Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement

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This article suggests how a jurisdiction might best go about evaluating the quality of its competition policy system. It urges that competition agencies and collateral institutions strive to improve the ability to measure the economic effects of merger control and to verify the consequences of different approaches to enforcement. The article uses merger control in the United States as its main illustration, but the article's observations apply to other areas of competition policy oversight, as well. The article seeks to encourage the recent trend within the global competition policy community of accepting a norm that focuses greater attention on the evaluation of the economic effects of enforcement decisions—especially by developing better quantitative measures of actual economic effects—and the assessment of the processes by which competition agencies examine individual transactions.

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I. Introduction

Horizontal merger policy is an important focus of contemporary discussions about the quality of competition policy.[1] It should be. Horizontal merger policy attempts to forestall combinations that otherwise would permit the merged entities to exercise substantial market power, and it tries to curb the creation of market environments that encourage coordination by rival firms through tacit coordination or the formation of express agreements. Because society also has a major stake in allowing business restructurings that improve economic performance, both in individual transactions and in the preservation of a robust market for corporate control, merger policy ought to go about these tasks without blocking combinations that are benign or procompetitive.

The fulfillment of these objectives has important links to other areas of competition law.[2] If merger control misses the dominance issue, mergers can create durable market power with consequent adverse effects on prices, quality, and innovation. If merger control overlooks a transaction's contribution to oligopolistic interdependence, a merger can contribute to a market configuration in which the surviving firms either find it easier to establish effective cartels by a direct exchange of assurances or to use indirect means to realize the results that express agreements yield. Because competition law has not addressed dominance or tacit collusion with great success, it matters that merger policy make proper choices about when to intervene.[3]

In most jurisdictions, the competition agencies evaluate transactions before the parties complete them.[4] This process is unavoidably predictive and, in a number of instances, speculative. In a wide range of matters, no analytical calculus provides a sure way to distinguish transactions that pose anticompetitive dangers from those which promise to be benign or procompetitive. The examination of a proposed transaction often involves difficult, probabilistic assessments of future commercial developments. This is especially true in markets that display high levels of dynamism owing to technological or organizational innovation, or to developments in trade, transport, and communications that link previously isolated geographic regions into unified commercial markets.

Each possible course of action by a competition agency poses risks. Block the deal improvidently, and valuable economic benefits from consolidation are lost. Accept the wrong divestitures or conduct-related undertakings as conditions of allowing the deal to proceed, and the agency creates an illusion of effective intervention that masks future anticompetitive results. Unwisely allow the deal to proceed as proposed, and consumers suffer the costs of diminished economic performance. The public statements of agencies concerning specific decisions to intervene or take no action ordinarily either acknowledge no risks associated with the choice taken or assert that all risks were thoughtfully and correctly weighed. It takes a high and unusual level of institutional self-assurance to state that the chosen course of action could be wrong.

Seen in the aggregate, public enforcement decisions over time reflect more humility about the analytical quandaries and difficult judgments associated with merger control than do the agencies' portrayal of individual episodes of review. The history of merger review has featured what best can be seen as a series of experiments through which the public agencies have used various analytical and procedural measures to improve the accuracy of the predictive process. Modern commentary tends to accept the view that contemporary analytical methods are superior to predecessor techniques, but that may be because many contemporary commentators played some part in creating the modern techniques. The field is still a work in progress, and much remains to be done to improve procedures and substantive analysis, particularly for what might generally be labeled as the hard cases.

So how are we to tell if a competition system is doing a good job of the important, forward-looking exercise of merger control? A popular and seemingly irresistible technique is to measure the worth of a competition agency by studying how often it blocks deals, allows deals, or subjects proposed transactions to elaborate analysis.[5] Commentators lean on this method so often and so heavily that they forget its frailties. To say that an agency is doing a lot of things or only a few things does not tell us whether it is doing the right things. In sport, coaches admonish athletes not to equate activity with accomplishment.[6] So it should be for merger control.

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There is a debate worth having, and that is whether antitrust oversight of mergers is improving or retarding economic performance. Answers to questions about actual economic effects will not emerge from the study of activity levels, unless we bravely (and dubiously) assume that specific levels of enforcement activity invariably or typically beget good results. Especially amid larger contemporary debates about the correct form of government intervention in the economy, we cannot rely on these feeble proxies to assess effectiveness. When competition policy agencies ask external audiences to accept the value of antitrust intervention on faith, they are likely to hear variants of the aphorism: In God we trust; all others provide data.[7] The relevant data cannot be found in simple counts of merger reviews and challenges.

This article suggests how a jurisdiction might best go about evaluating the quality of its competition policy system. It urges that competition agencies and collateral institutions strive to improve the ability to measure the economic effects of merger control and to verify the consequences of different approaches to enforcement.[8] The article uses merger control in the United States as its main illustration, but the article's observations apply to other areas of competition policy oversight, as well. The article seeks to encourage the recent trend within the global competition policy community of accepting a norm that focuses greater attention on the evaluation of the economic effects of enforcement decisions—

especially by developing better quantitative measures of actual economic effects[9]—and the assessment of the processes by which competition agencies examine individual transactions.[10]

The article begins the treatment of evaluation with several normative propositions about what is good merger policy. Part III sketches the pendulum narrative of modern U.S. antitrust enforcement. This narrative figures prominently in discussions about the quality of U.S. merger policy since the early 1960s and relies chiefly on activity-based measures of efficacy to identify dramatic changes in policy over time. The pendulum narrative attributes the observed variations in activity to changes in political leadership. Part IV suggests future focal points for evaluation and means for assessing the quality of merger review. Among other sources, it draws upon the results of a recently completed self-study of the U.S. Federal Trade Commission (FTC).[11]

II. What Is "Good" Merger Policy? Three Suggested Criteria

Discussions about competition policy tend in a colloquial way to ask whether public enforcement agencies are doing a "good" job of carrying out their responsibilities. This form of discourse seldom involves a careful specification of what constitutes "good" performance. Expressly or implicitly, levels of enforcement activity are the foundation for judgments.

In the case of merger policy, an appropriate assessment of the quality of merger policy should focus on three criteria. First, has merger policy improved economic performance by reducing the price or improving the quality of goods or services? This is the essential question about the effectiveness of merger policy. It is worth asking and debating regularly. A merger review system accomplishes this result by intervening to correct or preclude transactions that pose serious competitive dangers and by allowing combinations that promise to have benign or procompetitive effects.

