

# SYMPOSIUM: AT THE INTERSECTION OF ANTITRUST AND INTELLECTUAL PROPERTY LAW: LOOKING BOTH WAYS TO AVOID A COLLISION

## ARTICLES

### The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property

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#### I. INTRODUCTION

Nothing determines the success of a competition agency<sup>1</sup> more than its skill in setting a strategy for applying its authority. Good competition agencies, new and old, create effective, forward-looking mechanisms for

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1. The rationale for thinking of the Federal Trade Commission—and many of its counterparts around the world—as a “competition agency” rather than as merely an “antitrust agency” is spelled out in William E. Kovacic, *Competition Policy and Intellectual Property: Redefining the Role of Competition Agencies*, in ANTITRUST, PATENTS AND COPYRIGHT: EU AND US PERSPECTIVES 1, 5–6 (François Lévêque & Howard Shelanski eds., 2005).

establishing goals and devising means to accomplish them.<sup>2</sup> To do otherwise is to be swept along entirely by a current of external impulses, whether in the form of complaints from consumers, requests for action by business operators, or queries from legislatures and other government ministries. These impulses sometimes direct a competition agency toward matters of the greatest economic significance, but this is not invariably or even routinely the case. Lest it react passively to the random ordering of external events, even the most humble, least-funded competition agency must exert itself to define what it intends to do and, at a minimum, to form criteria for deciding which of the matters brought to its attention is worthy of further scrutiny.

How can a competition agency best develop a strategy? This Article makes the case for using history to inform judgments about the appropriate selection and performance of competition policy programs.<sup>3</sup> Historically oriented research and other historically related projects can improve a competition agency's judgment about what legal issues or commercial developments are important, and therefore worthy of the agency's attention, and about how to address such issues or developments proficiently. The benefits of a historical perspective can be substantial for old and new competition agencies alike.

The Article's framework for considering the value of history in shaping strategy is the effort of the Federal Trade Commission (FTC) to apply its competition policy powers to issues involving intellectual property (IP).<sup>4</sup> The Article chooses the example of intellectual property because of its importance to the modern work of the FTC and the increasingly significant place that intellectual property and, more generally, technology-driven innovation hold in the field of competition policy.<sup>5</sup> To provide context for the discussion, Part II of the Article presents a profile of the FTC's modern competition policy initiatives concerning

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2. The importance to a competition agency of developing and articulating a strategy—what former FTC Chairman Timothy Muris has called a “positive agenda”—is examined 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. See also Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 165 (2005) (“[N]o public institution achieves success without a coherent strategy for exercising its authority and spending its resources wisely.”).

3. As discussed below in Part IV, I use the term “competition policy” to encompass the application of a broad range of policy instruments that go beyond the prosecution of cases for infringements of antitrust statutes, which forbid various types of business conduct.

4. As used in this Article, the term “intellectual property” includes patents, copyrights, trademarks, and data subject to protection as trade secrets.

5. The importance of intellectual property and innovation issues in modern competition policy is explored in ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 1062–83 (2002).

intellectual property. Part III then reviews how, since the major reforms of the FTC in the late 1960s and early 1970s, the Commission has sought to improve the agency's performance by studying the past. Part IV uses the most recent FTC initiatives, discussed in Part II, along with the Commission's past experience with historically oriented research, discussed in Part III, to suggest prescriptions about how the FTC and other competition authorities can use history to develop effective competition policy strategies.

## II. THE FTC AND INTELLECTUAL PROPERTY: A SURVEY OF RECENT ACTIVITY

Much of what the FTC does today takes place at the intersection of competition policy and intellectual property. This is not a recent development in the agency's experience. Competition policy issues involving the exploitation of IP rights occupied significant FTC resources in the first years of the agency's operations, beginning when the agency opened for business in March 1915.<sup>6</sup> Across the nine decades that followed, a striking number of the Commission's most significant contributions to competition policy and antitrust enforcement have taken place in matters involving the acquisition or use of IP rights.<sup>7</sup>

The discussion in this Part reviews five areas of endeavor that indicate the breadth and intensity of the FTC's modern work involving intellectual property. The areas chosen for discussion—merger review, settlements between producers of pharmaceutical products, monopolization

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6. President Woodrow Wilson signed the Federal Trade Commission Act (FTC Act) into law on September 26, 1914. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 592 (1982) [hereinafter Kovacic, *Congressional Oversight*] (discussing adoption of the FTC Act). The agency was organized and began operations on March 16, 1915. See 1916 FTC ANN. REP., at 3 (describing establishment of the Commission). The history of the FTC's creation and the aims that led to its formation are examined in Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003). The Commission's first reported decisions included a number of cases that charged respondents with conditioning the sale of patented goods upon the purchase of unpatented products. See *A. B. Dick Co.*, 1 F.T.C. 20 (1917) (sales of patented stencil-duplicating machines tied to sale of unpatented supplies); *Nat'l Binding Mach. Co.*, 1 F.T.C. 44 (1917) (sale of patented gummed-tape moistening machines tied to sale of unpatented gummed sealing tape). Other cases in this period alleged that defendants had engaged in unfair methods of competition by threatening in bad faith to file patent infringement actions. See, e.g., *Chicago Lino-Tabler Co.*, 1 F.T.C. 110 (1918) (manufacturer of device used by printers to produce printed ruled lines alleged to have threatened in bad faith to file patent infringement suits against customers who used its rivals' products).

7. Landmark actions in this period have included the agency's challenge in the 1960s to alleged fraud in the procurement of patents for tetracyclin, see *American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *on remand*, 72 F.T.C. 623 (1967), *later appeal sub nom.* *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969), and the settlement in 1975 of allegations that Xerox had illegally monopolized the market for dry-paper photocopiers, see *Xerox Corp.*, 86 F.T.C. 364 (1975).

and attempted monopolization, research and reports, and submission of amicus briefs dealing with issues of patent policy—demonstrate the application of the Commission’s litigation and non-litigation policy instruments for making competition policy.

#### A. Merger Review

Since the 1990s, the FTC has examined a large number of mergers that posed issues involving the acquisition or application of IP rights.<sup>8</sup> Most of these transactions concerned pharmaceutical companies,<sup>9</sup> but other sectors featuring IP-intensive deals for FTC review included aerospace,<sup>10</sup> chemicals,<sup>11</sup> and software.<sup>12</sup> In a number of these transactions, the Commission obtained settlements that mandated the divestiture or licensing of IP rights.<sup>13</sup>

#### B. Settlements Between Producers of Pharmaceutical Products

Over the past decade, the FTC has pursued a significant number of cases involving agreements between producers of pharmaceutical products.<sup>14</sup> Many FTC cases have challenged agreements between producers

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8. See David Balto, *Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies*, 69 GEO. WASH. L. REV. 952, 962–63, 971–72 (2001) (discussing FTC merger remedies in the 1990s that involved IP issues).

9. See, e.g., Press Release, Fed. Trade Comm’n, Preserving Competition, FTC Requires Divestiture Before Allergan’s Acquisition of Inamed (Mar. 8, 2006), <http://www.ftc.gov/opa/2006/3/allergan.htm> (announcing consent order to remedy the likely anticompetitive effects of merger of Allergan and Inamed); Press Release, Fed. Trade Comm’n, Commission Finalizes Teva/Ivax Consent Order (Mar. 7, 2006), <http://www.ftc.gov/opa/2006/03/fyi0614.htm> (announcing final approval of consent order resolving competitive concerns associated with merger of two pharmaceutical companies); Press Release, Fed. Trade Comm’n, FTC Seeks to Block Cytac Corp.’s Acquisition of Digene Corp. (June 24, 2002), [http://www.ftc.gov/opa/2002/06/cytac\\_digene.htm](http://www.ftc.gov/opa/2002/06/cytac_digene.htm) (announcing decision to challenge merger of two producers of screening tools used to detect cervical cancer); Ciba-Geigy Ltd., 123 F.T.C. 842 (1997) (consent order requiring licensing of intellectual property to resolve potential anticompetitive effects of merger of two pharmaceutical firms).

10. See Boeing Co., 123 F.T.C. 812 (1997) (consent order resolving competitive concerns associated with merger of two aerospace firms and requiring establishment of “firewall” to limit flows of competitively sensitive information); Raytheon Co., 122 F.T.C. 94 (1996) (consent order resolving competitive concerns arising from merger of two aerospace firms and requiring establishment of information “firewall” to prevent disclosure of non-public information).

11. See Montedison S.P.A., 119 F.T.C. 676 (1995) (consent order resolving competitive concerns about merger’s effect on licensing of polypropylene technology).

12. See Aspen Tech., Inc., No. 9310 (F.T.C. Dec. 20, 2004), available at <http://www.ftc.gov/os/adjpro/d9310/041221do.pdf> (consent order resolving competitive concerns arising from merger of producers of process engineering simulation software).

13. See MSC Software Corp., No. 9299 (F.T.C. Oct. 29, 2002), available at <http://www.ftc.gov/os/2002/11/mscdo.pdf> (consent order requiring compulsory licensing to enable rivals to develop and produce Nastran computer-aided engineering software).

