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[ABSTRACT NEEDED]

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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 tools\(^3\)—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.\(^5\)

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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. 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). See generally Daniel A. Crane, The Institutional Structure of
Today the FTC is again in the spotlight. Various commentators have urged that the FTC dramatically expand its efforts to apply its distinctive powers. 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. To some observers, the FTC’s scalable mandate makes it the preferred vehicle for a fundamental reorientation of competition and consumer protection.

6. See, e.g., 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., id. (encouraging the FTC to take three reform measures to achieve these goals).
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 chair from May 1977 to

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. These papers are collected in Symposium, Federal Trade Commission 90th Anniversary, 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) [hereinafter FTC’s Critics]; Sidney M. Milkis,
February 1981, Michael Pertschuk, exemplified the FTC’s determination to exercise the full potential inherent in its mandate. Pertschuk came to the FTC after a long, influential career as a congressional staffer. As FTC chairman, he urged the Commission to embrace a view of “competition ... in the broadest sense” and to apply the agency’s powers expansively.

The program conceived by Pertschuk and his predecessors in the late 1960s and in the 1970s was breathtaking in its aims and ________


11. See PERTSCHUK, supra note 10, at 1.

means. The agency achieved some litigation and rulemaking successes, and introduced policies that have had enduring value. At the same time, the FTC’s program of the 1970s generated many failed cases and rules. FTC efforts to explore the outer limits of its powers elicited powerful political backlash that threatened a major curtailment of the agency’s jurisdiction.

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. This Article also studies the institutional prerequisites for such an agency to apply this mandate effectively. The necessary predicates include awareness

13. See, e.g., infra notes 83-208 and accompanying text (describing successful FTC programs originated in the late 1970s).
14. See infra Part IV (describing FTC policy failures in programs originated in 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.
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.\(^\text{18}\) 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.\(^\text{19}\)

The Article proceeds in five parts. Part I first 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 1970s 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.\(^\text{20}\) The speeches provide essential

\(^{18}\) See infra Part IV.C.

\(^{19}\) See infra Conclusion.

\(^{20}\) See Pertschuk, Boston Speech, supra note 12; Michael Pertschuk, Chairman, Fed. Trade Comm’n, Remarks Before the Annual Meeting of the Section of Antitrust and Economic Regulation of the Association of American Law Schools (Dec. 27, 1977) [hereinafter Pertschuk, Atlanta Speech].

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foundations for understanding the evolution of modern U.S.
competition and consumer protection policy.

Part III describes how the FTC sought to realize Pertschuk’s
vision from 1977 until late 1981, when James C. Miller III took
office as the FTC’s chairman, President Ronald Reagan’s first
appointee to serve on the FTC.

Part IV critically assesses the FTC’s experience in the
1970s. The Article does not evaluate the economic effects of the
agency’s program in 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 carry out its ambitious agenda
successfully, 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.

The Conclusion turns to the potential implications of the
FTC’s experience in the 1970s for modern debates about possible
adjustments in antitrust law and policy. Drawing upon modern
commentary, the Conclusion sketches what a far-reaching program
to reorient and expand the FTC’s antitrust and consumer
protection programs might look like. The Conclusion 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 addresses parallel developments in the Department of Justice. Despite its U.S.-centric orientation, the story has things for other jurisdictions to ponder, as well.

II. 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.\textsuperscript{21} Publication of the Nader study led President Richard Nixon to request the American Bar

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. The following Section reviews the Nader and ABA studies and discusses their significance for the FTC’s work in the 1970s.

A. The Nader and ABA Reports

Taken together, three 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 stumble into doing something that advanced consumer interests. The ABA panel was more generous in recognizing positive FTC accomplishments, but these appear as rare oases in a desert of

22. On the history of the ABA study, see FTC’s Critics, supra note 9, at 1953.
24. See infra Part I.A.
26. See ABA REPORT, supra note 23, at 65, 69 (noting FTC’s
ineptitude, slouth, and timidity.27

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, 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 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; NADER REPORT, supra note 21, at 44-45.

29. See ABA REPORT, supra note 23, at 26; NADER REPORT, supra note 21, at 47-48.

30. See ABA REPORT, supra note 23, at 67-68.

31. See id. at 77-81.
to function effectively. \(^{32}\)

Second, of the 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, Ralph 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

\(^{32}\) See, e.g., \textit{id.} at 81-83 (discussing the FTC’s failure to make use of its power to delegate authority to its staff).

\(^{33}\) \textit{NADER REPORT}, \textit{supra} note 21, at 127, 130.

\(^{34}\) \textit{Id.} at 121.

\(^{35}\) \textit{Id.} at vii.
mediocre.”

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. Richard Posner’s dissent from the panel’s recommendations was more pointed and less generous. In a subsequent law review article, he said shut it down.

A third 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

36. Id. at 4.
37. See ABA REPORT, supra note 23, at 34-35.
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”).
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 the 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 The FTC’s appropriate direction of travel as an antitrust policymaker would be to focus resources on “difficult and complex antitrust questions,”⁴⁴ leaving enforcement of well-established, per se rules of illegality to the Department of Justice.⁴⁵ The redirection of effort should 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

⁴⁰ See ABA REPORT, supra note 23, at 9-11.
⁴¹ Id. at 9.
⁴² Id.
⁴³ See id. at 3.
⁴⁴ Id. at 64.
⁴⁵ See id. at 66.
1950s and 1960s. The new FTC would focus chiefly on matters “where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases had not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct.”

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, punctuated only by occasional projects of genuine value, 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. This would require the FTC to replace trivial matters with matters of the highest economic importance; swap out repetitive treatments 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 creative applications of the full range of the agency’s authority.

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

47. ABA REPORT, supra note 23, at 66.

48. See supra Part I.A.
visible, innovative applications of the FTC’s powers would be essential to the agency’s continued existence.\textsuperscript{49} 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 its human talent.\textsuperscript{50} Faulty planning induced a preoccupation with trivial matters and denied the agency the ability to set meaningful priorities and select projects to achieve them.\textsuperscript{51} Poor case management and sclerotic procedures caused “crippling delay” in carrying out projects.\textsuperscript{52} Years of uneven appointments to senior leadership positions, and uninspired staff-level recruiting that deliberately targeted weak

\textsuperscript{49}. See supra Part I.A.

\textsuperscript{50}. See ABA REPORT, supra note 23, at 77-84; NADER REPORT, supra note 21, at 87.

\textsuperscript{51}. ABA REPORT, 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.

\textsuperscript{52}. Id. at 34.
candidates whom other employers would not be tempted to poach, created grave personnel deficits. The predicate to executing a sweeping revitalization of the FTC’s substantive program would be dramatic upgrades in internal decision making processes and human resources. The anticipated institutional makeover would require the agency to rebuild the house and live in the house at the same time.

