***Statement of Federal Trade Commission Chairman William E. Kovacic*[1]**

Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act

I. Introduction

To advance the analysis of dominant firm conduct, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) in 2006 undertook an ambitious program of public consultations.[2] When these proceedings began, I hoped that if the agencies were to publish something based on the deliberations, they would prepare one document that reflected their common views. That did not come to pass. Today the DOJ has issued its policy prescriptions based on the proceedings and related research.[3]

Robust public debate – even between the two federal antitrust agencies – can serve the valuable end of pressing the U.S. antitrust system toward the acceptance of better practices. If one fears one's ideas cannot survive an open intellectual contest, it is time to get new ideas. I do not expect today's events to diminish the efforts of the DOJ and the FTC to cooperate in addressing key issues and in performing the valuable function of giving guidance about their views of doctrine and about their enforcement intentions.

I am most grateful to the DOJ and FTC staff attorneys, economists, and administrative professionals who organized the proceedings and worked heroically to prepare a draft report that both federal antitrust agencies might endorse. The DOJ Report acknowledges these contributions and graciously thanks the FTC team for their efforts. To

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[1] This statement draws extensively on themes developed at greater length in William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Behavior: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1.

[2] *See* Federal Trade Commission, News Release, *Federal Trade Commission/Department of Justice Hearings on Single-firm Conduct to Begin June 20* (June 6, 2006), available online at http://www.ftc.gov/opa/2006/06/section2.htm (describing start of FTC/DOJ proceedings).

[3] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008).

recognize the extraordinary, thoughtful participation of the FTC staff in this process, I thank Bill Cohen, Karen Grimm, Bill Adkinson, Chris Bryan, Karen Goldman, Andrew Heimert, Doug Hilleboe, Tom Klotz, Pat Schultheiss, and Jim Taronji. In a number of chapters, the DOJ Report absorbed much of the work of this outstanding group, although the specific assessments and interpretations in the DOJ document are the Department's alone. I hope the FTC finds ways to place the excellent work product of the Cohen team in the public domain for the benefit of public officials, practitioners, and researchers at home and abroad.

I had hoped that a DOJ/FTC report on the unilateral conduct deliberations would devote considerable effort to put modern developments in context – to examine how the U.S. antitrust system developed as it did, and to assess what that history means for the future of U.S. and global competition policy. Historical context can supply an extremely helpful foundation for a review of current doctrine and a statement of suggested enforcement approaches. Studying the history of enforcement of prohibitions against monopolization and attempted monopolization can identify formative influences in the evolution of the U.S. system and help assess how those influences bear upon the future development of law and policy toward dominant firms.

II. The Value of an Historical Perspective

One great FTC strength in the modern era has been to understand that insights from history can be valuable in setting legal rules and enforcement policy on a sound footing. In several ways, the historical view improves the interpretation of existing judicial doctrine and the formulation of prescriptions about enforcement policy.

A. Path of Doctrine and Policy Governing Dominant Firms: 1930s to Present

An examination of U.S. antitrust experience with dominant firms illuminates how greatly law and policy have changed over time. In particular, developments in U.S.

antitrust doctrine and enforcement policy since the 1970s have narrowed significantly the range of dominant firm conduct that is subject to condemnation. Before the change of direction in the past three decades, U.S. doctrine and enforcement policy toward dominant firms generally had been more intervention-minded than the competition policy systems of other jurisdictions before or since.[4] Judicial decisions adopted an expansive view of abuse. For a time in the 1940s, the Supreme Court seemed poised to dispense with the requirement of abusive conduct and endorse a no-fault theory of monopolization.[5] Although Section 2 cases in this period required some element of bad conduct, courts defined the concept of wrongful behavior so broadly that a wide range of conduct sufficed to create liability. Public enforcement policy toward dominant firms in this period also was far-reaching and at times featured ambitious efforts to restructure the affected industries through divestitures or the compulsory licensing of intellectual property.[6]

Due to doctrinal changes since the mid-1970s, dominant firms today have relatively broad freedom to choose pricing, product development, and marketing strategies as they please. Several aspects of modern Section 2 jurisprudence stand out. The first is the judiciary's almost exclusive focus on whether challenged behavior yields harmful economic effects or is likely to do so.[7] The definition of liability standards and the analysis of specific claims of unlawful exclusion overwhelmingly address efficiency effects. The relevant decisions do not consider how the defendant's conduct might have affected the

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[4] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 448-52 (2003) (hereinafter Enforcement Norms) (discussing federal government enforcement programs in late 1960s and in 1970s in United States).

