Enforcing Competition Law with Multiple Agencies and Private Enforcers

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My topic today is the enforcement of competition law by multiple enforcers. There are many different ways to think about this issue, because it can mean a number of very different things. In the U.S., for example, we have enforcement by many different sources. At the federal level, we have two different antitrust agencies—the Department of Justice's Antitrust Division and the Federal Trade Commission ("FTC"). Then, each of the 50 States has an Attorney General who can enforce both federal and state antitrust law. Finally, as we shall see, we have expansive private rights of action. In the U.S., there are ten private cases for every one brought by the government.

The interaction between all of these different enforcers is very complex and I do not have time to cover the entire story today. Also, some of the issues are idiosyncratic to the American experience, or at least to federal systems. Hence, I propose to limit my comments to two broad issues: (1) the significance of having two or more antitrust enforcement agencies at the national level; and (2) the role of private enforcement.

My plan is as follows. I will first offer some broad comments about what it means to have multiple national competition authorities and discuss some trends in institutional structure around the world. Second, I will provide an overview of the American experience with multiple agencies. Third, I will present some justifications for multiple agency enforcement. Fourth, I present some drawbacks of multiple agency enforcement. Finally, I will turn to the way that private enforcement has interacted with public enforcement in the U.S. experience.

I. Multiple Agency Enforcement: Meaning and Trends

How many countries have multiple antitrust enforcement agencies? The answer depends in large part on exactly what we mean by multiple antitrust enforcement agencies. Many countries have more than one specialized institution dealing with competition law matters, but not all such countries have multiple agencies in sense in which I mean to discuss the matter today.

For convenience, we may break down institutional models into four categories. First, there are jurisdictions like Canada, South Africa, and Australia that have multiple specialized antitrust institutions that are vertically related. One institution (usually called a "Tribunal") reviews the decision of an antitrust enforcement authority. The tribunals' powers range from a broadly administrative and non-judicial function to a grant of first-instance quasi-judicial power, which makes the tribunal something akin to a specialized antitrust court.

For present purposes, I will not include this vertical model as multi-agency models. Instead, I shall focus on two other multi-agency models that both involve horizontal distribution of power. One such model—best exemplified by China—involves the distribution of authority to multiple agencies by category of regulated activity. Three separate Chinese agencies enforce laws aimed at specific forms of anticompetitive conduct. The Ministry of Commerce has exclusive control over mergers and acquisitions and has created the Anti-monopoly Bureau to serve that function.[1] The State Administration for Industry and Commerce's (SAIC) enforcement authority covers unilateral abuse of dominance and cartels that do not involve price-fixing. The third enforcement agency, the National Development and Reform Commission (NDRC), which originally was responsible for price regulation under the State Planning Commission, is now responsible for regulating price-setting conduct that is not directly supervised by the Chinese government. In addition to the three enforcement agencies, the Anti-Monopoly Law also created a policy research body, the Anti-Monopoly Commission, which oversees the development of competition policy and suggests broad antitrust strategies.

A second species of multi-agency enforcement with horizontal functions is exemplified by the U.S. The two federal antitrust enforcement agencies—the Justice Department's Antitrust Division and the FTC—share concurrent jurisdiction over most of the same types of conduct (*i.e.*, mergers, monopolization, restraints of trade). To the extent that they divide labor, it is largely along industry or sectoral lines. We shall return further to this division of labor in a moment.

The final category of agency model is the unified model, employed (at a European level) in the E.U. and in much of the world that follows the E.U. model. In this model, there is a single antitrust enforcement agency that consolidates executive and adjudicatory functions. Appeals are to a usually non-specialized court.

Having now surveyed four different models, we may ask what are the trends in the design of antitrust institutions around the world. Although it is dangerous to over-generalize, the overall trend seems to be away from multi-agency enforcement (in the sense of the two horizontal categories) and toward a unified structure. China, of course, is the glaring counter-example, but in the last few years a number of significant jurisdictions have moved away from multi-agency enforcement. France and Portugal have consolidated enforcement in a single agency. Brazil, which had three different agencies, is in the process of consolidating enforcement into a single agency and appears likely to complete that process by the end of 2010. India, which completely restructured its competition laws in 2002, has adopted a single-agency model.

To the extent that there is discussion about separating powers in the antitrust community, it is usually in the context of separating prosecutorial and adjudicatory functions, as with the vertical multi-agency model.

[1] On the institutional structure of the Chinese Anti-Monopoly Law, *see generally* Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 Antitrust L. J. 133 (2008); Bruce W. Owen, Su Sun & Wentong Zhang, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 Antitrust L. J. 231 (2008).

For example, some advocates believe that the European Commission needs to create separate prosecutorial and adjudicatory branches. However, I have yet to hear much serious endorsement of moving toward horizontal distribution of functions, as in the Chinese or American models. What, then, explains the organization and persistence of the American model? To that question we now turn.

II. An Overview of the American Experience

The U.S. model is more a product of historical development than conscious institutional design. With the passage of the Sherman Act—the foundational U.S. antitrust legislation—in 1890, federal antitrust enforcement was vested primarily in the U.S. Attorney General and in the regional U.S. Attorneys offices. However, Congress did not appropriate designated funds for antitrust enforcement until 1903 and did not create a separate Antitrust Division within the Justice Department until 1933.

