

“Competition Policy in Its Broadest Sense:
Michael Pertschuk’s Chairmanship of the Federal
Trade Commission 1977-1981

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Repository Citation

William E. Kovacic, “Competition Policy in Its Broadest Sense:” *Michael Pertschuk’s Chairmanship of the Federal Trade Commission 1977-1981*, 60 Wm. & Mary L. Rev. 1269 (2019), <https://scholarship.law.wm.edu/wmlr/vol60/iss4/6>

“COMPETITION POLICY IN ITS BROADEST SENSE”:
MICHAEL PERTSCHUK’S CHAIRMANSHIP OF THE FEDERAL
TRADE COMMISSION 1977-1981

WILLIAM E. KOVACIC*

ABSTRACT

In the late 1960s and through the 1970s, the Federal Trade Commission (FTC) undertook an ambitious program of reforms. Among other measures, the agency expanded the focus of antitrust enforcement to address economic concentration, including the use of Section 5 of the FTC Act to restructure dominant firms and oligopolies. In many ways Michael Pertschuk, who chaired the agency from 1977 to 1981, became the symbol of the FTC’s efforts to stretch the boundaries of antitrust policy—to pursue a conception of “competition policy in its broadest sense.” Despite a number of valuable accomplishments, the FTC achieved relatively few litigation successes, and its efforts aroused political opposition that nearly crippled the institution. The experience of the FTC in the 1970s, and during the Pertschuk chairmanship in particular, offers insights into the implications of future efforts to use the FTC to carry out a sweeping redesign and expansion of U.S. competition policy.

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INTRODUCTION

Among competition and consumer protection regulators, the U.S. Federal Trade Commission (FTC) is perhaps the most intriguing. The FTC’s extraordinarily elastic mandate—including the power to ban “unfair methods of competition”¹ and “unfair or deceptive acts or practices,”² and its diverse portfolio of policy making tools³—gives the FTC a seemingly unmatched capacity to study and remedy a multitude of economic problems.⁴ Since the FTC’s creation in 1914, these institutional features have placed the agency in the center of debates about the future of U.S. competition and consumer protection policy.⁵

Today the FTC is again in the spotlight. Various commentators have urged that the FTC dramatically expand its efforts to apply its distinctive powers.⁶ The suggested agenda for the FTC includes measures to reduce excessive levels of industrial concentration, to arrest abusive behavior by dominant enterprises, to protect the interests of small and medium enterprises, and to achieve a range of social policy objectives beyond the promotion of economic efficiency.⁷ To some observers, the FTC’s scalable mandate makes

1. 15 U.S.C. § 45(a)(2) (2012).

2. *Id.*

3. *See, e.g., id.* § 57a (granting the FTC the power to prescribe rules and policy statements).

4. *See id.* § 46(a)-(f) (granting the FTC the power to collect and publish information from individuals, partnerships, and corporations); *supra* notes 1-3 and accompanying text.

5. *See generally* DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011) (discussing the agency’s actual and potential role in formulating U.S. competition policy). For information on the FTC’s creation and the expectations that surrounded its formation in the early twentieth century, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *ANTITRUST L.J.* 1, 58-92 (2003).

6. *See, e.g.,* Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”*: *The Latent Power of the Federal Trade Commission*, 19 *U. PA. J. BUS. L.* 645 (2017); Lina Khan, *How to Reboot the FTC*, *POLITICO* (Apr. 13, 2016, 5:35 AM), <https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090> [<https://perma.cc/YLD8-62JY>] (“Over the past century, the Federal Trade Commission has never been as vital as it is today.... As mergers reach record highs and Internet platforms amass greater unchecked power over our political economy, the FTC’s competition mandate has never been more vital. Let’s hope it seizes the opportunity for reform.”).

7. *See, e.g.,* Khan, *supra* note 6 (encouraging the FTC to take three reform measures to achieve these goals).

it the preferred vehicle for a fundamental reorientation of competition and consumer protection policy.⁸

In the late 1960s and in the 1970s, similar calls for action helped spur ambitious applications of the FTC's competition and consumer protection powers.⁹ As the FTC's chairman from May 1977 to February 1981, Michael Pertschuk exemplified the FTC's determination to exercise the full potential inherent in its mandate.¹⁰ Pertschuk came to the FTC after a long, influential career as a congressional staffer.¹¹ As FTC chairman, he urged the Commission to embrace a view of "competition ... in its broadest sense" and to apply the agency's powers expansively.¹²

The program conceived by Pertschuk and his predecessors at the FTC in the late 1960s and in the 1970s was breathtaking in its aims and means. The agency achieved some litigation and rulemaking successes, and introduced policies that have had enduring value.¹³

8. *See id.* ("Reforming the FTC to meet current challenges does not require any act of Congress. But it does require a bold leadership willing to use the full breadth of its expansive authority.")

9. The transformation of the FTC since the late 1960s is a major focus of a collection of essays produced in conjunction with a symposium celebrating the agency's 90th anniversary in 2004, and a symposium convened by the *George Washington Law Review* to commemorate the agency's 100th anniversary in 2014. *See Federal Trade Commission 90th Anniversary Symposium*, 72 ANTITRUST L.J. 745 (2005); Symposium, *The FTC at 100: Centennial Commemorations and Proposals for Progress*, 83 GEO. WASH. L. REV. 1835 (2015). Essays from these collections that focus on the catalytic effect of calls for reform made in the late 1960s include Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899 (2005); David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015); Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Chance and Administrative Pragmatism*, 72 ANTITRUST L.J. 911 (2005).

10. For more information about Pertschuk's chairmanship of the FTC, see RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 154-86 (2d ed. 1996); PHILIP B. HEYMANN, *THE POLITICS OF PUBLIC MANAGEMENT* 27-41 (1987). For Pertschuk's own reflections on his experiences at the FTC, see generally MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION* (1982).

11. Pertschuk recounts his career as a legislative staff member, including his tenure as a Senate Commerce Committee staffer and an advisor to the Commerce Committee's Chairman, Warren Magnuson, in MICHAEL PERTSCHUK, *WHEN THE SENATE WORKED FOR US: THE INVISIBLE ROLE OF STAFFERS IN COUNTERING CORPORATE LOBBIES* 1-8 (2017).

12. *See* Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks Before the Eleventh New England Antitrust Conference 20 (Nov. 18, 1977); *see also infra* notes 184-200 and accompanying text (describing Pertschuk's agenda for the FTC).

13. *See, e.g., infra* Part III (describing successful FTC programs that originated in the late 1970s).

At the same time, the FTC’s program of the 1970s generated many failed cases and rules.¹⁴ FTC efforts to explore the outer limits of its powers elicited powerful political backlash that threatened a major curtailment of the agency’s jurisdiction.¹⁵

This Article examines Michael Pertschuk’s leadership of the FTC for several purposes. This Article uses this era to consider the policy implementation difficulties that an “independent” regulatory agency faces when it seeks to apply a powerful, flexible policy mandate.¹⁶ This Article also studies the institutional prerequisites for such an agency to apply this mandate effectively.¹⁷ These predicates include an awareness of the broader political and economic context in which the agency operates, the development of sound methods to set priorities and choose specific projects, and the establishment of effective processes to match an agency’s commitments to its capabilities.¹⁸ In doing these things, the Article suggests implications of the FTC’s 1970s experience for modern proposals that would have the FTC undertake a far-reaching expansion of its existing law enforcement and regulatory programs.¹⁹

The Article proceeds as follows. Part I describes the FTC policymaking status quo when Pertschuk became chair in 1977. This Part traces the causes and content of the sweeping redirection of FTC programs that began in the late 1960s and carried forward until Pertschuk came to the agency in May 1977.

Part II sets out how Pertschuk defined his agenda in 1977. Pertschuk presented the basic ingredients of his program in two speeches delivered late in 1977.²⁰ The speeches provide essential foundations for understanding the evolution of modern U.S. competition and consumer protection policy.

14. *See infra* Part IV (describing policy failures of FTC programs originating in the 1970s).

15. *See infra* Parts IV.A-B (describing congressional backlash to FTC programs from 1970s).

16. *See infra* Part IV.C.

17. *See infra* Part IV.C.

18. *See infra* Part IV.C.

19. *See infra* Part V.

20. *See* Pertschuk, *supra* note 12; Michael Pertschuk, Chairman, Fed. Trade Comm’n, Remarks Before the Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools (Dec. 27, 1977).

Part III describes how the FTC sought to realize Pertschuk's vision from 1977 until March 1981, when President Ronald Reagan appointed David Clanton to serve as the agency's acting chairman.

Part IV critically assesses the FTC's experience in the 1970s. The Article does not evaluate the economic effects of the agency's program during this period. Instead, it focuses on the quality of the FTC's program from an institutional perspective. It emphasizes two institutional flaws: a failure to ensure that the agency had the capacity to successfully carry out its ambitious agenda, and a failure to account for how the FTC's projects would land in an increasingly hostile political environment. Among other developments, this discussion also recounts congressional moves from 1979 through the early 1980s to curb the FTC's antitrust and consumer protection authority.

Part V turns to the potential implications of the FTC's experience in the 1970s for modern debates about possible adjustments to antitrust law and policy. Drawing upon modern commentary, Part V sketches what a far-reaching program to reorient and expand the FTC's antitrust and consumer protection programs might look like. Part V does not assess the substantive wisdom of proposals for FTC policy reforms. Instead, it uses the institutional perspective set out in Part IV to consider how the agency might fare in seeking to implement a bolder program of enforcement, notably measures to break up concentrated industries.

The story of the FTC in the 1970s reveals phenomena that ought to inform contemporary discussions about the purposes and content of U.S. competition and consumer protection policy. This Article chiefly examines the FTC's experience, but it also notes parallel developments in the antitrust program of the Department of Justice (DOJ). Despite its U.S.-centric orientation, the story has things for other jurisdictions to ponder, as well.

I. MAKEOVER: THE FTC FROM 1969 TO THE PERTSCHUK CHAIRMANSHIP

In the late 1960s and through the 1970s, the FTC undertook a sweeping overhaul of its competition and consumer protection programs. Two highly critical studies of the agency set the reforms

in motion. In early 1969, Ralph Nader’s organization published a caustic evaluation of the agency, focusing chiefly on its consumer protection programs.²¹ Publication of the Nader study led President Richard Nixon to request the American Bar Association (ABA) to carry out its own inquiry.²² Later in 1969, an ABA-sponsored blue ribbon panel issued a report that largely echoed the Nader study’s dismal assessment, albeit in less flamboyant terms.²³ The following Section reviews the Nader and ABA studies and discusses their significance for the FTC’s work in the 1970s.²⁴

A. *The Nader and ABA Reports*

Taken together, four aspects of the Nader and ABA studies stand out, because they shaped expectations about what the FTC had to do to redeem itself and justify its continued existence. First, both studies depicted the agency as being an appallingly bad institution. The Nader study relentlessly criticized the FTC’s work, suggesting that only by chance did the FTC occasionally stumble into doing something that advanced consumer interests.²⁵ The ABA panel more generously recognized positive FTC accomplishments,²⁶ but suggested that these appeared as rare oases in a desert of ineptitude, sloth, and timidity.²⁷

Second, both reports blamed several causes; chief among them the FTC’s obsession with trivial cases.²⁸ Both groups scolded the agency for spending massive consumer protection resources on policing the labeling requirements for furs and textiles.²⁹ On the antitrust side,

21. EDWARD F. COX ET AL., ‘THE NADER REPORT’ ON THE FEDERAL TRADE COMMISSION (1969).

22. For more information on the history of the ABA study, see Hyman & Kovacic, *supra* note 9, at 1953-54.

23. See AM. BAR ASS’N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 34-35 (1969).

24. See *infra* Part I.A.

25. See COX ET AL., *supra* note 21, at 37-39.

26. See AM. BAR ASS’N, *supra* note 23, at 65, 68-69 (noting FTC’s contributions to the development of U.S. merger policy).

27. See *id.* at 1 (“Through lack of effective direction, the FTC has failed to establish goals and priorities, to provide necessary guidance to its staff, and to manage the flow of its work in an efficient and expeditious manner.”).

28. See *id.* at 25-26; COX ET AL., *supra* note 21, at 44-45.

29. See AM. BAR ASS’N, *supra* note 23, at 26; COX ET AL., *supra* note 21, at 47-48.

the ABA damned the FTC for its preoccupation with Robinson-Patman enforcement to the exclusion of other, more worthy pursuits, such as challenges to vertical contractual restraints.³⁰ The preoccupation with the trivial stemmed from a basic failure to devise internal policy planning and priority setting mechanisms to focus resources on matters of true economic significance.³¹ Grave weaknesses in senior leadership and the professional staff likewise denied the FTC the talent it needed to function effectively.³²

Third, both reports featured a notably scathing tone. The Nader report dripped with contempt. In a chapter titled "The Cancer," the Nader report observed: "Misguided leadership is the malignant cancer that has already assumed control of the Commission, that has been silently destroying it, and that has spread its contagion on the growing crisis of the American consumer."³³ In another passage, the Nader report used words such as "corruption" and "collusion" to describe the agency's relationship with businesses under its supervision.³⁴ In his preface to the study, Nader said the FTC was "a self-parody of bureaucracy, fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, impervious to governmental and citizen monitoring."³⁵ Even the FTC's headquarters building took it on the chin: the Nader group observed that "the architect of the Federal Trade Commission building had a genius for sensing the mediocre."³⁶

The ABA panel's language was more prosaic than the Nader report, but its dreary recital of FTC failures conveyed a similar sense of institutional decay. The ABA panel documented major deficiencies in the FTC's competition and consumer programs, and recounted grave weaknesses in the agency's operational procedures (for example, for setting priorities) and leadership.³⁷ Richard Posner's dissent from the panel's recommendations was more

30. See AM. BAR ASS'N, *supra* note 23, at 67-68.

31. See *id.* at 77-81.

32. See, e.g., *id.* at 32-33.

33. COX ET AL., *supra* note 21, at 127, 130.

34. *Id.* at 121.

35. *Id.* at vii.

36. *Id.* at 4.

37. See AM. BAR ASS'N, *supra* note 23, at 34-35.

pointed and less generous.³⁸ In a subsequent law review article, he recommended shutting down the agency.³⁹

A fourth criticism appears most clearly in the ABA report. The ABA study reviewed earlier evaluations of the FTC, and perceived a powerful institutional resistance to needed reforms dating back to the agency’s first decade.⁴⁰ The ABA’s reading of past commentary indicated the persistence of the same flaws over time.⁴¹ These included “the absence of effective planning and failure to establish workable priorities, the consequent tendency to become involved in too many trivial cases, the delay and unnecessary secrecy in FTC operations, and the uneven quality of staff.”⁴²

Rather than dismantle the agency and allocate its duties to other government bodies, the ABA panel recommended that Congress give the FTC one last chance to demonstrate its worth.⁴³ As an antitrust policymaker, the FTC needed to focus resources on “difficult and complex antitrust questions,”⁴⁴ leaving enforcement of well-established, *per se* rules of illegality to the DOJ.⁴⁵ The redirection of effort would entail, among other means, a substantial curtailment of Robinson-Patman Act enforcement, which the FTC had made the centerpiece of its antitrust program in the 1950s and 1960s.⁴⁶ The new FTC would focus chiefly on matters “where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases ha[d] not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct.”⁴⁷

38. *See generally id.* at 92-119 (stating that the ABA Committee’s report was a “missed opportunity” and only examined “the surfaces of problems”).

39. *See* Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 89 (1969) (“On what evidence we have, the costs of having a [F]ederal [T]rade [C]ommission appear to exceed the benefits.”).

40. *See* AM. BAR ASS’N, *supra* note 23, at 9-11.

41. *See id.* at 9.

42. *Id.*

43. *See id.* at 3.

44. *Id.* at 64.

45. *See id.* at 66.

46. *See* Hyman & Kovacic, *supra* note 9, at 1957-59 (describing ABA’s proposed redeployment of FTC resources away from Robinson-Patman Act enforcement).

47. AM. BAR ASS’N, *supra* note 23, at 66.

1. Institutional Implications of the Suggested Reforms

The ABA and Nader recommendations came with a major catch. The depiction of an agency so obdurate in its decades-long commitment to a program of economic insignificance,⁴⁸ punctuated only by occasional projects of genuine value,⁴⁹ suggested that the proof that the FTC had undertaken needed reforms would have to come in the form of dramatic enhancements in the FTC's program.⁵⁰ This would require the FTC to replace trivial matters with matters of the highest economic importance; swap out the repetitive application of well-settled legal principles for imaginative, pathbreaking cases that addressed unsettled areas of the law; and set aside timid, unimaginative matters in favor of bold, creative initiatives that exercised the full range of the agency's authority.⁵¹ Big, visible, innovative applications of the FTC's powers would be essential to the agency's continued existence.⁵² If the FTC could be likened to a movie production company, its merit would be measured by its capacity to turn out blockbusters—lots of them, and quickly.

How was the FTC to accomplish such an extraordinary turnaround? A fundamental retooling of the institution would be necessary. The ABA and Nader studies documented severe weaknesses in the FTC's operational methods and human talent.⁵³ Faulty planning induced a preoccupation with trivial matters and denied the agency the ability to set meaningful priorities and select projects to achieve them.⁵⁴ Poor case management and sclerotic procedures caused "crippling delay[s]" in carrying out projects.⁵⁵ Years of uneven appointments to senior leadership positions, and uninspired staff-level recruiting that deliberately targeted weak candidates whom other employers would not be tempted to poach, created

48. *See supra* notes 28-32, 40-42 and accompanying text.

