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CONSUME OR INVEST: WHAT DO/SHOULD AGENCY LEADERS MAXIMIZE?

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

Abstract: In the regulatory state, agency leaders face a fundamental choice: should they "consume," or should they "invest"? "Consume" means launching high profile cases and rulemaking projects. "Invest" means developing and nurturing the necessary infrastructure for the agency to handle whatever the future may bring. The former brings headlines, while the latter will be completely ignored. Unsurprisingly, consumption is routinely prioritized, and investment is deferred, downgraded, or overlooked entirely. This Article outlines the incentives for agency leadership to behave in this way and explores the resulting agency costs (pun intended). The U.S. Federal Trade Commission's health care portfolio provides a useful case study of how one agency managed and minimized these costs. Our Article concludes with several proposals that should help encourage agency leadership to strike a better balance between consumption and investment.

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INTRODUCTION

"[P]art of public service is planting trees under whose shade you'll never sit . . . ."[1]

In the management cliché hall of fame, the all-time winner is pick the "low hanging fruit."[2] Of course, obtaining high-value results with a minimum of effort is excellent advice, at least as a starting point. But, as a general principle, the message is extremely short sighted. Unless leaders plant trees, there will be neither shade nor fruit for future generations to enjoy.

The conflict between picking and planting—between consuming and investing—is a policy perennial. Good leaders know that any success they may achieve depends on the investment decisions made by their predecessors. In like fashion, good leaders also know that many of the benefits of any investment they make will be captured by their successors.

Agency leaders are not angels.[3] They are human beings, who desire personal recognition and advancement. Investment in institutional capability and capacity does not result in newspaper headlines, popular acclaim, or the offer of a high-paying private sector job. Instead, it is the announcement of a "big" case or rulemaking that casts agency leadership in a positive light.

If there is no turnover in agency leadership this dynamic would not

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1. *Hillary Clinton Transcript, Building the 'Growth and Fairness Economy*,' WALL ST. J. (July 13, 2015, 12:46 PM), http://blogs.wsj.com/washwire/2015/07/13/hillary-clinton-transcript-building-the-growth-and-fairness-economy/ [https://perma.cc/946P-R7LL].

2. Lucy Kinder, *Office Jargon: The Worst Culprits in Management Speak*, TELEGRAPH (Oct. 21, 2013, 3:08 PM), http://www.telegraph.co.uk/finance/jobs/10393668/Office-jargon-The-worst-culprits-in-management-speak.html [https://perma.cc/EUE2-PRLL].

3. *See* THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin F. Wright ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

create a major problem: "[w]hen agency leadership does not change, the leaders capture the benefits (and bear[] the costs) of the outcomes in the cases that they initiate."[4] But agency leadership is never indefinite. Indeed, in most of the administrative state, political appointees come and go quite frequently.[5] A timely departure makes it possible for agency leaders to "'outrun their mistakes,' so that when blame-time arrives, the burden will fall on someone else."[6] In practice, this means that agency leaders have a significant incentive to launch big cases or rulemaking without being overly concerned about the agency's capability and capacity to deliver the goods.[7] Stated more concretely, agency leaders will predictably and systematically slight investment and prioritize consumption. I.B.G.-Y.B.G. ("I'll be gone, you'll be gone") does not apply only to Wall Street.[8]

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4. David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948, 1973 n.151 (2015).

5. PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 316–17 (2014) ("A study of presidential appointees . . . found an overall median tenure of only 2.5 years; one quarter of them served more than 3.6 years while another quarter served for less than eighteen months.").

6. Hyman & Kovacic, *supra* note 4, at 1973 n.151 (quoting ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 90 (1988)). King and Crewe study the behavior of cabinet ministers and other senior officials in the United Kingdom, and reach the same conclusion:

> The sheer passage of time may also result in non-accountability. By the time the Thatcher government's exciting new personal pensions had been mis-sold on a vast scale, the relevant ministers and probably most of their senior officials had long since passed on. It would have been almost impossible to hold any of them to account . . . . [T]he relationship in British politics between, on the one hand, long-term success and failure and, on the other, personal triumph and disgrace is all but non-existent. Most blunderers, however gross their blunders, go unpunished.

ANTHONY KING & IVOR CREWE, THE BLUNDERS OF OUR GOVERNMENTS 354, 359 (2014).

7. Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 166 (2005) ("An agency head garners great attention by beginning 'bold' initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors.").

8. Eric Dash, *What's Really Wrong with Wall Street Pay*, N.Y. TIMES: ECONOMIX (Sept. 18, 2009, 2:31 PM), http://economix.blogs.nytimes.com/2009/09/18/whats-really-wrong-with-wall-street-pay/?_r=0 [https://perma.cc/3YSF-5H6H] ("A major cause of the current crisis will most likely prove to be a mismatch of incentives for Wall Street traders. If a mortgage trader made a big bet, he had the chance to land a big bonus if it paid off (and his boss did, too). If, however, that bet didn't pan out — and the trader lost a lot of money for the firm — he might receive no bonus at all. On the contrary, he might get a princely severance package. But one thing seems pretty clear: That trader would not receive a 'negative bonus.' In other words, he did not personally incur the cost of the trading blowup. Indeed, the open secret on Wall Street was that traders did not risk losing their own money — just the chance of receiving an enormous payout. Economists call this a moral hazard problem. In bankerspeak, it's known as the 'I.B.G.-Y.B.G.' issue — as in 'I'll Be Gone and

Building on our previous work,[9] we show the importance of balancing consumption against investment. We focus on the policy mismatches that arise when short-term political appointees lead governmental agencies with long-term policy needs—but our analysis also applies to private and nonprofit firms. We also discuss measures that can serve to counteract inadequate attention to investment. The Federal Trade Commission's (FTC) health care program illustrates the importance and benefits of sustained investments in capability.

Part I describes how investments in agency capability provide the necessary foundation on which an agency builds successful cases, rules, and other policy initiatives. Part II examines the structural and political incentives that encourage agency leadership to systematically privilege consumption over investment. Part III provides a case study of the FTC's health care portfolio, where investments in policy research and development (R&D) have played a critical role in generating policy success. Part IV identifies a few modest strategies that might encourage the prioritization of investment by agency leaders. Part V addresses objections that might be raised against a rebalancing of consumption and investment.

I. THE NEED FOR INVESTMENT

In this Article, we focus on agencies similar to the FTC, but the framework we describe applies to many governmental agencies.

You'll Be Gone' if the trade goes south.").

The same dynamic has been noted in international development projects:

> When those who design development projects and get them approved by relevant authorities, move on, get promoted, and are not held accountable for results, is that not a case of you'll be gone and I'll be gone? If you are not going to be held accountable for implementation and results you don't have to worry about whether or not the project will produce results under real world conditions. You can cut and paste global best practice on a technical issue into projects to be implemented in vastly different environments. Job done. When implementation challenges inevitably arise and hold things up, well, that is somebody else's problem. For the design team it is a case of "I'll be gone and you'll be gone."

Sina Odugbemi, *I'll Be Gone and You'll Be Gone*, WORLD BANK: PEOPLE, SPACES, DELIBERATION (Sept. 23, 2009), http://blogs.worldbank.org/publicsphere/ill-be-gone-and-youll-be-gone [https://perma.cc/VT88-S9R2].

9. Hyman & Kovacic, *supra* note 4; David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163 (2013) [hereinafter Hyman & Kovacic, *Institutional Design*]; David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014) [hereinafter Hyman & Kovacic, *Agency Performance*]; William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527 (2012); David A. Hyman & William E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?* 33, 42, *in* COMPETITION LAW ON THE GLOBAL STAGE (Nicolas Charbit & Elisa Ramundo eds., 2014) [hereinafter Hyman & Kovacic, *Divide or Conquer*].

Regulatory agencies, like the FTC, have a wide variety of policy instruments at their disposal.[10] A regulatory agency can prosecute cases, promulgate rules, conduct studies, issue reports, convene public consultations, issue guidelines, and have agency personnel give speeches. To apply these tools effectively, the agency must do three things well: it must understand the behavior it observes; it must decide whether the behavior is sufficiently problematic to justify intervention; and it must then choose among the various alternative solutions. Competent performance of these three tasks requires substantial institutional capability and capacity—and expert performance requires substantially more than that.[11] Developing the necessary capability and capacity requires an agency to invest effectively in five distinct domains: hiring personnel, developing administrative infrastructure, building depth and currency of substantive knowledge, establishing internal decision-making procedures, and engaging effectively with other organizations and leaders.

The first investment domain is *hiring personnel.* The agency must find, hire, and retain skilled professionals and other personnel. And, once the personnel are hired, they must be organized into teams. For example, the FTC has separate Bureaus for Competition, Consumer Protection, and Economics. The Bureau of Competition and the Bureau of Consumer Protection are staffed by lawyers; the Bureau of Economics is staffed by economists.[12] As we have noted elsewhere, "[t]he

10. For a discussion of how effective policy making often requires a wide range of instruments, see *More than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005) [hereinafter *Muris/Pitofsky Conversation*]; Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Reflections on the Supreme Court's *North Carolina Dental* Decision and the FTC's Campaign to Rein in State Action Immunity 11 (Mar. 31, 2015), https://www.ftc.gov/system/files/documents/public_statements/634091/150403hertiagedental.pdf [https://perma.cc/GU29-58YV] ("[O]ur state action efforts, *like most of our contributions to the development of the antitrust laws*, depended on the broad use of all of our agency functions – including research, advocacy, administrative litigation, and federal court enforcement." (emphasis added)).

