction to Competition Law*, in *COMPETITION ACT & COMMENTARY* 1, 6 & n.27 (D. Jeffrey Brown ed., 2013 ed. 2012). The foundations for the European Union’s competition law system were set in the 1950s with the establishment of an antitrust regime in Germany and the adoption of competition law articles in the Treaty of Rome, which established the European Union. DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 266-69, 342-44 (1998) (describing the strong influence of Germany’s competition regime in Europe and recounting the establishment of the competition law provisions of the Treaty of Rome).

³ William E. Kovacic, *Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy*, *GLOBAL COMPETITION REV.*, Dec. 2010, at 39 [hereinafter Kovacic, *Dominance*].

⁴ *Cf. id.* at 41 (discussing influence of recent EU enforcement guidelines).

⁵ *Id.* at 40.

through the Eastern Mediterranean, and as far east as the Caucasus strengthened its global clout.⁶

Today nearly one hundred and thirty jurisdictions have competition laws, and the EU-U.S. duopoly is giving way to an oligopoly.⁷ China is quickly gaining the same capacity that the EU and the U.S. have possessed to establish global norms of business behavior.⁸ Brazil and India continue to emerge as formidable competition policy systems,⁹ and there is the real possibility that other countries will use regional collaborative mechanisms (such as the Association of South East Asian Nations) to assert the same prerogatives.¹⁰

Americans should not be surprised that jurisdictions other than the U.S. would generate formative ideas about competition policy principles and create powerful institutions to apply them. Many antitrust agencies have attracted exceptional talent at home and recruited astutely abroad.¹¹ With each year, these teams gain experience that narrows the advantage in implementation that older systems, with more years of bringing cases, once enjoyed. Nor should Americans reflexively be dismayed by this decentrali-

⁶ See Thomas J. Doleys, *Promoting Competition Policy Abroad: European Union Efforts in the Developing World*, 57 ANTITRUST BULL. 337, 365 (2012) (remarking that the lure to affiliate with the EU increases when a country desires EU membership or access to EU markets).

⁷ See *Worldwide Competition Database*, THE GEO. WASH. U. COMPETITION L. CTR., <http://www.gwclc.com/World-competition-database.html> (last visited June 24, 2015) (listing 120 jurisdictions with competition laws); see also Press Release, Int'l Competition Network, Annual Conference Press Release (May 1, 2015), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1027.pdf> (indicating the International Competition Network comprises 132 competition agencies from 119 jurisdictions).

⁸ See generally CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS (Adrian Emch & David Stallibrass eds., 2013) [hereinafter CHINA'S LAW] (presenting a diverse collection of articles on the development and significance of the competition law regime in China); William E. Kovacic, *China's Competition Law Experience in Context*, J. ANTITRUST ENFORCEMENT, Advance Access published July 4, 2015, doi: 10.1093/jaenfo/jnv016 (discussing developments in implementation of China's Anti-Monopoly Law).

⁹ See Vinicius Marques de Carvalho, *Brazil: Regulator's Introduction*, in COMPETITION LAW IN THE BRICS COUNTRIES 3, 4, 7 (Adrian Emch et al. eds., 2012) [hereinafter LAW IN THE BRICS] (noting that Brazil's principal independent agency charged with making final antitrust decisions—the Administrative Council for Economic Defense (CADE)—won the Global Competition Review Award for the Americas in 2011, beating out the Department of Justice's Antitrust Division); Seema Gaur, *Regulator's Introduction: Recent Activities and Policy Priorities in India*, in LAW IN THE BRICS, *supra*, at 101, 109 (forecasting that “[t]he development of a robust jurisprudence in the coming years will lay down the foundation for competition regulation that is credible in the eyes of stakeholders—both in India and abroad”).

¹⁰ The members of the Association of South East Asian Nations (“ASEAN”) have committed themselves to adopt competition laws by the end of 2015. *Competition Policy*, ASS'N OF SOUTHEAST ASIAN NATIONS, <http://www.asean.org/communities/asean-economic-community/category/competition-policy> (last visited June 24, 2015). See also R. Ian McEwin, *Introduction to CPI Special Issue on ASEAN Competition Law*, CPI ANTITRUST CHRON., Aug. 2015 (introducing a Special Issue containing a collection of articles on development of competition law in ASEAN member countries).

¹¹ Kovacic, *Dominance*, *supra* note 3, at 39.

zation of authority. Over time, the application of numerous pools of strong human capital and experience may yield the development of new and better competition policies. If rivalry among systems yields superior approaches within and across individual jurisdictions, then that is a competition worth having.

The global expansion in competition regimes does raise a question of influence that ought to concern the U.S. competition policy community of academics, practitioners, and policy makers: amid a multiplicity of decisionmaking centers, how can the U.S. most effectively promote the global adoption of sound substantive competition policy principles and procedures? The world's many competition policy systems are interdependent.¹² Some systems acting alone can create standards for international commerce; others lack this power, but the operation of their antitrust regimes can affect the costs that businesses incur in carrying out routine transactions.¹³

Interdependence has powerful consequences. The quality of choices made by competition systems, large or small, old or new, affects whether economic growth rises or falls within and across jurisdictions. For this reason, the U.S. competition policy community has a big stake in the identification and global acceptance of superior substantive norms and procedures.

This Article considers how competition authorities in the U.S., especially the Antitrust Division of the Department of Justice ("DOJ" and "Antitrust Division") and the Federal Trade Commission ("FTC"), can promote global acceptance of superior norms and see that norms evolve to reflect advances in theory and knowledge gained through implementation experience. The chief means of international influence amid the global decentralization of authority is persuasion. Trade agreements provide some capacity to impose procedural and substantive standards on the signatories, but the U.S. generally cannot compel other jurisdictions, especially economically and politically powerful states, to abide by its antitrust preferences.¹⁴ To a great degree, it only can persuade them to do so.

¹² William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, in *COMPETITION POLICY IN THE EU: FIFTY YEARS ON FROM THE TREATY OF ROME* 314, 314-15 (Xavier Vives ed., 2009) [hereinafter Kovacic, *Competition Policy*]. The interdependence takes several forms, most notably the spillover effect of decisions taken in one jurisdiction upon commerce in other jurisdictions. Interdependence also results from the sharing among competition agencies of information related to enforcement. See Stanley Wong, *Effectiveness of Technical Assistance in Capacity Building on Competition Law and Policy: The Case of China*, in *CHINA'S LAW*, *supra* note 8, at 357 (discussing how various countries have given China technical assistance on the implementation of competition law).

¹³ See Kovacic, *Competition Policy*, *supra* note 12, at 315 (noting that procedural differences can discourage beneficial business transactions).

¹⁴ U.S. competition authorities, constrained by principles of international comity, will not always assert jurisdiction for antitrust harms actually affecting U.S. parties within the United States if those harms originate in other countries. See John "Jay" A. Jurata, Jr. & Inessa Mirkin Owens, *A New Trade*

The U.S. enjoys great potential advantages in promoting adoption of favored ideas about antitrust process and substance, yet also faces formidable obstacles in applying these advantages effectively. This Article proceeds in three parts. Part I describes the measures that individual jurisdictions, including the U.S., can take to influence global competition law norms. Part II discusses three factors—reputation, branding, and investment—that affect the decisions of jurisdictions with relatively new competition regimes when they consider adopting ideas from jurisdictions with older systems. Part III begins by discussing what the U.S. can do to influence the processes and substantive standards of competition law in the future.¹⁵ It concludes by examining specific obstacles that U.S. competition agencies face as they attempt to exert influence on global norms and describes how each of these obstacles can be overcome.

With respect to reputation, scholars and commentators have crafted an incorrect but widely accepted narrative that depicts federal antitrust enforcement as prone to extended periods of irrationality. This narrative has served the professional and partisan political purposes of commentators on the left and the right at the cost of diminishing the reputation of the U.S. competition system abroad. With respect to branding, the U.S. agencies' incomplete efforts to define and communicate common principles and to coordinate their activities have confused foreign antitrust audiences. This devalues the U.S. competition agencies' brands and erodes their global influence. Finally, the U.S. competition authorities have an opportunity to increase their influence by making greater investments in the creation of new policy applications, refining older U.S. policy "products," and building stronger international relationships. After examining these factor-specific obstacles in turn, this Article closes with a conclusion that outlines desired next steps.

Two principal perspectives inform this Article. The first is my experience working in and performing research about the U.S. antitrust regime. The second is my work with competition law systems outside the U.S., including my experience as a Non-executive Director with the United Kingdom Competition and Markets Authority. The opportunity to observe developments outside the U.S. and to see how other competition agencies perceive the U.S. experience has provided the motivation for this Article.

I. GLOBAL COMPETITION LAW STANDARDS: MEANS OF INFLUENCE

To create a strategy for shaping international norms, one needs an understanding of how competition law systems are designed and how they

War: Applying Domestic Antitrust Laws to Foreign Patents, 22 GEO. MASON L. REV. 1127, 1150 (2015).

¹⁵ For an expanded discussion of this topic, see Kovacic, *Dominance*, *supra* note 3.

operate. Competition law systems have three basic elements: an operating system of statutes and institutions needed for their execution, applications that take the form of analytical methods and procedures, and “know-how” accumulated during the course of implementing the framework of statutes and related rules.¹⁶ Each element provides a focal point for a jurisdiction to influence international norms. A nation can seek to shape the design of the operating system, devise applications for adoption by others, and convey know-how that it has accumulated about the implementation of competition rules. Part I.A introduces the concept of antitrust operating systems. Part I.B discusses implementations. Part I.C continues by describing the significance of know-how about the implementation of competition laws.

A. *Antitrust Operating Systems: Statutes and Implementing Institutions*

The essential framework of a competition law system consists of statutory commands that spell out standards of business conduct and prescribe the process that agencies and courts must follow in determining whether companies have transgressed the standards.¹⁷ A legislature can express substantive commands in more general terms (the approach taken, for example, in the Sherman Act¹⁸), or it can specify forbidden practices in more detail (the approach used in Articles 101 and 102 of the Treaty on the Functioning of the European Union¹⁹).

Various institutional mechanisms are necessary to implement these commands.²⁰ The legislature can entrust implementation to a prosecutor that files charges in the nation’s courts; it can create an administrative body that makes an initial decision about whether an infringement has occurred, subject to judicial review; or it can use some combination of the prosecutorial and administrative models.²¹ The public agency can be headed by a single

¹⁶ See William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 254-55 (2015) [hereinafter Kovacic, *Respected Brand*] (describing the value of reviewing an agency’s analytical methods, which advances the development of that agency’s knowledge).

¹⁷ See William E. Kovacic & David A. Hyman, *Competition Agency Design: What’s on the Menu?*, 8 EUR. COMPETITION J. 527, 532 (2012).

¹⁸ 15 U.S.C. §§ 1-7 (2012).

¹⁹ Consolidated Version of the Treaty on the Functioning of the European Union arts. 101-02, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

²⁰ See generally THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES (Eleanor M. Fox & Michael J. Trebilcock eds., 2013) (presenting a collection of essays examining how various jurisdictions design the institutions needed to implement a competition law); ANNETJE OTTOW, MARKET & COMPETITION AUTHORITIES: GOOD AGENCY PRINCIPLES (2015) (studying design and operational factors that determine the effectiveness of independent regulatory agencies); Kovacic & Hyman, *supra* note 17 (offering legislative design alternatives that influence the quality and efficacy of competition agencies).

²¹ See Kovacic & Hyman, *supra* note 17, at 534-35.

executive, or by a board.²² Its powers can be limited solely to competition law, or it can be assigned other policy tasks.²³ Public enforcement authority can be restricted to a single national authority, distributed across two or more national bodies, or delegated to political subdivisions, such as member states.²⁴ Private rights of action can be established to supplement enforcement by public agencies.²⁵

The effectiveness of public enforcement institutions depends partly on the quality of collateral institutions beyond the walls of the competition agency.²⁶ These include the judicial tribunals that decide competition cases in the first instance or hear appeals from agency decisions, universities that teach competition law and foster research, citizen advocacy groups, legal societies, the media, and business associations. The work of these and other groups can determine the capability of the public competition agencies (e.g., the academic community that trains students and generates scholarly commentary), serve as two-way information conduits between the competition agency and those affected by its decisions (e.g., consumer advocacy groups, legal societies, and business associations), and provide important quality control devices that discipline the decision to prosecute (e.g., the courts).

B. *Applications for Implementation*

To implement a competition law, the public enforcement institutions develop analytical methods and procedures that resemble the applications that run on computer operating systems. Examples of these applications include public statements that explain how the agency will analyze various forms of conduct (e.g., merger guidelines),²⁷ techniques for gathering evidence useful in detecting or proving violations (e.g., leniency),²⁸ and methods for organizing an agency and managing its operations (e.g., the placement of economists in the agency).²⁹

²² *Id.* at 531.

²³ Kovacic, *Respected Brand*, *supra* note 16, at 242.

²⁴ Kovacic & Hyman, *supra* note 17, at 532.

²⁵ *Id.* at 528.

²⁶ Kovacic, *Dominance*, *supra* note 3, at 41.

²⁷ *E.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,100, *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

²⁸ *E.g.*, U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,113, *available at* <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

²⁹ *E.g.*, *About the Bureau of Economics*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/about-bureau-economics> (last visited June 25, 2015) [hereinafter *About the Bureau of Economics*] (explaining how economists, in their own bureau within the FTC, participate in all investigations concerning possible violations of the antitrust laws); *see also* Statement

C. *Implementation Know-How*

In the course of implementing a competition law, an agency can acquire substantial know-how about how to translate substantive commands into effective law enforcement programs. In conducting numerous investigations, case handling teams improve their ability to plan the collection and analysis of evidence, to interview business operators, and to present proof in judicial proceedings. An agency also collects know-how about the performance of vital administrative tasks, such the management of the internal secretariat that oversees the preservation of agency records, the safeguarding of confidential business information, and responses to demands for information under freedom of information statutes. An agency with a large reservoir of know-how can be a valuable resource to a newer authority in the early phase of implementing a competition law regime.

II. FACTORS DETERMINING SUCCESS IN PERSUASION

All three system elements set out above—operating system, applications, and know-how—provide focal points for one jurisdiction to influence how others design their own competition law systems and implement assigned responsibilities. A country can exert influence because other jurisdictions are persuaded that it has a better operating system, superior applications, or valuable know-how about policy implementation.

A nation's economic conditions, history, and political forces may predetermine some features of its competition law system. Some system characteristics may be so hard-wired by the country's experience that they are largely immutable and unlikely to be influenced by the experience or preferences of other jurisdictions. Thus, a civil law country with historical reliance on an administrative enforcement model may never find a prosecutorial model to be an attractive method to apply the competition law. A built-in source of the EU's global influence in the design of competition operating systems is the similarity of its policy implementation institutions, reliant as they are on administrative enforcement, to the civil law regimes of most of the world's nations.³⁰

Other system characteristics, however, may be influenced by the country's examination of the experience of other jurisdictions and the intensity of that country's interaction with other jurisdictions. Especially for jurisdictions with relatively new competition regimes, there is a strong interest in

of Commissioner Joshua D. Wright, Fed. Trade Comm'n, On the FTC's Bureau of Economics, Independence, and Agency Performance (Aug. 6, 2015), https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf (discussing the role of the Bureau of Economics as an independent source of analysis within the FTC).