49. *See supra* note 26 and accompanying text.

50. *See* AM. BAR ASS'N, *supra* note 23, at 3.

51. *See, e.g., id.*, at 2-3; *supra* notes 44-47 and accompanying text.

52. *See* AM. BAR ASS'N, *supra* note 23, at 2-3; *supra* notes 44-47 and accompanying text.

53. *See* AM. BAR ASS'N, *supra* note 23, at 77-84; COX ET AL., *supra* note 21, at 87.

54. AM. BAR ASS'N, *supra* note 23, at 34. For example, the ABA panel said poor planning "caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern." *Id.* at 1.

55. *Id.* at 34.

serious talent deficits.⁵⁶ In order to revitalize its substantive program, the FTC needed to dramatically upgrade its internal decision-making processes and workforce.⁵⁷ The anticipated institutional makeover would require the agency to rebuild the house and live in it at the same time.

2. Deconcentration: A Focal Point for Expanded Enforcement

At the time of the Nader and ABA studies, economic concentration had emerged as a difficult, unsettled, and highly significant competition law issue—the very type that the ABA report envisioned the FTC asserting its powers over. From the mid-1940s through the 1960s, a large body of commentary argued that competition policy had failed grievously to deal effectively with economic concentration.⁵⁸ The literature said that, to a growing degree, dominant enterprises and tight oligopolies gripped the American economy.⁵⁹

In 1945, the U.S. Court of Appeals for the Second Circuit’s ruling in *United States v. Aluminum Co. of America (Alcoa)* seemed to open possibilities for the broader application of the Sherman Act to attack industrial concentration.⁶⁰ In 1947, two articles published in the same issue of the *University of Chicago Law Review*—one authored by Edward Levi and the other by Eugene Rostow—seized upon *Alcoa* to call for renewed federal enforcement to attack industrial concentration.⁶¹ To both authors, the urgency for a basic redirection

56. See *id.* at 32-34 (finding “too many instances of incompetence in the agency, particularly in senior staff positions”); COX ET AL., *supra* note 21, at 101-26 (criticizing the quality of the FTC’s leadership and staff).

57. See *supra* notes 53-56 and accompanying text.

58. See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1105 & n.4 (1989).

59. See *id.* at 1122-23.

60. 148 F.2d 416, 448 (2d Cir. 1945). The Second Circuit served as the court of last resort in the case because recusals had denied the Supreme Court a quorum to hear the appeal. For more information on *Alcoa*’s significance, see Kovacic, *supra* note 58, at 1117-19, 1132-33; Marc Winerman & William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295 (2013).

61. See Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947); Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 568 (1947). The role of Levi and Rostow in shaping the debate about industrial concentration in the post-World War II era is recounted in Kovacic, *supra* note 58, at 1134-35,

of U.S. competition policy was clear. A prominent academic, Levi later became Attorney General during the administration of President Gerald Ford.⁶² In his article, he warned:

It is doubtful if a free and competitive society can be maintained if the direction of concentration is to continue.... If the concentration problem in this country is to be dealt with by measures themselves not incompatible with free enterprise, it is probable that the hope lies in the new interpretation of the Sherman Act and an increased awareness of the responsibility of the courts to give adequate relief.⁶³

Rostow's article elaborated upon the same themes. High levels of concentration undermined economic performance: "There is a great deal of evidence ... that on the whole Big Business is less efficient, less progressive technically, and relatively less profitable than smaller business."⁶⁴ No less important was the danger that industrial concentration posed to the nation's broader social and political health.⁶⁵ Rostow said:

One of the major problems requiring a social decision in our time is whether we could achieve a wider dispersal of power and opportunity, and a broader base for the class structure of our society, by a more competitive organization of industry and trade, in smaller and more independent units.⁶⁶

He added that "[i]t should be easier to achieve the values of democracy in a society where economic power and social status are more widely distributed, and less concentrated, than in the United States today."⁶⁷

Commentary from the 1940s through the 1960s acknowledged that from time to time since 1890, federal enforcement officials had mounted campaigns to dissolve positions of individual and shared

1135 n.190.

62. See Kovacic, *supra* note 58, at 1135 n.190.

63. Levi, *supra* note 61, at 183.

64. Rostow, *supra* note 61, at 568.

65. See *id.* at 569-70.

66. *Id.* at 569.

67. *Id.* at 570.

dominance.⁶⁸ This literature contained a persistent theme that the government had gained few victories of true importance in seeking to deconcentrate industries dominated by a single firm or a small collection of firms.⁶⁹ Many commentators considered this lapse to be the single-greatest failure of the U.S. system and an urgent priority for correction.⁷⁰ One of the most powerful proposals for a redirection of policy appeared in 1959 with the publication of Donald Turner’s and Carl Kaysen’s book *Antitrust Policy*, which provided the most influential synthesis of the economics and law of competition policy of its time.⁷¹ Kaysen and Turner said, “The principal defect of present antitrust law is its inability to cope with market power created by jointly acting oligopolists.”⁷² Kaysen and Turner proposed new legislation that would restructure industries whose concentration exceeded certain thresholds.⁷³

In 1969, when the Nader and ABA studies appeared, the case for a new program to reduce economic concentration received a boost from a blue ribbon panel convened by President Lyndon Johnson.⁷⁴

68. See Kovacic, *supra* note 58, at 1105 & n.3.

69. Walter Adams provided an influential treatment of this theme in Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951). Owing to weaknesses in remedies obtained in Sherman Act monopolization cases, Adams said, “the Government ... has won many a law suit but lost many a cause.” *Id.* at 31. Among other initiatives, Adams concluded that the famed Department of Justice suits against Standard Oil Co. and American Tobacco Co. in the first two decades of the twentieth century yielded feeble remedial outcomes. See *id.* at 2. For other contemporary contributions that took a similarly gloomy view of the U.S. deconcentration experience, see STAFF OF THE S. TEMP. NAT’L ECON. COMM., 76TH CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS 84 (Comm. Print 1941) (authored by Milton Handler) (“It is common knowledge ... that the [monopolization dissolution] decrees have rarely succeeded in restoring competition.”); DONALD DEWEY, MONOPOLY IN ECONOMICS AND LAW 247 (1959) (“Taken together the so-called big cases fought by the antitrust agencies in the last twenty years reveal a pattern of ‘legal victory-economic defeat.’”); Rostow, *supra* note 61, at 570.

70. See *supra* note 69 and accompanying text.

71. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959). On the importance of Kaysen and Turner in contemporary discussions of competition law, see Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1522 n.64 (1984).

72. KAYSEN & TURNER, *supra* note 71, at 110.

73. See *id.* at 110-19, 261-66.

74. See Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, ANTITRUST L. & ECON. REV., Winter 1968-69, at 11, 20-30. For more information on the formation and recommendations of the Neal Task Force Report, see generally Herbert Hovenkamp, *Introduction to The Neal Report and the Crisis in Antitrust*, COMPETITION POLY

Known as the White House Task Force on Antitrust Policy, and chaired by Dean Phil Neal of the University of Chicago Law School, the group proposed a threefold strategy: expand the DOJ's and FTC's enforcement of the existing antitrust laws against dominant firms and tight oligopolies, police mergers more aggressively, and adopt new legislation to deconcentrate U.S. industry.⁷⁵ The Neal report helped frame expectations for the FTC makeover that the Nader and ABA studies demanded.⁷⁶ Some component of the FTC's competition program would have to include measures to address the problem of industrial concentration.⁷⁷

*B. The FTC's Antitrust Agenda Before the Pertschuk
Chairmanship*

Congress embraced the Nader and ABA studies' damning assessments of the FTC, and used the ABA report as a blueprint for reorienting the FTC's competition programs.⁷⁸ Echoing the ABA panel's "one last chance" warning,⁷⁹ some key legislators said the agency's continued existence depended on a sweeping overhaul.⁸⁰ At an FTC oversight hearing convened on the day the ABA panel issued its report, Senator Edward Kennedy said the time had come for the FTC to correct longstanding flaws, or "to consider abolishing the agency and starting it from the ground again."⁸¹

The FTC got the message. From late 1969 until Michael Pertschuk's arrival to chair the agency in May 1977, the FTC undertook a variety of new competition and consumer protection

INT'L, Spring 2009, at 217; Kovacic, *supra* note 58, at 1119, 1137.

75. See Neal et al., *supra* note 74, at 14-17.

76. See *id.*

77. See *id.*

78. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 630-31 (1982) (describing congressional endorsement of the ABA's views about appropriate future direction of the FTC competition program). Leading members of Congress gave prominent and favorable attention to the Nader Report when it was released in 1969. *Id.* at 593 & n.16.

79. See AM. BAR ASS'N, *supra* note 23, at 3.

80. See Kovacic, *supra* note 78, at 630-31.

81. *Federal Trade Commission Procedures: Hearings Before the Subcomm. on Admin. Practice & Procedures of the S. Comm. on the Judiciary*, 91st Cong. 110 (1969) (remarks of Sen. Edward Kennedy, Chairman, Subcomm. on Admin. Practice & Procedures of the S. Comm. on the Judiciary).

programs that responded to criticism from the ABA commission, the Nader study, and Congress.⁸² Sketched below are some of the most notable elements of the agency’s policy agenda in this period. This Section focuses on new competition cases initiated from 1969 onward,⁸³ and identifies selected respects in which the agency sought to formulate competition policy with tools other than litigation.⁸⁴ This Section emphasizes competition-related matters, and Part I.C briefly identifies important consumer protection initiatives that represented new directions in agency policy.⁸⁵

This Section does not survey the FTC’s work comprehensively. Instead, it captures highlights of the nonmerger competition program that was underway at the FTC when Pertshuck became chairman in 1977. This Section provides context for the discussion in Part II, below, which reviews Pertschuk’s speeches in Boston and Atlanta late in 1977. In particular, this Section provides a basis for assessing Pertschuk’s claim that federal antitrust enforcement policy (including the work of the FTC) had performed poorly due to a lack of ambition, frail political will, and a faulty understanding of the aims of competition law.

1. Concentrated Industries: Dominant Firms and Collective Dominance

One set of FTC cases that were filed between 1969 through 1976 addressed exclusionary conduct by dominant firms. The Commission initiated predatory pricing cases against the largest U.S. bread producer (IT&T),⁸⁶ the leading U.S. instant coffee producer (General Foods),⁸⁷ and the largest U.S. reprocessed lemon juice producer

82. See HARRIS & MILKIS, *supra* note 10, at 140-224 (reviewing FTC consumer protection reforms in the early 1970s); Kovacic, *supra* note 78, at 643-51 (describing FTC antitrust reforms undertaken from 1969 through 1976); William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 951-54 (2005) (describing FTC consumer protection rulemaking activity between 1969 and 1977).

83. See *infra* Parts I.B.

84. See, e.g., *infra* notes 97-98 and accompanying text.

85. See *infra* Part I.C.

86. Int’l Tel. & Tel. Corp., 104 F.T.C. 280, 280-86 (1984) (describing the FTC’s 1974 complaint).

87. Gen. Foods Corp., 103 F.T.C. 204, 204-08 (1984) (describing the FTC’s 1976

(Borden).⁸⁸ In this period, the agency settled a monopolization claim against the largest plain-paper photocopier manufacturer (Xerox),⁸⁹ prosecuted the largest citrus fruits producer (Sunkist) for various exclusionary practices,⁹⁰ sued the largest U.S. automobile manufacturer (General Motors) for attempting to monopolize the distribution of crash parts,⁹¹ and prosecuted the principal airline service directories publisher for a refusal to deal (Reuben Donnelley).⁹²

A second category of cases dealing with concentrated sectors involved allegations of collective dominance. The FTC brought two matters that became known as "shared monopoly" cases.⁹³ In one matter, the agency challenged the four leading U.S. ready-to-eat breakfast cereal producers (Kellogg, General Mills, General Foods, and Quaker).⁹⁴ In the other, the FTC sued the eight leading U.S. petroleum refiners (Exxon, Mobil, Gulf, Texaco, Atlantic Richfield, Amoco, Chevron, and Shell).⁹⁵ The FTC also brought a conspiracy to monopolize case against the three leading automobile rental companies (Hertz, Avis, and National) for excluding rivals from the best airport rental locations.⁹⁶

As it was litigating cases, the FTC sought to build a stronger empirical foundation for analyzing the performance of individual sectors. The FTC's leading initiative, the line-of-business program, used the agency's information-gathering powers to issue questionnaires to individual firms.⁹⁷ The program had a number of possible applications, but one of its main purposes was to identify

complaint).

88. Borden Inc., 92 F.T.C. 669, 669-72 (1978) (describing the FTC's 1974 complaint), *aff'd*, 674 F.2d 498 (6th Cir. 1982), *modified*, 102 F.T.C. 1147 (1983).

89. Xerox Corp., 86 F.T.C. 364, 369 (1975), *modified*, 91 F.T.C. 728, *and modified*, 100 F.T.C. 455 (1982), *and modified*, 102 F.T.C. 1107 (1983).

90. Sunkist Growers, Inc., 97 F.T.C. 443 (1981) (consent decree).

91. Gen. Motors Corp., 99 F.T.C. 464, 464-68 (1982) (describing the FTC's 1976 complaint).

92. Reuben H. Donnelley Corp., 95 F.T.C. 1, 1-5 (1980) (describing the FTC's 1976 complaint), *enforcement denied sub nom.* Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980).

93. See George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 472 n.125 (1982).

94. Kellogg Co., 99 F.T.C. 8, 8-16 (1982) (describing the FTC's 1972 complaint).

95. Exxon Corp., 98 F.T.C. 453, 454-59 (1981) (describing the FTC's 1973 complaint).

96. Hertz Corp., 88 F.T.C. 715, 715-18 (1976) (describing the FTC's 1975 complaint).

97. See George J. Benston, *The Validity of Profits-Structure Studies with Particular Reference to the FTC's Line of Business Data*, 75 AM. ECON. REV., March 1985, 37, 39.

connections between economic concentration, profitability, and other measures of economic performance.⁹⁸ Industry strongly contested the line-of-business program and litigation ensued.⁹⁹ After several years of litigation, the U.S. Court of Appeals for the D.C. Circuit sustained the FTC’s program.¹⁰⁰

2. Horizontal Conduct

The FTC initiated several distinctive matters concerning agreements involving competitors or having significant horizontal effects. Most notably, the FTC challenged the American Medical Association, the largest U.S. professional physicians association, for its advertising restrictions.¹⁰¹ The FTC also prosecuted a shopping mall development (Tysons Corner) for agreeing with its anchor tenant not to allow competing enterprises to locate stores in the development.¹⁰²

The FTC also brought a pathbreaking matter involving the adoption of facilitating practices by rivals: the FTC challenged the leading U.S. softwood plywood producers (Boise Cascade, Georgia Pacific, and Weyerhaeuser) for the parallel, noncollusive adoption of base-point pricing.¹⁰³

3. Distribution Practices

The FTC acted upon the ABA report’s recommendations by expanding its program to address vertical contractual restraints. A flagship for this initiative was the prosecution of the leading U.S. soft drink companies (Coca-Cola, Pepsi, Seven-Up, and Crush) for giving their bottlers exclusive territories.¹⁰⁴ The challenged behavior

98. *See id.* at 37-39.

99. *See* Appeal of FTC Line of Bus. Report Litig., 595 F.2d 685, 690 n.1 (D.C. Cir. 1978).

100. *See id.* at 711.

101. Am. Med. Ass’n, 94 F.T.C. 701, 701-03 (1979) (describing the FTC’s 1975 complaint), amended by 99 F.T.C. 440 (1982), and amended by 100 F.T.C. 572 (1982), and amended by 114 F.T.C. 575 (1991).

102. Tysons Corner Reg’l Shopping Ctr., 85 F.T.C. 970, 971-72 (1975) (describing the FTC’s 1972 complaint), modified, 86 F.T.C. 921.

103. Boise Cascade Corp., 91 F.T.C. 1, 1-6 (1978) (describing the FTC’s 1974 complaint), enforcement denied, 637 F.2d 573 (9th Cir. 1980).

104. Coca-Cola Co., 91 F.T.C. 517, 518-23 (1978) (describing the FTC’s 1971 complaint),

had been a standard distribution practice in the sector for decades.¹⁰⁵ The FTC also brought a comparable matter against a leading participant in the brewing sector (Coors).¹⁰⁶ The FTC demonstrated its commitment to police resale price maintenance (RPM) more aggressively by challenging a minimum RPM agreement imposed by the leading U.S. blue jeans manufacturer (Levi Strauss).¹⁰⁷

The FTC also investigated major U.S. aerospace companies (Boeing, Lockheed, and McDonnell Douglas) that had used commercial bribery to accomplish sales overseas.¹⁰⁸ The investigation yielded a consent decree in 1978.¹⁰⁹

4. Notable Qualitative Features

This incomplete list is notable for several reasons beyond an accounting of the number and types of cases. A number of cases (*Official Airline Guides*,¹¹⁰ *Kellogg Co.*,¹¹¹ *Exxon Corp.*,¹¹² *Boise Cascade Corp.*,¹¹³ and *Xerox Corp.*¹¹⁴) were premised substantially or wholly upon the capacity of Section 5 of the FTC Act to reach beyond existing interpretations of the other antitrust laws. FTC complaints involving dominant firm misconduct or collective dominance stated a theory of harm—the maintenance of a noncompetitive market power—that had no counterpart in existing jurisprudence under the Sherman Act.¹¹⁵ All of these matters could

dismissed, 97 F.T.C. 257 (1981).