The FTC was the product of 1914 legislation under President Woodrow Wilson that not only created a new antitrust institution under the Federal Trade Commission Act but also added new substantive provisions to the federal antitrust laws under the Clayton Act. The FTC grew out of Progressive Era thinking and reflected that era's values. The Progressives believed in technocratic virtues—that social problems could best be solved by non-ideological, independent experts working in commissions with broad and prophylactic regulatory powers. The FTC was considered a model technocratic body. Its five Commissioners were to be antitrust experts, draw from a mix of political backgrounds (no more than three Commissioners may be of the same political party). They were to have broad investigatory and semi-legislative powers and a broad mandate to detect and prevent "unfair methods of competition." The Commission itself was not clearly a part of any of the three traditional branches of government—executive, legislative, or judicial—but a combination of all three.

The FTC did not replace the Justice Department in enforcing the antitrust laws. The 1914 legislation did not spell out completely what the division of labor would be. A few things were spelled out, but turned out to be largely irrelevant over time. Section 6(c) of the Act calls for the Commission to monitor compliance with antitrust decrees obtained by the Justice Department.[2] Section 6(e) allows the Attorney General to request that the FTC "make recommendations for the readjustment of the business of any corporation alleged to be violating the Antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."[3] Section 7 of the Act allows district courts to refer Department of Justice antitrust cases to the FTC to sit as a "master of chancery" and determine the appropriate form of relief.[4] These provisions contemplating coordinated enforcement between the two agencies have been almost completely ignored over the agencies' nearly 100-year history.

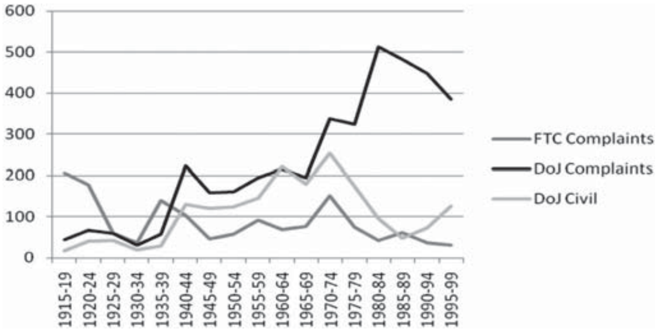
One division of labor was implicitly clear. Only the Justice Department could criminally enforce the antitrust laws. Apart from that, the agencies were left to figure out their respective roles over time.

In 1938, Congress amended the FTC Act to give the Commission an additional mandate—consumer protection against fraudulent and abusive practices. Since 1938, the FTC has both enforced the antitrust laws in tandem with the Antitrust Division and acted as the sole agency protecting consumers against deceptive conduct.

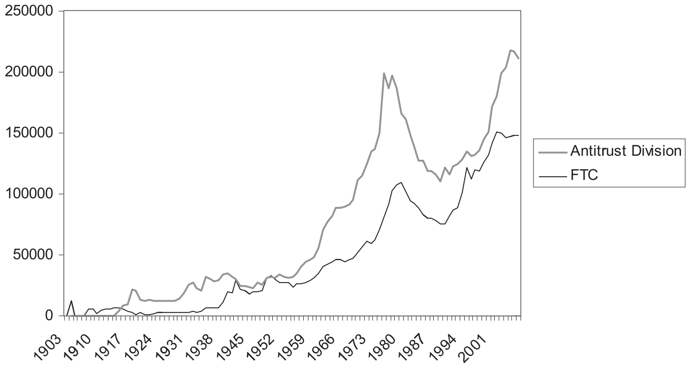
The two charts below reflect the agencies' overall activity levels and budgets. From the trend lines, we can observe that the FTC started out as a much better funded and more active antitrust enforcement agency. However, by the 1950s, the Antitrust Division had emerged as a co-equal antitrust enforcer. Since then, the two agencies' paths have largely traveled in parallel, with the notable exception that criminal antitrust enforcement by the DoJ took off in the 1970s and accounts for a large percentage of overall federal antitrust enforcement today. On a budgetary

[2] 15 U.S.C. § 46(c).
[3] 15 U.S.C. § 46(e).
[4] 15 U.S.C. § 47.

level, the FTC is the better funded agency, but its budget includes appropriations for both its consumer protection and antitrust missions. The Antitrust Division has a larger appropriation than the FTC for antitrust matters.



FTC and Antitrust Division Budgets (Real 2007 Dollars in Thousands)



III. Justifications for Multiple-Agency Enforcement

The creation of two federal antitrust agencies was not the product of a deliberate decision to have two co-equal federal antitrust agencies but a reaction to the perceived failures of the ordinary law enforcement model exemplified by the Sherman Act's delegation of power to the Attorney

General. When one encounters justifications for the existence of two agencies, they are generally justifications for the existence of the FTC, not generic justifications for having more than one agency. Three primary virtues are often cited: independence, expertise, and a hybrid agency model that creates decisional advantages. As it turns out, the FTC has exhibited these three virtues only weakly over the course of its history.

