POLITICS AND PARTISANSHIP IN U.S. FEDERAL ANTITRUST ENFORCEMENT

WILLIAM E. KOVACIC*

U.S. antitrust law provides an informative context in which to examine what guides the behavior of regulatory agencies. Congress cast the federal antitrust statutes in broad terms1 and gave the Department of Justice and Federal Trade Commission much latitude to decide what conduct to proscribe and how to remedy infringements. The interest in predicting how the DOJ and the FTC will use their authority reflects the formidable capacity of federal antitrust enforcement to affect individual firms and entire industries.

Modern experience illustrates the magnitude of enforcement discretion in the U.S. antitrust system. In a number of areas, the DOJ and the FTC have adjusted enforcement priorities significantly over time. For example, in the 1960s and 1970s, distribution practices were core elements of FTC antitrust enforcement.2 Since the late 1980s, however, the FTC has brought just two Robinson-Patman Act3 cases, and the Commission has initiated no vertical

---

* Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. The author served as a commissioner with the Federal Trade Commission from 2006–2011 and chaired the agency from March 2008 to March 2009. The author is grateful to David Hyman, Marina Lao, Jon Leibowitz, James Rill, Steven Salop, and Ted Voorhees for many informative discussions. The author also thanks Nathan Wilson for his excellent editorial guidance. The views expressed here are the author’s alone.


2 Data on these trends are summarized in William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 411 (2003) [hereinafter Kovacic, *Modern Evolution*]. From 1961 through 1968, the FTC brought over 500 Robinson-Patman Act (RP) cases. If closely-related cases are counted as one matter, the number of FTC Robinson-Patman cases filed in this period is 134. *Id.* From 1970 through 1979, the FTC brought 74 vertical restraints cases. *Id.*

restraints matters since 2000. The DOJ brought Sherman Act criminal charges to challenge single-firm conduct as late as the mid-1960s, but DOJ criminal enforcement has focused exclusively on horizontal restraints since the early 1980s. From 1993 through 2000, the DOJ brought seven civil cases predicated mainly on alleged Sherman Act Section 2 violations. Since 2000, the department has filed one such case.

What accounts for these and other notable variations in federal enforcement activity? One common explanation is “politics”—a shorthand expression for the capacity of elections and elected officials to bend the antitrust enforcement system to serve a set of policy preferences or constituent desires. By this view, the political process affects enforcement through presidential elections, the selection of agency leadership, the intervention of executive branch and congressional officials in routine agency decision making, and the appointment of federal judges who hear antitrust cases.

It is unsurprising that a regulatory system rich in power and prosecutorial discretion would have some connection to the political process. The substantial economic significance of the statutes whose enforcement is entrusted to the DOJ and the FTC ensures that elected officials will study what these agencies do and sometimes seek to influence the exercise of their prosecutorial authority. It is also difficult to imagine that a nation would give significant responsibility to law enforcement bodies without some means for elected officials to hold agency officials to account for their policy choices. Expansive grants of authority tend to come with accountability strings attached.


6 This policy adjustment is described in William E. Kovacic, Criminal Enforcement Norms in Competition Policy: Insights from US Experience, in CRIMINALISING CARTELS 45 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

7 Kovacic, Modern Evolution, supra note 2, at 449.


10 On the tradeoff between agency independence and accountability, see William E. Kovacic, Competition Agencies, Independence, and the Political Process, in COMPETITION POLICY AND
For academics, practitioners, and public officials, the question is not whether political forces surround the DOJ and the FTC, or whether decisions by elected officials sometimes influence agency behavior. They assuredly do. The relevant queries are how, and how much? This Article addresses these questions by examining one dimension of the relationship between the federal antitrust agencies and the political process. It discusses how electoral politics can increase the influence of partisanship in the operation of the DOJ and the FTC. As used in this Article, partisanship is a determined commitment to party goals and causes. It manifests itself in a tendency to exaggerate the virtues of the party and to disregard or devalue the accomplishments of political rivals. Through the political appointment of the DOJ and FTC leadership, partisanship can spill over into the formulation and presentation of agency policy.

As will be shown, partisanship can have destructive effects. Among other consequences, partisan attitudes can lead officials to act in ways that serve party goals at the expense of the agency’s programs and reputation. The partisan tends to overlook how continuity of policy and incremental improvements have strengthened the DOJ and FTC antitrust programs regardless of which party controls the White House. Partisanship impedes the development of a norm that recognizes the importance of cumulative improvements, respects past contributions to agency effectiveness regardless of party origin, and encourages long-term investments that enhance the agency’s capability and reputation. The striving for electoral success can beget partisanship, and, by eroding support for a norm that encourages cumulative investments for improvement over the long term, partisan attitudes can diminish agency effec-


13 Norms are widely held views about how members of a group ought to behave. Norms often take the form of customs or standards that a group embraces. Although norms often are not embodied in a binding legal command, they can influence substantially the behavior of individuals and institutions. See Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 INT’L REV. L. & ECON. 215, 218 (1994) (defining concept of norms); Lawrence E. Mitchell, Understanding Norms, 49 U. TORONTO L.J. 177 (1999) (reviewing modern literature on norms).
tiveness. In this sense, politics can influence federal antitrust enforcement, and influence it negatively.

I. PARTISANSHIP AND FEDERAL ANTITRUST ENFORCEMENT

A. PARTISANSHIP DEFINED

Presidential election campaigns emphasize policy differentiation. Each party offers a policy agenda that claims to depart significantly from the other party’s program. To differentiate their programs, political parties may overstate their own achievements, make extravagant promises about future performance, and denigrate the accomplishments of their adversaries. In contemporary presidential campaigns, even a reluctant acknowledgment that a rival has done something well is uncommon.

The policy differentiation that takes place during a presidential campaign and persists afterwards has at least two distinct sources. One is a philosophy about the appropriate course of policy. For example, a party might embrace the general philosophy that stricter controls on certain forms of business conduct are necessary to protect consumers and promote economic progress. In antitrust, this philosophy could encompass a preference for more restrictive merger control or tighter scrutiny of dominant firm conduct.

For the victorious party, one prize of electoral success is the capacity to nominate candidates to lead government bodies such as the DOJ and the FTC. Appointees to DOJ and FTC leadership positions ordinarily undergo political screening by the White House Office of Executive Personnel and share the philosophy of the president who appointed them. The appointees generally embrace the party’s assumptions about how the economy operates and about the effects of different forms of business conduct. These assumptions inform judgments about the appropriate content and application of antitrust rules. However, in addition to sharing common philosophies, nominees for top leadership positions tend to be party loyalists. It is more likely than not that the appointees have engaged in several or all of the following activities: they have registered as party members, voted regularly (for party candidates, one presumes), contributed money, raised campaign funds, or advised party offi-

---

14 This Article uses philosophy rather than ideology to describe a body of ideas. As described below, see infra notes 24–26 and accompanying text, ideology today has the generally pejorative meaning of thinking that resists reassessment in the face of evidence that its assumptions may be faulty. There comes a point at which a philosophy can harden into an inflexible worldview that today often is labeled an ideology.

