

Enforcing Competition Law: Benefits and Costs of a Multi-Purpose Agency

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[O]rganization is never neutral. As any Washington taxi driver can point out, government organization has serious implications for policy outcomes. It matters who has the information, who has the jurisdiction, who has the last word. It matters whether intelligence is collected by diplomats or spies, whether international negotiations are conducted through the Department of State or through back channels in the White House. . . . When it comes to selecting, shaping, and implementing. . . policy, the devil often lies in the details of agency design.²

Take a bright young lawyer, scientist, economist, or other professional and, depending on whether she works in OIRA, or the Department of Homeland Security, the Environmental Protection Agency, the Occupational Safety and Health Administration, or another agency, her perspective and behavior will vary dramatically. . . . Each department or agency behaves as if its mission was the most important to the country, and each has its own culture that has evolved over time. The different cultures can clash, and alliances and animosities among career staff have hardened over years and sometimes decades of repeat interactions. . . . The Hatfield-and-McCoy relationships of the professional career staff at different agencies are often shared by the political staff. . . .³

The development of competition law is a striking, modern international phenomenon. Through the 1970s, competition law was a matter of concern in a relatively small number of countries, all of whom had well-established market economies.⁴ Today more than 100 countries, including nations in every area of the globe, have competition agencies.⁵ There are also several competition agencies that serve multiple nations.⁶ Each system enforces its own competition laws, cooperates in joint investigations, and develops what it hopes are best (or at least better) practices. Yet, there is surprisingly little consensus (and even less evidence) on the optimal institutional framework with which to enforce competition law, let alone for developing and implementing competition policy. The result is considerable variation in the institutional

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² AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC I-II* (1999)

³ Susan E. Dudley, *Lessons Learned, Challenges Ahead: Is There a Constituency for OIRA*, Regulation 7-8 (Summer, 2009)

⁴ The most important of these by the late 1970s were the United States and the European Union, along with EU member states such as Germany.

⁵ Kovacic: add cite from ICN materials.

⁶ In particular, the EU has its own competition agency, as does Caricom, which covers Barbados, Guyana, Jamaica, the Bahamas, and Trinidad and Tobago. See <http://www.caricom.org/index.jsp>

arrangements that have been adopted -- along with considerable debate about their respective merits and demerits.

Consider the competition policy system of the United States, which has a singularly elaborate system of enforcement. U.S. antitrust law is enforced by a dual purpose federal agency with responsibility for both antitrust and consumer protection (the Federal Trade Commission (“FTC”)), and single-purpose divisions within 51 state and federal multi-purpose agencies (the federal Department of Justice, and 50 state attorneys general). Consumer protection law is enforced by the FTC, the Consumer Product Safety Commission, the Food and Drug Administration, the Securities and Exchange Commission, and consumer protection units of the state attorneys general. There are also sector-specific regulators that have jurisdiction to approve mergers and impose and enforce consumer protections within their respective domains (e.g., the Federal Communications Commission for telecommunications and the Federal Energy Regulatory Commission for energy). The United States also has a uniquely powerful system of private rights of action for antitrust violations, with more variable and limited private rights of action for consumer protection violations. The diversity of enforcement agencies and modalities occasions much head-shaking and amusement among personnel at foreign competition agencies.

Internationally, over thirty jurisdictions rely on a single agency that combines antitrust and some elements of consumer protection (especially jurisdiction over false advertising) in the same institution.⁷ Some of the world’s best known competition policy bodies share this design characteristic, including the United Kingdom’s Office of Fair Trading (“OFT”)⁸ and Canada’s Competition Bureau.⁹ Other countries employ more exotic combinations such as Panama’s CLICAQ (antitrust, consumer protection, and trade),¹⁰ Peru’s INDECOPI (antitrust, consumer protection, trade, intellectual property, and bankruptcy),¹¹ Russia’s Federal Antimonopoly Service (antitrust, advertising, and public procurement),¹² and the Australian Competition and Consumer Commission (antitrust, consumer protection, and telecommunications).¹³ Such agencies have policymaking responsibilities for competition law, as well as other substantive areas.

This diversity of functional combinations is likely to remain a dominant feature of the competition policy landscape. Yet, there has been little systematic consideration of the costs and benefits of these varying arrangements. One complication is terminological; the diversity of combinations complicates analysis of the comparative performance of “competition agencies.” The broader problem is that the issue has attracted little attention from scholars and commentators. Instead, the overwhelming focus of attention has been upon the consequences of having numerous jurisdictions address the same commercial behavior and on how best to coordinate oversight across multiple regulators within and across countries.¹⁴ The compatibility of consumer protection or other functions with an antitrust mandate has rarely received

⁷ Kovacic: add cite to materials from RA survey.

⁸ Kovacic: add cite to OFT web cite.

⁹ Kovacic: add cite to Competition Bureau web site.

¹⁰ Kovacic: add cite to CLICAQ web site.

¹¹ Kovacic: add cite to Boza paper on formation of INDECOPI.

¹² Kovacic: add cite to Russia FAS OECD paper 2008.

¹³ Kovacic: add cite

¹⁴ See, e.g., Howard Shelanski, *From Sector-Specific Regulation to Antitrust Law for U.S. Telecommunications: The Prospects for Transition*, 26 *Telecommunications Policy* 335 (2002).

scrutiny.¹⁵ This pattern is not unusual. Agency design is the Rodney Dangerfield of administrative law: it gets no respect.¹⁶

A number of considerations help explain this indifference to the institutional arrangements through which governments develop and implement competition law and policy. Academic researchers are more interested in developing broad theories of substantive policy/doctrine than in the nitty-gritty of who does what. The former gets one invited to give keynote addresses at international conferences; the latter is routinely dismissed as being unduly interested in “practical lawyering.” Conveniently, one can also do “grand theory” by sitting in one’s office and staring at the ceiling and the computer screen, while understanding “who does what” requires in-depth knowledge of the day-to-day activities of governmental agencies. Practitioners understandably tend to focus on judicial doctrine and enforcement policy that most directly affects their clients. Political considerations also enhance the probability that existing arrangements, whatever they might happen to be, will be perceived as relatively durable. The result is that scholarly commentary and policy discourse dwell overwhelmingly on the “physics” of doctrine and theory and only rarely try to address the “engineering” issues that surround the design and operation of competition agencies.¹⁷

There is no question that “physics” is more glamorous, but focusing on it to the exclusion of “engineering” is unlikely to lead to good results. Would you board a plane based only on the assurance of the (well-credentialed) designer that it worked fine “in theory?” To ask the question is to know the answer – and airlines behave accordingly. Unfortunately the same dynamic does not generally apply to scholarship regarding competition agencies, or, to a surprising degree, to the agencies themselves. Indeed, if anything, the incentive is for top personnel to launch big planes (cases), garner the resulting favorable press, and move on before anyone finds out whether the plane (case) is brought safely to earth, or crashes and burns.

We think more focused attention to system design for enforcing competition law is long overdue. First, the global financial crisis has drawn attention to the issue of institutional design. In the United States, at least six federal agencies (and multiple state agencies) share responsibility for overseeing the operations of the financial services sector.¹⁸ Commentators and legislators have repeatedly suggested that this organizational fragmentation helped contribute to the financial crisis. In response, the Obama administration has proposed to increase the power of the Federal Reserve, eliminate the Office of Thrift Supervision, and create an agency with responsibility for the regulation of consumer credit.¹⁹ These measures fall well short of the wholesale reorganization that some proposed in the months immediately after the full dimensions of the crisis became clear. However, there is still a live debate on the optimal combination of

¹⁵ Kovacic: add cite to proceedings of OECD programs in 2004 and 2006 involving the links between competition and consumer protection programs.

¹⁶ DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 I (2003) (“Not many people find the study of American bureaucracy a provocative or compelling subject”)

¹⁷ A rare exception is the September 11, 2009 conference at Loyola University on “A Comparative Analysis of Antitrust Law Regimes: Designing Better Institutions for Deciding Antitrust Issues, available at <http://www.abanet.org/antitrust/symposium2009.html>.

¹⁸ The six agencies are the Commodities Futures Trading Commission, the Department of the Treasury, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Federal Trade Commission, and the Securities and Exchange Commission.

¹⁹ See U.S. Treasury, Financial Regulatory Reform: A New Foundation, available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf

regulatory obligations within individual agencies.²⁰ We anticipate this debate will inevitably migrate to the field of competition law.

A second reason, independent of the financial crisis, is the increased interest in recent years among competition agencies in the links between institutional design and substantive outcomes. There has been growing recognition that the quality of a nation's competition policy depends crucially on the effectiveness of the institutions entrusted with the formulation and implementation of that policy.²¹ There is little point in discussing what substantive programs the world's competition agencies should pursue without an examination of how they agencies will carry them out. The latter inquiry inevitably and necessarily involves an assessment of institutional design.

The time is ripe for increased attention to the role of institutional design in determining policy outcomes. Earlier research by one of us –much of it based on comparative study of regulatory regimes and advisory projects involving new competition and consumer protection systems in transition economies -- has provided many occasions to see how the quality of institutional arrangements shapes the substance of policy.²² We also worked together on a number of projects at the Federal Trade Commission and saw firsthand the challenges associated with carrying out projects that require the mobilization of resources across different operating units in the same agency or demand cooperation between public authorities with shared responsibilities.²³ One of us led the formulation of the recent FTC self-study, *The FTC at 100*,

²⁰ Live debate is an understatement. See Damian Paletta and Deborah Solomon, *Geithner Vents at Regulators as Overhaul Stumbles*, Wall St. J., Aug. 4, 2009, at 1 (“Treasury Secretary Timothy Geithner blasted top U.S. financial regulators in an expletive-laced critique last Friday as frustration grows over the Obama administration's faltering plan to overhaul U.S. financial regulation, according to people familiar with the meeting. The proposed regulatory revamp is one of President Barack Obama's top domestic priorities. But since it was unveiled in June, the plan has been criticized by the financial-services industry, as well as by financial regulators wary of encroachment on their turf. . . Mr. Geithner, without singling out officials, raised concerns about regulators who questioned the wisdom of giving the Federal Reserve more power to oversee the financial system.”). See also *Treasury Plans Under Fire*, Wash Post., Aug 10, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/09/AR2009080902124.html> (“Wary of taking on deeply entrenched bureaucracies, Mr. Obama opted for a proposal that left in place all eight regulatory bodies but one (the Office of Thrift Supervision, which covers federally chartered savings and loans). This went against the recommendations of many who felt that consolidating the agencies would eliminate the regulatory forum-shopping that had enabled some of Wall Street's riskiest practices. The administration concluded it was more realistic politically, and sufficient in policy terms, to realign responsibilities among the agencies, while adding two new bodies, one for financial consumer protection and one to monitor systemic risks. Sen. Mark R. Warner (D-Va.) has come out against the administration plan in favor of what he says is a necessarily bolder one that would assign to a single new agency the banking regulation functions that are currently spread among the OTS, the Federal Deposit Insurance Corp., the Federal Reserve Board and the Office of the Comptroller of the Currency. Meanwhile, the heads of some of these same agencies have trooped to Capitol Hill to complain that the proposed consumer agency would usurp functions that should belong to them.”)

²¹ Kovacic: Add cite to ICN agency effectiveness seminar in Brussels January 2009 and to Fingleton ICN Zurich speech from June 2009.

²² See, e.g., William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 Chi-Kent L. Rev. 265 (2001).

²³ Earlier in this decade we worked together in the FTC's Office of the General Counsel, where Kovacic served as the General Counsel and Hyman was Special Counsel. Among other projects we collaborated on preparation of joint hearings between the FTC and the Department of Justice on competition in health care. Hyman was the principal author of the report that grew out of those proceedings. Department of Justice & Federal Trade Commission, *A Dose of Competition* (2004). Kovacic was involved in the joint DOJ/FTC hearings that laid the foundation for the FTC report on competition policy and the patent system, see Federal Trade Commission, *To Promote Innovation* (2003), and in the joint DOJ/FTC hearings on standards governing the treatment of dominant

which entailed an extensive examination of the FTC's institutional arrangements and broad consultation with foreign competition and consumer protection authorities.²⁴ In all these matters, we have seen the need to address not only normative questions about *what* governments should do but also fundamental practical questions about *how* they should do it.

In this article we systematically evaluate the merits of a multi-purpose competition agency, focusing on a dual-purpose institutional form – i.e., combining antitrust and consumer protection under one roof. Although we draw heavily on our experiences at the Federal Trade Commission, our analysis is not so limited. Part II provides an overview and historical perspective on the complexities of dividing versus combining responsibilities in a public agency, along with a theoretical framework for thinking about the problem. Part III situates the problem of agency design in the context of developing and enforcing competition law. Part IV analyzes the benefits, and Part V focuses on the costs and risks of combining antitrust and consumer protection. Part VI outlines strategies for maximizing the benefits and minimizing the costs of a dual purpose competition agency, including but not limited to internal governance arrangements. Part VII spells out some of the implications of our analysis for administrative law. Part VIII considers the application of our analysis to governmental reorganization, focusing specifically on the Obama Administration's proposal to reorganize oversight of the financial services sector. Part IX concludes.

II. Designing An Agency: How Much Responsibility And Over What?

What is the optimal strategy for setting the scope of responsibility for a government agency? The polar solutions are obviously unacceptable: no one creates an agency and fails to give it something to do, and there are no takers in a modern nation state for a “Department of Everything.” In between, the dividing lines are less obvious: how does one decide whether an administrative agency should have N or (N+1) or (N+10) areas of responsibility? What counts as a distinct area of responsibility? Does it depend on whether the areas involve separate substantive bodies of law – and how are the boundaries to be set? Should the same agency enforce both civil and criminal laws? Should the agency combine legislative, judicial, and executive functions, or just amalgamate two of the three – and which two? What arrangement minimizes the possibility of capture by those being regulated? What arrangement will be most appealing to the Senators and Representatives who create the agency in the first place – as well as those charged with oversight and budgetary authority? If another agency already occupies part of the field, is it better to expand the existing agency, or create a new one? Should we have multiple agencies responsible for the same general area – and if so, how should their jurisdiction be defined and enforced? If we want closer coordination of policy and implementation, is it necessary to combine two (or more) agencies into one, or are other strategies (e.g., creating a coordinating council or a “czar”) more effective? What are the differing consequences of creating a new agency, adding new functions to an existing agency, and reorganizing governmental functions? And so on.

These questions are policy perennials, since they are raised by every piece of legislation that is not self-executing – but they have been largely ignored by administrative law scholars.²⁵

firm behavior, that resulted in a report issued only by the Department of Justice. See <http://www.ftc.gov/opa/2008/09/section2.shtm>

²⁴ Kovacic: Add cite to FTC at 100.

