Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036

June 28, 2021

Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment on Possible Rescission of Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act

Dear Chair Khan:

Washington Legal Foundation (WLF) appreciates the opportunity to comment on an item set for discussion at the Commission's July 1 open meeting. We also applaud your general goal of bringing transparency to the Commission's work, and this open meeting is a positive step in that direction.

We must agree with Commissioner Noah J. Philips, however, who on June 25 stated via Twitter: "a mere week's notice on matters requiring serious deliberation . . . undermine[s] that very goal." Rescinding the 2015 policy statement on "unfair methods of competition" under Federal Trade Commission Act § 5 would represent a significant policy and enforcement shift for the Commission. For the public to participate meaningfully in any debate over the Statement's rescission, the Commission should provide at least 30 days, if not 60, of public comment.

The published meeting agenda infers that the Commission is considering rescinding the 2015 Statement because it is purportedly misaligned with "the requirements set out by Congress to condemn 'unfair methods of competition.'" We attach to this letter a 2014 WLF Working Paper by William Kolasky that probes the legislative intent behind Section 5. That analysis reveals a set of principles that Congress sought to advance by outlawing unfair methods of competition. Several of these principles are reflected in the 2015 Statement, including that § 5 enforcement should be guided by "the promotion of consumer welfare"; that enforcement should target "harm to competition or the competitive process"; and that the Commission should apply a framework "similar to the rule of reason" when evaluating acts or practices.

The principles that Mr. Kolasky identifies reflect that Congress meant to both guide and cabin the Commission's discretion under § 5. Rescission of the 2015 statement would greatly expand the Commission's discretion in a manner inconsistent with Congress's intent. We urge your office to take Mr. Kolasky's findings and conclusions into consideration before taking action on the 2015 Statement.

Respectfully,

Glenn G. Lammi

Glenn G. Lammi
Executive Director and Vice President of Legal Studies

Attachment: "Unfair Methods of Competition": The Legislative Intent Underlying Section 5 of the FTC Act

Critical Legal Issues: WORKING PAPER SERIES

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"UNFAIR METHODS OF COMPETITION": THE LEGISLATIVE INTENT UNDERLYING SECTION 5 OF THE FTC ACT

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Foreword
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Stanford Law School

WLF

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ABOUT THE AUTHOR

William Kolasky is a partner in the Washington, D.C. office of Hughes Hubbard & Reed LLP, and is a former Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice. While there, Mr. Kolasky was one of the architects of the International Competition Network, a network of over 100 competition authorities worldwide designed to promote great international cooperation and convergence among those authorities. He has also taught antitrust law for over ten years at the American University's Washington College of Law.

Mr. Kolasky regularly represents clients in antitrust litigation before courts all over the country. He also represents clients in criminal and civil investigations before both the Antitrust Division and the Federal Trade Commission. Mr. Kolasky has secured antitrust clearance from the two agencies for more than 100 mergers and acquisitions, and has coordinated merger reviews in multiple other jurisdictions around the world. In 2013, he received the Global Competition Review's Lifetime Achievement Award for his achievement in private practice, government service, and antitrust scholarship.

He was assisted in researching and writing this article by Katherine Steele, Tristan Bird, and Stephen Halpin, III, all of Hughes Hubbard & Reed LLP. Mr. Kolasky also thanks Marc McClure, whose book, *Earnest Endeavors: The Life and Public Work of George Rublee*, helped inspire this article and who provided valuable research assistance and comments on this article.

Comments are welcome as the author considers this a work in progress; please send them to kolasky@hugheshubbard.com.

FOREWORD

by
A. Douglas Melamed[1]
Herman Phleger Visiting Professor
Stanford Law School

Bill Kolasky has written an excellent, important, and carefully researched paper about the meaning of Section 5 of the Federal Trade Commission Act. To appreciate its importance, one needs to understand the context.

The Sherman Antitrust Act was enacted in 1890. It prohibits certain types of anticompetitive conduct. Twenty-four years later, in the aftermath of a Presidential election in which the three candidates' different views about antitrust enforcement figured prominently, Congress passed and President Wilson signed the Clayton Act, which prohibits anticompetitive mergers, and the Federal Trade Commission Act. Among other things, the FTC Act created a new agency, the Federal Trade Commission, and provided in Section 5 that "unfair methods of competition in and affecting interstate competition" are unlawful. Section 5 further authorized the new Commission to commence adjudicative proceedings against any person it has reason to believe has used or is using such methods of competition and to issue cease-and-desist orders with respect to such conduct.

In the 100 years since the passage of the FTC Act, the Federal Trade Commission has taken the position, largely without controversy, that it is authorized by Section 5 in effect to enforce the Sherman Act and the Clayton Act. The Commission and the Justice Department

[1]**A. Douglas Melamed** retired as Senior Vice President and General Counsel of Intel Corporation in June 2014 and will continue serving as Vice President and Senior Corporate Counselor at the company through January 26, 2015. He previously served as Acting Assistant Attorney General of the United States Department of Justice's Antitrust Division.

have thus acted largely in parallel. Both enforce the Sherman Act and the Clayton Act—the Commission in administrative proceedings and the Justice Department in federal court—and they have adopted and over the years refined a so-called "clearance" agreement to allocate enforcement matters between them.

Section 5 of the FTC Act uses language, "unfair methods of competition," that is different from the language of the Sherman Act and the Clayton Act. It is widely understood that Congress did not intend to confine the Commission's cease-and-desist authority to conduct that violated the Sherman Act or the Clayton Act, at least as those statutes were construed in 1914.

The Supreme Court stated that explicitly in *FTC v Sperry & Hutchison*, 405 U.S. 233 (1972). The case concerned a Commission order finding that Sperry & Hutchison had violated Section 5 in connection with its trading stamp business. According to the Court, the case raised the question whether Section 5 empowers the Commission to "proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws." The Court answered that question in the affirmative, largely on the basis of congressional committee reports stating that Congress had decided to leave it to the Commission to determine what practices are unfair because there were too many unfair practices for Congress to define them all and new ones would in any event be devised in the future. The Court's discussion turned out to be dicta, however, because the Court affirmed the lower court decision setting aside the Commission's finding of unlawful conduct.

Although dicta, the Court's discussion of Section 5 might have emboldened the Commission. Over the next several years, the Commission brought a number of cases that applied Section 5 to conduct that did not violate the antitrust laws. None of them ended well for the Commission. In *Official Airline Guides v FTC*, 630 F.2d 920 (2d Cir. 1980), the court set aside a Commission order prohibiting a monopoly publisher of airline flight schedules from discriminating between certified air carriers and commuter airlines. The court explained that enforcing the order would "give the Commission too much power." In *Boise Cascade v FTC*, 637 F.2d 573 (9th Cir. 1980), the court refused to enforce a Commission order prohibiting noncollusive, parallel adoption by competitors of practices that the Commission believed diminished price competition. The court rejected the argument that it should defer to the Commission's expertise on the ground that that argument was "in tension with the acknowledged responsibility of the court to interpret Section 5," and it relied on what it called "well forged" antitrust case law to determine that Section 5 did not apply to the conduct at issue in the case. And in *E. I. Du Pont de Nemours v FTC*, 729 F2d 128 (2d Cir 1984), the court set aside another Commission order prohibiting certain practices that had been adopted without collusion by a number of competing firms and that the Commission found led to higher prices. The court said that, while the Commission is not confined to "the letter" of the antitrust laws and may proscribe "incipient violations" and conduct that is "close to a violation" or "contrary to the spirit" of the antitrust laws, it may not proscribe conduct simply because it has an adverse effect on competition.

That's where matters stood thirty years ago—a vague understanding that Section 5 encompasses something beyond the antitrust laws, not even the beginning of a workable definition of the bounds of Section 5, and a Commission that had repeatedly been slapped down when it tried to push Section 5 beyond the antitrust laws. Thereafter, except for a couple of uncontroversial consent decrees in cases involving invitations to enter into illegal agreements, the Commission seemed content to confine its competition enforcement activities to enforcing the antitrust laws.

That changed with the *N-Data* case in 2008. The issue was whether the transferee of certain patents violated Section 5 by announcing an intention to license them on fair, reasonable, and non-discriminatory (FRAND) terms after the original patent holder had committed to a standard-setting organization that they would be licensed for a one-time fee of $1000. The Commission agreed that there was no antitrust violation because, even though the conduct meant higher prices for licensees, it did not exclude rival technologies or otherwise injure competition. Nevertheless, by a 3-2 vote, the Commission accepted a consent decree under Section 5. The majority acknowledged that case law permits the unfair competition prong of Section 5 to be applied only to conduct that injures competition and asserted that competition was injured in that case, but it did not explain how there could be injury to competition under Section 5 when there was no such injury under the antitrust laws.[2]

The *N-Data* case triggered an ongoing debate about Section 5. Proponents of a broad reading of Section 5 rely principally on the expansive language of the statute and argue that a broad reading is needed to proscribe anticompetitive conduct beyond the reach of the antitrust laws. Those who favor a narrow reading of Section 5 argue that, unless the vague term “unfair methods of competition” is understood to be cabined by the abundant judicial construction of the antitrust laws or some other authoritative legal source, the law will be unpredictable and thus more likely to harm than to promote competition; that the antitrust laws are sufficiently capacious to reach almost all anticompetitive conduct that

[2]The author represented N-Data in that matter.

warrants government enforcement; and that the FTC and the Justice Department ought to apply the same law regarding anticompetitive conduct. Present and former FTC Commissioners are on both sides of the debate.

The Commission held a workshop anticipating possible Guidelines about the meaning of Section 5, but the Commissioners were unable to reach agreement. A majority of the present Commissioners appear willing to apply Section 5 in some undefined way to conduct not prohibited by the antitrust laws, but the Commission has brought few cases since *N-Data* that attempt to do so. Notably, the debate has been almost entirely about how Section 5 ought to be construed as a policy matter. There is no consensus about that, and it appears that no one knows what Section 5 actually means.

Bill Kolasky's WLF WORKING PAPER shows a way, perhaps *the* way, out of this unsatisfying stand-off. Like most good insights after they have been articulated, the premise of the paper seems both simple and obvious: Instead of focusing on the second-order question whether Section 5 is broader than the antitrust laws, we should focus directly on the ultimate question of what Congress meant by "unfair methods of competition."

After a meticulous study of the legislative history of Section 5, Kolasky concludes that, in selecting the statutory language it did and adopting and rejecting various proposed changes thereto, Congress embraced important substantive principles that give meaning to Section 5 and can guide and cabin the discretion of the Commission and the judgment of the courts in applying Section 5. The most fundamental of these principles are that Section 5 gives the FTC authority to outlaw exclusionary practices, but not exploitative practices; that Section 5 is intended to protect competition, not individual competitors; and that Section 5 proscribes only practices that exclude equally efficient competitors.

Kolasky sets a high bar by drawing parallels at the beginning of his paper to Judge (then Professor) Bork's seminal work on the legislative history of the Sherman Act. Kolasky's WORKING PAPER is unlikely to be so influential, in part because its scope is narrower. Even so, it is a timely and thoughtful paper that brings a valuable new perspective to a question that has eluded satisfactory answer for decades.

ABSTRACT

In the debate over the scope of Section 5 of the Federal Trade Commission Act, the Section's legislative history has been largely neglected. Most commentators seem simply to assume that the Section's legislative history provides little guidance as to how the FTC should exercise its authority to prohibit as "unfair methods of competition" business practices. This same assumption has led the Supreme Court in at least one case to suggest in dicta that the Commission has broad authority to use Section 5 to prohibit practices that violate the "spirit," but not the letter, of the antitrust laws without explaining what that means.

Inspired by Robert Bork's seminal article, *Legislative Intent and the Policy of the Sherman Act,* this WORKING PAPER undertakes a closer examination of the legislative history of the Section 5. It shows that while Congress intended Section 5 to reach beyond the Sherman Act to enable the FTC to prohibit anticompetitive practices in their incipiency before they become full-blown Sherman Act violations, it intended that the Commission's authority to do so would be constrained by three critical governing principles. First, the Commission would have authority only to outlaw exclusionary, not exploitative, practices. Second, the Commission would have authority to prohibit only those practices that were likely to harm competition and hence consumer welfare, and not practices whose only effect was to harm less efficient competitors. Third, the Commission would be required to apply a rule of reason analysis, similar to that used under the Sherman Act, to declare unfair only those methods of competition "which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper." This paper's review of the legislative history shows, therefore, that Congress intended Section 5 to be a "consumer welfare prescription," just as Robert Bork found to be the case for the Sherman Act.

"UNFAIR METHODS OF COMPETITION": THE LEGISLATIVE INTENT UNDERLYING SECTION 5 OF THE FTC ACT

INTRODUCTION

Considering that the Federal Trade Commission (FTC) just celebrated its centennial, it is remarkable how much uncertainty remains as to the scope of its authority under Section 5 of the Federal Trade Commission Act to prohibit "unfair methods of competition."[1] This continuing uncertainty has led some to call for the Commission to issue a policy statement to define its authority with greater clarity.[2]

Surprisingly, the ongoing debate over the scope of the FTC's authority under Section 5 has taken place without much careful study of the legislative history of the statute itself. The commentators on both sides of the debate have largely ignored the Act's legislative history, assuming perhaps that it would provide little guidance.[3] If so, their assumption is

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[1]15 U.S.C. § 45. As examples of the continuing debate over the scope of Section 5, *see, e.g.*, A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, GLOBAL COMPETITION POL'Y (Nov. 12, 2008), http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=94926 (arguing for a narrow interpretation); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?, Remarks at the ABA 57th Antitrust Law Section Spring Meeting in Washington, D.C. (Mar. 25, 2009) (transcript available at www.ftc.gov) (urging a broad interpretation).

[2]*See, e.g.*, Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI ANTITRUST CHRON., at 7 (Nov. 27, 2013), www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf; William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930-33 (2010); James J. O'Connell, *Section 5, 1914, and the FTC at 100*, ANTITRUST (forthcoming Fall 2014).

[3]This is not to say that others have completely ignored Section 5's legislative history. There were, in fact, several earlier articles that reviewed it generally. *See, e.g.*, Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003); 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, 229-38 (1980); Gilbert Holland Montague, "*Unfair Methods of Competition,"* 25 YALE L.J. 20, 2-6, 51-96 (1915). But none of these earlier discussions sought, as this article does, to fit that legislative history into the kind of consumer welfare framework Robert Bork did in studying the legislative history of the Sherman Act. *See infra* pp 2-3 and note 4.

mistaken. Just as Robert Bork found when he examined the legislative history of the Sherman Antitrust Act in his seminal article, *Legislative Intent and the Policy of the Sherman Act,*[4] the legislative history of Section 5 reveals it was intended to protect competition in order to promote consumer welfare, just as the Sherman Act was.