³⁰ Kovacic, *Dominance*, *supra* note 3, at 40.

what other authorities are doing and an openness to making refinements that incorporate superior analytical methods and procedures. The market for the operating systems of competition law may be dominated by administrative enforcement approaches, but the development of applications and the transfer of know-how are robustly competitive.

Various considerations lead jurisdictions to modify their own regimes to adopt applications and absorb know-how from other systems. The discussion below identifies why jurisdictions emulate some jurisdictions more actively than others. Part II.A discusses the affect of regulatory agencies' reputations in influencing persuasion. Part II.B explores the concept of branding and its role in how an agency formulates and communicates its policies. Part II.C describes the importance of investment in creating competition policy applications and in international cooperation as means to gain influence.

A. *Reputation*

Regulatory agencies develop reputations,³¹ and the reputation of a competition system affects whether other authorities choose to emulate that jurisdiction's applications, seek its know-how, or even amend their own operating systems. A competition agency's reputation is a function of many factors. The most important is the perceived quality of its programs: has the agency delivered visibly good economic results for consumers in its decisions about what to do and what not to do?

In some cases, it is possible to link improvements in economic performance directly to the agency's work.³² Because it can be difficult to show how the operation of a competition system affects economic performance, other proxies of effectiveness serve to separate stronger competition systems from weaker ones. In many instances, the volume of the agency's activity—notably, the filing of cases and the successful defense of litigation matters in court—and the sum of monetary penalties recovered are taken as

³¹ *E.g.*, DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 338-51 (2001) (describing the Department of the Interior's Reclamation Service as habitually overcommitting and underperforming, leading to its reputation taking "a continuous beating" in Congress and its complete loss of discretion by 1914).

³² *See* Jon Leibowitz, *17th Annual Antitrust Symposium: Keynote Panel Discussion*, 21 *GEO. MASON L. REV.* 1111, 1117 (2014) (discussing effects of the FTC's work in challenging reverse payment agreements involving manufacturers of generic and branded pharmaceuticals).

measures of agency quality.³³ Agencies that bring big cases and obtain substantial penalties figure prominently in discussions about agency quality.³⁴

Reputation also is shaped by perceptions of the quality of an agency's process.³⁵ One important element of process is the set of procedural techniques (both formal rules and norms) that the agency uses to ensure that it operates within the boundaries of the law and tests theory and evidence rigorously. Another ingredient of good process is meaningful public disclosure—notably, informative statements about priorities, guidelines and other commentary that spell out how the agency analyzes business behavior, and clear explanations of why the agency chose to issue complaints, close files, or settle cases. Good practice also leads agency officials to appear regularly in public to explain their views and accept criticism. A further measure is the establishment of a routine practice to evaluate the substance of the agency's work and its procedures.

B. *Branding*

Reputation is the central ingredient of an agency's efforts to build a well-respected brand internationally.³⁶ The concept of branding extends beyond the development of a good reputation to encompass efforts that make the agency well-known and well-respected in the eyes of external observers, including other competition authorities. In this way, branding has an important dimension of marketing. An agency's good work is unlikely to exert substantial influence abroad unless it is known and understood by a wider audience.

Effective branding is a function of how the agency formulates and communicates its policies. A major determinant of effectiveness is to ensure that the agency's expressions of policy—through hard tools such as law enforcement and rulemaking or through softer policy instruments, such as guidelines, reports, and speeches—are coherent. Policy coherence in turn depends heavily on the agency's ability to form an overall strategy and to set out priorities that guide its staff about the selection of programs and inform outsiders about its intentions.

Coherence also requires discipline in external communications, including the agency's public relations program. Means of informing external observers include public statements by the agency and its senior managers,

³³ See William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 908 (2009) [hereinafter Kovacic, *Rating the Competition Agencies*].

³⁴ *Id.*

³⁵ Kovacic, *Respected Brand*, *supra* note 16, at 253-55 (discussing the importance of good process and how outsiders view process in the shaping of an agency's reputation).

³⁶ *Id.* at 238 & n.1 (using “the terms ‘brand’ and ‘reputation’ as synonyms”).

presentations at conferences, formal decisions on the initiation or resolution of cases, and the publication of studies. Each public utterance of an agency or its officials is an occasion to emboss or tarnish the agency's brand. As a group, these messages should consistently and clearly reinforce the agency's main themes, as contained in its statement of strategy and priorities.

C. *Investment*

To influence outsiders, agencies must make investments that build an inventory of competition policy "products" (e.g., enforcement guidelines) and establish conduits for distributing these products overseas. The creation of influential applications requires investments in competition policy research and development. This can take the form of research projects and public consultations that assemble knowledge, which is the vital raw material of drafting good agency guidelines or devising improvements in analytical techniques.

The distribution of an agency's ideas occurs through engagement with other competition agencies and with non-government bodies. One important form of engagement consists of participation in networks that assemble competition agencies in efforts to devise standards and to discuss policy issues of common concern. Major examples include the Competition Committee of the Organization for Economic Cooperation and Development ("OECD"), the International Competition Network ("ICN"), and the United Nations Conference on Trade and Development ("UNCTAD"). Agencies also can distribute their ideas through bilateral consultations with other competition authorities, regional networks, and technical assistance programs aimed at improving the capacity of new competition agencies or assisting jurisdictions in creating new competition law systems.³⁷

III. U.S. INFLUENCE TODAY AND TOMORROW

As Part I of this Article described, three basic elements—operating systems, applications, and know-how—can serve as focal points for a jurisdiction to influence international competition policy norms. Part III.A describes the influence of EU and U.S. institutional frameworks in shaping operating systems internationally and the U.S.'s path to influence through the development and implementation of competition policy applications. Part III.B discusses the U.S. antitrust agencies' accumulation of implementation know-how. Part III.C builds on the factors introduced in Part II; it

³⁷ Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy*, 7 EUR. FOREIGN AFF. REV. 241, 246, 248 (2002).

describes the factors that determine success in implementation as they relate to U.S. influence globally: reputation, branding, and investment.

A. *The Operating Systems and Applications*

As noted above, the EU's competition system provides the most widely adopted operating system model for the world's competition agencies.³⁸ Civil law institutional arrangements provide the foundation for the EU system.³⁹ Because most nations have civil law systems, the EU's competition system is dominant in influencing the institutional designs that most countries use to implement competition laws.⁴⁰

The U.S. competition regime is a secondary force in shaping the institutional operating system of global competition law, but some of its features have true influence.⁴¹ Many civil law antitrust systems today are considering whether to create or expand private rights of action and to punish antitrust offenses as crimes,⁴² areas where the U.S. has substantial experience and expertise. Although U.S. competition agencies can exert substantial influence over the development of EU-based, civil-law operating systems in these areas, some difficulties exist. To be effective, private rights of action tend to require discovery rights that most civil law systems do not provide.⁴³ Furthermore, in civil law regimes, criminalization complicates enforcement because the antitrust agency (usually an administrative body) must cooperate with an executive branch prosecutor to pursue cases.⁴⁴

A more powerful path for the U.S. to influence international norm-creation is the development and implementation of competition policy applications. The U.S. has provided applications that most of the world's

³⁸ Kovacic, *Dominance*, *supra* note 3, at 40.

³⁹ The EU implements the TFEU's competition policy articles with an expert public administrative body that is subject to judicial review. *See* TFEU, *supra* note 19, arts. 103(1), 105; Consolidated Version of the Treaty on European Union arts. 13(1), 17(1), 19(1), Oct. 29, 2012, 2012 O.J. (C 326) 13.

⁴⁰ Kovacic, *Dominance*, *supra* note 3, at 40. This factor, combined with the aspirations of many nations to either gain membership in the EU or establish a strong affiliation with the EU, gives the EU's competition system extraordinary influence. *Id.*

⁴¹ *Id.*

⁴² Even the EU is evolving to some extent in this direction. *See* Damien Geradin, *Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?*, 22 GEO. MASON L. REV. 1079, 1079 (2015) ("Private antitrust litigation is, however, bound to play a greater role in the EU as a result of legislative developments, including the 2014 Directive on actions for damages from competition law infringements . . .").

⁴³ *See, e.g.*, James H. Jeffs, *Private Rights of Action under the Anti-Monopoly Law—The First Five Years*, in CHINA'S LAW, *supra* note 8, at 307, 315-16 ("One of the challenges to private litigation in China, generally, is the relatively limited amount of discovery that is allowed. . . . The information that can be gained by more liberal discovery rules in other jurisdictions can be vital for prosecuting a competition lawsuit.")

⁴⁴ Kovacic, *Dominance*, *supra* note 3, at 40.

competition law systems use in the treatment of cartels and the use of leniency to detect them.⁴⁵ In management and operations, a number of jurisdictions have emulated the U.S. approach of placing economists in a separate organizational group and giving the chief economist a direct reporting line to agency leadership.⁴⁶

Because competition policy applications reflect significant cross-border borrowing, applications perceived as effective can give their authors strong global influence. The U.S. experience with leniency, merger guidelines, and premerger notification demonstrates the force of persuasion at work. Other jurisdictions have emulated these innovations by choice, not compulsion.⁴⁷ Four traits determine an application's appeal to potential adopters. The first is the quality of the application's intellectual vision. The EU guidelines on non-horizontal mergers in 2007 provide a useful example. The EU's guidelines have been influential owing to "their careful effort to synthesize modern perspectives on vertical and horizontal transactions."⁴⁸

A second factor is currency. The EU 2007 non-horizontal guidelines stand in contrast to the last U.S. guidelines on non-horizontal mergers, issued in 1984.⁴⁹ Much like a computer program with a 1984 issuance date, the U.S. non-horizontal guidelines are obsolete and are ignored—even in the U.S.⁵⁰ The EU guidance paper on the Commission's enforcement intentions with respect to Article 102 of the Treaty on the Functioning of the European Union ("TFEU") has been influential because it is both relatively new, published in 2008, and a thoughtful treatment of the analysis of dominant firm conduct.⁵¹

A third key attribute is implementation experience. Implementation experience includes the extent of the agency's practical experience with

⁴⁵ Kovacic, *Competition Policy*, *supra* note 122, at 318; *see also* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1824 (2011) ("[DOJ efforts to promote international cooperation] have accompanied a 'convergence in leniency programs,' in which at least forty-eight other countries adopted leniency-type programs." (footnote omitted)).

⁴⁶ *See* Kovacic, *Dominance*, *supra* note 3, at 40.

⁴⁷ *Id.* ("No multinational treaty, regional pact, or bilateral agreement compelled any nation to create replicas of the merger guidelines, premerger notification mechanisms, or leniency [programs] first tested by the US competition agencies.").

⁴⁸ *Id.* at 41; *see* European Comm'n, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6, 7 (Oct. 18, 2008) ("The guidance set out in this document draws and elaborates on the Commission's evolving experience with the appraisal of non-horizontal mergers . . .").

⁴⁹ James Langenfeld, *Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up?*, 16 GEO. MASON L. REV. 851, 851-52 (2009).

⁵⁰ Robert Pitofsky, Former Chairman, Fed. Trade Comm'n, 90th Anniversary Symposium of the Federal Trade Commission: A Conversation with Tim Muris and Bob Pitofsky 172 (Sept. 22, 2004), available at <https://www.ftc.gov/news-events/events-calendar/2004/09/ftc-90th-anniversary-symposium> ("[M]y guiding principle in deciding which challenges to initiate was to ignore the vertical merger guidelines. They are hopelessly out of date, and they ought to be revisited.").

⁵¹ Kovacic, *Dominance*, *supra* note 3, at 41.

respect to the subject matter of the new application. The greater the agency's experience base, the more likely that potential adopters will have confidence that the agency knows what it is talking about in new guidelines. Experience in the implementation of guidelines is no less important, as it assures potential adopters that the application functions well in practice.

A fourth attribute consists of the policy equivalent of post-sale services. Enforcement guidelines, however informative, cannot "supply a complete exposition of a contemplated enforcement approach."⁵² Success in implementation requires continuing explanation and popularization. Offered to domestic and international audiences, speeches, roundtables, frequently asked questions, and other devices serve to clarify specific concepts and describe actual experience with operative principles.⁵³ The popularization of the DOJ-FTC Horizontal Merger Guidelines ("HMGs") released in August 2010, for example, required extensive agency efforts to discuss their implementation and to provide interpretations of the instrument through speeches and other public statements.⁵⁴

B. *Implementation Know-How*

By reason of their longevity and the breadth of their programs, the U.S. antitrust agencies have accumulated a massive body of know-how regarding the implementation of competition law. In some areas of law enforcement and non-litigation policy work, the combined experience of the DOJ and the FTC is unsurpassed. Notable areas of deep experience and accumulated knowledge in law enforcement include the prohibition of illegal horizontal agreements and merger control.⁵⁵ Among all nations that treat certain antitrust offenses as crimes, only the DOJ has achieved significant success in gaining convictions and plea agreements as well as imposing custodial sentences upon individuals.⁵⁶ By contrast, the once-thriving federal agency efforts to challenge price discrimination offenses and to prosecute

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.* For example, an important step in the popularization of the 2010 Horizontal Merger Guidelines was the publication by Carl Shapiro, one of the principal authors of the Guidelines, of an article discussing the logic of the new document. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 49-50 (2010).

⁵⁵ *See* Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1179 (2014) (remarking on the FTC's "unprecedented" success in finding violations over the last two decades).

⁵⁶ *See* Garrett, *supra* note 455, at 1792 (noting the preference of many European countries for milder penalties); Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 859-60 (2011) ("Virtually every conviction in modern times has resulted in a prison term for corporate employees, officers, and directors, ranging from relatively low-level employees to Presidents and CEOs.").

vertical price and non-price violations have waned.⁵⁷ The U.S. agencies have supplemented their law enforcement efforts with substantial use of non-litigation tools such as competition advocacy,⁵⁸ market studies (an FTC policy domain),⁵⁹ and public consultations.⁶⁰

Each activity described here involves special competencies. Effective law enforcement demands skill in framing the theory of a case, designing an investigation plan, collecting evidence, and matching legal theories to proof. Merger control today involves the use of sophisticated quantitative analytical techniques to simulate likely competitive effects.⁶¹ The preparation of an influential market study or report involves skill in framing the topic, collecting data, and distilling the essence of research in antitrust economics and law. Successful public consultations demand extensive preparatory research to define topics and select speakers as well as considerable skill in synthesizing research and conference proceedings.

Beyond these programmatic areas of knowledge, the DOJ and the FTC have learned a great deal about how to organize and operate an agency. Good agencies rely upon an internal administrative infrastructure that manages internal information flows, provides technical support (e.g., the maintenance of information technology systems), informs outsiders about the agency's activities, and interacts with media organizations. Agencies also develop insights about how to achieve a high degree of quality control—for example, by creating a separate unit for the agency's economists and having the economics team present separate recommendations to agen-

⁵⁷ D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1008 (2014) (“[F]ormal government policy starting in the Reagan administration . . . led to a significant decline in federal enforcement against vertical restraints. Government challenges to vertical practices . . . have never recovered to pre-Reagan levels.” (footnote omitted)).