²⁵ Although administrative law scholars have not focused on these issues, political scientists and public administration scholars have spent decades on them. See, e.g., Karen M. Hult, Agency Merger and Bureaucratic

It is easy to find examples of the idiosyncratic consequences, duplication, and “jurisdictional chaos” that can result from the failure to attend to these issues. Why do 15 federal agencies share responsibility for food safety – with the Food and Drug Administration (“FDA”) responsible for cheese pizza, and the Department of Agriculture responsible for pepperoni pizza?²⁶ Why is the FDA responsible for bottled water, and the Environmental Protection Agency (“EPA”) responsible for tap water?²⁷ Why is the FDA responsible for both food and drugs, when, except for a relatively small number of circumstances, there is no overlap between these two industries?²⁸ Why is the National Oceanic and Atmospheric Administration in the Department of Commerce and the Coast Guard in the Department of Homeland Security, and the U.S. Public Health Service in the Department of Health & Human Services, when all three are uniformed services, like the Army, Navy, Air Force, and Marines, all of which reside in the Department of Defense? Why is the U.S. Forest Service (and responsibility for National Forests) in the Department of Agriculture, and the National Park Service (and responsibility for National Parks) in the Department of the Interior?²⁹ Why was Representative Collin Peterson, chair of the House Agriculture Committee, willing to kill the 2009 climate bill if it allocated responsibility for determining whether farmers would receive credit for “tilling and conservation practices that keep carbon dioxide stored in the soil” to the EPA instead of the Department of Agriculture?³⁰

Redesign (1987); Beryl A. Radin & Willis D. Hawley, *The Politics of Federal Reorganization: Creating the U.S. Department of Education* (1988); James Q. Wilson, *Bureaucracy: What Government Agencies Do And Why They Do It* (2000); *The Executive Branch* (Joel D. Aberbach & Mark A. Peterson, eds. 2005); Donald F. Kettl, *System Under Stress: Homeland Security and American Politics* (2004); Beryl A. Radin & Joshua M. Chanin, *Federal Government Reorganization: A Policy and Management Perspective* (2009); Zegert, supra note 2; Lewis, supra note 16.

There are only a few articles in the legal literature focusing on the issue of agency design. See, e.g., Dara K. Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. (2006); Jonathan Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. Econ. & Org. 93 (1992); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

²⁶ Jane Black & Ed O’Keefe, *Overhaul of Food Safety Rules in the Works*, Wash. Post, July 8, 2009, (“Fifteen federal agencies oversee food inspections in a complex and sometimes bizarre division of labor: The Food and Drug Administration is responsible for produce, while the Agriculture Department is responsible for meat. Cheese pizzas are inspected by the FDA, while pepperoni pies go to the USDA.”)

²⁷ General Accounting Office, *Bottled Water: FDA Safety and Consumer Protections Are Often Less Stringent Than Comparable EPA Protections For Tap Water* (June, 2009), available at <http://www.gao.gov/new.items/d09610.pdf>.

²⁸ One example of a product category in which the drug and food sectors do overlap is dietary supplements. The active ingredient of some supplements whose consumption is claimed to yield significant weight loss or weight control results is a drug subject to FDA approval and oversight. Kovacic: add cite to FTC dietary supps web page.

²⁹ For the largely historical answer, see Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovations in Executive Agencies, 1862-1928* (2001).

³⁰ Steven Mufson, *Vote Set on House Climate Bill*, Wash. Post, June 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/23/AR2009062303456.html> (“Peterson wanted authority for evaluating offset proposals moved from the EPA to the Agriculture Department. Environmentalists and the bill’s main sponsors feared that the Agriculture Department might use lax standards, which would blow a hole through the nationwide cap on carbon dioxide emissions. Peterson and House Energy and Commerce Committee Chairman Henry A. Waxman said late yesterday that they had reached a deal putting the Agriculture Department in charge of running the offset program. The lawmakers said they would seek advice from the Obama administration about an advisory role for the EPA.”). See also Derek Thompson, *The Collin Peterson Climate Change Compromise*, The Atlantic, available at http://business.theatlantic.com/2009/06/the_collin_peterson_climate_change_compromise_1.php (“So it looks like the Waxman-Markey climate change bill will pass in the House this week: The sponsors hammered out an

Profound difficulties can result when agencies share jurisdiction over an area, or are required to coordinate their efforts, but do not “get along.” Conflicts within intelligence agencies, and between intelligence and law enforcement agencies over information sharing, culminating in 9/11, are long-standing and well-documented.³¹ A trivial example makes the point: when top brass at the CIA and FBI announced that analysts from each would be detailed to the other, so as to break down these barriers, personnel at both agencies referred to it as a “hostage exchange program.” As detailed below, inter-service conflicts within the Department of Defense are legendary. Even children of military personnel are rapidly socialized into the tribal nature of the individual services.³²

One can see the same dynamic playing out during the government reorganizations that have been a staple of virtually every Administration during the past century.³³ The establishment of blue ribbon commissions to examine the design and implementation of public authority became a favored policy making tool in the early 20th century and continues in various forms today. Presidents Teddy Roosevelt and Howard Taft set up commissions to review the structure of government. President Franklin Roosevelt conducted a bruising multi-year fight to reorganize the federal government, culminating with the creation of the Federal Security Agency in 1939.³⁴ President Harry Truman had the Hoover Commission on the organization of the executive branch, and the “unification” of the Department of the Navy and the Department of War under a single Department of Defense in 1949.³⁵ President Eisenhower reconstituted the Hoover Commission. President Lyndon Johnson had two task forces on reorganization, and oversaw the creation of the Department of Housing and Urban Development in 1965. President Richard Nixon had the Advisory Council on Government Organization, proposed a major reorganization, and was responsible for the creation of the Environmental Protection Agency. President Carter had a Reorganization Project (run by OMB), and was responsible the creation of the Departments of Energy and Education. President Ronald Reagan had the Grace Commission. President William Clinton had a Reinventing Government Initiative. President George W. Bush created the Department of Homeland Security (“DHS”) by combining entities from 22 agencies in 2003, and then reorganizing DHS in 2005.³⁶ As noted previously, we are currently in the midst of a debate over the optimal structure for the regulation of the financial services industry.³⁷

One can also trace the resolution of past debates over government organization by examining the genealogy of various agencies. Consider five representative examples. The

agreement last night with Collin Peterson, the chair of the Agriculture Committee. The main sticking point was over whether the EPA or the Department of Agriculture would administer a carbon offset program intended for farmers. (The offset program will pay farmers to do environmentally friendly things like plant trees.) Peterson got his way: The (more sympathetic) Department of Agriculture will do the work.”)

³¹ See Amy B. Zegert, *Spying Blind: The CIA, the FBI, and the Origins of 9/11* (2007); The 9/11 Commission Report, available at <http://www.9-11commission.gov/report/911Report.pdf>;

³² Mary Ellen Wertsch, *Military Brats: Legacies of Childhood Inside the Fortress* 311, 312 (2006) (“When I was a young child, I understood that we were something called an ‘Army family’ although I had only a vague idea of what that meant. But I knew one thing for certain: We were most definitely *not* Navy. . . One Army colonel’s daughter told me her father refused to attend her wedding because she was marrying a Navy brat.”)

³³ Donald F. Kettl, *Reforming the Executive Branch of the U.S. Government*, 345, 346, Table 1; Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20th Century* (2003).

³⁴ Mariano-Florentino Cuéllar, ‘Securing’ the Nation: The Federal Security Agency and the Political Design of Legal Mandates, 1939-1953, 76 *U. Chicago L. Rev.* * (2009).

³⁵ <http://www.trumanlibrary.org/hoover/hoover.htm>

³⁶ http://www.dhs.gov/xabout/history/editorial_0133.shtm

³⁷ See *supra* notes * - *, and accompanying text.

Federal Aviation Administration (“FAA”) is currently part of the Department of Transportation (“DOT”), but it started as a branch of the Department of Commerce in 1926. It became an independent agency (the Civil Aeronautics Authority (“CAA”)) in 1938. In 1940, it was split into two separate agencies, one of which (the CAA) was moved back into the Department of Commerce, and the other which remained independent (the Civil Aeronautics Board). These two entities were partially reunified into the (still independent) Federal Aviation Agency in 1958. The Federal Aviation Agency was renamed the FAA in 1967, when it lost its independent status, and was merged into the Department of Transportation.

The Drug Enforcement Administration (“DEA”) was created within the Department of Justice in 1973 by merging personnel from the U.S. Customs Service (located within the Department of Treasury) and the Bureau of Narcotics and Dangerous Drugs (already part of DOJ). The Bureau of Narcotics and Dangerous Drugs was itself created five years earlier, by merging the Bureau of Narcotics (Department of Treasury) and the Bureau of Drug Abuse Control (from the United States Department of Health, Education, and Welfare's Food and Drug Administration). The Bureau of Narcotics began life as the Narcotic Division of the Bureau of Internal Revenue, again within the Department of Treasury.³⁸

The Department of Education was an independent department from 1867-1868, after which it was downgraded to a bureau, and transferred to the Department of the Interior. In 1939, it was transferred to the Federal Security Agency (“FSA”), along with the U.S. Public Health Service and the Civilian Conservation Corps. The FSA was subsequently renamed the Department of Health, Education & Welfare. In 1979, the Department of Education once again became a full-fledged independent department in its own right.

The Social Security Administration similarly started as an independent board in 1935, merged into the FSA in 1939, stayed within the same agency as its name changed to HEW and then HHS – and finally became an independent agency again in 1995.³⁹

Finally, the U.S. Coast Guard started in the Department of Treasury in 1790, moved to the Department of Transportation in 1967, and moved again to the Department of Homeland Security in 2002.

As these examples indicate, the frequency of governmental reorganizations means that “new” agencies and bureaus are generally cobbled together from bits and pieces of other agencies and bureaus – and the departmental “home” of any given function is frequently temporary.⁴⁰ The result is that agency design is simultaneously polycentric, path-dependent, and political. Efficiency and responsiveness are certainly important considerations, but other factors loom large, and are often decisive.⁴¹ Given this dynamic, we flag a dozen issues that should be

³⁸ <http://www.archives.gov/research/guide-fed-records/groups/170.html#170.3>

³⁹ <https://www.socialsecurity.gov/history/orghist.html>

⁴⁰ Daniel Carpenter, *The Evolution of National Bureaucracy in the United States*, 41, 43 in Aberbach & Peterson, *supra* note 25 (New agencies are “built from existing agencies and institutions. The institutions of the future seem endlessly created from the organization of the past.”)

⁴¹ See Terry M. Moe, *The Politics of Bureaucratic Structure: A Perspective on Structural Politics, Self-Interest, and the New Social Regulation*, in *Can the Government Govern* (John E. Chubb & Paul Peterson, eds.) (Brookings, 1989) (“American public bureaucracy is not designed to be effective. The bureaucracy arises out of politics, and its design reflects the interests, strategies, and compromises of those who exercise political power.”); Barry R. Weingast, *Caught in the Middle: The President, Congress, and the Political-Bureaucratic System* 312, 335 in Aberbach & Peterson, *supra* note 25 (“Ex ante constraints are designed to mirror the political environment facing the enacting coalition and to stack the deck in favor of particular interests and to disadvantage others.”)

kept in mind on the assumption that we should, when possible, strive to maximize the efficiency of the resulting agency:

1. Are The Purposes Related?

Before assigning multiple purposes to an agency, it is important to consider the degree of relatedness between the functions. Is there some core commonality that suggests synergies or efficiencies are likely to result from the combination? In economic terms, are the functions complements or substitutes? If they are substitutes, it is unlikely that a multi-purpose agency will outperform two single-purpose agencies. If they are complements, a multi-purpose agency may outperform two single-purpose agencies. Stated more bluntly, a “garbage can” approach to combining agency functions is likely to result in more garbage.

An important source of commonality is a shared intellectual framework. When distinct areas of policymaking responsibility rest upon a common platform of ideas, there is a greater likelihood that complementarities will emerge, and be exploited by agency personnel.

2. Are The Purposes Consistent?

Even if the purposes are related in some way, if they are at odds with one another, the combination can lead to schizophrenia, if not outright paralysis. Combining the proposed Department of Peace and Nonviolence and the Department of Defense is unlikely to be a good strategy, regardless of one's position on the desirability of each department.⁴² An agency responsible for both antitrust and trade will have to reconcile the belief that low prices are generally good (antitrust) with the belief that low prices of imported goods are generally bad (anti-dumping authority). An agency charged with the protection of workers (i.e., the Department of Labor) is unlikely to be a good combination with an agency charged with the promotion of business (i.e., the Department of Commerce) – making it understandable why this particular combination only lasted from 19**-19**, after which the Department of Commerce and Labor was split in two. When President Johnson proposed to recombine these two departments in 1963 and again in 1964, the proposal went absolutely nowhere. An agency charged with promoting hunting is unlikely to be a good combination with an agency charged with identifying and protecting endangered species.⁴³ More broadly, an agency committed to mixed use of a common resource is likely to find itself at odds with an agency focused on the interests of a particular set of users.

To be sure, one should not overstate the problem of consistency, since sound policy-making routinely requires the balancing of competing interests. Should the same entity regulate the solvency of banks/insurers/credit card issuers, and also be responsible for ensuring consumer protection? If they are handled by distinct agencies, each will focus on the areas within their respective domains, and either discount or ignore entirely the other's area of responsibility. Yet, that approach is a recipe for regular battles between the agencies as to which should prevail on an issue that implicates both sets of interests. A decision balancing the relevant considerations

⁴² See Department of Peace and Nonviolence Act, H.R. 808, 110th Cong. (2007). The Department of Peace was to include offices of peace education and training, domestic and international peace activities, technology, arms control and disarmament, peaceful coexistence and nonviolent conflict resolution, and human and economic rights. But see P.J. O'ROURKE, GIVE WAR A CHANCE (2002) “the Marine Corps does more to promote world peace than all the Ben & Jerry's ice cream ever made.”)

⁴³ A real world example of this problem is that the U.S. Department of Fish & Wildlife Services (“FWS”) resides within the Department of the Interior – which was charged by executive order during the Bush Administration with promoting hunting on federal lands, even as FWS was responsible for protecting endangered species. http://usgovinfo.about.com/od/thepresidentandcabinet/a/hunting_eo.htm

will eventually have to be made by someone – either within a single agency, if both functions are combined, or at a higher level if the two (or more) involved agencies are unable to agree amongst themselves.

The problem gets even stickier when the interests being balanced fall in different legal domains, or are incommensurable. Consider the risks (whether real or hypothetical) posed to endangered species and the general population by military training and technology.⁴⁴ If DOD is put in charge of deciding whether military training/technology is more important than the risks created by such training/technology, it will predictably focus on the benefits, and decide accordingly. If Interior or EPA get to decide the same dispute, they will predictably focus on the risks of training/technology, and decide accordingly. Thus, which agency decides the matter will significantly affect the outcome of the dispute – which helps explain why reorganization is as much about changing outcomes as it is about the efficiencies of process to arrive at the outcome. One can see a similar dynamic play out across other domains, including the balancing of environmental protection against nuclear/energy R&D, balancing industrial development (and the associated employment) against population health and environmental justice claims, and so on.

