

2013

Institutional Design, Agency Life Cycle, and the Goals of Competition Law

David A. Hyman
University of Illinois

William E. Kovacic
George Washington University Law School

Recommended Citation

David A. Hyman and William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 Fordham L. Rev. 2163 (2013).
Available at: <http://ir.lawnet.fordham.edu/flr/vol81/iss5/3>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

INSTITUTIONAL DESIGN, AGENCY LIFE CYCLE, AND THE GOALS OF COMPETITION LAW

David A. Hyman* & William E. Kovacic**

INTRODUCTION

U.S. antitrust professors have their own version of the Marquess of Queensberry Rules. The most important rule is that arguments about the merits of any given case, dispute, or regulatory decision/action must be faithful to the Gospel of Antitrust (i.e., the specific history, logic, and objectives that justified the adoption of the U.S. competition laws in the first place).

Of course, it complicates matters slightly that there are at least three competing versions of the Gospel: the Chicago School, the post-Chicago School, and the Market-Egalitarian School.¹ Consider the basic tenets of each school. Chicago School enthusiasts, following in the footsteps of Robert Bork, frame their arguments about the original aims of U.S. antitrust law solely in terms of economic efficiency.² As one federal court of appeals panel put it,

Defendants' concern for the weakest among them has a quaint Rawlsian charm to it, but we find it hard to square with the competitive philosophy of our antitrust laws. Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some road kill on the turnpike to Efficiencyville.³

Post-Chicago School enthusiasts accept the importance of efficiency but argue that the antitrust laws also exist to achieve other economic ends, including the protection of consumer choice and the prevention of unfair

* H. Ross & Helen Workman Chair in Law and Professor of Medicine, University of Illinois. From 2001 to 2004, he served as Special Counsel at the Federal Trade Commission.

** Global Competition Professor of Law and Policy, George Washington University Law School. From 2001 to 2011, he was, at various points, the General Counsel, Commissioner, and Chairman of the Federal Trade Commission.

1. In many ways, these are imprecise classifications, but they are accurate enough for our purposes. See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 4–15.

2. Bork's formative contributions are ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978), and Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

3. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003).

transfers of wealth from consumers to producers.⁴ Market-Egalitarian School enthusiasts discern larger egalitarian aims in the antitrust laws. Some emphasize the importance of preserving opportunities for smaller firms and individual entrepreneurs to gain access to the market and compete.⁵ Others stress legislative expressions of concern about preventing concentrations of economic power from sapping the vitality of democratic institutions.⁶

On some matters relating to goals, doctrine, and analytical method, enthusiasts of all three schools agree. For example, there is a broad consensus that Congress adopted the Robinson-Patman Act⁷ and its ban on certain forms of price discrimination to protect small businesses as an end in itself by ensuring that large businesses (especially powerful buyers) did not disadvantage the small local vendors with whom at least some Americans prefer to trade.⁸ Perhaps because of the Act's unabashedly protectionist roots and dubious economic effects, academics of all persuasions have acquiesced in its abandonment by the public antitrust agencies.⁹ It is no small irony that those who find themselves obsessed with the market power of Walmart seem to have forgotten that the A&P of blessed memory was the Walmart of its day.¹⁰

Nonetheless, on many other issues, enthusiasts of the three schools disagree strongly about the proper content of antitrust policy. The source of disagreement cuts across a wide range of antitrust matters, whether the immediate issue for debate is whether to challenge a merger or not; whether to demand certain divestitures; whether to accept various efficiency or state action defenses; or whether a new administration is behaving differently

4. Robert Lande's study is the leading treatment of the distributional concerns of the antitrust statutes. See Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). The leading exponents of the consumer choice model are Professor Lande and Neil Averitt. Robert H. Lande & Neil Averitt, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007).

5. This is a central theme in the work of Eleanor Fox. Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981). In its interpretation of the Celler-Kefauver amendments to the Clayton Act's merger control provision, the Supreme Court in 1962 said "[w]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

6. See generally David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988).

7. 15 U.S.C. §§ 13-13b, 21a (2006).

8. See Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 766 (1991); Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1120-24 (1983).

