Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission

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The period from 1970 to the present—roughly a third of a century—has witnessed profound changes in the quality of regulation at the Federal Trade Commission and a remarkable convergence of antitrust enforcement policy between left and right, and between primarily legal as opposed to primarily economic approaches. With respect to substantive law, areas of intellectual debate and uncertainty remain, but viewpoint differences that existed between the 1960s and the 1980s are today vastly reduced. In the 1960s, emphasis was on populist values, hostility to “Bigness,” protection of competitors (especially small business) as opposed to the competitive process, and neglect of or outright hostility toward efficiencies. In the 1980s, at least late in the decade, we saw extreme economic analysis that regarded most horizontal agreements as so unstable that they would collapse of their own weight and barriers to entry as generally easily surmounted. That approach led to little or no enforcement outside the area of hardcore cartels (price fixing, market division, and output limitations—all of which saw a fairly standard level of enforcement throughout the thirty-five-year period) and challenges to a few very large horizontal mergers.

Since the early 1990s, the effort at the Federal Trade Commission, and elsewhere in the antitrust world, has been to find a middle ground that avoids the extremes of over- and underenforcement.

I. THE PATH FROM RIDICULED TO RESPECTED

A. The Old Days at the FTC

Philip Elman, an exceptionally thoughtful scholar and government lawyer, served as a Commissioner at the Federal Trade Commission (FTC) from 1961 to 1969—before reforms were instituted. His vivid and unfortunately accurate description of the agency was as follows:

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My general impression of the FTC was that it was a sleepy, second-rate agency. Their lawyers were mediocre. They didn't compare at all in quality with the lawyers in the appellate sections of the Department of Justice or other regulatory agencies. When I was appointed to the Federal Trade Commission and broke the news to people like Justice Frankfurter, their reaction was that this was a great opportunity for me to bring to an agency that had great potential, which had never been realized, whatever talents I had as a creative lawyer.1

With respect to quality of staff, Elman told the following story:

[The Chairman] said that if two people came to him looking for a job as a lawyer at the Federal Trade Commission—the first, let's say, went to Harvard or Yale Law School and was on the Law Review and was very bright and very articulate and had an attractive personality; and let's suppose the second one had gone to law school in North Carolina or Texas (well, let's make that Tennessee), and the second fellow was not on the Review and he had only gotten a C average and he wasn't particularly bright or personable, but he seemed to be intelligent and would be a hard worker—[the Chairman] said, if you have to choose between the first and the second one, something like, "I'll take the second one all the time. Because if you hire that first fellow, he'll do a good job but in two or three years he will say to himself, I'm going to go out and make a lot of money. I'm going to join a big firm like Sullivan and Cromwell, and they are going to want me because I've got all this experience at the FTC."2

In the end, Elman, despite acknowledging the FTC's occasional but significant successes, concluded that the agency was beyond reform and ought to be abolished.3

The American Bar Association (ABA) Commission to Study the FTC (the "Kirkpatrick Commission"—named after its chair) offered a similar evaluation of the quality of law enforcement at the agency in a report issued in 1969:

Over the past 50 years, a succession of independent scholars and other analysts have consistently found the FTC wanting in the performance of its duties by reason of inadequate planning, fail-

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2 Id at 289–90.
3 Id at 368.
ure to establish priorities, excessive preoccupation with trivial matters, undue delay, and unnecessary secrecy. . . .

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.

. . .

Through an inadequate system of recruitment and promotion, it has acquired and elevated to important positions a number of staff members of insufficient competence. The failure of the FTC to establish and adhere to a system of priorities has caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern.

The ABA group, over a single eloquent dissent, voted 15-1 that the potential of the agency was great and that one more effort at reform was justified. The progress of the Federal Trade Commission since 1969—going from ridiculed to respected—is unusual in the history of bureaucratic reform. It cannot be addressed fully, however, without taking into account developments in substantive priorities during the same period.

B. Substantive Changes in Antitrust

In the 1960s, U.S. competition enforcement (backed by an indulgent Warren Court) challenged extremely small mergers with insignificant barriers to entry, usually ignored countervailing factors relating to the efficiency of a transaction, pursued a broad range of per se rules (such as tie-in sales, boycotts, and maximum resale price maintenance) that turned out to be impractical and often to undermine com-

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5 See, for example, United States v Von’s Grocery Co, 384 US 270 (1966) (blocking a horizontal merger between retail supermarkets in Los Angeles even though it produced a combined market share of 7–9 percent and there were low barriers to entry); Brown Shoe Co v United States, 370 US 294 (1962) (declaring illegal a vertical merger in the shoe business involving a manufacturer accounting for about 4 percent of production and a distributor with less than 2 percent of retail sales where there were low barriers to entry at the manufacturing and retailing levels, notwithstanding a trend toward concentration).

