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COMPETITION POLICY AND THE APPLICATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

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Since the mid-1970s, the U.S. courts generally have narrowed the range of single-firm behavior subject to condemnation under Section 2 of the Sherman Act[1] as attempted monopolization or monopolization.[2] The intervention skepticism reflected in modern U.S. antitrust jurisprudence has inspired some commentators to consider the possibility that the Federal Trade Commission increase the use of Section 5 of the Federal Trade Commission Act,[3] which forbids unfair methods of competition ("unfair methods" or UMC), to challenge single firm conduct without relying directly on an underlying violation of Section 2. As interpreted by the U.S. courts, Section 5 enables the FTC to proscribe behavior beyond conduct prohibited by the other federal antitrust statutes, including Section 2.[4] Commentators have suggested that, among other

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[1] 15 U.S.C. § 2.

[2] These trends are examined in Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 582–762 (2d ed. 2008); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp., Winter 2000, at 43, 54–58. For Supreme Court decisions in this decade that have relaxed restrictions on dominant firm conduct, see Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109 (2009), Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); and Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[3] 15 U.S.C. § 45.

[4] *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 239–40 (1980) (discussing Supreme Court's interpretation of Section 5 and its endorsement of the capacity of Section 5 to reach beyond boundaries of other federal antitrust statutes).

consequences, a jurisprudence predicated on Section 5 would facilitate convergence with approaches used to implement Article 102 of the Treaty on the Functioning of the European Union (formerly Article 82 of the European Treaty).[5]

In this article, we examine possibilities for the FTC to develop cases that are not premised on Sherman Act doctrine and instead apply distinctive Section 5 principles to address apparent instances of anticompetitive conduct. (For purposes of this article, references to the Sherman Act include the Clayton Act.) Initially, we lay out the rationale for using Section 5 to address conduct beyond the reach of prevailing concepts under the Sherman Act. We then set out cautions that should accompany expanded reliance on Section 5 as an antitrust enforcement instrument. We conclude by presenting what we believe to be institutional prerequisites for broader application of Section 5. Among other steps, we see a need for the Commission, as a foundation for future litigation, to issue a policy statement that sets out a framework for the application of Section 5. We also offer some elements of what such a framework should include. In this article we focus chiefly on dominant firm behavior, but our observations apply as well to other forms of conduct.

I. SECTION 5 AND THE CASE FOR ITS EXPANDED APPLICATION

Section 5 of the FTC Act, with its prohibition upon unfair methods, was integral to establishment of the Commission in 1914.[6] Congress intended Section 5 to be a mechanism for upgrading the U.S. system of competition law by permitting the FTC to reach behavior not necessarily proscribed by the other U.S. competition statutes, including the 1890 Sherman Act and the Clayton Act.[7] Section 5 would be applied by an expert administrative tribunal which had power to impose prospective equitable relief (not monetary remedies or criminal sanctions), whose

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[5] *See, e.g.*, Thomas A. Miller & Ryan W. Marth, Promoting Greater Consistency in Single Party Conduct: Is Section 5 of the FTC Act a "Third Way" to Converge European and U.S. Interests? (June 18, 2009) (unpublished paper presented at the American Antitrust Institute's 10th Annual Conference) (discussing how application of Section 5 might permit development of more intervention-oriented policies), *available at* http://www.antitrustinstitute.org/archives/files/Marth%20Miller%20Convergence%20Article_071420091600.pdf; Albert A. Foer, Section 5 as a Bridge Toward Convergence, Presentation at the FTC Workshop on Section 5 of the FTC Act as a Competition Statute (Oct. 17, 2008), *available at* http://www.ftc.gov/bc/workshops/section5/docs/afoer.pdf.

[6] The FTC's creation and the role of Section 5 in its establishment are examined in Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 58–92 (2003).

[7] The Clayton Act became law less than three weeks after the FTC Act in 1914. *Id.* at 92.

decisions interpreting Section 5 would not have collateral effects in private litigation and whose work would be reviewed by appellate courts under a deferential standard.

Five principal motivations inspired this legislative choice. One was the fear that the Sherman Act, at least as applied by the courts, would be too narrow to address the "trust" problem.[8] The second was the desire to introduce an administrative mechanism that could adjust the boundaries of acceptable business conduct in light of evolving business practices and developments in economic and legal understanding.[9] In effect, Section 5 would serve as an expansion joint in the U.S. competition policy system. The third was to locate that authority in a body that could conduct investigations and prepare studies as well as bring administrative cases, so that Section 5 litigation would be embedded in a broad understanding of business practices and their implications.[10] The fourth was to create a policy instrument that would be relatively independent of control by the Executive Branch and would be more responsive to legislative preferences.[11] The fifth was to embed the Commission's broad authority in a regime with lighter-handed penalties than those available under the Sherman Act.

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[8] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 32–34 (1938) (observing that "there was widespread distrust of the courts' ability to evolve workable concepts to direct the economic forces" that had created competition policy problems and stating that this "distrust based itself upon the belief that the men who composed our judiciary too often held economic and social opinions opposed to the ideals of their time"); Averitt, *supra* note 4, at 233–34.

[9] *See Report of the Senate Comm. on Interstate Commerce*, S. REP. NO. 63-597, at 9 (1914), *reprinted in* 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, PART I (Earl W. Kintner ed., 1982) [hereinafter KINTNER] ("The proper enforcement of the Sherman law also requires vigilant supervision which is most effectively obtained by a body in continual touch with the business organizations in the various industries."); *id.* at 13 (explaining the rationale for enacting "a general declaration condemning unfair practices" and authorizing an administrative commission "to determine what practices were unfair"); 51 CONG REC. 11,083 (Senator Newlands observing that Commission would be composed of eminent lawyers and economists, experienced businessmen, and publicists; *id. at* 11,090 (1914) (Senator Newlands observing that, if twenty improper practices were specified today, more would be developed tomorrow.).

[10] REPORT OF THE SENATE COMM. ON INTERSTATE COMMERCE, S. REP. NO. 63-597, at 10 (KINTNER, *supra* note 9, at 8–9) (explaining the need for a body with the "information, experience, and careful study of the business and economic conditions of the industry affected").

