

# THE MEANING OF "UNFAIR METHODS OF COMPETITION" IN SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

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The Federal Trade Commission directly administers at least seven different statutes, and is charged by Congress with additional tasks on an *ad hoc* basis. The Commission's basic power and effectiveness as an agency, however, rest upon a single sentence in its enabling statute:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.<sup>1</sup>

This provision, although in fact only a small part of the entire section, is commonly referred to as "Section 5."

Since the language of Section 5 was deliberately left broad and general, its exact scope has been determined by the courts through a process of case-by-case construction. The results of this process are of considerable importance. The interpretation put upon the word "unfair" establishes the categories of competitive methods prohibited by Section 5 and, in consequence, the range of business conduct that falls within the Commission's jurisdiction. This article will present a general overview and summary of the interpretive process surrounding Section 5. In so doing it will focus on the competition half of the statute. It will review the legislative and judicial constructions of the term "unfair methods of competition," and will attempt to define where present contours of that statute are now understood to be.

This discussion is divided into eight principal sections. The opening section briefly reviews the legislative history of the Federal Trade Commission Act. The following six sections then discuss the six conceptual categories of conduct<sup>2</sup> that will violate the Act: (1) Section 5 will reach conduct that directly violates the letter of one of the antitrust statutes; both the Sherman Act and the Clayton Act can be enforced through these means. (2) Section 5 will also reach conduct that threatens an incipient violation of either of those

<sup>1</sup> 15 U.S.C. § 45(a)(1) (1976).

<sup>2</sup> The word "conduct" is used here because most Section 5 actions historically have been framed in those terms. This does not necessarily preclude a purely structural theory, however, and the possibility of such a case will be discussed in text at notes 263-64 *infra*.

statutes. The Commission is empowered to make expert business judgments about the probable consequences of certain activities, and to prohibit those likely to result in future antitrust violations. (3) In addition to enforcing the letter of the antitrust statutes, the Commission can enforce their underlying policy or "spirit." In this way Section 5 can be used to fill technical loopholes in the Sherman and Clayton Acts, and can also extend those statutes by analogy to reach conduct which would frustrate their basic objectives. (4) Section 5 might not be restricted to conduct that bears a close relationship with traditional antitrust violations. However, it also may reach conduct that violates recognized standards of fair competitive behavior—standards which may be based on long established business custom, other statutes, or the Constitution—in at least those circumstances where this conduct has given the violator a competitive advantage. (5) The Commission also may be authorized to frame and enforce competition policies by its own initiative. Legislative history and one Supreme Court decision indicate that the Commission, within certain limits, may be empowered to halt any activity that results in substantial harm to the competitive process. (6) Finally, the Commission may make occasional use of the second half of Section 5 in a competition case, and challenge such conduct as an "unfair act or practice." Once these six major categories of Section 5 actions have been discussed, the final section of the paper will examine the standards of judicial review under which the courts will consider a determination by the Commission that certain conduct has violated the statute.

This organization seems the most useful, and is also the most faithful to the analytical categories that have been recognized in previous Supreme Court decisions.<sup>3</sup> The outline proposed here should still be understood as a tool of convenience, however, rather than as a rigid or immutable formula. The lawyer working with Section 5 should be aware that these categories are nothing more than devices for applying the single underlying concept of "unfair methods of competition" to a variety of factual situations. An actual case might depart from this outline in any of several ways. A court might find that a certain course of conduct violates Section 5 simultaneously under several different theories and therefore may reach cumulative holdings. A court also might engage in a composite holding—although none appears yet to have done so—under which certain conduct would be found improper through a sequential combination of theories. And finally, of course, a court may recognize some entirely new category of unfair competition. All of this is to suggest that Section 5 is a broad and flexible statute, and one that leaves considerable room for thoughtful and constructive application.

### I. THE LEGISLATIVE BACKGROUND

Before considering judicial interpretations of Section 5, it will be useful to review the legislative history of the Federal Trade Commission Act. Legislative history is an integral part of any exercise in statutory construction, but is

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<sup>3</sup> Organizational schemes generally similar to the one adopted here have been used in, *e.g.*, ABA ANTITRUST LAW DEVELOPMENTS, pp. 167-74 (1975); 1 CCH TRADE REG. RPTR. ¶ 805.

particularly important where, as here, the statute is written in vague and general language, and draws its meaning from the entire climate of regulatory and social-reform goals then current. The discussion of the legislative history will be divided into several parts. A general overview of the congressional intent will be presented in this section, while more detailed references will be deferred until the discussion in later sections of specific types of conduct that might be considered "unfair."

The legislative history of the Federal Trade Commission Act begins, in a sense, in the year 1890 with the passage of the Sherman Antitrust Act.<sup>4</sup> The Sherman Act marked the first venture by Congress into the establishment of a national competition policy. Under the Sherman Act the Justice Department was charged with the dual tasks of attacking contracts, combinations and conspiracies in restraint of trade, and of moving against monopolies and attempts to monopolize. Each type of case was to proceed as an adversary litigation in the federal courts.<sup>5</sup> Reliance on the district courts simplified administration of the Sherman Act, but also proved, in the eyes of many congressmen, to be its undoing. These courts soon added a judicial gloss to the Act, replacing an absolute prohibition on trade restraints with the "Rule of Reason." The Supreme Court adopted this rule in *Standard Oil Co. v. United States*.<sup>6</sup> Henceforth the Sherman Act would be construed in light of the following principles:

The statute . . . evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint . . . . Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.<sup>7</sup>

In other words, the process of judicially interpreting the Sherman Act, endorsed by the Supreme Court in *Standard Oil*, ensured that not all restraints

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<sup>4</sup> For a general discussion of the legislative history see Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILLANOVA L. REV. 517 (1962), which is probably the best single article on the subject. See also H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955) (emphasis on Sherman Act); E. KINTNER, *THE FEDERAL TRADE COMMISSION ACT OF 1914* (to be published); Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 ACAD. POL. SCI. PROC. 666 (1926) (written by one of the originators of the idea); Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915) (emphasis on legislative debates).

<sup>5</sup> See 15 U.S.C. § 4 (1979).

<sup>6</sup> 221 U.S. 1 (1911), *rev'g* *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

<sup>7</sup> 221 U.S. at 60.

on trade would be deemed to violate that statute. Only those restraints found unreasonable in the context of a particular case would be declared illegal.

The *Standard Oil* decision was not well received in Congress. The day after the decision was announced, Senator Newlands of Nevada, later to become the principal sponsor of the Federal Trade Commission Act, recommended corrective legislation:

The question therefore presents itself to us whether we are to permit in the future the administration regarding these great combinations to drift practically into the hands of the courts and subject the question as to the reasonableness or unreasonableness of any restraint upon trade . . . to the varying judgments of different courts upon the facts and the law, or whether we will organize, as the servant of Congress, an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation.<sup>8</sup>

There followed a three-year period of congressional activity in the competition area. Senator Newlands set the process in motion shortly after he made the speech quoted above, introducing two bills that may be considered the precursors of the Federal Trade Commission Act.<sup>9</sup> Both bills provided for the federal registration of corporations, created an interstate trade commission, and introduced an elastic concept of unfairness. The provisions stated that "[t]he said Commission may at any time . . . revoke and cancel the registration of any corporation . . . upon the ground of either violation of any operative judicial decree rendered under [the Sherman Act] . . . or the use of materially unfair or oppressive methods of competition."<sup>10</sup>

Neither of Senator Newlands' bills became law, but they paved the way for passage of Senate Resolution 98,<sup>11</sup> which authorized the Committee on Interstate Commerce to hold hearings on the need for the new antitrust legislation. The committee received three months of testimony and compiled a record of some 2,800 pages. On February 26 the majority report was issued. This is the "Cummins Report," named in honor of its principal author, Senator Cummins of Iowa. It generally confirmed Senator Newlands' objections to *Standard Oil* and the Rule of Reason. The report declared that "whenever the rule is invoked the court does not administer the law, but makes the law."<sup>12</sup> To the authors of the report it was "inconceivable that in a country governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the

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<sup>8</sup> 47 CONG. REC. 1225 (1911).

<sup>9</sup> S. 2941 was introduced on July 5, 1911. A substitute bill, bearing the same number, was introduced on August 21 of that year. For the text of the former bill see 47 CONG. REC. 2619-20 (1911).

<sup>10</sup> *Id.* at § 10.

<sup>11</sup> S. Res. 98, 62d Cong., 1st Sess. (1911). For the text of the Resolution see 47 CONG. REC. 3225 (1911).

<sup>12</sup> S. REP. NO. 1326, 63d Cong., 3d Sess., at xii.

individual members of the court may happen to approve."<sup>13</sup> Nor, in their opinion, had Supreme Court review led to sufficient predictability or uniformity of outcomes:

There are many forms of combination, and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful; but as the statute is now construed there are . . . many other practices that seriously interfere with competition, and are plainly opposed to the public welfare, concerning which it is impossible to predict with any certainty whether they will be held to be due or undue restraints of trade.<sup>14</sup>

The committee concluded that further action was necessary to remedy the perceived weaknesses in the interpretation of the Sherman Act. They suggested that in the measures then pending before Congress, "it will be very desirable to accompany such legislation with a measure establishing a commission for the better administration of the law and to aid in its enforcement."<sup>15</sup>

It is against this background that the bills which eventually became the Federal Trade Commission Act were introduced in Congress. On January 22, 1914, S. 4160 was introduced in the Senate by Mr. Newlands. On the same day Representative Clayton, the chairman of the Judiciary Committee, introduced H.R. 12120 in the House of Representatives.<sup>16</sup> Mr. Clayton's bill was identical to the Senate version, and this was not the same legislation that later became known as the Clayton Act. Mr. Clayton's bill was unexpectedly referred to the Interstate Commerce Committee. Mr. Covington, the chairman of that committee, introduced a somewhat similar measure on April 13, 1914.<sup>17</sup> It was Mr. Covington's bill that eventually passed the House, while Mr. Newlands' was eventually successful in the Senate.

Before considering the legislative history of these bills before the Congress, it is useful to pause and see what can be learned from the events leading up to their introduction. One aspect of this analysis is clear. The congressional reaction to *Standard Oil* was extraordinarily prompt, and its condemnation of the Rule of Reason was greatly disproportionate to any offense that the Court may have actually given. After all, few would object in principle to the concept of "reasonableness," and equally few would assert that the Sherman Act was meant to bar every routine commercial contract as a "restraint of trade."<sup>18</sup> It seems clear that something else about the Court's action was disturbing the legislators.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at xiv.

<sup>15</sup> *Id.* The legislation in question was a federal incorporation statute that contained prohibitions on certain trade practices and an elastic clause to reach new practices. *Id.*

<sup>16</sup> See S. REP. NO. 597, 63d Cong., 2d Sess., at 7-8 (1914).

<sup>17</sup> This was H.R. 15613.

<sup>18</sup> A number of Senators stated specifically that, in their opinion, *Standard Oil* had not modified the original intent of the Sherman Act. See, e.g., 51 CONG. REC. 12871 (1914) (remarks of Senator Pomerene, a member of the Conference Committee); *id.* at 12733 (remarks of Senator Weeks).

It is less than clear just what that something was. It may have been only a reflexive distaste for the process by which the Rule of Reason came about, for lawyers under the somewhat different jurisprudence of that time, and not yet exposed to the flexible constructions of the due process and commerce clauses, were probably unused to any process of judicial legislation. To a more important extent, however, the congressional reaction probably reflects, not displeasure with the outcome in *Standard Oil* itself, but rather a sudden realization of the costs that were always inherent in a procedure for litigating antitrust cases in the courts. Three such costs were to be identified as the debates progressed: (1) delay in resolution;<sup>19</sup> (2) divergence in results from court to court;<sup>20</sup> and (3) a shift in control of antitrust policy from Congress to the judiciary. A fourth consideration received little attention in the early studies, but later was to assume dominant importance. The Sherman Act was in fact rather narrow, and did not empower the courts to condemn conduct before an industry had reached the brink of monopoly.<sup>21</sup> None of these four problems arose out of the *Standard Oil* decision; they were inherent in the Sherman Act from the beginning. *Standard Oil*, by articulating the inevitable Rule of Reason, merely brought these weaknesses forcefully to the attention of the Congress.

Thus it appears that the congressional reaction to *Standard Oil* was motivated in large part by jurisdictional and administrative considerations, and only secondarily by concern over the uncertainties introduced by the Rule of Reason. The initial task for the legislature was to recover the power to control antitrust policies. It was to prevent subversion of the legislative intent by district courts that either were unsympathetic or otherwise preoccupied, and, conversely, to broaden antitrust enforcement beyond the substantive limitations that were coming to be perceived in the Sherman Act. It will be recalled that Senator Newlands, in his first address on the subject, spoke of the need to establish an administrative tribunal "as the servant of Congress."<sup>22</sup> Those jurisdictional concerns were not inappropriate. The point is merely that they came to predominate, and specific concerns over the Rule of Reason ultimately proved less important than they first appeared. This is illustrated by the willingness of Congress to insert a test of "unfairness" into the bills before

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<sup>19</sup> See, e.g., 51 CONG. REC. 8977 (1914) (remarks of Congressman Murdock); *id.* at 11105 (remarks of Senator Cummins).

<sup>20</sup> It was probably this factor, more than the Rule of Reason, that resulted in uncertainty for business. A number of congressmen stated, although without discussing the distinction, that they hoped the new commission would increase business certainty. See, e.g., 51 CONG. REC. 11086 (1914) (remarks of Senator Newlands); *id.* at 8977 (remarks of Congressman Murdock); *id.* at 11088 (text of President Wilson's message to Congress).

<sup>21</sup> See text at notes 71-74 *infra*. Many congressmen therefore supported the FTC Act in order to better assure a competitive structure for American industry. Some also had in mind a more indirect social goal: that of assuring a pluralist, individualist society, and thereby heading off popular pressures for some form of state socialism. See, e.g., 51 CONG. REC. 11379 (1914) (remarks of Senator Cummins); *id.* at 11302 (remarks of Senator Borah); *id.* at 8850 (remarks of Congressman Stevens, a member of the Conference Committee).

<sup>22</sup> See note 8 *supra*.

it in 1914, thus re-introducing as much flexibility and uncertainty as the Rule of Reason had ever embodied.

The bills as originally introduced contained no reference to unfairness. Instead they contemplated a commission with specific and limited powers. The new agency would receive annual reports from large corporations; would investigate Sherman Act cases on behalf of the Justice Department; and would report to the President and Congress on the need for additional antitrust legislation. Thus the new agency would have the powers of publicity and persuasion, but few substantive powers beyond those.

This limited scope was changed as the Newlands bill emerged from the Interstate Commerce Committee. The committee had strengthened the original bill in a number of ways. Most notably, the limitations in the Sherman Act were to be corrected by making "unfair competition" in commerce unlawful. This was accomplished through the provisions of Section 5 of the amended bill. The committee report explained the change as follows:

One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by order issued after hearing.... The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturer's Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.<sup>23</sup>

Senator Newlands was comfortable with the broadened language. This is hardly surprising, since he was committee chairman and since the new reference to "unfair competition" was similar to the language in the bill he had first introduced in 1911.<sup>24</sup> "My belief," he said, "is that this phrase will cover

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<sup>23</sup> The committee further stated:

It is believed that the term "unfair competition" has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.

S. REP. NO. 597, 63d Cong., 2d Sess., at 13 (1914). Some members of the House desired to make a parallel change in the Covington bill. See the dissenting statements in H.R. REP. NO. 533, 63d Cong., 2d Sess., pp. 9 *et seq.* (1914). See also 51 CONG. REC. 8977 (remarks of Congressman Murdock); *id.* at 9049 (remarks of Congressman Morgan); *id.* at 9062-63 (remarks of Congressman Good).

<sup>24</sup> See text at notes 9 and 10 *supra*.

everything that we want, and will have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition."<sup>25</sup> Even the concrete definition that he gave is striking in its breadth: "[T]he question is what unfair competition covers. It covers every practice and method between competitors upon the part of one against the other that is against public morals, . . . or is an offense for which a remedy lies either at law or in equity."<sup>26</sup>

The broad language introduced by the committee soon was extended further. A number of Senators observed that the phrase "unfair competition" already had a recognized and limited meaning at common law—that of passing off the goods of one company as the products of another. Senator Reed of Missouri feared that this precedent would jeopardize the future of the new Section 5:

It is my opinion that if we employ the term 'unfair competition' as it is employed in this bill, without adding anything to it, the courts will adopt as the meaning of Congress that meaning which has been affixed to the term by all of the law dictionaries and by a great many legal authorities.<sup>27</sup>

An inspired solution to this problem was proposed by Senator Hollis, who suggested "that the words 'unfair' and 'competition' be separated by some word that will not do them any harm, such as 'oppressive' or 'methods of' so that there will not be the particular label that has been attached in many cases."<sup>28</sup> An amendment to this effect was eventually adopted,<sup>29</sup> thus confirming that the Senate intended Section 5 to have a general reach unconstrained by previous common law interpretations of "unfair competition."<sup>30</sup>

The very breadth of Section 5 meant that, in applying it, reference would have to be made to the same Rule of Reason that had been the ostensible motive for taking up the Federal Trade Commission Act in the first place. Senator Cummins was well aware of this. He noted that "[i]f the rule of reason—and I am not quarreling with the rule of reason, because it must prevail everywhere—if the rule of reason is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the

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<sup>25</sup> 51 CONG. REC. 12024 (1914).

<sup>26</sup> 51 CONG. REC. 11112 (1914).

<sup>27</sup> 51 CONG. REC. 12936 (1914). *See also* 51 CONG. REC. 12814 (1914) (remarks of Senator Sutherland).

<sup>28</sup> 51 CONG. REC. 12145 (1914).

<sup>29</sup> This change was not made until the meeting of the Conference Committee. *See* H.R. REP. NO. 1142 (1914). When discussing the conference bill Senator Cummins observed that "[i]n my judgment these two phrases mean exactly the same thing." 51 CONG. REC. 14768 (1914). *See also id.* at 14786. For a statement of the House of Representatives' reasons for the change *see* 51 CONG. REC. 14937 (1914) (remarks of Congressman Stevens).

<sup>30</sup> A number of cases have held that "unfair methods of competition" has a broader meaning than "unfair competition." *See* *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310-11 n.1 (1934); *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931).

phrase 'unfair competition.'"<sup>31</sup> Despite this apparent anomaly, however, Congress had wrought two important changes in the situation that had prevailed after *Standard Oil*. First, the Rule of Reason would henceforth be used to interpret an underlying statute that was much broader than the Sherman Act, so that the Rule itself would limit antitrust enforcement much less than it had under the earlier provision. Second, the Rule would be applied, at least in the first instance, by the new Commission rather than by the courts. Hence there should be a more informed application of the law—since the Commission was designed to accumulate and develop expertise in business and economics<sup>32</sup>—and many of the problems that had been observed in judicial enforcement could be avoided. Senator Cummins spoke to this point as well:

I realize that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the commission might do great harm. I realize that just as I realize that the trend of economic thought upon the part of some judges has done and will continue to do great harm, or rather will continue to render ineffective to a degree a statute that it was believed by its authors would exterminate the monopolies then in existence and prevent the establishment of others.

I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people . . . than . . . upon the abstract propositions, even though they be full of importance, argued in the comparative seclusion of the courts.<sup>33</sup>

The committee's version of the bill, therefore, although adopting the criticized Rule of Reason, contained revisions sufficient to minimize many of the faults perceived in the interpretation of the Sherman Act.

With matters in this posture the Federal Trade Commission Act passed the Senate. The House version of the bill, as introduced by Mr. Covington, likewise passed that body and was duly transmitted to the Senate. The Senate Committee on Interstate Commerce recommended, however, that the Senate

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<sup>31</sup> 51 CONG. REC. 12915 (1914). A number of other congressmen observed that Section 5 was just as uncertain as the Sherman Act after *Standard Oil*. See, e.g., 51 CONG. REC. 11104 (remarks of Senator Lewis); *id.* at 11389 (remarks of Senator Cummins); *id.* at 11600 (remarks of Senator Borah); *id.* at 13000 (remarks of Senator Hollis).

<sup>32</sup> The importance that Congress ascribed to Commission expertise was described by the Supreme Court in the following terms:

[The Commission] was created with the avowed purpose of lodging the administrative functions committed to it in a "body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934), quoting REPORT OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE, No. 597, June 13, 1914, 63d Cong., 2d Sess., pp. 9, 11.

<sup>33</sup> 51 CONG. REC. 13047 (1914).

bill by Newlands be substituted for the House version. The substitution was made; the Conference Committee suggested some further amendments;<sup>34</sup> both Houses concurred; and President Wilson signed the resulting legislation into law on September 26, 1914.<sup>35</sup>

The judicial decisions which have reviewed this legislative history confirm that the Commission has, as it must have, considerable flexibility in determining which particular acts or practices will constitute "unfair methods of competition." The Supreme Court stated that this term "belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"<sup>36</sup> The Court has reiterated this point in many subsequent opinions. In 1965, for example, it noted:

The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce . . .'. In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight.<sup>37</sup>

The Second Circuit has reached a similar conclusion:

The Commission has wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.<sup>38</sup>

Judicial language of this sort is striking in its implication of broad Commission discretion. It does not, however, define the intended scope of this discretion. This language establishes only the Commission's general authority to single out and proscribe certain individual business tactics such as price fixing, commercial bribery, or disparagement.<sup>39</sup> The language does not help to define the broad conceptual categories of conduct within which the Commission

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<sup>34</sup> See H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. (1914).

<sup>35</sup> This legislative history is recapitulated in the Conference Report, H.R. REP. NO. 1142, 63d Cong., 2d Sess. (1914). At the same time the Clayton Act was proceeding through the Congress as a separate piece of legislation. It too eventually passed, and became law two weeks after the Federal Trade Commission Act. A more detailed discussion of the Clayton bill will be deferred until the section of this article that deals specifically with the relationships between the two statutes. See text at notes 141-53.

<sup>36</sup> *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931).

<sup>37</sup> *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (citation omitted).

<sup>38</sup> *FTC v. Standard Educ. Society*, 86 F.2d 692, 696 (2d Cir. 1936) (L. Hand, J.), *rev'd in part on other grounds*, 302 U.S. 112 (1937). See also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241 (1972) ("the sweep and flexibility of this approach were thus made crystal clear"); H.R. REP. NO. 1142, 63d Cong., 2d Sess., at 19 (1914) ("If Congress were to adopt the method of definition, it would undertake an endless task").

<sup>39</sup> Extensive listings of such forbidden tactics may be found at 16 C.F.R. §§ 13.1 *et seq.*, and in the Statement of Basis and Purpose for the Cigarette Advertising Rule, 29 Fed. Reg. 8324, 8354-55 (1964).

can make these determinations, and it therefore does not help to define the actual scope of Section 5. It is to the identification of those broad categories that the remainder of this article is devoted.

