Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy

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INTRODUCTION

When I began my undergraduate studies in 1970, the reading list for the introductory course in microeconomics included Robert Heilbroner’s *The Great Ascent.*\(^1\) Published in the early 1960s, Heilbroner’s book urged American policymakers to accept the need for “political authoritarianism and economic collectivism” to spur economic growth.\(^2\) Emerging nations deserved “the strongest possible encouragement—and not merely a grudging acquiescence—in finding independent solutions along indigenous socialist lines.”\(^3\) Above all, Heilbroner concluded, the United States “must forge a foreign policy which begins with the explicit premise that democratic capitalism, as a model for economic and political organization, is unlikely to exert its influence beyond the borders of the West, at least within our lifetimes.”\(^4\)

Few observers expected Heilbroner’s premise to be proven wrong so swiftly and decisively. To even imagine in 1970 that, by the end of the twentieth century, only a handful of countries would embrace central economic planning, would have constituted proof of delusion. The economic and political transformation of former communist and socialist countries in Africa, Asia, Central and Eastern Europe, Latin America, and

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\(^{2}\) *Id.* at 148.

\(^{3}\) *Id.* at 150.

\(^{4}\) *Id.* at 149.
the former Soviet Union is one of the most remarkable stories of our time.\(^5\)

To a striking degree, antitrust has been a component of the mix of law reforms that transition economies have adopted to move from central planning to market processes.\(^6\) In the past twenty years, over forty transition economies have enacted new antitrust laws.\(^7\) As many as twenty other transition nations are considering the creation of new competition policy systems.\(^8\) In 1950, the United States alone had a robust system of antitrust laws; by 2010, the number of countries with competition laws could exceed 100, most of them consisting of former communist or socialist states.\(^9\) Encouragement by and pressure from Western countries have contributed substantially to the establishment of new antimonopoly regimes. Advisors from the United States and the European Union (EU) have played an important role in shaping the substantive commands and

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\(^9\) See Kovacic, *Merger Enforcement*, supra note 6, at 1077 (tracing the past and projected development of antitrust laws).
implementation mechanisms of the new antitrust laws. I have participated in this process by working on competition policy projects for the governments of Benin, Egypt, El Salvador, Georgia, Indonesia, Mongolia, Morocco, Nepal, Russia, Ukraine, Vietnam, Guyana, and Zimbabwe. Transition economy officials have frequently asked me and other foreign advisors to describe Western antitrust institutions and to identify the best practices of mature competition policy regimes.

Responding to questions about Western experience has given me many opportunities to reassess the U.S. antitrust system. While recognizing that distinctive national conditions can make general recommendations problematic, the host country reformers want foreign advisors to identify the types of laws and implementing institutions they would propose if they were starting with a blank sheet of paper. It is impossible to do so without critically evaluating the system of one's own country.

This article examines existing American antitrust institutions in light of the advice that Western observers often give transition economies about creating new antimonopoly regimes. The article considers several normative criteria for antitrust laws that Western advisors tend to urge upon transition economies, and measures U.S. institutions by those criteria. I focus on six elements of guidance that foreign advisors offer to transition economies: heads of state and legislatures should appoint individuals with substantial relevant expertise to head national competition authorities; institutional clarity and simplicity are desirable objectives in designing enforcement mechanisms; policymaking should be transparent; nominal legal commands and actual enforcement policy should be congruent; antitrust agencies should subject the results of their work to

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continuing evaluation, including scrutiny by outsiders; and a high priority of competition law should be to forestall government intervention that suppresses business rivalry. The article suggests that the American antitrust system would improve if U.S. policymakers embraced the advice that Western officials often give to transition economy governments.

I. QUALITY OF APPOINTMENTS

Nominal legal commands, such as antitrust statutes, count for little without effective means for their enforcement. In most countries, public enforcement institutions play the central role in implementing competition policy commands, including prohibitions on specific behavior, the preparation of enforcement guidelines, and the performance of advisory and competition advocacy functions inside the government. To a large degree, a country reveals the intensity of its commitment to enforce the law through its choice of officials to head its public enforcement institutions. The more capable the appointees, the more serious the nation’s intent to implement its laws effectively.

In discussions with transition economy governments, Western advisors routinely emphasize the importance of selecting highly qualified individuals to head new competition agencies. Transition economy governments are told that expert leadership is essential to the ability of antitrust agencies to make sound enforcement choices and gain the respect of business operators, consumers, and courts. Good appointments, alone, are insufficient to ensure success, but without them there is little point in trying.

12 See Kovacic, Reforms in Transitional Economies, supra note 5, at 1214 (noting that in the absence of implementing institutions, statutes may create more problems than solutions).

A. The U.S. Experience: The Federal Trade Commission

In selecting leaders for its own independent competition agency, the Federal Trade Commission (FTC), the United States has followed its own advice about the importance of leadership appointments halfheartedly.\(^{14}\) The selection of Commissioners of truly outstanding ability in the FTC's areas of responsibility—antitrust and consumer protection—has been unusual rather than routine. For the FTC's first half-century, the overall record of appointments to the agency was dismal.\(^{15}\) With rare exceptions, the agency became an outlet for the political largesse of the Congress or the President.\(^{16}\) Although the overall quality of FTC appointments has improved since the late 1960s,\(^{17}\) it remains the case in the modern era that few appointees have arrived at the agency with significant experience in the fields of antitrust or consumer protection.\(^{18}\)

Nor have the agency's Commissioners featured the diversity of backgrounds in business, economics, and law that Congress envisioned in 1914 when it created the FTC.\(^{19}\) Of the seventy-

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\(^{15}\) See Kovacic, Quality of Appointments, supra note 14, at 930–33 (recounting the views of blue-ribbon groups and individual commentators on the quality of FTC appointees from 1914 through the 1960s).

\(^{16}\) In 1976, two scholars published a scathing study of appointments to the FTC and the Federal Communications Commission from 1949 through 1974. The authors said:

Commission seats are good consolation prizes for defeated Congressman; useful runner-up awards for persons who ricochet into the appointment as a result of a strong yet unsuccessful campaign for another position; appropriate resting berths for those who have labored long and hard in the party vineyards; and a convenient dumping ground for people who have performed unsatisfactorily in other more important Government posts.

Graham & Kramer, APPOINTMENTS, supra note 14, at 391.

\(^{17}\) See Kovacic, Quality of Appointments, supra note 14, at 934–35 (noting that the FTC's membership has increased in capability since 1969).

\(^{18}\) See id. at 935–39 (describing trends in appointments since 1969).

\(^{19}\) See id. at 918–22 (discussing congressional expectations in 1914 for qualifications of FTC Commissioners); see also William H. Hardie III, The Independent Agency After Bowsher v. Synar: Alive and Kicking, 40 VAND. L. REV.
three individuals who have served as FTC Commissioners, only four have been economists or individuals with graduate degrees in business administration. Only six of the FTC's seventy-three Commissioners have had business backgrounds at the time of their appointment. No person with substantial experience as a business manager has been appointed to the FTC since 1929.

Appointments to the FTC during the Clinton Administration exemplify the recurring weaknesses of the selection process. President Clinton has appointed two members, Thomas Leary and Robert Pitofsky, of unquestioned prominence and achievement in the subject matter of the Commission's jurisdiction. Clinton's other appointees include an attorney with no previous experience in the field (Christine Varney); an attorney with no antitrust or consumer protection experience but with expertise in intellectual property (Sheila Anthony); an attorney with a limited background in antitrust but with private practice experience in corporate dealmaking and experience as a public official in public finance and privatization (Mozelle Thompson); and a former political advisor who is neither an attorney nor an economist (Orson Swindle). Five of the Clinton appointees are lawyers, none are economists, and none have substantial experience as business managers (although Leary served in the General Counsel's office of General Motors).

By some standards, one could say that this pattern of appointments is acceptable. All of Clinton's appointees are bright and capable individuals. Like a number of their
predecessors, those who initially lacked substantial expertise in the FTC's areas of responsibility have gained relevant knowledge on the job. After all, one might reason, antitrust and consumer protection are not neurosurgery. In the course of a practicing career, many economists and lawyers with no substantial expertise in antitrust or consumer protection operate, in at least some sense, at their periphery and acquire a general awareness of what these areas involve. During a year or so at the Commission, an intelligent person can absorb enough knowledge about the relevant substantive and institutional frameworks to achieve respectable work.

This undemanding measure of quality has become the standard for evaluating appointments to the FTC. Such a standard is entirely unsatisfactory. The universe of individuals with extensive expertise in consumer protection and competition policy in the United States is incomparably large and richly diverse by any benchmark of demography or political perspective. There is no human capital barrier to selecting Commissioners who not only are intelligent and respected as professionals but are also unmistakably expert in the fields of antitrust or consumer protection at the time of their appointment. It would be fascinating to know how the Clinton White House—or, indeed, any earlier presidential administration—performed its search for FTC Commissioners. How did the White House identify the candidates? Who was asked to be considered for the position? Of all those who welcomed consideration, which names appeared on the "short list" of prospective nominees? Why did the White House believe its chosen nominees were best suited to join the Commission? What contribution did the U.S. Senate, in exercising its confirmation powers, make to ensuring that the search was broad and rigorous?

One suspects that the outcome of such a study would be embarrassing. There was probably no routine systematic effort of the type suggested above to seek out potential nominees with distinguished backgrounds in economics or the law of antitrust or consumer protection. For the Clinton White House and the

25 See ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 135 (1980) [hereinafter KATZMANN, REGULATORY BUREAUCRACY] (discussing appointments to the FTC and observing that "[u]sually the White House does not actively search for qualified individuals
Senate to do no better than have two of six appointees since 1993 take Commissioner positions with substantial relevant substantive expertise is indefensible and cannot be explained by limitations in the talent pool. There is no principled reason for failing to make each appointment count towards increasing the agency's capability and prestige. Only a conscious decision to dispense political patronage or reward accomplishments unrelated to the protection of competition or consumers can explain such lackluster results.