3. Will The Combination Result In A Recognizable Brand?

One aim of a public agency is to create an identifiable “brand” which conveys a clear message about the agency’s aims and priorities. The brand can become diluted and/or confused if the agency has too many responsibilities, or if the responsibilities are not both related and consistent. For agency insiders, a diluted/confused brand can create confusion about what projects ought to be selected, what theory ought to motivate the pursuit of individual matters, and the relative priority and seriousness of particular projects/matters. A diluted/confused brand will also affect the agency’s decision rules; agency personnel are more likely to adopt amorphous standards and employ ad hoc reasoning when justifying their decisions. A diluted/confused brand can also distract the agency from its core mission, and change the culture of the agency in a variety of ways. Finally, those who interact with an agency with a diluted/confused brand will find it operates inconsistently and unreliably.

Such considerations help explain why agencies sometimes resist the addition of new responsibilities, even when acceptance would result in a greater budget and more visibility. For example for several decades the FBI vigorously resisted attempts to make the agency responsible for enforcing federal drug laws.⁴⁵ The State Department did not want the United States Information Agency and the Agency for International Development.⁴⁶ The same dynamic also explains why agencies sometimes try to get rid of responsibilities that senior agency personnel believe detract from the agency’s core mission. In 1973 and again in 1974, the Department of Agriculture tried to get rid of responsibility for the Food Stamp program, since it viewed itself as being in the “food business” – not the “welfare business.”⁴⁷

The FTC offers another example, now largely forgotten. The FTC was the first federal agency to propose regulatory action on cigarettes after the issuance of the Surgeon General’s

⁴⁴ Examples: ELF and the Navy, risk of cancer, resulting in 7th Circuit opinion; Vieques and Navy bombardment; Naval Sonar and risk to dolphins; EPA non-enforcement against DOD/DOE/government contractors.

⁴⁵ Wilson, 180 (“For years members of Congress tried to persuade J. Edgar Hoover that the FBI should take over federal responsibility for investigating drug trafficking.

⁴⁶ Id.

⁴⁷ Wilson, 108-109

report on the hazards of smoking in 1964.⁴⁸ The FTC proposed a trade regulation rule that would have required tobacco companies to place health warnings on cigarette packages. Congress eventually adopted legislation mandating such labeling, but it assigned responsibility for testing tar and nicotine levels in cigarettes to the FTC – even though the agency had no particular expertise in testing, or in assessing the health risks of different levels of tar and nicotine. For roughly twenty years, the FTC dutifully ran a “smoking laboratory,” using machines that measured the tar and nicotine content of cigarettes smoked using a specified method. The FTC abandoned this function in 1987, after concluding that it had no comparative advantage in running a testing laboratory, and the work could be outsourced to an independent testing laboratory under the supervision of the FTC.⁴⁹ As these examples make clear, agency personnel have complex interests and incentives, and do not simply seek to grow their domains and budgets.

4. Does the Agency Have the Capacity to be Multi-purpose?

Agency resources are scarce, just like everything else. Assigning N +1 purposes to an agency that only has the resources (whether measured by headcount, band-width, or credibility) to handle N responsibilities is asking for trouble.⁵⁰ Stated differently, a multi-purpose agency can easily find itself with too many things to do, relative to the pool of talent that it has available. One needs a critical mass of talent to do any one thing well; to do multiple things well requires both sufficient capacity and continuous fine-tuning of the agency’s allocation of resources. Absent such conditions, agencies will necessarily give superficial treatment to areas that, at any particular point in time, are deemed less central to the agency’s mission. Agency employees are not stupid, and will respond accordingly, sorting themselves to work in particular areas – with their choices dictated by their ambition and enthusiasm. The result is that some areas will flourish and others will languish – even if budgets keep pace with new responsibilities (which they almost never do).

Aberbach and Peterson argue that the Nixon administration relied heavily on this strategy: Nixon “impounded (refused to spend) unprecedented amounts of funds appropriated by Congress for endeavors he did not like in an explicit effort to stop entire programs and to downgrade others without going through the legislative process. He used administrative reorganizations for the same purposes, cutting programs off from their support and merging them with others so that they would effectively change or even cease to function effectively.”⁵¹ More recently, the creation of DHS appears to have had similar consequences, as a fixed budget had to be allocated across existing and new portfolios. So, the Coast Guard saw a dramatic drop in the resources it had available to inspect cruise ships dumping sewage, since it saw a drop in its real budget (some of which was reallocated to other entities within DHS), and was also required to reallocate some of its diminished resources to homeland defense.

Congress already has a tendency to assign new responsibilities to existing agencies without providing much in the way of additional funding. A norm that encourages the use of multi-purpose agencies will only make this problem worse. To be sure, there will always be

⁴⁸ The trade rule was drafted by Richard Posner, then an attorney advisor at the FTC.

⁴⁹ The independent testing laboratory was the Tobacco Institute Testing Laboratory. After the Tobacco Institute was dissolved, the testing was continued by the Tobacco Industry Testing Laboratory.

⁵⁰ Capacity encompasses both the ability to handle current responsibilities and to plan for the future.

⁵¹ Aberbach & Peterson, *supra* note ** at 528. See also Conrad Black, *Richard M. Nixon: A Life in Full* 796 (2008) (“One of the many areas of Nixon’s expertise was his intimate knowledge of public administration law, and how to muddy the waters and reduce any subject to inter-jurisdictional chaos.”)

competition for resources, whether within a single multi-purpose agency, or across multiple single-purpose agencies. The point is that the underlying problem is not eliminated by combining functions; it is merely shifted to a less transparent setting for resolution.

5. Will a Multi-Purpose Agency Be Sufficiently Transparent?

The funding/resource allocation problem noted above will necessarily be less visible in a multi-purpose agency than in multiple single-purpose agencies. The multi-purpose agency will present a funding request that reflects its internal resolution of the budgetary fight, and its assessment of its overall priorities. The same dynamic applies to the allocation of effort within the multi-purpose agency. Barring a whistle-blower, external constituencies will never learn the details of who wanted what – and what is no longer being done with the same enthusiasm, if at all. If the funding debate involved several single-purpose agencies, there would be a higher degree of transparency, since each agency would be required to make its case individually during the budgeting process.⁵²

6. Does a Multi-purpose Agency Make Better Decisions?

Agencies can make better or worse decisions. An agency with enforcement responsibilities will predictably make two types of errors: Type I (intervening when they should not, or a false-positive), and Type II (not intervening when they should, or a false negative). The institutional design question is whether a multi-purpose agency is likely to make more or fewer mistakes – and perhaps, of which type. In principle, both types of error are equally problematic; it is the overall frequency of error that matters. In practice, false positives are viewed as more problematic than false negatives, since they are more visible, and the aggrieved constituency can readily mobilize in opposition. Before deciding whether to create a multi-purpose agency, it is worth assessing whether it will make fewer mistakes (and of which type) than two single-purpose agencies.

7. Is A Multi-purpose Agency Less Prone to Capture?

Government agencies are prone to capture by the industries they regulate. In general, multi-purpose agencies are less prone to capture than single-purpose agencies, because their broader scope of responsibility means that all of the industries they regulate must bid against one another to capture the regulator. This dynamic may raise the price of capture so high as to make it no longer cost-effective for any given industry or market participant to attempt to do so. Thus, the Interstate Commerce Commission was much harder for a single industry to capture, because it covered both trucking and railroads, compared to the dynamic in financial services, where Congress allocated responsibility for regulating insurers, banks, and securities to entirely separate regulators.⁵³ The EPA presents a similar dynamic; because it is responsible for pollution of the air, water, and land, it is harder for polluters in a single industry to capture the agency. Conversely, the regulation of financial services presents a much clearer example of

⁵² To be sure, the budgeting process is not fully transparent. If the Administration decides not to include funding for an initiative that agency personnel would like to pursue, Congress may never learn of that fact. Agency personnel are not allowed to request from Congress a budgetary allocation in excess of the amount in the Administration's budget – which can lead to considerable frustration during Congressional hearings, if the recent fight over the funding of the Consumer Product Safety Commission is any indication.

⁵³ Macey, *supra* note **.

capture.⁵⁴ To be sure, the prospect of capture may be the whole point of creating the agency in the first place – or at least the price-tag of getting an agency.⁵⁵

8. Does A Multi-purpose Agency Tend to Become a “Garbage Can” Over Time?

Agency jurisdiction tends to expand over time, as Congress assigns new duties to agencies that have not been visible failures. Some issues are complementary to the existing portfolio, while others bear little or no relationship to the other areas within the agencies’ jurisdiction. For example, the FTC is responsible for enforcing the Muhammad Ali Boxing Reform Act,⁵⁶ regulating certain aspects of the relationship between sports agents and college athletes,⁵⁷ and conducting physical audits of all federal credit unions.⁵⁸ There is no obvious nexus between these disparate responsibilities and the rest of the FTC’s portfolio.

Stated differently, regardless of the underlying logic of the original combination, N-purpose agencies have a distinct tendency to become (N+y)-purpose agencies over time. If an agency is multi-purpose to begin with, it is more difficult to make a principled argument that new purposes shouldn’t be added to their portfolio. At the margins, this means that a multi-purpose agency is more likely to be a receptacle for matters not elsewhere classified, and the agency may find its attention diverted from its core competencies – whatever those might happen to be. Once an agency becomes a dumping ground for the assignment of regulatory tasks, it becomes easier to allocate further unrelated matters to the agency.

In practice, some agencies are little more than a “garbage can” for depositing bureaus with dissimilar portfolios. The DOI has long exemplified this problem. As its own web page reflects, DOI was known at the outset as “the Department of Everything Else” and the “Great Miscellany.”⁵⁹ Less kindly disposed commentators described it as “a slop bucket for executive fragments,” and a “hydra-headed monster.”⁶⁰ John C. Calhoun predicted that “everything upon the face of God’s earth will go into the Home Department.”⁶¹ Such combinations make it hard for an agency to devise and apply the unifying themes and analytical approaches that generate true synergies and give coherence to an institution’s work.

9. Will a Multi-purpose Agency Have Credibility?

Credibility matters to government agencies, whether in their relationship with Congress, the courts, or the industry they regulate. The better the reputation an agency has with Congress and congressional staffers, the more likely it is to receive adequate funding, and not be subjected to routine second-guessing/reversal. The better the reputation an agency has with courts, the greater the deference it is likely to receive for its decisions. The better the reputation an agency has with the parties it regulates, the more likely it is to be able to work out a cost-effective solution in a timely way.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ [Kovacic: add cite to boxing act and describe what it does.]

⁵⁷ Kovacic: add cite to college sports agent statute]

⁵⁸ Kovacic: add cite to credit union auditing provisions and note that the FTC has succeeded in getting Congress to suspend its implementation.

⁵⁹ http://www.nps.gov/history/history/online_books/utley-mackintosh/interior2.htm

⁶⁰ Horace S. Merrill, William Freeman Vilas, *Doctrinaire Democrat* (Madison, Wisc., 1954), pp. 134,139.

⁶¹ Henry B. Learned, "The Establishment of the Secretaryship of the Interior," 16 *American Historical Review* 751, 768 (1911).

Although credibility obviously depends on multiple factors, including the particulars of the involved agencies, and their respective histories and past decisions, the bundling of functions can either increase or decrease an agency's reservoir of political capital. Regulatory bodies are continually engaged in a process of accumulating and spending political capital. Combining a function that generates political capital surplus with a function that runs political capital deficits may give an agency greater ability to perform deficit-prone functions that are important to the larger economy. Conversely, an agency whose portfolio of responsibilities ensures that it always runs a political deficit, such as the Office of Information and Regulatory Affairs ("OIRA") is an agency that has no constituency.⁶²

10. Will the Combination Damage the Regulatory Ecosystem?

The government is already thickly planted with bureaus, agencies and inter-agency working groups, departments and commissions. Many of these institutions have overlapping authority – sometimes by reason of deliberate legislative choice and sometimes by accident. In a number of circumstances, shared authority stems from conscious congressional decisions to dedicate policymaking responsibilities to two or more public bodies. Sometimes the deliberate duplication of responsibility stems from Congressional desire to test alternative institutional means of delivering a desired policy result.⁶³ On other occasions it reflects an explicit desire to use interagency rivalry to spur performance improvements.⁶⁴ Finally, as we describe below, technological change and market developments can give rise to such regulatory overlap “by accident.”

Whatever the origins, the fact of overlapping authority typically elicits effort by the agencies with shared jurisdiction to coordinate their efforts. These efforts do not arise because the agencies in question like each other. In many circumstances, rivalry among agencies to be seen as the lead institution in a given field of regulation is inevitable, as perceptions of primacy influence congressional decisions about budgets, affect the recruitment of skilled staff, and generally shape the agency's self-image. In analyzing the conduct of public institutions, one rarely goes wrong by overestimating the power of parochialism and self-interest to warp behavior.

Even though agencies with contested or contestable functions compete aggressively with each other, they often come to realize the need, at least on some level, to avoid destructive duplication and to invest in joint activities to deliver better policy results. The means of cooperation and coordination are myriad, and range from formal exchange of written instruments (e.g., memoranda of understanding) to the creation of interagency working groups to less formal (but still important) personal interaction among agency heads, senior managers, and case handlers. In ways that are visible and invisible to external observers, agencies with overlapping authority and responsibilities routinely create a vibrant and interlocking ecosystem of cooperation.

⁶² Dudley, *supra* note 3.

⁶³ This is probably the best interpretation of the decision of Congress in 1914 to establish the FTC and to give the Commission concurrent authority with the Department of Justice over the Clayton Act. The decision permitted a test of the relative efficacy of competition policymaking through administrative elaboration by a multimember commission (the FTC model) versus litigation in the federal courts by a single-headed executive branch body (the Justice Department model). See William E. Kovacic, Dual Enforcement paper, *Antitrust Bulletin* (199_).

⁶⁴ See William E. Kovacic, Bid Protest Paper, *American University Administrative Law Journal* (199_) (discussing congressional decision in 1980s to give General Services Board of Contract Appeals broader bid protest authority and create an alternative to protest oversight by the General Accounting Office).

When regulatory tasks are reallocated, or a new agency is inserted into the mix, or new powers are given to an existing agency, there is a significant potential to disrupt this regulatory ecosystem. Disruption can take a variety of forms. The new entrant may siphon off money and personnel, making it difficult for incumbent agencies to perform their existing responsibilities. Reallocation of authority may also upset long-standing understandings that formed the basis for fruitful inter-agency collaboration. To be sure, Congress certainly has the authority to close down an agency entirely, or substantially limit its jurisdiction and authority – and it knows how to do that when it wants to. But, the kinds of regulatory reorganizations listed above usually do not reflect that objective – meaning that the damage to the regulatory ecosystem is an unintended consequence of Congressional failure to understand that personnel would migrate to the new and more glamorous and higher paying outpost – leaving other parts of the regulatory ecosystem permanently blighted. To summarize, if functions are to be combined – either by adding functions to an existing agency or creating new regulatory bodies – the wisdom of any specific realignment will depend heavily upon whether the changes build upon a sophisticated understanding of the existing ecology.

