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THE PERILS OF EXCESSIVE DISCRETION
The Elusive Meaning of Unfairness in Section 5 of the FTC Act

by James Campbell Cooper

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About the Author

James Campbell Cooper
George Mason University School of Law
Jcoope20@gmu.edu

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Abstract

Section 5 of the Federal Trade Commission (FTC) Act gives the FTC an undefined mandate to prosecute "unfair methods of competition." For nearly 100 years, the Commission has searched tirelessly for the meaning of this amorphous concept. Since 1992, the FTC has continued to define Section 5 through a series of consent decrees. Absent any external constraint, the FTC appears to have broad discretion to define the reach of Section 5 beyond the Sherman Act. This discretion causes uncertainty, which is likely to deter beneficial conduct. It also creates incentives to divert resources from productive to redistributional purposes. The recent FTC investigation of Google illustrates the FTC's discretion to define the reach of Section 5. This paper suggests that the FTC issue a binding statement making Section 5 coterminous with the Sherman Act or limiting Section 5 to conduct that clearly harms consumers through adverse effects on competition, and that would not otherwise fall under the antitrust laws.

***JEL* codes:** K21, K23, L51, H10

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The Perils of Excessive Discretion:

The Elusive Meaning of Unfairness in Section 5 of the FTC Act

James Campbell Cooper

I. Introduction

When deciding between rules and standards, there is a well-known trade-off between certainty and flexibility.[1] The Sherman Act is a famously vague statute that sets a standard prohibiting "unreasonable restraints of trade" and "monopolization."[2] This decision was wise in retrospect; the Sherman Act has proved adaptable to all manner of industries and practices that have evolved since its inception in the 19th century. Although such indefinite prohibitions could have served as a font of uncertainty for businesses, courts have taken the Sherman Act's open architecture and over the course of 120 years created an antitrust system that provides relatively clear—and for the most part, economically sound—liability standards.[3]

The same cannot be said about Section 5 of the Federal Trade Commission (FTC) Act.[4] Like the Sherman Act, the antitrust provision of the FTC Act is a vague standard, prohibiting "unfair methods of competition" (UMC).[5] Congress intentionally left the term "unfair" undefined, hoping that an administrative body "with broad business and economic expertise" would give it meaning.[6] Unlike the Sherman Act, however, the boundaries of the FTC's UMC authority remain largely unresolved. Over the past century, the FTC has been on a quest to find

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[1] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 556–57 (6th ed. 2003); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1993).
[2] 15 U.S.C. §§ 1, 2 (2006).
[3] *See* Joshua D. Wright & Douglas A. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013) (explaining how "the promotion of economic welfare" became "the lodestar of antitrust laws").
[4] 15 U.S.C. § 45 (2006).
[5] The FTC Act also prohibits "unfair or deceptive acts or practices" (UDAP), which is the legal grounding for the FTC's consumer protection program involving fraud, advertising substantiation, and more recently, privacy and data security matters. *Id.*
[6] *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

its elusive competition mandate. Through its first 60 years, a series of Supreme Court cases interpreting the FTC Act—the most recent and widely cited of which is more than 40 years old—told the FTC that its authority to condemn unfair methods of competition gave it wide-ranging powers, beyond those associated with Sherman Act enforcement.[7] A series of adverse rulings in the 1980s and early 1990s, however, appeared to scale back Section 5's domain.[8]

Since 1992, the FTC has continued to define Section 5's reach internally through settlements primarily involving two classes of conduct: so-called "invitations to collude" (ITCs),[9] and breaches of agreements to disclose or to license standard-essential patents (SEPs).[10] Closely related to ITCs, the Commission has alleged pure Section 5 violations in two cases involving sharing of competitively sensitive information.[11] In addition to these lines of cases, the FTC has used Section 5 in two additional matters: the "CD MAP" cases, in which major record companies

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[7] *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); *see also* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 873 (2010); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930–31 (2010).

[8] FTC v. Boise Cascade, 637 F.2d 573, 581 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d. Cir. 1980); E.I. DuPont de Nemours & Co. v. FTC (Ethyl), 729 F.2d 128 (2d Cir. 1984). The FTC's last judicially decided Section 5 action was in 1992. FTC v. Abbott Labs, 853 F. Supp. 526 (D.D.C. 1992).

[9] Decision and Order, *In re* U-Haul Int'l, Inc., FTC File No. 081-0157 (July 20, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf; Decision and Order, *In re* Valassis Commc'ns, Inc., FTC File No. 051-0008, FTC Docket No. C-4160 (Apr. 28, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf; Decision and Order, *In re* Stone Container Corp., FTC File No. 951-0006, FTC Docket No. C-3806 (June 3, 1998), *available at* http://www.ftc.gov/os/1998/06/9510006.do.htm; Decision and Order, *In re* Precision Moulding Co., Inc., FTC Docket No. C-3682 (Sept. 10, 1996), *available at* http://www.ftc.gov/os/1996/09/c3682.do.pdf; *In re* YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993); *In re* A.E. Clevite, Inc., 116 F.T.C. 389 (1993); *In re* Quality Trailer Prods. Corp., 115 F.T.C. 944 (1992).

[10] Decision and Order, *In re* Dell Computer Corp., 121 F.T.C. 616 (1996); Decision and Order, *In re* Negotiated Data Solutions, FTC File No. 051-0094 (Sept. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf; Decision and Order, *In re* Robert Bosch GmbH, FTC File No. 121-0081, FTC Docket No. C-4377 (Apr. 24, 2013), *available at* http://www.ftc.gov/os/caselist/1210081/130424robertboschdo.pdf; Decision and Order, *In re* Motorola Mobility, FTC File No. 121-0120, FTC Docket No. C-4410 (July 24, 2013), *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf.

[11] Decision and Order, *In re* Bosley, FTC File No. 121-0184, FTC Docket No. C-4404 (June 5, 2013), *available at* http://www.ftc.gov/os/caselist/1210184/130605aderansregisdo.pdf; Decision and Order, *In re* Nat'l Ass'n of Music Merchants, FTC Docket No. C-4255 (Apr. 10, 2009), *available at* http://www.ftc.gov/os/caselist/0010203/090410nammdo.pdf.

adopted "minimum advertised price" restrictions unilaterally, but in parallel fashion, and the suit against Intel for engaging in exclusionary conduct, including deception and loyalty discounts.[12]

Absent external appellate review to determine whether the FTC had actually proved a Section 5 violation, however, it is unclear whether Congress intended these classes of conduct to be illegal as "unfair methods of competition." Because settlement with the FTC is preferable to litigation in a wide array of circumstances—since 1992, only Intel has refused to settle before the instigation of litigation—what is considered illegal under Section 5 largely has become whatever at least three commissioners can agree on. Accordingly, although the appellate rebukes of the 1980s provide some clear boundaries on the Commission's ability to apply Section 5 beyond the Sherman Act, there is still a relatively large zone in which it can develop this quasi–Section 5 common law with little fear of triggering litigation and the concomitant specter of judicial scrutiny.

The recent Google investigation provides some evidence about just how large this zone of discretion may be. Although the Commission eventually decided to close its investigation into Google's search practices—and was able to extract informal concessions from Google related to "scraping" and failures to facilitate "multihoming," or advertising on competing search engines—that the Commission would entertain a case premised on such conduct hints at a willingness to make arguments that clear Sherman Act precedent involving duties to aid rivals should not apply to the Section 5 actions, or that misappropriation can serve as the basis for a Section 5 theory. The Commission's settlement with Google concerning breaches of commitments to license SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms, moreover, continued its application of antitrust and consumer protection law to contractual disputes between sophisticated businesses.

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[12] Decision and Order, *In re* Intel Corp., FTC File No. 061-0247, FTC Docket No. 9341 (Nov. 2, 2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf. Although the FTC's complaint alleged that Intel's conduct would satisfy a stand-alone Section 5 case, it also alleged that Intel had violated Section 2 of the Sherman Act. The case ultimately settled, but only after the parties had begun administrative litigation.

Absent judicial or other external limitations on the Commission's Section 5 UMC power, the FTC is left with an enormous amount of discretion to classify conduct as an unfair method of competition—far more discretion than it enjoys when applying the Sherman Act. This discretion potentially comes at a steep price. First, it creates uncertainty. If businesses are unsure about where the line between legal and illegal behavior is drawn, they rationally will take too much care to avoid violating the law, which in antitrust can mean competing less aggressively. Second, the more discretion the FTC enjoys to condemn a practice as an unfair method of competition, the more competition will be channeled from the marketplace to the FTC headquarters. Although this development may be good for economists and attorneys, it is bad for consumers.

The FTC could go a long way toward solving this problem by taking a cue from the history of its consumer protection program. The FTC's overreach in the 1970s on both the competition and consumer protection sides nearly shut the agency down. While pursuing antitrust cases to break up the cereal and automobile industries, the FTC had also proposed banning advertising to children—a gambit that led the *Washington Post* to dub the FTC the "national nanny."[13] Congress reacted by threatening to defund the Agency and placing serious constraints on its consumer protection and competition authority.[14] As part of a program to inspire public—and more importantly, congressional—trust, the FTC adopted a series of binding policy statements that made consumer harm the touchstone of its authority to challenge "unfair or deceptive acts or practices" (UDAP authority).[15]

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[13] *See The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

[14] *See* William E. Kovacic, *The FTC and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 665–66 (1982) (detailing these restrictions and noting that the rancor over the FTC caused its funding to lapse twice, causing the Agency to shut its doors).

[15] The FTC released its Unfairness Statement in 1980, which was later appended to *International Harvester* and eventually codified. This statement limited FTC challenges to instances where consumer harm was likely and unavoidable, and the harm was not offset by countervailing benefits. The FTC also issued statements on deception and advertising substantiation during the same period.

A similar effort at self-regulation that limits the FTC's discretion to stretch its UMC authority could help reduce uncertainty and rent-seeking. One path would be to confine Section 5 to the Sherman Act. This option would force the FTC to grapple with the reality that in many ways, the search for Section 5's domain beyond the Sherman Act is a solution in search of a problem. There is certainly no consensus that the Sherman Act—even after some recent limitations imposed by cases like *Twombly*, *Trinko*, and *Credit Suisse*—is no longer fit to police anticompetitive conduct. It may well be that the FTC is trying to sell a product that nobody needs. Consequently, the costs of abandoning an expansive Section 5 may be small; with the exceptions of ITCs and information-sharing involving small firms, the rest of the FTC's Section 5 portfolio can also be reached under existing Sherman Act theories (albeit with more difficulty) or handled through other laws or self-regulation. What's more, anchoring Section 5 to the Sherman Act will reduce the ill effects associated with the excessive regulatory discretion that comes from enforcing a nebulous statute.

However attractive it may be from a policy standpoint to jettison Section 5 beyond the Sherman Act, Congress is unlikely to permit the FTC to abrogate its UMC power, because doing so would diminish congressional power. Accordingly, a more realistic path for the Commission would be to spell out the circumstances under which it would consider a stand-alone Section 5 case.[16] This domain should be narrow, focusing only on conduct that (1) clearly is harmful (or poses a significant threat of substantial harm) to consumers through its effect on competition, (2) is unlikely to generate any cognizable efficiencies, and (3) but for the application of Section 5,

[16] Commissioners Ohlhausen and Wright have recently begun this discussion. *See* FTC Comm'r Maureen K. Ohlhausen, Section 5: Principles of Navigation, Remarks Before the U.S. Chamber of Commerce (July 25, 2013), *available at* http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf; FTC Comm'r Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (June 19, 2013), *available at* http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf.

would remain unremedied. In practice, this would mean retaining only two classes of conduct in the FTC's current portfolio of Section 5 cases: ITCs and certain types of competitively sensitive information-sharing involving small firms.

The remainder of the paper is organized as follows. Part 2 provides an overview of Section 5 jurisprudence. Part 3 explores dimensions in which the Commission has exercised, or some have argued should exercise, its considerable discretion, and part 4 examines the Google investigation in this context. Part 5 discusses the costs of the FTC's Section 5 discretion and part 6 offers some solutions. Part 7 concludes.

II. Section 5 of the FTC Act

Section 5 of the FTC Act ambiguously proscribes both "unfair and deceptive acts and practices" and "unfair methods of competition." The former prohibition, added by Congress as part of the Wheeler-Lea Amendments in 1938, has been interpreted to form the basis of the Commission's consumer protection authority.[17] The prohibition on UMC is the focus of this essay and forms the legal basis for the FTC's antitrust authority.

In this section, I first discuss the threshold issue of who determines the reach of Section 5. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[18] the courts are supposed to defer to an agency's "reasonable" interpretation of an ambiguity in a statute it enforces. But this does not appear to be the case for the FTC's interpretation of its UMC authority. Next, I examine the case law that establishes the boundaries of Section 5: first, those early cases that establish Section 5 as broader than the Sherman Act; second, a series of cases in

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[17] *See* FTC Policy Statement of Unfairness, appended to *In re* International Harvester Co., 104 F.T.C. 949 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.
[18] Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

the 1980s that placed some clear limits on Section 5's reach; and finally, the modern push of Section 5 beyond the Sherman Act into the field of so-called "invitations to collude" and breaches of commitments involving SEPs. None of the modern cases have been litigated. Whether by design or luck, this fact has left the FTC to define a new direction of Section 5 expansion without any judicial oversight.

A. A Threshold Question: Who Defines the Reach of Section 5?

Section 5's prohibition on "unfair methods of competition" clearly is not a rule, but a standard. Accordingly, it is left to some administrative body to determine exactly when behavior is "unfair." In the landmark case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., the Supreme Court held that when statutory language is ambiguous—in the sense that it is susceptible to more than one reasonable meaning—courts must defer to a reasonable agency interpretation.[19] As Dan Crane has noted, however, the vagueness of the term "unfair" should be viewed not as an ambiguity—in the sense that the term is susceptible to multiple meanings—but as evidence that Congress has delegated the function of creating a federal common law.[20] The important question is whether Congress delegated this task to the FTC or to the courts.[21] The courts have answered this question by reserving to themselves the right to define unfair methods of competition. Thus, despite a rich legislative history suggesting that Congress intended an expert Commission to use Section 5 as a vehicle to establish new competition norms,[22] courts

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[19] *Id.* at 865.
[20] Daniel Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008).
[21] *Id*. at 1190.
[22] *See* Winerman, *supra* note 6. This may reflect an institutional failing; a general view that the actual make-up of the Commission has rarely lived up to the Congressional ideal of an expert body equipped to develop competition law. *See* Kovacic, *supra* note 14.

appear to possess a veto right over any FTC definition of unfairness—not merely an unreasonable one.