B. The Transition Environment

The contrast between the level of commitment by the United States to make top quality appointments to the FTC and the degree of effort by various transition economy competition authorities to select superior leaders for their competition agencies is jarring. Many transition economies have allocated precious human capital — individuals with substantial background in market-oriented economics or law — to leadership positions in their new competition agencies. In these countries, progress toward creating sturdy foundations for public enforcement is directly attributable to inspired appointments to top management positions in the competition agency.

Current and former transition economy officials, such as Beatriz Boza of Peru, Rafael Carles of Panama, Anna Fornalczyk of Poland, Ana Juliar Jatar of Venezuela, Gesner Oliveira of Brazil, and Olexander Zavada of Ukraine, would be proud additions to the Western competition agencies that have given these same transition economy officials advice. It is difficult to overstate the dedication, technical skills, and leadership qualities of these individuals and many of their colleagues in the transition economy environment. A closer look at experiences in

but reacts to campaigns waged by candidates or their sponsors)

26 See William E. Kovacic, The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries, 11 AM. U. INT'L L. & POL'Y 437, 468-70 (1996) [hereinafter Kovacic, Law Reform] (discussing Poland's and the Ukraine's appointments of experienced individuals to competition agencies); Song, supra note 13, at 420 (noting that because competition policy is so complicated, it requires highly qualified people, and therefore Taiwan selects commissioners for its competition agency from those experienced in law, economics, and finance).

27 See Kovacic, Law Reform, supra note 26, at 468-70 (describing the importance of leadership in the success of new transition economy competition agencies).
Brazil and Peru illustrates how a number of transition economies have taken the appointment of competition agency leaders more seriously than the United States takes the selection of FTC Commission members.

1. Brazil

In Brazil, the principal competition policy authority is the Conselho Administrativo de Defesa Economica (CADE). For several days in August 1998, I visited CADE’s headquarters in Brasilia. I spent a considerable amount of time discussing competition policy issues with CADE’s six commissioners and attended a public meeting at which CADE discussed a pending merger. In private conversations, each of the CADE commissioners revealed a sophisticated understanding of both the technical details and broader policy considerations of competition policy analysis. Their backgrounds suggested why this was so. Three commissioners had doctorates in economics or finance. Two held doctoral degrees in law (the equivalent of the JSD degree in the United States) and had written their dissertations on topics involving competition policy. The sixth commissioner held an LL.M degree from the Harvard Law School and was writing his JSD dissertation for a Brazilian university on merger policy.

The expertise of the CADE commissioners was apparent during the public meeting on the merger. All six CADE members participated in a free-wheeling discussion of the transaction. They addressed previous CADE merger decisions and examined the transaction in light of current developments in doctrine and policy in the EU and the United States. The members debated fine points of the EU and United States merger guidelines, judicial decisions, and the recent academic literature from economic and legal commentators. I wonder whether the current FTC could conduct a comparable discussion.

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29 CADE’s enabling statute provides for seven commissions. There was one vacancy at the time of my visit. For information about the structure of CADE, see Administrative Council of Economic Defense (visited Mar. 15, 2000) <http://www.mj.gov.br/cade/inicial.htm>. 
about a merger in which all five commissioners, without the prompting of their advisors, demonstrated a comparable mastery of the substantive competition policy issues.

2. Peru

Peru’s competition policy body is the National Institute for Defense of Competition and Protection of Intellectual Property ("Indecopi").\textsuperscript{30} Indecopi is distinctive among new competition policy systems in several respects. The first is its institutional form. Indecopi consolidates several competition-policy related functions into a single organization.\textsuperscript{31} Indecopi has three “jurisdictional bodies.” The first is the Free Competition Chamber, which consists of seven separate Commissions responsible for Free Competition, Dumping and Subsidies, Consumer Protection, Repression of Unfair Competition, Technical and Commercial Standards, Market Access, and Market Exit (Bankruptcy).\textsuperscript{32} The second jurisdictional body is the Intellectual Property Chamber, which has separate Offices for Trademark, Patent, and Copyright issues.\textsuperscript{33} Rulings of the individual Commissions and Offices are subject to review by the third jurisdictional unit, the Tribunal for the Defense of Competition and Intellectual Property, whose decisions may, in turn, be appealed directly to Peru’s Supreme Court.\textsuperscript{34}

Two aims have motivated Peru’s decision to combine these functions into one institution. The first is to ensure that government policies in a variety of distinct areas that affect competition facilitate the accomplishment of market-oriented goals. This includes ensuring that the attainment of pro-competition objectives—ordinarily associated with antitrust law—is not undercut by the pursuit of competition-suppressing


\textsuperscript{31} See Rodriguez & Williams, supra note 30, at 171–72 (discussing Indecopi's provisions for enforcement, regulation, and administrative courts).

\textsuperscript{32} See id. at 15-18 (describing these commissions as the enforcers of antitrust law).

\textsuperscript{33} See id. at 17-18 (describing these officers as responsible for regulation of intellectual property).

\textsuperscript{34} See id at 17.
policies in consumer protection enforcement or anti-dumping programs. The second rationale is to make the best use of a comparatively limited pool of specialists with training in market-oriented economics and law. Like many transition economies, Peru does not yet have access to a large reservoir of individuals with formal training or experience in competition law or industrial organization economics. Rather than attempt to create a number of new institutions with more narrowly defined responsibilities, the unification of competition-related functions in one body enables a core team of specialists to apply their skills to a variety of problems posing related conceptual issues.

Indecopi's experience is noteworthy for reasons beyond its institutional novelty. The first is the exceptional capability of its leadership. Overseeing the operations of Indecopi, which now employs approximately 300 individuals, is a Board of Directors, headed by its president. From January 1995 until August 2000, Indecopi's president was Beatriz Boza. In recent years, the global competition policy community has not seen a leader more impressive than Boza. With a J.D. from the Pontificia Universidad Catolica del Peru and an LL.M. from the Yale Law School, Boza spent several years with Shearman & Sterling's New York office before returning to Peru to head Indecopi. Her powerful vision of a market-oriented legal framework and charismatic style enabled her to attract first-rate attorneys and economists—many with advanced degrees from Western universities—to Indecopi. Within Peru, Indecopi has become a coveted career opportunity for the top graduates from the country's economics departments and law schools.

Boza's vision is reflected in the efforts Indecopi has devoted to building a sound institutional foundation for developing substantive policies. In addition to assembling a superb professional staff, Boza devoted the first years of the agency to establishing administrative structures, procedures, and activities that ensure consistency and integrity in the agency's operations and imbue the institution with widely-accepted methodologies and values that will survive the departure of individual managers or operational personnel. Indecopi has also clearly understood the value of education, publicity, and other outreach efforts in the early stages of a competition policy institution in a transition environment. Among other strategies, Indecopi has emphasized the distribution of consumer
information and the informal mediation of disputes as ways to make the country's new market-oriented laws accessible to consumers and business operators.

C. The Complacent U.S. Competition Policy Community

Measured by the overall quality of appointments, the FTC fares poorly compared to Brazil, Peru, and a number of other transition economies. It might be comforting to assume that the limited competition policy expertise of various FTC appointees is invisible to the transition economy audience. This is not so. Though they lack extensive hands-on experience in implementing competition laws, many transition economy officials have studied the U.S. experience carefully and know the backgrounds and accomplishments of the FTC Commissioners who appear before them in international forums. In public, the transition economy officials effusively praise even the most modestly qualified FTC Commissioners. Privately, they express surprise to see that a number of FTC Commissioners have little background in antitrust or consumer protection and have acquired their familiarity with these fields on the job.

The unimpressive quality of many FTC appointments is made possible, in part, by the passivity of the antitrust bar that practices before the Commission and the business community that is subject to its decisions. Practitioners and affected business operators fear that a nominee lacking preeminence in antitrust or consumer protection may punish critics if confirmed. Even to raise the issue of appointments for public discussion might displease incumbent Commissioners who might not have been selected if their own appointments had been tested by a rigorous expertise standard ex ante. The American Bar Association's Section of Antitrust Law has occasionally issued blue ribbon studies that question the quality of past FTC appointments, but usually in terms so mild and oblique as to be meaningless.35 The ABA and the rest of the antitrust bar scrupulously avoid confronting deficiencies in proposed appointments. Aside from grumbling that takes place in private conversations, the antitrust community meekly accepts

35 See Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, reprinted in 58 ANTITRUST L.J. 43, 118 (1989) (stating that the special committee was “troubled by the uneven quality of FTC appointments”).
uninspiring nominees as though an immutable law of nature ordained their appointment.

Like many members of the U.S. antitrust community, I once subscribed to a policy of praising FTC appointments in public and criticizing weaker nominees privately and quietly. A consulting trip to Kiev in 1994 to work with Ukraine’s Antimonopoly Committee (AMC) changed my mind on this issue. During a seminar for the AMC’s professional staff on the institutional prerequisites for success of competition agencies, I stressed the importance of good appointments to key leadership positions. One seminar participant asked me to assess the quality of the FTC Commissioners. At first I was tempted to say that the FTC appointees, though not uniformly strong, were generally experts in the Commission’s areas of responsibility. Before I spoke, I noticed that the audience was watching attentively to see how I would respond. This was not an innocent inquiry. It was a test: would the Western visitor speak the party line or answer candidly?

I directly acknowledged that the history of appointments to the FTC was disappointing. Had I dissembled, the Ukrainians would have doubted anything else I might have said. My questioner had studied the issue and knew the relevant history. He and his colleagues would immediately detect an evasion. The Ukrainians also were aware that their own government had appointed a number of first-rate individuals to the AMC. Ukraine’s effort to find capable commissioners highlighted the comparatively feeble commitment of the United States to find truly superior nominees for the FTC. If Ukraine can find commissioners such as Olexander Zavada, Svetlana Moroz, and Andrei Melnichenko to the AMC, it hardly asks too much of the United States to make every appointment to the FTC reflect the extraordinary capabilities of the country’s antitrust and consumer protection talent pool.