11. Is the Existing Assignment of Functions Adaptable and Sustainable?

Statutes routinely allocate jurisdiction according to the technology used to supply a product or the status of the organization that provides the service. What happens when the character of the industry is altered by technological change or the emergence of new categories of suppliers of the sector's goods or services? Regulatory jurisdictional boundaries can shift over time in much the way that the movement of a river will sometimes alter rights in real property.⁶⁵ When such changes take place, multiple agencies may seek to exercise authority by arguing that the reconfigured industry falls within their purview. A sustainable assignment of functions will be able to adapt to such changes; a non-sustainable assignment will not – making bureaucratic warfare between the rival agencies a very real possibility.

One obvious example is the almost decade-long dispute between the SEC and the CFTC over products that arose at the interface of regulatory authority of these two agencies.⁶⁶ The SEC regulates securities; the CFTC regulates futures contracts. But what happens when a futures contract is for the delivery of securities? The SEC took the logical (and self-interested) position that a futures contract involving a security was subject to its jurisdiction. The CFTC took the logical (and self-interested) position that it had exclusive jurisdiction over all futures contracts. Both agencies pointed to their enabling legislation. When the CFTC approved the Chicago Board of Trade's trading of futures contracts on GNMA certifications and the Chicago Mercantile Exchange's trading of futures contracts on T-bills, the SEC took the position that it might view such trading as illegal, notwithstanding the CFTC's approval. The Chicago Board of Trade brought a lawsuit against the SEC, challenging its assertion of jurisdiction.⁶⁷ The SEC also brought several lawsuits challenging the CFTC's assertion of exclusive jurisdiction.⁶⁸ The dispute was finally settled with a negotiated agreement between the two agencies, which was ultimately enacted into formal law.

⁶⁵ Whether the property right moves with the course of the water depends on whether the movement was the result of avulsion (no change in property right) or accretion (change in property right).

⁶⁶ Macey,

⁶⁷ Board of Trade v. SEC, 677 F.2d 1137 (7th Cir. 1982), vacated as moot, 459 U.S. 1026 (1982)

⁶⁸ SEC v. American Commodity Exchange, 546 F.2d 1361 (10th Cir. 1976); SEC v. Univest, Inc., 410 F. Supp 1029 (D. Ill. 1976).

The regulation of financial services routinely raises this problem, because regulatory authority is generally tied to the type of entity being regulated, rather than the type of product being offered. Consider the comments of a FDIC associate director, noting the complexities of determining whether a particular depository institution was indeed a bank:

First, you have to figure out, what in the hell is a bank? And what is the intent of deposit insurance? It's a far cry from when they set it up. A typical commercial bank was one that made agricultural loans, commercial loans, and held demand deposits. . . Congress had in mind what a bank was. . . Now you may have a furniture company and they may say "we will sell a lot of couches on credit, and we borrow money to do that. We could [finance the credit] with commercial paper, but by and large we use a commercial bank for our needs. . . Why don't I establish a bank and get insurance. . . I could go out and sell CDs. . . Then I've got back up and my financing rates go way down. . . Now I am a lender for couches; instead of selling the loans to the bank or borrowing, I just put the loans on my books." Well that isn't what anyone was thinking of or imagined at first. . . They get deposit insurance and they play on the federal guarantee to reduce interest costs and financing.⁶⁹

Although the FDIC's problem was framed in the context of determining whether the furniture company's credit practices made it a bank for purposes of FDIC insurance, such problems routinely create turf wars between agencies. Firms also maneuver to find a regulatory "gap," and to "choose" their regulator.

These problems are pervasive. Broadband information services provide an example involving the FTC and FCC. These products did not exist (nor were they even imagined) when the Federal Communications Commission ("FCC") was set up. The statutory framework authorizing the FCC is premised on the understanding that the lowest cost way to provide telephony services is to have a single firm in each geographic area, and subject that firm to comprehensive oversight by a specialist public utility body. Over the past thirty years, it has become apparent that the model of a single provider subject to specialist public utility oversight is not the inevitable configuration of the telecommunications sector. Competition in a variety of areas is not only feasible but desirable. Changes in technology – e.g., the development of the internet and the introduction of means for delivering larger packets of information at greater speed – have raised questions about what constitutes "telephony" – the definition that serves to define the jurisdictional boundaries of the Federal Communications Commission. Conversely, these changes have raised the question of whether the FTC should have a role in regulating broadband information services, even though they are prohibited from regulating common carriers of telecommunication services.⁷⁰

In both instances, a regulatory framework that is more adaptive to changes in industry conditions, particularly those resulting from technological change, would have clearly allocated regulatory authority to one of the two involved agencies – instead of forcing personnel at both agencies to spend considerable time and effort disputing the allocation of responsibility. The

⁶⁹ Anne M. Khademian, *Checking on Banks: Autonomy and Accountability in Three Federal Agencies* 126-127 (1996)

⁷⁰ *Kovacic: FCC v. Brand X*, ___ U.S. ___ (200_) (broadband services deemed not to be telecommunications services within meaning of Telecommunications Act); see also William E. Kovacic, *FTC Testimony on Broadband* (in light of *Brand X* decision, stating FTC's view that Commission has jurisdiction over broadband services).

issue of adaptability could be addressed in several ways. One is to build into a statute a mandate that compels the periodic reexamination of initial assumptions that guided the original allocation of tasks. One powerful form of mandate is a “sunset” clause that extinguishing regulatory authority after a given period of time unless Congress adopts new legislation to extend it.⁷¹ A weaker approach is to develop a norm that entails periodic assessment within the agency and by the Congress.

Whatever approach is taken, it is desirable to have a mechanism that routinely assesses the existing distribution of authority. To a considerable degree, the United States has examined the allocation of regulatory tasks only by means of ad hoc blue ribbon bodies or in response to train wrecks and crises, in which perceived and/or real failures in the regulatory process give rise to reassessment. The current consideration of reforms in financial services oversight is an example of the latter circumstance.

12. Will A Multi-purpose Agency Actually Work?

It is one thing to combine multiple purposes within a single agency, and another to expect the combination to actually “work.” The combination of multiple functions within a single agency ordinarily entails the creation of separate (internal) operating units for each function. Each operating unit tends to see the other units as rivals for prestige and headcount/budgetary resources. The rivalry can be beneficial if it results in improvements that serve the larger aims of the agency. The rivalry is destructive if it manifests itself in credit-claiming or other measures designed to enhance the visibility of the operating unit as an end in itself. Issues of culture and history loom large in determining whether a shotgun marriage of previously separate functions will work out happily, result in icy co-existence, or a messy divorce.

To be sure, these issues are unavoidable, whether we are dealing with a single multi-purpose agency or several single-purpose agencies, as long as the discrete parts are expected to coordinate their efforts. Such difficulties can exist within a single department: consider the intra-service rivalries in the U.S. Air Force (bomber v. fighter pilots) and the U.S. Navy (surface navy v. aviators v. submarines).⁷² One striking and extensively documented example involves U.S. Navy intelligence operations during World War II. Wartime collection and analysis of intelligence inside the Navy suffered from the reluctance of Navy intelligence units in the Washington, D.C. headquarters to acknowledge and credit the contributions of Navy intelligence units in the field. For example, Washington-based Navy intelligence officials adopted and maintained a position of, at best, extreme skepticism to the work of Joseph Rochefort and his Navy codebreakers at Pearl Harbor. Rochefort’s team laid a critical foundation for the Navy’s triumph against the Japanese Imperial Navy at the Battle of Midway by accurately diagnosing the Japanese intentions and capabilities. His antagonists in Naval intelligence in Washington later claimed credit for Rochefort’s work, had him transferred to oversee supply and repair operations at the Navy’s base in Oakland, California, and saw that Rochefort during his lifetime did not receive honors that Admiral Chester Nimitz had propose to recognize his role in the victory at Midway.⁷³

⁷¹ Similar proposals have been made by other scholars to ensure that “emergency measures” do not become permanent features of the regulatory state, and to address the risks of over-criminalization.

⁷² More colloquially, these are referred to as the brown shoe, black shoe, and soft shoe Navy. Wilson, *supra* note 25, at **.

⁷³ The Rochefort episode is recounted in several sources, including Edward Layton, *And I Was There* (198_).

Matters are often much worse across divisions within a single agency or department, such as the legendary conflicts between the rival military services contained within a single Department of Defense:

It was the late 1950s and General Curtis LeMay was the Chief of Staff of the Air Force. The Air Force and the Navy at that time were vying for who would have the primary mission of the strategic defense of the country. The Air Force was advocating its land based strategic bombers and intercontinental ballistic missiles. The Navy was advocating its ballistic missile submarines and putting nuclear capable aircraft aboard aircraft carriers. The debate was heated and there was not enough money to do both. The future missions of both services were at stake. An Air Force Colonel was briefing General LeMay on the Soviet threat versus the strategic requirements funded in the budget. The Colonel told General LeMay that the Russians, our enemy, were capable of . . . and at that point General LeMay stopped him. LeMay was quoted as saying, “The Russians are our adversary. The Navy is our enemy.”⁷⁴

Other examples of such attitudes (and their consequences) are not hard to find. The Air Force is responsible for close air support of ground operations, but, air force culture is “based on flying high-performance fighters and long-range bombers, especially the latter.”⁷⁵ Not surprisingly, the Air Force historically gave “minimal attention to close air support and buys just enough attack aircraft to protect its claim to the close air support mission. Meanwhile, the Army, unsure that it can rely on Air Force support when it is needed, purchases a vast fleet of attack helicopters which, while more expensive than attack plans and potentially far more vulnerable, can be placed under direct Army command.”⁷⁶ When Grenada was invaded, there were problems with the interoperability of communications between Marines in the north and Army Rangers in the south: “since their radios could not communicate with the ships of the Independence battle group, Army radiomen were forced to send their request for fire support to Fort Bragg which in turn relayed them by satellite to the ships.”⁷⁷

To summarize, coordination among and within the uniformed services (known colloquially as “jointness”) has been a persistent problem, even though all of the uniformed services are part of a single Department of Defense.⁷⁸ The coordination of functions and responsibilities will not happen merely because previously separate bureaus are combined into a single department. This is perhaps an inevitable consequence of efforts within individual services to build esprit de corps and to instill the view within each unit that it is truly elite.

⁷⁴ John Melchner, *Managing the Budget Process*, J. PUB. INTEGRITY 11, 13 (Fall/Winter, 1998), available at <http://www.ignet.gov/randp/jpifw98.pdf>. Ronald Spector, the military historian, provides a similar example of institutional narrow-mindedness in his study of how institutional factors explain the performance of the world’s navies since the late 19th century. Ronald H. Spector, *At Way at Sea* (200_). [Kovacic: add quote].

⁷⁵ Wilson, *supra* note 25, at 186

⁷⁶ Richard A. Stubbing, *The Defense Game* 142 (1986)

⁷⁷ <http://www.dtic.mil/doctrine/jel/history/urgfury.pdf>. In the Hollywood version, a Marine squad was in danger of being overrun, and was unable to request air support because its radio had been destroyed. A young Marine (played by Mario Van Peebles) patched together a phone line, and placed a call to Camp Lejeune in North Carolina, using a credit card that he had carried into battle. The call was relayed to a Navy ship stationed off Grenada, which coordinated the necessary close air support. See *Heartbreak Ridge* (1986).

⁷⁸ <http://www.carlisle.army.mil/library/bibs/joint02.htm>

To be sure, such intra-departmental conflict is not unique to the Department of Defense. Many agencies have developed discrete sub-cultures, each with their own norms, goals, and priorities. These sub-cultures are reinforced by several forces. For example, each unit will recruit specialists with skills to fulfill the unit's responsibilities. This specialization can result in the creation of teams whose interests, training, and abilities focus narrowly on the work of their unit and which have little understanding of the backgrounds and activities of other units underneath the same broad institutional roof. The CIA, for example, has had a long-standing cultural conflict between analysts and field agents, as well as ongoing debates between internal communities which favor, respectively, reliance on high technology monitoring systems (e.g., reconnaissance satellites) versus human, on the ground data collection to gather intelligence. Those who design and manage intelligence gathering through advanced technology systems tend to have backgrounds in science and engineering. The human intelligence community tends to be drawn from individuals with skills in the social sciences.

The interaction among the FTC's Bureaus of Competition, Consumer Protection, and Economics supplies another illustration. These groups are rivals for budgetary resources and physical space within the Commission. The process of setting budgets involves annual decisions about bureau staffing levels, and each unit engages in efforts to persuade the Commission that its needs should receive priority in the internal allocation of funds.⁷⁹ The bureaus also compete actively for office space within the agency's D.C. headquarters. Top managers in the Commission's Office of the Executive Director (and sometimes even the agency's Chairman) spend surprising amounts of time refereeing disputes about how space within the headquarters building should be allocated.⁸⁰

There can develop within the FTC's major operating units a substantial degree of detachment from the activities of other units within the agency. This perspective develops partly out of each unit's need to focus intensely on matters before it. The imperative to address the demands of one's own workload, and the effort to build team spirit within the unit, can create an element of insularity that leads bureau leadership to treat other entities within the Commission with wariness. One of us (Kovacic) saw this first hand from the Commission perspective. Upon becoming the agency's Chairman in March 2008, Kovacic asked the top managers of one operating division to provide a summary of the bureau's pending matters. The response of the top managers, nearly in unison, was "Why do you need to see that?" The notion that even the agency's top official could have access to bureau management documents only on a need-to-know basis suggests the extent to which unit managers can define the aims of the institution mainly in terms of what advances the interests of their own units.

Of course, these problems are not unique to the FTC; as the former head of OIRA noted, "Transportation career staff are more likely to accept guidance from policy officials than EPA staff who behave as if following political leaders' direction is unprincipled. EPA staff are notorious for leaking to the media or allies in Congress any decision with which they don't fully agree."⁸¹

⁷⁹ Discussions during the consultations with foreign officials for the FTC self-study indicated a number of instances in countries outside the United States in which competition and consumer units battle contentiously over their agencies' allocation of resources.

⁸⁰ Indeed, one of Tim Muris' first acts as the head of the Bureau of Competition was to reclaim an office that had been given to the Office of Policy & Planning to house its director. The director at the time was Robert Reich, who subsequently became the Secretary of Labor.

⁸¹ Dudley, *supra* note 3.

III. Agency Design and the Enforcement of Competition Law

Competition law exemplifies the complexities and tensions of agency design. We focus on three specific issues: internal organization; division of authority among multiple competition agencies; and the choice between a competition agency and a sector-specific regulator.

A. Internal Organization

A competition agency is typically composed of attorneys and economists. Even if the agency limits itself to antitrust, the obvious question is how should the agency be configured internally? There are two obvious polar possibilities: put the attorneys in one bureau and the economists in another, or put both in a single bureau.⁸² From the first forty years of its existence, the FTC put the attorneys and economists in separate bureaus.⁸³ From 1954 to 1960, it combined attorneys and economists into a single bureau. In 1960, it switched back to separate bureaus, and has followed that approach ever since – although there have been periodic proposals to return to a single consolidated bureau.⁸⁴ What difference (if any) does internal structure make to agency performance?