[5] *See* Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 615-17 (2d. ed. 2008) (describing how cases suggested abandonment of the improper conduct requirement).

[6] *See, e.g.*, William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105, 1106-08, 1119-20 (1989) (discussing government cases against concentrated industries in late 1960s through early 1980s).

[7] Earlier this decade, commentators noted that U.S. competition policy was shifting from reliance on the categorization of conduct toward effects-based analytical techniques that emphasize the application of overarching concepts. *See* Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 38 (2002).

attainment of a more egalitarian economic environment or the pursuit of related objectives that animated competition policy at various times from the 1940s to the early 1970s.[8]

The second trait of this jurisprudence is wariness of rules that might discourage dominant firms from pursuing price-cutting, product development, or other strategies that generally serve to improve consumer welfare. This wariness reflects respect for the economic contributions of large firms and concern that overly restrictive rules will induce passivity.[9] Implicit in this view is confidence in the resilience of the U.S. economic system and the capacity of the dominant firm's rivals, suppliers, and customers to adopt effective counterstrategies to blunt exclusionary strategies. Judicial concerns about over-deterrence also appear to stem from perceptions that the existing system of private rights of action is unduly expansive. Fears about unduly expansive private enforcement are driving doctrine in an increasingly non-intervention minded direction that encumbers public agencies as well. In their efforts to correct what they believe to be overreaching by private litigants, courts are embracing liability standards that inevitably curb public enforcement bodies.

A third factor is concern for the limitations of antitrust courts and enforcement agencies to ensure that analytical approaches which are conceptually sound are applied sensibly in practice. Decisions such as *Trinko*, for example, focus directly on the relative capabilities of antitrust courts and sectoral regulators and view sectoral oversight more favorably than antitrust decisions did in the 1970s and early 1980s.[10]

Modern Supreme Court jurisprudence gives no reason to conclude that future doctrine will be less hospitable to dominant firms in the foreseeable future. A proper

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[8] *See* Terry Calvani & Craig Sibarium, *Antitrust Today: Maturity or Decline*, 35 Antitrust Bull. 123 (1990) (reviewing growing importance of efficiency and related economic goals in Supreme Court antitrust decisions since mid-1970s).

[9] *See Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2003) ("The cost of false positives counsels against an undue expansion of § 2 liability."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

[10] *Trinko*, 540 U.S. at 411-17.

appreciation for these trends ought to inspire caution before one embraces the proposition that U.S. antitrust doctrine and policy today expose dominant firms to significant, systematic risks attributable to over-inclusive liability rules.

B. Formative Intellectual Influences

To see the trend sketched above is to ask why it happened. A fuller historical perspective would explain why U.S. antitrust system has grown more tolerant of dominant firm behavior since the mid-1970s. A key reason for the course of U.S. doctrinal and policy evolution lies in the ideas that have narrowed the zone of intervention. The intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today is mainly a double helix[11] that intertwines two chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the modern Harvard School of Phillip Areeda, Donald Turner, and Steven Breyer.[12] The combination of Chicago School and Harvard School perspectives features shared prescriptions about the appropriate substantive theories for antitrust enforcement (Chicago's main contribution to the double helix) and cautions about the administrability of legal rules and the capacity of the institutions entrusted with implementing them (Harvard's main contribution to the double helix). The double helix of ideas does not preclude enforcement, but it has supported the acceptance of presumptions that elevate the hurdles that antitrust plaintiffs must clear to prevail in the courts.

Three presumptions embedded in the Chicago-Harvard double helix stand out in the treatment of dominant firms. First, both schools generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in forming antitrust rules.[13]

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[11] The image borrows from Francis Crick's and James Watson's discovery of the double helix structure of DNA. *See* James D. Watson, The Double Helix (Penguin Books 1999).

[12] By speaking of the modern Harvard School, I mean to distinguish the work of Areeda, Turner, and Breyer from the 1970s onward from the more intervention-minded scholarship that characterized the Harvard School from the 1940s through the 1960s.

[13] *See* I Phillip Areeda & Donald F. Turner, Antitrust Law, paras. 103-13 (1978); Robert H. Bork, The Antitrust Paradox 69-89 (1978).