[11] *See* ABA ANTITRUST SECTION, 1 MONOGRAPH NO. 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: THE ROLE OF SECTION 5 IN THE FTC ACT IN ANTITRUST LAW 20–25 (1981) (discussing institutional aims that led Congress to establish the FTC). Senator Albert Cummins, one of the leading advocates for the creation of the FTC, said, "If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. . . . Congress can always destroy the commission; it can repeal the law which creates it . . . ." 51 CONG. REC. 13,047–48 (1914).

As conceived in 1914, the FTC's administrative powers under Section 5 incorporated a significant trade-off. The Commission's power to shape doctrine would be relatively broad and would include the authority to arrest conduct not previously condemned by prevailing interpretations of the Sherman Act. Its remedial authority would be relatively light handed and include the capacity to impose only equitable remedies.[12]

In theory, Section 5 had the potential to help make the Commission the preeminent vehicle for setting competition policy in the United States.[13] Through repeated exposure to competition policy problems, the FTC would use distinctive research and data collection powers to develop, apply, and assess doctrine. Expert commissioners would determine the appropriate standards of liability and business over time would conform to those standards,[14] and courts would eventually look to the Commission for guidance about how to frame and apply antitrust rules.[15] By this design, there was the possibility that the Department of

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[12] Until 1938, the only remedy available to the Commission for a violation of an agency order was to seek a separate enforcement order from a court of appeals. FTC Act, Pub. L. No. 63-204, § 5, 38 Stat. 717, 719–721 (1914). The Commission obtained the authority to seek civil penalties for Section 5 order violations in 1938. Wheeler-Lea Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 114 (1938), *amending* FTC Act § 5, 52 Stat. 111, 114.

[13] This was the expectation of some of the FTC Act's principal sponsors. Shortly before Congress passed the legislation in 1914, Senator Cummins predicted that the FTC "will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce." 51 CONG. REC. 14,770 (1914).

[14] Senator Francis Newlands, one of the FTC Act's chief sponsors, noted during the legislative debates in 1914 that "as a result of investigation and as the result of long experience [the FTC] will build up a body of information and of administrative law that will be of service not only to [it] but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals." 51 CONG. REC. 11,083 (1914).

[15] The legislative history contains mixed indications of whether Congress intended Section 5 UMC to reach conduct within the letter of the Sherman Act at all. *See* Averitt, *supra* note 4, at 238 (noting that application of antitrust laws to conduct that could have been successfully challenged under the Sherman Act finds less support in the legislative history than do most other types of Section 5 violations). The Commerce Committee's initial report highlighted that the Commission would not interfere with Justice Department enforcement of the Sherman Act. S. REP. NO. 63-597, *supra* note 10, at 10 (Commission would have power "ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law . . . ."). Senator Cummins anticipated that the Commission would refer Sherman Act cases to the Department. 51 CONG. REC. 11,529 (1914). Senator Henry Hollis, one of the principal proponents of Section 5, offered a different emphasis. *See* Winerman, *supra* note 6, at 79–80. Hollis observed that the DOJ would be able to focus on "the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition, so as to protect small business men, keep an open field for new enterprise, and prevent the development of trusts." 51 CONG. REC. 12,146. George Rublee, one of the original Commissioners and a key player in persuading Woodrow Wilson to endorse Section 5, believed that Section 5 had at most limited overlap with the Sherman Act; it reached "acts

Justice would gravitate toward focusing on the prosecution of offenses deemed suitable for criminal punishment, along with some major monopolization cases.[16] Other civil law enforcement would become the province of the FTC, and the flexibility inherent in Section 5 and the Commission's other institutional features would be a major reason for its specialized role.

In practice, the FTC's application of Section 5 has played a comparatively insignificant role in shaping U.S. competition policy. Since enactment of the FTC Act in 1914, the adjudication of cases premised on the Sherman Act, rather than upon the FTC Act, has provided the main vehicle for setting boundaries for business behavior. The treatment of dominant firm conduct illustrates the point. The Supreme Court last examined the FTC's application of Section 5 to address allegations of improper exclusion by a dominant firm in 1927 (when it ruled against the Commission).[17] Dominant firm cases litigated under Sherman Act theories overwhelmingly provide the frame of reference by which courts assess firm conduct, attorneys advise clients, and antitrust professors teach students.[18] One would be hard-pressed to come up with a list of ten adjudicated decisions that involved the FTC's application of Section

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of competition," but not "agreements or combinations, prohibited by the Sherman Act, which limit or put an end to competition between the parties." George Rublee, *Book Review*, 38 HARV. L. REV. 269 (1924) (reviewing GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION (1924)). In any event, the Commission was soon bringing administrative cases that could have been brought under the Sherman Act. By 1922, in finding a Section 5 violation in a resale price maintenance case, the Supreme Court highlighted that the challenged conduct "goes far beyond" what the Sherman Act would allow; the Court then modified the Commission's order in ways that seemed intended to hew more closely to Sherman Act. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453–54 (1922).

[16] Perhaps the least used provision of the FTC Act is Section 7, which authorizes the Commission to serve as a special master to assist the court in formulating remedies in complex cases. 15 U.S.C. § 47.

[17] FTC v. Eastman Kodak Co., 274 U.S. 619 (1927). In the 1950s and 1960s, the Supreme Court did take a number of Commission cases involving the conduct of a respondent towards its merchandisers. In the last case to reach the Supreme Court, *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968), Texaco had entered into contracts with manufacturers of tires, batteries, and accessories pursuant to which Texaco received commissions and by virtue of which Texaco pressed its dealers to sell those manufacturers' products. In its decision, the Court emphasized that Texaco "holds dominant economic power over its dealers." *Id.* at 226. The Court endorsed the FTC's decision to use Section 5 to condemn Texaco's efforts to induce its dealers to purchase specified brands of tires, batteries, and accessories. *Id.* at 231.

[18] Since 1914, there have been courts of appeals decisions involving dominant firm conduct challenged under Section 5 of the FTC Act, but these have been rare. *See, e.g.*, E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980).