105. *See id.* at 623, 640.

106. *Adolph Coors Co.*, 83 F.T.C. 32, 32-37 (1973) (describing the FTC's 1971 complaint), *enforced in part, set aside in part*, 497 F.2d 1178 (10th Cir. 1974).

107. *Levi Strauss & Co.*, 92 F.T.C. 171, 171-75 (1978) (describing the FTC's 1976 complaint), *modified*, 118 F.T.C. 1218 (1994).

108. *See Boeing Co.*, 92 F.T.C. 972 (1978).

109. *See id.* at 973-75.

110. *See Reuben H. Donnelley Corp.*, 95 F.T.C. 1, 6, 35 (1980), *enforcement denied sub nom. Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980).

111. 99 F.T.C. 8, 15 (1982).

112. 98 F.T.C. 453, 459 (1981).

113. 91 F.T.C. 1, 6 (1978), *enforcement denied*, 637 F.2d 573 (9th Cir. 1980).

114. 86 F.T.C. 364, 368 (1975), *modified*, 91 F.T.C. 728, *and modified*, 100 F.T.C. 455 (1982), *and modified*, 102 F.T.C. 1107 (1983).

115. *See, e.g., Exxon Corp.*, 98 F.T.C. at 459 (noting the FTC had accused the petroleum refiners of "restrain[ing] trade and maintain[ing] a noncompetitive market structure ... in violation of Section 5 of the [FTC] Act").

be considered to be experimental, prototype cases that sought to extend the reach of competition law.¹¹⁶

Another important aspect of the FTC’s program in this period was the agency’s emphasis on structural remedies as a means to reduce economic concentration. Four cases (*Kellogg*, *Exxon*, *Borden*, and *Xerox*) sought structural relief in the form of divestitures or compulsory trademark licensing, or both. In the cereal case, the FTC sought to break each of the respondents into multiple firms, and to mandate extensive royalty-free licensing of their trademarks.¹¹⁷ The relief requested in the petroleum shared monopoly case comprised a mix of horizontal and vertical divestitures.¹¹⁸ Compulsory licensing of intellectual property anchored the request for relief in the *Borden*¹¹⁹ and *Xerox*¹²⁰ cases.

Finally, it is impressive to note the economic significance of the commercial interests that the FTC prosecuted in its competition program. The list of defendants is a roster of some of the most significant firms in the U.S. economy of the 1970s: petroleum (Exxon, Mobil, Chevron, Amoco, Gulf, Atlantic Richfield, Shell, Texaco);¹²¹ food (Borden, Coca-Cola, Pepsi-Cola, Crush, Seven-Up, IT&T, General Foods, Kellogg, General Mills, Sunkist);¹²² the medical profession (American Medical Association);¹²³ apparel (Levi Strauss);¹²⁴ lumber products (Boise Cascade, Weyerhaeuser);¹²⁵ automobile manufacturing (General Motors);¹²⁶ aerospace (Boeing, Lockheed, and McDonnell Douglas);¹²⁷ photocopiers (Xerox);¹²⁸ and transportation services (Hertz, Avis, and National).¹²⁹ The agency’s

116. *Cf. supra* notes 48-52 and accompanying text.

117. *See Kellogg Co.*, 99 F.T.C. 8, 33 (1982).

118. *See Exxon Corp.*, 98 F.T.C. 457.

119. *See Borden, Inc.*, 92 F.T.C. 669, 774-75 (1978), *aff’d*, 674 F.2d 498 (6th Cir. 1982), *modified*, 102 F.T.C. 1147 (1983).

120. *See Xerox Corp.*, 86 F.T.C. 364, 379-80 (1975), *modified*, 91 F.T.C. 728, *and modified*, 100 F.T.C. 455 (1982), *and modified*, 102 F.T.C. 1107 (1983).

121. *See supra* note 95 and accompanying text.

122. *See supra* notes 86-88, 90, 94, 98 and accompanying text.

123. *See supra* note 101 and accompanying text.

124. *See supra* note 107 and accompanying text.

125. *See supra* note 103 and accompanying text.

126. *See supra* note 91 and accompanying text.

127. *See supra* notes 108-09 and accompanying text.

128. *See supra* note 89 and accompanying text.

129. *See supra* note 96 and accompanying text.

nonlitigation programs during this period also attracted the attention of major business enterprises.¹³⁰ As discussed earlier, the line-of-business program affected many leading U.S. companies, which vigorously attacked the FTC for this data collection initiative.¹³¹

C. The Consumer Protection Agenda

As noted above, this Article deals mainly with the FTC's 1970s competition policy programs. To understand the magnitude of the FTC's redirection in this decade, it is important to note the extent of the agency's efforts to transform its consumer protection program in this period leading up to the Pertschuk chairmanship. Several highlights stand out. In the early 1970s, the FTC established its advertising substantiation program, which required firms to support factual claims made in advertising.¹³² Established through litigation and policy guidance,¹³³ the advertising substantiation program transformed commercial advertising regulation in the United States.¹³⁴ It is the essential foundation of federal advertising regulation today.¹³⁵

Perhaps more notable was the FTC's expanded recourse to rulemaking to achieve consumer protection and, sometimes, competition policy aims. This approach accelerated in the mid-1970s when Congress adopted the Magnuson-Moss Warranty Act, which expanded the FTC's rulemaking authority.¹³⁶ The list in Table 1

130. *See supra* notes 97-100 and accompanying text.

131. *See supra* notes 97-100 and accompanying text.

132. *See* Federal Trade Commission, Special Reports Relating to Advertising Claims, 36 Fed. Reg. 12058 (June 24, 1971).

133. The formative litigation matter was the FTC's sunburn cream case against Pfizer. Pfizer Inc., 81 F.T.C. 23 (1972). The agency subsequently issued guidelines that formalized and extended the substantiation requirement. *See* Thompson Med. Co., 104 F.T.C. 648, 839-42 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

134. *See* Raymond D. Sauer & Keith B. Leffler, *Did the Federal Trade Commission's Advertising Substantiation Program Promote More Credible Advertising?*, 80 AM. ECON. REV., March 1990, at 191, 191-92 (finding that the increase in regulatory activity improved the credibility of advertising).

135. *See* Randall Shaheen & Amy Ralph Mudge, *Has the FTC Changed the Game on Advertising Substantiation?*, ANTITRUST, Fall 2010, at 65, 65 (noting the FTC's efforts to expand the advertising substantiation rule).

136. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 202, 15

below is a partial list of the FTC rulemaking matters completed between 1969 and 1976:

Table 1: Selected FTC Rules Completed Between 1969 and 1977¹³⁷

Rule	Initial Proposal	Year Issued
Octane Labeling ¹³⁸	1969	1971
Care Labeling ¹³⁹	1969	1971
Negative Option Plan ¹⁴⁰	1970	1973
Door-to-Door Sales Cooling Off Period ¹⁴¹	1970	1972
Holder in Due Course ¹⁴²	1971	1975
Mail Order Merchandise ¹⁴³	1971	1975

Table 2 provides a partial list of rulemaking proceedings pending at the time Michael Pertschuk’s chairmanship began in 1977:

U.S.C. § 57a (2012).

137. For a complete list of major rulemakings during the 1970s, see William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 953 & n.57 (2005). Table 1 above includes all of the major rules from MacLeod’s list that were issued between 1969 and 1977.

138. Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 Fed. Reg. 23,871 (Dec. 16, 1971) (to be codified at 16 C.F.R. pt. 422).

139. Care Labeling of Textile Wearing Apparel, 36 Fed. Reg. 23,883 (Dec. 16, 1971) (to be codified at 16 C.F.R. pt. 423).

140. Use of Negative Option Plans by Sellers in Commerce, 38 Fed. Reg. 4896 (Feb. 22, 1973) (to be codified at 16 C.F.R. pt. 425).

141. Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,934 (Oct. 26, 1972) (to be codified at 16 C.F.R. pt. 429).

142. Preservation of Consumers’ Claims and Defenses, 40 Fed. Reg. 53,506 (Nov. 18, 1975) (to be codified at 16 C.F.R. pt. 433).

143. Mail Order Merchandise, 40 Fed. Reg. 49,492 (Oct. 22, 1975) (to be codified at 16 C.F.R. pt. 435).

Table 2: Proposed FTC Rules Pending in 1977¹⁴⁴

Rule	Initial Proposal
Vocational Schools ¹⁴⁵	1974
Credit Practices ¹⁴⁶	1975
Mobile Homes ¹⁴⁷	1975
Food Advertising ¹⁴⁸	1975
Hearing Aids ¹⁴⁹	1975
Prescription Drugs ¹⁵⁰	1975
Cellular Plastics ¹⁵¹	1975
Health Spas ¹⁵²	1975
Protein Supplements ¹⁵³	1975
Funeral Services ¹⁵⁴	1975

144. For a complete list of major rulemakings during the 1970s, see MacLeod et al., *supra* note 137, at 953-54, 953 n.57. Table 2 above includes all of the major rules from MacLeod's list that were proposed before 1977 but not issued by that year.

145. Advertising, Disclosure, Cooling Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools, 39 Fed. Reg. 29,385 (proposed Aug. 15, 1974) (to be codified at 16 C.F.R. pt. 438).

146. Credit Practices, 40 Fed. Reg. 16,347 (proposed Apr. 11, 1975) (to be codified at 16 C.F.R. pt. 444).

147. Mobile Home Sales and Service, 40 Fed. Reg. 23,334 (proposed May 29, 1975) (to be codified at 16 C.F.R. pt. 441).

148. Food Advertising, 40 Fed. Reg. 23,086 (proposed May 28, 1975) (to be codified at 16 C.F.R. pt. 437).

149. Hearing Aid Industry, 40 Fed. Reg. 26,646 (proposed June 24, 1975) (to be codified at 16 C.F.R. pt. 440).

150. Disclosure Regulations Concerning Retail Prices for Prescription Drugs, 40 Fed. Reg. 24,031 (proposed June 4, 1975) (to be codified at 16 C.F.R. pt. 447).

151. Cellular Plastics Products, 40 Fed. Reg. 30,842 (proposed July 23, 1975) (to be codified at 16 C.F.R. pt. 439).

152. MacLeod et al., *supra* note 137, at 954. The Health Spas rule was not published in the Federal Register. *See id.* at 953 n.57.

153. Advertising and Labeling of Protein Supplements, 40 Fed. Reg. 41,144 (proposed Sept. 5, 1975) (to be codified at 16 C.F.R. pt. 454).

154. Funeral Industry Practices, 40 Fed. Reg. 39,901 (proposed Aug. 29, 1975) (to be

Over-the-Counter Drugs ¹⁵⁵	1975
Holder in Due Course Rule Amendment ¹⁵⁶	1975
Care Labeling ¹⁵⁷	1976
Ophthalmic Practices ¹⁵⁸	1976
Antacid Advertising ¹⁵⁹	1976
Used Cars ¹⁶⁰	1976

The pending rules presented above implicated a broad swath of U.S. commerce. Some of the affected firms were large enterprises that operated throughout the United States.¹⁶¹ Others were small businesses which, collectively, had a presence in many communities across the country.¹⁶²

D. The Administrative and Human Resources Infrastructure

From 1969 to 1976, the FTC responded to the ABA and Nader reports by upgrading its processes for policy planning, setting priorities, and selecting projects.¹⁶³ The Commission undertook major

codified at 16 C.F.R. pt. 453).

155. Advertising for Over-the-Counter Drugs, 40 Fed. Reg. 52,631 (Nov. 11, 1975) (to be codified at 16 C.F.R. pt. 450).

156. Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,530 (proposed Nov. 18, 1975) (to be codified at 16 C.F.R. pt. 433).

157. Care Labeling of Textile Products and Leather Wearing Apparel, 41 Fed. Reg. 3747 (proposed Jan. 26, 1976) (to be codified at 16 C.F.R. pt. 423).

158. Advertising of Ophthalmic Goods and Services, 41 Fed. Reg. 2399 (proposed Jan. 16, 1976) (to be codified at 16 C.F.R. pt. 456).

159. Advertising for Over-the-Counter Antacids, 41 Fed. Reg. 14,534 (proposed Apr. 6, 1976) (to be codified at 16 C.F.R. pt. 451).

160. Sale of Used Motor Vehicles, 41 Fed. Reg. 1089 (proposed Jan. 6, 1976) (to be codified at 16 C.F.R. 455).

161. *See, e.g.*, Credit Practices, 40 Fed. Reg. 16,347, 16,347 (proposed Apr. 11, 1975) (to be codified at 16 C.F.R. pt. 444) (applying to “person[s] who engage[] in ... lending money to consumers”).

162. *See, e.g.*, Funeral Industry Practices, 40 Fed. Reg. 39,901, 39,901 (proposed Aug. 29, 1975) (to be codified at 16 C.F.R. pt. 453) (applying to funeral homes).

163. *See Kovacic, supra* note 78, at 643-45.

efforts to improve its human capital in management and case-handling positions.¹⁶⁴

II. TWO SPEECHES

Michael Pertschuk became the FTC's Chairman in April 1977.¹⁶⁵ Appointed by President Jimmy Carter, Pertschuk served on the Commission from 1977 to 1984,¹⁶⁶ and chaired the agency from 1977 to 1981.¹⁶⁷ In the 1960s and 1970s, as one of the most powerful staffers in the U.S. Congress, Pertschuk played a pivotal role in drafting new consumer protection legislation.¹⁶⁸ He had a sure grasp of the FTC's work in consumer protection, so he devoted considerable time early in his chairmanship to studying the FTC's competition mission.¹⁶⁹ Pertschuk spent several months with his staff and external experts assessing the state of the agency's antitrust programs.¹⁷⁰

After months in which he said little about his intentions for antitrust, Pertschuk rolled out his program in two speeches late in 1977. He presented the first in Boston on November 18 before what was then one of the most prominent gatherings of competition law specialists, the New England Antitrust Conference.¹⁷¹ He gave the second speech in Atlanta in December at the annual meeting of the Association of American Law Schools.¹⁷² Together, the two talks staked out a decidedly ambitious program for the agency.

164. *See id.* at 649-51.

165. *See* William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 app.A at 953 (1997).

166. *See id.* app.B at 955.

167. *See id.* at 922.

168. *See* PERTSCHUK, *supra* note 11, at 35-154 (recounting the enactment of consumer protection laws during Pertschuk's tenure as a member of the Senate Commerce Committee staff).

169. *See* Pertschuk, *supra* note 12, at 1.

170. *See id.*

171. *Id.*

172. Pertschuk, *supra* note 20.

A. Boston: “Competition Policy in Its Broadest Sense”

Pertschuk titled his address before the New England Antitrust Conference “New Directions for the FTC.”¹⁷³ He called the talk “a first public effort to set forth my own evolving competition philosophy.”¹⁷⁴ Pertschuk’s assessment of the state of U.S. antitrust policy was generally gloomy. “I have seen and learned a good deal since joining the Commission,” he began, “I have become increasingly convinced that current antitrust policies lack clarity and conviction.”¹⁷⁵ Describing antitrust enforcement as one instrument of a broader domain of “competition policy,”¹⁷⁶ Pertschuk found its modern application to be seriously deficient:

[T]here is a widespread perception that antitrust has failed to deal significantly with significant problems. In the clear, cold light, there appears [to be] a failure of philosophy, a failure of resources, and, most important, a failure of political courage, of will. There is a sense abroad that federal antitrust cases have not focused with enough frequency or intensity on the most important questions.¹⁷⁷

Even when the federal agencies had addressed “central questions” such as “cases which would restructure dominant firms or entire industries,” the efforts often yielded “protracted proceedings and ineffective remedies instead of real reform.”¹⁷⁸

Several failings in agency perspective and practice accounted for the inadequate performance. The most basic failing was a cramped view of their responsibilities:

The antitrust enforcement agencies have often been lacking in historical perspective and imagination. Tending to think only like litigators or to restrict themselves to a narrow allocative efficiency approach to economics, they have failed to provide leadership in their most important and fundamental area of

173. See Pertschuk, *supra* note 12, at 1.

174. See *id.*

175. *Id.*

176. *Id.* at 2.

177. *Id.* at 3.

178. *Id.*

responsibility: taking the broad view and attempting through enforcement initiatives and the power of information to bring the structure and behavior of major industries and, indeed, of the economy itself more into line with the nation's democratic political and social ideals.¹⁷⁹

In antitrust enforcement and other applications of their competition law mandate, the federal agencies had lost sight of why Congress created them: "Competition policy has inadequately served the American people because it has forgotten that human beings are its constituency."¹⁸⁰ The agencies too often "have lost touch with too many aspects of the human condition[, leaving] [t]he individual ... to dog-paddle as best he can in a rough sea of over-sized and often undemocratic organizations—big government, big business, big labor."¹⁸¹

In his inadequacy narrative, Pertschuk chiefly villainized the U.S. antitrust system's growing emphasis on economic analysis, especially ideas generated by the Chicago School:

The heart of the present dilemma is a misunderstanding of the social and political underpinnings of competition policy in the United States, most vividly demonstrated by the role economic analysis is accorded in policy decision-making and enforcement activity today. Antitrust has been preoccupied with, if not entirely overtaken by, the narrow economic objective of allocative efficiency. The impact of the Chicago School has certainly been felt in the law schools, at the Commission, and in the Courts.¹⁸²

To Pertschuk, this direction of travel was ill conceived: "[C]ompetition policy, as I picture it, incorporates far more than the scientific search for efficiency."¹⁸³

179. *Id.* at 4.