The second criterion is whether individual competition systems minimize unnecessary implementation costs within and across jurisdictions. Enforcement agencies should seek to achieve a given level of monitoring and enforcement at the lowest possible cost to society.[12] Among other means, a jurisdiction can eliminate unnecessary burdens associated with its own notification procedures and investigations, promote international standardization based on superior techniques, and raise levels of interoperability across competition systems.

The third criterion is whether a competition system has committed itself to a process of continuous reassessment and improvement.[13] This has two dimensions. The first deals with the testing and improvement of methods to assess (a) the economic consequences of individual decisions to intervene or not to intervene and (b) the aggregate effects of a system of merger review. The second involves an examination of the procedures for merger review and an analysis of whether the jurisdiction can achieve a given level of oversight at lower cost. Improvements in both dimensions require competition authorities to make meaningful disclosures about decisions to prosecute or not prosecute, to maintain and reveal informative data sets about activity levels, and to refine techniques—with the agency's resources and in cooperative ventures with external bodies such as research institutions—for measuring actual economic effects of intervention decisions.

III. Modern U.S. Merger Policy: Alternative Narratives

Discussions about the quality of merger policy ought to dwell upon whether a system of competition law satisfies the criteria sketched above. Such discourse frequently does not. In many instances, assessments of merger policy neither define normative criteria clearly nor apply them systematically. In other cases, problems associated with the measurement of merger enforcement consequences cause commentators to run away from the issue of actual economic effects. The means for determining the economic effects of merger policy are not ideal.[14] In practice, it can be difficult to determine how merger control, in individual cases or across a range of intervention opportunities, affects economic performance.

Owing to problems of measurement, the antitrust community ordinarily succumbs to the temptation to duck the ultimate question of economic effects.[15] Discussions about the quality of merger enforcement instead use a variety of effectiveness proxies. Three stand out. The primary fallback is to trace and analyze levels of activity, such as the total number of government interventions over a period of time or the percentage of all transactions in which the competition agency conducts an elaborate inquiry or takes action to modify or block a deal. By this measure, enforcement quality is inferred from rates of action or inaction.

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A second popular evaluation technique is to seek out the opinions of practitioners about the quality of the competition authority's performance. Is it challenging too many deals, or too few? Are remedies too weak or too strong? Does the agency have sound processes in place for sorting out the good and the bad? Compared to other eras of competition policy, is it easier, or more difficult, today to get a merger approved by the enforcement agency?

In principle, practitioner views can be valuable source of information, and commentators and competition authorities ought to seek them out. As presented in the literature on merger control, practitioner views tend to be qualitative, unsystematic, and unverifiable. As a group, the accounts of practitioner views generally provide a haze of unattributed impressions that no outsider can test rigorously. Some commentary offers the vastness of the narrator's own experience as authority that an asserted proposition captures a broad, important reality.[16] Other articles and press reports quote unidentified individuals with the suggestion that the speakers have revealed universal, fundamental truths.[17] There have been some efforts to conduct surveys of larger numbers of practitioners, but these seldom specify or discuss the transactions that provide the basis for the participants' qualitative views, and the identities of the participants invariably are anonymous. The anonymity may be necessary to avoid retribution by a competition agency that dislikes the speaker's opinion, but anonymity also relaxes the speaker's incentives to portray events fully and accurately.

The third approach is to present specific enforcement episodes as exemplars of the competition agency's philosophy about merger control. By offering an exemplar, the commentator asks the reader to draw broader conclusions about whether the competition agency's analytical methods and ultimate conclusions are sound.[18] Case studies can be informative in what they say about the agency's philosophy, analytical perspectives, and methodology. Yet individual enforcement episodes too often are analyzed in isolation. To be reliable as a way to make larger judgments about the quality of merger enforcement, one needs a sufficiently large number of case study observations to know how the agency is performing in any single period or across periods. For example, comparisons of enforcement choices in specific sectors over time can help illuminate adjustments in policy and technique, and can offer insights about how a collection of consolidation events affected sectoral performance.

Activity levels, practitioner perspectives, and the occasional case study provide the main ingredients for discussions of U.S. merger policy. Below I describe the most popular approach —the pendulum narrative—that commentators use to assess the quality of merger policy. In this narrative, federal merger enforcement swings dramatically from extraordinary intervention to extraordinary permissiveness as a consequence of political appointments to the two U.S. antitrust authorities, the Department of Justice ("DOJ") and FTC. The discussion then presents an alternative interpretation of U.S. experience.

A. THE PENDULUM NARRATIVE OF MODERN MERGER ENFORCEMENT

The leading narrative about modern U.S. antitrust enforcement policy uses the metaphor of a swinging pendulum to describe shifts in the government's approach to intervention.[19] This metaphor is popular among academics, journalists, and practitioners as a way to explain patterns of public antitrust enforcement and to assess the quality of merger control in individual eras. The pendulum narrative posits a fundamental instability in U.S. competition policy. Pendulum narrators attribute this instability largely to changes in the country's political leadership, although streaks of raw enforcement agency irrationality divorced from political forces also receive some credit. Thus, in its attempts "to balance possible threats to competition against merger benefits," modern U.S. merger policy often "has careened from one extreme to another in this balancing process."[20] This is not a flattering characterization of U.S. experience. Reckless drivers careen. Good public policy does not.

As applied to merger policy, the pendulum narrative divides the modern U.S. enforcement experience into four periods. Public enforcement policy toward mergers is said to have been too aggressive in the 1960s and 1970s, too lenient in the 1980s, just right in the 1990s, and too cold again in the first decade of the 21st century. This mimics the classification scheme first introduced in the account of Goldilocks and her encounter with the three bears: U.S. merger policy is first too hot (1960s-1970s), then too cold (1980s), then just right (1990s), and then too cold again (2000s).