⁵⁸ Maureen K. Ohlhausen, *100 Is the New 30: Recommendations for the FTC's Next 100 Years*, 21 GEO. MASON L. REV. 1131, 1134 (2014) (describing competition advocacy as a tool of “great importance”).

⁵⁹ See William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861, 865 (2005) (describing how empirical research supports policy interventions).

⁶⁰ William E. Kovacic, *The Federal Trade Commission as Convenor: Developing Regulatory Policy Norms without Litigation or Rulemaking*, 13 COLO. TECH. L.J. 17, 27-28 (2015) [hereinafter Kovacic, *The Federal Trade Commission as Convenor*] (describing FTC's efforts to advance policy by convening public consultations and conferences); William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097, 1103 (2012) [hereinafter Kovacic, *Federal Antitrust Joint Venture*] (remarking on DOJ and FTC initiatives involving public consultations on antitrust and intellectual property).

⁶¹ See, e.g., Ohlhausen, *supra* note 58, at 1140 (explaining the results of the recent seven-month investigation and analysis regarding office supply superstores Office Depot and OfficeMax).

cy leaders.⁶² A multimember body such as the FTC gains insights about the dynamics associated with collective decision-making.

C. *Factors Determining Success in Implementation*

As discussed above, reputation, branding, and investment help determine whether a particular antitrust enforcement system operates successfully. In a number of important ways, U.S. competition policymaking excels with regard to each of these factors. In many respects, the U.S. system stands on strong foundations. Nonetheless, as described below, there remain valuable areas in which the U.S. could improve its reputation, branding, and investment in order to increase the influence of its competition law regime abroad.

1. Reputation

The U.S. public enforcement system has achieved great esteem in the eyes of foreign competition agencies. Because the U.S. agencies have unmatched experience in law enforcement and in using non-litigation policy tools, other jurisdictions routinely pay close attention to how the U.S. federal agencies behave and the work they produce. In formulating their own programs, they account for what seems to be the prevailing state of doctrine and policy in the U.S.⁶³ Other jurisdictions do not invariably adhere to U.S. approaches, yet they rarely ignore them. Many authorities have adopted variants of analytical concepts and operational techniques devised and tested in the U.S.⁶⁴

The reputation of the U.S. public enforcement system, though strong, could be better. Several developments since the mid-1970s have blemished the reputation of the U.S. system and, as a consequence, reduced the influence of the U.S. antitrust agencies in shaping global competition policy standards.

a. *The Irrationality Narrative: A System Unhinged*

One force that reduces the perceived legitimacy of the U.S. system is a widely accepted narrative, reflected in popular discourse and scholarly commentary, which portrays federal enforcement as irrational and unsta-

⁶² Kovacic, *Competition Policy*, *supra* note 12, at 333; *see also supra* note 29 and accompanying text.

⁶³ *See infra* Part III.C.2.d.

⁶⁴ Kovacic, *Competition Policy*, *supra* note 12, at 323.

ble.⁶⁵ In this interpretation of modern U.S. enforcement history, antitrust policy undergoes recurring erratic shifts, with a small number of lucid intervals. For the most part, the irrationality narrative suggests that U.S. antitrust policy embraced unsupportable extremes of over-enforcement in the 1960s and 1970s, under-enforcement from 1981 to 1988 and 2001 to 2008, and achieved a sensible, balanced equilibrium only from 1993 to 2000 and 2009 to the present.⁶⁶ This accounting of antitrust history raises a troublesome question: why should any jurisdiction outside the U.S. respect a system that has lost its mind in roughly 41 of the past 55 years?

Policy-making in the irrationality narrative is sharply discontinuous, and the enforcement institutions have little evident capacity for self-assessment or correction over time.⁶⁷ Individual leaders count for everything, and institutional arrangements fail to discipline policy-making;⁶⁸ appoint a wise official and you get good results, but pick a zealot and the agency swerves toward frantic hyperactivity or utter indolence. The irrationality narrative is the public policy equivalent of an interpretation of Formula One racing that attributes the outcome in races entirely to the driver and treats the quality of the car and supporting team as largely irrelevant.

The irrationality account of U.S. enforcement history derives power from the stature of the narrators. Despite its unreliable reading of U.S. experience, the narrative's academic pedigree is daunting. Some of the greatest scholars in U.S. competition law have contributed to the story. If nonentities constructed the narrative, foreign observers would dismiss it out of hand. Instead, the narrative of irrationality and instability, often presented with the metaphor of a wildly swinging pendulum, originated and developed in the work of some of the field's most influential commentators. On many occasions outside the U.S., I have heard enforcement officials, practitioners, and scholars speak of the irrationality narrative as though it were an established truth. To these observers, the stature of the scholars who popularized the irrationality narrative invariably lends verisimilitude to the story.

As described below, the irrationality narrative of the U.S. system serves the aims of the right and the left in the debate about federal enforcement policy. For those who favor more intervention or less intervention, alike, the image of a system dangerously out of control serves to frame their own "sensible" policy proposals. By this technique, the narrator emerges as the voice of wisdom in a crazed policy environment.

⁶⁵ Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 196 (1992) [hereinafter Pitofsky, *Proposals*].

⁶⁶ *Id.*; Robert T. Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 586 (2002) [hereinafter Pitofsky, *View from the Middle*].

⁶⁷ Pitofsky, *Proposals*, *supra* note 65, at 196-99.

⁶⁸ William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L.J. 855, 857-59 (2014) [hereinafter Kovacic, *Out of Control?*] (discussing the enormous impact that a single leader in antitrust law had on U.S. antitrust policy).

The architecture of the modern irrationality narrative took shape in 1978 when Professor Robert Bork published the first edition of his transformative treatise, *The Antitrust Paradox*.⁶⁹ Professor Bork's central thesis was that "modern antitrust has so decayed that the policy is no longer intellectually respectable."⁷⁰ Each institution with a role in the implementation of the antitrust laws—the courts, the Congress, and the federal enforcement agencies—caused the decay. On antitrust matters, the Congress displayed the mentality of "the sheriff of a frontier town" who "did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people."⁷¹ With few exceptions, the courts embraced a view of antitrust law that "teaches the necessity for government intervention when no such necessity exists, and even when intervention is positively harmful."⁷² Without regard to adverse economic effects, the DOJ and the FTC "must continually press on to fresh territory, seeking theories that broaden the application of the law and make violations easier to establish."⁷³

In Professor Bork's telling, the implementing institutions were capricious, reckless, or bent upon self-aggrandizement.⁷⁴ As a group, the institutions have gone mad, for they have no tendency or, perhaps, any capacity to reflect on their experience, identify error, and make corrections.⁷⁵ Instead, the U.S. antitrust system had "an inbuilt thrust toward greater severity or further extension."⁷⁶ Nothing, Professor Bork warned, seemed able to contain the destructive march of intervention: "This process has no obvious stopping point."⁷⁷

The image of a system out of control served Professor Bork's rhetorical aims; it showed the urgency for reform by presenting a system in shambles. The image also distorted (more mildly, misread) current trends substantially. When *The Antitrust Paradox* appeared in January 1978, each institution Professor Bork rebuked—the Congress, the courts, and the federal enforcement agencies—had taken steps to rebalance the antitrust system.⁷⁸ The adjustments came slowly, but they were coming, nonetheless. If Professor Bork had acknowledged that the seemingly out-of-control institu-

⁶⁹ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 418 (1978). Bork's depiction of the U.S. antitrust system in *The Antitrust Paradox* is examined in Kovacic, *Out of Control?*, *supra* note 68.

⁷⁰ BORK, *supra* note 69, at 418.

⁷¹ *Id.* at 6.

⁷² *Id.* at 420.

⁷³ *Id.* at 415.

⁷⁴ *See generally id.*

⁷⁵ *Id.* at 418-19.

⁷⁶ BORK, *supra* note 69, at 421.

⁷⁷ *Id.*

⁷⁸ Kovacic, *Out of Control?*, *supra* note 68, at 867-75.

tions were making important adjustments, his book would have lost some (maybe much) of its force.

A second decisive contribution to the irrationality narrative came in the late 1980s and early 1990s from one of Professor Bork's harshest critics, Professor Robert Pitofsky. Though Professor Pitofsky scorned Professor Bork's calls for a vast retrenchment of antitrust enforcement, he used his own version of the irrationality narrative while setting out a more interventionist agenda.⁷⁹ Describing federal merger enforcement from the early 1960s through the early 1990s, Professor Pitofsky wrote:

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, 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.⁸⁰

Like Professor Bork in *The Antitrust Paradox*, Professor Pitofsky presented a system run amok. Federal policy “careen[s] from one extreme to another,” like an automobile with an impaired driver swerving across the centerline.⁸¹ No institutional feature in the U.S. system provided needed balance.⁸²

In Professor Pitofsky's version of the narrative, the solution to the aberrant enforcement behavior came by way of appointments—including his own—to the federal agencies.⁸³ In 2002, after chairing the FTC from 1995 to 2001, Professor Pitofsky said federal merger control by the late 1990s “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”⁸⁴ Under the Clinton Administration's appointees, federal policy stopped “careening,” avoiding the extremes of an overheated, populist-inspired activism of the 1960s and the “minimalist” program of the Reagan presidency with its “hostility to the core assumptions of antitrust.”⁸⁵

For Professor Pitofsky, like Professor Bork, the narrative of a system gripped by irrational, erratic variations in behavior served an important instrumental purpose. The portrayal of a regime swinging wildly between extremes allowed Professor Pitofsky to claim the role—as suggested in the

⁷⁹ Pitofsky, *Proposals*, *supra* note 65, at 196-99.

⁸⁰ *Id.* at 196 (footnotes omitted).

⁸¹ *Id.*

⁸² *Id.* at 196-98.

⁸³ Pitofsky, *View from the Middle*, *supra* note 66, at 586.

⁸⁴ *Id.*

⁸⁵ *Id.*

title of his 2002 article, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*—of the wise centrist.⁸⁶ Professor Pitofsky underscored the rationality of his own program by juxtaposing it against the irrationality of his predecessors.⁸⁷ Clinton Administration antitrust officials strove to claim the mantle of wise centrism.⁸⁸ As the following passage from an essay in *The Economist* in 2000 shows, they framed their program as a sensible middle way between the irrational interventionism of the 1960s and 1970s and the inactivity of the 1980s:

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 legal 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.⁸⁹

In reporting on the Clinton administration strategy, *The Economist* presents the federal enforcement policy just as the DOJ and FTC leadership wished: a “modest” and “mainstream” program standing between two eras of irrationality; one guided by “trust-busting zealots” and the other led by “laissez-faire ideologues.”⁹⁰

Taken on its own terms, the irrationality interpretation of U.S. antitrust history provides a grim picture of the American system. One should be wary of a system that intermittently has lucid policymaking intervals, but its normal state is irrationality. If everything depends on the appointment of wise centrists to head the agencies, nothing good can happen when the

⁸⁶ *Id.* at 585-86.

⁸⁷ *Id.* at 588-94. Professor Pitofsky’s characterization of his FTC chairmanship repeats the theme of prudent moderation. See, e.g., Jonathan B. Baker & Robert Pitofsky, *A Turning Point in Merger Enforcement: Federal Trade Commission v. Staples*, in *ANTITRUST STORIES* 311, 316 (Eleanor M. Fox & Daniel A. Crane eds., 2007) [hereinafter *STORIES*] (stating that in opposing the merger between Staples and Office Depot, the FTC sought “to restore effective and sensible merger enforcement—avoiding the undue activism of the 1960s and the extreme under-enforcement of the 1980s”).

⁸⁸ In a speech in 1999, DOJ Assistant Attorney General Joel Klein said that in the early 1960s the government antitrust agencies had “challenged everything.” A press report of his speech went on to say that Klein expressed his belief that “the antitrust ‘pendulum’ on his watch has swung back to the ‘middle,’ where ‘big was not necessarily bad’ but government prudently cracked down on anti-consumer deals and practices.” *Klein Spurs Consumer Action to Address Challenges of Information Age, Globalization*, 76 *Antitrust & Trade Reg. Rep. (BNA)* No. 1910 (May 20, 1999). One year earlier Joel Klein had given an interview in which, discussing federal antitrust enforcement trends, he said “[t]he pendulum is in the middle.” James Toedtman, *Ball Is in his Court*, *NEWSDAY*, June 7, 1998, at F8. For a similar assessment from one of Robert Pitofsky’s advisors at the FTC, see David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 *CORNELL J.L. & PUB. POL’Y* 61, 132 (1999) (stating that Clinton-era antitrust agencies had pursued “pragmatic, well-focused and balanced” enforcement programs).

⁸⁹ *The New Enforcers*, *ECONOMIST* (Oct. 5, 2000), <http://www.economist.com/node/387757/print>.

⁹⁰ *Id.*

choice of DOJ or FTC leadership is not so inspired. Because personalities are decisive, when the wise centrists depart, nothing in the institutions themselves can prevent the system from returning quickly to bad old habits.

As the quotation presented above illustrates, the wise centrism story acquires force if periods of thoughtless extremism bracket the sensible policy era. As developed by Professor Pitofsky and other antitrust scholars, the irrationality narrative derives its power from the system's tendency to embrace extremes.⁹¹ Dramatic variations in performance demonstrate the absence of thoughtful policy-making. The narrator seems sane by comparison if all others appear to be deranged. Professor Pitofsky's article in 2002 about the future of antitrust policy used this framing technique.⁹² He wrote that "during 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."⁹³

The passage quoted above highlights two recurring features of the irrationality narrative. First, Professor Pitofsky's statement uses sweeping, categorical language ("no enforcement whatsoever") to describe the period of extreme inactivity.⁹⁴ In the 2002 article and in other papers, Professor Pitofsky made strong claims of inactivity to portray the Reagan Administration antitrust program as a gross departure from good practice.⁹⁵ Second, the portrayal of events, though written with the utmost self-assurance, often cannot withstand fact-checking and is verifiably incorrect.⁹⁶

⁹¹ For example, Professor Milton Handler, one of the leading antitrust scholars of the 20th Century, said in 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 . . ." Milton Handler, *Introduction*, ANTITRUST BULL., Spring 1990, at 13, 21.

⁹² Pitofsky, *View from the Middle*, *supra* note 66, at 584-88.

⁹³ *Id.* at 587.

⁹⁴ *Id.*

⁹⁵ *Id.* at 585; Pitofsky, *Proposals*, *supra* note 65, at 249.