11. "Capacity" refers to the level of human talent and supporting resources needed to carry out the agency's assigned functions. "Capability" refers to whether the agency has the statutory authority, organizational structure, and quality control mechanisms needed to execute its mission effectively. The importance of these factors is examined in Hyman & Kovacic, *Agency Performance*, *supra* note 9; William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 J. ON TELECOMM. & HIGH TECH. 1, 7 (2010); *see also* KING & CREWE, *supra* note 6, at 382–84 (identifying "skills shortages" as an important cause of governmental failure).

12. *See* Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569 (2009) (describing the impact of relying on multidisciplinary teams of lawyers and economists versus having lawyers and economists organized into separate bureaus); Hyman & Kovacic, *Divide or Conquer*, *supra* note 9.

government is already thickly planted with bureaus, agencies, and inter-agency working groups, departments and commissions"—and each has its own internal organization designed to effectuate the statutory mission.[13]

Whatever organizational configuration is chosen, a successful operating unit will contain teams with strong analytical skills and deep expertise in the relevant subject matter.[14] Good teams prosper by reason of their intellectual acumen and intuition, honed by repeated study of specific problems. For example, the FTC economists and lawyers who review mergers in the pharmaceutical industry have analyzed dozens of transactions over the past few decades.[15] They have a sophisticated understanding of individual firms, drug research pipelines, and industry trends. The specific individuals staffing this area have changed over time, but the FTC pharmaceutical mergers team has sustained a good mix of experienced managers and case handlers and newer employees who learn from longstanding team members.

The second investment domain is *developing an administrative infrastructure (both personnel and physical facilities) to support substantive projects.* A major component of the FTC's consumer protection work consists of prosecuting fraudulent schemes involving health care products and services.[16] These and other antifraud initiatives benefitted immensely from investments the FTC made in the 1990s to build an electronic database (Consumer Sentinel) that collects and

13. Hyman & Kovacic, *Divide or Conquer*, *supra* note 9, at 28; *see also* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015).

14. *See* WILLIAM E. KOVACIC, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 46–49 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf [https:// perma.cc/T9SG-C9AB] (noting the importance of talented personnel to FTC performance).

15. MARKUS H. MEIER ET AL., FED. TRADE COMM'N, OVERVIEW OF FTC ANTITRUST ACTIONS IN PHARMACEUTICAL SERVICES AND PRODUCTS 26–64 (2013), https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/rxupdate.pdf [https://perma.cc/Y28J-VCE3] (discussing FTC pharmaceutical mergers program).

16. *See, e.g.*, Press Release, Fed. Trade Comm'n, All 50 States and D.C. Charge Four Cancer Charities with Bilking Over $187 Million from Consumers (May 19, 2015), http://www.ftc.gov/news-events/press-releases/2015/05/ftc-all-50-states-dc-charge-four-cancer-charities-bilking-over [https://perma.cc/D2RE-BPEU]; Press Release, Fed. Trade Comm'n, Company Touting Unproven Cancer Treatment Agrees to Settle FTC Charges (July 24, 2002), http://www.ftc.gov/news-events/press-releases/2002/07/company-touting-unproven-cancer-treatment-agrees-settle-ftc [https://perma.cc/4M3Y-KBHV]; Press Release, Fed. Trade Comm'n, No Silver Lining for Marketers of Bogus Supplement; Federal Agencies Crack Down on Health Fraud (June 19, 2003), http://ftc.gov/news-events/press-releases/2003/06/no-silver-lining-marketers-bogus-supplement-federal-agencies [https://perma.cc/7M5N-B3VJ].

analyzes complaints about alleged misconduct.[17] By amassing complaints received by the FTC and a variety of governmental and nongovernmental partners, Consumer Sentinel enables the FTC's consumer protection specialists to quickly identify fraudulent scams, and assemble the evidence necessary to initiate litigation.[18] Thus, the investment in Consumer Sentinel made it much easier for the FTC to detect and remedy serious fraud on a real-time basis.[19]

The FTC has made similar investments supporting its mobile telephony programs.[20] Communications technology is one of the most dynamic areas of commerce, and the FTC has to continuously invest to keep up. In response, the FTC has hired technologists with expertise in the relevant technical disciplines and established an internal "mobile laboratory" to detect fraud in the use of mobile telephones.[21]

The third investment domain is *building depth and currency of substantive knowledge*. As described above, one element of this knowledge base is the accumulated experience of agency personnel, who develop expertise in specific industries and commercial practices.[22] But,

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17. *See Muris/Pitofsky Conversation*, *supra* note 10, at 789–91 (discussing creation and operation of Consumer Sentinel).

18. *Consumer Sentinel Network*, FED. TRADE COMMISSION, http://www.ftc.gov/enforcement/consumer-sentinel-network [https://perma.cc/9HWU-BHKX] (last visited Jan. 31, 2016) (describing functions of Consumer Sentinel Network).

19. *See Muris/Pitofsky Conversation*, *supra* note 10, at 796–97 (describing the impact of Consumer Sentinel).

20. On the FTC's programs in this area, see FED. TRADE COMM'N, MOBILE PRIVACY DISCLOSURES: BUILDING TRUST THROUGH TRANSPARENCY (2013), https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf [https://perma.cc/MT6B-8T5N]; FED. TRADE COMM'N, PAPER, PLASTIC . . . OR MOBILE? AN FTC WORKSHOP ON MOBILE PAYMENTS (2013), https://www.ftc.gov/sites/default/files/documents/reports/paper-plastic-or-mobile-ftc-workshop-mobile-payments/p0124908_mobile_payments_workshop_report_02-28-13.pdf [https://perma.cc/UP9F-WTHN].

21. *See Division of Litigation Technology & Analysis*, FED. TRADE COMMISSION, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-litigation-technology [https://perma.cc/3BWR-322N] (last visited Jan. 31, 2016) (describing FTC's Mobile/Internet Lab); Joel Schectman, *Q&A David Vladeck, Former Director of FTC Consumer Unit*, WALL ST. J.: RISK & COMPLIANCE J. (Jan. 22, 2014, 3:39 PM), http://blogs.wsj.com/riskandcompliance/2014/01/22/qa-david-vladeck-former-director-of-ftc-consumer-unit/ [https://perma.cc/3W2G-RXSW] ("We did not have technologists on staff at the time and to do highly technical cases of the kind that we did during my [Vladeck's] tenure there, and doing still today, you need sophisticated forensic work. One of the things we did was bring in technologists to have on staff. We set up a laboratory to do forensic work on mobile devices. You need to have people who can view evidence captures on mobile devices and really understand the ecosystem behind the screen. I think we were the first civil law enforcement agency anywhere that had a fully functioning lab for mobile devices.").

22. *See supra* notes 12–14 and accompanying text.

an equally important source of an agency's knowledge base consists of investments that are the public policy equivalent of the research and development (R&D) expenditures that a private company makes to create new or improve existing products.[23] Such policy R&D[24] can take various forms, including empirical studies of individual sectors or commercial phenomena, research concerning the legal predicates for future cases, hearings, and public consultations; and retrospective assessments of completed agency initiatives.[25] These measures have a common purpose—to improve the agency's ability to identify areas of needed intervention, devise useful remedies, and give advice to legislators and other government agencies. The urgency to make these investments is especially great in sectors such as health care that feature high levels of technological and organizational dynamism.[26] Congress gave the FTC a diverse portfolio of policy R&D tools,[27] and the application of the complete portfolio has figured prominently in the

23. *See* Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902, 1905 (2015) (discussing role of "prospective study" to enhance FTC's capacity to understanding emerging industry trends and practices); KOVACIC, *supra* note 14, at 91–109 (describing FTC investments that increase the agency's knowledge base).

24. This phrase originated in Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359 (2003).

25. *See Muris/Pitofsky Conversation*, *supra* note 10, at 774–76 (discussing FTC policy R&D tools); Gavil, *supra* note 23, at 1908–09 (same); William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861 (2005) (same); KOVACIC, *supra* note 14, at 91–109 (same).