Some older cases appear to give more weight to Commission determinations, suggesting a wide berth to declare business practices unfair. For example, in *Cement Institute*, the Second Circuit sustained the Commission's conclusion that concerted base point pricing is an unfair method of competition, explaining, "we give great weight to the Commission's conclusion, as this Court has done in the past."[23] This deference may have rested on the court's belief that the FTC had lived up to Congress's vision of it as an expert agency, whose conclusions "would be the result of expertness coming from experience."[24] It found that "the Commission's long and close examination of the questions it here decided has provided it precisely the experience that fits it for performance of its statutory duty."[25]

More recent cases, however, appear to give the FTC little deference. In *Official Airline Guides*, for example, the court agreed to give a nod to the FTC's view of what was unfair, but clearly reserved to itself the power to make the ultimate decision, explaining, "The final word is left to the courts."[26] The Second Circuit in *Ethyl* similarly explicated that although the FTC's interpretation of Section 5 "is entitled to great weight, and its power to declare trade practice unfair is broad, it is the function of the court ultimately to determine the scope of the statute upon which the Commission's jurisdiction depends."[27] The Ninth Circuit in *Boise Cascade* was more dismissive of any call for deference to the FTC's legal conclusions that a method of competition is unfair: "It is often repeated that the Commission was set up as an expert body with power 'to

[23] FTC v. Cement Institute, 333 U.S. 683, 720 (1948). *See also* FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968); FTC v. Motion Pictures Advertising Service Co., 344 U.S. 392, 396 (1953).
[24] *Cement Institute*, 333 U.S. at 721.
[25] *Id*.
[26] *Official Airline Guides*, 630 F.2d at 927 (internal quotations omitted).
[27] *Ethyl*, 729 F.2d at 136.

restrain practices . . . which, although not yet having grown into Sherman Act dimensions, would most likely do so if left unrestrained . . . . The policies calling for deference to the Commission are, of course, in tension with the acknowledged responsibility of the courts to interpret Section 5."[28]

There have been no post-*Chevron* cases that directly address a proposed FTC interpretation of its UMC authority, and only one post-*Chevron* appellate case that even considers the extent to which courts owe the Commission deference in a UMC case.[29] *FTC v. Indiana Federation of Dentists* involved an FTC challenge to a joint effort among dentists—acting through a professional association—to withhold x-rays from dental insurers.[30] In laying out the correct standard of review, the Supreme Court acknowledged that it must defer to the Commission's findings of fact.[31] The Court allowed that "courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair'" but explained that "the legal issues presented—that is, the identification of governing legal standards and their application to the fact found—are . . . for the courts to resolve."[32] Because the Commission had found that the practice in question was an unfair method of competition solely because it had violated Section 1 of the Sherman Act, however, the Supreme Court addressed only the Sherman Act question.[33] Thus, it did not have occasion to consider just how much deference it would accord a Commission decision to condemn a practice as an unfair method of competition.

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[28] FTC v. Boise Cascade, 637 F.2d 573, 581 (9th Cir. 1980).

[29] Since *Chevron*, the FTC has received deference in consumer protection rule making. *See* Mainstream Marketing Servs., Inc. v. FTC, 358 F.3d 1228, 1250 (10th Cir. 2004). FTC v. Abbott Labs., 853 F. Supp. 526 (D.D.C. 1994), is the only post-*Chevron* decision to consider the FTC's UMC authority. In this case, the Commission proceeded as a plaintiff under its Section 13(b) power to initiate Section 5 actions in federal district court. Because it was not an appeal from a Commission determination that Abbott's conduct was unfair (the Commission needs only "reason to believe" that a defendant violated the FTC Act to approve a complaint), the court had no occasion to even consider the issues of deference. Rather, it merely tested the evidence against the unfairness standard announced by the Second Circuit in *Ethyl*, and found it lacking.

[30] 476 U.S. 447 (1986).

[31] *Id*. at 454.

[32] *Id*.

[33] *Id*. at 455.

Despite *Chevron*, the existing case law strongly suggests that the courts have reserved to themselves the common-law function of fleshing out the definition of "unfairness" as it relates to the Commission's competition mission.[34] This situation is distinct from the normal course of affairs under administrative procedure law, in which the courts provide an agency with room to maneuver, subject to a judicial veto when the agency decision is, for example, arbitrary and capricious or an abuse of discretion. With regard to the Commission's UMC authority, courts—although giving lip service to the possibility that the FTC may deserve some small modicum of deference in its unfairness determinations—have determined that they are not constrained by these administrative law precepts. They have claimed unfettered discretion to replace the FTC's view of its UMC authority with theirs.[35] In some ways, this result should not be surprising—*Chevron* deference is an inverse function of the number of governmental actors that have authority to enforce the underlying statute.[36] Although the domain of UMC is greater than that of the Sherman Act, most UMC authority corresponds with the Sherman Act, which the FTC enforces jointly with the Department of Justice (DOJ) and private plaintiffs.[37]

Even if the courts are the *de jure* arbiters of what constitutes an unfair method of competition, as long as the Commission avoids litigation, it becomes the *de facto* decider. This

[34] The question of deference to FTC interpretation raises what Cass Sunstein has referred to as the "Chevron Step Zero" problem. That is, whether *Chevron* applies to an agency interpretation is ultimately a question of congressional delegation; the reviewing court must first determine whether Congress intended to delegate the duty to interpret the statute to the agency in the first place. The answer to this "step zero" question may hinge on whether the interpretation decides an important policy issue or merely concerns a minor ministerial function. *See* Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

[35] *See* Crane, *supra* note 20, at 1205 ("The FTC takes antitrust norms as it finds them and merely enforces the law like any other entity with standing . . . .").

[36] *See id.* at 1209 (The fact that the FTC and Department of Justice both enforce the Sherman Act "impairs the FTC's claim to *Chevron* deference because courts generally withhold such deference from agencies that share responsibility with other agencies for the enforcement of a statute.").

[37] *See id.* at 1198–99 (noting how there is little difference between the FTC and the DOJ).

state of affairs calls into question the legitimacy of the FTC's modern Section 5 cases. As long as the FTC's theories remain untested in an adversarial proceeding, and unratified by appellate decisions, uncertainty will remain about the true reach of Section 5.

B. **Cement Institute, Brown Shoe,** ***and*** **S&H*: Establishing Section 5's Extensive Reach***

There is no dispute that, subject to important statutory exemptions, Section 5 covers all conduct that the Sherman and Clayton Acts cover.[38] Early cases also established the proposition that Section 5 sweeps more broadly than the Sherman Act. For example, in *FTC v. Cement Institute*, the FTC successfully challenged the use of a base-point pricing system in the cement industry as an unfair method of competition because of its tendency to lead to uniform prices.[39] In reaching its decision, the court stated that "[i]t has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations."[40] Similarly, in *FTC v. Brown Shoe*, a case challenging an exclusive dealing arrangement involving a tiny fraction of the US shoe industry, the Supreme Court explained that the "broad power" of the FTC "is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."[41]

Most arguments to allow Section 5 to be broader than the Sherman Act inevitably cite language from the Supreme Court's decision in *FTC v. Sperry & Hutchinson Co*. ("*S&H*"), a case involving a Commission challenge to attempts by S&H to "suppress the operation of trading

[38] *See Boise Cascade*, 637 F.2d at 581.
[39] 333 U.S. 683 (1948).
[40] *Id*. at 694.
[41] 384 U.S. 316, 321 (1966).

stamp exchanges."[42] In the Court's most searching review of the FTC's UMC authority, it addressed two questions:

> First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition?[43]

The Court answered both questions in the affirmative, noting that the FTC may consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws" when determining whether a practice is an unfair method of competition.[44]

As discussed in part A, although these decisions suggest an expansive reading of Section 5, they also appear to reserve for the courts the power to define the statute's exact metes and bounds. Further, given that *S&H* is over 40 years old, and concerns a practice that would fail to raise an eyebrow of a modern antitrust agency or court, it is unclear how powerful a precedent it remains.

C. Limits on Section 5: **Boise Cascade*, *Official Airline Guides*, and *Ethyl**

A trio of appellate decisions in the 1980s together limited the FTC's ability to use Section 5 to reach certain unilateral conduct. The first of these cases, *Boise Cascade v. FTC*, involved a Commission challenge to a base point pricing system in the Northwest plywood market.[45] The Court found insufficient evidence to support the Commission's order enjoining the use of the pricing system and rejected the Commission's invitation to treat an industry-wide adoption of

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[42] 405 U.S. 223 (1972). In each of its recent SEP cases—*N-Data*, *Bosch*, and *Google*—the Commission has cited *S&H* for the proposition that Section 5 is broader than the Sherman Act.
[43] *S&H*, 405 U.S. at 239.
[44] *Id.* at 244. *See also* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986) (quoting approvingly the language from *S&H*).
[45] 637 F.2d 573 (9th Cir. 1980).

"an artificial method of price quoting" as *per se* illegal under Section 5.[46] Specifically, the Ninth Circuit concluded "to allow a finding of a Section 5 violation on a theory that the mere widespread use of a practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior."[47]

Four months later, the Second Circuit again rebuffed the Commission's attempt to expand the reach of Section 5 to unilateral conduct that affected ancillary markets. In *Official Airline Guides, Inc. v. FTC*, the Commission had found that a publisher of flight schedules violated Section 5 for refusing to publish commuter airline schedules.[48] This practice, according to the Commission, put commuter airlines at a competitive disadvantage relative to "certificated air carriers."[49] The court explained that the *Colgate* doctrine provided a monopolist with the right to deal with whom it wishes, absent a purpose to create or maintain a monopoly.[50] Noting that any competitive effects from the defendant's refusal to deal with commuter airlines would accrue in an ancillary market, the court rejected the Commission's urging that it take a "small step" to further the "fundamental goals of antitrust."[51] The court concluded that "we think enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[52]

In the last case in the trilogy, *E .I. DuPont de Nemours & Co. v. FTC* (*Ethyl*), the Second Circuit again struck down a Commission finding that unilaterally adopted pricing practices in an oligopolistic industry—such as quoting only delivered prices, the use of most-favored-nation clauses, and contractual provisions that publicized price increases—were unfair methods of

[46] *Id.* at 581.
[47] *Id*. at 582.
[48] 630 F.2d 920 (2d. Cir. 1980).
[49] *Id*. at 922–23.
[50] *Id*. at 925.
[51] *Id.* at 927.
[52] *Id.* at 927.

competition.[53] The court focused on the need to articulate clear standards for the "elusive concept" of unfairness:

> Standards for determining whether [a business practice] is unfair must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving maximum competitive potential, ban certain practices in the hope that its action would increase competition.[54]

The court examined the history of FTC actions, noting that when enforcing Section 5 beyond the Sherman Act, the Commission had traditionally confined itself to challenging business practices that were "collusive, coercive, predatory, restrictive, deceitful, or exclusionary."[55] In the process, it came the closest that any court has to laying out a framework for finding Section 5 liability (at least in the context of widely adopted practices in an oligopolistic industry), explaining that there must be "at least some indicia of oppressiveness, 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."[56] Even under this broad standard—which still appears to relieve the Commission of the burden to show anticompetitive effects, as it would be required to in a Sherman Section 2 case[57]—the court ultimately rejected the FTC's theory of liability given ample evidence that the practices had legitimate business justifications.[58]

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[53] 729 F.2d 128 (2d Cir. 1984).
[54] *Id.* at 138–39. *See also id*. at 137 ("The term 'unfair' is an elusive concept, often dependent upon the eye of the beholder").
[55] *Id.* at 138.
[56] *Id.* at 139.
[57] *See, e.g.*, United States. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2000).
[58] In *FTC v. Abbott Labs.*, 852 F. Supp. 526 (D.D.C. 1994), the Commission brought an action in district court alleging a pure Section 5 claim against Abbott for unilaterally providing information to competitors that facilitated collusive bidding for WIC program formula contracts. The district court applied the *Ethyl* test, but found that Abbott's conduct did not have anticompetitive intent and was supported by legitimate business purposes. *Id*. at 536–37.

D. The Modern Era: Invitations to Collude and Standard-Setting

Since 1992, the FTC has continued to define Section 5's reach internally, through settlements primarily involve two classes of conduct: so-called "invitations to collude" (ITC),[59] and breaches of agreements to disclose or to license standard-essential patents (SEPs).[60] Similar in spirit to ITCs, the Commission has also alleged pure Section 5 violations in cases involving sharing of competitively sensitive information.[61] In addition to these lines of cases, the FTC has used Section 5 in two additional matters: the "CD MAP" cases, involving the parallel adoption by major record companies of "minimum advertised price" restrictions; and the suit against Intel for engaging in exclusionary conduct, including deception and certain pricing practices.

1. Invitations to collude. ITC cases address a problem that cannot be reached under the Sherman Act. When a company with low market share invites a rival to join a conspiracy or signals to a rival a willingness to enter into a conspiracy, absent a completed agreement, there is no cause of action under either Sherman Section 1 or 2. Sherman Section 1 requires an agreement, and although an invitation case can be brought under Sherman Section 2, the

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[59] Decision and Order, *In re* U-Haul Int'l, Inc., FTC File No. 081-0157 (July 20, 2010), *available at* http://www.ftc .gov/os/caselist/0810157/100720uhauldo.pdf; Decision and Order, *In re* Valassis Commc'ns, Inc., FTC File No. 051-0008, FTC Docket No. C-4160 (Apr. 28, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c 4160ValassisDecisionandOrder.pdf; Decision and Order, *In re* Stone Container Corp., FTC File No. 951-0006, FTC Docket No. C-3806 (June 3, 1998), *available at* http://www.ftc.gov/os/1998/06/9510006.do.htm; Decision and Order, *In re* Precision Moulding Co., Inc., FTC Docket No. C-3682 (Sept. 10, 1996), *available at* http://www.ftc .gov/os/1996/09/c3682.do.pdf; *In re* YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993); *In re* A.E. Clevite, Inc., 116 F.T.C. 389 (1993); *In re* Quality Trailer Prods. Corp., 115 F.T.C. 944 (1992).

[60] Decision and Order, *In re* Dell Computer Corp., 121 F.T.C. 616 (1996); Decision and Order, *In re* Negotiated Data Solutions, FTC File No. 051-0094 (Sept. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094 /080923ndsdo.pdf; Decision and Order, *In re* Robert Bosch GmbH, FTC File No. 121-0081, FTC Docket No. C-4377 (Apr. 24, 2013), *available at* http://www.ftc.gov/os/caselist/1210081/130424robertboschdo.pdf; Decision and Order, *In re* Motorola Mobility, FTC File No. 121-0120, FTC Docket No. C-4410 (July 24, 2013), *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf.