## II. CONDUCT VIOLATING THE LETTER OF ONE OF THE ANTITRUST LAWS

The first general category consists of conduct that would violate the letter of one of the antitrust laws.<sup>40</sup> Actions that will violate the Sherman, Clayton, or Robinson-Patman Acts also will violate Section 5 of the Federal Trade Commission Act. This proposition was succinctly stated by the Supreme Court. The Court noted that Section 5 "minimally . . . registers violations of the Clayton and Sherman Acts."<sup>41</sup>

This category of Section 5 violations actually finds less support in the legislative history than do most of the others. There was, in theory, little need for the Congress to make such offenses cognizable under Section 5. Clayton Act violations could be prosecuted by the Commission directly under that statute,<sup>42</sup> without need to resort to the FTC Act. Sherman Act violations could be prosecuted by the Justice Department under existing arrangements that, if not wholly satisfactory, were at least in place and functioning.<sup>43</sup> For these reasons Senator Newlands gave at least passing consideration to the idea of withholding Sherman Act jurisdiction from the new commission. Indeed, some of his remarks suggest that he viewed the FTC Act as doing precisely that:

This bill does not interfere with the Attorney General in the administration of the antitrust law. There has been a great indisposition to change in any way the Sherman antitrust law, in which the country has confidence, or to change the agency through which that law is administered, so that this bill leaves the powers of the Attorney General as complete as ever with reference to the enforcement of the antitrust law. . . . All the powers of this commission are in aid of the courts and in aid of the Attorney General, and are not intended to interfere with his control over the enforcement of the Sherman law.<sup>44</sup>

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<sup>40</sup> Some cases have stated that the Federal Trade Commission Act is not itself an "antitrust law." See *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 186 (D. Vt. 1969); cf. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958) (definition contained in the Clayton Act is "exclusive"). Although most people today would probably view the Act as, in part, an antitrust law, we follow the view expressed in these cases for simplicity of exposition.

<sup>41</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953).

<sup>42</sup> See Clayton Act § 11(a), 15 U.S.C. § 21(a) (1976).

<sup>43</sup> See Sherman Act § 4, 15 U.S.C. § 4 (1976).

<sup>44</sup> 51 CONG. REC. 11083 (1914). See also S. REP. NO. 597 at pp. 10, 12 (1914); 51 CONG. REC. 11234-35 (1914) (remarks of Senator Newlands); *id.* at 12146 (remarks of Senator Hollis). Senator Newlands also believed that his original 1911 proposal, whose language was similar in relevant respects, would have had the same effect: "[As] the Attorney General's office is now proceeding, to the satisfaction of the country to break up the existing trusts, I thought it best not to complicate the work of the new commission with the administration of the Sherman Act." 47 CONG. REC. 2621 (1911). These remarks may have meant, however, only that the Commission would not have sole responsibility for the Sherman Act.

Other language from the 1914 debates supports the more inclusive construction, however. At one point Senator Newlands noted that Section 5 would encompass every "offense for which a remedy lies either at law or in equity."<sup>45</sup> This test presumably would include violations of the Sherman Act.

Whatever the ambiguities in the original legislative history, the Supreme Court has since clearly held that Congress did not intend to withdraw the other antitrust statutes from the reach of Section 5. Challenges under that section to both Sherman Act and Clayton Act violations have been upheld.

#### A. *Sherman Act violations*

The applicability of Section 5 to Sherman Act violations was decided in *FTC v. Cement Institute*,<sup>46</sup> a case involving the cement industry trade association.<sup>47</sup> Members of the association had maintained a multiple basing-point delivered-pricing system. This system enabled the members to quote identical prices and terms of sale for cement at any given destination. The respondents argued that if these facts made out a violation of any kind, it was a violation of Section 1 of the Sherman Act rather than of Section 5 of the FTC Act. To this assertion the Court replied:

Assuming, without deciding, that the conduct charged in each court constitutes a violation of the Sherman Act, we hold that the Commission does have jurisdiction to conclude that such conduct may also be an unfair method of competition and hence constitute a violation of § 5 of the Federal Trade Commission Act.<sup>48</sup>

Somewhat later in its opinion the Court reasserted the point even more uncompromisingly, stating that a Section 5 action would lie "even though the selfsame conduct may also violate the Sherman Act."<sup>49</sup> In reaching this holding the Court considered and rejected a defense based on the legislative history discussed above. The Court stated that "on the whole the Act's legislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the federal district courts but also to supplement that enforcement through the administrative process of the new Trade Commission."<sup>50</sup>

The Court offered two reasons for reaching this conclusion, one principled and one pragmatic. The principled reason was that the Commission was a body with wide and flexible jurisdiction, empowered by Congress to eradicate all unfair practices "then existing or thereafter contrived,"<sup>51</sup> and a with-

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<sup>45</sup> 51 CONG. REC. 11112 (1914).

<sup>46</sup> 333 U.S. 683 (1948).

<sup>47</sup> Even prior to the *Cement Institute* holding this was generally assumed to be the law, on the basis of *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922). This case is discussed in greater detail in text at notes 128-32 *infra*.

<sup>48</sup> 333 U.S. at 690.

<sup>49</sup> *Id.* at 693. Section 5 will not literally reach every Sherman Act violation, however, since the FTC Act also imposes some unique jurisdictional limitations. See *Community Blood Bank v. FTC*, 405 F.2d 1011, 1018 (8th Cir. 1969) (FTC cannot challenge practices of organizations that operate neither for their own profit nor that of their members).

<sup>50</sup> 333 U.S. at 692.

<sup>51</sup> *Id.* at 693.

drawal of Sherman Act jurisdiction would be inconsistent with the breadth of the fundamental legislative purpose. The pragmatic reason looked to the probable consequences of such a withdrawal. To the Court there was "no greater obstacle . . . to the fulfillment of these congressional purposes than to inject into every Trade Commission proceeding brought under § 5 and into every Sherman Act suit brought by the Justice Department a possible jurisdictional question."<sup>52</sup>

The Commission's jurisdiction over a Sherman Act type of claim will not be defeated even if the Justice Department subsequently brings a suit founded expressly on that statute. This, in fact, was the situation involved in *Cement Institute*. The Court held that the two cases could proceed independently:

Just as the Sherman Act itself permits the Attorney General to bring simultaneous civil and criminal suits against a defendant based on the same misconduct, so the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition.<sup>53</sup>

The lower courts have upheld numerous Section 5 actions based on the letter of the Sherman Act. Such actions have challenged group boycotts,<sup>54</sup> collusion on terms of sale,<sup>55</sup> and, most commonly, price-fixing.<sup>56</sup>

#### B. Clayton Act violations

A Section 5 action also can be brought on the basis of facts that would make out a Clayton Act violation. Such cases are less common than those based on facts that would constitute a violation of the Sherman Act, presumably because the Commission is authorized to enforce the Clayton Act directly.<sup>57</sup> It is therefore unnecessary to bring such an action under the umbrella of Section 5. In *Fashion Originators' Guild v. FTC*,<sup>58</sup> however, the Supreme Court made it clear that the Commission can proceed in that manner if it chooses.

*Fashion Originators'* involved the activities of a trade group made up of the designers and manufacturers of original-fashion women's clothing. The Guild was formed primarily to combat "style piracy"—the practice of copying original fashions and selling the copies at discount prices. To this end the Guild members agreed that they would collectively refuse to deal with any retailer who carried the products of style copyists. This threat proved to be

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 694.

<sup>54</sup> See *Millinery Creators' Guild v. FTC*, 109 F.2d 175, 176 (2d Cir. 1940), *aff'd*, 312 U.S. 469 (1941).

<sup>55</sup> See *Butterick Publishing Co. v. FTC*, 85 F.2d 522, 526 (2d Cir. 1936).

<sup>56</sup> See, e.g., *Virginia Excelsior Mills v. FTC*, 256 F.2d 538, 540 (4th Cir. 1958); *Standard Container Mfrs.' Ass'n v. FTC*, 119 F.2d 262, 265 (5th Cir. 1941); *California Rice Industry v. FTC*, 102 F.2d 716, 719 (9th Cir. 1939); cf. *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (vertical price fixing).

<sup>57</sup> See 15 U.S.C. § 21(a) (1976).

<sup>58</sup> 312 U.S. 457 (1941).

successful and merchants abandoned the copyists in favor of the established producers of original designs. The Commission sued under Section 5 and issued a cease-and-desist order. The Supreme Court affirmed the Commission's order on the alternative ground that this conduct constituted a violation of the Clayton Act, and therefore of Section 5:

[The] relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which . . . garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs. And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.<sup>59</sup>

Drawing upon this authority, a number of lower court decisions have held that Section 5 will reach violations of the letter of the Clayton Act. Most of these cases involved exclusive dealing requirements.<sup>60</sup> There is no principled reason why Section 5 should be confined to this particular facet of the Clayton Act, however, and several other cases have noted in dictum that the statute will reach, for example, mergers that would violate the letter of Section 7 of the Clayton Act.<sup>61</sup>

Although the Commission may be technically empowered to sue under Section 5 alone, the better policy is to base at least the primary charge directly on the Clayton Act wherever it is feasible to do so.<sup>62</sup> This procedure will give the respondent more precise warning of the charges against him, and will

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<sup>59</sup> *Id.* at 464 (footnote omitted).

<sup>60</sup> See, e.g., *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1187 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *Mytinger & Casselberry, Inc. v. FTC*, 301 F.2d 534, 539 (D.C. Cir. 1962) (alternative ground); *Carter Carburetor Corp. v. FTC*, 112 F.2d 722, 734 (8th Cir. 1940) (alternative ground). See also *United States v. St. Regis Paper Co.*, 285 F.2d 607, 612 (2d Cir. 1960), *aff'd* 368 U.S. 208 (1961) (on action to enforce § 6(b) order).

<sup>61</sup> See *United States v. Papercraft Corp.*, 540 F.2d 131, 138 (3d Cir. 1976); *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 28 n.6 (2d Cir. 1973); *Stanley Works v. FTC*, 469 F.2d 498, 499 n.2 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973). *But cf.* *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 291-92 n.1 (4th Cir. 1977) (no case has upheld the propriety of reaching such mergers under Section 5). An interesting anomaly is the decision in *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973), which might be construed as upholding, by implication, the propriety of a merger action under Section 5. See also text at notes 188-193 *infra*.

<sup>62</sup> Courts have sometimes reacted sarcastically to duplicative charges of Clayton Act and Section 5 violations. See, e.g., *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 28 n.6 (2d Cir. 1973). There may, however, be certain cases where it is justifiable to proceed solely or primarily under Section 5. This may be true, for example, when the Commission wishes to establish a novel theory of liability under the Clayton Act, but, in fairness to the respondent, does not wish to subject him to the risk of a subsequent private damage action.

contribute to a clearer understanding of the nature of the action.<sup>63</sup> For reasons such as these the Attorney General's Committee concluded that Section 5 "should not be invoked whenever the transaction in question is governed by specific provisions in the Clayton Act."<sup>64</sup> This is, however, only an expression of preference. The pleadings themselves will give a respondent sufficient notice of the theory under Section 5 that will be relied upon.<sup>65</sup> Attempts to have actions dismissed on due process grounds have therefore proven unsuccessful.<sup>66</sup>

### III. CONDUCT THREATENING AN INCIPIENT VIOLATION OF ONE OF THE ANTITRUST LAWS

Section 5 also will reach conduct that threatens to bring about an anti-trust violation in the foreseeable future. This authority was confirmed by the Supreme Court in *FTC v. Motion Picture Advertising Service Co.*<sup>67</sup> in the following terms:

It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipency acts and practices which, when full blown, would violate those Acts, as well as to condemn as 'unfair methods of competition' existing violations of them.<sup>68</sup>

In establishing this as a general category of Section 5 authority the Supreme Court has indicated that it is executing a particularly clear legislative intent.<sup>69</sup> The Court appears to be correct in this assessment. The goal of halting incipient violations has more support in the legislative history than any of the other five categories of Section 5 violations.

<sup>63</sup> Moreover, an adjudication of guilt under the Clayton Act may be *prima facie* evidence in subsequent private treble damage actions, which should increase the deterrent effect of Commission proceedings. See *Farmington Dowel Products v. Forster Mfg. Co., Inc.*, 421 F.2d 61, 76 (1st Cir. 1969).

<sup>64</sup> REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, at 148-49 n.78 (March 21, 1955); accord, Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 851 (1961).

<sup>65</sup> See *Grand Union Co. v. FTC*, 300 F.2d 92, 95 (2d Cir. 1962) (dictum).

<sup>66</sup> See *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

<sup>67</sup> 344 U.S. 392 (1953).

<sup>68</sup> *Id.* at 394-95 (citations omitted). The *Fashion Originators'* case had expressed this concept in somewhat similar language: "[I]t was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipency combinations which could lead to these and other trade restraints and practices deemed undesirable." *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 466 (1941).

<sup>69</sup> The Court has observed:

All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages.

*FTC v. Cement Institute*, 333 U.S. 683, 693 (1948).

This support did not materialize with one stroke. Congress first had to overcome its early focus on the Rule of Reason, recognize that the real problems were those inherent in the Sherman Act itself, and receive the Commerce Committee amendment that added the prohibition against "unfair methods of competition." Once these steps were taken, however, the legislators' attention then shifted to the utility of the new Section 5 in forestalling Sherman Act violations. It seemed to them that an effective means of dealing with trusts was to forbid the unfair practices that allowed them to grow. As one article described it, "[t]he legislative history of the Federal Trade Commission Act is replete with references which reiterate that the function of the Commission would be to arrest trade restraints in their incipency."<sup>70</sup>

Various comments made just prior to the enactment of the statute illustrate this climate of legislative opinion. The Conference Committee report noted that "[t]he most certain way to stop monopoly at the threshold is to prevent unfair competition."<sup>71</sup> Senator Reed of Missouri made the following observation:

We are declaring that we intend to do something that will strike a death blow to monopoly; we propose to arrest its progress in its infancy. We are dealing not with honest mistakes in judgment, but with acts which are in their nature malicious, with the same class of conspiracies exactly as the Sherman Antitrust Act deals with, except that we propose to strike those acts in their incipency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade.<sup>72</sup>

Similar comments were made in the House of Representatives. Congressman Stevens identified the "most important" reason for supporting the act as that "it will give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief source of monopoly."<sup>73</sup> It was Senator Newlands, however, who stated the goal most tersely. "We want," he said, "to check monopoly in the embryo."<sup>74</sup> With its legislative *bona fides* thus established, the incipency theory has been invoked in a number of cases to forestall threatened violations of both the Sherman Act and the Clayton Act.

#### A. Incipient Sherman Act violations

The best-known Sherman Act incipency cases involve threatened violations of Section 2; they involve incipient monopolization. One such case was *Fashion Originators' Guild v. FTC*.<sup>75</sup> We previously saw this decision as illus-

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<sup>70</sup> MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407, 414-15 (1973) (footnote omitted).

<sup>71</sup> H.R. REP. NO. 1142, 63d Cong., 2d Sess., at 19 (1914).

<sup>72</sup> 51 CONG. REC. 13118 (1914).

<sup>73</sup> 51 CONG. REC. 14941 (1914).

<sup>74</sup> 51 CONG. REC. 12030 (1914). See also 51 CONG. REC. 14929 (1914) (remarks of Congressman Covington); *id.* at 11455 (remarks of Senator Cummins); *id.* at 12147 (remarks of Senator Hollis).

<sup>75</sup> 312 U.S. 457 (1941).

trating a present violation of the Clayton Act. The case also was based, however, on the alternative theory of an incipient violation of the Sherman Act. The members of the Guild accounted for more than 60 percent of all women's garments wholesaling at \$10.75 or more, and the Guild was therefore close to establishing a collusive monopoly. The Court found that a cause of action was stated on these facts:

[It was not] determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly . . . . It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act that its effects might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipency.<sup>76</sup>

A theory of incipient Sherman Act violation may be particularly appropriate in reaching attempts to monopolize that do not meet the requirements of Section 2. Such an attempt might, for example, lack a sufficient "probability of success." The conduct might still be reached through Section 5's more forward-looking standard of incipency. This possibility is illustrated by *Hastings Manufacturing Co. v. FTC*.<sup>77</sup> Hastings, a manufacturer of piston rings for the automobile aftermarket, embarked upon a program to improve the exposure it received through its jobbers. To this end it requested assurances of exclusivity from its jobbers and, in cases where these could not be obtained, offered to buy up (or "lift") the jobbers' inventory of competing brands.<sup>78</sup> Through these means Hastings grew from one of the smallest piston ring manufacturers to become the second largest. It was still far from monopolizing the industry, however, and a Sherman Act action probably could not have been brought. An action under Section 5 nonetheless accomplished the same results. The circuit court observed that "[i]t was not imperative, in order to bring into play the 'prophylactic' action of the Commission, to prove that monopoly actually has been achieved."<sup>79</sup>

The theory of incipient violations will also apply to enforce Section 1 of the Sherman Act, which forbids contracts or combinations in restraint of trade. One case suggesting this application of the theory is *Triangle Conduit & Cable Co. v. FTC*.<sup>80</sup> There the manufacturers of electrical conduits had

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<sup>76</sup> 312 U.S. at 466. See also *Luria Bros. & Co. v. FTC*, 389 F.2d 847, 859 (3d Cir. 1968), cert. denied, 393 U.S. 829 (1968); *Hershey Chocolate Corp.*, 28 F.T.C. 1057, 1072 (1939), aff'd, 121 F.2d 968 (3d Cir. 1941). It will be noted that the Court in *Fashion Originators' Guild* referred to the "policy" of the Sherman Act, thus evoking a separate category of Section 5 violations that will be discussed below under the heading of "conduct contrary to the spirit of the antitrust laws." The substance of the Court's remarks dealt with actual incipency, however, the reference to "policy" should not be read as altering this meaning.

<sup>77</sup> 153 F.2d 253 (6th Cir. 1946), cert. denied, 328 U.S. 853 (1946). In 1979 the FTC proposed, on other grounds, a modification of the order in this case. See Docket No. 4437, Dec. 26, 1979.

<sup>78</sup> See 153 F.2d at 255.

<sup>79</sup> *Id.* at 257.

<sup>80</sup> 168 F.2d 175 (7th Cir. 1948), aff'd by an equally divided Court sub nom. *Clayton Mark & Co. v. FTC*, 336 U.S. 596 (1949).

utilized a basing-point scheme in order to stabilize price competition among themselves. The Seventh Circuit characterized this arrangement as a conspiracy, a present violation of the Sherman Act.<sup>81</sup> The court went on to find, however, that the unilateral adoption of basing-point systems by individual firms could also be prohibited as long as those firms were aware that others were adopting similar practices. The court reasoned that the temptation toward collusive conduct was too great, and that pricing systems of this kind, even if unilateral at the start, represented the first steps toward a conspiracy. "A major purpose of [the FTC] Act," the court concluded, "was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained."<sup>82</sup> Thus there is significant precedent allowing the Commission to attack incipient violations of the Sherman Act.

### B. Incipient Clayton Act violations

It is now settled that Section 5 will reach incipient violations of the Clayton Act as well as those of the Sherman Act. For many years, however, there had been doubt as to whether this was the case. This doubt stemmed from the legislative history of the two statutes. The chief concern of the Congress in 1914 was to supplement and reinforce the Sherman Act. To this end the FTC Act was passed with the express purpose of reaching incipient Sherman Act violations. The Clayton Act was passed with a similar motive. It enumerated certain trade practices that were thought especially likely to result in monopolies, and explicitly forbade them. The Clayton Act was subsidiary to the Sherman Act, a fact reflected in its title as "an act to supplement existing laws against unlawful restraints and monopolies."<sup>83</sup> As a result, it does not necessarily follow, from the fact that Congress intended Section 5 to reach incipient Sherman Act violations, that it also intended the section to reach incipient violations of the Clayton Act. It can be argued that the use of Section 5 to supplement a statute which itself is supplementary should not be made without some support in the legislative history, and it can be argued further that no such support exists. One commentator has stated that references to the incipency concept, wherever they appeared in the legislative record, referred to Sherman Act violations exclusively.<sup>84</sup>

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<sup>81</sup> 168 F.2d at 180.

<sup>82</sup> *Id.* at 181, quoting *FTC v. Cement Institute*, 333 U.S. 683, 708 (1948). See also *Keasbey & Mattison Co. v. FTC*, 159 F.2d 940, 951 (6th Cir. 1947); *FTC v. Mar-kin*, 391 F. Supp. 865, 870 (W.D. Mich. 1974), *aff'd*, 532 F.2d 541 (6th Cir. 1976) (in context of subpoena enforcement). Cf. *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957) (after finding a conspiracy the Commission could then ban even the individual use of a zone pricing system, if identical prices resulted).

<sup>83</sup> See Ch. 323, 38 Stat. 730 (1914).

<sup>84</sup> See Handler, *Some Misadventures in Antitrust Policymaking*, 76 YALE L.J. 92, 99 n.53 (1966). Too much can be made of this point, however. The Clayton Act had not yet passed Congress at the time that the FTC Act was being debated, and the legislators may therefore have considered it still too hypothetical to discuss. Cf. note 141 *infra*.

These doubts were reinforced by differences in the language of the two statutes. The Sherman Act refers to present, existing conspiracies and monopolies, whereas the Clayton Act looks to the future effect of certain practices. In most of its sections the operative language of the Clayton Act bars only that conduct whose effect "may be substantially to lessen competition, or to tend to create a monopoly."<sup>85</sup> The Clayton Act thus carries its own internal standard of incipency.<sup>86</sup> To permit a Section 5 action for an incipient Clayton Act violation would be to permit, in a sense, a theory of "incipient incipency." Such a theory would permit the Commission to reach conduct far removed from the evils that Congress presumably had in mind when it passed the Clayton Act.<sup>87</sup>

Notwithstanding these questions, however, the Supreme Court has concluded that the incipency doctrine applies to the two statutes equally. This conclusion was stated as early as the decision in *FTC v. Motion Picture Advertising Service Co.*,<sup>88</sup> quoted above, in which the majority said that Section 5 would reach practices "which, when full blown, would violate those Acts . . . ."<sup>89</sup> Justice Frankfurter, dissenting on other grounds, agreed that "[t]he Federal Trade Commission Act was designed, doubtless, to enable the Commission to nip in the bud practices which, when full blown, would violate the Sherman or Clayton Act."<sup>90</sup> For a variety of reasons, however, this case was not thought to settle the issue. The opinion was not clearly reasoned and, in any event, involved an incipient violation of only the Sherman Act. References to the Clayton Act were therefore dictum.<sup>91</sup>

The issue was squarely faced and resolved in *FTC v. Brown Shoe Co.*<sup>92</sup> This case involved a "franchised dealer program" offered by Brown Shoe. The company made available to selected retailers a package of services, including

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<sup>85</sup> See, e.g., Clayton Act §§ 3, 7; 15 U.S.C. §§ 14, 18 (1976).

<sup>86</sup> Congress intended for the Clayton Act to halt the creation of trusts and monopolies "in their incipency and before consummation . . . ." S. REP. NO. 698, 63d Cong., 2d Sess., at 1 (1914). This report was construed in *United States v. E.I. duPont deNemours & Co. (DuPont/GM)*, 353 U.S. 586, 597 (1957).

<sup>87</sup> The theory had been sharply criticized in the literature for this reason, both before and after it was expressly adopted by the Supreme Court. See Howrey, *Interplay of Unfair Competition and Antitrust Doctrine Under Section 5 of the FTC Act*, 12 IDEA 119 (1968); Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961); Note, *The Attack on Trading Stamps*, 57 GEO. L.J. 1082 (1969). As the law has developed, however, the theory of incipient Clayton Act violations does not appear to rely on the kind of attenuated two-step analysis that the phrase "incipient incipency" implies. See text at note 108 *infra*.

<sup>88</sup> 344 U.S. 392 (1953).

<sup>89</sup> *Id.* at 394-95.

<sup>90</sup> *Id.* at 400-01.

<sup>91</sup> See 344 U.S. at 397. It is possible that both references were dictum, and that the Court viewed the respondents' practices as a present restraint of trade, a violation of the letter of the Sherman Act. The opinion is quite opaque on this point. Compare 344 U.S. at 395 (practice "falls within the prohibitions of the Sherman Act") with *id.* at 400 (Frankfurter, J., dissenting) ("Commission [had] not found any Sherman Law violation").