26. *See, e.g.*, William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097, 1102–03 (2012). Professor Andrew Gavil, who headed the FTC's Office of Policy Planning from 2013 to 2015, cautions that "[a]gencies can fall behind the times in a variety of ways. They can be caught unaware of new industry trends and practices that impact competition as well as new academic and economic learning and analytical methods." Gavil, *supra* note 23, at 1907. He explains that "periods of economic transformation" feature changes that "can take the form of entirely new industries, novel products or services, evolving industry structures and new industry practices, and innovative business models facilitated by new technologies." *Id.* at 1905. He concludes that "[p]rospective study will be needed to inform and thereby better prepare the [FTC] for both advocacy and law enforcement." *Id.*; *see also* Farhad Manjoo, *For the New Year, Let's Resolve to Improve Our Tech Literacy*, N.Y. TIMES (Dec. 23, 2015), http://www.nytimes.com/2015/12/24/technology/for-the-new-year-lets-resolve-to-improve-our-tech-literacy.html?_r=0 [https://perma.cc/4QEM-E764] (discussing need for public policy makers to improve ability to understand developments in fast-changing technology sectors).

27. The FTC is specifically authorized to collect information on industrial conditions and practices and to publish studies, independent of its law enforcement efforts. 15 U.S.C. §§ 46, 49 (2012). Their significance is discussed in William E. Kovacic, *The Federal Trade Commission as Convenor: Developing Regulatory Policy Norms Without Litigation or Rulemaking*, 13 COLO. TECH. L.J. 17, 19 (2015).

agency's health care programs.[28]

A fourth form of investment that fosters program success is the *development of internal procedures* that enable the agency to make intelligent decisions about how to deploy its limited resources. There are many ways that an agency can structure its internal decision-making process.[29] Good agency practice includes continuing efforts to improve these processes to test evidence rigorously and to counteract behavioral phenomena that might otherwise cause the agency to slight theories or facts that should dictate a reassessment of its views.[30]

Finally, an agency must "*play well with others*." In many fields of regulation, policymaking duties are shared by a multiplicity of public bodies within individual jurisdictions and across nations.[31] In a world of increasing policymaking multiplicity and fragmentation, the attainment of good regulatory solutions requires interagency and inter-jurisdictional engagement. Some forms of engagement take place through formal mechanisms such as memoranda of understanding between two or more agencies, or a network that brings together multiple agencies within a single jurisdiction or across jurisdictions.[32] Others can be highly informal, such as regular meetings of senior managers or case handlers from different agencies to discuss matters of common concern. These formal and informal means of coordination and cooperation do not happen without investment—although investment does not guarantee that other agencies will decide to make nice.[33]

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28. Gavil, *supra* note 23, at 1908–10 (describing diversified FTC policy making approach in health care); *see also* Ohlhausen, *supra* note 10, at 8–11 (same).

29. *See* William E. Kovacic et al., *Merger Control Procedures and Institutions: A Comparison of EU and U.S. Practice*, 59 ANTITRUST BULL. 55 (2014) (comparing European Union and United States merger control processes); *supra* note 12 and accompanying text.

30. James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REG. ECON. 41 (2012) (noting the impact of confirmation bias and other behavioral factors on regulators).

31. Hyman & Kovacic, *Agency Performance*, *supra* note 9, at 1480–81.

32. *See* Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274 (2011) (describing development of formal networks that bring together competition agency officials to discuss matters of common concern); *Muris/Pitofsky Conversation*, *supra* note 10, at 795 (describing FTC agreements with foreign governments to cooperate on consumer protection matters).

33. There have been periodic bitter disputes between the FTC and the Department of Justice (DOJ) over "clearance" (i.e., which agency should handle certain types of cases); the substantive content of a report on Section 2 of the Sherman Act; and the DOJ's recommendation against the granting of certiorari in *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), an early FTC reverse payment case. One of us (Kovacic) ruefully noted in an interview that despite considerable investment by the FTC, "[w]e have an archipelago of policy-makers, with very inadequate ferry service between the islands . . . . In too many instances, when you go to visit those

An agency that does all of these things increases the chances of attaining policy success. The requisite investments will seldom happen by accident. Rather, each generation of agency leadership must make a commitment to build institutional capability and capacity and continuously examine whether it is investing enough and in the right things. As we discuss more fully below, these investments are the foundation on which good outcomes depend.

II. THE SIRENS OF CONSUMPTION

If investment is so important, why do we think that agency leadership routinely defers, downgrades, or overlooks it?[34] The explanation is simple: the Sirens of consumption are hard to resist.[35] What agency leader can resist the temptation of being the one to announce an attention-grabbing intervention, such as the initiation of a case against a major industry player, or the launch of a new rulemaking project? The resulting press conference and favorable academic commentary provide ready-made opportunities for credit claiming. Professional reputations and post–public service employment opportunities will rise or fall depending on the volume of an agency's activity.[36] Simply stated, the initiation of cases and rulemaking projects are the readily observable events by which agency leadership is typically judged.[37]

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islands, the inhabitants come out with sticks and torches and try to chase you away." Jonathan B. Baker, *Turning on Itself*, NEW REPUBLIC (Sept. 14, 2008), https://newrepublic.com/article/63428/turning-itself [https://perma.cc/N4AS-ZMTB].

34. *See* Muris, *supra* note 7.

35. William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 922 (2009) ("The perceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the sirens of credit-claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed.").

36. Consumption increases post-public service employment opportunities in two ways. First, consumption enhances reputation directly by creating opportunities for credit-claiming. Second, those responsible for creating a regulatory labyrinth are ideally situated to guide affected firms through the maze—and will be handsomely compensated for doing so. In nautical terms, having created underwater obstacles at the entry to the harbor, the former regulator then acts as the pilot who can bring ships safely to shore. *See* Hyman & Kovacic, *supra* note 4 (discussing private sector demand for former regulators who played a role in creating regulatory mechanisms).

37. *See* KING & CREWE, *supra* note 6, at 333–45 (noting "hyperactivism" of ministers in U.K.); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 404–05, 408–10 (2003) (describing and criticizing tendency of commentators to use prosecution of cases as main measure of competition agency quality). Unsurprisingly, the preeminent annual ranking of competition agencies focuses chiefly on the prosecution of cases. *See 2015 Rating Enforcement—The Annual Ranking of the World's Leading Competition Authorities*, 18 GLOBAL COMPETITION REV., June 2015.

Worse still, the temporal disconnect between launches and (sometimes crash) landings means that agency leadership does not bear the full cost of bad outcomes—whether the bad outcome is because the case/rulemaking should never have been brought/initiated in the first place, or because the case/rulemaking was worth bringing/initiating, but failed because there was insufficient capability and capacity to successfully handle the matter in question. Indeed, agency leadership may not bear *any* of the costs if they are able to blame their successors for the (usually unspecified) mistakes that supposedly caused a bad outcome.[38]

Politics can also encourage excessive and unwise consumption. When the price of gasoline rose sharply in the early 1970s, Congress demanded that the FTC take action to protect independent refiners from alleged overreaching by large, vertically-integrated petroleum companies.[39] The FTC responded in 1973 by filing the *Exxon* "shared monopolization" case,[40] which sought the vertical disintegration of the eight largest petroleum refiners in the United States.[41] The sprawling case was unmanageable from the start, and FTC staff soon saw the matter as a professional chain gang where morale and careers went to die.[42] In 1981, after eight years of pretrial discovery, the Commission dismissed the case.[43] *Exxon* consumed massive resources and inflicted lasting harm on the FTC's reputation.[44]

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38. William E. Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 RES. L. & ECON. 173, 189 (1989) ("[A] short-term perspective may incline the manager to launch headline-grabbing initiatives with inadequate regard for the matter's underlying merits or the ultimate cost to the agency, in resources and reputation, in litigating the case. If the case goes badly, the manager responsible for the take-off rarely is held to account for the crash landing. He can hope the passage of time will dim memories of his involvement, he can blame intervening agents for their poor execution of his good idea, or he can shrug his shoulders and say he was making the best of the fundamentally bad situation that policymakers encounter in the nation's capital."); *see also* Muris, *supra* note 7.

39. William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 637–39 (1982).

40. *In re* Exxon Corp., [1973–1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 20,388 (Dkt. No. 8934, July 17, 1973), *complaint dismissed*, 98 F.T.C. 453 (1981).

41. *Id.* The run-up to the case and the political pressure that inspired it are examined in Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of* Standard Oil*: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843, 859–64 (2012).

42. Edward Cowan, *Attorneys Quit F.T.C. Oil Case*, N.Y. TIMES, June 26, 1978, at D1.

43. *In re* Exxon Corp., 98 F.T.C. 453, 453 (1981).

44. William E. Kovacic, Standard Oil Co v. United States *and Its Influence on the Conception of Competition Policy*, 2012 COMPETITION L.J. 89 (2012) (discussing FTC's prosecution of petroleum industry shared monopolization case and its long-term effects on the agency). Kovacic spent two

The same pattern recurred thirty years later, albeit with a different outcome. The price of gasoline spiked repeatedly between 2000 and 2008, and members of Congress used a variety of techniques to induce the FTC to take action.[45] In one instance, two members of the Senate imposed a "hold" on the nomination of Deborah Majoras to be the agency's chair.[46] The hold was released only after the FTC opened an investigation into Chevron's closure of a refinery in Bakersfield, California.[47]

Congress held multiple hearings, during which legislators berated agency leaders for allowing gasoline prices to rise. Perhaps the most striking of these legislative show-trials was the appearance of Chairman Majoras in May 2006 before the Senate Committee on Commerce, Science & Transportation to defend an FTC report on the impact of Hurricane Katrina and Hurricane Rita on petroleum product prices.[48] The report found no evidence of supplier collusion, and instead concluded that the observed price spikes were the inevitable result of national disasters that severely disrupted refining and transport operations.[49] Despite demagogic and frequently ad hominem interrogation, Majoras held firm.[50] She refused to commit the agency to use its antitrust law enforcement powers in a futile, expensive attempt to tame forces entirely beyond the agency's control.

