Regulating Beyond the Rule of Reason

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Abstract. The Federal Trade Commission ("FTC" or "Commission") is testing the boundaries of its authority with an enforcement policy that departs from the rule of reason in the antitrust laws and a procedural agenda that prescribes general regulations of business practices. Neither proposition is unprecedented. Both have reached the Supreme Court.

In its first two decades, the Commission suffered numerous reversals in the courts when it declared business practices unfair without finding unjustifiable harm to competition. Although the Supreme Court has opined in dicta that the prohibitions in the FTC Act extend beyond violations the Sherman and Clayton Acts, it has not upheld a Commission decision on those grounds. The most expansive expression of the FTC's powers rendered by the Court came with a remand directing the agency to analyze the record in accordance with the approach of the antitrust laws.

Empowering the Commission to promulgate rules of competition was considered and rejected by the Congress that passed the FTC Act, and the Supreme Court held a comparable grant in the National Industrial Recovery Act to be an unconstitutional delegation of power. One court, however, did uphold a Commission competition regulation fifty years ago. The vitality of that decision is assessed in light of modern jurisprudence.

At stake in the outcome of the Commission's initiatives are the prices customers will pay and the costs that producers will bear. The Article will review enforcement of the Robinson-Patman Act for evidence of the costs of departures from antitrust norms.

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Introduction

A century after its founding, the Federal Trade Commission ("FTC" or "Commission") declared independence from antitrust laws and rewrote competition-enforcement policy.[1] The Commission renounced the rule of reason and the consumer welfare standard that informs antitrust policy; dedicated its competition mission to the causes of interest groups, including workers, minorities, and small businesses; retreated from the goal of sustaining vigorous competition; and proposed the first of a series of regulations intended to make markets fair and equitable.[2]

These actions have revived questions that precede the Commission itself about the extent of its authority. Is the rule of reason a misguided approach, and is consumer welfare an inadequate objective for competition policy? Are rules superior to cases for protecting competition, and has Congress given the Commission such rulemaking authority? If so, how might the new enforcement policies and procedures affect the economy?

If a century of settled precedent is any guide, three conclusions are predictable with reasonable confidence. First, the Federal Trade Commission Act ("FTC Act") does not give the Commission latitude to depart from the analytical approach of the other antitrust laws (i.e., the Sherman and Clayton Acts). Second, Congress denied the Commission authority to promulgate competition regulations. Third, the concepts of fair competition that the Commission envisions would inflict substantial costs on the economy.

Since its first encounter with the Supreme Court, the FTC has struggled to define its role as an enforcer of antitrust laws. Early Commission cases that departed from precedents under the Sherman and Clayton Acts foundered when courts faulted the agency for failing to find anticompetitive effects.[3] Only once has a competition rule been upheld, fifty years ago on an application of statutory construction since abandoned.[4] History does, however, offer an indication of potential consequences of enforcement that eschews the rule of reason; for three decades in the mid-twentieth century, the Commission campaigned to protect competitors from price discrimination regardless of competitive

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1 *See* Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 1 (Aug. 13, 2015) [hereinafter 2015 Policy Statement].

2 *See* discussion *infra* Part I.

3 *See* G. Cullom Davis, *The Transformation of the Federal Trade Commission, 1914-1929*, 49 MISS. VALLEY HIST. REV. 437, 441–42 (1962).

4 *See* Maureen K. Ohlhausen & Ben Rossen, *Dead-End Road:* National Petroleum Refiners Association *and FTC "Unfair Methods of Competition" Rulemaking*, *in* RULEMAKING AUTHORITY OF THE U.S. FEDERAL TRADE COMMISSION 35–36 (Daniel A. Crane ed., 2022).

effects.[5] The campaign ended when the costs to customers became widely recognized.[6]

This Article is divided into four Parts. Part I describes the current course the FTC has charted. Over the last decade, a new wave of critique blamed inadequate antitrust enforcement for a host of asserted economic ills, including industrial concentration, predatory conduct, unfair discrimination, and neglected stakeholders. According to the critique, an antitrust establishment preoccupied with consumer welfare allowed producers to acquire dominant positions in numerous industries, especially in technology, where a handful of companies control platforms essential for modern commerce. At fault for this state of affairs were not only the enforcers but the courts and the laws themselves. Nothing short of an overhaul of the American antitrust regime was deemed necessary to arrest the ominous trends.

As described in Part II, the laments of the reformers today echo the agitation of a century ago that added the FTC and Clayton Acts to the antitrust arsenal. The new Commission experimented with actions to arrest practices that would not have offended other antitrust laws, but the Supreme Court largely rejected those efforts. Congress ultimately expanded the agency's authority to prosecute unfair and deceptive acts and practices without demonstrating effects on competition. Since then, with the exception of price-discrimination cases, the courts have consistently reversed Commission competition decisions that departed from prevailing antitrust analysis.

Part III explores the legal and economic consequences of departing from the rule of reason. After the Robinson-Patman Act of 1936 removed the requirement of proving competitive harm from discriminatory discounts in prices and promotions, the Commission enforced the law aggressively, raising prices and costing consumers billions of dollars. Official enforcement of the Robinson-Patman Act evaporated in the 1980s, a reaction to the recognition of its costs and the Supreme Court's commands that it be interpreted consistently with other antitrust laws. The current administration has called for a resumption of Robinson-Patman enforcement, so there is good reason to consider the implications of a renewed official hostility to price discrimination. Evidence from its heyday suggests that mandated price uniformity could saddle consumers with hundreds of billions of dollars annually in higher prices.

Part IV considers the authority of the FTC to issue rules in light of the Supreme Court's decisions since the New Deal and of the "major

[5] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 410–11 (2003).

[6] *See id.* at 383.

questions" doctrine recently enunciated. A crisis of confidence in competition erupted during the Great Depression. Blamed for wage and price deflation, poor working conditions, unemployment, and other economic ills, competition was curtailed by the National Industrial Recovery Act ("NIRA"), the centerpiece of the New Deal. It suspended antitrust laws and authorized codes of fair competition. The Supreme Court held the NIRA unconstitutional and declared rulemaking incapable of distinguishing legitimate from illegitimate competitive methods. That task required adjudication. Part IV concludes that the Court would regard competition rulemaking no differently today than it did in 1935. A competition policy untethered from antitrust, implemented in industry-wide rules, is unlikely to survive review.

I. The Antitrust Overhaul of 2021 to 2023

In this Part, Section A recounts the Federal Trade Commission's formal adoption of the rule of reason. Section B reviews the Commission's debates and decisions to reject the rule of reason as the foundation for determining unfair methods of competition. Section C describes the academic antecedents to the departure from traditional antitrust enforcement policy.

A. *Adopting the Rule of Reason as Commission Policy*

Since the 1980s, the FTC has been aligning its competition-enforcement policy with the larger body of antitrust laws. The Commission officially endorsed that alignment in 2015 when it issued the *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* ("2015 Policy Statement").[7] Comprising a single page, the 2015 Policy Statement described the principles that would guide prosecutorial decisions under Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), which gives the Commission the authority to declare methods of competition unfair.[8] The 2015 Policy Statement recognized that Congress had left unfair methods undefined to allow enforcement of the statute to evolve with changing circumstances, including those that might not violate the letter of the Sherman and Clayton Acts.[9] There was no doubt in the 2015 Commission that it possessed the power to challenge conduct that contravened the spirit of

7 2015 Policy Statement, *supra* note 1.

8 *Id.*

9 *Id.*

those laws, as well as acts and practices that, if allowed to mature, could become actual violations.[10]

Uncertainty is as old as the statute as to how far the Commission could go beyond the boundaries of the other laws (which are intentionally imprecise themselves). The 2015 Policy Statement sought to reduce that uncertainty by committing the Commission to observe three principles. First, it would respect "the public policy underlying the antitrust laws," which the Commission characterized as the "promotion of consumer welfare."[11] Second, the agency would apply Section 5 under "a framework similar to the rule of reason."[12] In other words, an act or practice "must cause, or be likely to cause, harm to competition or the competitive process" in order to warrant enforcement.[13] Evaluation of the activity would be extensive, taking into account any "cognizable efficiencies and business justifications" associated with it.[14] Finally, the agency would be less likely to invoke Section 5 as a sole basis for challenge if the Sherman or Clayton Act were sufficient to address the perceived threat to competition.[15] Adopted by a bipartisan vote of the Commission, the 2015 Policy Statement aroused a lone dissent; one Commissioner argued that the text did not adequately explain the application of Section 5.[16]

Defending the 2015 Policy Statement, Edith Ramirez, then chair of the Commission, explained that the Commission was "restating the general principles that guide us, all of which are reflected in the Commission's recent precedents exercising standalone Section 5 authority."[17] She noted that for decades the Commission had confined its cases to conduct that diminished consumer welfare by harming competition or the competitive process.[18] The agency, correctly in her view, declined to champion the causes of competitors or policies

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[10] *Id.* ("Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."); *see, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (suggesting in dicta that the FTC could promote "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").

[11] 2015 Policy Statement, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement, at 1 (Aug. 13, 2015).

[17] Edith Ramirez, Chair, Fed. Trade Comm'n, Address at the George Washington University Law School Competition Law Center 2 (Aug. 13, 2015), https://perma.cc/N8WG-Y6KU.

[18] *Id.* at 4–5.

unrelated to competition.[19] There was "broad consensus at the Commission" to apply the same objectives that underlie other antitrust laws, she explained.[20] Pervasive in those laws is the rule of reason, the framework of which informs the analysis, "whether we are looking at restraints of trade, monopolies, or mergers."[21]

Responding to critics who might regard the 2015 Policy Statement as too general to provide guidance, she conceded it was concise, "but only because it explicitly incorporates concepts widely used in antitrust law, such as 'consumer welfare,' 'rule of reason,' 'harm to competition,' and 'cognizable efficiencies.'"[22] Those concepts, she observed, "derive their content from 125 years of precedent under the Sherman and Clayton Acts . . . ."[23] That precedent would inform Commission analysis under Section 5, and the analysis would apply in case-by-case enforcement, rather than any code of regulations, because "antitrust has always relied on a case-by-case approach," and no code would be "feasible or desirable in [the] variegated and intensely dynamic economy" of the United States.[24]

B. *Removing the Rule of Reason from Section 5*

The 2015 Policy Statement did not survive six years. In 2021, the Commission rescinded it and disputed virtually every justification its drafters had offered.[25] The new majority began with an assertion that the 2015 Policy Statement contravened "the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence."[26] Adherence to the principles in the 2015 Policy Statement, said the Commission, would abrogate its "congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute."[27]

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19 *Id.* at 5.

20 *Id.* at 7.

21 *Id.*

22 *Id.* at 9.

23 Edith Ramirez, *supra* note 17, at 9.

24 *Id.*

25 Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 1 (July 9, 2021) [hereinafter 2021 Statement of the Commission].

26 *Id.*

27 *Id.*; *see also* Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021) [hereinafter 2021 Khan et al. Statement].

The Commission made it clear that it regarded the principal defect of the 2015 Policy Statement to be its alignment with the rule of reason.[28] Delving into the legislative history of the FTC Act, the majority quoted lawmakers in 1914 who were concerned that the Supreme Court's interpretation of the Sherman Act in *Standard Oil Co. v. United States*[29] would subject competitive restraints to an open-ended "standard of reason" that "delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts."[30] Assertedly unchecked judicial discretion had led to "unwieldy" proceedings, "soaring enforcement costs," and "inconsistent outcomes."[31] The Commission cited judges and scholars who had derided the rule as "unadministrable or exceedingly difficult to meet."[32] Not only did the rule of reason offend Section 5, its cumbersome framework "needlessly constrain[ed] the Commission from taking action to safeguard the public from unfair methods of competition."[33] In other words, Section 5 was intended to reduce the difficulty of proving antitrust violations.

Two other aspects of the 2015 Policy Statement were critical to the Commission's decision to rescind it. First was the requirement that conduct must present a likelihood of anticompetitive effects before it could be condemned.[34] This, in the Commission's view, would abrogate its statutory mandate to combat incipient wrongdoing "*before* it becomes likely to harm consumers or competition."[35]

A second concern for the 2021 Commission was the 2015 Policy Statement's reliance on adjudication rather than rulemaking.[36] In 2015, former FTC chair Ramirez explained that regulations would not "be feasible or desirable in our variegated and intensely dynamic economy, which is why antitrust has always relied on a case-by-case approach to

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28 *Id.* at 5.

29 221 U.S. 1 (1911).

30 2021 Statement of the Commission, *supra* note 25, at 3 (citing Neil Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the FTC Act*, 21 B.C. L. REV. 227, 229–240 (1980); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911)).

31 *Id.* at 5.

32 *Id.* (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 916 (2007) (Breyer, J., dissenting); Richard A. Posner, *The Rule of Reason and Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977)).

33 *Id.* at 6.

34 *See id.*

35 *Id.* (citing FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 463, 466 (1941)); *see also* FTC v. Brown Shoe Co., 384 U.S. 316, 321–22 (1966) (finding the conduct at issue would violate the other antitrust laws).

36 *See* 2021 Statement of the Commission, *supra* note 25, at 6.

doctrinal development."[37] Rather than dispute Ramirez's explanation, the 2021 Commission ignored it, claiming instead, "[w]ithout explanation, the [2015 Policy] Statement fails to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants."[38] An "adjudication-only approach," opined the Commission, "often fails to deliver clear guidance."[39]

Two Commissioners dissented from the recission, objecting to the abandonment of the rule of reason and the consumer welfare standard.[40] In the dissenters' view, the 2015 Commission was justified in embracing the analytical approach based on economic theory that had informed antitrust policy for half a century.[41] Pursuing objectives other than consumer welfare, the dissenters argued, would tempt the FTC to favor special interests that would benefit from a reduction of competition and expose enforcement actions to reversals in the courts.[42] In response to the argument that the standard was too unwieldy, they cited a Supreme Court case that had just affirmed liability after applying the rule.[43]

In its Strategic Plan for Fiscal Years 2022 to 2026, the Commission released a prediction of the kind of competition it intends to foster, who would benefit, who would bear the costs, and what practices would face

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37 Edith Ramirez, *supra* note 17, at 9.

38 2021 Statement of the Commission, *supra* note 25, at 7.

39 *Id.* (citing Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359–63 (2020); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 668–70 (2017); Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1288, 1304–05 (2014); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 933–34 (2010); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674–80 (2009); Daniel A. Crane, Comments at FTC Workshop on Section 5 of the FTC Act as a Competition Statute 78–79 (Oct. 17, 2008)). These sources recognized the Commission had relied on numerous sources in addition to adjudication to give guidance.

40 *See* Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," at 5–6 (July 9, 2021).

41 *See id.* at 9.

42 *Id.* at 7–9 (citing Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Off. Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984)). "[I]n 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." *Id.* (quoting William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 933–34 (2010)).

43 *Id.* at 6 (citing NCAA v. Alston, 141 S. Ct. 2141 (2021)).

scrutiny.[44] The draft dropped a longstanding commitment in prior plans to support "vigorous competition," and replaced it with a pledge to promote "fair competition."[45] As for the beneficiaries of this new form of competition, the draft also dropped a dedication to consumers and replaced it with a goal to "[s]upport equity for historically underserved communities . . . often low-income, rural, veterans, and/or communities of color . . . ."[46] Included in (or in addition to) those ideals, the draft plan also emphasized an objective to protect employees from unfair competition.[47]

The potential costs of the strategy were signaled in a deletion from the plan. No longer would it be a top priority of the Commission to avoid "unduly burdening legitimate business activity," a pledge that formerly defined the agency's entire mission.[48] The commitment to avoid undue burdens applies only to merger enforcement in the 2022 to 2026 Plan.[49]

Regulatory priorities were revealed in December 2021, when the FTC announced its intention to cover entire industries, if not the whole economy, with one action, purportedly because years of ineffective case-by-case enforcement had left behind "a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches."[50] No source was given for the characterization of hyper-concentration or what the rules would do to remedy it.[51] The practices and industries under consideration for rulemaking, however, were identified, including non-compete clauses in employment contracts, surveillance practices (i.e., data collection), and otherwise unidentified "industry-specific practices that substantially inhibit competition."[52] As

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44 FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2022 TO 2026 13 (2022) [hereinafter 2022 to 2026 Plan], https://perma.cc/QZ8H-4ZD8.

45 *Compare id. with* FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2018 TO 2022 2 (2018) [hereinafter 2018 to 2022 Plan], https://perma.cc/8DC4-FSW2.

46 *Id.* at 19.

47 *Id.* at 13.

48 *See, e.g.*, 2018 to 2022 Plan, *supra* note 45, at 2.

49 *See* 2022 to 2026 Plan, *supra* note 44, at 14.

50 Fed. Trade Comm'n, Statement of Regulatory Priorities, at 1 (2021), https://perma.cc/GF2J-H6DF.

51 *Id.* Unrebutted research already published by the National Bureau of Economic Research had refuted the characterization. *See* Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, *in* 35 NAT'L BUREAU OF ECON. RSCH., NBER MACROECONOMICS ANNUAL 2020, at 119 (Martin Eichenbaum & Erik Hurst eds., 2021); *see also* Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 1 (distinguishing industry concentration from market concentration).

52 *Id*. at 2 (citing Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 14, 2021)). Other areas included limitations on rights to repair products; agreements that pay to delay generic pharmaceutical competition; unfair methods of competition in online marketplaces; restrictions in occupational

described below, a formal proposal to ban non-compete clauses is now under consideration.

The regulatory priorities prompted another dissent from Commissioner Christine Wilson, who saw in the plan "the foundation for an avalanche of problematic rulemakings."[53] Drawing on lessons from what she described as "the disastrous regulatory frameworks in the transportation industry," she described studies that concluded rules "stifle innovation, increase costs, raise prices, limit choice, and decrease output, frequently harming the very parties they are intended to benefit . . . ."[54] She also cited economic literature that found prices dropping after deregulation in transportation sectors, benefits that flowed to consumers when competition replaced regulation in transportation.[55]

In November 2022, the Commission filled the gap left by the withdrawal of the 2015 Policy Statement and issued a new policy statement ("2022 Policy Statement") that described the approach it would take to identify an unfair method of competition.[56] With a background of extensive citations from the legislative history of the FTC Act, the Commission reiterated its intent to distinguish Section 5 from the rule of reason that characterized enforcement of the Sherman Act.[57] Congress passed the FTC Act, according to the Commission, "to push back against the judiciary's adoption and use of the open-ended rule of reason for analyzing Sherman Act claims, which it feared would deliver inconsistent and unpredictable results and 'substitute the court in the place of Congress.'"[58] Henceforth, the Commission would replace the rule of reason and the analysis that accompanies it with a new two-part test:

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licensing, and real-estate listing and brokerage restrictions. *See* Exec. Order No. 14036, 86 Fed. Reg. at 36992.