[61] Complaint, *In re* Bosley, FTC File No. 121-0184, FTC Docket No. C-4404 (June 5, 2013), *available at* http:// www.ftc.gov/os/caselist/1210184/130605aderansregiscmpt.pdf; Complaint, *In re* Nat'l Ass'n of Music Merchants, FTC Docket No. C-4255 (Apr. 10, 2009), *available at* http://www.ftc.gov/os/caselist/0010203/090410 nammcmpt.pdf.

defendant must have market shares north of 60 percent to make out a monopolization claim, and at least 30 percent for attempted monopolization.[62] By filling these statutory interstices, ITC cases broadly fall under the rubric of "gap filling."[63]

The Commission's first forays into this area involved private communications and adopted a *per se* standard; the consent agreements contained no inquiry into competitive effects or market structure. More recently, the Commission has included public communications in the ITC framework. In *Valassis*, for example, the Commission challenged a public announcement by a publisher of free-standing newspaper advertising inserts that it would no longer compete for rivals' customers.[64] Most recently, the Commission obtained a consent order against U-Haul for a mixture of public and private communications by an officer with the company that were alleged to be attempts to "stabilize" the trailer rental market in Florida.[65]

These cases largely have met with positive reactions from commentators.[66] Absent the Sherman Act requisites, Section 5 is the only vehicle to challenge an ITC, and this conduct

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[62] The DOJ successfully brought a case against American Airlines for conduct that involved the CEO inviting the CEO of Braniff to collude on prices at Dallas-Fort Worth. *See* United States v. Am. Airlines, Inc., 743 F.2d 1114 (1984).

[63] *See* Kovacic & Winerman, *supra* note 7, at 935.

[64] Complaint, *In re* Valassis Commc'ns, Inc., FTC File No. 051-0008, FTC Docket No. C-4160 (Apr. 28, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf.

[65] Decision and Order, *In re* U-Haul Int'l, Inc., FTC File No. 081-0157 (July 20, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf.

[66] *See, e.g.*, Larry Fullerton, *FTC Challenges "Invitations to Collude*,*"* 25 ANTITRUST 30 (2011); William E. Kovacic, Section 5 hearings; Kovacic & Winerman, *supra* note 7, at 948–49; Wright, Proposed Policy Statement on Section 5, *supra* note 16, at 8; Lui v. Amerco, No. 11-2053 (1st Cir. May 4, 2013) (explaining that the FTC's ITC precedents "sensibly hold[] unlawful pernicious conduct with a clear potential for harm and no redeeming value whatever"); Amy Marshak, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 86 N.Y.U. L. REV. 1121, 1143 (2011) ("Advocates [of these cases' gap-filling rationale] see practices like invitations to collude . . . as particularly harmful and without procompetitive justification; such practitioners see these practices as excepted from the Sherman Act by what may be mere accidents of language or cramped antitrust doctrine rather than design"); *but cf.* Fullerton, *supra* ("[The *Valassis* and *U-Haul* decisions] have made the Commission's stance on invitations to collude significantly more controversial, particularly with respect to public communications, and have increased uncertainty about when the Commission will intervene.").

arguably has no social benefit and potentially tremendous social cost.[67] The case for *per se* condemnation under Section 5, however, loses power when one moves from private to public communications, as deterring the latter may come at some social cost. Further, the closer the FTC gets to condemning public price announcements in interdependent industries, the closer it gets to the use of Section 5 that was strongly rejected in *Boise Cascade* and *Ethyl*. Accordingly, some have argued that the FTC should treat public and private communications differently.[68]

2. Standard setting. The Commission has brought a series of cases alleging Section 5 violations that involve a company that holds a patent essential to an industry standard either concealing its patent at the time of the standard adoption, or later reneging on a commitment to license a standard-essential patent (SEP) on FRAND terms.[69]

The first standard-setting case, *Dell*, involved allegations that Dell had failed to act in good faith to identify any intellectual property that it may hold on a proposed standard.[70] Once the Video Electronics Standards Association (VESA)—of which Dell was a member—adopted a standard for VL-bus (an interface between the computer and its expansion slot that provides data flow), Dell revealed that it held patents that covered the standard and sought to enforce those intellectual property rights. The Commission alleged that Dell's omission affected the standard ultimately adopted by VESA, raised the cost of using the VL-bus standard, and chilled

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[67] *See* Richard Dagen, *Rambus, Innovation Efficiency, and Section 5 of the FTC Act*, 90 BOSTON U. L. REV. 1479, 1515 (2010); *See* Transcript of Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute at 17–18 (Oct. 17, 2008) (Chairman William E. Kovacic), *available at* http://www.ftc.gov/bc/workshops/section5/transcript.pdf.
[68] *See* Fullerton, *supra* note 66, at 31.
[69] I do not include a discussion of *Unocal* or *Rambus*, as both of those cases relied on traditional Sherman Act precepts, and the Commission did not suggest that these cases represented an exercise of its Section 5 authority beyond the Sherman Act.
[70] *In re* Dell Computer Corp., 121 F.T.C. 616 (1996).

willingness to participate in standard setting.[71] Dell's conduct was alleged to have been an unfair method of competition under Section 5.[72]

Twelve years later, the Commission entered into a settlement with Negotiated Data Solutions ("N-Data") over allegations that it had reneged on a promise to license patents that were part of an adopted "fast Ethernet" technology for a one-time fee of $1,000. According to the Commission, N-Data had engaged in postcontractual opportunism by reneging on its earlier promise and attempting to extract larger licensing fees once its technology had been widely adopted. In an expansion on *Dell*, the complaint alleged that this conduct was both an unfair method of competition *and* an unfair act or practice. The Commission allowed that "a mere departure for previous licensing commitments is unlikely to constitute an unfair method of competition under Section 5." It explained, however, that such conduct in the context of standard setting was different both because of the "procompetitive potential of standard-setting activities" and because "a standard may displace the normal give and take of competition."[73] The Commission also found reason to believe that N-Data's conduct was an unfair act or practice. According to the majority, N-Data's conduct had a substantial adverse effect on consumers that was not offset by any efficiencies and that consumers could not reasonably avoid.

In 2012, the Commission again challenged a breach of a commitment to license intellectual property essential to a standard. In *Bosch*, the respondent had made a commitment to license two patents necessary to a standard for air conditioner reconditioning and repair, but

[71] Complaint ¶ 9. Because the case alleged that Dell's concealment potentially affected the standard chosen, it may have survived scrutiny under Sherman Section 2 as interpreted subsequently by the D.C. Circuit in *Rambus*. Rambus Inc. v. F.T.C., 522 F.3d 456 (D.C.C. 2008).
[72] Complaint ¶ 10.
[73] *See* Analysis of Proposed Consent Order to Aid Public Comment, *In re* Negotiated Data Solutions, FTC File No. 051-0094 at 4–5, n.3 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf. The Commission noted that "the Supreme Court has not hesitated to impose antitrust liability on conduct that threatens to undermine the standard-setting process or to render it anticompetitive." *Id.*

continued to seek previously initiated injunction actions against companies that were using that standard. Most recently, the Commission accepted a consent agreement with Google concerning an alleged breach to license SEPs to Apple, among others. As the next section will discuss in more detail, this consent agreement contained a UDAP charge.

There is no obvious distinction between the conduct alleged in the *Google* and *Bosch* complaints, but only the former contains a UDAP allegation. Indeed, the facts in *Google* are more similar to those alleged in *Bosch* than those in *N-Data*. One way to reconcile this seemingly inconsistent treatment of similar conduct is that Commissioner J. Thomas Rosch was not needed to constitute a majority in *Bosch*. In both *N-Data* and *Google*, Commissioner Rosch was part of a majority that found that the breaches in question violated Section 5.

3. Information-sharing. The Commission twice has asserted Section 5 authority in settlements involving the exchange of competitively sensitive information. The first cases involved allegations that the National Association of Music Merchants (NAMM) violated Section 5 by "arranging and encouraging the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors."[74] The Commission's complaint is not a model of clarity, but the consent documents suggest that the FTC alleged both Sherman Section 1 and Section 5 claims. On the one hand, the Commission notes that "the conduct of a trade association or its authorized agents is generally treated as concerted action," which suggests a standard Sherman Act claim.[75] On the other hand, it is far from certain that such conduct—NAMM sponsoring the meetings,

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[74] Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re* National Association of Music Merchants, Inc., FTC File No. 001-0203 at 1 (2009), *available at* http://www.ftc.gov/os/caselist/0010203/090304 nammanal.pdf.
[75] *Id.* at 3.

setting the agendas, and steering discussions—would satisfy the Section 1 requirement for an agreement, or that even if an agreement could be found, that the substance of the agreement—to facilitate an exchange of "competitively sensitive subjects"—would rise to the level of an unreasonable restraint of trade. These facets of the case may be why the Commission also cites three pure Section 5 cases that did not involve an agreement for the proposition that "[u]nilateral conduct that impairs competition by facilitating collusion may be changed under Section 5 of the FTC Act."[76]

The Commission's most recent use of its Section 5 UMC power involved allegations that competitors in the management of medical/surgical hair transplantations shared competitively sensitive information. Specifically, in *Bosley* the complaint alleged that the respondents' CEOs repeatedly exchanged details about future product offerings, surgical hair transplantation price floors and discounts, plans for expansion and contraction, and business operations and performance.[77] The competitive threat alleged was that the information exchange could lead to a full-blown conspiracy, facilitate tacit collusion, or reduce uncertainty about rivals' actions.[78] The Commission also alleged that there were no legitimate business justifications for this conduct.[79]

4. CD MAP. The FTC also applied Section 5 once in what appears to be a throwback to the collective dominance theories that were rejected in the 1980s. In the "CD MAP" cases, the Commission entered into a series of consents with major music distributors involving minimum advertised price (MAP) restrictions. These cases can be read as merely garden-

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[76] *Id.* at 3 n.4 (citing E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 [2d Cir. 1984]).
[77] Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re* Bosley, Inc., FTC File No. 121-0184 at 2 (2013), *available at* http://www.ftc.gov/os/caselist/1210184/130408bosleyanal.pdf.
[78] *Id.*
[79] *Id.*

variety vertical restraints involving advertising. However, conspicuously absent in the Commission documents are references to the individual distributors' shares—a necessary element for a Sherman Section 1 rule of reason analysis. Nor does the complaint allege an agreement among manufacturers to adopt the MAP policies. Instead, the complaint references the five distributors' *collective share* —85 percent—and the distributors' adoption of the MAP policy around the same time.[80] Further, the Analysis to Aid Public Comment speaks generally of the collective share of, and the simultaneous adoption of the MAP policy by, the music distributors, but it does not mention an agreement among the distributors or any individual distributor's market power.[81]

5. Intel. In December 2009, the Commission issued an administrative complaint against Intel for practices allegedly aimed at hindering the adoption of non-Intel products.[82] The primary conduct challenge involved Intel's attempts to prevent computer original equipment manufacturers (OEMs) from using competing chips, including through market share and volume discounts that acted to tax OEM purchases of competing chips that resulted in pricing below cost.[83] The complaint also alleged that Intel redesigned its compiler and library software to reduce the performance of competing chips. This failure to disclose material information,

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[80] ¶ 2, Complaint, *In re* Sony Music Entm't, FTC File No. 971-0070, FTC Docket No. C-3971 (Sept. 6, 2000), *available at* http://www.ftc.gov/os/2000/09/sonycomp.htm.

[81] *In re* Sony Music Entm't, Inc., FTC File No. 971-0070 (Sept. 6, 2000), *available at* http://www.ftc.gov/os/2000/09/musicstatement.htm (the Commission "will henceforth consider unlawful arrangements that have the same practical effect [as a minimum resale price maintenance agreement] without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power"). In its statement, the Commission suggested that it will be willing to target unilateral acts that fall short of resale price maintenance—which at the time was *per se* illegal—even if the firm in question "lacks substantial market power." Although *Leegin* (and two subsequent administrations) have mooted this policy statement, at the time it represented an additional dimension in which the Commission was willing to expand Section 5 beyond the Sherman Act.

[82] Analysis of Proposed Consent Order to Aid Public Comment, *In re* Intel Corp., FTC File No. 061-0247, FTC Docket No. 9341 (2010) at 2, *available at* http://www.ftc.gov/os/adjpro/d9341/100804intelanal.pdf.

[83] Complaint ¶ 52–54.

according to the complaint, misled OEMs and the public about the performance of Intel chips relative to that of its competitors.[84]

This case is somewhat of an outlier from the Commission's modern development of Section 5 in that the primary allegations were related to Intel's pricing. Further, rather than alleging a "pure" Section 5 claim, the FTC also alleged that the same conduct made out a Sherman Section 2 claim.[85] The only clear departure from Section 2 jurisprudence in this regard was the Commission's note in the complaint that Section 5 does not require a showing of recoupment. The allegations involving Intel concealing material information about its compiler redesign, however, are somewhat consistent with its SEP cases in that they both involve deception. Further, as in *N-Data* and *Google*, the Commission alleged that the conduct not only constituted an unfair method of competition, but also an unfair act or practice.[86]

III. Expansion Paths for Section 5

It seems clear that Congress intended Section 5 to cover more conduct than the Sherman Act, but just how much more, and over what dimensions, remains uncertain. As discussed previously, the courts appear to have barricaded expansion in the direction of challenges to unilateral conduct that may facilitate oligopolistic coordination in a firm's own market or that may have an anticompetitive effect in ancillary markets. Although the defeats of the 1980s stung, and kept the

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[84] *See* Complaint ¶ 10.

[85] Commissioner Rosch dissented on this point. He argued that the Commission should have pursued a pure Section 5 theory on four grounds: (1) harm from competition cannot be segregated from harm to competitors in a market with one primary competitor (here, AMD); (2) to the extent that consumer harm is primarily in the form of reduced choice, Section 5 is a superior vehicle; (3) Section 5 may be a superior means of addressing a course of conduct; and (4) intent is more likely to be relevant under Section 5. *See In re* Intel Corp., FTC File No. 061-0247, FTC Docket No. 9341 at 1–2 (2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf. Dan Crane has disagreed with Commissioner Rosch's reasoning, arguing that Section 2 can easily reach Intel's conduct. *See* Dan Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, COMPETITION POLICY INTERNATIONAL (2010).

[86] Complaint ¶ 105. The complaint also alleged that deception involving the compiler redesign was a deceptive act. Complaint ¶¶ 103–04.

Commission off the field for several years, they left many potential avenues of Section 5 expansion open. Further, even if these decisions stymied FTC efforts to expand Section 5 in certain directions, they also reinforced the notion that Section 5 covered more than the Sherman Act.