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years working on the *Exxon* case and saw firsthand the corrosive effects of requiring staff to work on a matter that everyone involved knew was doomed.

45. This episode is recounted in Muris & Sayyed, *supra* note 41, at 903–07.

46. One of us (Kovacic) was the FTC's General Counsel at this time and observed the congressional moves to delay consideration of the Majoras nomination.

47. The opening and closing of the FTC inquiry are described in Press Release, Fed. Trade Comm'n, FTC Closes Its Investigation of Shell Oils Decision to Close Bakersfield, California, Refinery (May 25, 2005), https://www.ftc.gov/news-events/press-releases/2005/05/ftc-closes-its-investigation-shell-oils-decision-close [https://perma.cc/2UAC-9VPL].

48. Press Release, Fed. Trade Comm'n, FTC Releases Report on Its Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases (May 22, 2006), https://www.ftc.gov/news-events/press-releases/2006/05/ftc-releases-report-its-investigation-gasoline-price-manipulation [https://perma.cc/96XJ-QSGB]. The actual report may be downloaded at FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION INVESTIGATION OF GASOLINE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (2006), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf [https://perma.cc/YA6C-AS92].

49. FED. TRADE COMM'N, *supra* note 48, at vii–x.

50. *See generally Price Gouging: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. (2006), https://www.gpo.gov/fdsys/pkg/CHRG-109shrg71812/html/CHRG-109shrg71812.htm [https://perma.cc/NL59-AJUY] [hereinafter *Price Gouging Hearing*]. An earlier hearing in November 2005 involved similar behavior. *See Energy Prices* CSPAN, (Nov. 9, 2005), http://www.c-span.org/video/?189831-2/energy-prices [https://perma.cc/CW8S-V26E].

To be sure, the problem is not unique to gasoline. Elected officials routinely demand that regulators "do something" when the price of heating oil, natural gas, electricity, and other important consumer products rises dramatically. Rather than attribute a price increase to causes beyond the control of the product's suppliers, such as a sudden boost in input costs, elected officials typically insist that wrongful supplier behavior (e.g., collusion, fraud, price gouging) accounts for the unwanted event. In these circumstances, the regulator will face intense pressure to use its powers to address the problem. Intervention (in the form of an investigation or a case) is faster and easier than attempting to educate legislators and cabinet officials that the root cause of the market shock lies elsewhere—and the intervention may actually be counterproductive.[51] Indeed, the failure to intervene may be viewed by members of Congress as dereliction of duty.[52]

Caving in to the pressure to intervene will provide momentary relief to agency leadership, but at a significant long-term institutional cost. Filing the *Exxon* case got Congress off of the FTC's back, but it inflicted painful long-term harm. By the time the bill comes due, those who were responsible for the initial decision to intervene will be long gone—and they will find it easy to blame their successors if anyone bothers to ask.[53]

A third factor encouraging consumption is miscalculation of the likely difficulty, costs, and risks of the contemplated intervention. The decision to launch a case should rest upon a clear-headed understanding of how hard it will be to gather relevant evidence; to establish the legal

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51. Price-gouging legislation provides a particularly clear example. *See* Steven Mufson, *Congress Tells FTC to Define Price Gouging*, WASH. POST (May 6, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/05/AR2006050501626.html [https://perma.cc/LA8D-A5CW] ("'Many economists cringe when they hear politicians talk about price gouging,' said N. Gregory Mankiw, an economics professor at Harvard University and former chairman of President Bush's Council of Economic Advisers. 'To economists, the price system is central to how market economies allocate resources. Sometimes prices need to rise to balance supply and demand, even if that outcome is politically unpopular.'"); Michael A. Salinger, *Give Your Cabdriver a Fat Tip!*, WALL ST. J. (June 24, 2006, 12:01 AM), http://www.wsj.com/articles/SB115110485824489519 [https://perma.cc/C9ZY-F46B] ("If the public were to ask my advice on the wisdom of price gouging legislation, however, I would counsel against it. When disasters like Katrina and Rita occur, prices must go up. The difficulty is that without knowing the details of a disaster, it is impossible to specify in advance how much prices need to rise. As result, price-gouging legislation—particularly if penalties are severe and enforcement is aggressive—will pose two distinct risks. One is that prices will not rise to market-clearing levels and gas stations will run out of gasoline. As unpleasant as high-priced gasoline is, running out will be even worse. The other is that gas stations will shut down rather than risk an allegation of price gouging.").

52. *See Price Gouging Hearing*, *supra* note 50 (statement of Sen. Barbara Boxer) ("I'll tell you, we don't need an FTC like this.").

53. *See* Kovacic, *supra* note 38.

foundations of the case; to assemble the type and quality of personnel required for effective implementation; and to manage the risks to the agency of proceeding. Each of these should be evaluated within the context of the agency's overall portfolio of existing commitments. If an agency does not undertake this analysis, leadership will tend to initiate matters without a realistic view of what it will take to complete them successfully.

The *IBM* monopolization case[54] provides a striking example of the problem. The Department of Justice (DOJ) launched the case on the final day of Lyndon Johnson's presidency in January 1969.[55] Among other relief, the DOJ sought to break IBM into several computer companies.[56] It quickly became apparent that the case was in trouble.[57] The DOJ had vastly underestimated the doctrinal, evidentiary, and administrative difficulties of seeking to take apart what was, perhaps, the paramount exemplar of American technological progress in the post-World War II era.[58] Nor did the DOJ anticipate the scope and ferocity of defense that IBM and its external advisors would mount to oppose the government. IBM's ensemble of exceptional trial lawyers and expert economists overwhelmed a DOJ prosecution team afflicted with disorganization and rapid turnover in personnel.[59] In 1982, the DOJ abandoned the case,[60]

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54. United States v. IBM Corp., [1961–1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization).

55. By launching the case on the final day of the Johnson Administration, those responsible ensured that the successive Administrations (i.e., Nixon, Ford, Carter, and Reagan) would bear all of the costs of bringing the case to completion.

Similar examples are not hard to find. The Clinton Administration took almost four years to prepare privacy regulations pursuant to the Health Insurance Portability and Accountability Act (HIPAA). Standards for Privacy of Individually Identifiable Health Information, 45 Fed. Reg. 82,462 (2000), http://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/privacyrule/prdecember2000all8parts.pdf [https://perma.cc/Y8UT-VBVA]. These regulations were issued in the final month of the Clinton Administration (i.e., on December 28, 2000)—leaving the Bush (43) Administration to sort out the complexities, and take the political heat.

56. *See* FRANKLIN M. FISHER ET AL., FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND *U.S. v. IBM* 353–68 (1983) (reprinting DOJ's original complaint and amended complaint against IBM); *The Computer Industry: Hearing Before the Subcomm. on Antitrust and Monopoly*, 93d Cong. 5706–08 (1974) (reprinting the DOJ's preliminary memorandum on relief).

57. Donald Baker, who served as the DOJ's Assistant Attorney General for Antitrust from 1976 to 1977, wrote that "[b]y even the mid-1970s, it was clear that the [IBM] case was a relic." Donald I. Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898, 910 (1986).

58. The history of the *IBM* case and the DOJ's missteps in the formulation and litigation of the matter are recounted in John E. Lopatka, United States v. IBM*: A Monument to Arrogance*, 68 ANTITRUST L.J. 145 (2000). We also based the statements in this paragraph on interviews that Kovacic conducted with Edwin Zimmerman, a senior official at the DOJ at the time of the filing of the *IBM* case, and Frederic M. Scherer, who served as the DOJ's chief economic expert on the case.

59. IBM's successful defense against the DOJ case is reviewed in JAMES B. STEWART, THE

which had "spanned the terms of five Presidents, nine Attorney Generals, and seven Assistant Attorney Generals."[61] The trial consumed 700 calendar days, generated a transcript of over 104,000 pages, and featured 17,000 exhibits.[62] In Robert Bork's phrase, the *IBM* case was "the Antitrust Division's Vietnam."[63]

The *Exxon* and *IBM* examples make it clear that an agency's failure to think carefully in advance about its capability to deliver on a *single* major case can be devastating. What happens when agency leadership ignores these points and chases the Sirens of consumption on a larger scale? The FTC in the 1970s provides a clear case study of what can go wrong. As we noted in an earlier Article:

> It is one thing to launch a single bet-the-agency case and entirely another to launch a half-dozen of those cases and an equal number of significant rulemaking projects simultaneously—let alone staff each case and rulemaking project so as to maximize the likelihood of good outcomes across the entire portfolio.[64]

Despite the obvious risks, that is more or less what the FTC did in the 1970s. Consider a partial list of the agency's competition matters during this period:

- Shared monopolization cases involving the country's eight leading petroleum refiners (the *Exxon* case)[65] and the four leading producers of ready-to-eat breakfast cereals;[66]
- Cases alleging monopolization or attempted monopolization based on predatory pricing against leading producers in the bread, coffee, and reconstituted lemon juice sectors;[67]

PARTNERS 53–113 (1983). Among the stars of the IBM defense team was David Boies, a young partner at Cravath, Swaine & Moore. Years later, Boies headed the litigation trial team in the DOJ's successful prosecution in the late 1990s of Microsoft for illegal monopolization of the market for computer operating systems.