53 Dissenting Statement of Commissioner Christine Wilson, [FTC] Annual Regulatory Plan and Semi-Annual Regulatory Agenda (Dec. 10, 2021).

54 *Id.* (citing Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF'T 10 (2020)).

55 *Id.* (citing Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF'T 10 (2020) (noting that price declines between 35–75 percent in trucking and 20–30 percent in airlines)).

56 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, at 1 (Nov. 10, 2022) [hereinafter 2022 Policy Statement].

57 *Id*. at 3–5.

58 *Id.* at 2 (footnotes omitted); *see also* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act, at 1–2 (Nov. 10, 2022); Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act, at 1–2 (Nov. 10, 2022).

> [(1)] Conduct must be a "method of competition" to violate Section 5. A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition, but the relationship can be indirect. . . .
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> [(2)] The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits [and satisfy two criteria:] . . . .
>
> [(a)] First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances . . . .
>
> [(b)] Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.
>
> These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions.[59]

The 2022 Policy Statement makes clear that the actual harm of the conduct need not be shown.[60] Instead, the Commission would consider whether the "conduct *has a tendency* to generate negative consequences . . . . [either] in the aggregate along with the conduct of others . . . [or] as part of the cumulative effect of a variety of different practices by the respondent."[61]

Like the withdrawal of the old policy, the announcement of the replacement provoked a vigorous dissent. Commissioner Wilson argued that the new statement overlooked the legislative history supporting the FTC's use of the rule of reason, ignored the Supreme Court's admonition that antitrust "protects competition, not competitors," and rejected the "vast body" of precedent that requires the agency to prove the likelihood of competitive harm.[62] She took issue with the unidentified interests that the Commission would protect and feared that, without the cost-benefit framework of the rule of reason, the various objectionable adjectives characterizing illegal conduct could become per se rules of liability.[63]

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59 2022 Policy Statement, *supra* note 56, at 8–9 (footnotes omitted).

60 *Id.* at 10.

61 *Id.* at 10 (emphasis added) (footnotes omitted) (noting that among the negative consequences are "raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition").

62 Dissenting Statement of Commissioner Christine Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," at 3 (Nov. 10, 2022).

63 *Id.* at 6.

C. *Academic Antecedents to the New FTC Policy*

Debates over the objectives of antitrust laws and the analytical framework that agencies and courts should apply were not new when the controversy reached the FTC in 2021 and 2022. Commentators in academic and official circles have been arguing over the role of antitrust for years (indeed for over a century, as discussed in Part II below). For example, in 2016, the White House Council of Economic Advisors ("CEA") released an issue brief citing three trends indicating that competition had declined in the United States: "increasing industry concentration, increasing rents accruing to few firms, and lower levels of firm entry and labor market mobility."[64] The findings documented in the report, according to the chairman of the CEA, were consistent with other contemporary studies.[65]

Similar scholarship accumulated, including a 2017 article by Lina Khan, then the future chair of the FTC, who advocated that antitrust return to a reliance on structuralism—"the idea that concentrated market structures promote anticompetitive forms of conduct."[66] Her thesis was that the rise of price theory in the 1970s and 1980s caused antitrust policy to overestimate the benefits of allocative efficiency and underrate the costs of predatory pricing and vertical integration.[67] That thesis gained adherents in 2018 when the *Yale Law Journal* published an article positing that the "United States has a market power problem; one that may well extend beyond individual markets to slow economic growth and widen economic inequality."[68]

Another sympathetic history of structuralism, *The Curse of Bigness*, was published in 2018 by an academic who became an advisor to the

[64] COUNCIL OF ECON. ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), https://perma.cc/33L5-BU9Z.

[65] Jason Furman, Chairman, Council of Econ. Advisers, Address at the Searle Center Conference on Antitrust Economics and Competition Policy, Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth 1, 22 (Sept. 16, 2016), https://perma.cc/WLG5-LQAP (citing MARC JARSULIC, ETHAN GURWITZ, KATE BAHN & ANDY GREEN, CTR. FOR AM. PROGRESS, REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY (2016), https://perma.cc/MN9L-QKSE).

[66] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717–20 (2017) (invoking the modern retailer and an influential book, *The Antitrust Paradox*, published by Professor Robert Bork in 1978).

[67] *Id.* at 719–22, 737.

[68] Jonathan B. Baker, Jonathan Sallet & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916, 1916–17 (2018) (citing Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. EQUITABLE GROWTH (Mar. 20, 2017), https://perma.cc/E9CH-A2YR).

President on antitrust policy three years later.[69] A 2019 report from the Stigler Center at the University of Chicago joined the chorus, arguing that the antitrust authorities do not have the tools to deal with the challenges of the digital economy.[70] The missing tools could be found, the authors maintained, in the methods of the 1950s and 1960s.[71]

This scholarship caught the interest of a congressional committee, which investigated industries, held hearings, and issued a voluminous staff report in 2020, finding numerous faults with the performance of large companies, especially those in the tech sector.[72] The report recommended legislation that would favor plaintiffs and government prosecutors by creating structural presumptions of illegality when challenging mergers, acquisitions, and unilateral conduct.[73] Serving on the committee staff was Khan.[74]

Practitioners and professors of modern economics responded with robust scholarship of their own. In 2020, the Global Antitrust Institute at George Mason University published a compendium of studies that summarized the challenge to the antitrust regime in the United States as a "revolution [that] appears to be strong and growing, with a broad range of enthusiastic participants and followers, including legal academics and economists, public intellectuals, think tankers, prominent members of Congress, and some foreign competition authorities."[75] The studies in the compendium marshalled historical, theoretical, and empirical rebuttals of the structural paradigm.[76] Meanwhile, books and journals continued to publish articles examining the assertions of antitrust inadequacy.[77] Empirical analyses found evidence of decreasing, not increasing,

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69 *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Kate Cox, *White House Signals Coming Antitrust Push with Tim Wu Appointment*, ARS TECHNICA (Mar. 5, 2021, 1:01 PM), https://perma.cc/MRQ9-EUEB.

70 STIGLER CTR. FOR THE STUDY OF THE ECON. AND THE STATE, U. CHI. BOOTH SCH. BUS., STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT 31 (2019), https://perma.cc/F2XG-YY2L.

71 *See id.* at 92–93.

72 MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 6 (2020).

73 *See id.* at 380–81.

74 *Id.* at 2; *Lina M. Khan*, FED. TRADE COMM'N, https://perma.cc/4C8B-QV8T.

75 GLOBAL ANTITRUST INSTITUTE, GEO. MASON U. ANTONIN SCALIA L. SCH., THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY VII (Joshua Wright & David Ginsburg eds., 2020), https://perma.cc/2E3X-URHU.

76 *See, e.g.*, *id.* at VIII–XI.

77 *See* JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 7 (2019); Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893, 897 (2022); William E. Kovacic, *Keeping Score: Improving the Positive Foundations for Antitrust Policy*, 23 U. PA. J. BUS. L. 49, 53–56 (2020).

concentration when it is measured in markets more narrowly defined by the goods and services offered.[78] One such report, which found concentration declining overall between 2002 and 2017 in the United States, summarizes the principal studies of concentration in more relevant markets.[79]

The relationship between the evolution of antitrust jurisprudence and trends in economic analysis is an imprecise correlation, to be sure, but it is significant and positive.[80] A full description of the thousands of pages of scholarship and precedent is beyond the scope of this Article. Now that the debate has taken center stage at the FTC, however, a narrower and more manageable question presents itself: whether the plan the Commission has charted for its own enforcement is legally sound and likely to improve competition. Given that the experiment underway at the agency has been tried before, the answer may be discernable from the records of past attempts. The discussion turns next to the origin of the rule of reason and its relationship to the FTC Act.

II. Judicial Interpretations of the Sherman and FTC Acts

This Part covers the interpretations of basic antitrust laws, beginning in Section A with early interpretations of the Sherman Act. Section B then covers early interpretations of the FTC Act. Finally, Section C reviews antitrust enforcement under the Acts.

It should come as no surprise that the Commission, in its recantation of the rule of reason, attributed the doctrine to a court decision that handed "unchecked discretion to the judiciary."[81] This history of Sherman Act jurisprudence has enjoyed acceptance from generations of practitioners and academics. Professor Phillip Areeda, one of the most prominent antitrust scholars of the twentieth century, once intoned a catechism to frame the rule as an invention of the Supreme Court:

> Q: What is the rule of reason? A: It is the proposition that a contract, combination, or conspiracy is not unlawful under Sherman Act Section 1 unless "unreasonable."
>
> Q: Who made it? A: The Supreme Court.

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[78] *See* Werden & Froeb, *supra* note 51, at 78; Rossi-Hansberg et al., *supra* note 51, at 117–18.

[79] ROBERT KULICK & ANDREW CARD, NERA ECONOMIC CONSULTING, U.S. CHAMBER OF COM., INDUSTRIAL CONCENTRATION IN THE UNITED STATES: 2002-2017 5 (2022), https://perma.cc/6RMR-S43L.

[80] A one-volume history tracing the development of economics and its influence on the origins of the antitrust statutes and the trends in their interpretation can be found in Gregory Werden's book, *The Foundations of Antitrust*. *See* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES (2020).

[81] Khan, *supra* note 58, at 1.

> Q: Of what is it made? A: Of whole cloth, for the statute says that *every* contract, combination, or conspiracy in restraint of trade is a sin.[82]

Neither the Commission's characterization in 2022 nor Areeda's catechism is accurate. For his part, Areeda immediately qualified the obviously tongue-in-cheek characterization by noting that reasonableness is assessed in terms of the purpose of the statute.[83] The Commission majority in 2022, however, saw a different purpose in the FTC Act. There was "no basis in precedent for applying [the rule of reason and consumer welfare standards] wholesale to standalone Section 5."[84] The assessment of that proposition requires a comparison of the standards in the antitrust statutes.

A. *Construing the Sherman Act*

1. Early Sherman Act Precedent

At the end of the nineteenth century, antitrust was a cause célèbre.[85] The Sherman Act passed the Senate 51–1 and the House 242–0 in 1890.[86] It declared for the first time in the U.S. Code, "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . to be illegal."[87] Persons found guilty of entering such arrangements could be fined and imprisoned, as could anyone "who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce . . . ."[88] This gave the federal government a powerful weapon to take on cartels of the day, especially the industrial trusts and the financial titans, which had become regular targets of popular protests and media condemnation.[89]

Enforcement of the Sherman Act was given to the Attorney General, and the Department of Justice ("DOJ") embarked on prosecutions to dismantle trusts and prohibit agreements that had spread through sectors such as coal, meat, railroads, tobacco, oil, and steel.[90] At first, the DOJ

[82] Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 571 (1986) (footnote omitted).

[83] *Id.* at 572.

[84] Khan, *supra* note 58, at 4.

[85] *See, e.g.*, Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 2 (2003).

[86] *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, https://perma.cc/QY8W-BRW5.

[87] 15 U.S.C. § 1.

[88] *Id.* § 2.

[89] *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1226–27 (1988).

[90] *History of the Antitrust Division*, U.S. DEP'T OF JUST., https://perma.cc/VQ76-C27S; George Bittlingmayer, *The Stock Market and Early Antitrust Enforcement*, 36 J.L. & ECON 1, 3–4, 11 (1993).

proceeded cautiously, bringing just twenty-two actions between 1890 and 1904,[91] but some of those cases demonstrated the potential power of the new law. In 1897, the Supreme Court affirmed the illegality of rate-fixing agreements among eighteen railroad companies in the Trans-Missouri Freight Association that controlled all the rail traffic from the Mississippi River to the West Coast.[92] The agreements undeniably restrained trade, so they fell within the literal language of the Act.[93] The railroads defended the agreements as a reasonable remedy for ruinous competition.[94]

The Court rejected the defense but did not hold that the new law doomed every restraint of trade,[95] and dicta in the decision clearly expressed the Court's view that some restraints were permissible. For example, the Court acknowledged that:

> [a] contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question.[96]

There was no need to further explore the distinction between legitimate and illegitimate restraints because the law clearly did not allow agreements whose purpose was to prevent competition, no matter how ruinous, and that was the purpose found in the Trans-Missouri agreements.[97] The Court's rejection of a destructive-competition defense put parties and courts on notice that Sherman Act cases would not entertain arguments that cartels would survive condemnation if they fixed prices at reasonable levels. This message was more meaningful to trusts and associations than the dicta about ancillary restraints in legitimate contracts for the sale of property.

A year later, the Court ruminated again on the possibility of permissible restraints in another case against a rail combination. In *United States v. Joint Traffic Ass'n,*[98] thirty-one railroads were accused of setting rates between Chicago and the East Coast.[99] Comparing the case to *Trans-*

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[91] Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263, 273 (1992) (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 (1970)).

[92] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 297–98, 301, 342 (1897). Justice Edward Douglass White, persuaded that the fixed rates had been reasonable, wrote for four Justices who dissented from the strict construction of the law. *Id.* at 343–44, 354 (White, J., dissenting).

[93] *Id.* at 312–13.

[94] *Id.* at 330–31.

[95] *Id.* at 329.

[96] *Id.*

[97] *Id.* at 327–28.

[98] 171 U.S. 505 (1898).

[99] *Id.* at 506.

Missouri, the Court said, "The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail . . . ."[100] But the Court deemed it necessary to refer to the dicta from *Trans-Missouri* because the government had argued for a categorical ban on restraints.[101] The Court again declined to declare *every* restraint of trade illegal under the Sherman Act.[102] Such a construction would not make sense because restraints on parties were inevitable in legitimate contracts:

> An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. . . . "[T]he act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract . . . that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."[103]

Given that the restraints in *Joint Traffic* were not the type that required the "reasonable construction" of a legitimate contract,[104] the observation could again be considered dicta, but it signaled that reasonable restraints of trade—those with a legitimate purpose—would pass muster. The Department of Justice lost its argument for a draconian construction of the Sherman Act but won the case anyway.

Restraints were assessed by the competition they impeded rather than the prices they set. In 1899, the Court again considered and rejected an argument that competitors had fixed prices at reasonable levels when it upheld an injunction prohibiting iron pipe manufacturers from coordinating bids in *Addyston Pipe & Steel Co. v. United States.*[105] But the Court again distinguished legitimate contracts that might restrain trade but had only an incidental effect on commerce:

> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade . . . . Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and

100 *Id.* at 565.

101 *Id.* at 568 ("To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this Court.").

102 *Id.*

103 *Id.* (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898)).

104 *Joint Traffic*, 171 U.S. at 568.

105 175 U.S. 211, 235, 248 (1899).

> restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.[106]

The Court affirmed the lower court decision and agreed with the opinion, written by then Judge (later President and Chief Justice) William Howard Taft, who derived these principles from an extensive review of the common law of trade restraints.[107] He had distilled dozens of cases into a rationale that remains a cornerstone of the rule of reason as applied today:

> [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.[108]

These early decisions left no doubt that the courts would reject arguments that price fixing—if reasonable—should escape the condemnation of the law. The Supreme Court in *Addyston* put it bluntly. Even if "the prices . . . were reasonable," the Court said, the issue was not important because "we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract."[109] A contract would be condemned because of its "tendency . . . to give to the defendants the power to charge unreasonable prices, had they chosen to do so."[110]

The refusal of the Court to countenance price fixing—even at assertedly reasonable levels—surprised some observers, including a senator who did not expect the Sherman Act to outlaw associations of competitors that agreed to charge reasonable prices.[111] Leading economists at the time, concerned that ruinous competition could cripple markets, were ambivalent about the condemnation of cartels.[112] Business interests blamed the decisions for a pause in the merger wave that was reshaping the economy at the turn of the century.[113] Not widely appreciated at the time were the Court's repeated observations in dicta that the Act allowed restraints of trade in otherwise legitimate business agreements.[114] Since the combinations in the railroad and pipe cases did not pass the first test

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106 *Id.* at 244–45.

107 *Id.* at 247–48; *see* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

108 *Addyston*, 85 F. at 282.

109 *Addyston*, 175 U.S. at 237–38.

110 *Id.* (adding "if it were important we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable").

111 Hazlett, *supra* note 91, at 273.

112 *See, e.g.*, WERDEN, *supra* note 80, at 140–44.

113 Hazlett, *supra* note 91, at 273.

114 *See supra* notes 95, 103, 106 and accompanying text.

of a legitimate purpose, the Court did not reach the issue of whether the restraints were justifiable.[115]

Although the 1890s are often regarded as a disappointing beginning for antitrust,[116] the Department of Justice achieved in court what the Interstate Commerce Commission ("ICC") had failed to accomplish in its first decade of regulation. According to one study, railroad fares dropped after *Trans-Missouri* and *Joint Traffic*.[117] To be sure, setbacks accompanied the early victories, often because the prevailing interpretation of the Interstate Commerce Clause excluded many activities from the jurisdiction of the federal government.[118] In the 1890s, manufacturing was not deemed an activity in interstate commerce, even if the output was intended for interstate shipments.[119] On this basis, a combination of sugar refiners, widely known as the Sugar Trust, escaped liability under the Sherman Act.[120] Meanwhile, increasing consolidation in major industries, documented by muckraking reporters and authors, fueled enthusiasm for trust-busting.[121] Antitrust sentiment animated the 1900 presidential campaign, especially for vice-presidential candidate Theodore Roosevelt.[122] After his ascension to the presidency upon the death of President William McKinley, Roosevelt targeted some of the largest and most notorious combinations, including those controlled by John D. Rockefeller, J.P. Morgan, and other business barons of the age.[123]

The Supreme Court delivered the Roosevelt administration a significant victory over the trusts but unfortunately added confusion over the meaning of the Sherman Act with a self-contradictory opinion. Justice John Marshall Harlan, who wrote for the majority in striking down a 1904 railroad merger in *Northern Securities Co. v. United States*,[124] opined that the Sherman Act "embraces *all* direct *restraints*," reasonable or unreasonable,

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115 *See Addyston*, 175 U.S. at 240–41; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341–42 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505, 577 (1889).

116 WERDEN, *supra* note 80, at 59.

117 *See, e.g.*, John J. Binder, *The Sherman Antitrust Act and the Railroad Cartels*, 31 J.L. & Econ. 443, 445–47 (1988) (noting temporary fare reductions when courts decided *Trans-Missouri Freight* and *Joint Traffic*, but subsequent fare increases after companies apparently adjusted).

118 *See, e.g.*, United States v. E. C. Knight Co., 156 U.S. 1, 12–13 (1895).

119 *Id.* at 13–14.

120 *See id.* at 17–18; William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464, 474 (1959).

121 *See, e.g.*, WU, *supra* note 69, at 24–25, 36–38.

122 *See* WERDEN, *supra* note 80, at 72–73.