5 in which the FTC prevailed and the case can be said to have had a notable impact, either in terms of doctrine or economic effects.[19]

Several factors explain why Section 5 has played so small a role in the development of U.S. competition policy principles. Probably the most important is that the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century. For example, the potential elasticity of the Sherman Act's prohibition on monopolization and attempted monopolization became apparent in the period that began in 1945 with the decision in *United States v. Aluminum Company of America* (*Alcoa*),[20] and extended into the mid- to late-1970s.[21] *Alcoa* and subsequent decisions, such as *American Tobacco Co. v. United States*,[22] *United States v. Griffith*,[23] and *United States v. United Shoe Machinery Corp.*[24] suggested that the Sherman Act would reach an especially wide range of business behavior.[25] Scholarly commentary in the 1970s also proposed that Section 2 could encompass "no-fault" theories of liability that would treat persistent, durable monopoly power that was unrelated to superior performance as an infringement without proof of bad acts.[26]

These doctrinal trends raised questions about the utility of Section 5. There seemed little need for the elasticity of Section 5 when the Sher-

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[19] Our own list of adjudicated matters in which the Commission relied on Section 5, prevailed, and achieved important doctrinal or economic results would be led by *FTC v. Cement Institute*, 333 U.S. 683 (1948) (upholding FTC challenge, predicated upon Section 1 of the Sherman Act and Section 5 of the FTC Act, to base-point pricing scheme)—if not for the subsequent fate of that case. *See infra* text accompanying note 66.

[20] 148 F.2d 416 (2d Cir. 1945).

[21] More than any other case from the 1970s, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), marked a rethinking of more expansive enforcement approaches that *Alcoa* had set in motion in the 1940s. *See* ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 153–54 (5th ed. 2004) (discussing significance of *Berkey Photo*).

[22] 328 U.S. 781 (1946).

[23] 334 U.S. 100 (1948).

[24] 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[25] *See, e.g.*, Eugene Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 577 (1947) (*Alcoa* and *American Tobacco* "mark the new birth of Section 2."); Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 183 (1947) ("Today . . . as a result of an increased awareness of the monopoly problem, and as a result of the *Alcoa* and *American Tobacco* decisions we appear to have a new interpretation of the [Sherman] Act, closer probably to its original intention, which can give the act strength against monopolies as such, and also against control by three, four or five corporations acting together.").

[26] The most notable scholarly contribution supporting the application of no-fault theories of liability under Section 2 of the Sherman Act was 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 614–623 (1978). The history of post-World War II no-fault monopolization proposals is sketched in GAVIL ET AL., *supra* note 2, at 620–21.

man Act was proving to be so elastic itself. In the period when courts were interpreting the Sherman and Clayton Acts expansively, it was not evident what useful contribution the capacity of Section 5 to reach still further would add to the mix. The Supreme Court had affirmed the FTC's authority to use Section 5 to prohibit behavior beyond the reach of the Sherman Act, but it was unclear if Section 5 could come into play except in relatively rare circumstances.

One possible application would be to fill gaps in coverage, such as to prohibit invitations to collude that neither constituted unlawful agreements within the reach of Section 1 of the Sherman Act nor violated the Sherman Act Section 2 ban on attempted monopolization. Such applications would serve to condemn behavior that posed the same competitive dangers as conduct proscribed by the other antitrust statutes yet evaded effective control because it lacked some characteristic required by these measures. Among other hurdles, FTC cases seeking to serve this gap-filling function would have to overcome arguments that Congress purposefully created the gaps in question and did not intend that Section 5 be used to cure deliberate omissions in the coverage provided by the Sherman and Clayton Acts.

Another possible application of Section 5 in a period of expansive Supreme Court readings of the other antitrust laws would be to extend still further a zone of prohibition that already reflected a strongly interventionist orientation. This arguably is what the Commission sought to do in its challenge to the exclusive dealing practices at issue in *FTC v. Brown Shoe Co.*[27] The Commission relied on Section 5 to proscribe exclusive dealing contracts (terminable at will by either party) that affected 766 of the nation's 70,000 retailers classified as retail shoe outlets.[28] The Eighth Circuit refused to enforce the Commission's order and ridiculed the agency's reasoning.[29] The Supreme Court upheld the FTC's ruling and endorsed the agency's position that the exclusive dealing agreements infringed Section 5 of the FTC Act, regardless of whether they violated the other antitrust statutes.[30]

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[27] 384 U.S. 316 (1966).

[28] Brown Shoe Co., 62 F.T.C. 679, 715–27 (1963). The Commission also found that the challenged practice violated "the standards of illegality under Section 3 and Section 7 of the Clayton Act." *Id.* at 717.

[29] Brown Shoe Co. v. FTC, 339 F.2d 45, at 55 (8th Cir. 1964).

[30] *Brown Shoe*, 384 U.S. at 322. The court of appeals decision had been so damning of the Commission's analysis and scornful of its interpretation of Section 5 that the Supreme Court may have perceived that the very legitimacy of the agency's basic charter was at stake and consequently may have felt compelled to come to the FTC's defense.

The Commission's *Brown Shoe* decision, issued in 1963, viewed the Supreme Court's merger decision one year earlier in *Brown Shoe Co. v. United States*[31] as endorsing close scrutiny of vertical foreclosures of less than one percent;[32] warranting efforts to give heavy weight to concentration levels that, by current standards, would be seen as innocuous;[33] and endorsing the subordination of economic efficiency aims to attain a more egalitarian business environment.[34] The FTC interpreted the Supreme Court's *Brown Shoe* merger decision and cases such as *United States v. Aluminum Co. of America*[35] as mandates to extend the reach of antitrust oversight, and it viewed its application of Section 5 in the *Brown Shoe* exclusive dealing case as a natural and appropriate extension of the principles of the Court's modern Clayton Act and Sherman Act jurisprudence.

The Commission's *Brown Shoe* opinion reveals no apprehension that the prevailing jurisprudence of the period perhaps had established a zone of liability under the Clayton and Sherman Acts that was so expansive that it required no further extension through Section 5. We cannot recreate the internal deliberations that animated the agency's decision to prosecute or its resolution of the case. It is conceivable that if the Commission believed Section 5 obliged it to add something distinctive

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[31] 370 U.S. 294 (1962).

[32] *Brown Shoe*, 62 F.T.C. at 716–17.

[33] The Commission's decision observed:

> The structure of the industry is significant. Although there are a large number of shoe manufacturers, a few companies occupy a commanding position. Of the approximately 1,000 shoe manufacturers in 1959, the top 70 manufacturers accounted for approximately 54 percent of the shoe production in that year. The 5 largest manufacturers, it should be noted, produced 24 percent of total pairs of shoes produced in 1959 and their production further constituted 45 percent of the product manufactured by the top 70 manufacturers.

Id. at 717–18.

The Commission did not assign a specific market share to Brown Shoe. In the *Brown Shoe* merger decision, which examined structural conditions existing at the time of the exclusive dealing plan challenged in the FTC's case, the Supreme Court found that the combined shares of production of Brown Shoe and Kinney totaled 5 percent. *Brown Shoe*, 370 U.S. at 302–03.