53. See id. (finding “too many instances of incompetence in the agency, particularly in senior staff positions”); NADER REPORT, supra note 21, at 101-26 (criticizing quality of FTC’s leadership and staff).

54. See supra note 52 and accompanying text.

dominant enterprises and tight oligopolies gripped the American economy.  

In 1945, however, the U.S. Court of Appeals for the Second Circuit, serving as the court of last resort 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.  

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. To both authors, the urgency for a basic redirection of U.S. competition policy was clear. A prominent academic, Levi later became Attorney General during the administration of President Gerald [hereinafter Failed Expectations].  

56. *Cf. id.*  


58. 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 55, at 1134-35, 1135 n.190.
Ford.\textsuperscript{59} 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 not themselves incompatible with free enterprise, it is probable that the hope lies in the new implementation of the Sherman Act and an increased awareness of the responsibility of the courts to give adequate relief.\textsuperscript{60}

Rostow’s paper 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.”\textsuperscript{61} No less important was the danger that industrial concentration posed to the nation’s broader social and political health.\textsuperscript{62} Rostow said:

One of the major problems requiring a social decision

\textsuperscript{59} See id. at 1135 n.190.
\textsuperscript{62} See id. at 568-69.
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.\textsuperscript{63}

He added that “it 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.”\textsuperscript{64}

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 dominance.\textsuperscript{65} 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.\textsuperscript{66} Many commentators considered

\textsuperscript{63} Id. at 569.

\textsuperscript{64} Id. at 570.

\textsuperscript{65} See Failed Expectations, supra note 55, at 1105 & n.3.

\textsuperscript{66} Walter Adams provided an influential treatment of this theme in Walter Adams, Dissolution, Divorcement, and Divestiture: The Pyrrhic Victories of Antitrust, 27 IND. L.J. 1 (1951). Owing to weaknesses in remedies obtained in Sherman Act monopolization
this lapse to be the single-greatest failure of the U.S. system and an urgent priority for correction. On this point, Antitrust Policy provided the most influential synthesis of the economics and law of competition policy of its time. Kaysen and Turner 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 and American Tobacco 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.

67. See supra note 36 and accompanying text.

68. Carl Kaysen & Donald Turner, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959). On the importance of Kaysen and Turner in
said, “The principal defect of present antitrust law is its inability to cope with market power created by jointly acting oligopolists.”\(^6^9\) Kaysen and Turner proposed new legislation that would restructure industries whose concentration exceeded certain thresholds.\(^7^0\)

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.\(^7^1\) Known as the White House Task Force on Antitrust


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

Policy, and chaired by Dean Phil Neal of the University of Chicago Law School, the group proposed a threefold strategy: expand the Department of Justice’s and FTC’s enforcement of the existing antitrust laws against dominant firms and tight oligopolies, polic mergers more aggressively, and adopt new legislation to deconcentrate U.S. industry. The Neal report helped frame expectations for the FTC makeover the Nader and ABA studies demanded. Some component of the FTC’s competition program would have to include measures to address the problem of industrial concentration.

Congress embraced the 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. Echoing the ABA at 1119, 1137.

72. See Neal Task Force Report, supra note 71, at 14-17.
73. See id.
74. See id.
panel’s “one last chance” warning, some key legislators said the agency’s continued existence depended on a sweeping overhaul. 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.”

The FTC got the message. From late 1969 until Michael Petschuk’s arrival to chair the agency in May 1977, the FTC undertook a variety of new competition and consumer protection programs that responded to criticism from the ABA commission, the Nader study, and the Congress. Sketched below are some of the appropriate future direction of FTC competition program). Leading members of Congress gave prominent and favorable attention to the Nader Report when it appeared in 1969. Id. at 593 n.16.

76. See ABA REPORT, supra note 23, at 3.
77. See Congressional Oversight, supra note 75, at 630-31.
79. See HARRIS & MILKIS, supra note 10, at 140-224 (reviewing FTC
most notable elements of the agency’s policy agenda in this period. This Section focuses on new competition cases initiated from 1969 onward, and it also identifies selected respects in which the agency sought to formulate competition policy with tools other than litigation. This Section emphasizes competition-related matters, but briefly identifies important consumer protection initiatives that represented new directions in agency policy.

This Section here 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 Pertshuck’s speeches in Boston and Atlanta late in 1977. In particular, this Section provides a basis for assessing Pertshuck’s claim that federal consumer protection reforms in the early 1970s); Congressional Oversight, supra note 75, 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 (2002) (describing FTC consumer protection rulemaking activity between 1969 and 1977).
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.

Concentrated Industries: Dominant Firms and Collective Dominance

One set of FTC cases begun 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),80 the leading U.S. instant coffee producer (General Foods),81 and the largest U.S. reprocessed lemon juice producer (Borden).82 In this period, the agency settled a monopolization claim against the largest plain-paper photocopier manufacturer (Xerox),83 prosecuted the largest citrus fruits

producer (Sunkist) for various exclusionary practices,84 sued the largest U.S. automobile manufacturer (General Motors) for attempting to monopolize the distribution of crash parts,85 and prosecuted the principal airline service directories publisher for a refusal to deal (Reuben Donnelley).86

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.87 In one matter, the agency challenged the four leading U.S. ready-to-eat breakfast cereal producers (Kellogg, General Mills, General Foods, and Quaker).88 In the other, the FTC sued the eight leading U.S. petroleum refiners (Exxon, Mobil, Gulf, Texaco,

Atlantic Richfield, Amoco, Chevron, and Shell).\(^8\) 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.\(^9\)

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.\(^9\) The program had a number of possible applications, but one of its main purposes was to identify connections between economic concentration, profitability, and other measures of economic performance.\(^9\) Industry strongly contested the line-of-business program and litigation ensued.\(^9\) After several years of litigation, the U.S.

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92. See id. at 39.
Court of Appeals sustained the FTC’s program.\textsuperscript{94}

\textbf{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.\textsuperscript{95} 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.\textsuperscript{96}

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.\textsuperscript{97}

\textbf{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

\begin{itemize}
  \item 94. See \textit{id.} at 711.
  \item 95. \textit{Am. Med. Ass’n, 94 F.T.C. 701 (1979)}.
  \item 96. \textit{Tysons Corner, 85 F.T.C. 970 (1975)}.
  \item 97. \textit{Boise Cascade, 91 F.T.C. 1, 81 (1978)}.
\end{itemize}
U.S. soft drink companies (Coca-Cola, Pepsi, Seven-Up, and Crush) for giving their bottlers exclusive territories. The challenged behavior had been a standard distribution practice in the sector for decades. The FTC also brought a comparable matter against a leading participant in the brewing sector (Coors). 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).