<sup>92</sup> 384 U.S. 316 (1966).

store layouts and plans for construction, the advice of sales representatives, and low-cost insurance policies. In return the company demanded that the retailers handle Brown Shoe products exclusively, except as to product lines that the company did not itself provide.<sup>93</sup> These arrangements were exclusive-dealing contracts which would be prohibited under Section 3 of the Clayton Act if they threatened "substantially to lessen competition." Such a showing could not be made, however, since Brown Shoe, despite its plans to expand its franchise program, thus far had involved too few dealers to effect this anti-competitive result. The Commission therefore sued under Section 5 on an incipency theory, and the Supreme Court accepted its position:

We reject the argument that proof of this § 3 element [present likelihood of substantial harm to competition] must be made for . . . our cases hold that the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.<sup>94</sup>

Thus the Court in *Brown Shoe* resolved the doubts concerning the applicability of the incipency theory to Clayton Act violations.

### C. How close must the violation be?

To say that Section 5 reaches incipient violations of the Sherman and Clayton Acts is useful, but it only begins the analysis. There remains the question of what constitutes an "incipient" violation, or, stated differently, of how close to the completed violation a respondent must be before Section 5 will apply. The answer to this question is still by no means clear, but certain guidelines and reference points have emerged.

As one such guideline, it seems to be established that no actual and present harm to competition must be shown. This rule is clearly appropriate in cases where the completed violation itself would be a *per se* offense. Since a price-fixing conspiracy is illegal without showing its effect on competition, for example, an incipient conspiracy of this nature should also be illegal without showing present adverse effects.<sup>95</sup> Some support for this proposition may be gleaned from *Triangle Conduit & Cable Co. v. FTC*.<sup>96</sup> There a present conspiracy among the conduit manufacturers was shown to exist.<sup>97</sup> In concluding that the unilateral adoption of delivered-pricing systems also would violate Section 5 on an incipency theory, however, the Seventh Circuit did not make reference to the history of price-fixing.<sup>98</sup> Some additional support for the

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<sup>93</sup> *Id.* at 317-18.

<sup>94</sup> *Id.* at 322 (alternative ground) (footnote omitted). See also *Rader v. Balfour*, 440 F.2d 469, 472 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971) (dictum); *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 188 (D. Vt. 1969) (dictum).

<sup>95</sup> This rule would still permit an exception, if one seemed desirable, for conduct that threatens an antitrust violation but still has so many other beneficial characteristics that the agency desires not to invoke the *per se* standard.

<sup>96</sup> 168 F.2d 175 (7th Cir. 1948), *aff'd*, 336 U.S. 596 (1949).

<sup>97</sup> *Id.* at 181.

<sup>98</sup> See *id.* at 180-81.

proposition may be found by analogy to those cases challenging conduct similar to that which is forbidden by a specific provision of the antitrust laws.<sup>99</sup> These cases generally have held that the Section 5 action should adopt the same burden of proof that is required by the statute serving as a model, and should proceed on a *per se* theory whenever the underlying statute is also *per se*.<sup>100</sup>

Even where the completed violations would not be a *per se* offense, however, no showing of present harm to competition should be required. The very purpose of the incipency doctrine was, after all, to reach undesirable conduct before it had resulted in public injury. It would be self-defeating to require a demonstration of that injury before finding a violation; such a rule would be contrary to the intent of Congress.<sup>101</sup> In reaching this conclusion it is necessary to distinguish between what the Commission actually does as a matter of practice, and what it is required to do as a matter of law. One commentator writing in 1960 noted that the Commission had *never* brought a Section 5 case without alleging harm to competition.<sup>102</sup> It does not follow that such allegations are legally required, and at least one court has concluded that they are not. In a predatory pricing case, although finding actual injury, the Sixth Circuit made the following observation:

The fact that the sales were not greatly below cost does not aid the petitioner. It was not necessary that the evidence show that Schanzer [the target company and sole competitor] suffered loss . . . . The purpose of the Federal Trade Commission Act is to prevent potential injury by stopping unfair methods of competition in their incipency.<sup>103</sup>

<sup>99</sup> These cases are discussed in text at notes 156-60 *infra*.

<sup>100</sup> See, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962) (solicitation of discriminatory promotional consideration should be *per se* illegal, since the granting of it would be). See also *In re Perpetual Federal Savings & Loan Ass'n* (FTC 1978), *dismissed due to supervening legislation* (1979) (Clayton Act's *per se* rule against interlocking directorates adopted in an action based on Section 5, even though the Clayton Act appeared to be technically inapplicable since it contained an exception for banks).

<sup>101</sup> This conclusion is supported by the following exchange:

SENATOR McCUMBER. [A complainant] would have to prove some kind of a result from that unfair competition. What result would he have to establish under the provisions of [this] bill? Would he not have to prove the fact that the result was such as to destroy the competition entirely, to destroy his competitor, and thereby create a monopoly?

SENATOR NEWLANDS. I presume the Senator would not contend that the result must be proven if we prove that this practice was indulged in with the intent to injure or destroy.

SENATOR McCUMBER. . . . No; I simply say that you would have to allege the inevitable result of that competition, and to prove it, or else you would have to allege that it had accomplished such results. One of those two things must be done.

51 CONG. REC. 12217 (1914).

<sup>102</sup> Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULLETIN 161, 178 (1960).

<sup>103</sup> *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 517 (6th Cir. 1944) (citation omitted).

The Commission therefore should not be required to demonstrate actual injury to competition to establish an incipient violation of one of the antitrust laws.

If the Commission need not show any present injury, however, one must still ask what it does have to show. How close and how foreseeable must the completed violation be? An answer to this question may be gained by comparing the Section 5 standard of incipency with the Clayton Act's reference to conduct that may substantially lessen competition. The Supreme Court has held that the Clayton Act test involves something akin to a "probability" that the forbidden result will occur:

It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect. But . . . the use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.<sup>104</sup>

The Clayton Act's "probability" standard, therefore, can be a useful starting point in determining the scope of the incipency standard.

The probability of a forbidden result occurring, however, is not a wholly satisfactory focus for the FTC Act. The Clayton Act gives the Commission considerable latitude in predicting future events, but it appears that the Section 5 incipency test will confer still more latitude and will allow the banning of conduct whose anti-competitive effects are still further away from fruition. This was made clear in the *Brown Shoe* case, where the company's dealer-franchising program was struck down under Section 5 even though it could not be reached under Section 3 of the Clayton Act.<sup>105</sup> Two commentators have attempted to characterize the relevant legal standard in light of these events. They conclude that the appropriate incipency standard under Section 5 lies somewhere between a "probability" and "reasonable possibility" that the violation will come about.<sup>106</sup>

The decided cases seem consistent with this proposed formula. The incipient conspiracy cases, such as the alternative holding in *Triangle Conduit*, are well within its boundaries. It did not require any great leap of faith to conclude that companies utilizing parallel pricing formulas that facilitated collusion one day actually might begin to collude. The incipient monopoly involved in the *Muller* case was similarly close to fruition. Only one competitor then survived in the industry, and he was being demonstrably injured by the predatory pricing practices at issue. *FTC v. Motion Picture Advertising Service Co.*<sup>107</sup>

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<sup>104</sup> *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 738 (1945) (citation omitted). Similarly, cases under Section 7 of the Clayton Act have held that the word "may" refers to probabilities rather than certainties. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1963).

<sup>105</sup> See discussion at notes 121-23 *infra*.

<sup>106</sup> See MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407, 422 (1973).

<sup>107</sup> 344 U.S. 392-93 (1953).

involved more tenuous inferences. There four companies held among themselves some 75 percent of the market for the advertising films that were shown in movie theaters. Their contracting practices were prohibited as an incipient violation of the Sherman Act. Since no one firm held a great market share, however, and since there was no evidence of collusion from which a shared monopoly could be predicted, the Court's result probably could not have been reached under the kind of incipency test that was used in the Clayton Act. Finally, *Brown Shoe* involved facts that stretch even the MacIntyre & Volhard formula to its limits. Brown Shoe as a whole accounted for annual sales of only about \$111 million in an industry of \$1.8 billion. Since little significant vertical foreclosure had yet taken place, it appears that the Section 5 incipency test in fact reached conduct that involved little more than a reasonable possibility of eventually resulting in a substantial lessening of competition.<sup>108</sup>

In reviewing these cases one is struck by the extent to which, as a practical matter, the standard of proof for incipency charges is procedural rather than substantive. The appeals courts appear to give a close and searching review if they think that the Commission's own investigation was too brief or conclusory. At the same time, however, they appear to give the Commission considerable latitude once they are convinced that it has conducted a thorough investigation.<sup>109</sup> Thereafter they are hesitant to upset its expert judgment as to the business consequences that may be expected from certain conduct. The importance of this factor may be inferred from Justice Frankfurter's dissenting opinion in *Motion Picture Advertising*, a case in which he believed the Commission had not pronounced a sufficiently articulated or reasoned conclusion. Justice Frankfurter observed:

The Commission has been content to rest on its conclusion that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. If judicial review is to have a basis for functioning, the Commission must do more than pronounce a conclusion by

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<sup>108</sup> It might be thought that *Brown Shoe* does not illustrate the outer limits of the incipency doctrine in general, but instead reflects the particularly loose standard of "incipient incipency" that arises when the threatened violation is of the Clayton rather than the Sherman Act. The case law is not wholly clear on the point, but it seems more probable that the Court applied the ordinary one-step test of incipency. The Court observed that Brown's program "obviously conflicts with the central policy of . . . § 3 of the Clayton Act against contracts which take away freedom of purchaser to buy in an open market." 384 U.S. at 321. The Court's language suggests a direct threat to this business standard, rather than the indirect threat of an incipient violation of that standard. Further, the Court noted that "[w]e reject the argument that proof of this § 3 element [threatened harm to competition] must be made . . . *Id.* at 322. Thus the Court appears to have dispensed with the Clayton Act's own incipency test altogether before applying the Section 5 test, rather than combining them, as it easily could have done, in a reference to "incipient violations of this § 3 element." In short, therefore, the concept of "incipient incipency" is a misnomer, preserved in the literature for its force as a *bon mot* rather than for its utility as a term of analysis.

<sup>109</sup> This is consistent with the congressional intent. See 51 CONG. REC. 11108 (1914) (remarks of Senator Newlands) (thorough administrative hearings, rather than judicial review, were best safeguard against arbitrary action).

way of fiat and without explication. This is not a tribunal for investigating an industry. Analysis of practices in the light of definable standards of illegality is for the Commission. It is for us to determine whether the Commission has correctly applied the proper standards and thus exhibited that familiarity with competitive problems which the Congress anticipated the Commission would achieve from its experience.<sup>110</sup>

Presumably, had the Commission further elaborated on its reasoning in this case, Justice Frankfurter would have been more inclined to uphold its findings.

In sum, although we do not yet have precise standards for determining the existence of an incipient violation, enough guidelines have developed to give substance to the concept. Actual and present harm to competition need not be shown, but the eventuality of the predicted harm must be more than a mere speculation. While the predicted harm need not be probable, it must exist as a "reasonable possibility." Within these parameters the findings of the Commission will be upheld, provided that its opinion demonstrates that it has attained the expected degree of familiarity with the industry involved.

#### IV. CONDUCT VIOLATING THE SPIRIT OF ONE OF THE ANTITRUST LAWS

Section 5 is not confined to conduct that actually violates, or that threatens to violate, one of the other antitrust statutes. If it were limited to this extent it would be a largely duplicative provision. The legislative purpose instead assigned to Section 5 a broader role. It was to be an interstitial statute; it was to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete. In addition to overt violations, therefore, Section 5 would reach closely similar conduct that violates the policy or "spirit"<sup>111</sup> of the antitrust laws, even though it may not come technically within its terms.<sup>112</sup> An early commentator described this interstitial function in the following manner:

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<sup>110</sup> *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 401 (1953). See also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 248-49 (1972). But cf. *National Lead Co. v. FTC*, 227 F.2d 825, 837-38 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957). In the latter case the circuit court rejected a finding of incipient monopolization, despite considerable evidence in the record.

<sup>111</sup> References to the "policy" or "spirit" of the antitrust laws are often used interchangeably in the cases. The latter term will be used in this article in order to prevent confusion with the separate category of Section 5 actions that are based on general public policy.

<sup>112</sup> There are a number of reasons why the FTC Act can properly reach a wider range of conduct than the other antitrust statutes. There are no criminal penalties, treble damages, or private actions under it, and so conduct that has not previously been held to be anticompetitive, or whose anticompetitive effects are present but not particularly serious, can be corrected without fear of inflicting excessive hardship. Moreover, the agency itself has special characteristics that suit it to the exercise of a broader authority than a district court would have. Through specialization its Commissioners have developed expertise in the fields of business, law, and economics, and, in addition, have the assistance of a staff of industrial organization economists.

[T]he debates themselves suggest, what seems obvious from the text of the Act, that it was the Congressional intention to confer on the Commission, subject to court review, the duty of giving a detailed content to the general principle embodied in the phrase ['unfair methods of competition'], and to employ, in fulfilling this duty, not only the rules and precedents established by the courts at common law and under previous statutes, but the technique of reasoning by analogy and upon principle, with which jurists are familiar.<sup>113</sup>

This early interpretation survives without substantial change in the modern commentary.<sup>114</sup> The cases have likewise been explicit in adopting the view that violations of the spirit of the antitrust laws will constitute a cause of action under Section 5. *Brown Shoe*, for example, noted that the "broad power of the Commission is particularly well established with regard to trade practices which conflict with basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."<sup>115</sup>

As with most general principles, however, the mere recognition of this theory is not of great help. The theory first must be given concrete meaning

<sup>113</sup> G. HENDERSON, *THE FEDERAL TRADE COMMISSION*, p. 36 (1924).

<sup>114</sup> One author recently noted: "The Federal Trade Commission Act spans an archipelago of condemnatory practices and not all of them by any means are cognizable under other statutes. Nevertheless, other acts, and the antitrust acts in particular, form a skeleton for much of Section 5." J. VON KALINOWSKI, *16E BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION* § 43.04 (1976). Areeda and Turner have taken a position somewhat to the contrary, suggesting that Section 5 will not reach significantly beyond other antitrust statutes. "Nothing prevents [the Sherman and Clayton Acts] from working their own condemnation of practices violating their basic policies." P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 307b (1978); see also *id.* at ¶ 307f. It should be noted that this position does not actually differ greatly from the formula suggested in the text. Both agree that Section 5 ought to reach the spirit of the other laws. The difference lies only in the reasoning. Areeda and Turner would say that the statutes themselves, when properly construed, should include their underlying spirit as well, and so this can be reached through a Section 5 action to enforce their letter, whereas this article suggests that Section 5 has a special interstitial role which reaches beyond the original antitrust statutes. The later construction appears to be best supported by the legislative history noted in the opening section of this article, which revealed a clear congressional purpose to have Section 5 reach beyond the letter of the Sherman Act. It is also supported by the Sherman Act case law, which has not yet construed that statute as incorporating everything that might be included within its spirit.

<sup>115</sup> 384 U.S. at 321 (alternative ground). The practical operation of this theory, and the use of the concept to reach actions that are analogous to established violations, are both well illustrated in the following passage:

At the outset we must stress what we do not find present here. We recognize that [the oppressive practice at issue] is not a tying arrangement. . . . But neither do we understand that either the Commission or the Court of Appeals held that [it] was a tying scheme. What they did find was that the central competitive characteristic was the same in both cases—the utilization of economic power in one market to curtail competition in another. . . . When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.

*Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70 (1965).

through the accretion of case law. In this category of Section 5 actions one question in particular stands out. How similar to a recognized offense must conduct be before it will be held to violate the spirit of the antitrust laws? This question will be addressed through a review of the decided cases. Cases based on the Sherman and Clayton Acts again will be examined separately, since, as we shall see, the Clayton Act poses some special problems of statutory construction.

### A. *The Spirit of the Sherman Act*

First, then, the Sherman Act. Cases involving violations of the spirit of this statute may be divided into two general classes, and discussion of them likewise will be divided into two sections. The first section will consider the "core" cases and the relatively straightforward applications of the theory. The second section will turn to the more difficult cases that have invoked the spirit of the Sherman Act in order to reach instances of conscious parallelism.

The basic cases in this area seem to proceed according to a relatively simple principle. Legislatures generally are concerned about results, and the spirit or policy of a statute is generally defined by the ends it seeks to attain. Hence a particular course of conduct may be said to violate the spirit of the Sherman Act—and so to constitute an unfair method of competition under Section 5—if it tends to bring about the same kind of consequences that the Sherman Act was intended to prevent.<sup>116</sup>

The use of this criterion is best illustrated in the so-called "TBA cases" of the mid-1960's. The cases grew out of marketing arrangements for "tires, batteries, and accessories," staples of the retail gas station trade. Gas stations often are leased or franchised by the major oil companies, but operated by independent businessmen. For many years the station operators had been able to buy TBA products from suppliers of their own choosing. The principal tire manufacturers then realized that they could improve their market penetration by enlisting the parent oil companies in an effort to sell their brands to the station operators. Each major tire manufacturer approached an oil company and offered it a commission on all sales made to that company's outlets. The oil companies in turn pressured the outlets to buy their tire requirements in the recommended brand exclusively. No overt tie was made between a

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<sup>116</sup> Conduct meeting these tests may be less anticompetitive than that forbidden by the Sherman Act, since the lesser penalties attached to violation of the FTC Act make it appropriate to reach a wider range of business practices. Some substantive analogy to a Sherman Act violation, however, if only an attenuated one, would still seem to be required. It might be argued that the spirit of the Sherman Act extends further than this and will justify any decision that the Commission makes as a result of balancing the costs of a particular practice against the justification for its use, on the theory that this process is analogous to the application of the Sherman Act's Rule of Reason. That analogy relates primarily to a matter of adjudicatory procedure, however, rather than to the "competitive characteristics" referred to in *Atlantic Refining*, *supra* note 115. Cases based on a balancing of the equities would therefore seem best considered under the heading of the Commission's power to define public policy, which will be discussed in a later section.

dealer's purchase of the designated tires and his ability to retain his lease or to obtain gasoline. A threat to this effect was, however, implicit in the relative situation of the parties. The gas station operators knew that they were dependent upon the continued good will of the oil companies, that their leases were short-term and might not be renewed, and that it was in their best interest to purchase the named tires. The FTC considered this situation to be so inherently coercive that it was functionally equivalent to a rigid tying arrangement. The Commission accordingly determined that the practices violated Section 5, and issued appropriate cease-and-desist orders.

The reviewing courts affirmed. In so doing they found that the practices at issue violated the goals of the Sherman Act in two respects. First, the practices produced the same kind of effect on competitors—in this case market foreclosure—that the law was intended to prevent. "Within seven months after the agreement Goodyear had signed up 96% and 98%, respectively, of Atlantic's dealers in two of the three areas assigned to it."<sup>117</sup> Second, it was recognized that the practices produced a similarly forbidden effect—coercion—on the individual dealers involved:

A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord. When he hears that Shell will benefit from his patronage of sponsored TBA outlets, the velvet glove of request has within it the mailed fist of command.<sup>118</sup>

In short, the practices used in TBA sales brought about end results of the type that the Sherman Act was intended to prevent, and so were condemned as violations of the spirit of that statute.

Although this use of Section 5 may be relatively simple in principle, it can sometimes prove unexpectedly difficult to apply in practice. Legislation is often designed to serve more than one end. In that event one must decide which of several legislative goals is the one whose spirit should be taken as the basis for an action under the FTC Act. The situation of multiple goals may arise in any of several forms. The legislature may have enacted a statute with parallel goals in mind, such as with separate and independent purposes for the new law to serve. The legislature may have acted with conflicting goals in mind, so that one part of the voting majority supported the statute

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<sup>117</sup> *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 366 (1965). Thus the Court did not treat this situation as a *per se* violation, even though it also refused "to embark upon a full-scale economic analysis of competitive effect":

Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves.

*Id.* at 371. For further indications that a *per se* test was not used see *Shell Oil Co. v. FTC*, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

<sup>118</sup> *Shell Oil Co. v. FTC*, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). See also *FTC v. Texaco, Inc.*, 393 U.S. 223, 229 (1968) (system is "inherently coercive").

for one reason, and another part for a different reason. Or the legislature may have visualized concentric goals, in the sense that a provision was passed for a number of reasons of increasing breadth and generality.

The case of concentric goals seems most likely to raise issues for Section 5 jurisprudence. Situations of parallel or conflicting goals do not create serious conceptual problems,<sup>119</sup> and may not in fact be encountered with great frequency. Concentric goals, on the other hand, underlie every provision of every statute that is passed. Any statutory term can be described in a variety of ways, as serving a variety of values arranged along a continuum of increasing breadth and sweep. Thus Section 2 of the Sherman Act, for example, is intended to prevent the practice of monopolization; to prevent the undue growth of corporations through sharp trading practices; to slow the pace of asset concentration; to prevent the concentration of socio-political power; and to help create a just society. Each of these things is in some sense "the goal" of Section 2.

It must be clear, however, that not all of these legislative purposes can be invoked in an action under the FTC Act. Senator Sherman might have described his ultimate goal as the creation of a just society, but this cannot be a basis for defining the spirit of that statute. If it were, the Commission would be able to frame any public policy that it believed was wise, could assert that this policy tended toward the creation of a just society, could point out that the policy served the same end as the Sherman Act, and could then enforce compliance with that policy under Section 5 on the ground that it was a means of carrying out the spirit of the Sherman Act.

An initiative based on the creation of a just society is the extreme case. It would not require extensive analysis to conclude that this was not a proper use of Section 5. The proposition serves, however, to illustrate a problem that frequently arises in more subtle forms. There are many possible Section 5 actions which would implement legislative goals somewhat narrower than the achievement of a just society, but still broader than the basic letter of the statute.<sup>120</sup> The Commission might consider a no-fault monopoly action, for example, enforcing the Sherman Act's underlying goal of eliminating monopoly power, but escaping from the restriction of that statute to active forms of monopolization. The Commission might also consider similar initiatives based on the spirit of the Clayton Act. It might, for example, challenge a

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<sup>119</sup> Parallel goals each reflect an independent legislative purpose, and so either of them may properly be the basis for a Section 5 action. In the case of conflicting goals, on the other hand, a legislative majority could not normally have been found for either goal, and so a Section 5 action should be confined to those points on which a legislative majority can affirmatively be shown to exist. This often may be only the letter of the statute, plus more or less technical corrections.

<sup>120</sup> It cannot be emphasized too strongly that the examples given in this and the following paragraphs are only examples. They are stylized hypothetical cases chosen in the hope of illustrating and clarifying the underlying legal theory. Whether such cases should actually be resolved in the manner suggested when viewed amid the complexities of the real economy is a different problem, and one that would call for far more extensive analysis of the business consequences and of the individual legislative histories than has been given here.

large but purely conglomerate merger on the theory that it violated the Section 7 policy against excessive concentrations of social and political power, even though the merger was unlikely to bring about any reduction in the price competition that is the apparent focus of the Clayton Act. Each of these initiatives would utilize a Section 5 spirit theory to vindicate an unquestioned goal of the underlying antitrust legislation. The issue is whether that goal is a proper basis for an FTC case, or whether it instead lies too far removed along the spectrum of concentric legislative ends.

This issue has not been squarely addressed by the courts, and so we do not have authoritative criteria for determining the limits of the spirit theory. An approximate formulation would nonetheless seem possible. Concentric goals would appear to be relevant to Section 5 if they fall within a range of "reasonably central" legislative purposes. This test should be applied through an examination of the letter of the underlying statute.