II. RATIONALITY IN THE STRUCTURE OF PUBLIC ENFORCEMENT

A central issue in the design of new competition policy institutions in transition economies is the proper structure of

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The conventional wisdom of Western advisors is that transition economy governments should seek to establish rational mechanisms for enforcing the law. Rationality dictates that competition systems should clearly delineate enforcement responsibilities and ensure clarity and consistency in articulating government policy. Increases in the complexity of enforcement structures must be justified by their capacity to improve the implementation of the law. For example, some diversification of the sources of enforcement power may be appropriate as a safeguard against default by the principal public prosecutorial body. Concerns about enforcement structures reflect the awareness that the choice of institutional design for implementation can greatly affect the substance of public policy.

The U.S. antitrust enforcement scheme fares poorly when measured by this criterion. An extraordinary number of public authorities share power to enforce the nation's competition laws. In sectors such as communications and energy, a vast collection of federal, state, and municipal bodies assert power under the antitrust laws and various other statutes to assess the competitive significance of individual mergers. One could never

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37 See generally Kovacic, Reforms in Transitional Economies, supra note 5, at 1209-14 (discussing the importance of institutional design to the successful operation of antitrust and consumer protection laws).

38 See id. at 1214 (stating that without rational mechanisms to implement antitrust and consumer protection laws, such laws may create more harm than good).

39 See Khemani & Dutz, Instruments of Competition Policy, supra note 13, at 27 ("Granting sole enforcement power to an organ of the government invites problems related to lack of transparency, corruption, and misuse of power . . . ."); Stephen Calkins, Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties, 60 LAW & CONTEMP. PROBS. 127, 161 (1997) (summarizing the benefits of private enforcement as a complement to public enforcement of antitrust laws in the United States).

40 See Colin Scott, Institutional Competition and Coordination in the Process of Telecommunications Liberalization, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 382 (Joseph McChahery et al. eds., 1996) (analyzing how different constitutional and institutional arrangements yielded contrasting telecommunications policy outcomes in the United States and the EU, respectively); Gary Hewitt, Background Note, 1 OECD J. COMP. L. & POL'Y 177 (1999) (reviewing the interrelationship between institutional regulatory design and the substance of competition policy).

41 See William E. Kovacic, The Influence of Economics on Antitrust Law, 30 ECON. INQUIRY 294, 295 (1992) (stating that consumers, antitrust agencies, state attorneys general, and others have standing to bring antitrust actions).
imagine that an external advisor would urge a transition economy to emulate an enforcement mechanism that is so prone to fragment policymaking responsibility, generate inconsistent outcomes, and increase the costs of executing the law.

A. Decentralizing the Decision to Prosecute

More than any other system of antitrust enforcement, the United States has decentralized prosecutorial power. Statutes and case law confer standing on two federal agencies, the Department of Justice and the FTC, and a variety of other “persons,” including state attorneys general, consumers, and business enterprises. The multiplicity of prosecutorial agents severely limits the ability of any single agent to establish consistent enforcement policies. Unless Congress or the courts establish binding rules that apply to all prosecutorial agents, any single agent can undermine policy adjustments undertaken or sought by other agents.

Two principal features of the public enforcement mechanism deserve reassessment. The first is dual federal enforcement. In theory, having two public institutions compete to perform the same service could reduce the cost and improve the quality of that service. In practice, however, there is scant evidence that dual federal enforcement by the FTC and the Justice Department to prosecute the same antitrust commands and make policy concerning the same industrial phenomena has improved the application of the antitrust laws. Congress’s experimentation with dual federal enforcement by creating the FTC in 1914 was sensible, but actual experience has not vindicated the legislative expectations that inspired that experiment. American advisors do not recommend that transition economies duplicate the dual enforcement experiment.

A second troubling aspect of the distribution of public

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42 See id. at 295–96 (analyzing the structure of U.S. antitrust enforcement and its implications for the development of antitrust policy).
43 See id. at 295 (“No single gatekeeper controls access to the courts or determines what ideas may be asserted to support antitrust claims.”).
44 See id. (noting that the rejection of certain theories by one institution does not restrain other institutions from adopting them).
46 See id. at 522-35 (discussing experience with FTC antitrust enforcement).
enforcement power involves the role of state antitrust bureaus. The delegation of prosecutorial power to state governments can impede the development of rational national public enforcement policies.\(^47\) In a number of areas of antitrust policy, state governments can curb efforts by the federal antitrust agencies to design and execute coherent competition policy.\(^48\) The restrictive effect of state participation is greatest when state officials object to federal efforts to retrench antitrust enforcement.

The costs of having parallel federal and state review of business behavior under the federal antitrust statutes are especially evident in several areas of antitrust enforcement. Perhaps the most noteworthy involves controls on mergers and distribution practices. The policies of the National Association of Attorneys General (NAAG) toward mergers are materially more restrictive than the policies of the federal antitrust agencies.\(^49\) NAAG's 1993 Horizontal Merger Guidelines\(^50\) deviate significantly from the federal merger guidelines by expanding the range of circumstances in which the states will attack proposed acquisitions.\(^51\) As a matter of law, the decision of a federal agency concerning a merger does not preclude the states from attacking the same transaction.\(^52\) In practice, the states have challenged mergers under more stringent thresholds than those applied by federal authorities,\(^53\) and have used their

\(^{47}\) See ABA ANTITRUST SECTION, MONOGRAPH NO. 21, STATE MERGER ENFORCEMENT 67-70 (1995) [hereinafter STATE MERGER ENFORCEMENT] (discussing the conflict between federal and state guidelines and the resulting confusion to the public).

\(^{48}\) See id. (“[D]ifferences in state and federal merger enforcement philosophies can produce substantial complications.”).

\(^{49}\) See id. at 65-70 (documenting state government preferences for more aggressive application of federal antitrust controls on mergers).


\(^{51}\) See STATE MERGER ENFORCEMENT, supra note 47, at 66-68 (analyzing respects in which NAAG merger guidelines stake out broader enforcement terrain than federal merger guidelines).

\(^{52}\) See California v. American Stores Co., 495 U.S. 271, 284-85 (1990) (explaining that merger enforcement by private persons, including state governments, was “an integral part of the congressional plan for protecting competition”); AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 575 (7th Cir. 1999) (“Courts do not generally defer to an agency’s decision not to challenge a merger.”).

enforcement power to block business restructurings that would reduce employment within their borders. State intervention to review and challenge a merger would be justifiable where the merger's effects occur entirely or chiefly within that state's borders, and the transaction does not raise larger competition policy concerns that affect the nation as a whole. The states have not so delimited their merger enforcement efforts to date; instead, they have devoted considerable resources to reviewing transactions that have major national competition policy implications and fully occupy the attention of the federal antitrust agencies. As a result, firms must spend resources anticipating and accommodating the desires of state antitrust officials, even if it means providing concessions that federal officials do not demand.

The autonomy of state antitrust officials to shape merger policy and resist federal policy preferences confronts federal authorities with a difficult choice. Federal antitrust officials can publicly criticize state participation in the review of transactions with national significance, but past efforts by federal officials to discourage state involvement by condemning state intervention have failed to stymie state participation and may have strengthened the states' resolve to persevere.56 A second


54 See Pennsylvania v. Russell Stover Candies, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,224, 70,095 (E.D. Pa. 1993) (denying the state's motion for a preliminary injunction against the acquisition of a company's competitor); Stanley Works v. Newell Co., 1992-2 Trade Cas. (CCH) ¶ 70,008, 68,896–97 (D. Conn. 1992) (ordering enforcement of an agreement between the state and Newell in which Newell agreed to discontinue its effort to acquire a competitor and to sell all concurrently-held interests in that competitor); see also STATE MERGER ENFORCEMENT, supra note 47, at 69–70 (discussing employment-related concerns that motivated the state's decision to prosecute in Russell Stover and Newell).

55 See Robert H. Lande, When Should States Challenge Mergers: A Proposed Federal/State Balance, 35 N.Y.L. SCH. L. REV. 1047, 1072–89 (1990) (suggesting that the allocation of responsibility between federal and state antitrust regulators depends upon the size of transactions and the geographic area in which a transaction has its principal competitive effects).

56 During Ronald Reagan’s Presidency, top leadership at the FTC and the Justice Department publicly deplored state government efforts to expand their role in reviewing mergers. See 60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division, 58 ANTITRUST L.J. 377, 381 (1989) (stating that state attorneys general “are more interested in headlines than in sound law enforcement, [and] have begun to use antitrust enforcement as a means of
approach is for the federal agencies to cooperate with the states and seek to convince the states of the wisdom of the federal enforcers’ preferences. During the Bush Administration, and with greater intensity during the Clinton Administration, federal antitrust officials have pursued a strategy of cooperation and persuasion. By this approach, the federal agencies hope to co-opt state authorities by publicly acknowledging the states as partners or co-equals in public antitrust enforcement, and undertaking collaborative activities such as the establishment of information-sharing and joint enforcement efforts. The federal officials’ apparent hope is that through extended contact and cooperation, the FTC and the Justice Department will pull state policy increasingly within the orbit of federal analytical methodologies and enforcement tastes.

The federal agencies may temper some of the most expansive enforcement impulses of the state governments, but no amount of federal-state cooperation will yield harmonized policies that converge on federal norms. As a condition for harmonization, state officials will force federal agencies to make concessions that broaden the zone of liability beyond the limits that the federal agencies, acting alone, would establish. The states will resist and retard efforts by federal officials to implement competition policies that loosen limits on mergers.

advancing their political careers”); Daniel Oliver, Federal and State Antitrust Enforcement: Constitutional Principles and Policy Considerations, 9 CARDOZO L. REV. 1245 (1988) (presenting the FTC Chairman’s criticism of the expansion of state enforcement). These attacks did not diminish the enthusiasm of state officials to challenge mergers and other behavior under the federal antitrust laws. See Lloyd Constantine, The States’ Role in Challenging National Mergers Is Vital, 3 ANTITRUST 37, 38 (1989) (presenting the observation by the principal state antitrust enforcement official that “antitrust practitioners know where to go to speak with people who are still seriously interested in enforcing the law that Congress enacted. These people work for NAAG and the state attorneys general”).