123 *Id.* at 47–48; *see also* N. Secs. Co. v. United States, 193 U.S. 297, 325–26, 360 (1904) (enjoining common stock ownership in competing railroads); Swift & Co. v. United States, 196 U.S. 375, 391–92, 402 (1905) (dismantling a bid-rigging and price-fixing combination of meat packers).

124 193 U.S. 197 (1904).

"imposed by any combination, conspiracy or monopoly upon such trade or commerce" and then observed that Congress had done nothing more than adopt a rule that had long been applied in the states.[125] Both statements could not have been true. In fact, neither was. Common law and state statutes generally did not prohibit reasonable restraints, nor did the prior Sherman Act rulings of the Court.[126] Thus the twentieth century began with inconsistent interpretations of the Act, and reconciliation took nearly a decade of decisions to achieve.

Enforcement expanded dramatically during the twelve years of the Roosevelt and Taft administrations. Prosecutors sued hundreds of companies and scored major victories against combinations in railroads, oil, and many other industries.[127] The sweeps snared major targets in May 1911, when the Supreme Court decided two cases that would clarify the application of the rule of reason and spark a political movement to revamp antitrust laws.[128] Its first ruling upheld a decree disentangling the thirty-eight corporations in the Standard Oil trust;[129] the second resulted in the dismantling of the American Tobacco Trust into four domestic companies.[130] James McReynolds (who would become a Supreme Court Justice three years later) prosecuted the tobacco case for the government.[131]

The arguments on appeal in *Standard Oil* left no doubt that the Court's caveats about interpreting the Sherman Act with reason had gone unheeded. Among the advocates urging rejection of the rule was the Department of Justice, which contended "[t]hat the language of the

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125 *Id.* at 331, 339 ("The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce . . . . When Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce.").

126 William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 242–43 (1956).

127 *See* Bittlingmayer, *supra* note 90, at 4–10, 13 ("All told, the Department of Justice filed 127 antitrust cases from January 1904 through July 1914 . . . .")

128 *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

129 *See Standard Oil*, 221 U.S. at 30, 78, 81–82 (enjoining the Standard Oil Company "from voting the stocks or exerting any control over the said 37 subsidiary companies," and the subsidiaries "from paying any dividends as to the Standard Oil Company or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination").

130 *See Am. Tobacco*, 221 U.S. at 187 (finding restraint of trade and remanding for further consideration); Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 328 (2005).

131 *See Am. Tobacco*, 221 U.S. at 108; *Attorney General: James Clark McReynolds*, U.S. DEP'T OF JUST., https://perma.cc/V3XC-4QYW.

statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment . . . within its literal language."[132] This put the issue of the construction of the Sherman Act squarely before the Court, and it endeavored to dispel the ambiguity of its previous holdings before deciding the legality of the agreements.

Every contract constrained the trading of parties who agreed to be bound, the Court reasoned, and Congress could not have intended the Sherman Act to outlaw all such restrictions in interstate commerce.[133] The activities attacked in *Missouri Freight* and *Joint Traffic,* wrote Justice Edward Douglass White for the majority, were so clearly anticompetitive that they did not require consideration of the enforcement of the statute in more ambiguous circumstances.[134] They were consistent with "all of the numerous decisions of this court which have applied and enforced the Anti-trust Act, since they all . . . rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted."[135] Thus, the Court rejected, as it had in *Joint Traffic,* the government's contention that it had to prove no more than a restraint of trade.[136] Instead, the Sherman Act should be construed consistently with English and American common law, from which the statutory terms "restraint of trade" and "attempts to monopolize" had originated.[137] Common-law courts declined to enforce restraints associated with anticompetitive effects:

> [T]he dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions . . . [or] of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.[138]

Spared from condemnation, however, were contracts that served "the legitimate purpose of reasonably forwarding personal interest and

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[132] *Standard Oil*, 221 U.S. at 63. Justice John Marshall Harlan, concurring in the result but dissenting from the announcement of the rule of reason, argued for the government's interpretation. *Id.* at 82–83 (Harlan, J., concurring in part, and dissenting in part).

[133] *Id.* at 63–64.

[134] *Id.* at 64–65.

[135] *Id.*

[136] *Id.* at 66.

[137] *Id.* at 50–51.

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

developing trade . . . ."[139] As the Court had explained in *Addyston*, it observed again that common law had long allowed contractual obligations that were ancillary to legitimate business purposes.[140] A proprietor selling his business and promising not to compete with his buyer could be held to that promise, for it facilitated the sale and the vitality of commerce.[141] Competition law should not prohibit these restraints.[142] Congress, the Court held, deliberately preserved the freedom to enter legitimate agreements because they fueled the market forces of competition and could undermine market power.[143] That freedom, when not unduly or improperly exercised, facilitated "the centrifugal and centripetal forces . . . by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it . . . ."[144] Noting "the omission of any direct prohibition against monopoly in the concrete" in the law, the Court concluded that Congress had understood the difference between legitimately achieved monopolies and illegitimate means to secure them.[145]

The Court addressed the perceived tension between the rule of reason and its earlier holdings that agreements among competitors to fix prices and coordinate bids were indefensible.[146] The latter agreements had been so obviously unreasonable that they could be condemned without elaborate analysis—a concept now known as per se illegality.[147] Arrangements that had no purpose other than to suppress competition needed no balancing on the rule of reason scale, because the fruits of naked restraints did not qualify for consideration.[148] Courts could condemn them summarily.[149] But when the competitive consequences of an arrangement were not clear, parties would be permitted to defend it:

> [T]he construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of

139 *Id.*

140 *See id.* at 55; United States v. Addyston Pipe & Steel Co., 175 U.S. 211, 244–45 (1899), *aff'g* 85 F. 271, 280–81 (6th Cir. 1898).

141 This was the holding in a 1711 case, where a renter of a bakery in England was permitted to hold the landlord to a promise not to open a competing bakery during the term of their lease. Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 347–48 (Ch).

142 *See id.* at 349.

143 *See Standard Oil*, 221 U.S. at 63–64.

144 *Id.* at 62.

145 *See id.*

146 *See id.* at 63–65.

147 *See id.* at 65; Donald L. Beschle, *"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 477–78 (1987).

148 *See Standard Oil*, 221 U.S. at 65.

149 *See id.*

> the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied.[150]

Fortunately for the government, it had not relied solely on the literal construction that the Court was unwilling to give to the Act. The trial of the case had produced a voluminous record that enabled prosecutors to insist that the purpose of the trust was to "unlawfully acquire wealth by oppressing the public," which posed "an open and enduring menace to . . . trade and . . . reproach to modern economic methods."[151] With the same record, defendants argued that their combination was developed by "lawful competitive methods . . . serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public."[152] In the Court's view, the government's evidence was sufficient to prove the violation.[153]

Two weeks later, *American Tobacco* reiterated the holding, elaborated on the rationale and rejected the suggestion that the rule of reason represented a departure from its earlier cases.[154] The rule was "in accord with all the previous decisions of this [C]ourt, despite the fact that the contrary view was sometimes . . . attributed" to *Trans-Missouri* and *Joint Traffic*.[155] Applying the rule to American Tobacco and its affiliates, the Court had no difficulty declaring their activities illegal under Sections 1 and 2 of the Sherman Act.[156]

Although the policy described by the Court was hardly novel in 1911, and the government won both cases decisively, the announcement of the rule of reason reignited debates over the efficacy and objectives of antitrust enforcement. Critics of the rule argued that it rendered the Sherman Act vague and its application uncertain.[157] The criticism began with Justice Harlan's furious dissent in *Standard Oil,* arguing that the

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150 *Id.* at 66. Justice White had dissented in *Trans-Missouri* on the basis that the rates in question were reasonable. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 344 (1897) (White, J., dissenting).

151 *Standard Oil*, 221 U.S. at 47–48.

152 *Id.* at 48 (observing this to be a "powerful analysis").

153 *See id.* at 73–74.

154 *See* United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911) (citing *Standard Oil*, 221 U.S. at 59–60; *Trans-Missouri*, 166 U.S. at 328–29; United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898)).

155 *Am. Tobacco,* 221 U.S. at 179.

156 *See id.* at 184.

157 *See, e.g.*, Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1754–55 (1994) "[T]he rule of reason . . . . remains a vague listing of factors that gives neither courts nor litigants a clear understanding of the types of competitive conduct that will be permitted or precluded.").

majority had departed from its earlier holdings (such as *Northern Securities*) and that "the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable . . . ."[158] That the law might be unwise was not for the Court to weigh, he declared; that was for the Congress to decide.[159]

Public reaction to *Standard Oil* and *American Tobacco* was swift and divided. An editorial in the *New York Times* hailed the decision: "Under the law as the court reads it to us, business can be carried on in accordance with sound practice, yet departures from sound practice into oppression and extortion are punished."[160] Business leaders generally concurred. Typical were the comments of the chairman of the Chase National Bank, who called it "just, as it reads the word reasonable into the law, and we are all in favor of what is reasonable."[161] The president of the National Manufacturers' Association saw at least "partial relief from the doubt and anxiety which has depressed our business progress for many months."[162] Although shares of Standard Oil fell, stocks generally rose on heavy trading.[163]

Progressives decried the decision. William Jennings Bryan, fighting for farmers, declared defeat with a terse judgment: "The Trusts Have Won."[164] Congress launched investigations and drafted bills to write the rule of reason out of the Sherman Act.[165] Echoing Justice Harlan, the progressives sought to prohibit all contracts that restrained interstate commerce, reasonable and unreasonable.[166] These efforts to overturn *Standard Oil* failed, but debates over the efficacy of antitrust continued.[167]

The controversy erupted just in time for the presidential campaign of 1912, which began amidst a fervor for antitrust reforms not seen since

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158 *Standard Oil,* 221 U.S. at 99 (Harlan, J., concurring in part and dissenting in part); *see also* William Kolasky, *Chief Justice Edward Douglass White and the Birth of the Rule of Reason*, ANTITRUST, Summer 2010, at 82 ("On the bench, Harlan was even harsher.").

159 *See Standard Oil*, 221 U.S. at 106 (arguing that "the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws").

160 *The Momentous Decision*, N.Y. TIMES, May 17, 1911, at 12, https://perma.cc/965D-Y7PT.

161 *Business Men Pleased,* N.Y. TIMES, May 17, 1911, at 7 (quoting A. Barton Hepburn), https://perma.cc/965D-Y7PT.

162 *Id.* (quoting John Kirby, Jr.).

163 *See Boom in Stocks, with Rush to Buy*, N.Y. TIMES, May 17, 1911, at 7, https://perma.cc/965D-Y7PT.

164 Winerman, *supra* note 85, at 13 (citations omitted).

165 *See id.*

166 *See id*. For colorful accounts of these events, see also WERDEN, *supra* note 80, at 111–129, and WU, *supra* note 69, at 75–77.

167 *See generally* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1394–98 (2009).

1890.[168] The incumbent (Taft, for the Republicans) defended the status quo.[169] His major challengers proposed radical departures, from regulating the trusts (Roosevelt, for the Bull Moose Party) to nationalizing them (Debs, for the Socialists).[170] Woodrow Wilson, the Democratic candidate, eschewed the extremes and took the advice of Louis Brandeis, who had gained fame fighting corporate combinations, in particular J.P. Morgan's railroad and industrial trusts.[171] Brandeis remained a believer in the power of competition, if protected from predatory practices and buttressed by government expertise.[172]

After Wilson won the presidency and Democrats returned majorities to Congress, work on legislation gained momentum.[173] Draft provisions circulated between the administration and Congress, with Brandeis consulting both Congress and the President.[174] James McReynolds, the successful *American Tobacco* prosecutor whom Wilson appointed Attorney General, also assisted.[175] Out of these efforts, a two-fold strategy took shape. First would be a clarification of specific definitions of illegal practices.[176] Second would be the creation of an independent agency dedicated to developing economic expertise, investigating industries, identifying unfair methods of competition, and adjudicating cases before its own judges in civil proceedings.[177] The Clayton Act addressed the specifics, codifying prohibited practices such as product tie-ins and business acquisitions, which embodied the first approach.[178] The FTC Act, establishing the FTC, achieved the second objective—a general declaration of illegality.[179]

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168 *See* Winerman, *supra* note 85, at 15; *see also* Millon, *supra* note 89, at 1226 (noting wide opposition to monopolies in the late nineteenth century).

169 *See* Winerman, *supra* note 85, at 32.

170 The incumbent Republicans, with President Taft at the top of the ticket, had three significant challengers: Democrats nominated Woodrow Wilson; Progressives broke away from the Republicans and nominated Theodore Roosevelt; and Socialists offered Eugene Debs. *See* Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2026–28 (2015); *Wilson's Election in 1912*, PBS, https://perma.cc/24TZ-P965.

171 *See* Crane, *supra* note 170, at 2028. His adventures became the subject of a series of articles in *Harper's Magazine* in 1913 and a book about how financiers had formed and influenced the trusts. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT V (1914).

172 *See* Winerman, *supra* note 85, at 34–38.

173 *See id.* at 48–49.

174 *See id.* at 53–55.

175 *See id.*

176 *See id.* at 52.

177 *See id.* at 52, 68.

178 *See* Clayton Act, 15 U.S.C. §§ 14, 18.

179 *See* FTC Act, 15 U.S.C. § 45.

As the laws were moving toward passage, Wilson nominated McReynolds for a vacancy on the Supreme Court.[180] He joined the Court in late 1914, and Brandeis followed him two years later.[181] Soon thereafter, the Court would have the opportunity to interpret the laws the two attorneys helped draft.[182] The Supreme Court thus had two unique advantages in construing the FTC and Clayton Acts. First, was the obvious advantage of statutory construction when the terms and provisions in the text of the law were fresh, not yet obscured by the passage of time and the evolution of language. Second was the coincidence that two Justices, whose decisions would interpret the legislation, had helped draft it.[183] Ironically, they disagreed on the first Supreme Court decision to interpret Section 5 of the FTC Act, with Justice McReynolds writing the majority opinion and Justice Brandeis penning a vigorous dissent.[184] Ultimately, however, the two Justices joined several unanimous opinions that left little doubt where the Court stood on rules of fair competition and the Commission's authority to issue them.[185]

Before either justice addressed the FTC Act, however, Justice Brandeis authored an opinion that described the approach to antitrust analysis that remains definitive today, in *Board of Trade of Chicago v. United States*.[186] The case involved the Chicago Board of Trade ("Board"), which was appealing a Sherman Act injunction prohibiting the restrictions its rules imposed on members and how they could transact business.[187] The restriction at issue set limited times during which members could negotiate the price of certain grain contracts.[188] After hours, prices were fixed until the following day.[189] The government challenged the restrictions as an indefensible suppression of competition, like the conduct condemned categorically in *Addyston* and *Trans-Missouri.*[190] In the trial, prosecutors introduced no evidence showing that the Board had

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180 *See* Calvin P. Jones, *Kentucky's Irascible Conservative: Supreme Court Justice James Clark McReynolds,* 57 FILSON CLUB HIST. Q. 20, 23 (1983).

181 *See id.* at 23, 30.

182 *See* FTC v. Gratz, 253 U.S. 421, 422 (1920); *id.* at 429 (Brandeis, J., dissenting).

183 *See* Winerman, *supra* note 85, at 53–55.

184 *See Gratz,* 253 U.S. at 422; *id.* at 429 (Brandeis, J., dissenting).

185 *See* FTC v. Am. Tobacco Co., 264 U.S. 298 (1924); FTC v. Raymond Bros.-Clark Co., 264 U.S. 565 (1924); FTC v. Sinclair Refin. Co., 261 U.S. 463 (1923).

186 246 U.S. 231 (1918).

187 *Id.* at 237–38. (Justice James McReynolds did not participate, likely because the case was prosecuted during his term as Attorney General.)

188 *Id.* at 236.

189 *Id.* at 237.

190 *Id.*; *see also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 213, 248 (1899); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 310, 342 (1897).

intended, or its restrictions had caused, reductions in quantities, increases in prices, or losses for traders.[191] When the Board sought to introduce evidence to show that the restraints served the convenience of members and helped break up a monopoly that warehouses had formed, the government objected, and the trial court struck the justifications from the record.[192] The court enjoined the rule without writing an opinion.[193] The Board appealed, and the case arrived at the Supreme Court with a record largely lacking evidence on the costs or the benefits of the practice and completely missing the lower court's analysis.[194] In an opinion for a unanimous Court, Justice Brandeis gave the rule of reason its iconic articulation: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[195]

Delivering an unmistakable message to prosecutors and judges who might have misunderstood the lesson of *Standard Oil,*[196] the Court demonstrated that the rule sometimes entailed a meticulous exercise, requiring a careful assessment of the history, circumstances, and economics of the conduct at issue.[197] For practices that had potentially plausible justifications, antitrust cases would not be truncated proceedings like the trial below.

The Court then undertook the analysis that the trial court had disregarded. Noteworthy evidence in the record indicated that numerous other exchanges had rules governing hours of trading and pricing, and that the challenged rule "had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago."[198] Rather than interfering with competition, the Board's rules helped to improve market conditions by creating a public market, spreading information, increasing trading in the allegedly disadvantaged contracts, reducing risks necessarily incident to a private market, and enabling dealers to do business on smaller margins, among other

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191 *Bd. of Trade*, 246 U.S. at 238.

192 *Id.* at 237.

193 *Id.* at 237–38.

194 *See id.* at 238.

195 *Id.*

196 *Id.* ("No opinion was delivered by the District Judge. The government … made no attempt to show that the rule … resulted in hardship to anyone.")

197 *Id.* ("To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.")

198 *Id.* at 240–41.

advantages.[199] All this made it possible for traders to pay more to farmers without raising the prices to consumers.[200] These were among nine benefits the Court attributed to the restraint, compared to "bald proposition" that the restraint was illegal simply because it set prices for after-hours trading.[201]

The rule of reason today retains the essential elements that the Court articulated in *Standard Oil* and *Board of Trade* over a century ago. Justice Brandeis's quote has been cited in 240 unique cases, including 211 federal cases in all circuits, twenty-six state court cases, and two decisions in Puerto Rico.[202] Although not cited in the Supreme Court's latest antitrust decision, *NCAA v. Alston*,[203] the Court reaffirmed the framework that Justice Brandeis described a century ago:

> Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price.[204]

The quick condemnation of naked restraints from *Trans Missouri* and *Joint Traffic* also survives. Cartels cannot defend fixed prices as reasonable, competitors cannot suspend competition because it is ruinous, and bidders cannot rig bids.[205] Such practices are unreasonable and illegal per se.[206] Other practices have become recognized as serving no purpose other than the suppression of competition, as the courts have applied the per se rule to agreements among competitors to refrain from advertising, discounting, lending, or providing services, for just a few examples.[207] On the other hand, when restraints once considered indefensible are shown to have pro-competitive effects, courts have returned them to the balancing test of a full *Board of Trade* analysis.[208] Vertical restraints, like exclusive territories and resale price-maintenance agreements, are now given the full cost-benefit assessments.[209]

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[199] *Bd. of Trade*, 246 U.S. at 240–41.