The truly central legislative purposes will ordinarily be those that are expressly mentioned as the statute's key concepts. Section 1 of the Sherman Act, for example, has two such key concepts. It is concerned (1) with combinations (2) that tend to restrict competition. The spirit theory of Section 5 can therefore be used to expand or modulate those key concepts in light of the special characteristics of an FTC action.<sup>121</sup> Section 5 can expand the definition of "combination" to reach anticompetitive situations that otherwise might escape, for example, or it can reduce the quantum of present harm to competition that must be shown in order to constitute a violation of the Act.<sup>122</sup> The spirit theory cannot be used, however, where it would directly contradict one of the key elements of the statute, or where it would be based on an underlying legislative goal that is not reflected in the key elements at all. Such an expansive course would not have enough limiting mechanisms to ensure satisfactory adherence to the congressional intent.

To illustrate, a Section 5 action premised on a theory of no-fault (or "no-conduct") monopolization would probably be jurisdictionally permissible, since this would involve only a modulation of the Sherman Act's existing ban against firms that "monopolize" a line of commerce.<sup>123</sup> An action challenging a conglomerate merger on the basis of its size alone, however, would probably not be permissible. Such a theory would directly contradict, rather than merely modify, the limitation of the Clayton Act to mergers that threaten a substantial lessening of competition.

The conclusions reached by examining the statute for its key elements should be cross-checked against the legislative history. This examination may

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<sup>121</sup> See note 112 *supra*.

<sup>122</sup> Section 5 has already been used to reduce the quantum of harm below that which would be required by the Clayton Act. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). A similar holding might be found for the Sherman Act as well. See *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 8-9 (7th Cir. 1971). There the respondent's conduct resembled acts of monopolization, although they were anticompetitive to a lesser degree than might have been required in a pure Sherman Act case.

<sup>123</sup> This assumes that the use of the active verb "monopolize" does not itself indicate an affirmative desire to limit the statute to cases of active misconduct.

reveal that a major goal was simply omitted from explicit mention in the details of the statute, or, conversely, that what appears to be a key element is in fact of little importance. Our primary focus should remain on the letter of the statute, however, since the inclusion of a term there offers a more objective measure of its importance to the Congress. Through those means an action based on the spirit of the Sherman Act should be kept acceptably close to the original legislative intent.

Thus far most "spirit" cases have involved relatively close analogies to the letter of the Sherman Act, and hence have not actually tested the criteria for reaching conduct in which the analogies are more remote. The spirit theory has, however, been used to make at least one significant extension of this sort. The extension came in the cases that have considered conscious parallelism. These cases used Section 5 to modulate the concept of "combination or conspiracy"—that is, the concept of conscious agreement—that appears in the letter of the Sherman Act.

"Conscious parallelism" refers to the interdependent behavior on the part of firms that, while not explicitly colluding, still take account of one another's actions when making their business decisions. It is a pattern of conduct most often encountered in oligopolistic industries.<sup>124</sup> Of course, not all forms of mutual awareness are undesirable. It is to be expected that every businessman will take some account of his competitor's actions. In a fully-developed case of conscious parallelism, however, the dialectic of actions among the firms can be exceptionally detailed and subtle, and may amount to a system of sign language or silent communication. It may sometimes result in coordinated pricing and output decisions that achieve supracompetitive profits and thus may result in the anticompetitive consequences of collusion without actual conspiracy.<sup>125</sup> Conscious parallelism might best be combatted under a theory of incipient conspiracy, relying on the *Cement Institute* and *Triangle Conduit* cases discussed in the previous section.<sup>126</sup> Such conduct also might be reached, however, on a theory that the practice violates the spirit of the Sherman Act. Conscious parallelism can result in many of the same evils that overt collusion would bring, and therefore can be found contrary to the spirit of Section 1.<sup>127</sup>

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<sup>124</sup> For a well-balanced discussion of the relationship between market structure and economic performance see *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (H. GOLDSCHMID *et al.*, eds., 1974).

<sup>125</sup> See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* at 340-42 (1977). See also III P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 840 *et seq.* (1978) (although questioning whether suitable remedies will often be available).

<sup>126</sup> If the evidence of direct contact among the firms is sufficient, and the parallelism of their behavior sufficiently clear, the situation might be reached under the letter of the Sherman Act, on the theory that a tacit agreement among competitors can be deduced from the circumstantial evidence of their economic conduct. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 316 (N.D. Cal. 1971); R. POSNER, *ANTITRUST LAW—AN ECONOMIC PERSPECTIVE* at 55-71 (1976). The alternative theories reviewed here, however, can allow the Commission to reach patterns of conduct that are less fully developed, or on which the quantum of available evidence is less.

<sup>127</sup> For a more detailed treatment of these issues, see Note, *Oligopoly and Section 5 of the Federal Trade Commission Act*, 13 B.C. IND. & COM. L. REV. 113 (1971). This article also contains an excellent general review of the law under Section 5.

Some support for this proposition may be found in one of the first cases to be decided under Section 5, *FTC v. Beech-Nut Packing Co.*<sup>128</sup> *Beech-Nut* involved an elaborate system of resale price maintenance, instigated by the manufacturer but enforced by jobbers, dealers, and other parties at all levels of the distribution system. Some "contract" in restraint of trade, either express or implied, was presumably required to harmonize the efforts of so many parties. The Commission, however, accepted a stipulation to the effect that neither a contract nor an agreement existed. It charged Beech-Nut only with the unilateral adoption and enforcement of the system. The court of appeals reversed the resulting conviction, holding that unilateral conduct was protected by the Supreme Court's decision in *United States v. Colgate*.<sup>129</sup>

The Supreme Court reversed again, upholding the original charges against Beech-Nut. It agreed that the Commission's stipulation had precluded a Sherman Act charge, but rested its decision on the underlying policy of that statute. "The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are the unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress."<sup>130</sup> The Court determined that the spirit of the Sherman Act condemned parallel actions in restraint of trade, even in the absence of agreement. The Court then examined the facts and found "suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."<sup>131</sup> The Court therefore upheld the Commission's finding of an illegal restraint of trade.

It is possible to make too much of this decision. It may be argued that the decision should be confined to the unusual procedural context in which it arose. The Supreme Court clearly believed that there *was* an agreement in restraint of trade, and the opinion can be explained as merely an effort to find a way around the Commission's tactical error in accepting a stipulation that there was none. One author accordingly concluded that *Beech-Nut* was an aberration, and suggested that the case does not establish a general rule under which Section 5 can be used to extend the reach of the Sherman Act.<sup>132</sup>

*Beech-Nut* was to be cited again by the Supreme Court, however, and in an important conscious-parallelism case. In *FTC v. Cement Institute*<sup>133</sup> the Court found ample evidence of conspiracy among the cement companies which had adopted delivered-pricing systems. Then, in a footnote, the Court made the following observation:

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<sup>128</sup> 257 U.S. 441 (1922).

<sup>129</sup> 250 U.S. 300 (1919).

<sup>130</sup> 257 U.S. at 453.

<sup>131</sup> *Id.* at 455.

<sup>132</sup> See Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULLETIN 161, 168 (1960).

<sup>133</sup> 333 U.S. 683 (1948); see text at note 46 *supra*.

While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Trade Commission Act.<sup>134</sup>

This reference presumably leaves the door open to a conscious-parallelism action under Section 5.

### B. *The Spirit of the Clayton Act*

Just as with the Sherman Act, it is also well settled, as a matter of general principle, that Section 5 will reach conduct that violates the spirit of the Clayton Act. "It is, of course, well established that the Commission has broad power to apply § 5 to reach transactions which violate the standards of the Clayton Act, although technically not subject to the Act's prohibitions."<sup>135</sup> When descending from general principles to specifics, however, the situation becomes more complicated.

The problem is that it is difficult to identify the spirit—the underlying legislative purpose—behind any particular provision of the Clayton Act. This is so because the Clayton Act is a narrower and more focused statute than the Sherman Act. It enumerates specific forms of conduct which, under specific circumstances, will be illegal. Congress obviously intended to prohibit that conduct. The question then arises, however, of whether this enumeration exhausted the legislative purpose, so that conduct generally similar to a Clayton Act violation, but falling outside the specific provisions of the statute, was intended to be permissible. In brief, the problem is when to apply the maxim of *expressio unius est exclusio alterius*.<sup>136</sup>

#### 1. The General Rule

There is no single answer to this question. The issue instead must be separately resolved for each term of the Clayton Act. In some provisions Congress drew a precise line between legal and illegal conduct while in other provisions it merely identified particularly flagrant abuses and declared that those, at least, were improper. Two examples will illustrate this distinction. Section 2(a) of the Robinson-Patman Act<sup>137</sup> (a part of the Clayton Act) prohibits, under certain circumstances, the charging of discriminatory prices for commodities "of like grade and quality."<sup>138</sup> It is clear that this term exhausts the legislative intent on the subject. There does not exist a more general legislative purpose opposed to all price differences, on the basis of which one

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<sup>134</sup> *Id.* at 721 n.19, citing *Beech-Nut. But cf. Boise Cascade Corp. v. FTC*, Dkt. No. 78-1757 (9th Cir.) (May 9, 1980).

<sup>135</sup> *United States v. American Building Maintenance Industries*, 422 U.S. 271, 279 n.7 (1975).

<sup>136</sup> It should be noted that this maxim is increasingly considered unreliable. See *National Petroleum Refiners' Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

<sup>137</sup> 15 U.S.C. § 13(a) (1976).

<sup>138</sup> *Id.*

could bring a Section 5 action challenging price discrimination between goods of different grade or quality. By contrast, however, other terms of the Act do not exhaust the legislative intent. Section 2(d) of the Robinson-Patman Act<sup>139</sup> forbids the granting, but not the receipt, of discriminatory promotional allowances. It is clear in this case that there is a general policy against discriminatory allowances. An action may therefore be brought under Section 5, enforcing the spirit of this legislation, to reach the buyer who induces the grant of such allowances to himself.

The remainder of this section will attempt to trace the ways in which the decided cases have categorized the various terms of the Clayton Act. It also will attempt to frame a general rule of statutory construction that can be applied to sections of the Act that have not yet been litigated. At some risk of getting ahead of our story, that rule can be summarized as follows: "There is a presumption that the specific terms of the Clayton Act do not exhaust the legislative intent, and a Section 5 action may normally be brought to halt analogous<sup>140</sup> conduct that is not expressly barred by the Act. This presumption can be rebutted by reference either to the legislative history or to the internal logic of the statutory term at issue, but the reasons for holding the legislative intent to be exhausted must affirmatively appear." The task of justifying this rule of construction will begin with the legislative history of the Clayton Act in general, and it is to that history that we now turn.

## 2. The Legislative History

The Clayton and Federal Trade Commission Acts were passed by the same Congress, and within two weeks of one another. It is therefore clear that to some extent they represent a coordinated legislative approach to the general problem of trade restraints,<sup>141</sup> and must to some extent be construed *in para materia*.<sup>142</sup> To say that the statutes must be construed together, however, only begins the analysis. The relationship between them can be characterized in either of two general ways. On the one hand it might be thought that they represent a single program—a unified vision—and hence should be read to minimize any overlap between them. Under this hypothesis a distinct "territory" would be allocated to each statute, and matters expressly regulated by the Clayton Act would presumptively be withdrawn from the jurisdiction of the FTC Act. On the other hand, however, it might be said that the two

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<sup>139</sup> 15 U.S.C. § 13(d) (1976).

<sup>140</sup> The analogy presumably would be shown by the same tests used to make out a violation of the spirit of the Sherman Act: (1) an analogous end result being brought about; (2) in an area defined at a level of generality that makes it reasonably central to the original statutory intent. See text at note 116 *supra*.

<sup>141</sup> Congressmen had both bills in mind when they were debating the FTC Act. See, e.g., 51 CONG. REC. 12273 (1914) (remarks of Senator Newlands); *id.* at 11867 (remarks of Senator Cummins); *id.* at 12030 (remarks of Senator Reed); *id.* at 11536 (remarks of Senator Lippitt).

<sup>142</sup> See *United States v. American Building Maintenance Industries*, 422 U.S. 271, 275-83 (1975); *FTC v. Reed*, 243 F.2d 308, 309 (7th Cir. 1957), *cert. denied*, 355 U.S. 823 (1957).

statutes represent two different approaches to the reform of the Sherman Act, each backed by its own faction in the legislature, so that they would provide complementary rather than mutually-exclusive plans of antitrust enforcement. In this event the limitations in the Clayton Act would not diminish the independent reach of the FTC Act.

A review of the legislative history makes it clear that the second alternative is the correct one. The two statutes originated independently and proceeded through Congress in relative isolation from one another. They represented two distinct schools of thought as to the best method of antitrust enforcement.<sup>143</sup> One school, backed by Woodrow Wilson in the 1912 election campaign, believed it was important to provide businessmen with clear standards of legal and illegal conduct. This group favored the specific prohibitions of the Clayton Act.<sup>144</sup> A second faction believed that unfair conduct was too protean in its shape ever to be captured by specific proscriptions. Hence this group favored the more general language of Section 5.<sup>145</sup>

These divergent approaches were harmonized, in the minds of the legislators, by a simple device. The specific prohibitions of the Clayton Act were taken as a listing of particularly pernicious forms of "unfair competition." Congress withdrew these particular business practices from the discretion of the Commission and expressly declared them to be illegal. Other business practices, however, not specifically outlawed, remained subject to the Commission's judgment under the general authority of Section 5. As a result, the fact that a practice falls close to, but outside of the Clayton Act creates no inference that Congress intended to permit it.<sup>146</sup>

A few quotations will illustrate how the relationship between the two statutes was perceived. Congressman Covington, the principal manager for the FTC bill in the House of Representatives,<sup>147</sup> reported to his colleagues that Section 5 "embraced within its broad and elastic scope all the specific practices against which there had been prohibitions in the Clayton Bill."<sup>148</sup> Senator

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<sup>143</sup> See 51 CONG. REC. 15996-99 (1914) (remarks of Senator Chilton).

<sup>144</sup> Cf. note 20 *supra*. See also 51 CONG. REC. 12935-38 (remarks of Senator Reed).

<sup>145</sup> See note 23 *supra*. The advocates of Section 5 had, if anything, the upper hand in the debates, and eventually converted President Wilson to their view. Thereafter he virtually ignored the Clayton Act. See LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA* at 72-73 (1954); Travers, *Interlocks in Corporate Management and the Anti-trust Laws*, 46 TEX. L. REV. 819, 831 (1968).

<sup>146</sup> Rather than casting the proposed rule of construction in terms of a special presumption, it can therefore also be understood as one application of the general principle that implied exemptions from the antitrust laws (here, exemptions from Section 5) are not favored.

<sup>147</sup> See 51 CONG. REC. 14939 (1914) (remarks of Congressman Stevens).

<sup>148</sup> 51 CONG. REC. 14927. Senator Clapp, also a member of the Conference Committee, and speaking at a time when the proposed Clayton Act still contained criminal sanctions, expressed the point in this way:

[W]hile the definition of "unfair competition" is, I believe, broad and sufficient if properly interpreted, what objection can there be to taking those things which we all agree clearly fall within the purview of unfair competition and prohibiting them, declaring a violation of the prohibition to be a

Chilton, one of the Senate managers of the Clayton Act, stated that "the Senate and House have adopted a theory of handling those practices in competition which were not reached by the Sherman law; they condemned four of them specifically [in the Clayton Act] and all of them generally by section 5 of the Trade Commission bill."<sup>149</sup> Indeed, Senator Newlands, the principal sponsor of the FTC Act, was "near cavalier"<sup>150</sup> in his belief that the Clayton Act was merely duplicative:

[The Judiciary Committee] can, if it chooses, taking the view that is entertained by the Interstate Commerce Committee, conclude that section 5 covers all the various practices that in the common vernacular are termed 'unfair competition,' and having come to that conclusion, the Judiciary Committee can, if it chooses, leave out all legislation with reference to specific practices which are today regarded as unfair competition, or they can put them in, according to their pleasure.<sup>151</sup>

It can be seen, therefore, that the congressional understanding of the relationship between Section 5 and the Clayton Act was not one of mutual

crime, and seeking to punish the crime with a penalty? And to the extent to which we define any particular offense we withdraw that question from the judgment of the commission . . .

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[T]hose things that may be made plain, upon which we are generally agreed, should be prohibited. We should prohibit them, and then leave the commission with that territory to work in which we are unable to cover by specific cases.

51 CONG. REC. 14257, 14259 (1914).

<sup>149</sup> 51 CONG. REC. 14226 (1914). Senator Reed had a similar perception: . . . I want somebody to tell me why Congress should not specify that particular act and denounce it here and now as criminal. To do so will not interfere with the trade commission; it will help the trade commission; it will not destroy its power; it will make the path certain and the remedy complete. All you have done is to provide a penalty . . . which can be enforced without in any way interfering with the trade commission.

51 CONG. REC. 14226 (1914). Some additional support for the proposition may be found in the 1913 Cummins Report:

{O}ur legislation should . . . recite certain known forms of combination and declare them to be unlawful because in restraint of trade. With respect to other forms, we should declare that if restraint is established the burden of proof is upon the person or corporation involved to show that the restraint is reasonable.

S. REP. No. 1326, 62d Cong., 3d Sess. at 12 (1913). This committee report antedates the introduction of the FTC and Clayton Acts themselves, and so it is not formal authority for the issue at hand. Since the report constituted the background study for both statutes, however, see text at note 11 *supra*, it still has some weight. Although the committee recommendations with respect to a revised burden of proof were not accepted, it appears significant that the report contemplates the coexistence of both general and specific prohibitions. See also Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 ACAD. POL. SCI. PROC. 666 (1926).

<sup>150</sup> Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILLANOVA L. REV. 517, 537 (1962).

<sup>151</sup> 51 CONG. REC. 12030 (1914). For more reflective comments to the same effect see 51 CONG. REC. 11537 (1914) (colloquy between Senators Cummins and Newlands).

exclusivity. Rather, statements by congressmen responsible for the two acts clearly indicate that the Clayton Act is a subset of Section 5, and its prohibitions are a listing of some specific forms of "unfair competition."<sup>152</sup>

This proposed rule of construction is confirmed by most of the cases that have considered violations of the spirit of the Clayton Act. These cases will be reviewed under the remaining headings of this section. The discussion will touch in sequence on: (1) the inducement of discriminatory promotional allowances; (2) the issuance of subpoenas; (3) the ordering of divestiture in merger cases; and (4) the elimination of the requirement for a "substantial lessening of competition."<sup>153</sup>

### 3. Inducement of Discriminatory Allowances

The best-known line of cases based on the spirit of the Clayton Act are those which interpret Section 2(d). These are the cases which consider whether a buyer may be prosecuted under Section 5 for inducing a seller to grant him discriminatory promotional allowances. This particular conduct falls outside of the letter of the Clayton Act. Section 2(d) only prohibits a seller from *granting* discriminatory promotional allowances,<sup>154</sup> and Section 2(f) only

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<sup>152</sup> The commentators generally have shared these congressional observations. Professor Stone has probably best summed up the relationship between the FTC and Clayton Acts:

Three principal factors led Congress to pass the Clayton Act in spite of the relatively clear intention of the framers of the FTC Act and the Conference Committee that the phrase "unfair competition" was to embrace the specific practices included in Sections 2, 3, 7, and 8 of the Clayton Act. First, the legislative travels of the two bills were dissimilar. While the Federal Trade Commission bills originated in the commerce committees of the Senate and House, the Clayton Act originated in the judiciary committees; and when the Clayton bill was still in committee, the FTC bill was being debated on the floor. Second, the Clayton bill originally, and for a long period in its legislative travels, was a criminal bill, while the Trade Commission bill was at all times a civil-administrative piece of legislation. Third, and most important, Congress felt particularly strongly about certain unfair methods of competition. Senator Moses Clapp, one of the Clayton bill's most forceful advocates, said succinctly that the four modes of competition proscribed by the Clayton Act were specific examples of unfair competition.

A. STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST* 48 (Cornell Univ. Press, 1977). See also G. HENDERSON, *THE FEDERAL TRADE COMMISSION* p. 27 (1924).

<sup>153</sup> Taken in combination, these lines of authority suggest that the Commission has considerable latitude in enforcing the spirit of the Clayton Act. In reviewing the cases one red herring should be given a decent burial. Respondents who are charged with violating the spirit of the Clayton Act often retort with a Supreme Court citation to the effect that the Commission cannot supply "what Congress has studiously omitted." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). This is quite true as a general proposition. *Simplicity Pattern* stands for the proposition only in the most abstract terms, however, and it has no direct bearing on the propriety of most FTC actions. The case is distinguishable in two respects. First, it was referring to the powers of a court rather than to the powers of the Commission. Second, it involved an attempt by a defendant to imply a defense in the Clayton Act, which is obviously a very different matter from an attempt by the Commission to imply a particular cause of action under the general authority expressly conferred by Section 5.

<sup>154</sup> 15 U.S.C. § 13(d) (1976).

prohibits a buyer from inducing or receiving discriminations in *price*.<sup>155</sup> The Commission and the courts have agreed, however, that the inducement of excessive promotional allowances is contrary to the underlying spirit of the statute. They have therefore held that such conduct is a violation of Section 5. This proposition was first established in the case of *Grand Union Co. v. FTC*.<sup>156</sup>

*Grand Union* was in many respects an uncomplicated case. It was not necessary to determine whether the spirit theory would empower the Commission to announce a wholly new competition rule. A general legislative policy against discriminatory promotional allowances was apparent on the face of Section 2(d), and thus a Section 5 action could be justified by an affirmatively expressed spirit of the Clayton Act rather than having to be implied by analogy in the face of legislative silence. The Second Circuit pitched its decision on the safer, narrower ground that was available, and emphasized how small an extension it was making:

Nor can we accept the notion the Commission is here legislating a 'new antitrust prohibition.' The practice itself is clearly proscribed by § 2(d); . . . The Commission is not upsetting specific Congressional policies; the proceedings did not 'circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act.' No economic activity, once lawful, had been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from the technical confines of § 2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent abuse of *buying* power.<sup>157</sup>

The appeals court's decision to permit Section 5 enforcement of the spirit of the Clayton Act was therefore achieved through a cautious and wholly technical expansion of the scope of Section 2(d).<sup>158</sup> Despite its limited holding, *Grand Union* still attracted considerable adverse comment. The commentary did not dispute the reasonableness of what was actually decided, but it clearly foresaw, and was alarmed by, the potential reach of the underlying

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<sup>155</sup> 15 U.S.C. § 13(f) (1976).

<sup>156</sup> 300 F.2d 92 (2d Cir. 1962). The case had given rise to considerable commentary when it was decided at the Commission level. See Alexander, *Section 5 of the FTC Act: A Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317 (1961); Rahl, *Does Section 5 of the FTC Act Extend the Clayton Act?*, 5 ANTITRUST BULL. 533 (1960); Note, 49 GEO. L.J. 379 (1960); Note, 8 U.C.L.A. L. REV. 243 (1961).

<sup>157</sup> 300 F.2d at 98 (footnotes omitted) (emphasis in original).