Over more than five months of debate on the floors of the House and Senate during the spring and summer of 1914, Section 5's proponents emphasized that their purpose in outlawing unfair methods of competition was to protect the public generally from the harms that flow from monopoly power, rather than to protect smaller competitors from larger, more efficient rivals. In response to objections that the term "unfair methods of competition" was too vague, they proposed a test for unfair competition similar to what Judge Richard Posner has urged be applied to single-firm conduct under Section 2 of the Sherman Act.[5] Like Judge Posner, they argued that a business practice should be found to be unfair only when it employs "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper," and should not be used to attack "a corporation which maintains its position solely through superior efficiency."[6]

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[4]*See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). In his article, Professor Bork showed that Congress intended the courts to apply a consumer welfare standard in interpreting the Sherman Act. Under this standard, Bork argued that the courts were required "to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output" and that only the latter could violate the Act's broad prohibitions of "restraint of trade" and "monopolization." *Id.* at 9, 16. Just over a decade later, the Supreme Court, in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), accepted Bork's reading of the legislative history, agreeing that the Sherman Act was a "consumer welfare prescription." That insight has helped shape antitrust policy ever since.

[5]*See* Richard A. Posner, ANTITRUST LAW 194-95 (2d ed. 2001) (arguing that a practice should not be found to violate the antitrust laws unless it "is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor").

[6]*See* Memorandum from George Rublee for President Woodrow Wilson Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (unpublished memorandum) (on file with the Washington, D.C. office of Hughes Hubbard & Reed LLP). *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen.

To avoid confusion at the outset, it should be made clear that this WORKING PAPER uses the term "consumer welfare" in the same sense that Judge Bork did in his article on the legislative intent behind the Sherman Act. As Kenneth Heyer has explained in an article forthcoming in the *Journal of Law and Economics,* Bork treated "consumer welfare" as meaning "total welfare, which is . . . equivalent to consumer plus producer surplus and economic efficiency."[7]

As Judge Bork found in the case of the Sherman Act, the legislative history shows that the Congress that enacted Section 5 valued competition because of its contribution to overall social welfare, not because of its distributional effects in shifting surplus from producers to consumers. The proponents of Section 5 assured their colleagues that Section 5 would not give the FTC authority to condemn competition on the basis of a firm's greater efficiency as unfair, even if it resulted in driving other less efficient rivals from the market, leaving a single firm with a monopoly. Nowhere did they suggest that this outcome should be condemned because some of the resulting surplus might flow to producers, rather than consumers.

The legislative history also shows that Congress did not intend, by proscribing unfair methods of competition, to give the Commission authority to regulate a firm's efforts to exploit its power once it had obtained a monopoly, as the FTC mistakenly did in its 2008 action against *N-Data*.[8] Section 5 was intended to give the FTC only the power to regulate

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Henry Hollis), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4141 (Earl W. Kintner ed., 1982).

[7]Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. (forthcoming 2014, issue no. 3) (manuscript at 2) (available at awards.concurrences.com/IMG/pdf/heyer_consumer_welfare.pdf). *See also* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 719 (2014).

[8]*See* Negotiated Data Solutions LLC, FTC Docket C-4234, 2008 FTC Lexis 119 (Complaint) (Sept. 22, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf.

exclusionary conduct that might otherwise result in a monopoly, not to regulate exploitative conduct once a firm had gained a monopoly. As Woodrow Wilson's key advisor on antitrust policy, Louis Brandeis, phrased it, the goal was "to regulate competition, instead of monopoly."[9]

With this introduction, the paper turns next to a brief overview of the legislative history of the Federal Trade Commission Act generally, and Section 5 in particular. It will then examine the legislative history in more detail, focusing in turn on each of the three principles governing Section 5 enforcement that emerge from that history:

- First, Section 5 gives the FTC authority only to outlaw exclusionary practices, not exploitative practices.
- Second, the purpose of Section 5 is to protect competition, not less efficient competitors.
- Third, a business practice may be found to be an unfair method of competition only when it employs "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[10]

The paper's final section will briefly review the case law interpreting Section 5. It will show that nothing in that case law should prevent the Commission and the courts from applying these three guiding principles in order to construe Section 5 in a manner consistent with its legislative purpose.

I. AN OVERVIEW OF THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT

By 1914, when Woodrow Wilson asked Congress to enact legislation to reform the antitrust laws as part of his New Freedom program, the idea of creating a new

[9] *See* Sidney M. Milkis, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 204 (2009).

[10] *See* Rublee, *supra* note 6, at 3. *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Henry Hollis), *reprinted in* Kintner, *supra* note 6, at 4141.

administrative agency to assist in enforcing the antitrust laws had been under discussion for more than a decade. Theodore Roosevelt, despite his reputation as a trustbuster, never liked the Sherman Act. In his very first Message to Congress in December 1901, Roosevelt argued that "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled."[11] Two years later, in 1903, at his urging, Congress established a Bureau of Commerce within its newly created Department of Commerce to collect information about the practices of large corporations. Roosevelt hoped that the Bureau of Commerce could use the information to persuade companies to comply with the antitrust laws and avoid government enforcement actions.[12]

Roosevelt continued to believe, however, that the federal government should have greater power to regulate the conduct of large companies. Thus, in his final Message to Congress in December 1907, Roosevelt urged Congress to amend the Sherman Act so as "to forbid only the kind of combination which does harm to the general public," and to give "a grant of supervisory power to the Government over these big concerns engaged in interstate business."[13] To accomplish this objective, Roosevelt asked Congress to enact a general federal incorporation law under which a new federal board or commission would determine whether the applicant for a federal charter stood in violation of the amended Sherman Act prior to granting a license, and would enforce compliance thereafter.

When a somewhat watered-down version of Roosevelt's proposal was introduced in

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[11]Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901), http://teachingamericanhistory.org/library/document/first-annual-message-to-congress-2/.

[12]Martin J. Sklar, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 184 (1989).

[13]Theodore Roosevelt, Seventh Annual Message to Congress (Dec. 3, 1907), http://teachingamericanhistory.org/library/document/state-of-the-union-address-part-i-12/.

Congress in March 1908, it met fierce opposition from those who feared it would give Roosevelt too much control over business generally.[14] Faced with an "avalanche of criticism,"[15] Roosevelt withdrew his support for the bill, which then quickly died in committee.

William Howard Taft succeeded Roosevelt as President in 1909 and immediately shifted direction. A former judge, Taft saw little value in trying to jawbone companies into complying with the law. He believed that it would be better to enforce the Sherman Act vigorously, leaving the courts to decide what was or was not unlawful.[16] Taft agreed with Roosevelt, however, that the Sherman Act should not prohibit all restraints of trade, but only those that unreasonably harmed competition. But to achieve that objective, rather than ask Congress to amend the Act, Taft appointed justices to the Supreme Court who shared his view of how it should be interpreted. By 1911, when the *Standard Oil* case reached the Court,[17] a majority of justices were Taft appointees. As a result, the Court ruled, over an angry dissent from Justice John Marshall Harlan, that the Act prohibited only unreasonable restraints, rather than all restraints as some earlier decisions had suggested.[18]

Despite being a victory for the government that resulted in dissolution of the country's most notorious trust, *Standard Oil* dismayed many progressives, who feared that

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[14] Sklar, *supra* note 12, at 244 (quoting *Amending the Anti-Trust Law*, N.Y. TIMES, Mar. 24, 1908, at 1, http://query.nytimes.com/mem/archive-free/pdf?res=F50611FA345E13738DDDA80A94DC405B838DF1D3) (objecting that the bill was "intended to enable President Roosevelt to accomplish by indirection what he very well knows he could not get by the express authorization of Congress, the power to regulate and control all corporation business of the country by a system of registration or license").

[15] *Id.* at 253.

[16] William Kolasky, *Theodore Roosevelt and William Howard Taft: Marching Toward Armageddon*, ANTITRUST 97, Spring 2011, at 97, 103.

[17] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[18] *See, e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (holding that the statute's condemnation of '*every* contract . . . in restraint of trade' encompassed *all* contracts of that nature, not simply those invalid as unreasonable under the common law).

its "rule of reason" would give conservative judges too much latitude in deciding what constituted an unreasonable restraint of trade.[19] But it also worried the business community, which was concerned that the rule of reason would make it difficult to predict what practices would be found unlawful. These similar, but opposing concerns led to calls for legislative action from both sides. Five senators, described as "radical Democrats and Republican insurgents," introduced bills to overrule *Standard Oil* legislatively by proscribing all contracts, combinations, and conspiracies in restraint of trade.[20] A second group of three senators, led by Robert La Follette, introduced a bill that Louis Brandeis helped draft. They designed the bill to define more clearly what would constitute an unreasonable restraint of trade and to place the burden of showing that its conduct was reasonable on the defendant.[21] A third group, led by Senator Francis Newlands, Chairman of the Committee on Interstate Commerce, sought to revive the idea of an interstate trade commission to which corporations could submit their proposed "trade agreements" for approval or disapproval.[22]

With these competing legislative proposals on the table, the election of 1912 became a national referendum on how business conduct should be regulated, with each of the three candidates advocating very different approaches.[23] The incumbent President and Republican nominee, William Howard Taft, argued in favor of leaving the law unchanged and continuing to rely on judicial enforcement of the Sherman Act as interpreted by the Supreme Court in *Standard Oil.* The Progressive Party candidate, Theodore Roosevelt, renewed his

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[19] William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History*, ANTITRUST 82, Summer 2010, at 82.

[20] Winerman, *The Origins of the FTC*, *supra* note 3, at 13.

[21] Kolasky, *The Election of 1912*, *supra* note 19, at 85.

[22] SKLAR, *supra* note 12, at 290.

[23] *See generally* Kolasky, *The Election of 1912*, *supra* note 19.

calls for accepting that modern economic conditions required large corporations and for the creation of an interstate trade commission, with powers similar to those of the Interstate Commerce Commission, to regulate the conduct of these large companies. Finally, the Democratic Candidate, Woodrow Wilson, advised by Louis Brandeis, advocated a third approach. He argued that instead of accepting that monopolies were inevitable and trying to regulate them as Roosevelt proposed, the government should seek "to regulate competition" and thereby prevent monopolies from forming. Wilson, therefore, advocated legislation that would define more clearly those practices which tend to destroy competition and that would create an administrative "sunshine" commission to expose those practices and help prevent them.[24] With Taft and Roosevelt dividing the Republican vote, Wilson won the election decisively. Wilson took his victory as a mandate to pursue this third approach as part of his New Freedom legislative program.

After focusing in his first year on other parts of his New Freedom program, President Wilson, in his First Annual Address to Congress in December 1913, began his push for new legislation "to prevent private monopoly more effectually than it has yet been prevented."[25] One month later, in an address to a joint session of Congress, Wilson outlined a two-part program similar to the one he had advocated during his 1912 campaign.[26] First, he called for a "more explicit legislative definition of the policy and meaning of the existing antitrust law." Second, he proposed "an interstate trade commission" to provide "the advice, the definite

[24]*Id.* at 86.

[25]Woodrow Wilson, State of the Union Address (Dec. 2, 1913), *reprinted at* 51 CONG. REC. 75 (1913).

[26]Woodrow Wilson, Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies (Jan. 20, 1914), *reprinted at* 51 CONG. REC. 1962-64, 1978-79 (1914), and *reprinted in* Kintner, *supra* note 6, at 3746-49.

guidance and information which can be supplied by an administrative body."[27]

President Wilson, at the time he delivered this address, appeared to contemplate that his proposed "administrative body" would serve principally to gather information and provide advice, but would not have any enforcement authority, and that enforcement of the antitrust laws, as clarified by his proposed legislation, would continue to be left to the Justice Department and the federal courts. This conception of the new commission's authority was reflected in testimony Louis Brandeis gave on behalf of the Administration before the House Committee on Interstate Commerce in February.[28] It was also reflected in the Interstate Trade Commission bill that emerged from that Committee in April, which the Committee chairman, James Covington, introduced on the floor of the House on April 14, 1914.[29] Section 10 of that bill authorized the Commission to conduct investigations "relating to any alleged violation of the antitrust Acts" but only at the direction of the President, the Attorney General, or either house of Congress. That section further authorized the Commission only to "report the facts" relating to the alleged violation and to offer "recommendations for readjustment of business in order that the corporation investigated may thereafter maintain its organization, management, and conduct of business in accordance with law."[30] It gave the Commission no enforcement power.

Brandeis, after testifying before the House Commerce Committee in February, returned to his private practice in Boston, leaving one of his colleagues, George Rublee, to

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[27] *Id.*

[28] *See Bill to Create an Interstate Trade Commission: Hearing on H.R. 12120 Before the H. Comm. on Interstate and Foreign Commerce*, 63d Cong. 101 (1914) (statement of Louis Brandeis) ("The most important function which this commission can exercise is to prevent wrongs and not prepare for the prosecution of wrongs.").

[29] H.R. 15613, 63d Cong. § 10 (1914), *reprinted in* Kintner, *supra* note 6, at 3769.

[30] *Id.* at § 15, *reprinted in* Kintner, *supra* note 6, at 3773.

follow the progress of the trade commission bill, as well as its companion bill designed to define more clearly what conduct would violate the antitrust laws.[31] The chairman of the House Committee on the Judiciary, Representative Henry Clayton, introduced this companion bill on the floor of the House on the same day as the trade commission bill. By April, Rublee had become disenchanted with the idea of trying to define more precisely through legislation the conduct that would violate the antitrust laws. Rublee explained in a memorandum he prepared for President Wilson in June that he had become convinced it would be "impossible to frame a set of definitions which embrace all unfair practices" and would "fit business of every sort in every part of this country."[32] He concluded that the better approach would be to give the new trade commission broad authority "to prevent corporations from using unfair methods of competition in commerce," leaving it to the commission to determine what conduct met that test.[33]

[31] *See* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, ANTITRUST 106, Fall 2011, at 107; Thomas K. McCraw, PROPHETS OF REGULATION 122-23 (1984). Rublee's central rule in formulating Section 5 and in persuading President Wilson to propose it was acknowledged by Senator Newlands, the chairman of the Senate Committee on Commerce who introduced the Federal Trade Commission bill on the floor, during the debate on the bill. *See* 51 CONG. REC. 11,537 (1914) (Remarks of Sen. Francis Newlands) ("It is true . . . that a suggestion was made with reference to including unfair competition by Mr. Stevens of the House, Mr. Rublee, and Mr. Brandeis. That matter was presented to me, as it was to other members of the committee of both parties. . . . It was presented to the President, and that was his view, and the matter was presented to the committee later on and was accepted."), *reprinted in* Kintner*, supra* note 6, at 4077.

[32] Rublee, *supra* note 6, at 7.

[33] President Wilson was also advised by Joseph Davies, who was then the Commissioner of Corporations and later became the first chair of the FTC. Davies shared Rublee's and Brandeis's view that the new commission should regulate competition, not monopoly. Elizabeth Kimball MacLean, *Joseph E. Davies: The Wisconsin Idea and the Origins of the Federal Trade Commission*, 6 THE JOURNAL OF THE GILDED AGE AND PROGRESSIVE ERA 248, 270 (2007) ("'The whole purpose of [the FTC] legislation,' Davies reminded Newlands and other colleagues, was to 'destroy monopoly and to regulate competition.'"). Davies agreed with Rublee, but not Brandeis, that the commission should use its authority to protect consumers, not smaller competitors. *Id.* at 272 ("Davies favored the consumer—thus his opposition to price fixing, which suppressed competition that lowered prices for the consumer. Brandeis favored the small entrepreneur, whether he provided lower prices or not."). Like Rublee, Davies also "was convinced that the effort to define unfair practices through legislation was impractical. Given their 'infinite variety,' he knew it was 'impossible to specify all that [might] be regarded as 'unfair.'" *Id.* at 262.