The FTC also investigated major U.S. aerospace companies (Boeing, Lockheed, and McDonnell Douglas) that had used commercial bribery to accomplish sales overseas. The investigation yielded a consent decree in 1978 and, in a very general way, anticipated the adoption of the Foreign Corrupt Practices Act and its controls on commercial bribery.

Notable Qualitative Features

This incomplete list is notable for several reasons beyond

99. See id. at 623, 640.
103. See id. at 974.
an accounting of the number and types of cases. A number of cases
(Official Airline Guides,104 Kellogg,105 Exxon,106 Boise Cascade,107
Xerox108) 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.109 All of these matters could be considered to be
experimental, prototype cases that sought to extend the reach of
competition law.

Another important aspect of the FTC’s program in this period

104. See Reuben H. Donnelley Corp., 95 F.T.C. 1, 1 (1980),
enforcement denied sub nom. Official Airline Guides, Inc. v. FTC,
630 F.2d 920 (2d Cir. 1980).
109. See, e.g., Exxon Corp., 98 F.T.C. at 459 (noting the FTC had
accused the petroleum refiners of “restrain[ing] and
[maintain[ing] a noncompetitive market structure ... in violation
of Section 5 of the [FTC] Act”).

32
was the agency’s emphasis on structural remedies as means to restructure concentrated sectors. 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.\(^{110}\) The relief requested in the petroleum shared monopoly case comprised a mix of horizontal and vertical divestitures.\(^{111}\) Compulsory licensing of intellectual property anchored the request for relief in the *Borden*\(^{112}\) and *Xerox*\(^{113}\) 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*, *Arco*, *Shell*, *Texaco*); food (*Borden*, *Coca-Cola*, *Pepsi-Cola*, *Crush*, *Seven-Up*, *ITT*, *General Foods*, *Kellogg*, *General Mills*, *Sunkist*); the medical

\(^{110}\) See *Kellogg Co.*, 99 F.T.C. 8, 33 (1982).


\(^{112}\) See *Borden, Inc.*, D 8978 (July 2, 1974), *finding liability*, 92 F.T.C. 669, 774-75 (1978).

\(^{113}\) See *Xerox Corp.*, 86 F.T.C. 364, 379-80 (1975).
profession (American Medical Association); apparel (Levi Strauss); lumber products (Boise Cascade, Weyerhaeuser); automobile manufacturing (General Motors); aerospace (Boeing, Lockheed, and McDonnell Douglas); photocopiers (Xerox); and transportation services (Hertz, Avis, and National).\textsuperscript{114} The agency’s non-litigation programs during this period also attracted the attention of major business enterprises.\textsuperscript{115} The line-of-business program, mentioned above, affected the leading U.S. companies, which vigorously attacked the FTC for this data collection initiative.\textsuperscript{116}

\section*{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 in this period leading up to the Pertschuk chairmanship to transform its consumer protection program. 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.\textsuperscript{117}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} See supra Part I.B.1-3.
\item \textsuperscript{115} See supra notes 89-91 and accompanying text.
\item \textsuperscript{116} See supra notes 89-91 and accompanying text.
\item \textsuperscript{117} See Federal Trade Commission, Special Reports Relating to
\end{itemize}
\end{footnotesize}
Established through litigation and policy guidance, the advertising substantiation program transformed commercial advertising regulation in the United States. It is the essential foundation of federal advertising regulation today.

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. The list in Table 1 below is a partial list of the FTC rulemaking matters completed between 1969 and 1976:

Table 1: Selected FTC Rules Completed Between 1969 and 1977

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


Table 2: Selected FTC Rules Pending at Outset of Pertschuk Chairmanship

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. Others were small businesses which, collectively, had a presence in many communities across the country.

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. The Commission undertook major efforts to improve its human capital in management and case-handling positions.

II. TWO SPEECHES

Michael Pertschuk became the FTC’s Chairman in April 1977. Appointed by President Jimmy Carter, Pertschuk served on the FTC

120. Congressional Oversight, supra note 75, at 643-44.
121. Id.
from 1977 to 1984,\textsuperscript{123} and chaired the agency from 1977 to 1981.\textsuperscript{124} 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.\textsuperscript{125} 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.\textsuperscript{126} Pertschuk spent several months with his staff and external experts assessing the state of the agency’s antitrust programs.\textsuperscript{127}

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.\textsuperscript{128} He gave the second speech in Atlanta in December at the annual meeting of the Association of American Law Schools.\textsuperscript{129} 

\textsuperscript{123} See id. app.B at 955.
\textsuperscript{124} See id. at 922.
\textsuperscript{125} See id.
\textsuperscript{126} See Pertschuk, Boston Speech, supra note 12, at 1.
\textsuperscript{127} See id.
\textsuperscript{128} See id.
\textsuperscript{129} See Pertschuk, Atlanta Speech, supra note 20.
Together, the two talks staked out a decidedly ambitious program for the agency.

=S2A. Boston: “Competition in the Broadest Sense”

Pertschuk titled his address before the New England Antitrust Conference “New Directions for the FTC.” 130 He called the talk “a first public effort to set forth my own evolving competition philosophy.” 131 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.” 132 Describing antitrust enforcement as one instrument of a broader domain of “competition policy,” 133 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.

130. See Pertschuk, Boston Speech, supra note 12.
131. See id. at 1.
132. Id.
133. Id. at 2.
There is a sense abroad that federal antitrust cases have not focused with enough frequency or intensity on the most important questions.\textsuperscript{134}

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.”\textsuperscript{135}

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 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

\begin{flushleft}
\textsuperscript{134} Id. at 3.  \\
\textsuperscript{135} Id.
\end{flushleft}
and social ideals.\footnote{136}

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.”\footnote{137} 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 oversized and often undemocratic organizations—big government, big business, big labor.”\footnote{138}

In his inadequacy narrative, Pertschuk chiefly villianized 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

\footnote{136. Id at 4.}
\footnote{137. Id.}
\footnote{138. Id.}
allocative efficiency. The impact of the Chicago School certainly has been felt in the law schools, at the Commission, and in the Courts.\textsuperscript{139}

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.”\textsuperscript{140}

\textbf{31. 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.”\textsuperscript{141} He expected this reexamination to produce an expanded vision of competition policy: “I believe we have a mandate to develop competition policy in the broadest sense.”\textsuperscript{142} As he explained, “the broadest sense” encompassed a wide array of concerns:

\begin{quote}
[Al]though efficiency considerations are important, they alone should not dictate competition policy. Competition policy sometimes must choose between greater efficiency, which may carry with it the promise
\end{quote}

\textsuperscript{139} Id. at 5.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 20.
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.143