Subject to the strictures laid out in *Boise Cascade*, *Official Airline Guides*, and *Ethyl*, the FTC largely can control the scope of Section 5 as long as it chooses its cases carefully to avoid litigation and the ire of Congress. Either by luck or design, this is how the FTC has proceeded: since 1992 the Commission has exercised its Section 5 authority solely through a series of consent orders. Cases against small companies are unlikely to garner congressional attention in the way that FTC attempts to reshape large sectors of the economy did in the 1970s. Further, the Commission has ample room in which to work before triggering litigation that may lead to appellate review. With injunctive relief as the only penalty involved in settling with the FTC, parties almost always will prefer a consent order to litigation. This preference is especially true for small firms. Parties, moreover, have no incentive to litigate merely to vindicate the true bounds of Section 5, and indeed may prefer that a complaint be grounded in a pure Section 5 theory to ameliorate the threat of collateral litigation.

The FTC also lacks a strong external constituency that has an interest in shaping Section 5. Unlike sector-specific regulators like the Federal Communications Commission, for example, most businesses deal with the FTC only sporadically. Further, there is no ready metric for external observers to gauge the FTC's use of Section 5 relative to congressional intent. As former FTC Chairman Muris has remarked, "without strong interest groups and without measures of inputs and outputs, the leaders of the FTC have great discretion."[87]

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[87] Remarks of Timothy J. Muris, *Panel Discussion: Politics and Policy in 1981*, at 16–17 *in* THE REGULATORY REVOLUTION: A THIRTY YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION (James C. Cooper ed., 2013).

These two factors conspire to allow the Commission to define the reach of Section 5 in a zone that is likely larger than the actual scope that Congress intended for Section 5. Next, I examine additional directions of expansion that some both inside and outside the Commission have suggested.

A. Circumvention of Sherman Act Precedent

One potential area in which Section 5 could be used beyond the Sherman Act is to circumvent unfavorable Sherman Act precedent, especially with respect to unilateral conduct. This role for Section 5 is distinct from the gap-filling observed in ITC cases, in which the statutory requirements of a Sherman Act claim—agreement or monopoly power—could not be met. A circumvention argument, rather, concedes that there are no unmet statutory requirements that put the conduct in question beyond the reach of the Sherman Act, but nonetheless asks the court to reach a different conclusion under Section 5. In this manner, Section 5 would act as a trump card to adverse Sherman Act precedent.

The rationale for this trump card role rests on what some have portrayed as an increasingly narrow scope for Sherman Act enforcement, which has been animated in part by the fear of overdeterrence from treble damage class actions combined with a nontrivial probability of erroneous liability findings from generalist judges and lay juries.[88] Although the Supreme Court has been narrowing the scope of Sherman Act liability at least since *GTE Sylvania* in 1978, a

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[88] *See, e.g.*, *How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy: Hearing Before the S. Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 111th Cong. 11 (2010) (statement of Jon Leibowitz, Chairman, Federal Trade Commission) [hereinafter Leibowitz Testimony], *available at* http://www.judiciary.senate.gov/pdf/10-06-09Leibowitz Testimony.pdf; *Is There Life After* Trinko *and* Credit Suisse*?: The Role of Antitrust in Regulated Industries: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts and Competition Policy*, 111th Cong. 126 (2010) (statement of Howard Shelanski, Deputy Director for Antitrust in the Bureau of Economics, FTC) [hereinafter Shelanski Testimony], *available at* http://judiciary.house.gov/hearings/printers/111th/111-119 _56952.pdf; Kovacic & Winerman, *supra* note 7, at 938–39.

trilogy of recent cases serves as a focal point for this argument: *Verizon v. the Law Offices of Curtis V. Trinko*,[89] *Bell Atlantic Corp. v. Twombly*,[90] and *Credit Suisse v. Billings*.[91]

The first two cases, *Credit Suisse* and *Trinko*, involved the application of the antitrust laws to conduct that is also covered by SEC and FCC regulations, respectively. In *Credit Suisse*, the plaintiffs alleged that a group of underwriters had violated Sherman Section 1 by engaging in illegal tying. The Court held that the defendants were immune from antitrust claims because their conduct was covered by securities law. In *Trinko*, the plaintiff complained that Verizon was hindering AT&T's ability to interconnect with its local exchange network in violation of Sherman Section 2. The Court rejected the notion that the 1996 Telecom Act could create an antitrust duty to assist rivals, noting that even a monopolist has an almost unqualified right to deal with whomever it wishes on its own terms. In both cases, the Court pointed to the small marginal benefits of antitrust law, especially against the backdrop of a comprehensive regulatory regime, and the potentially large overdeterrence costs of a flood of treble damage class action suits.[92] *Twombly* concerned allegations that the regional Bells had conspired not to enter each other's markets. The Court held that allegations of parallel behavior without specific allegations of an agreement would not survive a motion to dismiss.[93] Again, the court pointed to the costs associated with discovery in antitrust cases as a reason to raise the standard to survive a motion to dismiss.[94]

Advocates of an expansive Section 5 have argued that the strictures found in *Trinko*, *Credit Suisse*, and *Twombly* should not apply to a Section 5 action because the same concerns are not present; the FTC is an expert agency that can seek only equitable relief, and there is no

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[89] 540 U.S. 398 (2004).
[90] 550 U.S. 544 (2007).
[91] 551 U.S. 264 (2007).
[92] *See* Credit Suisse Sec., 551 U.S. 264, 284 (2007).
[93] Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 556–57, 571 (2007).
[94] *Id.* at 558–59.

private right of action under the FTC Act.[95] Thus, the FTC is more likely to bring truly anticompetitive cases, and the extent to which it will chill procompetitive behavior is minimized because firms will not face treble damage suits.[96] Importantly, the FTC appeared to put this theory of Section 5 into practice in the *Intel* case. As noted previously, the Commission pled that it was not required to show a dangerous probability of recoupment, as *Brooke Group* requires for a predatory pricing claim under Section 2 of the Sherman Act or the Robinson Patman Act.[97]

B. Taking Account of Noneconomic Factors

Dicta in *S&H* and *Cement Institute* suggest that the FTC can take into account broader "public policy" objectives when determining what constitutes an unfair method of competition. Some have argued that this language should allow Section 5 to encompass factors beyond those traditionally used to assess consumer welfare in competition policy—namely price, quantity, and on occasion, incentives to innovate.

For example, law professor Robert Lande has suggested a "consumer choice framework" to guide Section 5.[98] Under this paradigm, the Commission would use Section 5 to condemn practices that may not have price or output effects, but that pose serious threats to consumer choice over dimensions like quality, safety, variety, and perspectives.[99] For example, he argues that exclusive dealing or tying arrangements that may not meet Sherman Act

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[95] *See* Leibowitz Testimony, *supra* note 88, at 11; Transcript of Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute at 211–12 (Oct. 17, 2008) (Commn'r Jon Leibowitz), *available at* http://www.ftc.gov/bc/workshops/section5/transcript.pdf; Shelanski Testimony, *supra* note 88, at 10–12.

[96] The strong version of this argument urges Congress (or the courts) to exempt all public enforcement actions—even those brought under the Sherman Act—from these restrictive precedents. *See* Shelanski Testimony, *supra* note 88, at 12.

[97] *See* Intel Complaint at ¶ 53.

[98] *See* Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, 8 ANTITRUST SOURCE 1 (2009). *See also* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007) (advocating the consumer choice framework for both the Sherman and FTC Acts).

[99] Lande, *supra* note 98, at 3.

thresholds of foreclosure, market power, or price effects should nonetheless satisfy Section 5 under a consumer choice framework if they reduce choices available to consumers.[100] Former Commissioner Rosch also appears to have embraced this notion.[101] He has argued that Section 5 could be used to challenge conduct that reduces consumer choice, subject to limiting principles, like deception or oppressiveness.[102] In this manner, Section 5 would not be used to prescribe a specific level of safety or quality, but rather would be called into action when conduct threatened to reduce the number of choices along these dimensions below the competitive level, whatever that may be.

One dimension of choice that some commentators have suggested be included in antitrust analysis is privacy. As data-driven industries that give away their services to consumers have risen in prominence, the call to incorporate privacy into antitrust analysis has grown. The notion that privacy issues be considered in an antitrust investigation first arose in the Google–DoubleClick merger. Opponents of the merger, including Commissioner Pamela Jones Harbour, argued that the Commission needed to consider the transaction's privacy ramifications.[103] The argument concerned the combining of datasets and the collecting and mining of more data for more accurate views of consumers.

Although the first objection could be fit into a standard antitrust analysis as gaining market power over advertisers and content providers from a combination of assets,[104] the second

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[100] *Id*. at 6. Lande also argues that the Commission's modern Section 5 portfolio of standard-setting and invitation-to-collude cases also can be best explained in a consumer choice framework. *Id*. at 5–7.
[101] *See* J. Thomas Rosch, Remarks at FTC's Section 5 Hearings at 4–5 (Mar. 25, 2009), *available at* http://www.ftc.gov/speeches/rosch/090325abaspring.pdf.
[102] *Id*.
[103] *See In re* Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007) (Harbour, Comm'r, dissenting), *available at* http://ftc.gov/os/caselist/0710170/071220harbour.pdf.
[104] *See* Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Version of Relevant Product Markets*, 76 ANTITRUST L. J. 769, 786–87 (2010).

clearly called for considering privacy as a dimension of competition.[105] As Professor Lande noted in connection with the proposed Microsoft–Yahoo merger, "Antitrust is actually about consumer choice, and price is only one type of choice . . . . [C]onsumers want an optimal level of variety, innovation, quality, and other forms of non-price competition. Including privacy protection."[106] Professor Peter Swire has echoed a similar theme, arguing in the context of the Google–DoubleClick merger that the combination of "deep" and "broad" consumer datasets will reduce the quality of the search product by collecting more consumer information.[107] Also in reaction to the Google–DoubleClick merger, the Electronic Privacy Information Center suggested that to the extent that privacy is a fundamental right, the antitrust laws should protect it directly, in the same way that they protect consumers from high prices.[108] In his statement on closing the Google investigation (as will be discussed in more detail in part 4), Commissioner Rosch cryptically hinted that Google's data collection practices may have implicated Section 5.

C. Conflating UMC and UDAP

The legislative history, as well as FTC practice at least since the unfairness policy statement, suggests that UDAP has been reserved for actions that directly harm consumers through fraud or similar conduct, as opposed to those that harm consumers through their effect on

[105] *See id.* at 792–95.
[106] Robert H. Lande, *The Microsoft–Yahoo Merger: Yes, Privacy Is an Antitrust Concern*, FTC: WATCH, no. 714, at 1 (Feb. 25, 2008). *But see* James C. Cooper, *Privacy & Antitrust: Underpants Gnomes, The First Amendment, and Regulatory Discretion*, 20 GEO. MASON. L. REV. 1129 (2013) (arguing that antitrust is not the proper vehicle to consider privacy).
[107] *See* Peter Swire, Testimony Before the FTC Town Hall on Behavioral Advertising, at 5 (Oct. 18, 2007), *available at* http://ftc.gov/os/comments/behavioraladvertising/071018peterswire.pdf.
[108] *An Examination of the Google–Doubleclick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 110th Cong. (2007) (statement of Marc Rotenberg, President, Electronic Privacy Information Center), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e 5476862f735da12e9067&wit_id=e655f9e2809e5476862f735da12e9067-1-5.

competition.[109] The Commission has alleged both UDAP and UMC in two of its three recent Section 5 cases involving breaches of agreements related to SEPs. However, it never identified the factors that gave rise to distinct UDAP claims in *Google* and *N-Data*, but not *Bosch*. These cases raise the specter that the Commission is willing to expand its UDAP authority to business-to-business transactions, which could render the FTC's antitrust authority superfluous. As former Chairman Bill Kovacic explained in his *N-Data* dissent, under this approach to UDAP, "It would seem that the three-factor test prescribed for [UDAP] analysis would capture all actionable conduct within the UMC prohibition and the proscriptions of the Sherman and Clayton Acts."[110] Because UDAP claims do not have a market power threshold, the course of conduct in *N-Data* and *Google* further increases Commission discretion to involve itself in business disputes on the premise that these disputes might impact consumer prices.[111]

D. Collective Dominance

Collective dominance, or shared monopoly, is an antitrust theory to reach unilateral, but parallel, exclusionary or predatory conduct by firms in an interdependent, oligopolistic industry. This conduct can fall through gaps in the Sherman Act because individual firm shares are too low to satisfy the thresholds for attempted monopolization, and there is no agreement to satisfy Section

[109] FTC Policy Statement of Unfairness, appended to *In re* International Harvester Co., 104 F.T.C. 949 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. *See also* Kovacic & Winerman, *supra* note 7, at 946–47 (noting that the Commission used to routinely plead both UMC and UDAP, and today UMC and UDAP are "essentially complementary").
[110] *In re* Negotiated Data Solutions, FTC File No. 051-0094 at 2 (Jan. 23, 2008) (Kovacic, Comm'r, dissenting), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.
[111] *See In re* Motorola Mobility LLC and Google Inc., FTC File No.121-0120 at 4 (Jan. 3, 2013) (Ohlhausen, Comm'r, dissenting), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf (expressing concern that the use of UDAP for contract disputes between "sophisticated technology companies" threatens to make "the FTC into a general overseer of all business disputes simply on the conjecture that a dispute between two large businesses may affect consumer prices").

1 or Section 2 conspiracy.[112] The notion that unilateral conduct in a concentrated industry when aggregated presents an antitrust problem has a strong link to the Section 5 of the past, with a focus on parallel pricing and tacit collusion. So it should not be surprising that some have suggested Section 5 as a vehicle to fill this gap in the Sherman Act.

A recent law review article by Professors Scott Hemphill and Tim Wu, for example, proposes an antitrust theory of parallel exclusion, defined as the parallel, but unilateral, adoption of practices that tend to exclude rivals.[113] Although Hemphill and Wu would prefer to nest this theory in Sherman Section 2, they also suggest that Section 5 would be a suitable home.[114] They acknowledge the FTC's "setbacks" when pursuing Section 5 cases based on independent parallel conduct, but nonetheless suggest that the FTC use Section 5 to challenge "independently incentivized but nonetheless harmful exclusionary tactics" that lack a "plausible or cognizable efficiency justification," even when the requisite market power or agreement for a Sherman Act claim is missing.[115]

IV. The Google Investigation: Expansionary Theories on Display

As seen earlier, there are many directions in which the Commission could take Section 5 beyond the Sherman Act. By picking its cases carefully to minimize the threat that a defendant will

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[112] *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1443 (9th Cir. 1995) ("We recognize that a gap in the Sherman Act allows oligopolies to slip past its prohibitions, but filling the gap is the concern of Congress, not the judiciary"); JTC Petrol. Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775 (7th Cir. 1999) ("it would be novel to characterize [tacit collusion] as conspiratorial within the meaning of either section 1 or section 2 of the Sherman Act"); Dimmit Agri. Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 526–29 (5th Cir. 1982) (dismissing complaint because "there is considerable support for the proposition that low market shares, if undisputed, make monopolization an impossibility as a matter of law); City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20 (D.D.C. 2007); Phoenix Elec. Co. v. Nat. Elec. Contractors Ass'n, 867 F. Supp. 925 (D. Or. 1994). *See also* 1 ABA Section of Antitrust Law, Antitrust Law Developments 328 (7th ed. 2012) ("Lower courts consistently have rejected the shared monopoly theory in the absence of any allegation of a conspiracy to monopolize, not permitting Section 2 to be invoked as a tool to challenge oligopolies engaged in parallel but not collusive conduct.").