180. *Id.*

181. *Id.*

182. *Id.* at 5.

183. *Id.*

1. *The Cures*

Pertschuk called for a competition policy rethink, starting with a reformulation of its aims. He saw “a critical need to re-examine the purposes of competition policy and to arrive at a new consensus as to what [the FTC is] about.”¹⁸⁴ He expected this reexamination to produce an expanded vision of competition policy: “I believe we have a mandate to develop competition policy in its broadest sense.”¹⁸⁵ As he explained, “broadest sense” encompassed a wide array of concerns:

[A]lthough efficiency considerations are important, they alone should not dictate competition policy. Competition policy must sometimes choose between greater efficiency, which may carry with it the promise of lower prices, and other social objectives, such as the dispersal of power, which may result in marginally higher prices. In 1977, no responsive competition policy can neglect the social and environmental harms produced as unwelcome by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands. Economic analysis can clarify the terms of the trade-off between efficiency and other objectives to ensure that the *least* inefficient remedy consistent with other policy objectives is found. But economic analysis alone cannot dictate the final outcome.¹⁸⁶

In other passages, Pertschuk elaborated his vision of what constituted competition policy “in its broadest sense.” He said “competition policy can help assure that the worker has a choice of employers to deal with and a work place of human scale.”¹⁸⁷ He warned that “[i]ncreasing macroconcentration can turn this country into a series of very big and very frightening company towns.”¹⁸⁸ Instead, the country’s “economic structure should be consistent

184. *Id.*

185. *Id.* at 20.

186. *Id.* at 10 (emphasis added).

187. *Id.* at 8.

188. *Id.*

with the democratic political and social norms of the nation.”¹⁸⁹ Moreover, the country’s economic structure “must operate within a framework of fairness and ethical commercial conduct”¹⁹⁰—an objective embodied in the FTC’s mandate to arrest “unfair methods of competition,” which Pertschuk said “clearly subsumes concepts of both equity and efficiency.”¹⁹¹

To implement competition policy “in its broadest sense,”¹⁹² Pertschuk enumerated a number of specific steps he expected the FTC to consider and, in many instances, to carry out. One element would be forward-looking applications of Section 5 of the FTC Act to address “the future structure, conduct and performance of industry.”¹⁹³ The application of Section 5 “require[d] boldness on the part of the decision-makers” and “bold action based upon reasoned prediction.”¹⁹⁴ Pertschuk noted that this dimension of the FTC’s mandate “ha[d] been largely dormant since 1914,” but its revival would be “central to the implementation of an effective competition policy in the last quarter of this century.”¹⁹⁵ He added that the FTC was “contemplating a number of test cases [it] would like to bring, when the appropriate facts are presented, to resolve the breadth of Section 5 so that Congress will have a clearer picture of the scope of existing competition legislation and the possible need for statutory revisions.”¹⁹⁶

Pertschuk highlighted other possibilities beyond a renewed application of Section 5, such as fulfilling a promise, delivered during his Senate confirmation hearings, to have the FTC conduct “a large scale investigation of the impact of macroconcentration on our lives.”¹⁹⁷ He explained: “I want to stress that the realm of competition policy includes problems of macroconcentration as well as microconcentration. This would seem to be a truism, but because of the blinders that antitrust has been wearing, it may lead to new

189. *Id.* at 6.

190. *Id.* at 9.

191. *Id.*

192. *Id.* at 20.

193. *Id.* at 11.

194. *Id.* at 12.

195. *Id.*

196. *Id.* at 15.

197. *Id.* at 16.

directions for the Commission.”¹⁹⁸ Pertschuk also anticipated “a step-up in merger activities” and efforts “to refine the concept of actual potential competition and to try to win its acceptance either through the courts or, if necessary, by legislation.”¹⁹⁹ Pertschuk also said he expected the FTC to explore the use of rulemaking to make competition policy, to expand the agency’s advocacy program involving regulated industries and government curbs on competition, to focus more intensely on the design of effective remedies, and to make fuller use of the FTC’s information-gathering and reporting parties.²⁰⁰

Pertschuk closed his address by praising his immediate predecessor, Calvin Collier, whom he thanked for “[h]is efforts at modernizing the management of the Commission and his constant, probing demand for quality.”²⁰¹ One might question the depth of Pertschuk’s gratitude to Collier and other agency leaders who had shaped the FTC’s program following the FTC’s near-death experience in 1969.²⁰² The testimonial to Collier appeared on the final page of the speech’s twenty-page text.²⁰³ Many of the previous nineteen pages had documented the failures of federal antitrust policy.²⁰⁴ Among other criticisms, Pertschuk recited a lack of boldness, a failure of political will, a lack of vision, blindness to the true aims of competition policy, and the incapacity to grasp the full potential inherent in the FTC’s mandate²⁰⁵—not exactly a glowing tribute to Collier. In Boston, Pertschuk positioned himself to change all of those failings, and place the FTC on a fundamentally different path.²⁰⁶

198. *Id.*

199. *Id.* at 16-17.

200. *See id.* at 17-19.

201. *Id.* at 20.

202. *See Kovacic, supra* note 78, at 599. (“If Congress, the President, and the agency’s own leaders did not pursue a comprehensive reform program, the Committee flatly favored the FTC’s abolition.”).

203. *See Pertschuk, supra* note 12 at 20.

204. *See, e.g., id.* at 1, 3-5 (criticizing current antitrust policy).

205. *See id.*

206. *See id.* at 20.

B. Atlanta: "The Unchartered Territory of Competition Law"

In late December, Pertschuk came to the annual meeting of the Association of American Law Schools (AALS), and spoke at a session arranged by the organization's Section on Antitrust and Economic Regulation.²⁰⁷ He started with a rueful jibe at the symbiotic relationship that linked the FTC to a parasite economy of external groups that profited from its presence:

[T]he FTC has brought Christmas cheer to many a prosperous household: the Chevy Chase homes of the FTC bar, who enjoy secure and gainful employment through generations of trial; the deregulators, that hardy group which simultaneously reviles and praises the FTC; the newsletter writers who proliferate and prosper; woodsmen and papermakers, court reporters, printers, and archivists.²⁰⁸

He promised that under his leadership the FTC would strive to ensure "that the consumer and the citizen benefitted at least equally as richly" from the FTC's labors as its external constituencies.²⁰⁹ In doing so, the agency would be "somewhat more bold, innovative and risk-taking."²¹⁰ There was no mistaking the intended direction of the agency's competition programs: "[W]e are determined to venture in the unchartered territory of the law of competition."²¹¹

Pertschuk then summarized "the working principles of competition policy" he had set out a month earlier in Boston.²¹² He largely paraphrased his "working principles of competition policy" from the earlier text,²¹³ but he also sharpened some of his previous remarks. For example, he warned that "[a] failure of competition policy to come to terms with the effects of very large institutions on the quality of life can have repercussions that are far more threatening to our society than some marginal losses of efficiency."²¹⁴

207. See Pertschuk, *supra* note 20.

208. *Id.* at 1.

209. *Id.*

210. *Id.*

211. *Id.* at 16.

212. *Id.* at 1.

213. *Id.*

214. *Id.* at 3.

With this preamble in hand, Pertschuk turned to the chief purpose of his talk to the law professors: to discuss how an expanded application of Section 5 would enable the FTC to fulfill the destiny he had described in Boston—“to develop competition policy in its broadest sense.”²¹⁵ Pertschuk said, “[W]e are convinced that the FTC Act, interpreted unflinchingly and with imagination, affords us the basic instrument for effectuating a far-reaching competition policy.”²¹⁶ He recited a traditional taxonomy of concepts that courts had determined to be prohibited as “unfair method[s] of competition.”²¹⁷ He identified four categories: conduct that (1) transgressed “the letter of either the Sherman Act or the Clayton Act[,]” (2) “threatene[d] an incipient violation of” these antitrust statutes, (3) “violate[d] the underlying spirit of” the other antitrust laws, or (4) “violate[d] public policy” as articulated in statutes and other legal commands outside the antitrust laws.²¹⁸

Pertschuk’s framing of the FTC’s authority accurately reflected and cited the legislative history and jurisprudence. This part of his talk was unremarkable. The provocative element appeared in his elaboration of what behavior the FTC might deem to be contrary to public policy and worthy of condemnation under Section 5.²¹⁹ He correctly noted that the Supreme Court’s recent decision in *FTC v. Sperry & Hutchinson Co. (S&H)*²²⁰ appeared to have given the FTC considerable discretion to discern when conduct violated public policy even though the behavior at issue violated neither the letter nor the spirit of the antitrust laws.²²¹ Pertschuk said the FTC would continue to make use of the *S&H* precedent, “as it illustrates the elastic nature of the concept of ‘unfairness’ which Section 5 embodies.”²²² In the following passage, Pertschuk discussed the potential breadth of the power this elasticity gave the Commission:

215. See Pertschuk, *supra* note 12, at 20.

216. Pertschuk, *supra* note 20, at 5.

217. See *id.* at 7-10.

218. *Id.* at 8-10.

219. See *id.* at 10-12.

220. 405 U.S. 233, 239, 249-50 (1972).

221. See Pertschuk, *supra* note 20, at 11-12.

222. *Id.* at 12.

What are the sources of public policy from which Section 5 can draw? Certainly, we can include those policies declared by statute We can also include policies established by the generally recognized business ethics of the community The implications are interesting, though I won't dwell on them. Can the FTC enjoin businessmen from employing illegal aliens? Could we enjoin a company from cheating on its taxes to gain a competitive advantage? Could we obtain an order requiring that an environmentalist be placed on the board of a company that repeatedly violates the pollution control laws? I leave you to ponder these and related possibilities.²²³

In these comments, Pertschuk may have been thinking out loud in an academic style before an audience of academics about one dimension of competition policy rather than announcing well-formulated intentions about the enforcement of Section 5.²²⁴ Perhaps Pertschuk meant only to speculate about the logical limits of the public policy component of unfairness. Might Section 5 enable the FTC to punish firms that gained a competitive advantage by avoiding costs through their noncompliance with other legal commands? Noncompliance could provide a major cost advantage; a broad range of conduct that infringed legal rules outside the antitrust laws—for example, failing to satisfy air pollution abatement mandates,²²⁵ ignoring workplace health and safety standards,²²⁶

223. *Id.* at 11.

224. *See supra* note 207 and accompanying text (noting the speech was delivered to the AALS).

225. Environmental Protection Agency (EPA) enforcement policy seeks to deter violations of pollution control laws by recovering, in the calculation of civil penalties, the economic benefit that violators derive from noncompliance. *See, e.g.*, WASTE & CHEM. ENF'T DIV., U.S. ENVTL. PROT. AGENCY, COMBINED ENFORCEMENT POLICY FOR CLEAN AIR ACT SECTIONS 112(R)(1), 112(R)(7), AND 40 C.F.R. PART 68, at 7-8 (2012) (discussing civil penalties for various violations of the Clean Air Act and noting that "the [EPA] enforcement team should always evaluate the economic benefit of noncompliance in calculating penalties").

226. Studies of gruesome industrial accidents sometimes reveal that company management deliberately violated health and safety laws. The coal dust explosion that killed twenty-nine miners in April 2010 at Massey Energy Company's Upper Big Branch Mine in West Virginia is a notable example. NORMAN G. PAGE ET AL., MINE SAFETY & HEALTH ADMIN., REPORT OF INVESTIGATION: FATAL UNDERGROUND MINE EXPLOSION, APRIL 5, 2010 (2011), <https://arlweb.msha.gov/Fatals/2010/UBB/FTL10c0331.pdf> [<https://perma.cc/ZYF8-F763>]. The Mine Safety and Health Administration's report on the disaster found: "The physical conditions that led to the explosion were the result of a series of basic safety violations at [the Upper Big Branch mine] and were entirely preventable." *Id.* at 2. The report added that Massey "promoted and

employing illegal aliens and shortchanging their wages,²²⁷ or evading taxes²²⁸—could confer a significant cost advantage on their wrongdoer. At a high conceptual level, do such illicitly attained cost advantages not distort the competitive process?²²⁹ If so, are they not unfair methods of competition?

Maybe Pertschuk’s aim was only to provoke an active discussion among academics on a winter’s day in Atlanta. Yet, to pose the questions as he did, even in the form of a “what if” hypothetical before an audience fond of such thought exercises, had foreseeable consequences beyond the AALS annual meeting. Pertschuk’s remarks about the potential reach of Section 5 soon appeared in the antitrust trade press.²³⁰ As Pertschuk’s opening comments indicated, there is an attentive audience of external observers (such as practitioners, business officials, journalists, advocacy groups) who scour each word uttered by senior FTC officials for clues, genuine and spurious, of intentions to be analyzed and reported.²³¹

To the audience of FTC kremlinologists, Pertschuk’s comments suggested, however faintly, that the FTC could become, and might want to become, the nation’s omnibus regulator. An agency

enforced a workplace culture that valued production over safety, including practices calculated to allow it to conduct mining operations in violation of the law.” *Id.*

227. See Kevin S. Marshall, *The Unfair Trade Practice of Hiring Illegal Alien Workers*, 11 U. PA. J. BUS. L. 49, 87-93 (2008) (finding that hiring illegal aliens at below-market wages may constitute a violation of the federal antitrust laws and an unfair trade practice under state law).

228. Some competition law systems directly seek to address competitive distortions that can arise in the implementation of a taxation program. See, e.g., Commission Decision 2017/1283 of 30 August 2016 on State aid SA.38373 (23014/C) (ex 2014/CP) Implemented by Ireland to Apple, 2017 O.J. (L187) 1 (EU) (applying state aid provisions of the Treaty on the Functioning of the European Union to compel Ireland to recover reductions in tax conferred upon Apple).

229. See, e.g., Marshall, *supra* note 227, at 87-93.

230. In early January 1978, BNA’s Antitrust & Trade Regulation Report carried an account of the Pertschuk’s Atlanta speech and reported his comments about whether Section 5 of the FTC Act might address the scenarios (hiring illegal aliens, nonpayment of taxes, and repeated violations of environmental laws) Pertschuk had mentioned. See *Pertschuk Speculates on Stretching Laws: Can Robinson-Patman Act Apply to Services?*, Antitrust & Trade Reg. Rep. (BNA), No. 845, at A-17 (Jan. 5, 1978). The legal press also covered Pertschuk’s Boston Speech and summarized his plans for expanding the focus of antitrust law. See, e.g., *Will Populist Approach Work in Trustbusting?* 64 A.B.A. J. 523, 523-24 (1978) (reviewing Pertschuk’s Boston speech).

231. See *supra* note 208 and accompanying text.

determined to develop “competition policy in its broadest sense”²³² and “venture in the uncharted territory of the law of competition”²³³ might aspire to use Section 5 to backstop the ineffective or half-hearted efforts of other public bodies entrusted with primary responsibility to enforce the law.²³⁴ If other regulatory agencies or law enforcement bodies could not or would not do their jobs, Section 5 could provide a universal safety net.²³⁵ The application of Section 5’s public policy component would enable the FTC to secure compliance with nonantitrust laws, subject only to the constraints imposed by the agency’s budget ceiling.²³⁶ Were there any laws that affected the operation of business enterprises that would not be fair game for FTC intervention?

The brief rumination about the FTC as a super-regulator overshadowed specific proposals that were serious and not mere speculation. In one passage, Pertschuk said the FTC was considering whether Section 5 could arrest “conglomerate mergers whose effects tend to increase macroconcentration, but which have no identifiable anticompetitive effect in any one product and geographic market[.]”²³⁷ He added that the agency was exploring the possibility of devising a competition trade regulation rule to create a presumption against conglomerate mergers of a certain size.²³⁸ In another comment, Pertschuk said, “Section 5 may prove even more effective than the Sherman Act in reaching actions by oligopolists who operate so interdependently that the distinction between monopoly and oligopoly is a chimera.”²³⁹ The Commission might consider whether “certain acts of price signaling are incipient forms of collusion” and whether Section 5 would allow the agency to challenge incipient threats to competition posed by nondominant firms, without having to demonstrate a “dangerous probability of success.”²⁴⁰

232. Pertschuk, *supra* note 12, at 20.

233. Pertschuk, *supra* note 20, at 16.

234. *Cf. supra* notes 219-23 and accompanying text.

235. *Cf. supra* notes 181, 193-96 and accompanying text.

236. *Cf. supra* notes 219-23 and accompanying text.

237. Pertschuk, *supra* note 20, at 14.

238. *See id.*

239. *Id.* at 14-15.

240. *Id.* at 15.

III. THE PERTSCHUK PROGRAM

In a number of ways, the Pertschuk FTC sought to deliver on the promise of the Boston speech and use Section 5 to stretch the frontiers of enforcement. During Pertschuk’s chairmanship of the FTC, the agency initiated the following competition litigation matters:

1. A Section 5 test case challenging the parallel, noncollusive adoption of a facilitating practice in the tetraethyl lead industry (*Ethyl*).²⁴¹
2. A Section 5 test case challenging plant expansion announcements as improper strategic entry deterrence (*Du Pont/Titanium Dioxide*).²⁴²
3. A test case (*Russell Stover*) that sought to overturn the safe harbor created in *United States v. Colgate & Co.*²⁴³ for firms that announced a policy of not dealing with discounters and terminating retailers that did not abide by the policy.²⁴⁴
4. Cases that challenged potential competition mergers.²⁴⁵
5. Cases that reinforced the FTC’s authority to police restrictive practices in the learned professions.²⁴⁶

Beyond these measures, the Commission studied litigation possibilities that the agency ultimately did not pursue. It conducted preliminary investigations of firms that might be suitable candidates for a no-fault monopolization test case brought under Section 5 of the FTC Act.²⁴⁷ In articles, speeches, and testimony, the Commission

241. *Ethyl Corp.*, 101 F.T.C. 425 (1983), *vacated sub nom.* *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

242. *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

243. 250 U.S. 300, 304-05 (1919).