In 1998, the FTC, the Justice Department, and state attorneys general established a protocol for coordinating the review of mergers. See Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (last modified Mar. 11, 1998) <http://www.usdoj.gov/atr/public/guidelines/1773.htm>.

58 See Federal Trade Commission Hearings on Global and Innovation-Based Competition (Nov. 7, 1995) (visited Feb. 12, 2000) <http://www.ftc.gov/opp/global/macleod.htm> (prepared statement of William C. MacLeod) (“Even if the Commission recognizes... dynamic efficiencies, the failure of state regulators to recognize the welfare effects of nonprice competition threatens to block beneficial transactions.”); see also Kevin J. O’Connor, Efficiencies: Should Current Antitrust Policy Be Changed?, Comments Before the FTC’s Hearing on Changing Nature of
Where federal authorities seek to establish more permissive public enforcement policies toward consolidation and desire such policies to be truly national in scope, they must either persuade the states to accept such policies or convince Congress to limit the states' role in merger oversight for transactions with significant regional or national effects.

Merger enforcement is not the only area of antitrust activity in which the states exert a powerful influence on the formulation of national competition policy. NAAG's approach to distribution practices is generally more interventionist than the preferences of the federal antitrust agencies. NAAG's 1995 Vertical Restraints Guidelines\(^{59}\) prescribe enforcement approaches—such as a willingness to use criminal sanctions to challenge resale price maintenance\(^{60}\)—that the federal antitrust agencies are unlikely to endorse. Since 1992, the federal agencies have joined the states in challenging minimum resale price maintenance (RPM).\(^{61}\) The states have matched the federal agencies in attacking RPM and non-price vertical restraints.\(^{62}\)

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\(^{60}\) See NAAG, VERTICAL RESTRAINTS GUIDELINES, supra note 59, at 21,153 ("Although such criminal challenges have been infrequent, RPM may be prosecuted by the attorneys general in appropriate cases where state antitrust laws provide for criminal sanctions.").

\(^{61}\) See United States v. California SunCare, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,843 (C.D. Cal. 1994) (analyzing a Justice Department consent decree banning a producer of indoor tanning products from imposing RPM on its dealers); David A. Balto, Antitrust Enforcement in the Clinton Administration, 9 CORNELL J. L. & PUBLIC POLY 61, 97-102 (1999) (describing FTC RPM initiatives during the Clinton Administration).

United States Supreme Court's deliberations in *State Oil Co. v. Khan*\(^6^3\) that led to the Court's reversal of the per se ban on maximum RPM, over thirty states filed a joint amicus curiae brief urging the Court to retain the per se prohibition.\(^6^4\) Both the FTC and the Justice Department filed briefs supporting the use of a rule-of-reason test for maximum RPM.\(^6^5\)

A final noteworthy area of state participation in formulating national competition policy concerns dominant firms. The recent government suits against Microsoft underscore the anomalies of multiplicity in public antitrust enforcement.\(^6^6\) Microsoft has been the subject of close attention by federal antitrust officials since the late 1980s.\(^6^7\) On May 18, 1998, the Justice Department filed a complaint accusing the software giant of illegal restraints of trade under section one of the Sherman Act and of illegal monopolization and attempted monopolization under section two of the Sherman Act.\(^6^8\) On the same day, twenty state governments jointly filed a parallel action,\(^6^9\) which the United States District Court for the District of Columbia consolidated with the federal government's case.\(^7^0\) The Justice Department and the states have cooperated in gathering evidence, deposing witnesses, and in conducting the trial, although the Justice Department played the dominant role in questioning witnesses.

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\(^6^3\) 522 U.S. 3 (1997).


\(^6^7\) For the history of the federal antitrust agencies' scrutiny of Microsoft, see William H. Page, *Microsoft and the Public Choice Critique of Antitrust*, 44 ANTITRUST BULL. 5, 12–30 (1999).


and making arguments at trial.\footnote{See James V. Grimaldi, Microsoft Trial Puts States in Back Seat Out for Blood, SEATTLE TIMES, Dec. 26, 1999, available in 1999 WL 30979770 (describing the limited role of state attorneys general in conducting the Microsoft trial).}

Despite their limited role in the courtroom, the states have considerable power to limit the Justice Department's freedom to define and prosecute the Microsoft case. Most important, the states have a strong voice in negotiating settlement terms or shaping the position of the government plaintiffs with respect to remedies. The Justice Department is unlikely to welcome a public disagreement with its co-plaintiff, particularly if the states depict the Antitrust Division as being too soft on the defendant. To avoid engaging in a debate with the state plaintiffs over whether the Justice Department's litigation strategy is sufficiently aggressive, the Justice Department will probably go to great lengths in order to accommodate state preferences. In doing so, the chief antitrust enforcement body of the United States necessarily loses a substantial measure of control over its own case.\footnote{See id. (describing the interplay between state plaintiffs and the Department of Justice throughout the Microsoft suit).}

In effect, the disposition of the federal government's Microsoft antitrust case—one of the most significant in over a century of experience under the Sherman Act—depends significantly on the preferences of state government officials who are not accountable to the public as a whole, and may be far more receptive than the Justice Department to entreaties from parochial interests within their own boundaries.\footnote{See Christopher Georges, Politics Play a Role in States' Status in Microsoft Suit, WALL ST. J., May 28, 1998, at A24 (describing political motivations for participation and non-participation by various state governments in the Microsoft case); but see Jesse W. Markham, Jr., Local Politics and the Microsoft Suit, N.J.L.J., June 8, 1998, at 24 (“NAAG is not free from the political interests of its members. But contrary to some detractors, these joint efforts are more fully shaped by diligent staff work than by those aspiring to governorship.”).}

One can only wonder about the Justice Department's unvarnished assessment of what is added or lost through its partnership with the states in the federal Microsoft litigation. Does the Justice Department lack the institutional capacity and courage to prosecute the case vigorously and effectively by itself? Do the states have special insight into the interests of consumers that the Antitrust Division tends to undervalue? If the states' presence in the Microsoft case as prosecutors is desirable, would
it be useful for the states to shadow the Justice Department or the FTC in other civil cases of substantial national importance? A fuller discussion by the U.S. antitrust community would help answer these questions and evaluate the wisdom of having two or more public enforcement authorities prosecute the same conduct.\textsuperscript{74} Perhaps it is only through the litigation of cases and the establishment of binding doctrinal constraints by the federal courts that national competition policy will truly be harmonized and the fragmenting influences of individual public prosecutors can be curbed.

B. The Case of Regulated Industries

In the energy and telecommunications sectors, many government bodies share authority to formulate competition policy. Parties to a merger in the energy or telecommunications industries are subject to challenge on competition grounds by the federal antitrust agencies, the federal sectoral regulators (the Federal Communications Commission or the Federal Energy Regulatory Commission), the attorney general of any state in which they do business, and the public service commission (PSC) of every state in which they operate.\textsuperscript{75} The competition policy mandates of the federal sectoral regulators and the state PSCs are not identical to the mandate of the FTC and the Justice Department under the federal antitrust laws, but are broad enough to permit the sectoral regulators and states to examine the same issues as the federal antitrust agencies and reach different outcomes. Municipal authorities have also asserted the right to impose competition policy conditions upon mergers of cable television system operators.\textsuperscript{76}


\textsuperscript{75}See generally William E. Kovacic, The Impact of Domestic Jurisdictional Multiplicity on the International Harmonization of Competition Policy (June 1999) (unpublished manuscript prepared for the International Competition Policy Advisory Committee) (on file with author) (discussing the framework for competition policy analysis of mergers in sectors formerly or currently subject to extensive public utility regulation).

\textsuperscript{76}The U.S. Court of Appeals for the Ninth Circuit recently disapproved an effort by the City of Portland to mandate open access to a local cable television network's high-speed data system as a condition for transferring its local cable television franchise to AT&T as part of a merger agreement. See AT&T Corp. v. City
The possibility of applying inconsistent or contradictory standards under the status quo is substantial. The federal antitrust agencies and sectoral regulators may apply different standards of review, and these standards, in turn, may deviate from the approaches used by state regulators. One cannot imagine proposing to a transition economy that it subject mergers involving regulated firms to independent competition policy reviews by two national regulation entities (the antitrust agency and the sectoral regulator), by the state attorneys general (using their status as plaintiffs under the federal antitrust laws), and by state regulators in every jurisdiction in which the parties operate.

III. TRANSPARENCY

A basic principle of law is that the rationale for public policies and the process by which public instrumentalities make policy be transparent. Transparency is an important antidote to many pathologies of public administration. It promotes clarity in policy formation, increases the understanding of legal commands by affected parties, and disciplines the exercise of discretion by public officials by subjecting their actions to external review and criticism. Western advisors frequently urge transition economy antitrust agencies to increase the transparency of policymaking. Transparent policymaking methods are suggested as a means to inform external observers (especially business operators) about the content and rationale of

of Portland, 216 F.3d 871, 876-80 (9th Cir. 2000).

77 See Joseph E. Stiglitz, Knowledge for Development: Economic Science, Economic Policy, and Economy Advice, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1998, at 9, 40 (Boris Pleskovic & Joseph E. Stiglitz eds., 1999) ("Governments in many countries have a strong proclivity for secrecy.... Secrecy provides more scope for the work of special interest groups, greater cover for corruption, and greater opportunities for hiding mistakes.").