1. Political Independence

Unlike the Antitrust Division which is directly accountable to the President, the FTC is supposed to exercise independent technical judgment in the interests of the American people. Does it actually do that?

To answer that question, we should put aside a normative evaluation of the FTC's decisions and simply try to understand whether the FTC is independent from the one political organ that exerts the greatest influence over it—Congress. The President lacks the power to remove Commissioners, but Congress does not lack the power to remove their funding (or, conversely, to give them more). A series of empirical studies collected in 1987 tried to gauge the extent of this purse-string influence.[5] Tellingly, the studies uniformly showed that Congressional influence had a significant explanatory effect on FTC outcomes. For example, a study by Roger Faith, Donald Leavens, and Robert Tollison found that case dismissals at the FTC were non-randomly concentrated on defendants headquartered in the home districts of Congressmen on committees and subcommittees with budgetary and oversight jurisdiction over the FTC.[6] Bill Kovacic, who later went on to become the FTC's Chair, found that the FTC has consistently chosen policy programs that follow the ex-

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5 The studies are collected in ROBERT J. MACKAY, JAMES C. MILLER III, & BRUCE YANDLE (EDS.), PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION (1987).

6 Roger L. Faith, Donald R. Leavens, & Robert D. Tollison, *Antitrust Pork Barrel*, in MACKAY, MILLER & YANDLE, *supra* n. 5 at 15-29.

pressed will of the FTC's oversight committees in Congress.[7]

To say that the FTC responds to the will of Congress—or, more particularly, the will of the Congressmen with the greatest control over the FTC's purse strings—is not necessarily to criticize the FTC for being a "political" institution. In a democracy, having a politically accountable agency may be desirable. But what these studies do accomplish is to lessen the argument for dual federal enforcement because the "non-political" FTC will balance out the "political" Antitrust Division. There is a "checks and balances" argument to be made, but it is for a "political" agency controlled by Congress to be checking another "political" agency controlled by the President.

A related argument for multiple enforcement agencies is that the existence of multiple and independent law enforcement agencies will tend to ensure that antitrust enforcement continues in periods during which one branch abdicates its enforcement responsibilities. This is particularly thought to be the case of the "politically independent" FTC, which should check the occasional delinquency of the Antitrust Division.

Experience, however, shows that the agencies largely "hunt in pairs." That is to say, both agencies tend to bring more cases during periods of pro-enforcement sentiment and bring fewer cases during periods of anti-enforcement sentiment. There is little evidence of *counter-cyclical* tendencies—of one agency abandoning a particular kind of theory and the other agency picking it up in order to keep the ball rolling.

If anything, the two-agency model represents a law enforcement diversification strategy—put multiple enforcers in different institutional contexts and it is more likely that they will identify more things that are anticompetitive than if they are all lumped in a single agency. That is a very different story than the counter-cyclical smoothing story and has its own set of problems. In particular, it is not clear whether what we want in antitrust enforcement is a wide but shallow reach over lots of different

[7] William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in MACKAY, MILLER & YANDLE, *supra* n. 5 at 63.

competition problems or the narrow but deep enforcement in the most obviously problematic areas. If we assume that the total amount of resources allocated to federal antitrust enforcement remains relatively constant whether there are two agencies or one, it could be the case that diversifying federal enforcement leads us to spend too few dollars on clearly problematic practices (like hard-core cartels) and too many dollars on marginally anticompetitive practices (like strikes by disaffected government-employed trial lawyers).[8]

Further, even assuming that there is some benefit to diversification, it is not clear that we need two agencies to achieve it. Given the availability of the private antitrust remedy and state Attorney General enforcement, we may already have achieved (or exceeded) the optimal level of diversification.

2. Expertise

One of the Progressive Era's durable ideological commitments was to expertise in regulatory decision-making, and the FTC was conceptualized as a particularly expert body. But there is no particular reason to think that, today, the FTC has any greater antitrust expertise than does the Antitrust Division. To be sure, there was a time when the FTC had a comparative advantage over the Antitrust Division in economic sophistication. When the FTC came into being in 1914, it inherited the Economic Department (later transformed into the Economic Division and then the Bureau of Economics) of its predecessor—the Bureau of Corporations.[9] The Antitrust Division did not hire its first economist or create an economics unit until 1936.[10] Until the early 1970s, economists played a relatively small role in the Division—mostly in data gath-

[8] *See FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990).

[9] Lawrence J. White, *Economics, Economists, and Antitrust: A Tale of Growing Influence*, NYU Law and Economics Research Paper No. 08-07, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091531.

[10] R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 791 n. 12 (2005).

ering and statistical litigation support.[11] The FTC's economics unit, by contrast, enjoyed earlier influence within the agency.[12] Today, however, there is little distinction between the agencies on this score. At the Antitrust Division, a Deputy Assistant Attorney General for economics—usually a prominent academic economist—heads a staff of approximately 60 Ph.D.-level economists.[13] At the FTC, the Bureau of Economics features about 70 Ph.D.-level economists (although they spend about a quarter of their time on consumer protection issues).[14] The Bureau Director is also usually a prominent academic economist and it is typical to have an economist among the commissioners. Historically, the Commissioners have not been leading experts in their fields when appointed and have not stayed at the Commission long enough to acquire expertise.[15] In terms of economic brainpower and prestige of leadership, there is no substantial difference between the agencies.