14. See Fed. Trade Comm’n, Prepared Statement on Barriers to Generic Entry Before the Special Committee on Aging of the United States Senate (July 20, 2006) [hereinafter FTC Statement on Barriers to Generic Entry], available at <http://www.ftc.gov/os/2006/07/P052103BarrierstoGeneric>

of branded pharmaceutical products and producers of generic drugs, agreements which ostensibly are designed to resolve patent disputes, but which the Commission has alleged involve payments by the branded drug producer to delay entry into the market of an equivalent generic product.<sup>15</sup> The FTC has also attacked what it has alleged to be agreements not to compete between brand-name and generic companies outside the context of patent litigation.<sup>16</sup>

### C. Monopolization and Attempted Monopolization

In recent years, the FTC has pursued a number of matters that allege monopolization or attempted monopolization in connection with the exploitation of IP rights. These matters fall into two categories. In one group of cases, the FTC has obtained relief to forestall allegedly improper efforts by branded pharmaceutical producers who seek to manipulate the process created by the Hatch-Waxman Amendments (Hatch-Waxman Act) to the Food, Drug and Cosmetic Act<sup>17</sup> in order that they may block or delay market entry by producers of generic equivalents.<sup>18</sup>

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EntryTestimonySenate07202006.pdf (describing FTC's litigation and non-litigation initiatives involving the entry of generic pharmaceutical products).

15. On the FTC's cases and private suits dealing with similar claims, see C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553 (2006). These matters include the FTC's unsuccessful effort to enjoin what the Commission had alleged to be an illegal agreement by which Schering-Plough Corporation paid Upsher-Smith Laboratories and American Home Products Corporation to delay the introduction of generic equivalents of a branded drug that Schering sold. *See* Schering-Plough Corp. v. F.T.C., 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 2929 (2006).

16. *See, e.g.*, Complaint at 2, *FTC v. Warner Chilcott et al.*, Civ. Action No. 1:05-CV-2179 (D.D.C. Nov. 7, 2005), available at <http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20.pdf> (alleging agreement not to compete between sellers of oral contraceptives).

17. The Hatch-Waxman Amendments were adopted as the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended at 21 U.S.C. § 355). The Hatch-Waxman Amendments allow for accelerated approval by the Food and Drug Administration (FDA) of drugs through an Abbreviated New Drug Application upon a showing, among other things, that the new drug is "bioequivalent" to an approved drug. *Id.* § 355(j)(2)(A)(iv). The Amendments also encourage the development of generic drugs by treating various research and development efforts as non-infringing. For a detailed discussion of the Hatch-Waxman Amendments, see Elizabeth Stotland Weiswasser & Scott D. Danzis, *The Hatch-Waxman Act: History, Structure, and Legacy*, 71 ANTITRUST L.J. 585 (2003).

18. To market a new drug, a producer of brand-name pharmaceuticals first must obtain the approval of the FDA by filing a New Drug Application (NDA) that shows that the product is safe and effective. Upon filing its NDA, the producer also must give the FDA certain information concerning patents that cover the drug that is the subject of the NDA. After receiving the patent data, the FDA must list the information in an FDA publication called Approved Drug Products with Therapeutic Equivalence, which is known as the "Orange Book." The FTC cases at issue allege that defendants wrongfully abused the FDA's drug approval process by listing patents in the Orange Book that did not meet the FDA's listing criteria. *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 983-87 (2005) (discussing FTC's "Orange Book" cases).

The second category of monopolization and attempted monopolization cases has involved the manner in which companies participate in the activities of institutions that establish industry standards for designing products. In 1995, the Commission obtained a settlement after alleging that Dell Computer Corporation had misrepresented the nature of its IP portfolio in order to induce a standard-setting body to establish a standard that would embody technology already patented by Dell, thereby requiring firms that designed products using the standard to obtain licenses from Dell.<sup>19</sup> In 2002, the FTC brought separate actions against Union Oil Company of California (“Unocal”)<sup>20</sup> and Rambus Incorporated (“Rambus”)<sup>21</sup> for their alleged failure to disclose IP rights to a standard-setting body. The *Unocal* matter was resolved by a consent decree in 2005,<sup>22</sup> and the *Rambus* case remains in administrative litigation before the Commission.<sup>23</sup>

One way to appreciate the magnitude of the Commission’s investment in the monopolization and attempted monopolization matters sketched above is to place them in the context of past FTC law enforcement. Measured simply by the number of cases that allege the Sherman Act § 2 offenses of monopolization or attempted monopolization,<sup>24</sup> the

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19. See Dell Computer Corp., 121 F.T.C. 616 (1996) (consent order).

20. Union Oil Co. of Cal., No. 9305 (F.T.C. Mar. 4, 2003) (complaint), available at <http://www.ftc.gov/os/2003/03/unocalcmp.htm>.

21. Rambus Inc., No. 9302 (F.T.C. June 18, 2002) (complaint), available at <http://www.ftc.gov/os/adjpro/d9302/020618admincmp.pdf>.

22. See Press Release, Fed. Trade Comm’n, Dual Consent Orders Resolve Competitive Concerns About Chevron’s \$18 Billion Purchase of Unocal, FTC’s 2003 Complaint Against Unocal (June 10, 2005) [hereinafter Chevron/Unocal Press Release], <http://www.ftc.gov/opa/2005/06/chevronunocal.htm>. In *Unocal*, the FTC alleged that Unocal had misrepresented its IP rights during proceedings before the California Air Resources Board (CARB) to set standards for reformulated gasoline. Unocal allegedly failed to disclose to the CARB that adherence to the standard under consideration would require gasoline refiners to obtain licenses to use patents held by Unocal. The settlement in June 2005 forbade Unocal from enforcing the patents in question. Roughly one year before the settlement, the FTC issued a decision rejecting Unocal’s argument that its representations to the CARB enjoyed immunity from antitrust prosecution because of the protection established by the *Noerr* doctrine for efforts to petition government bodies. See Union Oil Co. of Cal., No. 9305 (F.T.C. July 7, 2004) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>. For a discussion of the *Noerr* doctrine and its role in modern antitrust policy, see Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 HARV. J.L. & PUB. POL’Y 443 (2004).

23. In *Rambus*, the Commission alleged that Rambus had engaged in illegal monopolization by failing to disclose patents that were relevant to a proceeding to set a standard for dynamic random access memory technology. The Commission subsequently found that Rambus had engaged in unlawful behavior and ordered further proceedings to determine the remedy. See Rambus Inc., No. 9302 (F.T.C. Aug. 2, 2006) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

24. Section 2 of the Sherman Act provides that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . .” 15 U.S.C. § 2 (2000). For a summary of the jurisprudence

FTC's enforcement actions over the past five years constitute the agency's most ambitious program in roughly thirty years.<sup>25</sup> From January 2001 through the present, the FTC has initiated four IP-related cases alleging illegal monopolization or attempted monopolization: *Biovail/Elan*,<sup>26</sup> *Bristol-Myers Squibb*,<sup>27</sup> *Unocal*,<sup>28</sup> and *Rambus*.<sup>29</sup> A fifth case, *Valassis*,<sup>30</sup> did not involve IP rights but closely resembles a claim of attempted monopolization and was prosecuted as a violation of the FTC Act's prohibition on unfair methods of competition.<sup>31</sup> This rate of prosecution (five cases in nearly six years) exceeds the rate of new FTC monopolization or attempted monopolization cases in any five-year period since the early to mid-1970s.<sup>32</sup>

Beyond the mere rate of activity, a more meaningful measure of an enforcement program's significance is the economic importance of the matters it initiates and the effect of the results it obtains. The four IP-related cases discussed above each involved either the production and

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that has interpreted § 2 of the Sherman Act, see ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, *ANTITRUST LAW & ECONOMICS IN A NUTSHELL* 27–33 (5th ed. 2004).

25. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *ANTITRUST L.J.* 377, 449, 477 (2003) [hereinafter Kovacic, *Competition Policy Norms*] (presenting data on FTC abuse-of-dominance cases from 1961 through 2002); see also 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, 1136–41 (1989) [hereinafter Kovacic, *Failed Expectations*] (discussing development of the federal government's deconcentration cases of the 1960s and 1970s).

26. *Biovail Corp. and Elan Corp.*, File No. 011 0132 (F.T.C. June 27, 2002) (consent order), available at <http://www.ftc.gov/os/2002/06/biovailelanagreement.pdf>. In *Biovail/Elan*, the Commission alleged that Biovail and Elan had wrongfully sought to block entry by producers of generic drugs by listing patents in the FDA's Orange Book even though the patents in question failed to meet the Orange Book's listing criteria. See also *supra* notes 17–18 and accompanying text (discussing Hatch-Waxman drug approval mechanism and the Orange Book).

27. *Bristol-Myers Squibb Co.*, No. C-4076 (F.T.C. Apr. 18, 2003) (complaint), available at <http://www.ftc.gov/os/2003/04/bristolmyerssquibbcmp.pdf>. In *Bristol-Myers Squibb*, the Commission alleged that the respondent had wrongfully sought to block generic drug producers' entry by listing patents in the Orange Book even though the patents in question failed to meet the Orange Book's listing criteria; by paying a would-be generic rival over \$70 million not to introduce competing products; and by filing baseless patent infringement lawsuits. See also *supra* notes 17–18 and accompanying text (discussing Hatch Waxman drug approval mechanism and the Orange Book).

28. See *supra* notes 20, 22, and accompanying text (discussing *Unocal*).

29. See *supra* notes 21, 23, and accompanying text (discussing *Rambus*).

30. See *Valassis Commc'ns, Inc.*, No. C-4160 (F.T.C. Apr. 19, 2006) (complaint) (alleging illegal invitation to collude); Press Release, Fed. Trade Comm'n, *FTC Consent Order Protects Competition in the Market for Free-Standing Newspaper Inserts* (Mar. 14, 2006), <http://www.ftc.gov/opa/2006/03/valassis.htm>.

31. Section 5 of the FTC Act provides that "[u]nfair methods of competition . . . are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (2000). On the interpretation of § 5, see GELLHORN ET AL., *supra* note 24, at 36–37.