[34] The agency's decision stated,

> In assessing the need for Commission action . . . we must take account of the fact that historically one of the purposes of the antitrust laws, over and above purely economic considerations, has been to preserve ". . . an organization of industry in small units which can effectively compete with each other. . . ." To foster the competitive position of the smaller manufacturers, Brown should be prohibited from entering into arrangements with its customers interfering with the latter's independent judgment in making purchasing decisions.

Id. at 720 (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945); Brown Shoe Co. v. United States, 370 U.S. 294 (1962)).

[35] 148 F.2d 416 (2d Cir. 1945).

to antitrust jurisprudence, it may have felt an institutional imperative to press doctrine outward, even in a period of expansive judicial interpretations of the other antitrust laws.

In the midst of the expansive doctrinal construction of the Clayton and Sherman Acts though, the Supreme Court also opened the door to a particularly broad interpretation of Section 5. In 1972, in *FTC v. Sperry & Hutchinson Co.* (*S&H*),[36] the Court said that Section 5 enables the Commission to reach conduct prohibited by the other antitrust laws, conduct that infringes the spirit of these laws, and even some conduct that violates neither the letter nor the spirit of the other statutes.[37] *S&H* was not the only case during the expansion of Sherman Act jurisprudence in which the Court defined Section 5 broadly. In the late 1940s, in *FTC v. Cement Institute*,[38] the Court had suggested that Section 5 usefully could address facilitating practices or other scenarios involving tacit coordination where the facts might not support a finding of concerted action needed to satisfy the agreement requirement of Section 1 of the Sherman Act.

As noted above, the general trend toward expansion in the interpretation of Sherman Act jurisprudence that began in the 1940s ended in the late 1970s. This is particularly evident in the treatment of dominant firms. Beginning roughly with the court of appeals' decision in *Berkey Photo*[39] in 1979 and continuing to the present, judicial rulings in Section 2 cases generally have narrowed the limits on single-firm behavior. Dominant firms today enjoy considerably more freedom under U.S. law than they did thirty years ago to select pricing, product development, and marketing tactics.

Three intellectual forces have propelled Section 2 doctrine in progressively more permissive directions. The first is a literature that offers benign or procompetitive explanations for behavior once treated with suspicion when practiced by a dominant firm. A major example is predatory pricing, where advocates of a "no rule" approach and proponents of limited scrutiny have persuaded courts to limit severely the circumstances in which a dominant firm's decision to drop prices in the face of entry or expansion by a rival can be condemned.[40] The path in Supreme

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[36] 405 U.S. 233 (1972).

[37] *Id.* at 239–44.

[38] 333 U.S. 683 (1948).

[39] Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

[40] *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 43–51 (discussing influence of modern scholarship on predatory pricing doctrine).

Court decisions that started with *Utah Pie Co. v. Continental Baking Co.*[41] in the 1960s and carries forward to *Weyerhaeuser*[42] in this decade underscores the point.

The second stimulus for retrenchment has been the concern that the U.S. style of private rights of action poses unacceptable risks of overdeterrence, especially when used to challenge behavior that poses a seemingly complex mix of procompetitive and anticompetitive attributes.[43] From the late 1970s to the present, the federal courts have embraced the view, stated most famously in the work of Phillip Areeda and Donald Turner, that limits upon dominant firm conduct ought to be applied cautiously lest errors in the formulation and application of legal rules in private cases (especially where jury trials were the norm) would create unwarranted, disproportionate, and unavoidable treble damage liability for behavior that either was legitimate or was improper only by a narrow margin.[44] Modern Supreme Court decisions that have restricted the reach of the Sherman Act in Section 1 and Section 2 cases have emphasized this theme.[45]

The third force, closely related to the first two, is the concern with what Areeda and Turner termed "administrability."[46] This concept encompasses two ideas. The first is that legal rules should be stated with sufficient clarity to permit sensible implementation, especially in private suits that are conducted before courts of general jurisdiction and often are tried before juries.[47] The second, related idea is that the application of competition rules ought to account for the capability, including the relative capabilities, of the institutions responsible for their implementation. At one time, manifest in decisions such as *Otter Tail Power Co. v. United States*[48] and lower court cases involving claims that AT&T had engaged in illegal monopolization,[49] the federal courts were skeptical about the ability of controls contained in various forms of sectoral regu-

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[41] 386 U.S. 685 (1967).

[42] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

[43] Kovacic, *supra* note 40, at 51–64. **R**

[44] *Id.*

[45] *See, e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136–37 (1998) ("To apply the per se rule here . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases.").

[46] Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697 (1975).

[47] *Id.* at 699.

[48] 410 U.S. 366 (1973).

[49] *See* United States v. AT&T Corp., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

lation to provide adequate limits on dominant firm discretion.[50] Recent decisions such as *Trinko*,[51] *Credit Suisse*,[52] and *linkLine*[53] reflect a different assessment of the relative strengths of regulatory oversight and antitrust enforcement as means of controlling dominant firms.

The intervention skepticism of modern jurisprudence involving dominant firms and the intellectual foundations for cautious application of Section 2 have drawn attention back to Section 5 of the FTC Act. If Section 5 as a distinctive source of liability has limited utility in periods of Sherman Act doctrinal expansion, what happens when the reach of the Sherman Act shrinks, and shrinks dramatically? This is a worthy subject for discussion when the acute fear of the courts about overreaching in private litigation is spurring adjustments in substantive standards that encumber public litigants as well. Public agencies now must meet liability tests that the courts have set to cope with what is perceived to be disproportionate treble damage exposure. In bringing their own Section 2 cases, public agencies today must satisfy liability standards that have been set to deal with overdeterrence hazards that the public agencies do not pose.

To the extent that the drive toward cautious application of the Sherman Act rests upon considerations of administrative capacity, Section 5 again provides a possible institutional solution. Compared to the typical federal court, the FTC offers a superior platform for elaborating competition policy, and particularly for policy toward dominant firms. It has tools to perform empirical and policy work that can inform the design of legal rules. In its routine operations, it is a specialized tribunal whose decisions under Section 5 have no collateral effect in private cases. In principal, administrative elaboration of doctrine by the FTC, subject to judicial review, should ameliorate many of the concerns that accompany the private litigation of antitrust cases before generalist courts.[54]

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[50] *See* William E. Kovacic, *Accounting for Regulation in Determining the Application of Antitrust Rules to Firms Subject to Public Utility Oversight*, 40 ANTITRUST BULL. 483, 496 (1995) (discussing how courts in antitrust cases regarded the effectiveness of public utility regulation).