What if the relevant expertise is not in economics but in legal strategy? Again, there is no reason to believe that the FTC has a comparative advantage over the Antitrust Division. Both employ skilled lawyers to litigate their cases, or if they lack a lawyer with the right skill set, they can farm out work to private lawyers as the Justice Department did when it retained the prominent litigator David Boies to try the Microsoft case.

The one kind of expertise that the agencies do not mutually share is expertise in particular industries. The agencies have historically divided up the cases they bring based on their prior work with particular industries.[16] Thus, for example, the FTC has much experience with pharmaceuticals and health care and the Antitrust Division has considerable experience with airlines and computer software. Thus, disbanding

[11] White, *supra* n. 9 at 11.
[12] *Id.*
[13] *Id.* at 13.
[14] *Id.*
[15] *See* Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L. J. 761, 768 (2005).
[16] *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 Tex. L. Rev. 1159, 1199 (2008).

one or the other of the agencies could entail a loss in expertise (unless the personnel and institutional memory of the two agencies could be preserved through a seamless merger), but for historical rather than structural reasons. Expertise may be a compelling reason to retain the dualistic status quo, but it is not a compelling reason to choose a dual agency model in the first place. There is nothing to prevent a single agency—whether as a branch of the executive or as an independent agency—from becoming optimally expert.

3. Agency Model

A critical justification for the FTC is that its Commission model differs from ordinary law enforcement—a clearly executive function—insofar as it wields both judicial and legislative functions in addition to its law enforcement functions. The hybrid agency model can be used to explain not only why the FTC should be independent, but why we should have an FTC at all. In particular, if we think that the antitrust statutes are highly indeterminate—going little beyond such generalities as "restraints of trade," "monopolization," "lessening competition," and "unfair methods of competition"—then there is quite a bit of policy-making to be done before the statutes can be applied to particular circumstances. Perhaps this "legislative" function should be done by administrators who have tools at their disposal to gather facts and, unlike judges, are not limited to the records presented to them by litigants. Similarly, given the highly specialized and technical work required of making and enforcing competition policy, perhaps it makes sense to have the primary adjudicatory function wielded by administrative law judges who frequently see competition issues and are specialists in the field.

Turning first to the FTC's legislative function, it seems that the sort of "legislation" function that most commentators have in mind is the promulgation of regulations. During the 1970s administrative law maven Kenneth Culp Davis argued that the FTC's primary institutional advantage was its power to promulgate rules.[17] Whether for good or ill,

[17] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY

however, the FTC has never been an antitrust rule-maker. Certainly, the FTC has promulgated influential rules on the consumer protection side—the Cigarette Rule and the Do Not Call Registry come notably to mind—but it has published almost no antitrust rules.[18] Indeed the opinion of the antitrust establishment seems to incline against any such role for the agency. A 1989 ABA report on the FTC concluded "we are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions on specific types of business conduct."[19]

Even if we conceive of the legislative function as broader than the formulation of administrative regulations, the FTC is accorded no deference on its interpretations of the law. Early during the history of the FTC, the Supreme Court rejected the view that the Commission should have any special position when it came to the meaning of the FTC Act.[20] In later cases, the Supreme Court took back this restrictive view of agency interpretation,[21] but the official position remains that the FTC gets very little deference on questions of law.[22] Thus, on the antitrust side, the FTC does not have a real legislative function but is essentially an enforcer of norms created by the courts.[23] In that, it is not any different from the Antitrust Division.

There is one potentially significant structural difference between the FTC and Antitrust Division, related to the FTC's judicial function. The Antitrust Division can only sue in court, but the FTC staff can also bring administrative proceedings before administrative law judges, with an appeal to the Commission. Two significant points should be kept in mind. First, the FTC brings as many or more injunctive actions in district court as it does administrative actions. During the 1990s, for example, the FTC brought slightly more injunctive cases in district court than it did administrative actions.[24] Thus, while the FTC enjoys the flexibility of choice, it often chooses the conventional law enforcer route—in which capacity it is essentially identical to the Antitrust Division. Second, even as to cases that the FTC brings administratively, the ultimate decision is usually in the Court of Appeals or Supreme Court, which accord the FTC deference only on findings of fact.

Ironically, the one place where the FTC may actually have a significant statutory advantage over the Justice Department is not as a legislator or adjudicator, but as a prosecutor. Under Section 13(b) of the FTC Act (or Section 53(b) of Title 15, as it is often called), the FTC sometimes receives greater deference than the Justice Department when seeking to block a merger in district court in order thereafter to initiate administrative proceedings. Some courts have interpreted Section 13(b) as relieving the FTC of having to show the traditional requirement of a substantial likelihood of success on merits and creating a presumption that the Commission will be accorded a preliminary injunction so long as it raises "serious, substantial, difficult, and doubtful" issues about the merger.[25] Although there is some doubt as to the correctness of this interpretation of the FTC Act, for now the Commission is sometimes able to score preliminary injunction wins—which, in the merger context are

70-74 (1969).

[18] A 1989 ABA report found only one instance of the FTC promulgating an antitrust rule. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 91 n.103 (1989).