[200] *Id.*

[201] *Id.* at 238.

[202] Results from Westlaw and Lexis searches conducted May 27, 2023.

[203] 141 S. Ct. 2141 (2021).

[204] *Id.* at 2155 (citing Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

[205] *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 689–93 (1978).

[206] *Id.* at 692.

[207] *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986); *see also infra* Section II.C.

[208] *See, e.g.*, *Ind. Fed'n of Dentists*, 476 U.S. at 457–59; *Alston*, 141 S. Ct. at 2141.

[209] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007); *see also infra* Section II.C.

B. *Early Federal Trade Commission Act Precedent*

Although *Board of Trade* involved restraints of trade and monopolization under the Sherman Act, it was an open question in 1918 how unfair methods of competition in the FTC Act would fit into the rubric of antitrust. Some of the Commission's early actions bore little resemblance to the DOJ's prosecutions of the industrial trusts. The first reported FTC decisions dealt with vendors of cotton textiles who—allegedly deceptively—promoted their fabrics as silk.[210] Another case charged a vacuum cleaner dealer with disparaging competitors and misrepresenting its own appliances.[211] At the new Commission, deception aimed at customers was deemed an unfair method of competition, on the grounds that dishonest traders harmed honest competitors as well as unwary consumers.[212] The FTC brought dozens of cases involving deceptive advertising, mislabeling, and passing off as competitors.[213] By number of respondents, the largest category of cases in the first volume of decisions involved allegations of bribery—of either customers' or competitors' employees.[214] In three cases, the Commission held that soliciting or hiring competitors' employees or leaving employment and starting up a competing business were unfair methods of competition.[215] These decisions did not face scrutiny in the Supreme Court, nor did any other FTC cases for its first five years.[216]

Cases that involved more typical antitrust issues also appeared in the early FTC decisions. The Commission stopped dominant firms from

[210] FTC v. Clarence N. Yagle, 1 F.T.C. 13, 14 (1916); FTC v. A. Theo. Abbott & Co., 1 F.T.C. 16, 19 (1916).

[211] FTC v. Muenzen Specialty Co., 1 F.T.C. 30, 35 (1917).

[212] *Id*. at 35, 37.

[213] *See* 1 FED. TRADE COMM'N, FEDERAL TRADE COMMISSION DECISIONS, INDEX 616–19, 623 (1920).

[214] The Table of Cases that appears in Vol. 1 of Federal Trade Commission Decisions lists 188 cases resulting in final orders. By the FTC's classification in the Index, fewer than a third (sixty-one) involved practices such as price-fixing, monopolizing and price discrimination – practices prohibited by the Sherman and Clayton Acts. A quarter of the cases (forty-seven) involved deception. The largest category, almost half the cases (eighty-two), fell under the category of "commercial bribery," although many of those amounted to promotional items, such as cigars, liquor, and theatre tickets given to employees of customers. *See Id.*

[215] FTC v. Standard Car Equip. Co., 1 F.T.C. 144, 146–48 (1918) ("inducing employees of its competitors to leave their employment"); FTC v. Wayne Oil Tank & Pump Co., 1 F.T.C. 259, 267–68 (1918) (enticing away employees of a competitor, disorganizing its sales force); FTC v. Allen Sales Serv., 1 F.T.C. 459, 461 (1919) (starting up a competing enterprise with confidential information taken from employer).

[216] *See generally* Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1947 (2000) (noting Supreme Court pushback on FTC rulings beginning in 1920 with *FTC v. Gratz*).

demanding exclusive loyalty from their distributors,[217] dissolved associations of competitors that were fixing prices,[218] and attacked product tie-ins by dominant firms[219]—practices that could have met the same fate under the Sherman or Clayton Acts if the requisite competitive effects were found. It was one of those cases that arrived at the Court in 1920.

In an administrative complaint filed in June 1917, the Commission alleged that two companies and their principals, including Anderson Gratz, had violated the FTC and Clayton Acts by tying sales of bags and wire for baling cotton "with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging."[220] The adjudication produced an extensive record, upon which the Commission found that the respondents' "dominating and controlling position [of about seventy-five percent of all ties] . . . made it possible for them to force would-be purchasers of ties to also buy from them bagging," and that "in many instances" they did so, "often times" compelling purchasers to buy the bundle.[221] The Commission found this sufficient to constitute an unfair method of competition but insufficient to support a violation of Section 3 of the Clayton Act.[222] That distinction was fatal to the case.

Gratz appealed, and the parties submitted the entire record of the adjudication to the Court of Appeals for the Second Circuit.[223] It framed its analysis by acknowledging that the Commission's factual findings were conclusive if supported by the evidence, that unfair methods were not restricted to "such as violate the Anti-Trust Acts," and that violations could include conduct that "if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-Trust Acts."[224] Still, the court held:

> [U]nfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the [C]ommission such questions as whether a person, partnership or corporation had treated or bribed the employe[e]s of a competitor for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Anti-Trust Acts, must be at least such as are unfair to the public generally.[225]

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217 *See* FTC v. Nat'l Binding Mach. Co., 1 F.T.C. 44, 52–53 (1917).

218 *See* FTC v. Bureau of Stats. of Book Paper Mfrs., 1 F.T.C. 38, 41–43 (1917).

219 *See* FTC v. A. B. Dick Co., 1 F.T.C. 20, 25–28 (1917).

220 FTC v. Gratz, 1 F.T.C. 249, 250–51 (1918); *see* FTC v. Gratz, 253 U.S. 421, 424 (1920).

221 *Gratz*, 1 F.T.C. at 255–57.

222 *Id.* at 257.

223 FTC v. Gratz, 258 F. 314 (2d Cir. 1919).

224 *Id.* at 317.

225 *Id.* at 316–17.

Applying these considerations, the court examined the record and found "no evidence" of a policy to refuse to sell ties separately from bags.[226] Instead, in a review reminiscent of the opinion in *Board of Trade*, the court delved into the record and cited contextual evidence that the Commission had not detailed in its findings. It was the "natural and prevailing custom in the trade to sell ties and bagging together," like "cups and saucers," according to the testimony of one witness.[227] "Such evidence as there is" of refusals to sell ties without bags was limited to customers with whom respondents had previously experienced "unsatisfactory relations," and those instances occurred during periods when crops were large, ties were scarce, and people feared "the marketing of the cotton crop might be endangered by speculators creating a corner in ties."[228] But for these "exceptional and individual cases, which established no general practice affecting the public," the respondents sold ties without any restrictions.[229] Noteworthy to the court was Commission's conclusion that the challenged practices fell short of the Clayton Act's requirement that conduct "lessen competition or tend to create a monopoly," an indication that the case did not implicate the public interest essential to the application of the FTC Act.[230] The controversy, held the court, involved nothing more than "specific individual grievances," which the Commission had "no jurisdiction" to adjudicate.[231]

On appeal at the Supreme Court, *FTC v. Gratz*[232] precipitated an inconclusive argument between the two Justices who had helped conceive the FTC Act six years earlier. Justice McReynolds, writing for a majority of seven, quoted just one sentence of the Court of Appeals for the Second Circuit's opinion—the statement that no evidence supported "[a] general practice" of respondents' refusing to sell ties without bags.[233] Rather than relying on the failure of proof, however, the majority turned to the Commission's complaint and held that "[i]f, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to

226 *Id.*

227 *Id.*

228 *Gratz*, 258 F. at 317.

229 *Id.*

230 *Id.* at 317.

231 *Id.* at 318. Unavailing for the Commission was its calling the court's attention to a not-yet-reported decision of the Court of Appeals for the Seventh Circuit, which had upheld deceptive advertising as an unfair method of competition. The Court of Appeals for the Second Circuit distinguished the case because it involved "statements calculated to deceive all purchasers and discredit all competitors." *Id.*

232 253 U.S. 421 (1920).

233 *Id.* at 424–25.

desist—the thing which may be prohibited is the method of competition specified in the complaint."[234] An order that does not follow the complaint "will be annulled by the court."[235] The Court affirmed the lower court's decision while all but ignoring the extensive rationale.[236]

The decision provoked a dissenting opinion by Justice Brandeis, who admonished the majority for basing its decision on the pleadings rather than the record of the adjudication.[237] Following the example of the Court of Appeals for the Second Circuit (and his own methodology in *Board of Trade*), he examined the record for evidence of unfair methods of competition.[238] In his review of the record, he found evidence supporting findings that the companies dominated and controlled the trade in the markets for the commodities.[239] On this structural issue, there was no dispute with the Commission, the lower court, or the majority. The Justice disagreed, however, with the gravamen of the Court of Appeals for the Second Circuit's opinion—that the Commission had adduced only evidence of individual incidents, rather than effects implicating the public interest.[240] Echoing and amplifying the Commission's findings that many merchants were affected, the Justice stated that a "*great* many merchants . . . were many times unable to procure ties from any other firm . . . . and such purchasers were oftentimes compelled to buy" bags with ties.[241] This was enough for him to defer to the Commission's condemnation of the practices as unfair methods of competition, because full-line forcing and exclusive dealing were well-known to be unfair methods of competition

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234 *Id.* at 427.

235 *Id.* The Court did not explain why this allegation in paragraph 3 of the complaint was not sufficient: "That with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to be bought . . . ." *Id.*

236 *See id.* at 427–29.

237 *See id*. at 429–30 (Brandeis, J., dissenting).

238 *See Gratz*, 253 U.S. at 439–41.

239 *See id.*

240 *See id.*

241 *Id.* at 440 (emphasis added). The dissent did not address the evidence of customer relations, tie shortages, and other justifications on which the Court of Appeals for the Second Circuit relied, in contrast to the extensive agreement of defenses in *Board of Trade*. *Compare id.* at 439–41 (finding unfair competition based on evidence of market dominance and public detriment), *with* FTC v. Gratz, 258 F. 314, 317 (2d Cir. 1919) (finding insufficient evidence of unfair competition based on evidence of prevailing customs and tie scarcity), Bd. of Trade v. United States, 246 U.S. 231, 239–41 (1918) (finding a call rule did not violate antitrust laws based on evidence of the rule's nature, scope, and effects).

"when practiced by concerns holding a preponderant position in the trade."[242]

It is neither the Justices' disagreement over factual findings nor the majority's unexplained focus on pleadings that has made *Gratz* a milestone in the annals of antitrust. *Gratz* earned its distinction, a dubious one, for the debate between Justice Brandeis and the majority over the reach of the FTC Act. In a passage utterly unnecessary to the decision, the majority opined that the statute applied only to conduct already recognized as harmful:

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the [C]ommission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.[243]

Standing alone, a statement that the courts have ultimate responsibility to construe a statute is hardly novel, although it caused the Court to clarify the deference due to the Commission in defining unfair acts and practices. By contrast, the conclusion that unfair methods applied only to previously condemned practices had no basis in the language or history of the FTC Act.[244] Not surprisingly, the Court retreated from that notion in the next Commission case it decided.[245] Most important to modern jurisprudence is that neither the majority nor the dissent in *Gratz* posited that "unfair methods of competition" could be ascertained and condemned by an analysis other than the rule of reason or that the Act reached incidents of unfair competition between two businesses.[246] Justice Brandeis's dissent was an application of the economic analysis that the rule of reason entails, much like his majority opinion in *Board of Trade*.[247]

Soon after *Gratz*, the Court dealt with a Commission order against a chewing gum company for cutting off dealers who discounted its products below suggested resale prices. *FTC v. Beech-Nut Packing Co.*[248] divided the Justices as they debated the applicability of two Sherman Act precedents to the methods of competition.[249] The Court had held in *Dr. Miles Medical*

242 *Gratz*, 253 U.S. at 441 (citing JOSEPH E. DAVIES, DEP'T OF COM., TRUST LAWS AND UNFAIR COMPETITION 319-23, 328 (1915)).

243 *Id.* at 427.

244 *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453–54 (1922).

245 *See id.*

246 *See Gratz*, 253 U.S. at 427; *id.* at 437–39 (Brandeis, J., dissenting).

247 *See id.* at 439–41; *see* Bd. of Trade v. United States, 246 U.S. 231, 240–41 (1918).

248 257 U.S. 441 (1922).

249 *See id.* at 451–53; *id.* at 456–57 (Holmes, J., dissenting); *id.* at 458–59 (McReynolds, J., dissenting).

Co. v. John D. Park & Sons Co.[250] that the "sole purpose" of contracts securing agreements from customers of the Dr. Miles Company to resell its products at designated prices was "the destruction of competition and the fixing of prices," and thus violated Section 1 of the Sherman Act.[251] In 1919, the Court limited the reach of *Dr. Miles* when it held that Colgate Company could announce resale prices and then refuse to deal with distributors who did not adhere to the policy without violating the Act.[252] In *United States v. Colgate & Co.*,[253] the Court explained that *Dr. Miles* did not override the right of a supplier to choose its customers and the conditions under which it will deal.[254] Liability turned primarily on explicit agreements or evidence of efforts to enforce resale price maintenance ("RPM").[255] With agreements, *Dr Miles* applied.[256] With nothing more than an announced policy, *Colgate* did.[257]

These Sherman Act cases framed the issues in *Beech-Nut*, where the Commission found that the company had undertaken extensive efforts to discipline its resellers—more than *Colgate* allowed.[258] Beech-Nut had urged its resellers to comply with the policy, maintained a network of informants, encouraged them to report infractions, and acted on tips by launching investigations of suspected discounters.[259] A divided Supreme Court, with five Justices in the majority, reiterated the rationale in *Gratz* and stated that the Sherman Act "shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress."[260] Applying this analysis to Beech-Nut's practices, the Court declined to shelter them under the *Colgate* umbrella:

> If the "Beech-Nut system of Merchandising" is against public policy because of its "dangerous tendency unduly to hinder competition or create monopoly," it was within the power of the Commission to make an order forbidding its continuation. We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. The facts found show that the Beech-Nut system goes far beyond the simple

250 220 U.S. 373 (1911).

251 *Id.* at 407–09.

252 United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

253 250 U.S. 300 (1919).

254 *Id.* at 306–08.

255 *See id.*

256 *See* Mark D. Bauer, *Whither* Dr. Miles?, 20 LOY. CONSUMER L. REV. 1, 6 (2007).

257 *See id.* at 6–7.

258 *See* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922).

259 *See* FTC v. Beech-Nut Packing Co., 1 F.T.C. 516, 525 (1919).

260 *Beech-Nut*, 257 U.S. at 453.

> refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer.[261]

Justice Oliver Wendell Holmes dissented, with the concurrence of Justices Brandeis and McKenna, not because Beech-Nut's conduct qualified for *Colgate* treatment but because the FTC had failed to find anticompetitive effects from the practice.[262] Harm to competition, Justice Holmes argued, was necessary to declare a method of competition unfair.[263] In the practices of Beech-Nut, he could not "see how it is unfair competition to say to those to whom the respondent sells, and to the world, you can have my goods only on the terms that I propose, when the existence of any competition in dealing with them depends upon the respondent's will."[264]

In a separate dissent, Justice McReynolds cited the *Colgate* doctrine, again not for the absence of an agreement, but for the absence of harm to competition: "There is no question of monopoly. Acting alone, respondent certainly had the clear right freely to select its customers—to refuse to deal when and as it saw fit—and to announce that future sales would be limited to those whose conduct met with its approval."[265]

The dissenting opinions in *Beech-Nut* foreshadowed rulings under the Sherman Act fifty years later when the Court assessed vertical restraints by their competitive effects instead of their place on the *Colgate–Dr. Miles* spectrum.[266] In the evolving jurisprudence under the FTC Act, the lasting legacy of the *Beech-Nut* opinions, majority and minority, is that all were interpreting the FTC Act according to Sherman Act precedent.[267] The majority condemned the practice according to the *Dr. Miles* doctrine it deemed controlling.[268] The dissenters, including Justices Holmes (with Justice Brandeis's concurrence) and McReynolds, argued for the analysis that the rule of reason would prescribe.[269] They paid little heed to the distinctions between written and unwritten RPM policies.[270] What mattered to them was that the FTC Act required an analysis of the effects

[261] *Id.* at 454.

[262] *See id.* at 456–57 (Holmes, J., dissenting).

[263] *See id.*

[264] *Id.*

[265] *Id.* at 458 (McReynolds, J., dissenting) (citing United States v. Colgate & Co., 250 U. S. 300 (1919)).

[266] *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 894–95 (2007).

[267] *See Beech-Nut*, 257 U.S. at 452–54; *id.* at 456–57 (Holmes, J., dissenting); *id.* at 458 (McReynolds, J., dissenting).

[268] *See id.* at 452–54 (majority opinion).

[269] *See id.* at 456–57 (Holmes, J., dissenting); *id.* at 459 (McReynolds, J., dissenting).

[270] *See id.*

of the policies on competition.[271] The opportunity to persuade their brethren with similar arguments came in another appeal the following year.

While *Beech-Nut* was rising through the courts, so were FTC orders against thirty oil companies,[272] one of which was Sinclair Refining Company, that leased gasoline storage tanks on the condition that the tanks could store only the lessor's petroleum products.[273] The adjudication had not established collusion among the oil companies or agreements explicitly requiring lessees to deal exclusively with their lessors, but the Commission found the practical effect of the lease restrictions resulted in exclusive dealing.[274] On this basis, the Commission determined that the conditions amounted to tying practices in violation of the Clayton Act and unfair methods of competition under the FTC Act.[275]

By the time the cases reached the Supreme Court, it had found the effects of similar restrictions sufficient to condemn the leases of United Shoe Machinery under the Clayton Act.[276] Nonetheless, in a unanimous opinion in *FTC v. Sinclair Refining Co.*,[277] the Court concluded, "[n]o purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition."[278]

The Court explained that the "powers of the Commission are limited" by the FTC and Clayton Acts.[279] "It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition."[280] It was essential to that competition that "those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."[281] Applying this analysis, the Court regarded the principal distinction

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[271] *See id.* The dissenting opinions foreshadowed the Sherman Act decisions decades later in such cases as *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (involving non-price vertical restraints), and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007) (involving resale price maintenance), in which the Court removed the per se status from these restraints and assigned them to the rule of reason.

[272] The thirty were addressed collectively in *FTC v. Sinclair Refin. Co.*, 261 U.S. 463, 464–65 (1923).

[273] FTC v. Sinclair Refin. Co., 2 F.T.C. 127, 134–36 (1919).

[274] *See id.* at 137.

[275] *Id.*

[276] United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457–58 (1922).

[277] 261 U.S. 463 (1923).