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Scholarly and popular commentary that embraces the pendulum narrative emphasizes what are said to be indefensible lapses in decision making, other than in the just-right era of the 1990s. In the other periods, government enforcement officials and judges appear incapable of well-reasoned, sober-minded thought. Thus, in the 1960s, federal enforcement policy is set by "antitrust witchdoctors,"[21] "trust-busting zealots … who saw evil in every big company or merger,"[22] and "excessively intrusive Populists."[23] With this collection of economic primitives in control, the government agencies "challenged everything."[24]

In the pendulum narrative's depiction of the 1980s, federal enforcement policy swings dramatically away from the mindless interventionism of the 1960s and the "extraordinary activism" of the Carter administration in the 1970s.[25] Thus begins the modern ice age of antitrust policy that is Ronald Reagan's presidency. During the Reagan administration, the federal antitrust agencies "trivialized" the U.S. antitrust laws[26] and produced "the most lenient antitrust enforcement program in fifty years."[27] In this era, federal antitrust "[e]nforcement ceased;"[28] "U.S. Federal merger enforcement ground to a halt;"[29] and the federal agencies achieved the "emasculation of the nation's merger policy."[30] The Reagan appointees responsible for these developments were characterized as "extremists"[31] given to "lawlessness"[32]—a "garbage barge of ideologues."[33] Their influence stemmed from brute political force, not the power of ideas. The Reagan administration's success in altering U.S. antitrust policy was "largely a political victory, not an intellectual or legal one."[34]

In the pendulum narrative, the wild swings in merger policy – from the hyperactive 1960s and 1970s to the indolent 1980s—ceased temporarily in the 1990s. Antitrust policy had a lucid interval during the Clinton administration. Through a series of prosecutions and non-litigation policy adjustments in the 1990s, the federal agencies "restore effective and sensible merger enforcement—avoiding the undue activism of the 1960s and the extreme under-enforcement of the 1980s."[35] Spurring this temporary transformation was the appointment of new leadership to the federal agencies. "Beginning in the 1980s," observes one account, "we entered a period of calm on the merger front. This was particularly true at the Federal Trade Commission, which was seen as a sleepy agency. Then along came the appointment of Bob Pitofsky as Chair of the FTC [and] the appointment of Jon Baker as the Director of the FTC's Bureau of Economics."[36] Through the efforts of these appointees and the guidance of Justice Department officials such as Joel Klein, the enforcement pendulum came to rest at a thoughtful, moderate equilibrium.[37] Many authors who say federal enforcement policy attained a sensible, moderate equilibrium in the 1990s served as high officials in the antitrust agencies during the Clinton administration and helped mold the antitrust policies of the just-right era.[38]

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In the latest chapter of the pendulum narrative, the presidency of George W. Bush destroys the sensible balance of the 1990s and returns federal merger enforcement to the ice age. Like the experience in the 1980s in the Reagan administration, merger enforcement in the Bush administration features an "extraordinarily low level of government merger enforcement."[39] As the Bush presidency draws to a close in 2008, the merger policy "pendulum has swung too far in the direction of nonintervention."[40] The capacity of merger policy to swing toward excessive permissiveness is "particularly evident in the minimalist enforcement agenda of the Antitrust Division during the second term of the Reagan administration and during the George W. Bush administration."[41] On a good day, the public officials responsible for these developments are merely captives of "the excesses and rigidities of extreme theoretical economic analysis."[42] On a bad day, they are intellectually unprincipled. Not only do they employ "extreme interpretations and misinterpretations of conservative economic theory," they also engage in a "constant disregard of the facts."[43]

The three proxies for effectiveness mentioned earlier in this section serve as the factual foundations for the pendulum narrative's assessment of federal merger enforcement since 2001. First, several commentaries contend that enforcement policy during the George W. Bush administration was significantly more "lenient" than enforcement policy during the Clinton administration.[44] This deviation from past periods of enforcement is taken to show that the quality of merger policy has deteriorated.[45]

Second, Professors Jonathan Baker and Carl Shapiro surveyed twenty practitioners whose responses are said to indicate agreement with the view that DOJ and the FTC were more likely to approve mergers under the Bush administration than they had been in the previous decade.[46] In this survey, DOJ is reported to be more permissive than the FTC.[47] Professors Baker and Shapiro also present quotations from news accounts saying that the Bush administration offers the best opportunity for firms to attempt anticompetitive transactions in the hope that permissive Bush antitrust appointees will not attack them.[48] As with activity rates, the greater permissiveness reported in the survey of practitioners and in the news accounts is said to show that the quality of merger policy has declined.

Third, Professors Baker and Shapiro offer a case study of the Whirlpool-Maytag merger, which DOJ approved in 2006. Professor Shapiro acted as a consultant for the Justice Department and urged DOJ to block the combination of the two producers of washing machines. DOJ did not do so. Professors Baker and Shapiro say DOJ's non-intervention in Whirlpool-Maytag reveals how the DOJ during the Bush administration embraced analytical techniques that improperly biased enforcement decisions toward non-intervention.[49]

In their review of Bush administration merger enforcement policy, Professors Baker and Shapiro expressly embrace the pendulum narrative[50] and conclude that "the pendulum has swung too far in the direction of nonintervention."[51] Criticizing "the too-ready acceptance by some courts and enforcers of unproven non-interventionist economic arguments about concentration, entry, and efficiencies," they propose measures to "reinvigorate horizontal merger enforcement."[52]

B. TOWARD AN IMPROVED INTERPRETATION OF MODERN U.S. MERGER POLICY

The pendulum narrative of modern U.S. merger enforcement policy portrays a system whose instability robs it of legitimacy. As Thomas Leary has observed, "How much credence could be given to merger policy if it really were so susceptible to change, depending on the outcome of Presidential elections?"[53] President Barack Obama may choose, as he promised during his campaign for the presidency, "to reinvigorate antitrust enforcement" and "step up review of merger activity."[54] If the narrative correctly interprets American antitrust experience, the U.S. system is so prone to politically-driven variations in enforcement that future presidential elections could send the merger policy pendulum swinging wildly again. There is no reason to expect that the just-right enforcement approach of the 1990s is the norm rather than an exceptional interlude.

IF THE NARRATIVE CORRECTLY INTERPRETS AMERICAN ANTITRUST EXPERIENCE, THE U.S. SYSTEM IS SO PRONE TO POLITICALLY-DRIVEN VARIATIONS IN ENFORCEMENT THAT FUTURE PRESIDENTIAL ELECTIONS COULD SEND THE MERGER POLICY PENDULUM SWINGING WILDLY AGAIN.