<sup>158</sup> The narrowness of this initial decision was understood by *Grand Union's* companion case, *American News Co. v. FTC*, 300 F.2d 104, 111 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962). There the court expressly reserved the question of whether Section 5 would reach an *unsuccessful* attempt to induce the grant of improper allowances. *Id.* The court observed that this would make a substantive rather than a merely "technical" extension in the law, since there did not already exist a parallel prohibition on the seller. *Id.* at 98.

theory.<sup>159</sup> Such arguments, however, proved fruitless. *Grand Union* appears to have been uniformly followed by later cases considering the same issues.<sup>160</sup>

#### 4. Issuance of Subpoenas

The issue that could be avoided in *Grand Union* was squarely presented to the courts when they had to determine the scope of the FTC's subpoena power. The courts were asked to imply a power that most certainly did not appear in the Clayton Act. Both the Clayton Act and the FTC Act contain sections dealing with procedural and housekeeping matters. Section 11 of the Clayton Act<sup>161</sup> sets out procedures for hearings, cease-and-desist orders, enforcement by the court of appeals, and similar matters. This section, however, does not confer subpoena powers on the enforcement agencies. Such powers were conferred by Section 9 of the Federal Trade Commission Act,<sup>162</sup> but only "for the purposes of this Act." When the FTC attempted to issue a subpoena in a Clayton Act proceeding, therefore, there was some question as to the propriety of its action. There was nothing on the face of the two statutes to affirmatively indicate that Congress intended them to be other than what they appeared—two complete and separate sets of procedure. The inference of subpoena power for a Clayton Act proceeding could be justified only on the basis of an interpretation that the limitations of the Clayton Act did not mark the outer boundaries of the legislative intent, and that they could therefore be overridden by Section 5. If such a presumption had to be made, the courts were willing to make it. It appears that the circuit courts have uniformly endorsed this interpretation and have upheld the Commission's subpoena authority in actions brought solely under the Clayton Act.<sup>163</sup>

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<sup>159</sup> See, e.g., Handler, *Review of Antitrust Developments*, 17 N.Y.B.A. RECORD 402-03 (1961) ("the specific acts of Congress in the antitrust field which the Commission administers [are thus made] essentially superfluous"). See also Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75 (1961); 57 F.T.C. 382, 429 (1960) (Commr. Tait dissenting from original decision) ("too much supplement and too little bolster"); Casenote, 61 COLUM. L. REV. 291 (1961). This criticism tends to downplay the legislative history discussed above, however. The history shows that the Clayton Act was intended to ensure that certain defined acts would be illegal, not that all other acts would be legal.

<sup>160</sup> See, e.g., *Alterman Foods, Inc. v. FTC*, 497 F.2d 993 (5th Cir. 1974); *FTC v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965); *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Giant Food Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963); cf. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

<sup>161</sup> 15 U.S.C. § 21 (1976).

<sup>162</sup> 15 U.S.C. § 49 (1976).

<sup>163</sup> See, e.g., *FTC v. Tuttle*, 244 F.2d 605 (2d Cir.), cert. denied, 354 U.S. 925 (1957); *Menzies v. FTC*, 242 F.2d 81 (4th Cir. 1957), aff'g 145 F. Supp. 164 (1956), cert. denied, 353 U.S. 957 (1957); *FTC v. Reed*, 243 F.2d 308 (7th Cir.), cert. denied, 355 U.S. 823 (1957). But see *FTC v. Rubin*, 145 F. Supp. 171 (S.D.N.Y. 1956), rev'd per curiam, 245 F.2d 60 (2d Cir. 1957). The *Papercraft* decision is not to the contrary. See *United States v. Papercraft Corp.*, 540 F.2d 131 (3d Cir. 1976). There the court held that the Commission, in imposing penalties for failure to divest an improper acquisition, could assess only the fines provided by the Clayton Act rather than the larger fines provided by the FTC Act. This decision was based, however, on the fact that the

Although the subpoena cases demonstrate support for the proposed rule of construction, they are not wholly conclusive on that question. Their value as precedent is diminished by two special considerations. First, they relate only to a question of procedure, which is different from, and arguably less important than, questions of substantive law as to which different rules of construction might apply.<sup>164</sup> Second, the context of these decisions was such that a court could deny that it was framing general rules of construction at all. One court claimed, for example, albeit with considerable sophistry, that it was merely construing the procedural terms of Clayton Act Section 11 as incorporating by reference the substantive terms of FTC Act Section 9.<sup>165</sup> Thus the question at issue here was not always directly addressed. It was, however, considered somewhat more clearly in the merger cases discussed in the following section.

### 5. Merger Divestiture

Although it is *Grand Union* which is usually cited for the proposition that the FTC's powers are presumptively not limited by the specific terms in the Clayton Act, this point was established earlier, and by a higher court, in a less well-known line of cases dating back to the 1920's. These are the decisions considering the Commission's power to order divestiture of assets that had been acquired in violation of Section 7.

A brief historical interpolation is needed to put these cases in perspective. For many years the Clayton Act did not reach, as it now does, the acquisition of assets. Section 7 instead barred only the acquisition of "the whole or any part of the stock or other share capital of another corporation. . . ." Section 11 was similarly limited, authorizing the Commission only to order an offending company to "divest itself of the stock held." These limitations created the expected problems of enforcement. A company could entirely escape the restrictions of the Clayton Act by the simple expedient of buying a competitor's assets. It could also escape the Act, even if it had bought the forbidden stock, by using its voting control over the acquired company to transfer that company's assets to itself. Thereafter any Commission order to the company to divest itself of the stock would be a meaningless gesture.

In 1926 the Commission brought the *Western Meat* case against a company that had executed this last technique.<sup>166</sup> Attempting to break out of the procedural constraints in which it found itself, the Commission added to its order a requirement that the assets themselves be divested. This it did on the theory that the assets were a fruit of the illegal stock acquisition. The Supreme Court reluctantly reversed, noting that the Commission's action was based solely on Section 7 and thus

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Commission had brought its original action under Section 7 of the Clayton Act. The court intimated that both the divestiture order and the penalty could have been based on the FTC Act, provided only that the Commission was consistent in its choice of statute. See 540 F.2d at 138. This same degree of inconsistency was not present in the subpoena cases, however, since the Commission did not have a choice of procedures.

<sup>164</sup> Cf. Casenote, 61 COLUM. L. REV. 291, 294 (1961).

<sup>165</sup> *FTC v. Menzies*, 145 F. Supp. at 169 (1956).

<sup>166</sup> *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

could not escape the Clayton Act's limitation of its remedial powers to stock divestiture. The Court strongly hinted that an action could have been brought under Section 5, however, using the less restricted remedial provisions of the FTC Act.<sup>167</sup>

The Commission accepted the obvious invitation and returned the following year in *FTC v. Eastman Kodak Co.*<sup>168</sup> with a divestiture order based on Section 5.<sup>169</sup> Surprisingly enough, the Supreme Court retreated from its previous position and found this order improper as well. It is difficult to tell why this happened. The judicial language focused at times on the scope of Section 5, and at other times on the intent of the Clayton Act.<sup>170</sup> On balance, however, it appears that the problem did not lie in any general belief that the limitations set out in the Clayton Act remedies must also be read into the remedial provisions of the FTC Act. Rather, the problem seems to have arisen from the belief that there were no divestiture powers contained in the FTC Act at all, irrespective of what the Clayton Act provided.<sup>171</sup> Only after reaching this primary conclusion did the Court consider the Clayton Act, and thereupon reaffirmed its earlier holding that it too contained no provisions authorizing the divestiture of assets.<sup>172</sup>

*Kodak* was a limited case, in other words, construing the letter of Section 5 on a particular issue rather than announcing general principles of Section 5 jurisprudence.<sup>173</sup> And, as so limited, the case has since been "repudiated" by

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<sup>167</sup> The Court stated:

Section 5 of the Act . . . declares unfair methods of competition in commerce unlawful, prescribes the procedure to be followed, and gives the Commission power to require an offending party to cease and desist from such methods. This section is not presently important; the challenged orders sought to enforce obedience to § 7 of the Clayton Act.

*Id.* at 557.

<sup>168</sup> 274 U.S. 619 (1927).

<sup>169</sup> *Id.* at 623.

<sup>170</sup> *See id.* at 623-24.

<sup>171</sup> *Id.* at 623. *See* Chamber of Commerce v. FTC, 280 F. 45, 48 (8th Cir. 1922); National Harness v. FTC, 268 F. 705, 707 (6th Cir. 1920).

<sup>172</sup> 274 U.S. at 624 (citing *Western Meat* as controlling).

<sup>173</sup> This was the construction that the Supreme Court itself put on *Kodak* many years later. In *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the following footnote appears:

Actually, the holdings in the three cases that reached this Court, *Thatcher*, *Swift*, and *Arrow-Hart* [the first two being companion cases of *Western Meat*], were quite narrow.\* \* \* They were based not on a lack of substantive power under § 7, but on the enforcement section, § 11, which limited the FTC's remedial powers to 'an order requiring such person to . . . divest itself of the stock held . . . .'

The question of the FTC's remedial powers under § 11 of the Clayton Act is to be distinguished from that of its remedial powers under § 5 of the Federal Trade Commission Act . . . . In *Federal Trade Commission v. Eastman Kodak Co.* . . . the Court, relying on *Thatcher* and *Swift*, held that the Commission had no power to order divestiture in § 5 proceedings. *But cf. Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-131; *Pan American World Airways v. United States*, 371 U.S. 296, 312, and n.17.

374 U.S. at 339-40 n. 17. *Cf. Note*, 26 COLUM. L. REV. 589, 594-96 (1926).

the Supreme Court;<sup>174</sup> Section 5 is now construed as including divestiture powers. Thus the suggestion put forward in *Western Meat* retains its viability. The remedial powers of the Commission under Section 5 are presumptively not limited by the existence of narrower provisions on the same subject contained in the Clayton Act. Moreover, by logical extension, the substantive powers of the Commission under Section 5 should likewise not be limited by the existence of narrower provisions in the Clayton Act. This latter point was addressed in the cases arising under Section 3 of the Clayton Act, to which we now turn.

#### 6. Section 3 and the Requirement for a "Substantial Lessening of Competition"

The three lines of cases discussed above have offered some useful insights into the proper standard of statutory construction, and have generally tended to confirm that the Clayton Act does not exhaust the legislative intent in the areas that it addresses. All three lines of cases, however, dealt with collateral matters. This may be seen by analyzing them in a somewhat stylized way. The *Grand Union* line can be said to have removed a jurisdictional impediment from the Clayton Act, the subpoena line a procedural impediment, and the merger line a remedial impediment. The question of substantive law still remained unanswered. It was still unclear whether Section 5 could, by invoking the spirit of the law, extend the Clayton Act to new substantive conduct that was analogous to, but outside of, the letter of that statute. This question was to be answered in the context of Section 3, the Clayton Act prohibition against exclusive-dealing contracts. Section 3 forbids sales contracts made on the condition that the buyer "shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller."<sup>175</sup> Section 3 applies, however, only where the effect of such a contractual term "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."<sup>176</sup>

The relationship between this provision and Section 5 was first considered in two early Supreme Court cases.<sup>177</sup> In each, the Commission brought actions under both Section 3 and Section 5. In each instance the Commission was reversed.<sup>178</sup> Although these cases might be decided differently today, however, they were grounded upon relatively narrow factual determinations and thus did not hold generally against actions based on the spirit of the Clayton Act. In the first of these cases, *FTC v. Curtis Publishing Co.*,<sup>179</sup> the Commission challenged the use of exclusive agents in magazine

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<sup>174</sup> *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.4 (1966) (*Kodak* "has been repudiated").

<sup>175</sup> 15 U.S.C. § 14 (1976).

<sup>176</sup> *Id.*

<sup>177</sup> *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *FTC v. Sinclair Oil Co.*, 261 U.S. 463 (1923).

<sup>178</sup> 260 U.S. at 582 (cease and desist order "clearly wrong"); 261 U.S. at 476 (circuit courts' decisions setting aside cease and desist orders affirmed).

<sup>179</sup> 260 U.S. 568 (1923).

distribution. The Supreme Court approved the practice, noting that it involved a *bona fide* agency relationship rather than a sale, thus placing it outside of Section 3.<sup>180</sup> The Court further noted that the practice as actually used was fair and reasonable, thus sheltering it from condemnation under Section 5.<sup>181</sup> The second case, *FTC v. Sinclair Oil Co.*,<sup>182</sup> involved an oil company's practice of leasing gasoline pumps to service stations at a nominal charge, on condition that only the company's products be dispensed from those pumps. The Court held that this arrangement was permissible under Section 3 because the service stations remained legally free to sell other brands of gasoline from other pumps.<sup>183</sup> The arrangement was similarly found permissible under Section 5 because, in the Court's opinion, it would not create undue market foreclosure as a practical matter.<sup>184</sup>

The most interesting thing about these cases lay in what the Supreme Court did *not* do. It did not confine its analysis to Section 3 of the Clayton Act, dismissing the Section 5 count as an impermissible attempt to extend the former statute beyond its terms. Rather, in each instance the Court considered the Section 5 count on its own merits.<sup>185</sup> Thus from the very beginning of the FTC Act the Court was open to cases challenging conduct that was analogous to Clayton Act violations, even in the absence of any affirmative indication that the legislature desired such extensions.

The Supreme Court's long-standing promise came to fruition in the 1966 case of *FTC v. Brown Shoe Co.*<sup>186</sup> This is the same *Brown Shoe* decision that was discussed in an earlier section, involving a program of designated exclusive-dealing outlets. The Court conceded that too few dealers were involved in the program to threaten, at that time, a substantial lessening of competition, and thus no challenge could be brought under the letter of Section 3. The Court nonetheless struck the program down, as we have seen, on the theory that it constituted an incipient violation of the Clayton Act.<sup>187</sup> There the matter might have rested. In fact, however, the Court went further. It announced an alternative basis for its decision. The Court found that the practice was also illegal because it constituted a present violation of the spirit of Clayton Act:

[T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission 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 those laws . . . . This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3

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<sup>180</sup> *Id.* at 581.

<sup>181</sup> *Id.* at 581-82.

<sup>182</sup> 261 U.S. 463 (1923).

<sup>183</sup> *Id.* at 473.

<sup>184</sup> *Id.* at 475-76.

<sup>185</sup> *Id.*; 260 U.S. at 579-81.

<sup>186</sup> 384 U.S. 316 (1966).

<sup>187</sup> 384 U.S. at 321-22. See text at notes 92-94 *supra*.

of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market.<sup>188</sup>

It will be observed that the *Brown Shoe* decision meets many of the criteria for which we have been searching. It involves substantive conduct rather than collateral issues of jurisdiction and procedure. Moreover, it involves, unlike *Grand Union*, a fact pattern as to which the legislative intent was ambiguous. The legislature may have wished to permit (though not to require) the condemnation of all exclusive-dealing contracts, on the theory that they have few countervailing benefits for society. With equal plausibility, however, the legislature may have wished to permit condemnation of only those that threaten a substantial lessening of competition, on the theory that individuals should otherwise be free to regulate their affairs as they please. There is no way of telling the true legislative intent from the face of the statute, and the Court did not think it necessary to delve into the legislative history. It simply affirmed on the basis of a general analogy to the statute. By so doing, the Court also affirmed the principle that, in ambiguous cases, the Commission is free to extend the substantive provisions of the Clayton Act by means of Section 5 actions based upon its spirit.<sup>189</sup>

The principle enunciated in *Brown Shoe* has recently received some indirect but powerful support. For some years the Commission has taken the position that Section 5 may be used to extend Section 7 of the Clayton Act to cover the acquisition of partnerships, as well as of the "corporations" that are specifically covered by that statute.<sup>190</sup> The Commission has made this extension only in its own decisions,<sup>191</sup> which have evidently not been subjected to judicial review. The Supreme Court, however, in an apparently gratuitous footnote, has strongly hinted that the extension was proper:

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<sup>188</sup> 384 U.S. at 320-21 (footnotes omitted). That this is a full-fledged alternative ground is not entirely beyond dispute. It might be argued that it is dictum, since the final sentence of the opinion was cast in incipency terms alone: "[W]e hold that the Commission acted well within its authority in declaring the Brown Shoe franchise program unfair whether it was completely full blown or not." *Id.* at 322. The two concepts are treated in the body of the opinion on such equal (if undifferentiated) terms, however, that the better reading seems to be that of alternative theories.

<sup>189</sup> *Brown Shoe* has since been followed in *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19-21 (7th Cir. 1971) (exclusive-dealing contracts). See also *LaPeyre v. FTC*, 366 F.2d 117, 120 (5th Cir. 1966). *LaPeyre* involved discrimination in lease charges, rather than in the "prices" expressly covered by the Clayton Act. The Fifth Circuit, however, although upholding the charges against the respondent, did not rest its decision explicitly on the policy of the Clayton Act. This omission may only reflect the fact that the case was begun, and its pleadings framed, before *Brown Shoe* had been decided.

<sup>190</sup> See 15 U.S.C. § 18 (1976).

<sup>191</sup> See *Beatrice Foods Co.*, 67 F.T.C. 473, 724-27 (1965), modified by consent, 1967 Trade Cases ¶ 72,124 (9th Cir. 1967) ("Applying Section 5 to non-corporate acquisitions effectuates, rather than circumvents or conflicts with, Congress' policy with respect to the prevention of anticompetitive acquisitions"). Commission decisions have utilized Section 5 in order to enforce the spirit of Section 7 in a number of other respects as well. See *Dean Foods Co.*, 70 F.T.C. 1146, 1288-92 (1966), modified by consent, 1967 CCH Trade Cases ¶ 72,086 (7th Cir. 1976) (acquired firm held liable);

It is, of course, well established that the Commission has broad power to apply § 5 to reach transactions which violate the standards of the Clayton Act, although technically not subject to the Act's prohibitions . . . . We have no occasion in the case now before us to decide whether application of § 5 to assets acquisition by or from noncorporate business entities constitutes an appropriate exercise of the power . . . .<sup>192</sup>

Since nothing in Section 7 affirmatively indicates a desire to reach partnerships, this dictum again suggests a presumption in favor of Commission discretion.<sup>193</sup>

#### V. CONDUCT VIOLATING RECOGNIZED STANDARDS OF FAIR BUSINESS BEHAVIOR

The authority discussed in the previous sections does not exhaust the Commission's powers. The legal theories discussed above are all means by which the Commission can enforce more or less clearly expressed legislative antitrust policies. The Commission was intended to have a broader jurisdiction than that, however. Congress intended that it should also exercise a general mandate to articulate and enforce recognized standards of fair business conduct. Senator Saulbury, a member of the Conference Committee, put the point in the following way:

Courts have always recognized the customs of merchants, and it is my impression that under this act the commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers, and traders, and probably prohibit many practices and methods which have not heretofore been clearly recognized as unlawful.<sup>194</sup>

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Foremost Dairies, Inc., 60 F.T.C. 944 (1962) (acquisition of firms not engaged in interstate commerce); *id.* at 1091-92 (series of acquisitions, no one of which might violate Section 7) (dictum); Beatrice Foods Co., 67 F.T.C. at 727, 731 (same) (dictum). Notwithstanding these relatively numerous cases, however, no reviewing court has yet held that Section 5 will reach any merger, let alone a merger that is outside the letter of Section 7. See note 61 *supra*.

<sup>192</sup> *United States v. American Building Maintenance Industries*, 422 U.S. 271, 279 n.7 (1975) (citations omitted).

<sup>193</sup> The rule of construction suggested in this section is generally similar to the one proposed in Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 844 n.68 (1961). Oppenheim proposes that Section 5 be used to supplement the Clayton Act "only . . . to reach transactions and practices *economically equivalent* to those particularized by the Clayton Act but not within its coverage because of a jurisdictional deficiency." *Id.* (emphasis in original). This test would appear to take the *Grand Union* case as its paradigm, and would appear somewhat narrower than the formula proposed in this paper. It should be noted, however, that the intervening case law, and the *Brown Shoe* decision in particular, has to some extent undercut Oppenheim's restrictive proviso.

<sup>194</sup> See 51 CONG. REC. 12981 (remarks of Senator Sutherland, quoting Senator Saulsbury). For similar references to trade customs see *id.* at 8979 (remarks of Congressman Murdock); *id.* at 13048 (remarks of Senator Cummins).

Senator Newlands expressed the same point in still more general language. He stated that unfair competition "covers every practice and method between competitors upon the part of one against the other that is against public morals, in my judgment, or is an offense for which a remedy lies either at law or in equity."<sup>195</sup> In short, therefore, the Commission was to enforce public policy as well as legislative policy.

This role of the Commission was recognized in *FTC v. Gratz*,<sup>196</sup> the first case to reach the Supreme Court under Section 5. The *Gratz* decision is usually cited as an example of narrow and unsympathetic Supreme Court review, and, in fact, the Commission's determination was reversed in that case. The Court's decision seems best understood, however, as only a reflection of the Court's then-current practice of independently reviewing the Commission's factual conclusions. The legal holding of the case actually was quite generous in its negative implication. The Court found that the words "unfair methods of competition" were "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."<sup>197</sup> From this it appears that conduct opposed to good morals in the enumerated ways *could* constitute a violation of Section 5.<sup>198</sup>

Some years later the Court moved from negative implication to positive holding. In *FTC v. R.F. Keppel & Bro., Inc.*,<sup>199</sup> the Court considered the propriety of a plan for marketing children's penny candy. Under the plan a certain percentage of the candies were packaged with a penny inside the wrapper. Buyers who happened to pick those pieces thus received their purchase for free. The elements of chance in this plan proved irresistible to children, and Keppel accordingly expanded its market share at the expense of competitors who did not adopt the same technique.<sup>200</sup> The Court condemned the marketing scheme as an unfair method of competition. It held that the

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<sup>195</sup> 51 CONG. REC. 11112 (1914). For a more complete discussion of this concept see 51 CONG. REC. 12980 (1914) (remarks of Senator Newlands) ("I think there are certain practices that shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair").

<sup>196</sup> 253 U.S. 421 (1920).

<sup>197</sup> *Id.* at 427.

<sup>198</sup> The Supreme Court subsequently observed that the *Gratz* decision was broader than it has sometimes been interpreted. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (it "would grant the FTC greater power . . . than the panel of the Court of Appeals acknowledges").

<sup>199</sup> 291 U.S. 304 (1934).

<sup>200</sup> *Id.* at 312-13. Thus Keppel's conduct was shown to be a "method of competition." Cf. *FTC v. Radam Co.*, 383 U.S. 643 (1931) (Section 5 applies only where competitors are affected). The Court treated the harm to competition as only a threshold jurisdictional issue, however, rather than as a consideration on the merits, since it proceeded to find the conduct "unfair" on the basis of moral and legislative-policy determinations. 291 U.S. at 310-12.

gambling features of the plan were contrary to public policy, and that the Commission was empowered to halt the scheme under Section 5.<sup>201</sup>

Some general principles can be established when *Gratz* and *Keppel* are considered together. The Commission appears to be empowered to enforce two separate types of public policies. First, it can prevent violation of generally recognized business ethics. Second, it can prevent violation of general substantive statutes in cases where the violation has conferred a cost advantage. The clearest teaching of the two cases concerns the Commission's power to enforce recognized business ethics. The word "recognized" is used advisedly. Both decisions took some pains to note that the applicable moral standards would have originated outside of the Commission itself. *Gratz* referred to practices "heretofore regarded" as improper,<sup>202</sup> while *Keppel* referred to a public policy against gambling that was defined by "the common law and criminal statutes."<sup>203</sup> Such sources are the most suitable foundation for a Section 5 action.<sup>204</sup> This is not to say that the Commission has no power to define public policies on its own initiative. As will be seen in the following section, it has that power as well. Since the limits on that power are not yet precisely defined, however, its exercise will be subject to close judicial review. Whenever possible, therefore, a public-policy action is best founded on the basis of some external authority.

The second teaching of the cases opens an entirely different vista. It appears that the Commission is empowered to prevent the violation of any substantive statute—not merely the violation of an antitrust law—in cases where the violation gives a competitive advantage to the firm committing it. This principle is derived from *Keppel*, where the respondent gained a marketing advantage by breaking the criminal laws relating to gambling.<sup>205</sup> The Court held the practice to be a form of unfair competition.<sup>206</sup> The principle,

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<sup>201</sup> 291 U.S. at 313. The Court observed:

Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy . . . . It would seem a gross perversion of the normal meaning of the word . . . to hold that the method is not 'unfair'.