60. *In re* Int'l Bus. Machs. Corp., 687 F.2d 591, 604 (2d Cir. 1982) (ordering the issue of a writ of mandamus directing district court to dismiss complaint in accordance with stipulation of the parties).

61. Baker, *supra* note 57, at 899 n.13.

62. BNA, *Post-Mortem on IBM Case Provides Forum for Conflicting Perspectives*, 42 ANTITRUST & TRADE REG. REP. 310–11 (1982).

63. Baker, *supra* note 57, at 899 n.13 (quoting R. BORK, THE ANTITRUST PARADOX (1978)).

64. Hyman & Kovacic, *supra* note 4.

65. Exxon Corp., 98 F.T.C. 453, 456–59 (1981) (complaint alleging agreement to monopolize and maintenance of a noncompetitive market structure).

66. Kellogg Corp., 99 F.T.C. 8, 11–16 (1982) (complaint alleging maintenance of a highly concentrated, noncompetitive market structure and shared monopolization).

67. Gen. Foods Corp., 103 F.T.C. 204, 206–08 (1984) (complaint alleging attempted monopolization in production and sale of instant coffee); Int'l Tel. & Tel. Corp., 104 F.T.C. 280,

- A challenge to the nation's leading soft-drink bottlers' longstanding practice of using exclusive territories to distribute their products;[68]
- A case alleging attempted monopolization in the chemicals sector by means of strategic announcements of capacity expansion;[69]
- A case alleging monopolization and attempted monopolization against the world's leading producer of plain-paper photocopiers;[70]
- A case challenging illegal monopolization and attempted monopolization against one of the largest U.S. producers of citrus fruit;[71]
- A case attacking the American Medical Association for imposing restrictions on advertising and marketing in the medical profession;[72]
- A case designed to make it easier to challenge resale price maintenance;[73]
- Two cases challenging the parallel, noncollusive adoption of facilitating practices by rival producers;[74] and
- A case challenging alleged discrimination by the publisher of airline timetables in its presentation of flight information.[75]

The overextension of the FTC's 1970s antitrust program was matched by an even more astonishing agenda of consumer protection rulemaking

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284–85 (1984) (complaint alleging attempted monopolization in the bread sector); Borden, Inc., 92 F.T.C 669, 671–72 (1978) (complaint alleging monopolization and maintenance of a noncompetitive market structure in production and sale of reconstituted lemon juice), *enforcement granted*, 674 F.2d 498, 517 (6th Cir. 1982), *modified*, 102 F.T.C. 1147 (1983).

68. Coca-Cola Co., 91 F.T.C. 517 (1978), *remanded for dismissal*, 642 F.2d 1387, 1388 (D.C. Cir. 1981).

69. E.I. duPont de Nemours & Co., 96 F.T.C. 653, 654–55 (1980) (complaint alleging attempted monopolization).

70. Xerox Corp., 86 F.T.C. 364, 367–68 (1975) (complaint alleging monopolization, attempted monopolization, and maintenance of a highly concentrated market structure).

71. Sunkist Growers, Inc., 97 F.T.C. 443, 445–49 (1981) (complaint alleging monopolization, attempted monopolization, and maintenance of a noncompetitive market structure).

72. Am. Med. Ass'n, 94 F.T.C. 701 (1979), *aff'd in part, modified in part*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982).

73. Russell Stover Candies, Inc., 100 F.T.C. 1 (1982), *enforcement denied*, 718 F.2d 256 (8th Cir. 1983).

74. Ethyl Corp., 101 F.T.C. 425 (1983), *enforcement denied*, 729 F.2d 128 (2d Cir. 1984); Boise Cascade, 91 F.T.C. 1 (1978), *enforcement denied*, 637 F.2d 573 (9th Cir. 1980).

75. Reuben H. Donnelley Corp., 95 F.T.C. 1 (1976), *enforcement denied*, 630 F.2d 920 (2d Cir. 1980).

proceedings.[76] There were almost thirty major rulemaking projects in progress during this period, including "proposed rules that would have: imposed disclosures on over-the-counter medicines; required inspections, disclosures, and warranties on used cars; established definitions (like 'natural') for foods; regulated mobile home warranties; and banned certain credit practices."[77] And then-FTC Chairman Michael Pertschuk had announced that, going forward, rulemaking might be based on public policy grounds, including to "prohibit businesses from hiring illegal aliens, to prevent companies from cheating on taxes, and to require companies with repeated environmental violations to place an environmentalist on their boards."[78] Pertschuk subsequently acknowledged that he had presided over a rulemaking "frenzy."[79]

Even if one boldly assumes that each ambitious decision by the FTC to undertake each of these matters, when seen in isolation, made good substantive sense, the full collection completely overwhelmed the FTC's institutional capacity to deliver. To add new, difficult initiatives to an already-crowded agenda without accounting for implementation burdens was a breathtaking example of administrative malpractice.[80]

In fairness, the fault for overextension sometimes lies with legislators, who assign new duties to agencies without considering capability and capacity. These new responsibilities only rarely come with additional resources attached. As we have explained in other work, the agency then faces the choice of either ignoring selected responsibilities or spreading its resources thin in trying to do it all.[81] The first strategy is a form of regulatory disobedience, and the second is a formula for inevitable failures in delivery.

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76. On the FTC's consumer protection rulemaking agenda in the 1970s, see William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 951–54 (2005).

77. *Id.* at 952.

78. *Id.* at 952–54 (citing TIMOTHY J. MURIS & J. HOWARD BEALES, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 14 (1991)).

79. MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION 54 (1982).

80. Kovacic, *supra* note 35, at 923 ("One could understand a decision to bring one innovating and potentially pathbreaking shared monopolization case, but it was improvident to bring two. One could imagine a decision to bring one or two predatory pricing cases, but it overtaxed the agency's capacity to do three at once. To do four significant dominance cases at one time might have been manageable. To do eight was unwise. Incumbent leadership began new matters without asking difficult questions about how the agency would bring them to a successful end."); *see also* KOVACIC, *supra* note 14.

81. Hyman & Kovacic, *Agency Performance*, *supra* note 9. The Dodd-Frank Act placed the new Consumer Financial Protection Bureau in precisely this unenviable position. *Id.*; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

In reciting the dangers of overextension, we are not suggesting that agency leadership should forego consumption and devote all of its efforts to investment. Consumption, in the form of law enforcement and rulemaking, is essential to the work of a good regulatory agency. The willingness to litigate cases and the ability to pursue them to a successful end are vital to an agency's credibility, effectiveness, and legitimacy. Litigated cases set the boundaries of lawful behavior. A regulator that cannot credibly commit that it will challenge misconduct is quickly recognized to be a paper tiger.[82] Litigation also provides an indispensable means for obtaining remedies for the victims of misconduct. Rulemaking is similarly important as a means to correct problems that pervade entire economic sectors, or appear in multiple areas of commerce. Finally, establishing a reputation for courageously taking on hard problems can build internal morale and attract high quality talent.

Simply stated, a sensible scorecard for agency performance should consider not just whether cases or rulemaking are launched, but when and how they land.[83] The issue is not whether agency leadership aims at ambitious targets or succeeds in all of its endeavors. A healthy dose of ambition is a valuable spur to policy success.[84] We do not regard failure, in itself, as a sign of bad agency decision making.[85] There is a world of difference between accepting a calculated risk and taking a reckless gamble, by proceeding with a difficult project without a clear assessment, ex ante, of the risks and the institution's ability to address them.

The critical question is whether the agency has a disciplined process

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82. Of course, litigation does not require actually taking defendants to trial. As we noted in an earlier Article, "taking a case to trial and losing doesn't help the agency's brand—and successful agencies don't need to take their cases to trial to accomplish their regulatory objectives." Hyman & Kovacic, *Agency Performance*, *supra* note 9, at 1473 n.119.

83. In some instances, the scorecard does include outcomes. When the website for Obamacare (healthcare.gov) failed on launch, no amount of spinning could obscure the problem. The continuing inability of the Veterans Administration to address its waiting lists, other than by outright falsification of the data, provides another example of the phenomenon.

84. As we describe below in Part III, the FTC's health care program is unmistakably ambitious and difficult. Other FTC policy successes, such as the implementation of the agency's Do Not Call Rule for telemarketing, were similarly ambitious and required the agency to confront formidable obstacles involving legal doctrine, political opposition, and program implementation. *See* MacLeod et al., *supra* note 76 (describing design and promulgation of the Do Not Call Rule).