Rublee took his idea to Congressman Raymond Stevens, a freshman Democrat he knew from New Hampshire and who sat on the House Commerce Committee. Stevens agreed to introduce a bill embodying Rublee's new conception of the commission and to seek to have it substituted in committee for the Covington bill. Stevens' bill renamed the proposed agency the "Federal Trade Commission," and added a new Section 5 to prohibit "unfair and oppressive competition" and give the commission power to issue orders restraining "unfair methods of competition."[34] The committee quickly rejected Stevens' substitute bill and reported out its original bill. Stevens then attempted to have his version substituted for the committee bill on the House floor, again without success.[35]

Having failed in the House, Rublee and Stevens decided to approach President Wilson personally, with the help of a mutual friend, Norman Hapgood, who was the editor of *Harper's Weekly* and a close friend of the President. With opposition to the Clayton bill growing, Wilson agreed in late May to meet with Rublee. Knowing that Wilson would likely not act without consulting Brandeis, Rublee asked Brandeis to join him for the meeting, along with Stevens and Senator Henry Hollis of New Hampshire.

After Rublee outlined his proposal to Wilson, Brandeis surprised Rublee by supporting his proposal, even though he had earlier opposed giving the commission any enforcement authority. Despite Brandeis' support, Wilson decided it was too late to so radically change the trade commission bill before it was voted on in the House. The president instead waited until the bill had passed the House on June 5 before calling Rublee and the others back to the White House to tell them that he intended to have Rublee's

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[34] H.R. 15660, 63d Cong. (1914).

[35] 51 CONG. REC. 9,059 (1914), *reprinted in* Kintner*, supra* note 6, at 3878-79.

provisions incorporated into a new bill in the Senate that would be introduced as a substitute for the House bill. At Wilson's direction, the chairman of the Senate Interstate Commerce Committee, Senator Francis Newlands, introduced this substitute bill on June 13.[36] The new bill was modeled closely after the bill Representative Stevens had introduced in the House. Like that bill, it changed the name of the new commission to the Federal Trade Commission, increased its membership from three to five, and added a new Section 5 to give it broad enforcement powers. Adopting Stevens' language, this new Section 5 provided that "unfair competition in commerce is hereby declared unlawful," and empowered the Commission "to prevent corporations from using unfair methods of competition in commerce."

Debate on the new bill began on the Senate floor on June 25 and continued for nearly six weeks until the bill passed by a vote of 53 to 16, with 27 senators abstaining, on August 5. Over this period, the bill was debated on the floor for 26 full days, with the vast majority of this time being spent on Section 5's grant of authority to the Commission to prohibit "unfair methods of competition." Senator Charles Thomas, a Democrat from Colorado, set the tone for this debate on the opening day by attacking the "indefiniteness" of the term "unfair competition," and declaring that Section 5 would give the FTC "the absolute power . . . of arbitrarily determining whether any act submitted to it is or is not unfair competition."[37] Senator James Reed, a Democrat from Missouri and perhaps the most persistent critic of Section 5, added that the bill would leave the FTC "without any guide of law . . . to determine what is fair and what is unfair," thereby unconstitutionally

[36] S. 4160, 63d Cong. (1914), *reprinted in* Kintner, *supra* note 6, at 3924.

[37] 51 CONG. REC. 11,103 (1914), *reprinted in* Kintner, *supra* note 6, at 3947.

delegating to the Commission the powers of Congress to legislate.[38]

After the first two weeks of this debate, George Rublee prepared a memorandum for President Wilson with "answer[s] to most, if not all, of the objections that have been raised to" Section 5.[39] This memorandum, which remains unpublished, provides valuable insight into the intentions of the original authors of Section 5. Stating that "[t]he object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods," the memorandum goes on to explain what Rublee understood the term "unfair methods of competition" to mean: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[40]

Rublee's statement of the purposes and meaning of Section 5 was later embraced by the proponents of the bill on the floor of both the Senate and House, who used his arguments—often verbatim—to rebut the concerns of Senator Reed and others that Section 5 was too vague to be enforceable.[41] As they expanded on these views over the course of

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[38]*Id.* at 11,114, *reprinted in* Kintner, *supra* note 6, at 3972.

[39]Letter from Franklin K. Lane, U.S. Sec'y of the Interior, to Woodrow Wilson, President of the United States, providing an introduction to and attaching George Rublee's Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission (July 10, 1914) (unpublished memorandum) (on file in the Washington, D.C. office of Hughes Hubbard & Reed LLP). For a more detailed account of Rublee's role in guiding administration senators in their defense of Section 5, *see* Kolasky, *The Election of 1912*, *supra* note 19.

[40]Rublee, *supra* note 6, at 3. *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Henry Hollis), *reprinted in* Kintner, *supra* note 6, at 1982 (repeating Rublee's formulation of the distinction between fair and unfair competition nearly verbatim).

[41]In a series of interviews conducted from December 1950 to February 1951, Rublee explained that he "was very busy during all this time furnishing ammunition by explaining to the Administration Senators what this meant, why it was a good thing, why it was constitutional, and all that. [He] actually wrote speeches that were delivered by senators." Reminiscences of George Rublee (series of interviews conducted from December 1950 to February 1951), at 116 (available at Columbia University's Rare Book & Manuscript Library in the Columbia Oral History Archives). Rublee sat in the visitors' gallery during the debates, distributing his notes and speeches to the senators, and slipping them arguments to rebut the other senators' views. *Id.* at 117

that debate, the proponents were able to overcome the initial skepticism, if not outright opposition, that greeted the bill when it was first introduced, resulting in the bill's ultimate passage in early September. Their arguments in support of the bill, therefore, provide the best evidence of the legislative intent behind Section 5.

II. THE PRINCIPLES CONGRESS INTENDED TO GOVERN THE COMMISSION'S ENFORCEMENT OF SECTION 5's PROHIBITION OF UNFAIR METHODS OF COMPETITION

The debates on the floor of both the Senate and House reveal three main principles that Congress intended would govern the FTC's exercise of its authority under Section 5 to prohibit unfair methods of competition. The first principle was that Section 5 would give the Commission authority only to regulate exclusionary practices that might lead to monopoly, not to regulate a firm's efforts to exploit its monopoly power once acquired. The second principle was that Section 5 would give the FTC authority only to prohibit those unfair methods of competition that threaten to harm competition itself and thereby expose consumers to the evils of monopoly, and the agency's authority could not be used to protect smaller, less efficient rivals. The third, which was a corollary of this second principle, was that the Commission could find that a business practice violated Section 5 only when it employed unfair "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper," and that it could not be used

("One speech I wrote, I had fifteen or twenty copies typewritten and distributed and I could see the distinctive covers which I had placed them in laying around on the tables."). Rublee was so visible during the debates that Senator Reed questioned his role: "I asked [the senator] if he did not know a man named Rublee, who has been weeks here in Washington and has haunted the galleries and antechambers of the senate. He has been very active in the advocacy of this bill, and I wanted to learn what the Senator knows about the activities of Mr. Rublee . . . and who, if anybody, is paying Mr. Rublee." 51 CONG. REC. 14,786-87 (1914), *reprinted in* Kintner*, supra* note 6, at 4702.

to attack "a corporation which maintains its position solely through superior efficiency."[42] Each of these three controlling principles will now be examined in turn.

A. Section 5 Gives the Commission Authority to Only Regulate Competition, Not Monopoly

The first major theme that emerges from the legislative history is that Section 5 was designed to put into law President Wilson's 1912 campaign pledge to regulate competition, not monopoly. Congress did not give the FTC the power to regulate a firm's use of monopoly power to extract monopoly rents from its customers, however unfair or oppressive a firm's conduct might be, but gave it the power to prevent firms from acquiring or maintaining monopoly power through exclusionary practices.

This limitation was a natural result of the debate during the election of 1912 as to how business should be regulated.[43] The Progressive Party, led by Theodore Roosevelt, saw some measure of monopoly power as inevitable in a modern industrial economy. The Progressives sought, therefore, to give the government the power to regulate the exercise of that monopoly power which, in their view, could not be prevented. The Democratic Party, led by Woodrow Wilson and Louis Brandeis, argued to the contrary that large firms were not necessarily more efficient than small ones and that most monopolies were likely the result of exclusionary conduct. The Democrats urged, therefore, that the government should strive to prevent monopolies from forming by seeking to regulate competition, rather than try to regulate monopolies once they had formed, as Roosevelt urged.

The reports of the House and Senate Committees on Interstate Commerce that

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[42]Rublee, *supra* note 6, at 4-5. *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Henry Hollis), *reprinted in* Kintner, *supra* note 6, at 1982.

[43]*See generally* Kolasky, *The Election of 1912*, *supra* note 19.

accompanied the bills to create a new trade commission took great pains to make clear that these bills embodied the Democratic Party's view and not that of the Progressive Party. Thus, the House report begins by stating that the purpose of its bill was "the preservation of proper competitive conditions in our great interstate commerce," and that there was "no place in the bill" for "the establishment of a commission having powers of regulation or control of prices."[44] The Senate report was even more explicit:

> Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable . . . , but recognize that a commission is a necessary adjunct to the preservation of competition. . . . The commission which is proposed by your committee in the bill is founded upon the latter purpose and idea.[45]

Notwithstanding these clear statements of legislative purpose by both committees, several senators and representatives sought further assurances during the floor debates that the new commission would not have the power to regulate the conduct of firms with monopoly power, expressing a fear that such authority could dull efforts to prevent monopolies from forming in the first place. The first senator to raise the issue was Senator William Borah, an outspoken populist from Idaho who had spent much of his political career crusading for stronger antitrust enforcement.[46] As soon as Senator Newlands introduced the Senate substitute with its new Section 5, Senator Borah rose to state:

> What I fear is that this bill can serve no other purpose than to dull the edge of our activities and our desire to destroy monopoly. We know that within the last few years there has been a distinct and aggressive movement in this country to legalize monopoly . . . . The people are told that they will be made safe and even happy . . .

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[44] H.R. REP. NO. 63-533, pt. 1, at 2 (1914), *reprinted in* Kintner, *supra* note 6, at 3757.

[45] S. REP. NO. 63-597, at 10 (1914), *reprinted in* Kintner, *supra* note 6, at 3907.

[46] *See* Thurman Arnold, THE FOLKLORE OF CAPITALISM 217 (1937) ("Men like Senator Borah founded political careers on the continuance of such crusades, which were entirely futile but enormously picturesque.").

> by means of a commission or bureau appointed and sitting at Washington, whose functions it shall be to regulate these monopolies. It is argued that combinations with monopolistic powers . . . are inevitable, necessary, and that all they need is a little regulation.[47]

Two of the bill's principal proponents, Senator Newlands, the Chairman of the Commerce Committee who introduced the bill in the Senate, and Senator Hollis, who had helped persuade President Wilson to add Section 5, responded that Senator Borah's concerns were unwarranted. They assured the Senate that the commission would have no power to regulate a firm's exercise of its monopoly power.

Senator Hollis, responding to Senator Borah's concerns, referred back to the fact that "[o]ne of the great issues in the last presidential campaign was whether the solution of the trust problem was to be found in the regulation of monopoly or in the regulation of competition."[48] He reminded Borah that the Democratic Party in that election had "declared itself for the abolition of monopoly and the regulation of competition," rather than accepting monopolies as inevitable and attempting to regulate them as the Progressive Party had urged. At a later point in the debate when Senator Borah, still not persuaded, raised this point again, Senator Hollis suggested he read all three of the pending antitrust bills the Administration was proposing, saying that if he did so, he would "find that there is not one line or syllable in any one of them that countenances monopoly in any way" and that they were all "intended not to regulate monopoly, but to . . . prohibit those practices which will lead to and encourage it."[49]

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[47] 51 Cong. Rec. 11,233 (1914), *reprinted in* Kintner*, supra* note 6, at 4009–10. *See also id.* (Remarks of Sen. Borah) ("While I know it is not the purpose of the authors of the bill—I know the very opposite to be the object and purpose of the authors of the bill—a time is coming when this will be used as a buffer against prosecutions under the Sherman Act."), *reprinted in* Kintner, *supra* note 6, at 4009.

[48] *Id.* at 12,146, *reprinted in* Kintner*, supra* note 6, at 4142.

[49] *Id.* at 12,732, *reprinted in* Kintner*, supra* note 6, at 4236.

Senator Newlands, both at the time and again later in the debate, likewise drew a sharp distinction between the type of commission the Progressive Party had proposed and that which his bill would create:

> The commission which they [the Progressive Party] wanted was a commission which would recognize consolidation, which would recognize monopoly, but would regulate it even to the extent of regulating its prices.
> . . . .
> Now, this kind of a commission is an entirely different commission. This commission is not to recognize consolidation, but to destroy it. It is not to recognize monopoly, but to destroy it. . . . Instead of regulating monopoly we are regulating unfair competition. . . . [This commission] is so organized as . . . [to] impair and destroy monopoly in the future in the embryo . . . .[50]

Senator Albert Cummins, a Republican from Iowa and the ranking minority member of the Commerce Committee, endorsed these descriptions of the limitations on the FTC's authority under Section 5. Saying that he "was astonished to hear it said that this bill was intended or would have the effect of regulating monopoly instead of maintaining and preserving competition,"[51] Cummins told the Senate:

> I do not believe there is a single provision in any of the bills intended to encourage or protect monopoly, or that can by any possibility encourage or protect monopoly. The bill that we have before us is not a regulation of monopoly in any of its parts. It is not intended to permit monopoly to exist and then prescribe the terms or conditions upon which it may operate or do business. It is intended to destroy the monopolies that are now with us and to prevent the establishment of other monopolies.[52]

Again referring back to the 1912 election, Senator Cummins assured the Senate that, while the Progressive Party "did propose to regulate monopoly," he, as a member of the committee reporting out the bill, was "unalterably opposed to any such proposition," and did not "want a commission imposed upon the industry of this country which recognizes a

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[50] *Id.* at 12,867, *reprinted in* Kintner, *supra* note 6, at 4342–43.

[51] *Id.* at 12,919, *reprinted in* Kintner, *supra* note 6, at 4373.