78 See, e.g., Claudio R. Frischtak, The Changed Role of the State: Regulatory Policies and Reform in a Comparative Perspective, in REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 1, 13 (Claudio R. Frischtak ed., 1995) ("Administrative decisions must be... transparent and subject to judicial review."); Khemani & Dutz, Instruments of Competition Policy, supra note 13, at 28 (emphasizing the importance of transparent decisionmaking processes); Russell W. Pittman, Second Annual Latin American Competition and Trade Round Table: Introduction, 25 BROOK. J. INT'L L. 263, 274 (1999) ("A young [competition enforcement] agency must establish its credibility both within the government and among the population. All of this calls for careful case selection, transparent and predictable enforcement, and public explanation of decisions.").
specific decisions, and to ensure the regularity and honesty of public administration. Proposed transparency measures include publishing decisions in law enforcement matters, issuing guidelines, and using speeches to articulate the basis for specific initiatives. In several important respects, federal enforcement of the antitrust laws in the United States lacks the quality of transparency that Western countries recommend to transition economy competition systems.

A. The Implications of Policy-Making by Settlement

Since the late 1970s, federal antitrust policy has featured substantial reliance on consent agreements, a number of which impose expansive ongoing regulatory oversight.79 Three principal developments have accounted for this trend. The first is the transformation of the merger review process resulting from the interplay between the premerger notification mechanism created by the Hart-Scott-Rodino Antitrust Improvements Act of 197680 and the “fix-it-first” approach that the federal antitrust agencies adopted in the 1980s.81 The second is the increasing frequency with which antitrust officials confront access and interconnection issues at the boundary between traditional public utility regulation and antitrust doctrine in industries such as energy and telecommunications.82 The third is the apprehension of antitrust officials about trying


81 See generally Symposium, Twenty Years of Hart-Scott-Rodino Merger Enforcement, 65 ANTITRUST L. J. 813 (1997) (analyzing the importance of the pre-merger notification mechanism in identifying and resolving competitive concerns involving mergers and acquisitions).

82 See, e.g., United States v. MCI Communications Corp., 1994-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994) (discussing the Antitrust Division consent decree permitting the joint venture between MCI and British Telecom and imposing anti-discrimination safeguards and reporting requirements).
cases before federal judges who, as a group, have relatively conservative antitrust preferences and are likely to view government (or private) antitrust claims more skeptically than the judiciary of the 1960s and early 1970s.\textsuperscript{83} The increased use of consent agreements as policy-formation tools poses a number of problems. Most problems result from the limited transparency concerning the rationale for accepting a consent agreement. Limited transparency makes it difficult for those other than the parties to the negotiations to determine the basis or significance that should be attributed to the consent agreement.\textsuperscript{84} Press releases and competitive impact statements that accompany the announcement of Antitrust Division or FTC consent decrees usually contain highly stylized statements of the facts that portray the enforcement agency's decision to prosecute in the most favorable light. To establish the wisdom of their acts, and to convince non-participants, including legislators and consumers, that they executed their responsibilities appropriately, the enforcement agencies limit their disclosures to identifying perceived competition concerns and to providing assurances that the relief obtained has corrected serious competition problems.

Consent agreements also provide an attractive opportunity for enforcement officials to portray their work as path-breaking and innovative, and thereby distinguish it from the accomplishments of previous management. Public officials rarely define their mission as consisting of the competent


execution of programs begun by their predecessors, especially predecessors in a previous presidential administration. Most appointees to significant government bureaus feel compelled to identify distinctive accomplishments. The impulse to differentiate the product of one's stewardship is especially strong when the change in Presidents involves a change in political control of the White House. What, after all, is the purpose of changing parties if not to carry out different policies?

In the first term of the Clinton Presidency, the need for federal antitrust officials to demonstrate distinctive accomplishments resulted, in part, from greater congressional appropriations for enforcement. During Clinton's first term as President, the Antitrust Division persuaded Congress to restore a large part of the funds cut during the Reagan Administration. To justify this result, the Clinton Justice Department had to show Congress that taxpayers were getting value for additional expenditures. Emphasizing the number of new initiatives and characterizing them as qualitatively distinctive serve as two ways to demonstrate that the funds have been well spent. The product differentiation impulse frequently manifests itself in exaggerations by enforcement officials about the novelty and importance of their programs. Such exaggerations often occur in speeches that depict comparatively isolated or minor consent agreements as portending major departures from past practice.

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85 George Hay makes this point as follows:
No one likes to give speeches without having something to say, and a speech which simply says "business as usual," or even "we are going to work hard and do an even better job on the usual matters," is not likely to make the evening news, however reassuring such a pronouncement might be to the audience or the business community at large.


87 See Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 882–83 n.65 (1997) (discussing the sharp increase of merger complaints with the Clinton Administration and listing merger cases during Clinton's tenure).

88 See Hay, supra note 85, at 8 ("[S]peeches often reflect more what an administration would like to do, or would like an audience to think that it will do,
Perhaps the clearest recent example of exaggerated product differentiation is the importance that the Clinton Administration attributed to its efforts to examine competitive effects in the context of "innovation market[s]."  

The observers having the most informed perspective on the government's claims about the value and significance of consent decrees are often the respondent firms. In theory, firms subject to consent decrees might challenge the government's exaggerations about the rationale and scope of such agreements. In practice, the statements of the private signatories are usually tame and meaningless. Though they have the information to point out enforcement agency puffery, their incentives to do so are weak. The increasingly regulatory nature of the functions performed by the antitrust agencies has induced business operators to pull their punches. The greater emphasis on negotiated settlements spurred by the Hart-Scott-Rodino process has changed the relationship between the enforcement agencies and the outside parties (e.g., the private bar, the consulting firms, and the companies subject to antitrust oversight) with whom they deal. The repeat-game nature of the regulatory process discourages private entities from engaging in candid public discussion of the merits of settlements to which they are parties. This inhibits the revelation of information needed to assess the effects of negotiated agreements, although in rare occasions competitors and others have mounted formal challenges to the approval of settlements.

Extensions of the regulatory process through greater reliance on negotiated arrangements also expand the class of service providers, such as law firms and economic consulting firms, whose well-being depends on the antitrust industry. The private bar and private consulting groups that might be

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90 See Sims & Herman, supra note 87, at 865–67 (discussing the effects of regulatory agencies on business strategy).

91 See id. at 883 (noting that the lack of public information about consent decree negotiations has left many uninformed about how the agencies are handling these situations).

92 See id. at 869 ("This transformation of merger practice from litigation to very comprehensive regulation has been good for the Washington antitrust bar, the principal beneficiary for the enormous demand for antitrust regulatory lawyers that has been created.").
informative participants in debates about government enforcement have become increasingly timid sources of criticism. In an interview in 1995, Robert Litan, who served as a deputy to Anne Bingaman, the Assistant Attorney General for Antitrust, described the cause of this phenomenon: "Most antitrust lawyers in Washington are very happy with Anne [Bingaman]. . . . Even though they have to litigate against her, she is making them quite rich." The riches from representing parties before government agencies often mute the service provider and leave the heavy lifting of criticism to corporate clients, or to outsiders such as academics, who frequently dine from the same consulting feedbag and are either equally desirous of repeat business or do not know the details of the enforcement process. Private signatories to consent decrees will seldom offer an informative discussion of the facts or policy arguments that weighed against intervention or provide information that would allow an external observer to construct the relevant arguments.

Over time, the fuller context surrounding a consent agreement becomes somewhat clearer as enforcement officials give speeches, as news organizations conduct inquiries, and as enforcement officials, respondents, or external advisors reveal what took place during deliberations between the enforcement agency and the firm. A more complete picture of the underlying decision often emerges over time, but the picture and the means that generate it are unsatisfying. Many elements of the picture are articulated informally by agency officials and respondents, and lack the certainty that permits outsiders to make confident judgments about future enforcement. The process puts a premium on the ability of insiders with access to enforcement officials to gain insight into how discretion was in fact exercised.

To a considerable extent, the phenomenon described here is the inevitable result of creating any system of regulation. All regulation involves the exercise of discretion, and information about the preferences and tendencies of the public officials who

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94 See 60 Minutes with the Honorable Janet D. Steiger, Chairman, Federal Trade Commission, 60 ANTITRUST L.J. 177, 184 (1991) (describing how the FTC conveys rules through speeches and articles on a variety of topics).
95 See Sims & Herman, supra note 87, at 883.
exercise the discretion will always be valuable. And because the information that formally accompanies the release of consent agreements is so austere and incomplete, the emphasis on consent agreements as policy instruments magnifies the role of enforcement agency discretion and correspondingly increases the reliance on Washington insiders as a means for identifying and articulating the basis for the exercise of such discretion.\footnote{See Malcolm R. Pfänder, \textit{Developments in Merger Law and Enforcement 1989–90}, 59 \textit{Antitrust} L.J. 319, 328 (1990) (stating that the author cannot give much information about the consent decrees for the years 1989 and 1990 because "the Commission uses boilerplate pleadings").}

The incomplete and often one-sided nature of the information surrounding a consent agreement has another important consequence. Inadequate disclosures of settlement-relevant information not only make it difficult for outsiders to identify what the enforcement agency has done and why it has intervened, but they also impede efforts by outsiders to evaluate the wisdom of the decision to prosecute. Unlike a trial, which usually generates a relatively rich, publicly available record, the consent agreement supplies little basis for outsiders to evaluate the enforcement agency’s strategy and tactics.\footnote{See \textit{Federal Trade Commission, Hearings on Global and Innovation-Based Competition} (Oct. 25, 1995) (statement of Michael Sohn) (visited July 15, 2000) (<http://www.ftc.gov/opp/global/GC102595.htm>). Mr. Sohn notes that previous federal enforcement concerning innovation markets has occurred when the research and development overlap is a small part of a much “larger transaction.” \textit{Id.} In such a context, “the parties have strong incentives to ‘fix’ the problem” quickly and go forward regardless of their assessment of the merits of the Commission’s case. \textit{Id.} Mr. Sohn suggests that we may well continue to have enforcement by consent order without the important safeguard provided by the litigation alternative or even a vigorous defense at the enforcement agency level. \textit{See id.} In that context, Mr. Sohn suggests that “it’s very important that the Commission clearly set forth and consistently apply its enforcement principals.” \textit{Id.}}

One is left to sift through the enforcement agency’s announcement that it has gained valuable relief and the respondent’s vague public suggestions that, while it accepted the remedy, the transaction emerged essentially unscathed.