85. FTC Commissioner Ohlhausen has noted that "a leading competition agency like the FTC must have the courage to fail from time-to-time." Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, How to Measure Success: Agency Design and the FTC at 100, at 11 (Nov. 6, 2014), https://www.ftc.gov/system/files/documents/public_statements/597191/141106ftcat100fall forum.pdf [https://perma.cc/NT35-8FUP].

to assess, before the start of every new initiative, whether it has the "ability to match means to ends."[86] In particular, does the agency make investments that give it a reasonable prospect of success in carrying out ambitious programs? The challenge is to harness the personal ambition and zeal of agency leaders in the service of effective policy implementation.[87]

III. A CASE STUDY OF BALANCED INVESTMENT AND CONSUMPTION

The FTC's health care portfolio shows the benefits of a balanced approach to investment and consumption. Since the 1970s, the FTC has devoted considerable effort to health care, beginning with a major case challenging restrictions on advertising in the medical profession,[88] and then going on from there to bring cases involving every aspect of the health care delivery system.[89] In health care, the FTC has batted through its entire rotation of policy tools, including numerous cases, rulemaking, advisory opinions, hearings, and competition advocacy.[90] More than any other program, the health care program has paid the rent for the FTC's charter as a competition authority.

Consider just a few recent accomplishments. Over the past three years, the FTC has achieved victories in three Supreme Court cases involving health care. In *North Carolina State Board of Dental Examiners v. FTC*,[91] the Supreme Court held that absent active supervision, antitrust scrutiny of the actions of a state licensing board dominated by active market participants was proper.[92] In *FTC v. Phoebe*

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86. *See* KING & CREWE, *supra* note 6, at 419.

87. SCHUCK, *supra* note 5, at 129 ("What matters, or should matter, to the citizenry is the actual performance of officially administered programs on the ground, yet this performance may have little or nothing to do with how publicly spirited they are. Indeed, just as speed is a bad thing if one is going in the wrong direction, so officials' zeal may in some situations actually exacerbate program failure.").

88. Am. Med. Ass'n, 94 F.T.C. 701 (1979), *modified and enforced*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982).

89. John E. Kwoka, Jr., *The Federal Trade Commission and the Professions: A Quarter Century of Accomplishment and Some New Challenges*, 72 ANTITRUST L.J. 997 (2005).

90. *See* Jonathan Nuechterlein, Gen. Counsel, Fed. Trade Comm'n, Remarks at Administrative Law Review Annual Symposium 3–6 (Mar. 20, 2015) https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf [https://perma.cc/VE5B-FYU4] (describing FTC's reliance on the full portfolio of its policy tools in development of its modern health care program); Gavil, *supra* note 23, at 1908–09 (same); Ohlhausen, *supra* note 10, at 8–11 (same).

91. __ U.S. __, 135 S. Ct. 1101 (2015).

92. *See generally id.*

Putney Health System,[93] the Court said that state action immunity should be read narrowly, and reiterated the requirement that states must clearly articulate their purpose to suppress competition.[94] In *FTC v. Actavis*,[95] the Court said the rule of reason applies to "reverse payments" in the pharmaceutical sector, and rejected a more permissive "scope of the patent" test.[96]

All three victories were built on a foundation of decades of hard work.[97] These high-profile cases were part of a larger litigation program that has seen the FTC successfully challenge hospital mergers (after more than a decade of losses);[98] dramatically reduce abuse of the Hatch-Waxman Act;[99] attack horizontal restraints involving health care providers;[100] and oppose overreaching forms of occupational licensing and other restrictions on competition.[101] In addition to these litigation programs, the FTC has engaged in a large number of advocacy initiatives, encouraging other government entities to account for the competitive impact of statutes and regulations.[102]

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93. __ U.S. __, 133 S. Ct. 1003 (2013).

94. *See generally id.*

95. __ U.S. __, 133 S. Ct. 2223 (2013).

96. *Id.* at 2237–38.

97. Nuechterlein, *supra* note 90, at 1–2 ("I mention these victories not out of a misplaced sense of triumphalism, but because each of the three cases tells a compelling back story about what makes the FTC successful as a competition authority. Each of the three arose from a multi-decade FTC initiative focusing on a difficult and discrete area of competition policy. And each of those initiatives was built on a solid foundation of strong bipartisan support and close coordination among the FTC's litigators, economists, and policy analysts."); Ohlhausen, *supra* note 10, at 8–11 (describing how FTC policy research in early 2000s, including work of the FTC's State Action Task Force, set the foundation for litigation success in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. __, 135 S. Ct. 1101 (2015)).

98. Since 2000, the FTC's merger enforcement program in the hospital sector has achieved litigated victories in the courts of appeals in two cases—*St. Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd*., 778 F.3d 775 (9th Cir. 2015), and *ProMedica v. FTC*, 749 F.3d 559 (6th Cir. 2014)—and has resulted in the abandonment of proposed mergers in two others. In another case (*In re* Evanston Northwestern Healthcare Corp., 144 F.T.C. 375 (2007)) the FTC issued an opinion finding that a consummated merger had violated section 7 of the Clayton Act, though the remedy ultimately achieved in the case is generally regarded as a disappointment. These accomplishments are reviewed in Nuechterlein, *supra* note 90, at 6.

99. 15 U.S.C. §§ 12–27 (2012); 29 U.S.C. §§ 52–53 (2012); *see also Actavis*, 133 S. Ct. 2223.

100. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008).

101. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. 1101; S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006).

102. On the FTC's advocacy program, see James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005); Andrew I. Gavil & Tara Isa Koslov, *A Flexible Health Care Workforce Requires a Flexible Regulatory Environment: Promoting Health Care Competition Through Regulatory Reform*, 91 WASH. L. REV. 147 (2016); Maureen K. Ohlhausen, *100 Is the New 30: Recommendations for the FTC's Next 100 Years*, 21

These successes were not an accident, or the result of dumb luck. Instead, the FTC (a) identified health care as a major priority; (b) invested substantial resources to build capability and capacity in the area; and (c) conducted periodic ex post evaluations to identify areas of useful refinement.[103] We briefly address each of these steps below.

A. Setting Goals and Designing a Strategy to Achieve Them

Before the 1970s, the FTC was a reactive agency, responding to complaints from consumers and legislators. During this period, health care was not a major priority for the agency. Health care became a priority because the FTC decided to engage in strategic planning. The strategic planning process was driven by the FTC's desire to identify areas of the economy where it could make a useful and distinctive contribution, thereby delivering major benefits to consumers. Strategic planning made it clear that health care was a "target-rich" environment for the FTC.

Why did the FTC decide to engage in strategic planning, rather than allow its workload and priorities to be driven by the inbox of consumer complaints? The FTC adopted strategic planning because of external pressure and internal changes. External commentators and legislators demanded the FTC do a better job in setting priorities, including focusing on difficult and unsettled areas of competition law where the FTC's unique array of policy-making instruments could make a difference.[104] Legislators in the early 1970s also identified the rising cost of medical services as a worthy subject for the FTC's attention.[105] These demands established the framework within which the FTC shaped its competition-policy agenda.

The internal changes were less visible, but equally significant. During the 1970s, the Commission recruited talented managers and supporting personnel to spot potential high-value applications of the agency's competition powers. Internal analysis and research made it clear that a greater dedication of resources to health care would significantly

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GEO. MASON L. REV. 1131, 1134 (2014) (calling FTC's competition advocacy role a "tool of great importance").

103. Nuechterlein, *supra* note 90, at 7 (in targeting health care, "the Commission identified a competition policy problem, closely analyzed it over many years with all the investigatory tools at its disposal, and brought a series of enforcement actions to protect consumers from anticompetitive practices").

104. *See* Hyman & Kovacic, *supra* note 4 (discussing criticism of the FTC by the American Bar Association's Commission to Study the FTC, and by Congress).

105. Kovacic, *supra* note 39, at 639–40.

improve consumer welfare.[106] The combination of these elements caused agency leadership to prioritize health care.

B. Capability and Capacity Enhancements

Health care promised to be a difficult and risky area of endeavor for the FTC. The FTC was taking on a powerful industry, and intervening in a sector of the economy where the use of competition policy was extremely controversial.[107] Although the FTC went "looking for trouble," it did so in a way that gave it a fighting chance to succeed. More specifically, the FTC invested heavily in health policy R&D.[108] These efforts included influential studies of the impact of advertising restrictions on health care products and services;[109] a major study of the impact of entry by generic producers on the pricing of pharmaceutical products;[110] and a retrospective examination of the impact of hospital mergers.[111] These research projects set the foundation for the FTC's enforcement efforts, including the hospital merger litigation program of the past decade.[112]

The FTC also used hearings, seminars, and workshops to gather information.[113] Among other results, these proceedings led to the

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106. The authors are grateful to Daniel C. Schwartz for sharing his experiences about the design of the FTC's modern health care program in the 1970s. Schwartz served as a Deputy Director for the FTC's Bureau of Competition and played a central role in the formulation of the new program. *See* Kovacic, *supra* note 39; *FTC Moves to Block Exxon Bid*, CHI. TRIB. (July 28, 1979), http://archives.chicagotribune.com/1979/07/28/page/202/article/ftc-moves-to-block-exxon-bid [https://perma.cc/8T28-VGYC].