9. See *infra* note 28 and accompanying text (describing the decline in public enforcement of the Robinson-Patman Act).

10. Nancy F. Koehn, *Before Wal-Mart, There Was A&P*, N.Y. TIMES (Sep 3, 2011), http://www.nytimes.com/2011/09/04/business/in-aps-story-parallels-to-retail-battles-of-today.html?pagewanted=all&_r=0. The A&P was actually the Great Atlantic & Pacific Tea Company.

than a predecessor administration. Bubbling under the surface of each of these disputes is a contest over the ownership of the intellectual DNA of the antitrust laws—and with it, the ability to praise or condemn any given decision based on the Gospel of Antitrust.

There is much at stake in such debates, but we believe the exclusive focus on the Gospel of Antitrust overlooks an important issue. It is striking that, at this and every other symposia on antitrust that we can recall, far more time is spent measuring the decisions of the antitrust agencies against their fidelity to the principles of long-dead legislators, than on inquiring whether the specific decision in question represented a sensible response to the institutional forces and constraints under which the antitrust agencies actually operate on a day-to-day basis. In this Symposium and in other gatherings, there is a tendency to ignore how antitrust agencies go about defining their aims, selecting among the mix of available strategies, and deploying their personnel in a constant attempt to fill $N+1$ holes in the dikes they are required to defend, when they only have N corks with which to do so.

We use this Essay to highlight some of the less exalted (but by no means less important) issues in the public administration of our nation's antitrust laws. Our analysis builds on work that we have previously published in the *European Competition Journal*¹¹ and on a forthcoming publication in *Concurrences*.¹²

We proceed as follows. In Part I, we describe the complications that can result from the ambiguous objectives and expectations that invariably accompany the adoption of a competition law. In Part II, we describe how agencies, in the course of implementation, make their own decisions that influence the development of competition law and simultaneously constrain the range of options for that entity going forward. Part III offers observations about how agencies can manage legislative commands that are inconsistent, conflicting, schizophrenic, or out-and-out foolish.

I. HORTON HATCHES AN EGG

When legislatures pass new laws, they invariably specify what the penalties will be for violating the law, which agency or agencies will enforce the law, and which senators and congressman should get the credit for the legislation (e.g., the Sherman Act¹³). However, in our experience,

11. William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUROPEAN COMP. J. 527 (2012).

12. David A. Hyman & William E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?*, CONCURRENCES (forthcoming 2013).

13. The Sherman Act was named for Senator John Sherman, the brother of General William Tecumseh Sherman, the civil war hero. George Stigler, who won a Nobel Prize in Economics, once jokingly compared the implications for case outcomes if the Sherman Act had been named for General William T. Sherman, instead of Senator John Sherman. See George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 8–9 (1982) (“Consider the problem of defining a market within which the existence of competition or some form of monopoly is to be determined. The typical antitrust case is an

legislatures demonstrate far less concern with more prosaic matters that can make a huge difference in whether a law actually “works” on the ground.

Of course, it is a good thing if the law spells out the penalties for violation and also allocates enforcement responsibility to someone. And, credit claiming is important to create the necessary incentives for legislators to actually enact legislation.

But, much more is required for a legal regime to be effective. Consider the challenges of enacting a law that will work well. What should be prohibited, and what should be allowed? Who should bear the burden of proof on which issues? Some terms must be defined, but which ones? And how should they be defined? Legislators must guess at the costs of the provisions that they are enacting; at the preferences and priorities of those who will end up implementing the provisions they have carefully crafted; and how those provisions will stand up to technological development and political movements they simply cannot imagine. Legislators must also balance the design requirements of a well-functioning law against the coalition-building necessary to enact the law. Statutes with multiple purposes are more likely to have provisions that are at odds with one another—but it is harder to create a coalition behind a single-purpose statute. Statutes with clear and unambiguous decision rules provide more guidance, but create more legislative opposition than a statute drafted with more “strategic ambiguity.”

Quite sensibly, instead of trying to anticipate and resolve all of these hard questions with definitive statutory language, the dominant strategy is to avoid or paper over many of these issues, leaving them to be argued about at a later date—preferably by a future Congress or in front of a judge or an administrative agency. But, the challenge, when that later date eventually arrives is significant; the greater the underlying disagreement, incoherence, or failure to decide, the more the deciding entity will have to confront competing aims and expectations about what the law is supposed to achieve and how it should go about doing so. Worse still, it will have to make its decisions in the face of statutory “weasel words” like “reasonable” and “appropriate.”¹⁴

almost impudent exercise in economic gerrymandering. The plaintiff sets the market, at a maximum, as one state in area and including only aperture-priority SLR cameras selling between \$200 and \$250. This might be called J-Shermanizing the market, after Senator John Sherman. The defendant will in turn insist that the market is worldwide, and includes not only all cameras, but also portrait artists and possibly transportation media because a visit is a substitute for a picture. This might also be called T-Shermanizing the market, this time after the Senator’s brother, General William Tecumseh Sherman. Depending on who convinces the judge, the concentration ratios will be awesome or trivial, with a large influence on his verdict.”). Other Congressman have passed into obscurity, but for their immortalization in the name of a statute. Who would remember James Robert Mann but for the Mann Act, which prohibited white slavery and the interstate transport of women for “immoral purposes”? Can anyone even name which state he represented? (Illinois).