[51] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[52] Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).

[53] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109 (2009).

[54] While it might ameliorate those concerns, however, it would not address the potential to incorporate Commission UMC law into the construction of state laws with their own UMC provisions. Many states have statutes, modeled on the FTC Act, that prohibit unfair methods of competition (as well as unfair or deceptive acts or practices). The federal and state systems do not operate in watertight compartments. As commentators have documented, the federal and state regimes are interdependent. *See, e.g.*, DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW 143–52 (2009–2010 ed.) (discussing use of FTC precedent to interpret state consumer protection statutes); Law-

II. CAUTIONS FROM HISTORICAL EXPERIENCE

There are strong conceptual bases, outlined above, for U.S. competition policy system to rely more heavily upon administrative elaboration of Section 5 of the FTC Act to address claims of improper exclusion. These bases provide good reason to consider how Section 5 might supply a superior basis for the development of principles for single firm conduct.

There also is a cautionary history that ought to inform discussions about how fast, how far, and by what means the FTC might expand its use of Section 5 as an alternative to Section 2 litigation before the federal courts. FTC experience with Section 5 is generally a bleak record. It features few episodes of success in using Section 5 to establish distinctive competition policy jurisprudence with respect to single firm conduct or other forms of behavior. The Commission must confront this history directly and understand why the list of failures is considerably longer than the list of accomplishments.

The FTC's success in achieving durable, influential adjustments in doctrine through Section 5 jurisprudence can best be measured through a simple inquiry: How often do appellate courts endorse FTC efforts to premise liability on Section 5 theories?[55]

This definition of accomplishment discounts the importance of consent decrees premised upon Section 5 theories. Firms and their counselors must and do pay attention to consent decrees, for settlements can be important signs of the Commission's enforcement intentions. Settlements also can be a way to test and gain acceptance for a theory. At least indirectly, such support might create a more accepting environment

rence Fullerton et al., *Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums* (ABA Section of Antitrust Law, Working Paper No. 1, July 1988) (describing how FTC consumer protection actions inform application of state law). State laws modeled on the FTC Act can include private causes of action, including private causes of action with multiple damages and attorneys' fees.

[55] The FTC's success in developing a unique Section 5 jurisprudence is only one measure of its success as a competition enforcement agency. Most UMC cases are expressly premised on an underlying Sherman Act theory. For those cases, a comparable inquiry would examine the extent to which the Commission has influenced broader antitrust doctrine. It would consider, for example, the impact of the Commission's analysis of how to conduct a rule of reason analysis, which was endorsed on judicial review, *PolyGram Holdings, Inc. v. FTC,* 416 F.3d 29 (D.C. Cir. 2005), and has influenced other courts. Further, a fuller analysis would consider the Commission's influence on policy and conduct through its research mission, consumer education, foreign and domestic advocacy, and other tools. *See generally* WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY (2009) (report by FTC Chairman on the results of the FTC's self-study), *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

when the federal courts review a future FTC decision that employs the concepts embodied in prior consents.

As influences on doctrine and firm behavior, though, settlements are weak substitutes for decisions by the appellate courts that affirm FTC rulings based on Section 5. One can have confidence in a theory's power and durability only when it has been tested in adversarial proceedings and endorsed by reviewing courts (and respondents who contest an administrative complaint before the agency will generally seek judicial review if the agency rules against them).[56] The consent decree achieved by the FTC in *N-Data*[57] is interesting, but the concept applied there becomes truly significant only if and when it ultimately prevails in a contested matter and survives review in the appellate process.

The FTC's record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is uninspiring. The cases of greatest interest are those in which the Commission expressly disavowed reliance on Sherman Act jurisprudence and indicated that it was attempting to reach conduct not prohibited by the other statutes. Aside from *S&H*, complexities of which are discussed below, one needs to go back to the 1960s to find cases in which the Commission succeeded on appeal in a case applying a Section 5 theory. These would be matters such as the tires, batteries, and accessories cases involving Texaco and Atlantic Refining,[58] which involved variants of tying, and the exclusive dealing prosecution of Brown Shoe.[59] To this list one might add *Brunswick/Yamaha*, which approved the FTC's use of Clayton Act Section 7 and FTC Section 5 theories to nullify a joint venture.[60] In the period before the 1960s, the list of FTC appellate successes is short as well.

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[56] In addition to the lack of a judicial screen, settling respondents may have less interest in the doctrine reflected in the complaint than in the limitations on conduct imposed by the order, while the Commission's priorities might be more weighted to the doctrinal implications. In particular, a respondent who is otherwise inclined to settle a case may have little incentive to resist an alternative theory of liability that leads to no additional order provisions.

[57] *See* Negotiated Data Solutions LLC, FTC No. C-4234 (Sept. 22, 2008) (Decision and Order), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf. *But see* Dissenting Statement of Commissioner William E. Kovacic, *In re* Negotiated Data Solutions LLC, FTC No. C-4234 (Sept. 22, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

[58] FTC v. Texaco, Inc., 393 U.S. 223 (1968); Atl. Refining Co. v. FTC, 381 U.S. 357 (1965).

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

[60] Yamaha Motor Co. v. FTC, 657 F.2d 971, 981 (8th Cir. 1981).

These results have not been for lack of trying. In the 1970s the Commission premised several cases on distinctive Section 5 theories. Three of these matters—*Boise Cascade*,[61] *Official Airline Guides*,[62] and *Ethyl*[63]—resulted in court of appeals decisions. All were adverse to the agency. The FTC also litigated and lost a case (*Abbott Laboratories*) in federal district court in the mid-1990s.[64] These federal court decisions in Section 5 cases reveal similar themes. In each instance, the tribunal recognized that Section 5 allows the FTC to challenge behavior beyond the reach of the other antitrust laws. In each instance, the court found that the Commission had failed to make a compelling case for condemning the conduct in question.

In the more recent and in the more distant cases, one can suggest several reasons for the reluctance of federal courts to sustain the FTC's Section 5 cases. The first is judicial concern about the apparent absence of limiting principles. The tendency of the courts has been to endorse limiting principles that bear a strong resemblance to standards familiar to them from Sherman Act and Clayton Act cases. The cost-benefit concepts devised in rule of reason cases supply the courts with natural default rules in the absence of something better.