B. Possible Improvements

How can the transparency of the consent process be increased and the quality of enforcement agency choices be evaluated more effectively? One approach is for enforcement agencies to issue competitive impact statements that include a
fuller discussion of the arguments that the respondent raised on its own behalf and clearly specify the agency's reasons for discounting or rejecting those arguments. Furthermore, in speeches, the Antitrust Division and the FTC could reveal more information about why they decide not to intervene to challenge or modify specific transactions.

A second approach is to rely on periodic ex post audits to examine and evaluate the decision-making process and to consider the effects of the consent agreement. As described below, the ex post audit would be performed by an individual or entity outside the agency and having no relationship to the respondent or industry members affected by the consent agreement. The results of the audits would be made public. For example, audits would be especially useful in determining the value of firewalls and anti-discrimination mandates as tools for resolving concerns about vertical mergers in sectors such as telecommunications and defense.

A third approach is to rely more extensively on litigation to clarify and establish legal principles. Since 1995, the Clinton Administration's antitrust agencies have made a conscious commitment to increase recourse to litigation as a tool for shaping policy. The most important and visible area of attention is the renewed concern over dominant firms. The most prominent initiatives have been the Justice Department's case against Microsoft and the FTC's prosecution of Intel, which

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98 See Federal Trade Commission, Hearings on Global Commerce and Innovation, supra note 84 (prepared statement of Robert A. Skitol) (proposing that, to aid public comment, the FTC reveal the bases for its decision to intervene).
99 See id.
100 See infra notes 123-32 and accompanying text.
resulted in a settlement. Had it been tried to a conclusion, the Intel matter would have provided an influential test of the FTC’s effort to expand the duty of a dominant firm to continue to deal with suppliers who may also be competitors. The Microsoft case remains a vital vehicle for defining the content of rules governing exclusive dealing, tying, invitations to collude, predatory pricing, and innovation. Lesser known but significant matters include a Justice Department predatory pricing case against American Airlines and an FTC administrative trial of pharmaceutical producers accused of using the settlement of patent infringement claims to restrict competition from generic drugs. The litigation of these and other pending matters could generate judicial decisions that clarify antitrust doctrine in areas where settlements and guidelines have dominated agency policymaking.

IV. RECONCILING NOMINAL LEGAL COMMANDS AND ENFORCEMENT POLICY: THE TREATMENT OF DISTRIBUTION PRACTICES

In 1993, the Clinton Administration announced its intention to expand enforcement of prohibitions against vertical restraints. Among her first policy moves as Assistant


105 See Daniel J. Gifford, Microsoft Corporation, The Justice Department, and Antitrust Theory, 25 Sw. U. L. Rev. 621, 622 (1996) (“The sparring between the Justice Department and Microsoft over these Department challenges to Microsoft’s plans may reveal something about the antitrust laws and about the Department’s current views of what those laws are about.”).


108 Other noteworthy cases include Toys “R” Us, Inc. v. Federal Trade Commission, 221 F.3d 928 (7th Cir. 2000) (finding a violation of section five of the FTC Act by the nation’s leading toy retailer for using group boycott and exclusive dealing arrangements to deny discount retailers access to popular toys); see also Complaint, United States v. Dentsply Int’l, Inc. (visited March 13, 2000) <http://www.usdoj.gov/atr/cases/f2100/2164.htm>; Complaint, United States v. VISA U.S.A. Inc. (visited March 13, 2000) <http://www.usdoj.gov/atr/cases/f1900/1973.htm> (challenging restrictions that the VISA and Mastercard credit card networks impose on their members concerning the issuance of credit cards issued by rival networks).

109 See generally Janet L. McDavid & Richard M. Steuer, The Law of Vertical
Attorney General, Anne Bingaman issued a highly-publicized retraction of the Reagan Administration's enforcement guidelines for non-price vertical restraints. The FTC's current chairman, Robert Pitofsky, is one of the strongest defenders of the per se ban against minimum resale price maintenance (RPM) and a vigorous critic of the Reagan Administration's policy of non-intervention.

Despite the much-heralded shift in policy, the precise dimensions of Clinton Administration enforcement intentions for distribution practices remain unclear. The Clinton Antitrust Division and the FTC took no steps to replace the Reagan guidelines with their own comprehensive statement about the appropriate content of vertical restraints policy. For example, it is unclear whether the Clinton enforcement agencies are committed to defending the rule of per se illegality for minimum RPM to the last round, even to the point of precluding exceptions for new entrants, new products, or failing companies. Neither the Antitrust Division nor the FTC have offered a comprehensive statement of their views on issues such as tying and exclusive dealings. It would have been appropriate for the Clinton enforcement agencies to prepare their own policy statement about the proper focus for vertical restraints enforcement. A comprehensive policy statement would have provided useful guidance regarding the government's views about the best use of its vertical restraints enforcement authority, just as the Justice Department's 1982 merger guidelines illuminated the

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See Anne K. Bingaman, Address to the ABA's Antitrust Section, reprinted in 65 Antitrust & Trade Reg. Rep. (BNA) 250 (Aug. 12, 1993).


But see John E. Lopatka & William H. Page, Posner's Program for the Antitrust Division: A Twenty-Five Year Perspective, 48 SMU L. REV. 1713, 1724 (1995) (stating that the Clinton Administration seems to be taking a "more activist approach"); Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 GEO. L.J. 1487, 1495 (1983) (suggesting the appropriateness of limited exceptions to per se illegality for minimum RPM). The Antitrust Division and the FTC filed amicus briefs that endorsed the liability standard that the U.S. Supreme Court ultimately adopted for maximum RPM in its recent decision in State Oil Co. v. Khan, 522 U.S. 3 (1997). See supra notes 63-65 and accompanying text. In Khan, the Court eliminated the existing per se ban on maximum RPM and held that such arrangements must be evaluated by the rule of reason. See Khan, 522 U.S. at 22.
government’s views about merger policy.\textsuperscript{113}

Enforcement policy for the Robinson-Patman Act\textsuperscript{114} is a second area requiring further clarification. Measured by observable enforcement activity, the Clinton agencies largely abandoned Robinson-Patman enforcement.\textsuperscript{115} Continuing a policy of non-enforcement that dates back to the 1960s, the Justice Department during the Clinton Administration initiated no Robinson-Patman cases.\textsuperscript{116} Recently, however, the FTC under Clinton initiated one Robinson-Patman claim against a major consumer goods manufacturer.\textsuperscript{117} Bill Clinton and Ronald Reagan are the only Presidents whose administrations have generated no Robinson-Patman cases since the Clayton Act’s price discrimination provisions were amended in 1936. Ronald Reagan’s FTC issued one Robinson-Patman complaint, which the Clinton FTC dismissed in 1996.\textsuperscript{118}

In early 1993, before he became chair of the FTC, Robert Pitofsky said that the “nullification of enforcement against resale price maintenance, despite support for the per se rule in the Supreme Court and in Congress, was the most indefensible prosecutorial decision in the last twelve years.”\textsuperscript{119} It seems no more defensible for the federal agencies to have declined, since 1989, to essentially “nullify” enforcement of a statute that

\begin{itemize}
\item \textsuperscript{115} There have been occasional indications that the FTC has opened and conducted nonpublic investigations of possible Robinson-Patman violations in the 1990s. See John B. Kirkwood & K. Shane Woods, Robinson-Patman Enforcement at the FTC: Promoting a Level Playing Field While Protecting Consumers (Apr. 5, 1995) (presentation by two FTC attorneys describing FTC Robinson-Patman Act activities in the 1980s and 1990s), reprinted in 38TH ANNUAL ADVANCED ANTITRUST SEMINAR ON DISTRIBUTION AND MARKETING 969 (1999).
\item \textsuperscript{116} To put things more accurately, the FTC has recently abandoned Robinson-Patman (RP) enforcement. The Justice Department exited the RP business over 30 years ago and ceded the RP terrain to the Commission.
\item \textsuperscript{119} Pitofsky, Antitrust Policy, supra note 111, at 219.
\end{itemize}
commentators have stridently criticized but Congress has never repudiated. The FTC ought to state what it believes to be the proper circumstances for prosecuting Robinson-Patman violations and specify the criteria it will use to select cases. If the FTC has concluded that no (or exceedingly few) good Robinson-Patman cases exist, it should say so.

The Clinton Administration’s inability to find more than one worthy case in eight years verifies the view of many commentators that Robinson-Patman compliance costs are so high, and welfare-enhancing (or at least welfare-neutral) cases so rare, that the statute should be repealed.\textsuperscript{120} De facto non-enforcement is a poor substitute for repeal of the statute. Western advisors often admonish transition economy governments to ensure that the formal structure of legal commands mirrors enforcement policy and to discourage the use of prosecutorial neglect to soften the hard edges of ill-conceived statutes. Rather than using prosecutorial discretion to minimize Robinson-Patman enforcement and effectively circumvent an ill-conceived law,\textsuperscript{121} the U.S. antitrust agencies should call for the statute’s repeal or amendment. If the agencies believe that the statute has value, they should identify the types of cases that would serve to realize that value.\textsuperscript{122}

V. EX POST ASSESSMENT

An important component of Western assistance to transition economy antitrust agencies has consisted of performing ex post evaluations of completed enforcement matters and encouraging new competition bodies to assess the impact of existing enforcement criteria.\textsuperscript{123} For several years, small teams of foreign


\textsuperscript{121} I know of no instance where an American antitrust advisor has proposed that a transition economy government create a price discrimination scheme resembling the Robinson-Patman Act.

\textsuperscript{122} But see Andrew I. Gavil, Secondary Line Price Discrimination and the Fate of Morton Salt: To Save It, Let It Go, 48 EMORY L.J. 1057 (1999) (providing an analytical framework for rationalizing the enforcement of the Robinson-Patman Act prohibition of secondary line price discrimination).