32. From 1971 through 1976, the Commission brought a larger number of § 2 cases, including prosecutions involving airline guides, breakfast cereal, bread, instant coffee, petroleum, and photocopiers. See Kovacic, *Competition Policy Norms*, *supra* note 25, at 451–52.

sale of pharmaceutical drugs (*Biovail/Elan*<sup>33</sup> and *Bristol-Myers Squibb*<sup>34</sup>) or standard setting (*Unocal*<sup>35</sup> and *Rambus*<sup>36</sup>). In qualitative terms, the performance of the pharmaceutical sector and the operation of standard-setting bodies are among the most important competition policy issues of our time.<sup>37</sup> In terms of observable results, the Commission prosecutions of *Biovail/Elan*, *Bristol-Myers Squibb*, and *Unocal* yielded some of the largest benefits to consumers in the history of FTC cases involving monopolization or attempted monopolization. The payoff from the *Unocal* case is likely to be at least \$500 million per year in reduced prices for gasoline sold in California,<sup>38</sup> and the direct effects of the two “Orange Book” settlements in 2003 (*Biovail/Elan* and *Bristol-Myers Squibb*) have likely exceeded hundreds of millions, if not billions, of dollars.<sup>39</sup> Few previous FTC § 2 prosecutions have yielded comparable results.<sup>40</sup> When the number of cases and the observable outcomes are both taken into account, the FTC’s program of monopolization and attempted monopolization cases since 2001 arguably has no parallel in the agency’s history.<sup>41</sup>

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33. See *supra* note 26 (discussing *Biovail/Elan*).

34. See *supra* note 27 (discussing *Bristol-Myers Squibb*).

35. See *supra* notes 20, 22, and accompanying text (discussing *Unocal*).

36. See *supra* notes 21, 23, and accompanying text (discussing *Rambus*).

37. On the significance of standard setting, see HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY § 35 (2002 & Supp. 2005). On the importance of competition in the pharmaceutical sector, see FTC Statement on Barriers to Generic Entry, *supra* note 14, at 1–5.

38. The \$500 million per year represents the cost of royalties that would have been charged to petroleum refiners had the FTC not obtained a settlement precluding enforcement of the *Unocal* patents that were implicated by the gasoline standard established by the CARB. See *Chevron/Unocal* Press Release, *supra* note 22, at 1.

39. See Press Release, Fed. Trade Comm’n, FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition (Mar. 7, 2003), <http://www.ftc.gov/opa/2003/03/bms.htm> (announcing settlement of monopolization charges against Bristol-Myers Squibb). The FTC alleged that the illegal conduct of Bristol-Myers Squibb “protected nearly \$2 billion in annual sales at a high cost to cancer patients and other consumers, who—being denied access to lower-cost alternatives—were forced to overpay by hundreds of millions of dollars for important and often life-saving medications.” *Id.* The FTC’s consent order forbade the behavior that caused the overcharges.

40. FTC monopolization or attempted monopolization cases that belong in this cohort include the agency’s settlement with Xerox in 1975 concerning the plain paper photocopier industry, *Xerox Corp.*, 86 F.T.C. 364 (1975) (consent order), and its lawsuit against Mylan Laboratories for using exclusive dealing agreements to raise the price that rival producers of pharmaceutical products would have to pay for vital inputs, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999). With respect to *Mylan*, the FTC subsequently obtained a consent order requiring Mylan to disgorge \$100 million to consumers. See Press Release, Fed. Trade Comm’n, FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market (Nov. 29, 2000), <http://www.ftc.gov/opa/2000/11/mylanfin.htm>.

41. *But see* Stephen Labaton, *New View of Antitrust Law: See No Evil, Hear No Evil*, N.Y. TIMES, May 5, 2006, at C5 (stating that, outside the areas of “combating cartels and price-fixing,” the Bush administration “has taken the most relaxed and least aggressive approach since the last years of the Reagan presidency,” and quoting Albert A. Foer, president of the American Antitrust

#### D. Research and Reports

The FTC has relied extensively on research and reports to improve the state of competition policy concerning intellectual property.<sup>42</sup> These efforts fall into essentially two categories. The first involves the pharmaceutical sector. In 2000, the Commission commenced a study of the entry of generic drugs into the market under the framework established by the Hatch-Waxman Act.<sup>43</sup> The agency used its authority under § 6(b) of the FTC Act<sup>44</sup> to obtain details of settlements that had been struck between the makers of branded pharmaceutical drugs and producers of generic equivalents of these drugs.<sup>45</sup> The agency's study of the settlements (eighty-six in total) yielded recommendations that resulted in regulatory policy adjustments by the Food and Drug Administration (FDA)<sup>46</sup> and congressional modifications of the Hatch-Waxman Act.<sup>47</sup> The FTC's generic drug study has also become an influential focal point for discussion by commentators and competition authorities that are examining questions associated with the pharmaceutical sector.<sup>48</sup> Pursuant to measures that Congress adopted in 2003 in the Medicare Prescription Drug, Improvement, and Modernization Act,<sup>49</sup> the FTC's staff has issued annual reports on the types of patent settlements reached between branded

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Institute, as stating that the federal antitrust agencies during the Bush administration “[do not] even seem to think that monopolies are bad”).

42. See William E. Kovacic, Remarks at the Intellectual Property and Antitrust Roundtable, *in* FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY 285, 314–15 (Barry Hawk ed., 2005) (discussing the FTC's investments in “competition policy research and development” relating to competition issues involving IP rights).

43. See FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002) [hereinafter FTC GENERIC DRUG STUDY], available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>. See *supra* note 17 and accompanying text for discussion of the Hatch-Waxman Act.

44. Section 6(b) of the FTC Act authorizes the Commission to compel corporations, persons, or partnerships to prepare and file special reports. 15 U.S.C. § 46(b) (2000).

45. See FTC GENERIC DRUG STUDY, *supra* note 43, at 9–11 (describing methodology used to gather data for FTC study).

46. See FED. TRADE COMM'N, FULFILLING THE ORIGINAL VISION: THE FTC AT 90, at 29 (2004), available at <http://www.ftc.gov/os/2004/04/040402abafinal.pdf> (discussing the impact of recommendations made in the FTC's generic drug study upon FDA regulations concerning implementation of the Hatch-Waxman Act).

47. See Timothy J. Muris, *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 777 (2005) [hereinafter *Muris-Pitofsky Dialogue*] (comments by former FTC Chairman Timothy Muris; discussing impact of publication of FTC generic drug study).

48. See, e.g., Hemphill, *supra* note 15.

49. Pub. L. No. 108-173, 117 Stat. 2071 (2003). Among other provisions, the 2003 Act requires that notice of patent settlements between branded and generic pharmaceutical manufacturers be given to the FTC and to the Department of Justice. See 21 U.S.C. § 355 (2006).

and generic producers of pharmaceuticals.<sup>50</sup> The Commission also has undertaken a new § 6(b) study to examine the practice by which branded pharmaceutical producers authorize market entry by specific generic producers.<sup>51</sup>

The second major area of research and reporting activity involves the operation of the U.S. patent system. In 2003, the FTC published a report on the U.S. patent system and the effect of the rights-granting process on competition.<sup>52</sup> The chief basis for the report was an extensive set of hearings conducted by the FTC and the Department of Justice (DOJ) in 2002.<sup>53</sup> The FTC's report made recommendations for patent system reform that, among other ends, are designed to ensure that patents granted satisfy existing standards of patentability.<sup>54</sup> The report has commanded close attention among patent authorities and competition agencies around the world and has stimulated considerable debate among academic commentators and practitioners.<sup>55</sup>

#### *E. Amicus Submissions in the Federal Courts*

In recent years, the Commission has contributed to a number of amicus filings whose aim is to encourage courts to account for competition policy considerations in the application of legal rules governing the exploitation and interpretation of patent rights. In 2002, the Commission filed an amicus brief in which it argued that *Noerr* petitioning immunity<sup>56</sup> should not be recognized for the act of making filings in the FDA's Orange Book.<sup>57</sup> Endorsing a line of reasoning that the FTC had

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50. BUREAU OF COMPETITION, FED. TRADE COMM'N, AGREEMENTS FILED WITH THE FEDERAL TRADE COMMISSION UNDER THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003 (2006), available at <http://www.ftc.gov/os/2006/04/fy2005drugsettlementsrpt.pdf> (report on patent settlements between October 2004 and September 2005).

51. Press Release, Fed. Trade Comm'n, FTC Proposes Study of Competitive Impacts of Authorized Generic Drugs (Mar. 29, 2006), <http://www.ftc.gov/opa/2006/03/authgenerics.htm>.

52. FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003) [hereinafter TO PROMOTE INNOVATION], available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

53. See *id.* at 3 (describing FTC/DOJ intellectual property hearings). The FTC and the DOJ conducted twenty-four days of hearings and collected testimony from over 300 witnesses.

54. See *id.* at 7–17 (executive summary of recommendations for reform of system for granting patent rights).

55. See, e.g., *Intellectual Property Rights*, ORG. FOR ECON. COOPERATION AND DEV., COMPETITION POLICY ROUNDTABLES NO. 24 (2004), available at <http://www.oecd.org/dataoecd/61/48/34306055.pdf> (discussing the FTC's 2003 Patent Report).