15 This observation is based on the author’s familiarity (based on personal experience and discussions with other appointees from various administrations) with the operation of the White House Office of Executive Personnel. One element of the application process for a potential appointee is the submission of what amounts to a political resume—a statement of past activity that demonstrates fidelity to party interests.
cials on policy matters.\textsuperscript{16} This may increase the extent to which the appointee approaches policy disagreements in a partisan manner.

A second source of policy differentiation is partisanship. As used in this Article, partisanship is a resolute commitment to achieve or maintain electoral success separate from a desire to pursue philosophically distinctive policies. A partisan not only may embrace the party’s policy philosophy, but also may regard the party’s electoral success as a vital end worthy of attainment by the exaggeration of policy differences. The voice of party philosophy might call for more (or less) antitrust enforcement of certain types. The partisan voice not only promises policy adjustments but also portrays the antitrust stewardship of the political rivals as bankrupt. It may be that the partisan assumes that the policy ends made possible by electoral success justify aggressive—even harsh—means to attain it. Because electoral victories are seen as necessary to advance cherished policy aims, the partisan willingly exaggerates the features of the party’s own program at the expense of political rivals. This is an understandable impulse, yet, as shown below, it has harmful consequences for the reputation and quality of an antitrust system.

This is not to claim that political partisanship is the sole force that induces leaders of government agencies to inflate their own importance and belittle others. Self-aggrandizement, without regard to political affiliation or system of belief, is a powerful motivation. For some public officials, party affiliation may serve mainly as a convenient means to seek acclaim, power, and riches. Moreover, even appointees of the same party succumb to strife that has as much to do with a craving for power and prestige as with philosophical differences.\textsuperscript{17} The limited point here is that political partisanship serves as an important spur for—albeit not the only cause of—exaggerated efforts to differentiate policy across time at the federal antitrust agencies, or in other government institutions.

\textsuperscript{16} The appointment of political “independents” to the FTC presents a different case. The Federal Trade Commission Act establishes a political diversity requirement for Commission members; no more than three of the five commissioners can belong to the same political party. 15 U.S.C. § 41. If a vacancy occurs and the President’s party already accounts for three FTC members, the President can satisfy this requirement either by nominating an individual from the other party or by proposing an independent. In either case, the White House is likely to select a person who most shares the President’s preferences. To qualify as a true independent, the candidate cannot have the indicia of political affiliation (e.g., party registration, contributions focused on one party) that would be necessary for a party appointee. An individual nominated as an independent rarely has no connection to the political process. The successful navigation of the White House nomination and the Senate confirmation processes ordinarily requires piloting by a politically connected patron, such as an influential member of the U.S. Senate.

\textsuperscript{17} The bitter struggle between William Humphrey and Abram Myers, both Republican members of the FTC in the 1920s, is an example of this phenomenon. See Marc Winerman & William E. Kovacic, \textit{The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929}, 77 \textit{Antitrust L.J.} 701 (2011).
Partisan individuals are likely to carry their partisan impulses into senior leadership positions in an antitrust agency. At least to some degree, such officials may feel empowered to use the agency leadership position to serve party objectives. Partisanship can reinforce an individual’s commitment to the party’s philosophical aims in ways that discourage consideration of important alternative points of view.18

An example from the 2008 presidential campaign illustrates the differences between a substantive policy philosophy and partisanship. Early in 2008, Senator Barak Obama answered an invitation from the American Antitrust Institute to state his aims for antitrust policy.19 The Obama statement combined philosophical and partisan perspectives. The philosophical perspective was a call for expanded antitrust enforcement. The candidate pledged to “reinvigorate antitrust enforcement” if he achieved the presidency.20

The statement’s partisan dimension appeared in its portrayal of federal antitrust enforcement during the George W. Bush administration.21 To make the case for his program, Senator Obama said the DOJ and the FTC from 2001–2008 had achieved “what may be the weakest record of antitrust enforcement of any administration in the last half century.”22 As explained more fully below, the statement is partisan in its denigration of the DOJ and the FTC antitrust programs during the Bush administration and its use of a strained historical comparison to make its case for change.23

B. MAJOR CHARACTERISTICS OF POLITICAL PARTISANSHIP

Several forms of behavior tend to indicate the presence of a partisan at work. Partisans did not invent the conduct described below, nor, as suggested above, are they its only practitioners. Yet the drive to achieve and sustain political power has sharpened and extended the state of the art.

---

20 Id.
22 Obama AAI Statement, supra note 19, at 1. The statement appears to have distinguished weakness from strength on the basis of the volume of cases initiated. For a critique of the view that the number and size of an agency’s prosecutorial targets is a sound measure of agency effectiveness, see William E. Kovacic, Rating the Competition Agencies: What Constitutes Good Performance?, 16 Geo. Mason L. Rev. 903 (2009) [hereinafter Kovacic, Rating the Competition Agencies].
23 See infra notes 55–59 and accompanying text.
1. Portrayal of Rivals as Extremists, Ideologues, or Irrational

In the mid-1960s, the political scientist Paul Sigmund compiled an influential volume of writings to capture trends in political thought in anticolonial movements after World War II. Sigmund titled his anthology, *The Ideologies of Developing Nations.*24 In the book’s introduction, Sigmund confronted the problem of how to define “ideology.” He wrote: “Ideology . . . can be used in two principal senses—as a body of ideas that serves as a guide and impulse, to action, and as a systematic distortion, exaggeration, or simplification which has other bases besides the attempt to understand and evaluate the world of experience and action.”25

In modern antitrust discourse, the pejorative connotation identified by Sigmund prevails.26 To call someone an ideologue, or to say that ideology controls an individual’s decision, is to accuse the person of, at best, narrow-mindedness and rigidity or, still worse, dishonesty or intellectual zealotry. In this sense, decisions rooted in ideology are tainted because they depart from outcomes that a careful, balanced assessment of theory and fact would generate. There is no room for good-faith disagreement in this view of the world. The epithet of “ideologue” swiftly and powerfully puts an adversary on the defensive. As such, it is a common instrument of partisan argument.