[19] *Id.*

[20] *FTC v. Gratz*, 253 U.S. 421, 427 (1920) ("The words 'unfair competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include.").

[21] *See FTC v. Brown Shoe Corp.*, 384 U.S. 316, 320-21 (1966).

[22] *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

[23] *See* Posner, *supra* n. 15 at 768 (observing that the FTC has become "a conventional law enforcement agency").

[24] According to a tally from the FTC's annual reports, during the 1990-1998 period, the FTC brought 31 administrative complaints and 33 district court actions. (The 1999 annual report does not report the data in a way that allows the comparison).

[25] *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (citation omitted).

usually case-dispositive—with the help of this unique statutory advantage. Whether or not such an advantage is justified, it cannot be justified as a product of the Commission's hybrid status as a legislative and adjudicatory body. 13(b) is a *prosecutorial* advantage.

IV. Drawbacks of Multiple Agency Enforcement

As we have just seen, the ostensible justifications for the existence of two agencies turn out to be weak at best. Worse, having two agencies has created a number of pathological interactions in antitrust enforcement.

1. Clearance Confusion

Since much of the FTC and Justice Department's jurisdiction is duplicative, both agencies could theoretically investigate and/or sue over the same activity. This is particularly a problem in merger cases, where the Hart-Scott-Rodino Act requires merging firms to give pre-merger notification to both agencies 30 days before closing the merger. At times much of the 30-day process—during which the agencies should hopefully be trying to understand whether they should investigate (and hence, delay) the merger and the parties should be cooperating with the agencies quickly to address any concerns—is eaten up in a clearance process, during which time no one inside or outside the agency knows which agency will ultimately assume jurisdiction.[26] Improved clearance processes can ameliorate, but never entirely eliminate, this cost of committing overlapping enforcement authority to multiple agencies.

2. Cost Duplication

In one sense, having two antitrust enforcement agencies does not result in much cost duplication, since once the agencies have resolved any initial clearance confusion, they generally do not work on the same matters.[27] Duplication, however, can occur in another sense—the failure to achieve economies of scale. It is in the latter sense that the dual agency structure is suboptimal.

Consider the dual agency problem from the perspective of a business activity that the agencies pervasively regulate: mergers. Mergers are justified from a business perspective when two firms could, by combining, consolidate operations under highly skilled (and hence scarce) management, integrate complementary functions, more efficiently deploy firm resources by assigning employees to more specialized tasks, and eliminate duplicative cost centers. Many of these good reasons that firms have for merging would apply to a consolidation of the agencies.

For example, the FTC has experience with computer hardware markets (and, hence, handles Intel) and the Antitrust Division has experience with software markets (and, hence, handles Microsoft).[28] Of course, computer software and hardware are complementary products and many antitrust cases turn on the relationship between the two. Combining knowledge centers about both products within a single firm is the very sort of efficiency that the agencies consider virtuous when undertaking merger review.[29] A unified antitrust agency could take advantage of economies of scale and scope to a greater degree than is possible in the fractured dual-agency system.

3. Inconsistent Treatment

The Antitrust Division and FTC have essentially a market-division approach to jurisdiction, with each agency laying claim to the industries with which they have the greater experience. As we have seen, there is

26 *See* Antitrust Modernization Commission, Report and Recommendations at 132-137.

27 *See* Antitrust Modernization Commission, Report and Recommendations at 129.

28 *See* Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (2002), available at http://www.ftc.gov/opa/2002/04/clearanceoverview.shtm.

29 *See* U.S. Dep't of Justice and FTC Joint Horizontal Merger Guidelines § 4 (1992).

little to distinguish the two agencies in terms of their real capabilities. But to the extent that agencies have significantly different statutory positions on particular functions, this means that firms in different industries are treated differently based on the happenstance of which agency considers itself their industrial patron.

For example, we noted above that some courts accord the FTC special presumptions when it seeks a preliminary injunction under Section 13(b). This means that a controversial hardware merger might be tougher to pull off than a controversial software merger (such as the Oracle-PeopleSoft merger that the Justice Department was unable to block).[30] There is currently a debate over whether the substantive reach of Section 5 of the FTC Act may sometimes extend beyond the substantive reach of the Sherman Act. If so, then monopolistic practices by Intel (hardware) might be judged more harshly than monopolistic practices by Microsoft (software). Or, a firm like Apple that makes both hardware and software might face different liability rules depending on which side of its business was at issue.

There is no logical justification for such an arbitrary disparity in governing legal rules on a sectoral basis. If the FTC should enjoy distinctive powers because of its position as an administrative agency, then those powers should apply with equal weight and vigor across all industries. If the FTC should not enjoy distinctive powers because of its position as an administrative agency, then it is hard to see why we should have an FTC.

4. Squabbling

From time to time, the FTC and Antitrust Division fall into squabbling. For example, a recent bout of apparent bad blood began with the FTC's enforcement action against Schering-Plough over several of Schering's patent litigation settlements involving "reverse payments" (payments from the branded drug maker to the generic drug maker not to enter the market).[31] The FTC suffered a stinging defeat in the United States Court of Appeals for the Eleventh Circuit and sought a writ of certiorari in the Supreme Court.[32] The Solicitor General and the Antitrust Division then filed their own brief (at the invitation of the Supreme Court) recommending that the Court deny certiorari,[33] which the Court did.[34] The FTC was highly displeased—and not merely with the courts. A sister agency had not even accorded them the courtesy of agreeing that the Supreme Court should hear the case.