Contemporaneous sources indicate that in 1954, the FTC switched from two bureaus to a single bureau because the new chairman (Ed Howrey) wanted to ensure that economics played a larger role in “what was going on around the Commission.”⁸⁵ Prior to 1954, the economists had made recommendations that certain mergers should be investigated, and then the attorneys took over the case. After the switch, according to the former director of the bureau of economics, “the change we implemented was to send the economist along with the memo to the Bureau of Investigation, to make it clear that this is my case as well as it is your case.”⁸⁶ The change was not particularly successful, which explained why it was unwound six years later.⁸⁷

To this day, the attorneys and economists in the FTC occupy separate bureaus, with both making separate recommendations to the commission about whether a case should be pursued, although they work together in a single team once a case is brought. The result is that economists report to other economists, and lawyers report to other lawyers. There are also separate bureaus for lawyers who work on consumer protection issues, and lawyers who work on antitrust issues.

Of course, “the optimal organization of a competition agency depends on what you want it to do.”⁸⁸ Why might it matter whether lawyers and economists occupied separate bureaus or were combined, as long as they were both in the same agency? As a contemporaneous account reflected, prior to the merger, “the economists . . . disagreed vehemently with the economic approach being taken by the legal division, and the lawyers wanted greater control over the

⁸² The alternatives are basically functional v. divisional forms.

⁸³ Luke Froeb, Paul A. Pautler & Lars-Hendrik Röller, *The Economics of Organizing Economists*, *Antitrust L. J.* (forthcoming, 2009).

⁸⁴ See, e.g., Joan Z. Bernstein and Ann Malester, *Federal Trade Commission: Consumer Protection and Competition for a 21st Century Economy*, in *Change For America* (Center for American Progress Action Fund) (Mark Green & Michelle Jolin, eds., November 2008), pp. 413-422,

⁸⁵ <http://www.ftc.gov/be/workshops/directorsconference/docs/directorstableGOOD.pdf#page=17>

⁸⁶ *Id.* at 19.

⁸⁷ “I think it was a terrible idea myself. It's one of those things like your first marriage. It seemed like a good idea at the time.”

⁸⁸ Froeb et al, page 5.

economists.”⁸⁹ Combining the economists and lawyers into a single bureau meant that the economists reported to the lawyers – which meant that the views of the lawyers invariably prevailed, irrespective of whether they represented sound economics or not.⁹⁰ Separate bureaus helped allow both perspectives to be presented to decision-makers, and ensured that disciplinary norms prevailed over the demands of one’s supervisor – and the felt necessities of pursuing any given case.

To be sure, there is diversity internationally with regard to the internal organization of competition agencies. One of the most notable trends across jurisdictions has been a move to converge upon the practice of the U.S. competition authorities and give economists a more independent institutional status and, accordingly, a more independent voice in agency decisionmaking. One noteworthy illustration involves the competition policy apparatus of the European Union. In 2002, the Competition Directorate of the European Commission (DG Comp) lost three merger cases before the European Union’s Court of First Instance.⁹¹ These defeats raised serious concerns about the quality of DG Comp decisionmaking and inspired a number of measures to improve internal quality control. One means to this end was the creation of the position of Chief Economist and the establishment of a Chief Economist’s Team. The Chief Economist was given a direct reporting line to the Director General for DG Comp and to the Commissioner for Competition. Similar to the U.S. model, the members of the Chief Economist’s Team work with attorneys in the formulation of cases, but the Chief Economist provides an independent assessment of proposed matters to the Director General and the Commissioner. Establishing a separate economists’ unit and providing the Chief Economist with direct access to top leadership has given economists a stronger voice in DG Comp policymaking. A number of the national competition authorities of the EU member states have taken steps toward emulating this model, as have competition agencies outside the European Union and the United States. This experience underscores how organizational design can affect the form and effect of policy inputs within a competition agency.

Similar questions about the impact of organization and structure upon policymaking have arisen in agencies that have both competition and consumer protection responsibilities. The most common internal organizational model has been to place competition and consumer protection staff in different operating units. The attainment of a synthesis of perspectives, and the realization of synergies between the competition and consumer protection fields, tend to occur not as a result of direct interaction between the competition and consumer protection operating units, but from other sources. The joining up of competition and consumer protection perspectives tends to occur at the board level (e.g., among the FTC commissioners), within policy offices assigned responsibility to assist in devising overall agency strategy and program selection, and within stand-alone offices of economists (e.g., the FTC’s Bureau of Economics).

A number of agency officials have questioned, at least among themselves, whether reliance upon these tools for policy integration – board level involvement, contributions from separate policy units, and guidance from independent economic units – is sufficient to deliver the synergies that are said to exist from placing competition and consumer protection under one institutional roof. There is a major experiment underway to test whether an alternative form of internal agency structure can alter yield better integration results. The UK’s Office of Fair

⁸⁹ Id.

⁹⁰ A similar problem was observed at the SEC. At both agencies, economists were described as “case killers,” and their advice was discounted, or ignored entirely. Cite:

⁹¹ Kovacic: add cite to the Airtours, Schneider, Tetra trilogy.

Trading has long maintained separate bureaus for antitrust and consumer protection – but it recently consolidated both bureaus into a single “Markets and Projects” bureau.⁹² The bureau is sub-divided along lines of business – i.e., services, goods, consumer, and infrastructure.⁹³ Two additional teams remain “antitrust-only:” mergers, and cartels/criminal enforcement. Strikingly, economists are assigned to each OFT team instead of being maintained in a separate bureau. Sweden recently combined its economists and lawyers into a single bureau as well. It is too soon to tell how these experiments will work out, but they represent ambitious efforts to use a competition agency’s internal design to force coordination and exploit synergies between the antitrust and consumer protection missions of the agency.

B. Competing Competition Agencies: Who Does What?

As noted previously, the U.S. system of competition law decentralizes policymaking and prosecutorial authority to a degree unmatched by any other jurisdiction. Since 1914, the FTC and DOJ have shared responsibility for enforcing major elements of the U.S. antitrust laws.⁹⁴ Although there are areas of exclusive jurisdiction (DOJ’s enforcement of the criminal provisions of the Sherman Act; the FTC’s enforcement of the prohibition on unfair methods of competition and on unfair or deceptive trade practices in Section 5 of the FTC Act), the Clayton Act expressly provides that both Agencies may enforce its provisions.⁹⁵ The Clayton Act does not specify how the Agencies should decide which of them has enforcement responsibility for any given case, and judging from the legislative history it appears that Congress simply overlooked the possibility that such conflicts might arise.⁹⁶

Since the late 1940s, DOJ and the FTC have used a liaison arrangement (commonly called “clearance”) to avoid conflicts in the exercise of their concurrent power under the Clayton Act.⁹⁷ A 2002 press release from the FTC concisely describes how this process has worked (and not worked) over time:

For most of its history, this process has worked well, because it was based primarily on the relative expertise of the respective agencies. Thus, because the FTC had experience with automobiles, it conducted investigations in that industry; similarly, DOJ investigated steel matters. . . .

In recent years, the process has become more contentious as the convergence of industries has blurred bright lines between industry boundaries. For example, because the DOJ historically has investigated electricity, while the FTC has investigated all other energy matters, convergence mergers between

⁹² <http://www.ofit.gov.uk/about/structure/>

⁹³ <http://www.ofit.gov.uk/about/structure/marketsprojects#named3>

⁹⁴ Kovacic: add cite to Marc Winerman, Command, Competition, Coordination, and Control, *Antitrust Law Journal* (2003).

⁹⁵ 15 U.S.C. § ** (2006).

⁹⁶ The authors are grateful to Marc Winerman for this point.

⁹⁷ James C. Grimaldi, *Enron Case Attracts Lawyers Like a Flame Attracts Moths, More than You Can Shake A Stick At*, *Washington Post*, Jan. 28, 2002, at E2 (“There are a handful of industries in which both the FTC and Justice Department have expertise. So when a hot merger comes up, and the staff of each agency wants a piece of it, the assistant attorney general for antitrust and the FTC chairman have to sort it out. This had been done in an ancient ritual that included a series of athletic events such as arm wrestling, mud wrestling, greased-pig wrestling and a bull-riding competition, and an essay contest. Okay, we’re making that up. Well, most of it. The agencies really *do* write essays explaining why they are best to review the mergers.”). See also Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 *Vanderbilt L. Rev.* 1307 (2008).

electricity and natural gas companies have led to contentious disputes regarding which agency should investigate. Moreover, although the FTC predominantly has investigated computer hardware and the DOJ has investigated computer software, matters involving both have become increasingly common, resulting in clearance disputes.

In the 1980s, there were only about 10 disputes per year. Since then, the average has exceeded 80. These disputes result in significant delays. Delays averaging three weeks occurred in 24 percent of the matters on which clearance was sought from the beginning of FY 2000 through January 28, 2002. . . . During this time, neither agency could investigate potentially serious allegations of illegal behavior.⁹⁸

The clearance process also created other problems not mentioned in the press release. Resolution of clearance disputes was supposed to be based on the comparative expertise of each agency – but the agencies controlled whether or not they initiated cases in each area – and both knew that the first agency to bring a case in a new area would be more likely to get all cases arising out of that area into perpetuity. The clearance process thus encouraged “gun-jumping” by the agencies – each seeking to be the first-mover, irrespective of the relative strength of the case(s) in question.

In 2002, the Agencies sought to implement a permanent structural solution to the clearance problem by explicitly allocating exclusive responsibility for particular sectors of the economy to either the FTC or the DOJ.⁹⁹ Among other features, the agreement would have dedicated the telecommunications and media sectors to DOJ while reserving electric power, health care, and aerospace to the FTC.¹⁰⁰ Although the proposal attracted bipartisan support and was hailed by antitrust practitioners, business groups, and former FTC and DOJ personnel, it was ultimately sunk by the vehement opposition of Senator Ernest Hollings. Senator Hollings, as chairman of the Commerce Committee, had oversight authority over the FTC, but not over the DOJ (which fell within the jurisdiction of the Senate Judiciary Committee). Hollings had one other important pressure point to exploit. He chaired the Senate Appropriations Subcommittee that oversees the funding of both the Justice Department and the FTC.¹⁰¹

Senator Hollings, along with several self-styled consumer groups, objected that mergers among media corporations should be reviewed by the FTC, and not the DOJ. Among other measures, he threatened to use his position on the Senate Appropriations Committee to reduce the budgets of both agencies. After months of jockeying, the FTC and DOJ abandoned the agreement and matters returned to the status quo ante, with the DOJ handling most media mergers.

Like virtually all disputes over agency design, the dispute over the clearance agreement was intensely political, and it was resolved on that basis. The underlying dispute resulted from the original Congressional decision to have two agencies enforce the antitrust laws – a decision

⁹⁸ <http://www.ftc.gov/opa/2002/04/clearanceoverview.shtm>. See also Grimaldi, *supra* note 97, at E2 (“The ‘discussions’ would last more than two weeks sometimes, and that’s almost half the 30 days in which investigators must decide whether to launch a more detailed review, called a “second request” for documents. Delays of more than 15 days occurred 32 times in 2000.”)

⁹⁹ <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ Senator Hollings was also chair of the Senate Appropriations Subcommittee on the Commerce, Justice and State Departments.

that Congress has shown no signs of revisiting, even though the dual enforcement model has been the source of a heated debate within the antitrust community. The Antitrust Modernization Commission ably summarized the state of the debate in its 2007 final report, including its recommendation to stick with the status quo:

Critics contend that having two agencies enforce the federal antitrust laws entails unnecessary duplication and can result in inconsistent antitrust policies, additional burdens on businesses, or other obstacles to efficient and fair federal antitrust enforcement. Some have suggested eliminating the FTC's antitrust authority; others propose reallocating nearly all antitrust enforcement authority to the FTC, with the DOJ prosecuting only criminal violations of the antitrust laws.

* * *

Although concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits. Furthermore, there is no consensus as to which agency would preferably retain antitrust enforcement authority.

The Antitrust Modernization Commission properly emphasized the transition costs associated with a reorganization. As noted above, far too often, such costs are ignored, or assumed to be minor. Yet, despite having the benefit of decades of experience with two agencies, through multiple Presidential Administrations and reorganizations and reflecting upon its own proceedings, the AMC took no position on the ultimate issue we focus on in this paper.

In one sense, it is easy to understand why the AMC decided to walk away from the issue. Strong political forces support the status quo of institutional arrangements and work against the realignment of responsibilities. Individual members of Congress derive important electoral advantages from the committees on which they service. These include access to campaign contributions from commercial and other interest groups which are affected by the activities of government agencies subject to the oversight of the committees. Oversight of a specific government agency creates a revenue stream that flows from the affected industry to the committee's members. Reorganization measures that alter an agency's powers can reduce or eliminate the revenue stream to a given committee. Of course, there are also gains from expertise; individual members gain knowledge and experience with an agency's operations over a period of years, and proposals to transfer regulatory authority to an agency that is overseen by a different committee places that investment of intellectual capital at risk.

For both of these reasons, Congress takes a keen interest in reorganization. A change in the allocation of regulatory responsibilities that shrinks the incentive of commercial or other entities to make contributions or otherwise pay homage to a committee is a change that will face tough sledding in Congress. The congressional uproar over the DOJ/FTC clearance "deal" is completely understandable if one recognizes that the reforms would have changed perceptions about which Congressional committees firms should approach to complain about DOJ or FTC decision-making. It is no accident that Congress has adopted a variety of reporting and approval

requirements that forestall agency efforts to carry out what might seem to be relatively minor internal reorganizations unless the oversight committee consents.¹⁰²

No committee is inclined to surrender oversight authority unless it gets something of equal value in return. This tends to freeze in place existing allocations of policymaking power and to disable reform proposals that would move authority away from some government agencies and give it to others. In light of the political phenomena described here, it is tempting to shrug and acquiesce in the apparent inevitability of the existing distribution of competition policy tasks in the U.S. system.

Yet the rise of dual-purpose and multi-purpose agencies internationally lends greater urgency to revisiting matter. Not all countries have decided to surrender to a path dependency of existing arrangements. Within the past five years, three jurisdictions – France, Portugal, and Spain – have simplified their public enforcement mechanisms by combining two national competition authorities into a single institution.¹⁰³ Thus, we should not assume that the status quo is immutable.

C. Competition v. Sectoral Regulation

Certain sectors of the economy are pervasively regulated. To what extent should competition law be enforced against firms in such sectors – and by which agency? A sectoral regulator has greater knowledge of the peculiarities of the industry, but is more subject to capture, and more likely to disregard the command of the nation’s competition laws. A competition agency will have the opposite profile.