[52] *Id.* at 12,733, *reprinted in* Kintner, *supra* note 6, at 4237-38.

monopoly and attempts to check its ravages in that way."[53]

When the Senate's substitute bill returned to the floor of the House after passing the Senate, Representative James Covington, who had introduced the original House bill, likewise assured his colleagues that the addition of Section 5 would not give the commission the power to regulate the pricing or output decisions of large firms:

> The acceptance of section 5 of the present bill, conferring upon the Federal trade commission the power to deal with unfair methods of competition, in no wise [sic] interferes with the declaration made by me respecting the way in which the powers of the commission ought to be circumscribed. There is not now found within the extent of the well-defined doctrine of the substantive law recognized by the courts as "unfair methods of competition" any attempt to make terms with monopoly or . . . to regulate production or enforce by orders the maintenance of fixed prices.[54]

These excerpts from the Act's legislative history illustrate how far from the legislative purpose of Section 5 the FTC strayed when, in 2008, it authorized a complaint against Negotiated Data Solutions LLC ("N-Data") for allegedly violating Section 5 by engaging in unfair methods of competition in its enforcement of its patents against makers of equipment employing Ethernet, a widely used computer networking standard.[55] In its complaint, the Commission alleged that N-Data had violated Section 5 by reneging on a commitment its predecessor company had made to an Ethernet standing-setting organization by demanding higher royalties for its patents than it had committed to charge at the time they were incorporated into the industry standard. Two commissioners dissented from the Commission's action, with one of them writing that "[t]his case departs materially from the prior line [of FTC standard-setting 'hold-up' challenges], in that there is no allegation that [N-

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[53] *Id.* at 4238.

[54] *Id.* at 14,927*, reprinted in* Kintner*, supra* note 6, at 4721.

[55] *See Negotiated Data Solutions LLC*, FTC Docket C-4234, 2008 FTC Lexis 119 (Complaint) (Sept. 22, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf.

Data] engaged in improper or exclusionary conduct to induce" the Ethernet standard-setting organization to include its technology, which would have required proof that its predecessor intended to renege on its commitment at the time it made it.[56]

The three commissioners voting to authorize the complaint did not disagree. Instead, they argued that a complaint was justified because N-Data, by reneging on its predecessor's commitment, had "engaged in conduct that was both oppressive and coercive when it engaged in efforts to exploit licensees that were locked into a technology by the adoption of a standard,"[57] and that "consumers would be forced to pay higher prices" because of its conduct.[58] This rationale for the Commission's action shows that however "contrary to good morals" N-Data's conduct may have been, it was not conduct designed to exclude any rival from the market—because there were none—but was simply an effort to more fully exploit a monopoly its predecessor had acquired lawfully. Just as Theodore Roosevelt might have wished, the Commission was therefore seeking to regulate the pricing behavior of a lawful monopolist, not to protect competition. But that was a power the proponents of Section 5 had repeatedly assured their Senate and House colleagues the Federal Trade Commission would not have.

B. Section 5 Protects Competition, Not Competitors

The second governing principle that emerges from the legislative history is that by giving the FTC authority in Section 5 to prohibit unfair methods of competition, Congress

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[56] *See id.* (Dissenting Statement of Chairman Majoras), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf.

[57] *See id.* (Statement of the Commission), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf.

[58] *See* Press Release, Fed. Trade Comm'n, FTC Challenges Patent Holder's Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S. (Jan. 23, 2008) (transcript available at http://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license).

sought to protect the public interest in competition, not to protect weaker competitors for their own sake. Section 5, therefore, like the Sherman Act, can be fairly described as a "consumer welfare prescription."[59]

When Senator Newlands introduced the Senate substitute for the House bill on the floor, some senators raised serious concerns as to its new Section 5 declaring "unfair competition" unlawful and giving the new commission authority to prohibit "unfair methods of competition." Led again by Senator Borah, a number of senators objected that the bill would leave the FTC free "to determine whether or not that competition was fair or unfair," without any legal standard to guide judicial review of whether it had acted beyond its authority.[60] The new section would, Senator Reed declared, "confer upon five men a power more arbitrary than that possessed by any king or potentate on earth."[61]

Senator Borah and others also saw a potential conflict between the policy of the Sherman Act and that of the new bill. As Borah explained,

> The Sherman law bids the business of the country to compete. It was built upon the theory that competition is the life of trade. It punishes those who unnecessarily restrain trade or destroy competition. . . . We have given business to understand that we were not concerned with the severity of competition, but only with its preservation, however strong.[62]

He then contrasted this policy in favor of free and open competition with that of a law that would regulate that competition:

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[59] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

[60] 51 CONG. REC. 11,232 (1914) (Remarks of Sen. Borah), *reprinted in* Kintner*, supra* note 6, at 4007.

[61] *Id.* at 11,113, *reprinted in* Kintner, *supra* note 6, at 3969.

[62] *Id.* at 11,186, *reprinted in* Kintner*, supra* note 6, at 3989. *See also id.* at 12,208 (Remarks of Sen. McCumber) ("There are two vices in section 5, vices that must not only seriously affect the producer and seller of commodities but more disastrously affect the consumer. First, this section destroys the main purpose of the antitrust law. Second, it destroys the incentive for any new and untried project by surrounding the individual and hemming him in between two conflicting laws—one law that enforces full competition and another that ... punishes him if his competition is too ardent or too strong."), *reprinted in* Kintner*, supra* note 6, at 4151.

> [W]hile the Sherman antitrust law bids the business world to compete . . . we announce another rule here in another law, saying that while we recognize competition as necessary we insist that it shall not be unfair competition. We propose to have competition, but to regulate competition which means to oversee the whole business world and ultimately and logically to tolerate monopoly.[63]

To illustrate his point, Senator Borah cited the then-recent *International Harvester* case,[64] where defendants had argued that the alleged restraints of trade had been "made for the purpose of getting rid of ruthless, unfair, overreaching competition."[65] He maintained that, while the defendants may have viewed the competition as unfair, it had proven to be "of unquestionable benefit" to the farmers who paid the lower price, and who suffered "when the severe competition ended [and] the price was ultimately raised."[66]

Several days later, to further illustrate his concern, Senator Borah cited a letter he had received "from a gentleman who is in favor of a trade commission which should have power to fix prices."[67] Using the letter as a foil, he continued:

> That undoubtedly would be a satisfactory proposition to the small competitor if his business was in a failing condition; but how about the consumers throughout the country? Would the commission say that that was unfair competition—that because a large business could afford . . . to sell at the lower price it was unfair for them . . . simply because smaller concerns could not afford to sell for that price?[68]

A number of other senators expressed similar concerns over the course of the ensuing

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[63]*Id.* at 11,186, *reprinted in* Kintner, *supra* note 6, at 3989.

[64]*See State ex rel. Major v. International Harvester Co. of America*, 237 Mo. 369, 141 S.W. 672 (1911), *aff'd*, 234 U.S. 199 (1914).

[65]51 CONG. REC. 11,187 (1914), *reprinted in* Kintner, *supra* note 6, at 3992.

[66]*Id.* at 11,232, *reprinted in* Kintner, *supra* note 6, at 4007.

[67]*Id.* at 11,601, *reprinted in* Kintner, *supra* note 6, at 4100.

[68]*Id.*

debate.[69]

In response to these concerns, the proponents of Section 5 emphasized throughout the debate that it would give the new commission power to prohibit a practice as an "unfair method of competition" only if it was likely to cause harm to the public at large, not just to a competitor. Thus, Senator Cummins, who was the first to address Senator Borah's concerns, assured the Senate that Section 5 was concerned "not merely with unfairness to the rival or competitor," but instead that "the unfairness must be tinctured with unfairness to the public."[70] Expanding on this point, he explained:

> We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and, of course there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare.[71]

Senator Cummins assured Senator Borah that Section 5 would not condemn aggressive price competition just because it discomfited a rival. "No sane, sensible man," he argued, "ever suggested that mere underselling constitutes unfair competition."[72] Instead, Section 5

[69]*See, e.g.*, *id.* at 12,218 (Remarks of Sen. McCumber) ("He may take means that I consider unfair . . . , and he may drive down the price of the commodity that we are both selling, . . . and suppose he has not destroyed me entirely but has merely injured me[,] . . . but [that] I am still continuing in business. Can he be indicted for unfair practices so long as I am keeping alive and keeping up a competition, when the result of that competition is for the benefit of the purchasing public which buys our commodities? . . . If that is the case, then I think we are stifling competition, and in the end are doing a great injury to the country."), *reprinted in* Kintner, *supra* note 6, at 4172; *id.* at 12,221 (Remarks of Sen. Frank Brandegee) ("[R]epresentatives of both the large and small coal operators . . . were complaining of [ ] cutthroat competition. . . . They said that . . . if they were allowed to have a trade commission which would have authority to set the seal of approval of this government upon an agreement that those otherwise competing coal miners and coal companies might make with each other to stop this wasteful competition, to fix the price of coal higher, it would result in a great economic operation of their coal properties."), *reprinted in* Kintner, *supra* note 6, at 4178.

[70]*Id.* at 11,105, *reprinted in* Kintner, *supra* note 6, at 3952. *See also id.* at 13,304 (Remarks of Sen. McCumber) ("[T]here are a great many practices which might be declared to be unfair as between two competitors, the result of which is beneficial to the public, and it only ceases to be beneficial to the public when the effect of the competition is such that it destroys one of the competitors and thereby creates a monopoly."), *reprinted in* Kintner, *supra* note 6, at 4655.

[71]*Id*. at 11,105, *reprinted in* Kintner, *supra* note 6, at 3952

[72]*Id.* at 12,815, *reprinted in* Kintner, *supra* note 6, at 4315.

would reach only those "practices indulged in for the purpose of driving anybody out of business or destroying his trade,"[73] and that were "inconsistent with or repugnant to the continuance of competition as a force in the business life of the country."[74]

Senator Hollis, another proponent of the bill who had helped persuade President Wilson to add Section 5, agreed. In successfully resisting an amendment designed to define what constituted an unfair method of competition, he argued that the amendment would have meant that, "[i]f you undertook to undersell him honestly or to give better service, you would come under the prohibition of the amendment."[75]

Other supporters of the bill likewise assured the Senate that Section 5 would not interfere with price competition that resulted in lower prices to consumers, but only those unfair methods of competition that were likely to lead ultimately to consumers paying higher prices. Senator Newlands, for example, said that he assumed that the commission would act only when it felt that "the matter is of sufficient importance, both between the parties and with reference to the public interest, to call the parties before them and hav[e] a hearing."[76] Senator Henry Lippitt of Rhode Island likewise emphasized that, "when you come to the question of what is 'unfair competition,' such unfair competition must involve an element of unfairness to the public."[77] For competition to be unfair, he continued, it must be "because in some way it will ultimately result in higher prices to [the public], but if

[73] *Id.* at 13,046, *reprinted in* Kintner, *supra* note 6, at 4464.

[74] *Id.* at 13,051, *reprinted in* Kintner, *supra* note 6, at 4475.

[75] *Id.* at 13,313, *reprinted in* Kintner, *supra* note 6, at 4669. Several other senators echoed these views. *See, e.g.*, *id.* at 13,101 (Remarks of Sen. Porter McCumber) ("I further agree that the definition ought to be such as will exclude all the ordinary efforts of competition except those which are directed to the destruction of competition in some way and at some particular point."), *reprinted in* Kintner, *supra* note 6, at 4510.

[76] *Id.* at 11,109, *reprinted in* Kintner, *supra* note 6, at 3960.

[77] *Id.* at 11,081, *reprinted in* Kintner, *supra* note 6, at 3952.

the competition results in lower prices to the public, it is fair to them."[78]

Other senators continued to be concerned, however, that this public interest requirement did not appear in the language of the statute itself. Senator George Sutherland, a Republican from Utah and later Supreme Court Justice, said that while he found comfort in Senator Cummins' remarks, he still would not be able to support the bill when it came to a vote in the Senate because he did not read its language as imposing such a requirement:

> The Senator from Iowa [Cummins] who, I may say, of those who have stood sponsors for this legislation is, in my judgment, the only one who has measurably put coherence into what I regard as a hopelessly incoherent proposition, says [that unfair competition] "is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly. . . . The unfairness must be tinctured with unfairness to the public, not merely with unfairness to the rival or competitor. . . ." That is a coherent statement, although I do not believe it to be a precise limitation of what unfair competition will include.[79]

To satisfy those who shared Senator Sutherland's concerns, when the Senate bill reached conference, the committee added an express public interest requirement to Section 5. Their amendment read as follows:

> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, *and it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue . . . a complaint stating its charges in that respect . . . .[80]

Representative Covington, who had chaired the conference committee, explained when he introduced the conference substitute in the House that the purpose of this amendment was to ensure that Section 5 would give the FTC authority to prohibit only those

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[78] *Id.* at 11,106, *reprinted in* Kintner, *supra* note 6, at 3953.

[79] *Id.* at 12,981, *reprinted in* Kintner, *supra* note 6, at 4415. *See also id.* at 11,081 (Remarks of Sen. McCumber) ("I confess I cannot agree with the Senator from Iowa [Mr. Cummins] that the term here used would be applicable only to those cases in which the public itself might be interested."), *reprinted in* Kintner, *supra* note 6, at 3959.

[80] H.R. REP. NO. 63-1142, at 3 (1914), *reprinted in* Kintner, *supra* note 6, at 4682 (emphasis added). Senator Cummins, it should be noted, was a member of the conference committee.

unfair methods of competition that were "detrimental to the public" and had the "potential for restraint of trade or monopoly."[81] He continued:

> As the bill passed the Senate there was not, however, any limitation in section 5, relating to unfair competition, directing the trade commission to deal with cases only where a public interest is involved, so the conferees agreed to insert a provision that the commission shall act—"if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public." That prevents the commission from becoming a clearing house to settle the everyday quarrels of competitors, free from detriment to the public, which should be adjusted through the ordinary processes of the courts.[82]

Another member of the conference committee, Representative Frederick Stevens of Minnesota, offered further insight into the committee's reasoning. It was, he said, "a recognized fact that there may be many controversies between competitors over the unfairness or fairness of methods of competition with which the public can have no concerns."[83] "In such cases," Representative Stevens argued, "competitors properly ought to be left to their ordinary legal remedies through the courts." If, on the other hand, "the general purpose and the result of it will be to the detriment of the public by eliminating competition which in the public interest ought to exist . . . , then it is fraud against the public and ought to be repressed."[84]

Several of the senators who had expressed concerns about the vagueness of the term "unfair methods of competition" had insisted for this reason that its enforcement by the new commission should be subject to strict judicial review.[85] In order to secure its

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[81] 51 CONG. REC. 14,931 (1914), *reprinted in* Kintner, *supra* note 6, at 4732

[82] *Id.* at 14,930, *reprinted in* Kintner, *supra* note 6, at 4729.

[83] *Id.*

[84] *Id.* at 14,937, *reprinted in* Kintner, *supra* note 6, at 4744.

[85] S*ee, e.g.*, *id.* at 12,874 (Remarks of Sen. Atlee Pomerene) ("If we cannot define [unfair competition], I want the courts to define it. I do not want it to be left to the single judgment of the commission itself."), *reprinted in* Kintner, *supra* note 6, at 4355; *id.* at 14,793 (Remarks of Sen. Reed) ("In closing, I may say that the

passage, the conference committee therefore also amended Section 5 to give any party against whom the Commission issued a cease-and-desist order a right to seek judicial review of that order by one of the circuit courts of appeal.[86] This amendment enabled the Supreme Court, in the first FTC case to come before it, *FTC v. Gratz*, to hold that, "[i]t is for the courts, not the commission, ultimately to determine as a matter of law what [the words 'unfair method of competition'] include."[87]

With these changes to its language, the Federal Trade Commission Act passed both the House and Senate by overwhelming margins.[88] As its legislative history shows, clarification that Section 5's purpose was to protect competition, not competitors—and thereby promote consumer welfare—was critical to the Act's passage. Like the Sherman Act, Section 5 is, therefore, "a consumer welfare prescription."[89]

C. The Enforcement of Section 5 Requires a Rule-of-Reason Analysis in which the Ultimate Question Is Whether a Practice May Exclude Equally Efficient Competitors

A requirement that the public interest in competition must be harmed still left open the question of how the new commission was to determine whether an allegedly unfair method of competition met that test. Congress devoted much of the remainder of the debate to this issue. Three main points emerged from this discussion. The first was that whether a method of competition was fair or unfair should depend on whether it was likely

conference report improves the Senate bill. The court review is more carefully safeguarded."), *reprinted in* Kintner*, supra* note 6, at 4715.