[113] C. Scott Hemhill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013).

[114] *Id.* at 1243.

[115] *Id.* at 1245.

choose to litigate rather than settle, the FTC has the ability to articulate its own common law of Section 5 through complaints and analyses to aid public comment. To date, however, this common law is a muddle, threatening to leave businesses "without an inkling as to what they can do lawfully."[116] This muddle was on full display in the recent Google investigation, with the Commission—or subsets thereof—announcing a hodgepodge of Section 5 theories divorced from any coherent legal framework.

In January 2013, the FTC announced that it had closed its two-year investigation of Google's search practices, but that Google had agreed to settle charges under Section 5 for allegedly breaching FRAND commitments related to certain SEPs.[117] In a unanimous statement, the Commission explained that it had agreed to close the investigation into charges that Google unfairly biased its results in favor of its sites. Through so-called universal search, Google would respond to queries about weather, travel, or restaurants, for example, with direct answers from Google ranking first on the search results page. The Commission said that it failed to find sufficient evidence of an anticompetitive effect to bring a case.

Although this result—and its explanation—appears quite reasonable, digging deeper into the multiple statements from the Commission and two individual Commissioners reveals the truly muddled state of Section 5. Taken together, these statements suggest several directions that some Commissioners were willing to take Section 5 in without offering any coherent limits, and they reveal the truly broad discretion that the Commission enjoys to determine what conduct violates Section 5.

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[116] *Ethyl*, 729 F.2d at 139.

[117] *See* Press Release, Federal Trade Commission, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), *available at* http://ftc.gov/opa/2013/01/google.shtm.

First, consider the legal underpinnings of a search bias investigation, the gravamen of which was that Google was failing to aid its search rivals.[118] The Section 5 framework the Commission employed appears to be an inquiry into Google's intent: did Google change its algorithms "primarily to exclude actual or potential competitors," or "to improve the quality of its search product"?[119] It ultimately decided not to challenge Google's search practices because it was not prepared to "second guess" Google's algorithm design decisions "where plausible precompetitive justifications have been offered, and . . . supported by ample evidence."[120] Similar in vein to the search practices, the Commission also investigated whether Google put unreasonable restrictions on users' abilities to "multihome"—that is, simultaneously to advertise on Google and on competing search engines. Google did not prohibit its AdWords customers from using competing platforms, but its application programming interface (API) prevented the use of third-party platforms to manage multiple ad campaigns. This conduct did not result in a complaint, but Chairman Jon Leibowitz and Commissioner Julie Brill expressed "strong concerns" that this practice constituted an unfair method of competition under Section 5.[121] The threat of a complaint against this practice appears to have been sufficient to elicit a commitment from Google to adjust its API to accommodate multihoming.[122]

On these two claims, the statement does not attempt to confront the Sherman Act framework embodied in *Trinko*, although it is a case with which the FTC almost certainly would have to

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[118] *See In re* Google Inc., FTC File No. 111-0163 at 1–2 (Jan. 3, 2013), *available at* http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf (explaining complaints involving Google were "unfairly promoting its own vertical properties," which had the effect of pushing "organic search results . . . farther down the search page," and manipulation of its search algorithm "to demote vertical websites that competed against Google's own vertical properties").
[119] *Id*. at 2.
[120] *Id*. at 3.
[121] *See id.* at 3 n.2.
[122] *See* Letter from David Drummond, Chief Legal Officer, Google Inc., to Hon. Jon Leibowitz, FTC Comm'r, at 2–3 (Dec. 27, 2012), *available at* http://ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf.

contend under a Sherman Section 2 action.[123] Indeed, Commissioner Maureen Ohlhausen notes that the API claim is tantamount to arguing that Google had a duty to change its API policies to lower its rivals' costs.[124] Further, Commissioner Rosch noted that there was no evidence that Google's practices fit the narrow exceptions to the general rule announced under *Trinko* that refusals to assist competitors are not illegal under Section 2 of the Sherman Act. In the Commission statement, there appeared to be no inquiry into whether Google's search practices harmed consumers or advertisers, or whether there was evidence that Google sacrificed previously profitable business arrangements. Instead, the statement focused on a subjective assessment of the legitimacy of Google's business justifications in a manner reminiscent of the test announced by the Second Circuit in *Ethyl*—one that centers on "independent business reasons" and "anticompetitive intent or purpose." Without a complaint, it is impossible to tell the extent to which the Commission was considering a pure Section 5 theory. Nonetheless, the analysis provided in the statement frames the issue as a Section 5 case, employing *Ethyl*'s subjective test instead of *Trinko*'s objective one.[125]

Three Commissioners—Leibowitz, Brill, and Edith Ramirez—expressed "strong concerns" that Google's alleged misappropriation of content from other websites, coupled with threats to remove these websites from Google's search results when content providers protested, constituted an unfair method of competition under Section 5.[126] As Commissioners Ohlhausen and Rosch explain, however, the legal and factual underpinnings for this claim are weak; the Sherman Act ordinarily does not cover business torts like misappropriation, and there appeared

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[123] *See In re* Motorola Mobility, FTC File No. 121-0120 at 5 (Jan. 3, 2013) (Rosch, Comm'r), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaroschstmt.pdf.
[124] *In re* Google Inc., FTC File No. 111-0163 at 1–2 (Jan. 3, 2013) (Ohlhausen, Comm'r), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchohlhausenstmt.pdf. *See In re* Motorola Mobility, FTC File No. 121-0120 at 4 (Jan. 3, 2013) (Rosch, Comm'r), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaroschstmt.pdf.
[125] This interpretation is entirely consistent with the public statements of Chairman Leibowitz discussed above. *See supra* notes 119–20 and accompanying text.
[126] *See In re* Google Inc., FTC File No. 111-0163 at 2, n.2 (Jan. 3, 2013), *available at* http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf.

to be no evidence of consumer harm from these practices.[127] Although it seems unlikely that the Commission could have pursued a viable Sherman Act claim for this conduct, the threat of a Section 5 complaint was enough to prod Google voluntarily to allow websites to prevent Google from displaying their content on certain Google pages. Google also assured that websites that did opt out will not be adversely impacted in search results.

Although Commissioner Rosch opposed any claims based on scraping or multihoming restrictions, his statement cryptically hints that he may have been willing to entertain a Section 5 claim related to Google's data collection practices. He notes that Google has "monopoly or near monopoly power in the search advertising market and this power is due in whole or in part to its power over searches generally," and then takes Google to task for not revealing to consumers that its market position is due to the personal data it collects.[128] It is unclear whether this alleged deception would form the basis of an antitrust or consumer protection claim, but the citations to *International Harvester* and *North American Phillips* suggest the latter. It is also unclear what remedy Commissioner Rosch had in mind, but it seems plausible that he would remedy Google's "half truths" by requiring it to disclose how it uses consumer information to improve its search product.[129]

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[127] *See In re* Google Inc., FTC File No. 111-0163 at 1–2 (Jan. 3, 2013) (Ohlhausen, Comm'r), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchohlhausenstmt.pdf; *See In re* Motorola Mobility, FTC File No. 121-0120 at 3 (Jan. 3, 2013) (Rosch, Comm'r), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaroschstmt.pdf.

[128] *See In re* Motorola Mobility, FTC File No. 121-0120 at 1, n.1 (Jan. 3, 2013) (Rosch, Comm'r), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaroschstmt.pdf.

[129] In a post-decision interview, Commissioner Rosch elaborated on his footnote:

> Google has told consumers that everything it is doing in terms of gathering information about their shopping habits et cetera was for the benefit of consumers. In fact, that is wrong—that is a classic half-truth. Because everything they have done in that regard, in my judgment, was for the benefit of Google, and more specifically, in favor of Google search, over which they have monopoly power. And I think that is to some extent, in whole or in part, related to their position in respect to search. That's valuable to them, incredibly valuable to them to attract advertisers. I've always been in favor of making a claim based upon half-truths.

Ron Knox, *An Interview with Tom Rosch*, 16 GLOBAL COMPETITION REV. 51, 51–52 (2013), *available at* http://www.globalcompetitionreview.com/features/article/32974/an-interview-tom-rosch/.

Finally, Google agreed to a consent order to settle a pure Section 5 claim involving allegations that it breached commitments to license several SEPs on FRAND terms. Although the alleged conduct is almost indistinguishable from that in *Bosch*, unlike the *Bosch* order—and like the *N-Data* order—the Commission alleged that Google's conduct constituted both an unfair method of competition *and* an unfair act or practice.[130] Further, as in *N-Data*, there is no attempt to explain which facets of the alleged conduct comprise an unfair method of competition, and which comprise an unfair act or practice. Indeed, the inclusion of a UDAP claim essentially renders the Commission's UMC authority superfluous and, as Commissioner Ohlhausen notes, turns the FTC "into a general overseer of all business disputes" that may affect consumer prices.[131]

If you are keeping score, the Google statements suggest at least four directions in which at least one Commissioner was willing to expand Section 5 beyond the Sherman Act: duties to aid rivals, misappropriation, failure to disclose the relationship between data collection and market power, and breach of an agreement to license SEPs on FRAND terms. Further, in two instances, at least one Commissioner additionally was willing to declare conduct an unfair act or practice.

Rather than offering a coherent framework, this hodgepodge of Section 5 claims suggests a subjective inquiry into intent and a willingness to invoke Section 5 in instances where an action predicated on a Sherman Act theory may be difficult to win. For example, if the Commission were concerned that Google had misrepresented the nature of its search results, it could have pursued a Sherman Section 2 case on the theory that these misrepresentations led to, or helped to

[130] Commissioner Ramirez dissented from the UDAP claim, whereas Commissioner Ohlhausen dissented from both the UMC and UDAP claim.

[131] *See In re* Google Inc., FTC File No. 111-0163 at 4 (Jan. 3, 2013) (Ohlhausen, Comm'r), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchohlhausenstmt.pdf.

maintain, Google's market power in search.[132] The Commission could have framed the multihoming issue as a garden-variety exclusionary practice under Sherman Section 2. Similarly, rather than relying on Section 5 to address scraping concerns, it could have perhaps articulated a tying or leverage theory: to place in organic search results, entities must be willing to allow their content to be scraped to populate Google's vertical search.

None of these cases would be easy to bring under existing Sherman Act jurisprudence.[133] Nonetheless, they are cognizable claims; the Sherman Act is flexible enough to address novel conduct. The only role that Section 5 appeared to play in the Google matter was to make it easier for the Commission to win a difficult Section 2 case. This "trump card" theory of Section 5 serves only to highlight the broad discretion the Commission has to define the reach of Section 5. The next section addresses some costs associated with this discretion.

V. Problems with Discretion: Overdeterrence and Rent-Seeking

The trade-off between flexibility and predictability is the crux of the age old "rules versus standards" debate. Bright-line rules provide clear direction and certainty about whether conduct

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[132] *See, e.g.*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

[133] Traditionally, tying only involves an agreement to sell a product on the condition that the buyer also purchase another product or alternatively agree not to purchase the second product from any other supplier. *See* Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19 (1983) (". . . any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold."). In Google's case, scraping did not involve a second product, but rather permission to repurpose the scraped information, and courts as yet have not expanded the scope of tying to encompass the appropriation of intangible data. Sherman Act liability would not attach under leverage theory unless the FTC proved both that Google has a monopoly in search engines and leveraged its market power to require the condition, thereby impeding competition in some second market. Whether the scraping condition affects competition in the search engine market or a second product market appears unclear. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993) ("Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992); Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973); AD/SAT v. Assoc. Press, 181 F.3d 216 (2d Cir. 1999) (per curium); *see also In re* Microsoft Corp. Antitrust Litig., 333 F.3d 517, 532 (4th Cir. 2003) ("monopoly leveraging theory . . . has not been recognized in this circuit nor has it received general acceptance" as providing a cognizable claim under Section 2).

breaks the law, but giving regulators discretion allows them to deal with a wide range of circumstances in a flexible manner.[134] For the FTC Act, Congress chose a standard. And by using an elusive term like "unfair" as the trigger for liability, it invested the Commission with a great degree of discretion. When discretion leads to uncertainty over when conduct falls short of a standard, however, it can cause actors to take too much precaution. In the context of competition law, especially that focused on unilateral conduct by a dominant firm, overdeterrence often takes the form of less intense competition. What's more, when the stakes are high and a regulator has broad discretion to determine whether given conduct is legal or illegal, firms rationally will engage in socially wasteful spending to convince the regulator that its behavior is legal, but its rival's is not. Next, I discuss these twin costs associated with an undefined Section 5.

A. Overdeterrence

It is a standard result in the economics of accidents literature that uncertainty in a legal regime leads potential violators to take too much precaution.[135] What does that mean in the context of antitrust? To take too much care in antitrust means to avoid business practices where the line between legal and illegal behavior is blurred. The magnitude of these error costs depends on exactly which business practices firms are choosing to forego. The *per se* rule against naked agreements among competitors may deter some interfirm communications. But, because there are likely few, if any, beneficial naked horizontal agreements, the costs associated with overdeterrence are likely to be small. On the other hand, if marketplace success brings antitrust scrutiny, firms will respond rationally and not want to compete as aggressively. Accordingly, the

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[134] *See supra* note 1 and accompanying text.
[135] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 224–27 (2004).

antitrust laws are careful to limit the instances in which firms may face liability for damaging their competitors through conduct that looks like aggressive competition.