6 See, for example, FTC v Procter & Gamble Co, 386 US 568, 580 (1967) (refusing to consider efficiencies as a defense to illegality); Northern Pacific Railway Co v United States, 356 US 1, 6 (1958) (noting that “tying agreements serve hardly any purpose beyond the suppression of competition”), quoting Standard Oil Co v United States, 337 US 293, 305–06 (1949).
petitive markets, and at the FTC devoted substantial resources to minor price and service discrimination challenges under the Robinson-Patman Act.

The patterns of antitrust enforcement for the last fifteen years look nothing like the patterns of enforcement thirty-five years ago. These changes are a result of some fundamental shifts in opinion as to how competition policy ought to be reviewed—so fundamental that enforcement priorities changed radically as a result. Former Chairman Muris reviews these changes more thoroughly in his Essay parallel to my own, but a few salient points are worth noting. While there will always be forceful advocates calling for far more or far less enforcement, a substantial consensus has emerged, consigning much of antitrust to a common middle ground. Evidence of this development can be found in the fact that enforcement priorities of the FTC during the first Bush administration, with a Republican chair and a majority of Republican commissioners; the Clinton years, with a Democratic chair, Democrats in senior staff positions, and for most of the period a majority of Democratic commissioners; and the second Bush administration, with a Republican chair, a majority of Republican commissioners, and almost a clean sweep of Republicans in senior staff positions, is roughly the same—that is, similarities in enforcement priorities exceed differences.

Examples of general agreement between what formerly were two poles in FTC enforcement priorities are discussed more extensively by Muris, but they include the following:

1. Recognizing, in establishing priorities and goals, that the primary concern is with the welfare of consumers—not shareholders of corporations or competitors.

2. Accepting an essential role for economic analysis to inform the design and application of legal rules.

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7 See, for example, Klor's, Inc v Broadway-Hale Stores, Inc, 359 US 207, 212-13 (1959) (applying a per se rule to a boycott organized by a large department store inducing manufacturers of radios, TV sets, and household appliances not to deal, or deal on discriminatory terms, with a rival merchant); Northern Pacific, 356 US at 6; Standard Oil, 337 US at 305-06. See also Albrecht v Herald Co, 390 US 145 (1968) (declaring maximum resale price maintenance illegal per se).

8 The Robinson-Patman Antidiscrimination Act is an amendment to § 2 of the Clayton Act and is codified at 15 USC §§ 13a, 13b, 21a (2000). See Kirkpatrick, 427 Supp Antitrust & Trade Reg Rep at 37–38 & n 101 (cited in note 4) (identifying a “large and growing body of uniformly critical opinion questioning” FTC use of the price discrimination statute).

9 Timothy J. Muris, Principles for a Successful Competition Agency, 72 U Chi L Rev 165 (2005) (arguing that the FTC should no longer be measured by cases brought or won but rather by the ability to fulfill its mandate of promoting competition and protecting consumers).
3. Devoting primary attention to horizontal restraints in establishing an enforcement agenda, both in merger and non-merger cases.

4. Continuing enforcement against practices, not horizontal in themselves, that facilitate horizontal restraints, such as minimum resale price maintenance, a narrow range of boycotts, and intellectual property licensing.

5. Increasing sensitivity and concern about private restraints achieved through state action.

6. Shifting to a far more modest role for challenges to price and service discrimination under the Robinson-Patman Act, conglomerate mergers based on theories of raising barriers to entry, and vertical distribution arrangements that are purely vertical and have no significant horizontal effect.

Once substantial agreement is reached on these core issues, similar (though not identical) enforcement priorities tend to follow. The convergence of antitrust thinking with respect to core values is all the more remarkable since it has occurred in a period of the country's history when positions on many political issues—tax policy, environmental policy, regulation of media concentration, gay and lesbian rights, health care, and many others—have become more polarized.

C. The FTC Today

There are many reasons why the Federal Trade Commission has progressed to its current level of respect. These include:

1. Linking the agency’s antitrust and consumer protection missions has a beneficial effect on its budget; consumer protection issues have usually been more popular with appropriations committees of Congress than antitrust.

2. Excellent law school graduates and midcareer attorneys are more willing today to commit, at least for a few years, to public service than thirty-five years ago.

3. The Commission, especially in the last fifteen years, has a record of significant procompetitive and proconsumer activities—an attractive agenda for young and midcareer attorneys.

4. The integration of the FTC’s substantial staff of economists into the day-to-day work of the agency, instead of leaving them to write reports unrelated to law enforcement, has improved both economic and legal analysis.