244. *See Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256, 257 (8th Cir. 1983).

245. *See, e.g., BOC Int’l Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977).

246. *See FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986).

247. I first joined the FTC in the fall of 1979 as an attorney in the Planning Office of the Bureau of Competition. One of my assignments was to work with a team of Planning Office attorneys to identify possible candidates for a no-fault test case that the FTC would bring under Section 5. The team prepared one memorandum that spelled out the legal foundations of a no-fault case and a second memorandum that singled out five companies as possible test case targets. My recollection is that Campbell Soup Company stood atop the list of recommended targets.

supported antitrust legislative reforms to recognize a no-fault cause of action.²⁴⁸

A key landmark of the Pertschuk era was the development of the administrative and policy framework for implementing merger review responsibilities imposed by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR).²⁴⁹ Congress designed the HSR to give the government an opportunity to review certain mergers before they were consummated.²⁵⁰ The statute required firms undertaking mergers above a certain size to notify the federal antitrust agencies in advance.²⁵¹ HSR established an initial waiting period in which the agencies could decide whether to request additional information from the merging parties; if the agencies sought more information (a step known today as a “second request”), the parties were obliged to provide it, and, upon completing the submission, to give the reviewing agency additional time to consider whether to challenge the transaction.²⁵² During the initial waiting period, the second request production, and the final waiting period, the parties were barred from consummating the transaction.²⁵³

The HSR statute gave the FTC responsibility for administering the merger notification regime on behalf of both federal antitrust agencies²⁵⁴—a major administrative undertaking. The FTC drafted the implementing rules and established the operational infrastructure—including a premerger notification office and the development of internal procedures for reviewing information submitted by the parties—to execute the system.²⁵⁵ Once the system went live late in

248. See Alfred F. Dougherty, Jr. et al., *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83, 84-85 (1980).

249. See generally Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, sec. 201, § 7A, 90 Stat. 1383, 1390-94 (codified as amended at 15 U.S.C. § 18a (2012)). For information on the enactment and early implementation of the HSR premerger notification system, see William E. Kovacic, *HSR at 35: The Early U.S. Premerger Notification Experience and Its Meaning for New Systems of Competition Law*, in NEW COMPETITION JURISDICTIONS—SHAPING POLICIES AND BUILDING INSTITUTIONS 9 (Richard Whish & Christopher Townley eds., 2012).

250. See Malcolm R. Pfunder, *Premerger Notification After One Year: An FTC Staff Perspective*, 48 ANTITRUST L.J. 1487, 1487-89 (1979).

251. See Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 7A(a).

252. See *id.* § 7A(d)-(e).

253. See *id.*

254. See *id.*; Kovacic, *supra* note 249, at 9-11.

255. See Pfunder, *supra* note 250, at 1487-89.

1978, the FTC (and the DOJ) began the difficult task of deciding what information to collect and, in challenging specific transactions, when to engage with the federal courts to determine which standards should be applied in determining when challenged transactions should be enjoined.²⁵⁶ None of these tasks—drafting rules, devising procedures, and litigating the cases—was easy.

In his Boston speech, Pertschuk said the FTC would attempt to use rulemaking to develop substantive competition policy standards.²⁵⁷ The FTC considered a variety of possibilities, but promulgated no competition policy rules other than the measures required to implement the HSR statute.²⁵⁸ The Commission issued an initial proposal to regulate standards and certification processes,²⁵⁹ and it gave consideration to measures to control certain conglomerate transactions, to prohibit physician organizations from controlling Blue Shield medical plans, and to bar integrated oil companies from owning crude oil or petroleum products pipelines.²⁶⁰ The FTC ultimately adopted none of these measures.²⁶¹ The agency’s staff testified before Congress regarding legislation to amend the Clayton Act to establish limits on conglomerate transactions and recommended enactment of a “cap and spin-off” measure that would allow large firms to make acquisitions so long as they divested an equivalent amount of assets.²⁶²

256. *See id.*

257. *See* Pertschuk, *supra* note 12, at 19. At the time of Pertschuk’s arrival at the FTC, the agency already had undertaken studies about the possibility of using rulemaking to achieve its competition policy aims. *See* Burt Schorr, *Regulatory Reach: FTC Plans to Promote Competition by Use of Rules Now Limited to Consumer Area*, WALL ST. J., Jan. 26, 1977, at 38.

258. *See* Kovacic, *supra* note 78, at 664. For a list of promulgated HSR rules and their proposed versions, see *HSR Statements of Basis and Purpose*, FED. TRADE COMMISSION, <https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations/statements-basis-purpose> [<https://perma.cc/KTM9-D62Q>] (listing only five final HSR rules promulgated during Pertschuk’s chairmanship, each of which was procedural).

259. Standards and Certification, 43 Fed. Reg. 57,269 (Fed. Trade Comm’n proposed Dec. 7, 1978) (to be codified at 16 C.F.R. pt. 457).

260. *See* Kovacic, *supra* note 78, at 664.

261. *See id.*

262. The “cap and spin-off” proposal and the testimony of FTC officials in support of legislation to restrict conglomerate mergers are described in Michael Pertschuk & Kenneth M. Davidson, *What’s Wrong with Conglomerate Mergers?*, 48 FORDHAM L. REV. 1, 5 & n.27, 17-19 (1979).

Under Pertschuk's guidance, the FTC expanded its infrastructure devoted to policy analysis, planning, and implementation. Among other steps, the agency formed two new units in the Bureau of Competition (the Office of Special Projects and the Planning Office),²⁶³ and created a consumer protection unit within the Bureau of Economics.²⁶⁴ These and other FTC units undertook a wide range of policy research and development projects to improve the foundations for FTC policymaking. Key initiatives included:

1. Hearings and the publication of a report on the social effects of firm size and market structure;²⁶⁵
2. Hearings and the publication of proceedings on the effects of concentration in the media;²⁶⁶
3. A conference and published papers and proceedings on modern theories of predation;²⁶⁷
4. Publication of staff papers setting out new theories of harm involving raising rivals' costs and facilitating practices;²⁶⁸
5. Publication of staff papers on the origins and meaning of the FTC's mandate and on the history of its enforcement programs;²⁶⁹
6. A symposium and publication of proceedings on the history of competition policy in the United States;²⁷⁰ and

263. See Kovacic, *supra* note 78, at 659.

264. See Paul A. Pautler, *A History of the FTC's Bureau of Economics* 68-69, 128-29 (Am. Antitrust Inst., Working Paper No. 15-03; Inst. for Consumer Antitrust Studies, Working Paper No. 2015-3, 2015), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/FTC-Bureau-of-Economics-History_0.pdf [<https://perma.cc/Z3BM-3GPM>].

265. FED. TRADE COMM'N, *THE ECONOMICS OF FIRM SIZE, MARKET STRUCTURE, AND SOCIAL PERFORMANCE* (John J. Siegfried ed., 1980).

266. FED. TRADE COMM'N, *PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION* (1978).

267. FED. TRADE COMM'N, *STRATEGY, PREDATION, AND ANTITRUST ANALYSIS* (Steven C. Salop ed., 1981).

268. See, e.g., Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 WIS. L. REV. 887; Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. (SPECIAL ISSUE), May 1983, at 267.

269. For a list of such papers, see William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE UNIV. L. REV. 319, 333 n.78 (2007).

270. NATIONAL COMPETITION POLICY: HISTORIANS' PERSPECTIVES ON ANTITRUST AND GOVERNMENT-BUSINESS RELATIONSHIPS IN THE UNITED STATES (Fed. Trade Comm'n ed., 1981). The origin and purpose of these proceedings are described in William E. Kovacic, *Antitrust in Historical Context: Creating Historical Awareness for Competition Agencies*, 60 ANTITRUST BULL. 83 (2015).

7. Evaluations of the economic effects of previous law enforcement matters.²⁷¹

As described more fully below, few of the agency’s innovative litigation initiatives succeeded in the face of what proved to be significant judicial resistance.²⁷² Nor did the FTC’s legislative reforms become law.²⁷³ As the 1970s came to a close, the FTC’s competition and consumer protection programs had created powerful political backlash that threatened key elements of the FTC’s authority.²⁷⁴

IV. A CRITICAL ASSESSMENT

Michael Pertschuk’s Boston and Atlanta speeches laid the groundwork for a number of changes that fostered lasting improvements at the FTC.²⁷⁵ The most notable enduring accomplishments involved enhancements of institutional capacity: the initiation of what became a continuing program of impact evaluations of completed matters,²⁷⁶ the creation of the HSR merger review system,²⁷⁷ the development of the agency’s role as a convenor of programs and a sponsor of research involving emerging topics of law and policy,²⁷⁸ and the raising of awareness of history as a tool for improving agency decision making.²⁷⁹

The Pertschuk litigation program also yielded some important successes. A notable example is *FTC v. Indiana Federation of Dentists*, which commanded sustained support from FTC leadership into the 1980s and generated a favorable Supreme Court decision on the application of the rule of reason.²⁸⁰ Most FTC cases initiated in

271. See generally William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006) (describing these evaluations).

272. See *infra* Part IV.

273. See Kovacic, *supra* note 78, at 667.

274. See *infra* Part IV.B.

275. See *supra* Part II.

276. See *supra* note 271 and accompanying text.

277. See *supra* notes 249-56 and accompanying text.

278. See *supra* notes 263-71 and accompanying text.

279. See *supra* notes 269-71 and accompanying text.

280. 476 U.S. 447, 457-66 (1986).

the 1970s by Pertschuk and his predecessors to extend the frontiers of antitrust enforcement failed.²⁸¹ The philosophy of expansionism that guided FTC competition and consumer protection programs from the late 1960s through the Pertschuk era—do more, push the frontiers, be bold²⁸²—elicited a hostile reaction from Congress.²⁸³ A legislative conflagration beset the agency from 1979 to 1982; with a few relatively minor exceptions, the FTC successfully defended most of its jurisdiction, but the near-death experience left lasting scars.²⁸⁴

Why did the FTC enjoy relatively little success in building a program of law enforcement and rulemaking grounded in an understanding of “competition policy in its broadest sense”?²⁸⁵ Why did so many of the agency’s proposed consumer protection rules run aground? One popular narrative portrays the FTC of the 1970s, and the Pertschuk era in particular, as simply a product of irrationality, a period in which the FTC plunged into the abyss because it became what one legislator called “a rogue agency gone insane.”²⁸⁶ This narrative typically depicts Pertschuk as the villain and berates him.²⁸⁷

For three reasons, the Pertschuk-centric irrationality narrative is seriously mistaken. First, many failed projects that ultimately inflicted woe on the FTC took shape before Pertschuk became the FTC’s chairman.²⁸⁸ If the FTC came to grief because it abandoned a necessary sense of caution or realism in applying its broad powers,

281. The Commission dismissed its shared monopolization cases against the breakfast cereal manufacturers and the petroleum refiners. *Kellogg Co.*, 99 F.T.C. 8, 269 (1982); *Exxon Corp.*, 98 F.T.C. 453, 459-62 (1981). Various courts of appeals denied enforcement of Commission orders in three cases initiated in the 1970s and predicated upon the application of Section 5 of the FTC to reach conduct not prohibited by the other antitrust laws. *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 142 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980). The Eighth Circuit Court of Appeals also denied enforcement of the FTC’s order in a test case that sought to overturn the *Colgate* doctrine. *Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256, 260 (8th Cir. 1983).

282. See *supra* notes 48-52 and accompanying text.

283. See PERTSCHUK, *supra* note 10, at 69-117; Kovacic, *supra* note 78, at 664-67.

284. See Kovacic, *supra* note 78, at 664-67; *infra* Part IV.B.

285. See Pertschuk, *supra* note 12, at 20.

286. See Kovacic, *supra* note 78, at 590 (quoting 125 CONG. REC. H10,758 (daily ed. Nov. 14, 1979) (statement of Rep. Frenzel)).

287. See, e.g., PERTSCHUK, *supra* note 11, at 69-70.

288. See *supra* Part I.A.

Pertschuk’s predecessors (especially Caspar Weinberger, Miles Kirkpatrick, and Lewis Engman²⁸⁹) deserve a generous share of blame for the result.²⁹⁰ At most, Pertschuk added fuel to a conflagration ignited well before he became the agency’s chair; if Pertschuk was irrational—for example, in seeking to press the exercise of the FTC’s powers to the limits and aggressively attack problems of industrial concentration—he had lots of respectable company.²⁹¹

Second, portraying the FTC of the Pertschuk era (and the 1970s, more generally) as an unrelieved calamity overlooks the many good things that Pertschuk and the Commission did in this period. As noted in the introduction to this Part, various FTC substantive programs and processes established in the 1970s and during the Pertschuk chairmanship have improved the quality of competition and consumer protection policy.²⁹² The paint-it-black interpretation ignores valuable FTC accomplishments in the 1970s, and diminishes our understanding of how good programs and practices originate.

Third, and most relevant to this Article, the irrationality narrative that casts Pertschuk as the demented head of a “rogue agency gone insane”²⁹³ takes an easy way out of the problem of why

289. See Kovacic, *supra* note 165, at 953 app.A.

290. See generally *supra* Part I.B.

291. See generally *supra* Part III (describing the ambitious FTC competition and consumer protection programs initiated earlier in the late 1960s and in the 1970s before Pertschuk’s chairmanship began). Pertschuk’s predecessors used adventurist rhetoric hardly different from his own. For example, in 1970, in a letter to Senator Edward Kennedy, Weinberger said the Commission was urging its staff “to make recommendations to us that will probe the frontiers of our statutes.” William E. Kovacic, *Congress and the Federal Trade Commission*, 57 *Antitrust L.J.* 869, 876 n.29 (1988) (quoting Letter from Caspar W. Weinberger, Chairman, Fed. Trade Comm’n, to Senator Edward M. Kennedy, Chairman, Senate Subcomm. on Admin. Practice & Procedure (July 22, 1970), in *Hearing on the Nomination of Miles K. Kirkpatrick to be Chairman of the Federal Trade Commission Before the S. Comm. on Commerce*, 91st Cong. 133-34 (1970)). Weinberger added that the agency was making progress in “[p]robing the outer limits” and “exploring the frontiers” of its statutes. *Id.* In remarks published in 1971, Kirkpatrick said he and his fellow commissioners “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.” *Id.* at 876 (quoting *Federal Trade Commission, ‘43 Grad Transforms Agency into a ‘Growling Watchdog’*, U. PA. L. ALUMNI J., Fall 1971, at 9). Pertschuk’s commitment to deconcentration echoed the views of many contemporary commentators, including distinguished academics who advocated the application of “no-fault” monopolization theories to restructure dominant firms. See Kovacic, *supra* note 58, at 1137.

292. See *supra* notes 275-80 and accompanying text.

293. See *supra* note 286 and accompanying text.

regulatory agencies and other organizations fail. The irrationality narrative excoriates a scapegoat (here, Pertschuk) for problems substantially attributable to flaws in culture, design, and operations of institutions.²⁹⁴ This blame-casting approach ignores major institutional factors that deserve more attention in explaining the behavior of the FTC and other regulatory bodies. The popular ritual of individual condemnation hides institutional weaknesses that have contributed to policy failures at the FTC.²⁹⁵

The discussion below considers the performance of the FTC in the 1970s and the Pertschuk era by identifying institutional weaknesses that contributed to its mixed record of success in executing its substantive programs and exposed the agency to destructive political backlash in the late 1970s and early 1980s. As the discussion indicates, Pertschuk made his own share of improvident decisions. Yet the decision making lapses were not his alone. Some miscalculations—for example, the failure to achieve a suitable match between the agency’s commitments and its capabilities—were evident in the choices made by Pertschuk’s predecessors.²⁹⁶ Deeper institutional explanations account for a number of difficulties that commentators tend to lay at Pertschuk’s feet. The aim here is to illuminate avoidable errors rooted in how institutions make decisions.

294. Simple explanations that attribute failure in complex organizations to the “human error” of specific individuals often overlook larger institutional forces that cause such systems to break down. *See generally* DIANE VAUGHN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* (1996) (examining how culture and decision making processes of the National Aeronautics and Space Administration influenced decision to launch the Challenger space shuttle on its fatal journey); DAVID D. WOODS ET AL., *BEYOND HUMAN ERROR* (2d ed. 2010) (focusing on how “human error” can obscure system malfunctions). On the phenomenon of scapegoating individuals as a convenient alternative to addressing larger institutional deficiencies that cause organizations to fail, see Marilyn Paul, *Moving from Blame to Accountability*, SYS. THINKER, <https://thesystemsthinker.com/moving-from-blame-to-accountability/> [<https://perma.cc/R88T-NHTQ>]. In regulatory policy, the decisions of individual leaders can have a major impact on the outcomes produced by their agencies, but these decisions must be considered in the larger context of institutional forces that determine what regulators do. *See* PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER* (2014).

295. *See, e.g.*, Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 *ANTITRUST L.J.* 145 (2010) (attributing policy failures of the FTC to inadequate attention to building capacity to handle difficult matters, rather than to the unwillingness of Commission leadership to address major economic problems).