[86]*See* H.R. REP. NO. 63-1142, at 4 (1914), *reprinted in* Kintner, *supra* note 6, at 4683.

[87]253 U.S. 421, 427 (1920).

[88]The Act passed the Senate by a vote of 43 to 5. 51 CONG. REC. 14,802 (1914), *reprinted in* Kintner*, supra* note 6, at 4716. The Act passed the House by voice vote without the yeas and nays being taken. *Id.* at 14,943, *reprinted in* Kintner*, supra* note 6, at 4756.

[89]*Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

to exclude equally efficient competitors. The second point was that the new commission and the courts would need to rely on a rule of reason similar to that which the courts used to enforce the Sherman Act in determining whether a method of competition was fair or unfair in the circumstances of each particular case. The third point was that Section 5 would allow the FTC to prohibit incipient practices that might ultimately lead to a loss of competition before they had matured into a full-blown Sherman Act violation, but not to prohibit practices that did not have that potential. These three points will now be examined in detail.

1. The ultimate test of whether a practice is a fair or unfair method of competition is whether it is likely to exclude equally efficient competitors from the market

Many of those who have examined the legislative history of Section 5 have come away with the impression that it provides little guidance as to how the Federal Trade Commission should apply its authority to prohibit unfair methods of competition.[90] It may be true that the debate on the floor of the Senate was often confused, with different senators at different points in the debate offering what seemed to be conflicting understandings of what the term meant. A close reading of the legislative history reveals, however, that by the end of the debate there was general agreement that the new commission was not intended to be a general arbiter of business morals, but that its focus should instead be on whether a practice was likely to harm competition by excluding equally efficient competitors, thereby allowing the respondent to then raise prices to the detriment of consumers.

A major source of the confusion over the scope of the FTC's authority stems from the comments of the bill's chief sponsor in the Senate, Senator Francis Newlands. When he first

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[90] *See supra* p. 1 and note 3.

introduced the Senate substitute for the House bill, Senator Newlands—who had played no role in its drafting—described Section 5 in a way that made it sound as if the new commission's job would be to police business morals. "[I]t would be utterly impossible," he announced, "for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade and that tend to give competitors unfair advantage and dishonest advantage."[91] Newlands continued to make similar statements throughout much of the ensuing debate.[92]

Senator Newlands' suggestion that Section 5 would outlaw business practices that were "against good morals" triggered a wave of protests from others in the Senate, sometimes bordering on ridicule. Senator Porter McCumber of North Dakota, for example, asked Newlands "whether [he] contemplate[d] that the Government of the United States is to go into the business of controlling the commercial morals of every individual in the country . . . ."[93]

The other proponents of Section 5 quickly distanced themselves from Senator Newlands' remarks. On the floor of the Senate, they sought to assure their fellow senators that policing business morals was not the purpose of Section 5 through statements like this one from Senator Cummins:

> One Senator has gone so far as to say that the words "unfair competition" would leave a court at liberty to denounce any conduct which, in the opinion of the court,

[91]51 Cong. Rec. 11,084 (1914), *reprinted in* Kintner, *supra* note 6, at 3936.

[92]*See, e.g.*, *id.* at 11,112 (Remarks of Sen. Newlands) ("[T]he question is what unfair competition covers. It covers every practice and method between competitors upon the part of one against the other that is against public morals . . . or is an offense for which a remedy lies either at law or in equity."), *reprinted in* Kintner, *supra* note 6, at 3968; *id.* at 12,980 (Remarks of Sen. Newlands) ("The Senator objects to the term 'public morals' or 'good morals' as a test. I think it is a very good test. I think there are certain practices that shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair."), *reprinted in* Kintner, *supra* note 6, at 4414.

[93]*Id.* at 11,108, *reprinted in* Kintner, *supra* note 6, at 3959.

> was unethical or un-Christian or unneighbor like. I feel sure that a review of the matters I have already brought to the attention of the Senate will disabuse the mind of any candid person of that view.[94]

In private they were even more derogatory. Louis Brandeis, for one, described Newlands as "the despair of mankind," attributing "his shortcomings to senility."[95] The other proponents argued that the fairness of a business practice should be understood instead in economic terms and that determining whether it was fair or unfair would require an examination of both its purposes and its likely effects on competition. Thus, Senator Hollis explained that, "[t]he regulation of competition means the prevention of competition that destroys competition for the purpose of creating a monopoly, and so is harmful to the public—the prevention, in short, of unfair competition."[96] Senator Cummins agreed, arguing that the term referred to "those methods which have not for their object the profit of the person who practices them so much as the destruction of the competitor against whom the methods are used."[97]

In order to counter concerns stimulated by Senator Newlands' opening remarks that the language of Section 5 was too vague and would give the new commission virtually unbridled authority over business conduct, the bill's other proponents also argued that the

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[94]*Id.* at 12,913, *reprinted in* Kintner, *supra* note 6, at 4360.

[95]Winerman, *The Origins of the FTC*, *supra* note 3, at 78 n.473 (internal quotation marks and citation omitted).

[96]51 CONG. REC. 12,146 (1914) (Remarks of Sen. Hollis), *reprinted in* Kintner, *supra* note 6, at 4142. Several other proponents of Section 5 echoed Senator Hollis' view that to be viewed as unfair a practice must have as its objective the destruction of competition. *See, e.g.*, *id.* at. 11,104 (Remarks of Sen. Cummins) ("Unfair competition is the pursuit of that practice which destroys competition and establishes monopoly."), *reprinted in* Kintner, *supra* note 6, at 3950; *id.* at 12,150 (Remarks of Sen. McCumber) ("No competition should be covered by this bill except that competition which is intended in the end to create a monopoly and destroy competition."), *reprinted in* Kintner, *supra* note 6, at 4152; *id.* at 12,213 (Remarks of Sen. Newlands) ("I will ask the Senator, if one of these corporations was cutting the price with a view to destroying its competitor, and with a view to afterwards raising the price to a high monopolistic price, whether he would not regard that a method that should be condemned by law?"), *reprinted in* Kintner, *supra* note 6, at 4161.

[97]*Id.* at 11,389, *reprinted in* Kintner, *supra* note 6, at 4041.

term “unfair methods of competition” had a well-understood meaning in the business community.[98] To support this argument, they pointed to cases in both the federal and state courts in which the term had been used to describe conduct that violated the federal or state antitrust laws, often quoting at length from those decisions.[99] Several also pointed to an article by Professor William S. Stevens of Columbia University, in which he had identified eleven types of business practices that the courts had characterized as unfair methods of competition.[100] The practices he listed included various forms of predatory pricing, such as local price cutting, “fighting ships,” and “fighting brands.” They also included various forms of exclusionary conduct, such as tying, exclusive dealing, boycotts, rebates, and preferential contracts.

From these eleven practices, Professor Stevens had distilled a definition of fair competition, which several proponents quoted approvingly during the debates:

> Fair competition in an economic sense signifies a competition of economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. As the production and selling efficiency of competitors increase, marginal concerns which are unable to keep pace will gradually lose their market and ultimately discontinue business. But in such an

[98]*See, e.g.*, *id.* at 11,189 (Remarks of Sen. Lewis) (“[T]he expression ‘unfair competition,’ as now incorporated in the bill, is not a new phrase. It is not untried, and in the processes of business is not an experimental phraseology, but is a mere adaptation of expressions from the decisions of the courts which have come down to us as expressive of certain conduct.”), *reprinted in* Kintner, *supra* note 6, at 3996; *id.* at 11,228 (Remarks of Sen. Robinson) (“Not only has the term ‘unfair competition’ a meaning fairly well-fixed in law and in economics, but it is also easily understood by the average business man.”), *reprinted in* Kintner, *supra* note 6, at 4003.

[99]*See, e.g.*, *id*. at 11,107 (Remarks of Sen. Robinson) (“The words ‘unfair competition’ have received definition by the courts in quite a number of cases.”), reprinted in Kintner, *supra* note 6, at 3956; *id.* at 11,107 (Sen. Robinson quoting *T.B. Dunn Co. v. Trix Manufacturing*) (“The term ‘unfair competition in trade’ includes the simulation by defendant of the packages of plaintiff, … The court will only interfere to protect the plaintiff and the public, and for the suppression of unfair and dishonest competition, when ‘the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer…”), reprinted in Kintner, *supra* note 6, at 3957.

[100]*See, e.g.*, *id.* at 11,230 (Remarks of Sen. Joe T. Robinson), *reprinted in* Kintner, *supra* note 6, at 4003 (quoting William S. Stevens, UNFAIR COMPETITION–A STUDY OF CERTAIN PRACTICES (1914).

> elimination there is nothing not economically fair to all concerned. If all have an equal chance to survive, it is economically proper that those failing through lack of efficiency should be destroyed. The community is entitled to the most efficient service that can be given. Inefficient organizations constitute a burden to the community and no justification can be found for their continued existence.[101]

Based on Professor Stevens' article, these proponents of Section 5 argued that efficiency should be the touchstone of fair versus unfair competition. Senator Hollis, for example, argued that efficiency should be the principal criterion for distinguishing fair from unfair competition:

> Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position through superior efficiency is ordinarily no menace to the public interest. The object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods.[102]

Senator John Sharp Williams, a Democrat from Mississippi who also supported the bill, agreed:

> [I]f any monopoly could grow up without a legal privilege merely by fair competition and by producing as good an article as someone else, or a cheaper article and a better one, it would have a God-given right to a monopoly. If I could go out to-morrow and raise cotton cheaper than any man in the South . . . I would have conferred a benefit upon mankind; in other words, it is not the size of the business that hurts; it is the nature of the business that hurts. . . . If I can exceed you in cheapness and quality of production or you can exceed me, that is

[101]*See, e.g.*, *id.* at 11,300 (Remarks of Sen. Borah), *reprinted in* Kintner, *supra* note 6, at 4021 (quoting STEVENS, *supra* note 100).

[102]*Id.* at 12,146, *reprinted in* Kintner, *supra* note 6, at 4141. The chair of the House Commerce Committee, James Covington, who had been the sponsor of the commission bill in the House and was later chair of the conference committee that reported it out, cited Senator Hollis' speech with approval when he introduced the conference substitute of the floor of the House. *See id.* at 14,929 (Remarks of Rep. Covington) ("Upon this subject, I want to call the attention of the House to the statement of Senator Hollis, of New Hampshire, in his very able speech elucidating the subject of unfair competition, in the Senate on July 15 last"), *reprinted in* Kintner, *supra* note 6, at 4726.

> your right, and no man has any right to do away with it . . . .[103]

Even Senator Newlands ultimately agreed that an efficiency-based test would provide an effective criterion for separating fair from unfair competition. Speaking shortly after Senator Williams delivered his remarks, Senator Newlands agreed that the purpose of Section 5 was "to prevent the stifling of competition by unfair methods" and that the new commission should look to "authorities, both in economics and in the decisions of courts and the decrees of courts," in determining what constitutes an unfair method of competition.[104] He then pointed to Senator Hollis' earlier remarks, which had emphasized the central role of efficiencies in distinguishing between fair and unfair competition, as providing a sound framework for doing so:

> I will not weary the Senate by reading these decisions or decrees. They will be found in the remarks I made in presenting this bill [and] in the very able address of the Senator from New Hampshire [Senator Hollis] yesterday, in which he met fully and completely every criticism that has been made upon this phrase, and I beg Senators who did not have the pleasure of hearing that speech to read it, for it is a strong, close, legal argument upon this single proposition.[105]

Many of the senators who initially had been most skeptical of Section 5 also came ultimately to accept the notion of using efficiency as a measuring rod for unfair competition. Even Senator Borah, who had been concerned that the bill would be used to protect small, inefficient competitors for their own sake, seemed to endorse this standard when he stated: "Mr. President, the Senator says that if a combination

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[103] *Id.* at 12,211, *reprinted in* Kintner*, supra* note 6, at 4156. *See also id.* at 11,231 (Remarks of Sen. Joe T. Robinson) ("Not only has the term 'unfair competition' a meaning fairly well fixed in law and in economics, but it is also easily understood by the average business man. Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling, while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'"), *reprinted in* Kintner, *supra* note 6, at 4003.

[104] *Id.* at 12,211, *reprinted in* Kintner, *supra* note 6, at 4157.

[105] *Id.* at 12,212, *reprinted in* Kintner, *supra* note 6, at 4157–58.

or an individual can produce an article cheaper than anybody else and thereby get control of a market and in a sense create a monopoly, that would be a blessing to mankind. I agree with that proposition . . . ."[106] Senator Reed, another of the bill's most persistent skeptics, agreed: "What are we trying to do?" he asked. "We are not trying to write a code of business morals. . . . We are trying to keep the doors of competition open in this land. . . ."[107] Citing the *Standard Oil* case, Senator Reed drew a distinction between conduct designed only to destroy a rival and conduct that benefitted the purchaser of the larger firm's products:

> Another practice calculated not to benefit the purchaser, but to destroy competition, is well illustrated in certain practices attributed to the Standard Oil Co. . . . It was merely a method used to destroy competition; not an attempt to sell goods, but to destroy a rival. That would be within the terms of my amendment, because it is an act done for the purpose of restraining trade. It is not the lessening of the trade of one man which results from simple competition. The object and purpose is to destroy the trade rival. That can be reached under this definition.[108]

As this examination of the debates on the Senate floor shows, despite initial confusion over the purposes of Section 5, there ultimately emerged a consensus among its supporters, and even among those who in the end reluctantly voted in favor of it, that the ultimate test of whether a practice was an unfair method of competition was whether it might exclude equally efficient competitors from the market.[109] Again, this is plainly a consumer welfare prescription, similar to the

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[106]*Id.* at 12,211, *reprinted in* Kintner, *supra* note 6, at 4157.

[107]*Id.* at 13,231, *reprinted in* Kintner, *supra* note 6, at 4635.

[108]*Id.* at 4635–36.