Several examples illustrate how the partisan method uses “ideology,” “ideologue,” and “extremism” as rhetorical weapons. Ronald Reagan had been president for barely a month in 1981 before his budget director, David Stockman, took a run at the Federal Trade Commission. As head of the Office of Management and Budget, Stockman recommended budget cuts to eliminate the FTC’s Bureau of Competition.27 Soon afterward, the OMB Director explained the plan sought to eliminate the agency’s capacity to enforce the antitrust laws. The FTC, Stockman said, is a “passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”28

25 Id. at 42.
A second example comes from more recent experience. In a formative text published in 2008, former FTC Chairman Robert Pitofsky said the search for a "middle ground between over-enforcement of the 1960s and under-enforcement of the 1980s . . . came to an end with appointments during President Bush’s second term of some agency enforcement officials, lower court judges and, most important, the confirmation of two conservative justices to the Supreme Court."\(^{29}\) By their efforts, “extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of the facts) have come to dominate antitrust.”\(^{30}\) This comment illuminates where the mere expression of philosophy ends and the partisan voice emerges. It is possible to have a robust (even contentious) debate about policy philosophy in which one says an adversary reached an utterly wrongheaded conclusion but did so after a good faith assessment of theory and evidence. It is another matter—a true expression of the partisan—to say the adversary reached the wrong policy result dishonestly—by distorting theory and ignoring relevant evidence.

A related partisan tendency is to say political adversaries have an irrational commitment to flawed ideas. An ideologue deliberately engages in what Sigmund calls “systematic distortion, exaggeration, and simplification.”\(^{31}\) In a speech in 1985, amid sharp debates about antitrust policy during the Reagan administration, Charles F. Rule, the Deputy Assistant Attorney General for Antitrust, took on commentators who criticized the Reagan DOJ for pursuing too few matters involving dominant firms. The AAG said the criticism reflected views that animated the DOJ and the FTC deconcentration cases of the late 1960s and the 1970s. Rule observed that antitrust analysis “need not be very sophisticated, of course, to determine that such antitrust notions as ‘no fault monopolization’ have little economic merit and can be explained as merely a knee-jerk reaction to economic success and a suspicion of capitalism.”\(^{32}\)

In Rule’s speech, the partisan depiction of ideological irrationality assumes that no sensible person could share the irrational views. Consider the following complication: what happens if reasonable people endorse the challenged ideas? Can adoption of the disfavored views properly be said to be irrational—in the case of no-fault monopolization, “a knee-jerk reaction to eco-


\(^{30}\) Id. at 6.

\(^{31}\) Sigmund, supra note 24, at 42. A slightly more charitable explanation is that the ideologue is not engaged in conscious misrepresentation but is so intellectually and emotionally hardwired that she has lost the ability to reassess her views.

omic success”? In the late 1960s and early 1970s, the no-fault concept built upon intellectual foundations set by, among others, Phillip Areeda, Donald Turner, and Oliver Williamson.33 There is nothing inappropriate, in a robust debate about antitrust philosophy, in claiming that these views were wrong.34 But in the partisan’s depiction, the disfavored policy preference is attributed to reflexive, unthinking fidelity to a point of view—such as saying that no-fault advocates such as Areeda, Turner, and Williamson were guided by “a knee-jerk reaction to economic success and a suspicion of capitalism.” The partisan method declines to address opposing arguments on their own terms and refuses to engage their best arguments.

The irrationality interpretation of modern U.S. antitrust experience—the system periodically goes mad in the hands of antitrust extremists—has broad appeal in discourse about competition law.35 Critiques of the FTC’s competition and consumer protection programs of the 1970s often descended into suggesting that the agency simply had lost its mind. During floor debates in 1979 and 1980, a number of legislators justified proposals to curb the FTC’s authority on the ground that an irrational antipathy to business had seized the agency. Representative William Frenzel famously called the Commission “a rogue agency gone insane.”36 Many observers attributed the insanity to Michael Pertschuk, a Jimmy Carter appointee who chaired the agency from 1977 to 1981. Reagan-era leadership at the FTC scorned Pertschuk for engaging the agency in reckless adventurism.37 This narrative ignored how previous Republican chairmen had promoted the expansionism often attributed to Pertschuk.38 If Pertschuk was irrational, so too, perhaps, were Caspar Weinberger (FTC Chairman 1969–1970) and Miles Kirkpatrick (FTC Chairman


34 For an early example of such a critique, see Thomas Leary, Do the Proposals Make Any Sense from a Business Standpoint? Con., 49 ANTITRUST L.J. 1281 (1980).

35 The New Enforcers, THE ECONOMIST, Oct. 7, 2000, at 79, 80 (describing federal antitrust enforcement trends; discussing eras, respectively, of “trust-busting zealots of the 1960s who saw evil in every big company or merger” and “the laissez[faire ideologues of the Reagan years.”).


38 For example, the FTC issued its breakfast cereal and petroleum shared monopolization complaints in 1972 and 1973, respectively, well before Pertschuk became the agency’s chairman. See William E. Kovacic, The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement, 17 TULSA L.J. 587, 636–40, 646–47 (1982) [hereinafter Kovacic, FTC and Congressional Oversight] (describing origins of FTC cereal and petroleum refining cases). Pertschuk may well have embraced these prosecutions, but Kirkpatrick (cereal) and Lewis Engman (petroleum) bear greater responsibility for the initiation of matters that consumed vast resources, resulted in dismissals, and damaged the agency.
1970–1973), who welcomed efforts to test the boundaries of the Commission’s authority.39

The partisan accusation of ideological irrationality also is a recurring theme in discussions about the Chicago School of antitrust and antitrust policy since the late 1970s. In one narrative of modern U.S. antitrust history, federal enforcement policy leaves the rails in the 1980s as Chicago School adherents take control of the DOJ and the FTC.40 Images of fanaticism and religious zealotry abound in descriptions of the federal enforcement system in this period. Under Reagan, the federal agencies were accused of becoming “a garbage barge of antitrust ideologues.”41 DOJ and FTC appointees were “extremists”42 whose decisions reflected the almost diabolical influence of the Chicago school43 and a “blind faith in the efficacy of competitive rivalry.”44 Whatever success the Reagan appointees achieved in altering policy was “largely a political victory, not an intellectual or legal one.”45

As documented elsewhere, the formative influences on U.S. antitrust policy are more complex. Many policy adjustments complained of in the popular narrative drew considerable strength from Harvard School scholars not ordi-

39 For example, in a letter to a congressional committee in 1970, Weinberger reported the FTC’s progress in “[p]robing the outer limits” and “exploring the frontiers” of the Commission’s statutes. He also said the FTC “is receptive to novel and imaginative provisions in orders seeking to remedy alleged unlawful practices.” Letter from Caspar W. Weinberger, Chairman, Fed. Trade Comm’n, to Senator Edward M. Kennedy, Chairman, S. Judiciary Subcomm. on Admin. Practice and Procedure (July 22, 1970), reprinted in Hearing on the Nomination of Miles W. Kirkpatrick to be Chairman of the Fed. Trade Comm’n Before the S. Comm. on Commerce, 91st Cong., 2d Sess., 133, 135–36 (1970). Soon after he succeeded Weinberger as the FTC’s chairman, Kirkpatrick told a bar association meeting that “we are moving into ‘high gear’ in the task of preserving and promoting competition throughout the American economy; and . . . we fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.” Federal Trade Commiss. ’43 Grad Transforms Agency into a ‘Growling Watchdog,’ U. PA. L. ALUMNI J., Fall 1971, at 9.