56. See *supra* note 22 (discussing *Noerr* doctrine).

57. See Memorandum of Law of Amicus Curiae the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss, *In re Bupirone Patent Litig./In re Bupirone Antitrust Litig.*, MDL No. 1410 (JGK) (S.D.N.Y. Jan. 8, 2002), available at <http://www.ftc.gov/os/2002/01/busparbrief.pdf>. In the *Bupirone* case, various generic drug producers alleged that Bristol-Myers Squibb had fraudulently filed a patent with the FDA for its branded drug and that the filing caused

suggested in its amicus filing, the district court rejected the argument that *Noerr* protection was warranted simply because the defendant's patent filings had been accepted and reviewed by the FDA.<sup>58</sup> Drawing extensively on the findings of the FTC's 2003 Patent Report, the Commission's staff has also participated in the formulation of positions taken by the Solicitor General in various recent patent-related cases before the Supreme Court.<sup>59</sup>

#### F. Summary

The FTC's modern competition policy program continues and extends the agency's more distant practice of devoting significant attention to issues associated with intellectual property. Several features of the initiatives described above stand out. First, the commitment to devote substantial resources to IP-related matters stemmed from a conscious decision within the agency to assign a high priority to this area of competition policy.<sup>60</sup> That decision reflected the view that such issues had large and unmistakable importance for economic performance and consumer welfare. The second noteworthy trait is the degree to which the Commission has employed the full array of its distinctive mix of policy tools—administrative litigation, litigation directly in the federal courts, empirical research, convening hearings, preparing reports, filing amicus briefs, and advocating before Congress and other federal government bodies—to improve the quality of competition policy in this field.

The Commission's recourse to a broad collection of litigation and non-litigation policy instruments reflects the recognition that genuine improvements in competition policy involving intellectual property require adjustments in policies across a large collection of institutions. A program limited solely to the prosecution of antitrust cases is unlikely to touch the broader group of bodies—for example, Congress and regulatory bodies such as the FDA and the Patent and Trademark Office—whose contributions are needed to ensure that the IP system takes proper account of the value of competition as a stimulus for innovation. A

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the FDA to list the patent in the Orange Book. *In re Buspirone Patent Litig./In re Buspirone Antitrust Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

58. *Buspirone*, 185 F. Supp. 2d at 369–70.

59. See Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, A Government Perspective on IP and Antitrust Law Remarks to the American Antitrust Institute at The IP Grab: The Struggle Between Intellectual Property Rights and Antitrust (June 21, 2006), available at <http://www.ftc.gov/speeches/majoras/060621aai-ip.pdf> (discussing FTC contributions to recent Solicitor General amicus briefs in cases involving the interpretation of patent law).

60. See *Muris-Pitofsky Dialogue*, *supra* note 47, at 845–47 (discussing the FTC's identification of competition policy issues involving intellectual property as a major Commission priority).

competition agency that lacks the broader portfolio of policy-making tools provides a badly limited platform on which to operate in this area.

### III. USING HISTORY TO GUIDE COMPETITION POLICY: THE FTC SINCE 1969

The FTC's modern experience demonstrates how an appreciation for the past can usefully inform the development of new policies. This Part of the Article focuses on the FTC's use of history to guide competition policy since the late 1960s, when two external appraisals of the Commission inspired a fundamental reorientation of the agency's work. This Part reviews the external studies that stimulated reforms in the late 1960s and 1970s and examines how conscious efforts to derive lessons from the past has guided future policy developments.

#### *A. Invoking History to Justify Reform: The Nader and ABA Reports*

In many respects, the modern era of the FTC began in the late 1960s and early 1970s with a series of management and organizational reforms inspired by two external studies of the agency's performance. Highly critical appraisals of the Commission by researchers affiliated with Ralph Nader<sup>61</sup> and by a blue-ribbon panel convened by the American Bar Association<sup>62</sup> stimulated far-reaching changes in the agency.<sup>63</sup> The ABA report drew heavily upon past studies of the FTC and, pointing to the history of assessments of the Commission, depicted the agency as being impervious to suggestions for needed change.<sup>64</sup> Among other findings, the ABA report concluded that a major source of the agency's inadequate performance was the FTC's failure to establish strong internal processes for setting priorities.<sup>65</sup> The implication of the ABA report was that, without effective means for ranking projects according to their

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61. The original version of the Nader Report was placed in the Congressional Record by Senator Gaylord Nelson soon after the study was released. See *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, 115 CONG. REC. 1539 (1969) (remarks of Sen. Nelson). An expanded version of the report was published as EDWARD F. COX, ROBERT FELLMETH & JOHN SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter NADER REPORT]. For reflections on the preparation and impact of the Nader Report by one of its authors, see Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899 (2005).

62. AM. BAR ASS'N, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter ABA REPORT].

63. The impact of the 1969 ABA Report on the FTC is analyzed in Kovacic, *Congressional Oversight*, *supra* note 6, at 592–602.

64. See *id.* at 599–602 (describing the ABA Report's interpretation of earlier studies of the FTC).

65. See ABA REPORT, *supra* note 62, at 77 ("Many of the present problems of the FTC . . . are traceable to a considerable extent to the fundamental failure to establish goals and priorities and to implement effective planning controls consistent with those goals and priorities.").

economic importance, the strategy of the Commission was set by default as the agency responded mechanically to what arrived in the mail.<sup>66</sup>

The repeated invocations to history in the Nader and ABA reports, along with the depiction of the FTC as intransigently resistant to previous calls for reform, resulted in setting extraordinarily high expectations for what would constitute a satisfactory response to the demands for improvement. With few exceptions, the Nader and ABA reports portrayed the Commission's past performance in dismal terms and suggested that the agency had stubbornly refused to amend its ways in the face of earlier calls for change.<sup>67</sup> This led the studies' authors and members of Congress to say that the agency should be given one last chance to prove its worth or face abolition.<sup>68</sup>

Although the ABA and Nader reports arguably misinterpreted the findings of earlier studies and exaggerated the decay of the Commission in order to give their findings and the demand for change greater rhetorical force,<sup>69</sup> these subtleties were lost on Congress and the wider community of constituencies that followed the FTC's competition and consumer protection work. There was broad acceptance of the "one last chance" prescription and the notion that extraordinary improvements, manifest through the pursuit of a substantially more ambitious enforcement program, must be forthcoming.<sup>70</sup> This encouraged the Commission and outside observers, including key members of Congress, to embrace the view that the only worthy signs of success were the competition policy equivalents of 600-foot home runs. Mere singles, doubles, or triples would not do. To use another metaphor, an agency that seemed to have received failing or nearly failing grades in its courses for more than half a century and had refused to reform its study habits was being told that it must achieve an A+ on the next examination in order to remain in school.

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66. *See id.* at 80 (criticizing the FTC's use of "passive" case selection devices).

67. *Id.* at 3; NADER REPORT, *supra* note 61, at 38–39.

68. ABA REPORT, *supra* note 62, at 3, 9; *see also* Kovacic, *Congressional Oversight*, *supra* note 6, at 630–31 (describing congressional reaction to the ABA Report); William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 874–77 (1989) (same).

69. *See* Kovacic, *Congress and the Federal Trade Commission*, *supra* note 68, at 877–79 (arguing that the ABA Report's findings failed to interpret results of earlier studies).

70. In 1969, Senator Edward Kennedy, the Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedures, delivered a warning that was representative of congressional advice to the FTC in this period. Kennedy said, "the time has come either to do something" about the recommendations of the ABA Report and earlier blue-ribbon panels or "to consider abolishing the agency and starting it from the ground again." *Federal Trade Commission Procedures: Hearings Before the Subcommittee on Administrative Practice and Procedures of the Senate Committee on the Judiciary, 91st Cong.*, 99, 110 (1969) (remarks of Sen. Kennedy).

*B. Learning from and Applying Lessons  
from the Past: The FTC After 1969*

In a number of important respects, the Commission accepted the historically based diagnosis of its ills, presented by the Nader and ABA studies, and it undertook measures to correct these flaws.<sup>71</sup> Perhaps the most important manifestation of these efforts was the enhancement of the FTC's processes for strategic planning.<sup>72</sup> By the late 1970s, the FTC had established several units with responsibility for helping to choose priorities and develop better approaches for setting priorities. One group, the Office of Policy Planning and Evaluation, was designed to provide guidance for the agency as a whole.<sup>73</sup> Supplementing the work of this body were two new offices within the Bureau of Competition: The Office of Special Projects and the Planning Office.<sup>74</sup> To an exceptional degree, these planning units undertook what might be called historically oriented research as a guide to formulating the agency's competition policy strategy.

This concentration of effort became most evident during the Chairmanship of Michael Pertschuk from 1977 to 1981.<sup>75</sup> Several initiatives undertaken during Pertschuk's chairmanship stand out. First, the Commission hosted a symposium at which business historians presented work relating to the role of competition policy in the United States from the late nineteenth century through the twentieth century.<sup>76</sup> Not only did the proceedings generate a transcript that remains a superb resource for

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71. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 82 (Robert MacKay et al. eds., 1987) (describing how the ABA report's negative assessment of past FTC antitrust programs helped motivate the agency to pursue the ABA's recommended reforms).

72. The ABA report found that the FTC, from its inception, had performed deficiently in large measure due to its "fundamental failure to establish goals and priorities and to implement effective planning controls consistent with those goals and priorities." ABA REPORT, *supra* note 62, at 77.

73. The Commission's development in the late 1960s and 1970s of new methods for setting priorities and planning programs is reviewed in Kovacic, *Congressional Oversight*, *supra* note 6, at 643-45, 659-61. Two of the most notable heads of the agency-wide planning apparatus during the 1970s were Wesley J. Liebeler, who directed the office in the mid-1970s, and Robert Reich, who held that post in the late 1970s.