The Commission has done relatively little to inform judicial thinking, as the agency has not issued guidelines or policy statements that spell out its own view about the appropriate analytical framework. This inactivity contrasts with the FTC's efforts to use policy statements to set boundaries for the application of its consumer protection powers under Section 5, which, since 1938, have supplemented Section 5's prohibition on UMC with a separate prohibition on unfair or deceptive acts or practices ("unfair or deceptive acts" or UDAP).

Another possible reason for judicial reluctance to endorse distinctive FTC invocations of UMC authority is doubt about the depth and quality of the agency's expertise. To extend the reach of competition policy beyond prevailing interpretations of the other antitrust laws, the Commission arguably needs to persuade judges that the agency knows where it is going and has a sound conceptual and empirical basis for the steps it wishes to take. If courts perceive that those foundations have not been set, they may be reluctant to take the Commission's suggested path.

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

[62] Official Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980).

[63] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) *(Ethyl)*.

[64] FTC v. Abbott Labs., 853 F. Supp. 526 (D.D.C. 1994). The Commission proceeded under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), added in 1975, and sought a permanent injunction and disgorgement or restitution.

In addition to addressing the history of judicial skepticism toward an expansion of efforts to apply the UMC authority, the Commission also must confront historical episodes of hostile legislative reactions to the application of Section 5. In the 1950s and the 1970s, Commission efforts to use Section 5 litigation to reach beyond prevailing interpretations of Sections 1 and 2 of the Sherman Act elicited strong political backlash from the Congress.[65] The very breadth of Section 5 creates political risks in its application. The Commission always will face objections from respondents in Section 5 cases that the agency is going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes. To go beyond interpretations of the other antitrust laws is a central aim of Section 5, but the act of doing so creates immediate opportunities to scold the Commission for taking "unprecedented" measures or entering "uncharted" territory.

In a number of painful instances, these objections have resonated with Congress. In the early 1950s, Congress's ire was aroused by the Commission's successful challenge to base point pricing in the *Cement Institute* case, and the legislation that Congress passed (and President Truman vetoed) focused on that narrow issue.[66] In the 1970s, a wide range of competition (and consumer protection) initiatives included UMC challenges to collective dominance in the breakfast cereal and petroleum sectors; that time, legislation that Congress passed (and President Carter signed) restrained numerous aspects of the agency's authority.[67] In each of these instances, a major theme of the attacks was that the Commission was purporting to use its elastic mandate to assert unlimited control over the conduct and structure of American industry.

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[65] William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869 (1989); William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement,* 17 TULSA L.J. 587, 625–27, 666 (1982) [hereinafter *Congressional Oversight of Antitrust Enforcement*].

[66] *See* Kovacic, C*ongressional Oversight of Antitrust Enforcement,* supra note 65, at 625–27. John Blair, who headed the FTC's Bureau of Economics in the early 1950s, wrote in 1964 that "[t]he agonies that the Commission went through in trying to justify its attack upon the basing-point system . . . left a scare which will long remain." John Blair, *Planning for Competition*, 64 COLUM. L. REV. 524, 525 (1964). Blair's prediction came to pass. To abate congressional outrage at the *Cement Institute* decision, the Commission forswore future efforts to address base-point pricing and similar arrangements except through the application of traditional Sherman Act concepts. These concessions came back to haunt the agency in 1979 in the *Boise Cascade* case, where the court of appeals cited the agency's representations to Congress soon after the Supreme Court issued its *Cement Institute* opinion as a factor weighing against the application of Section 5 to condemn the respondents' parallel, independent adoption of delivered pricing systems. *Boise Cascade*, 637 F.2d at 576.

[67] *Id.* at 630–67.

III. THE PATH AHEAD

The unfair methods mandate that appears in Section 5 of the FTC Act is one of the Commission's distinctive institutional elements.[68] To say that it has no role in the elaboration of competition doctrine and policy is to call into question a major basis for the agency's formation. The dramatic narrowing of the zone of enforcement in modern abuse of dominance jurisprudence provides a good reason to reexamine possibilities for the application of this policy instrument.

Yet there is no point in considering an expansion of Section 5 enforcement to address single firm conduct unless one devises a strategy that rests upon an accurate diagnosis of past Section 5 enforcement failures and corrects them. The FTC must explain why things will be better the next time. The path ahead requires several steps.

1. *Use a Policy Statement or Guidelines.*

The first institutional predicate is for the Commission to articulate, in a policy statement or guidelines, its views about what constitutes an unfair method. Such an articulation should describe how the agency will exercise its enforcement discretion and, beyond that, set forth a high-level framework for analyzing Section 5 cases in adjudication. This approach parallels that which the Commission took in 1980 to secure its consumer protection authority (then under substantial question from Congress).[69] A comparable UMC policy statement might set forth a similarly high-level test, broad enough to encompass specific (and in many cases unanticipated) conduct as it arises. The recent FTC workshops on unfair methods of competition provide one source of insight for this undertaking.

Without clearly defined analytical concepts and implementing techniques, the Commission runs a serious risk that courts will simply default to existing Sherman Act Section 2 standards, and the elastic properties of Section 5 will not be realized in practice.

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[68] Others include its multi-member and bi-partisan composition; its authority to conduct adjudicative hearings; its combination of investigatory, reporting, and litigation functions; and its combination of competition and consumer protection missions.

[69] FTC Policy Statement on Unfairness (1980), *appended to* Final Order, Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. The principal section of that text was characterized as a "Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction."

2. *Articulate a Framework that Accounts for Similarities to, as Well as Differences from, Other Antitrust Laws*

The second institutional predicate is to account (preferably in a policy statement or guidelines), for the similarities between a stand-alone UMC case and a Sherman Act case, as well as the differences between the two. The Commission must confront these issues directly. In cases that fit squarely within a Sherman Act framework, the Commission has relied, and will continue to rely, on Sherman Act precedent and modes of analysis. When the Commission seeks to move beyond Sherman Act precedent, or to have its evidence evaluated on a standard unique to Section 5, a court will almost inevitably look to the similarities and differences noted above.