⁹⁶ The DOJ and the FTC did not bring lots of these types of cases during the Reagan Administration, but the sum of federal enforcement activity unmistakably exceeded "no enforcement whatsoever." For example, from 1981 through 1988, the FTC brought two matters involving allegations of illegal monopolization. *See* AMERCO, 109 F.T.C. 135 (1987) (finding liability for monopolization with Commission decision); Western Gen. Dairies, Inc., 99 F.T.C. 433 (1982) (resolving claim of monopolization in consent order). DOJ attempted monopolization cases in this period included the high-profile attempted monopolization prosecution of American Airlines for an invitation to collude. *See* United States v. Am. Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984). The DOJ's challenges to the DuPont-Conoco and GTE-Southern Pacific transactions rested chiefly on vertical theories. *United States v. GTE Corp.*, 603 F. Supp. 730, 732-33 (D.D.C. 1984); *United States v. E.I. DuPont De Nemours & Co.*, No. 81-1837, 1981 WL 2175, at *1-2 (D.D.C. Nov. 20, 1981). The FTC accepted consent orders in several resale price maintenance cases during the Reagan administration and prosecuted a well-known, collusive boycott case involving legal services. On the settlement of resale price maintenance cases during the Reagan administration, see William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 460-62, 460 n.302 (2003) [hereinafter Kovacic, *Modern*

Professor Pitofsky has plenty of esteemed company in telling the U.S. irrationality story by making bold claims belied by actual enforcement experience. As noted above, Professor Bork's denunciation of antitrust policy circa 1978 ignored important doctrinal and policy developments that fit poorly with a system out of control.⁹⁷ The story of horrible decay is less compelling if the asserted flaws are not so horrible. Other accounts of U.S. enforcement experience by the field's leading commentators include claims that during the Reagan Administration "merger enforcement ground to a halt,"⁹⁸ that antitrust "[e]nforcement ceased,"⁹⁹ and that the DOJ and the FTC "did not file a single vertical case."¹⁰⁰ Why did the U.S. system lose its mind? The answer, say two of America's best scholars, is that "extremists" took control of the enforcement agencies.¹⁰¹ Experts in the U.S. might excuse these descriptions of federal enforcement as careless hyperbole. In my experience, foreign observers are more likely to take them at face value.

The story of U.S. antitrust policy in the 1980s is considerably more complex. Crucial factual tenets of the irrationality narrative are unsupported. Merger enforcement never halted,¹⁰² enforcement never ceased,¹⁰³ and vertical restraints cases (at least a few) still appeared.¹⁰⁴ To look beyond the categorical statements of inactivity and recount enforcement developments

Evolution]. The FTC's collusive group boycott case is reported in Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510 (1986), *rev'd*, Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 441 (1990).

⁹⁷ See *supra* text accompanying note 77. Merger policy in this period was truly aggressive, yet the irrationality story ignores steps that the federal agencies—notably, the Antitrust Division under Donald Turner's leadership—had taken to moderate the expansionism of the era. Mark J. Niefer, *Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s*, ANTITRUST, Summer 2015, at 53.

⁹⁸ Eleanor M. Fox, *Can We Control Merger Control?—An Experiment*, in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW 79, 84 (1999).

⁹⁹ Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 206-08 (1998).

¹⁰⁰ Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 43 & n.50 (1997). To the same effect, see Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321, 321 (1987) [hereinafter Pitofsky, *Future*] (stating that the Reagan Administration "has not brought a single case" involving resale price maintenance or nonprice vertical restraints).

¹⁰¹ 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, 945 (1987) (discussing changes brought about by Reagan appointees to the U.S. antitrust agencies, including William Baxter, who headed the DOJ Antitrust Division from 1981-1983; observing that "[i]t is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done.").

¹⁰² See Kovacic, *Modern Evolution*, *supra* note 96, at 433-39 (describing Reagan-era federal merger enforcement).

¹⁰³ See *id.* at 418-30 (describing Reagan-era federal enforcement against horizontal restraints).

¹⁰⁴ See *id.* at 460 n.302 (reporting vertical restraints cases filed by FTC during the Reagan Administration).

accurately would reveal a more thoughtful enforcement program at work. There is a major difference, for example, between saying a merger enforcement program has disappeared, and saying that boundaries have been reset, but policed actively.

Would a fuller, more accurate account of federal enforcement trends over time reveal intense debate about the proper direction of policy? Of course. Has policy shifted across administrations, especially after a regime change? No doubt. Yet, liberated from the irrationality narrative's determination to accentuate the magnitude of changes and cast decision-makers as senseless extremists, a more faithful account of U.S. federal enforcement history would portray adjustments as more gradual and nuanced, in most cases, than the irrationality narrative suggests. The discipline imposed by institutional arrangements, not simply patterns in leadership appointments (whether irrational officials or prudent centrists), would account for refinements over time.

b. *The Irrationality Narrative: Partisanship*

Since the early 1980s, the irrationality narrative has acquired an increasingly partisan dimension.¹⁰⁵ Partisan narrators denigrate the contributions of political opponents and exaggerate the accomplishments of their own party.¹⁰⁶ Partisan narratives distort antitrust experience and claim credit for achievements that required contributions across several presidential administrations, including eras in which a regime change took place.¹⁰⁷ The partisan voice attributes severe variations in activity to appointees chosen by one's political opponents: choose my team, and the system performs sensibly, but elect my opponents, and federal enforcement leaves the rails.

To foreign observers, the partisan explanation for enforcement variations suggests that U.S. enforcement policy is driven chiefly by politics. By this view, the system lacks a widely accepted, stable core and swings dramatically depending on election results. Through publications and speeches, the competition policy community outside the U.S. hears respected American scholars suggest that the party of the president determines whether anti-trust enforcement thrives or withers.¹⁰⁸ In this narrative, institutional ar-

¹⁰⁵ See William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014) [hereinafter Kovacic, *Politics and Partisanship*], for a discussion on the distortions introduced by partisanship in discussions about the U.S. antitrust system.

¹⁰⁶ *Id.* at 700-03.

¹⁰⁷ *Id.* at 709.

¹⁰⁸ The notion that politics is the deciding factor in U.S. antitrust policymaking is spoken in many settings. For example, at a conference in February 2015, Professor Steven Salop urged the DOJ to issue new guidelines on vertical merger enforcement. Professor Salop said the content of new guidelines would depend heavily on the party of the victor in the 2016 U.S. presidential elections: "Since we know that guidelines affect the courts, I think the Democrats are going to be really sorry later on when the

rangements and a norm of professionalism play weak, secondary roles in constraining political appointees.

One sign of partisanship in the irrationality narrative is the emphatic statement of fact that the speaker knows, or should know, is incorrect. As noted above, the portrayal of irrationality relies heavily on the depiction of extreme behavior.¹⁰⁹ A partisan commentator strives to portray the political opponent as given to extreme policies, and this extremism is contrasted with the narrator's own sensible policy preferences. To admit that an opponent sometimes, or even often, behaves responsibly robs the narrative of its power.

Professor Pitofsky's account of Reagan Administration enforcement policy involving dominant firm behavior illustrates the phenomenon. In an article published in 1987, Professor Pitofsky said "although section 2 of the Sherman Act still outlaws monopolization, the [Reagan] Administration has brought not a single case in seven years."¹¹⁰ In the first seven years of the Reagan Administration, the FTC brought two monopolization cases, including a widely publicized matter involving abuse of government processes as an exclusionary device.¹¹¹ A review of the FTC cases from 1981 through 1987 would have revealed that the FTC's prosecution of monopolization violations exceeded more than "not a single case."¹¹²

Several years later, Professor Pitofsky again scolded the Reagan anti-trust agencies for their inattention to dominant firm misconduct. As noted above, Professor Pitofsky several times accused Reagan antitrust officials of abandoning the field in the early 2000s.¹¹³ In one article, Professor Pitofsky said that during the Reagan era "there was no enforcement whatsoever" against attempts to monopolize or monopolization.¹¹⁴ In a second article, he said that during the Reagan Administration, "there was an absence of enforcement against . . . monopolization and attempts to monopolize . . ."¹¹⁵

vertical merger guidelines are revised under a Republican administration." Ron Knox, *Salop Takes Aim at Baer and Lack of Vertical Guidelines*, GLOBAL COMPETITION REV. (Feb. 9, 2015), <http://globalcompetitionreview.com/news/article/37948/salop-takes-aim-at-baer-lack-of-vertical-guidelines/> (internal quotation marks omitted).

¹⁰⁹ Kovacic, *Politics and Partisanship*, *supra* note 105, at 693.

¹¹⁰ Pitofsky, *Future*, *supra* note 100, at 321.

¹¹¹ In 1982, the Commission accepted a consent decree to resolve a claim of monopolization in the dairy industry. *Western Gen. Dairies, Inc.*, 99 F.T.C. 433, 436-38 (1982). In 1985, the FTC charged a truck rental company with abusing bankruptcy proceedings to forestall a rival. The case was resolved by settlement in 1987. *AMERCO*, 109 F.T.C. 135, 137-38 (1987).

¹¹² Pitofsky, *Future*, *supra* note 100, at 321.

¹¹³ See Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 170 [hereinafter Pitofsky, *Matter of Remedies*]; Pitofsky, *View from the Middle*, *supra* note 66, at 587.

¹¹⁴ Pitofsky, *View from the Middle*, *supra* note 66, at 587.

¹¹⁵ Pitofsky, *Matter of Remedies*, *supra* note 113, at 170.

The DOJ and the FTC brought a total of four matters focused on attempted monopolization or monopolization during the Reagan presidency.¹¹⁶ By some historical measures, four dominant firm misconduct cases is a relatively small number.¹¹⁷ It is nevertheless unmistakably more than “an absence” or “no enforcement whatsoever.”¹¹⁸ One of the four Reagan-era cases—the prosecution of American Airlines for attempting to monopolize passenger service in and out of Dallas-Fort Worth¹¹⁹—was especially noteworthy and provided a crucial legal foundation for the DOJ’s prosecution of Microsoft in the late 1990s for illegal monopolization.¹²⁰ Given its colorful circumstances and doctrinal importance, no prominent antitrust scholar could have missed it, and there is good reason to think Professor Pitofsky was aware of the case.¹²¹ For the sake of a clean narrative that discredits political adversaries, the *American Airlines*¹²² case had to disappear. Partisanship provides the motivation to say there was “no enforcement whatsoever” instead of acknowledging that there were a few dominant-firm-conduct cases, including at least one with arguably substantial significance.¹²³

The partisan ingredient of the irrationality narrative surfaced powerfully in the run-up to the 2008 presidential election and in the years following President Barack Obama’s inauguration in January 2009.¹²⁴ Leading U.S. antitrust scholars argued that the wise antitrust centrism of the Clinton Administration had given way, during the George W. Bush presidency, to the inactivity doldrums seen earlier in the Reagan era.¹²⁵ Professor Pitofsky observed in 2008 that the pursuit of “a middle ground between overen-

¹¹⁶ Kovacic, *Modern Evolution*, supra note 96, at 449 (collecting data on the number of DOJ and FTC monopolization and attempted monopolization cases from 1961 to 2000).

¹¹⁷ *Id.* at 448-60 (reviewing enforcement trends from 1960 to 2000 concerning dominant firm misconduct).

¹¹⁸ Pitofsky, *Future*, supra note 100, at 321; Pitofsky, *View from the Middle*, supra note 66, at 587.

¹¹⁹ *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1116-17 (5th Cir. 1984).

¹²⁰ On the importance of the *American Airlines* case to DOJ’s legal theory in its case against Microsoft, see Kovacic, *Politics and Partisanship*, supra note 105, at 701 n.62.

¹²¹ In 1996, in the Fourth Edition of their antitrust casebook, Professor Pitofsky and his co-authors reprinted part of the transcript of the telephone conversation in which Robert Crandall, the President of American Airlines, tried to persuade Howard Putnam, the President of Braniff Airways, to raise prices for service in Dallas/Fort Worth. The casebook observes: “Putnam turned the tape recording of the conversation over to the Government. American Airlines and Crandall were proceeded against successfully by the Government, which charged an attempt to monopolize under Section 2 of the Sherman Act.” MILTON HANDLER, ROBERT PITOFSKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, *TRADE REGULATION: CASES AND MATERIALS* 238 (4th ed. 1996).

¹²² 743 F.2d 1114 (5th Cir. 1984).

¹²³ Pitofsky, *View from the Middle*, supra note 66, at 587.

¹²⁴ See Robert Pitofsky, *Introduction: Setting the Stage*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 3, 5-6 (Robert Pitofsky ed., 2008) [hereinafter Pitofsky, *Setting the Stage*].

¹²⁵ *Id.* at 5.

forcement of the 1960s and underenforcement of the 1980s . . . came to an end with appointments during President Bush's second term of some agency enforcement officials, lower court judges and, most important, the confirmation of two conservative justices to the Supreme Court"¹²⁶ Through these individuals, "extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of the facts) have come to dominate antitrust"¹²⁷

I am not a disinterested bystander in these events. By the time Professor Pitofsky made the comments quoted above, President Bush had appointed a total three persons to the federal antitrust agencies: Thomas Barnett was appointed to the DOJ, while Thomas Rosch and I were appointed to the FTC.¹²⁸ During a visit to Europe in 2008 as Chair of the FTC, I met a foreign enforcement official who, after reading Professor Pitofsky's statement, had identified the three individuals appointed by President Bush in his second term to the federal antitrust agencies. Noting that the Pitofsky remark ("appointments . . . of some agency enforcement officials"¹²⁹) seemed to apply to two of the three, he asked, "Are you the one who constantly disregards the facts, or is it only Barnett and Rosch?" I can attest to the difficulty of defending the legitimacy of the U.S. antitrust system as a government official at international events after a revered U.S. scholar suggests that DOJ and FTC leadership is extremist and intellectually dishonest.

The depiction of extremism, a certifying trait of the irrationality narrative, anchored the critique of the Bush program.¹³⁰ The sweeping categorical characterizations common in discussions of the Reagan antitrust program now were cast at the Bush presidency.¹³¹ At a conference in 2009, Professor Harvey Goldschmid said "there has been no enforcement" of Sherman Act § 2 during the George W. Bush Administration.¹³² In a similar vein, in the 2010 edition of their antitrust casebook, Professor Pitofsky, Professor Goldschmid, and Judge Diane Wood wrote that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration."¹³³

¹²⁶ *Id.*

¹²⁷ *Id.* at 6.

¹²⁸ *Thomas O. Barnett: Assistant Attorney General for Antitrust*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/atr/thomas-o-barnett-assistant-attorney-general-antitrust> (last visited Sep. 7, 2015); *J. Thomas Rosch: Former Commissioner*, FED. TRADE COMM'M, <https://www.ftc.gov/about-ftc/biographies/j-thomas-rosch> (last visited Sep. 7, 2015); *William Kovacic: Former Chairman*, FED. TRADE COMM'M, <https://www.ftc.gov/about-ftc/biographies/william-kovacic> (last visited Sep. 7, 2015).

¹²⁹ Pitofsky, *Setting the Stage*, *supra* note 124, at 5.

¹³⁰ *Id.* at 5-6.

¹³¹ *See id.* at 5.

¹³² *ABA Chair's Showcase Probes Effects of Faltering Economy on Enforcement*, 96 *Antitrust & Trade Reg. Rep. (BNA)* No. 2395 (Apr. 3, 2009) [hereinafter *ABA Chair's Showcase*].