*Id.*

<sup>202</sup> 253 U.S. at 427.

<sup>203</sup> 291 U.S. at 313.

<sup>204</sup> It may also be possible to define public policies by direct reference to the Constitution. See *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294-95 (7th Cir. 1976). There it was held an "unfair practice" to bring collection suits in an inconvenient forum, on a theory that this was analogous to a violation of the due-process clause. The decision is discussed in a Note, 55 Tex. L. Rev. 1416 (1977). This approach may be of value primarily in consumer-protection cases, due to the Constitution's emphasis on the rights of individual persons. On at least some occasions, however, the approach may be valuable to the competition case as well. For example, the desire for diverse sources of information which underlies the First Amendment might be a relevant consideration when a merger between two communications firms is judged under Section 5.

<sup>205</sup> 291 U.S. at 313.

<sup>206</sup> *Id.*

however, is broader than the facts of that case. Most regulatory statutes involve substantial compliance costs to the subject firm. Labor laws, EPA regulations, and OSHA rules come to mind by way of examples. A firm which purposely violates any of these rules can realize significant cost savings, and those savings can translate into a competitive advantage over companies that have complied with the relevant law. The violations might therefore be reached through a Section 5 action to enforce the public policy declared in the statutes, and to end the unfairness inherent in a calculated breach of them.<sup>207</sup>

There would, of course, be serious questions of primary jurisdiction in many such actions, as well as questions of interagency comity. But assuming that these questions can be resolved in a particular case, the bare existence of the necessary enforcement powers under Section 5 would seem to follow as a reasonable reading of *Keppel*. In some ways an action along these lines actually would be on stronger ground than *Keppel* itself. In that case the Court assumed, for purposes of its decision, that the respondent's conduct might not have constituted a literal violation of the law.

In short, the Commission seems to be empowered to determine and enforce recognized standards of fair competitive behavior, whether these have been declared by statute or have emerged as the generally accepted ethical norms of the community. This is primarily true (and perhaps exclusively true) where violation of those standards confers a competitive advantage. To this, however, one qualification must be added. The public policy on which the Commission acts cannot be too broad, no matter how firmly established it may be. Some of the truly fundamental policies of the country—such as those involved in supporting small business or in ending racial discrimination in employment—are too important and all-pervasive to be stated in terms of monolithic principles. They contain qualifications, limitations, and countervailing considerations, and are frequently in a state of flux. If the Commission were to resort to such policies as these to define a standard of fair conduct, therefore, it necessarily would have to engage in a balancing of their constituent elements. To the extent that the outcome of this balancing is not clearly prescribed by congressional intentions, judicial precedent, or similar factors, a court would be most reluctant to uphold such a degree of discretion

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<sup>207</sup> The Supreme Court has intimated that such an action would be proper. In *FTC v. Sperry & Hutchinson* the Court cited, with apparent approval, a Commission memorandum in which one criterion of unfairness was identified as "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes . . ." See 405 U.S. 233, 244 n.5 (1971). This passage is reproduced in full at note 245 *infra*. At least one state court has adopted this theory in a case based on a "little FTC Act." See *Health Care Services, Florida, Inc. v. Shevin*, 311 So.2d 760 (3d Dist. Ct. App. Fla. 1975), *cert. denied*, 334 So.2d 608 (S.Ct. Fla. 1976). There it was held an unfair practice to market a weight-control drug for which the required FDA approval had not been obtained. Another state has reached a similar result legislatively. A section of Louisiana's little FTC Act makes it an unfair act to commit "any violation of any prohibitory law of this state." See *Lawyer's Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1292 (E.D. La. 1977) (construing LA. REV. STAT. § 22:1214 (West)). It does not follow, of course, that legislation was required in order to attain this goal. See also *Rogers v. FTC*, 492 F. 2d 228, 232 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Simeon Management Corp.*, 87 F.T.C. 1184, 1231 (1976).

in a matter of such great public importance. What emerges then, is the following qualifying principle: The Commission's ability to enforce an established public policy is limited by the ambiguity of that policy. To the extent the policy is ambiguous in terms of the conduct that it demands, it is less amenable to characterization, for the purpose of stating positive law under Section 5, as an "established" public policy.

#### VI. CONDUCT VIOLATING COMPETITION POLICY AS FRAMED BY THE COMMISSION

Some of the limitations discussed in the previous section may be dispensed with here. The Supreme Court's decision in *FTC v. Sperry Hutchinson Co.*<sup>208</sup> seems to endow the Commission with power—within parameters that are not yet fully defined—to formulate and enforce competition policy on its own initiative. The Court stated:

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.<sup>209</sup>

In this passage the Court declared that the Commission could pursue "public values" not contained in the letter or spirit of the antitrust laws. Since the Court did not explicitly define or limit the values that might be used, it might seem at first that this power is essentially boundless. From a rereading of the case, however, and from a review of the pertinent legislative history, it would appear that a workably precise definition is in fact attainable. The "public values" will be limited primarily to those that make up the congressional competition policy. That is to say, the Commission may seek to enjoin conduct only if it has a significant adverse effect on competition, and only if those effects are not outweighed by other consumer benefits or by *bona fide* business justifications. But if those limitations are satisfied—and judicial review should ensure that they are—then the Commission should be able to reach any conduct that significantly threatens competition, even if such conduct neither violates the letter or spirit of the antitrust laws, nor constitutes an incipient violation of them.

Discussion of this authority will be divided into three parts. The first part will review the relevant legislative history. The second will review the *Sperry & Hutchinson* decision, which is the most recent and important Supreme Court pronouncement on the subject. And finally, the third part will explore the probable boundaries and limitations on this cause of action.

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<sup>208</sup> 405 U.S. 233 (1972).

<sup>209</sup> *Id.* at 244. Although this language is quite broad, it probably would not be justifiable to extend it still further, as some have proposed, by emphasizing the comparison to a 'court of equity'. This reference was presumably only meant to suggest the variety of non-statutory factors the Commission could include in a legal analysis, rather than to imply that the agency possessed substantive discretion to the same degree as an equity court.

### A. *The Legislative History*

References to the legislative history are particularly important in interpreting this aspect of Section 5. Unlike the theories of Section 5 that were discussed previously, this one has not yet been the subject of many court decisions.<sup>210</sup> The intentions of the legislature therefore must be deduced almost wholly from the language of the floor debates, rather than with the assistance and cross-checking that can be provided by subsequent judicial constructions. This method of inquiry will give rise to some special hazards. The floor debates on Section 5 contain, not a shortage of information, but rather an embarrassing excess of it. The Senate debates alone lasted nearly six weeks and filled perhaps a thousand pages of the *Congressional Record*. During this extended discussion nearly every point of view was expressed, and nearly every possible construction was put on Section 5. Quotations from the debates must therefore be read with a certain amount of skepticism; much will depend on the identity and the motivations of the congressman being quoted. Some legislators were not particularly familiar with the bill, and others made implausible predictions about the effects of certain provisions in order to dissuade their colleagues from voting for them. As a result, courts have occasionally cautioned against excessive reliance on the debates when construing Section 5.

This difficulty, although real, can be minimized by an appropriate selection of the remarks to be relied upon. The views of four people would appear to be particularly persuasive. On the Senate side they were Senator Newlands, the author of the FTC Act in general, and Senator Cummins, the author of the original committee study and of Section 5 in its final version.<sup>211</sup> Of these two men Senator Newlands was generally considered to be the more authoritative spokesman.<sup>212</sup> The two senators did not always agree,<sup>213</sup> but when they did they could usually persuade the Senate to accept their ideas on the bill.<sup>214</sup> On the House side the principal figures were Congressman Covington, who first introduced the FTC Act in that body, and Congressman Stevens, who first proposed the addition of language prohibiting unfair competition.<sup>215</sup> Of these two persons Congressman Covington was regarded as the principal spokesman.<sup>216</sup>

The speeches of these and other legislators make it reasonably clear that the Commission, under Section 5, can go beyond established public policies and can frame competition policies on its own initiative. This conclusion was not neatly reached on the final day of the debates. Rather, it is a concept that

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<sup>210</sup> One author states that, during the period between *Brown Shoe* and *Sperry & Hutchinson*, the Commission brought no Section 5 actions without analogizing them in some way to violations of other antitrust laws. Comment, *The Attack on Trading Stamps*, 57 GEO. L.J. 1082, 1090-91 n.38 (1969).

<sup>211</sup> See note 295 *infra*.

<sup>212</sup> 51 CONG. REC. 11103, 11106 (1914) (remarks of Senator Cummins).

<sup>213</sup> See, e.g., *id.* at 11535.

<sup>214</sup> See, e.g., *id.* at 13315-18.

<sup>215</sup> Mr. Rublee and Mr. Brandeis, who were among the original proponents of this idea, were working with Congressman Stevens. *Id.* at 11537 (remarks of Senator Newlands).

<sup>216</sup> See *id.* at 14939 (remarks of Congressman Stevens).

is threaded through the entire length of the discussion, recurring at intervals. The development of the concept will therefore be recounted in a non-chronological manner, beginning with the more basic perceptions of the Commission's authority and building from those to the more complex formulations.

The most basic perception of Section 5's public-policy powers is easily stated. The section was regarded by friend and foe alike as vesting the Commission with a largely novel degree of authority.<sup>217</sup> Senator Borah, no friend of the measure, saw no "possible industrial condition [that] would . . . not be within the power of the commission to examine."<sup>218</sup> Senator Reed, another opponent of Section 5, observed that this law was different from other general prohibitions in that it conveyed no sense of what particular conduct would be included within it:

Fraud has been defined; false pretenses have been defined; tricks and devices have been defined by a general rule, both in the statute law and in the decisions of the courts. Of course, we have not undertaken in any law to specify all of the things which may constitute a fraud. You have, however, laid down well-known rules as to what constitutes fraud.

This bill leaves us as much in the dark as would a bill declaring that "whoever shall do anything which is wrong shall be punished."<sup>219</sup>

The proponents of Section 5, while not conceding that the bill would allow the Commission to exercise arbitrary powers, did agree that it would let the agency go beyond previous court decisions and the common-law concepts of unfair competition.<sup>220</sup>

The advocates of Section 5 expected that it would reach not only beyond the existing common law, but also beyond the existing standards of business ethics whenever necessary to put a stop to anticompetitive behavior. It was for this reason that Senator Cummins opposed the addition of criminal sanc-

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<sup>217</sup> The Interstate Commerce Commission Act, which gave that agency the power to determine "reasonable" rates, was frequently cited as some precedent for Section 5. *See, e.g., id.* at 11104 (remarks of Senator Cummins). That act applied only to a single segment of the economy, however, rather than to business in general.

<sup>218</sup> *Id.* at 11103. Senator Borah later stated that this power was unduly broad and would prove to be burdensome and chilling. *Id.* at 11188.

<sup>219</sup> *Id.* at 11116.

<sup>220</sup> This is illustrated by the following colloquy:

SENATOR SUTHERLAND. I should like to ask . . . where would the trade commission go in order to find out what was meant by 'unfair competition'? Would they go to the decisions of the courts and to the common law?

SENATOR CUMMINS. Partly.

*Id.* at 11105. This same point was later taken up in another exchange:

SENATOR POMERENE. Has not the Senator from Iowa [Mr. Cummins], as well as the other Senators, been contending that the words 'unfair competition' embrace many practices which might not heretofore have been declared to have been unfair competition?

SENATOR CUMMINS. Unquestionably.

tions.<sup>221</sup> He concluded that it would be improper to impose criminal liability where the general language of the statute did not afford adequate notice that a particular action, considered proper in the past, would be found unlawful by the Commission.<sup>222</sup> A similar view of the Commission's authority may be inferred from some remarks of Senator Newlands, in which he indicated that the Commission would have discretion to turn down a case that involved only borderline ethical considerations.<sup>223</sup> It will be observed that if the Commission is able to decline a case involving borderline ethical considerations, it also

*Id.* at 11105 (1914). Senator Newlands similarly noted that the phrase included "those things which the courts of this country have declared to be illegal," to which Senator Reed replied: "We do not care to reach the things the law already condemns and that the courts already prohibit and punish . . . What we want to reach is that realm which at present may be entered upon by the unjust man." *Id.* at 12028. *But see id.* at 11115 (remarks of Senator Pomerene, a member of the Conference Committee) ("Of course, this commission could not declare a thing to be unfair competition which was not unfair competition under the well-defined principles of the law"). This remark occurred relatively early in the debates, however, and so it may not reflect the Senator's final views on the subject.

<sup>221</sup> Senator Cummins stated:

I would not give immunity to any man. I shrink from any sort of immunity. When one has violated the law—consciously violated the law—he should pay the penalty for his wrongdoing. But when it becomes necessary in order to preserve competition that we shall prohibit acts which have heretofore been regarded as moral, which have heretofore prevailed in every industrial society in the world, I am unwilling that the failure to obey these regulations, which must necessarily be somewhat uncertain and vague, shall make the men who conduct our business affairs criminals, without consciousness of moral turpitude or moral dereliction.

*Id.* at 11539. Senator Newlands was likewise opposed to the inclusion of the "extreme penalties" in the FTC Act, on the grounds that rights and duties under that legislation would remain uncertain for some time. *See id.* at 11111-12.

<sup>222</sup> The context of these remarks is not entirely clear. On previous pages of the *Congressional Record* Senator Cummins had been advocating amendments to the FTC Act that would have forbidden interlocking directorates, stock acquisitions, and other matters that were eventually incorporated into the Clayton Act instead. His remarks may therefore be relevant only to the Clayton Act. On the other hand, however, the quoted passage is the conclusion for a more wide-ranging speech on the FTC Act in general. That speech began, as it apparently ended, by considering whether the Commission could grant immunity from Sherman Act prosecutions by its decisions under Section 5. *See id.* at 11528. The best interpretation therefore seems to be that this passage refers to the FTC Act generally, and not just to the unsuccessful amendments.

<sup>223</sup> He began by stating that any businessman who felt himself unfairly injured could apply to the Commission for relief. The following exchange then ensued:

SENATOR NEWLANDS. It would then be in its [the Commission's] discretion as to whether it would grant a hearing. I would not expect it to take hold of every trivial matter.

SENATOR McCUMBER. Would the Senator regard a matter of this kind [referring to a hypothetical that he had just posed] as trivial?

SENATOR NEWLANDS . . . When I say 'trivial' I do not mean in the amount involved but I mean trivial in the sense that it is so near the dividing line between good and bad morals that people would differ with reference to it.

*Id.* at 11109.

is able, in its discretion, to select such a case for hearing. This in turn implies that the Commission is authorized to decide a case based on principles of conduct that have not yet won universal acceptance in the business community.

Given that Section 5 can reach anticompetitive behavior not proscribed by existing common law or business ethics, it remains to be determined just how far the statute will reach. The answer, it appears, is that Section 5 will cover any form of conduct that is significantly detrimental to competition. Senator Cummins suggested as much in the following remarks:

We are here endeavoring to sustain competition; that is the primary purpose of the antitrust law [i.e., the Sherman Act]; it is the chief object of all these laws that we are now proposing; . . .

We have chosen to report a rule for the trade commission in the language which has been suggested, namely, 'unfair competition.' It is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly. That is the 'unfair competition,' in its broad sense, which this bill endeavors to prevent . . . The unfairness must be tinged with unfairness to the public, not merely with unfairness to the rival or competitor. . . . We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and of course, there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare.<sup>224</sup>

The language of the statute was therefore made deliberately broad to provide, in all instances, for adequate protection against harms to competition.<sup>225</sup>

An actionable harm to competition need not be calculated or deliberate. Section 5 can evidently reach such harms regardless of how they come about. Senator Cummins was clearly of this view. At one point in the debates a colleague proposed to replace the general language of Section 5 with a more specific listing of unfair practices. In speaking against this proposal the Senator said:

All these devices and acts [specified in the amendment] must be done or used with the intent or with the effect of destroying or unreasonably hindering the business of another, or of preventing another from engaging in business. That is to say, before the Government can enforce this section, if the amendment now proposed is made a part of it, it must prove that these things were done with the intent upon the part of the person who performs or does them to

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<sup>224</sup> *Id.* at 11104-05.

<sup>225</sup> Senator Hollis had a generally similar understanding of the bill: Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper.

*Id.* at 12146.

destroy or unreasonably hinder the business of another. It omits the great public interest. There can be unfair competition in which the public is interested without any intent as described in the amendment.<sup>226</sup>

Thus Section 5 permits the Commission to act against any form of conduct detrimental to competition regardless of the presence or absence of specific intent.

Some may still doubt that the Commission possesses a general power to enjoin anticompetitive conduct, notwithstanding the support for this interpretation in the debates, since it appears to be broader and more general than formulations traditionally given by the courts. In fact, however, Congress was virtually unanimous in this understanding of the matter. Even the strongest opponents of Section 5 were more concerned with its uncertainty than with its scope. Many of them were willing to accept alternative language that would have been somewhat more precise but little narrower.<sup>227</sup> Senator Reed, perhaps the leading opponent of Section 5, endorsed such limiting proposals and stated that if something to this effect were substituted for the existing language of the bill it would cure his constitutional doubts about it.<sup>228</sup> A few days later he formally proposed an amendment along similar lines. The amendment provided that:

The term 'unfair competition' shall embrace all those acts, devices, concealments, threats, coercions, deceptions, frauds, discriminations, dishonest practices, false representations, slanders of business, and all other acts or devices, whether of like nature with those herein enumerated or not, done or used with the intent or the effect of

<sup>226</sup> *Id.* at 13311. The proposed amendment was eventually rejected. *See id.* at 13314. This reading is also suggested by a colloquy that took place on the House side of Congress. There two members were discussing "fraud on the public," a broad concept that they seemed to regard as synonymous with "unfair methods of competition":

MR. MONTAGUE. I would ask the gentleman if this distinction is not clear: There may be fraud where there is fraudulent intent, in the first place. Secondly, there may be a fraud where the result is so injurious, whether intent exists or not, as to imply fraud?

MR. STEVENS. I think in those classes of cases wherever the public interest is injuriously affected the commission has clearly the right to denounce it as a fraud....

*Id.* at 14937.

<sup>227</sup> Senator Lewis, for example, gave the following interpretation on the floor: I hold that 'unfair competition' means that course of conduct which undermines a man by misrepresenting him and his methods[,] by seeking to obtain advantages through rebate systems[,] through private contracts—'tying' contracts, as they are sometimes called—or by any other form of competition which places the individual at such a disadvantage that he cannot obtain equal rights in transportation, equal opportunities in the city where he lives, equal opportunities for trade and sale, or any other form of conduct which would be so oppressive and unjust in its application as would be entitled, under the law of humanity, to be designated unfair.

*Id.* at 12932-33.

<sup>228</sup> *Id.* at 12933-34.

which is to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monopoly.<sup>229</sup>

Senator Reed's overall sense of Section 5 thus appears, in short, to have been not greatly different from Senator Cummins' own interpretation.

This is not to say, of course, that there were no significant differences between the perceptions of those who supported and those who opposed the bill. The bill's advocates presumably intended for it to have a greater reach in some substantive respects than the opponents would have been willing to concede. At one point, for example, Senator Cummins intimated that Section 5 might allow the Commission to impose a limit on the relative size that a company could attain.<sup>230</sup> It is doubtful, in light of their concerns regarding the

<sup>229</sup> *Id.* at 13310. It was against this proposed amendment that Senator Cummins made the remarks quoted above. A general summary of different Senators' definitions of 'unfair competition' appears at *id.* at 12980-84 (remarks of Senator Sutherland). A more thorough compilation of those definitions appears in Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

<sup>230</sup> Senator Cummins made this remark during the course of a discussion of the steel industry. He began by observing that one company—United States Steel—controlled half of the capital employed in the industry, while the remaining half was divided among twenty-five or thirty other corporations. He then made the following comments:

If I were a czar, if I could make the law, that would never have occurred. I do not believe that it is necessary, in order to reach full efficiency and employ and utilize all the economies of this age, that there shall be a billion and a half dollars in the hands of one man or in the hands of one board of directors. I believe that competition in many respects between this great combination and its lesser rivals is unequal; it is not, so far as I know, unfair. I think it would be vastly better for this country if, instead of one corporation having a billion and a half dollars of capital, or one-half of it, and the remainder distributed among a score or more of corporations, there should be 5 or 6 or 10 corporations each employing \$300,000,000 of capital.

51 CONG. REC. 11456 (1914). Senator Cummins, it will be observed, expressly noted that the competitive methods being used were not necessarily unfair. A few moments later, however, he seemed to indicate that there was an inherent unfairness in the industrial structure itself:

If I had my way about it—and the Senate would have an opportunity to vote upon that proposition before the consideration of this bill shall have been concluded—some function, some tribunal of the Government, would be given the authority to determine what capital could be employed in any one business, with this guide, that it should not be so great as in and of itself to impair or destroy substantially competitive conditions; and until we do limit the amount of capital that can be associated under one management we shall not have arrived at a fair regulation of commerce. It is the very beginning of any efficient regulation of the power that can be exercised in the association or aggregation of wealth.

*Id.* Senator Cummins acknowledged that "bigness" *per se* was not an evil and observed that an appropriate asset ceiling would differ from industry to industry, so it would not be practical for Congress to enact the limitations itself. He then proposed a solution:

I would, however, give that power to a commission. I would give it to the trade commission—with this rule: That no corporation shall employ an

propriety of ambiguous legislative language, that the more conservative opponents of the measure would have been willing to go this far.<sup>231</sup> In any event, there is considerable support in the legislative debates for the proposition that the Commission may reach and enjoin any conduct, otherwise within its jurisdiction, that poses a significant threat to competition.

There is also support in the congressional debates for the view that the Commission can act *only* when there is a threat of such harm to competition. Thus the Commission may not have the authority to decide a case on the sole basis of social or political considerations that are not reasonably central to Congress' conception of a competitive marketplace.<sup>232</sup> Rather, some substantial harm to competition must always be shown.<sup>233</sup> Senator Cummins had expressly noted this, stating that "[t]he only unfair competition that the sec-

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extent of capital which in and of itself destroys or substantially impairs competitive conditions. \* \* \* Undoubtedly it is within the power of Congress [and hence the power may be delegated]. We could say, for example, that no corporation engaged in the iron or steel business with a capital of more than \$100,000,000 should engage in interstate commerce.

*Id.* at 11456-57 (1914). It is difficult to judge how significant these remarks are. It seems most probable that they refer, not to Section 5, but rather to an amendment to the FTC Act, generally similar to Section 7 of the Clayton Act, that Senator Cummins later proposed. *See id.* at 12726. In this event the comments would not have any direct bearing on the scope of Section 5.

Under an alternative interpretation, however, they could bear on Section 5. Two arguments tend to point in that direction. First, Senator Cummins' version of Section 7 referred only to stock acquisitions, rather than to asset size *per se*. The amendment therefore does not jibe precisely with the comments quoted above, and, as a result, the comments might be held to be directed toward some other portion of the law. That portion would presumably be Section 5. Second, and more important, the proponents of Section 5 believed that the specific prohibitions of the Clayton Act were covered by Section 5 in any event. Regardless of whether Senator Cummins' comments found expression in the precise language of the later act, therefore, they would still inform our understanding of Section 5 as well.

<sup>231</sup> This is not, however, uniformly true. Senator Sutherland, generally an opponent of Section 5, indicated that he also favored a limitation on corporate assets. *Id.* at 12983.