[278] *Id.* at 475.

[279] *Id.*

[280] *Id.* at 475–76.

[281] *Id.* at 476.

between *Sinclair Refining* and *United Shoe Machinery Corp. v. United States*[282] to be the monopoly the shoe company possessed and maintained with its covenants.[283] It controlled over ninety-five percent of the market.[284] Its share enabled its covenants to "effectually prevent [a shoemaker] from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business."[285] By contrast, in *Sinclair Refining*, buyers could choose from dozens of suppliers.[286]

Traditional antitrust analysis allowed the Court to conclude with an easy rejection of the FTC's last argument "that the assailed practice is unfair because of its effect upon the sale of pumps by their makers"; a contention, the Court dismissed as "sterile" and requiring "no serious discussion."[287] Disgruntled suppliers did not constitute competitive effects.[288] Nothing in the opinion suggests different analytical approaches to assessing competitive effects under the Clayton Act, FTC Act, or Sherman Act. Different outcomes did not derive from different analytical approaches, but from distinguishable facts on the respective records.

Along with these competition cases, appeals from the FTC's advertising decisions made their way to the Court. In each case, the Court relied on the Commission's findings of competitive effects. In the early cases, a relatively cursory assertion of harm to competitors was enough to qualify deceptive advertising as an unfair method of competition.[289] In *FTC v. Winsted Hosiery Co.*,[290] the Court held, per Justice Brandeis, that the Commission had properly ordered the Winsted Hosiery Company to cease marketing garments containing cotton as "Natural Wool," "Merino," and other descriptions implying pure wool content.[291] Describing the FTC's "clear, specific and comprehensive" findings that the deceptive advertising injured competitors as well as consumers, the Court stated that "[a] substantial part of the public" was misled, "the public had an interest in stopping the practice as wrongful," and, since competitors who

282 258 U.S. 451 (1922).

283 *Sinclair Refin. Co.*, 261 U.S. at 473–74 (citing *United Shoe*, 258 U.S. at 457–58).

284 *United Shoe*, 258 U.S. at 455.

285 *Id.* at 458.

286 *See Sinclair Refin. Co.*, 261 U.S. at 468.

287 *Id.* at 476.

288 *See id.* at 474–75.

289 *See, e.g.*, FTC v. Winsted Hosiery Co., 258 U.S. 483, 492–93 (1922); FTC v. Royal Milling Co., 288 U.S. 212, 216–17 (1933); FTC v. Algoma Lumber Co., 291 U.S. 67, 75–76 (1934); FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 306–08 (1934).

290 258 U.S. 483 (1922).

291 *Id.* at 490, 494.

marked their goods truthfully were affected by the practice, "the Commission was justified in its conclusion that the practice constituted an unfair method of competition . . . ."[292]

In contrast, the Court chastised the agency for intervening in a classic unfair competition case—a feud between two retailers of window coverings that had no demonstrated effect on competition in the broader market.[293] Justice Brandeis wrote for a unanimous Court in *FTC v. Klesner*[294] that the parties might have competed unfairly against one another, but their disparaging claims did not implicate the FTC Act.[295] To be unfair, a method of competition had to threaten present or potential competition, impose "flagrant oppression" by powerful companies, or cause harm so "serious and widespread" that private suits could not stop it.[296] Justice Brandeis cited *Beech-Nut* and *Winsted* (itself decided on Sherman Act grounds), where the misleading advertising had been found pervasive in the industry, for the type of competitive harm the FTC should show.[297] A marketing dispute between the two competitors in *Klesner*, by contrast, did not qualify as an unfair method of competition within the reach of Section 5.[298]

Likewise, the Court rejected an FTC decision condemning an advertising campaign without identifying any injured competitors or consumers. In *FTC v. Raladam Co.,*[299] involving a purveyor of dubious obesity cures, the Court remanded the case with instructions to employ the tools of antitrust to assess effects on competition:

> All three statutes [the Sherman, Clayton, and FTC Acts] seek to protect the public from abuses arising in the course of competitive interstate and foreign trade. In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are "unfair," and whether, *as in cases under the Sherman Act*, they tend to the substantial injury of the public by restricting competition in interstate trade and "the common liberty to engage therein." The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance.[300]

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292 *Id.* at 491, 494.

293 *See* FTC v. Klesner, 280 U.S. 19, 23–24, 30 (1929).

294 280 U.S. 19 (1929).

295 *See id.* at 27–28.

296 *Id.* at 28.

297 *Id.* at 27–28.

298 *See id.* at 23–24, 30.

299 283 U.S. 643 (1931).

300 *Id.* at 647–48 (emphasis added) (citing Int'l Shoe Co. v. FTC, 280 U.S. 291, 297–299 (1930)).

> It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade,

Three more marketing cases survived Supreme Court review in 1933 and 1934—*FTC v. Royal Milling Co.*,[301] challenging deceptive claims about flour;[302] *FTC v. Algoma Lumber Co.*,[303] enjoining the sale of misbranded lumber;[304] and *FTC v. R. F. Keppel & Bro., Inc.,*[305] prohibiting confectioners from luring children to gamble for prizes when they bought candy.[306] Each Commission decision cited findings that the cases involved more than private controversies, that the practices were commonplace in the market, and that the conduct harmed competitors and consumers.[307] On appeal, those findings were credited.[308] By the mid-1930s, an advertising practice had to imperil competition to constitute an unfair method, and evidence of that peril had to be found by the Commission.[309]

Keppel illustrates the circumstances that could distinguish private disputes from public injury. The Court dwelt at length on the competitive effects of the advertising at issue, in part with these observations:

> The proceeding involves more than a mere private controversy. A practice so generally adopted by manufacturers necessarily affects not only competing manufacturers but the far greater number of retailers to whom they sell, and the consumers to whom the retailers sell. Thus the effects of the device are felt throughout the penny candy industry. A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute.
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> . . . .
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> . . . A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

> or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market. All this was left without proof and remains, at best, a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission.

Id. at 653.

301 288 U.S. 212 (1933).

302 *Id.* at 214–16.

303 291 U.S. 67 (1934).

304 *Id.* at 80–82.

305 291 U.S. 304 (1934).

306 *Id.* at 306–07, 314.

307 *See Royal Milling Co.*, 288 U.S. at 215–16; *Algoma Lumber Co.*, 291 U.S. at 69–73; *Keppel*, 291 U.S. at 307–08.

308 *See Royal Milling Co.*, 288 U.S. at 217–18; *Algoma Lumber Co.*, 291 U.S. at 81–82; *Keppel*, 291 U.S. at 309, 314.

309 *See, e.g.*, *Keppel*, 291 U.S. at 313–14.

> The practice in this case presents the same dilemma to competitors . . . . But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. . . . [I]t is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons, a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous.[310]

The last advertising case based on unfair methods of competition reached the Supreme Court in 1937, but competitive effects were not litigated. In *FTC v. Standard Education Society*,[311] the Court dealt with the scope of an order and the deference to be accorded to the Commission's factual findings.[312] The Court of Appeals for the Second Circuit (per Judge Learned Hand), dispensed with the competition issue, held that the parties had admitted to engaging in interstate competition, and relied on *Raladam* and *Keppel* for the proposition that the Commission has latitude to address prohibit practices that give unscrupulous sellers a competitive advantage.[313]

Congress eliminated the need to treat advertising cases as unfair methods of competition in 1938 with the passage of the Wheeler-Lea Act ("Wheeler-Lea"), which amended the FTC Act to prohibit unfair and deceptive acts and practices regardless of competitive effects.[314] The amendment finally freed the Commission from proving competitive effects when prosecuting cases involving deception or unfairness.[315] A consistent theme runs through the first two decades of judicial interpretation of the FTC Act. When the cases sounded in antitrust—from refusals to deal to tie-ins, exclusive dealing, challenges, and price fixing, the courts reviewed Commission actions in accord with the analysis developed under the Sherman and Clayton Acts. FTC decisions stood or fell depending on assessments like the antitrust statutes require—either the rule of reason or the likelihood that practices at issue may substantially

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[310] *Id.* at 309, 313. Years later, the Court characterized *Keppel* as displacing the approach of *Raladam*. In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Court implied that *Keppel* had dispensed with the requirement to show competitive effects in advertising cases: *Keppel*, the court suggested, had distinguished unfair methods of competition from those "likely to have anticompetitive consequences after the manner of the antitrust laws . . . [or] confined to purely competitive behavior." *Id.* at 244. That characterization, however, cannot be squared with the opinion in *Keppel.*

[311] 302 U.S. 112 (1937).

[312] *See id.* at 113.

[313] FTC v. Standard Educ. Soc'y, 86 F.2d 692, 695–96 (2d Cir. 1936).

[314] Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a)). The *Sperry & Hutchinson* Court said the perspective of *Keppel* was "legislatively confirmed" when Congress amended the law. *Sperry & Hutchinson*, 405 U.S. at 244.

[315] *See* Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 115 (codified as amended at 15 U.S.C. §§ 52(b)–53(b)).

lessen competition or tend to create monopolies. *Gratz, Beech-Nut*, and *Sinclair* failed the competitive effects test. Advertising cases that were no more than disputes between two competitors routinely failed, too.[316] Until Wheeler-Lea, the Commission had to plead and prove disadvantages to interstate aggregations of competitors and customers; private disputes between competitors were beyond the scope of the statute, as *Klesner* and *Raladam* made clear.[317]

C. *Mid-Century: Unfair Methods Remain Tethered to Competitive Effects*

By the middle of the century, the Supreme Court often acknowledged Congress's desire to allow Section 5 some leeway from the standards of the Sherman and Clayton Acts, but not from the analysis of competitive effects. For example, in *Fashion Originators' Guild of America, Inc. v. FTC*,[318] a 1941 case involving an arrangement among competitors not to deal with low-cost rivals, the Court began its decision with the observation that the FTC Act could prohibit conduct that might not have ripened into violations of the Sherman and Clayton Acts.[319] However, the observation was unnecessary to the decision, because the Court saw the challenged conduct as obvious violations of those laws: the "purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts."[320] The pernicious competitive effects were so obvious to the Court that they could have been condemned per se.[321] Accordingly, it was not an error for the Commission to have excluded evidence of the reasonableness of the practices, "for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."[322]

In 1953, in *FTC v. Motion Picture Advertising Service Co.*,[323] the Court again observed that the Commission could proceed under Section 5 to prohibit methods of competition that, if not prevented in their incipiency,

316 *See* FTC v. Gratz, 253 U.S. 421, 428–29 (1919); FTC v. Sinclair Refin. Co., 261 U.S. 463, 474–76 (1923).

317 *See* FTC v. Raladam Co., 283 U.S. 643, 653–54 (1931); FTC v. Klesner, 280 U.S. 19, 25, 30 (1929).

318 312 U.S. 457 (1941).

319 *Id.* at 463–64, 466.

320 *Id.* at 467–68.

321 *See id.* at 468.

322 *Id.*

323 344 U.S. 392 (1953).

could become Clayton or Sherman Act violations when full–blown.[324] At issue in the case were contracts by which commercials were placed in movie theaters.[325] Four companies, accounting for three quarters of the nation's theaters, had exclusive contracts to place the ads with the theaters.[326] These contracts, found the Commission, foreclosed other companies from entering the market, restraints that amounted to unfair methods of competition.[327] The Court of Appeals for the Fifth Circuit reversed, holding that the practice was neither unfair nor unreasonable "but was rendered desirable and necessary by good-business acumen and ordinarily prudent management."[328]

The Supreme Court disagreed with the court of appeals and held that it was for the Commission, not the courts, to decide whether the facts supported the finding that "respondent's exclusive contracts *unreasonably* restrain competition and tend to monopoly."[329] Although the Court showed deference to the factual findings of the Commission about the threat to competition in the market, the Court did not depart from Sherman Act jurisprudence in upholding the Commission's analysis:

> It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an "unfair method of competition" within the meaning of § 5 (a) of the Federal Trade Commission Act.[330]

Justice Felix Frankfurter dissented, not because he disagreed with the applicable law, but because he found the Commission's competitive analysis deficient.[331] Half of the respondent's contracts ran for a year, putting the share of theaters foreclosed to its competitors at six percent of the total number and ten percent of the theaters that accepted advertising.[332] In light of these percentages, he reasoned, the Commission had simply stated "a dogmatic conclusion that the use of these contracts constitutes an 'unreasonable restraint and restriction of competition.'"[333] The Justice characterized the majority opinion as "merely an echo of this conclusion and states without discussion that such exclusion from a

[324] *Id.* at 394–95.

[325] *Id.* at 393.

[326] *Id.*

[327] *Id.* at 395.

[328] Motion Picture Advert. Serv. Co. v. FTC, 194 F.2d 633, 637 (5th Cir. 1952).

[329] *Motion Picture*, 344 U.S. at 395 (emphasis added).

[330] *Id.*

[331] *See id.* at 398 (Frankfurter, J., dissenting).

[332] *Id.* at 399.

[333] *Id.*

market without more 'falls within the prohibitions of the Sherman Act.'"[334] The evidence did not demonstrate to Justice Frankfurter "how these practices, if full blown, would violate one of those Acts."[335] He concluded with the observation that would frame the debate over the respective roles of the Commission and the courts in defining unfair methods of competition:

> Until Congress chooses to do so, we cannot shirk our duty by leaving determinations of law to the discretion of the Federal Trade Commission. Not only must we abstain from approving a mere say-so of the Commission and thus fail to discharge the task implied by judicial review. It is also incumbent upon us to seek to rationalize the four statutes directed toward a common end and make of them, to the extent that what Congress has written permits, a harmonious body of law. This opinion is an attempt, at least by way of adumbration, to carry out this aim.[336]

The disagreement among the Justices is more significant for what was *not* at issue: the analytical approach that the Commission should employ. Both the majority and the dissent endeavored to ascertain whether the Commission had found adequate evidence to show unreasonable restraints that threatened competition in a relevant antitrust market.[337] Neither opinion suggested that the FTC Act gives the Commission authority to depart from the tenets of antitrust analysis.

During the 1960s and 1970s, the Court continued to defer to the agency, but the deference showed no signs of separating FTC Act analysis from the framework of the Clayton and Sherman Acts. In *FTC v. Brown Shoe Co.*,[338] for example, a case involving restrictions against shoe stores dealing with competitors of a dominant company, the Court compared the Commission's assessment of the market facts of the industry to an earlier Clayton Act case involving the same company.[339] The analysis persuaded the Court "that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3

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334 *Id.*

335 344 U.S. at 401, 405 ("The vagueness of the Sherman Law was saved by imparting to it the gloss of history. Difficulties with this inherent uncertainty in the Sherman Law led to the particularizations expressed in the Clayton Act. The creation of the Federal Trade Commission . . . made available a continuous administrative process by which fruition of Sherman Law violations could be aborted. But it is another thing to suggest that anything in business activity that may, if unchecked, offend the particularizations of the Clayton Act may now be reached by the Federal Trade Commission Act." (citations omitted)).

336 *Id.* at 406.

337 *See id.* at 395 (majority opinion); *id.* at 398 (Frankfurter, J., dissenting).

338 384 U.S. 316 (1966).

339 *See id.* at 319 n.2, 321–22.

and Section 7 of the Clayton Act, as amended, have been met."[340] Brown Shoe's program, said the Court, "obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act . . . ."[341] The Court also recognized "in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair."[342] For example, the Court suggested, the Commission could prevent incipient practices that, when full-blown, would violate the other antitrust laws.[343] But both the Court and the Commission, after acknowledging flexibility in Section 5, analyzed the legality of unfair methods within the framework of the antitrust laws.[344]

The Court gave the FTC Act its most expansive interpretation in *FTC v. Sperry & Hutchinson Co.*,[345] with an opinion addressing the Commission's competition and consumer protection authority.[346] Before the Court was a reversal of a Commission decision by the Court of Appeals for the Fifth Circuit that condemned a company's bans of exchanges (or traffickers) in trading stamps that stores issued to consumers when they purchased goods.[347] Like points in modern-day affinity plans such as airline miles and credit card points, trading stamps could be accumulated and redeemed for merchandise—but not sold or swapped in aftermarkets.[348] The case presented questions about the reach of both the competition and the consumer protection authority of the FTC.[349] With respect to competition, the Court asked, "does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws?"[350] On consumer protection, "does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition?"[351] The Court answered both questions in the affirmative:

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340 FTC v. Brown Shoe Co., 62 F.T.C. 679, 717 (1963) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 296 (1962) (finding merger acquisitions unlawful under Section 7 of the Clayton Act where the effect "may be substantially to lessen competition, or to tend to create a monopoly")).

341 *Brown Shoe*, 384 U.S. at 321.

342 *Id.* at 320–21.

343 *Id.* at 322 (citing FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953)).

344 *See id.* at 322; *Brown Shoe*, 62 F.T.C. at 716–17.

345 405 U.S. 233 (1972).

346 *See id.* at 239.

347 *Id.* at 234–35.

348 *See id.* at 236–38.

349 *See id.* at 239.

350 *Id.*

351 *Sperry & Hutchison*, 405 U.S. at 239.

> Thus, legislative 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.[352]

The Court found, however, that the Commission's decision had failed to explain how the facts on the record amounted to either an unfair method of competition or an unfair act or practice.[353] Accordingly, and in unsparing language, the Court refused to sustain the Commission's cease and desist order:

> There is no indication in the Commission's opinion that it found S&H's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws. . . .
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> . . . The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.[354]

Subsequent proceedings would not elaborate on "the root of the antitrust laws" or whether the Commission could ignore assessments of competitive practices because the case was remanded without further decisions on the merits.[355] An unmistakable answer would come, however, in the generation of cases that *Sperry & Hutchinson* inspired.[356]

Armed with the invitation of *Sperry,* the Commission set out to find unfair methods of competition and unfair acts and practices in a host of industries.[357] That quest produced a series of cases that defined the framework for analysis under Section 5, but to the Commission's chagrin, the framework was the rule of reason.[358]

The first reminder that discerning methods of unfair competition required the analytical approach of the other antitrust laws came in 1980

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352 *Id.* at 244. The Court was interpreting both the competition and consumer protection provisions of Section 5, the latter a result of the Wheeler-Lea Act that had added a prohibition of unfair and deceptive acts and practices in order to dispense with competitive analysis from advertising and marketing cases that had often foundered on their tenuous connection to competition. *See id.*; Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a)).

353 *Sperry & Hutchison*, 405 U.S. at 247.

354 *Id.* at 247–48 (footnote omitted) (citations omitted).

355 *See id.* at 247.

356 *See infra* notes 359–411 and accompanying text (discussing subsequent cases).