40 See Kovacic, Modern Evolution, supra note 2, at 384–89 (discussing “pendulum narrative” of modern U.S. antitrust enforcement).


42 Eleanor M. Fox & Lawrence A. Sullivan, Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, 62 N.Y.U. L. Rev. 936, 945 (1987) (“It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done.”).

43 Stephen D. Susman, Business Judgment vs. Antitrust Justice, 76 Geo. L.J. 337, 337 (1987) (“We have sold the soul of competition to the devil, no question about that. As for the devil, there are several to choose from: the Chicago School, certain opinions of the Supreme Court, and [the Reagan] Administration’s antitrust policies are chief among them.”).


45 Fox & Sullivan, supra note 42, at 947.
narily associated with Chicago School perspectives: Phillip Areeda, Donald Turner, and Stephen Breyer.\textsuperscript{46} Much criticism of the Chicago School and the Reagan antitrust program is partisan in the sense that it overlooks how individuals, believed to be reasonable analysts, began to accept ideas that pressed antitrust doctrine and policy in less interventionist directions. The conventional narrative also sidesteps the pivotal role of jurists such as William Brennan and Thurgood Marshall in joining or authoring opinions that advanced the Chicago School agenda.\textsuperscript{47} It is difficult to treat a body of thought as irrational if widely respected scholars and jurists embrace its major tenets or facilitate its adoption.

Partisanship in action also is seen when agency leaders use the narrative of ideology and irrationality to exalt one party’s antitrust program by denigrating the opposing party’s program. In one form of partisan framing,\textsuperscript{48} the public official portrays his public service as a wise period of policy making in contrast to eras dominated by ideology and irrationality. In 1992, Robert Pitofsky described U.S. merger enforcement from the 1960s through the 1980s in these terms:

American antitrust policy has tried to balance possible threats to competition against merger benefits, but remarkably, has careened from one extreme to another in this balancing process. For example, the United States had by far the most stringent antimerger policy in the world in the 1960s, striking down mergers among small firms in unconcentrated markets. By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors.\textsuperscript{49}

In 2002, after chairing the FTC from 1995 to early 2001, Pitofsky said the federal antitrust agencies by the late 1990s had “stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist

\textsuperscript{46} See Kovacic, Double Helix, supra note 5.


\textsuperscript{48} On framing as a means to shape perceptions, see Daniel Kahneman, Thinking, Fast and Slow 363–74 (2011).

enforcement based on hostility to the core assumptions of antitrust.” In this and similar accounts, the Clinton administration achieved “effective and sensible” antitrust centrism. Federal policy ceased “careening” between the “populist ideology” of the 1960s and the Reagan administration’s thoughtless antipathy to “the core assumptions of antitrust.”

As Pitofsky and other architects of Clinton-era antitrust policy have argued, progress was short-lived. The George W. Bush administration brought the lucid interval to a close, as ideology and irrationality again took control of federal antitrust enforcement. Bush appointees to the antitrust agencies replaced “pragmatic, well-focused and balanced” decision making with “extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of facts).”

In describing this narrative, I put aside the question of whether its presentation of enforcement trends is correct. I think not, but let us assume for the moment that there is no factual distortion in what I have described as a partisan narrative. Assume instead that modern U.S. antitrust history has featured sustained, recurring periods in which raw ideology and pronounced irrationality determine federal enforcement policy, with only occasional interruptions in which sense prevails. Why should anyone have confidence in, or respect for, a system that so often loses its bearings and sails into grave danger?

2. Exaggeration of Differences

As mentioned previously, differentiation is a basic ingredient of political party positioning. To a point, a party’s effort to distinguish its program is not only inevitable but also valuable. The clear revelation of policy preferences and the identification of policy disagreements can give voters a better informed basis for deciding which party to support. One cannot expect or demand that a healthy delineation of differences will provide a precisely accurate side-by-side comparison between political rivals. In this context, par-

---


52 Balto, supra note 50, at 132.

53 Pitofsky, Setting the Stage, supra note 29, at 6.

54 I have argued elsewhere they are not. See William E. Kovacic, Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement, Competition Pol’y Int’l., Spring 2009, at 130; Kovacic, Modern Evolution, supra note 2; Kovacic, Rating the Competition Agencies, supra note 22.
Partisanship involves a matter of degree. But where partisan differentiation involves exaggeration so severe that it badly represents the differences between political opponents, it is pernicious.

In debates about antitrust policy, partisan overstatement takes several forms. One partisan method is to exaggerate flaws in the rival party’s program. The Obama 2008 campaign statement illustrates the technique. The statement said “the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century.”\(^{55}\) The choice of the half-century comparison is marvelously and cleverly partisan. The comparison period is long enough to make the Bush record seem gravely deficient, and the claim is slightly qualified (“may be the weakest”)—a faint signal that the statement’s authors did not calculate case activity throughout the period.\(^{56}\) Careful examination of federal law enforcement into the 1950s also suggests that the comparison period was a guess. Antitrust historians have documented that, measured by the number and type of cases, federal antitrust enforcement throughout the 1950s was robust.\(^{57}\)

A review of enforcement activity from 2001–2008 with enforcement from 1958 through 2000 also illuminates the Obama statement’s partisan exaggeration. For example, the rate and significance of FTC antitrust enforcement from 2001–2008 generally matches or exceeds the Commission’s work from 1981 through 2000.\(^{58}\) It also is difficult to conceive any basis for suggesting

---

\(^{55}\) Obama AAI Statement, supra note 19, at 1.

\(^{56}\) The absence of substantiation for strong claims usually is a reliable sign of partisan exaggeration. In a speech delivered in May 2009, President Obama’s first appointee to serve as head of the DOJ’s Antitrust Division asserted that “inadequate antitrust enforcement” had contributed to the economic crisis in the United States. Christine A. Varney, Assistant Att’y Gen’l, Antitrust Div., U.S. Dep’t of Justice, Vigorous Antitrust Enforcement in this Challenging Era 4–5 (May 12, 2009), available at www.usdoj.gov/atr/public/speeches/245777.pdf. Varney’s text offered no substantiation for this strong claim.

\(^{57}\) One of the major works in this field is Theodore Philip Kovaleff, Business and Government During the Eisenhower Administration 155 (1980) (“In the context of the mid-twentieth century, the Eisenhower Administration, incontrovertibly, oversaw a period of vigorous and innovative enforcement of the antitrust laws by the Justice Department’s Antitrust Division.”). An antitrust analyst familiar with enforcement in the 1950s would be unlikely to set 1958 (the outer marker of Obama statement’s “last half-century”) as an antitrust divide separating strong and weak enforcement. Merger policy before 1958 underscores this. In 1955, the DOJ filed its challenge to the Brown-Kinney merger. Id. at 180. This prosecution initiated the case decided by the Supreme Court in Brown Shoe Co. v. United States, 370 U.S. 294 (1962). In October 1957, the FTC commenced its case to unwind Procter & Gamble’s purchase of Clorox, Procter & Gamble Co., 63 F.T.C. 1465 (1963). The FTC’s prosecution culminated in the Supreme Court’s decision in FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). The Brown/Kinney and P&G/Clorox prosecutions ordinarily are not associated with prosecutorial weakness.