In other passages, Pertschuk elaborated his vision of what
constituted competition policy “in the 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.”144 He
warned that “[i]ncreasing macroconcentration can turn this
country into a series of very big and very frightening company
towns.”145 Instead, the country’s “economic structure should be

143. Id. at 10.
144. Id. at 8.
145. Id.
consistent with the democratic political and social norms of the
nation.”\textsuperscript{146} Moreover, the country’s economic structure “must
operate within a framework of fairness and ethical commercial
conduct”\textsuperscript{147}—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.”\textsuperscript{148}

To implement competition policy “in its broadest sense,”
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 structure, conduct, and performance of
industry.”\textsuperscript{149} The application of Section 5 “require[d] boldness on
the part of the decision-makers” and “bold action based upon
reasoned prediction.”\textsuperscript{150} 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

\begin{thebibliography}{99}
\bibitem{146} Id. at 6.
\bibitem{147} Id. at 9.
\bibitem{148} Id.
\bibitem{149} Id. at 11.
\bibitem{150} Id. at 12.
\end{thebibliography}
century.” 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.”

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.” 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 directions for the Commission.” 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

151. Id.
152. Id. at 15.
153. Id. at 16.
154. Id.
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.  

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.” 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. The testimonial to Collier appeared on the final page of the speech’s twenty-page text. Many of the previous nineteen pages had documented the failures of federal legislation.”

155. Id. at 17.
156. See id. at 17-19.
157. Id. at 20.
158. See Congressional Oversight, supra note 75, 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.”).
159. See Pertschuk, Boston Speech, supra note 12 at 20.
antitrust policy. 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 mandate—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.

=S2B. 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 Antitrust and Regulation Committee. 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,

160. See id. at 1, 3-5.

161. See Pertschuk, Atlanta Speech, supra note 20.
and archivists.\textsuperscript{162} 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.\textsuperscript{163} In doing so, the agency would be “somewhat more bold, innovative and risk-taking.”\textsuperscript{164} 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.”\textsuperscript{165}

Pertschuk then summarized “the working principles of competition policy” he had set out a month earlier in Boston.\textsuperscript{166} He largely paraphrased his “working principles of competition policy” from the earlier text,\textsuperscript{167} 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

\textsuperscript{162} Id. at 1.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 16.
\textsuperscript{166} Id. at 1.
\textsuperscript{167} Id.
losses of efficiency.”

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.” 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.” He recited a traditional taxonomy of concepts that courts had determined to be subject to prohibition as an “unfair method of competition.” He identified four categories: conduct that (a) transgressed “the letter of either the Sherman Act or the Clayton Act[,]” (b) “threaten[ed] an incipient violation of” these antitrust statutes, (c) “violate[d] the underlying spirit of” the other antitrust laws, or (d) “violat[ed] public policy” as articulated in statutes and other legal commands outside the antitrust laws.

Pertschuk’s framing of the FTC’s authority accurately

168. Id. at 3.
169. See Pertschuk, Boston Speech, supra note 12, at 20.
170. Pertschuk, Atlanta Speech, supra note 20, at 5.
171. See id. at 7-10.
172. Id.
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.\textsuperscript{173} He correctly noted that the Supreme Court’s recent decision in \textit{FTC v. Sperry & Hutchinson Co.} ("S&H")\textsuperscript{174} 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.\textsuperscript{175} Pertschuk said the FTC would continue to make use of the \textit{S&H} precedent, “as it illustrates the elastic nature of the concept of ‘unfairness’ which Section 5 embodies.”\textsuperscript{176} In the following passage, Pertschuk discussed the potential breadth of the power this elasticity gave the Commission:

> 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

\textsuperscript{173} See \textit{id.} at 10-12.

\textsuperscript{174} 405 U.S. 233, 239, 249-50 (1972).

\textsuperscript{175} See Pertschuk, Atlanta Speech, supra note 20, at 10-12.

\textsuperscript{176} \textit{Id.} at 12.
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. 177

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. 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, ignoring workplace health and safety standards, employing illegal aliens and shortchanging their

177. Id. at 11.
wages, or evading taxes—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? 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. 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.

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 determined to develop “competition policy in the broadest


179. See supra note 159 and accompanying text.
sense”180 and “venture into the uncharted territory of the law of competition”181 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. If other regulatory agencies or law enforcement bodies could not or would not do their jobs, Section 5 could provide a universal safety net. The application of Section 5’s public policy component would enable the FTC to secure compliance with non-antitrust laws, subject only to the constraints imposed by the agency’s budget ceiling. 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 macrocentration, but which have no identifiable anticompetitive effects in any one product and geographic market.”182 He added that the agency was exploring the possibility of devising a competition trade regulation rule to

181. Pertschuk, Atlanta Speech, supra note 20, at 16.
182. Id. at 14.
create a presumption against conglomerate mergers of a certain size.\textsuperscript{183} In another comment, Pertschuk said, “Section 5 may prove to be 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.”\textsuperscript{184} 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 non-dominant firms, without having to demonstrate a “dangerous probability of success.”\textsuperscript{185}

=SIIII. 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).\textsuperscript{186}

\textsuperscript{183} See id. at 14-15.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 15.
\textsuperscript{186} Ethyl Corp., 101 F.T.C. 425 (1983), vacated sub nom. E.I. Du
2. A Section 5 test case challenging plant expansion announcements as improper strategic entry deterrence (DuPont/Titanium Dioxide). 187

3. A test case (Russell Stover) that sought to overturn the safe harbor created in Colgate188 for firms that announced a policy of not dealing with discounters and terminating retailers that did not abide by the policy. 189

4. Brought and litigated potential competition mergers. 190

5. Brought health care cases that reinforced the FTC’s authority to police restrictive practices in the learned professions. 191

Beyond these measures, the Commission studied litigation possibilities that the agency ultimately did not pursue. It

189. See Russell Stover Candies, Inc. v. FTC, 718 F.2d 256, 257 (8th Cir. 1983).
190. See, e.g., BOC Int’l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977).
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.\textsuperscript{192} In articles, speeches, and testimony, the Commission supported antitrust legislative reforms to recognize a no-fault cause of action.\textsuperscript{193}

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).\textsuperscript{194} Congress designed the HSR to give the government an opportunity to review certain

\textsuperscript{192} 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 first assignments was to work with a team of Planning Office attorneys on a project 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 stood atop the list of recommended targets.


mergers before they were consummated. The statute required firms undertaking mergers above a certain size to notify the federal antitrust agencies in advance. 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. During the initial waiting period, the second request production, and the final waiting period, the parties were barred from consummating the transaction.