<sup>232</sup> It is, unfortunately, beyond the scope of this paper to attempt a relatively precise definition of what Congress meant by "competition" in Section 5 and in the other antitrust laws. It should be noted, however, that a case could be made for a somewhat broader view of the Commission's jurisdiction than that suggested in text. This would begin with the observation that the ultimate concerns of Congress were not business and competitive conditions *per se*. Rather, the concern was for harm to consumers and members of the general public. Ordinarily we seek to indirectly safeguard the welfare of this group by ensuring that competition is fair and vigorous. In some respects, however, it may be preferable to address this goal directly. Thus the Commission might have a general equitable jurisdiction to examine consumer business practices that harm members of the public, to balance that harm against the benefits or justifications for the practices, and to prohibit any business practice whose net social effects make it undesirable. This approach would give the Commission considerable latitude and flexibility. For the reasons stated in text, however, it appears that the approach would probably diverge too greatly from the congressional intent underlying Section 5 to be appropriate.

<sup>233</sup> A case based on established public policy may be an exception to this rule. But see note 254 *infra*.

tion will ever touch is that competition which has for its object the destruction of competition. There is no unfair competition that is consistent with the endurance of any competition."<sup>234</sup> This is not to say that non-economic values have no place in the equation. They are unquestionably relevant and important considerations, and ones alluded to throughout the debates over the antitrust laws. In enforcing the provisions of Section 5, however, the Commission must recognize that social or political considerations alone cannot carry the entire weight of the argument.<sup>235</sup>

<sup>234</sup> 51 CONG. REC. 11385 (1914). Senator Cummins appears to have somewhat overstated his position here. Section 5 presumably will reach conduct which injures competition, as well as that which "destroys" it. The significant point about this quotation, however, is that it focuses the analysis exclusively on competitive effects.

<sup>235</sup> The somewhat limited role of non-economic values is suggested by the following exchange:

MR. CUMMINS. If anything can be more indefinite or vague than the prohibition against the restraint of trade or commerce, it has yet to be brought to my attention. What is a restraint of trade or commerce depends entirely upon one's economic and sociological view of industrial society.

MR. LIPPITT. Psychological.

MR. CUMMINS. No; I will not include psychological; I do not believe it involves that element in our affairs. We are here endeavoring to sustain competition; that is the primary purpose of the antitrust law; it is the chief object of all these laws that we are now proposing; it is the only justification for the establishment of a trade commission; for if we do not desire to maintain the competitive force as part of our industrial commercial life, then all these things are unnecessary.

*Id.* at 11104. It is possible that Senator Cummins intended to make a distinction here between psychological and sociological values, but the overall context of his remarks would suggest not. The Supreme Court has recently expressed similar reservations about the use of non-economic values as a sole basis for an action:

We are . . . unable to accept Judge Browning's interpretation of *Schwinn*. In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on 'price, quality, and quantity of goods and services,' 537 F.2d at 1019. This view is certainly not explicit in *Schwinn*, which purports to be based on an examination of the 'impact [of the restrictions] upon the marketplace.' 388 U.S. at 374. Competitive economies have social and political as well as economic advantages, *see, e.g., Northern Pac. R. Co. v. United States*, 356 U.S. at 4, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Mr. Justice Brandeis reminded us: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence." *Chicago Bd. of Trade v. United States*, 246 U.S. at 238.

*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977). The *Sylvania* case itself is readily distinguishable as a private action for treble damages under the Sherman Act, but the reasoning behind the Court's approach may have a more general applicability. For a discussion of the case *see* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977). *Cf. National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (non-economic values cannot be raised as an affirmative defense to an antitrust charge) (association members had restricted competitive bidding, and sought to justify this as protecting the public by assuring a higher level of professional competence). *See also* 51 CONG. REC. 11105 (1914) (remarks of Senator Cummins) (Commission would not, any more than the courts, define "unfair competition" on the basis of "their own inner consciousness").

Notwithstanding this possible limitation, it appears that the Commission can consider a wide variety of factors when exercising its public policy powers under Section 5. Some possible elements in the equation were listed by Senator Cummins:

[I]t will be the duty of the [Commission] to consult the decisions of the courts, the learning of the time, the custom of merchants, the habits of trade, the writings of studious and thoughtful men, all of which go to make up our understanding of the words 'unfair competition.' It will be the duty of the commission to apply those words in that sense precisely as it is now, the duty of the court to apply the words 'undue restraint of trade' in the sense in which we commonly understand that phrase.<sup>236</sup>

### B. *Sperry & Hutchinson*

This aspect of the legislative history has given rise to surprisingly few cases. There is, in fact, only one major case considering the Commission's power to establish public policy on competition. That is the important Supreme Court decision in *FTC v. Sperry & Hutchinson Co.*<sup>237</sup> The case involved the operation of a trading-stamp business. Sperry & Hutchinson (S&H) manufactured the stamps and sold them to retail stores; the stores gave them to customers as a bonus on their purchases; and the customers then redeemed the stamps with S&H for additional merchandise. Problems in this business arose when independent trading-stamp exchanges were opened. The exchanges permitted customers to trade one brand of stamps for another. This process undermined S&H's goodwill, since customers then lost their motivation to return to stores offering its stamps; they could go to other stores and still complete their stamp books through trades. S&H therefore embarked upon a program of suppressing the stamp exchanges. It accomplished this by claiming to retain title to the stamps, and by thereafter litigating against all exchanges which dealt in those stamps without authorization. This course of conduct, all parties agreed, violated neither the letter nor the spirit of any of the antitrust laws.

The Commission nonetheless found that S&H's action constituted an unfair method of competition under Section 5, evidently on a theory that it was unfair to destroy an entire collateral industry such as the exchanges.<sup>238</sup> The Fifth Circuit reversed, stating that Section 5 would reach *only* violations of the letter or spirit of the antitrust laws.<sup>239</sup> The Supreme Court reversed again, holding that the Commission, "like a court of equity," could consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."<sup>240</sup>

<sup>236</sup> 51 CONG. REC. 13048 (1914).

<sup>237</sup> 405 U.S. 233 (1972).

<sup>238</sup> The initial Commission decision was discussed in two casenotes. See 57 GEO. L.J. 1082 (1969); 67 MICH. L. REV. 560 (1969). The circuit court decision was discussed in three casenotes. See 12 B.C. IND. & COM. L. REV. 982 (1971); 71 COLUM. L. REV. 476 (1971); 49 TEX. L. REV. 791 (1971).

<sup>239</sup> 432 F.2d 146, 150 (5th Cir. 1970).

<sup>240</sup> 405 U.S. at 244. The Supreme Court decision was reported in a number of casenotes. See 22 CATH. U. L. REV. 697 (1973); 26 RUTGERS L. REV. 427 (1973); 17 ANTITRUST BULL. 975, 984 (1972); 58 A.B.A. J. 511 (1972).

This result was by no means preordained. Although the Fifth Circuit was clearly incorrect in omitting public policy cases from the reach of Section 5 altogether, it was not clear that the Commission's actual decision was a proper exercise of the powers that it did possess in that regard. The decision in *Sperry & Hutchinson* evidently involved something more than the violations of settled business norms that were discussed in the previous section. The company's attempt to retain title to its stamps was certainly not contrary to the established morals of the community.<sup>241</sup> Moreover, its means of enforcing its contentions—through litigation in the courts—has always been considered permissible conduct.<sup>242</sup> The Commission's decision was therefore based on a more *ad hoc* judgment that the actions taken by S&H were substantively unfair.

The Supreme Court, by holding this to be an appropriate basis for a decision, thus confirmed that the Commission is empowered to frame public competition policy on its own initiative. The Court did not state precisely how far this power would extend. It appears most probable, however, that the Court reached the same conclusion that was derived above from the legislative history, and understood the Commission's authority to be coterminous with the existence of any significant injury to competition. The Court observed that it was possible to have an anticompetitive effect that is not violative of the antitrust laws, and still violate Section 5.<sup>243</sup> Moreover, in a footnote to the opinion the Court cited, with apparent approval,<sup>244</sup> a Commission policy statement in which such injury was identified as sufficient grounds for finding "unfairness." Conduct could be improper if it "causes substantial injury to . . . competitors or other businessmen . . ."<sup>245</sup> The Court was not without some

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<sup>241</sup> It may have been an improper restraint on alienation, under the then-current *Schwinn* rule, but the Commission expressly declined to decide the case on that basis. See 405 U.S. at 247 n.6.

<sup>242</sup> Cf. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (Noerr-Pennington doctrine extended to good-faith adjudicatory proceedings).

<sup>243</sup> See 405 U.S. at 246.

<sup>244</sup> The circuit courts have generally assumed that the quoted passage reflects the Supreme Court's own views. See *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 n.8 (7th Cir. 1976); *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974).

<sup>245</sup> 405 U.S. at 244-45 n.5. This was only one of three criteria of unfairness that the Commission had listed. The manner in which the Court italicized the passage suggests that the three should be read in the disjunctive, however, so that any one could state a cause of action. The Court's footnote reads in full as follows:

The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen). Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964).

precedent for this interpretation. At least one commentator had suggested that Section 5 could be construed only as reaching all forms of injury to competition.<sup>246</sup> At least one lower court case, moreover, had previously found a course of conduct to be "unfair" on the sole basis of the harm it did to competition in another line of commerce.<sup>247</sup>

This interpretation of *Sperry & Hutchinson* is consistent with the legal theory being discussed in this section. It does not, however, account for all the language that appears in the Court's opinion. Running throughout the decision are passages that might indicate a broader reading than that presented above. Three such passages will bear special mention. The first is the Court's reference to "public values" as the basis for an action—a cryptic term that was left undefined, but that seems to imply something more than competition policy. The second passage identifies conduct as being potentially unfair if it were "immoral, unethical, oppressive, or unscrupulous," and treats this as a category separate from conduct that demonstrably injures a competitor or a consumer.<sup>248</sup> Finally, a third passage involves the Court's remark that "unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws . . ."<sup>249</sup> When viewed in combination, these three parts of the opinion seem to suggest that the Commission can define an "unfair method of competition" on the basis of other factors in addition to its competitive effects.

Upon closer examination, however, the quoted language does not appear to be so expansive. The language evidently refers, not to the Commission's powers under "unfair methods of competition," but rather to its powers under "unfair or deceptive acts or practices." This latter concept found its way into the case through a series of more or less procedural errors. *Sperry & Hutchinson* originally had been brought as a competition case, and was disposed of by the Commission on that basis. By the time it reached the Supreme Court, however, the litigants were agreed that it sounded primarily in consumer protection and that significant harm to competition had not been threatened. The main problem lay in the restrictions on the use to which

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S&H argues that a later portion of this statement commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as 'unfair' absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the statement referred to was that '[t]he wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others.' *Ibid.* (emphasis added).

*Id.* (emphasis in Court's opinion).

<sup>246</sup> See Pearson, *Section 5 of the Federal Trade Commission Act as Antitrust: A Comment*, 47 B.U. L. REV. 1 (1967).

<sup>247</sup> See *LaPeyre v. FTC*, 366 F.2d 117, 121 (5th Cir. 1966). The respondent in that case held a legal patent monopoly, however, and so may have been under a special duty to deal on non-discriminatory terms. It is not clear how much importance the Fifth Circuit attached to this circumstance.

<sup>248</sup> See 405 U.S. at 244-45 n.5 and note 245 *supra*.

<sup>249</sup> 405 U.S. at 244.

consumers could put their stamps. Although approving in principle the policy-oriented process by which the case had been decided, therefore, the Court remanded it to the Commission for fresh findings and opinion.<sup>250</sup> In so doing the Court also thought it advisable to include some general guidance for the new proceeding. No Supreme Court case previously had construed the term "unfair practices" outside of a competition setting,<sup>251</sup> and the Court took this occasion to elaborate on the concept. Thus the "public values" being referred to are primarily the values of fair consumer dealing.<sup>252</sup>

Although the Court's discussion of "public values" does not bear directly on the Commission's power to establish public policy on competition, there is one respect in which it will directly expand the meaning of "unfair methods of competition." The "public values" being referred to include the strictures against immoral, unethical, oppressive, or unscrupulous conduct—in short, they include the established public policies that were identified as a basis for action in the previous section. *Keppel* and the other cases discussed there, however, would allow enforcement of only those moral standards that were widely shared in the business community. *Sperry & Hutchinson*, on the other hand, when read in light of its legislative history,<sup>253</sup> will evidently allow the Commission to base a decision on ethical considerations that have not yet won universal acceptance, provided only that it meets the overarching requirement of showing some harm to competition from their non-observance.<sup>254</sup>

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<sup>250</sup> *Id.* at 250. It is conceivable that these events will in some ways weaken the value of the decision as a precedent for future competition cases. They may allow the decision to be distinguished, for example, so that the Commission's latitude could become less in competition than in consumer-protection matters. There seems no reason to believe, however, that this particular quirk of the case should be significant. The Court's remand may have anticipated that the new findings would involve consumer-protection issues, but, if appropriate new facts were found, it did not preclude a disposition of the case on competition grounds alone. See 405 U.S. at 245, 250.

<sup>251</sup> See Casenote, 22 CATH. U. L. REV. 697, 699-700 (1973).

<sup>252</sup> The Court's discussion of this part of the Commission's jurisdiction was an important step, and one that will be discussed more fully in a later section of this article, but it does not seem to have a direct bearing on the Commission's power to establish public policy on competition. The most able commentary has all treated *Sperry & Hutchinson* as being basically a consumer-protection case. See Note, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 Wisc. L. REV. 1071 (1972); Casenote, 22 CATH. U. L. REV. 697 (1973).

<sup>253</sup> Recall the reasons that Senator Cummins gave for opposing criminal penalties in the FTC Act. See text at notes 221-22 *supra*.

<sup>254</sup> S&H's competition practices probably did not violate accepted business morals, but the Court indicated that a competition action might still be brought. The Court could not have gone further than this, and allowed the Commission to formulate novel moral rules that were *not* essential to free competition, for the reasons set forth in the previous sections. It is quite true, of course, that *Keppel* banned an immoral practice as an "unfair method of competition" without regard to its competitive effects. See note 200 *supra*. This holding has never been questioned, and it forms the basis for the previous section's discussion of violations of recognized standards of fair conduct. It might therefore be thought that, if such violations are to be extended from established moral standards to novel ones, the extension can still be made without reference to competitive impact. The Court in *S&H* may have inadvertently left that impression, observing at one point that after *Keppel* "unfair competitive practices were

### C. Limitations on the Action

The powers conferred by the *Sperry & Hutchinson* decision are potentially quite broad. Their very breadth also means, however, that they are bound to be tempered in their exercise by additional limiting rules. Three such rules may be anticipated: (1) the Commission will be required to perform an interest-balancing test; (2) the Commission will not be allowed to promulgate affirmative requirements; and (3) judicial review will become increasingly strict.

The first limitation is that a balancing test will probably be required of the Commission, in which the harm to the public interest will be weighed against the business justification for a particular practice.<sup>255</sup> Without such a rule the Commission might be empowered to halt any practice that restricts competition, no matter how slight the restriction, how slight the public harm, or how compelling the respondent's reasons for adopting the practice might be. This power would be even more threatening than that exercised by the federal courts prior to *Standard Oil*. Section 1 of the Sherman Act had applied only to the external dealings that one company had with others, whereas this power will apply to all of the company's unilateral policies as well. The Sherman Act, as we have seen, was soon tempered by the Rule of Reason. It seems inevitable that this rule also will be applied to the powers that *Sperry & Hutchinson* has recognized.<sup>256</sup>

A second limitation is that the Commission will remain empowered only to prohibit unfair practices, not to prescribe fair ones.<sup>257</sup> At first it might seem that the agency can bypass this proviso. If it can ban any practice that harms competition, then, by appropriate findings, it also can ban every practice except the one that it considers most conducive to competition. Carried to an extreme, however, such a course would involve the Commission in detailed regulation of business decisions, which is likely to be both stultifying and impractical. Such conduct would also be contrary to the congressional intent. Senator Cummins spoke directly to this point:

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not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws . . . ." 405 U.S. at 244. It must be remembered, however, as the court noted in its next sentence, that *Keppel* was decided before the prohibition against "unfair or deceptive acts or practices" was added to Section 5, 405 U.S. at 244. Previously conduct had to be characterized as an "unfair method of competition" if it was to be reached at all. Now that "unfair or deceptive practices" is available as an alternative theory, however, this will be the more appropriate vehicle for reaching conduct that has no competitive effects. Thus it is unlikely that *Keppel* will be extended beyond its facts. This, it should be noted, is more a matter of analytical consistency than a substantial limit on the Commission's powers. Other undesirable conduct can still be reached on the theory of unfair practices, as will be discussed in the next section of this article.

<sup>255</sup> Some of the many factors that should (and should not) be included in a balancing process were enumerated in *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1343-46 (4th Cir. 1976) (on application to enjoin a merger).

<sup>256</sup> Such an approach was suggested by Judge Wisdom in his dissent from the Fifth Circuit's decision in *Sperry & Hutchinson*. See 432 F.2d at 155; cf. 51 CONG. REC. 12915 (1914) (remarks of Senator Cummins).

<sup>257</sup> Cf. Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 852-53 (1961).

[T]here is nothing in this bill which attempts to give to the trade commission the power to say to any person or to any corporation 'You must do so and so in the future.' Its only power is to declare the legality of an act already committed . . . , or to condemn the act as unlawful, and to require that it shall no longer be committed.<sup>258</sup>

Similar views were expressed by the bill's managers in the House of Representatives, who, when asked to confirm that the Commission "has no affirmative power to say what shall be done in the future," responded: "We desired clearly to exclude that authority . . . from the commission."<sup>259</sup> As a result, if a court were to perceive excessive<sup>260</sup> tendencies in the direction of imposing affirmative requirements, even if those steps were individually justified in light of *Sperry & Hutchinson*, it presumably would call them to a halt by referring back to this aspect of the legislative history.

Finally, a third limitation is likely to be found in increasingly close judicial review. *Sperry & Hutchinson* did not merely recognize a broad aspect of the Commission's jurisdiction. It also held that the Commission had not explained its reasoning with sufficient clarity, and remanded the matter for further proceedings. That remand was made, as the Court emphasized, in order to supply a better basis for judicial review.<sup>261</sup> We may anticipate that such review will become an increasingly important feature of FTC litigation, at least in cases where the Commission has acted under its general competition authority. In the conventional Section 5 case the agency is to some degree constrained by the terms and goals of the specific antitrust statutes that it is applying, and judicial review has become correspondingly relaxed.<sup>262</sup> Those constraints will be removed in the pure "policy" case, however, and so judicial review will become a more important safeguard.

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<sup>258</sup> 51 CONG. REC. 12916 (1914).

<sup>259</sup> 51 CONG. REC. 14938 (1914). This view emerges from the following exchange:

MR. SHERLEY. If the gentleman will permit, the Federal Trade Commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

MR. STEVENS. Certainly . . . We desired clearly to exclude that authority from the power of the Commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question.

51 CONG. REC. 14938 (1914). For similar comments see 51 CONG. REC. 12917 (1914) (remarks of Senator Cummins) ("It is absurd; . . . it is not the purpose of those who are favoring this bill that any such course shall be pursued"); *id.* at 13052 (remarks of Senator Walsh); *id.* at 14932 (1914) (remarks of Congressman Covington) ("The Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future").

<sup>260</sup> Some increasing discretion in this regard is to be expected. Senator Cummins and his colleagues opposed the grant of peremptory powers in large part because they doubted their constitutionality. With administrative law now more favorably disposed toward the delegation of such powers, Congress' constitutional concerns have lost much of their force. Still, however, Congressman Stevens' remarks suggest that the Commission was denied the power of promulgating affirmative requirements for other policy reasons as well.

<sup>261</sup> See 405 U.S. at 249. About eighty percent of the citations to *Sperry & Hutchinson* are made for this proposition.

<sup>262</sup> This point is discussed in more detail in text at notes 290-303 *infra*.

Some commentators have argued for a fourth limitation as well. They point out that Section 5 is phrased in terms of unfair "methods" of competition, and suggest that it should therefore reach only instances of active or calculated misconduct. It should not support, they say, oligopoly or other theories that are based primarily on market structure rather than on identifiable misconduct.<sup>263</sup> This argument is probably accurate insofar as Congress anticipated that Section 5 would work primarily through conduct rather than through structural theories, but it does not follow that the structural case was affirmatively precluded. Certainly the language of Section 5 does not rule it out. The reference to "methods" of competition was, as we saw above,<sup>264</sup> introduced only as filler, to prevent confusion with the common law concept of unfair competition. Similarly, the word "competition" itself would not seem to have any particular implication of active conduct as opposed to overall competitive posture. Since the letter of Section 5 is thus inconclusive as to the propriety of structural litigation, the Commission should resolve that issue according to the underlying legislative purposes. The ultimate purpose of Congress was to deal with the problems of monopoly and market power, and to halt trends toward concentration before they culminated in outright monopolization. If developing economic and antitrust analysis now indicates that a structural case is the best means of achieving this goal, therefore, it may be permissible under Section 5.

#### VII. CONDUCT CONSTITUTING AN "UNFAIR ACT OR PRACTICE"

Up until this point we have considered only four words in Section 5—its prohibition against "unfair methods of competition." The section, however,

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<sup>263</sup> This view has been expressed by Kruse, *Deconcentration and Section 5 of the Federal Trade Commission Act*, 46 GEO. WASH. L. REV. 200 (1978). A distinction should be drawn between such cases and those involving structural situations affecting primarily a single firm. It is already fairly clear that the latter type of case can be brought under Section 5. Mergers and director interlocks have been successfully challenged at the Commission level, for example, although linguistically speaking these do not involve "methods" of competition in the ordinary sense of the term. See, e.g., *In re Perpetual Federal Savings and Loan Ass'n*, 90 F.T.C. 608 (1977), *dismissed due to supervening legislation*, Sept. 6, 1979 (director interlock). These cases have been generally accepted despite the fact that there is at least some indication in the legislative history that such "structural" parts of the Clayton Act were not to be incorporated into Section 5. See 51 CONG. REC. 11103 (1914) (remarks of Senator Cummins); cf. *id.* at 12939 (remarks of Senator Newlands) (by implication). But see *id.* at 11107, 12980 (remarks of Senator Newlands). In this situation, Senator Newlands' views should be considered more authoritative. See *id.* at 11103, 11106 (remarks of Senator Cummins). Cases of this sort are still somewhat easier to justify than those based on pure oligopoly theory because the steps involved in bringing about a merger or director interlock are, to some extent, active forms of conduct. Further, since these cases utilize the letter and spirit of specific terms of the Clayton Act as reference points they imply a less expansive view of the Commission's direction.

<sup>264</sup> See text at notes 28-30 *supra*.

also goes on to prohibit "unfair or deceptive acts or practices."<sup>265</sup> The second clause has become particularly important since *Sperry & Hutchinson* gave such an expansive reading to its terms. It should therefore be asked whether this language will add anything to the Commission's authority in competition matters.<sup>266</sup>

For the most part, of course, it will not. The reference to "deceptive acts or practices" appears to be directed exclusively toward questions of consumer harm, and the reference to "unfair acts or practices" primarily so. Still, this leaves open the possibility that an activity normally characterized as an unfair method of competition might also be challenged as an "unfair practice." This in turn leads to two questions. First, can the Commission in fact bring a competition case on that theory? Second, are there any significant benefits to be gained by doing so?

#### A. Requirements for the Action

The threshold question is whether it is possible to bring any competition case on a theory of "unfair acts or practices." This question should be answered separately for each of two different situations. The case is easy when a particular course of conduct harms both competitors and consumers. The case is harder when the harm is felt primarily or exclusively by competitors.