[109]The emphasis on efficiency as the determinant of fair versus unfair competition on the floor of the Senate was consistent with the views Representative Ray Stevens of New Hampshire had expressed in his minority views to the House report in which he had urged the addition of Section 5 to the House bill. *See* H.R. REP. NO. 63-533, pt. 2, at 2 (1914) ("[T]he chief means these combinations have used to acquire a monopoly or partial control of the business field has been by unfair methods of competition. They have been able to drive

standard Robert Bork argued a half century later should be used in enforcing Section 2 of the Sherman Act.[110]

2. Congress intended the Commission to apply a rule of reason in enforcing Section 5

Having argued that the main criterion of whether a practice should be prohibited should depend on whether it was likely to exclude equally efficient competitors if allowed to continue, the proponents of Section 5 were next asked how the new commission would be expected to apply this test in practice.[111] Their response, delivered first by Senator Cummins, was that the new commission should do so "[b]y applying the rule of reason."[112] Referring back to the Supreme Court's decision in the *Standard Oil* case,[113] Senator Cummins argued, "If the rule of reason—and I am not quarreling with the rule of reason, because it must prevail everywhere—if the rule of reason is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the phrase 'unfair competition.'"[114]

Other supporters of Section 5 agreed. Senator Hollis was perhaps the most explicit, agreeing that the commission should "apply the rule of reason, which every judge has in his

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their competitors out of business not by superior efficiency in the manufacturing of their product but by securing special advantages and contracts in the buying of their raw materials and in the distribution and selling of their products. Any advantage large corporations have over small corporations or individuals through lower costs or production they are entitled to, but they should be prevented from an unfair use of the power that comes from their size alone."), *reprinted in* Kintner, *supra* note 6, at 3763-64.

[110]Bork, *supra* note 4, at 7 ("Congress intended the courts to implement . . . only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.").

[111]*See, e.g.*, 51 CONG. REC. 12,917 (1914) (Remarks of Sen. LeBaron B. Colt) ("I should like to ask the Senator how the court would determine what was fair and what was unfair in trade practices?"), *reprinted in* Kintner, *supra* note 6, at 4369-70.

[112]*Id.* (Remarks of Sen. Cummins), *reprinted in* Kintner, *supra* note 6, at 4370.

[113]*Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[114]51 CONG. REC. 12,910 (1914), *reprinted in* Kintner, *supra* note 6, at 4366.

head, . . . precisely as our courts have under the Sherman antitrust act."[115] Another supporter, Senator James Hamilton Lewis of Illinois, added that "if 'unfair competition' shall be so construed and applied by those to whom its construction is committed within the light of the reason of business affairs, then such does no wrong."[116]

By suggesting that the new commission should apply a rule of reason in enforcing Section 5, these senators were endorsing a test that the Supreme Court had held requires an examination of both the purposes and likely effects of an alleged restraint or other anticompetitive conduct. In its opinion in *Standard Oil*, the Court instructed the lower courts, in applying the rule of reason, to examine whether the alleged restraint had "been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade," or had, instead, "been entered into or done with the intent to do wrong to the general public" and thereby "bring about the evils, such as enhancement of prices, which were considered to be against public policy."[117] This is the same test the courts apply today in evaluating allegedly anticompetitive conduct under both Sections 1 and 2 of the Sherman Act.[118]

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[115]*Id.* at 13,000, *reprinted in* Kintner, *supra* note 6, at 4447.

[116]*Id.* at 12,931, *reprinted in* Kintner*, supra* note 6, at 4392-93.

[117]*Standard Oil Co.*, 221 U.S. at 58.

[118]*See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 ("[O]ur inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . , or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'") (citations omitted); *United States v. Microsoft Corp.*, 253 F.3d 34, 45-48 (D.C. Cir. 2001) (holding that under Section 2, a court must first examine whether the plaintiff can show that alleged exclusionary conduct had the "requisite anticompetitive effect" and, if it did, whether the defendant can show "a procompetitive justification" for its conduct—that is, "that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal," in which case the burden then "shifts back to the plaintiff to rebut that claim").

While not mentioning the rule of reason expressly, several others, some of whom had initially questioned Section 5 but ultimately voted in favor of it, suggested essentially the same test. Thus, Representative Frederick Stevens of Minnesota told the House that if an act or practice was "merely for an ordinary business purpose, it is as innocent as any other act."[119] By contrast, as Senator Reed of Missouri noted, if it "was merely a method used to destroy a competitor, not an attempt to sell goods," then it should be unlawful.[120] Another Senator, John Sharp Williams of Mississippi, described an unfair method of competition as a "profitless stifling of competition," rather than an honest effort to sell one's goods by undercutting the price of a rival.[121] Another, Senator Porter McCumber, provided an example of how he thought the rule of reason should be applied in practice:

> The mere fact that a manufacturer or merchant may sell his product at a particular point at a loss would not constitute an offense against the term 'unfair competition' as defined by the amendment which I propose. For the purpose of disposing of a surplus or getting rid of an accumulation at the end of a season, the sale of such product at a loss is not only proper and just but often necessary but if that sale is made not for these purposes, but from all of the evidence it should appear that it is persisted in for the main purpose of getting rid of a competitor, it ought to be stopped, and it ought to be stopped not because it is competition, but because in the end it is destructive of competition.[122]

Senator McCumber's example illustrates a key point made throughout the debates in both the House and Senate. The proponents of Section 5 did not intend for it to be used to interfere with competition on the merits, but only to reach what the Supreme Court has

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[119] 51 CONG. REC. 12,910 (1914), *reprinted in* Kintner*, supra* note 6, at 4743.

[120] *Id.* at 13,231, *reprinted in* Kintner*, supra* note 6, at 4636.

[121] *Id.* at 12,210, *reprinted in* Kintner*, supra* note 6, at 4154 (Senator Williams offered two examples of what he viewed as a "profitless stifling of competition. The first was "selling goods within a restricted area or for a restricted time at less than the cost of production, in order to drive out of trade a restricted competitor;" the second, "buying the raw material at a price so high that the restricted competitor cannot afford to pay for it, and thus drive him out.").

[122] *Id.* at 12,208, *reprinted in* Kintner*, supra* note 6, at 4152.

called "unnecessarily restrictive" conduct.[123] By this, both the proponents of Section 5 and the Supreme Court meant an act or practice that could potentially exclude a rival from the market that served no other legitimate business purpose in terms of promoting the sale of the firm's own goods or services. The senators who in the end supported Section 5 believed that "competition, however severe or unfair, would finally work out for the public good," even if it was painful for smaller, less efficient competitors.[124] They, therefore, did not intend Section 5 to be used to condemn bigness itself, so long as it "resulted from normal and regular growth, from giving increased quality of goods," or from other forms of competition on the merits.[125] Instead, they expected it to be used only to condemn those practices designed to "place[] the individual at such a disadvantage that he cannot obtain . . . equal opportunities for trade and sale . . . ."[126]

3. Section 5 gives the Commission power to prohibit unfair methods of competition in their incipiency before they mature into full-blown Sherman Act violations

While Congress intended the FTC to apply a rule of reason in enforcing Section 5, this does not mean that it viewed that section as outlawing only those practices that would violate the Sherman Act. The legislative history makes it clear that in order to protect competition, Congress intended that Section 5 would give the new commission authority to prohibit unfair methods of competition in their incipiency before they matured into full-

[123]*See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585, 604 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.").

[124]*See* 51 CONG. REC. 11,187 (1914) (Remarks of Sen. Borah), *reprinted in* Kintner, *supra* note 6, at 3991. *See also id.* at 12,212 (Remarks of Sen. Thomas Sterling) (noting that "[in] the intensity of competition . . . , perfectly independent concerns will . . . be induced to cut prices to the general public," and that this may cause smaller "competitors with fewer facilities or . . . a higher wage . . . [to] be forced out of business," but should not, for that reason alone, "come under the ban of the law"), *reprinted in* Kintner, *supra* note 6, at 4160.

[125]*Id.* at 11,187 (Remarks of Sen. Borah), *reprinted in* Kintner*, supra* note 6, at 3990-91.

[126]*Id.* at 12,933 (Remarks of Sen. Lewis), *reprinted in* Kintner*, supra* note 6, at 4396-97.

blown Sherman Act violations—as one senator put it, to "nip those practices in the bud."[127] The debates on the floor of both the House and Senate made it equally clear, however, that Congress did not intend to give the Commission free rein to go after practices that did not have that potential.

Thus, when Representative Covington, the original sponsor of the legislation and the chair of the conference committee, brought the bill to the floor of the House for a final vote, he received applause when he stated that the purpose of Section 5 was to prohibit only those anticompetitive practices that might otherwise culminate in a restraint of trade or monopoly that would violate the Sherman Act:

> We are seeking here not to enter into any unknown or speculative realm of the law but to deal, as we ought to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially. [Applause.][128]

On the floor of the Senate, the bill's proponents likewise emphasized that the purpose of Section 5 was to give the commission authority to prohibit unfair methods of competition that threatened the same type of harm to the public interest in competition as

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[127]*Id.* at 12,146 (Remarks of Sen. Hollis), *reprinted in* Kintner, *supra* note 6, at 4142. *See also, e.g.*, *id.* at 11,529 (Remarks of Sen. Cummins) ("We propose to make it unlawful for any corporation, or any person, indeed, to practice unfair competition, and wherever the practice of unfair competition has not reached a point that constitutes a violation of the antitrust law . . . ."), *reprinted in* Kintner, *supra* note 6, at 4066; *id.* at 12,146 (Remarks of Sen. Hollis) ("The Sherman Act does not become effective until a monopoly is fully grown . . . ; but if the proposed trade commission has its attention called to some unfair method of competition, it can immediately investigate, and if it decided that it is unfair competition and may lead to monopoly or restraint of trade, it may prohibit it."), *reprinted in* Kintner, *supra* note 6, at 4141.

[128]*Id.* at 14,929*, reprinted in* Kintner, *supra* note 6, at 4725. *See also id.* at 13,156 (Remarks of Sen. Kenyon) ("That, it seems to me, is the difference between the Sherman Act and the present act. This can take hold of matters that are not in themselves sufficient to amount to a monopoly or to amount to restraint of trade."), *reprinted in* Kintner, *supra* note 6, at 4576; *id.* at 12,217 (Remarks of Sen. Newlands) ("I should say, with reference to stifling competition, that all you would have to prove would be an unfair method whose tendency was to stifle competition. I do not think you would have to wait until the destruction was complete in order to entitle you to make the complaint."), *reprinted in* Kintner, *supra* note 6, at 4170; *id.* at 13,160 (Remarks of Sen. Kenyon) ("If this act shall do even a little to help in stopping monopoly in this country by getting at unfair practices before they have fully ripened and blossomed, then it will do good and it will justify the long time that has been taken in its discussion."), *reprinted in* Kintner, *supra* note 6, at 4582.

did violations of the Sherman Act, but to do so before that harm had "fully ripened and blossomed."[129] As Senator Cummins explained,

> Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the antitrust law. . . . The purpose of this bill in this section . . . is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.[130]

The bill's proponents envisioned that, by stepping in to prohibit conduct before it violated the Sherman Act, the FTC would play an important role in supplementing the Department of Justice's enforcement of antitrust laws. Congress intended for the Commission to conduct quick investigations of potentially anticompetitive practices that the Department of Justice had neither the authority nor the resources to challenge. During the debates, Senator Hollis explained:

> [T]he Department of Justice with its manifold other activities, has not in the past brought suit under the Sherman Act, and probably will not do so, except in cases of great magnitude involving what appear to be very clear violations of the act.
> . . . .
> The commission, by reason of its knowledge of business affairs and . . . its facilities for investigation, its rapid, summary procedure, will be able to protect business against unfair competition in [a] much more effective and timely fashion than the Department of Justice can do.[131]

The quoted portion also appears verbatim in the memorandum Rublee prepared for President Wilson, which suggests that Rublee prepared this speech for Senator Hollis.[132]

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[129] *Id.* at 13,160, *reprinted in* Kintner, *supra* note 6, at 4584.

[130] *Id.* at 11,455, *reprinted in* Kintner, *supra* note 6, at 4060.

[131] *Id.* at 12,146, *reprinted in* Kintner, *supra* note 6, at 4141-42. *See also id.* at 11,236 (Remarks of Sen. Borah) ("[T]he execution of the Sherman law has not thus far aided the man in the street; but that is because we stopped short of our duty; it was not the court's fault. I agree the way we have been proceeding the burden has been too great for the court; but we can relieve the situation by appropriate administrative measures.), *reprinted in* Kintner, *supra* note 6, at 4015; *id.* (Remarks of Sen. Cummins) ("The Attorney General of the United States. . . is a man who must take into account tens of thousands of other things than the enforcement of the antitrust law. It is utterly impossible, as I look at it, to expect that the Attorney General will follow these decrees into their full and complete execution."), *reprinted in* Kintner, *supra* note 6, at 4016.

[132] Rublee, *supra* note 6, at 4-5.

These excerpts from the legislative history show that Congress did not intend, as some have seemed to suggest,[133] to wholly untether Section 5 from the principles governing the application of the other antitrust laws. Like Section 5, the Clayton Act was designed to make unlawful the practices at which it was aimed—tying, exclusive dealing, price discrimination, and mergers—in their incipiency when they were likely "substantially to lessen competition," even if they would not yet have violated the Sherman Act as then interpreted.[134] As the next section discusses, it is a mistake, therefore, to suggest, as the Supreme Court did in *FTC v. Brown Shoe*,[135] that Section 5 could be used to prohibit a practice that is expressly addressed in the Clayton Act, but that would not violate that Act under its own incipiency standard.

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This review of its legislative history shows that its sponsors drafted Section 5 with a clear purpose—to protect competition in order to promote consumer welfare. It also shows that the section's proponents articulated a viable set of governing principles to guide the FTC's exercise of its enforcement power. First, Section 5 can only be used to prohibit exclusionary, not exploitative, practices. Second, Section 5 can only be used to protect competition, not weaker competitors. Third, Section 5 can be used to prohibit only those

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[133] *See, e.g.*, Rosch, *supra* note 1, at 1 (Stating that the first "unassailable proposition[] about Section 5 . . . is that its reach is not confined to conduct reached by the Sherman and Clayton Acts. Otherwise, Congress would just have provided that the Commission could enforce these statutes. It did not do so. Instead it provided that the Commission could challenge, inter alia, any 'unfair method of competition.' That is why the Supreme Court held in the *Sperry & Hutchinson* case that Section 5 was not simply coextensive with these other antitrust statutes.").

[134] *See, e.g.*, S. REP. NO. 63-698, at 1 (1914) ("The purpose is only to supplement [the Sherman Antitrust Act] and the other antitrust acts . . . and make unlawful certain trade practices . . . in their incipiency and before consummation."); S. REP. NO. 81-1775, at 6 (1950) (Referring to the Clayton Act as a "statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act.").

[135] 384 U.S. 316 (1966).

unfair methods of competition that threaten to "shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[136] All three governing principles require the Commission to apply a rule of reason in order to determine whether a particular act or practice represents fair competition designed to promote the sale of the firm's own goods or services or unfair competition designed to stifle competition by denying rivals an equal opportunity to compete.