To study the pendulum narrative carefully is to see that, in its struggle to accentuate the swings of the pendulum, it provides an unsupportable, unreliable interpretation of modern U.S. merger control. With repeated telling, the pendulum narrative ignores discordant facts and obliterates troublesome complexities in merger enforcement policy. This is a serious obstacle to effective public administration. Without an interpretation that more faithfully recounts actual events and forswears superficial explanations in favor of deeper exploration of causes, the antitrust community will neither understand why policy evolved as it did, nor will it identify paths for improvement going ahead. This section discusses some of the pendulum narrative's main faults and offers an alternative interpretation of modern U.S. merger policy that suggests important elements of continuity and progressive, cumulative development.

1. Failings of the Pendulum Narrative

The narrative depends crucially on fractured accounts of antitrust history to highlight the asserted reasonableness of merger policy in the just-right 1990s. To accomplish this result, the narrative must frame the just-right era between periods of indefensible extremism—the too-hot era of the 1960s and 1970s, and the too-cold periods of the 1980s and the current decade. There is an evident compulsion in the pendulum narrative to achieve rough symmetry in the swings away from the sensible middle of the 1990s—to show that the too-hot and too-cold periods displayed comparable levels of extremism.

The effort to achieve symmetrical, massive swings away from a sensible mean requires unacceptable distortions in the presentation of antitrust history. The narrative depicts the too-hot era as a time of irrational, fanatical intervention undisciplined by sound analysis of individual mergers or thoughtful reflection upon recent experience. For commentators who endorse the pendulum narrative's account of merger policy and its treatment of the 1990s as a sensible mean between periods of extremism, there appears to be a felt need to single out and disavow the too-hot 1960s as a way of signaling the reasonableness of their views.[55]

Did merger policymaking in the United States in the 1960s, as the pendulum narrative suggests, simply and inexplicably lose its mind?

Did merger policymaking in the United States in the 1960s, as the pendulum narrative suggests, simply and inexplicably lose its mind? To be sure, merger enforcement standards were highly interventionist.[56] The interesting question is why they came to be so. Was merger enforcement policy "careening" because it was driven by what the pendulum narrative calls antitrust witchdoctors, zealots, or populist extremists? To reflect upon who made the policy is to see that the pendulum narrative's fundamental weaknesses. The epithets of irrationality poorly describe FTC Commissioner Philip Elman, who applied his formidable intellect in the 1960s to shape conglomerate merger enforcement doctrine that attracts intense rebuke today.[57] Nor does Donald Turner resemble the enforcer who single-mindedly seeks to expand the government's ability to "challenge everything." In DOJ's 1968 merger guidelines, Turner took critical steps to retrench the existing zone of government merger enforcement. This self-correcting measure, which existing trends in judicial analysis did not compel DOJ to undertake, proved to be an enormously influential exercise in wise self-assessment and prudential self-restraint.[58] Turner and his 1968 guidelines fit awkwardly in a narrative in which enforcement extremists, zealots, or witchdoctors careen out of control. The pendulum narrative seizes up if such complexities are acknowledged and the apparent capacity of public enforcement agencies to reassess policy and make appropriate refinements is taken into account.

The second pillar of the pendulum narrative's effort to highlight the sensibility of the just-right 1990s is to portray merger enforcement policy in the 1980s and in the 2000s as dramatic swings toward non-intervention. To achieve the desired stark contrasts, the pendulum narrative must side-step or flatten out phenomena that suggest continuity across periods or otherwise reduce the degree of variation. This explains demonstrably false observations that federal merger enforcement "ground to a halt" in the 1980s,[59] and that the FTC was a "sleepy agency" when it came to merger control.[60] It also accounts for the perceived imperative to say that enforcement officials from these periods were extremists and ideologues.[61] If their thinking was so cramped, it would have been difficult for these enforcement officials to devise policy measures such as the 1982 DOJ merger guidelines, whose intellectual vision brought about enduring changes in U.S. policy and changed, by way of persuasion, how the world's competition agencies think about merger policy.[62] Few of the world's merger guidelines today do not owe an intellectual debt to William Baxter and his DOJ guidelines team.

The recent Baker & Shapiro paper evaluates horizontal merger enforcement policy since 2001 with the assistance of the pendulum narrative. The paper is more measured than some in its assessment of the enforcement agencies during the administration of George W. Bush, and its claims are more nuanced than much of the pendulum narrative literature. Professors Baker and Shapiro properly draw attention of the antitrust community to issues associated with the future development of judicial doctrine governing horizontal mergers. The Baker/Shapiro paper usefully helps define issues for future debate about the role of structural presumptions. Their discussion of enforcement agency policy could bring more attention to the pursuit of better techniques for measuring the consequences of merger enforcement choices. These are useful contributions to future policy making.

In its discussion of the work of the federal enforcement authorities since 2001, the Baker/Shapiro paper does little to improve our understanding of the quality of modern merger enforcement policy generally or of the merger programs of the DOJ and the FTC. The paper's findings rest heavily upon an examination of levels of federal agency enforcement activity. It detects a decline in enforcement activities, and it treats this trend as a reliable indication that the quality of merger enforcement policy deteriorated during the presidency of George W. Bush.[63]

These conclusions, which use activity levels as proxies for the quality of merger control, place unsupportable faith in the reliability and meaning of data on rates at which the federal agencies engage in enforcement related activities—for example, how often they issue second requests or intervene to block or modify mergers. Assembling an informative data set that permits meaningful comparisons of activity rates between presidential administrations is a difficult undertaking. Calculations based on activity levels require extraordinary care in determining whether observed activity levels across periods are genuinely comparable.[64] Among other steps, this demands close examination and classification of the type of transactions coming before the agencies at any one time. Relatively small adjustments to account for various factors can change the results materially. The effort to amass activity-related data sets with high levels of comparability is worthwhile for the agencies and collateral institutions, such as research institutes, as one part of the effort to assess merger policy. At best, existing data sets permit conclusions about activity levels that require careful, and perhaps debilitating, qualification.

THESE CONCLUSIONS, WHICH USE ACTIVITY LEVELS AS PROXIES FOR THE QUALITY OF MERGER CONTROL, PLACE UNSUPPORTABLE FAITH IN THE RELIABILITY AND MEANING OF DATA ON RATES AT WHICH THE FEDERAL AGENCIES ENGAGE IN ENFORCEMENT RELATED ACTIVITIES.