14. *Cleland v. Bronson Health Care Grp., Inc.*, 917 F.2d 266, 271 (6th Cir. 1990) (“‘Appropriate’ is one of the most wonderful weasel words in the dictionary, and a great aid to the resolution of disputed issues in the drafting of legislation.”).

The antitrust laws of most nations exemplify these difficulties. First, the legislative text and supporting legislative history often announce a variety of objectives.¹⁵ It is not unusual for a legislature to announce that the law will simultaneously increase economic efficiency, reduce costs, raise productivity, increase opportunities for small- and medium-sized enterprises, improve the well-being of historically disadvantaged social groups, and support the development of a more egalitarian political environment.

Admittedly, some legislators may perceive no need for trade-offs among these diverse aims. Professor James May has demonstrated that, in adopting the Sherman Act in 1890, many members of Congress believed it was possible to pursue a broad plan of economic de-concentration without suffering losses in economic efficiency.¹⁶ This view stemmed from the widely held belief that efficiency considerations rarely, if ever, explained the creation or maintenance of immense firms. Only later did researchers show that firms could and did achieve preeminence mainly by reason of superior performance and not by improper collusive or exclusionary practices.

In other cases, legislators recognize a tension among some goals (e.g., between productivity enhancements and the protection of small business), but nonetheless command the agency to pursue both aims in the enforcement of the law. In many countries, the non-efficiency objectives remain in the statute because their presence is a precondition for a coalition that will support enactment.¹⁷ There is good reason to doubt that many countries would establish a competition system if economic efficiency were the only reason they were allowed to offer in support of enacting such laws.

A second source of complexity arises from competing legislative expectations about how the competition agency will function. The deliberations that led to the creation of the Federal Trade Commission (FTC) in 1914 got off the ground because of dissatisfaction with how the Department of Justice was enforcing the Sherman Act—but even among those who agreed on the need for a second agency in the same space, there were competing visions about how the agency should go about making policy.¹⁸ Some proponents envisioned the Commission as a law-

15. See William E. Kovacic, *Institutional Foundations for Economic Law Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI-KENT L. REV. 265 (2001) (describing Kovacic's experiences advising countries on the adoption and implementation of competition laws).

16. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1919*, 50 OHIO ST. L.J. 257, 391–94 (1989).

17. For example, it is certain that South Africa would not have established a new competition law system in the late 1990s if the law had not identified, as one of its goals, the enhancement of economic opportunities for nonwhite citizens. DAVID LEWIS, *THIEVES AT THE DINNER TABLE* 1–74 (2012) (discussing the origins and aims of South Africa's modern competition law).

18. DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* ch. 1 (2011) (discussing the origins of the FTC); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) (same).

enforcement body that would devise norms of business behavior by means of an elastic substantive mandate which it would implement through administrative adjudication. A second camp strongly believed that the Commission should make policy through research, report writing, consultation with business leaders, and the promulgation of trade regulation rules and guidelines, rather than the law-enforcement model that the Department of Justice had pioneered.

The compromise that emerged gave the FTC capabilities consistent with both visions. Legislators from both camps could read the statute and see something they liked—and each could hope that their vision would win out, depending on the choices made by agency management. From its first days, the FTC was encumbered with significantly different expectations about how it would carry out its elastic, open-ended mandate (which allowed it to ban “unfair methods of competition”) and about what role it would play in the economy.¹⁹ As we detail elsewhere, these expansive powers turned out to be a Faustian bargain when they led the FTC to overreach just as the political tides were turning against it.