¹³³ ROBERT PITOFSKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, *TRADE REGULATION: CASES AND MATERIALS* 1075 (6th ed. 2010) [hereinafter PITOFSKY ET AL., Sixth Edition]. The co-authors, two

Professor Goldschmid's "no enforcement" comment ignored the FTC's prosecution during the George W. Bush administration of monopolization cases that yielded substantial, measurable economic benefits for consumers in the pharmaceutical and petroleum sectors.¹³⁴ The FTC's unsuccessful challenge to alleged monopolization by *Rambus*¹³⁵ is reported as a principal case in the 2010 edition of the Pitofsky, Goldschmid, and Wood casebook.¹³⁶ The efforts that casebook authors usually make to follow federal merger enforcement developments likewise would preclude a claim that there was "no enforcement at all" against vertical mergers in this period.¹³⁷

The volume of vertical merger cases from 2001 to 2008 was not high, but enforcement did take place.¹³⁸ Why would renowned students of the U.S. antitrust system insist so strongly ("no enforcement *at all*"¹³⁹) that nothing happened? This is the power of irrationality narrative and partisanship at work. The narrators distorted experience to create artificially sharp contrasts, disparage opponents, and showcase the wisdom of their own preferences.

As the discussion here suggests, I contest the factual assumptions that underpin the irrationality interpretation of modern U.S. federal enforcement experience. The fondness for stark polarities (my team is enlightened, your team is demented; my team did everything, your team did nothing) is destructive. It prevents the attainment of a fuller understanding of how U.S. antitrust policy has changed over time. It also obscures the complex mix of forces—individual leadership, institutional arrangements, and the larger

of whom (Pitofsky and Wood) held senior positions in the federal antitrust agencies during the Clinton administration, used the irrationality theme to bracket their sensible period of enforcement between the extremes of the 1980s and 2000s. After reviewing the policy planning accomplishments of the Clinton-era antitrust agencies, the casebook co-authors warned that "the 1980's and early 2000's saw a significant issue arise as to the proper boundaries of prosecutorial discretion. Enforcement officials stated that they would not enforce certain antitrust rules with which they disagreed." *Id.* at 71. The work of these "recalcitrant officials" stands in contrast to the leadership of the Clinton-era antitrust agencies, whose exercise of prosecutorial discretion, the Goldschmid, Pitofsky, Wood casebook implies, never raised "issues."

¹³⁴ Kovacic, *Rating the Competition Agencies*, *supra* note 33, at 911 (describing FTC monopolization cases involving Bristol-Myers and Unocal).

¹³⁵ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

¹³⁶ PITOFSKY ET AL., Sixth Edition, *supra* note 133, at 328-36.

¹³⁷ *Id.* at 1075. For examples of vertical merger enforcement during the George W. Bush administration, including the FTC decision to block the merger of Cytoc and Digene, see FED. TRADE COMM'N, A POSITIVE AGENDA FOR CONSUMERS: THE FTC YEAR IN REVIEW 8 (2003), <http://www.ftc.gov/reports/aba/gpra2003.pdf>, and for the DOJ decision to bar the merger of Premdor and Masonite, see Complaint at 1-2, *United States v. Premdor, Inc.*, No. 1:01CV01696 (D.D.C. Apr. 5, 2002), 2002 WL 1816981, <http://www.justice.gov/atr/cases/f8800/8893.pdf>.

¹³⁸ See Jonathan M. Jacobson & Sara Ciarelli Walsh, *Merger Enforcement in an Obama Administration*, THRESHOLD, Fall 2008, at 28.

¹³⁹ PITOFSKY ET AL., Sixth Edition, *supra* note 133, at 1075 (emphasis added).

economic context—that accounts for policy adjustments. The irrationality narrative is a dreadfully crude diagnostic device in an era where much better analytical tools are available.

But let's assume that the factual predicates of the irrationality narrative are exactly right. Let's say that the story accurately documents the U.S. system's tendency to swing dramatically to extremes, with only occasional periods of lucidity. This is a most discouraging portrait of American anti-trust policy and not a recommendation for emulation abroad. In this regime, politics and personalities count for everything, and institutions have no capacity to discipline decision-making or foster useful policy refinements. It is easy to see how foreign observers who read such commentary would hesitate to respect or emulate an antitrust regime with a reputation so volatile and unprincipled. It is not reassuring to say that the system functions properly only if election results bounce the right way.

2. Branding

Several features of the U.S. public enforcement system complicate the effort to develop a coherent, well-respected brand for the nation's antitrust system. One obstacle is the effects of the irrationality narrative and the tendency of agency leadership to succumb to the partisan impulses that sometimes fuel efforts to exaggerate the variation in public enforcement over time. A second difficult feature is the multiplicity of public agency decision-makers. This condition can impede efforts to communicate consistent messages to foreign audiences. The third impediment, related to the second, is the challenge of achieving and expressing a common vision for an agency, such as the FTC, which is governed by a multimember board. Each of these is examined in turn below.

a. *Recognizing Accomplishment over Time*

The brand of an antitrust agency depends in part on how much current and past agency leaders show respect for the contributions of earlier leadership teams, especially those appointed by another political party. Acceptance of the irrationality narrative, where incumbent leadership juxtaposes its wise stewardship against the extremism of other agency heads, and partisan behavior, with an attitude that one's own political team improved the agency and the other party's team degraded it, can erode the agency's brand. These perspectives stand in contrast to the development of a norm that sees the immediate episode of policy-making as part of a continuum in which current success often builds on the contributions of earlier generations of leaders and the duty of leaders today is to create foundations for future achievement, regardless of which party controls the presidency.

New leadership can and should introduce new ideas and programs. The task of running an agency can exhaust an individual's mental and emotional energy, and the arrival of a fresh team that occurs with a regime change can provide needed vitality. In many instances, the U.S. antitrust system has thrived because new perspectives entered the system in this way.¹⁴⁰

The new team can do its good work without belittling predecessors, especially those appointed by another political party. Leaders who understand the importance of building a respected agency brand, and know that the brand's quality requires continuous attention over time, refuse to disparage previous managers in pursuit of individual advantage. The temptation to create a favorable baseline for measuring one's own achievements by flattening out the contributions of predecessors can be powerful. Even the best organizations at times can give in to this impulse. A key ingredient of institutional improvement is the acceptance, over successive generations of leadership, of a shared norm that sees good policy-making as an exercise in continuous refinement, that recognizes experimentation and evaluation as necessary means of improvement, and that generously applauds the contributions of those who have gone before. Those who work in an agency and those who watch from the outside, including those who watch from abroad, are more likely to respect an institution and accord it greater legitimacy when incumbent leaders embrace this norm. Making magnanimous gestures to predecessors does not diminish the stature of the incumbent leader. Miniaturization often is desirable in electronics, but never in the human spirit.

The norm of respect for earlier contributions, regardless of the presidential administration in which they occurred, took a beating in the 2008 presidential campaign. As a candidate for the presidency, Barack Obama said George W. Bush presided over what "may be the weakest record of antitrust enforcement of any administration in the last half century."¹⁴¹ If elected, candidate Obama promised to "reinvigorate antitrust enforcement."¹⁴²

The Obama campaign statement used the irrationality narrative's dismal technique of creating a false extreme against which to frame the candidate's superior policy agenda. Partisanship made it impossible to acknowledge that the federal agencies had done anything of merit from 2001 through 2008. The candidate and his supporters rubbished the incum-

¹⁴⁰ See Kovacic, *Politics and Partisanship*, *supra* note 105, at 706-707 (describing how Assistant Attorney General for Antitrust Anne Bingaman upgraded DOJ's leniency program in the 1990s and how FTC Chairman Timothy Muris took steps to enhance the effectiveness of the FTC's hospital merger enforcement program).

¹⁴¹ Statement of Senator Barack Obama, U.S. Senator (D-IL), for the American Antitrust Institute (Sept. 27, 2007), http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

¹⁴² *Id.*

bent's contributions and promised to restore the wise centrism of the Clinton-era antitrust program.

The distortions of U.S. antitrust experience in the Obama campaign's version of the irrationality narrative are deplorable on their own terms.¹⁴³ They served their domestic political purposes at a real cost to the U.S. antitrust brand overseas. In my year as FTC Chairman from April 2008 to April 2009, I spent much time seeking to reassure foreign competition officials that the FTC program and the U.S. system as a whole had not collapsed, and it was worth their effort to continue to cooperate with the U.S. agencies until the handover of leadership. The skeptical perceptions fostered by the Obama campaign's statement were formidable impediments.

No less disturbing was the partisan spirit that the Obama campaign's statement, and related comments before and after the election, imparted to the new DOJ leadership team. The campaign's variant of the irrationality narrative—the Antitrust Division collapsed under Bush administration and we are here to restore it—became the DOJ's party line. In May 2009, in her first speech as President Obama's first Assistant Attorney General (“AAG”) for Antitrust, Christine Varney made the bold claim, without substantiation, that “inadequate antitrust oversight” had contributed to the U.S. economic crisis that began in 2008.¹⁴⁴ One year later, Eric Holder, President Obama's first Attorney General, announced that the Antitrust Division “is open for business again”¹⁴⁵—suggesting that Bush-era appointees had shuttered the place. The “open for business again” slogan echoed in the speeches from the Antitrust Division front office.¹⁴⁶

Reinforcing the direct and oblique disparagement of the Bush-era DOJ appointees was a form of shunning. The texts issued by the Obama Antitrust Division leadership have omitted the names of Bush-era predecessors, even where one might have expected some recognition that the Bush appointees made important contributions to programs that incumbent Obama officials regard as valuable.¹⁴⁷ An important opportunity to set the right tone

¹⁴³ My critique of the Obama statement's factual claims appears in Kovacic, *Politics and Partisanship*, *supra* note 105, at 699-700, and Kovacic, *Rating the Competition Agencies*, *supra* note 33, at 909-14.

¹⁴⁴ Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in this Challenging Era* (May 12, 2009), <http://www.usdoj.gov/atr/public/speeches/245777.pdf>.

¹⁴⁵ Christopher Leonard, *Farmers Tell Feds Considering Antitrust Action that Big Poultry Companies Control Industry*, STARTRIBUNE.COM (May 21, 2010), http://www.startribune.com/templates/Print_This_Story?sid=94618149 (quoting remarks of Attorney General Eric Holder).

¹⁴⁶ See, e.g., Sharis A. Pozen, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Remarks at the Brookings Inst., Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers 1-2* (Apr. 23, 2012), <http://www.justice.gov/atr/public/speeches/282515.pdf>.

¹⁴⁷ See Kovacic, *Politics and Partisanship*, *supra* note 105, at 702-03, 702 n.66 (discussing omission, in Antitrust Division texts, of mention of Bush-era appointees to the Antitrust Division).

before an influential international audience came in September 2009, when Christine Varney made her first appearance as AAG at the annual Fordham Law School conference on global antitrust policy.¹⁴⁸ Among other subjects, AAG Varney recounted how the DOJ set important foundations for the creation of the ICN in October 2001 and spearheaded enforcement against international cartels.¹⁴⁹

This was a suitable occasion to say a few words of gratitude to the George W. Bush Antitrust Division leadership team for its contributions to the ICN's successful launch and growth, as well as the Bush administration's enhancement of the DOJ's already robust anti-cartel criminal enforcement program.¹⁵⁰ The AAG could have said something like this: "We are changing the DOJ program. Before I present what's new, I assure you that we will continue the good work DOJ has done since 2001 to develop the ICN and to enhance enforcement against international cartels. I thank Charles James, Hew Pate, Tom Barnett, and Deborah Garza for building a strong platform for our future work here."

For the briefest moment, it seemed that the AAG would seize the opportunity to make such a gesture. In discussing the ICN, AAG Varney turned to praise the work of "my predecessor," but the predecessor was Joel Klein, who led the Antitrust Division in the second term of Bill Clinton's presidency and convened the International Competition Policy Advisory Committee ("ICPAC") in 1997.¹⁵¹ AAG Varney's short history of the ICN went as follows: Joel Klein formed ICPAC, which in 2000 proposed a new international antitrust network.¹⁵² The new institution was established in October 2001, and . . . here we are today.¹⁵³ The AAG bounded over the eight years in which her more immediate predecessors embraced the ICPAC's recommendation, pressed for the ICN's creation, and devoted substantial, high-quality resources to sustain its development.¹⁵⁴ In her prepared remarks and in the panel discussion that followed, the Bush-era con-

¹⁴⁸ Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Our Progress Towards International Convergence*, Remarks as Prepared for the 36th Annual Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy (Sep. 24, 2009) [hereinafter Varney, Fordham Speech], <http://www.justice.gov/atr/public/speeches/250264.pdf>.

¹⁴⁹ *Id.* at 1.

¹⁵⁰ On the formation and development of the ICN, see Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274, 301-09 (2011). On the development of the DOJ anti-cartel program, see Scott Hammond & Ann O'Brien, *The Evolution of Cartel Enforcement over the Last Two Decades: The U.S. Perspective*, in CHANGES IN COMPETITION POLICY OVER THE LAST TWO DECADES 11, 11 (Małgorzata Krasnodębska-Tomkiel ed., 2010).

¹⁵¹ See Press Release, Int'l Competition Policy Advisory Comm., U.S. Dep't of Justice, *International Competition Policy Advisory Committee Delivers Final Report to Attorney General Reno and Assistant Attorney General Klein 2* (Feb. 28, 2000), <http://www.justice.gov/atr/icpac/4272.pdf>.

¹⁵² Varney, Fordham Speech, *supra* note 148, at 1.

¹⁵³ *Id.* at 1-2.

¹⁵⁴ *Id.* at 3.

tributions to the ICN—or to any positive aspect of competition policy—did not make the cut.¹⁵⁵

I attended the Fordham conference that year as an FTC Commissioner, and I watched the AAG's speech in the audience. Later that day I had lunch with two colleagues—one headed a competition agency in Europe and the other was a revered international antitrust scholar—who also heard the talk. Both welcomed President Obama's election, and both were astute students of the ICN. My two colleagues, referring to the Varney presentation, asked in unison, "What was that all about?" Neither person had a high opinion of the DOJ antitrust law enforcement program from 2001 to 2008. Both knew, however, that the DOJ had worked admirably to get the ICN up and running, and they respected the Antitrust Division officials responsible for this achievement. To both, the snub was evident and unbecoming. Said one: "Not worthy of a great agency."

There has been some detectable softening of this position during the tenure of AAG Bill Baer. In a speech in January 2014, AAG Baer hit the right notes:

There is important continuity between the efforts of our predecessors, both Republican and Democratic, and the Antitrust Division's current enforcement efforts and policies. Political affiliation means little in this job. Prior Assistant Attorneys General and I share the goal of protecting competition and consumers by making sound and factually supported law enforcement decisions. Of course, our judgment calls occasionally may differ in some cases and on some issues, but I believe the similarities in goals and methods vastly outweigh those differences.¹⁵⁶

AAG Baer did not invoke the sharp policy-making dichotomies that propel the irrationality narrative, and he retreated, cautiously and obliquely, from the Obama campaign's portrayal of the Bush-era Antitrust Division stewardship as abysmal.