Let's suppose that we had absolutely precise and meaningful comparisons of activity over time. It is not clear that variations in activity across periods tell us anything about the larger question posed earlier in this article: How has public merger enforcement affected economic performance? Activity levels say nothing about whether an agency's work has positive or negative economic effects. It is one thing to say that enforcement has become "tougher" or "more lenient" in the sense that the agency is intervening more often or less often as a percentage of all matters to come before it. It is another thing to say that a given level of activity begets specific economic results.

Professors Baker and Shapiro supplement their examination of activity levels with a survey of 20 distinguished practitioners with extensive experience in competition law. The authors do not identify the participants by name, but their identities can be reverse engineered from information provided in the paper. Surveys and interviews can provide useful information about merger enforcement—especially about the effectiveness of the processes by which agencies study individual transactions. On the question of economic effects, surveys have nothing to say, unless the participants have specific data to offer about individual transactions. A general statement that is easier or more difficult to get deals through does not improve our understanding of economic effects unless the speaker at least identifies specific transactions to provide a concrete basis for knowing which deals ought to have been modified or stopped.

The participants in the Baker/Shapiro survey presumably knew what hypothesis the authors were testing and knew how the authors were likely to portray the survey result. Are the authors confident that the participants, owing to past service with a specific presidential administration or a preference for a political party in the 2008 elections, would not answer questions in any way strategically to bias the results? The participants provided narrative answers to the survey questions, and the authors coded them on a five-point scale. The aggregate scores are offered as evidence of greater Bush administration permissiveness and, by inference, of weaker enforcement policy quality. Are the authors confident that their own preferences—both worked for the Clinton antitrust agencies in the 1990s—did not affect their scoring of the responses?

The third measurement technique in the Baker/Shapiro paper is a case study of the Whirlpool/Maytag transaction. The authors say they "are deeply concerned that the Whirlpool case is indicative of an overly lax approach to merger enforcement at the current Justice Department."[65] Case studies can be informative tools for understanding what an enforcement agency has done and for making judgments about the soundness of its analytical approach. First-person accounts, such as Professor Shapiro's observations from his perspective as a consultant to DOJ on Whirlpool/Maytag, can be enlightening.

IT TAKES EXTRAORDINARY SELF-DISCIPLINE FOR A FIRST-PERSON NARRATOR TO AVOID THE TEMPTATION TO SKEW THE NARRATION IN WAYS THAT, AT LEAST TO SOME DEGREE, UNDERSCORES THE APPARENT REASONABLENESS OF THE NARRATOR'S VIEWS.

For all of their positive attributes, case studies informed by first person accounts of events also present problems that affect their value. It takes extraordinary self-discipline for a first-person narrator to avoid the temptation to skew the narration in ways that, at least to some degree, underscore the apparent reasonableness of the narrator's views.[66] One such problem is selectivity in singling out a case study as the informing exemplar. An example of this selectivity is to take an individual merger review episode in isolation and attribute great significance to that episode alone. When the narrator presents the single episode as the informing example, is the attitude toward risk exhibited in that episode unique to the incumbent agency leadership, or might their predecessors have made decisions that showed a similar tolerance for risk?

There is a way to avoid misinterpretations of single merger review episodes, and that is to do comparisons over time. A useful way to test whether an agency at any one moment is taking unacceptable risks in allowing mergers to proceed is to use other case studies from other periods to get a rough sense of how the agency in other periods assessed risk and accounted for risk. Did DOJ gamble excessively in allowing Whirlpool and Maytag to combine? We can ask: compared to what? One approach to seeing if Whirlpool/Maytag tells us something important and distinctive about DOJ decision making since 2001 is to look more closely at transactions approved by the Clinton administration in the just-right 1990s.

For example, what does the FTC's decision to allow Boeing to purchase McDonnell Douglas in 1997 tell us about the Clinton administration's treatment of risk in merger analysis? Professor Baker was the FTC's chief economist when Robert Pitofsky and his colleagues reviewed and approved the transaction with no modifications. I consulted for McDonnell Douglas in this merger, and I believe that the FTC properly declined to take any action. Yet the merger involved many defense and commercial aerospace markets that were close calls.[67] In approving the deal, the Commission took risks about the future of competition in commercial aircraft production and military systems (such as fighter aircraft, aerial refueling tankers, and innovation in the design of weapons generally) that are at least as great as those DOJ took in allowing Whirlpool to buy Maytag. A right-minded person reasonably could have voted to block the Boeing/McDonnell Douglas merger on the ground that these risks were unacceptable. If DOJ behaved unreasonably in Whirlpool/Maytag, was the FTC's decision in Boeing/McDonnell Douglas appropriate?

IF DOJ BEHAVED UNREASONABLY IN WHIRLPOOL/MAYTAG, WAS THE FTC'S DECISION IN BOEING/MCDONNELL DOUGLAS APPROPRIATE?

The same question about enforcement agency risk-taking across time periods can be posed in connection with the Clinton administration's review of mergers involving the petroleum industry. No sector of FTC competition policy responsibility has received more intense and critical congressional scrutiny in this decade. Since 2001, FTC officials have made many appearances before congressional committees to answer questions about the agency's review of mergers involving petroleum companies, especially transactions that took place during the Clinton administration in the 1990s. A much-repeated charge by members of Congress is that the FTC oversight of mergers in the 1990s was lax—that the Commission improvidently allowed, albeit with substantial divestitures in some cases, Exxon to buy Mobil, Chevron to buy Texaco, BP to buy Arco and then Amoco, and many others. Imagine that these transactions had taken place during the George W. Bush presidency. What would the pendulum narrative have to say if the FTC in the Bush administration had made exactly the same choices as the Clinton administration made in the 1990s? By further point of comparison, recall also that it was during the too-cold period of the Reagan administration that the FTC sued to bar Mobil from buying Marathon Oil Company, the 16th largest U.S. refiner.[68]

In 2004, the Government Accountability Office ("GAO") published a study that sought to measure the price effects of eight mergers that took place during the Clinton administration. It concluded that six of the eight mergers—including Exxon/Mobil—caused prices to increase.[69] Professors Baker and Shapiro are familiar with a number of the transactions that have received criticism from Congress and from the GAO. Many of the relevant transactions took place during Professor Baker's tenure as the head of the FTC's Bureau of Economics, and

Professor Shapiro advised British Petroleum in support of its acquisition of Amoco.