357 On the consumer protection side, the agency embarked on an extensive campaign of rulemakings to prohibit unfair and deceptive marketing practices. *See* William C. MacLeod & Robert A. Rogowsky, *Consumer Protection at the FTC during the Reagan Administration, in* REGULATION AND THE REAGAN ERA 71–80(Roger E. Meiners & Bruce Yandle eds., 1989) (detailing the FTC's rulemaking spree under the Nixon and Carter administrations).

358 *See infra* notes 359–411 and accompanying text (discussing subsequent cases).

on the appeal of a Commission decision involving parallel, but not collusive, adoptions of pricing formulas by members of the plywood industry.[359] In *Boise Cascade Corp.*,[360] the Commission challenged the practice, finding the formulas corresponded more closely to one another than to the actual shipping costs they purportedly reflected.[361] That correspondence, held the Commission, created a presumption of anticompetitive effects, and the pricing systems thereby violated the FTC Act.[362]

The Court of Appeals for the Ninth Circuit reversed in *Boise Cascade Corp. v. FTC*,[363] holding that in the absence of collusion, the FTC must find evidence of competitive effects before condemning a practice.[364] Presumptions belonged to the type of conduct that amounted to per se violations under the Sherman Act, in the court's opinion, and it rejected the shortcut in a case outside the per se categories.[365] Instead, the court concluded, "to apply *per se* analysis to these facts would be to assume what must be proven . . . ."[366] An examination of the record on appeal revealed it was barren of proof "that the practice exerts an anticompetitive effect on the price of plywood . . . ."[367] Without that proof the court had no reason to assume such an effect.[368]

The court rejected the argument that "a different result [was] warranted by the unique features of the [FTC Act]."[369] It was well recognized that "the Commission was set up as an expert body with power 'to restrain practices . . . which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained,'" but the court regarded deference to the Commission's unsupported conclusions "in tension with the acknowledged responsibility of the courts to interpret section 5."[370] The weight of the case law and the history of the Commission "establish the rule that the Commission must find

359 *In re* Boise Cascade Corp., 91 F.T.C. 1, 4–5 (1978).

360 91 F.T.C. 1 (1978).

361 *See id.* at 103.

362 *See id.* at 103, 105.

363 637 F.2d 573 (9th Cir. 1980).

364 *Id.* at 582.

365 *Id.* at 581.

366 *Id.*

367 *Id.*

368 *Id.* at 581–82.

369 Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980).

370 *Id.* at 581–82 (quoting FTC v. Cement Inst., 333 U.S. 683, 708 (1948)) (citing FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394-95 (1953); FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922); Ger-Ro-Mar, Inc. v. FTC, 518 F.2d 33, 38 (2d Cir. 1975)).

either collusion or actual effect on competition to make out a section 5 violation."[371] The obligation of the Commission was clear, and tied to the Sherman Act:

> We thus hold that in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices. Without such effect, a mere showing of parallel action will not establish a section 5 violation.[372]

Another 1980 decision delivered a setback to the Commission when the Court of Appeals for the Second Circuit considered the Commission's effort to impose on a monopolist a duty to deal with customers it had declined to serve.[373] In *Official Airline Guides, Inc. v. FTC*,[374] the court reversed a Commission decision declaring the refusal of Official Airline Guides to publish flights of smaller airlines in its eponymous schedule book an unfair method of competition.[375]

The Commission had asked the court to take "the small step" of declaring that a monopolist had a duty under Section 5 to deal with prospective customers who could have difficulty competing in their markets without the services of that dominant supplier.[376] The court declined, notwithstanding its recognition that a customer denied service would suffer injury.[377] Mandating a monopolist to sell services to companies in other markets "would give the FTC too much power to substitute its own business judgment for that of the monopolist . . . ."[378] Indeed, it would permit the Commission to delve into "social, political, or personal reasons" for challenging a monopolist's refusal to deal.[379] This was more authority than the Congress had given the Commission, the court concluded, because the issue was long settled under the Sherman Act: "We do not think that the *Colgate* doctrine is as dead as the Commission would

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371 *See id.* at 582.

372 *Id.* at 577.

373 Off. Airline Guides, Inc. v. FTC, 630 F.2d 920, 925 (2d Cir. 1980).

374 630 F.2d 920 (2d Cir. 1980).

375 *Id.* at 923, 928.

376 *Id.* at 927 (internal quotation marks omitted).

377 *Id.* at 927–28.

378 *Id.* at 927.

379 *Id.* (internal quotation marks omitted) (quoting *In re* Reuben H. Donnelley Corp., [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650 at 21,818).

have it."[380] Section 5 was not about to declare a method of competition unfair when it did not offend the policy of the other antitrust laws.[381]

Four years later, the Commission was defending its prohibition of another non-collusive pricing practice in *E.I. du Pont de Nemours & Co. v. FTC*,[382] which concerned ethyl—a leaded gasoline additive and the principal product involved in the case. In a decision spanning a hundred pages, the Commission found that "delivered-cost" pricing—quoting price at destination—by refiners of the additive was an unfair method of competition.[383] The Commission preferred free-on-board pricing—quoting prices separately from shipping costs—on the theory that it discouraged oligopolistic interdependence.[384] Accordingly, the order banned the respondents' use of delivered-cost pricing.[385]

On appeal, the Court of Appeals for the Second Circuit reversed.[386] It rejected the Commission's effort to deem the business practices unfair methods of competition, because the agency had not found "that the challenged practices significantly lessened competition in the antiknock industry or that the elimination of those practices would improve competition."[387] Whatever authority the Commission might have under Section 5 to forbid non-collusive business practices, the court held, that power evaporates without "a sufficient showing of lessening of competition."[388] The Commission could not label a business practice unfair within the meaning of Section 5 unless there was a tacit agreement or evidence of oppressiveness such as "evidence of anticompetitive intent or purpose on the part of the producer charged," or "the absence of an independent legitimate business reason for its conduct."[389] This requirement, the court explained, "is comparable to the principle that there must be a 'plus factor' before conscious parallelism may be found to be conspiratorial in violation of the Sherman Act."[390]

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380 *Id.* The Supreme Court reiterated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), that a monopolist limiting its offerings does not violate the antitrust laws, adding the observation reminiscent of *Standard Oil,* that monopolies foster market forces that undermine them. *Off. Airline Guides*, 630 F.2d at 415–16.

381 *Off. Airline Guides*, 630 F.2d at 927.

382 729 F.2d 128, 130 (2d Cir. 1984).

383 *Id.* at 134.

384 *Id.* at 135.

385 *Id.*

386 *Id.* at 142.

387 *Id.* at 141.

388 *E.I du Pont de Nemours*, 729 F.2d at 142 (citing Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980)).

389 *Id.* at 139.

390 *Id.* at 140 n.10.

A concurring opinion by Judge Joseph Lumbard explained the analytical burden succinctly: "In propounding a more flexible standard for § 5 violations, the FTC has imposed on itself the heightened requirement of showing that challenged practices have had a substantial adverse effect on competition."[391] Because the agency had not met that requirement, the judge agreed with the vacation of the order, although he would have left open the question whether, "with more clearly delineated standards and on a more compelling set of facts, the FTC could use § 5 to reach non-collusive 'facilitating practices' shown to have a substantial anticompetitive effect, without any procompetitive justification."[392]

These losses stand in contrast to the Commission's record when it applied Section 5 within the rubric of the Sherman Act. As the courts rejected the agency's efforts to separate its statute from the antitrust laws, the Supreme Court upheld two Commission decisions finding collusive behavior by dentists in Indiana and lawyers in Washington, D. C., to be unfair methods of competition because the practices amounted to unreasonable restraints of trade.[393] In *FTC v. Indiana Federation of Dentists*,[394] the Court held:

> Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of x rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[395]

Likewise, the Court found no difficulty in upholding the Commission's finding that an association of lawyers who refused to accept assignments at prevailing prices "'constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.' As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act."[396]

But the Commission was rebuked when it tried to use the FTC Act to change settled law under the Sherman Act.[397] The agency took on the

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[391] *Id.* at 142 (Lumbard, J., concurring in part and dissenting in part).

[392] *Id.* at 144.

[393] *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 466 (1986); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422 (1990).

[394] 476 U.S. 447 (1986).

[395] *Ind. Fed'n of Dentists*, 476 U.S. at 459 (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

[396] *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 422 (internal citations omitted) (quoting Superior Ct. Trial Laws. Ass'n v. FTC, 856 F.2d 226, 234 (D.C. Cir. 1988)) (citing FTC v. Cement Inst., 333 U.S. 683, 694 (1948)).

[397] *See* Russell Stover Candies, Inc. v. FTC, 718 F.2d 256, 260 (8th Cir. 1983).

venerable *Colgate* doctrine when it challenged a candy company, Russell Stover Candies, for refusing to deal with discounting customers.[398] In order to isolate the legal issue, the company and the Commission stipulated that the policy was squarely within the safe harbor of *Colgate.*[399] That was enough for the administrative law judge to dismiss the complaint.[400] But the Commission reversed, finding the practice a per se violation of the Sherman Act, and hence an unfair method of competition under the FTC Act.[401] When the company appealed, it presented the Court of Appeals for the Eighth Circuit with the opportunity to reinterpret Sherman Act jurisprudence in a Section 5 proceeding.[402] The vitality of *Colgate* was the sole issue on appeal; the practice was either illegal per se or immune from liability.[403] After surveying numerous interpretations of the *Colgate* doctrine, the court concluded that if it "no longer stands for the proposition that a 'simple refusal to sell to customers who will not sell at prices suggested by the seller is permissible under the Sherman Act', it is for the Supreme Court, not this court, to so declare."[404] Another failure by the Commission to meet the demands of the rule of reason came in a recent reversal of a decision by the Court of Appeals for the Second Circuit that took a short cut through the cost-benefit analysis necessary to adjudge a practice unfair.[405] In *1-800-Contacts, Inc. v. FTC*,[406] the court started and concluded its analysis by recalling the consistency between the FTC Act and the Sherman Act.[407] Invoking Justice Brandeis's formulation of the rule of reason, the court rejected the Commission's determination that agreements among competitors to refrain from bidding on one another's trademarks in auctions for online advertising could be condemned as inherently suspect.[408] The court began its analysis by setting the framework:

> Because "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of § 1 of the Sherman Act . . . aimed at prohibiting restraint of trade," it was appropriate that the [administrative law judge] and the Commission consulted

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398 *See id.* at 258.

399 *See id.* at 256–57.

400 *See* Russell Stover Candies, Inc., 100 F.T.C. 1, 16 (1982).

401 *Russell Stover*, 718 F.2d at 258.

402 *Id.* at 260.

403 *Id.* at 256–57.

404 *Id.* at 260 (internal citation omitted).

405 *See* 1-800-Contacts, Inc. v. FTC, 1 F.4th 102, 117–20 (2d Cir. 2021).

406 1 F.4th 102 (2d Cir. 2021).

407 *Id.* at 114, 122.

408 *Id.* at 114, 116.

> Sherman Act jurisprudence to determine whether the Challenged Agreements violated Section 5 of the FTC Act.[409]

Finding "strong procompetitive justification" in protecting trademark rights, the court concluded the challenged agreements "merely regulate[] and perhaps thereby promote[] competition."[410] Since they did not constitute a violation of the Sherman Act, the asserted violation of the FTC Act fell "*of necessity*."[411]

The decisions of the courts have been clear and consistent. Without conducting the analysis that the antitrust laws require, the Commission has no authority to declare a method of competition unfair.[412] The Supreme Court has invited the FTC to extend the other antitrust statutes, but the agency has never been allowed to dispense with the analysis that the statutes entail.[413] Every time the agency has tried, its decisions have failed to survive appeal, even in *Sperry & Hutchinson,* the most permissive interpretation ever rendered of the FTC Act.[414] The consistent judicial hostility to Commission decisions that dispense with the analysis required under the Sherman and Clayton Acts bodes ill for the cases and rules that follow the approach of the 2022 Enforcement Policy Statement.[415]

III. Robinson-Patman Revives Fair Competition

This Part describes how the yearning for fair competition and the pressure to protect small business from larger enterprises gave birth to the Robinson-Patman Act of 1936 ("Robinson-Patman"), which amended the Clayton Act and made it easier for plaintiffs to prove illegal discrimination in prices, services, or facilities between competing buyers and sellers.[416]

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409 *Id.* (internal citation omitted) ("Under [the rule of reason] analysis an antitrust plaintiff 'must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.'").

410 *Id.* at 122 (internal quotations omitted) (quoting Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

411 *Id.* (emphasis added).

412 *See supra* notes 359–411 and accompanying text.

413 The Commission's 2021 Statement explaining its withdrawal of the 2015 Policy contends that *Boise Cascade*, *Ethyl*, and *Official Airline Guides* "confirm that Section 5 empowers the Commission to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence." *See* 2021 Khan et al. Statement, *supra* note 27, at 4. The 2021 Khan et. al Statement does not mention that the basis for its losses in those cases were its failures to follow the other antitrust laws.

414 *See supra* notes 345–355 and accompanying text.

415 2022 Policy Statement, *supra* note 56, at 2–5.

416 15 U.S.C. § 13.

In its original form, the Clayton Act prohibited discrimination only "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . . ."[417] Under the Robinson-Patman amendments, discrimination could be condemned if it were found "to injure, destroy, or prevent competition *with any person* who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[418] A single company losing business to an aggressive competitor no longer had to prove harm to competition.[419] Neither did the Commission.[420] For the first time in its history, the Commission gained explicit authority to bring cases that were essentially private disputes.[421] The concept of tying violations to an injury of any "person" would give new life to disputes of the sort that the Court said would not qualify as unfair methods of competition during the first twenty years of Section 5 jurisprudence, from *Gratz* to *Standard Education*.[422]

Robinson–Patman added a variety of practices to the proscriptions in the Clayton Act and changed the burden of proof on plaintiffs. Charging different prices remained a violation.[423] The Act also prohibited offering different compensation for various marketing and distribution services to customers who compete with one another.[424] The amended law placed the burden on sellers to defend discounts and benefits rather than requiring plaintiffs to prove competitive harm.[425] For example, the Commission could make a prima facie case by showing one customer received a discount or allowance that a competitor did not receive.[426] The statute created various presumptions depending on the type of preference and whether the complaining party was a customer or competitor of the

417 Clayton Act, Pub. L. No. 63–212, 38 Stat. 730 (1914).

418 15 U.S.C. § 13(a) (emphasis added).

419 FTC v. Morton Salt Co., 334 U.S. 37, 46 (1948).

420 *Id.*

421 *See id.* at 47 ("[T]he Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition.").

422 *See supra* Section II.B.

423 15 U.S.C. § 13(a) (declaring price discrimination illegal "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them").

424 *Id.* § 13(d)–(e) (prohibiting the provision of or payment for distribution services unless such offers were available to all competitors of the customer receiving such benefits).

425 *Id.* § 13(b).

426 *Id.*

seller.[427] Discriminatory pricing, marketing, and distribution services could be illegal with little or no showing of competitive effects.[428]

The Commission became an active enforcer of Robinson-Patman, bringing hundreds of cases in the ensuing years.[429] Price-discrimination cases became a staple of FTC enforcement—occupying the vast majority of its competition resources in the middle of the twentieth century.[430] One of those cases, against the Morton Salt Company, established presumptions in favor of harm from discounts and placed burdens on defendants to justify them.[431] The Commission held that quantity discounts and special sales violated the statute when the company could not prove that the discounts were justified by cost savings, and when the special sales lowered prices below competitors' charges.[432] The discounts ranged from five to ten percent, depending on the quantity purchased.[433] When the case reached the Court of Appeals for the Seventh Circuit, it reversed the decision and dismissed the complaint because the Commission had failed to find the essence of an antitrust case "that the effect of such discrimination is to substantially lessen competition, or tend to create a monopoly or to injure, destroy or prevent competition . . . . essential elements under the Act . . . ."[434]

The Supreme Court disagreed, not only with the factual analysis in the lower court's opinion, but more importantly with the standard of liability and the burden the Commission had to meet.[435] As for the standard, the Court interpreted a Congressional intent "that § 2 of the Clayton Act had 'been too restrictive, in requiring a showing of general injury to competitive conditions . . . .'"[436] The Clayton Act did not prohibit

427 Cases involving competitors of sellers became known as "primary line"; customer cases were "secondary line." *See, e.g.*, ABA ANTITRUST LAW SECTION, 1 ANTITRUST LAW DEVELOPMENTS 541, 570 (9th ed. 2022).

428 The genesis of the legislation was a lobbying campaign by small retailers, led by local grocers, who were struggling to compete with growing national chains that bought supplies in large volumes at discounted prices and passed those prices on to shoppers *See, e.g.*, Frederick M. Rowe, *Political Objectives and Economic Effects of the Robinson-Patman Act: A Conspicuous U.S. Antitrust Policy Failure*, 136 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT [J. INSTITUTIONAL & THEORETICAL ECON.] 499, 500 (Ger. 1980); ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS, 311 (2007), https://perma.cc/DKC2-DX7S.

429 Rowe, *supra* note 428, at 507.

430 *Id.*

431 FTC v. Morton Salt Co., 334 U.S. 37, 45 (1948).

432 Morton Salt Co., 39 F.T.C. 35, 43–45 (1944).

433 Morton Salt Co. v. FTC, 162 F.2d 949, 952–53 (7th Cir. 1947).

434 *Id.* at 958.

435 FTC v. Morton Salt Co., 334 U.S. 37, 55 (1948).

436 *Id.* at 49 (quoting S. REP. NO. 74-1502, at 4 (1936)).

the mere possibility of harm.[437] The Robinson-Patman amendments, by contrast, required only "a reasonable possibility" that price discrimination "may have such an effect."[438] The new law "was intended to have a broader scope than the corresponding provision of the old Clayton Act."[439] Along with a lower standard of liability came a lighter burden of proof:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.[440]

Justice Robert H. Jackson and Justice Frankfurter dissented, conceding that Robinson-Patman was intended to prevent incipient violations of the antitrust laws, but maintaining that incipiency meant more than a "mere possibility" of harm.[441] "The law rarely authorizes judgements on proof of mere possibilities," they wrote, citing decisions establishing a probable "effect on competition" as the appropriate standard.[442] Their effort to harmonize the antitrust statutes failed in 1948. For decades to come the "*Morton Salt* presumption" made it difficult to defend meaningful discounts.[443]

But piecemeal progress toward reconciliation of Robinson-Patman and the other antitrust laws began just five years later when the Court

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437 *Id.* at 46 n.14.

438 *Id.* at 46 (internal quotation marks omitted) (quoting Corn Products Co. v. FTC, 324 U.S. 726, 742 (1945)).

439 *Id.* at 46 n.14 ("The statute is designed to reach such discriminations in their incipiency, before the harm to competition is effected. It is enough that they may have the prescribed effect. But as was held in the *Standard Fashion* case, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which may be to substantially lessen competition, 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." (internal quotation marks and citations omitted) (quoting *Corn Products*, 324 U.S. at 738)).