First, the Supreme Court has set a high bar for a plaintiff to bring a Sherman Section 2 action based on "predatory pricing" allegations.[136] Not only is harmful predatory pricing—using sustained below-cost pricing to drive competitors from a market—likely to be rare,[137] it is almost indiscernible from aggressive price competition. Skeptical of fact finders' abilities to distinguish such a rare event from vigorous competition, courts understandably have been worried that allowing predatory pricing claims to succeed too easily will deter exactly the type of competition that the antitrust laws are designed to encourage. Accordingly, a plaintiff must show (1) that the defendant held prices below some proxy for marginal cost for a sustained period, and (2) that the market structure is such that the defendant will be able to sustain monopoly pricing for enough time to make the predation profitable.[138]

A second area in which the antitrust laws give businesses wide berth is with respect to their duty to aid marketplace rivals. As in the case of low pricing, refusing to help a competitor looks a lot like competition; a rule that too readily condemns a failure to aid a rival will chill beneficial competition out of a fear of erroneously being held liable. Accordingly, since *Trinko*, a necessary—but not sufficient—condition for a refusal to aid claim appears to be that the defendant terminated a profitable course of dealing.[139]

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[136] *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[137] *See* Matsushita Elec. Indus. Co. v Zenith Radio, 475 U.S. 574, 590 (1996) ("predatory pricing is rarely tried, and even more rarely successful.").
[138] *See Brooke Group*, 509 U.S. at 210. Since *Brooke Group*, there have not been any successful predatory pricing cases. *See* Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2258–59 (2000).
[139] *See* Pac. Bell Tel. Co. v. Linkline Comm., Inc., 555 U.S. 438 (2009); Loren Data Corp v. GXS, Inc., 501 Fed. Appx. 275 (4th Cir. 2012); Four Corners Nephrology Assoc. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009); Stein v. Pac. Bell, 172 Fed. Appx. 192 (9th Cir. 2006); Covad Commutations, Inc. v. Bell Atl., Corp., 398 F.3d 666 (D.C. Cir. 2005); ASAP Paging Inc. v. Centurytel of San Marcos, Inc., 137 Fed. Appx. 694 (5th Cir. 2005); Covad Communications, Inc., v. Bellsouth Corp., 374 F.3d 1044 (11th Cir. 2005); Morris Communications

So what conduct does an expansive Section 5 threaten to deter? At one end of the spectrum, consider ITC cases that adopt a *per se* rule against private communications inviting a naked agreement among competitors. Error costs are not likely a large concern with respect to this class of conduct—like the *per se* rule against naked agreements to fix price or to allocate markets, the beneficial conduct that would be deterred by too stringent a rule in this area is likely to be trivial, if it exists at all. As ITC cases move from private to public communications, however, the error cost calculation changes because there is more social benefit in the behavior that is deterred. In the limit, recall the cases from the 1980s involving independently adopted mechanisms that may stabilize prices.[140] The courts of appeal rejected these cases in large part due to the deterrence effects they may have. More recently, the conduct at issue in *Intel* in large part involved pricing. To the extent that this settlement signaled that the FTC would be willing to

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Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004); *In re* Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007); Corr Wireless Comm. v. AT&T, Inc., 893 F. Supp. 2d 789 (N.D. Miss 2012); AstroTel, Inc. v. Verizon Florida, 2012 WL 1581596 (M.D. Fla. May 4, 2012); Sunbeam Tele. Corp. v. Nielsen Media Research, Inc., 763 F. Supp. 2d 1341 (S.D. Fla. 2011); Safeway Inc. v. Abbot Labs., 761 Supp. 2d (N.D. Calif. 2011); TXU Generation Co. v. Pub. Util. Comm'n of Texas, 165 S.W.3d 821 (Tex. App. 2005); RxUSA Wholesale, Inc. v. Alcon Labs. Inc., 661 F. Supp. 2d 218 (E.D.N.Y. 2009); Liveuniverse, Inc. v. Myspace, Inc., 2007 WL 6865852 (C.D. Calif. June 4, 2007); Tucker v. Apple Computer, Inc., 493 F. Supp. 2d. 1090 (N.D. Calif. 2006); Stand Energy Corp. v. Columbia Gas Transmission Corp., 373 F. Supp. 2d 631 (S.D. W. Va. 2005); Greco v. Verizon Comm., Inc., 2005 WL 659200 (S.D.N.Y. Mar. 22, 2005); Creative Copier Services v. Xerox Corp., 344 F. Supp. 858 (D. Conn. 2004); Nobody In Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048 (D. Colo. 2004). In *Int'l Bus. Machines Corp. v. Platform Solutions, Inc.*, the court held that termination of a prior course of dealing did not satisfy "the limited exception" to the general right to refuse to deal with a competition when the refusal involved a superseded product line. 2009 WL 3127744, at *7 (S.D.N.Y. Sept. 30, 2009) ("IBM is not required to support and maintain its [old] technology"). The court reasoned that it would be improper to infer that by foregoing sales in support of its old system IBM was sacrificing short term profits in the hopes of anticompetitive gains. *Id*. *But see* Tucker v. Apple Computer, Inc. 493 F. Supp. 2d 1090 (N.D. Cal. 2006) (allowing a refusal to deal claim to proceed without allegations of a prior business relationship, only allegations that the defendant had foregone allegedly profitable sales). In upholding a verdict for the defendant, the Court distinguished Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 U.S. 585, 601 (1985) from the case before it based on the accuracy of inferences that could be drawn from prerefusal courses of dealing. *Aspen* concerned the termination of a voluntary, "and presumably profitable," business relationship. *Trinko*, on the other hand, concerned the refusal to provide a service—access to unbundled network elements—that existed only by regulatory dint. *Trinko*, 540 U.S. at 409. Thus, the Court observed in *Trinko* that "the defendant's prior conduct sheds no light upon the motivation of its refusal to deal." *Id*.

[140] *See supra* notes 45–47, 53–58 and accompanying text.

go beyond traditional Sherman Act boundaries on pricing—for example, by pleading that it need not show recoupment under Section 5—this case may deter aggressive price competition.

As discussed previously, much of the conduct at issue in the Google investigation involved failing to aid rivals. Signaling that the Commission is at least willing to entertain the possibility that a Section 5 claim can rest in part on subjective assessments of intent and business justifications, however, risks deterring beneficial competitive behavior. This message may give other firms pause before they engage in innovations that disadvantage rivals. Although Google escaped liability on this matter, other firms may not be so lucky if three Commissioners discover documents suggesting that a business justification is pretextual or that conduct was motivated by anticompetitive intent.[141]

It is true that the costs of erroneous Section 5 liability are likely to be smaller than those associated with the Sherman Act because the Commission can obtain only equitable relief (as opposed to treble damages), and there is no private right of action under the FTC Act. At the very least, however, firms will have to consider the possibility that the Commission will initiate a lengthy—and costly—Section 5 investigation into conduct that harms rivals. What's more, injunctive relief can include disgorgement and almost always involves lengthy consent decrees of 10 or 20 years; these entail intrusive FTC monitoring of future business decisions as well as the possibility of civil fines if the consent terms are broken.[142] Further, states enforce "little FTC acts," many of which are to be interpreted consistent with the FTC Act and allow private rights of action. As former Chairman Kovacic has observed in this regard, "federal and state systems do not operate in watertight compartments."[143]

[141] *Id.*
[142] *See, e.g.*, Decision and Order, *In re* Intel Corp., FTC File No. 061-0247, FTC Docket No. 9341 (2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf.
[143] *See* Kovacic & Winerman, *supra* note 7, at 939 n.54.

B. Rent-Seeking

The second cost associated with FTC discretion under Section 5 is that competition will be channeled from the marketplace to the FTC headquarters. When government actors have the power to make decisions that affect resource distribution, private parties rationally spend money in an attempt to effect a favorable distribution.[144] The larger the pot over which the government has control, the more will be spent on these unproductive lobbying activities. At the limit, parties rationally may exhaust nearly the value of the rent to be determined. This is why the "rectangle" costs associated with government-created market distortions are often thought to be larger than the "triangle," or deadweight-loss, costs.[145]

This reality is why we see companies spending large sums trying to persuade antitrust regulators that their conduct comports with the antitrust laws, but that their rivals' does not. As long as antitrust regulators can prohibit certain business practices, companies rationally will spend money to curry their favor. The extent to which the limits of Section 5 remain largely elastic will exacerbate this tendency.

When the law is well established, one is left to argue that the facts place the conduct under scrutiny on one side or another of the line between legality and illegality. With the exception of certain forms of unilateral conduct,[146] this is largely the case for most Sherman Act claims because it is relatively clear how most conduct would be treated under either Sherman Sections 1 or 2. Consider the case of a naked horizontal agreement to fix prices or to allocate markets. If the facts are ambiguous, parties will expend resources to convince authorities that

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[144] Resource distribution can be accomplished through both rent extraction and rent creation. *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997).
[145] *See id.* at 12–13.
[146] For example, courts have split on their handling of bundling and loyalty rebates. *See, e.g.*, LePages Inc. v. 3M, 24 F.3d 141 (2003).

there was no agreement, or that if there were one, the agreement was reasonably ancillary to efficiency-enhancing conduct. No reasonable legal argument, however, could be advanced that the alleged conduct—if shown—is not *per se* illegal.[147] Similarly, a party could not advance with a straight face an argument to condemn above-cost pricing by a small firm. Rather, it must argue that the firm in question has monopoly power and that its prices are predatorily low. When the legal goalposts are known and constant, plaintiffs attempt to steer the facts through them, while defendants try to deflect these shots. Regulatory discretion in these circumstances is limited to interpretation of the facts.

For Section 5 claims, however, the law is much more malleable; parties have ample room to manipulate both the path of the facts and the position—and size—of the goal. Consider, for example, invitations to collude. Absent an agreement or monopoly power, this conduct would meet neither the requirements of a Sherman Section 1 or Section 2 claim. In such cases a party rationally would opt not to spend large sums to persuade regulators to initiate an action against its rival. Because the Commission cannot unilaterally change Sherman Act precedent, unless an agreement or monopoly power can be shown, there is little that lobbying can do to increase the probability of an antitrust challenge. Nor, for the same reason, would a Commission threat to bring such a case under the Sherman Act elicit a flurry of expenditures from the target to convince the Commission that the facts do not make out a claim. Absent facts to show an agreement or monopoly power, any threat to litigate is merely cheap talk. Again, the FTC's discretion would be limited only to its interpretation of the facts.

Things change, however, when an undefined Section 5 is an option. Not only can parties argue that the conduct in questions fits—or does not fit—into a traditional antitrust violation,

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[147] *See* Palmer v. BRG, 498 U.S. 46 (1990).

they also have the option to urge the Commission to alter the traditional antitrust standard so that the conduct in question is legal or illegal. With the ability to argue that the Commission should move the legal goalposts, parties essentially can convert all manner of conduct that would be clearly legal or illegal under the Sherman Act into an ambiguous case under Section 5. Again, consider an invitation to collude. Without an agreement or market power, the Commission left only with the Sherman Act would lack discretion to act. But, with Section 5 available, the Commission can make a credible threat to challenge this conduct under the theory that Section 5 covers this sort of incipient violation. Because Section 5's reach is unclear, the target will have a greater incentive to spend resources to convince the Commission that Section 5 does not reach this sort of conduct. What's more, the potential that the Commission could exercise discretion under Section 5 and declare this conduct illegal will attract expenditures from rivals to encourage such an action. In this manner, the ambiguous reach of Section 5, and the concomitant FTC discretion, effectively increase the range of facts over which lobbying will affect the probability that the Commission will take favorable action.[148]

This scenario is not fanciful. Recall the FTC's plea to the Second Circuit in *Official Airline Guides* to take a "small step in terms of the fundamental goals of antitrust" and hold that a refusal to deal that harms a competitor in another market violates Section 5.[149] The Commission could ask for this "small step" only because it had an undefined Section 5 at its

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[148] To put this point more formally, consider the following simple model. Parties will expend resources to effect a favorable governmental decision as long as the marginal benefit from lobbying is greater than the marginal cost. The marginal benefit to a company from an additional unit of lobbying (L) to persuade an antitrust regulator is the change in probability (P) that the ultimate governmental decision goes in its favor, weighted by the value of that decision (V). If c is the marginal cost of an additional unit of lobbying, the rational party will expend resources on lobbying until $\frac{\partial P}{\partial L} \times V = c$, where $\frac{\partial P}{\partial L} \geq 0$. Because one can attempt to persuade antitrust regulators over more dimensions under Section 5 than under the Sherman Act, it is likely that $\frac{\partial P}{\partial L}$ is larger on average for lobbying under Section 5 than under the Sherman Act. Consequently, parties rationally will spend more to affect regulatory decisions when Section 5 is in play than when only a Sherman Act claim is available.

[149] 630 F.2d at 927.

disposal. It does not take much imagination to think that the harmed commuter airlines in that case had urged the Commission to take this "small step" in enforcing Section 5. Nor is it hard to believe that Google's rivals were urging the FTC to take similar "small steps" in imposing liability on Google for its search practices. Such "small steps" would be unavailable under the Sherman Act or a well-defined Section 5. And if it they were unavailable, no company would find it worthwhile to spend money asking for them.

To move away from the abstract to the concrete, it is doubtful that Section 5 would ever be used to reach conduct that is clearly legal under the Sherman Act (e.g., above-cost pricing of nondominant firms), both because of the Commission's prosecutorial discretion and because there is little likelihood that a court would countenance such an expansive view of Section 5.[150] Where Section 5 is likely to provide the Commission with more discretion than the DOJ, however, is with unilateral cases involving novel conduct.

The Google investigation again brings this issue into sharp relief. The lobbying campaign by Google and its rivals, primarily Microsoft, is well-documented.[151] It is arguable that had the DOJ won clearance for this matter, the lobbying sums may have been substantially smaller. Why? Consider the core arguments pressed by complainants: first, that Google's search results were biased in its favor; second, that Google was scraping content from other providers to provide universal search results; and third, that Google's AdWords program made it difficult to "multihome" advertising campaigns. As discussed in part 3, each of these arguments was

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[150] *But see* Complaint ¶ 53, *In re* Intel Corp., FTC File No. 061-0247, FTC Docket No. 9341 (2010), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf (the FTC asserting that it need not show a dangerous probability of recoupment when a below-cost pricing claim is brought under Section 5).

[151] *See, e.g.*, Gordon Crovitz, *Google's $25 Million Bargain*, WALL STREET J., Jan. 14, 2013, at A13; Gordon Crovitz, *Silicon Valley's 'Suicide Impulse,'* WALL STREET J., Jan. 28, 2013, at A13; Knox, *supra* note 129; Tony Romm, *How Google Beat the Feds*, POLITICO.COM, Jan. 13, 2013, *available at* http://www.politico.com/story/2013/01/how-google-beat-the-feds-85743.html.

problematic under a Sherman Section 2 theory. Stuck with clear Sherman Act case law, the DOJ would have been left to thread a needle with the facts.