On the FTC's behalf, I have testified on several occasions since 2001 to defend the Commission's petroleum industry program and to rebut the GAO's criticisms of Clinton administration merger enforcement policy in this sector.[70] On those occasions I have said, and I believe today, that the FTC's choices in these matters were correct. Even if my assessment is right, there remains the question of how the chances the FTC took in those cases compare to the chances taken by DOJ in Whirlpool/Maytag. How should we assess the competitive risks of the FTC's decision to allow some transactions (e.g., Unocal/Tosco) to proceed without modification, or the risks associated with divestitures required as a condition for allowing other transactions to go through (e.g., Exxon/Mobil)? How do those risks—as well as the sector-wide risks associated with the many petroleum transactions that the Clinton FTC approved in whole or in part—compare to the risks taken by the DOJ in Whirlpool/Maytag?

To consider the wisdom of the enforcement agency's decisions about what risks to take and when to intervene, single episodes of merger review—such as Whirlpool/Maytag—should be analyzed in a larger context when the enforcement agency has made judgment calls no less problematic in other periods that are depicted as eras of sound public administration. The potential adverse economic and social consequences of the FTC getting things wrong in the aerospace and defense sector and in the petroleum industry in the 1990s are at least as grave as the hazards of having DOJ improvidently permit two leading producers of washing machines to merge. In the Baker/Shapiro account of Whirlpool/Maytag, one gets no idea that the Clinton antitrust agencies might have taken risks of equal or greater magnitude. Measured by risks taken and risks avoided, Boeing/McDonnell Douglas and the petroleum deals of the 1990s are as damning of FTC enforcement under Bill Clinton as Whirlpool/Maytag is of DOJ's work under George W. Bush. They ought to be part of the story.

2. An Alternative Interpretation: The Role of Continuity

Horizontal merger policy has changed considerably since the early 1960s. The process of change has involved a significantly greater degree of continuity that the pendulum narrative suggests. The first ingredient has been a gradual narrowing of the zone of liability.[71] This narrowing has been largely continuous rather than sharply discontinuous. Using a rough structural measure, the threshold at which the federal agencies could be counted on to apply strict scrutiny and to be most likely to challenge involved a reduction of the number of significant competitors in the following manner: 1960s (12 to 11), 1970s (9 to 8), 1980s (6 to 5), 1990s (4 to 3), 2000s (4 to 3). These thresholds can be derived from parsing the cases which the government agencies chose to litigate. It is reasonable to debate whether a 4 to 3 deal had a better chance of getting through in this decade than it did in the 1990s. The main point is that the perimeter the federal agencies have been defending has shrunken substantially over the decades. This is a function of the agencies' own reassessments of policy and of interpretations of merger law in the lower federal courts.[72]

The second ingredient has been an increased willingness on the part of the agencies to engage in fact-intensive analysis that qualifies the application of structural criteria. This is evident in decisions taken in matters such as Boeing/McDonnell Douglas and in Whirlpool/Maytag. It is entirely appropriate to ask whether the agencies have applied qualifying factors correctly. The key point here is that modern experience, especially since the issuance of the 1982 DOJ merger guidelines, has involved greater consideration of non-structural criteria and more willingness to experiment with enforcement approaches short of outright prohibition to resolve competitive concerns.

THE MAIN POINT IS THAT THE PERIMETER THE FEDERAL AGENCIES HAVE BEEN DEFENDING HAS SHRUNKEN SUBSTANTIALLY OVER THE DECADES.

Seen this way, modern U.S. enforcement policy toward horizontal mergers has not resembled a wildly swinging pendulum. There instead has been a relatively steady progression toward a narrower zone of enforcement for horizontal transactions. The pendulum narrative and its emphasis on enormous periodic policy swings deflect attention away from the larger question raised above: Is this trend of enforcement policy, combined with reinforcing doctrinal developments in the courts, producing desirable economic effects? That question, rather than an examination of aggregate activity levels or single cases, ought to occupy the attention of the competition policy community.[73]

III. Conclusion: Institutional Arrangements for Evaluation

The development of a performance evaluation methodology for horizontal merger enforcement and other forms of competition policy can take advantage of a growing body of experience and scholarship with the subject.[74] Improvements in existing evaluation programs and extensions of the methodological state of the art might proceed along several paths. One is to engage competition authorities and researchers in more extensive collaborative discussions about existing projects and in explorations about evaluation techniques. This can take place in a variety of multinational and regional forums such as the International Competition Network and the Organization for Economic Cooperation and Development. In recent years, these and other organizations have shown an increased interest in operational issues, including performance management. Another way is for competition agencies to form partnerships with major research institutions.

A second element is for competition authorities to expand resources devoted to performance measurement. Agencies can ensure that, in every budget cycle, there are outlays for evaluation. These performance measure exercises can be carried out by agency insiders, external consultants, or some combination of the two. Competition authorities with common interests and common investigations usefully could cooperate to do relevant research. Focal points for collaboration would include the assessment of economic effects and of the processes for merger control. In making budget outlays, agencies should view performance measurement as an integral element of the policy-making life cycle and not simply as a luxury. Performance measurement investments are part of the policy research and development ("R&D") by which a public competition authority grows smarter.

A third element is to continue and extend the trend of publishing fuller data sets on merger enforcement activity.[75] For the DOJ and the FTC, this means an acceleration of the recent trend to publish accounts of decisions not to prosecute and to issue reports on major variables affecting the decision to prosecute. These transparency measures could be coupled with workshops and seminars that rely on these and other materials to discuss enforcement trends and effects.

GOOD POLICY RUNS ON AN INFRASTRUCTURE OF INSTITUTIONS, AND BROADBAND-QUALITY POLICY CANNOT BE DELIVERED ON DIAL-UP-QUALITY INSTITUTIONS.

All of these measures will help to build and reinforce an ethic of self-assessment and continuous improvement. They underscore the importance of institutional improvement as a necessary complement to advances in doctrine or theory. Good policy runs on an infrastructure of institutions, and broadband-quality policy cannot be delivered on dial-up-quality institutions. If one asks whether the U.S. antitrust agencies have got things just right today, the answer yesterday and today is no. If one asks whether there are measures in place to get there, the answer is emphatically yes. Better answers to the question of how to assess actual economic effects of enforcement will be key ingredients of reaching that destination.

1 For a representative discussion of current issues, *see Roundtable Discussion on Developments—and Divergence—in Merger Enforcement*, 23 ANTITRUST 9 (Fall 2008).