In two recent cases, the Supreme Court has struggled to accommodate these conflicting perspectives. In both cases (*Trinko* and *Credit Suisse*), the Court concluded that sectoral regulation should prevail over antitrust claims brought by private litigants, despite the risk of effective immunity from the antitrust laws if the sectoral regulator decides not to enforce the law, or takes it less seriously than antitrust enforcers.¹⁰⁴ These decisions reflect a more sanguine view of the capabilities and incentives of sectoral regulators than judicial decisions of the 1970s and early 1980s dealing with attempts to apply the antitrust laws to the conduct of firms subject to elaborate public utility oversight. If the standards established in *Trinko* and *Credit Suisse* had been in effect earlier, the cases brought by the Justice Department against Otter Tail electric utility and AT&T would probably have been quickly dismissed.

Other countries have opted for different strategies in addressing this issue. The ACCC combines antitrust and consumer protection – but it also has responsibility for a broad range of competition issues associated with the operation of telecommunications networks.¹⁰⁵ In this respect, Australia is unique among the world’s competition agencies. The ACCC is the boldest experiment to date with giving a competition agency the type of regulatory powers ordinarily associated with oversight by a public utility board. Across most countries, the norm remains that telecommunications is handled by a sectoral regulator because competition agencies are generally averse to activities that resemble rate-setting or determining the terms of access to networks.

To be sure, in several Eastern European countries, competition agencies handled telecommunications as an interim measure – and New Zealand used a similar arrangement until

¹⁰² Note political science literature on this issue.

¹⁰³ Kovacic: add cite.

¹⁰⁴ *Verizon v. Trinko, LLP*, 540 U.S. 398 (2004)

¹⁰⁵ See <http://www.accc.gov.au/content/index.phtml/itemId/269262>.

it switched to a sectoral regulator in 2001.¹⁰⁶ But, the combination is a surprising one – and the analysis of Part 3 suggests this particular combination of functions within the ACCC may not prove to be a stable one. Or, Australia may just be a one-off; the ACCC also had a role in enforcing Australia’s VAT tax.¹⁰⁷ We are unable to identify any other jurisdiction in which the competition agency had any responsibility for taxation.

IV. Benefits of A Dual Purpose Competition Agency

Why might one expect a dual-purpose competition agency to outperform two (or more) single purpose agencies? In this section we examine in more detail the benefits of a dual-purpose competition agency. Our baseline scenario is a competition agency responsible for enforcing both the antitrust and consumer protection laws.

We begin with the observation that competition policy and consumer protection have important complementary conceptual foundations. Many areas of competition policy and consumer protection share a core of ideas grounded in microeconomics and industrial organization.¹⁰⁸ The economics literature concerning the collection, analysis, and transmission of information provides important insights into the behavior of individual firms and groups of firms and illuminates the manner in which consumers make choices among the array of products and services available to them.¹⁰⁹

From a more theoretical perspective, antitrust primarily focuses on increasing supply-side choices, while consumer protection primarily focuses on safeguarding choice architecture on the demand-side of the equation.¹¹⁰ From a functional perspective, antitrust helps ensure, with respect to any good or service, that there is a larger range of options and selections from which consumers can ultimately choose. Conversely, consumer protection helps ensure that consumers are provided with the information they need to make good choices among the available alternatives, and lowers the chances they will be the victims of sharp practices, including deception and outright fraud. These complementarities serve to increase the possibilities that a competition agency with consumer protection responsibilities will realize synergies between the two fields.

In the discussion below, we turn to the particulars of what antitrust can learn from consumer protection, and what consumer protection can learn from antitrust when both are combined in a dual purpose agency.

A. What can antitrust learn from consumer protection?

Developing and enforcing consumer protection law requires one to understand consumer behavior in the real world, including shortsightedness, rational ignorance, optimistic bias, and a

¹⁰⁶ See

http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/AppendixII.pdf.

See also

http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Interrelations_Between_Antitrust_and_Regulation.pdf

¹⁰⁷ See also David Cousins, The GST: the ACCC’s Role and the Impact on Prices, NSW Economics and Business Teachers Conference, Mar. 9, 2001, on file with authors.

¹⁰⁸ Kovacic: add cite to BE volume from 1990s on consumer protection economics and to FTC 90th anniversary symposium volume.

¹⁰⁹ The literature on information economics provides the principal basis for the category of research now known as behavioral economics. Kovacic: add cite to proceedings of FTC 2007 workshop on behavioral economics.

¹¹⁰ Kovacic: Add cite to Muris Brussels 2002 paper and Averitt/Lande.

range of other cognitive biases. By comparison, antitrust enforcers usually operate at a remove from the pell-mell of individual consumer behavior in the marketplace, and assume a higher degree of knowledge and rationality than do consumer protection enforcers. As such, consumer protection can teach antitrust about the findings of behavioral economics, including cognitive limitations on the likely ability of consumers to engage in the type of behavior that figures prominently in antitrust analysis.¹¹¹ For example, antitrust enforcement generally assumes that consumers will quickly respond to price increases by switching from one product to another – while behavioral economics teaches that rational ignorance and inertia are important limitations on such switching.

We offer three brief case studies as exemplars of the potential for consumer protection to inform and improve the enforcement of competition law. What these three examples have in common is that they point to the reality that if enforcers focus only on antitrust-specific diagnoses and remedies, they are less likely to recognize the existence of dysfunctions on the demand side. The result is a predictable skew toward under-enforcement of competition law.¹¹² Stated differently, understanding the consumer protection implications of the market helps enforcers avoid Type II errors in their deployment of competition law.¹¹³

1. *Funeral services.* From an antitrust perspective, the principal problem in the market for funeral services was state laws that created barriers to price competition, including the prohibition on purchasing a casket from any individual who was not a licensed funeral director. Using advocacy and litigation, the FTC took steps to dismantle these barriers – with the result that one can now buy a coffin at Costco, and on-line.¹¹⁴ Indeed, anyone driving into Chicago on the Dan Ryan can see a large billboard advertising discount coffins from a firm on Halsted Street. From a pure antitrust perspective, once these state-created barriers to entry were dismantled, their task was complete.

However, there are also significant consumer protection problems in the market for funeral services. Most consumers purchase funeral services while they are grieving for a loved one. They are unlikely to be able to negotiate effectively for the mix of goods and services they would like to purchase – particularly if they are only offered bundled packages of services on a take-it-or-leave-it basis, coupled with an appeal to raw emotions (“doesn’t your mother deserve the best?”).

Greater supply-side competition does not address these demand-side problems. Accordingly, the FTC also developed and implemented the Funeral Rule in 1984.¹¹⁵ Among other measures, the funeral rule requires funeral homes to give each customer a General Price

¹¹¹ See Joseph P. Mulholland, Behavioral Economics and the Federal Trade Commission (2007), available at <http://ssrn.com/abstract=1091745>. See also Matthew A. Edwards, The FTC and the New Paternalism, available at <http://ssrn.com/abstract=1014652>.

¹¹² To be clear, we are not suggesting that a single-purpose antitrust agency will under-enforce the antitrust laws. Instead, our point is that an agency that has only antitrust remedies will not be able to use the broader menu of enforcement options to address problems on the demand side of the market – if it recognizes them as problems at all. The result is that an antitrust agency will either ignore such problems, or view them as a SEP (“Somebody Else’s Problem”). See Douglas Adams, *Life, The Universe, and Everything* (“A SEP is something we can’t see, or don’t see, or our brain doesn’t let us see, because we think that it’s somebody else’s problem.... The brain just edits it out, it’s like a blind spot.”)

¹¹³ To be sure, whether antitrust law is being under-enforced, taken on its own terms, is a different question, and will depend on the degree to which consumer protection perspectives .

¹¹⁴ <http://www.costco.com/Common/Category.aspx?cat=20595&eCat=BC%7C20595&whse=BC>

¹¹⁵ <http://www.ftc.gov/bcp/rulemaking/funeral/index.shtm>

List, separately enumerating the price for a variety of services, including a basic services fee, embalming charge, cost of picking up the body, the price of a viewing, the price of a memorial service, and so on. By forcing disaggregation of bundled packages into individually listed and priced items, consumers are better able to pick a funeral that matches their preferences and pocketbook. Thus, in funeral services, the FTC used both its antitrust and consumer protection enforcement authority to improve the performance of the market – achieving results that were superior to what would have been the case had they only attacked problems on either the supply side or demand side of the market.

2. *Electricity* The past fifteen years has seen considerable interest by state and federal regulators in creating competition in the retail market for electricity. Predictably enough, antitrust enforcers focused on a familiar and traditional set of issues: eliminating barriers to entry, preventing the development of a deregulated monopoly, addressing illegal tie-ins, competition advocacy, and the like.¹¹⁶ Yet, for retail competition to succeed, consumers have to be able to comprehend rival offerings and be willing to switch from tried-and-true incumbent providers to unknown new entrants. Substantial cost savings might motivate consumers, but the calculations necessary to determine whether switching will yield savings is so complex that many consumers have rationally declined to undertake the necessary analysis.¹¹⁷ Instead, their reaction is likely to be “whatever,” and they will remain with their incumbent provider, even if they could save money by switching.

A consumer protection perspective thus underscores to antitrust enforcers that the benefits of rivalry-based regulatory reform will emerge only if they attend to both the demand side and the supply side of a market. Education programs or disclosure requirements are obvious consumer protection demand-side strategies that complement the traditional supply-side focus of antitrust.

3. *Information Intermediaries* In some instances, the demand-side perspective associated with consumer protection analysis can improve an agency’s understanding of the competitive significance of specific commercial phenomena. The electricity example described above is one of a number of markets in which consumers face dense, complex amounts of information concerning alternative providers of a good or service. In these markets, third parties may emerge to interpret the information for consumers or otherwise act as agents for consumers in making or recommending selections among an array of alternatives. In some instances, the intermediary not only advises the consumer about product or service alternatives but also acts as the point of contact with the supplier. Suppliers may benefit from information complexity because it inhibits the ability of consumers to compare product offerings and identify superior alternatives. This condition can serve to increase the prices that suppliers receive because consumers cannot shop effectively. Where intermediaries emerge to assist consumers in choosing among alternatives, suppliers may seek to forestall access to information that the intermediary needs to make an assessment on the consumer’s behalf.¹¹⁸ By understanding the significance of information

¹¹⁶ See, e.g., <http://www.usdoj.gov/atr/public/speeches/0524.htm>

¹¹⁷ Kovacic: Add cites to FTC behavioral economics workshop presentation on retail electricity competition and difficulties in calculating savings. Pennsylvania PUC worksheet v. AMT computation.

¹¹⁸ There have been occasional public exhortations by law school deans that law schools collectively refuse to provide information to U.S. News & World Report, which prepares an annual ranking of law schools and other graduate programs in the United States. The stated objection to the U.S. News survey is that it uses badly flawed evaluative criteria and therefore provides a misleading assessment of the quality of the schools surveyed. A skeptical interpretation of this objection is that it stems, at least in part, from the desire of many schools to determine

asymmetries on the demand side and by appreciating the role that expert third parties can play in addressing these asymmetries, an agency's competition team can better formulate a theory of harm arising from unilateral or concerted efforts by suppliers to impede the effectiveness of intermediaries.¹¹⁹ Thus, a consumer protection approach strengthens and complements the conclusions an antitrust approach would typically reach on its own.

B. What can consumer protection learn from antitrust?

W.C. Fields believed that “you can't cheat an honest man,” but he obviously didn't spend much time doing consumer protection. Even if consumer protection enforcers limit themselves to raw fraud and deceptive advertising, the list of miracle cures, guaranteed money-making business opportunities, weight-loss schemes, and the like is long, and illustrious. Faced with a steady diet of such cases, consumer protection enforcers naturally start to assume that their portfolio represents the mine run of cases. Because they repeatedly see a dismal stratum of commerce, bureaus dedicated solely to consumer protection can become extremely interventionist, adopting a “shoot first, shoot again, no real need to ask questions” mindset about the “need” for regulatory intervention to address market failures.¹²⁰ In a dual-purpose agency, the competition ethic developed from antitrust enforcement and from economic analysis performed in a bureau of economics can discipline the exercise of consumer protection enforcement efforts. The competition policy ethic can temper overreaching by a consumer protection bureau by reminding the institution that market forces may be employed to fix such problems, and that consumer protection remedies induce their own distortions. The competition policy perspective also counsels caution about consumer protection strategies that rely on industry guidelines.

We offer three brief case studies as exemplars of the potential for antitrust to inform and improve the enforcement of consumer protection law. What these examples have in common is that they point to the reality that if enforcers focus only on consumer protection-specific diagnoses and remedies, they are less likely to recognize the existence of dysfunctions on the supply side, and the potential for market forces to address the underlying problem. The result is a predictable skew toward over-enforcement. Stated differently, understanding the antitrust implications of the market helps enforcers avoid Type I errors in their deployment of consumer protections.

1. *Privacy and data protection* Those interested in privacy issues understandably tend to develop data protection strategies that put a premium on privacy.¹²¹ If data protection policies are motivated only by a consumer protection perspective, the result is likely to be strict and inflexible privacy protections.

their own ranking among American law schools and report it to applicants without challenge from any third-party observer outside the field of legal education.

¹¹⁹ This insight was the foundation of the cause of action in *FTC v. Indiana Federation of Dentists*. The Commission successfully challenged a collective refusal by dentists in Indiana to withhold patient x-rays from insurance companies that were seeking to assess the reasonableness of charges imposed by the dentists.

¹²⁰ Cf. Wild, *Wild West* (1999) (“Mr. West, not every situation requires your patented approach of shoot first, shoot later, shoot some more and then when everybody's dead try to ask a question or two.”) available at <http://www.imdb.com/title/tt0120891/quotes>

¹²¹ The problem of regulatory projection of one's own priorities and values is obviously not unique to those interested in privacy issues. See Dudley, *supra* note 3.

A competition policy-oriented perspective would emphasize that consumers might well have different priorities – particularly if they expect to derive benefits from the aggregation and sharing by merchants of information regarding their preferences and purchasing patterns, or are willing to surrender their privacy. There also appear to be important generational differences in consumer preferences that should be factored into the mix: as one specialist in social media aptly observed, “a lot of (young people) are totally willing to give up tons of privacy information for like, free crap.”¹²² Similarly, the willingness of individuals to volunteer personal information about their private lives on social media sites such as facebook indicates that social norms on privacy vary widely.

Finally, a perspective shaped by exposure to competition law and economics would also note that companies can “brand” themselves by announcing that they will follow a more restrictive policy involving the use and transfer of data (e.g., “We do not share your data unless you tell us it is OK.”) In combination, these factors are likely to result in more flexible privacy protections that more closely match the diversity of actual consumer preferences than would be the case if only consumer protection perspectives were considered.

2. *Advertising* Historically, consumer protection enforcers were extremely leery of advertising by professionals, reasoning that ordinary consumers were likely to be misled and there was little utility in such advertising. This approach neatly dovetailed with the position of professional organizations that such advertising was per se unethical, and should be the target of harsh discipline. The hostility to advertising was so pervasive that one wag referred to medical ethics in the mid-1950s as focusing on the “three ‘A’s’ – adultery, alcoholism, and worse of all, advertising.”