The HSR statute gave the FTC responsibility for administering the merger notification regime on behalf of both federal antitrust agencies—a major administrative undertaking. The FTC drafted the implementing rules and established the operational infrastructure—including a premerger notification

197. See id.
198. See id.
office and the development of internal procedures for reviewing information submitted by the parties—to execute the system.\textsuperscript{199} Once the system went live late in 1978, the FTC (and the Department of Justice) 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.\textsuperscript{200} None of these tasks—drafting rules, devising procedures, and litigating the cases—were easy.

In his Boston speech, Pertschuk said the FTC would attempt to use rulemaking to develop substantive competition policy standards.\textsuperscript{201} The FTC considered a variety of possibilities, but promulgated no competition policy rules other than the measures required to implement the HSR statute.\textsuperscript{202} One area of attention was the development of a rule that would control conglomerate

\begin{flushleft}
\textsuperscript{200} See id.
\textsuperscript{201} See Pertschuk, Boston Speech, supra note 12, at 17-19.
\end{flushleft}
transactions by restricting the ability of firms to grow beyond a certain size by merger.\textsuperscript{203} Although the FTC issued no rule of its own, the agency supported legislative proposals to amend the Clayton Act to establish limits on conglomerate transactions.

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),\textsuperscript{204} and created a consumer protection unit within the Bureau of Economics.\textsuperscript{205} 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

\begin{itemize}
\item \textsuperscript{203} See id.
\item \textsuperscript{204} See Congressional Oversight, supra note 75, at 659.
\end{itemize}
effects of macroconcentration on the U.S. economy;\textsuperscript{206}

2. Hearings and the publication of proceedings on the effects of concentration in the media;\textsuperscript{207}

3. A conference and published papers and proceedings on modern theories of predation;\textsuperscript{208}

4. Publication of staff papers setting out new theories of harm involving raising rivals costs and facilitating practices;\textsuperscript{209}

5. Publication of staff papers on the origins and meaning of the FTC’s mandate and on the history of its enforcement programs;\textsuperscript{210}

\textsuperscript{206} [replace entire footnote]

\textsuperscript{207} \textsc{Fed. Trade Comm’n, Proceedings of the Symposium on Media Concentration} (1978).

\textsuperscript{208} \textsc{Fed. Trade Comm’n, Strategy, Predation, and Antitrust Analysis} (Steven C. Salop ed., 1981).


\textsuperscript{210} For a list of such papers, see William E. Kovacic, \textit{The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property},
6. A symposium and publication of proceedings on the history of competition policy in the United States;\textsuperscript{211} and

7. Evaluations of the economic effects of previous law enforcement matters.\textsuperscript{212}

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.\textsuperscript{213} Nor did the FTC’s legislative reforms become law. 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.\textsuperscript{214}

=S1IV. A CRITICAL ASSESSMENT

Michael Pertschuk’s Boston and Atlanta speeches laid the

\footnotesize{30 SEATTLE UNIV. L. REV. 319, 333 n.78 (2007).}


\textsuperscript{213} See infra Part IV.

\textsuperscript{214} See infra Part IV.B.
groundwork for a number of changes that fostered lasting improvements at the FTC.\textsuperscript{215} The most notable enduring accomplishments involved enhancements of institutional capacity: the initiation of what became a continuing program of impact evaluations of completed matters; the creation of the HSR merger review system;\textsuperscript{216} the development of the agency’s role as a convenor of programs and a sponsor of research involving emerging topics of law and policy;\textsuperscript{217} and the raising of awareness of history as a tool for improving agency decision-making.\textsuperscript{218}

The Pertschuk litigation program also yielded some important successes. A notable example is \textit{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.\textsuperscript{219} Much of the Pertschuk litigation program floundered, however, especially matters that consciously sought to extend the frontiers of antitrust enforcement. The philosophy of expansionism that guided the Pertschuk-era competition and consumer protection programs—do

\begin{center}
\textsuperscript{215} See supra Part II.
\textsuperscript{216} See supra notes 191-97 and accompanying text.
\textsuperscript{217} See supra notes 200-08 and accompanying text.
\textsuperscript{218} See supra notes 206-08 and accompanying text.
\end{center}
more, push the frontiers, be bold—elicited a hostile reaction from Congress.\textsuperscript{220} 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.\textsuperscript{221}

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 the broadest sense”?\textsuperscript{222} 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.”\textsuperscript{223} This narrative typically depicts Pertshuck as the villain and excoriates him.

For three reasons, this is a serious mistake in Pertschuk’s case. First, many failed projects that ultimately inflicted woe

\textsuperscript{220} See Congressional Oversight, supra note 75, at 664-67.
\textsuperscript{221} See id.; infra Part IV.B.
\textsuperscript{222} See Pertschuk, Boston Speech, supra note 12, at 20.
\textsuperscript{223} See Congressional Oversight, supra note 75, at 589-90 (quoting 125 CONG. REC. H10,758) (daily ed. Nov. 14, 1979) (Statement of Rep. Frenzel)).
on the FTC took shape before Pertschuk became the FTC’s
chairman.224 If the FTC came to grief because it abandoned a
necessary sense of caution in applying its broad powers,
Pertschuk’s predecessors (especially Caspar Weinberger, Miles
Kirkpatrick, and Lewis Engman) deserve a generous share of blame
for the result. Pertschuk did not start the fire, though he added
fuel to the conflagration.

Second, casting Pertschuk as the head of a demented agency
overlooks the many good things that Pertschuk and the FTC did in
this period. As noted in the introduction to this Part, a variety
of FTC substantive programs and processes established in the
1970s and during the Pertschuk chairmanship have improved the
quality of competition and consumer protection policy.225 The
paint-it-black interpretation ignores valuable things the agency
did well in the 1970s, and diminishes our understanding of how
good programs and practices originate.

Third, and most relevant to this Article, the irrationality
narrative takes a cheap and delusional way out of the problem of
policy failure. It assumes that expunging the bad guy solves the
problem. This ignores major institutional factors that deserve
more attention in studies of FTC and other regulatory body policy

224. See supra Part I.A.

225. See supra notes 211-15 and accompanying text.
making. The popular ritual of individual condemnation forestalls an informative examination of the layers of institutional phenomena that often contribute to policy failures. The discussion below considers the FTC of the 1970s and the Pertschuk era by discussing several of these phenomena.

=S2A. Poor Historical Awareness

In his tenure as FTC Chairman, Pertschuk spoke of history as a valuable input to good regulatory agency decision-making. His Boston speech mentioned the contributions of historians as potentially useful sources of insight in formulating FTC policy. 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. 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.