\(^{58}\) See Kovacic, Rating the Competition Agencies, supra note 22, at 909–14 (reviewing FTC enforcement program from 2001–2008). I discuss case counts and litigation activity rates here only because the Obama statement treated them as the appropriate measures of agency performance.
that the DOJ criminal enforcement program from 2001–2008 was weaker than the period before 1974, when the Sherman Act criminal offense was a misdemeanor (not a felony) and convicted individuals rarely served prison sentences. By most measures—total cases, fines, prison terms—the DOJ criminal program from 2001–2008 surpasses the program of the 1950s, 1960s, 1970s, and 1980s.59

A second form of partisan exaggeration is to denigrate the contributions of the rival party. The disparagement takes several forms. One approach is to depict the seemingly substantial programs of political rivals as trivial or inadequate.60 Arguably valuable accomplishments receive little, if any, recognition.


60 At a conference in 2008, Robert Pitofsky said that, during the George W. Bush administration, “[t]he FTC has brought some cases that parade under the [Sherman Act] Section 2 label, but these cases are not comparable to the cases against Microsoft, Intel, AT&T, Xerox, Kodak.” Roundtable Discussion—Advice for the New Administration, ANTITRUST, Summer 2008, at 8, 10. Some of the FTC’s single-firm cases in the parade yielded billions of dollars in measurable consumer benefit (for example, Unocal and Bristol-Myers Squibb)—among the largest returns realized in any FTC monopolization cases going back to the origin of the agency. Union Oil Co. of Cal. (Unocal), FTC Docket No. 9305 (July 27, 2005), available at www.ftc.gov/sites/default/files/documents/cases/2005/08/050802do.pdf (decision and order); Bristol-Myers Squibb Co., FTC Docket No. C-4076 (Apr. 14, 2003), available at www.ftc.gov/sites/default/files/documents/cases/2003/04/bristolmyerssquibbdoo.pdf (decision and order). Others involved doctrinally significant matters, including one—Rambus—that produced the FTC’s only appearance before the courts of appeals in a monopolization case since the early 1980s. Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); Rambus Inc., FTC Docket No. 9302 (May 14, 2009), available at www.ftc.gov/enforcement/cases-proceedings/011-0017/rambus-inc-matter; see Kovacic, Rating the Competition Agencies, supra note 22, at 912–14 (discussing FTC single-firm conduct cases initiated from 2001 through 2008). Only a partisan voice would dismiss these matters as secondary initiatives.

In the same year, a former DOJ official from the Clinton administration said that from 2001 to 2008 the federal agencies “have been AWOL” in civil nonmerger litigation, “except for the standard setting and intellectual property settlement agenda of the FTC.” Roundtable Discussion, supra, at 11. It is not obvious why the FTC’s standard setting and reverse payment cases can dismissively be consigned to an “except for” category. See Kovacic, Rating the Competition Agencies, supra note 22, at 909–10 (discussing importance of FTC litigated cases involving standard setting and reverse payments). Nor is it apparent why the Commission’s court of appeals successes in state action cases (Kentucky Movers and South Carolina State Board of Dentistry) and the interpretation of the rule of reason (PolyGram and North Texas Specialty Physicians) are signs of an agency absent without leave. Ky. Household Goods Carriers Ass’n v. FTC (Kentucky Movers), 199 Fed. App’x 410 (6th Cir. 2006); S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006); PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008); Kovacic, Rating the Competition Agencies, supra note 22, at 910 (discussing FTC state action and rule of reason cases). Only a partisan voice would apply so dismissive a characterization to the work of political rivals.
Another method is to say that political rivals utterly abandoned their enforcement duties. Thus, the partisan maintains that political rivals did “nothing,” engaged in “no enforcement at all,” “quieted” their agencies

61 Reagan administration officials at the FTC and commentators who welcomed the arrival of Reagan appointees to the Commission were notably ungenerous in crediting the agency’s positive accomplishments during Michael Pertschuk’s chairmanship. To be sure, Pertschuk made choices that damaged the agency severely and imperiled key elements of its jurisdiction. Richard A. Harris & Sidney M. Milkis, The Politics of Regulatory Change: A Tale of Two Agencies 177–94 (2d ed. 1996) (describing political upheaval at FTC in late 1970s). At the same time, the FTC in the Pertschuk era built vital foundations for the agency’s future success. These include the development of the agency’s competition program in health care, the establishment of a program to evaluate the effects of completed antitrust cases, the convening of conferences that served as catalysts for advances in theory and empirical work, and the promotion of historically oriented research to examine the evolution of U.S. competition law. See William E. Kovacic, The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property Law, 30 Seattle U. L. Rev. 319, 332–35 (2007) (describing historically oriented research programs originating at FTC in late 1970s); Kovacic, FTC and Congressional Oversight, supra note 38, at 658–64 (describing FTC competition programs from 1977 to 1981).

62 In an essay published in 2008, Harvey Goldschmid wrote that “[a]lmost nothing is happening in the Antitrust Division, at the FTC, or in the courts in the section 2 area.” Harvey J. Goldschmid, Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act, in HOW THE CHICAGO SCHOOL OVERTHOT THE MARK 123, 127 (Robert Pitofsky ed., 2008). Speaking at a conference in 2009, Goldschmid sharpened this observation by saying that in the previous eight years “there has been no enforcement” of Section 2 of the Sherman Act. ABA Chair’s Showcase Probes Effects of Faltering Economy on Enforcement, Antitrust & Trade Reg. Rep. (Bloomberg BNA), Apr. 3, 2009, at 315. Thus vanished the FTC’s Section 2 cases involving Bristol-Myers, Rambus, and Unocal. See Kovacic, Rating the Competition Agencies, supra note 22, at 911 (describing the FTC dominant firm conduct cases from 2001–2008). In a book chapter published in 2007, two former Clinton administration DOJ officials said the DOJ’s Microsoft monopolization case, filed in 1998, was “the first government Section 2 case of any kind in nearly 20 years.” A. Douglas Melamed & Daniel L. Rubinfeld, U.S. v. Microsoft: Lessons Learned and Issues Raised, in ANTITRUST STORIES 287, 302 (Eleanor M. Fox & Daniel A. Crane eds., 2007). One important foundation for the DOJ case against Microsoft was United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984), which condemned an invitation to collude as attempted monopolization. In the DOJ’s Microsoft narrative, Microsoft proposed a market division agreement to Netscape to head off the emergence of a potential commercial threat to Microsoft’s Windows operating system. Brief for Appellees, at 12–15, 87–96, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212, 00-5213) (filed Feb. 9, 2001), available at www.justice.gov/atr/cases/f201300/201393.pdf (discussing Microsoft’s market division proposal to Netscape; arguing that district court properly found this conduct to be illegal attempted monopolization under the reasoning of American Airlines). The district court’s findings of fact had embraced the DOJ’s factual narrative and had endorsed its argument that the principle of American Airlines rendered this conduct to be attempted monopolization. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 30–33 (D.D.C. 1999) (findings of fact); United States v. Microsoft Corp., 87 F. Supp. 2d 30, 45–46 (D.D.C. 2000) (conclusions of law).