Another important change in the Commission’s approach to regulation, contributing to its enhanced status, involves the recogni-
tion that the FTC was not created solely as a law enforcement agency. Rather, it was established in 1914 to work with the private sector, provide advice about possible violations, anticipate and study economic trends and developments, and anticipate and report to the White House, Congress, and the public likely economic problems. To support this role, the FTC was granted in its enabling statute broader powers of investigation than almost any other department or agency in the federal government. Published reports and studies over the last several years relating to changes in business patterns as a result of global competition, for-profit invasions of individual privacy, strengths and weaknesses of the current patent system, and issues at the intersection of antitrust and intellectual property, among many others, have usefully discharged that function.

Other reasons for the FTC's increasing success could be added, but I suggest one additional reason is of paramount importance. The Commission could not have achieved this enhanced level of respect—such as it is, and recognizing that some will see little improvement—if there had not been the convergence of antitrust doctrine on the basis of

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10 See Federal Trade Commission Act, Pub L No 63-203, 38 Stat 717 (1914), codified as amended at 15 USC § 41 et seq (2000). See 15 USC § 46(a) (empowering the FTC “to gather and compile information concerning ... business, conduct, practices, and management” of commercial entities); 15 USC § 46(d) (empowering the FTC, upon request, to report to the president or Congress about any alleged antitrust violation); 15 USC § 46(e) (giving the FTC the power to “investigate and make recommendations for the readjustment of the business of any corporation” allegedly violating antitrust laws); 15 USC § 46(f) (authorizing the FTC to provide reports to the public and to Congress). See also Gerard C. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure 21, 45-46 (Yale 1924) (describing the desire of businesses for ex ante “authoritative advice as to the legality of a contemplated undertaking” and summarizing the FTC’s investigatory and advisory powers).

11 See 15 USC § 49 (giving the FTC investigatory powers including subpoena powers and access to and the right to copy “any documentary evidence of any person, partnership, or corporation being investigated”); 15 USC § 50 (authorizing fines up to $5000 and one year imprisonment for disobedience of discovery orders). See also Stephanie W. Kanwit, 1 Federal Trade Commission § 13:1 at 13-1 (West 2003) (“The [FTC] possesses what are probably the broadest investigatory powers of any federal regulatory agency.”); Kirkpatrick, 427 Supp Antitrust & Trade Reg Rep at 69, 70 (cited in note 4) (noting that “Congress used extremely broad language in defining the FTC’s powers” and that the FTC has “broad power to prepare and publish reports on almost any relevant aspect of economic performance by corporations subject to its jurisdiction”).

of the principles I mentioned earlier, and the consequent common agenda of enforcement priorities. The FTC’s pre-1970 antitrust efforts—not always but at least all too often—were wide of any sensible mark; preoccupied with innocuous discrimination under the Robinson-Patman Act, attracted to exotic antitrust initiatives to protect small business for the sake of its smallness, inclined to challenge practices with trivial economic consequences, and addicted to remedies of little or no deterrent value. More recent Commissions have found comfort in a middle ground—largely consistent with the civil enforcement agenda of the Antitrust Division of the Department of Justice—which leaves the agency open to criticism of decisions with respect to particular cases but generally not of its overall approach to enforcement. Finally, the Commission’s increased attention to the remedy side of antitrust enforcement—a subject that deserves its own special conference—has rendered obsolete its former title of “The Little Old Lady of Pennsylvania Avenue.”

II. ISSUES THAT REMAIN TO BE ADDRESSED

The overriding theme of the parallel Essays by former Chairman Muris and me describing antitrust enforcement at the FTC emphasizes the remarkable convergence in doctrinal substance and enforcement priorities between left and right over the last thirty-five years, and particularly in the last fifteen years. In his Essay, Muris describes in detail the similarities of approach regardless of which political party was in control of the federal government and despite continuing differences about the role and influence of economic analysis in antitrust. With the usual modest reservations, I agree with his description.

It would be misleading, however, to suggest that there is virtually no difference in approach among different enforcement officials or groups of scholars addressing important antitrust issues. I would like to turn, therefore, to areas of antitrust where differences remain. I will discuss four topics: (1) the search for standards describing exclusionary behavior under § 2 of the Sherman Act; (2) limits on vertical mergers; (3) the appropriate scope of efficiency defenses under § 7 of the Clayton Act; and (4) the continuing disagreements over the competitive consequences of vertical distribution restrictions, and especially minimum resale price maintenance. Since this Essay addresses

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13 See notes 5–8 and accompanying text.
not just the past and present of the Federal Trade Commission but also its future, I offer this as a possible agenda of activities the Commission might undertake.