III. THE COURTS' CHANGING INTERPRETATIONS OF SECTION 5

In its early cases interpreting Section 5, the Supreme Court interpreted the provision in a manner consistent with its legislative purpose as outlined in this WORKING PAPER, using what was essentially a rule-of-reason analysis to determine whether allegedly anticompetitive practices violated Section 5. Several of the justices who decided these early cases had been involved in the formulation of Section 5, so they understood its legislative purpose and the limits imposed on the FTC's authority. In the 1960s and early 1970s, however, when the Warren Court was generally interpreting the antitrust laws very expansively, it deviated from these earlier decisions, appearing to read Section 5 broadly to condemn practices that violated "the spirit of the antitrust laws" even if they could not be found to have harmed competition.[137] In the early 1980s, both the Commission and the lower courts appear to have returned to a narrower construction of Section 5 that is more consistent both with the section's legislative history and with the Supreme Court's earlier decisions. The Supreme Court has not had occasion to discuss the scope of Section 5 in any detail since these more recent lower court decisions, but when it finally has an opportunity

[136] Rublee, *supra* note 6, at 3.

[137] *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244 (1972).

to do so, it will hopefully follow the lead of the lower courts in applying Section 5 in a manner more consistent with its original purpose.

A. Early Supreme Court Cases Adhered to the Governing Principles Outlined in Section 5's Legislative History

In *Gratz*[138]—the first Section 5 case to reach it—the Court affirmed a decision by the U.S. Court of Appeals for the Second Circuit overturning an FTC order condemning an alleged tying arrangement. In analyzing the alleged tie, the Court interpreted Section 5 in a manner consistent with the governing principles outlined in the above review of its legislative history. The Court held that the words

> unfair methods of competition . . . are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, *or as against public policy because of their dangerous tendency to unduly hinder competition or create monopoly*. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.[139]

The Court emphasized the importance of analyzing an allegedly unfair method of competition thoroughly in order not to inhibit healthy competition. Applying what was essentially a rule-of-reason test, the Court held that the allegations in the FTC complaint were "wholly insufficient" to charge the respondent with practicing an unfair method of competition because it did not allege any "deception, misrepresentation, or oppression," did not allege what share of the market was affected by respondent's behavior, and did not allege that respondent "held a monopoly of either [the tying or tied products] or had ability, purpose, or intent to acquire one."[140] The Court also pointed to the absence of any allegation that respondent had sold to customers at unfair prices or injured the public in any

[138] *FTC v. Gratz*, 253 U.S. 421 (1920).

[139] *Id.* at 427-28 (emphasis added).

[140] *Id.* at 428.

other way.[141]

Throughout the opinion, the Court reiterated the importance of not interfering with free competition. After detailing the inadequacy of the FTC's findings and emphasizing the absence of consumer harm, the Court concluded,

> [a]ll question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.[142]

Gratz made it clear that the FTC has no authority to condemn a tie in the absence of persuasive evidence that competition would be unduly hindered.

Justice Brandeis dissented in *Gratz*, arguing in favor of a broader interpretation of the FTC's authority under Section 5, but one that was still consistent with the governing principles outlined above. Brandeis agreed with the majority that the FTC must engage in a rule-of-reason analysis in order to distinguish between "honorable rivalry" and conduct that "may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate."[143] Brandeis disagreed with the majority as to the outcome of the case only because he saw the facts of the case differently. He saw the respondent as dominating the market for the tying product with a 45 percent share, as a result of which he believed consumers would often be unable to purchase that product from anyone other than respondent, thereby forcing them to buy the tied product from it as well.

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[141]*Id.*

[142]*Id.* at 428-29.

[143]*Id.* at 438 (Brandeis J., dissenting).

FTC v. Sinclair Refining Co.,[144] decided three years later in 1923, was similarly consistent with the governing principles outlined above. The FTC alleged that refiners and wholesalers of gasoline "leas[ed] underground tanks with pumps to retail dealers at nominal prices and upon condition that the equipment should be used only with gasoline supplied by the lessor."[145] The Supreme Court affirmed the Third Circuit's decision to set aside the FTC's order requiring the refiners and wholesalers to cease this conduct. In concluding that the FTC had not met its burden of proving that this practice was an unfair method of competition, the Court emphasized the procompetitive benefits of the practice. It found that many refiners and wholesalers had adopted this practice because they "regard[ed] it as the best practical method of preserving the integrity of their brands," and as "promot[ing] the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads."[146] The Court also found that the practice did not foreclose the market to competitors, because retailers could purchase competing pumps inexpensively and then use any distributor's gasoline in those pumps. After thoroughly analyzing the restraint's impact on the retail market for gasoline, the Court described the agency's limited authority under Section 5:

> The powers of the commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. . . . And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.[147]

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[144] 261 U.S. 463 (1923).

[145] *Id.* at 464-65.

[146] *Id.* at 475.

[147] *Id.* at 475-76.

Sinclair, like *Gratz* and the other early Supreme Court cases interpreting Section 5, therefore adhered to the original legislative purpose behind Section 5 and to the governing principles outlined in its legislative history.

B. Supreme Court Cases in the 1960s and 1970s Departed from the Limiting Principles Outlined in the Legislative History

In the 1960s, during a period in which the Supreme Court has been criticized by one current justice for adopting "antitrust theories so abbreviated as to prevent proper analysis" under which the "Government always wins,"[148] the Court appeared to take that same approach with respect to Section 5 in three cases, *Atlantic Refining Co. v. FTC*,[149] *FTC v. Brown Shoe Co.*,[150] and *FTC v. Sperry & Hutchinson Co.*.[151] These three decisions marked a substantial departure both from the Court's earlier decisions and from the limits Congress intended would govern the FTC's exercise of its authority under Section 5.

In *Atlantic Refining*, the Court upheld an FTC order finding that Atlantic had violated Section 5 by using a sales commission plan to induce its dealers to sell Goodyear tires, batteries, and accessories. Conceding that this arrangement could not be found to be an illegal tying arrangement under either the Sherman or Clayton Acts, the Court nevertheless upheld the FTC order, holding that "all that is necessary in § 5 proceedings to find a violation is to discover conduct that 'runs counter to the public policy declared in the' Act."[152] In so holding, the Court blessed the FTC's "refus[al] to consider evidence of economic justification

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[148] *California Dental Ass'n v. FTC*, 526 U.S. 656, 794 (1999) (Breyer, J., dissenting).

[149] 381 U.S. 357 (1965).

[150] 384 U.S. 316 (1966).

[151] 405 U.S. 233 (1972).

[152] 381 U.S. at 369.

for the program."[153] It was enough, the Court held, that the case involved "'a classic example of the use of economic power in one market . . . to destroy competition in another market.'"[154] The Court failed to explain how Atlantic's actions could have destroyed competition in the market for automotive tires, batteries, and accessories when Atlantic's share of the national market for gasoline was only 2.5 percent.[155] In both respects, the Court's opinion failed to recognize that the legislative purpose of Section 5 was to prohibit only those unfair methods of competition that threatened harm to the public at large, not just competing manufacturers.[156]

Similarly, in *Brown Shoe*, the Court upheld an FTC order finding that Brown Shoe had violated Section 5 by structuring its franchise program to give special benefits to retailers that sold Brown Shoes exclusively. The Court accepted the FTC's finding that "the franchise program effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers"[157] without analyzing what share of the market was foreclosed, without finding any consumer harm, and without considering procompetitive justifications. At the time, Brown Shoe had a share of less than ten percent of the total U.S. market for shoes and its program included fewer than 700 retail stores—only about one percent of the country's 70,000 retail shoe outlets.[158] The Court neither considered the procompetitive justifications

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[153] *Id.* at 371.

[154] *Id.* at 361.

[155] *Id.* at 364.

[156] As Justice Goldberg pointed out in dissent, many small dealers liked Atlantic's sales commission plan, arguing in an *amicus* brief that they needed sales commission plans to compete effectively with larger dealers. *See id.* at 385 (Goldberg, J., dissenting).

[157] *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

[158] *See Brown Shoe Co. v. FTC*, 339 F.2d 45, 47-48 (8th Cir. 1964) (program affected 682 stores; Brown Shoes had shoe sales of $111 million of the $1.8 billion in sales by the top 70 shoe manufacturers); *Brown Shoe Co. v. United States*, 370 U.S. at 300 (finding 70,000 retail shoe outlets in U.S.).

for the practice, which the lower court had found was designed to provide stores participating in the program services to make them more competitive with other retailers, nor the fact that several of Brown Shoe's competitors had similar programs. Again, the Court deviated from the legislative purpose of Section 5, which was not to interfere with practices a firm adopted in order to compete more effectively, but only to prohibit practices that were likely to destroy competition through methods that served no legitimate purposes but threatened to exclude competitors from the market.[159]

In support of its decision, the Supreme Court criticized the Eighth Circuit's reliance on *Gratz* in overturning the FTC order. Writing for the Court, Justice Black declared that "[l]ater cases of this court . . . have rejected the *Gratz* view and it is now recognized in line with the dissent of Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair."[160] This characterization of Justice Brandeis' dissent overlooks how Brandeis himself analyzed the alleged restraint in that case. It also mischaracterizes the two cases Justice Black cited as having overruled *Gratz—FTC v. R. F. Keppel*[161] and *FTC v. Cement Inst.*[162]

Keppel condemned the Respondent's sale of candy packages known as "break and take." There were three variations of the candy packages and consumers did not know which variation they would receive upon purchase. The packages had differing values, so there was an element of gambling involved in the purchase of the candy. The FTC considered this practice "dishonest" because "break and take" packages were enticing to

[159] The only plausible theory of anticompetitive harm in *Atlantic Refining* and *Brown Shoe* would have been an exclusionary theory, but the facts of neither case supported such a theory.

[160] *FTC v. Brown Shoe*, 384 U.S. at 320-21.

[161] 291 U.S. 304 (1934).

[162] 333 U.S. 683 (1948).

children and might induce them to buy Keppel's candy, even if it was inferior to other candies.[163] The Court concluded that "[a] method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion" not to engage in was an unfair method of competition.[164] There is nothing about this ruling that can be read to overrule *Gratz* either explicitly or implicitly. In it, the Court merely held that a practice that gave one competitor an unfair competitive advantage over its rivals based not on the merits of its product, but through a dishonest practice could be found to violate Section 5. That is entirely consistent with the legislative history, which made it clear that other dishonest practices, such as passing off one's goods as those of a competitor, could be found to be an unfair method of competition if they harmed the public at large, not just another competitor.[165]

In *Cement Institute,* the Court upheld an FTC order finding that an agreement among cement producers to employ a multiple basing point pricing system violated Section 5 because it facilitated more uniform pricing. Again, there is nothing in that ruling that could be read to overrule *Gratz.* The portion of the Court's opinion Justice Black cites as overruling *Gratz* actually cuts the other way; in it, the Court rejects the argument of the Respondents that "the term 'unfair methods of competition' should not be construed as embracing any conduct within the ambit of the Sherman Act."[166] The Court's holding in *Cement Institute*—

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[163] *Keppel*, 291 U.S. at 313.

[164] *Id.*

[165] *See, e.g.*, 51 CONG. REC. at 11,107 (1914) (Sen. Robinson quoting *T.B. Dunn Co. v. Trix Manufacturing*) ("The term 'unfair competition in trade' includes the simulation by defendant of the packages of plaintiff, … The court will only interfere to protect the plaintiff and the public, and for the suppression of unfair and dishonest competition, when 'the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer . . . ."), reprinted in Kintner, *supra* note 6, at 3957

[166] *Cement Inst.*, 333 U.S. at 692.

that Section 5 prohibits anticompetitive practices that would also violate the Sherman Act—does not support Justice Black's claim that the Court's decision in that case somehow overruled *Gratz.*

In *Sperry & Hutchinson*, the Court affirmed a Fifth Circuit decision overturning an FTC order. The order required the country's largest trading stamp company to cease and desist from attempting to suppress the operation of trading stamp exchanges. The FTC had failed to challenge the lower court's holding that Sperry & Hutchinson's conduct violated neither the letter nor the spirit of the antitrust laws. In his opinion for the Court, Justice White nevertheless cited Justice Black's opinion in *Brown Shoe* as having held that "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior."[167]

Justice White's dictum offers a more expansive reading of the scope of the FTC's Section 5 authority than that of any other justice in any Supreme Court opinion, "appear[ing] to contemplate almost no principled limitations on the Commission's power."[168] It is also the most at odds with the section's legislative history and purpose. As we have seen, while Congress intended Section 5's prohibition of unfair methods of competition to reach conduct that would not necessarily be unlawful under the antitrust laws, it did so only to the extent necessary to "nip those practices in the bud" before they matured into full-blown Sherman Act violations.[169] The legislative history reflects nothing, other than Senator Newlands'

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[167] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

[168] Karin A. DeMasi and Jonathan J. Clarke, *Section 5 of the FTC Act and the End of Antitrust Modesty*, BLOOMBERG LAW REPORTS, at 3 (June 25, 2010), http://www.cravath.com/files/Uploads/Documents/Publications/3233999_1.pdf.

[169] *See* discussion *supra* pp. 38-41, part II.C.3.

vague references to morality, to suggest that Congress intended Section 5 to reach anything other than "competitive behavior." Nor is there anything in the legislative history to suggest that Section 5 was intended to empower the FTC to prohibit "competitive behavior" that was not likely, if continued, to cause substantial harm to competition and thereby deprive consumers of the benefits of that competition.

In support of his broad reading of Section 5, Justice White claims that Congress' passage of the Wheeler-Lea Act of 1938 reflects that the legislature intended "unfair methods of competition" would reach beyond practices that harm competition. But, if anything, the passage of that Act reflects just the opposite. Congress passed the Wheeler-Lea Act in large part because the Supreme Court had earlier held, in *FTC v. Raladam Co.*,[170] that the Commission had no power under Section 5 to condemn misleading advertising as an unfair method of competition unless it "substantially injured, or tended thus to injure, the business of any competitor or competitors generally."[171] Congress responded in the Wheeler-Lea Act by amending Section 5 to broaden the FTC's authority beyond unfair methods of competition to "unfair or deceptive acts or practices in or affecting commerce," thereby giving the Commission an express consumer protection mission in addition to its mission to protect competition.[172] The passage of those amendments cannot be read to have somehow broadened the FTC's *existing* authority over unfair methods of competition to reach conduct that does not injure competition.

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[170] 283 U.S. 643 (1931).

[171] *Id.* at 652-53.

[172] *See* H.R. REP. NO. 75-1613, at 1 (1937) (stating that the Wheeler Lea Act's purpose was " to broaden the powers of the Federal Trade Commission over unfair methods of competition by extending its jurisdiction to cover unfair or deceptive acts or practices in commerce.").

C. The FTC and Lower Courts Have Returned to a Narrower Interpretation of Section 5 More Consistent with Its Legislative Purpose, but the Supreme Court Has Not Yet Spoken

As the Supreme Court began in the mid-1970s to acknowledge that many formerly suspect restraints may have procompetitive benefits,[173] the FTC and lower courts returned to an interpretation of Section 5 more consistent with its legislative history. In 1982, in *Beltone Electronics Corp.*,[174] the Commission analyzed the state of the law on exclusive dealing arrangements. The FTC reviewed Supreme Court cases dealing with exclusive dealing arrangements under Section 5, including *Brown Shoe*, and concluded that, although market foreclosure had frequently been the determinative factor in courts' analyses,

> today it would remain only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints, *under both Section 3 of the Clayton Act and Section 5 of the FTC Act*. More specifically, a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity.[175]

Beltone can be fairly read as repudiating *Brown Shoe*, because the Court's brief opinion in *Brown Shoe* concluded that market foreclosure occurred without defining the relevant market, analyzing the degree of foreclosure, or examining the legitimate business reasons for exclusive dealing arrangements, all of which would be required under the rule-of-reason test adopted by the Commission in *Beltone*.