“almost to the point of nonexistence,”64 or shuttered them altogether.65 The partisan attitude is evident in the use of emphatic, categorical forms of expression where an examination of agency practice in the relevant period belies the claim of inactivity.

Finally, in still other instances, the partisan goes beyond belittling the work of political rivals or accusing them of abject default. This third form of partisan disparagement is to speak of events as though the leaders affiliated with the rival party never existed. In this form of shunning, the recital of modern events in speeches and articles omits the names of senior officials from the rival party in instances in which one might expect some acknowledgment that they contributed, even in a limited way, to favorable policy developments.66

---

64 Marc Parry, *Tim Wu Tries to Save the Internet*, *Chron. Higher Educ.* (Mar. 20, 2011), www.chronicle.com/article/Can-Tim-Wu-Save-the-Internet-/126756/ (interview with Tim Wu soon after he was named to serve as an advisor at the FTC; quoting Wu as saying the FTC had been “quieted during the Bush years almost to the point of nonexistence”).

65 In 2010, Attorney General Eric Holder announced that the Antitrust Division is “open for business again.” Christopher Leonard, *Farmers Tell Feds Considering Antitrust Action that Big Poultry Companies Control Industry*, *Star Tribune* (Minn.) (May 21, 2010), www.star-tribune.com/templates/Print_This_Story?sid=94618149 (reporting remarks of Eric Holder). The remark’s implication was that the Bush administration Antitrust Division had closed up shop. Holder’s remarks were repeated by Antitrust Division appointees, often in the context of describing a restoration of antitrust in fulfillment of the 2008 Obama campaign promise. See Sharis A. Pozen, Acting Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the Brookings Inst., Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers 1–2 (Apr. 23, 2012), available at www.justice.gov/atr/public/speeches/282515.pdf. The Antitrust Division apparently was open for business on the days when the Bush administration blocked deals such as the proposed combinations of United Airlines/US Airways and General Dynamics/Northrop Grumman. See Kovacic, 2012 NYSBA Speech, supra note 21, at 69 (discussing DOJ merger enforcement during Bush administration).

66 In September 2009, Christine Varney made her first appearance as Assistant Attorney General for Antitrust at the Fordham University International Antitrust Conference. Among other topics, Varney’s speech touched upon the DOJ’s role in developing the International Competition Network (ICN) and in enforcing prohibitions against cartels. Christine A. Varney, *Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness* (Oct. 8, 2009), available at www.justice.gov/atr/public/speeches/250814...
Like a political regime that alters photographs to blot out party officials who have lost favor, partisan incumbent leaders make their rival party predecessors disappear.\(^{67}\)

Partisanship alone does not account for the behavior described above. Credit-claiming is a common phenomenon among leaders of public (and private) institutions. Even when there is no regime change, incumbent leaders sometimes exaggerate their own accomplishments and shed blame upon predecessors or successors. Debilitating tensions within an antitrust agency can arise between leaders of the same party.\(^{68}\) Although partisanship is not the sole cause of credit claiming, it can accentuate pre-existing impulses to engage in such behavior.

3. Reinforcement of Confirmation Bias and Hyperbolic Discounting

Various human tendencies documented in the modern literature on behavioral economics derive additional force from partisanship. One important behavioral phenomenon is confirmation bias, which is the tendency of individuals or institutions to weigh evidence in a manner that reinforces an initial hypothesis.\(^{69}\) Confirmation bias predisposes the actor to disregard or discount contrary views. Confirmation bias and partisanship can interact to harden an individual’s thought processes in ways that leave the actor rigid and unresponsive to new information. Confirmation bias can cause a political partisan to dig in and defend a party cause, no matter how failed the policy might appear to be.

A second relevant behavioral trait is hyperbolic discounting—the tendency to focus overwhelmingly on short term considerations and to ignore longer term consequences of specific acts. Partisanship and hyperbolic discounting

\(^{67}\) Although individual rival predecessors vanish, the specter of control by the rival party (presented, again, as bereft of positive accomplishments) continues to serve as a useful foil—a warning of what will happen if the opponent regains power.

\(^{68}\) See supra note 17 and accompanying text.

\(^{69}\) On confirmation bias and its impact on regulatory decision making, see James C. Cooper & William E. Kovacic, Behavioral Economics: Implications for Regulatory Behavior, 41 J. REG. ECON. 41, 47–49 (2012).
can go hand in hand to amplify negative effects on informed policy making. The political partisan may perceive an opportunity to engage in conduct that maximizes short-term credit-claiming opportunities for her party.

This does not mean that a deeply partisan agency leader is incapable of achieving good public policy outcomes. The accomplishment of the preferred policy may bring credit to the individual’s political party and result in future professional gain for the leader. The convergence of fierce commitment and the prospect of personal gain can generate valuable accomplishments in many areas of life. A breakthrough in treating disease benefits society even when the pursuit of glory or greed, rather than pure altruism, inspires its discovery. At the same time, it is wise to be aware of circumstances in which social interests and individual interests diverge. The creator of a valuable treatment for disease might not always provide disinterested advice about how much to prescribe in individual cases.

C. CONSEQUENCES OF PARTISANSHIP IN ANTITRUST ENFORCEMENT

One could dismiss the partisan utterances about antitrust enforcement as ephemeral—one of the many soon-forgotten slogans uttered during a political campaign. Seen one way, such partisan comments, even when made by the future president and repeated frequently by top antitrust agency officials and external observers, ultimately have little effect on the staffs of the DOJ and the FTC. Career civil servants do not enjoy hearing new appointees depict their previous work as barren, nor do they like to invest time in reflagging existing projects to suit the tastes and embrace the slogans of new leadership. Yet the attorneys, economists, and administrators who do the work of the DOJ and the FTC are generally adaptable and resilient. After the transition to a new regime ends, the good work of the federal antitrust agencies continues. Seen this way, partisan utterances are an annoying but modest tax on the agencies’ effectiveness in any given matter.70

For several reasons, however, I believe partisan behavior may have lasting, harmful effects for a competition policy system over the longer term. As discussed below, the costs of partisanship for agency effectiveness exceed this form of short-term transitional tax. Partisanship can degrade the brand of the antitrust agencies, reduce their influence abroad, and discourage longer term investments that strengthen agency performance. Though difficult to quantify, these constitute a potentially serious, unnecessary drag on agency effectiveness.