\textsuperscript{123} See JOHN FINGLETON ET AL., COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE 171 (1995) (discussing competition policy enforcement in Visegrad countries and urging “greater evaluation and refinement of the criteria used in making decisions”); J. Luis Guasch, Competition Policy
experts have met occasionally with transition economy antimonopoly agencies to review specific cases. Most of these discussions have taken place with competition authorities in Central and Eastern Europe and in the former Soviet Union, and have been organized by the Organization for Economic Cooperation and Development (OECD). Typically, foreign experts spend a week or so with transition economy competition officials to analyze one or more representative cases. The outside advisors examine the competition agency's prosecution files and hear presentations by the transition economy officials who recount their decision to prosecute and discuss the responses of the defendant firms. The foreign advisors then offer a critique of the agency's activity in the matter.

In addition to these case-specific audits, the OECD periodically conducts comprehensive surveys of enforcement experience for individual transition economies. Outside referees base such reports on a detailed examination of the agency's data on enforcement patterns, interviews and written questionnaires, and consultation with competition policy experts and business officials inside the country. Some observers have proposed that multinational bodies and individual Western donors increase such monitoring and analysis of transition economy competition agencies.

In principle, one would think that Western competition agencies would conduct similar reviews of their own work. Systematic, routine efforts to evaluate the impact of past enforcement actions should be obvious, necessary ingredients of responsible antitrust policymaking. This is particularly true for

Advocacy and Regulatory Reform (Dec. 1998) (unpublished manuscript prepared for the World Bank's First International Program on Competitive Policy, Dec. 13-18, 1998) (on file with author) ("It is imperative that competition agencies... periodically evaluate the impact (efficiency and distribution) of their decisions and widely disseminate their findings.").

124 The OECD and other multinational bodies, such as the United Nations and the World Bank, have played a formative role in building new competition policy systems in emerging markets. See Rodriguez & Coate, supra, note 10, at 313 (1996) ("Since the collapse of the former Soviet Union, multilateral lending institutions and the antitrust agencies of developed countries have actively collaborated in the formulation and implementation of these antitrust programs.").

125 See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, REGULATORY REFORM: THE HUNGARY COUNTRY REVIEW (1999) (presenting the results of a study of the activities of the Hungarian Competition Office).

126 See Rodriguez & Williams, supra note 30, at 178.
mature antitrust systems whose participants are aware of the often problematic judgments and intuitions that underpin specific enforcement decisions and recognize the important role that critiques by enforcement policy commentators and specific judicial decisions have had in the past in spurring adjustments.

When it comes to evaluating outcomes, Western competition agencies rarely practice what they preach in the transition environment. The U.S. antitrust agencies spend comparatively few resources assessing the effect of past initiatives.¹²⁷ No agency has a systematic process for routinely subjecting the results of past enforcement measures to periodic evaluation. In a small number of instances, the FTC and the Justice Department's Antitrust Division have performed retrospective assessments. These initiatives have added substantially to the antitrust community's understanding of how various liability rules influence business behavior and consumer welfare.¹²⁸ Expanded efforts to assess the effects of past enforcement decisions would provide important insights for policymaking.¹²⁹ The desirability of devoting greater resources to ex post evaluation of completed matters was a consistent theme of competition policy experts who testified at the FTC's hearings in

¹²⁷ See Federal Trade Commission, Hearings on Market Definition, Market Power, and Entry in Light of Global Competition (Oct. 18, 1995) (prepared remarks of Abbot B. Lipsky, Jr.) (visited April 8, 2000) <http://www.ftc.gov/opp/global/lipsky.htm> ("Retrospective research on the accuracy of the economic predictions underlying previous antitrust decisions is also extremely rare. When the Commission or a court strikes down a merger, for example, it seldom attempts to quantify either the efficiencies or the price increases that might result from a decision for or against the transaction.").

¹²⁸ See Federal Trade Commission, IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES (Ronald N. Lafferty et al. eds., 1984); see also Timothy F. Bresnahan, Post-Entry Competition in the Plain Paper Copier Market, 75 AM. ECON. REV. 15 (1985) (presenting results of impact evaluation funded by the FTC); PETER HUBER, THE GEODESIC NETWORK—1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY (U.S. Department of Justice, Jan. 1987) (evaluating the effects of AT&T divestiture as was mandated by the terms of the Modified Final Judgment).

1995 on innovation and international competition.\footnote{See Federal Trade Commission, Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age (Nov. 2, 1995) (prepared statement of Norman R. Augustine) (visited April 8, 2000) <http://www.ftc.gov/opp/global/augustin.htm> (stating that a study should be conducted to review, say, two years after the fact, whether the intended outcomes of previous antitrust reviews of defense industry mergers were actually achieved, and if not, what lessons are to be learned); Federal Trade Commission, Hearings on Competition Policy (Nov. 14, 1995) (prepared statement of Richard J. Gilbert) (visited April 8, 2000) <http://www.ftc.gov/opp/global/gilbert.htm> (urging the FTC "to use its investigatory powers to learn more about the competitive effects of hospital mergers... The Commission could do a great service by undertaking a critical review of the effects of antitrust enforcement in this industry."); Federal Trade Commission, Hearings on Market Definition, Market Power, and Entry in Light of Global Competition (Oct. 18, 1995) (prepared remarks of Abbott B. Lipsky, Jr.), supra note 127, at 10 ("The Commission should consider whether retrospective study of the assumptions and results of previous antitrust enforcement efforts would help to discover whether fundamental but unstated misconceptions about supply response may underlie some enforcement judgments."); Federal Trade Commission, Competition Hearings on Global Commerce and Innovation (Nov. 2, 1995) (statement of David Pitts) (visited April 8, 2000) <http://www.ftc.gov/opp/global/GC110295.htm> (suggesting that the government evaluate whether anticipated efficiencies in hospital mergers were realized in practice); Federal Trade Commission, Hearings on Global and Innovation-Based Competition (Nov. 14, 1995) (statement of Joseph Sims) (visited April 8, 2000) <http://www.ftc.gov/opp/global/GC111495.htm> (proposing that the FTC study the actual effects of hospital mergers); Federal Trade Commission, Hearings on Global Commerce and Innovation (Oct. 26, 1995) (prepared statement of Robert A. Skitol) supra note 84, (proposing that the Commission's Bureau of Economics review experience of selected consortia that filed notifications under the National Cooperative Research Act or the National Cooperative Research and Production Act); cf. Federal Trade Commission, Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age (Nov. 7, 1995) (preliminary draft of prepared statement of Joseph F. Broadley) (visited April 8, 2000) <http://www.ftc.gov/opp/global/brodney.htm> (advocating ex post verification that efficiencies claimed for mergers and joint ventures have materialized); Federal Trade Commission, Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age (Oct. 19, 1995) (prepared statement of Phillip B. Nelson) (visited April 8, 2000) <http://www.ftc.gov/opp/global/nelson1.htm> ("[I]t appears that the FTC could perform valuable services by researching and documenting more fully the economic circumstances under which shipments pattern data can be misleading.").}

There are a number of reasons why agencies spend little time evaluating the effects of completed initiatives. An audit might discredit the agency by revealing that its initiatives either had no effect or yielded perverse results. Though perfectly understandable, the possibility of incurring some institutional discomfort is not a valid policy basis for foregoing audits. Expense is another obstacle. Audits require the agency to spend resources that might be devoted directly to pursuing new
matters—activities for which the agency can more readily claim credit than for conducting studies of past activities. Although this consideration might legitimately affect the number and scope of audits, it does not dictate that the optimal level of such activity is close to zero—especially when so many features of antitrust policy, such as the proper approach to merger analysis—rely heavily on untested intuitions about the effects of intervention. A third obstacle involves methodology. Evaluating the effects of some prosecutorial decisions can present difficult measurement and data collection issues. Yet even relatively simple analytical models supported by limited data are likely to provide a more confident basis for policymaking than mere belief or intuition. In short, all of these reservations might limit the number and scope of antitrust audits, but they do not justify foregoing the evident need to analyze past activity as a basis for determining whether to alter or continue the mix of enforcement initiatives.

Ex post evaluations could be designed in a number of ways. One could begin with a simple model in which FTC or Justice Department personnel regularly conduct audits with no public disclosure of the results. The government agencies would establish a process for its own personnel to select completed enforcement initiatives (both litigated cases and consent agreements) and analyze their effects. In general, the audits would consist of reviewing specific enforcement episodes in detail, studying the deliberative processes of the agencies, interviewing those involved in the decision to prosecute, and collecting data on effects, such as by consulting customers or competitors of the respondents. Internal self-evaluation could be performed as a collaborative effort involving the litigation offices, the Bureau of Economics and the Economic Analysis Group, and policy bodies such as the FTC's Office of Policy Planning. The results of such assessments could be examined by the enforcement agencies in internal review sessions. This approach would be viewed by the institution as the least threatening form of audit. If the results are unflattering, only the agency will be aware of them. Performing the analysis with insiders exclusively provides a measure of assurance that external disclosure of the results and the agency's thought processes will not take place.

A second approach is to make the results of the audit public
in some form. The Antitrust Division and the FTC could issue public versions of the audits that delete references to sensitive information such as confidential business data or material that discloses enforcement intentions regarding pending matters. Even limited forms of public disclosure increase the transparency of the agency's operations and decision-making processes. A recent example of this approach is the FTC's assessment of outcomes of remedies ordered in merger cases.\footnote{See Federal Trade Commission, \textit{A Study of the Commission's Divestiture Process} (Aug. 6, 1999) (visited April 8, 2000) \url{http://www.ftc.gov/os/1999/9908/Index.htm#6}.} The merger remedies study was conducted by FTC attorneys and economists and the agency released a public version of the study. The FTC remedies study is informative to a degree, but it provides only a limited basis upon which outsiders can evaluate how the Commission staff determined whether the agency's past remedies were effective.