The similarities will likely turn on commonalities with other antitrust laws. We believe that UMC should be a competition-based concept, in the modern sense of fostering improvements in economic performance rather than equating the health of the competitive process with the well-being of individual competitors, per se. This limitation does not reflect early Commission precedent; before 1938, the Commission routinely challenged such practices as deception, lotteries, and commercial bribery as unfair methods.[70] This limitation, further, does not reflect indications in the legislative history of the 1938 legislation, which gave the Commission UDAP authority, that the new authority would not lessen the agency's UMC authority.[71] Nor does this limitation take full advantage of the assertion in *S&H* that the Commission could use its UMC authority to reach practices outside both the letter and spirit of the antitrust laws. We think the early history is now problematic, and we view the relevant language in *S&H* with skepticism.

S&H challenged the firm's efforts to stop "exchanges" that dealt in its trading stamps as commodities. The administrative case challenged the practice as anticompetitive, but the Commission had shifted ground before the case reached the Supreme Court. In accepting the Commission's far-reaching arguments, the Court not only referred approvingly to the pre-1938 precedent discussed above; it also criticized a 1931 decision, which held that the Commission could challenge trade practices only where they injured "present or potential rivals," as one of the cases that "so straitjacketed the FTC that the Commission could not issue a

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[70] *See, e.g.*, Circle Cilk Co., 1 F.T.C. 13 (1916).

[71] *See, e.g.*, S. REP. NO. 75-221 (1937) (UDAP authority would allow the Commission to protect the public, even when competitors are not entitled to protection because they engage in similar practices).

cease-and-desist order prescribing even an immoral practice."[72] It cited approvingly a 1934 decision that concluded that UMC could be found in the sale to children of penny candy because it tempted children to gamble and compelled more scrupulous competitors "to abandon their scruples."[73] When it remanded the case for the Commission to make new findings, the Court said that the agency might show "effects on competitors because of considerations other than those at the root of the antitrust laws," and "noncompetitive" injury.[74] The best reading of the case is that, in 1972 as much as in 1938, the Commission could use UMC to challenge such practices as deception and commercial bribery—in essence, to make UDAP cases virtually a subset of UMC cases.

It is hard to reconcile this broad approach, which addresses the import of UMC for challenging "immoral" practices, with the post-*S&H* evolution of UMC and UDAP authority. UDAP authority has increasingly focused on a harm-based test, and subordinated the fuzzier notions of "immorality" that *S&H* seemed to approve as a factor in the context of both competition (as noted above) and consumer protection (as reflected in a 1964 Commission statement).[75]

UMC authority, both in the occasional stand-alone Section 5 cases and in the more common Section 5 case premised on a Sherman Act theory, has focused on the pricing and output effects associated with competition law. While the Court had used the mantra of "protect[ing] competition, not competitors" before *S&H*,[76] it did not apply the under-

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[72] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 241–43 (1972) (discussing FTC v. Raladam Co., 283 U.S. 643 (1931), with disapproval).

[73] *Id.* at 242–43 (discussing FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934), with approval).

[74] *Id.* at 247, 248.

[75] In discussing unfairness (and clearly referring to UDAP and, perhaps, to UMC as well), *S&H* cited with approval the 1964 Statement of Basis and Purpose for the Commission's Cigarette Rule. That Statement identified three factors that could support a finding of unfairness: consumer injury, public policy, and whether a practice is unethical or unscrupulous. Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8355 (1964). The Commission's 1980 unfairness statement clarified that the unethical/unfairness test was not an independent basis for unfairness; focused on a more precisely defined injury test, and retained a public policy component while tethering it to injury (public policy could sometimes be the sole basis for finding injury). FTC Policy Statement on Unfairness (1980), *supra* note 58, at 1070. Further, when Congress codified the standard in 1994, it retained the injury test and a more limited public policy test, with the qualification that public policy "may not serve as a primary basis" for finding unfairness. 15 U.S.C. § 45(n).

[76] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). The Court's *Brown Shoe* decision used this phrase twice—once in a general discussion about the aims of Section 7 of the Clayton Act and again in a passage that ultimately endorsed the application of Section 7 to preserve a more egalitarian business environment even at the occasional

lying principle to create the doctrine of antitrust injury until fifteen years later, in 1977.[77] However intertwined UMC and UDAP may have been in the past,[78] today they are essentially complementary.[79] The increased analytical precision of both, moreover, affords the Commission greater credibility with a reviewing court. For all of these reasons, we doubt that a UMC holding will have much credibility if it falls outside the "spirit" of the antitrust laws. Further, although the spirit of those laws is not necessarily limited to the sort of pricing and output effects associated with modern antitrust doctrine, the Commission will have a rough road to travel, and be in particularly compelling need of a policy with clear limiting principles, if it moves beyond those effects.

All of this looks to the first part of a possible framework, which would examine the similarities between a stand-alone UMC theory and other antitrust laws. The second part of this framework would focus on the difference between the two. In the simplest cases, the difference could be a straightforward legal hurdle, as when Section 5 allows a challenge to a business that proposes to a rival firm that they fix prices, regardless of whether the rival agrees to do so. This course of action would not support a claim under Section 1 of the Sherman Act because it lacks the statutory predicate of an agreement, and it could not hope to support an attempted monopolization count absent suitable market share. However, the case is so straightforward, under the facts described above, that the conduct might constitute virtually a per se violation of Section 5.

In more challenging cases, particularly those involving abuse of dominance, the Commission might attempt to premise Section 5 enforcement expressly on considerations of institutional comparative advantage. As Dan Crane has observed, developments in federal court litigation, particularly in private lawsuits, have illuminated the importance of choosing the correct institutional platform to resolve difficult issues of competition law and policy.[80] The FTC's institutional features, including Section 5, might supply a means of avoiding the pitfalls that

cost of efficiencies that a challenged merger might produce. GELLHORN ET AL., *supra* note 21, at 45–47.

[77] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[78] Into the 1970s, for example, deception cases often pled both UMC and UDAP violations. *See, e.g.*, Creative Replacements, Inc., 88 F.T.C. 347 (1976) (Complaint) (hair replacement implant system).

[79] Although some cases may implicate both, in our view UMC doctrine should no longer subsume all unfair or deceptive acts (as it did from 1914 to 1938), nor should UDAP doctrine subsume all unfair methods (although it could be argued that every well-conceived competition case satisfies the statutory standard for unfairness).