But soon it would be payback time. In 2007, in a private lawsuit, the United States Court of Appeals for the Ninth Circuit ruled that an internet service provider ("ISP") could maintain a "price squeeze" claim against the local telephone company for charging the ISP too high a price at wholesale in relation to the telephone company's retail prices for DSL service.[35] Displeased with this result, the Solicitor General and Antitrust Division filed an amicus curiae brief supporting the phone company's certiorari petition in the Supreme Court.[36] The FTC then issued a lengthy press release explaining that it strongly disagreed with the Justice Department and refused to join the brief.[37]

The bickering was about to get worse. For several years, the agencies had been collaborating on a report on unilateral exclusionary conduct. They held numerous joint hearings, organized and staffed by

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30 *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

31 *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005).

32 *FTC v. Schering-Plough Corp.*, Petition for a Writ of Certiorari, 2005 WL 2105243 (Aug. 29, 2005).

33 *FTC v. Schering-Plough Corp.*, Brief for the United States as Amicus Curiae, 2006 WL 1358441 (May 17, 2006).

34 *FTC v. Schering-Plough Corp.*, Order denying certiorari, 548 U.S. 919 (2006).

35 *linkLine Communications, Inc. v. SBC California, Inc.*, 503 F.3d 876 (9th Cir. 2007).

36 *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, Brief for the United States as Amicus Curiae, 2008 WL 2155265 (May 22, 2008).

37 *Statement of the Federal Trade Commission*, Petition for a Writ of Certiorari *Pacific Tel. Co. d/b/a AT&T California v. linkLine Comms., Inc.*, (No. 07-512), available at http://www.ftc.gov/os/2008/05/P072104stmt.pdf (May 23, 2008).

members of both agencies. Since unilateral exclusionary conduct was a hot issue in the antitrust community, the joint report was much anticipated. But when the report was released in September 2008, it was unilateral in two senses: it discussed unilateral conduct and the FTC refused to join.[38] Instead, the FTC issued a harshly worded dissent, complaining that the report "would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act," asserting that "the testimony gathered during the hearings was not representative of the views of all Section 2 stakeholders,"[39] and threatening that the FTC "stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report."[40] The unilateral conduct report turned into an embarrassment to federal antitrust enforcement. One surmises that it was the culmination of a slow-developing schism that began with the *Schering* affair (although differing ideology surely played a part as well).

Should it bother us that the two federal agencies in charge of antitrust enforcement publicly disagree? Perhaps such public dialogue is simply part of the optimal give-and-take that democracy requires. After all, we do not think it at all odd—indeed we think it healthy—when FTC commissioners publicly disagree with each other and when judges dissent from their colleagues' opinions. We also usually do not have any conceptual problem when two regulatory agencies—say the Labor Department and the Office of the U.S. Trade Representative—disagree on some policy matter. Further, even within the discipline of antitrust, we usually find it beneficial that private enforcement puts a check on public enforcement and that state enforcement puts a check on federal enforcement. So why should it bother anyone that the two federal antitrust agencies fall into public disputation.

The answer is that not all dissent is created equal. From a systemic perspective, there can be suboptimal levels of dissent and suboptimal distribution of dissent among the various decision-making or policy-influencing institutions. One way to look at the problem is through the lens of informational modularity. For ultimate policy-makers (say the Supreme Court or Congress) to make informed decisions about complex issues like antitrust policy, they can acquire information in bits in pieces or in packets. It is hard to determine the optimal level of modularity in the abstract, but it clearly would not work, for example, to have each commissioner of the FTC and each senior official in the FTC submitting a separate brief urging his own point of view. Congress and the courts would prefer to interact with fewer modules of information.

Although each module requires reliable processes for producing information—including internal dissent and discussion—the ultimate module becomes a unified encapsulation of the internal work product and does not reveal all of its internal processes. Even the presence of majority and dissenting opinions only slightly frays the borders of the module. The fact that the majority opinion is the decision of the commission counts in ways that a mere tally of views does not—in the same way that an election counts in a way that an opinion poll does not. The winner can act on behalf of the entire electorate whether he won by fifty or ninety percent.

Having two competing modules of agency antitrust information (for example, in legal briefs or policy reports) diminishes the influence of agency antitrust information as a class. Agency antitrust information already has to compete with other modules of information—*i.e.*, other agencies, private litigants, state attorneys general, bodies of scholarship. When the two agencies disagree, their cumulative influence falls more than their cumulative influence rises when they agree. It is easy to dismiss entirely the competing positions advanced by two agencies on the theory that "if the antitrust agencies can't agree among themselves, why

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[38] U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008), available at http://www.usdoj.gov/atr/public/reports/236681.htm.

[39] It is particularly difficult to understand this procedural complaint, since the FTC was just as involved as the Antitrust Division in organizing the hearings.