A third method is to have outsiders participate in conducting the audits. The outsiders could consist of either non-government employees working under contract to the antitrust agencies, or employees of government institutions, such as the General Accounting Office, which have occasionally examined antitrust enforcement. The level of participation could range from expansive forms of involvement, such as designing and performing the studies, to more limited contributions such as offering comments on studies prepared by agency insiders. Compared to relying solely on insiders, participation by outsiders would likely provide more rigorous, critical scrutiny of the agency's work and increase the credibility of audit results. Even if an audit were not made public, the agency would obtain a more meaningful perspective on its work if it engages outsiders to participate in the process.

An evaluation process that systematically conducts audits using agency personnel exclusively and makes no public disclosure of results would be valuable for its tendency to force the institution to evaluate its work. As suggested above, an auditing system is likely to be more informative if it engages outsiders and encompasses disclosure, at least in some form, of the results. A model for this type of audit—featuring significant contributions by outsiders and the publication of results—can be found in a series of antitrust impact evaluations performed by
the FTC in the late 1970s and early 1980s.\footnote{See Federal Trade Commission, IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES, supra note 128 (reporting the results of these evaluations); Bresnahan, supra note 128 (same).}

To begin its studies, the Commission retained two prominent scholars, Richard Caves and Ben Klein, to design research protocols and hired relatively junior academics to prepare studies of FTC cases involving vertical restraints and single-firm exclusionary conduct. The researchers were assigned to examine the FTC's files and to review publicly-available data on the industries and practices in question. The researchers prepared papers that evaluated the Commission's economic theory, presented a preliminary assessment of the likely effect of FTC intervention, and proposed a methodology for conducting further empirical study.

The Commission's impact evaluation team, consisting of John Kirkwood and Robert Lande from the Bureau of Competition and Ronald Lafferty from the Bureau of Economics, chose the researchers on the basis of their scholarly promise and, to the regret of some FTC litigation offices, not according to the likelihood that they would deliver favorable assessments of the agency's work. Kirkwood and his colleagues obtained the services of an ideologically diverse panel of specialists, many of whom (including Timothy Bresnahan, Howard Marvel, and Sharon Oster) have established themselves as leading figures in the field of industrial organization and business behavior. Their research yielded a number of important substantive findings, including the conclusion that antitrust law's categorical prohibition against minimum resale price maintenance might reduce efficiency in a significant number of circumstances.

VI. RESTRICTING GOVERNMENT INTERVENTION TO SUPPRESS COMPETITION

Governments frequently restrict business rivalry by limiting entry into the market, by authorizing producers to cooperate in setting prices or other terms of commerce, and by granting exclusive privileges to selected entrepreneurs.\footnote{For surveys of these and related forms of government regulation, see JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 538-57 (1993); DANIEL F. SPULBER, REGULATION AND MARKETS} In some
instances, government dispensations from competition serve to correct market failures. In many other cases, regulation that restricts entry or sets prices enables individual firms or groups of business operators to gain monopoly rents by suppressing competition from actual or potential rivals. For the most part, government-imposed restraints on competition are often more powerful and effective than private restraints, owing to the government’s ability to enforce its will by using the machinery of the state to punish transgressors with civil sanctions or criminal penalties. As the scope of government measures to restrict competition grows, the vitality of a market system can suffer significantly.

Western advisors often propose that transition economies empower competition policy authorities to engage in advocacy or enforcement functions to curb state efforts to suppress competition. Many transition economies have taken this advice to heart, perhaps out of their own keen awareness of the dangers of government intervention born from decades of intrusive central economic controls. Transition economy competition policy systems contain a variety of tools for restricting the role of the state. These include subjecting state-owned enterprises to the same competition policy commands that govern private enterprises and permitting competition


136 See WORLD BANK & ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY 93-100 (1999) (advocating establishment of competition advocacy function within the competition policy authority as an element of adopting new competition law systems); Craig W. Conrath & Barry T. Freeman, A Response to “The Effectiveness of Proposed Antitrust Programs for Developing Countries,” 19 N.C. J. INT’L L. & COM. REG. 233, 243-45 (1994) (finding competition policy advocacy to be important element of antimonopoly programs in transition economies).

authorities to veto government action that restricts competition, unless such restrictions have been expressly approved by the national legislature.\textsuperscript{138}

As Western consultants counsel transition economies to resist government intervention that represses business rivalries, the United States tolerates government intervention that tears large holes in the fabric of the competition policy regime embodied in the antitrust laws. At the federal level, Congress continues to embrace measures, in areas such as agriculture, that encourage or mandate cooperation by producers to restrict output and raise prices.\textsuperscript{139} By displacing the operation of the federal antitrust laws, the judicially-created state action doctrine\textsuperscript{140} encourages producer groups to elicit government intervention to forestall competition.\textsuperscript{141} State measures to hinder business rivalries that inflict harm solely or chiefly on the citizens of the jurisdiction adopting the measures leave the state’s voters electoral tools to change such policies. The modern state action doctrine is not so discriminating, however, for it confers political immunity on state actors without accounting for whether the intervention of that state imposes significant


\textsuperscript{139} See ABA SECTION OF ANTITRUST LAW, \textit{ANTITRUST LAW DEVELOPMENTS} 1135-40 (4\textsuperscript{th} ed. 1997) (describing antitrust exemptions for the agricultural sector).

\textsuperscript{140} See Parker v. Brown, 317 U.S. 341, 350-51 (1943) (noting there is “nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature”); see also ABA SECTION OF ANTITRUST LAW, \textit{ANTITRUST LAW DEVELOPMENTS}, \textit{supra} note 139, at 1069-95 (describing the content of the state action doctrine).

\textsuperscript{141} See John Shepard Wiley, Jr., \textit{A Capture Theory of Antitrust Federalism}, 99 HARV. L. REV. 713, 714-15 (1986) (discussing that the state action doctrine inspires regulation that reflects capture of legislators by producer groups seeking to benefit at the expense of consumer interests).
adverse economic spillover effects on the citizens of other states. 142

American policymakers and the U.S. competition policy community take a remarkably tolerant view of government intervention forms that Western advisors urge transition economy governments to resist. The national competition agencies seem unwilling to spend much political capital opposing federal statutes, regulations, and administrative practices that curb rivalry, while transition economy competition agencies are told that robust efforts to advocate pro-market policies deserve a high priority. A number of American observers depict state action immunity as a source of desirable experimentation in economic regulation by state governments. 143 State antitrust officials, though sanguine about the value of substantial state expenditures to supplement federal agency enforcement of controls against abuse of dominance and mergers, devote negligible attention to opposing measures by state instrumentalities that needlessly restrict competition and injure constituents in their own and other jurisdictions. The acquiescence in state government intervention that undermines the attainment of true economic integration throughout the republic also finds support in United States Supreme Court jurisprudence that timidly applies the Commerce Clause as a check on economic rent-seeking by individual states 144 and suggests that congressional efforts to abolish or circumscribe the state action doctrine might constitute impermissible infringements of state sovereignty. 145


143 See Jean Wegman Burns, Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp., 68 Antitrust Law Journal 29, 44 (2000) (emphasizing the benefits from state experimentation with different forms of government intervention).

144 See Inman & Rubinfeld, supra note 142, at 1272-73 & n.228 (noting limits of negative Commerce Clause jurisprudence as a check against state regulation that restricts competition and imposes adverse spillovers on citizens of other states).

145 See Burns, supra note 143 at 38-39 (concluding that recent U.S. Supreme Court decisions interpreting the scope of the Eleventh Amendment is likely to preclude congressional legislative measures to retrench the state action doctrine).
The phenomenon of rent-seeking through government intervention at the national or regional levels is arguably more inimical to economic growth in transition economies than in mature Western market countries. The United States, after all, is a prosperous nation and has more margin for error in pursuing policies that allow producers to reallocate, rather than press them to expand, society’s total wealth. Yet a legal framework that indulges rent-seeking can be insidious even in a wealthy country. A country that advises transition economies to attack government efforts to restrict competition while tolerating such behavior inside its own borders runs a risk of being deemed a hypocrite and having its advice ignored. Moreover, economically perverse limits on entry by new entrepreneurs or expansion by existing firms can also impose painful social costs even in a wealthy country by raising prices and retarding innovation.

Heeding the message conveyed to transition economies would induce American antitrust institutions to devote more energy to resisting government policies that suppress competition. At the national level, this entails greater efforts to publicize the harmful effects of federal programs that curb rivalry. If the existing dimensions of state action immunity are politically or constitutionally immutable, state antitrust bureaus must assume more responsibility for opposing measures by state governments and their political subdivisions that restrict competition. This involves a significant reorientation of state antitrust priorities that moves at least some resources now dedicated to pursuing matters treated by federal enforcement agencies toward efforts to oppose legislative or regulatory encroachments on the competitive process. The urgency for state antitrust officials to undertake a robust advocacy role becomes all the more important if the United States Supreme Court remains indifferent to state measures that restrict competition and impose serious adverse spillovers upon other jurisdictions thereby impeding the functioning of a national economic union.

CONCLUSION

Americans and other Western advisors have devoted considerable effort to informing transition economy governments about the key role of institutional design in creating new competition policy systems. Wise substantive commands are
meaningless without well-conceived institutions to implement them. The basic ingredients of good institutional design are fairly straightforward. First, develop a rational enforcement structure with clear lines of responsibility and avoid mechanisms that may generate inconsistent, conflicting policies. Second, appoint genuine experts to run the competition policy institution. Third, clearly articulate and explain the basis for the decision to prosecute and the basis for other policy choices. Fourth, ensure that nominal legal commands are enforced or change the nominal commands to match actual enforcement practice. Fifth, evaluate the effects of completed initiatives. Finally, vigorously limit government intervention that suppresses competition. These precepts make sense for both mature and emerging competition policy systems alike. The competition policy community in the United States would do well to measure their own institutions by these tests. By looking outward at transition economies, we can gain some useful insights about possibilities for improvements within.