74. On the formation of these units, see *id.* at 659. The Special Projects group was directed by Albert Foer, and the Planning Office was managed by John Kirkwood, who is now a member of the Seattle University School of Law faculty. The author's first position with the FTC began in 1979 with Professor Kirkwood's Planning Office.

75. For a list of the periods of service of the FTC's commissioners and chairmen, see Commissioners and Chairmen of the Federal Trade Commission (Feb. 2006), <http://www.ftc.gov/ftc/history/06commissionerchartlegal.pdf>.

76. The proceedings of the business historians' symposium are reproduced in National Competition Policy—Historians' Perspectives on Antitrust and Business Relationships in the United States (Federal Trade Commission, Aug. 1981).

researchers, but they also stimulated a profound reassessment within the agency's leadership ranks about the wisdom of the agency's current initiatives and the appropriate course of future work.<sup>77</sup> Second, the planning and policy units conducted and published research on the origins and purposes of the agency's statutory charter, the evolution and scope of its powers, and the role of institutions such as Congress in shaping the Commission's agenda over time.<sup>78</sup> A third significant retrospective initiative consisted of projects to examine the consequences of past FTC competition policy cases.<sup>79</sup>

From time to time in the 1980s and 1990s, the FTC undertook historically oriented projects to assist in setting the agency's strategy and refining existing programs. Perhaps the most important of these measures were hearings convened in 1994 by Chairman Robert Pitofsky to examine competition policy and consumer protection in light of economic developments related to rapid technological change and globalization.<sup>80</sup> The hearings served a number of purposes and deeply influenced the agency's programs through the 1990s and beyond. In addition to highlighting the importance of issues involving such matters as pharmaceuticals and standard setting, the hearings provided an occasion for reflection. A number of witnesses examined the agency's past programs as a means for identifying possible areas for reassessment or for new

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77. As one of the symposium attendees, I recall myself and many of my colleagues being most affected by the cautions expressed by Alfred Chandler about the wisdom of large-scale efforts to restructure concentrated industries.

78. Papers published from research performed under John Kirkwood's supervision in this period include Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980); Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Devices After Ethyl Corp.*, 1983 WIS. L. REV. 887; James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Kovacic, *Congressional Oversight*, *supra* note 6; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

79. The FTC's program in the late 1970s and early 1980s of competition policy impact evaluations is described in William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 524-27 (2006) [hereinafter Kovacic, *Ex Post Evaluations*]. The FTC conducted evaluations of the relief obtained in its monopolization suit against Xerox in the 1970s and of various vertical restraints cases prosecuted in the 1970s. The results of the Xerox evaluation are reported in Timothy Bresnahan, *Post-entry Competition in the Plain Paper Copier Market*, 75 AM. ECON. REV. 15 (1985), and the evaluations of the Commission's vertical restraints cases are printed in FED. TRADE COMM'N, IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES (Ronald N. Lafferty, Robert H. Lande & John B. Kirkwood eds., 1984).

80. The plan of the hearings and the findings related to competition policy are presented in FED. TRADE COMM'N STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (May 1996), available at [http://www.ftc.gov/opp/global/report/gc\\_v1.pdf](http://www.ftc.gov/opp/global/report/gc_v1.pdf).

projects.<sup>81</sup> The hearings helped to establish a norm that has become a foundation for the FTC's operations: the habit of using hearings, workshops, and symposia to take stock of past programs, to learn about new commercial phenomena, and to gather the views of academics, business officials, practitioners, and government officials about future priorities.<sup>82</sup> The Pitofsky Commission also performed a highly influential study of the Commission's experience with remedies in merger cases.<sup>83</sup>

Robert Pitofsky's successor, Timothy Muris, continued and extended the agency's examination of the past as a way to look ahead. In the fall of 2001, after Muris became the agency's chairman, the Commission inaugurated the Miles Kirkpatrick Award to honor individuals whose careers contributed significantly to the work of the Federal Trade Commission.<sup>84</sup> In honoring the first awardee, Basil Mezines in 2001, and subsequent recipients, Robert Pitofsky in 2002 and Joan Bernstein in 2003, the Kirkpatrick ceremony has become an occasion to recall key episodes in the history of the Commission, to remind the agency's leadership and staff about those who built the institution, and to consider what must be done to continue the agency's improvement. The year 2001 also included a ceremony at the Commission to celebrate the 25th anniversary of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>85</sup> Like the Kirkpatrick Award ceremonies, this event supplied an opportunity to consider how the Hart-Scott-Rodino reforms had changed the agency's operations, particularly its review of mergers.<sup>86</sup>

The events of 2001 foreshadowed more elaborate projects and events with a historical focus. In 2003, the Commission hosted a roundtable to honor the 100th anniversary of the creation of the Bureau of Corporations, a body whose personnel and functions were absorbed into the FTC in 1915.<sup>87</sup> The Bureau of Corporations issued a number of major

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81. See William E. Kovacic, *Evaluating Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 855 & n.50 (2001) (discussing testimony from FTC Innovation and Globalization hearings).

82. See *Muris-Pitofsky Dialogue*, *supra* note 47, at 774-76 (discussing the use of hearings during the chairmanships of Timothy Muris and Robert Pitofsky).

83. See BUREAU OF COMPETITION, FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

84. Press Release, Fed. Trade Comm'n, FTC Chairman Establishes the Miles W. Kirkpatrick Award (Dec. 11, 2001), <http://www.ftc.gov/opa/2001/12/kirkpatrickaward.htm>.

85. See Statement of Peter W. Rodino, Jr. On the 25th Anniversary of Hart-Scott-Rodino (2001) (Pub. L. No. 94-435, 90 Stat. 1390 (codified at 15 U.S.C. § 18A)); available at <http://www.ftc.gov/bc/hsr/rodiinstmt.htm> (discussing enactment of Hart-Scott-Rodino bill).

86. The operation of the Hart-Scott-Rodino premerger notification mechanism is discussed in William Blumenthal, *Market Imperfections and Over-Enforcement in Hart-Scott-Rodino Second Request Negotiations*, 36 ANTITRUST BULL. 745 (1991).

87. On the history of the Bureau of Corporations, including its absorption into the Federal Trade Commission following the passage of the FTC Act in 1914, see Gerald Leinwand, A History

reports,<sup>88</sup> and the anniversary roundtable was an occasion to gather many past directors of the Bureau of Economics to discuss the agency's past and future role as a vehicle for economic research.<sup>89</sup> In 2004, the Commission held a two-day research symposium to honor the 90th anniversary of the passage of the FTC Act.<sup>90</sup> A central theme of the papers presented at the symposium was the consideration of how the agency's past experience might improve its performance in the future.<sup>91</sup> Finally, during Muris's tenure as FTC Chairman, the agency embarked upon additional projects to examine the effects of past Commission enforcement decisions<sup>92</sup> and to perform research that examined, from both distant and recent perspectives, the evolution of the agency's competition and consumer protection programs.<sup>93</sup>

### C. Summary

From the late 1960s onward, history acquired a more prominent place in the formulation of the FTC's competition policy programs. In one sense, the agency had no choice but to do so. The blue-ribbon studies of the late 1960s, especially the ABA Report, had amplified their calls

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of the United States Federal Bureau of Corporations (1903–1914) (1962) (unpublished Ph.D. dissertation, New York University). The absorption of the Bureau into the FTC ensured that the Commission would make research and analysis a central ingredient of its operations. See F. M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461 (1990) (discussing the FTC's economic research and reporting activities).

88. The Bureau's studies included influential treatments of the beef industry, U.S. BUREAU OF CORP., REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE BEEF INDUSTRY (1905), and the petroleum sector, U.S. BUREAU OF CORP., REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TRANSPORTATION OF PETROLEUM (1906). The Bureau's operations in the first decade of the twentieth century are examined in Arthur M. Johnson, *Theodore Roosevelt and the Bureau of Corporations*, 45 MISS. VALLEY HIST. REV. 571 (1959).

89. See Federal Trade Commission, Bureau of Economics: Bureau Director Conference (Sept. 4, 2003), <http://www.ftc.gov/be/workshops/directorsconference/index.htm> (symposium celebrating 100th anniversary of the creation of the Bureau of Corporations).

90. The FTC Act is codified at 15 U.S.C. §§ 41–58. Many of the papers presented at the 90th anniversary event are published in *Federal Trade Commission 90th Anniversary Symposium*, 72 ANTITRUST L.J. 745 (2005).

91. See Deborah Platt Majoras, *Celebrating the Federal Trade Commission: Introductory Remarks for the 90th Anniversary Symposium*, 72 ANTITRUST L.J. 755, 755 (2005) (remarks by FTC Chairman Majoras) (“[B]y studying the past we increase our understanding of what the agency must do today and tomorrow to improve the well-being of consumers.”).

92. See *Muris-Pitofsky Dialogue*, *supra* note 47, at 826–28 (discussing FTC retrospective studies of enforcement decisions).

93. Representative works include Kovacic, *Competition Policy Norms*, *supra* note 25; Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002); Timothy B. Muris, Chairman Fed. Trade Comm'n, *How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy*, Prepared Remarks for the American Bar Association Section of Antitrust Law Fall Forum (Nov. 19, 2003), <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>; and Winerman, *supra* note 6.

for change by calling attention to the Commission's alleged imperviousness to reform despite the recommendations of numerous blue-ribbon studies and individual commentators in the half-century since 1914. One way to shed the Commission's image as an institution content with mediocrity was to embrace the much-discussed but long-neglected reform agenda. As discussed below,<sup>94</sup> the enormously ambitious FTC competition policy program of the 1970s can be explained as an effort to execute a decisive, visible break from a dismal past.