296. *See supra* notes 288-90 and accompanying text.

A. Poor Historical Awareness

In his tenure as FTC Chairman, Pertschuk spoke perceptively about using history to improve agency decisionmaking. His Boston speech mentioned the contributions of historians as potentially useful sources of insight to guide FTC policy.²⁹⁷ In 1979, the FTC convened a series of seminars by leading business historians, who examined the changing and often ambivalent role of competition policy in the United States.²⁹⁸ In the late 1970s and early 1980s, with Pertschuk’s encouragement, FTC staff members performed extensive research projects, and published papers on the agency’s formation and the history of its efforts to carry out its mandate.²⁹⁹

The man who deeply cared for history lacked an informative historical perspective when he needed it the most—namely, in formulating his program in 1977 and in rolling out his competition and consumer initiatives in 1977-1978. As discussed in Part II.A. above, Pertschuk’s Boston speech portrayed the FTC as a seriously underperforming agency.³⁰⁰ Pertschuk depicted the FTC as timid and unimaginative; the FTC wanted for political will, lacked a proper understanding of its aims, and too often ducked significant matters.³⁰¹ The FTC of the Boston speech was beholden to an excessively narrow economic (Chicago School) perspective; it shirked its fuller responsibility to look beyond price effects to account for the interests of workers, to accomplish goals originating in other legal commands (for example, environmental policy), and to promote market structures compatible with the nation’s democratic ideals.³⁰² Because it lacked fortitude and an appreciation for “competition policy in its broadest sense,”³⁰³ the FTC had not explored creative

297. Pertschuk, *supra* note 12, at 4.

298. *See, e.g., supra* note 207 and accompanying text.

299. Representative contributions include Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980); Kovacic, *supra* note 78; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); *see also supra* note 269 and accompanying text.

300. *See* Pertschuk, *supra* note 12, at 3-5; *supra* notes 175-83 and accompanying text.

301. *See* Pertschuk, *supra* note 12, at 3.

302. *See id.* at 4-5; *supra* notes 179-83 and accompanying text.

303. *See* Pertschuk, *supra* note 12, at 20.

ways to fulfill its destiny by using its distinctive mandate, Section 5, to proscribe unfair methods of competition.³⁰⁴

The Boston speech revealed a poor understanding of the FTC's history, both recent and more distant. Pertschuk showed no awareness of the significance of the matters that the agency had undertaken from 1969 through 1976, nor did he comprehend the magnitude of the program the Commission had in flight in the late fall of 1977.³⁰⁵ Pertschuk and his advisors seem to have not mapped out the commitments, summarized in Part I above, that the FTC was already seeking to fulfill.³⁰⁶ Pertschuk's call for ambition and boldness did not grasp the boldness and ambition of the agency's existing antitrust litigation portfolio.³⁰⁷ In what possible sense could efforts to break up the leading petroleum refiners³⁰⁸ and the largest breakfast cereal producers³⁰⁹ be deemed substantively unimaginative, risk-avoiding, or lacking political courage? Or running three

304. *Cf. supra* notes 193-97 and accompanying text.

305. *See generally supra* Part I.B. Pertschuk's claim that U.S. antitrust enforcement in the years leading up to 1977 lacked courage and political will also took no apparent account of the magnitude of the DOJ's litigation program involving dominant firms. At the time of the Pertschuk speeches in 1977, the DOJ was prosecuting monopolization cases against the nation's largest producer of mainframe computers (IBM), the country's principal telephone company (AT&T), and its two leading manufacturers of automobile tires. *See United States v. IBM Corp.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. filed Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization); *United States v. AT&T Co.*, [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,074 (D.D.C. filed Nov. 20, 1974) (complaint alleging monopolization, attempted monopolization, and conspiracy to monopolize); *United States v. Goodyear Tire & Rubber Co.*, and *United States v. Firestone Tire & Rubber Co.*, [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073 (N.D. Ohio filed Aug. 9, 1973).

306. *See generally supra* Part I.B. (describing the FTC's antitrust agenda before Pertschuk became chairman). One basis for this observation is my experience at the FTC in the late 1970s and early 1980s. From late 1979 through 1982, I was an attorney in the Planning Office of the Bureau of Competition. In preparing a history of the FTC's competition programs and its relations with Congress, *see Kovacic, supra* note 291, I devoted special attention to the formulation of the FTC's competition program from the late 1960s through the 1970s. I found no indication that the agency (including the Pertschuk leadership team) realized in 1977 how the agency's agenda from 1969 through 1976 was easily the most ambitious competition enforcement program in the FTC's history and, arguably, no less remarkable in its scope and aims than the DOJ antitrust program from 1905 to 1920. *See Kovacic, supra* note 78 (discussing DOJ deconcentration efforts in early 20th century).

307. *See generally supra* Part I.B.

308. *See Exxon Corp.*, 98 F.T.C. 453 (1981); *supra* note 95 and accompanying text.

309. *See Kellogg Co.*, 99 F.T.C. 8 (1982); *supra* note 94 and accompanying text.

predatory pricing cases at one time against major enterprises?³¹⁰ Or dismantling the distribution system relied upon by soft drink producers for much of the twentieth century?³¹¹ Or attacking the longstanding advertising codes of the nation’s largest medical professional association?³¹²

The Boston and Atlanta speeches were no less historically obtuse in discussing the expanded application of Section 5 of the FTC Act.³¹³ In spelling out what he meant to do with Section 5, Pertschuk made little mention of what the agency already was doing, and how far it was reaching in prosecuting highly experimental theories of infringement.³¹⁴ The FTC had already concluded one expansive, pathbreaking application of Section 5 in settling its monopolization case against Xerox.³¹⁵ In late 1977, the agency was running four major matters—the Exxon and Kellogg shared monopolization cases, the Boise Cascade facilitating practices case, and the Official Airline Guides refusal to deal case—that were premised substantially or entirely on Section 5.³¹⁶ The Boston and Atlanta speeches give no hint that Pertschuk or his staff—in the months of reflection and preparation that led up to his presentations—understood the doctrinal and economic stakes of these cases.³¹⁷

The lack of short-term historical awareness in the Boston and Atlanta speeches is bewildering and distressing. How could the new chairman and his staff underestimate the significance (and difficulty) of the existing portfolio, and why did they not assess this

310. See *supra* notes 86-88 and accompanying text.

311. See *supra* Part I.B.3.

312. See *Am. Med. Ass’n*, 94 F.T.C. 701 (1979) *amended by* 99 F.T.C. 440 (1982), *and amended by* 100 F.T.C. 572 (1982), *and amended by* 114 F.T.C. 575 (1991); *supra* note 101 and accompanying text.

313. Cf. Pertschuk, *supra* note 12, at 11-12 (Boston speech); Pertschuk, *supra* note 20, at 8-10 (Atlanta Speech).

314. Cf. Pertschuk, *supra* note 12, at 11-12 (Boston speech); Pertschuk, *supra* note 20, at 8-10 (Atlanta Speech).

315. See *Xerox Corp.*, 86 F.T.C. 364 (1975), *modified*, 91 F.T.C. 728 (1978), *and modified*, 100 F.T.C. 455 (1982), *and modified*, 102 F.T.C. 1107 (1983). On the significance of the Xerox case, see Willard K. Tom, *The 1975 Xerox Consent Decree: Ancient Artifacts and Current Tensions*, 68 ANTITRUST L.J. 967 (2001).

316. See *Official Airline Guides, Inc. v. F.T.C.*, 630 F.2d 920, 922-23 (2d Cir. 1980); *Kellogg Co.*, 99 F.T.C. 8 (1982); *Exxon Corp.*, 98 F.T.C. 453 (1981); *Boise Cascade Corp.*, 91 F.T.C. 1 (1978), *enforcement denied*, 637 F.2d 573 (9th Cir. 1980).

317. See *generally* Pertschuk, *supra* note 12 (Boston speech); Pertschuk, *supra* note 20 (Atlanta Speech).

program in the context of the FTC's history going back to 1914? I offer two answers to this perplexing question. First, the prevailing sentiment, inspired by the Nader and ABA studies in 1969,³¹⁸ that the FTC had to do greater things to justify its existence, caused Pertschuk and his advisors to discount the significance of cases already underway. The second explanation points to an institutional weakness. There should have been a mechanism in the FTC to assess current developments in their larger historical context. This mechanism would have made Pertschuk and his advisors aware that, from its first decade onward, the FTC's efforts to undertake bold and imaginative applications of its competition or consumer protection powers confronted two, often-crippling obstacles: They involved massive implementation challenges that put a premium on recruiting and retaining capable staff, and they tended to arouse congressional opposition and, in some instances, spurred Congress to intervene destructively in the agency's affairs.³¹⁹

One expects that a primer on the agency's history—especially about its occasionally tumultuous relations with Congress—would have caught Pertschuk's attention. In his Atlanta speech, Pertschuk spoke approvingly of a 1940s FTC litigation program instituted to challenge the adoption of basing point pricing systems as a violation of Section 5.³²⁰ Pertschuk did not mention that the FTC's litigation success in this endeavor provoked a harsh congressional backlash.³²¹ So intense was the opposition that Congress elicited promises from the FTC never again to rely on features of the recent basing point cases that endorsed the agency's effort to dispense with a finding of agreement in prosecuting such behavior under Section 5.³²² In doing so, Congress in effect forced the FTC to forswear the future application of the doctrinal end it had sought to achieve with Section 5. The basing-point pricing episode provided a sobering lesson about how political backlash can eviscerate an inventive, novel Section 5 case, and Pertschuk's team missed it.

318. See *supra* Par I.A.

319. See Kovacic, *supra* note 291, at 874.

320. See Pertschuk, *supra* note 20, at 8-9.

321. See *id.*; see also William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 933-34, 934 n.19, 943 (2010).

322. See Kovacic & Winerman, *supra* note 321, at 943 n.66.

B. Lack of Political Awareness

In 1977, awareness of the larger historical context in which the FTC’s programs had evolved would not have dictated the abandonment of politically risky cases.³²³ Instead, a better sense of the Commission’s history would have revealed a potential hazard of using the agency’s distinctive authority to pursue a “competition policy in its broadest sense.”³²⁴ Such awareness would have pressed Pertschuk and his advisors to reflect more carefully on the political feedback loop that had confronted the agency since 1914.³²⁵ FTC cases involving high economic stakes—especially matters involving the application of novel theories of liability, and the pursuit of powerful remedies—tend to attract the attention of legislators whose constituents are agency targets.³²⁶ This reality requires the FTC to consider how many major battles it can fight at one time, and to find ways to mobilize countervailing political support for the contests it pursues.³²⁷

Thus, applying the agency’s broad policy making powers can have strong side effects, which the agency ignores at its peril.³²⁸ Accurately mapping the FTC’s competition and consumer protection agendas as of the fall of 1977 would have revealed the full dimensions of the political risks the agency had already undertaken.³²⁹ This exercise would also have indicated the possibilities of formulating powerful commercial coalitions that might assemble to demand intervention from Congress and the executive branch.³³⁰ A missing ingredient in the Commission’s decision making process in the 1970s was a conscious process to account for political risk—by anticipating potential political hazards of proposed and ongoing matters, and by devising counter measures.

323. *See id.*

324. Pertschuk, *supra* note 12, at 20.

325. *See* Kovacic, *supra* note 78, at 623.

326. *See id.* at 628 n.211.

327. *See* Daniel Jay Baum, *Antitrust Functions of the Federal Trade Commission: Area Discrimination and Product Differentiation*, 24 *FED. B.J.* 579, 606 (1964).

328. *See id.*; Kovacic, *supra* note 78, at 627.

329. *See* Kovacic & Winerman, *supra* note 321, at 943.

330. *Cf. id.*

Political awareness also requires ongoing monitoring of shifts in the political environment that could affect the FTC's fortunes.³³¹ Pertschuk was an astute student of the legislative process,³³² and his remarks in Boston revealed his confidence that Congress would support his plans for more aggressive competition and consumer protection programs.³³³ Since the ABA and Nader reports, Congress had supported the FTC's transformation not only in demanding bold applications of the agency's authority but also in augmenting the agency's statutory powers and budget.³³⁴ The FTC enjoyed especially strong backing in the Senate, where Pertschuk's patron (Senator Warren Magnuson) and a large cohort of Democrats and Republicans had urged the agency to explore the frontiers of its powers.³³⁵ In the eyes of a number of powerful legislators in the first half of the 1970s, the FTC's program was merely a good start.³³⁶

This supportive environment began to erode in the 1976 national elections.³³⁷ Jimmy Carter's victory for the presidency obscured major changes in the Senate, where key members of the pro-FTC coalition retired or failed to gain reelection.³³⁸ In many instances, senators with greater skepticism about the regulatory process replaced pro-FTC senators.³³⁹ A growing, vocal chorus of business opponents to the Commission was forming, and a more sympathetic Congress awaited the complaining commercial interests.³⁴⁰

Pertschuk's 1977 speeches did not take note of the changing political and commercial environment in which the Commission would have to carry out programs that explored "the uncharted territory of the law of competition."³⁴¹ The development of his program through 1978 seemed oblivious to the political storm that

331. See Kovacic, *supra* note 291, at 871, 881-82, 886-87.

332. See *id.* at 887 n.67; Pertschuk, *supra* note 11.

333. Pertschuk, *supra* note 12, at 14.

334. Kovacic, *supra* note 78, at 632-36, 640-41, 652.

335. See *id.* at 632-41 (discussing examples of how the Senate encouraged the agency to use its powers).

336. See *id.* at 632-34 (citing Senators who wanted the FTC to do more).

337. See *id.* at 659.

338. See Kovacic, *supra* note 291, at 882 n.48.

339. See *id.*

340. See *The Escalating Struggle between the FTC and Business—Executives Openly Challenge the Actions and Policies of the Newly Activist Agency*, BUS. WK., Dec. 13, 1976, at 53 (describing the growing business opposition to the FTC).

341. Pertschuk, *supra* note 12 (Boston speech).

had begun to descend on the FTC.³⁴² Key events that spelled further trouble for the FTC in 1978 included a *Washington Post* editorial ridiculing the FTC for assuming the role of the “National Nanny” in trying to adopt a rule that would limit the advertising of certain foods to children,³⁴³ and a further conservative shift in the Senate in the fall midterm elections.³⁴⁴

In barely two years, from the fall of 1976 to the fall of 1978, the congressional mood toward the FTC had changed from supportive to disturbingly hostile.³⁴⁵ Programs that began earlier in the decade in a more agreeable setting now confronted increasingly formidable opposition as they matured.³⁴⁶ By 1980, before Ronald Reagan came to Washington, D.C. as President, the roof had fallen in on the FTC. On two occasions the agency closed shop for a few days because Congress allowed its funding to lapse.³⁴⁷ On the day before national elections in November 1980, Vice President Walter Mondale promised at a rally in Battle Creek, Michigan (headquarters of Kellogg) that he and Jimmy Carter would seek legislation to bar the FTC from imposing structural relief in the Kellogg’s cereal shared monopoly case.³⁴⁸

C. Poor Awareness of Policy Implementation Prerequisites

Running successful cases requires an agency to have strong human talent in substantive disciplines, such as law and economics; in forensic skills, such as investigation and advocacy; and in administrative teams that support the economists and lawyers.³⁴⁹

342. See Kovacic, *supra* note 291, at 887, 896.

343. PERTSCHUK, *supra* note 10, at 69-70 (quoting Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22).

344. See Kovacic, *supra* note 291, at 882 n.48.

345. See *supra* notes 337-40 and accompanying text.

346. See Kovacic, *supra* 291, at 882 n.48.

347. See Kovacic, *supra* note 78, at 665; Deborah Platt Majoras, *The Federal Trade Commission: Learning from History As We Confront Today's Consumer Challenges*, 75 UMKC L. REV. 115, 118 (2006).

348. See William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 241 (2015).

349. See William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295, 299-301 (2016); see also AM. BAR ASS'N, *supra* note 23, at 32-33 (discussing the need for high quality personnel at the FTC); Kovacic, *supra* note 78, at 649 (discussing the FTC’s recruitment and retention efforts for attorneys

The harder the cases, the better the talent must be.³⁵⁰ Cases that involve large economic stakes or advance novel theories of liability place greater demands on the agency's teams than matters that concern lesser economic importance and rest upon well-established principles of law.³⁵¹ Cases that implicate large economic stakes and seek to extend the boundaries of doctrine are the hardest of the lot.³⁵²

When an agency strikes at the heart of large economic interests, the affected organizations assemble the best teams of lawyers and economic consultants they can find to defend themselves successfully.³⁵³ For an agency to prevail in such matters, it must field a team with comparable skills.³⁵⁴ Thus, a crucial question for an agency in deciding whether to launch a specific case is who will handle the matter.³⁵⁵ In answering this question, that agency cannot make the blithe assumption that its best team can handle all of its difficult matters.³⁵⁶ Agencies vary considerably in the breadth and depth of their talent, but no agency has a limitless number of first-rate case-handling teams.³⁵⁷ If an agency is to operate effectively, it must strive to ensure that the commitments entailed by its initiation of cases matches its capability to deliver.³⁵⁸ An agency's commitments can outrun its capability by some margin; this can be an inevitable step in stretching and improving an agency's skills.³⁵⁹ An

and economists).

350. See *supra* note 349 and accompanying text.

351. See Kovacic, *supra* note 78, at 628 n.211; William E. Kovacic, *Deciding What To Do and How To Do It: Prioritization, Project Selection, and Competition Agency Effectiveness*, 13 COMPETITION L. REV. 9, 22 (2018).