440 *Id.* at 50–51.

441 *Morton Salt*, 334 U.S. at 57 (Jackson, J., dissenting in part) (quoting *Corn Products*, 324 U.S. at 738).

442 *Id.* ("But as was held in the *Standard Fashion* case, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which may be substantially to lessen competition, 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." (internal quotation marks and citations omitted) (quoting *Corn Products*, 324 U.S. at 738)).

443 *See, e.g.*, Phillip A. Proger, Thomas Greene, Joel I. Klein, Robert Pitofsky, Eleanor M. Fox, Thomas E. Kauper & William E. Kovacic, *Roundtable Conference with Enforcement Officials*, 68 ANTITRUST L.J. 581, 611–12 (2000) (discussing the *Morton Salt* presumption's effect on the industry).

reversed a Commission finding of liability under another section of the statute.[444] In *Automatic Canteen Co. v. FTC*,[445] the Court held that a buyer was not liable for inducing apparently defensible discounts.[446] Putting a buyer in peril for negotiating discounts would undermine "the broader antitrust policies that have been laid down by Congress."[447] Twenty–five years later, the Commission tried to relitigate *Automatic Canteen*, and it lost again in *Great Atlantic and Pacific Tea Co. v. FTC* ("*A&P*"). The Court repeated its warning "against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'"[448] But advantages like the *Morton Salt* presumption remain good law, even though the Court continues to narrow some and refuses to expand others.[449]

For its discouragement of discounting, and its likely effect of making goods more expensive, a modern antitrust scholar cautioned that it was a "mistake to view the Robinson-Patman Act as an anti-trust law."[450] The price-discrimination restriction could be regarded as "an anti-chain law, designed to promote different values" than the antitrust laws.[451] The comment is comparatively kind. In *The Antitrust Paradox*, Professor Robert Bork summed up the scholarly and professional literature on the statute as "a cascade of vituperation."[452] By the early 1950s, the Supreme Court and the Department of Justice were calling for harmonization of the law with the other antitrust laws.[453] A 1956 report from the Attorney General applauded the Supreme Court for acknowledging the danger that "strict enforcement of the Robinson-Patman Act might foster a 'price uniformity and rigidity in open conflict with the purposes of other antitrust

444 *See* Automatic Canteen Co. v. FTC, 346 U.S. 61, 62–63 (1953).

445 346 U.S. 61 (1953).

446 *Id.* at 71.

447 *Id.* at 74.

448 *Id.* at 80 (quoting *Automatic Canteen*, 346 U.S. at 63).

449 *See, e.g.*, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180–81 (2006) ("Interbrand competition, our opinions affirm, is the 'primary concern of antitrust law.' The Robinson-Patman Act signals no large departure from that main concern . . . . By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act 'consistently with broader policies of the antitrust laws.'" (internal citations omitted) (first quoting Cont'l TV, Inc. v. GTE Sylvania, Inc., 433 U. S. 36, 51–52 n.19 (1977); then quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 220 (1993))).

450 TIM WU, THE CURSE OF BIGNESS 19 (Supp. 2020).

451 *Id.*

452 ROBERT H. BORK, THE ANTITRUST PARADOX 385 (1978).

453 U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 130–32 (1956).

legislation.'"[454] A presidential commission in 1969 did the same.[455] In 1975, a barrage of criticism pummeled the Act and inflicted serious damage on the reputation of the FTC:

> Within a period of seven months the President, the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Antitrust Division and two of his assistants all made statements attacking the Act. The President stated: "The Robinson-Patman Act is a leading example of [a law] which restrain[s] competition and den[ies] buyers substantial savings. . . . It discourages both large and small firms from cutting prices, and it also makes it harder for them to expand into new markets and to pass on to customers the cost savings on large orders."[456]

In a devastating report from the Assistant Attorney General for Antitrust in 1975, an expert estimated that enforcement of the Act cost consumers between $3 billion and $6 billion a year.[457] The report also cited a furniture executive who testified that FTC Robinson-Patman cases caused prices to rise by ten to twenty percent in his industry.[458] Citing decades of criticism of the Act and calling it "antithetical to core antitrust principles," for punishing discounting that the antitrust laws otherwise encourage,[459] a bipartisan Antitrust Modernization Commission joined the calls for repeal in 2007.[460]

That Robinson-Patman represented a departure from the antitrust laws did not deter the Commission from enforcing it. From the 1940s to the 1970s, the agency actively pursued price discrimination, bringing hundreds of cases (over 550 between 1961 and 1974 alone).[461] Robinson-Patman dominated FTC's competition mission in the middle of the century, to the detriment of competition and consumers.

The tension between Robinson-Patman and the remainder of the antitrust laws led to three developments in FTC policy and enforcement. First was a trend of increasingly narrow construction of the Act.[462] Second, partly a result of the first, was a decline in cases.[463] Finally, and most

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454 *Id.* at 131 (quoting Automatic Canteen Co. v. FTC, 346 U.S. 61, 73–74 (1953)).

455 REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 4, 101 (1969).

456 Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1115 n.8 (1983) (alteration in original).

457 U.S. DEP'T OF JUST., REPORT ON THE ROBINSON-PATMAN ACT 40 (1975).

458 *Id.* at 57–58.

459 ANTITRUST MODERNIZATION COMM'N, *supra* note 428, at iii.

460 *Id.* at 20.

461 Gen. Motors Corp., 103 F.T.C. 641, 695 (1984).

462 *See, e.g.*, *id.* at 699.

463 Mary L. Azcuenaga, Comm'r, Fed. Trade Comm'n, Remarks Before the American Bar Association Section of Antitrust Law and Corporate Counsel Center Northwestern University School of Law Program on "Living with the Robinson-Patman Act" 2 (May 13, 1993).

importantly, the Commission followed the lead of the courts in seeking to harmonize the statute with the other antitrust laws.[464]

With the implications of *A&P* still fresh, the Commission entered the 1980s with three Robinson–Patman cases advancing on its docket.[465] Each foundered for failing the test of anticompetitive effects. In *General Foods Corp*,[466] the Commission declined to use Section 5 to extend Robinson-Patman beyond its explicit terms to condemn discount pricing.[467] The complaint in the case alleged that General Foods had discounted its Maxwell House Coffee in selected markets to thwart the expansion of Procter & Gamble's Folgers brand.[468] Finding it unlikely that General Foods would achieve a monopoly by engaging in a price war against Procter & Gamble, a required showing under Section 2 of the Sherman Act, the Commission held:

> It is true that the broad language of Section 5 of the Federal Trade Commission Act permits the Commission to supplement the more specific terms of the antitrust laws. Exactly how far that authority extends, however, is an issue the Commission should treat cautiously. While Section 5 may empower the Commission to pursue those activities which offend the "basic policies" of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed. . . .
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> The record in this case does not offer a rationale for using the Federal Trade Commission Act to graft an extension onto Section 2 of the Sherman Act. . . .
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> . . . .
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> . . . If the conduct at issue here cannot reach the early threshold of doubts under the Sherman Act, we will not condemn it under the Federal Trade Commission Act.[469]

The opportunity to make the same point arose later that year when the Commission decided the appeal of *General Motors.*[470] In that case, General Motors allegedly gave promotional allowances to some rental companies that were not available to others.[471] But because the allowances were connected to rentals, the practice did not meet the Robinson-Patman requirement of association with sales.[472] And in the course of the litigation, Complaint counsel (i.e., the Commission staff prosecuting the case) abandoned any claim that the allowances caused any harm to

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464 *Id.* at 3–4.

465 Gen. Foods Corp., 103 F.T.C. 204, 365 (1984); General Motors Corp., 103 F.T.C. 641 (1984); Boise Cascade Corp., 107 F.T.C. 76 (1986).

466 103 F.T.C. 204 (1984).

467 *Id.* at 365.

468 *Id.* at 206.

469 *Id.* at 365–66.

470 General Motors Corp., 103 F.T.C. 641 (1984).

471 *Id.* at 683–84.

472 *Id.*

competition.[473] Thus, the Commission had to decide whether to condemn the allowances as standalone violations of Section 5 because they offended the "spirit" of the Act.[474] It refused: "While the 'spirit' theory, as embraced by the courts, may provide a useful technique in some cases, we decline to apply it in cases such as this *where there has been no demonstration of an anticompetitive impact* . . . ."[475] The Commission's recognition that "the underlying predicate of the Robinson-Patman Act was *not* consumer welfare" buttressed the rationale.[476] It was protectionist legislation intended to help small businesses, the Commission noted, but the vast majority of the hundreds of companies it had sued in the 1960s and early 1970s were smaller businesses, most of which consented to cease and desist orders.[477] Two Commissioners dissented, on the grounds that the FTC should not consider economic analysis of costs and benefits or consumer welfare in deciding how to interpret Section 5.[478]

A third Robinson-Patman case at the Commission in the 1980s required a reversal of a Commission decision that resisted the reconciliation with the other antitrust laws. In *Boise Cascade Corp.*,[479] the Commission used the *Morton Salt* presumption to find that the price discrimination at issue was sufficient to cause the requisite possibility of competitive injury.[480] The Commission allowed that the presumption could be rebutted by evidence breaking the causal connection between a price differential and lost sales or profits or a showing that market conditions unrelated to the price discrimination explained the effects on the disfavored competitors.[481] But it held that proof of healthy competition did not rebut the presumption of competitive harm.[482] That logic failed to persuade the Court of Appeals for the D.C. Circuit:

> The Commission nonetheless determined that Boise's showing of dealer-specific and industry-wide competitive health, in conjunction with the relative absence of lost sales, "fails to rebut the 'self-evident' inference of causation." Indeed, with virtually no elaboration, the Commission concluded that Boise's elaborate evidentiary showing did "not address the causal connection at all." The FTC emphasized that under Robinson-Patman actual injury to competition need not be shown, but only "a reasonable possibility

473 *Id.* at 691.

474 *Id.* at 692–93.

475 *Id.* at 701.

476 *General Motors Corp.*, 103 F.T.C. at 695.

477 *Id.* at 695–96.

478 *Id.* at 704 (Pertschuk, Comm'r, dissenting); *id.* (Bailey, Comm'r, dissenting).

479 Boise Cascade Corp., 107 F.T.C. 76 (1986).

480 *Id.* at 206.

481 *Id.*

482 *Id.* at 208.

> that a price difference may harm competition." (quoting Falls City, 460 U.S. at 434-35, 103 S. Ct. at 1288).
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> . . . .
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> . . . The Commission, in effect, employed the *Morton Salt* inference to presume competitive injury conclusively in this case, and would only treat as relevant evidence "breaking the causal connection" between that assumed injury and the price discrimination to rebut the inference. This approach defies both logic and the import of *Morton Salt* that the inference of injury is rebuttable; for if the respondent's evidence demonstrates that there is no competitive injury (or reasonable possibility of competitive injury) to begin with, then evidence breaking the causal connection is obviously impossible to adduce. There is, under those circumstances, no causal connection to break.[483]

Ten years later, the Supreme Court had the opportunity to advance the reconciliation in primary-line cases (those involving effects on competitors of the discounter) when a cigarette manufacturer sued a competitor for predatory pricing.[484] Before proceeding to an analysis of the record evidence, the Court discussed its recent cases calling for consistent interpretations of the antitrust laws:

> "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved." . . . "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."
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> . . . It is axiomatic that the antitrust laws were passed for "the protection of *competition,* not *competitors.*" Earlier this Term, we held in the Sherman Act § 2 context that it was not enough to inquire "whether the defendant has engaged in 'unfair' or 'predatory' tactics"; rather, we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market." Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."[485]

The Court then held that a primary line violation of Robinson-Patman requires the same analysis of potential harm to competition that would satisfy Section 2 of the Sherman Act.[486] The 2023 Commission, in its desire to depart from modern antitrust jurisprudence, is siding with the 1984 *Boise Cascade* dissenters and disputing what the Supreme Court has declared "axiomatic" in antitrust—the protection of competition, not

[483] Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1137, 1144 (D.C. Cir. 1988) (internal quotation marks and citations).

[484] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 212, 220 (1993).

[485] *Id.* at 223–25 (internal citations omitted).

[486] *Id.* at 229.

competitors, as its purpose.[487] There is no reason to expect the Court to regard the FTC Act as an exception to the axiom.

Since 2000, the FTC has not brought a single Robinson-Patman case.[488] The agency and the administration have signaled that the pause may be over.[489] A presidential executive order in July 2021 called on the Secretary of Agriculture and the Chair of the FTC to report "on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries, including any practices that may violate" the FTC Act and Robinson-Patman.[490] The Chair of the FTC and its newest Commissioner have risen to the challenge with expressions of interest and enthusiasm in reviving Robinson-Patman.[491]

Should the Commission reinvigorate Robinson-Patman enforcement, the records of past enforcement may offer a preview of the consequences. Decades of decisions have documented the price increases that Robinson-Patman enforcement could cause.[492] A sample of major decisions corroborate the evidence collected fifty years ago in the 1975 *Report on the Robinson Patman Act*, published by the DOJ assistant attorney general for antitrust.[493] Those decisions and the discounts cited in the opinions appear in the table below:

	Case	**Products**	**Disputed Discounts**
1945	*Corn Prod. Ref. Co. v. FTC*[494]	Refined Corn Products[495]	Up to 11%[496]
1948	*FTC v. Cement Inst.*[497]	Portland	3.04%[499]

487 *See* 2022 Policy Statement, *supra* note 56.

488 *See* Complaint at ¶ 20, *In re* McCormick & Co., FTC Docket No. C–3939 (Apr. 27, 2000).

489 *See* Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, "Returning to Fairness," Prepared Remarks at the Midwest Forum on Fair Markets 8 (Sept. 22, 2022).

490 Exec. Order No. 14036, 86 Fed. Reg. 36987, 36993 (2021).

491 *See* Dan Papscun, *FTC's Khan Eyes Old Weapon to Crack Down on New Market Players*, BLOOMBERG L. (July 7, 2022), https://perma.cc/K7GM-GARP; Leah Nylen, *New FTC Member Wants to Revive Price-Discrimination*, BLOOMBERG (Sept. 20, 2022), https://perma.cc/UBK9-UDQ3.

492 *See* Eleanor Tyler, *ANALYSIS: Is This the Robinson-Patman Act's Moment?*, BLOOMBERG L. (Apr. 8, 2022), https://perma.cc/7P3A-A4NW.

493 *See* U.S. DEP'T OF JUST., *supra* note 457.

494 324 U.S. 726 (1945).

495 *Id.* at 730.

496 *Id.* at 733.

497 333 U.S. 683 (1948).

499 *Id.* at 713.

		Cement[498]	
1948.5	*FTC v. Morton Salt Co.*[500]	Table Salt[501]	5 to 10%[502]
1951	*Ruberoid Co. v. FTC*[503]	Roofing Materials[504]	5 to 7.5%[505]
1953	*Automatic Canteen Co. v. FTC*[506]	Candy[507]	33%[508]
1960	*FTC v. Anheuser-Busch, Inc.*[509]	Beer[510]	8.5%[511]
1975	*Int'l Air Indus., Inc. v. Am. Excelsior Co.*[512]	Evaporative Cooler Pads[513]	39%[514]
1978	*In re Boise Cascade Corp.*[515]	Plywood[516]	5% and 3%[517]
1979	*Great Atl. & Pac. Tea Co. v. FTC*[518]	Fresh Milk[519]	30%[520]

If the difference between "vigorous competition" and "fair competition" eliminates discounts like those that Robinson-Patman

498 *Id.* at 700.
500 334 U.S. 37 (1948).
501 *Id.* at 39.
502 *Id.* at 41.
503 189 F.2d 893 (2d Cir. 1951).
504 *Id.* at 894.
505 *Id.*
506 346 U.S. 61 (1953).
507 *Id.* at 62.
508 *Id.*
509 363 U.S. 536 (1960).
510 *Id.* at 538.
511 *Id.* at 539.
512 517 F.2d 714 (5th Cir. 1975).
513 *Id.* at 717.
514 *Id.* at 719.
515 91 F.T.C. 1 (1978).
516 *Id.* at 2.
517 *Id.* at 43.
518 440 U.S. 69 (1979).
519 *Id.* at 72.
520 *Id.* at 73.

enforcement sought to ban, the new FTC strategy can be expected to raise prices by ten percent or more.[521] A surcharge of ten percent across the retail sector alone would cost U.S. consumers over $500 billion.[522]

The agency's characterization of the current consensus as a departure from the congressional intent behind the FTC Act not only disputes prevailing law, but it also misreads sixty years of earlier precedent dating back to the first decisions interpreting the FTC Act. All the antitrust laws, including Section 5 and (now at least in part) Robinson-Patman, place the interests of competition and consumers above the interests of competitors and special interests.[523] The Commission faced hostile courts when it disregarded that lesson a century ago and again a half century ago.[524] A similar fate looms today if the FTC tries a third time.

IV. The Commission's Rulemaking Authority

This Part reviews the Commission's decision to launch rules to regulate methods of competition in light of the legislative history of the FTC Act and previous judicial interpretations of the agency's authority.

A. *Regulating Non-Compete Clauses*

On January 4, 2023, the Commission unveiled applications of its 2022 competition policy statement with administrative complaints against three companies that maintained non-compete agreements with their employees.[525] A day later, the agency announced a proposed rule that would ban such contracts across all sectors under its jurisdiction.[526]

In the complaints, all of which were resolved by consent of the parties, the Commission alleged that it was an unfair method of competition to restrict employees from working for competitors of their employers for

521 *See supra* notes 494–520 and accompanying texts.

522 Press Release, U.S. Census Bureau, U.S. Retail Sales Top $5,570 Billion (Jan. 13, 2022), https://perma.cc/9TQX-AJJV ("Retail sales (NAICS 44-45) for the nation increased 3.1% from $5,402.3 billion in 2019 to $5,570.4 billion in 2020 . . . .").

523 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1976).

524 *See supra* notes 444–487 and accompanying text.

525 Press Release, Fed. Trade Comm'n, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), https://perma.cc/B9QK-H8WJ.

526 Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://perma.cc/4CX3-RG26; Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023).

two years after the termination of the employees' current contracts.[527] Such terms were "coercive" and "exploitative" according to the complaints, and their effect was to "negatively affect competitive conditions."[528] The Commission notably did not describe any relevant market in which competition was restrained, did not identify the shares of the respondents in those markets, and did not explain how competition in any market was affected by the practices.[529] An allegation did contend that the non-compete clauses depressed employees' wages and working conditions.[530]

The proposed rule applied the theory of the cases to businesses nationwide.[531] It would ban explicit non-compete clauses ("NCCs") in agreements and would also prohibit non-disclosure, non-solicitation, and non-recruitment agreements, if they effectively precluded someone from quitting a job and joining a competitor.[532] These would be deemed functional NCCs.[533] Likewise, agreements requiring workers to repay employers for training would be deemed functional NCCs if the payments did not reasonably relate to the cost of the training and prevented workers from quitting.[534]

The question of whether the Commission has the authority to promulgate the rule and the others it contemplates has revived a fifty-year-old debate among legal scholars.[535] Section 6(g) of the FTC Act authorizes the Commission: "From time to time [to] classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[536] Before 1964, rulemaking was confined to the FTC's administrative functions.[537] Commissioners considered

527 Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya in the Matters of Prudential Security, O-I Glass Inc., and Ardagh Group S.A., at 1 (Jan. 4, 2023).