———

70 From my experience at the FTC, especially as a junior attorney in the late 1970s and early 1980s, I believe the cost to staff morale and productivity is more substantial. My impression is that staff members prefer to be associated with an institution with proud traditions and a consistently strong record of policy contributions over time.
1. Damage to an Agency’s Brand

Public agencies, like private companies, develop brands that signify the quality of their programs and personnel. The brand developed by an individual antitrust agency, in turn, shapes perceptions of the brand or reputation of the entire competition policy system. Partisan behavior can run down an agency’s brand. For example, the partisan elements in the Obama 2008 campaign statement resonated in pronouncements by his antitrust appointees and in commentary by party loyalists, setting the tone for future discussions of federal antitrust policy.

Such statements are all the more notably partisan in comparison to those of antitrust officials who see their influence on antitrust as part of a continuum that spans presidential administrations. The speeches of Anne Bingaman and Joel Klein during the Clinton administration drew expressly upon the contributions of Republican predecessors, such as William Baxter and James Rill, to affirm the strong lineage of DOJ antitrust policy over time. As FTC Chairman, Timothy Muris made a point of praising his immediate predecessor, Robert Pitofsky, while emphasizing how the FTC during the Clinton administration set the foundation for successful Commission programs in the future.

Jon Leibowitz likewise spoke generously and expansively about the valuable contributions made during the Bush administration to the enhancement of FTC programs.


For example, both Bingaman and Klein acknowledged intellectual debts to William Baxter, who headed the Antitrust Division from 1981–1983. See Anne K. Bingaman, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the Celebration of the 60th Anniversary of the Founding of the Antitrust Div., Antitrust and Innovation in a High Technology Society (Jan. 10, 1994), available at www.justice.gov/atr/public/speeches/0100.htm (“The nation has been particularly fortunate in recent years to the extent that antitrust policy has been influenced by the intellectual gifts and discipline that Professors Turner, Baxter, Kauper, and Ginsburg brought to the Division. As a personal aside, I must tell you that I was especially thrilled to follow in the footsteps of Bill Baxter, my antitrust professor at Stanford.”); Roundtable Conference with Enforcement Officials, 68 ANTITRUST L.J. 581, 613–14 (2000) (comments by Joel Klein, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, discussing Baxter’s philosophy regarding litigation as mechanism for antitrust policy development).


In a recent speech, Bill Baer, the DOJ AAG for Antitrust, pointed to the cumulative nature of successful policy making. Baer observed:

There is important continuity between the efforts of our predecessors, both Republican and Democratic, and the Antitrust Division’s current enforcement efforts and policies. Political affiliation means little in this job. Prior Assistant Attorneys General and I share the goal of protecting competition and consumers by making sound and factually supported law enforcement decisions. Of course, our judgment calls occasionally may differ in some cases and on some issues, but I believe the similarities in goals and methods vastly outweigh those differences.\(^7\)

Baer’s comments are consistent with a model of public administration that recognizes the importance of continuity and appreciates the contributions from the fresh perspective and variation in priorities that a regime change can provide. Many successful DOJ and FTC programs reflect strong elements of continuity but also a series of major enhancements over time. Key examples include the DOJ criminal enforcement program, the FTC health care competition program, and the efforts of both federal agencies to use advocacy and litigation to address public restraints on competition and treat issues at the intersection of competition law and intellectual property.

In each decade since the Electrical Equipment Conspiracy cases\(^7\) of the late 1950s and early 1960s, the DOJ criminal enforcement program grew progressively stronger through a series of statutory enhancements (e.g., the upgrading of the offense from a misdemeanor to a felony in 1974), administrative innovations, and litigation successes. In some instances, a regime change brought about a new perspective that took an already successful program and made it even better. Anne Bingaman introduced the modern leniency reforms and expanded the prosecutorial focus upon cross-border cartels. She took these steps without disparaging or ignoring the contributions of her immediate predecessors, including James Rill.

The FTC’s health care program began with major litigation and rulemaking initiatives in the 1970s to challenge restrictions on advertising and entry into the provision of health care services and products like eyeware. In each subsequent decade, the agency enhanced its program. Regime changes played important roles in stimulating new experimentation and overcoming the sometimes inevitable fatigue that can set in during a previous administration. The Muris FTC, for example, made a substantial investment from 2001 to 2004 in research that would assist in reversing a series of setbacks in chal-

---

\(^7\) Baer, supra note 66, at 1.

\(^7\) The DOJ’s discovery and prosecution of the electrical equipment conspiracies is recounted in John G. Fuller, The Gentlemen Conspirators: The Story of the Price Fixers in the Electrical Industry (1962).
lenging hospital mergers. This research set the foundation for the agency’s Evanston hospital case\textsuperscript{78} and for subsequent hospital cases, including Inova Health System,\textsuperscript{79} St. Luke’s,\textsuperscript{80} and Promedica.\textsuperscript{81} The Muris program also focused attention on state action issues and set in motion developments that led to the prosecution of the Phoebe Putney case\textsuperscript{82} and the North Carolina Dental case\textsuperscript{83} that soon will be before the Supreme Court.

In these and other matters, regime changes can play a useful role for the entire antitrust system. New leaders who take office by virtue of a regime change (or a handover of authority within the same party) can draw upon different perspectives and experience to make useful adjustments—for example, altering the mix of litigation and non-litigation priorities, making new applications of existing policy tools, and enhancing the organization and management of an agency.\textsuperscript{84} These adjustments can have healthy, regenerative effects in the system, if only because a single regime may fall victim over time to some degree of path dependency and, in the face of litigation setbacks, wariness about returning to matters in which an agency has enjoyed little success. New leadership can provide useful adjustments. This is the case even for matters in which new leadership might not be entirely enthusiastic about a specific field of endeavor. It was William Baxter, not one to support expan-

---


\textsuperscript{83} N.C. State Bd. of Dental Exam’rs v. FTC, 717 F.3d 359 (4th Cir. 2013) (upholding FTC ruling that the state dental board illegally restricted competition for teeth whitening services), cert. granted, 134 S. Ct. 1491 (2014).

\textsuperscript{84} Anne Bingaman came to the DOJ with extensive experience as a litigator in a law firm. Drawing upon her work in private practice, she created the position of honors paralegal within the Antitrust Division. This innovation, soon adopted by the FTC, greatly improved the performance of the federal agencies.
sive programs to deal with dominant firm behavior, who conceived the remedy that ultimately resolved the AT&T monopolization litigation and gave antitrust one of its most valuable successes. Partisanship impedes the process of improvement by denying the value of cumulative contributions and making short-term credit claiming, rather than long-term policy development, the focus of attention.