Chicago School and Harvard School scholars do not define efficiency identically, but the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete.[14]

The second presumption endorses the elements of economic theory that favor giving individual firms broad freedom to select product development, pricing, and distribution strategies. Among other policy implications, this presumption generally disfavors intervention to control dominant firms.[15] Here Chicago School and Harvard School commentators tend to share the view that the social costs of enforcing antitrust rules against dominant firms too aggressively exceed the costs of enforcing them too weakly.[16]

The third presumption demands that courts and enforcement agencies pay close attention to considerations of institutional design and capacity in formulating and applying antitrust rules. The insistence that competition policy take account of the limitations of the institutional arrangements of the U.S. antitrust system is perhaps the Harvard School's main contribution to the double helix. Areeda and Turner urged courts and agencies to account for institutional factors and taught the precept that antitrust rules should not outrun the capabilities of implementing institutions.[17] These scholars argued that antitrust rules and decision-making tasks must be administrable for the central participants in the antitrust system (courts, enforcement agencies, the private bar, and business managers).[18] They also recommended that special substantive and procedural screens be used to ensure that private

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[14] For example, Areeda and Turner said "As a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor." 4 Phillip Areeda & Donald F. Turner, Antitrust Law 21 (1980).

[15] Bork, Antitrust Paradox, 163-97; Phillip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 704-12 (1975).

[16] *See* Walter Adams & James W. Brock, *Areeda/Turner on Antitrust: A Hobson's Choice*, 41 Antitrust Bull. 735, 741-42 (1996) (noting similarity of views of Easterbrook, Areeda, and Turner of relative dangers of over-inclusive and under-inclusive enforcement of restrictions on dominant firm behavior).

[17] *See* I Areeda & Turner, Antitrust Law, at 31-33 (discussing institutional limitations of courts and enforcement agencies).

[18] *See* 3 Phillip Areeda & Donald F. Turner, Antitrust Law 150-53 (1978) (discussing flaws in previous judicial efforts to define illegal predatory pricing).

antitrust suits were consistent with larger social aims. An acute wariness of U.S. private rights of action (including mandatory trebling of damages, asymmetric fee-shifting, and jury trials) is a major theme of Areeda's and Turner's writing. Their concern for overly expansive private enforcement guided their proposals concerning substantive antitrust standards and procedural screens relating to standing and injury.[19]

III. The Chicago-Harvard Double Helix and Future U.S. Policy

The modern Harvard School has had as much to do as the Chicago School with creating many of the widely-observed presumptions and precautions that disfavor intervention by U.S. courts and enforcement agencies. Having a clear view of the framework of formative ideas helps us we understand how these ideas can be extended or limited, stretched or collapsed. The Chicago-Harvard double helix sheds insights on two specific issues with substantial practical significance for competition policy.

The first issue is why the adjustments in U.S. doctrine and policy from 1960 to the present were so extensive and have been so enduring. Recognition of the Chicago-Harvard double helix provides an important explanation. The reorientation of U.S. competition law and policy since 1960 derived its strength from two complementary streams of thought and would have been considerably weaker if only one school had set the intellectual agenda. The reorientation would not have endured without the support of the two schools.

The second issue is to identify the content of the modern presumptions that disfavor intervention. The Chicago-Harvard double helix embodies a strong concern for over-inclusive, rather than under-inclusive, applications of competition law. This perspective assumes that the likelihood that entry and adaptability by competitors, customers, and suppliers more often than not will blunt dominant firm efforts to exercise market power.

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[19] *See, e.g.*, Areeda & Turner, *Predatory Pricing*, at 699 (in framing rules for predatory pricing, it is necessary to use "extreme care … lest the threat of litigation, particularly by private parties, materially deters legitimate, competitive pricing").

The perspective also makes important judgments based on institutional considerations and pays close attention to how institutional design affects substantive outcomes. This emerges most clearly in the Chicago/Harvard concern for the administrability of standards, the limitations of enforcement agencies and courts and the corresponding need to account for their limitations and strengths in formulating legal rules and enforcement policies, and the treatment of private rights of action and the mandatory trebling of damages.

The last consideration mentioned above may be the most important for public agencies. If, as I believe, judicial perceptions of overreaching by private suits are narrowing the zone of substantive liability, public agencies eventually may be unable to do their job. This consideration points to the need for a deeper empirical examination of how the operation of private rights actually affects business decision making and how public agencies can prosecute cases without carrying burdens that courts have imposed on private litigants to cure perceived deficiencies in the system of private rights.

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