107. *See* Kovacic, *supra* note 25.

108. *See* Gavil, *supra* note 23, at 1908–11 (documenting FTC's investment in policy research and related learning about health care).

109. *See* RONALD S. BOND ET AL., BUREAU OF ECON., FED. TRADE COMM'N, FEDERAL TRADE COMMISSION STAFF REPORT ON EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980), https://www.ftc.gov/sites/default/files/documents/reports/effects-restrictions-advertising-and-commercial-practice-professions-case-optometry/198009optometry.pdf [https://perma.cc/6LJP-TLPM].

110. FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002), https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf [https://perma.cc/BN8E-HB2L]. On the FTC's research program regarding reverse payment agreements in the pharmaceutical sector, see Ohlhausen, *supra* note 85.

111. Orley Ashenfelter et al., *Retrospective Analysis of Hospital Mergers*, 18 INT'L J. ECON. BUS. 5 (2011).

112. Ronan P. Harty, *Interview with Edith Ramirez, Chairperson, Fed. Trade Comm'n*, THRESHOLD, Spring 2014, at 1, 6–7 (2014); Nuechterlein, *supra* note 90; Ohlhausen, *supra* note 85, at 8–9.

113. For example, in 2003, the FTC and DOJ jointly held over twenty days of hearings on

publication of formative reports dealing with competition in health care[114] and the state action doctrine.[115] The state action project, in turn, set in motion a litigation program from which *North Carolina State Board of Dental Examiners* is the most recent output. Finally, the FTC and DOJ jointly issued guidelines on antitrust relevant behavior in the health care sector.[116]

C. Retrospective Evaluation

Every year, competition agency officials make dozens of presentations and speeches. These presentations and speeches invariably include some version of the observation, "we've been very busy." Although we have attended hundreds of these meetings, never once has a member of the audience responded, "but have you been very effective?"

Of course, some level of activity is important for an agency to build capability, credibility, and legitimacy.[117] However, to treat activity levels as the primary or exclusive measure of performance avoids the equally important issue of effectiveness.

To decide whether a program actually worked, ex post evaluation is necessary.[118] Lots of government programs fail.[119] An agency that routinely conducts ex post evaluation can identify what has worked well and what needs to be improved. Ex post evaluation is a vital quality control device, and it should be a core feature of the life cycle of policymaking.[120]

Competition and Consumer Protection in Health Care. *Muris/Pitofsky Conversation*, *supra* note 10, at 775.

114. FED. TRADE COMM'N & DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf [https://perma.cc/9KBJ-7XWF].

115. OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (2003), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf [https://perma.cc/VYS7-GN8V].

116. On the importance of agency guidelines as policy making tools, see Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039 (2005).

117. William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 247–48 (2015) (discussing importance of sustaining a minimum critical mass of activity).

118. *See supra* note 98.

119. *See* SCHUCK, *supra* note 5.

120. We are not suggesting that an agency should or must undertake a resource intensive examination of the effects for each matter it undertakes. For many matters, it is possible, at relatively low cost, to perform a "quick and dirty" comparison between the assumptions and

Beginning in the late 1970s, the FTC developed a path-breaking program to examine the effects of closed competition matters.[121] The program began with an assessment of a monopolization case and various vertical restraints matters. In the early 2000s, the program was extended to hospital mergers. The hospital merger retrospective sought to determine the consequences of various hospital mergers that the FTC had unsuccessfully challenged. The results were vital to the success of a renewed hospital merger enforcement program, which began with a case against Evanston Hospital[122] in the mid-2000s, and has since resulted in a string of successes.[123]

The FTC's experience with health care makes it clear that it is possible for public agency leadership to do a better job balancing consumption against investment. Part IV turns to some concrete steps that might help other agencies—and the FTC, in dealing with its non-health care portfolio—to do just that.

IV. STRIKING A BETTER BALANCE BETWEEN CONSUMPTION AND INVESTMENT

The conflict between consumption and investment may be a policy perennial, but it does not follow that there is nothing that can be done to tip the balance a bit more in favor of the latter. Following Professor James Q. Wilson, we propose "a few modest suggestions that may make a small difference."[124] These steps do not depend on agency leadership suddenly deciding to "do the right thing."

A. Create a Pro-Investment Norm

Our most general suggestion is the promotion of a norm that encourages agency leadership to make adequate investments in institutional capability. At conferences and in other public settings, agency leaders are invariably asked to discuss the cases they have

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expectations that led the agency to intervene, and the actual results achieved. The larger the commitment of resources, the more important it is for the agency to evaluate whether its actions are having the intended effects.

121. William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Authorities*, 31 J. CORP. L. 503 (2006).

122. *In re* Evanston Northwestern Healthcare Corp., 144 F.T.C. 375 (2007).

123. Kovacic, *supra* note 121 at 524–26; Nuechterlein, *supra* note 90, at 4–5; *see also supra* note 98.

124. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 369 (1989).

already launched, and their plans for initiating new cases. Agency leaders are happy to wax poetic on such subjects—but we should demand that they do more than brag about consumption. Agency leaders should be cross-examined about the steps they are taking to make their agencies better off in the future. Concrete questions might include:

- What investments are you making to enhance the capability of your agency?
- What are you doing to build your agency's knowledge about the commercial settings that it regulates?
- How many resources are you spending to build better networks with your fellow regulatory institutions, both at home and abroad?
- What steps are you taking to evaluate the results of past interventions?
- How should we measure your success in these areas?

If agency leadership knows they will have to answer these questions, they will have an incentive to proactively address (and defend) the balance they have struck between consumption and investment.

We realize that norms are fragile. Yet, the FTC's modern experience provides a striking example of how a conscious, sustained emphasis by agency leaders on policy R&D can create a strong institutional commitment to do things a certain way, even though the specific mandates of the law do not require such behavior. These norms can become an integral element of the language and practice of the agency. In her opening remarks at an FTC workshop in 2014 on competition in health care, FTC Chairperson Edith Ramirez observed that "in an industry such as health care, which is undergoing significant and rapid evolution, we must also invest our resources to understand and anticipate change."[125] Ramirez is the latest in a long line of FTC chairs and senior officials who have embraced a pro-investment norm.[126] As the custom continues and becomes deeply ingrained in the agency's culture over time, it becomes more difficult and costly for future leaders to abandon it.

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125. Edith Ramirez, Chairperson, Fed. Trade Comm'n, Opening Remarks at the Examining Health Care Competition Workshop 5, 6 (Mar. 20, 2014), http://www.ftc.gov/system/files/documents/public_events/200361/transcriptmar20.pdf [https://perma.cc/8QDH-TAEE].

126. *See Muris/Pitofsky Conversation*, *supra* note 10 (displaying the shared vision of Robert Pitofsky, who chaired the FTC from 1995 to 2001, and Timothy Muris, who chaired the FTC from 2001 to 2004). The theme of investment as a predicate for policy success has figured prominently in the work of Maureen Ohlhausen, who directed the FTC's Office of Policy Planning and now serves on the Commission. Ohlhausen, *supra* note 10; Ohlhausen, *supra* note 85.

B. Investment Budgets

Currently, agencies publicly report (and trumpet the successes of) their enforcement efforts, but their investment efforts are invisible. To redress this disparity, each agency should have to annually report its investments in capability and capacity, and explain how these investments will support the agency's anticipated substantive programs. Just as a public company reports its R&D budget to potential investors and analysts, each agency should specify its policy R&D budget.

Of course, we do not believe that each agency should spend a fixed percentage of its overall budget on policy R&D, nor do we believe that every dollar of policy R&D investment is of equal value. And we anticipate no shortage of efforts to "game" the reporting requirements by reporting inflated investments in policy R&D. Still, the process of preparing an investment budget should force agency personnel to examine whether they are doing enough to set a sound foundation for the future.

C. Setting Priorities and Approving Projects

We have both been in academics long enough to see serial rounds of strategic planning by our respective institutions. The process involves an endless series of meetings, culminating in the creation of meaningless mission statements, backed up by hundreds of pages of boilerplate. Lather, rinse, repeat.

We are hesitant to recommend anything that would force others to go through the same process. But agencies will either set their own priorities internally, or their priorities will be imposed on them by outsiders. Since agency leadership values autonomy, they should be willing to take steps that lower the likelihood outsiders will seize control of the policy agenda. Accordingly, agencies should annually identify and publicize their priorities. As with the investment budget, the process may encourage agency personnel (and outsiders) to consider what the agency is doing—and whether it is worth continuing down the same path.