227. See source cited supra note 207.
The man who deeply cared for history ignored it when, arguably, he needed historical perspective the most: in formulating his program in 1977 and in the roll-out of 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.\textsuperscript{229} The Boston speech 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.\textsuperscript{230} The FTC of the Boston speech was a prisoner of a narrow economic (Chicago-School) perspective; it refused to acknowledge 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 attaining market structures compatible with the nation’s democratic ideals.\textsuperscript{231} Because it lacked fortitude and an appreciation for “competition policy in its broadest sense,”\textsuperscript{232} the FTC had not explored creative ways to fulfill its destiny by using its

\textit{see also supra notes 207-08 and accompanying text.}

\textsuperscript{229} See Pertschuk, Boston Speech, supra note 12, at 3.

\textsuperscript{230} See id.

\textsuperscript{231} See id at 4-5.

\textsuperscript{232} See id. at 20.
distinctive mandate, Section 5, to proscribe unfair methods of competition.

The Boston speech was blind to the FTC’s history, both recent and more distant. Pertschuk’s comments reflected no awareness of the matters that the agency had accomplished from 1969 through 1976 or of the magnitude of the program it had in flight in the late fall of 1977. Pertschuk and his advisors apparently had not mapped out the commitments, summarized in Part I above, that the FTC already was seeking to fulfill. Pertschuk’s call for ambition and boldness showed no understanding of the boldness and ambition of the agency’s existing antitrust litigation portfolio. In what possible sense could efforts to break up the leading petroleum refiners and the largest breakfast cereal producers be deemed to be substantively unimaginative, risk-avoiding, or lacking in political courage? Or running three predatory pricing cases at one time against major enterprises? Or dismantling the distribution system relied upon by soft drink producers for much of the twentieth century? Or attacking the longstanding advertising codes of the nation’s largest medical professional association?

The Boston and Atlanta speeches were no less historically obtuse in discussing the expanded application of Section 5 of the
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. The FTC had already concluded one expansive application of Section 5 in settling its monopolization case against Xerox. 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. The Boston and Atlanta speeches give no hint that Pertschuk or his staff—in the months of reflection and preparation that led up to

233. See id. at 11-12; Pertschuk, Atlanta Speech, supra note 20, at 8-10.

234. Pertschuk, Atlanta Speech, supra note 20, at 8-10; Pertschuk, Boston Speech, supra note 12, at 11-12.


his presentations—understood the doctrinal and economic stakes of these cases.

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 be so blasé or ignorant about the significance of the existing portfolio? The evident lack of awareness about the longer span of the FTC’s history is equally dismaying. By studying this history, Pertschuk and his advisors would have seen that, from its first decade onward, the FTC’s past efforts to undertake bold and imaginative applications of its competition or consumer protection powers had tended to arouse congressional opposition and, in some instances, spurred Congress to intervene destructively in the agency’s affairs.237 For example, 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 5.238 Pertschuk did not mention that the FTC’s litigation success in this endeavor provoked a harsh congressional


238. See Pertschuk, Atlanta Speech, supra note 20, at 8-9.
backlash. 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. 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.

\[=S2B. \text{Lack of Political Awareness}\]

In 1977, awareness of the larger historical frame in which the FTC’s programs had evolved would not have dictated the abandonment of politically risky cases. Such awareness would have forced Pertschuk and his advisors to reflect more carefully on the political feedback loop that had confronted the agency since

\[\text{239. See id.; see also William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L.J. 929, 933-34, 934 n.19, 943 (2010) [hereinafter Kovacic & Winerman, Competition Policy].}\]
\[\text{240. See Kovacic & Winerman, Competition Policy, supra note 239, at 943 n.66 (quoting John Blair, Planning for Competition, 64 Colum. L. Rev. 524, 525 (1964)).}\]
\[\text{241. See id.}\]
1914. 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. This reality has required 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.

Thus, applying the agency’s broad policy making powers can have strong side effects, which the agency ignores at its peril. 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. This exercise would also have indicated the possibilities of formulating powerful commercial coalitions that

242. See Congressional Oversight, supra note 75, at 623.
243. See id. at 628 n.11.
245. See id.; Congressional Oversight, supra note 75, at 627 (quoting C. WILCOX, PUBLIC POLICIES TOWARDS BUSINESS 259-60 (1955)).
246. See Kovacic & Winerman, Competition Policy, supra note 239, at 943.
might assemble to demand intervention from Congress and the executive branch.\footnote{See id.}

Political awareness also requires ongoing monitoring of shifts in the political environment that could affect the FTC’s fortunes.\footnote{See Kovacic, Congress and The Federal Trade Commission, supra note 237, at 871, 881-82, 886-87.} Pertschuk was an astute student of the legislative process,\footnote{See id. at 887 n.67 (citing Burnham, Caught in a Cross Fire of Praise, N.Y. TIMES, Mar. 20, 1977).} and his remarks in Boston revealed his confidence that Congress would support his plans for more aggressive competition and consumer protection programs.\footnote{Petschuk, Boston Speech, supra note 12, at 14.} 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.\footnote{Congressional Oversight, supra note 75, at 632-36, 640-41, 652.} 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.\textsuperscript{252} For a number of powerful legislators in the first half of the 1970s, the message was that the FTC’s program was merely a good start.\textsuperscript{253}

This supportive environment began to erode in 1976.\textsuperscript{254} Jimmy Carter’s victory for the presidency in the 1976 national elections obscured major changes in the Senate, where key members of the pro-FTC coalition retired or failed to gain re-election.\textsuperscript{255} In many instances, senators with greater skepticism about the regulatory process replaced pro-FTC senators.\textsuperscript{256} Pertschuk’s 1977 speeches gave no hint of this process, and the development of his program through 1978 seemed oblivious to the political storm that had begun to descend on the FTC.\textsuperscript{257} 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

\textsuperscript{252} See Congressional Oversight, supra note 75, at 632-41 (discussing examples of how the Senate encouraged the agency to use its powers).

\textsuperscript{253} See id.

\textsuperscript{254} See id. at 659.

\textsuperscript{255} See Congress and The Federal Trade Commission, supra note 237, at 822 n.48.

\textsuperscript{256} See id.

\textsuperscript{257} See id. at 887, 896.
“National Nanny” in trying to adopt a rule that would limit the advertising of certain foods to children, and a further conservative shift in the Senate in the fall by-elections.

In a period of barely two years, from the fall of 1976 to the fall of 1978, the congressional mood toward the FTC had changed from supportive to increasingly hostile. Programs that began earlier in the decade in a more agreeable setting now confronted opposition as they matured. By 1980, before Ronald Reagan came to Washington, DC 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. On the day before national elections in November 1980, Vice-president Walter Mondale promised at a rally in Battle Creek, Michigan

259. See supra text accompanying notes 248-50.
260. See supra notes 248-53 and accompanying text.
261. See Kovacic, Congress and The Federal Trade Commission, supra 237, at 882.
(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.263

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. The harder the cases, the better the talent must be. 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. Cases that implicate large economic stakes and seek to extend the boundaries of doctrine are the hardest of the lot.