A third source of complexity arises from the diversity of policy responsibilities assigned to antitrust agencies. The FTC is a good example. The Commission is a policy conglomerate with three distinct product lines. It has responsibility not only for antitrust law but also for consumer protection and the increasingly important fields of data protection and privacy. Owing to the breadth of its mandate, the FTC also has become a dumping ground for legislative commands that don’t seem to fit anywhere else—including quirky statutes such as the Muhammad Ali Boxing Reform Act.²⁰

The FTC is not a one-off. Policy multiplicity is the norm rather than the exception for antitrust agencies throughout the world. By our count, in over half of the world’s 120 jurisdictions with competition laws, the agency assigned to enforce the antitrust law does something else (most often, consumer protection).²¹ As policy functions increase, the agency may find itself responsible for implementing a range of statutes with unrelated or even inconsistent aims. Figuratively speaking, the agency might spend the morning preparing a complaint condemning rival companies that are colluding to set terms of trade and then spend its afternoon encouraging other firms to establish voluntary protocols to restrict the advertising or marketing of certain products or services. In other instances, the agency’s policy portfolio does not create internal contradictions, but the varied mandates are so diverse and unrelated that they make it difficult for the agency to define its purpose in any meaningful way.

For all of these reasons, it is an oversimplification to believe that competition agencies are charged with a single agreed-upon task. Instead,

19. Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 150–55 (2010).

20. Hyman & Kovacic, *supra* note 12.

21. Hyman & Kovacic, *supra* note 11, at 527.

the agency must balance competing considerations in deciding how to implement the statutes it is charged with enforcing. Part II turns to how competition agencies reconcile statutory goals, legislative expectations, and an array of substantive mandates, by serving as “shock absorbers.”

II. ADAPTATION AND ADJUSTMENT

Competition agencies respond to diverse policy goals and assignments of functions in several ways. In the discussion below we describe the techniques agencies use to cope with varied (and often inconsistent) legislative commands and expectations concerning what they should do.

A. Initiatives That Fulfill Several Goals

Sometimes an agency can bring cases or promulgate rules that make everyone happy (except for those on the receiving end of the agency’s actions). Thus, in antitrust enforcement, it is possible to identify cases that have positive efficiency consequences and achieve distributional goals as well. Some antitrust programs present strong possibilities for simultaneous increases in output and manifest improvements in the well-being of the poorest citizens.²²

Cases that challenge government restrictions on competition provide useful illustrations. In *South Carolina State Board of Dentists*,²³ the FTC challenged restrictions that a state dental board had imposed on a program to provide low cost preventive treatment to school-aged children in poor areas in South Carolina.²⁴ The program had relied on dental hygienists, which was allowed under South Carolina law. The FTC alleged that the dental board prohibited (without the requisite authority from the state legislature) any child from receiving treatment from a school hygienist unless at least forty-five days had passed since the child had been seen by a dentist. If allowed to stand, the dental board’s decree would have dramatically reduced the availability of preventive dental treatments. The affected students overwhelmingly consisted of African American children from low-income families. The FTC’s case yielded a settlement that allowed the program to proceed as originally designed. The agency’s intervention had both positive efficiency effects (removing a needless restriction on output) and favorable distributional consequences (allowing access to care by economically disadvantaged citizens).

22. These possibilities are described in William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 WASH. U. J.L. & POL’Y 101 (2007).

23. F.T.C. Docket No. 9311 (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/socdentistcomp.pdf>.

24. *FTC Charges South Carolina Board of Dentistry*, FTC (Sept. 15, 2003), <http://www.ftc.gov/opa/2003/09/socdentist.shtm>.

B. Adjustment and Realignment

Given resource constraints, agencies must necessarily respond to changing circumstances and priorities. The agency has a front row seat from which to observe the economic consequences of its actions, and it will make adjustments in response to this feedback. Competition agency personnel (e.g., economists, lawyers, high-level managers) also keenly want to be seen as skilled professionals who make decisions on the merits, and will do their best to ignore demands from elected officials to use their discretionary power to serve parochial interests.

Learning from past experience and the development of strong professional standards can have several beneficial consequences for policymaking. These characteristics not only press toward substantive policy improvements, but they also give the agency a buffer against improvident political intervention. When these forces operate cooperatively and interactively, competition agencies can achieve autonomy as expert, technically proficient policymakers who will resist pressure to apply their broad policy mandate in politically motivated ways.

A second source of feedback emerges from the observations of expert external observers, such as academic researchers, affected businesses, and individual practitioners. These groups can help inform, and even influence, expectations about what agencies should do.