Although advertising obviously has certain risks, an industrial organization/antitrust perspective makes it clear that prohibiting truthful advertising has its own adverse consequences, including the near-certainty that consumers will end up paying more, and that non-incumbent providers of services will have a difficult time entering the market.¹²³ Persuaded by this line of reasoning, the FTC has used its consumer protection authority to challenge professional restraints on advertising.

This mismatch in perspectives is not limited to professional advertising. The FDA has historically frowned on the making of health claims by food manufacturers. Research by the FTC made it clear that consumers are more likely to obtain (and act upon) health information they learn from advertising and product labels than government reports and statements by health care professionals.¹²⁴ A similar dynamic applies to the promotion of off-label uses of pharmaceuticals – which the FDA prohibits outright, even though its position is essentially indefensible on 1st Amendment grounds.¹²⁵

¹²² Caroline McCarthy, Rough Seas Nearly Sink Facebook’s Beacon, available at http://news.cnet.com/8301-13577_3-9826664-36.html. The new head of the Bureau of Consumer Protection does not share this view, describing tracking as “Orwellian,” and suggesting that the FTC should consider the “dignity interests” of consumers in evaluating these issues. See Stephanie Clifford, Fresh Views at Agency Overseeing Online Ads, N.Y. Times, Aug. 4, 2009, available at http://www.nytimes.com/2009/08/05/business/media/05ftc.html?_r=2&scp=2&sq=david%20vladeck&st=cse. On the difficulties with operationalizing “dignity” as a standard, see David A. Hyman, Does Technology Spell Trouble With a Capital T?: Human Dignity and Public Policy, 27 Harvard J. L. & Pub. Pol’y 3-18 (2003).

¹²³ Cite Muris piece following Colorado Dental

¹²⁴ Kovacic: add cite to Pauline Ippolito research.

¹²⁵ Cite details; Allergan case

To be sure, both the antitrust and consumer protection perspectives lead to the conclusion that false, misleading, and deceptive promotion/advertising should be off limits. The difficulty is that after a steady diet of cases based on such conduct, a consumer protection advocate might well conclude that an outright prohibition on advertising/promotion is a better solution than trying to sort the wheat from the chaff – while an antitrust perspective makes it clear that approach has real costs that dwarf the likely benefits.

3. *Voluntary Self-Regulation* Consumer protection enforcers sometimes rely on self-regulation, encouraging firms to develop and enforce voluntary codes of conduct (e.g., by restricting product placements in films or television programs). Such approaches rely on the self-interest of firms instead of fighting against it. They are also quite flexible and can readily adapt to changing circumstances. From an antitrust perspective, self-regulation (particularly that undertaken with the encouragement of the state) can have several downsides. Such arrangements can be used to suppress rivalry and chill entry. Worse still, once service providers begin talking among themselves about one dimension of competition, the conversation is likely to lead to discussions about restraining price competition – all in the public interest, of course. Antitrust enforcers will accordingly counsel for limited use of self-regulation, including restrictions on scope and the sharing of information. To the extent self-regulation is still appropriate, antitrust enforcers will argue that such conduct should either be actively supervised, or not supervised at all, to ensure that there is no ambiguity about whether the conduct constitutes state action.

We do not suggest that the combination of competition and consumer protection functions necessarily results in a harmonious policy result. Social policy concerns can create strong tension within a competition policy authority when certain products – most notably, alcohol and tobacco – are at issue. Antitrust policy generally disfavors efforts by rivals to set output levels, fix prices, or to take concerted measures (e.g., collective agreements to curb advertising) that have the effect of restricting supply. Since the adoption of the Sherman Act in 1890, tobacco companies have spent considerable time defending themselves against government lawsuits or investigations that challenged concerted behavior by producers to restrict supply and raise prices.¹²⁶ Antitrust intervention that tends to reduce prices generally will have the effect of increasing consumption – a result that can contradict public policies that seek to discourage consumption. In recent decades, consumer protection officials sometimes have supported self-regulation measures by food producers to restrict the targeting children with the advertisement of food products with high fat or sugar content. These programs can raise significant competition concerns by supporting the position of incumbent producers and diminishing the ability of new entrants or fringe firms to expand their share of the market by advertising their products.

These initiatives are particularly difficult to oppose, because they are routinely sponsored by a coalition of “bootleggers and Baptists.”¹²⁷ The commercial interests at stake (“bootleggers”) provide the money and lobbying muscle, and capture the financial benefits, while well-meaning public-spirited organizations (“Baptists”) provide rhetorical cover. There is no easy way to reconcile these competing objectives, whether the involved agency is multi-purpose or single-purpose.

C. Other Benefits of Combining Antitrust and Consumer Protection

¹²⁶ See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (finding that cigarette producers had engaged in unlawful conspiracy to monopolize).

¹²⁷ Cite: Yandle

The combination of antitrust and consumer protection helps build political good will through portfolio diversification. As noted previously, the ability of a public agency to perform its responsibilities depends partly on its ability to build political capital and spend it wisely. Consumer protection generates a surplus of political capital, because its implementation often involves programs that address demonstrably harmful or distasteful behavior (e.g., serious fraud) and provide generate readily observable returns for consumers (e.g., halting manifestly offensive behavior, obtaining redress for consumers). By contrast, antitrust law often involves activities with less obvious consumer benefits (e.g., blocking a merger between two firms that produce inputs to commercial manufacturing) and can actually irritate important political constituencies (e.g., advocacy directed at state or local regulatory measures that needlessly suppress rivalry).

Packaging the two functions together permits the agency to cross-subsidize economically important but less popular measures with activities that yield political capital surpluses. One concrete example is the FTC's 2003 Do-Not-Call initiative, which generated broad public and political support for the Commission. Good will acquired as a result of that initiative may be spent on antitrust matters that do not have obvious appeal to the public and that may stimulate significant political opposition.

D. Summary

The combination of consumer protection and antitrust into a single agency can result in a deeper understanding of the nature of the underlying competition law problem, and better insight into the optimal regulatory response. Each substantive area complements the other, enhances the political capital of the agency, and allows enforcers to decrease or avoid the errors that would result if only one area was considered.

V. Costs and Risks of a Multi-Purpose Agency

The assignment of two or more substantive functions to a single institution can entail significant costs and risks. Below we highlight some of the difficulties experienced by the FTC throughout its history attributable to the combination of antitrust and consumer protection mandates within a single agency.

A. Destructive competition

We have mentioned earlier that multi-purpose agencies typically create single-purpose operating units to carry out specific duties. These units, in turn, tend to compete with each other for attention and resources, including outlays for personnel, office space, and control over infrastructure assets such as the information technology network. This phenomenon can be observed at the FTC and a number of other agencies that combine competition and consumer protection duties. Intramural competition for prestige and resources can cause agency officials to spend substantial effort refereeing disputes among rival divisions. These are resources that otherwise would be applied to serving program needs.

Intramural rivalry also can have other costs. If the rationale for combining functions is to realize synergies between discrete areas of responsibility, the rivalry for prestige and resources can create internal tensions that defeat the realization of synergies in practice. Where individual operating units strive to create separate identities, personnel within those units may establish strong loyalties to their own units and define success by the achievements of their units. Projects that entail cooperation across operating units may be seen by group as relatively unimportant or

simply contrary to each group's interests, even though greater collaboration across units would advance projects that serve the larger aims of the institution as a whole. Where its main operating units are assigned specific functions, a multi-purpose agency may find it difficult to mobilize resources across units.

B. Mismatch between responsibility and capacity

Multipurpose agencies seem to have an inherent tendency to “over-promise and under-deliver.” This phenomenon appears to have at least three important sources. The first cause consists of perceptions that develop within the multi-purpose agency, as staff start to believe that a broad grant of authority confers both the capacity and obligation to solve all problems that come to the agency's attention. Some agency officials may find the expansive grant of authority to be enervating and willingly grasp new opportunities to exercise it. Others may be more cautious but will feel obliged to apply a broad grant of power to new conditions, even if the behavior at issue seems at or beyond the boundary of the agency's statutes. In either case, the zone of what the agency and its leadership perceive to be appropriate forms of and occasions for intervention will tend to expand as Congress adds regulatory tools to its portfolio. This is especially true if the agency's mandates tend to be far-reaching and relatively open-ended. This arguably is the case of the FTC, whose foundational statute permits the agency to condemn “unfair or deceptive acts or practices” and to proscribe “unfair methods of competition.” Over time, agency staff have tended to read these statutes in increasingly expansive ways.

A second and closely related factor is that Congress, in the face of developments that could be linked, whether directly or indirectly to the agency's policy portfolio, will demand intervention by the agency. If there is a matter or pressing public policy concern (for example, an increase in petroleum prices, or a crisis in the financial services sector), the immediate reaction of individual legislators and committees will be to identify a public institution whose stated powers give it some apparent responsibility for the sector in question – and then blame it for not having prevented the problem. As an agency's regulatory portfolio increases, it is more likely to be seen as responsible for addressing an ever-wider array of commercial phenomena. Expansive grants of authority may also serve the electoral needs of individual legislators.¹²⁸ Once Congress has delegated an ambitious range of regulatory tasks to an agency, individual legislators or committees will predictably urge the regulatory agency to use its powers aggressively. Firms affected by the agency's activities will predictably complain to the Congress, especially to oversight committees whose members are recipients of contributions supplied by the regulated industry. Individual members or committees will predictably demand that the agency temper its intervention.

One can accomplish some of the same objectives by introducing a bill to regulate the industry, but using a middleman leaves fewer fingerprints. Such strategies need not be deployed very often; affected firms will make campaign contributions even if there is not a live controversy, to ensure they will have access to members when they need it -- meaning that service on an oversight committee is accompanied by an annuity from the affected firms.

A third element is that the agency seldom will receive the resources needed to fulfill all the regulatory commands assigned to it. Agency personnel will often respond to a demand to use their authority more aggressively by amping up effort to a level above the agency's capacity – for example, by weakening internal quality control measures, understaffing ambitious projects, or assigning difficult litigation or rulemaking tasks to relatively inexperienced personnel. Even

¹²⁸ Kovacic: Cite McChesney article on FTC rulemaking.

though senior personnel may recognize how much resource constraints limit agency capacity, they may still acquiesce in Congressional demands for the initiation of new projects, given the dynamics noted previously. In addition, a short term political appointee may regard the initiation of a new measure as a credit-claiming event and may see the risk that an improvidently conceived project may fail as a cost that will be borne by future agency leaders and will not be attributed fully, or at all, to the appointee who originated it. Without an effective feedback mechanism that forces the incumbent appointee to internalize such costs, it is easy to begin such projects, even when they outrun the agency's capacity.

These phenomena can be observed in the FTC's experience in the 1970s, a decade in which Congress dramatically enhanced the scope and power of the FTC's powers.¹²⁹ From 1970 through the middle of the decade, Congress urged the FTC to use its authority to address a broad range of competition and consumer protection issues. In a number of instances, powerful legislators suggested that the agency's willingness to dramatically expand its programs would determine its future survival. The FTC embraced this mandate and undertook an ambitious agenda of programs. From 1970 through 1979, the FTC initiated monopolization or attempted monopolization cases against the four leading producers of breakfast cereal, the eight largest refiners of petroleum products, the largest supplier of photocopiers, one of the country's leading agricultural cooperatives, a leading producer of industrial chemicals, a major pharmaceutical corporation, one of the country's largest producers of bread, and one of the two largest producers of instant coffee. The FTC also began a formative case that challenged advertising and marketing restrictions imposed on physicians by the American Medical Association and the distribution practices of the four leading bottlers of soft drinks. The agency also brought what could be called test cases that sought: to achieve the repudiation of a Supreme Court decision that had limited the application of the ban against resale price maintenance; to extinguish the trademark of a producer of a widely used consumer product; to establish new limits on the parallel, non-collusive adoption of certain pricing and marketing practices by competitors; and to establish a duty on the part of dominant firms not to discriminate in ways that affected competition between firms with which the dominant firm did not compete.

On still other occasions, top FTC officials indicated their willingness to challenge as an "unfair method of competition" the failure of firms to abide by collateral regulatory commands governing such matters as environmental protection, labor health and safety, and immigration, and to bring "no-fault" monopolization suits, based solely on the market share of the targeted firm.

The agency's consumer protection work during the 1970s was no less ambitious and perhaps more expansive. The FTC initiated over fifteen rulemaking proceedings. Some of these measures sought to modify doctrines with universal application in the economy, such as the holder in due course rule. Others attempted to impose requirements governing the provision of specific types of goods or services, including funerals, used cars, vocational schools, eyeglasses, dietary supplements, hearing aids, and advertising directed toward children.

The FTC's economic research program also pursued far-reaching objectives in the 1970s. The agency established a line-of-business reporting program that compelled a large number of enterprises to provide detailed information about their sales and profits in specific product groups. The Commission also undertook high profile studies involving specific sectors, including the business of insurance.

¹²⁹ Kovacic: add cite to Tulsa paper sections that document 1970s expansion of FTC powers.

This impressive list of projects quickly resulted in two distinct problems. The first is that the agency paid little attention to the fit between these ambitious measures and the FTC's capacity to execute them skillfully. FTC leadership blithely added multiple bet-your-agency initiatives to Commission's agenda without a demanding examination of who would do them, how long they would take to accomplish, and what they would cost. Top agency personnel were far more interested in what was possible in theory (and the credit-claiming associated with launching a series of new initiatives) rather than what the FTC could deliver in practice. With enough authority, and the FTC had plenty of it, all things seemed possible.

The problem, which FTC management never saw coming, was the political feedback generated by affected firms, and the departure from Congress of influential members who had encouraged the FTC to "swing for the fences." The Commission's competition, consumer protection, and economic research programs cut an astonishingly broad swath through American commerce. Not only did the Commission take on well-known giants of U.S. industry and, in many cases, threaten them with remedies such as divestiture and compulsory trademark licensing, it also attacked sectors that provided the backbone of small and medium-sized enterprise across the country. This dynamic set in motion powerful lobbying campaigns before Congress, resulting in a swift legislative backlash. Congress adopted important restrictions on the Commission's work in 1980 and threatened many others that were not enacted. On two occasions in 1980, Congress allowed the agency's authority to spend money to lapse, causing the agency to go through the embarrassing process of shutting down operations, albeit only for a day or so. In its selection of measures, the FTC was inattentive to the political risk associated with each new initiative and to the aggregate political significance of its sweeping portfolio of programs.

We do not suggest that it is impossible for a single-function agency to get in trouble by setting an agenda that outruns the agency's capacity to deliver good results or by generating a critical mass of political opposition that yields significant restrictions on future policymaking. Our claim is that agencies with more expansive authority and responsibility (exemplified in this case by the FTC) are more likely to make these mistakes than agencies with more limited jurisdiction. Without safeguards that force agency leadership to carefully match commitments to capabilities and to assess political risk, the multi-purpose agency may be less able to see clearly the costs of possible initiatives and less inclined to turn down opportunities to exercise its authority. When the political winds change, such conduct can place the very survival of the agency at risk.