This is a good start. As far as it goes, AAG Baer's gesture builds a better U.S. antitrust brand abroad. For the sake of the stature of the U.S. system, an agency so carefully watched at home and abroad should do more. As far as this author is aware, since January 2009, DOJ speech texts and other documents have yet to mention Bush-era DOJ appointees as contributors to the achievement of the constructive common policy ends to which AAG Baer referred in his January 2014 talk. Taking this further step would

¹⁵⁵ For the full transcript of the panel discussion delivered during the Thirty-Sixth Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy, see ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE INTERNATIONAL ANTITRUST LAW & POLICY (Barry E. Hawk ed., 2010).

¹⁵⁶ Bill Baer, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for Delivery to the New York State Bar Association, Reflections on Antitrust Enforcement in the Obama Administration 1 (Jan. 30, 2014), <http://www.justice.gov/atr/public/speeches/30369.pdf>.

set a good example for future public antitrust officials, regardless of which political party appoints them.

As things stand now, in years to come researchers examining DOJ texts issued from January 2009 through mid-2015 will see no sign that Charles James, Hewitt Pate, Thomas Barnett, or Deborah Garza headed the Antitrust Division or, in any sense, made it a better place. Their names appear only in footnotes in speeches that cite business review letters, or in the stray comment that acknowledges their presence at a DOJ event.¹⁵⁷ So ingrained is the habit of non-recognition that, in the balance of Barack Obama's presidency, the DOJ is unlikely to issue a text that speaks favorably of the George W. Bush Antitrust Division appointees.

It does not have to happen this way. Shunning is not a best practice. It damages the national brand. At my lunchtime discussion at Fordham in October 2009 and on other occasions, I have seen that an attentive and sophisticated audience abroad understands what is going on and finds it unattractive. Many of my foreign acquaintances disagreed with the DOJ's enforcement priorities in the George W. Bush presidency, but most have respect and fondness for the DOJ leaders who have disappeared from the Obama DOJ's account of modern federal antitrust policy.

Experienced students of the U.S. system also know that the DOJ's behavior since 2009 contrasts poorly with the practice of earlier AAGs who made a point of thanking their predecessors from both parties for their contributions to the Antitrust Division. During the Clinton Administration, AAGs Anne Bingaman and Joel Klein acknowledged debts to William Baxter,¹⁵⁸ the Reagan-appointed AAG whom the irrationality narrative often

¹⁵⁷ The Antitrust Division format for citing a business review letter identifies the Assistant Attorney General who signed the letter. For this reason, Thomas Barnett's name appears in speeches in which Obama-era Antitrust Division appointees have cited business review letters, which Barnett signed. *See, e.g.*, Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Innovation Through Patent and Antitrust Law and Policy 10 n.21 (May 26, 2010), [http://www.justice.gov/atr/file/518211/download_\(citing DOJ Business Review Letters authored by Thomas Barnett\)](http://www.justice.gov/atr/file/518211/download_(citing%20DOJ%20Business%20Review%20Letters%20authored%20by%20Thomas%20Barnett)). In another instance, the text of a presentation by Assistant Attorney General Varney mentions Deborah Garza's name when introducing Garza as a speaker at a DOJ workshop. Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Welcome to the Workshops, Welcome Remarks as Prepared for the Horizontal Merger Guidelines Review Project's First Workshop 5-6 (Dec. 3, 2009), [http://www.justice.gov/atr/file/519851/download_\(introducing Deborah Garza as panelist for workshop on horizontal merger guidelines\)](http://www.justice.gov/atr/file/519851/download_(introducing%20Deborah%20Garza%20as%20panelist%20for%20workshop%20on%20horizontal%20merger%20guidelines)).

¹⁵⁸ *See Roundtable Conference with Enforcement Officials*, 68 ANTITRUST L.J. 581, 613-14 (2000) (DOJ Assistant Attorney General Joel Klein commenting about Baxter's views on litigation as a policy development tool for the Antitrust Division); Anne K. Bingaman, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Celebration of the 60th Anniversary of the Founding of the Antitrust Division, Antitrust and Innovation in a High Technology Society (Jan. 10, 1994), [http://www.justice.gov/atr/file/519466/download_\(“The nation has been particularly fortunate in recent years to the extent that antitrust policy has been influenced by the intellectual gifts and discipline that Professors Turner, Baxter, Kauper, and Ginsburg brought to the Division. As a personal aside, I must](http://www.justice.gov/atr/file/519466/download_(%22The%20nation%20has%20been%20particularly%20fortunate%20in%20recent%20years%20to%20the%20extent%20that%20antitrust%20policy%20has%20been%20influenced%20by%20the%20intellectual%20gifts%20and%20discipline%20that%20Professors%20Turner,%20Baxter,%20Kauper,%20and%20Ginsburg%20brought%20to%20the%20Division.%20As%20a%20personal%20aside,%20I%20must)

disparages as an architect of Reagan-era antitrust enforcement “minimalism.”¹⁵⁹ In his first speech as AAG in August 2001, Charles James said that in taking the post as head of the Antitrust Division, “one cannot help but reflect upon the amazing accomplishments of those who held it before me.”¹⁶⁰ For praise, he singled out three Republicans—Bill Baxter, Douglas Ginsburg, James Rill—and two Democrats—Anne Bingaman and Joel Klein.¹⁶¹

President Obama’s DOJ appointees also could look to the example set by President Obama’s appointees to chair the FTC, Jon Leibowitz and Edith Ramirez. Both have used speeches to acknowledge how Bush-era programs helped set the foundations for recent FTC successes.¹⁶² Their approach is consistent with a modern FTC norm by which the FTC’s leadership expresses respect for earlier accomplishments, regardless of the party affiliation of the leaders who contributed to them. In his first speech as FTC Chairman in June 2001, Timothy Muris offered an extensive tribute to his immediate predecessor, Robert Pitofsky.¹⁶³ Chairman Muris also took steps internally to ensure that his management team embraced this norm. I attended a senior staff meeting earlier in his tenure in which Chairman Muris told the gathering that he would fire anyone whose speeches or other public comments disparaged the FTC’s program during the Pitofsky chairmanship.

Great institutions undergo variations in philosophy and programs over time. There is a constant that characterizes many of the best. Incumbent leaders steadfastly seek to improve their agencies’ brand. They do not belittle previous leadership as a way to enhance their own stature. Recognition

tell you that I was especially thrilled to follow in the footsteps of Bill Baxter, my antitrust professor at Stanford.”).

¹⁵⁹ See Eleanor M. Fox, *Antitrust, Trade and the Twenty-First Century—Rounding the Circle*, 48 REC. ASS’N B. N.Y. 533, 542 (1993) (recounting Reagan-era antitrust policy and observing that in the 1980s, “[t]he United States had reached the age of antitrust minimalism”); Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 ANTITRUST L.J. 217, 217 (1993) (“During the eight years of the Reagan Administration, the country witnessed about as minimal an antitrust program as can be imagined.”).

¹⁶⁰ Charles A. James, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, *Be Careful What You Wish For: Some Thoughts on the Merger Review Process 1* (Aug. 7, 2001), <http://www.justice.gov/atr/file/519021/download>.

¹⁶¹ *Id.* James said Bingaman’s “boundless and infectious enthusiasm brought life to Jim [Rill]’s vision of aggressive enforcement directed against multinational cartels.” *Id.* He added that Klein’s “civil enforcement initiatives fearlessly confronted some of the most complex issues of the so-called New Economy.” *Id.* at 2.

¹⁶² See, e.g., Jon Leibowitz, Chairman, Fed. Trade. Comm’n, *Remarks of FTC Chairman Jon Leibowitz as Prepared for Delivery at the ABA Section of Antitrust Law Fall Forum 2-3* (Nov. 17, 2011), http://www.ftc.gov/sites/default/files/documents/public_statemtns/remarks-ftc-chairman-jon-leibowitz-prepared-delivery/111117fallforum.pdf.

¹⁶³ Timothy J. Muris, Chairman, Fed. Trade Comm’n, Robert Pitofsky: Public Servant and Scholar, Presentation at the American Antitrust Institute’s Second Annual Conference (June 12, 2001), available at <https://www.ftc.gov/news-events/press-releases/2001/06/muris-addresses-american-antitrust-institute>.

of past accomplishment does not require uncritical acceptance of an agency's earlier programs; it demands only the acknowledgment of good work that others have done, an awareness of the cumulative nature of much policy-making, and a commitment to build on past success to make the institution even better.¹⁶⁴

b. *Institutional Multiplicity and Limited Policy Integration*

The multiplicity of public agency decision-makers in the U.S. antitrust system greatly complicates efforts to build a coherent and appealing brand. Two federal agencies, the state attorneys general, and sectoral regulators such as the Federal Communications Commission (“FCC”) and the Federal Energy Regulatory Commission share the competition policy portfolio.¹⁶⁵ Because strong political and historical forces appear to have frozen in place the existing distribution of authority among these agencies, the integration of policy must come through “contract” rather than through “ownership.”¹⁶⁶ The coherence and attractiveness of the U.S. competition law brand depends on the willingness of various public agency actors—notably, the DOJ and the FTC—to cooperate to define common principles, select programs consistent with those principles, and communicate messages that reinforce a shared vision of U.S. competition law.¹⁶⁷

¹⁶⁴ In 2014, the United Kingdom combined two competition agencies, the Office of Fair Trading and the Competition Commission, into a new body, the Competition and Markets Authority. See Alex Chisholm, Chief Executive, U.K. Competition and Markets Authority, *The New U.K. Competition Authority Within a Changing European Context* (Mar. 12, 2014), available at <http://www.gov.uk/government/speeches/the-new-uk-competition-authority-within-a-changing-european-context>. The leadership of the new institution regularly praised the work of the predecessor bodies and emphasized that their aim is to make an already superior competition policy system “even better.” See *id.* (“I would like to leave you with a firm commitment: the CMA will continue to build on the excellent work of its legacy organisations in responding effectively to developments in Europe. As a single unitary authority, . . . I think we are in a position to be even better at promoting competition for businesses operating across Europe, and ensuring a consistent and effective application of the law.”).

¹⁶⁵ On the broad distribution of competition policy-making authority in the United States, see DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 27 (2011); William E. Kovacic, *Toward a Domestic Competition Network*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 316, 317 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter Kovacic, *Domestic Competition Network*].

¹⁶⁶ This vocabulary borrows from the language used in the law and economics literature that analyzes the decision of business enterprises to perform various functions within their own institutional walls (ownership) or to engage third parties to perform these functions (contact). On the application of these concepts to the design of public agencies, see David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1464-65 (2014); Kovacic, *Federal Antitrust Joint Venture*, *supra* note 60, at 1106-07.

¹⁶⁷ The importance of DOJ and FTC policy integration as a foundation for establishing coherent U.S. competition policy is examined in Kovacic, *Federal Antitrust Joint Venture*, *supra* note 58, at 1106-17.

Within this ecology of public agencies, important forms of cooperation take place today on a regular basis, whether in the development of common enforcement guidelines by DOJ and the FTC,¹⁶⁸ the convening of public consultations by the two federal agencies on new developments in competition economics and law,¹⁶⁹ the sharing of information by the DOJ and the FCC in reviewing telecommunications mergers,¹⁷⁰ or in the work of the Multistate Task Force of the National Association of Attorneys General.¹⁷¹ Without these forms of cooperation, the disparate elements of the U.S. public enforcement regime would seize up and fail.

Existing levels of interagency cooperation play a vital role in the successful operation of the U.S. antitrust system, but they do not go far enough. The U.S. regime of multiple actors can be likened to the passenger rail system that links the metropolitan centers from Boston to Washington, D.C. In one sense, the system works adequately. Each day it moves large numbers of passengers from city to city. Nonetheless, the system is constrained by an aged infrastructure that limits the speed of trains that transit the corridor. No amount of better, state-of-the-art rolling stock can fix problems that reside in a merely adequate, but hardly superior, infrastructure. By comparison, the U.S. antitrust policy framework works adequately, but below levels of effectiveness it could achieve with a better policy infrastructure.

The U.S. has no mechanism for engaging the national authorities and the states in the regular, intensive discussions that take place between the European Commission and the national competition authorities of the EU member states in the context of the European Competition Network (“ECN”).¹⁷² Nor does the U.S. have the equivalent of the United Kingdom Competition Network (“UKCN”), which provides a forum for the United Kingdom Competition and Markets Authority to meet regularly with the nation’s sectoral regulators to discuss the application of shared or related

¹⁶⁸ See, e.g., FED. TRADE COMM’N & DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) [hereinafter ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS], https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

¹⁶⁹ Press Release, Fed. Trade Comm’n, Federal Trade Commission/Department of Justice Hearings on Single-Firm Conduct to Begin June 20 (June 5, 2006), <https://www.ftc.gov/news-events/press-releases/2006/06/federal-trade-commissiondepartment-justice-hearings-single-firm>.

¹⁷⁰ See *Effects of Consolidation on the State of Competition in the Telecommunications Industry: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 25-26 (1998) (statement of Joel L. Klein, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice).

¹⁷¹ Letter from National Association of Attorneys General, to All Attorneys General and Antitrust Staff, regarding Multistate Antitrust Task Force Overview 6-7 (June 14, 2002), <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/state-practices/02-task-force-description.pdf>.

¹⁷² On the operation of the ECN as a coordination and policy formation mechanism in the European Union, see Kovacic, *Domestic Competition Network*, *supra* note 165, at 316.

competencies for competition law.¹⁷³ The world outside the U.S. has worked harder to enact structural reforms to increase policy coherence, including the construction of platforms to encourage interagency coordination and the development of common strategies.¹⁷⁴ To my view, the competition systems of jurisdictions such as the EU and the United Kingdom enjoy more coherent brands as a result.

Nor is cooperation between individual actors as robust as it arguably should be. U.S. federal antitrust policy is produced by a somewhat reluctant joint venture between the DOJ and the FTC.¹⁷⁵ As suggested above, the federal agencies cooperate on a number of projects related to law enforcement and the use of non-litigation policy tools.¹⁷⁶ Some of these cooperative ventures produced competition policy applications (such as the 1982 Department of Justice Merger Guidelines and joint DOJ-FTC 1992 HMGs) that influenced policy in many other jurisdictions.¹⁷⁷

At the same time, the agencies have resisted the level of integration that one might think is a necessary element of policy development and branding in the modern global constellation of competition systems. For example, there is no place to which one can turn today to find a common statement of DOJ and FTC domestic or international policy priorities. The U.S. program must be deduced by constructing a policy mosaic from reading the reports, speeches, and testimony of each agency. There is no common exercise by which the agency leaders, at the start of each year, meet to define their policy aims for the year ahead. Nor is there a routine custom that leads agency officials to share texts or slides in advance of public presentations, including speeches before international audiences.

The lack of more robust formal and informal cooperation mechanisms reflects reluctance by the two agencies to view each other as true partners in policy-making and exploit the complementarities inherent in the dual-federal-agency design. The agencies have much to say about matters of common interest but their individual expressions in many instances do not appear to result from the formulation of a common strategy.