352. See *supra* note 351 and accompanying text.

353. See Kovacic, *supra* note 78, at 628 n.211; Kovacic, *supra* note 351, at 22.

354. See Kovacic, *supra* note 351, at 22.

355. See *id.* at 22-23.

356. See *id.* at 22.

357. See *id.*

358. See *id.* at 21-24 (discussing the importance of sound project selection methods to ensure that an agency's commitments do not outrun its capability); see also ROBERT A. KATZMANN, REGULATORY BUREAUCRACY—THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 202-03 (1980) (reviewing difficulties that FTC encountered in executing its ambitious antitrust litigation agenda in the 1970s and observing “[p]erhaps, the commission should consider placing its much improved decision-making apparatus at the service of activities better suited to the organization’s institutional capacities”).

359. Cf. Kovacic, *supra* note 351, at 22-23.

agency that tries to run at 200 percent of its capacity will break down.³⁶⁰

As recounted above, the dramatic upgrade of the FTC’s programs contemplated in the ABA and Nader reports—bigger defendants, larger economic stakes, ambitious applications of doctrine—required a sweeping overhaul of its personnel.³⁶¹ The agency could only take on a bolder agenda if it could recruit the managers and staff with the skills to run those projects effectively.³⁶² The demand for instant results meant that the agency could not wait until every piece was in place before it embarked on the new agenda.³⁶³ If the FTC rolled out its program too quickly, however, it faced a genuine risk of being crushed by the formidable opposition that its bold, economically significant cases would arouse.³⁶⁴

By early 1977, the FTC had achieved a poor match between its commitments and capabilities. For example, the showcase shared monopoly cases³⁶⁵ were in trouble from the outset, as the defendants’ strong legal teams ensnared the agency in the litigation-equivalent of trench-by-trench warfare.³⁶⁶ A careful look at the roster of competition and consumer protection matters pending in early 1977, as presented in Part I.B above, and reflection on the sophistication, experience, and sheer size of the advisors retained by the affected firms should have inspired the FTC to ask itself how it could land

360. *See id.* at 22.

361. *See Kovacic, supra* note 78, at 628 & n.211; *supra* Part I.A.1.

362. *See* AM. BAR ASS’N, *supra* note 23, at 32-33.

363. *See Kovacic, supra* note 78, at 630-31.

364. *See Hyman & Kovacic, supra* note 9, at 1969 (“The pursuit of economically significant matters galvanizes tougher opposition in litigation and motivates firms to seek out legislative assistance in backing down the agency.”); *supra* notes 351-52 and accompanying text.

365. *See supra* notes 93-96 and accompanying text.

366. In my first two years at the FTC, from 1979 to 1981, I was assigned to assist the team working on the *Exxon* shared monopolization case. I saw firsthand the mismatch between the resources and talent that the FTC was able to devote to the case and the advisors arrayed against it on behalf of the eight petroleum refiner defendants. *See Kovacic & Hyman, supra* note 349, at 305. The same ferocity of opposition was apparent in the FTC’s high visibility consumer protection matters, such as the rulemaking to restrict certain advertising toward children. *See* Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 990-92 (1980) (describing an ultimately unsuccessful litigation campaign by industry groups to disqualify Michael Pertschuk from participation in FTC’s children’s advertising rulemaking); *see also* Stephanie Gould, Michael Pertschuk and the Federal Trade Commission (Harvard Kennedy School Case Study No. 387.0; Jan. 1, 1981) (discussing business opposition to proposed children’s advertising rule).

its pending matters successfully.³⁶⁷ Such an assessment might have inspired still deeper thinking later in the year about how the agency would undertake a newer, bolder, more far-reaching agenda in the Pertschuk era.

Pertschuk and his leadership team were not indifferent to implementation issues. They pressed onward with efforts to upgrade the agency's talent and to invest in building the knowledge base that would support new FTC programs.³⁶⁸ The agency also tried to simplify the prosecution of new matters in light of knowledge gained from previous experiences with case management.³⁶⁹ As noted above, by the end of the 1970s the agency was taking steps to understand why its fortunes, and the role of competition policy, had risen and fallen at different times in the FTC's history.³⁷⁰

Despite these admirable initiatives, the FTC in the 1970s and during the Pertschuk chairmanship systematically underestimated the implementation issues and problems associated with major extensions of the FTC's programs.³⁷¹ Perhaps the single principal lapse was the failure to develop a system, from 1969 onward, that tested each new project proposal on its own terms and in the context of the agency's entire portfolio³⁷²: What did the agency expect to gain? What were the risks of failure? Who would do the proposed project? How long would it take? What would it cost? How did the project affect the risk and difficulty of the entire portfolio?³⁷³

One has to ask why the FTC did not give implementation issues more emphasis in deciding whether to initiate new litigation or rule-making matters in the 1970s. One factor may have been the acute pressure the FTC felt to be seen as making massive, immediate

367. See Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, REGULATION, Jan./Feb. 1980, at 33, 39; William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1431-33 (1990); Kovacic & Hyman, *supra* note 349, at 305, 308-09; *supra* Part I.B.

368. Efforts to upgrade the agency's talent began before Pertschuk was Commissioner. See Kovacic, *supra* note 78, at 649; see also Gould, *supra* note 366 (describing management reforms initiated by Pertschuk at FTC in 1977).

369. See Kovacic, *supra* note 78, at 659-60 (explaining ways in which the FTC worked to improve case management).

370. See *supra* notes 269-70 and accompanying text.

371. See William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 922-23 (2009).

372. See Kovacic & Hyman, *supra* note 349, at 307-08.

373. See Kovacic, *supra* note 351, at 21-24.

progress toward the realization of the performance standard (set out most clearly in the ABA Report) that had to be satisfied to justify the agency’s continued existence.³⁷⁴ The ABA and Nader Reports portrayed the FTC as a badly failed regulatory authority, beset by dull-witted leadership, shot through with weak managers and mediocre staff, oblivious to decades of criticism, and preoccupied with fishing for commercial minnows.³⁷⁵ Congress echoed this grim assessment and repeated the ABA panel’s admonition that this was the agency’s final chance to prove its worth.³⁷⁶ The agency needed to launch big initiatives—quickly and in large numbers.³⁷⁷ Even as the agency sought to ramp up its program in the early 1970s, key legislators reminded the agency that the output of seemingly massive new matters was not enough.³⁷⁸

Pertschuk himself would have felt this pressure. He was a product of a legislative environment that helped set stratospheric goals for the FTC.³⁷⁹ By the time he arrived at the FTC, he had become a leading figure in a public interest community that relentlessly demanded that regulators do more and undervalued what regulators actually did.³⁸⁰ If an agency landed on the Moon, the public interest community immediately asked why the regulator had yet to land on Mars. This community viewed any signs of

374. See AM. BAR ASS’N, *supra* note 23, at 3.

375. See *supra* Part I.A.

376. See Hyman & Kovacic, *supra* note 9, at 1957, 1964.

377. See *id.* at 1966.

378. See *id.* at 1966-67. This state of mind is captured in comments that Senator William Proxmire made to FTC Chairman, Lewis Engman, in a hearing convened by the Joint Economic Committee of Congress in November 1974. *Market Power, the Federal Trade Commission, and Inflation: Hearing Before the J. Econ. Comm.*, 93d Cong., 2d Sess. 58-59 (1974) [hereinafter *FTC Hearing*]. At the time of the hearing, the FTC was running its shared monopolization cases against the breakfast cereal and petroleum industries and its monopolization case against Xerox. See *supra* notes 308-09 and accompanying text. Powerful structural relief was the FTC’s stated objective in all three matters. See *supra* notes 117-20 and accompanying text. Against this background, Proxmire told Engman: “[T]he FTC, like a number of other regulator agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence.” *FTC Hearing, supra*, at 59.

379. See Gellhorn, *supra* note 367, at 33. See generally PERTSCHUK, *supra* note 11.

380. See PERTSCHUK, *supra* note 11 (describing the enactment of consumer legislation in the 1960s and 1970s and efforts by congressional committees to press regulatory agencies to implement the legislation effectively); see also HARRIS & MILKIS, *supra* note 10, at 160-61, 170-71, 179-80 (describing the rise of consumer advocacy); LOUIS M. KOHLMEIER, JR., *THE REGULATORS* 251-61 (1969) (arguing that the FTC focused on trivial matters rather than issues such as industrial mergers).

compromise or hesitation as betrayals of the public interest cause.³⁸¹ Pertschuk doubtlessly observed how key figures of the public interest community visited their wrath on others whom Jimmy Carter had appointed from its ranks to serve in key regulatory posts.³⁸² Long personal relationships and the demonstrated fidelity of these individuals to the public interest cause counted for nothing if the newly appointed regulators were seen to waver in any respect.³⁸³ For this audience, spoken concerns about policy implementation and agency capability were threadbare excuses for inaction.³⁸⁴ With courage and more funding, any aim was attainable.³⁸⁵

Another factor is the calculus that individual leaders use to decide how much the agency should invest, respectively, in new matters (such as cases or rules) and in building institutional capability to perform such matters effectively.³⁸⁶ Ideally, agency leadership strives to achieve an appropriate balance between the

381. See, e.g., COX ET AL., *supra* note 21, at 62-65 (criticizing the FTC's policy of voluntary enforcement to allow businesses to fix their behavior).

382. In one memorable episode, Ralph Nader accused his long-time colleague, Joan Claybrook, of betraying the cause of consumer protection in her role as a Carter Administration appointee to head the National Transportation Safety Board (NTSB). See Ernest Holsendolph, *Nader Calls on Ex-Colleague to Resign Safety Post*, N.Y. TIMES (Dec. 1, 1977), <https://www.nytimes.com/1977/12/01/archives/nader-calls-on-excolleague-to-resign-safety-post.html> [<https://perma.cc/2BRV-BTA4>]. Until her appointment to head the NTSB, Claybrook had lead Congress Watch, the main lobbying arm of the Nader organization. See *id.* Nader described Claybrook's tenure as "a trail of averted or broken promises" and accused her of "a failure of nerve." *Id.*

383. Nader's attack on Claybrook is illustrative. Nader scolded her for not moving fast enough and far enough with measures to introduce requirements that automobile manufacturers install air bags in all vehicles. See *id.* Journalists recounted how Nader was criticizing consumer advocates who had taken positions in the Carter Administration but had failed to meet Nader's expectations. See, e.g., *id.* One story quoted Nader as saying "My personal feelings about them are not at stake.... The issues are bigger than that." *Id.*

384. When challenged by Nader to be more aggressive, Joan Claybrook pointed out that her agency was understaffed and had "a long way to go." See *id.* The response did not persuade Nader, who said the only appropriate response to the Secretary of Transportation's decision to delay implementation of various safety measures was Claybrook's resignation. See *id.*

385. See Kovacic, *supra* note 349, at 885. During the early 1970s, Congress raised the FTC's budget from \$16.9 million to \$47.2 million to allow the FTC to pursue a more ambitious agenda. See *id.* Legislators seemed to assume that greater resources could immediately be translated into highly capable teams of analysts and case handlers. This overlooked the time it takes for an agency to recruit superior personnel, train the teams, and acquire the experience needed to carry out ambitious tasks.

386. See generally Kovacic & Hyman, *supra* note 349 (discussing the need to balance these two priorities).

two.³⁸⁷ On the one hand, a leader must recognize the importance of activity in performing the agency’s mandate—to prosecute violations, to deter future misconduct, and to demonstrate the agency’s legitimacy in the eyes of the public that provides the resources it deploys.³⁸⁸ On the other hand, a leader must understand the principal mentioned earlier: successful performance of ambitious programs requires the application of skills and knowledge equal to the task.³⁸⁹ Building these skills and knowledge requires investments that do not yield immediately observable results.³⁹⁰ The necessary capability will not emerge unless incumbent leaders make investments that will largely benefit their successors.³⁹¹ Incumbent leaders who are mainly interested in their own future advancement may emphasize investments in new initiatives that generate immediate credit-claiming opportunities and de-emphasize investments that improve agency capability.³⁹²

Pertschuk struggled to achieve a good balance between “consumption” in the form of new cases and “investment” in the form of outlays that build institutional capability.³⁹³ Despite his expressed intention to do more, his output of new matters lagged behind the pace set by his predecessors from 1969 through 1976.³⁹⁴ His investment in institutional capability grew beyond prevailing levels.³⁹⁵ Pertschuk’s predecessors began too many ambitious matters without proper concern for effective implementation, and

387. *See id.* at 322.

388. *See, e.g.*, William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 LAW & CONTEMP. PROBS. 85, 94-95 (2016) (explaining how the pursuit of a minimum critical mass of enforcement cases is necessary for an agency to be deemed credible and legitimate).

389. *See* Kovacic & Hyman, *supra* note 349, at 299-313.

390. *See id.* at 304.

391. *See id.* at 296.

392. *See id.* at 304-05; Kovacic & Hyman, *supra* note 349, at 914, 921-22.

393. *See* Hyman & Kovacic, *supra* note 9, at 1973; *see* Kovacic & Hyman, *supra* note 349, at 311-12.

394. While Pertschuk’s output of new matters lagged behind the pace of his predecessors, many of the matters initiated by predecessors were ongoing during Pertschuk’s tenure and demanded substantial resources. *See* Kovacic & Hyman, *supra* note 349, at 309-11 (listing some of the ongoing matters in the 1970s).

395. *See* Kovacic, *supra* note 78, at 659-64 (discussing developments within the FTC).

Pertschuk tended to receive the blame when many of those matters collapsed in the late 1970s and early 1980s.³⁹⁶

On the whole, one can see Pertschuk being pulled by two conflicting forces. One force pressed him to expand the agency's programs aggressively; the other called for significant upgrades in capability to do the job well. As he took office, he faced a political imperative to announce a new and bolder agenda.³⁹⁷ Given his professional background and his fidelity to the goals of the public interest community,³⁹⁸ he would have found it impossible to say something along the following lines:

I expect to do more at the FTC and to employ a broader conception of competition policy. At the same time, I am mindful of the number and magnitude of competition and consumer protection matters the FTC already has in motion. In light of those commitments, and the difficulties we are facing in delivering on the existing agenda, I will be somewhat cautious in adding new matters to the list.³⁹⁹

Had Pertschuk said that, various legislators and members of the public interest community would have demanded his head.⁴⁰⁰

In practice, Pertschuk turned out to be more restrained in adding new initiatives than his Boston and Atlanta speeches foreshadowed.⁴⁰¹ The evident difficulties faced by the agency in delivering on existing projects, and Pertschuk's belated awareness that the political environment was turning against him, inspired him to scale down some of his earlier plans.⁴⁰² At the same time, he did not back away from making investments to enhance the agency's capability.⁴⁰³ One wonders what might have happened if more of this investment had taken place early in his chairmanship—for example,

396. See Kovacic & Hyman, *supra* note 349, at 305, 307, 309 (discussing the collapse of the *Exxon* and *Kellogg* shared monopolization cases, both of which began before Pertschuk's tenure).

397. See *supra* notes 374-85 and accompanying text.

398. See *supra* notes 379-85 and accompanying text.

399. Cf. *supra* notes 386-92 and accompanying text.

400. Cf. *supra* notes 374-85 and accompanying text.

401. Compare *supra* notes 380-81 and accompanying text, with *supra* Part II.A.1, and *supra* notes 219-23 and accompanying text.

402. See *supra* Part IV.B; *supra* notes 394, 396 and accompanying text.

403. See *supra* notes 263-71, 368-69, 395 and accompanying text.

the historians’ seminar on the history of competition law in the United States⁴⁰⁴ or the research on the evolution of FTC enforcement and its political implications⁴⁰⁵—rather than later in his term.

V. IMPLICATIONS FOR A NEW OVERHAUL OF U.S. COMPETITION POLICY

As noted in the Introduction, a number of contemporary proposals aim to make the FTC the engine for a transformation of U.S. competition policy.⁴⁰⁶ Many of these proposals resemble the program that Michael Pertschuk set out in his Boston and Atlanta speeches. A number of similarities stand out.

First the current call for a dramatic redirection of policy is grounded in a narrative of calamitous system failure.⁴⁰⁷ Among other lapses, the modern critique argues that U.S. competition policy since the 1970s has squandered precious resources on trivial matters (notably, the prosecution of horizontal restraints cases involving small, poorly paid service providers),⁴⁰⁸ shied away from challenging dominant firms and industries characterized by collective dominance;⁴⁰⁹ ignored the destructive consequences of vertical integration;⁴¹⁰ and tolerated mergers that increased concentration or allowed dominant incumbents to absorb smaller firms that, as independent enterprises, could emerge as major competitive forces.⁴¹¹

404. See *supra* note 270 and accompanying text.

405. See *supra* note 269 and accompanying text.

406. See *supra* note 2 and accompanying text.

407. See generally JONATHAN TEPPER, *THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION* (2019); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE GILDED AGE* (2018).

408. See Khan, *supra* note 6 (calling the FTC “an agency adrift” that is “squandering resources on trivial cases”); Sandeep Vaheesan, *America’s Most Insidious Union Buster? Its Own Government*, *GUARDIAN* (June 29, 2018, 6:00 AM), <https://www.theguardian.com/us-news/commentisfree/2018/jun/29/america-insidious-union-buster-government> [<https://perma.cc/R645-9T4C>] (criticizing DOJ and FTC for bringing cases that attack efforts by workers and small-and-medium enterprises, such as music teachers, to raise wage levels).