A. Search for Standards of Exclusionary Behavior Under § 2 of the Sherman Act

My starting point in interpreting the monopolization provision of § 2 is that firms with monopoly power may not engage in conduct that is unreasonably exclusionary. Suggestions in earlier cases that (subject to certain narrow and uncertain exceptions) any conduct that has an exclusionary effect violates § 2 are no longer taken seriously. That significant redirection of thinking—virtually unanimous—is itself an example of doctrinal convergence. The question remains, however, how to approach the issue of what is unreasonably exclusionary.

Some boundaries are offered by cases that are easily decided. For example, if the monopoly power is achieved or maintained solely as a result of superior skill, foresight, and industry (lowering prices but remaining above some standard of predatory pricing, improving product, investing in innovation, undertaking innovations that reduce cost), that behavior, even for a monopolist, is in a safe harbor. At the other extreme, behavior by a monopolist that violates some provision of the antitrust laws (selling at what courts eventually decide is a predatory price, procuring a patent by fraud on the Patent Office) is almost always indefensible. Finally, some narrow areas of corporate behavior have developed their own special rules of what is unreasonable; for example, using monopoly power in one market to achieve advantages in a second separate market can be illegal only if the leveraging monopolist achieves or threatens to achieve monopoly power in the second market.

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16 See, for example, United States v Aluminum Co of America, 148 F2d 416 (2d Cir 1945); United States v United Shoe Machinery Corp, 110 F Supp 295 (D Mass 1953), affd, 347 US 521 (1954).
20 See Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP, 540 US 398, 415 n 4 (2004) (emphasizing that a plaintiff deploying a leveraging theory must show that the defendant, by exploiting a monopoly in one market, has a “dangerous probability” of attaining a monopoly in a second market).
For the remaining possible behavior by a company found to have monopoly power, there is no single rule, and it remains one of the most uncertain areas in all of U.S. antitrust law.\(^{21}\) Proposals have been advanced by enforcement officials who appear to be more tolerant of dominant firm behavior than standards in existing law. A formulation in the government’s amicus brief to the Supreme Court in *Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*\(^{22}\) is that the behavior must be shown to make no business sense unless it limited competition or excluded rivals.\(^{23}\) The problem with this formulation, however, is that in an admirable effort to reach a universal rule that applies to a broad range or even all circumstances, it fails to quantify effects. Put simply, any efficiency that makes business sense, and therefore moves the monopolist’s behavior to safe ground, may be modest or even insignificant while the anticompetitive effect on a rival or raising of barriers to entry may be substantial. It is hard to imagine many lines of behavior in which thoughtful lawyers on behalf of a company could not put forward a plausible claim of some level of efficiency.

I read the Supreme Court’s decision in *Aspen Skiing Co v Aspen Highlands Skiing Corp*\(^{24}\) and the unanimous opinion of the D.C. Circuit in *United States v Microsoft Corp*\(^{25}\) as requiring a balance of the adverse impact of the conduct at issue against the efficiency effects that may simultaneously arise. I recognize that a vague balancing approach, without any indication of the nature, weight, and priority of factors involved, leaves much to be desired. For the time being it will have to do until something better comes along. The challenge of finding “something better” remains.

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\(^{23}\) See Brief for the United States and the Federal Trade Commission as Amici Curiae, *Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*, No 02-682, *15 (S Ct filed May 23, 2003) (available on Westlaw at 2003 WL 21269559) (“Conduct is not ‘exclusionary’ or ‘predatory’ unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.”). A slight variation on that test, focusing on “sacrifice of short-term profits or goodwill” was stated at another point in the brief. See id at *16 (“Likewise in the context of asserted duties to assist rivals,... conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power.”).

\(^{24}\) 472 US 585, 605 n 32 (1985) (“[E]xclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way”), citing Phillip E. Areeda and Donald F. Turner, 3 *Antitrust Law* § 626b at 78 (Little, Brown 1978).

\(^{25}\) 253 F3d 34, 59 (DC Cir 2001) (“Finally, in considering whether the monopolist’s conduct on balance harms competition ... our focus is upon the effect of that conduct.”).
B. Search for Standards with Respect to Vertical Mergers

In the context of the widely accepted 1982 Department of Justice-FTC horizontal merger guidelines,\(^{26}\) convergence of views with respect to horizontal mergers is close to complete in the United States. If more aggressive commissioners would challenge a particular horizontal merger while more conservative commissioners would take no action, it is almost invariably because of differences of view about fact issues such as the definition of relevant market, durability of barriers to entry, and magnitude of efficiencies—rarely about major differences in views of the law. Instances of enforcement are similar with respect to conglomerate mergers. Few are challenged and any challenges that do occur are based on a widely accepted theory that, but for the merger, the acquiring firm would have remained “in the wings” and exerted a procompetitive influence on the market or would have actually entered the market and thus become an additional competitor.\(^{27}\) Theories once in vogue that a conglomerate merger should be challenged because the combined firm would be so large and powerful as to intimidate rivals, or so large and powerful as to extract special discounts from suppliers not available to smaller firms,\(^ {28}\) have been eliminated from the guidelines and have not been the basis of challenge in over twenty years.