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. For an agency to prevail in such a matter, it must field a team with comparable skills. Thus, a crucial question for an agency in deciding whether to launch a specific case is who will handle the matter? In answering this question, that agency cannot make the blithe assumption that its best team can handle all of its difficult matters. Agencies vary considerably in the breadth and depth of their talent, but no agency has a limitless number of first-rate case-handling teams. 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. 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. An agency that tries to run at 200 percent of its capacity will break down.

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.264 The agency could take on a bolder agenda only if it could recruit the managers and staff with the skills to run those projects effectively. The demand for instant results meant that the agency

264. See supra Part I.A.1.
could not wait until every piece was in place before it embarked on the new agenda.\textsuperscript{265} 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.\textsuperscript{266}

By early 1977, the FTC had apparently achieved a poor match between its commitments and capabilities. For example, the showcase shared monopoly cases were in trouble from the outset, as the defendants’ strong legal teams ensnared the agency in the litigation-equivalent of trench-by-trench warfare.\textsuperscript{267} A careful look at the roster of competition and consumer protection matters

\begin{enumerate}
\item 265. See Congressional Oversight, supra note 75, at 630-31.
\item 266. See FTC’s Critics, 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.”).
\item 267. See, e.g., Arthur John Keeffee & Gregoy W. Valpey-Toussignant, They’re Holding the Party Without Pertschuk, 85 A.B.A. J. 1407, 1407-08 (1979) (discussing how attorneys for Kelloggs and other businesses succeeded in having Pertschuk disqualified from the participating in the children’s television advertising proceedings); supra notes 85-88 and accompanying text.
\end{enumerate}
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 its pending matters successfully.\textsuperscript{268} 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.\textsuperscript{269} The agency


\textsuperscript{269} Efforts to upgrade the agency’s talent began before Pertschuk was Commissioner. See Congressional Oversight, supra note 75, at 649.
also tried to simplify the prosecution of new matters in light of knowledge gained from previous experiences with case management.\textsuperscript{270} As noted above, by the end of the 1970s the agency was taking steps to understand why the agency’s fortunes, and the role of competition policy, had risen and fallen at different times in the FTC’s history.\textsuperscript{271}

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.\textsuperscript{272} 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 portfolio\textsuperscript{273}: 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

\textsuperscript{270} See id. at 659–60 (explaining ways in which the FTC worked to improve case management).

\textsuperscript{271} See supra Part IV.A.


\textsuperscript{273} See id.; Kovacic & Hyman, Consume or Invest, supra note 268, at 307–08.
it cost? How did the project affect the risk and difficulty of the entire portfolio?

One has to ask why implementation issues tended to be secondary rather than primary concerns. One factor was the acute pressure the FTC felt to be seen to be making massive, immediate progress toward the realization of the standard (set out most clearly in the ABA Report) that had to be satisfied to justify the agency’s continued existence.\textsuperscript{274} 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.\textsuperscript{275} Congress echoed this grim assessment and repeated the ABA panel’s admonition that this was the agency’s final chance to prove its worth.\textsuperscript{276} The agency needed to launch big initiatives—quickly and

\textsuperscript{274} See Hyman & Kovacic, \textit{FTC’s Critics}, supra note 9, at 1960 (quoting ABA \textsc{report}, supra note 23, at 3).

\textsuperscript{275} See \textit{id.} (quoting ABA \textsc{report}, supra note 23, at 34); Cox, supra note 9, at 900.

\textsuperscript{276} See Hyman & Kovacic, supra note 9, at 1957, 1964 (quoting \textsc{F.T.C. Procedures: Hearings on Agency Responsiveness to Public Needs: The F.T.C. Before the Subcomm. on Admin. Practice \& Procedures of the S. Comm. on the Judiciary, 91st Cong. 110
in large numbers.\textsuperscript{277} 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.\textsuperscript{278}

Pertschuk himself would have felt this pressure. He was a product of a legislative environment that helped set stratospheric goals for the FTC.\textsuperscript{279} 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.\textsuperscript{280} 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 compromise or hesitation as betrayals of the public (1969) (statement of Sen. Edward Kennedy)).

\textsuperscript{277} See id. at 1966.
\textsuperscript{278} See id. at 1966-67.
\textsuperscript{279} See Gellhorn, The Wages of Zealotry: The FTC Under Siege, supra note 268, at 33.
\textsuperscript{280} See, e.g., 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 focuses on trivial matters rather than issues such as industrial mergers).
interest cause. Pertschuk doubtlessly observed how key figures of this community visited their wrath on others whom Jimmy Carter had appointed from its ranks to serve in key regulatory posts. 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. For this audience, spoken concerns about policy implementation and agency capability were threadbare excuses for inaction. With courage and more funding, any aim was attainable.

Another factor is the calculus that individual leaders use

281. See, e.g., NADER REPORT, supra note 21, at 62-65 (criticizing the FTC’s policy of voluntary enforcement to allow businesses to fix their behavior).
282.
283.
284. See NADER REPORT, supra note 21, at 71, 87-95 (arguing that the FTC needed to increase its staff and budget, and that the FTC needed to advocate for expanded regulatory power).
285. See Kovacic, Congress and The Federal Trade Commission, supra note 237, at 885 (stating that 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).
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. Ideally, agency leadership strives to achieve an appropriate balance between the two. 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. 286 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. 287 Building these skills and knowledge require investments that do not yield immediately observable results. 288 The necessary capability will not emerge unless incumbent leaders make investments that will largely

286. See, e.g., Kovacic & Winerman, Competition Policy, supra note 239, at 903-06 (discussing the how the FTC was depicted as weak during the 2008 presidential election despite being highly rated by the Global Competition Review).

287. See id. at 920, 922-23; supra note 263 and accompanying text.

288. See Kovacic & Winerman, Competition Policy, supra note 239, at 906, 925.
benefit their successors. 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.