409. See WU, *supra* note 407, at 102-26; *Trustbusting in the 21st Century*, *ECONOMIST*, Nov. 17, 2018, at 55.

410. See Khan, *supra* note 6.

411. See Germán Gutiérrez & Thomas Philippon, *You’re Paying More in America Than You Would in Europe*, *WASH. POST* (Aug. 13, 2018), https://www.washingtonpost.com/news/the-worldpost/wp/2018/08/13/middle-class/?utm_term=.619c7f364558 [<https://perma.cc/PBV9->

A major stated cause of these policy distortions has been a fundamental misconception of the proper aims of competition policy. Consumer interests, under the banner of “consumer welfare,” have displaced the egalitarian vision of a fairness-based competition policy that Congress embraced in adopting the Sherman, Clayton, and FTC Acts and the federal courts effectuated, especially from the late 1930s into the 1970s.⁴¹² The cramped, single-minded focus on consumer interests is attacked for excluding consideration of the interests of workers, small and medium enterprises, income distribution effects, and the welfare of communities devastated by capricious choices made by dominant enterprises.⁴¹³ The consumer welfare fixation on price effects is scorned for ignoring how restrictive practices and sheer corporate size undermine innovation and endanger a host of other values.⁴¹⁴ The misshapen contemporary goals structure is assailed for being so tolerant of corporate gigantism that it undermines democracy itself.⁴¹⁵

In a number of instances, the litany of competition policy failures merges with a parallel critique of modern consumer protection policy. This is another narrative of grave inadequacy, in no area

DFWL]; Steven Pearlstein, *Boeing and Airbus, the New ‘Super Duopoly,’* WASH. POST (Apr. 25, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/04/25/boeing-and-airbus-the-new-super-duopoly/?utm_term=.a9f11b4bfe03 [https://perma.cc/NNB4-SE74] (discussing the lack of governmental challenges to mergers within the aerospace industry).

412. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 464-67 (2003) [hereinafter Kovacic, *Modern Evolution*] (describing modern acceptance by U.S. federal antitrust agencies of an efficiency-oriented goals framework); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 34-35 [hereinafter Kovacic, *Double Helix*] (describing contributions of Chicago and Harvard School scholars to development of an efficiency-oriented U.S. antitrust goals framework).

413. See *supra* notes 408-11 and accompanying text; see also Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 269-72, 277-79 (2017).

414. See Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 737-39 (2017); Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, ROOSEVELT INST. (Dec. 11, 2017), <http://www.rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory/> [https://perma.cc/N9E7-YG8B].

415. See Wu, *supra* note 407, at 138-39; Russell Brandom, *The Anti-Monopoly Case Against Google: A Conversation with Open Markets’ Barry Lynn*, VERGE (Sept. 5, 2017, 2:55 PM), <https://www.theverge.com/2017/9/5/16243868/google-monopoly-antitrust-open-markets-barry-lynn> [https://perma.cc/68K9-9S2D].

more telling than the indifference to the collection and misuse of personal data collected by large information technology firms.⁴¹⁶

The new critique derives strength from more frequent expressions of concern by elected officials and candidates for public office.⁴¹⁷ Some demand closer regulatory scrutiny of existing commercial giants;⁴¹⁸ others call for a program to break up these enterprises into smaller firms.⁴¹⁹ Proposals to accomplish these or related ends through new legislation have appeared in statements by individuals and groups within the major political parties.⁴²⁰ Given the difficulties inherent in adopting legislation of this scope, one imagines that litigation would remain the policy tool of choice for the coming years.

Suppose that the advocates of the transformation sketched above get the opportunity they wish for. Political developments align to

416. See Roger McNamee, *I Mentored Mark Zuckerberg. I Loved Facebook. But I Can't Stay Silent About What's Happening*, TIME (Jan. 17, 2019), <http://time.com/5505441/mark-zuckerberg-mentor-facebook-downfall> [<https://perma.cc/TV9P-UWBF>].

417. See Rhys Blakely, *Tech Titans, Once the Darlings of US Politics, Are Recast as Enemies*, TIMES (LONDON), Sept. 23, 2017, at 46; Rana Foroohar, *Silicon Valley 'Superstars' Risk a Populist Backlash*, FIN. TIMES (Apr. 23, 2017), <https://www.ft.com/content/3349ef84-268c-11e7-a34a-538b4cb30025> [<https://perma.cc/JH8B-7HH4>]; Ron Knox, *Elizabeth Warren Is the Perfect Antitrust Crusader for 2020*, SLATE (Jan. 4, 2019, 3:24 PM), <https://slate.com/news-and-politics/2019/01/elizabeth-warren-2020-antitrust-monopoly-crusader.html> [<https://perma.cc/UBA6-X73T>].

418. See, e.g., Haley Sweetland Edwards, *Washington Takes on the Threat of Big Tech*, TIME (Sept. 6, 2018), <http://time.com/5388338/dc-google-facebook-twitter/> [<https://perma.cc/4V98-W6HN>]; Seth Fiegerman, *Facebook Faces New Regulatory Backlash over Data Privacy*, CNN TECH (June 4, 2018, 1:28 PM), <https://money.cnn.com/2018/06/04/technology/facebook-data-backlash/index.html> [<https://perma.cc/XE66-RK7F>].

419. See, e.g., WU, *supra* note 407, at 127-39; Robert Reich, *Break Up Facebook (and While We're At It, Google, Apple and Amazon)*, GUARDIAN (Nov. 20, 2018, 3:00 PM), <https://www.theguardian.com/commentisfree/2018/nov/20/facebook-google-antitrust-laws-gilded-age> [<https://perma.cc/XD8P-UXWA>] (“We should break up the hi-tech behemoths, or at least require they make their proprietary technology and data publicly available and share their platforms with smaller companies.”); Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC (July 13, 2017), <https://newrepublic.com/article/143595/return-monopoly-amazon-rise-business-tycoon-white-house-democrats-return-party-trust-busting-roots> [<https://perma.cc/DCR2-K5Q3>]; Jonathan Tepper, *We Are All Losing Out as Corporate Concentration Grows*, FIN. TIMES (Nov. 29, 2018), <https://www.ft.com/content/20801f16-f1a3-11e8-938a-543765795f99> [<https://perma.cc/38RR-UGSX>].

420. See, e.g., Customer Online Notification for Stopping Edge-provider Network Transgressions Act, S. 2639, 115th Cong. (as introduced in Senate, Apr. 10, 2018); Katy Steinmetz, *Congress Never Wanted to Regulate Facebook. Until Now*, TIME (Apr. 12, 2018), <http://time.com/5237432/congress-never-wanted-to-regulate-facebook-until-now/> [<https://perma.cc/7222-R4N8>].

elect a President and a Congress that embraces a redirection along the lines laid out above. The President appoints and the Senate confirms agency leaders committed to a program including the following elements:

1. Abandonment of an efficiency-based consumer welfare orientation of competition policy and its replacement with a conception of “competition policy in its broadest sense,” encompassing the interests of citizens as consumers, workers, and community residents who desire the protections afforded by a broad range of policy commands including areas such as environmental protection, health and safety legislation;⁴²¹
2. Primary emphasis on litigation programs to challenge individual dominant firms and tight oligopolies, with routine recourse to structural remedies to deconcentrate affected sectors, including efforts to unravel mergers that the federal agencies improvidently cleared or approved subject to inadequate remedies;⁴²²
3. Severe curtailment of advocacy programs that challenge occupational licensure restrictions and of current litigation efforts to cut back on the reach of the state action doctrine;⁴²³
4. Reform of existing horizontal restraints litigation programs to repudiate cases that (a) challenged efforts by low-wage service providers to raise their fees,⁴²⁴ and (b) rejected defenses predicated on the preservation of product or service quality;⁴²⁵
5. Revision of the Department of Justice criminal anticartel program to allow smaller enterprises to present defenses based on the preservation of employment levels;⁴²⁶
6. Expanded reliance on theories that challenge vertical integration by contract or ownership;

421. *See supra* note 186 and accompanying text.

422. *Cf. supra* Part I.B.1.

423. For an example of such litigation, see *N.C. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

424. *See, e.g., supra* note 408 and accompanying text.

425. This result would flow from an expansion of the antitrust goals framework to give greater emphasis to product quality and to deemphasize the concern about price effects.

426. By this approach, small enterprises would be able to raise, as a defense to illegality, the argument that their agreement to set prices or to allocate markets or customers served the beneficial social purpose of ensuring an adequate flow of work to all of the firms.

7. Restoration of Robinson-Patman Act enforcement as a core element of federal antitrust policy;⁴²⁷
8. Strict opposition to mergers whose concentrative effect exceeds levels set by the U.S. Department of Justice Merger Guidelines issued in 1968;⁴²⁸ in merger matters, the government will adhere to the policy aims set out in the Supreme Court’s decision in 1962 of *Brown Shoe v. United States*;⁴²⁹ and
9. The routine use by the FTC of Section 5 of the FTC Act to overcome doctrinal limitations imposed by existing Sherman Act and Clayton Act jurisprudence that embraces a consumer welfare standard and unduly confines the interpretation of these statutes.⁴³⁰

The implementation of the program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard and embrace the multi-dimensional conception of the proper goals of competition law.⁴³¹ Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded goals framework or they will find their duties reduced and their roles marginalized.

New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law.⁴³² The concern about compromised motives also is likely to disqualify academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard,⁴³³ or have consulting practices that have engaged them

427. The ABA previously recommended that the FTC significantly curtail its Robinson-Patman Act enforcement. See AM. BAR ASS’N, *supra* note 23, at 67-68.

428. See U.S. Dep’t of Justice, 1968 Merger Guidelines, *reprinted in* Trade Reg. Rep. (CCH) ¶ 13,101, 2016 WL 6107271.

429. 370 U.S. 294, 315-23, 322 n.38 (1961).

430. See, e.g., *supra* notes 215-18 and accompanying text.

431. See *supra* notes 361-62 and accompanying text.

432. See *Trustbusting in the 21st Century*, *supra* note 409, at 10 (stating that “competition regulators have been captured” and criticizing the U.S. revolving door that creates conflicts of interest and warped perspectives on competition policy).

433. In 2018, the Yale Law Journal published a set of papers which, in general, proposed an expansion of antitrust enforcement premised upon the application of concepts already

in acting for defendants in antitrust cases.⁴³⁴ The “do-more-with-what-we-have” proponents of some extension of enforcement will be dismissed as excessively timid or hopelessly centrist, and the somewhat proenforcement academics with too much experience representing defendants will bear much the same stigma as private practitioners in economic consultancies or law firms.

The demand for a single-minded, uncompromised vision of expansive enforcement will lead to a different pool of leadership candidates. New appointees to top leadership and senior management positions at the DOJ and the FTC will be drawn chiefly from nongovernment public interest organizations, state attorneys general antitrust units that adopted an expansive view of competition policy, and from university faculties (but not academics who consult extensively for private parties).

As noted above, the means for the redirection of competition policy will be the prosecution of large numbers of major cases.⁴³⁵ In this framework, there will be no room for smaller matters.⁴³⁶ Given the intensity of the modern inadequacy narrative and the expectation of sweeping reform, there will be strong demands for a high tempo of prosecutions.⁴³⁷ The elected officials and advocacy groups who demand and support this transformation of competition policy will have no patience for temporizing or half-measures.⁴³⁸ Those

recognized by existing jurisprudence and related scholarship. *Collection: Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916 (2018). A leading advocate of a more sweeping transformation of the U.S. competition law system criticized the authors for failing to question the basic goals framework that animates modern antitrust policy. Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960 (2018) (“While the ‘Unlocking Antitrust Enforcement’ Collection offers some useful suggestions for how to strengthen enforcement, they neglect to grapple with the current framework, ratifying an orientation and set of assumptions that ultimately undermine their project.”).

434. See Jonathan Tepper, *Why Regulators Went Soft on Monopolies*, AM. CONSERVATIVE, (Jan. 9, 2019) (criticizing revolving door that moves individuals between the government and external organizations where they represent or consult for private firms, and singling out various academics), <https://www.theamericanconservative.com/articles/why-the-regulators-went-soft-on-monopolies/> [<https://perma.cc/ZGG9-7QRC>].

435. *Cf. supra* notes 374-77 and accompanying text (noting similar expectations that Pertschuk faced during his chairmanship).

436. *Cf. supra* notes 374-77 and accompanying text.

437. *Cf. supra* notes 374-85 and accompanying text (describing a similar narrative of the FTC during the 1970s).

438. *Cf. supra* notes 376-78 and accompanying text (describing a similar level of impatience expressed by members of Congress towards the FTC during the 1970s).

who waver from a total commitment to the agenda may face a wrath comparable to the opprobrium Ralph Nader unleashed upon former colleagues whose zeal he found wanting during the Carter administration.⁴³⁹

The experience of Michael Pertschuk’s FTC chairmanship, and the experience of the FTC in the 1970s more generally, suggests what the newly transformed FTC might expect as it attempts to roll out the new policy agenda.⁴⁴⁰ One certainty is the difficulty of policy implementation.⁴⁴¹ The types of cases contemplated by the program outlined above will elicit strong resistance from the affected firms, which will amass large teams of accomplished lawyers and economic advisors to assist them.⁴⁴² How long will it take the newly re-oriented federal agencies to develop litigation teams to match the skills that the defendants will bring to the case—not just for one or a few cases, but the many high-stakes cases that the new program will call for?⁴⁴³ The political overseers and public interest community are likely to brush aside excuses about implementation difficulties.⁴⁴⁴ The pressures to deliver the new agenda will create serious dangers of a mismatch between commitments and capabilities—the same condition that befell the FTC in the 1970s and caused many of its flagship cases and rules to perish.⁴⁴⁵

The cases will be litigated before judges who are generally predisposed to accept the consumer welfare framework, either by personal preference or by a felt compulsion to abide by forty years of jurisprudence that tells them to do so.⁴⁴⁶ A new president gradually could change the philosophy of the federal courts by appointing judges sympathetic to the aims of the proposed transformation.⁴⁴⁷ The reorientation of the courts through judicial appointments could

439. *See supra* notes 388-90 and accompanying text.

440. *See supra* Part IV.B-C.

441. *See supra* Part IV.C.

442. *See Kovacic, supra* note 351, at 22; *supra* notes 353, 364, 367, and accompanying text.

443. *See generally supra* notes 361-64 and accompanying text.

444. *See supra* notes 377-81 and accompanying text.

445. *See supra* Part IV.C.

446. *See Kovacic, supra* note 349, at 1450-51, 1468-69 (describing the widespread acceptance of the consumer welfare framework by the federal judiciary).

447. *Cf. id.* at 1468-69 (noting the impact of President Reagan and President Bush on the acceptance of the consumer welfare framework); Kovacic, *Double Helix, supra* note 412 (describing diverse intellectual influences that support today’s consumer welfare consensus).

take a long time.⁴⁴⁸ In the interim, the agencies will face a doctrinal status quo that does not embrace competition law in its broadest sense.⁴⁴⁹

A possible antidote to the rigidities of existing jurisprudence is new legislation that directs the courts to apply the desired goals framework and changes various substantive standards. Such legislation would be a major undertaking, and it would elicit strong opposition from affected firms and industries.⁴⁵⁰ The affected business interests would mobilize all of the electoral resources available to them under the existing framework of lobbying and campaign financing.⁴⁵¹ Legislative relief from existing jurisprudential strictures might take years to accomplish.

The last consideration focuses attention on the likely durability and commitment of the electoral coalition that demands a redirection of competition policy and supports the overhaul of the enforcement agencies. The history of the FTC and the Pertschuk era show how political coalitions can be volatile, unpredictable, and evanescent.⁴⁵² Will the coalitions endure long enough—perhaps five to ten years—to support the agency through the entire life cycle of major litigation matters? Will the coalition of legislators who favor competition policy in its broadest sense resist the enormous political pressure that will be brought to bear—especially by firms within their own constituencies—once the full magnitude of the new program becomes apparent?⁴⁵³

CONCLUSION

The FTC's experience from the 1970s does not predetermine the outcome of a modern effort to reorient competition policy in a new time and a new place. The events of Michael Pertschuk's chairmanship may or may not reoccur in some form. Yet these experiences

448. *Cf. id.* (noting that presidents typically only appoint approximately 20 to 25 percent of the federal bench over a four-year period).

449. *Cf. id.*

450. *See Kovacic, supra* note 351, at 22; *supra* notes 353, 364, 367, and accompanying text.

451. *See Kovacic, supra* note 351, at 22; *supra* notes 353, 364, 367, and accompanying text.

452. *See supra* notes 379-84 and accompanying text.

453. *Cf. supra* notes 331-48 and accompanying text (noting the significant change of opinion in Congress during the 1970s towards the FTC's competition policy).

point to important institutional considerations that warrant attention in contemplating a journey into difficult seas; it makes sense to learn about navigational hazards that other mariners have encountered in the past, and to study how they sought to surmount them. The FTC of the 1970s suffered greatly because it lacked effective mechanisms to maintain a good fit between program commitments and capabilities to deliver, and to anticipate political backlash that major cases and rulemaking proceedings would elicit. There was no lack of trying, but there was too little attention to “the problem of implementation, that is, the path between the preferred solution and the actual performance of the government.”⁴⁵⁴ The FTC experience of the 1970s and the Pertschuk chairmanship deserve a close look if future Commission leadership attempts to build a new program to realize competition policy in its broadest sense.

454. GRAHAM T. ALLISON, *THE ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 267-68 (1970).