The Commission's renewed interest in history stemmed from more than desperate necessity. Although I cannot prove the point rigorously, the pursuit of numerous historically oriented research projects in the second half of the 1970s arguably was a consequence of devoting significant resources to create and sustain new policy and planning units. As one who served in the Bureau of Competition's Planning Office from 1979 through 1982, I am convinced that the urgency of addressing fundamental questions about the appropriate role of the agency and the design of its programs inevitably led the Commission's offices and their researchers to examine the origin and evolution of the Commission's competition programs.<sup>95</sup> It is also no accident that the pursuit of new historically oriented projects in the 1990s and 2000s took place during the tenure of Chairmen Robert Pitofsky and Timothy Muris, who spent much of their careers working in or writing about the FTC and found it useful to consider the agency's work in a larger historical context.<sup>96</sup>

What has emerged in the past thirty-five years or so, both from initiatives inspired by necessity and from measures adopted by choice, is a norm of agency behavior that takes the past seriously as a source of guidance for the future. This is a healthy trend for at least two reasons. First, there is considerable value to an institution in pausing from time to time to engage in ceremonial reflection. Any institution that aspires to greatness should and must take time to recall its past and to acknowledge the work of individuals who have contributed significantly to its development. This is a vital element of the commitment that a great institution makes to those who labor on its behalf. Second, past experience can have great practical value as a source of guidance about the appropriate course for current and future policy. The discussion below turns to some of the

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94. See *infra* notes 120–29 and accompanying text.

95. It is also true that, to some extent, an element of externally imposed need inspired these projects. Some of my own research from this period took place as Congress was considering measures to curtail the Commission's competition and consumer protection authority. My work was designed, in part, to refute arguments that the Commission had ignored the preferences of Congress. See Kovacic, *Congressional Oversight*, *supra* note 6.

96. The importance of a historical perspective to both Pitofsky and Muris is apparent in the dialogue reproduced in the *Muris-Pitofsky Dialogue*, *supra* note 47.

practical lessons that a thoughtful examination of history can have for a competition policy agency as it devises a strategy for matters involving intellectual property.

#### IV. DESIGNING EFFECTIVE COMPETITION POLICY STRATEGIES: LESSONS FROM FTC HISTORY

The FTC's experience in the modern era and its investment of resources in historically oriented projects illustrates how examining the past can inform the judgment of competition agencies about how to use their authority. The discussion in this Part identifies six guidelines that draw upon the Commission's history. The observations presented here apply to a competition agency's formulation both of general strategies and of specific strategies for intellectual property.

##### *A. Build an Accurate Profile of Powers and Activities*

The process by which a competition authority decides how to use scarce resources must build upon a recurring examination of the agency's existing foundation of statutes and regulations, as well as its existing patterns of activity.<sup>97</sup> Competition agencies operate in dynamic commercial and regulatory environments. Continuing changes in business patterns, methods of business operation, global trading patterns, and regulatory institutions at home and abroad require competition agencies to examine the adequacy of the statutes and regulations that supply the authority for their existing programs. Vital areas for attention include the sensibility of existing substantive rules and remedies, the significance of exemptions or other limits on the scope of the agency's operations, adjustments in the activities of other government bodies that share authority with the competition agency, and developments that stem from the exercise of private rights of action. This process of reassessment can profit substantially from contributions by expert observers outside the agency.<sup>98</sup>

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97. The proposals made in this paragraph are derived from William E. Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, 50 ANTITRUST BULL. 511, 512–13 (2005).

98. Competition agencies can elicit contributions from outsiders in various ways. One approach is to publish discussion papers and solicit public comments. See, e.g., Directorate-General for Competition, Eur. Comm'n, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (Dec. 2005), available at <http://www.ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf> (outlining possible approaches for treating dominant firm exclusionary conduct and soliciting public comments). Another approach is to hold public hearings. See, e.g., Press Release, Fed. Trade Comm'n, Federal Trade Commission/Department of Justice Hearings on Single-Firm Conduct to Begin June 20 (June 5, 2006), <http://www.ftc.gov/opa/2006/06/section2.htm> (describing FTC and DOJ public hearings on antitrust rules for unilateral conduct).

The process of regular stock-taking should also include an examination of past patterns of agency activity. The competition authority should build and maintain a database that reports all cases initiated; supplies the subsequent history of these matters; and aggregates statistics about the cases using a classification scheme that permits comparisons over time. Similar data sets should be maintained for non-enforcement activities, such as the preparation of reports and advocacy measures. An accurate understanding of the status quo is necessary to consider the wisdom of existing strategies and to formulate refinements.<sup>99</sup>

### *B. Employ a Balanced Portfolio of Policy Instruments*

The term “competition policy” sometimes is equated with the enforcement of prohibitions against anticompetitive business practices.<sup>100</sup> The traditional focus of what most competition agencies do is to bring cases against such practices.<sup>101</sup> Indeed, prosecuting cases is a vital, although not the only, element of a competition policy system: in formulating a law enforcement strategy, policymakers should seek to direct, as the main priority, enforcement resources toward practices posing substantial dangers for consumers, the cessation of which will promise the largest rewards for society.<sup>102</sup> The identification of such practices in the IP field often requires extensive study and industry-specific knowledge, as the role that IP rights play in competitive processes can vary substantially from industry to industry.<sup>103</sup> As discussed below,<sup>104</sup> this typically will require conscious efforts by the agency to improve its base of knowledge and ensure that it has the necessary human capital to pursue specific matters.

Properly understood, sound competition policy encompasses a larger collection of policy instruments by which a country can promote

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99. Examples of modern research by FTC officials that are based on this premise include Kovacic, *Competition Policy Norms*, *supra* note 25, and Leary, *supra* note 93.

100. See William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 281 (2001) [hereinafter Kovacic, *Institutional Foundations*] (describing the tendency in some commentary to equate competition law and policy with the prosecution of statutes that forbid various forms of business conduct).

101. See Kovacic, *Competition Policy Norms*, *supra* note 25, at 407–10 (discussing and criticizing the case-centric conception of competition policy).

102. See *Muris-Pitofsky Dialogue*, *supra* note 47, at 832–43 (discussing appropriate priorities for FTC antitrust law enforcement).

103. See William E. Kovacic & Andreas P. Reindl, *An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy*, 28 FORDHAM INT'L L.J. 1062, 1089–90 (2005) (discussing the importance to competition agencies of pursuing a research and analysis agenda concerning IP issues).

104. See *infra* Part IV.F.

business rivalry.<sup>105</sup> For any specific competition policy issue, antitrust enforcement might not always be the sole or superior policy instrument to be used.<sup>106</sup> To promote market rivalry, nations can tailor competition policy systems to suit their unique needs and capabilities through their initial choice of tools, e.g., advocacy, education, research, and law enforcement;<sup>107</sup> through the relative emphasis that the new competition agency gives to these tools as it begins operations and matures; and through adjustments to the agency's powers over time to alter the initial collection of policy tools. There is considerable room to account for specific national circumstances and changing capabilities through the initial definition of responsibilities and creation of policymaking instruments, the sequencing of activities, and the adjustment of powers over time.

Two examples illustrate the importance of non-litigation instruments to the development of an effective competition policy system. First, one of the most important contributions of a competition policy system is to serve as an advocate within the government and the country at large for reliance on pro-competition policies.<sup>108</sup> The root of an observed competition policy problem may reside in other government regulatory programs that distort the competitive process.<sup>109</sup> The competition agency's aim should be to identify first-best solutions, which may involve reforms to these collateral regulatory regimes. This consideration lies at the heart of the FTC's 2003 report on the patent system and its recommendations for reforming the rights-granting process.<sup>110</sup>

The second, closely related illustration involves education. Competition agencies must devote resources to educating business officials, consumers, and government policymakers about the merits of

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105. See William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861 (2005) [hereinafter Kovacic, *Measuring What Matters*] (discussing the importance of policy instruments other than litigation).

106. For example, improving the rigor of the mechanism by which IP rights such as patents are granted may be a superior way to correct competition problems, rather than using lawsuits premised on theories of monopolization or attempted monopolization in order to mandate access to what are arguably improvidently granted IP rights. See Kovacic & Reindl, *supra* note 103, at 1066–67 (arguing that improvements in the rights-granting process is a superior, first-best solution to problems sometimes addressed through the litigation of antitrust monopolization cases).

107. For a more complete description of these competition policy instruments, see Kovacic, *Institutional Foundations*, *supra* note 100, at 282–86.

108. See James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005) (discussing accomplishments of the FTC's competition advocacy program).

109. See William E. Kovacic & Andreas P. Reindl, *supra* note 103, at 1064–66 (discussing how imperfections in the system for granting IP rights can distort competition).

110. See TO PROMOTE INNOVATION, *supra* note 52, at 7–12. See also *supra* note 106 and accompanying text (describing how improvements in the process for granting IP rights can be superior to the prosecution of antitrust cases as a method for increasing competition).

competition and pro-competition policies. The competition authority can be a catalyst for public debate about the appropriate role of government intervention in the economy and the correct choice of strategies for using competition as a means to improve economic performance. Performing the education function can help the competition agency build a political constituency for pro-competition policies. To have positive, long-lived effects, reforms ultimately must command public support.