2 *See* William E. Kovacic et al., *Quantitative Analysis of Coordinated Effects*, ANTITRUST LAW JOURNAL (forthcoming 2009) (discussing connections between merger policy and learning from antitrust enforcement against cartels).

3 In an unpublished lecture at the Federal Trade Commission in the early 1980s, I recall Phillip Areeda borrowing a Cold War metaphor from George Kennan to describe merger control. Areeda said merger policy was antitrust law's program of "containment" because it sought to avoid the expansion of dominance and the growth of oligopolistic market structures which invited tacit coordination that yielded cartel-like results but generally evaded effective intervention by competition bodies.

4 Many competition policy regimes oblige the parties to notify the public enforcement agency of a proposed transaction. In these systems, the parties may not complete the consolidation until the agency has had a period of time to analyze the likely competitive effects. In a number of other systems, premerger notification and review are optional, but many companies choose to report proposed mergers in advance and allow the authority to review them before the integration of assets takes place.

5 In U.S. parlance this is the "second request." In the European Union, it is the second phase inquiry.

6 This advice seems to have primeval, untraceable antecedents.

7 I thank David Hyman for bringing this caution to my attention.

8 For an earlier treatment of this theme, *see* William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEORGE MASON L. REV. 843 (2001).

9 The case for increased efforts to conduct quantitative studies of the effects of merger policy is presented in Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy*, 22 ANTITRUST 39 (Summer 2008).

10 These trends are reviewed in William E. Kovacic, *Using Ex Post Evaluation to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

11 The Federal Trade Commission at 100: Into Our 2d Century (January 2009), available at http://www.ftc.gov/os/2009/01/ftc100rpt.pdf.

12 For statements of this normative aim and critical assessments of the efforts of the U.S. enforcement agencies to achieve this goal, *see* Joe Sims et al., *Merger Process Reform: A Sisyphean Journey?*, 23 ANTITRUST 60 (Spring 2009); Joe Sims & Deborah Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L. J.865 (1997).

13 The Federal Trade Commission at 100, *supra* note 11, at 22-23.

14 *See* Carlton, *supra* note 9, at 23 (noting that the dearth of quantitative studies and measures of effectiveness "means that there is no reliable guide for determining whether our antitrust policy is too lax in some areas and too stringent in others").

15 Professor Carlton observes: "Antitrust analysis of proposed mergers has become increasingly sophisticated. Evaluation of antitrust policy has not." *Id*. at 42.

16 *See*, e.g., Thomas G. Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 228 (1988) ("Our experience has been that the U.S. business community has read the enforcement actions of the Reagan administration as an invitation to everyone to merger with anyone.").

17 *See*, e.g., Thomas L. Greaney, *Merger Mania Has Gone Too Far*, ST. LOUIS POST-DISPATCH, Feb. 27, 1991, at 3B ("At the height of the Reagan administration's permissiveness toward corporate mergers, a former assistant attorney general with the Carter administration summarized the advice he was giving clients: 'I simply tell them that there's no merger not worth trying.'").

18 *See*, e.g., Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW CHICAGO OVERSHOT THE MARK 235, 248-51 (Robert Pitofsky ed., 2008) (discussing DOJ decision not to oppose the merger of Whirlpool and Maytag).

19 The popularity of the pendulum metaphor is traced in William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003).

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

21 Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution*, 66 N. C. L. REV. 931, 939 (1988).

22 The New Enforcers, THE ECONOMIST, Oct. 7, 2000, at 79, 80.

23 Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J. L. & PUB. POL'Y 239, 253 (1999).

24 *Klein Spurs Consumer Action to Address Challenges of Information Age, Globalization*, 76 Antitrust & Trade Regulation Report (BNA) 559, 560 (May 20, 1999) (*hereinafter* Kein Spurs Consumer Action) (quoting Joel Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice).

25 Janet L. McDavid & Robert F. Leibenluft, *What Impact Will Bush Have?*, NAT'L L.J., Feb. 5, 2001, at B8.

26 Eleanor M. Fox & Robert Pitofsky, *The Antitrust Alternative*, 62 N.Y.U. L. REV. 931, 931 (1987).

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

28 Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 17 BERKELEY J. INT'L L. 197, 206 (1998).

29 Eleanor M. Fox, *Can We Control Merger Control? – An Experiment, in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW 79, 84 (GLOBAL COMPETITION REVIEW: SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY, 1999). *See also* Jonathan B. Baker & Robert Pitofsky, *A Turning Point in Merger Enforcement: Federal Trade Commission v. Staples*, in ANTITRUST STORIES 311, 315 (Eleanor M. Fox & Daniel A. Crane eds., 2007) ("during the second term of the Reagan Administration, merger enforcement came close to disappearing").

30 Walter Adams & James W. Brock, *Reaganomics and the Transmogrification of Merger Policy*, 33 ANTITRUST BULL. 309, 309 (Summer 1988).

31 *See* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev 936, 945 (1987) (describing the role of William Baxter, Reagan's first Assistant Attorney General for Antitrust, in altering federal enforcement policy in the 1980s: "It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done.").

32 Lloyd Constantine, Remarks Concerning How Antitrust Should Assess the Role of Imports in Market Definition 1, 1 (Oct. 19, 1995) (statement at Federal Trade Commission Hearings on Global and Innovation-Based Competition), available at http://www.ftc.gov/opp/global/speech.htm.

33 *ABA Annual Meeting Emphasizes Competitiveness, International Trade*, 53 Antitrust & Trade Regulation Report (BNA) 311, 315 (Aug. 20, 1987) (remarks of Senator Howard Metzenbaum).

34 Fox & Sullivan, *supra* note 31, at 947.

35 Baker & Pitofsky, *supra* note 29, at 315-16.

36 Eleanor M. Fox & Daniel A. Crane, *Introduction*, in ANTITRUST STORIES 1, 4 (Eleanor M. Fox & Daniel A. Crane eds, 2007).

37 Klein Spurs Consumer Action, *supra* note 24, at 560 (reporting that Joel Klein "expressed belief that the antitrust 'pendulum' on his watch had swung back to the 'middle,' where 'big was not necessarily bad' but government prudently cracked down on anti-consumer deals and practices"); James Toedtman, *Ball Is in His Court*, NEWSDAY, June 7, 1998, at F8 (quoting Joel Klein, Assistant Attorney General for Antitrust: "The pendulum is in the middle.").