Nothing like that situation pertains to vertical mergers. There is agreement on some important core principles, such as the acceptance that vertical mergers often provide opportunities for substantial efficiencies, and that claims of “foreclosure” deserve more thorough analysis before concluding that they have an adverse impact on competition. While the aggressive stance of the Warren Court toward vertical mergers—hard to explain today—has long since been abandoned, the theory of possible harm by vertical mergers and the market share levels that trigger enforcement remain in doubt.

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\(^{27}\) Only one pure conglomerate merger was challenged during the eight years of the Clinton administration. See Testimony of the Federal Trade Commission, House Committee on the Judiciary (June 3, 1998), online at http://www.ftc.gov/os/1998/06/finanser.tes.htm (visited Nov 26, 2004) (“[In its decision against Questar Corporation, the FTC] blocked an acquisition by the only transporter of natural gas into Salt Lake City of a 50 percent interest in the only potential competitor.”). See also Questar Corp, Form 8-K (Dec 27, 1995), online at http://www.sec.gov/Archives/edgar/data/751652/0000751652-96-000002.txt (visited Nov 26, 2004) (announcing the termination of a proposed transaction after the FTC decision to oppose it). I am not aware of any pure conglomerate challenge to a merger during the first or second Bush administrations.

\(^{28}\) See *FTC v Procter & Gamble Co*, 386 US 568, 578–79 (1967).
During the period of 1961–1969, there were twenty-seven federal antitrust complaints against exclusively vertical mergers.\(^9\) Virtually all of these cases were grounded on a theory of foreclosure—upstream rivals of the merging party would not be given equal access to the downstream assets or distribution facilities of the combined firm, and downstream rivals of the merging party would be similarly disadvantaged when dealing with the upstream subsidiary. The most extreme of these was the first case heard by the Supreme Court under the revised § 7 of the Clayton Act. In 1955, the government successfully challenged the acquisition by Brown Shoe, a manufacturer of about 4 percent of the nation’s shoes, of Kinney, accounting for less than 2 percent of the nation’s retail sales. \(^3\) There was no evidence that, post-merger, Brown Shoe intended to displace rivals in Kinney stores with its own brand of shoes. This and similar decisions were attacked in the academic literature as gross exaggerations of possible anticompetitive effects of vertical mergers. \(^3\) The common theme of most of this criticism was that vertical mergers should only be challenged where one of the parties to the merger had monopoly power.

The negative reaction to *Brown Shoe Co v United States* \(^3\) and similar cases in the 1960s, and the positive reaction of many to the academic criticism, was that no vertical merger cases were filed from 1980 to the early 1990s. Moreover, the 1984 Merger Guidelines \(^3\) described very narrow circumstances in which a vertical merger could successfully be challenged. The only theories of harm accepted in the guidelines were the following three:

1. The vertical merger must substantially increase barriers to entry for potential rivals in the sense that they would need to enter at both levels to be effective. The theory is that two-level entry is more expensive, risky, and less likely to occur, and therefore the original vertical merger raises barriers.

2. A vertical merger or series of vertical mergers must facilitate collusion or other horizontal effects. An obvious example is where the vertical merger involves acquisition of a disruptive seller or buyer.


\(^{32}\) 370 US 294 (1962).

3. The vertical merger would have an effect on rate regulation. Thus, a monopolist whose rates are established by government regulation may acquire a supplier and then take its profits at the supplier level by increasing the level of transfer payments by the monopolist to the supplier.

The important point about these guidelines is they completely ignore any formulation of foreclosure theory—old fashioned or modern—that could lead to anticompetitive effects.