For example, the FTC has engaged in a number of efforts to disseminate the results of its study of the U.S. patent system.<sup>111</sup> Among other measures, the Commission has participated in various professional associations and academic discussions about the agency's proposals, aiming to explain its recommendations and build support for legislative reforms and adjustments to the operations of the U.S. Patent and Trademark Office.<sup>112</sup>

### C. Match Commitments to Capabilities

Decisions about what a competition agency should do must account for the capacity of the agency to execute contemplated programs successfully. Imagine that an acquaintance were to ask you whether you would like to attend a performance this evening of Beethoven's Ninth Symphony. A natural response to his question would be to ask, "Who is playing?" If the performers are an ad hoc ensemble of energetic, hard-working, and under-talented musicians, one is likely to find a reason to decline. If the composition is to be played by the Vienna Philharmonic, one is likely to say, "When and where?" In this example, as in so many other things, it is impossible to assess the wisdom of the proposed endeavor without knowing something about the capacity of the individuals and institutions that will carry out the task at hand.

So it is with competition policy and with the special analytical demands posed by many matters that arise with IP issues. A review of modern antitrust enforcement history suggests that debates about the appropriate form and mix of public agency activity fail to focus on potential mismatches between commitments and capability. One frequently used narrative of U.S. modern antitrust history depicts federal enforcement policy as a swinging pendulum.<sup>113</sup> In the pendulum narrative,

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111. See, e.g., TO PROMOTE INNOVATION, *supra* note 52.

112. See Press Release, Fed. Trade Comm'n, FTC to Co-Sponsor Town Meetings on Patent System Reform (Dec. 22, 2004), <http://www.ftc.gov/opa/2004/12/patenttownhallmeetings.htm> (announcing nationwide series of meetings on patent reform to be co-sponsored by the FTC, the National Academies' Board on Science, Technology, and Economic Policy, and the American Intellectual Property Law Association).

113. Kovacic, *Competition Policy Norms*, *supra* note 25, at 377–82.

federal antitrust enforcement swings through three phases: too active in the late 1960s and 1970s, too passive in the 1980s, and properly moderate in the 1990s.<sup>114</sup> To borrow the classification scheme introduced in a famous children's story, federal enforcement policy goes from too hot, to too cold, to just right.<sup>115</sup>

Popular and scholarly discussions of the “too hot” period of the late 1960s and the 1970s often depict the federal enforcement agencies as being virtually irrational.<sup>116</sup> Officials at the DOJ and the FTC are said to have distrusted all mergers and to have actively sought to dismantle large firms,<sup>117</sup> all the while guided by an undiluted populism that was undisciplined by prevailing concepts of proper economic analysis.<sup>118</sup> Thus, enforcement officials are claimed to have approached all commercial phenomena with the simplifying assumption that “bigness is bad.”<sup>119</sup>

Although there is no question that the federal enforcement agencies pursued what, in any era, would be considered to be an extremely ambitious agenda of cases,<sup>120</sup> a common explanation for this agenda—that the agencies believed “big is bad”—is unsupportable. The agenda in question included numerous cases that attacked dominant firms for monopolization or attempted monopolization and, in many cases, sought either to

114. *Id.*

115. In *The Story of the Three Bears*, Goldilocks makes an uninvited visit to the house of the Three Bears. The bears have taken a walk in the woods, leaving their house unoccupied. Goldilocks enters, sees three bowls of porridge on a table, and samples the food:

First, she tasted the porridge of the Great Big Bear, and that was too hot for her. Next she tasted the porridge of the Middle-sized Bear, but that was too cold for her. And then she went to the porridge of the Little Wee Bear, and tasted it, and that was neither too hot nor too cold, but just right, and she liked it so well, that she ate it all up, every bit!

*The Story of the Three Bears*, in THE ILLUSTRATED TREASURY OF CHILDREN'S LITERATURE 9, 70 (Margaret E. Martignoni ed., 1955).

116. See, e.g., Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution v. the Counterrevolution*, 66 N.C. L. REV. 931, 939 (1988) (describing officials who designed federal merger enforcement policy in the 1960s as “the government antitrust witchdoctors”).

117. See *The New Enforcers*, ECONOMIST, Oct. 7, 2000, at 79, 80 (calling federal enforcement officials “trust-busting zealots of the 1960s who saw evil in every big company or merger”); Charles Rule, Deputy Assistant Att’y Gen. for Antitrust, *Deregulating Antitrust: The Quiet Revolution*, Speech Before the 19th New England Antitrust Conference 10 (Nov. 8, 1985) (stating that antitrust analysis “need not be very sophisticated . . . to determine that such antitrust notions as ‘no fault monopolization’ have little economic merit and can be explained merely as a knee-jerk reaction to economic success and a suspicion of capitalism”).

118. See Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J. L. & PUB. POL’Y 239, 253 (1999) (calling federal antitrust enforcers from the 1960s “excessively intrusive Populists”).

119. See Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 822 (1987) (describing “the mythology on which some 1960s-style antitrust depended” as including “the notions that big is bad and that small is somehow beautiful”).

120. See Kovacic, *Competition Policy Norms*, *supra* note 25, at 450–51 (describing ambitiousness of the DOJ and FTC program in the late 1960s and 1970s, which was aimed at challenging the behavior of dominant firms).

restructure the defendant firms or to compel them to license intellectual property such as copyrights, trademarks, or patents.<sup>121</sup> Rather than being inspired by a simple-minded aversion to substantial corporate size, the cases in question built upon an intellectual foundation that assumed that high levels of concentration facilitated effective industry-wide coordination on pricing or output; that superior performance rarely explained a firm's market supremacy; and that efforts to disassemble large firms into smaller constituent parts seldom would sacrifice important efficiencies.<sup>122</sup> Proof that this vision of competition policy was not an aberration can be found in the impressive roster of scholars who either supported the Neal Commission's deconcentration recommendations in 1969<sup>123</sup> or endorsed proposals for no-fault monopolization measures in the late 1970s.<sup>124</sup>

A more accurate and sophisticated criticism of § 2 enforcement in the late 1960s and early 1970s would focus on two considerations. The first, which will be discussed in Part IV.D,<sup>125</sup> deals with the intellectual foundation on which the enforcement agencies pursued the abuse of dominance cases. The second criticism deals with institutional capability. As a group, the government's § 2 cases of the late 1960s and early 1970s were so ambitious and sweeping in their economic aims that, in my own assessment, the agencies' capabilities were dramatically overtaxed.<sup>126</sup> In the five-year period from 1969 to 1974, the DOJ and the FTC committed themselves to achieve massive corporate reorganizations that included the nation's four largest cereal producers, its eight largest petroleum refiners, the world's leading computer producer, the country's two leading tire producers, the largest U.S. producer of bread, the world's largest

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121. Examples of cases from this period in which the FTC sought or obtained compulsory licensing of intellectual property as a remedy for illegal monopolization or attempted monopolization include: Xerox Corp., 86 F.T.C. 364 (1975) (consent order requiring royalty-free licensing of patents relating to dry paper photocopying); Kellogg Co., 99 F.T.C. 8, 11-16 (1982) (complaint alleging maintenance of highly concentrated, noncompetitive market structure and seeking, among other remedies, trademark licensing); and Borden, Inc., 92 F.T.C. 669, 671-72 (1978) (complaint alleging monopolization and maintenance of noncompetitive market structure and seeking, among other remedies, trademark licensing), *aff'd*, Borden, Inc. v. FTC, 674 F.2d 498 (6th Cir. 1982), *modified*, 102 F.T.C. 1147 (1983).

122. See Kovacic, *Failed Expectations*, *supra* note 25, at 1136-39 (discussing the intellectual foundation for deconcentration cases in the late 1960s and 1970s).

123. *Id.* at 1137 & n.200.

124. *Id.* at 1137 & n.202.

125. See *infra* notes 131-32 and accompanying text.

126. The exceptional length of the proceedings of several matters pursued in this period is one indication that the FTC's resources were stretched too thin. See Kovacic, *Failed Expectations*, *supra* note 25, at 1120 (discussing the duration of monopolization litigation involving the cereal and petroleum industries).

telephone system, and the world's largest producer of photocopiers.<sup>127</sup> In a number of quarters, these initiatives were viewed as merely a good start.<sup>128</sup> Instead, it was a serious mismatch between enforcement objectives and institutional capability.

My view is that the federal agencies would have been better off if they had accepted an enforcement norm that emphasized choosing a smaller number of matters. I cannot offer a rigorous proof for the proposition, but I believe that an effort focused on prosecuting a smaller number of cases might have shortened the time needed to complete each case and would have permitted more attention to be directed toward improving the analytical foundations of each case. As it was, relatively few of the FTC's litigation efforts in this period succeeded, generating a considerable cost in resources and a drain on the institution's morale.<sup>129</sup>

A critical factor in avoiding commitment/capability mismatches is a careful assessment of the agency's human capital. A public agency goes only as far as its professional and administrative staff will carry it. This is particularly true in the area of intellectual property, where expertise in patent law, the sciences, or engineering is likely to be necessary to the formulation and prosecution of cases and to the pursuit of research and advocacy functions. The recruitment and retention of those with special skills must be considered as one element of larger efforts to ensure that an agency's programmatic commitments are commensurate with its capabilities to fulfill the commitments.

#### *D. Understanding the Intellectual Foundations of Competition Policy*

A competition agency that seeks to build a program that serves consumer interests successfully must pay close attention to the framework of ideas that shapes doctrine in the courts and molds widely held

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127. *Id.* at 1119–20.