[40] FTC Commissioners React to Department of Justice Report, "*Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*," (Sept. 8, 2008), available at http://www2.ftc.gov/opa/2008/09/section2.shtm.

should we listen to them at all." During periods of dissent, the dual agency model thus tends to diminish the influence of the agencies over antitrust decision-making. The unilateral conduct fiasco likely means that the courts will severely discount what either agency has to say on monopolization and fall back on other sources of information. Squabbling between the agencies is not merely "healthy dissent." Instead, it reduces their overall influence by diminishing the value of the information modules they produce.

5. Why Does Dual Enforcement Persist?

The dual agency system is inelegant on paper and imperfect in practice. It has little to commend to other jurisdictions. Why, then, does it persist? The answer seems to be that the system is not broken *enough* to warrant fixing.

Consider the most recent occasion on which a high-profile body gave serious consideration to consolidating antitrust enforcement. In 2007, the bi-partisan, Congressionally appointed Antitrust Modernization Commission released an evaluative report on the entire gambit of modern antitrust law. Among other things, the twelve members of the Commission considered whether dual federal enforcement should continue. Three of the twelve—including two former heads of the Antitrust Division—voted to recommend abolishing the FTC's antitrust enforcement authority and vesting responsibility for all antitrust enforcement with the Justice Department.[41] But the majority recommended retaining the dual enforcement structure. With the benefit of nearly 100 years of dual-agency history, the Commissioners sounded none of the "noble narrative" themes described above. They admitted that the two agencies did not provide counter-cyclical checks on each other—no, the two agencies "typically have worked together to develop similar, if not identical, approaches to substantive antitrust policy."[42] The Commissioners made clear the real justification for continuing with dual enforcement: "Although concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits."[43] The Commissioners noted further practical difficulties with such a switch: "there is no consensus as to which agency would preferably retain antitrust enforcement authority" and any such move "would likely be politically very difficult."[44]

What conclusions, then, may we draw from the history of two-headed enforcement in the U.S.? One conclusion is that, on balance, there is no good reason to commend the inelegant dual agency model to the rest of the world. The other is that there is wisdom in conservative impulse not to alter existing structures that seem to be working passably well, even if their theoretical basis is shaky. If there is one abiding principle of American pragmatism, it's "if it ain't broke, don't fix it." Dual enforcement may not be broken enough to fix.

Whether this sentiment is pragmatic common sense or just timidity and inertia, there is likely to come a time when political forces transpire to bring the American dual agency structure into the public spotlight. If ever there arises the political will for serious institutional reform in antitrust, there will not be a shortage of options, including ones that preserve an antitrust role for both agencies. For example, one could imagine handing all of the civil antitrust portfolio to the FTC and allowing the Justice Department to continue its criminal anti-cartel program. Or the FTC could handle all merger cases—thus exploiting its Section 13(b) advantage—and the Justice Department everything else. The political will to make such changes is remote, but the advantage to making them is not.

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[41] Antitrust Modernization Commission, Report and Recommendations II.A at 129 (footnote) (April 2007).

[42] *Id.* at 129.

[43] *Id.* at 129-30.

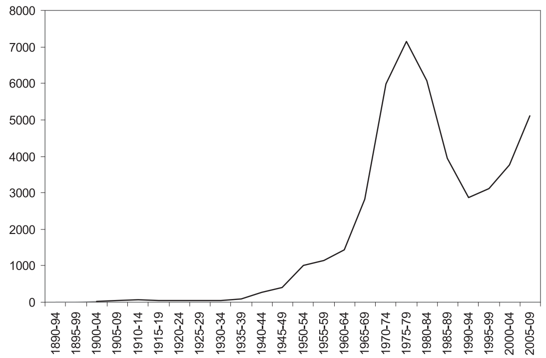
[44] *Id.* at 130.

V. PRIVATE ENFORCEMENT

I turn now to the significance of private enforcement in the U.S. experience. This is a very large topic, one to which I and many others have devoted much attention in recent years. Rather than attempting a comprehensive overview of private enforcement issues here, I will confine my remarks to the relationship between public and private enforcement.

The U.S. is perhaps unique in the world insofar as private enforcement far outnumbers public enforcement. The private right of action for treble damages (the prevailing plaintiff automatically recovers three times its actual damages) originated in the Sherman Act in 1890, but was little used in the early years. As set forth in the chart below, private filings exploded beginning in the 1940s and peaked in the 1970s. Thereafter, private filings dropped precipitously through the late seventies and eighties, before climbing again in the nineties and two thousands.

Private Antitrust Filings by Five-Year Period



For the last decade or so, private filings have been relatively level, at around one thousand to twelve hundred new private filings in the federal system each year. That means that for every filing by the Antitrust Division and FTC, there are more than ten private filings. This high ratio between private and public filings is a—perhaps *the*—distinctive attribute of the American antitrust system.

Over the last several decades, private antitrust enforcement has fallen into discredit in the courts—especially the Supreme Court. Rightly or wrongly, the Court has come to view private antitrust lawsuits as poor devices to advance society's interests in competition. Private plaintiffs are regarded as pursuing their own narrow interests, which are often antithetical to the public interest. For example, business rivals who assert predatory pricing cases have an interest in raising market prices, just the opposite from the public interest. Private plaintiffs are thought to abuse the discovery process to impose costs on legitimate business and try to extort settlements from innocent defendants. The treble damages remedy, in particular, is viewed as distorting the structure of incentives, since it can easily transform frivolous lawsuits into potentially damaging cases for defendants. The courts have also been highly skeptical about the institutional actors who decide private damages cases—particularly generalist judges and juries.