It is reasonably clear, in the first place, that a single course of conduct may injure both competitors and consumers in equal measure. In that event the prohibitions on "unfair methods of competition" and "unfair acts or practices" will meet and overlap. The conduct may be challenged under either aspect of Section 5, or under both aspects simultaneously. This, in fact, was the situation involved in *Sperry & Hutchinson*.<sup>267</sup> The harder case arises when the harm is felt primarily by the respondent's competitors. Such a case may be litigated under a theory of "unfair practices," but only if it will fit within the limitations inherent in that concept. There appear to be two such limitations. The phrase contemplates only harm to consumers, and it contemplates only harm that is direct rather than circumstantial.

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<sup>265</sup> "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (1976).

<sup>266</sup> This section of the paper, dealing briefly with a separate and equally complex body of law, should be considered more skeletal, preliminary and tentative than the others. For general discussions of the scope of Section 5, with emphasis on the second clause, see Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1 (1977); Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5*, 10 GONZAGA L. REV. 333 (1975); MacIntyre & von-Brand, *Unfair Methods of Competition as an Evolving Concept—Prelude to Consumerism*, 44 ST. JOHN'S L. REV. 1071 (1970); Note, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 WISC. L. REV. 1071 (1972); Note, *Section 5 of the Federal Trade Commission Act: An Elastic Anti-trust Supplement*, 2 LOY. CHI. L.J. 306 (1971).

<sup>267</sup> See 405 U.S. 233, 247-48 (1972).

The first requirement for an action is that it be cast in terms of redressing a harm to consumers. This part of Section 5 does not seem to include notions of commercial fairness *vis-a-vis* one's competitors. A case therefore may be brought only against those competitive methods that also result, as a collateral matter, in some substantial degree of consumer injury.<sup>268</sup> This requirement is a product of the statute's legislative history. The prohibition on "unfair acts or practices" was not part of the original FTC Act. It was instead added by the Wheeler-Lea amendment in 1938.<sup>269</sup> The circumstances leading up to the amendment indicate that its sole purpose was to simplify and clarify existing law for the benefit of consumers, rather than to confer new competition powers on the Commission.

From its very beginning Section 5 was capable of reaching practices whose primary harm lay in their effect on purchasers. Such practices could be legitimately characterized as unfair methods of competition, since they gave firms a competitive advantage over other companies that did not resort to sharp sales practices. A number of cases were successfully prosecuted on this theory. *Keppel*, for example, was decided on the finding that the respondent's practices had cut into the market share of companies that did not use gambling techniques to sell their candy.<sup>270</sup> In appropriate circumstances the courts would even infer, from the lure that a particular unfair practice might exert on consumers, the requisite injury to competition.<sup>271</sup>

This particular form of pleading was, however, a needlessly complicated way to reach practices that were actually considered unfair in and of themselves. It also contained procedural pitfalls into which the Commission stumbled from time to time. In *FTC v. Raladam Co.*,<sup>272</sup> for example, the Commission clearly established the harmfulness of a certain practice to consumers but neglected to call any competitors as witnesses, and thus neglected to show the requisite harm to competition.<sup>273</sup> The Supreme Court thereupon set aside the Commission's order, observing that "unfair trade methods are not *per se* unfair methods of competition."<sup>274</sup> The Wheeler-Lea amendment was passed to prevent a recurrence of these events. Congressman Lea explained the purposes of his bill as follows:

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<sup>268</sup> This statement gives the general rule for the majority of cases. An exception might have to be made for cases brought under certain of the *S&H* criteria, rectifying harm to "competitors or other businessmen" or correcting violations of "public policy." See note 245 *supra*. The contours of these *S&H* criteria have not yet been fully clarified. The point at which their legal theory becomes one of unfair competition likewise remains uncertain.

<sup>269</sup> See 52 Stat. 111 (1938).

<sup>270</sup> *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934). See note 200 *supra*.

<sup>271</sup> See, e.g., *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 695 (2d Cir. 1936) (L. Hand, J.) ("perhaps we might take judicial notice of that without any evidence at all"), *rev'd in part on other grounds*, 302 U.S. 112 (1937). See also *Sears Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919); *cf. FTC v. Royal Milling Co.*, 288 U.S. 212, 216 (1933); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922).

<sup>272</sup> 283 U.S. 643 (1931).

<sup>273</sup> *Id.* at 652-55.

<sup>274</sup> *Id.* at 649.

If this bill becomes law, one of the things it will do is to relieve the Federal Trade Commission of . . . unnecessary time and expense in showing that an act is injurious to a competitor. Indeed, the principle of the act is carried further to protect the consumer as well as the competitor. In practice the main feature will be to relieve the Commission of this burden, but we go further and afford a protection to the consumers of the country that they have not heretofore enjoyed.<sup>275</sup>

Senator Wheeler similarly noted that the bill "makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."<sup>276</sup> Thus the legislative history makes it clear that the focus of the Wheeler-Lea Act was on the problems of consumer protection. The Supreme Court has so interpreted the statute. In the Court's words, the Act was "a significant amendment showing Congress' concern for consumers as well as for competitors."<sup>277</sup> Hence any action brought under the "unfair practices" clause of Section 5 should be phrased in terms of consumer injury.

The second requirement for an "unfair practices" action is that the harm to consumers be direct. This portion of Section 5 will reach only those activities that affect specific individual consumers, in other words, rather than activities that circuitously affect all consumers, in their capacities as members of the general public, by bringing about some adverse change in the competitive environment.<sup>278</sup> An example may help illustrate the distinction. The use of abusive debt-collection practices will directly harm the individual consumers involved, but an anticompetitive merger will have its primary effect on the general business environment and will affect individual consumers only indirectly. Hence the collection practice, but not the merger, should be reachable as an "unfair act or practice." No case expressly relying on this rationale has been found, but it follows naturally from the legislative history. There are three reasons for this conclusion. First, if the Wheeler-Lea Act covered harm to business processes it would be duplicative of the prohibition against "unfair methods of competition." Second, if Congress intended the Act to reach such indirect injuries it would have referred to the beneficiaries of that legislation as "the public" rather than as "consumers." Third, if the Wheeler-Lea Act were to reach indirect competitive injuries it would swallow all pre-existing antitrust legislation, including the original FTC Act itself. With them it would take all the boundaries and rules—both legislative and judicial—that had

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<sup>275</sup> 83 CONG. REC. 391-92 (1938). This is a paraphrase of H.R. REP. NO. 1613, 75th Cong., 1st Sess., at 3 (1937). See also S. REP. NO. 1705, 74th Cong., 2d Sess., at 2-3 (1936).

<sup>276</sup> 83 CONG. REC. 3255 (1938). This legislative history is reviewed in *Lichtenstein v. FTC*, 194 F.2d 607, 609-10 (9th Cir. 1952), *cert. denied*, 344 U.S. 819 (1952).

<sup>277</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965). See also, e.g., *Scientific Mfg. Co., Inc. v. FTC*, 124 F.2d 640, 643-44 (3d Cir. 1941); *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941); *Minter v. FTC*, 102 F.2d 69, 70 (3d Cir. 1939).

<sup>278</sup> This statement again gives only the general rule to which some exceptions may be recognized. See note 268 *supra*.

been built up in the competition area. This would clearly be the most sweeping possible reform. Its very magnitude indicates that it cannot be implied on a silent legislative record, however. Since Congress gave no indication that it intended to make such changes, one must assume that the Act was not intended to reach indirect competitive injuries.<sup>279</sup>

### B. Benefits of the Action

The two limitations discussed above are not insuperable. From time to time there will be a competition problem that also brings about some smaller but nonetheless direct injury to consumers. The Commission will then have the legitimate option of challenging such a problem as an unfair practice. This raises, however, the obvious question: Why bother? What benefits are gained by pursuing a complicated rather than direct legal theory?

The potential benefits of the "unfair practices" action are of two general kinds. It is not expected that these will be important in a large number of cases, but they may prove useful on occasion. The first set of benefits is procedural. An "unfair practices" approach will allow use of the more favorable rulemaking and remedial powers that were conferred on the Commission by the Magnuson-Moss Act.<sup>280</sup> That subject is beyond the scope of this paper, although it may be observed that the existence of these special powers will soon force the courts to clarify the boundary between competition and unfair-practice cases. The second kind of benefit is more substantive. An action framed in terms of unfair practices can be prosecuted without any showing of harm to competition.<sup>281</sup>

This result is not wholly in line with the congressional purpose. Although Congress was quite clear in its desire to eliminate the need for showing competitive harm, it perceived this reform as being primarily a matter of administrative rationalization. The change was made to simplify the prosecution of practices that were harming competition in any event. One congressman described the Wheeler-Lea Act as "a more or less procedural amendment about which there is no controversy."<sup>282</sup> This was, moreover, the Commission's contemporaneous understanding of the measure. At the hearings on the bill

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<sup>279</sup> A contrary argument can be stated, however. See Carstensen & Questal, *The Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers*, 63 CORNELL L. REV. 841 (1978).

<sup>280</sup> That Act, for example, authorizes the Commission "... to recover a civil penalty ... against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices ..." 15 U.S.C. § 45(m)(1)(A) (1976). See also *id.* at §§ 45(m)(1)(B), 57b. Congress was explicit in its desire to limit these new powers to matters involving "unfair practices" rather than "unfair methods of competition." See, e.g., H.R. REP. NO. 1606, 93d Cong., 2d Sess., at 32 (1974) (Conference Report); 120 CONG. REC. 21978 (1974) (remarks of Senator Hart).

<sup>281</sup> It might be thought that there is another substantive benefit to be had. An action framed in terms of unfair practices can take advantage of the broad reading that *Sperry & Hutchinson* gave to that term. This benefit, however, does not seem particularly persuasive. The Court would presumably define the word "unfair" just as broadly in the context of "unfair methods of competition." Thus it is not necessary to proceed under a strained statutory construction in order to make use of that case.

<sup>282</sup> See 83 CONG. REC. 393 (1938) (remarks of Congressman Mapes).

Commissioner Ewin L. Davis stated that the amendment did not make any change "in the actual operation, actual result, except to make unnecessary the most exacting and specific requirements of having to always prove competition and injury to competitors after all of the other elements in the case have been established."<sup>283</sup> He further stated:

Perhaps not one time in a thousand cases would there be a case . . . where the Commission was not able to . . . mak[e] out a case of competition and injury to competitors . . . but [the *Raladam* holding] had put the Commission to a great deal of time and delay . . . .<sup>284</sup>

Although Congress' primary goals may have been limited and managerial, there is no doubt that the Wheeler-Lea Act did extend the substantive reach of the Commission.<sup>285</sup> It was extended by the one case in a thousand to which Commissioner Davis had alluded; that case now could be brought where it could not have been brought before. It was to be some years, however, before this new jurisdiction was utilized. Most Commission actions under the Wheeler-Lea Act involved consumer deception, a matter that could have been prosecuted under previous law. The few cases that proceeded on an "unfairness" theory were concentrated almost entirely in an effort to suppress games of chance as a sales device.<sup>286</sup> This was likewise an area in which competitive harm could have been—although now it need not<sup>287</sup>—be proved. Only in the past few years has the Commission challenged conduct as being substantively unfair to consumers in circumstances where competitive injury could have been neither alleged nor demonstrated. One such case was *Spiegel, Inc. v. FTC*,<sup>288</sup> in which the Commission secured an injunction against the bringing of debt-collection suits in an inconvenient forum. Although this aspect of the Commission's powers has been exercised only recently, it seems to be well established. It was expressly approved by the Supreme Court in *Sperry & Hutchinson*.<sup>289</sup> As a result, a pure theory of unfair practices now will furnish an effective basis for action.

There are two circumstances under which it might be useful to bring a competition case on that basis. The first is where there are problems of evidence. A respondent's conduct might in fact be injurious to competition, but

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<sup>283</sup> Hearings on S. 3744, 74th Cong., 2d Sess., at 76 (1936).

<sup>284</sup> *Id.*

<sup>285</sup> See *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917, 919 (2d Cir. 1942) (Wheeler-Lea Act supplemented, rather than modified, the phrase "unfair methods of competition"); cf. *Ritholz v. March*, 105 F.2d 937 (D.C. Cir. 1939).

<sup>286</sup> See, e.g., *Gellman v. FTC*, 290 F.2d 666 (8th Cir. 1961); *Surf Sales Co. v. FTC*, 259 F.2d 744 (7th Cir. 1958); *Wolf v. FTC*, 135 F.2d 564 (7th Cir. 1943). One comment states that until recently the game-of-chance cases were the only unfair practice suits the Commission brought. See Note, 1972 Wisc. L. Rev. 1071 (1972).

<sup>287</sup> See *Feitler v. FTC*, 201 F.2d 790 (9th Cir.), cert. denied, 346 U.S. 814 (1953); *Parke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437 (2d Cir.), cert. denied, 323 U.S. 753 (1944).

<sup>288</sup> 540 F.2d 287 (7th Cir. 1976).

<sup>289</sup> See 405 U.S. 233, 239 (1972) (Commission can "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").

in a way that would make those results difficult or impractical to prove. If the other elements of the case are present, however, the conduct can be reached in an unfair-practice action. Second, this approach might be useful in reaching conduct that is similar to an antitrust offense, but that is committed by a business entity that does not literally engage in "competition." Such a situation may arise from time to time with respect to partially regulated monopolies. There an action based upon an "unfair practices" theory can be an effective means of enforcing the underlying legislative purposes of Section 5.

### VIII. STANDARDS OF JUDICIAL REVIEW

This final section will discuss the scope of judicial review. The section does not deal with the substantive reach of Section 5, but rather with the procedural question of what standards the courts will apply when reviewing a Commission determination that Section 5 has been violated. Although its focus is different from that of the previous sections, however, its subject matter is of one piece with the general problem being considered. The reach of the agency's authority under Section 5 will be considerably influenced, as a practical matter, by the extent of latitude that is left to its expert judgment. This factor now tends to favor the Commission's discretion. The courts show, on the whole, considerable willingness to accept the Commission's judgment of the business consequences to be expected from a given type of conduct.

The Commission was not always so fortunate in the standard of review. In the early cases arising under the FTC Act the courts emphasized that the words "unfair methods of competition" set out a legal standard.<sup>290</sup> "It is for the courts, not the Commission, ultimately to determine as a matter of law what they include."<sup>291</sup> This statement was reasonable enough in principle, but the courts then used their general power of statutory construction to judge the propriety of the individual business methods that were at issue before it. This practice led the courts into consideration of the business effects to be anticipated from the challenged conduct, and thus, in effect, into a reconsideration of each case on its merits.<sup>292</sup>

The courts eventually replaced this practice by the modern standard of restrained review. The change was made in the *Keppel* decision. Although reaffirming the courts' ultimate power to define the scope of Section 5,<sup>293</sup>

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<sup>290</sup> Another possible basis for judicial review has not proven particularly important. Section 5(b) of the FTC Act requires that a Commission action be "to the interest of the public." This standard has occasionally been invoked to keep the Commission from intervening in a purely private dispute. See *FTC v. Klesner*, 280 U.S. 19 (1929) (confusing names on two neighboring shops). Except for the very clearest cases of impropriety, however, the Commission is left with "broad discretion" on this point. See *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941), *cert. denied*, 314 U.S. 668 (1941).

<sup>291</sup> *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

<sup>292</sup> See, e.g., *FTC v. Sinclair Co.*, 261 U.S. 463 (1923); *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *FTC v. Gratz*, 253 U.S. 421 (1920).

<sup>293</sup> Since *Keppel* the courts have consistently asserted this ultimate power, although perhaps with decreasing emphasis. See, e.g., *FTC v. Texaco, Inc.*, 393 U.S. 223, 226 (1968); *Ashville Tobacco Board of Trade Inc. v. FTC*, 294 F.2d 619 (4th Cir. 1961); *Ardelle, Inc. v. FTC*, 101 F.2d 718 (9th Cir. 1939).

*Keppel* announced a new willingness to rely on the Commission's special expertise. The Court stated:

While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected'. . . . If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence.<sup>294</sup>

The review standard announced in *Keppel* has been maintained in the more recent decisions. If anything it has evolved in the direction of yet more restrained review.<sup>295</sup> *Keppel* spoke of giving "weight" to the Commission's determinations, but the modern cases speak in terms of "great weight."<sup>296</sup> The Commission's judgment of specific business matters—as opposed to its ultimate disposition of the case—may stand on a firmer footing still.<sup>297</sup> From this it follows that a stronger case can usually be built on an incipency theory than a spirit theory, since the Commission's decision is then likely to rest more heavily on business predictions rather than on purely legal judgments.

It may be asked why this grant of discretion was so long in coming. The delay was presumably due to early constitutional restrictions on the delegation of legislative power. The so-called delegation doctrine provided that Congress

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<sup>294</sup> *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934).

<sup>295</sup> This evolution is responsive to the original congressional intent. Senator Newlands had intended for the Commission's decisions to be reviewable only to the minimum extent required by the Constitution. See 51 CONG. REC. 11108 (1914). Senator Cummins at first shared this view. See *id.* at 11104-05. Cummins later offered an amendment giving somewhat broader review, *id.* at 13045, but did so previously in order to head off another amendment that would have provided for still broader review. For an analysis of these events see *id.* at 13066. Senator Cummins' amendment was eventually adopted by the Senate. *Id.* at 13109. Its language was subsequently modified by the Conference Committee, but no substantial change appears to have been made. See H.R. REP. NO. 1142 (1914); 51 CONG. REC. 14768 (1914) (remarks of Senator Cummins).

<sup>296</sup> See, e.g., *FTC v. Texaco*, 393 U.S. 223, 225-26 (1968); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367-68 (1965); *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948).

<sup>297</sup> On this point the Supreme Court has stated:

The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question. . . .

*FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 396 (1953). The Commission's findings of fact will stand, of course, on the firmest footing of all. If supported by the record those are conclusive. See *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945). So too are the inferences drawn from those facts. See *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 739 (1945).

could not confer authority on administrative agencies without simultaneously providing reasonably definite standards for its exercise.<sup>298</sup> Without this safeguard it was feared that administrative agencies could exercise arbitrary and burdensome powers, and that persons under their jurisdiction could be subjected to sudden shifts of policy that had not been announced through the legislative process.<sup>299</sup> The Commission's power over "unfair methods of competition" could have been a classic example of excessive delegation. When announcing close judicial review and narrowing statutory constructions, therefore, the Supreme Court may have been endeavoring to shield Section 5 as a whole from constitutional infirmity.<sup>300</sup>

The delegation doctrine was eroded by the courts during the New Deal, at approximately the same time that *Keppel* established the present standard of restrained review. The doctrine is now largely defunct. The increasing complexity of modern government has made delegation a practical necessity, while the safeguards of modern administrative procedure have simultaneously made it less threatening. The Supreme Court now regularly upholds legislation embodying such vague standards as "just and reasonable", "public interest", or "public convenience, interest, or necessity".<sup>301</sup>

Although the delegation doctrine may no longer be binding constitutional law, however, the policy considerations that underlay it were nonetheless valid and important ones. Echoes of the doctrine therefore still appear to linger in the canons of statutory construction. For example, although Section 5 speaks of "unfair methods of competition" in broad and unqualified terms, it was not until *Sperry & Hutchinson* that the Supreme Court upheld such an action without analogizing it in some way to a violation of express antitrust laws. This long reliance on other statutes as reference points was presumably motivated in part by fears of excessive delegation.<sup>302</sup> It therefore appears that the delegation doctrine still possesses some life, and, although the standards of judicial review now are generally favorable to the Commission, the

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<sup>298</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>299</sup> A broad construction of Section 5 would have been even more troublesome if private actions were allowed under that statute, since the penalties for non-compliance would then have included damages. There was some reason to believe that Congress had actually contemplated private actions. See 51 CONG. REC. 13117 (1914) (remarks of Senator Clapp, a member of Conference Committee); *id.* at 13158 (remarks of Senator Kenyon). By the 1930's, however, it had become clear that there would be no private right of action. See *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926) (so holding); 51 CONG. REC. at 13120 (remarks of Senator Stone).

<sup>300</sup> Many congressmen had expressed doubt about the constitutionality of Section 5. See, e.g., 51 CONG. REC. 12816 (remarks of Senator Sutherland); *id.* at 11113 (remarks of Senator Reed); *id.* at 8981 (remarks of Congressman Talcott). But see 51 CONG. REC. 12147-48 (1914) (remarks of Senator Hollis); *id.* at 11103 (remarks of Senator Cummins) (although admitting that a more precise standard would be desirable).

<sup>301</sup> See K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 2.03, 2.10 (3d ed. 1972).

<sup>302</sup> It was also motivated by the legislative history of Section 5, of course, which consists primarily of references to the other antitrust laws.

doctrine can reappear in the guise of statutory construction to prevent an excessively broad reading of Section 5.<sup>303</sup>

### CONCLUSION

This brings us to the end of our review of the Commission's authority under Section 5. That authority originated with congressional dissatisfaction over the results achieved through previous legislation. Under the Sherman Act the control over antitrust policy had passed to the courts, and remedies seemed to be unavailable until an industry had been monopolized or brought to the very brink of a monopoly. Congress accordingly established the Commission as an administrative body under the control of the legislature, and gave it broad powers to promote competition and to end unfair trade practices, especially in industries not yet in immediate danger of monopoly. In exercising these broad powers the Commission can act to prevent several different types of unfairness: violations of the letter of one of the other antitrust statutes; incipient violations; violations of their underlying spirit; violations of settled business norms; violations of competition policy as declared by the agency; and, on occasion, violations that could be characterized as unfair acts or practices.

In exercising these powers the Commission cannot act arbitrarily. It cannot disregard the congressional antitrust policies that it is ultimately discharging, nor can it act without making careful predictions as to the likely effects of

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<sup>303</sup> This raises an interesting practical question. When the Commission wishes to establish a novel application of Section 5, how can it best assure that the delegation doctrine is not invoked against it? An answer to this question is suggested by referring back to the policy considerations that underlie the delegation doctrine in the first place. The doctrine was established in order to protect businessmen from the exercise of arbitrary authority and unfair surprise. The best approach to use in most doubtful cases, therefore, would be one which minimizes these factors. That would seem to be rulemaking. Rulemaking not only confers procedural advantages, in other words, but it may also allow the Commission to achieve a substantive result that would otherwise be denied to it. This conclusion is suggested by the dissenting opinion in *Atlantic Refining*:

The integrity of [the administrative] scheme is violated by the Commission's entering and the courts' affirming broad industry-wide orders the meaning and basis of which are unclear and the factual and economic analysis of which is inadequate. . . . I do not mean by this that the Commission is required to use a rule-making rather than a case-by-case approach to decision-making in this area, although it would seem that rule-making would here be the preferable approach. . . . Whichever method the Commission chooses to use, however, it seems obvious to me that the Commission must formulate a clear rational rule which is based on an adequate economic explication and takes into consideration the situation of all industry members affected by the rule.

*Atlantic Refining Co. v. FTC*, 381 U.S. 357, 390-91 (1965) (Goldberg, J., dissenting). The unfairness inherent in a test case can also be minimized by precluding later private treble-damage activities as a result of it. The theory of the test case therefore should be framed in distinct Section 5 terms, and it should not be described as vindicating the letter of one of the antitrust statutes, in which case it might have a *res judicata* effect.

its actions on consumers, competitors, and others who would be affected. In short, cases brought by the Commission must be measured and constructive, and are subject to judicial review to ensure that these standards are met.

The Commission has a broad and, in some respects, unique authority in the antitrust field. It was not intended to be a mirror image of the Antitrust Division. It was established precisely so that it would complement and supplement the work of the other agency. The special scope of Section 5 has been expressly recognized in the legislative history and by the Supreme Court. It is this which is the basis for a distinctive Federal Trade Commission jurisprudence, and thereby for the Commission's special contribution to the national competition policy as a whole.