38 *See*, e.g., Baker & Pitofsky, *supra* note 29, at 315-16. During their tenure with the enforcement agencies, the Clinton antitrust officials took pains to position their program as occupying the sensible middle ground. *See* Robert Pitofsky, Chairman, Federal Trade Commission, An Antitrust Progress Report for the FTC: Past, Present, and Future, Remarks Before the Antitrust 1996 Conference of Business Development Associates Inc. 2 (Mar. 4, 1996) ("The Commission of the 1990s has tried to strike a middle ground between what many people believe was an excessively active enforcement in the 1960s and the minimalist enforcement of the 1980s."), available at http://www.ftc.gov/speeches/pitofsky/speech4.htm.

39 Robert Pitofsky, *Reinvigorating Merger Enforcement That Has Declined as a Result of Conservative Economic Analysis*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 233, 233 (Robert Pitofsky ed., 2008).

40 Baker & Shapiro, *supra* note 18.

41 *Id*. at 269 n. 31.

42 Pitofsky, *Reinvigorating Merger Enforcement That Has Declined as a Result of Conservative Economic Analysis*, *supra* note 39, at 234.

43 Robert Pitofsky, *Introduction: Setting the Stage, in How the Chicago School Overshot the Mark* 3, 6 (Robert Pitofsky ed., 2008).

44 Baker & Shapiro, *supra* note 18, at 251.

45 *Id.* at 244-46.

46 *Id.* at 247-48.

47 *Id.* at 247.

48 *Id.* at 244.

49 *Id.* at 248-51.

50 *Id.* at 269 & n. 31.

51 *Id.* at 240.

52 *Id.* at 266-67.

53 Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 106 (2002).

54 Statement of Senator Barack Obama for the American Antitrust Institute 1 (Feb. 20, 2008), available at http://www.antitrustinstitute.org/Archives/obama2.ashx.

55 *See*, e.g., Baker & Shapiro, *supra* note 18, at 266 ("We certainly do not propose a return to the horizontal merger control policies and precedents of the 1960s.").

56 The standards of legality established by Supreme Court merger decisions and government enforcement policy in the 1960s and through the early 1970s are described in Kovacic, *Enforcement Norms*, *supra* note 19, at 433-34.

57 Among other contributions, Elman authored the Commission decision that the Supreme Court ultimately upheld in Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967). For a summary of modern criticism of *Proctor & Gamble*, especially its suggestion that efficiencies caused by a merger either were irrelevant to the assessment of legality or might serve to condemn the transaction, *see* Ernest Gellhorn et al., ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 462-63, 466-67 (5th Ed. 2004).

58 Turner's role as Assistant Attorney General for Antitrust from 1965 to 1968 and his contributions to improving the economic foundations of DOJ antitrust enforcement are examined in Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, ANTITRUST 61 (Spring 2003), available at http://groups.haas.berkeley.edu/bpp/oew/Spring03-Williamson.pdf (last viewed 4/12/09).

59 Fox, *supra* note 29, at 84. Federal merger enforcement activities from 1981 to 1986 are documented in Ronald W. Davis, *Antitrust Analysis of Mergers, Acquisitions, and Joint Ventures in the 1980s: A Pragmatic Guide to Evaluation of Legal Risks*, 11 DEL. J. OF CORP. L. 25 (1986). Other surveys of the federal enforcement experience in this period include Leary, *supra* note 53, at 111-21 and Kovacic, *supra* note 19 at 435-47.

60 Fox & Crane, *supra* note 36, at 4. One gets a sense of the alertness of the FTC in the 1980s by reading noteworthy court of appeals opinions involving some of the enforcement decisions. These include Hospital Corp. of America v. Federal Trade Commission, 807 F.2d 1381 (7th Cir. 1986); Federal Trade Commission v. PPG Industries, 798 F.2d 1500 (D.C. Cir. 1986); Federal Trade Commission v. Warner Communications, Inc., 742 F.2d 1156 (9th Cir. 1984). These are not obscure cases.

61 *See supra* notes 31-33 and 42-43 and accompanying text.

62 The contributions of the 1982 DOJ merger guidelines to competition policy are examined in William B. Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L. J. 5 (2000); Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

63 Another recent paper that travels largely the same path, with similar conclusions, based on activity levels is John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, 22 ANTITRUST 43 (Summer 2008).

64 These frailties are examined in Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, 22 ANTITRUST 37 (Summer 2008); *Roundtable Discussion, Advice for the New Administration*, 22 ANTITRUST 8, 13 (Summer 2008) (remarks of Timothy Muris).

65 Baker & Shapiro, *supra* note 18, at 250.

66 For a discussion of this pitfall and other limitations of first-person narrations of antitrust history, *see* William E. Kovacic, *Review of Antitrust Stories*, 4 Competition Policy International 241 (2008).

67 The transaction's competition issues are examined in detail in William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L. J. 805 (2001).

68 The FTC's opposition to Mobil's attempted purchase of Marathon and to Gulf Oil's attempted purchase of Cities Service is discussed in Kovacic, Enforcement Norms, *supra* note 19, at 444.

69 U.S. Government Accountability Office, Energy Markets: Effect of Mergers and Market Concentration in the U.S. Petroleum Industry (2004).

70 *See*, e.g., Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Hearing on the Status of the U.S. Refining Industry Before the House Committee on Energy and Air Quality (July 15, 2004) (prepared statement of William E. Kovacic, FTC General Counsel), available at http://www.ftc.gov/os/2004/07/040715gaspricetestimony.pdf.

71 *See* Kovacic, *Norms*, *supra* note 19, at 433-438 (discussing merger enforcement trends over time); Kovacic et al., *supra* note 2.

72 The relevant jurisprudential developments are described in Kovacic, Enforcement Norms, *supra* note 19, at 433-47; Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 436-38, 451-55, 467-68, 553-54 (2d Ed. 2008).

73 Kovacic et al, *supra* (discussing how recent judicial merger decisions may underestimate competitive dangers).

74 Kovacic, Ex Post Evaluations, *supra* note 10, at 516-32; FTC at 100, *supra* note 11, at 146-53, 166-69.

75 For a discussion of initiatives in the United States, *see* FTC at 100, *supra* note 11, at 100-09.