[80] FTC Workshop on Section 5 of the FTC Act as a Competition Statute, *supra* note 5, at 73–80.

judges associate with the litigation of private antitrust disputes in the federal courts. This rationale could be presented front and center as a basis for applying Section 5, and it might be premised on two broad aspects of the FTC Act: The Commission's expertise, and the relatively limited implications of a Section 5 violation (at least under Federal law[81]).

The challenge is to identify specific problems with private litigation—the Supreme Court has been quite explicit in citing some[82]—and to explain why, in a particular case, administrative enforcement should trouble a reviewing court less than would private litigation.

One possibility is to develop a rationale for what Former Commissioner Tom Leary calls "frontier" cases,[83] which announce a new principle that could apply under Section 2, but which is ready only for Section 5 prospective enforcement but not the prime time of Section 1 or 2. In a frontier case, the Commission would presumably find (and a reviewing court would presumably affirm) all the elements of a Sherman Act violation; the difference between Section 5 and the Sherman Act would be inherently transitory. The logic here would be that the Commission's institutional expertise provides a basis to announce a legal principle and impose equitable relief at the outset; then, once the principle is announced, its subsequent application could be entrusted to Sherman Act enforcement with the accompanying treble damages. The challenge to this approach, though, is to make it work in practice: for a court to announce a decision under Section 5 without providing a precedent for a plaintiff to use when it seeks to persuade a different court to impose treble damages for prior conduct.[84]

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[81] *See supra* note 54.

[82] *See, e.g.*, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1120–22 (2009) (appropriateness of judicial administration of certain remedies); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (noting costs of allowing discovery to proceed in an antitrust case); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 414 (2004) (noting risk of false positives); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 279–84 (2007) (noting, and finding particularly significant in a case involving the role of antitrust in the regulated securities industries, problems posed by non-expert and generalist judges, non-expert juries, and the risk of antitrust mistake).

[83] *See* Thomas B. Leary, *A Suggestion for the Revival of Section 5*, ANTITRUST SOURCE, Feb. 2009, http://www.abanet.org/antitrust/at-source/09/02/Feb09-Leary2-26f.pdf); *see also* Susan B. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, ANTITRUST SOURCE, Feb. 2009, *available at* http://www.abanet.org/antitrust/at-source/09/02/Feb09-Creighton2-26f.pdf.

[84] To the extent that the institutional concern with Sherman Act enforcement derives from the fairness of imposing treble damages for violating a (perhaps unanticipated) business norm, the optimal result could be to make the conduct subject to treble damages only after the Commission had enunciated the relevant standard—presumably not before the Commission filed its complaint, and perhaps not before it issued a litigated order or

Alternatively, the Commission could argue, in specific contexts, for less transitory differences between Section 5 scrutiny and Sherman Act scrutiny. Gap-filling cases, like the clear-cut invitation to collude cases noted above, fit squarely within this description. What else might?

Focusing either on the Commission's expertise, the relatively limited consequences of Commission action, or both, perhaps if might be argued that certain types of matters involve such fact-specific complexity that they should be reserved for Section 5. Or perhaps it might be argued that a particular element of proof needed to show a Sherman Act violation is unnecessary, or could be relaxed, for purposes of Section 5. The Commission might assert, for example, that, where an element of a Sherman Act test looks to a likelihood of anticompetitive effects, the Commission might establish a lower threshold of likeliness for purposes of Section 5.[85] Similarly, perhaps the Commission might argue, when the parties raise a specific defense to a Commission action, that a different threshold should apply under Section 5. (The latter might apply, for example, when respondents rely on the state action doctrine, a species of what Susan Creighton and Tom Krattenmaker call "yes, but" cases[86]).

Under any of these, the Commission should be prepared, as noted above, to articulate the standard that it proposes to adopt. To the extent that that standard differs from the standard applied under the Sherman Act, moreover, the Commission will likely encounter the skepticism it encountered in the 1980s unless it can persuasively explain those differences and, in particular, can tie them to one or more unique attributes of Section 5.[87] On the other hand, this poses challenges of its own. For

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even before that order was subject to judicial review. (Less common situations, such as an unappealed decision of an administrative law judge or a Commission decision for which respondents did not seek judicial review, would raise additional questions). Even if the optimal time to start damages could be identified it would be hard for a court that found a violation in a later Section 2 case to limit damages appropriately.

[85] An analogy would look to the way that (at least in theory) Section 7 of the Clayton Act, 15 U.S.C. 18, sets a threshold that reaches any transaction whose effects "may be substantially to lessen competition or to tend to create a monopoly."

[86] In other words, these are cases where yes, the challenged conduct is anticompetitive, but no, it does not violate the law because of a doctrine that trumps antitrust concerns. Creighton & Krattenmaker, *supra* note 83.

[87] To this end, we note that, to the extent an argument relies on the FTC's expertise (as opposed to the more limited consequences of a Section 5 violation), such an argument will be more persuasive when the Commission uses it to consider issues that draw on the Commission's core expertise in analyzing competition issues, rather than to require the Commission to balance competition concerns against values outside its core expertise in competition (or consumer protection) matters. Further, it is more persuasive when the Commission uses administrative litigation, or seeks a preliminary injunction in support of administrative litigation, than when it seeks a permanent injunction, since the latter case the Commission is not functioning, and does not anticipate functioning, as an adjudicative decision maker.

example, this rationale would require the Commission to encourage, or at least invite, a reviewing court to find that challenged conduct does not violate Section 2. Needless to say, this might not be popular, among other quarters, with the Antitrust Division.

3. *Build Institutional Competence*

Finally, the third foundation is to build the FTC brand for institutional competence. This means using research, workshops, reports, and related policy instruments to signal to the courts that the FTC has a sound basis for specific proposed applications of Section 5. The Supreme Court's decision in *Cement Institute*, which sustained the Commission's finding of an infringement, emphasized the agency's previous research and development in this area. Such investments may well be seen by courts as providing assurance that the steps proposed by the Commission are wise and worthy of support.

IV. CONCLUSION

Section 5 is important to the FTC in theory, but efforts to implement it have seen only limited success in practice. Future efforts to develop Section 5 jurisprudence must account for these past problems, if the Commission is to attain better results the next time. The Commission needs to articulate, perhaps through a policy statement prior to litigation, the basis on which it intends to proceed. That basis, moreover, should focus on the similarities between the proposed Section 5 theory and a Sherman Act theory (why is it essentially a competition-based theory?), as well as the differences (why should a violation be found under Section 5 but not under the Sherman Act?).