Unlike the horizontal merger guidelines which may be the most influential piece of government regulation in the past fifty years, and the conglomerate merger guidelines which seem to have caught the direction the law was going, the vertical merger guidelines have been widely ignored. Thus, the FTC successfully challenged three vertical mergers during the Clinton administration, and the FTC during the second Bush administration has challenged one and closely examined a second. In every one of the challenged cases the merger was abandoned or substantially restructured before it was allowed to proceed so there is no court opinion elaborating on theory. Nevertheless, on the basis of the facts alleged in the complaints, it appears that all five were based on some variation of foreclosure theory. For example, in 1999, the Federal Trade Commission staff indicated an intention to challenge a merger between Barnes & Noble, the largest retail book seller in the United States with 34 percent of national sales, and Ingram, the largest book wholesaler in the United States with 23 percent of national sales. Ingram was not only large but exceptionally aggressive in supporting smaller book stores with terms of sale, delivery

34 For a more recent and influential analysis of how to examine foreclosure issues in vertical mergers, see generally Michael H. Riordan and Steven C. Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 Antitrust L J 513 (1995).

35 See In re Cadence Design Systems, Inc, 124 FTC 131 (1997) (approving the merger of a circuit design tool company with a circuit routing tool company on the condition that other routing tool companies' products be able to interface with its design tools); In re Silicon Graphics, Inc, 120 FTC 928 (1995) (requiring a hardware manufacturer to ensure that the merger targets continue to make software functional on rival hardware platforms). The proposed Barnes & Noble merger with Ingram, discussed in the text accompanying note 36, was a vertical merger that was abandoned after it became clear that the Commission intended to challenge the transaction. See Stephen Labaton and Doreen Carvajal, Book Retailer Ends Bid for Wholesaler, NY Times Cl (June 3, 1999).

36 The FTC challenged the Cytyc/Digene vertical merger, whereupon the parties abandoned the deal. See FTC Press Release, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002), online at http://www.ftc.gov/opa/202/06/cytyc_digene.htm (visited Nov 26, 2004). The Commission chose not to formally challenge the merger between Avant! and Synopsys, but three commissioners noted in separate statements that the Commission intended to watch the market closely in the future and had not ruled out the possibility of seeking relief. See Statement of Commissioner Thomas B. Leary, Synopsys Inc./Avant! Corp, File No 021-0049, (July 26, 2002), online at http://www.ftc.gov/os/2002/07/AvantLearyStmt.htm (visited Nov 26, 2004).
dates, and marketing specials that would not be likely to remain available after the merger. For example, after the merger, extremely popular books during the Christmas season might go first to Barnes & Noble and only later to Barnes & Noble's smaller rivals. Under the existing vertical merger guidelines, however, the transaction probably would not be regarded as a violation.

The point that needs to be emphasized is that none of these five cases could have been brought if the vertical merger guidelines were controlling. The policy disagreement about enforcement, interestingly, is not so much between liberal and conservative enforcement but between conservative academic views and a broad range of government enforcement attitudes.

C. Scope of Efficiency Claims in Defense of Mergers

Over time a consensus has emerged that efficiencies should be taken into account when offered in defense of a merger. Of course, that was not the law thirty-five years ago. Indeed, in a much reported misstep in antitrust enforcement, the Supreme Court* (and the FTC for a time)** counted efficiencies against the legality of mergers—probably on grounds that small business might suffer as a result of what would otherwise be illegal mergers. The Supreme Court soon moved to a position that efficiencies were neutral.*** In practice, efficiency defenses might be taken into account by the enforcement agencies in the exercise of prosecutorial discretion, but were opposed by those agencies when advanced in court.**** Opposition to efficiency defenses in litigation derived from an unusual coalition of conservatives (who believed efficiencies were difficult to measure and almost impossible to trade off against anticompetitive effects) and liberals (who believed merger enforcement would be virtually impossible if clever lawyers could dream up efficiency defenses).***** Nevertheless, lower courts resented and occasionally ignored the direction to disregard efficiencies.****** After all, one could sensibly argue that efficiencies that

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37 See Brown Shoe, 370 US at 344.
38 See In re Ash Grove Cement Co, 85 FTC 1123, 1148 (1975).
39 The most emphatic Supreme Court statement is in Procter & Gamble, 386 US at 580 ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.")., citing Brown Shoe, 370 US at 344.
42 See, for example, FTC v University Health Inc, 938 F2d 1206, 1222–24 (11th Cir 1991) (acknowledging that claims of efficiency can rebut the government's prima facie case, but finding
will be passed on to consumers is the goal of a free market system and competition is only the best means of getting there.

The Clinton administration modified the merger guidelines in 1997 to add a narrow efficiency defense. It was narrow in the sense that a series of conditions needed to be established. The first three conditions remain noncontroversial. Evidence of efficiencies must be (1) clear and convincing (efficiencies are easy to allege and hard to prove), (2) substantial (efficiency claims complicate enforcement actions and need to be sufficient to make the effort worthwhile), and (3) merger specific (there is no point in allowing the merger if comparable efficiencies could be achieved in some less restrictive manner).