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[173] *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (Overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and holding that non-price vertical restraints could serve procompetitive purposes and therefore must be evaluated using the rule of reason.)

[174] 100 F.T.C. 68, 92 (1982).

[175] *Id.* at 92 (emphasis added).

Subsequent lower court cases echoed *Beltone*'s rule-of-reason approach to Section 5. For example, in *Boise Cascade Co. v. FTC*,[176] a case involving a basing-point pricing system in the freight industry similar to the system at issue in *Cement Institute*, the Ninth Circuit stated, "[W]e decline to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a per se violation of section 5."[177] To do so, the court wrote,

> would be to assume what must be proven, namely, that the use of West Coast freight by southern plywood producers is not a natural competitive response to buyer preference for traditional forms of price quotation, but rather is a deliberate restraint on competition. . . . [T]he weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or actual effect on competition to make out a section 5 violation for use of delivered pricing.[178]

The court noted that consumers prefer this type of pricing scheme and that consumers and an industry expert believed that the scheme had no impact on prices. *Boise Cascade* and *Beltone* both reaffirmed the need for a rule-of-reason approach to Section 5. The authors of the leading treatise on antitrust law, Areeda and Hovenkamp, endorse the approach taken to applying Section 5 in these cases and agree that it requires a rule-of-reason analysis of the allegedly anticompetitive practices:

> Federal Trade Commission Act § 5 does not simply speak of that which may be "unfair" in any vagrant sense. It concerns "unfair methods of competition." This would seem to require the Commission—at least when operating within the antitrust laws as distinct from, say, prohibiting practices that deceive consumers—to confront the same issues of competitive policy that must be analyzed in applying the Sherman Act and the Clayton Act.[179]

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[176] 637 F.2d 573 (9th Cir. 1980).

[177] *Id.* at 581.

[178] *Id.* at 581-82.

[179] Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 230 (3d ed. 2009).

The Second Circuit likewise articulated what is fundamentally a rule-of-reason test for applying Section 5 in *E.I. Du Pont De Nemours & Co. v. FTC*.[180] In that case, all four leading manufacturers of a compound added to gasoline to prevent "knocking" had "independently and unilaterally" adopted certain business practices that allegedly facilitated coordinated pricing.[181] The court held,

> In our view, before business conduct in an oligopolistic industry may be labeled "unfair" within the meaning of § 5 a minimum standard demands that, absent tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.[182]

The court emphasized the limits of the FTC's authority under Section 5, stating that "Congress did not . . . authorize[] the Commission under § 5 to bar any business practice found to have an adverse effect on competition. Instead, the Commission could proscribe only 'unfair' practices or methods of competition."[183]

Whether the Supreme Court will follow these decisions remains unclear. None of its decisions in Section 5 cases decided since *Du Pont* turned on whether the scope of Section 5 was broader than that of the Sherman Act.[184] Nevertheless, in one case, *FTC v. Indiana Federation of Dentists*,[185] the Court cited its earlier decision in *Sperry & Hutchinson* for the proposition that "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust

[180] 729 F.2d 128 (2d Cir. 1984).

[181] *Id.* at 130.

[182] *Id.* at 139.

[183] *Id.* at 136.

[184] *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2014); *FTC v. Phoebe Putney Health Sys, Inc*., 133 S. Ct. 1003 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

[185] 476 U.S. at 454.

laws, . . . but also practices that the Commission determines are against public policy for other reasons."[186] This statement has led one law professor, Robert Lande, to argue:

> There is no doubt that when Congress enacted Section 5 of the FTC Act, it intended the law to be more aggressive than the Sherman and Clayton Acts. The legislative history and Supreme Court decisions demonstrate that Section 5 was intended to cover incipient violations of the other antitrust laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy as framed by the Commission. Even though reasonable people may differ as to whether the FTC Act should be more expansive than the other antitrust laws, congressional intent concerning this point is clear.[187]

As we have seen, Professor Lande is only half right. The legislative history does show that Congress intended Section 5 to reach anticompetitive practices that might otherwise not violate either the Sherman or Clayton Acts, in order to "nip those practices in the bud."[188] But in this regard, Section 5 is no different from the Clayton Act, which Congress also intended to prohibit practices whose effect "may be substantially to lessen competition" in their incipiency before maturing into full-blown Sherman Act violations.[189] The only difference between the Clayton Act and Section 5, in that sense, is that the Clayton Act was limited to a handful of defined anticompetitive practices, whereas Section 5 was aimed at anticompetitive practices outside those defined areas that could likewise "substantially lessen competition."

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[186] *Id.*

[187] Robert H. Lande, Statement at the Federal Trade Commission's Workshop on Section 5 of the FTC Act as a Competition Statute, at 1 (Oct. 17, 2008) (cited in its revised and expanded written version, available at www.antitrustsource.com).

[188] *See* discussion *supra* pp. 38-41, part II.C.3.

[189] *See, e.g.*, *United States v. Von's Grocery Co.*, 384 U.S. 270, 284 (1966) (citing S. REP. NO. 63-698, at 1 (1914) ("Broadly stated, the bill, in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 (the Sherman Act), or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."); S. REP. NO. 81-1775, at 4-5 (1950) ("The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.")).

What Professor Lande overlooks is that the legislative history makes it equally clear that Congress did not intend Section 5 to prohibit methods of competition that were what we would today call competition on the merits—competition based on a firm's greater efficiency or on its ability to offer new and better products or services than its competitors. Congress intended, instead, only to give the FTC authority under Section 5 to prohibit *unfair* methods of competition, by which it meant exclusionary practices that had the potential to exclude equally efficient competitors from the market and that did not serve any legitimate business purpose.

D. Efforts by the FTC to Extend Section 5 beyond Exclusionary Conduct to Police Tacit Collusion

Another area in which the FTC has arguably applied Section 5 in a manner that goes beyond what its proponents viewed as its original purpose relates to the Commission's use of the provision to prohibit practices that it views as facilitating tacit coordination among a group of competitors or as invitations to collude. As our discussion of its legislative history shows, both the committee reports and the floor debates on Section 5 focused almost exclusively on the FTC's ability to prohibit exclusionary conduct that otherwise could not be reached under the Sherman Act before it had matured into a full-blown Sherman Act violation. To the extent there was any discussion of collusion, it was directed to the concern of Senator Borah and others that the commission might misuse Section 5's prohibition of unfair methods of competition as a vehicle for sanctioning price-fixing and other collusive conduct among smaller producers who viewed the prices charged by larger, more efficient producers as unfair.[190] As we have seen, the proponents argued strenuously that Section 5

[190] *See supra* pp. 21-26.

would give the Commission no such power and the conference committee ultimately added an express public interest requirement designed to assure it was not misused in that manner.

Despite those assurances and the addition of an express public interest requirement, Senator Borah's concerns were borne out in the 1920s when the FTC began to approve industry codes developed through so-called "Trade Conferences" that included provisions designed to limit price competition and restrict output, and that would otherwise have been *per se* unlawful under Section 1 of the Sherman Act.[191] These industry codes grew out of the associationist movement that began just a few years before the FTC was created and then flowered during World War I, when Woodrow Wilson created a War Industries Board, headed by New York financier Bernard Baruch. This board required every major industry to cooperate with it to develop policies to redirect their production to needed war material while imposing price controls to protect the public from price gouging.

Having grown accustomed to working together in this manner, many industries formed trade associations after the war to develop codes of conduct and to exchange pricing and other information.[192] While the Justice Department brought several actions challenging these trade association practices under the Sherman Act,[193] the FTC actively promoted them, sponsoring Trade Practice Conferences to assist industries in developing these industry codes and then approving the rules that emerged.[194] As one commentator has observed,

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[191]*See generally* Robert T. Joseph, *John Lord O'Brian, Hoover's Antitrust Chief, Gives the FTC an Antitrust Lesson*, ANTITRUST 88, Fall 2010.

[192]*Id.* at 89.

[193]*See, e.g.*, *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

[194]Joseph, *supra* note 191, at 89-90.

some of the rules approved by the FTC between 1927 and 1930 were

> startling—even shocking—when read today from the perspective of current antitrust doctrine. . . . [M]any of the provisions treated as "unfair methods of competition" pricing or marketing activity that we would view today as competition on the merits. These included secret discounts, selling surplus stock at reduced prices, failing to adhere to fixed bids, competition on elements other than price, and other competitive tactics that aggressive competitors could use to win business, but that would be disruptive of "stable" market conditions.[195]

By condoning these practices under Section 5, the FTC was plainly operating in a manner inconsistent with the section's legislative purpose. In 1929, the then-head of the Antitrust Division, John Lord O'Brian, began to urge the FTC to re-examine the industry codes it had approved and to excise from them any anticompetitive provisions. In response, the Commission ultimately revised its rules in at least fifty industries, deleting some of their most objectionable features and rephrasing others.[196]

After World War II, beginning with its action against the *Cement Institute,*[197] the FTC changed course and began using Section 5 to attack trade association practices that it found were likely to facilitate coordinated pricing. As discussed above, in *Cement Institute,* the Supreme Court affirmed a Commission order finding that an agreement among cement producers to employ a multiple basing point price system that the Commission found was calculated to produce more uniform pricing was an unfair method of competition that violated Section 5. Thirty-five years later, in the *DuPont* case, the Commission sought to extend this precedent to the parallel adoption by competitors in a highly concentrated industry of several allegedly facilitating practices, including a multiple basing point price

[195] *Id.* at 90.

[196] *Id.* at 92.

[197] *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

system similar to the one in *Cement Institute.*[198] As discussed earlier, the Second Circuit in this case agreed with the Commission that practices that facilitated coordinated pricing could violate Section 5, without the need to find an agreement, but only if it could be shown that they harmed consumers by raising prices and that there was no legitimate procompetitive explanation for the industry's parallel adoption of those practices.

Relying on this authority, the Commission has since used Section 5 to prohibit collusive practices, such as facilitating practices and invitations to collude, that it believes were likely to limit competition and thereby harm consumers even if they did not violate the Sherman or Clayton Acts. Some of these actions have involved "exchanges of competitively sensitive information" that the Commission alleged would "increase the likelihood of tacit collusion."[199] Others have involved what the Commission alleged were private, "naked solicitation[s] regarding price,"[200] that did not result in an agreement. All of these cases were resolved through consent orders so they did not produce a reasoned Commission decision, much less any judicial review of the FTC's use of Section 5 to attack these allegedly anticompetitive practices. As a result, there is only a limited public record on which to evaluate whether the Commission's actions in these cases—in some of which the Commission itself conceded no actual agreement was reached—were warranted.[201]

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[198] *Id.* at 696-700.

[199] Susan D. DeSanti & Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93, 94 (1994-95). The authors state that "courts have found a variety of facilitating practices to be unlawful under particular circumstances." *Id.* at 95-96 (citing, as examples, *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965)).

[200] DeSanti, *supra* note 199, at 109 (citing *Quality Trailer Prods. Corp.*, 115 F.T.C. 944 (1992); *A.E. Clevite Inc.*, 116 F.T.C. 389 (1993); *YKK (U.S.A.)*, 116 F.T.C. 628 (1993)). *See also Valassis Commc'ns Inc.*, 141 F.T.C. 247 (2006); *U-Haul Int'l, Inc.* 150 F.T.C. 1 (2010).

[201] DeSanti, *supra* note 199, at 107.

Despite the lack of a full public record in these cases, even those who have objected to the Commission's other efforts to apply Section 5 to conduct that would not violate the Sherman Act seem to agree that the FTC's application of Section 5 to prohibit invitations to collude, information exchanges that could facilitate coordinated pricing, and other facilitating practices is, in theory at least, a proper use of its authority under that section.[202] When these practices are, in fact, likely to result in higher prices and thereby harm consumers, and fail to serve any legitimate pro-competitive business purpose, the legislative history would appear to support the Commission's use of its authority to prohibit them. Even though the section's proponents focused principally on exclusion, rather than collusion, there is nothing in the legislative history to suggest that the FTC could not use its authority under Section 5 to attack practices that facilitate collusion in a way that would be likely to harm consumers.

CONCLUSION

When it enacted Section 5, Congress expected that the meaning of its prohibition on "unfair methods of competition" would be developed through a common law process as the Commission and courts enforced that prohibition over time, just as the meaning of "restraint of trade" and "monopolization" had been developed over time by the courts in deciding cases brought under the Sherman Act.[203] The proponents of Section 5 would almost

[202] *See, e.g.*, A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, *supra* n. 1, at 3*;* Statement of Comm'r Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013) (available at www.ftc.gov) ("An invitation to collude satisfies the harm to competition element of an unfair method of competition—whether or not it ultimately results in increased prices, reduced output, or other harm to competition—because it creates a substantial risk of competitive harm.").

[203] *See, e.g.*, 51 CONG. REC. 13,234 (1914) (Remarks of Sen. James Clarke) ("Those of us who think the phrase 'unfair competition' is adequate understand that it will be for the commission, subject to review by the courts, to fill in, under the rule of reason, such things as they may find to be unfair competition."), *reprinted in* Kintner, *supra* note 6, at 4642; *id.* at 11,179 (Remarks of Sen. Hollis) ("The very first case that went from this

certainly be disappointed that the meaning of Section 5 has not been developed nearly as fully through Commission and court decisions as they expected.

Having the Commission issue a policy statement explaining what it thinks the term "unfair methods of competition" means might be helpful, but would not be sufficient, by itself, to fill this gap. While such a policy statement might clarify how the FTC intends to use its authority under Section 5, it would suffer from the problem the framers of Section 5 saw in any effort to define more clearly in the statute itself what constitutes unfair competition. Instead, the best means to give content to the words "unfair methods of competition" would be to follow the common law approach that Congress intended. This path would require the FTC to explain more fully the reasoning behind each of its enforcement decisions and would require it to spend less time investigating and more time litigating, as Congress expected,[204] so that a fuller body of well-reasoned precedents could be developed as to what this otherwise inherently vague term means.[205]

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commission to the court would give a precedent; and there would probably be in a few years a body of advancing, progressing decisions on this question that would be a continually growing and improving guide of conduct, just like the decisions of every court in the county on the question of negligence in tort cases."), *reprinted in* Kintner, *supra* note 6, at 3980.

[204]*Id.* at 12,146 (Remarks of Sen. Hollis) (referring to the Commission's expected "facilities for investigation" and "rapid, summary procedure"), *reprinted in* Kintner, *supra* note 6, at 4141-42.

[205]For a contrary view on the efficacy of the case method, *see* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO MASON L. REV. 1287 (2014). The authors argue that the common law approach has failed to define the contours of the FTC's "unfair methods of competition" authority, and that the Commission should instead issue a formal policy statement explaining the purpose and limits of its authority. *Id.* at 1292 ("[T]he Commission's case-by-case approach to Section 5 enforcement has little to do with the common law process and cannot be expected to result in the same development of substantive competition doctrine or possess any of its other virtues.").