C. Coordination and Integration Problems

With the creation of a multipurpose agency come challenges associated with coordinating operations across units and with attaining in practice the integration of operations needed to realize synergies across functions. The FTC has struggled with mixed success to synthesize its antitrust and consumer protection agendas. One obvious difficulty is devising the internal policymaking mechanisms to achieve the synthesis across the competition and consumer protection functions.

One means of ensuring synthesis is to establish integrated teams that address both competition and consumer protection issues. This may be possible early in an agency's lifecycle, but it is difficult to achieve after a long period of experience with functionally separate bureaus. The longer that bureaus are organized along functional lines, the more likely it is that they will develop distinct identities, specializations, social networks, and career pathways. Any proposal

to combine two such bureaus will be vigorously resisted, and agency personnel will deploy a dazzling array of creative strategies to cripple or kill what they will view as “the latest idiotic proposal from know-nothing agency leadership who will be gone in 18 months, and won’t have to deal with the consequences.” These factors greatly raise the cost of trying to combine previously distinct functions, at least in the absence of a crisis (whether real or perceived) that agency personnel will view as legitimating the initiative.

More concretely, if the FTC attempted to replicate the OFT’s experiment of greater organizational integration, tremendous upheaval would result. FTC leadership would have to spend an enormous amount of effort over several years to accomplish the reorganization, with no guarantee that the change will be durable once they move on. For an agency with a longer history of functional separation, the most effective tool to achieve synthesis at the operational levels is to circulate staff between the units – for example, by seconding members of one unit to long-term assignments within another unit. This approach can include the movement of managers from one unit to another. To be sure, such strategies create their own difficulties, but they are still an improvement on allowing each bureau to behave as if they are the only entity in the agency that counts.

At the FTC, the historical response to the question of coordination and policy integration has been to rely on individual Commissioners and their attorney advisors. Few commissioners have had sufficient training or expertise in both competition and consumer protection for this to work consistently.¹³⁰ Moreover, the Sunshine Act and the limits it imposes on when a quorum of commissioners can consult each other, even informally and spontaneously, make it harder to pool skills at the Commission level. Not surprisingly, this means that the extent of coordination has varied greatly depending on the identity of the Chairman and the extent to which the Chairman arrives at the job with extensive experience in both antitrust and consumer protection.

Of course, the synthesis function can also occur by exploiting units that have the capacity to serve as bridges – notably, the Office of the General Counsel, the Office of Policy Planning, and the Office of International Affairs. To serve the bridging function, these offices require the cooperation of operating groups within the Bureau of Competition and the Bureau of Consumer Protection. This cooperation may not always be forthcoming without a sustained commitment to coordination by agency leadership.

D. Diluted Identity

As the number of functions assigned to the agency grows, it may become more difficult for the institution to define its aims to its own staff and to external constituencies. This is particularly true if Congress adopts the habit of assigning unrelated functions (the policy garbage can approach, noted above) and treats the institution as a convenient, not-elsewhere-classified repository for new legislative ideas. The assignment of more functions might be seen as an affirmation of the agency – a reflection of legislative confidence that the agency operates effectively in solving difficult problems and will take on new challenges successfully. The assignment of new responsibilities sometimes is accompanied by a larger budget, and the agency might be willing to accept new duties in return for greater resources.

But, the addition of new and unrelated functions poses several distinct hazards to the agency’s well-being. As the policy portfolio becomes broader and more diverse, the agency may

¹³⁰ There are important exceptions. Before their appointments to chair the FTC, Robert Pitofsky and Timothy Muris accumulated extensive familiarity with the agency’s competition and consumer protection functions by means of their research and teaching as law school academics and in previous periods of service at the Commission.

lose its ability to maintain the clear identity (i.e., the “brand”) that permits it to define and formulate a coherent mission. When line employees cannot reasonably predict the agencies’ “take” on any given issue, management will find it much more difficult to motivate and empower agency personnel, let alone ensure consistent decision-making.

A further complication is that it becomes more difficult to set goals and to establish a strategy for achieving them when the brand is confused or diffuse. The agency may feel a need to sustain all of its programs rather than allocating resources on the basis of an assessment of where its efforts can have the greatest positive social impact. The agency may suffer from decision-making paralysis that afflicts many institutions with diversified operations – for example, a multi-division, multi-product company or a university with numerous departments. Rather than concentrate its efforts on areas with the greatest “bang for the buck” an agency without a clear brand is likely to distribute its resources proportionally across all of its operations, with the most decisive factor being “what did you spend last year.” In like fashion, the agency becomes more likely to define its worth simply by levels of activity (i.e., “we’ve been very busy”) rather than by demonstrated improvements in specific areas of public policy.

An inability to define a coherent brand can endanger a multi-purpose agency, which may come to resemble a conglomerate firm whose pieces were assembled simply out of top management’s desire to maximize the size of the firm’s operations and sales. At some point investors (legislators) may begin to question the logic of amassing the enterprise in the first place and may demand a realignment that involves selling or spinning off assets/stripping the agency of some or all of its jurisdiction. An agency that cannot explain the relationship among its functions may become an attractive target for a reorganization that moves specific responsibilities to other agencies.

For the FTC, this is no idle concern. The imperative for the FTC to achieve coherence across diversified policymaking functions derives from the existence of other institutions with parallel or overlapping duties to which the FTC’s responsibilities could be distributed if the wisdom of the agency’s combination of functions were seriously doubted. As we discuss below, the proposal to create a consumer protection agency for financial services represents such a challenge.

VI. Maximizing the Upside

As Part III implies, attention to the theory of agency design can help increase the benefits (and decrease the costs) associated with assigning multiple functions to a single agency. The first task in designing a multi-purpose agency is to ensure that the assigned functions are complementary and consistent, in that they have common intellectual roots and serve mutually reinforcing purposes. For a competition agency, the combination of antitrust and consumer protection clearly meets these requirements. Other combinations are possible and worthy of consideration – but for any proposed combination, the most important screens are whether the functions are complementary and consistent.

It is also important to ensure adequate funding. Legislators often seem to think that an established institution can take on dramatically increased responsibilities without much in the way of new funding or headcount. Underfunding will inevitably lead the agency to either spread itself too thinly across its areas of responsibility or to devote a minimum of attention to some duties. Neither approach is optimal, if the goal is efficient enforcement of the law.

Once the agency is created, it should invest in an ex-post evaluation program. Most government agencies do not do enough to test the validity of their strategies, assuming that each

and every decision was optimal. Worse still, external constituencies often focus most of their attention on the launch of new cases and programs – paying much less attention to whether those cases/programs were successful – let alone whether they were the highest and best use of agency personnel’s scarce time and resources. A well-designed ex post evaluation system will yield insights about the validity of the agency’s decision-making process, including its decisions to intervene and its skill in selecting remedies.

It is also important for an agency to invest in an R&D program that allows the agency to prepare for the next generation of controversies, and allocate its resources accordingly. Commercial enterprises routinely invest in R&D and market intelligence; to do otherwise is a death sentence. Yet, public agencies often follow a more reactive mode, with predictable consequences on their ability to anticipate and handle new challenges. For a competition agency, some useful subjects for further research are the role of intermediaries in assimilating complex bodies of information and assisting consumers; factors that bear upon the capacity of consumers to absorb and use information; consumer preferences regarding their willingness to trade off privacy against other things; and the effect of various disclosure strategies on consumer behavior. Policy R&D helps ensure that the agency is not just picking the low-hanging fruit, but planting trees from which such fruit may be harvested in the future.¹³¹

A final element is benchmarking against other institutions, especially those with a similar combination of functions. For example, the FTC should regularly benchmark itself against comparable foreign competition agencies. Comparative study can be a useful way of evaluating program outcomes and seeing how variations in institutional design affect decision-making and error costs. Although the combination of economists and lawyers did not work for the FTC in 1950, it may work for the OFT in 2009 – in which case it might well make sense for the FTC to revisit the issue – although as we noted previously, we believe the transition costs associated with such a combination are likely to be exceedingly high. More broadly, issues of internal organization warrant further attention, including the comparative value of structuring bureaus by sectoral expertise (e.g., retailing) v. functional activity (e.g., services). Similarly, the proper design and operation of bridging/coordinating bureaus within a multi-purpose agency deserves closer attention.

Measured against these criteria, the FTC does fairly well, but there is room for improvement. Its principal components (antitrust and consumer protection) are clearly complementary, even though there are certain aspects of its portfolio that have little or nothing to do with these core competencies. It has invested time and resources in R&D, although the degree of agency commitment has varied greatly over time, depending on the interests of the chairman. Like all agencies, FTC personnel believe that more resources would be better; we leave to others the determination of whether funding has been adequate, but we note that agency headcount and budget have not kept pace with agency responsibilities.

Historically, the FTC has fallen short in two areas: ex post evaluation and benchmarking. Although the FTC does more ex post evaluations than every other federal agency with the exception of the DOD, that is mostly a reflection of the low frequency of ex post evaluations in other parts of the federal government. Benchmarking has also been an infrequent event. The recent self-study by the FTC emphasizes the importance of both of these elements in continuously pursuing better (if not best) practices.¹³²

¹³¹ Seed corn metaphor.

¹³² William E. Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, available at <http://www.ftc.gov/speeches/other/040420comppolicyinst.pdf>.

VII. Implications for Administrative Law

As noted above, political scientists and public administration scholars have devoted considerable attention to the issue of agency design, but legal academics have not. On the other hand, legal academics have devoted an extraordinary degree of attention to administrative law – while political scientists and public administration scholars have done much less in this area.

What are the implications of agency design for administrative law? The most obvious issue where agency design might matter to administrative law is the recurrent problem of the degree of deference that should be accorded to agency interpretations of a statute that the agency administers. We do not propose to review the massive literature on the Chevron doctrine and its progeny, and how many steps there are (or should be) in the analysis; instead, we simply ask whether the degree of deference should in some cases be affected by the extent to which the involved agency is multi-purpose v. single purpose.

To date, it does not appear that courts have considered this issue. However, the way in which courts have resolved the question of deference in a variety of cases suggests that the degree of deference should, in fact, vary based on the design details of the agency in question. Although courts have not considered this issue to date, the way in which they have decided cases on the periphery of this issue suggest that there is room for this idea in the doctrine of deference. For example, courts have generally refused to accord deference to an agency determination when the agency shares enforcement authority with other agencies, unless the determination was jointly issued.¹³³ Similarly, courts have refused to grant deference to an agency's interpretations made during an adjudicative proceeding unless the agency also has a policy-making role and is not simply an adjudicator.¹³⁴ Finally, courts have divided over whether they should defer to an agency's determination of its own jurisdiction.¹³⁵

Why should agency design matter in assessing the proper degree of deference? Answering that question requires an examination of the logic of the claim for deference in the first instance. To oversimplify greatly, the logic of deference is driven by claims of expertise and democratic legitimacy. Depending on the particular combination of functions, an n-purpose agency might well not be an “expert,” and awarding deference to its determinations could actually frustrate democratic legitimacy, instead of promote it. We are not the first to note this problem, but we believe our analysis of the theory and dynamics of agency design help deepen understanding of this long-standing “gap” in the doctrine of deference.

[More to come]

VIII. Implications for Governmental Reorganization, with particular application to the proposal to create a Consumer Financial Protection Agency

What are the implications of our analysis for governmental reorganization? As noted previously, across multiple decades and Administrations, the one constant has been attempts to reorganize various parts of the federal government, in response to the perception that all is not well with the status quo. As the Volcker Commission on public service cuttingly noted:

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¹³⁵ Individual Reference Services Group v. FTC, 145 F.Supp. 2d 6 (2001).

The federal government is a flotilla of many distinct organizational units. Virtually every year new vessels are added to respond to the demands of the time. Occasionally, in response to a broadly perceived national emergency, the vessels are regrouped. . . Virtually never are they combined to eliminate program duplication. Missions are not realigned or even rationalized. Program laps upon program. Responsibilities are not coordinated. . . Those who enter public service often find themselves at sea in an archipelago of agencies and departments that have grown without logical structure, deterring intelligent policymaking. The organization and operations of the federal government are a mixture of the outdated, the outmoded and the outworn.¹³⁶

We agree that there is considerable room for improvement, and we expect that proposals to reorganize the government will remain a prominent feature of the policy agenda for the foreseeable future. Although reorganization may be undertaken out of the purest of motives (i.e., the disinterested desire to improve the quality of policy-making, and enhance the delivery of services to all constituents), we are not so naive as to believe that is the only reason why Presidents propose reorganization – nor do we believe that Congress routinely opposes reorganization because it is in favor of inefficiency. Instead, as political scientists and public administration scholars have documented at length, reorganization proposals are merely the continuation of the political process that gives rise to governmental agencies in the first instance.

At the same time, the constituency for inefficiency is probably not a clear majority of the population, and the frequency with which reorganization is attempted suggests that there is a place for analytical clarity about which combinations of functions work better and which work worse. Although we have not offered a full-blown theory of optimal agency design, we believe the dozen factors we identify will provide a useful tool-kit for aspiring reformers about better and worse ways of reorganizing – as well as a cautionary blueprint about how hard it will be to actually rationalize the vast and sprawling operation that is the federal government.

To make our discussion of this point more concrete, we focus in this section on the Obama Administration’s proposal to reorganize regulatory oversight over the financial services sector. Such proposals are not new; over the past six decades there have been numerous proposals to “rationalize” the regulation of financial services, which with limited exceptions have gone absolutely nowhere.¹³⁷ To simplify matters, we focus our analysis on the proposed Consumer Financial Protection Agency (CFPA) in light of the considerations outlined in Part III.

[Description of CFPA and full analysis to come – our preliminary conclusions are the CFPA does extremely well on relatedness, consistency of purpose, transparency and credibility, less well but still acceptable on branding and adaptability, but poorly on capacity, “better decisions” (which admittedly incorporates a normative element), capture/vulnerability to backlash, tendency to become a garbage can agency, collateral damage to the regulatory ecosystem, and whether the agency will actually work (which again incorporates a normative element).]

IX. Conclusion

¹³⁶ National Commission on Public Service, *Urgent Business For America: Revitalizing the Federal Government for the 21st Century* (Jan. 2003), available at <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>

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Our analysis suggests that there are better and worse ways of designing an agency, at least if the goal is to have the agency efficiently enforce the law in the areas under its jurisdiction. To be sure, luck, history and culture all play a role – there are no guarantees in life or in agency design. That said, a competition agency that combines both antitrust and consumer protection has several predictable systematic advantages over two single-purpose agencies.

Administrative law scholars have generally ignored these issues – but attention to agency design undermines, at least in part, the theoretical underpinnings of the doctrine of judicial deference to agency decision-making. At a minimum, such considerations should be taken into account in evaluating the scope of deference that should be accorded to administrative determinations.

Finally, although the CFPA scores well on several of the factors that are associated with better agency performance, it does quite poorly on other factors. This pattern suggests that if the CFPA is created, it will face tough sledding pursuing the mission its supporters expect it to accomplish.