2. Diminished Effectiveness of Domestic Policy Making

A second reason to be concerned about the interpretation of U.S. experience involves the operation of the U.S. system itself. As discussed in Part I.C.1., faulty understanding of the forces that generate good policy results may obscure the best steps that policy makers can take to improve the federal antitrust enforcement system. In the narrative that depicts the U.S. system as being prone to abrupt periodic adjustments due to regime changes, the path of federal antitrust policy depends chiefly on election outcomes. Elect my party’s candidate for president, and policy will proceed on a good vector. Elect my party’s opponent, and new leadership at the antitrust agencies will move in a dramatically different, inferior direction. This model assigns little significance to a common commitment across political parties to shared objectives over time.

There is evidence that a number of antitrust enforcement programs have prospered by reason of cumulative learning and enhancements across several presidential election cycles that produced regime changes. Policy advances through a recurring three-step process of experimentation, assessment, and refinement. This approach requires acceptance of a norm that encourages agency leaders to make investments (the public administration equivalent of capital outlays) that increase the agency’s ability to perform its functions effectively. Such a norm recognizes that good policy outcomes may require an accumulation of effort over time. Good things that are taking place today may well have important antecedents in earlier periods.

Appreciation for the cumulative nature of policy making encourages the incumbent political appointee to liken her role to the member of a team in a relay race. Each team member must excel during her leg of the race, but

---


86 For example, this pattern characterizes the development of the DOJ’s criminal enforcement program against cartels from the 1960s to the present. See Baker, supra note 59.

hand-offs and continuity are vital to finishing ahead. The policy aim is to encourage acceptance of a norm in which individual agency leaders define success in terms of team accomplishment over time, not by the degree of individual achievement.

This long-term orientation contemplates that new leadership appointed by a new regime can add improvement innovations and refinements to an existing program. Periodic experimentation with new approaches is a natural and important ingredient of policy development and a valuable source of vitality in the U.S. antitrust system. In this framework, policy innovations introduced by one leadership team complement the positive contributions of their predecessors, including individuals affiliated with a rival political party.

As suggested above, credit claiming and the loss of a long-term orientation can occur even within members of the same party. Yet the likely severity and disruption of a transition is greater when the opposition political party gains the White House. The question is whether appointees of a new administration, which has just finished a bruising campaign in which it depicted the incumbent party as incompetent, will suppress remaining partisan impulses, recognize good work whenever it took place, and acknowledge earlier contributions to future success. The partisan appointee heralds herself as a great healer who arrived just in time to correct pervasive pathologies. The non-partisan leader makes adjustments, but never fails to recognize the good work that immediate predecessors have done to improve the quality of the agency.

As mentioned previously, no sensible person would deny the positive regenerative benefits that new leadership—including new leadership that comes with a presidential regime change—can bring to an antitrust agency. Again, examples of positive contributions abound, whether it is William Baxter’s conception of the remedy that in 1982 concluded the DOJ’s monopolization case against AT&T\(^8\) or Anne Bingaman’s establishment in 1993 and 1994 of the modern foundations for the DOJ’s leniency program.\(^9\) Nor could one reasonably begrudge these individuals or their political parties the opportunity to claim some credit for these accomplishments. Praise for these achievements should coexist with the recognition that current improvements often build upon past contributions, and that succumbing to the temptation to disregard the work of earlier leadership, even from another party, diminishes the stature of an agency and overlooks what it takes to build successful programs.

\(^8\) Kovacic, Modern Evolution, supra note 2, at 455–56.
\(^9\) Id. at 422–23.
Partisanship can diminish the stature of the agency in interactions with foreign competition agencies. One reason involves the reputation of the United States abroad. In the eyes of foreign competition agencies, the legitimacy of the U.S. antitrust system depends partly upon the perceived motives that guide implementation.\footnote{Id. at 476–77.} Foreign observers may not respect a regulatory system in which regime changes yield abrupt adjustments in enforcement policy. An antitrust system that lacks a widely-accepted foundation of enduring principles risks seeming capricious, unpredictable, and menacing. Stark policy variations are only a presidential election away.

Foreign perceptions assume ever greater importance in a world of multiple competition authorities. Only a relatively short time ago, antitrust law was chiefly a concern of U.S. economic policy alone. Today over 120 jurisdictions have antitrust laws, and more are on the way.\footnote{The jurisdictions with competition agencies, along with data on some of the principal institutional characteristics of these competition law systems, are collected at www.gwlc.com/World-competition-database.html.} The United States participates in numerous endeavors to encourage acceptance of sound enforcement norms.\footnote{See Hollman & Kovacic, supra note 66, at 286–309 (describing major international competition policy networks and role of U.S. agencies within them).} The ability of the DOJ and the FTC to encourage other jurisdictions to adopt sound practices and to resist destructive political influence may suffer if its own system is believed to be manifestly infirm.

II. CONCLUSION: OVERCOMING PARTISAN IMPULSES

Leadership transitions have taken different forms across the modern history of U.S. antitrust policy. Some of these have been harsh and, in unnecessary ways, harmful to the long term quality of the U.S. antitrust system.

A more sanguine and hopeful example is the transition from the chairmanship of Robert Pitofsky to the chairmanship of Timothy Muris in 2001. This handover is an exemplar of responsible public administration. In the months before Muris began his term at the FTC in 2001, Pitofsky and his leadership team worked arduously to achieve a smooth transition and to ensure that the Commission’s new leadership would have a full pipeline of pending competition and consumer protection matters. Muris, in turn, used his first public speech as FTC chairman to give a tribute to Pitofsky and his leadership of the Commission.\footnote{See supra note 74 and accompanying text.} Muris rarely missed an opportunity, at public presentations, to praise his immediate predecessor and thank him for setting high standards for public leadership. Privately, in meetings with his senior staff, Muris also in-
formed his team that he would dismiss anyone whom he heard criticizing the FTC’s leadership under the Clinton administration.

The latter example reflects acceptance of a norm that promotes agency quality over time—the respect for past achievement, the commitment to build upon existing strengths, the search for enhancements, and the investment in successful stewardship by future unknown generations of leaders. An institution that takes this attitude to heart is more likely to prosper than one that succumbs to partisan impulses to exaggerate one’s own accomplishments and disregard the contributions of others.

The temples and monuments of Angkor Wat contain numerous magnificent stone carvings. A striking feature of the artistic treasures is the faces. Over centuries, Angkor Wat changed hands between Buddhists and Hindus. When one group was ousted, the new incumbents developed the habit of gouging out the faces of the icons created by their immediate predecessors. Too often public administration in the United States mimics this experience. Angkor Wat is still wonderful to behold. Without the defacement of the artwork, it would be still better. So it is with the U.S. antitrust system.

---

94 On the defacing of works at Angkor Wat and other sites in Cambodia in the 13th and 14th centuries, see LONELY PLANET CAMBODIA 121–22 (Nick Roy & Greg Bloom eds., 8th ed. 2012).