The agency's process for project approval should involve a similar set of calculations. Unless the agency has a systematic process for deciding whether to initiate a new investigation, case, or rulemaking project, there will be little predictability or rationality in the results. And saying "this is the Chairman's pet project" is not a sufficient reason for committing public resources to a project, especially when the Chairman will not be around to bear the consequences of that decision. Before green-lighting a project, agencies should be able to answer the following questions:

- What do we expect to gain if the project succeeds—doctrinal

results, economic impact, enhancement of institutional reputation and capability?

- What are the risks—doctrinal barriers, political backlash that the project will arouse, reputational costs if the project fails?
- Who will do the project—is the team to which the project will be assigned equal to the task?
- How much will it cost, and what projects must we forego if this one goes ahead?
- How does the project fit within our existing portfolio of commitments?
- How long will it take to accomplish?
- How will we know whether it worked as we hoped?[127]

Of course, there will often be difficulty in giving confident answers to these questions, and genuine uncertainty has accompanied many a successful project. But, a rigorous effort to answer these questions increases one's confidence that the agency has the means to deliver, and is not engaged in a snipe/snark/shark hunt.[128]

D. Ex Post Evaluation

As described above, a routine program of ex post evaluation provides a valuable feedback mechanism that will allow the agency to assess whether it has properly matched commitments with capabilities. In comparing expectations ex ante to outcomes ex post, the agency should obtain a better sense of how to structure future projects, and how to increase the prospects for future success. A habit of ex post review also deters incumbent leaders from launching new projects without considering potential long-term negative externalities.[129]

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127. This framework is inspired by the prioritization principles adopted by the United Kingdom's Office of Fair Trading and continued by its successor, the Competition and Markets Authority. KOVACIC, *supra* note 14; Kovacic, *supra* note 11, at 8–10.

128. A snipe hunt is an impossible task. A snark hunt can end very badly for those involved if the snark turns out to be a Boojum. LEWIS CARROLL, THE HUNTING OF THE SNARK (1876). And, a shark hunt may require a bigger boat. *See* JAWS (Universal Pictures 1975) ("You're gonna need a bigger boat.").

129. *See* KING & CREWE, *supra* note 6, at 358 ("There would be a lot to be said for encouraging – and if necessary, permitting – both the National Audit Office and the select committees of the House of Commons to assess how well government initiatives were continuing to achieve their declared purposes after, say, five, ten or twenty years. . . . Those bodies might even be encouraged to identify and then either to applaud or to chastise those ministers who had been principally responsible for launching the initiatives in the first place. The thought of possibly being publicly chastised several years later, but still well within their own lifetime, might – who knows? – give over-hasty and overambitious ministers pause. It might even cause them to ask, before or at the moment of decision, 'How will that look in ten years' time?'").

V. A FEW COMPLICATIONS

A. Striking the Proper Balance

Although we have been quite critical of consumption, we are not suggesting that all consumption is bad. Similarly, although we have praised investment, we are not claiming that all investment is good. The key is to strike the proper balance between these two priorities. To date, the balance has been systematically skewed in favor of consumption. We will not be able to fix that problem until it is recognized as a problem. After that, we will have to create the necessary incentives for agency leadership to "do the right thing." That approach is far more likely to lead to good results than any of the alternative strategies; as one of us noted in an earlier Article:

> [I]f you get the incentives right, most of the big problems will take care of themselves, leaving a far smaller and more tractable set of problems to be addressed through regulation, litigation, and benign neglect. But, if you don't get the incentives right, no amount of speeches, op-eds, law review articles, whining and hectoring, moral preening, regulatory oversight, legislation, lawsuits, or lectures about fairness and justice can take their place. Reformers should accordingly focus on getting the incentives right—and legislation that does not address the underlying incentive problem is not, in fact, "reform," no matter what else it may accomplish.[130]

B. Does It Matter Whether Agency Leadership Is a Plank-Owner or a Successor-in-Interest?

Departments, agencies, bureaus, and commissions are periodically created from scratch, but most agency leaders inherit the job from someone else. The first agency leader is the equivalent of a plank-owner, with tremendous power to shape the nature of the agency, its personnel, and its priorities.[131] Subsequent leaders are successors-in-interest, who step into the shoes of their predecessors. As such, they have more limited ability to reshape the agency in their image. That said, if prior leadership has made good investment decisions, the agency will be in

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130. David A. Hyman, *Follow the Money: Money Matters in Health Care, Just Like Everywhere Else*, 36 AM. J.L. & MED. 370, 387 (2010).

131. *Plank Owners*, U.S. NAVY, http://www.navy.mil/navydata/nav_legacy.asp?id=180 [https://perma.cc/Q2F8-L4CH] (last visited Jan. 31, 2016) ("A 'plank owner' is an individual who was a member of the crew of a ship when that ship was placed in commission.").

better shape—and better able to withstand the effects of excessive consumption by the latest agency head. But, regardless of whether the agency head is a plank-owner or a successor-in-interest, they will each end up making a regular series of consumption versus investment decisions—and it is those decisions with which we are concerned. Thus, the dynamics we describe are not affected by whether agency leadership are plank-owners or successors-in-interest.

C. Agency Leadership Versus Agency Personnel

We have presented a stylized example of a governmental agency, in which agency leadership always (or almost always) gets its way. That is obviously an oversimplification. Agency leadership may be short-term, but most agencies are full of "WeBes," who have their own perspective and priorities.[132] The key question—to which the answer is likely to be agency- and leader-specific—is whether agency leadership must consult with the WeBes about consumption versus investment decisions—and who gets the last word on the subject. As always, attention to institutional detail is critical before drawing definitive conclusions.[133]

D. Operationalizing the Framework

In the abstract, investment is hard to argue with. Everyone knows Aesop's fable of the ant and the grasshopper—and the moral (to work today is to eat tomorrow) is hard to argue with. But, "invest more" is spectacularly unhelpful advice. "Build capability and capacity" is sufficiently vague and open ended that almost anything might qualify. Similarly, "consume less" means that the agency will not be as visible—making it a less credible (and less faithful) enforcer of its statutory mandate. There are political perils with consuming too aggressively—but there are perils with withdrawing from the field and leaving it unregulated. Finally, people strive to become agency leaders because they want to advance the goals of that agency—and bringing cases and

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132. Michael Grunwald, *Too Good For Government*, TIME (Aug. 30, 2012), http://business.time.com/2012/08/30/too-good-for-government/ [https://perma.cc/43H2-EBBJ] (describing travails of an agency head who tried to transform her agency by devising "a secret Operation Cupcake to try to fire the laggards, but the civil-service cupcakes knew political appointees come and go. They called themselves WeBes, as in We be here, you be gone"). The problem is not unique to the federal government. *See* JAMES PAYNE, ADVICE TO A NEW CHILD SERVICES LEADER (2011), http://www.issuelab.org/resource/advice_to_a_new_child_services_leader [https://perma.cc/984D-JZRH] ("[A]lways be mindful of the 'WeBes'– We Be here before you and We Be here after you!").

133. *See* SCHUCK, *supra* note 5; WILSON, *supra* note 124.

initiating rulemaking allow them to do that. Investing in capability and capacity doesn't result in favorable press coverage for a good reason—it is boring, and often unproductive. And some forms of consumption actually constitute investment because they allow the agency to train its personnel—and create the precedents the agency can then rely on to advance its objectives on a broader plane.[134]

We agree with these points—but the problem of excessive consumption is sufficiently pervasive that it demands our attention. Simply stated, we are not opposed to the building of skyscrapers by agency leaders with an edifice complex—we just want to ensure that those skyscrapers are built on a solid foundation.

CONCLUSION

Public agency leadership faces a recurring choice between consumption and investment. Several factors encourage agency leadership to favor consumption over investment. Predictably enough, this dynamic creates serious problems, including a mismatch between agency commitments (made in time t_0) and the agency's (in)ability to deliver good results (which does not become apparent until time t_n).

In this Article, we make the case that greater attention should be paid to whether agency leadership is investing, rather than consuming. We envision a strong investment program as a crucial ingredient for regulatory agency consumption that improves the well-being of consumers. More generally, adequate investment supplies the foundation for an effective enforcement agency—and we should start treating it as such. If we want agency leadership to plant trees, we need to make it in their interest to do so. Otherwise, instead of behaving like Johnny Appleseed, agency leaders will continue to follow the Sirens of consumption.

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134. For example, the FTC's prosecution of a case involving concerted refusal to deal by dentists in Indiana helped lay the foundation for modern jurisprudence on the rule of reason. *See* Kovacic, *supra* note 37 ("Consider the FTC's case in *Indiana Federation of Dentists (IFD)*. An index of importance that focused on the total volume of commerce affected probably would not give much weight to a challenge to a concerted refusal by dentists in Indiana to provide the x-rays of their patients to insurers. In that sense, *IFD* is a comparatively insignificant matter—a small case. Evaluated by its effect on doctrine, the small case made big law. The Supreme Court's decision in *IFD* helped shape modern jurisprudence governing the rule of reason and the proof of anticompetitive effects. Among other results, *IFD* provided a doctrinal foundation for the Justice Department's prosecution of Microsoft.").