Not so at the FTC. Although the claims against Google were highly suspect under existing Sherman Act jurisprudence, this did not stop Google's critics from spending vast sums to make these arguments to the FTC, nor did it stop Google from spending a similar fortune to rebut them. And this outcome should not be surprising; to the extent that Section 5 is viewed as a trump card with respect to unfavorable Sherman Act jurisprudence, what is an unfair method of competition can be reduced to what three Commissioners have reason to believe is unfair. With such a flexible domain, parties were left ample room to try to convince the Commission to find that Google's practices violated the FTC Act. And, as explained in part 3, at least two of these arguments were almost successful.[152]

The lesson to take away from this episode is that had Section 5 been tethered to the Sherman Act, the Commission would have had a much harder row to hoe to find a viable antitrust theory of liability. This of course would reduce the ability of lobbying to affect the probability that the FTC would bring a claim against Google—or that it could pose a credible enough threat of litigation to extract a settlement with conduct relief. The millions spent lobbying would have yielded a higher return for society had they been used to innovate or otherwise compete for consumers.

VI. A Path Forward: Lessons from Consumer Protection

The Commission needs to take a page from its consumer protection mission and clearly lay out its Section 5 UMC policy. The FTC implemented this strategy for its consumer protection

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[152] *In re* Google Inc., FTC File No. 111-0163 at 3, n.2 (Jan. 3, 2013), *available at* http://ftc.gov/os/2013/01/130103 googlesearchstmtofcomm.pdf.

mission in the 1980s and helped convert the Agency from one on the brink of extinction—or at least irrelevance—to a world-class consumer protection enforcer.[153] In the 1970s, armed with Magnuson-Moss rulemaking power and a Supreme Court blessing of wide power to declare acts and practices unfair, the FTC embarked on a "frenzy" of industry rulemaking.[154] The cumulative weight of these attempts to manage large swaths of the economy became too much when the FTC proposed a rule to ban advertising to children to save them from sugary foods—a proposal that famously earned the FTC the "national nanny" moniker from the *Washington Post*.[155] The result was congressional action limiting the Commission's ability to use its unfairness authority to promulgate advertising trade rules.[156] The external rebukes led the FTC to issue binding policy statements on unfairness[157] and deception,[158] which made consumer harm the touchstone of its UDAP authority.

The lessons of ill-defined limits should not be lost on the current Commission push to use its UMC authority more aggressively. And they are probably not; it is doubtful that the FTC would attempt to expand Section 5 into areas far afield from current antitrust norms as it did in the 1970s. Defining the margins of likely expansion in a binding manner, however, would go a

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[153] *See generally*, THE REGULATORY REVOLUTION, *supra* note 88.

[154] In 1964, as part of its cigarette rule, the FTC articulated an extraordinarily broad definition of unfairness, which the Supreme Court appeared to ratify in *S&H*. In 1975, Congress passed the Magnuson-Moss Federal Trade Commission Improvement Act, which gave the FTC authority—subject to a very stringent procedure—to promulgate industry-wide rules. *See* William MacLeod et al., *Three Rules and a Constitution*, 72 ANTITRUST L.J. 943 (2005), for a full discussion of this episode. For a discussion of the FTC's activism against advertising, also see JOHN E. CALFEE, FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING AND REGULATION 11–15 (1997).

[155] *See The FTC as National Nanny*, WASH. POST., Mar. 1, 1978, at A22.

[156] *See* Kovacic, *supra* note 14, at 665–66.

[157] The Commission first issued the Unfairness Policy Statement in 1980, and later made it binding precedent by appending to the International Harvester decision. *See* FTC Policy Statement of Unfairness, appended to *In re* International Harvester Co., 104 F.T.C. 949 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. Congress eventually codified the Unfairness Policy Statement with the 1994 FTC Reauthorization Act.

[158] *See* FTC Policy Statement on Deception, appended to *In re* Cliffdale Assoc., Inc., 103 F.T.C. 110, 175–183 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm. The Commission also issued a statement on advertising substantiation in *Thompson Medical*. FTC Policy Statement Regarding Advertising Substantiation, appended to *In re* Thompson Medical Co, 104 F.T.C. 648, 839 (1984), *available at* http://www.ftc.gov/bcp/guides /ad3subst.htm.

long way toward ameliorating the problems of overdeterrence and rent-seeking associated with such an elastic mandate. The need for the FTC to articulate clear standards is all the more pressing if it continues to avoid litigating Section 5 claims. By tying itself to the proverbial mast, moreover, the FTC could enhance its legitimacy, and in the process, forestall external criticism or congressional action to limit its authority.

As I turn to the normative portion of this article, I sketch out two paths the FTC could take. First, the FTC could decide to confine Section 5 to the reach of the Sherman Act. Although there are reasons to recommend this approach from a policy standpoint, political realities are likely to condemn it to the realm of theory. Accordingly, a second and likely more feasible approach would be to issue guidelines or a policy statement that describes narrow circumstances under which the FTC would invoke Section 5 beyond the Sherman Act.

A. Anchoring Section 5 to the Sherman Act

One way to end the search for a unique use for Section 5 would be to throw in the towel—that is, to permanently limit the FTC's UMC enforcement authority to the Sherman Act. Although this approach is unlikely to be politically feasible, there are reasons that recommend such an approach.

First, restricting Section 5 to the Sherman Act would eliminate the FTC's regulatory discretion to move beyond prevailing antitrust norms, ameliorating the costs associated with uncertainty and rent-seeking discussed in part 5. Further, it would reduce arbitrage opportunities between the FTC and the Antitrust Division. If the same conduct results in different legal treatment depending on which agency wins clearance—as it arguably would have in the Google

investigation—these routine bureaucratic procedures could have substantial influence on ultimate liability.[159]

At the same time, the costs associated with such a limitation on Section 5 would be minimal. For example, abandoning recourse to Section 5 would not necessarily mean that the conduct the FTC has used Section 5 to challenge to date would be unreachable under antitrust or other laws. Consider the FTC's Section 5 forays:

- *SEP cases*: In reviewing the FTC's decision in *Rambus*, the D.C. Circuit made it clear that Section 2 is available for cases involving deception *at the time* of the standard adoption that materially affected the choice of standard.[160] Under the *Rambus* standard, a Section 2 case could be made out if the Commission could show that a FRAND commitment was made in bad faith and again affected the choice of standard. Finally, garden-variety breaches of FRAND commitments involving SEPs that result in hold-up necessarily involve legal review; the court (or ITC) must decide whether to grant the SEP holder's request for an injunction (or an exclusion order), and the alleged infringer has opportunities to raise a variety of contract and patent law objections.[161] Further, some standard-setting organizations have adopted private mechanisms for resolving FRAND disputes.[162]

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[159] FTC Comm'r Maureen K. Ohlhausen, Section 5: Principles of Navigation, Remarks Before the U.S. Chamber of Commerce at 12 (July 25, 2013), *available at* http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf (Disparate treatment of the same conduct under the Sherman Act and Section 5 risks transforming "the FTC and DOJ's informal clearance procedures from a matter of administrative efficiency to a deciding factor for liability for certain conduct.").

[160] Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); *see also* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3rd Cir. 2007).

[161] *See* Dagen, *supra* note 68, at 1521–24; FTC Comm'r Maureen K. Ohlhausen, "Section 5: Principles of Navigation," Remarks Before the U.S. Chamber of Commerce at 12–13 (July 25, 2013), *available at* http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf; Public Comment, Am. Intellectual Prop. L. Ass'n., *In re*

- *Google search and multihoming*: The heart of both the search bias and multihoming claims goes to conduct that looks a lot like a refusal to aid rivals, which is actionable under Section 2. Further, viewed as exclusionary product design cases, again this conduct is reachable under Section 2.
- *Google scraping*: As mentioned earlier, the allegations involving Google's use of other websites perhaps could have been couched as a quasi-leveraging or tying claim under the Sherman or Clayton Acts: Google conditions content providers' display in organic search results on acquiescence to having their content scraped to populate Google's vertical search. Further, content providers also could use the copyright laws to challenge this conduct.
- *CD MAP*: These cases could be—and were—very easily couched as vertical restraints to be judged under a Sherman Section 1 rule of reason inquiry.
- *Intel*: Bundling,[163] predatory pricing,[164] and deception that leads to exclusion are cognizable claims under Sherman Section 2.[165]

Although much of the conduct is reachable under the Sherman Act, many of the cases would be difficult to win. For example, the evidence required to bring a FRAND breach claim under the *Rambus/Qualcom* standard may be nearly insurmountable; *Trinko* and *Microsoft* clearly would present serious obstacles to search bias and multihoming claims; and the

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Motorola Mobility, FTC File No. 121-0120, FTC Docket No. C-4410 (Feb. 22, 2013), *available at* http://ftc.gov/os/comments/motorolagoogle/563708-00021-85573.pdf.
[162] *See* Crane, *supra* note 20, at 1197.
[163] *See* LePage's Inc. v. 3M, 324 F.3d 141 (2003).
[164] *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Spirit Airlines, Inc. v. N.W. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005).
[165] Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); *see also* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3rd Cir. 2007); United States v. Microsoft, 253 F.3d 34, 76 (D.C. Cir. 2001); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

Commission likely would have had to contend with *Brooke Group* for the pricing claims in the *Intel* case. The viability of a leverage or tying claim for scraping in *Google*, moreover, would depend on whether Google's scraping were fair use, or whether there were evidence of conditioning. To the extent that these Sherman Act rules reasonably sort anticompetitive from procompetitive or benign conduct, however, forcing the Commission to satisfy Sherman Act standards would increase the likelihood that its actions promote consumer welfare. Further, even if Sherman Act claims prove unviable, parties are not left remediless: in the FRAND or scraping cases, for example, contract and intellectual property law actions are available.

The only types of conduct that clearly slip out of the FTC's grasp when Section 5 is confined to the Sherman Act are ITCs and information-sharing involving firms with low market shares. The costs of letting this conduct go, however, are likely minimal. Although most would agree that invitations to collude are conduct worth stopping, the FTC has pursued only seven of these cases in the past 20 years.[166] Even including deterrence effects, removing these cases from the FTC portfolio is unlikely to cause significant consumer harm. Most managers are probably aware that price fixing is illegal, and it is doubtful that anybody proposes a cartel without hoping that the other party will say yes. At the same time, ITC law is obscure, lurking in a series of consent orders on the FTC's website. The sophisticated antitrust bar likely is familiar with this strain of Section 5 activity, but outside the clients counseled by top-tier law firms, it is far from obvious that many businesses are aware that apart from the completed act of a price fixing

[166] Decision and Order, *In re* U-Haul Int'l, Inc., FTC File No. 081-0157 (July 20, 2010), *available at* http://www.ftc .gov/os/caselist/0810157/100720uhauldo.pdf; Decision and Order, *In re* Valassis Commc'ns, Inc., FTC File No. 051-0008, FTC Docket No. C-4160 (Apr. 28, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c 4160ValassisDecisionandOrder.pdf; Decision and Order, *In re* Stone Container Corp., FTC File No. 951-0006, FTC Docket No. C-3806 (June 3, 1998), *available at* http://www.ftc.gov/os/1998/06/9510006.do.htm; Decision and Order, *In re* Precision Moulding Co., Inc., FTC Docket No. C-3682 (Sept. 10, 1996), *available at* http://www.ftc .gov/os/1996/09/c3682.do.pdf; *In re* YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993); *In re* A.E. Clevite, Inc., 116 F.T.C. 389 (1993); *In re* Quality Trailer Prods. Corp., 115 F.T.C. 944 (1992).

conspiracy, the FTC can file a complaint for the act of proposing one. Without awareness, there can be no deterrence. Further, completed ITCs would be reachable under the Sherman Act, as would ITCs by firms with market shares sufficient for an attempted monopolization claim. Therefore, the marginal deterrence of applying Section 5 over the Sherman Act in this area is likely to be small.

Although some have argued that antitrust has become too tolerant of potentially harmful unilateral exclusionary behavior, especially after recent decisions in *Trinko*, *Twombly*, and *Credit Suisse*, the need for a supplementary antitrust statute is far from evident.[167] The history of the FTC Act suggests that a cramped Sherman Act was a key rationale for its birth,[168] but the Sherman Act is not nearly as cramped as it once was, even when considering how these recent cases may have limited the Sherman Act's scope. The modern Sherman Act has proved an able tool to tackle myriad forms of anticompetitive conduct.[169] To the extent that the reduction in the Sherman Act's domain has been driven by the seepage of modern economic learning into its jurisprudence, moreover, using Section 5 to recapture some of this lost territory is likely to be welfare-reducing.[170]

Section 5 arguably has more to offer to the extent that Sherman Act shrinkage is due to concerns about error costs in the face of private treble damage lawsuits or lack of institutional competence by generalist judges to discern competitive from anticompetitive behavior.[171] This argument, however, may be overstated. First, it is important to note that the use of Section 5 has

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[167] *See supra* notes 89–96 and accompanying text.
[168] *See* Kovacic & Winerman, *supra* note 7, at 931; Hovenkamp, *supra* note 7, at 3.
[169] *See* Hovenkamp, *supra* note 7, at 4; 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 302(h) (3d ed. 2006).
[170] *See* Wright & Ginsburg, *supra* note 3, at 2406; Leah Brannon & Douglas Ginsburg, *Antitrust Decisions of the U.S. Supreme Court: 1967–2007*, 3 COMPETITION POLICY INT'L 1 (2007).
[171] *See* Kovacic & Winerman, *supra* note 7, at 938–39. *See also* Michael R. Baye & Josh D. Wright, *Is Antitrust Too Complicated for Generalist Judges?* 54 J. L. & ECON. 1 (2010).

been largely orthogonal to modern judicially imposed Sherman Act limitations; it is not as if the Commission has used its Section 5 authority to challenge vertical restraints, refusals to deal, predatory pricing, or parallel conduct to pick up slack left in Sherman Act enforcement. Second, the little empirical evidence that exists does not suggest that the Commission is any better than federal appellate judges in adjudicating antitrust cases.[172] Finally, although the costs of errors are likely to be larger under the Sherman Act than under Section 5, as noted earlier, Section 5 does not operate in a vacuum; state attorneys general and private parties acting pursuant to state consumer protection acts can piggyback on FTC actions.[173]

Although some have argued that Section 5—because it carries only injunctive relief and has no private right of action—may have utility as a vehicle to pursue novel or "boundary" cases, let Section 5 test the waters, and the Sherman Act can follow if the enforcement theory survives scrutiny.[174] Over its 100-year history, however, the FTC has not used Section 5 to implement any important antitrust norms.[175] That is not to say that the FTC has lacked influence over the development of antitrust jurisprudence—to the contrary, it clearly has, but within the confines of the Sherman Act. For example, the FTC has made major positive contributions in the fields of joint conduct,[176] state action,[177] *Noerr-Pennington*,[178] professional regulation,[179] the rule of

[172] *See* Joshua D. Wright & Angela Diveley, *Do Expert Agencies Outperform Generalist Judges? Evidence from the Federal Trade Commission*, THE REGULATORY REVOLUTION AT THE FTC, James C. Cooper, ed. (Oxford University Press 2013).
[173] *See* Kovacic & Winerman, *supra* note 7, at 939 n.54.
[174] *See* Tom Leary, Suggestions for Section 5's Revival, at 11–12, FTC Workshop on Section 5 (Oct. 17, 2008), 10–11 (transcript available at http://www.ftc.gov/bc/workshops/section5/docs/tleary.pdf); Kovacic & Winerman, *supra* note 7, at 948.
[175] *See* Kovacic & Winerman, *supra* note 7, at 941 ("The FTC's record of appellate litigation involving applications of Section 5 that go beyond prevailing antitrust norms is uninspiring.").
[176] *See* Polygram Holding, Ltd. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).
[177] *See* FTC v. Phoebe Putney Healthcare Sys., Inc. 133 S. Ct. 1003 (2013); FTC v. Ticor Ins. Co., 504 U.S. 621 (1992); North Carolina Board of Dental Examiners v. FTC, No. 12-1172 (4th Cir. 2013).
[178] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).
[179] *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); FTC v. California Dental Ass'n, 526 U.S. 756 (1999).

reason applied to horizontal conduct,[180] and most recently in the context of pharmaceutical reverse settlements.[181] Thus, the FTC does not risk sacrificing a role as a norm creator if it is confined to the Sherman Act. This concern is further allayed when one considers the FTC's formidable research capabilities.