There has been recent criticism that the remaining conditions in the 1997 revisions are too stringent and ought to be relaxed or abandoned. These conditions are that the procompetitive effects of the efficiencies must be timely, the merger may not lead to monopoly or near-monopoly regardless of the magnitude of the efficiencies, the procompetitive effects are limited to consumer welfare, and the merger cannot be defended on grounds that it achieves producer surplus.

In fact, the 1997 guideline revisions addressing the efficiency issues were intended to create a narrow range of efficiency claims that would be taken into account. The goal was to introduce a tiebreaker where pro- and anticompetitive effects were roughly equivalent, but not to allow efficiency issues to predominate over competitive effects. A second reason was to gain additional experience in handling efficiency claims, and on the basis of that experience consider subsequent modifications. An unexpected development on that score was addressed by Muris in a recent paper on merger enforcement at the FTC. He noted that antitrust attorneys often advise their clients not to make the effort necessary to put forward their best efficiency case. The absence of sound, carefully developed, factually supported, efficiency claims has denied the Commission the opportunity to gain substantial practical experience with such defenses.

It is hard to understand why private sector attorneys would not put forward their strongest possible case. It is true that no court has yet declared an otherwise illegal merger not to constitute a violation insufficient evidence in the record); United States v Rockford Memorial Corp, 717 F Supp 1251, 1289-91 (ND Ill 1989) (considering evidence of efficiencies, but nevertheless finding a violation because the efficiencies may not have been unique to the merger and in any event were not sufficiently substantial to overcome anticompetitive effects), affd, 898 F2d 1278 (7th Cir 1990).

43 U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines (with Apr 8, 1997 revisions to Section 4), reprinted in 4 Trade Reg Rep (CCH) ¶ 13104.

because of efficiency considerations. The likely reason is that the agency will not challenge mergers where the pro- and anticompetitive effects are roughly equal and there is a respectable efficiency claim. Officials on several occasions since 1997 have noted that the agency has declined to challenge a merger, as a matter of prosecutorial discretion, because of efficiency considerations. Of the various proposals to modify existing preconditions to the assertion of an efficiency claim, this one seems least persuasive to me. Evidence that efficiencies will have a procompetitive effect four, three, or even two years after the transaction is completed is rather speculative. Even if valid, it means that consumers in the short term will subsidize the welfare of consumers at a later point in time. If the efficiencies do not occur, it will be difficult and expensive years later to break up the merger. Finally, it would put the matter of defenses into a different time range than challenges based on anticompetitive effects. For example, in *BOC International, Ltd v FTC*, the FTC found that an acquisition constituted a violation of § 7 under the “actual potential entrant” theory on the basis that the acquiring firm eventually would enter the market and exert a procompetitive effect. The Second Circuit characterized that as “uncabined speculation” and insisted that the alleged procompetitive effects resulting from probable entry relate to the near future. For similar reasons, mostly having to do with the practicalities of proof and the ability of courts to deal with the issue, I believe the same approach should be taken to efficiency claims. Other arguments about loosening the constraints of the 1997 efficiency guideline approach remain to be addressed.

47 557 F2d 24 (2d Cir 1977).
48 Id at 26.
49 Id at 29.
D. Vertical Distribution Arrangements—Particularly the Rule Relating to Minimum Resale Price Maintenance

With respect to some antitrust limits on restrictions in distribution, the convergence that is the main theme of this Essay has occurred. In *State Oil Co v Khan*, the Department of Justice Antitrust Division and the Federal Trade Commission joined many private sector advocates in calling for the Supreme Court to overrule *Albrecht v Herald Co* and thereby end per se treatment of maximum resale pricing maintenance. With respect to exclusive dealing contracts and tie-in sales, it is hard to see much difference in enforcement patterns between 1988 and the present. There is no such convergence, however, on a theoretical approach or levels of government enforcement with respect to minimum resale price maintenance (RPM). The debate over RPM is often framed as whether a per se rule or a rule of reason should apply. That formulation is a little misleading. During the Reagan years no challenges were advanced against RPM under either a per se or a rule of reason theory. There were a few challenges in extreme circumstances to RPM during the first Bush administration. Then federal enforcement was substantially restored during the Clinton administration, mostly in complaints by the Federal Trade Commission. During the second Bush administration, we find again no challenges to minimum RPM—either under a per se or rule of reason approach.

There are three areas of policy difference with respect to RPM that have yet to be reconciled.