A third form of feedback comes from the legal system. In the United States, legal precedent from 1945 through the early 1970s emphasized the role of antitrust in preserving opportunities for smaller firms and preventing aggregations of economic power that might undermine the integrity of the political process.²⁵ By the late 1970s, these views had fallen out of favor. In cases like *Continental T.V., Inc. v. GTE Sylvania Inc.*,²⁶ and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,²⁷ the Supreme Court disavowed all interest in the well-being of individual competitors and instead emphasized that economic efficiency was antitrust's principal aim. No matter how determined an antitrust agency is to advance a legal argument, when the Supreme Court slaps it down hard, it is sensible for the agency to reexamine its position, and make a different argument the next time around.

A fourth form of feedback is the adjustments that agencies make in the way they allocate their resources among the various programs they operate. During the 1960s and before, enforcement of the Robinson-Patman Act was one of the most prominent FTC flagship brands. The Commission brought many cases on behalf of small retailers who felt that they were being discriminated against by suppliers in favor of powerful buyers. Table 1

25. See *supra* note 5 and accompanying text (describing the *Brown Shoe* decision).

26. 433 U.S. 36 (1977).

27. 429 U.S. 477 (1977).

shows the time trend in the number of Robinson-Patman Act cases brought by the FTC from 1960 to 2012.²⁸

Table 1: FTC Robinson-Patman Act Cases, 1960 to the Present

Period		Number of Cases Initiated	Cases/Year
1960–1968	Cases	518	64.8
	Matters	134	14.9
1969–1976		41	5.9
1977–1980		8	2.7
1981–1988		5	0.7
1989–1992		0	0
1993–2000		1	0.1
2001–2008		0	0
2009–2013		0	0

For 1960–1968, there are 518 individual cases, which arise out of 134 distinct matters. We present both figures, so readers can draw their own conclusion on the right measure to use in assessing the decline in the number of Robinson-Patman Act cases over the past five decades.

Congress adopted the Robinson-Patman Act in 1936 and made no material amendments to the statute throughout the period in question. From the 1980s onward, the courts made it increasingly difficult for plaintiffs to win these cases. The more restrictive judicial interpretations might explain some marginal shifts in the FTC's commitment to Robinson-Patman Act litigation, but they cannot account for the magnitude of change observed in Table 1. The FTC, as a policy conglomerate, consciously chose to do other things with the money and resources that Congress provided.

So what role, if any, did Congress play in these trends? We think the most plausible explanation is one of congressional negotiation and accommodation. Each year, when it seeks its annual congressional appropriation, the FTC must reveal its program choices and specific funding allocations for the coming fiscal year. This allocation process is especially important as the agency's policy functions increase. These budget choices determine which of the agency's varied responsibilities will receive greater or less emphasis and support. The congressional authorization and appropriations committees review these proposed allocations, and they understand their significance.

The agency also makes public statements (speeches, reports, guidelines, and the like) in which it spells out such matters for those who are interested.

28. The data for this table through 2003 are drawn from William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 410–15 (2003). The federal antitrust agencies have brought no Robinson-Patman cases since 2000.

Our experience has been that at least some of this information filters its way back to Congress. Various external observers—including journalists, lobbyists for specific firms or industries, public interest organizations, and trade associations—also bring specific matters to the attention of oversight committees or the staffs of individual members.²⁹

The FTC does not ordinarily make abrupt shifts in direction.³⁰ Instead, it backs away from disfavored programs in smaller steps, and sees how Congress reacts. If retrenchment arouses strong opposition, the FTC will usually reinstate a program to the original level of enforcement. If a move elicits no objection or only a muted expression of concern, the FTC can continue stepwise in the direction it has taken. This *pas de deux* permits the FTC to change enforcement priorities with what it might reasonably view as the consent of Congress.³¹

C. Migration to Other Policy Domains

When an agency adjusts its priorities, the agency's subordination or abandonment of certain goals does not mean that these objectives disappear from public policy. One reason that legislators acquiesce in agency realignment is that they may effectuate their policy goals through other legislative measures and/or through other agencies.

If an antitrust agency concludes that it can no longer enforce limitations on vertical restraints by petroleum marketers against smaller dealers because judicial precedent has become unfavorable or priorities have changed, legislators can introduce new legislation, such as the Petroleum Marketing Practices Act,³² which curbs the ability of refiners to alter relationships with their downstream distributors. State law can also act to offset newly perceived difficulties with using federal antitrust law.³³

As these examples illustrate, goals and priorities with sufficient legislative support never die. Instead, they migrate to other policy areas and reemerge in new forms. The legislative priority may have been chased out of the antitrust neighborhood, but it simply takes up residence in a different part of town in another guise—for example, as a sector-specific regulatory command or as a transfer payment program.

29. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (identifying two distinct forms of Congressional oversight, with "fire alarm" oversight triggered by complaints from concerned groups that an agency is misbehaving).

30. For one of the exceptions that proves the rule, see *infra* note 34.

31. We do not suggest that antitrust agencies in all jurisdictions engage in precisely the same form of interaction with their legislatures or other elected officials when making adjustments in policy. We suggest that some explicit or implicit form of bargaining and renegotiation of goals will occur in the face of changed circumstances, without any formal amendment of the law.

32. 15 U.S.C. §§ 2801–2841 (2006).

33. Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L.J. 29, 31–36 (2000).

III. AGENCY ADAPTATION

How should agencies manage legislative commands that are inconsistent, conflicting, schizophrenic, or out-and-out foolish? The FTC's "squishy" process of programmatic adaption (accompanied by varying degrees of sub silentio congressional approval before the Commission diminishes or abandons specific goals or programs) provides an example of one possible strategy. Other agencies, and particular programs within other agencies, have followed more direct and hard-edged approaches.³⁴ The resulting disputes have tended to be heated, deeply partisan, and can leave lasting bad blood. But they do force a form of immediate programmatic triage—with some programs and personnel living to fight for another day and others slated for immediate execution. Further research will be necessary to determine which of these strategies is more adaptive, but there are costs and benefits to each approach.

CONCLUSION

Robert Lucas, who won the Nobel Prize in Economics in 1995, observed that "[o]nce one starts thinking about [growth], it is hard to think about anything else."³⁵ Once we started thinking about competition agency design, it became hard for us to think about anything else—and we believe such matters should play a larger role than they previously have in assessing the performance of those agencies and of antitrust law more broadly.

We are skeptical that the antitrust laws, adopted as they were with a multiplicity of aims, provide clear and unambiguous direction for current

34. Consider DOJ policy toward vertical restraints in the 1980s. Under the leadership of William Baxter, the Antitrust Division wanted to urge the Supreme Court to abandon the per se ban on resale price maintenance. Congress adopted legislation that prohibited Baxter from arguing that position. This episode is described in Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 644 & nn.117–18 (2001). For the FTC's brush with the same dynamics, see John R. Wilke, *Unlikely Enforcer: Ardent Reaganite Plays a New Tune As Head of the FTC*, WALL ST. J., Apr. 4, 2003, at A1 ("Early in the Reagan administration, lawmakers hauled a young Federal Trade Commission official before a congressional committee and accused him of trying to dismantle the agency. As the exchange grew heated, committee chairman John Dingell ordered the witness to 'just answer the questions 'yes' or 'no.' So Timothy Muris did exactly that. 'Yes or no,' he responded to the next question, and the one after that. Lawmakers, furious at his insolence, grilled him for another hour. The 32-year-old Reagan revolutionary was branded as an ideologue, bent on abandoning consumer protection and undermining antitrust law.").

35. Robert E. Lucas, *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 5 (1988) ("I do not see how one can look at figures like these without seeing them as representing *possibilities*. Is there some action a government of India could take that would lead the Indian economy to grow like Indonesia's or Egypt's? If so, *what*, exactly? If not, what is it about the 'nature of India' that makes it so? The consequences for human welfare involved in questions like these are simply staggering: Once one starts to think about them, it is hard to think about anything else."). Technically, the prize is the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel. NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/economics/.

policymaking.³⁶ If that assessment is correct, the dispute over the competing versions of the Gospel of Antitrust bears an uncomfortable resemblance to the hunting of the snark—“the impossible voyage of an improbable crew to find an inconceivable creature.”³⁷

To summarize, law professors’ fixation on the Gospel of Antitrust has caused them to slight or ignore other factors—including the role of public agency design in the dynamic architecture of the Church of Antitrust. Perhaps it is time for law professors to move to the less glamorous pews and consider matters other than the Gospel.

36. See May, *supra* note 16.

37. SIDNEY HERBERT WILLIAMS & FALCONER MADAN, HANDBOOK OF THE LITERATURE OF THE REV. C.L. DODGSON (LEWIS CARROLL), *quoted in* MARTIN GARDNER, THE ANNOTATED SNARK 16 (1962).