For example, it is difficult to tell what the DOJ and the FTC regard to be the best legal theory for challenging efforts by holders of standard-

¹⁷³ For a description of the membership and functions of the UKCN, see David Currie, Chairman, U.K. Competition and Markets Authority, *David Currie Speaks About Competition Policy in Regulated Markets* (July 7, 2014), <http://www.gov.uk/government/speeches/david-currie-speaks-about-competition-policy-in-regulated-markets>.

¹⁷⁴ For examples of modern structural reforms that streamline national enforcement mechanisms, see William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1043-44 (2012).

¹⁷⁵ See Kovacic, *Federal Antitrust Joint Venture*, *supra* note 60, at 1104-06 (describing tensions that arise in interactions between DOJ and FTC).

¹⁷⁶ See *supra* notes 168-71.

¹⁷⁷ See Timothy J. Muris & Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE, Apr. 2010, at 1.

essential patents (“SEPs”) encumbered by fair, reasonable, and non-discriminatory term (“FRAND”) commitments to obtain injunctions to halt infringements of the SEPs.¹⁷⁸ The FTC has applied the prohibition against “unfair methods of competition” in Section 5 of the Federal Trade Commission Act to discourage the use of injunctions to challenge infringements of SEPs encumbered by FRAND obligations.¹⁷⁹ The DOJ has used speeches and a letter issued jointly with the Patent and Trademark Office to promote acceptance of a norm that disfavors recourse to injunctive relief in these circumstances.¹⁸⁰ Both the DOJ and the FTC have used merger reviews to impose restrictions on the use of injunctions by SEP holders.¹⁸¹ There is no evidence that the application of this collection of policy instruments by the two agencies flows from the development of a common strategy, or from the use of coordination mechanisms such as an interagency working group to devise a joint strategy and to consult in advance before taking law enforcement actions, or from taking other coordinated steps to spell out policy.

Inadequate policy integration between the two federal agencies also undermines engagement with foreign competition authorities. In a discouraging number of instances over the past fifteen years, a failure to envision the DOJ-FTC relationship as an interdependent partnership has led to unilateral agency action that degraded the standing of the U.S. antitrust regime overseas. In October 2001, the Antitrust Division deputy responsible for international policy issues used a ceremonial event hosted by the OECD to broadside the European Commission for its prohibition of General Electric’s proposed acquisition of Honeywell.¹⁸² Representatives of roughly forty competition agencies, including dozens of new institutions, watched as the DOJ official scolded the EU’s competition commissioner, who sat beside him on the dais.¹⁸³ In September 2007, the Antitrust Division issued a press release that rebuked the EU’s Court of First Instance for upholding a

¹⁷⁸ See Kovacic, *Federal Antitrust Joint Venture*, *supra* note 60, at 1098-99.

¹⁷⁹ See, e.g., George T. Willingmyre, President, GTW Assocs., Comments of GTW Associates on Proposed Consent Agreement In the Matter of Robert Bosch GmbH; FTC File No. 121-0081, at 2 (Jan. 9, 2013) [hereinafter Robert Bosch GmbH], https://www.ftc.gov/sites/default/files/documents/public_comments/proposed-consent-agreement-matter-robert-bosch-gmbh-ftc-file-no.121-0081-00013/00013-85359.pdf.

¹⁸⁰ See U.S. DEP’T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 6 (2013), http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

¹⁸¹ See Shepard Goldfein & James A. Keyte, *Merger Review at FTC and Department of Justice; Antitrust Trade and Practice*, N.Y. L.J. ONLINE (Dec. 9, 2014), at 1.

¹⁸² This episode is recounted in Eleanor M. Fox, GE/Honeywell: *The U.S. Merger That Europe Stopped—A Story of the Politics of Convergence*, in *STORIES*, *supra* note 87, at 341, 343-45; William E. Kovacic, *Review of Antitrust Stories* (E. Fox & D. Crane eds., Foundation Press 2007), 4 COMPETITION POL’Y INT’L 241, 250-51 (2008) [hereinafter Kovacic, *Review of Antitrust Stories*].

¹⁸³ Kovacic, *Review of Antitrust Stories*, *supra* note 182, at 250.

European Commission decision to fine Microsoft five hundred million Euros for abusing a dominant market position.¹⁸⁴

In competition law (and in other areas), it is a serious matter for one competition agency to publicly criticize the work of a foreign counterpart, such as the European Commission's Directorate for Competition ("DG Comp"), whose cooperation is vital to the interests of the U.S.¹⁸⁵ The essence of good international relationships is an appreciation for time, place, and manner in raising specific issues. A general rule of thumb is no surprises. No agency should learn of criticism by a foreign competition agency of its own work or the work of related institutions by reading a press account, or by being ambushed at an international event to launch a new effort to increase cooperation between older and newer competition systems.

In neither of the instances described above did the DOJ inform the FTC about its intentions. As one who served at the time of both episodes as an FTC official (I had a front row seat for the OECD smash-up), I cannot claim that advance consultation between the two U.S. agencies necessarily would have discouraged the Antitrust Division from acting as it did. I do insist that discussions before the fact would have given FTC officials with experience in international matters an opportunity to spell out the costs—to the EU-U.S. relationship and to the U.S. antitrust system's brand—of the contemplated steps. The DOJ's unilateral behavior reflected no awareness that the FTC, as a partner in the federal antitrust joint venture, ought to have a say in how the venture's reputation capital was spent.

Some consequences of inadequate policy integration in international affairs are readily observable. Better advance DOJ-FTC collaboration and consultation might have discouraged other unilateral DOJ decisions that were less visible, but no less destructive. In the summer of 2009, the Antitrust Division decided to take no action concerning Oracle's acquisition of Sun Microsystems.¹⁸⁶ DG Comp ultimately cleared the deal as well, but not

¹⁸⁴ Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision (Sept. 17, 2007), http://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm. Neelie Kroes, the EC competition commissioner, replied: "It is totally unacceptable that a representative of the U.S. administration criticized an independent court of law outside its own jurisdiction." Elaine Chow, *Kroes Rebukes U.S. Criticism of Microsoft Ruling*, LAW360 (Sept. 20, 2007), <http://www.law360.com/articles/35498/kroes-rebukes-u-s-criticism-of-microsoft-ruling>. She added that "[t]he European Commission does not pass judgment on rulings by U.S. courts, and we expect the same degree of respect" from U.S. authorities on rulings by EU Courts. *Id.*

¹⁸⁵ See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 36-40 (2002).

¹⁸⁶ Press Release, U.S. Dep't of Justice, Department of Justice Antitrust Division Issues Statement on the European Commission's Decision Regarding the Proposed Transaction Between Oracle and Sun (Nov. 7, 2009), <http://www.justice.gov/opa/pr/antitrust-division-issues-statement-european-commission-s-decision-regarding-proposed> [hereinafter DOJ Press Release on Proposed Transaction Between Oracle and Sun]

before commencing a second phase inquiry in the matter.¹⁸⁷ DG Comp's decision to extend its investigation prompted the DOJ to issue a press release that asserted the soundness of its decision to close the matter and, by implication, chided DG Comp for not doing the same.¹⁸⁸

The press release was not the Antitrust Division's final volley. Each year, the leadership and top managers of DG Comp and the U.S. antitrust agencies meet for bilateral consultations.¹⁸⁹ In the fall of 2009, the consultations were to be held in Washington, D.C. Days before the meetings were to take place, to express its displeasure with DG Comp's handling of the Sun-Oracle transaction, DOJ said it would not participate in the consultations, causing the cancellation of the event.¹⁹⁰ Even after the acrimonious disagreement between DOJ and the EU over the disposition of the GE-Honeywell merger in the summer of 2001, the EU and the U.S. agencies proceeded to hold their scheduled bilateral discussions later that year.¹⁹¹

Another abrupt cancellation of a planned international consultation followed within the year. For several years, antitrust officials from the North American Free Trade Agreement ("NAFTA") signatories (Canada, Mexico, and the U.S.) have met from time to time to discuss possibilities for cooperation.¹⁹² In 2010, the three jurisdictions scheduled a meeting in Washington, D.C. with the heads of the two U.S. agencies, the Competition Bureau of Canada, and the Competition Commission of Mexico. With no explanation, the head of the Antitrust Division cancelled the event days before it was to occur. The president of the Mexican commission came to

¹⁸⁷ Emilio E. Varanini, *Running Soft Convergence into the Ground: The Case for an International Antitrust Treat*, 28 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 137, 155 (2010).

¹⁸⁸ See DOJ Press Release on Proposed Transaction Between Oracle and Sun, *supra* note 186; Aruna Viswanatha, *EU's Kroes Calls Antitrust Division Statement Unusual*, MAIN JUST. (Nov. 11, 2009), <http://www.mainjustice.com/2009/11/11/eus-kroes-calls-antitrust-division-statement-unusual/>.

¹⁸⁹ See RANDOLPH TRITELL & ELIZABETH KRAUS, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION'S INTERNATIONAL ANTITRUST PROGRAM 8-9 (2015).

¹⁹⁰ On the Monday that the cancelled consultations were planned to begin, I was attending a conference for the FTC in New Delhi, India. Because of the scheduled EU/U.S. consultations, Commissioner Kroes initially declined an invitation to speak at the New Delhi event. With the U.S. meetings off her calendar, she came to New Delhi instead. She asked me to join her and her principle international affairs liaison to discuss what had happened. She related that the Antitrust Division conveyed its withdrawal from the bilateral meetings in a manner that punctuated its annoyance. Rather than a call from the Antitrust Division's head to the EC Commissioner for Competition, the message was transmitted from the head of the Division's international group to his counterpart in DG Comp. She had left messages for the Assistant Attorney General three times and heard nothing back.

¹⁹¹ John R. Wilke, *U.S. Antitrust Chief Chides EU for Rejecting Merger Proposal*, WALL ST. J., July 5, 2001, <http://www.wsj.com/articles/SB99428227597056929>.

¹⁹² Eleanor M. Fox, *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries* 20-21 (New York Univ. Sch. of Law, Law and Econ. Research Paper Series, Working Paper No. 11-04, Oct. 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761619.

Washington, D.C. and met with FTC officials, even though the planned three-nation discussion did not take place.

Much information about interagency relationships passes through the global community of competition agencies. It did not take long for news of the cancellations of the EU-U.S. and NAFTA nation consultations to spread widely. It requires a great deal of effort to restore the good will that behavior of this type destroys. In each of these episodes, foreign officials can see the contradiction between the DOJ actions they observe and the DOJ officials' assurances that the mutual respect and mindfulness of the sensibilities of other agencies are the foundations for DOJ interaction with foreign competition authorities.¹⁹³ To my knowledge, in each instance, the DOJ acted without consulting the FTC beforehand. In a truly integrated policy joint venture, that would not happen.

c. *Inadequate Attentiveness to the Foreign Audience*

A starting place for the U.S. agencies in creating a respected brand is to be aware of how closely foreign observers watch the activities of the DOJ and the FTC. Although it lacks the supremacy it enjoyed in an earlier era, the U.S. system is nonetheless a powerful force in the realm of international competition law. It has an unequaled body of experience, its agencies have budgets that most agencies cannot imagine, and its contributions to the operation of international networks with norm-creating functions (such as the ICN and the OECD) are unsurpassed.

For these and other reasons, foreign jurisdictions study the U.S. agencies with exacting care. The external audience can be counted on to focus on contradictions and tensions that might go unnoticed for other authorities. At a meeting of the OECD Competition Committee in February 2015, I participated in a session dealing with questions of institutional design, including the issue of whether an agency's mandate should be limited to anti-trust or should include other policy duties, such as consumer protection. After the FTC delegate spoke of the rationale for having competition policy and consumer protection under the same roof, the DOJ representative said the Antitrust Division did not have a consumer protection mandate, did not want one, and would not accept it if the possibility were offered. At the OECD meeting and on several subsequent occasions, I have spoken with foreign officials who attended that session and remember vividly the interaction between the FTC and DOJ officials and the vigor with which the

¹⁹³ Rachel Brandenburger, Special Advisor, Int'l Antitrust Div., U.S. Dep't of Justice, International Cooperation: Taking a Broader View, Remarks as Prepared for the 29th American Chamber of Commerce Annual EU Competition Policy Conference 9 (Dec. 6, 2012), <http://www.justice.gov/atr/file/518981/download>.

Antitrust Division delegate brushed aside the idea that consumer protection was a good match with antitrust.

Statements that purport to reveal policy positions receive special attention. For example, I found that China's antimonopoly agencies and their advisors read virtually every word the officials from the DOJ and the FTC utter in speeches, decisions, guidelines, and testimony. Especially close attention is paid to measures that appear to create possibilities for the expansive application of competition law and the use of agency gatekeeping functions, such as merger review, to obtain concessions from parties subject to antitrust agency oversight.¹⁹⁴ Not only do the Chinese agencies scrutinize official texts, the agencies and their external advisors study news accounts for reports of comments by U.S. antitrust officials. Nothing goes unnoticed.

Too often the U.S. antitrust agencies, or individual officials, act without apparent regard for the possibility that foreign observers would read their comments, or without evident concern for how their comments might affect perceptions of the U.S. competition enforcement brand abroad. In nearly six years as a member of the FTC, I received questions from foreign antitrust officials that underscored for me how closely the U.S. agencies are scrutinized. At a seminar in Beijing in 2010, one Chinese official asked me if the U.S. antitrust agencies require parties to prove efficiencies as a condition for approving a merger. Another wanted to know if U.S. antitrust policy seeks to ensure high wages and working conditions for farmers. A third queried whether an unspecified concern with "fairness" was the chief motivation behind modern U.S. federal enforcement.

I said no to the first two questions, and suggested the third proposition was doubtful, as well. I wanted to know how my colleagues had formed their questions. They produced a highlighted and annotated transcript of a workshop that the DOJ convened with the Department of Agriculture earlier in the year on competition issues in agriculture.¹⁹⁵ In one passage, Assistant Attorney General Varney observed:

We will continue to carefully and closely scrutinize every single merger that comes before us, look at it on its facts, and make a decision on the facts of the merger. If it doesn't result in undue concentration and in lessening of competition and provides efficiency and helps farmers and growers get better prices and get more efficiency in what can get to consumers, that will be okay with us, but those that don't, we will stop. They will not go through during this Department of Justice.¹⁹⁶

The AAG concluded her comments as follows:

¹⁹⁴ See *Robert Bosch GmbH*, No. C-4377, 2013 WL 1911293 (F.T.C. Apr. 24, 2013).

¹⁹⁵ U.S. Dep't of Justice & U.S. Dep't of Agric., *Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplace*, Transcript of Proceedings (Mar. 12, 2010) [hereinafter *Issues Facing Farmers*], <http://www.justice.gov/atr/public/workshops/ag2010/iowa-agworkshop-transcript.pdf>.

¹⁹⁶ *Id.* at 53-54.