If Section 5 is to offer nothing beyond the Sherman Act, that naturally begs the question of whether the FTC is needed at all. In this manner, the quest for a species of harmful conduct that is reachable only through Section 5 is in many ways an existential one. Does it make sense to have two agencies enforcing the same law?[182] The short answer is, probably not. The FTC's comparative advantage over the DOJ lies in its research capability and of course its consumer protection mission. Accordingly, stripped of a unique antitrust enforcement authority, one possible reorganization would be to house enforcement in the DOJ, with the FTC providing competition policy R&D that would feed into case selection designed to improve the antitrust laws.

B. Specific Limitations on Section 5 beyond the Sherman Act

Although equating Section 5 to the Sherman Act has a lot to offer, it may be politically infeasible. Indeed, Congress would not even allow the FTC and the DOJ to enter into a merger clearance agreement in 2002.[183] A second and more realistic path is for the Commission to articulate meaningful standards for its UMC enforcement beyond the Sherman Act going forward. As I will lay out in more detail, this should be a narrow domain.

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[180] See, e.g., Polygram Holdings, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).
[181] FTC v. Atavis, Inc., 133 S. Ct. 2223 (2013). After several initial defeats, some had called for the FTC to use Section 5 as a vehicle to address reverse settlements. *See, e.g*, Leary, *supra* note 174, at 8.
[182] *See* Kovacic & Winerman, *supra* note 7.
[183] *See* Yochi J. Deazen & John R. Wilke, *Justice Department, FTC Deal Dividing Merger Reviews Collapses*, WALL ST. J., May 21, 2002, at B6.

As a threshold matter, the FTC should explicitly renounce its reliance on early Section 5 case law and write from a clean slate. No serious antitrust enforcer today would consider challenging the conduct at issue in these cases, let alone rely on their analysis to support an enforcement action.[184] Yet, in each of its recent standard-setting cases, the Commission dutifully invokes the language of cases like *S&H* and *Brown Shoe* as a sacred talisman that will conjure the authority to act beyond the "letter and spirit of the antitrust laws."[185] These dicta, however, come from seriously outmoded cases. For example, *Brown Shoe* concerned an exclusive dealing arrangement involving a miniscule share of retail stores nationwide.[186] *S&H* upheld the Commission's challenge to the practice of preventing unauthorized green-stamp exchanges, and it cited approvingly a Section 5 decision from 1934 that condemned the practice of selling penny candy to children in "break and take" packs, because "it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children."[187] *Brown Shoe* and *S&H* were decided in the era of *Schwinn* and *Utah Pie*. Sherman Act case law has moved light-years in the direction of economic literacy since then, and the Commission should recognize that had the Supreme Court entertained a Section 5 case in the past 40 years, precedents like *S&H* and *Brown Shoe* likely would have met fates similar to those of these outmoded cases.

Second, the FTC should not use Section 5 when the conduct at issue is reachable under the Sherman or Clayton Acts. Section 5 should never be used as a trump card to reduce the

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[184] *See* Kovacic & Winerman, *supra* note 7, at 945 ("We think the early history [of Section 5 jurisprudence] is now problematic, and we view the relevant language in S&H with skepticism.").
[185] *See* Analysis of Proposed Consent Order to Aid Public Comment, *In re* Negotiated Data Solutions, FTC File No. 051-0094 at 4–5, & n.3 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf; *In re* Google Inc., FTC File No. 121-0120 at 2, n.8 (Jan. 3, 2013); *In re* Robert Bosch GmbH, FTC File No. 121-0081 at 3, n.8 (Nov. 26, 2012), *available at* http://www.ftc.gov/speeches/ramirez/121126boschcommstmt.pdf).
[186] *See, e.g.*, Hovenkamp, *supra* note 7, at 4 (noting how *Brown Shoe* could not have possibly involved harm to competition).
[187] *S&H*, 405 U.S. at 242–43 (quoting FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 [1934]).

Commission's burden to show that a practice is harmful to consumers. As former Chairman Robert Pitofsky aptly put it, "I can't believe that Congress in 1914 said, let's make it easier for the Commission to prove its cases, let's put unfairness in there."[188] If the Commission cannot carry its burden under the Sherman Act, then presumably the conduct is not likely to be a threat to competition. This would mean, for example, that the Commission would have been left to challenge the pricing at issue in *Intel* under the extant Section 2 standards for bundling and predatory pricing.

Third, the Commission must explain how consumers would benefit from expansion of the antitrust laws beyond the current Sherman Act limits. Again, merely because there is old Supreme Court language blessing an expansive Section 5 does not *ipso facto* convert Section 5 enforcement beyond the Sherman Act into a welfare-enhancing exercise. Accordingly, demonstrable consumer harm—flowing from harm to the competitive process—must be a necessary condition for invoking Section 5 against a particular practice. As in the 1984 unfairness policy statement, the Commission needs to eschew subjective measures of harm, like reductions in variety or privacy, and instead anchor its UMC authority firmly in measurable impacts on price, output, or perhaps in some cases, incentives to innovate.

Further, to the extent that the Commission intends to rely on the concept of "incipiency" as grounds for invoking Section 5, it needs to anchor this potentially amorphous term in something concrete. Identifying the precise moment when nascent conduct transforms into a true threat to competition is an exercise fraught with error and the potential for abuse.[189] True, the Commission faces this task on a regular basis when reviewing mergers; Section 7 of the Clayton

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[188] *See* Transcript of FTC Workshop, Section 5 of the FTC Act as a Competition Statute at 64 (Oct. 17, 2008) (Robert Pitofsky), *available at* http://www.ftc.gov/bc/workshops/section5/transcript.pdf.
[189] *See* Hovenkamp, *supra* note 7, at 9 ("One of the problems of older FTC actions . . . was that monopoly was not in prospect at all.").

Act charges it to interdict potentially harmful transactions in their incipiency.[190] But here, what the FTC considers a threat is well-defined; outside parties have the benefit of the Horizontal Merger Guidelines—which have been updated three times since 1982, most recently in 2010—to tell them in detail the types of transactions that are likely to draw a Commission challenge under the Clayton Act's incipiency standard.[191] To prevent the concept of incipiency from introducing an additional dimension of regulatory discretion into FTC decision-making, the Commission should take a page from its consumer protection experience and define incipient conduct as that which "is likely to cause" substantial consumer harm.[192] This approach suggests that the FTC should act only when it has developed a strong empirical basis that the practice in question is likely to grow into a competitive problem. If part of the reason that the Supreme Court has limited the Sherman Act's reach is lack of confidence in the ability of generalist judges to assess the competitive effects of complex business arrangements, the FTC must demonstrate its institutional superiority. Again, use of the FTC's research function to provide an empirical basis for challenging incipient conduct can aid this task. By tying decisions to use Section 5 to objective standards, moreover, external observers—and courts—can more easily assess the FTC's actions against its commitments.

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[190] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines at 1 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf ("Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."). *See also* Lande, *supra* note 98, at 2. The operative language of the Clayton Act prohibits transactions if the effect of such "may be substantially to lesson competition, or tend to create a monopoly." 15 U.S.C. § 18 (2012).

[191] *See* U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines at 1, *available at* http://www.justice.gov/atr/public/guidelines/hmg.htm ("By stating its policy as simply and clearly as possible, the Agency hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.").

[192] *See* FTC Policy Statement of Unfairness, appended to *In re* International Harvester Co., 104 F.T.C. 949 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm; 15 U.S.C. § 45(n) (2012).

Finally, to mitigate the possibility of errors, and hence the probability that FTC action is welfare-enhancing, the practice in question should be one that is unlikely to generate cognizable efficiencies. Thus the FTC should avoid challenging practices that would call for anything save the most rudimentary balancing. In Sherman Act parlance, the FTC should limit itself to the type of conduct that would be subject to *per se* or a "quick look" rule of reason analysis—the type of conduct that can be assessed without an elaborate inquiry into market characteristics.[193] It should avoid matters that involve the sort of complex balancing associated with a full-blown rule of reason inquiry or a Sherman Section 2 case.

How would such a standard treat the FTC's portfolio of Section 5 cases? First, ITCs involving small firms would remain. This conduct is not reachable under the Sherman Act and is likely to generate substantial consumer harm. At the same time, the risk of deterring beneficial conduct is minimal, although as one moves from private solicitations to engage in price fixing or market allocation toward the types of public communications and unilateral conduct that were at issue in cases like *Valassis* and *Stone Container*, the calculus changes. Second, conduct involving information-sharing like that at issue in *Bosley* seems sensible to retain as well. Like ITCs, this conduct is not reachable under the Sherman Act (assuming sufficiently low market shares), it poses a significant threat to competition, and it is hard to conjure an efficiency rationale for the conduct.[194] Sherman Section 1 can reach agreements among competitors to exchange competitively sensitive information,[195] so this genre of cases

[193] *See, e.g.*, Polygram Holdings, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).
[194] Under this theory, the FTC could possibly use Section 5 to reach so-called "post-and-hold" laws, which require alcohol wholesalers to share pricing information with their competitors. Empirical research suggests that these laws are harmful to consumers. *See* James C. Cooper & Joshua D. Wright, *Alcohol, Antitrust, and the 21st Amendment: An Empirical Examination of Post and Hold Laws*, 32 INT'L REV. L. & ECON. 379 (2012).
[195] *See* Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); Wire Mesh Products, Inc. v. Wire Belting Assoc., 520 F. Supp. 1004 (E.D. Pa. 1981); United States v. Am. Soc. of Anesthesiologists, Inc., 473 F. Supp. 147 (S.D.N.Y. 1979) (distribution of relative value scale booklet to members does not violate Section 1 absent evidence

should be limited to instances where an agreement cannot be shown. Further, as in the ITC case, the FTC needs to tread carefully as the conduct moves further from direct and private exchange of future competitive actions toward unilateral public announcements of current and past competitive decisions.

Third, this approach would abandon the use of Section 5 to reach breaches of FRAND commitments. Although standard-setting may play an increasingly important role in today's digital economy, and policies that encourage participation in standard-setting are likely to benefit consumers, it is not apparent that Section 5 is the best—or even a good—vehicle to address these issues. That hold-up may result in a higher price for consumers is insufficient to justify the use of Section 5; there must be some nexus between the higher prices and diminished competition to invoke a competition statute.[196] What's more, a host of institutions are arguably better suited than the FTC to handle these policy issues, including Article III courts, the ITC, the Patent and Trademark Office, Congress, and self-regulatory bodies.[197]

Finally, deceptive conduct in business-to-business relationships—such as that alleged in *Intel* or in standard-setting cases like *Dell* and *Rambus*—should be left out of the portfolio entirely. As noted earlier, to the extent that deception gives rise to, or helps maintain, monopoly power, it is reachable under Sherman Section 2.[198] Otherwise, it should be left to the domain of contract law or business torts. Further, these practices should not be challenged under the

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that defendant "actually fixed fees or in any way hampered free play of market forces"); AREEDA & HOVENKAMP, *supra* note 169, ¶ 2112(c)–(d).

[196] If it could be shown that but for the FRAND commitment a different standard would have been chosen, and that, for example, the FRAND commitment was a lie to eliminate this competition, the Commission could rely on Sherman Section 2. *See supra* note 160 and accompanying text.

[197] As Commissioner Ohlhausen has noted, when the FTC intervenes and enjoins parties from seeking resolution from Article III courts and the ITC, it appears to lack "regulatory humility." *See In re* Robert Bosch GmbH, FTC File No. 121-0081 at 2 (Nov. 26, 2012) (Ohlhausen, Comm'r, dissenting), *available at* http://www.ftc.gov/os/case list/1210081/121126boschohlhausenstatement.pdf.

[198] *See supra* note 160 and accompanying text.

Commission's UDAP authority, which should be confined to deception that directly involves consumers. To the extent that early FTC cases give the impression that UDAP covers fraud between businesses,[199] the FTC should recalibrate and make clear that it is not relying on these precedents going forward.

VII. Conclusion

Section 5's broad prohibition of "unfair methods of competition" arms the FTC with an undefined and potentially broad mandate. Since a trio of adverse appellate decisions in the 1980s, no appellate court has ruled on the FTC's use of Section 5. This combination of an amorphous statute and little external guidance, coupled with most parties' preference for a consent order over litigation, vests the Commission with wide discretion to define the metes and bounds of "unfairness." This discretion, however, comes at a price—it creates uncertainty, and it increases incentives to spend money to curry favor with antitrust regulators. Both harm consumers; uncertainty over antitrust standards reduces incentives to compete aggressively, and rent-seeking diverts resources from productive use.

One easy solution would be for the FTC to confine Section 5 to the Sherman Act. The Commission should not use a statute merely because it can, or because it receives occasional congressional pressure to do so, especially given the costs associated with undisciplined exercise of such an elastic mandate. Maybe the fact that the Commission and antitrust commentators have searched so hard and so long for the elusive conduct that Section 5 alone was designed to tackle is a signal that such conduct does not exist. Perhaps Section 5 should go the way of the Robinson-Patman Act, another antitrust statute of a similar vintage that has been overtaken by

[199] *See, e.g.*, Analysis of Proposed Consent Order to Aid Public Comment, *In re* Negotiated Data Solutions, FTC File No. 051-0094 at 7–8, n.14 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.

economics to the point that neither the FTC nor the Antitrust Division enforces it. Absent this solution, Section 5 should play a very limited role in antitrust enforcement, one essentially confined to private invitations to collude and information-sharing involving small firms. Under either scenario, the FTC's quest will come to an end and consumers will be the better for it.