On a formal level, none of these perceptions of private enforcement should have any effect on public enforcement. Public enforcers can bring suit even after private litigants have failed (and vice versa) and have many powers—such as investigatory powers to compel the production of evidence before suing—that private litigants lack. Further, public lawsuits generally enjoy a prestige that private enforcers lack.

However, it is very difficult to insulate public litigation from the systemic effects of private litigation. One way that the courts have expressed their hostility to private litigation is by creating very pro-defendant liability norms. Since there are ten times as many private cases as public cases, most liability norms are being created in private litigation. However, the same norms are usually applied wholesale to subsequent public cases.

For example, during the 1980s and 90s, in a series of private cases, the federal courts sharply constricted the right of action for predatory pricing.[45] The courts justified restrictive predation liability rules by

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[45] *See generally* Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell

claiming that opportunistic private plaintiffs could chill rivals' aggressive pricing by bringing predatory pricing lawsuits for treble damages.[46] During the years that the courts were developing these restrictive liability norms, neither the FTC nor the Department of Justice brought any predatory pricing lawsuits. The liability rules were created with the institutional limitations of private litigation in mind. Then, in 1999, the Justice Department brought its first predatory pricing lawsuit in decades, against American Airlines.[47] The government lost the case on summary judgment in the district court and then again in Tenth Circuit largely because the courts applied off-the-rack predatory pricing liability rules designed to avoid abusive private litigation.[48] If the law of predatory pricing had developed with the institutional parameters of public enforcement in mind, it is doubtful that the resulting liability rules would have been so deferential to pricing decisions by dominant firms.[49]

The FTC has faced similar overhang from private litigation. Take, for example, the Commission's disappointing loss in *Rambus*.[50] Rambus was a technology company that had patents on various computer memory functions. During the 1990s, Rambus participated in the Joint Electron Device Engineering Council ("JEDEC"), which was then in the process of formulating new computer memory standards.[51] At some point before the finalization of the new standards, Rambus withdrew

L. Rev. 1, 3 (2005).

[46] *Id.*

[47] *U.S. v. AMR Corp*., 335 F.3d 1109 (10th Cir. 2003).

[48] For example, the Tenth Circuit relied on earlier precedent from predatory pricing cases that justified underinclusive liability norms because of the high costs of false positives. 335 F.3d at 1114. Such concerns are far greater in private actions for treble damages than in injunctive actions by the government seeking to interdict future misbehavior.

[49] For a thoughtful post-mortem on the case, *see* Gregory J. Werden, *The American Airlines Decision: Not With a Bang But a Whimper*, 18-FALL Antitrust 32 (2003).

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

[51] 522 F.3d at 458-60.

from JEDEC. According to the FTC's subsequent administrative complaint, Rambus failed to disclose that it had various patents or patent applications on technologies that would be essential to practicing the new standard. After the standard's adoption, Rambus began to demand royalties from firms practicing the standard.

The FTC decided that Rambus violated Section 2 of the Sherman Act (as enforced through Section 5 of the FTC Act) by deceiving JEDEC about its patents and patent applications. The FTC explicitly stated that it was relying on general Sherman Act Section 2 law in bringing its challenge to Rambus's comment.[52] The D.C. Circuit reversed the Commission's decision, finding that the Commission had not shown that any deception or fraud had impaired the competitive function of the market. In support of this holding, the court relied heavily on antitrust doctrines created in private cases, particularly the Supreme Court's decision in *NYNEX*.[53] In *NYNEX*, Justice Breyer's opinion rejecting fraud on rate regulators as a ground for antitrust liability worried that applying antitrust rules to "regulatory fraud … would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases."[54] Obviously, the concern over abusive treble damages lawsuits by frustrated competitors had nothing to do with the FTC's case in *Rambus*, but the FTC was bound to the prior judicial interpretations of the Sherman Act with all of its institutionalist baggage.

It is not inevitable that private litigation should have these spillovers on public enforcement. At present, the FTC is arguing that it should not be bound to Sherman Act case law when suing under the FTC Act. For example, in its recently filed case against *Intel*, the FTC issued a statement explaining that its FTC Act claim should not be adjudged under Sherman Act case law. While I am very sympathetic to this argument in principle, I have elsewhere identified some significant difficulties with

[52] 522 F.3d at 462.

[53] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998).

[54] 525 U.S. at 136-37.

efforts to make a wholesale break from the Sherman Act[55].

Although I have presented evidence that private enforcement can have the effect of stymieing public enforcement, I am not arguing against private enforcement altogether. Rather, I am arguing that the design of private enforcement must be carefully considered, not only for the sake of optimal private enforcement, but because of its systemic spillover effects on other aspects of antitrust enforcement.

[55] Daniel A. Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel* (2010), available at http://download.intel.com/pressroom/legal/ftc/Crane_Section_5_Paper.pdf.