So you have my commitment that we're going to do everything we can to make sure that it's a competitive agriculture economy, that farmers, growers, packers, processors, are all making a decent wage, and we're getting American consumers food on their table that's safe and healthy and a decent price.¹⁹⁷

Attorney General Eric Holder closed the session by praising the AAG by stating: "Well, you can see why I have such confidence in this woman, right?"¹⁹⁸ He also stated that "the overriding concern we have in the Justice Department is maintaining fairness."¹⁹⁹

I proposed that my Chinese audience treat these propositions, as I understood them, warily. Neither U.S. case law nor the merger guidelines require merging parties to prove efficiencies in order for their transaction to survive antitrust review.²⁰⁰ The inquiry ends if the plaintiff cannot show a likely "lessening of competition."²⁰¹ U.S. competition policy has little to say about the attainment of "a decent wage," and the supply of "safe and healthy" food products is the province of public bodies other than anti-trust agencies.²⁰² U.S. antitrust policy makers are guided by aims more structured and economically oriented than a generalized goal of "fairness."²⁰³

Perhaps the statements at the agriculture workshops were simply inadvertent and not meant to be taken as restatements of doctrine and policy. Whether intentional or not, they do have an attentive foreign audience. From the perspective of international influence, to speak or write this way is unwise, for it does not advance a coherent view about U.S. policy or build a respected brand. At a minimum, speakers attentive to international perceptions of what the U.S. agencies do would think carefully before they made such remarks. A sensible process of consultation within each agency and between the agencies would review draft texts with an eye to international consequences and at least raise questions about seemingly improvident remarks. No formal or informal process of consultation of this sort takes place either within the FTC or between the DOJ and FTC.

¹⁹⁷ *Id.* at 55.

¹⁹⁸ *Id.* at 56.

¹⁹⁹ *Id.*

²⁰⁰ See Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 374 (2011).

²⁰¹ Issues Facing Farmers, *supra* note 195, at 54.

²⁰² *E.g.*, 21 U.S.C. § 393 (2012) (granting the Food and Drug Administration the authority to regulate food and safety).

²⁰³ See, e.g., Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2012). For a discussion regarding the effects of addressing general fairness concerns through antitrust law, see D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247 (2015).

d. *Multimember Decision Making: The FTC*

Branding in a multimember governance structure poses special difficulties not found when a single executive heads the agency.²⁰⁴ In the FTC, the chair functions by law as the agency's chief operating officer and by practice as the main face of the institution.²⁰⁵ This does not always sit well with non-chair commissioners, who tire of the role of playing back up. Some non-chair commissioners accept and embrace what essentially is a supporting part, but others do not. For those who aspire to be chair (or at least think they would be a better chair than the incumbent), the subordinate part is confining and, ultimately unsatisfying. There is a consequent temptation to engage in what might be called "look at me" behavior—to make flamboyant public statements (e.g., speeches or separate statements in formal Commission matters) that draw the camera to the speaker.²⁰⁶

To foreign observers, the sight of five individuals making pronouncements about antitrust law and policy can be perplexing. For whom do these persons speak? What weight are we to attach to the comments of each? Transparency mechanisms such as the Government in the Sunshine Act²⁰⁷ prevent the type of closed door informal meetings in which the commission members, as a group, can meet to discuss what type of behavior is consistent with the agency's longer term aims, and what steps might be taken to increase the coherence of the agency's own messages.²⁰⁸ Regular, collective face-to-face meetings would provide superior means to address disagreements, to identify and correct misunderstandings, and to debate disparate policy views. To disable effective consultation in a governance structure whose effectiveness depends crucially on collegial decision-making calls into question the desirability of the governance mechanism itself.

Within the FTC or inside other multimember federal regulatory commissions, discussions about the formulation and implementation of agency

²⁰⁴ Kovacic, *Respected Brand*, *supra* note 16, at 244-45 ("Achieving coherence in external messaging can be more difficult with a board than with a single-person executive.").

²⁰⁵ See Eleanor M. Fox, *Chairman Miller, The Federal Trade Commission, Economics, and Rashomon*, 50 L. & CONTEMP. PROBS. 33, 33-34 (1987).

²⁰⁶ I am not immune to this temptation. In January 2007, I gave an interview in which I unwisely criticized the DOJ's interaction with the FTC. Corey Boles, *INTERVIEW: FTC Commissioner Criticizes Relations with DOJ*, DOW JONES NEW SERV., Jan. 29, 2007, Factiva, Doc. No. DJ00000020070129e31t000io ("The comments by Kovacic, one of five commissioners at the FTC, represent a rare public criticism of the Justice Department's antitrust unit Kovacic said relations between the European Union antitrust authorities and his agency at times were better than those between the FTC and the Department of Justice.").

²⁰⁷ 5 U.S.C. § 552b (2012). For an overview of the Government in Sunshine Act, see REEVE T. BULL, ADMIN. CONFERENCE OF THE U.S., *THE GOVERNMENT IN THE SUNSHINE ACT IN THE 21ST CENTURY* (2014).

²⁰⁸ See *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1182 (D.C. Cir. 2000).

strategy either must take place in public (an unsuitable forum for assessing how to approach sensitive matters of international relations) or in seriatim conversations involving no more than two members of the agency at one time.²⁰⁹ The limitation on private consultations among FTC commissioners does not apply to their advisors.²¹⁰ Thus, crucial consultation functions have devolved to the staff of the Commission's members—a most imperfect second-best alternative to having face-to-face consultations among the entire board. FTC commissioners cannot engage in so basic a process of meeting weekly, in person or by phone, to discuss what they have done in the week before, what they plan to do in the week ahead, and how their collective activities relate to the agency's larger objectives.

3. Investment

Two types of investments—research and development as well as engagement—can help develop U.S. competition policy applications and improve the U.S. competition agencies' global influence.

a. *Competition Policy Research and Development*

The development of successful competition policy applications depends heavily upon the extent and quality of an agency's allocation of financial and human resources to the continued exploration of new and superior competition policy—activities that build knowledge, identify superior substantive or process applications, and facilitate skillful implementation. These activities include research (such as industry studies) that examines specific commercial phenomena and public consultations (e.g., hearings, seminars, workshops) that “educate the agency on particular topics, and the evaluation of the effects of past agency initiatives.”²¹¹ Systematic efforts to study and learn from experience can be a particularly strong source of ideas and international advantage for older agencies with extensive experience.

A competition agency can bolster its research and development (“R&D”) efforts through partnerships with what Professor Allan Fels calls “co-producers.”²¹² For R&D purposes, these are universities, think tanks, and other institutions that perform research that can enrich the agency's base of knowledge.²¹³ Compared to their foreign counterparts, the U.S. anti-

²⁰⁹ See 5 U.S.C. § 552b.

²¹⁰ See *id.*

²¹¹ Kovacic, *Dominance*, *supra* note 3, at 41. See also Kovacic, *The Federal Trade Commission as Convenor*, *supra* note 60, at 19-20.

²¹² Allan Fels, *A Model of Antitrust Regulatory Strategy*, 41 *LOY. U. CHI. L.J.* 489, 490-91 (2010).

²¹³ See *id.* at 515-16.

trust agencies enjoy a major potential advantage in building a knowledge base that can be translated, directly and indirectly, into the development of superior competition policy applications. That potential advantage resides in the capabilities of U.S. graduate education programs in business, economics, law, and public administration. These capabilities provide an unmatched resource pool for U.S. competition agencies.²¹⁴

Given the expanding number of capable competition-policy systems around the world, comparative study is another tool that will provide U.S. agencies with a useful source of knowledge about new models and modes of implementing different procedures.²¹⁵ The FTC engaged in just this kind of valuable, comparative self-study in 2008 when it held hearings around the world for benchmarking the state of the art in competition policy.²¹⁶ Continued awareness of current global benchmarks will also allow U.S. competition agencies to assess the value of their own aging or out-of-date policy applications.

As suggested earlier, writing good applications and transmitting knowledge are two of the chief areas in which the U.S. agencies can exert influence today.²¹⁷ One useful focal point for future work is to examine the existing inventory of federal guidelines and upgrade older products by using the tools mentioned above. In a number of instances, existing U.S. policy applications have either exceeded their “best if used by” date or passed their expiry date. The U.S. has not issued guidelines on non-horizontal mergers since 1984.²¹⁸ In its sophistication and analytical power, the 30-year-old U.S. document pales in comparison to DG Comp’s 2007 guidelines on non-horizontal transactions. The U.S. guidelines on collaboration among competitors appeared in 2000.²¹⁹ Considerations involving existing cases led the agencies to sidestep several important issues in the 2000 document, and important subsequent developments in economic analysis and legal doctrine have advanced the state of the art.²²⁰ The guidelines most relevant to advisors counseling clients on benchmarking issues appeared in

²¹⁴ See, e.g., Fourth Annual Forum on International Antitrust Issues, Northwestern Law Searle Center on Law, Regulation, and Economic Growth (June 13-14, 2013), https://www.law.northwestern.edu/research-faculty/searlecenter/events/international/documents/Chicago_Forum_International_Antitrust_Issues_agenda.pdf (hosting various FTC representatives).

²¹⁵ Kovacic, *Dominance*, *supra* note 3, at 41.

²¹⁶ WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 68-72 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

²¹⁷ See *supra* Part I.

²¹⁸ See *supra* Part III.A.

²¹⁹ ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, *supra* note 168.

²²⁰ *Id.* at 1-2.

the late 1990s in the context of dealing with the health care sector.²²¹ Despite a dramatic retrenchment of enforcement of the price-discrimination provisions of the Robinson-Patman Act since the late 1970s, the FTC has had relatively little to say about how it will enforce this statute in the future.²²² All of these are areas in which good, recent U.S. contributions could have a major impact at home and abroad.

The absence of the U.S. agencies from modern policy debates is particularly striking in the area of minimum resale price maintenance (RPM). Since the Supreme Court's decision in *Leegin Creative Leather Products v. PSKS, Inc.*,²²³ the federal agencies have provided little guidance about their views concerning the application of the rule of reason to minimum RPM. FTC and DOJ activity since *Leegin* has consisted of issuing a decision in an order modification request²²⁴ and one speech by an agency leader.²²⁵ Minimum RPM is a matter of pressing concern in a significant number of jurisdictions, and a fresh U.S. perspective on the treatment of this practice is not available to inform their deliberations.²²⁶

A necessary foundation for preparing new guidelines or taking other steps (such as law enforcement) to make policy at home and influence policy abroad is a fuller joint effort by the DOJ and the FTC to identify the appropriate path for doctrinal development going ahead. For single-firm behavior and facilitating practices, for example, the two agencies must clarify what they regard to be the proper framework of legal rules and why types of measures—litigation under the Clayton and Sherman Acts, the application of the FTC's authority to ban unfair methods of competition, the preparation of guidelines or studies—would best support the proper framework. The intensity and quality of an agency's litigation program affects the attractiveness of the policy applications it devises. An agency that is not running any cases in a specific area of competition law will have a difficult time persuading other jurisdictions that it has an adequate current experience base to inform its policy judgments. Common efforts by the DOJ and the FTC to identify how doctrine and policy should progress, and to develop litigation and non-litigation measures to achieve those ends, will assist in building a U.S. resume that other nations will respect and seek to emulate.

²²¹ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 1-7 (1996), https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

²²² Kovacic, *Politics and Partisanship*, *supra* note 105, at 687-88.

²²³ 551 U.S. 877 (2007).

²²⁴ *Nine West Grp. Inc.*, No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008).

²²⁵ Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation (Oct. 7, 2009), <http://www.justice.gov/atr/public/speeches/250635.pdf>.

²²⁶ Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Rights*, 80 ANTITRUST L.J. 1, 2-3 (2015).

b. *Engagement*

None of the recommended investments in research and development can be fully effective without robust participation in international affairs. Primarily by investing in building international relationships, U.S. agencies can learn about other systems and then export the best that U.S. systems have to offer with the ultimate goal of promoting a convergence to superior norms.²²⁷

This requires an expansion of already significant U.S. engagement with other jurisdictions, including investment in international networks such as the OECD, ICN and UNCTAD. These networks can provide the means for promoting the adoption of superior norms²²⁸—those that through sufficient investment in R&D should often come from U.S. agencies. The requisite investment should also be directed to create and maintain bilateral relationships and regional friendships. In all cases, effective international links that yield improved U.S. agency influence will continue to require the formation and maintenance of strong personal relationships between agencies.²²⁹ Of course, in an era of budget austerity, efforts by the U.S. agencies will need to begin with a review of existing relationships and consideration of which future investments—bilateral contacts and engagement in international networks of all kinds—will yield the best returns.²³⁰

CONCLUSION

A tremendous modern expansion in the number of jurisdictions with competition law regimes has created multiple sources of influence over international norms. The U.S. has a crucial stake in how other jurisdictions apply competition laws whose enforcement affects global trade and investment. A policy domain that once was dominated by U.S. ideas and implementation techniques is increasingly competitive.

Influence over international norms today comes chiefly through persuasion by developing substantive frameworks, analytical techniques, and procedures whose conceptual quality and demonstrated effectiveness in practice gain adopters overseas. International competition policy—in areas such as advocacy, cartel enforcement, and merger review—reflects the power of U.S.-created applications that inspire emulation in other nations.

²²⁷ For an extensive discussion of how this might take place in an article focused more on general convergence to superior norms and less on how U.S. agencies can enhance their future global influence, see Kovacic, *Dominance*, *supra* note 3, at 42.

²²⁸ *Id.*

²²⁹ *See id.*

²³⁰ *See id.*

Looking ahead, the repetition of these successes will not come automatically, especially in the face of impressive efforts by other jurisdictions to create attractive policy applications and to engage actively with other jurisdictions to promote their adoption. The extent of future U.S. influence will depend on whether the U.S. antitrust authorities—particularly the DOJ and the FTC—take steps to improve the coherence of U.S. policymaking and to increase investments in creating new competition policy applications and refining older U.S. “products.”

Progress will depend most heavily on a greater recognition of the importance of the attentiveness of foreign agencies to what the U.S. agencies say and do, and to the value of stronger efforts by the DOJ and the FTC to function as a truly integrated policy joint venture. Such an approach would enable the agencies to take so basic a step as to formulate a common statement of their international policy aims, to be announced, perhaps, in a joint public appearance by the AAG for Antitrust and the chair of the Federal Trade Commission. This collaboration would be one step in a series of common projects involving mapping out how the two institutions—through cases, new guidelines, the revision of older guidance, reports, and convening public consultations—can influence global norms. By recognizing the importance of deeper integration within the federal antitrust joint venture, the U.S. agencies are likely to gain a better understanding of what builds a respected U.S. antitrust brand.

Greater respect from foreign observers also requires the U.S. competition policy community to reconsider the narrative that depicts the U.S. system as especially prone to irrational variations in policy and gives decisive effect to the selection of political leadership. To paraphrase Professor Andrew Roberts, much as commentators like to present their own political party as central to antitrust policy success, thus denigrating the contributions of appointees from the rival party, progress in the development of U.S. antitrust policy has been a team effort that required efforts from both parties over time, each in different but largely complementary ways.²³¹

²³¹ ANDREW ROBERTS, *THE STORM OF WAR: A NEW HISTORY OF THE SECOND WORLD WAR* 604 (2011).