1. Manufacturer and dealer incentives.

Opponents of per se treatment point out that a manufacturer enjoys maximum profits if its dealers sell a large number of its items at a relatively low markup. The argument is then advanced that the manufacturer, in setting a minimum price at which dealers can sell, will set the price low enough to compete with other manufacturers’

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52 See, for example, *In the Matter of Nintendo of America Inc*, 114 FTC 702, 703 (1991) (alleging that the respondent “engaged in a course of conduct to maintain the resale prices at which certain of its dealers advertise, offer for sale, and sell its home video game hardware”); Remarks of Commissioner Sheila F. Anthony, *Vertical Issues in Federal Antitrust Law* (Mar 19, 1998), online at http://www.ftc.gov/speeches/anthony/aliabaps.htm (visited Nov 26, 2004) (commenting that a “severe remedy was necessary because Nintendo commanded 80% of the market”).
products, and the manufacturer thereby acts as a sort of surrogate for the consumer.

Opponents contend that the argument that manufacturer imposition of RPM somehow represents the consumers’ interest is a short-run and rather impractical view of the distribution process. On any given sale, it is true that once the product has been sold to distributors, a manufacturer has extracted all the profit it can achieve on that sale, and thereafter is interested in keeping markups low. But it is also true that a pattern of lower retail prices, perhaps as a result of a price war, is not irrelevant to the manufacturers’ welfare. If that process continues, the manufacturer is not immune. Retailers will insist on a lower wholesale price and the manufacturer will eventually be forced to cut its prices to retain its outlets.

An interesting FTC investigation supporting that view involved minimum advertised price policies adopted by the Big Five prerecorded music distributors.54 The five firms collectively accounted for about 85 percent of the market for prerecorded music. Retail margins were slashed as a result of an extended retail price war and the music companies seriatim adopted nearly identical policies providing that minimum prices be identified in all advertising, including ads funded solely by the retailer, as a prerequisite for obtaining any cooperative advertising funds. The policy also applied to all in-store advertising other than nonpromotional stickers on the product. In proposed FTC complaints against the practice, the agency indicated it was prepared to prove that restrictions on minimum price advertising were adopted not only to preserve retail profit margins, but because it had become clear to the music companies that if the price war was not stopped, wholesale margins would eventually be affected. The matter was settled when the five companies agreed to consent orders including standard cease and desist provisions.55

2. Inducing dealer services.

The main argument relied upon by opponents of per se treatment for minimum RPM is the “free-rider” argument—unless the manufacturer can prevent cut-rate dealers from selling its product without related services essential to the competitive success of the manufacturer’s products, the services will be driven out of the market. For example, outlets will not continue to provide salesperson explanations of

55 Id.
complicated products if the customer can obtain the explanation in one outlet and then buy the product elsewhere, without the explanation, at a lower price.

The opposing argument is that it is doubtful that many manufacturers establish minimum RPM in order to induce particular services. How does the manufacturer know the right services will be selected? And, if the distributor is a multiproduct outlet—for example, a department store carrying hundreds or even thousands of items—the idea that the manufacturer can induce better services or more amenable surroundings by raising the retail price of a single product is absurd. In fact, the lower priced dealer often may offer comparable services, but may also want to pass on the efficiencies of its operation to consumers.

3. Attracting dealers.

Minimum RPM has been defended as a device to attract dealers to a new product that may not have an established consumer acceptance in the marketplace or to obtain desirable shelf space with distributors already committed to the manufacturer. A question remains whether antitrust should allow manufacturers to obtain additional shelf space or dealers by raising prices to consumers. Even if attracting dealers is a legitimate goal, one could argue that the way to do that is to compete for more dealers by lowering wholesale prices, not by arranging to raise retail prices to consumers.

It is unlikely that either side in this extremely lengthy policy debate will persuade its opponents. This may be an area where convergence depends upon some kind of compromise that acknowledges the validity in some circumstances of opponents' views. I have suggested elsewhere that one possibility is to preserve the per se rule but introduce some narrow exceptions. For example, there might be a "characterization preliminary" like that introduced in connection with horizontal price fixing. In those rare instances where the arrangement had a remote effect on market price (for example, where minimum RPM was adopted by only one or two out of a large number of manufacturers) and where the defendant could demonstrate that there were extreme examples of free-rider problems, a full rule of reason review would be justified.

57 See Broadcast Music, Inc v Columbia Broadcasting System, Inc, 441 US 1 (1979) (treating a blanket license to copyrighted music compositions under rule of reason rather than per se rule, even though it could be characterized as horizontal price fixing, because of the modest effect on competition and the efficiencies inherent in the arrangement).
CONCLUSION

It remains to be seen whether pursuit of a sound middle ground, avoiding the extremes of over- or underenforcement, will continue to characterize antitrust policy at the Federal Trade Commission. Given current agreement on many core principles, that pattern is likely to continue.