Pertschuk struggled to achieve a good balance between “consumption” in the form of new cases and “investment” in the form of investments in institutional capability. Despite his expressed intention to do more, his output of new matters lagged behind the pace set by his predecessors from 1969 through 1976. His investment in institutional capability grew beyond prevailing

289. See id.
290. See id. at 914, 921-22; Kovacic & Hyman, Consume or Invest, supra note 268, at 296.
291. See Hyman & Kovacic, FTC’s Critics, supra note 9, at 1973; see Kovacic & Hyman, Consume or Invest, supra note 268, at 311-12.
292. 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. See Kovacic & Hyman, Consume or Invest, supra note 268, at 309-11 (listing some of the ongoing matters in the 1970s).
levels.\textsuperscript{293} To the extent that Pertschuk’s predecessors generated too many matters without proper concern for effective implementation, Pertschuk tended to receive the blame when many of those matters collapsed in the late 1970s and early 1980s.\textsuperscript{294}

On the whole, one can see Pertschuk being pulled in two directions. As he took office, he faced a political imperative to announce a new and bolder agenda.\textsuperscript{295} Given his professional background and his fidelity to the goals of the public interest community,\textsuperscript{296} he would have found it impossible to say something along of the lines of the following:

\begin{quote}
I expect to do more at the FTC and to employ a broader conception of competition policy. At the same time, I am somewhat daunted by the number and magnitude of competition and consumer protection matters the FTC already has in motion. In light of those commitments,
\end{quote}

\begin{footnotes}
\item[293] See Congressional Oversight, supra note 75, at 659-64 (discussing developments within the FTC).
\item[294] See Kovacic & Hyman, Consume or Invest, supra note 268, at 305, 307-09 (discussing the collapse of the Exxon and IBM shared monopolization cases both of which began before Pertschuk’s tenure).
\item[295] See supra notes 272-79 and accompanying text.
\item[296] See supra notes 272-79 and accompanying text.
\end{footnotes}
and the difficulties we are facing in delivering on the existing agenda, I will be somewhat cautious in adding new matters to the list.

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

In practice, Pertschuk turned out to be more cautious in adding new initiatives than his Boston and Atlanta speeches foreshadowed.²⁹⁷ 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 back away from some of his earlier plans.²⁹⁸ At the same time, he did not back away from the investment in future capability.²⁹⁹ One wonders what might have happened if some of this investment had taken place at the beginning of his chairmanship—for example, the historians’ seminar on the history of competition law in the United States or the research on the evolution of FTC enforcement and its political implications—rather than at the end.

CONCLUSION: IMPLICATIONS FOR A NEW OVERHAUL OF U.S. COMPETITION POLICY

²⁹⁷. See supra notes 285-86 and accompanying text.

²⁹⁸. See supra Part IV.B and notes 286, 288 and accompanying text.

²⁹⁹. See supra notes 263-64, 287 and accompanying text.
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. A number 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 modern call for a dramatic redirection of policy is grounded in a narrative of modern system failure. Among other lapses, U.S. competition policy since the 1970s has squandered precious resources on trivial matters (notably, the prosecution of horizontal restraints cases involving small, poorly compensated service providers); shied away from challenging dominant firms and industries characterized by collective dominance; ignored the destructive consequences of vertical

300. See supra note 2 and accompanying text.


integration;\textsuperscript{303} and tolerated mergers that increased concentration or allowed dominant incumbents to absorb smaller firms that, as independent enterprises, could emerge as major competitive forces.\textsuperscript{304}

A major stated cause of these policy distortions has been a 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.\textsuperscript{305} The cramped, single-minded focus on [https://perma.cc/NNB4-SE74].


305. See William E. Kovacic, The Antitrust Paradox Revisisted:
consumer interests improperly excludes 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. The consumer interests’ obsession with price effects ignores the impact of restrictive practices and sheer corporate size on innovation. The misshapen contemporary goals structure is so tolerant of corporate gigantism that it undermines democracy itself.

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 more telling than the indifference to the collection and misuse of personal data collected by large technology firms.306

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306. See Steven Hetcher, The FTC as Internet Privacy Norm Entrepreneur, 53 VAND. L. REV. 2041, 2044, 2047 (2000) (explaining that the FTC has focused on promoting website privacy policies
The new critique derives strength from more frequent expressions of concern by elected officials and candidates for public office. Some demand closer regulatory scrutiny of existing commercial giants; others call for a program to break up these enterprises into smaller firms. Proposals to accomplish these or related ends through new legislation have appeared in statements by individuals and groups within the major political parties. Given the difficulties inherent in adopting


309. See, e.g., Edwards, supra note 308.

310. See, e.g., Customer Online Notification for Stopping Edge-
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 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 the 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 policy commands involving such matters as environmental protection, health and safety legislation;

2. Primary emphasis on litigation programs to challenge

individual dominant firms and tight oligopolies, with routine recourse to structural remedies to deconcentrate affected sectors;

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;

4. Reform of existing horizontal restraints litigation programs to repudiate cases that (a) challenged efforts by low-wage service providers to raise their fees, and (b) rejected defenses predicated on the preservation of product or service quality;

5. Revision of the Department of Justice criminal anti-cartel program to allow smaller enterprises to present defenses based on the preservation of employment levels;

6. Expanded reliance on theories that challenge vertical integration by contract or ownership;

7. Restoration of Robinson-Patman Act enforcement as a core element of federal antitrust policy;

8. Strict opposition to mergers whose concentrative effect exceeds levels set by the U.S. Department of
Justice Merger Guidelines issued in 1968;\textsuperscript{311} 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;\textsuperscript{312} 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.

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 multidimensional conception of the proper goals of competition law. As an interim measure, managers and staff who do not accept the framework of the new goals will find their duties reduced and their role in agency operations marginalized.

New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector. They will be drawn chiefly from nongovernment public interest organizations, from the offices of state attorneys general, and


\textsuperscript{312} 370 U.S. 294, 315-23, 322 n.38 (1961).
from other federal agencies.

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

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.\textsuperscript{313} One certainty is the difficulty of policy implementation. The types of cases contemplated by the program outlined above will elicit strong resistance from the affected firms, which will amass teams of accomplished lawyers and economic advisors to assist them. How long will it take the newly reoriented 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? The political overseers and public

\textsuperscript{313} See supra Part IV.B-C.
interest community are unlikely to listen to excuses about implementation difficulties. 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.\textsuperscript{314}

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. A new president gradually change the composition of the federal courts with new appointments sympathetic to the aims of the proposed transformation. The reorientation of the courts by this method could take a considerable period of time. In the interim, the agencies will face a doctrinal status quo that does not embrace competition law in its broadest sense.

A possible antidote to the rigidities of existing jurisprudence is legislative reform that directs the courts to apply the desired goals framework and changes various substantive standards. Legislation of this magnitude would be a massive undertaking, and it would elicit strong opposition from affected

\textsuperscript{314} See supra Part IV.C.
firms and industries. They would mobilize all of the electoral resources available to them under the existing framework of lobby and campaign financing. 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. Will the coalitions endure long enough—perhaps five to ten years—to support the agencies through the entire litigation life cycle? Will coalition members 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?

The FTC’s experience from the 1970s does not predetermine what will happen to a modern effort to reorient competition policy in a new time and a new place. The events of Michael Petschuk’s chairmanship may or may not be repeated in some form. Whatever their predictive power may be today, they are worth a close look if the leadership of the FTC attempts to build a new program that seeks to realize competition policy in its broadest sense.