128. In November 1974, FTC Chairman Lewis Engman appeared before the Joint Economic Committee of Congress to discuss the FTC's antitrust law enforcement program. See *Market Power, the Federal Trade Commission, and Inflation: Hearing Before the Joint Economic Committee of the Congress*, 93d Cong., 2d Sess. 58–59 (1974). By this time, the FTC had begun monopolization cases involving the breakfast cereal, petroleum refining, reconstituted lemon juice, bread, and photocopier sectors. Despite this level of activity, some legislators believed the FTC's efforts were inadequate. At the hearing, Senator William Proxmire complained to Engman that "the FTC, like a number of other regulatory agencies, seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." *Id.* Proxmire said that the FTC had lapsed by failing to take "aggressive" action against the steel industry. *Id.*

129. See Kovacic, *Failed Expectations*, *supra* note 25, at 1147 (discussing costs of the unsuccessful FTC monopolization cases from the 1970s); see also 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. IN L. & ECON. 173, 185 (1989) (discussing cost to the morale of FTC staff from the prolonged proceedings in the FTC's *Exxon* case, which sought to restructure the nation's eight leading petroleum refiners).

perceptions about what constitutes good enforcement policy. Two examples illustrate the point. As discussed above,<sup>130</sup> the intellectual weakness of government enforcement policy in the late 1960s and 1970s was not that the agencies defied existing notions of sound economics and attacked large corporations as an end in itself. The enforcement policies of the federal antitrust agencies toward dominant firms in this period rested upon an analytical model that highly respected commentators thought to be a suitable basis for enforcement. The more appropriate criticism of federal enforcement policy is that the agencies failed to pay adequate attention to new academic research that was raising serious doubts about the soundness of the intellectual platform upon which the deconcentration program rested.<sup>131</sup> The FTC launched its ambitious program of monopolization and attempted monopolization cases in the 1970s in the face of growing evidence that economists had serious second thoughts about their theories.<sup>132</sup> This experience suggests the need to engage in continuing efforts to determine whether existing ideas—both those that favor intervention and those that discourage it—are attuned to changes in thinking that warrant adjustments.

A second example involves the sources of ideas that have influenced courts, from the mid-1970s to the present, to impose more demanding standards on plaintiffs who pursue monopolization or attempted monopolization cases.<sup>133</sup> There is a tendency in antitrust commentary to attribute this judicial narrowing of the zone of liability for dominant firms to the influence of “Chicago School” scholars such as Robert Bork and Frank Easterbrook, who have proposed that antitrust law and policy should largely or completely ignore claims of unlawful exclusion by large enterprises.<sup>134</sup> This interpretation overlooks the substantial degree to which “Harvard School” scholars such as Philip Areeda and Donald Turner influenced courts’ retreat from expansive applications of antitrust law that would curb the behavior of dominant firms.<sup>135</sup> Careful examination of the intellectual foundations of the more permissive jurisprudence

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130. See *supra* notes 122–24 and accompanying text.

131. See Kovacic, *Competition Policy Norms*, *supra* note 25, at 458.

132. See Kovacic, *Failed Expectations*, *supra* note 25, at 1138 (discussing erosion of the intellectual foundations of FTC deconcentration cases).

133. On the retrenchment of liability standards for monopolization and attempted monopolization in the past thirty years, see GELLHORN ET AL., *supra* note 24, at 153–90.

134. See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double Helix*, 2006 COLUM. BUS. L. REV. (forthcoming) (collecting sources and describing the conventional view that non-interventionist Chicago School preferences account for modern limitations on monopolization and attempted monopolization doctrine).

135. *Id.* (analyzing the impact of modern Harvard School scholars on judicial analysis of monopolization and attempted monopolization claims from the 1970s to the present).

of the past three decades reveals why the transformation was so extensive by highlighting the breadth of the intellectual consensus—a fusion of Chicago and Harvard School perspectives—that motivated adjustments in doctrine. This type of study also highlights key Chicago-Harvard assumptions and policy preferences (including concerns about possible over-deterrence from private treble damage actions and about the limited capacity of courts and enforcement agencies to make sound judgments in this area) that account for the modern equilibrium of doctrine and policy.<sup>136</sup>

#### *E. Anticipating and Addressing Challenges to the Competition Agency's Exercise of its Authority*

Past experience provides a useful basis for predicting specific types of challenges that competition agencies are likely to face when they seek to exercise their authority in matters involving complicated IP issues. For example, the FTC's experience with current generation cases such as *Schering*,<sup>137</sup> *Unocal*,<sup>138</sup> and *Rambus*<sup>139</sup> indicates that respondents in such matters will strenuously press the agency to justify its theory of intervention, its jurisdiction to act, its analysis of the facts, and its choice of remedy. The FTC's failure in *Schering*<sup>140</sup> to persuade the court of appeals to sustain its finding of liability suggests that the agency may have to take additional steps to demonstrate its understanding of the phenomena at issue and to persuade reviewing tribunals that their interventions are well founded.

#### *F. Building and Sustaining a Knowledge Base*

A competition agency must make continuing investments to ensure that its litigation and non-litigation initiatives rest upon a sound base of knowledge. This is particularly important in matters involving IP, where a common criticism of competition policy is its inability to intervene expertly in matters involving great technological complexity or

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136. *Id.* (identifying the shared assumptions upon which Chicago School and Harvard School scholars have based their proposals for limiting the scope of the doctrine that addresses dominant firm misconduct).

137. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006); *see also supra* note 15 and accompanying text.

138. *See supra* notes 20, 22, and accompanying text.

139. *See supra* notes 21, 23, and accompanying text.

140. *See supra* note 15 and accompanying text (discussing *Schering* and other patent settlement cases).

dynamism.<sup>141</sup> One vital means to sustain capacity is to establish a research capability and research agenda that permits the agency to analyze the difficult issues that frequently emerge in the analysis of IP matters. By investing in competition policy research and development,<sup>142</sup> a competition agency creates a foundation for its advocacy activities and its selection of possible subjects for law enforcement.<sup>143</sup>

There are a variety of specific research and analysis tools that an agency can use to sustain and improve its intellectual proficiency. Means to this end include the periodic use of hearings, such as the FTC's innovation and globalization hearings in the 1990s<sup>144</sup> and the joint FTC/DOJ hearings on intellectual property in 2002,<sup>145</sup> and the preparation of empirical studies, such as the FTC's generic drug study in 2003.<sup>146</sup> An agency should also undertake a routine program of evaluation. The successful execution of competition policy programs requires a continuing commitment by competition authorities to assess the impact of efforts to design and implement the competition policy system.<sup>147</sup> By habitually reviewing the effects of completed cases and the agency's existing organization and operational procedures, an agency can identify adjustments that will help it to improve the quality of its programs.

## V. CONCLUSION

A competition agency cannot expect to prosper unless it first defines clearly what it intends to do. This requires a deliberate process for setting a strategy and explaining the agency's goals to its own staff and to outside observers. No responsibility of the competition agency's top officials is more important, and one measure of true greatness in an agency's leadership is the capacity to define and communicate the overarching themes that will guide the institution's work. There is great room to debate the wisdom of the specific choices made. There is no room to

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141. See William E. Kovacic, *Antitrust After Microsoft: Upgrading Public Competition Policy Institutions for the New Economy*, 32 UWLA L. Rev. 51, 55–56 (2001) (discussing criticisms of competition law's application in technologically complex and dynamic industries).

142. See Kovacic, *Measuring What Matters*, *supra* note 105 (discussing the importance of competition policy research and development).

143. See William E. Kovacic, *Competition Policy Research and Development: Institutional Interdependency and the Future Work of Competition Agencies in the Professions*, in EUROPEAN COMPETITION LAW ANNUAL 2004: THE RELATIONSHIP BETWEEN COMPETITION LAW AND THE (LIBERAL) PROFESSIONS 547 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2006) (discussing how a competition agency's investments in research provide a valuable platform for its efforts to devise advocacy and law enforcement programs).

144. See *supra* notes 80–81 and accompanying text.

145. See *supra* note 53 and accompanying text.

146. See *supra* notes 43–48 and accompanying text.

147. Kovacic, *Ex Post Evaluations*, *supra* note 79, at 546–47.

debate the need to have a process for deciding what the choices should be, lest the agency's program simply be determined by default.

To insist that a competition agency consciously formulate a strategy is not to suggest that doing so is easy or that a plan chosen in advance can be followed mechanically and without adaptation. The agency is like an ocean-going ship in the age of sail. The officers of the vessel have authority to select a course, but they have no power to control tides, currents, storms, winds, and other natural phenomena. Even with a course properly and carefully charted, a gale can push the ship well off of its track. One mark of a good captain is the capacity to adapt in the face of events whose occurrence can be anticipated but whose timing and severity cannot accurately be predicted. After the intervening force has spent itself, the effective commander of the ship instructs the helm to bring the vessel back to the originally specified course. It is the difference between an order that simply says "Sail" or "Drift along" and one that says "Sail on this heading."

The urgency of establishing and pursuing a conscious strategy stems from several closely related considerations. No competition agency enjoys unlimited funds, and the scarcity of resources demands that choices be made among a range of possible applications of the agency's powers. Society has a vital stake in having the agency make these choices in a manner that most improves economic performance. A well-defined strategy clearly informs external observers—business managers, consumers, and government bodies—about the agency's intentions and guides the agency's own staff. If asked to state the agency's top five priorities in a minute or less, the agency's leaders and top managers should be able to do so with a half-minute to spare.

In preparing a strategy and selecting tactics to implement it, an agency can learn a great deal from its past and from the histories of other competition policy institutions. Conscious, recurring efforts to examine past experience can yield informative perspectives about how to allocate resources, how to choose the mix of litigation and non-litigation instruments to accomplish specific competition policy objectives, and how to build institutional capacity. The path of the development of competition policy has accustomed all of us to accept the important connection between law and economics. A greater appreciation of the value of interdisciplinary study that links law and history could improve the formulation of wise competition policy programs no less dramatically.