528 *Id.*

529 *Id.* at 1–3.

530 These cases overturned, without mentioning them, the cases the Commission's brought in its early years when it prohibited the poaching of employees as an unfair method of competition. *See, e.g.*, FTC v. Allen Sales Serv. (Inc.), 1 F.T.C. 459, 459–62 (1919).

531 Non-Compete Clause Rule, 88 Fed. Reg. at 3482.

532 *Id.* at 3482–83.

533 *Id.*

534 *Id.* at 3510.

535 *See Substantive Rulemaking and the FTC*, 42 FORDHAM L. REV. 178, 179–81 (1973); MAUREEN K. OHLHAUSEN & JAMES RILL, U.S. CHAMBER OF COM., PUSHING THE LIMITS? A PRIMER ON FTC COMPETITION RULEMAKING 2, 5 (2021), https://perma.cc/L6LN-8386.

536 15 U.S.C. § 46(g). An amendment excepted section 57a(a)(2) from its scope. The amendment specifically authorized consumer protection rules but declined to "affect any authority" the FTC to promulgate other rules. *Id.* § 57a(a)(2).

537 Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519, 528–29 (2022).

substantive rulemaking beyond its authority.[538] Since then, rulemaking has typically addressed consumer protection concerns, the authority for which was codified in the Magnuson-Moss Warranty Act in 1975 and incorporated in Section 18 of the FTC Act.[539]

B. *Judicial Reviews of Rulemaking Authority*

The Commission's power to promulgate a competition rule under Section 6(g) has been tested only once in the courts.[540] That test played out in 1972 and 1973 in a case involving a rule the FTC issued requiring the posting of octane ratings on pumps at gas stations.[541] The agency deemed the failure to post such ratings where consumers could see them before selecting a grade of gasoline an unfair method of competition and an unfair or deceptive practice.[542] A failure to disclose material information was well established as a basis for unfairness and deception in FTC cases but seldom cited as an unfair method of competition.[543] Petroleum refiners and retailers challenged various aspects of the rules, including the authority of the Commission to issue them, and the case came to Judge Aubrey Robinson in the D.C. District Court.[544] He held that the FTC lacked such authority.[545]

The opinion began with a review of the legislative history, which the court found clearly established that Section 6(g) was intended "only as an authorization for internal rules of organization, practice, and procedure . . . [and] to insure that the FTC had the power to require reports from all corporations."[546] Congress had considered and refused twice to amend the legislation to confer rulemaking power, including an amendment to "make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition."[547] The section had not changed since 1914, observed the court, and the FTC for approximately fifty years had not asserted rulemaking authority.[548] The

538 *FTC Substantive Rulemaking Authority*, 1974 DUKE L.J. 297, 298–99 (1974).

539 Magnuson-Moss Warranty Act, Pub. L. No. 93–637, § 202, 88 Stat. 2183, 2193 (1975) (codified at 18 U.S.C. § 41 *et seq.*).

540 Nat'l Petroleum Refins. Ass'n v. FTC, 340 F. Supp. 1343, 1344 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir., 1973), *cert. denied*, 415 U.S. 951 (1974).

541 *Nat'l Petroleum Refins. Ass'n*, 340 F. Supp. at 1344–45.

542 *Id.*

543 *Id.* at 1349–50.

544 *Id.* at 1344.

545 *Id.* 1345.

546 *Id.*

547 *Nat'l Petroleum Refins. Ass'n*, 340 F. Supp. at 1346 (internal quotation marks omitted).

548 *Id.* at 1347.

court then cited several statutes in which Congress had explicitly granted FTC authority for regulations confined to industry-specific practices, which would have been unnecessary if the power already resided in Section 6.[549]

Turning to the Commission's arguments, the court considered whether the definitions of regulation in the Administrative Procedure Act ("APA"), enacted in 1946, should apply to the language of the FTC Act.[550] It was nothing less than "inconceivable" to the court that legislation unrelated to the FTC, passed thirty years after it was authorized, could change the meaning of words in its statute.[551] The court noted that after the enactment of the APA, Congress amended the National Labor Relations Act to authorize rulemaking under the labor laws.[552] The absence of a similar amendment to the FTC Act supported the inference that the "rulemaking power in Section 6(g) of the FTCA remains unchanged by Congress to date, and conveys only the authority to make such rules and regulations in connection with its housekeeping chore and investigative responsibilities."[553] To the argument that the FTC's authority under Section 5 to "prevent" unfair methods of competition includes the power to regulate, the court responded that "the very next paragraph of the statute that requires the Commission to conduct adjudicative proceedings."[554] After noting that the Commission itself had repeatedly admitted it had no power to promulgate substantive rules, and that the Supreme Court had impliedly rejected the agency's claims of such power, the court concluded with an application of the maxim, *expressio unius est exclusio alterius,* once articulated by Justice Brandeis: "What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."[555]

On appeal, the Court of Appeals for the District of Columbia found the language of the statute too vague to support reliance on e*xpressio unius est exclusio alterius,*[556] so the court looked elsewhere for a rationale. At the

549 *Id.* at 1347–48.

550 *Id.* at 1348–49.

551 *Id.*

552 *Id.*

553 *Nat'l Petroleum Refins. Ass'n*, 340 F. Supp. at 1348–49.

554 *Id.* at 1349.

555 *Id.* at 1349–50 (quoting Iselin v. United States, 270 U.S. 245, 251 (1926)).

556 Nat'l Petroleum Refins. Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973) ("This maxim is increasingly considered unreliable for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen." (internal citations omitted)).

time, agencies were turning from adjudication to rulemaking, and those assertions of regulatory authority were finding favor in the courts.[557] Rulemaking at the Securities and Exchange Commission and National Labor Relations Board had survived judicial review, noted thecourt, and such decisions "indisputably flesh out the contemporary legal framework in which both the FTC and this court operate and which we must recognize."[558] The court's opinion acknowledged that the agencies whose rules were upheld had received specific grants of rulemaking authority, but considerations of "practicality and fairness" supported the Commission's ambition to follow suit, and the APA provided "an agency about to embark on legal innovation with all relevant arguments and information" to support the assertion of rulemaking power.[559] Thus, trends and statutes that postdated the FTC Act by decades reinforced an implicit grant in the Act of rulemaking authority, even if that power was long-neglected or denied altogether by former agency officials.[560]

The court of appeals then considered whether "the Congress that enacted Section 5 and Section 6(g) gave clear indications of its intent to reject substantive rule-making . . . ."[561] After a painstaking review of the legislative history, the court found indications that Congress intended to deny substantive rulemaking as well as indications to the contrary.[562] Quoting at length from the debates, the court reiterated numerous expressions of concern about delegating too much power to the Commission.[563] For example, Congressman James Covington (floor manager of the conference bill that became the FTC Act) assured his colleagues that Congress was not delegating to the FTC legislative power (i.e. substantive rulemaking), which would have been unconstitutional, but was delegating administrative power (i.e., procedural rulemaking), which the Constitution permitted.[564] The court also cited explicit statements denying an intent to confer substantive rulemaking power on the FTC.[565] Congressman Covington, according to the court, "carefully

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[557] Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 486 (1970).

[558] *Nat'l Petroleum Refins. Ass'n*, 482 F.2d at 683.

[559] *Id.*

[560] *Id.* at 676, 683.

[561] *Id.* at 685.

[562] *Id.* at 686–88, 707–08.

[563] *Id.*

[564] *Nat'l Petroleum Refins. Ass'n*, 482 F.2d at 708 ("This view of Congressman Covington's remarks is buttressed by a reading of one of the cases on which he relied to rebut arguments that the grant of power to the commission to enforce and elaborate the standard of illegality was an unconstitutional delegation of legislative power.").

[565] *Id.* at 707.

differentiated the FTC's power to issue cease and desist orders from the ICC's power to order new railroad rates . . . ."[566] He assured his colleagues:

> The Federal trade commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature. . . .
>
> The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature. Under the Constitution power to act finally in a judicial capacity can be conferred only upon a court.[567]

The court also quoted this colloquy between Congressman Joseph Sherley of Kentucky and Congressman Dan Stevens of Minnesota:

> 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 of Minnesota. Certainly.
>
> Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?
>
> Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. 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.[568]

But the court declined to "conclude that the clear references in the final House floor debate to the ICC's rate-making power should be extrapolated to cover the issuance of substantive rules enforceable only in agency adjudication."[569] The ICC setting a rate, reasoned the court, was different from the FTC declaring a method of competition unfair.[570] The court could not imagine how a carrier could misinterpret a regulated rail fare, but an FTC competition rule left room to argue its meaning and applicability, and the FTC's determination of violations would be appealable.[571] Thus, although the court conceded that Congressman Covington in 1914 had "carefully differentiated" the FTC's and ICC's powers,[572] it deemed the difference between substantive and administrative rules nothing more than a "technical distinction" in 1972. Congressman Stevens' "clear[]" desire "to exclude [substantive] authority from the power of the commission," the court regarded, only underscored

566 *Id.* at 707.

567 *Id.* (quoting 51 CONG. REC. pt. 15, at 14932 (1914) (statement of Rep. James Covington)).

568 *Id.* at 709 (quoting 51 CONG. REC. pt. 15, at 14938 (1914)).

569 *Id.* at 709.

570 *Nat'l Petroleum Refins. Ass'n*, at 708–09.

571 *Id.* at 707–08.

572 *Id.* at 702.

"the utterly unhelpful quality of the floor comments."[573] Thus the court ignored the constraints that had preoccupied Congress in 1914 and instead applied "a more practical, broader conception of 'legislative' type activity prevalent today, [which] can be read to support substantive rule-making of the kind asserted by the [FTC]."[574]

The Supreme Court declined to review the *National Petroleum Refiners Ass'n v. FTC*[575] holding but has since ruled in two cases that cast serious doubt on the validity of the court of appeals decision.[576] In *AMG Capital Management v. FTC*,[577] ("*AMG*") the FTC used many of the same arguments that had worked in the Court of Appeals for the District of Columbia in 1972 to suggest the Act conferred an unexpressed power.[578] This time, however, the agency was unable to persuade a single Justice.[579] The question in *AMG* concerned whether the agency could bypass administrative adjudication and bring a cause of action directly in federal court for monetary relief.[580] Section 13(b) of the FTC Act authorizes the agency to seek injunctions without administrative proceedings, but a different section of the Act creates a cause of action for redress.[581] Section 19(b) prescribes the procedure whereby the Commission can seek redress, and that relief is available only after the agency has concluded an administrative proceeding that finds a violation of Section 5.[582] The two-step procedure is cumbersome, so the Commission resorted almost exclusively to Section 13(b) to obtain injunctions and recovery money in a single action in federal court.[583] For forty years, the FTC brought scores of cases that returned billions of dollars to consumers.[584] Appellate courts consistently affirmed the practice, but no case had reached the Supreme Court until *AMG* arrived in 2021.[585]

Writing for a unanimous Court, Justice Stephen Breyer found it highly unlikely "that Congress, without mentioning the matter, would have granted the Commission authority so readily to circumvent its

573 *Id.* at 707, 709.

574 *Id.*at 709.

575 415 U.S. 951 (1974).

576 *Id.*; AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1352 (2021); West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022).

577 141 S. Ct. 1341 (2021).

578 *Id.* at 1349–52.

579 *Id.* at 1352.

580 *Id.* at 1347.

581 *Id.* at 1349.

582 *Id.*

583 *AMG Cap. Mgmt.*, 141 S. Ct. at 1347.

584 *Id.*

585 *Id.* at 1351.

traditional § 5 administrative proceedings."[586] Turning aside the Commission's argument that the Court had construed other statutes more broadly, the Justices declined to do so with the FTC Act where the enforcement powers granted were clearly expressed.[587] The Court also rejected the Commission's arguments that Congress had intended to allow the Commission to choose between alternative enforcement avenues,[588] as well as the notion that Congress had ratified dual approaches with language in recent legislation that preserved "any authority of the Commission under any other provision of law."[589] Decades of appellate decisions upholding the broader authority did not impress the Court.[590] Nor did the suggestion that Congress had acquiesced in the Commission's use of both approaches, or the argument that efficient enforcement compelled bypassing the administrative process.[591] Rather than Justice Brandeis's characterization of *expressio unius est exclusio alterius*, on which the district court in *National Petroleum Refiners Ass'n* relied, the Supreme Court quoted from a more recent decision with the colorful metaphor, "Congress . . . does not . . . hide elephants in mouseholes."[592]

The source for the metaphor was *Whitman v. American Trucking Ass'ns*,[593] a 2001 case that figured prominently in the Court's most recent consideration of an agency's rulemaking authority.[594] In *West Virginia v. Environmental Protection Agency*,[595] ("*EPA*") the Court rejected an EPA regulation that substantially expanded the agency's reach.[596] The Court, recounting numerous examples of agencies asserting regulatory authority, noted that all the assertions "had a colorable textual basis" but that "common sense" made it very unlikely that Congress had delegated such authority.[597] Citing *Whitman,* the Court explained that "[e]xtraordinary grants of regulatory authority are rarely accomplished

586 *Id.* at 1349.

587 *Id.* at 1349–50.

588 *Id.* at 1350–51.

589 *AMG Cap. Mgmt.*, 141 S. Ct. at 1351 (internal quotation marks omitted) (quoting 15 U.S.C. § 57b(e)).

590 *Id.*

591 *Id.*

592 *Id.* at 1349 (alteration in original) (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

593 531 U.S. 457 (2001).

594 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

595 142 S. Ct. 2587 (2022).

596 *Id.* at 2616.

597 *Id.* at 2609.

through 'modest words,' 'vague terms,' or 'subtle device[s].'"[598] The plausibility of the power that the EPA claimed to have found rivaled the dubious discovery the FTC advocated in *AMG*:

> EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." It located that newfound power in the vague language of an "ancillary provision[]" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.[599]

AMG and *EPA* mirror the rationale of the district court in *National Petroleum Refiners Ass'n*. Arguments for expansive readings of regulatory authority that fell flat before Judge Aubrey Robinson in 1972 but regained traction on appeal in 1973 have been repeatedly rejected in subsequent Supreme Court decisions.[600] The harbingers of those decisions came out of the most important economic litigation of the twentieth century, when the Supreme Court relied on the framework of the FTC Act to reject the argument that Congress had delegated rulemaking authority to the National Industrial Recovery Administration.[601]

C. *Rules of Fair Competition Fail in the Supreme Court*

On May 27, 1935, a day that became known as Black Monday in the Roosevelt White House, the Supreme Court unanimously decided three cases that eviscerated the New Deal.[602] Two of those cases dealt extensively with the FTC Act, although the Commission was not a party to either.[603]

The first of the two decisions dealing with the FTC Act was *Humphrey's Executor v. United States*,[604] in which the Court held that the President did not have the authority to remove a Commissioner in order to appoint someone who would be more sympathetic to the administration's economic policies.[605] Commissioner William Humphrey was a Hoover administration holdover, known to be a critic of the economic policies of the Roosevelt administration, and the President sought to replace him with a more reliable supporter.[606] First trying

598 *Id.* (alteration in original).

599 *Id.* at 2610 (internal citations omitted).

600 *See supra* notes 540–599 and accompanying text.

601 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

602 *Id.*; Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935).

603 *Schechter Poultry*, 295 U.S. at 532; *Humphrey's Ex'r*, 295 U.S. at 629.

604 295 U.S. 602 (1935).

605 *Id.* at 632.

606 *Id.* at 618–19.

persuasion, the President wrote, "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."[607] Humphrey refused to resign.[608] A month later the President wrote to him that he was officially removed, and Humphrey died a few months later, but the struggle over the President's authority to remove him did not end with him.[609] His executor sued to recover the salary payments that the government had withheld after he was fired but before he died.[610] By the time that dispute reached the Supreme Court, it had become a defining test of executive powers. Did the President have the discretion to dismiss an FTC Commissioner as he did other appointees in the executive branch?[611]

To assess the extent of those powers, the Supreme Court examined the language setting Commissioners' terms and the congressional intent in creating the FTC.[612] The statutory provisions made clear that no more than three of the five Commissioners may be from one political party, and that Commissioners would serve for seven-year terms.[613] The statute specifically enumerated the grounds on which the President could remove a Commissioner—for "inefficiency, neglect of duty, or malfeasance in office."[614] But none of those grounds were invoked by counsel defending the President's action.[615] The government argued that the causes for termination were not limited to those enumerated in the statute.[616] The Court disagreed, holding that the legislative history and statutory language combined to demonstrate:

> Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.[617]

The FTC was an agency exercising quasi-legislative and quasi-judicial functions—legislative in making reports to Congress and judicial as a master of chancery—so the agency must "be non-partisan; and it must,

[607] *Id.* at 619 (internal quotation marks omitted).

[608] *Id.*

[609] *Id.*

[610] *Humphrey's Ex'r*, 295 U.S. at 618.

[611] *Id.* at 619.

[612] *Id.* at 619–23.

[613] *Id.* at 620.

[614] Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (current version at 15 U.S.C. § 41).

[615] *See Humphrey's Ex'r*, 295 U.S. at 626.

[616] *Id.* at 615.

[617] *Id.* at 625–26.

from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law."[618] To ensure fidelity to the law and independence from politics, the President could not remove a Commissioner without cause.[619]

In the second case that implicated the FTC, *A.L.A. Schechter Poultry Corp. v. United States,*[620] the agency figured prominently, and its congressional grant of authority gave the Court a rationale to deal a fatal blow to the National Industrial Recovery Act, the centerpiece of the New Deal.[621] Under the NIRA, the federal government had adopted regulations intended to achieve "fair competition."[622] Those regulations normalized working conditions, wages, products, and prices in many trades.[623] Their purpose was to stem the forces that were depressing wages and prices in the early years of the Great Depression, and excessive competition was regarded as one of those forces.[624] The NIRA sought to solve that problem by establishing a regulatory regime in which the federal government approved codes proposed by industries.[625] The codes became criminal laws.[626]

The Court held that the NIRA was an unconstitutional delegation of congressional power because the law lacked both the legal standards and adjudicatory procedures of the FTC.[627] Expanding on the discussion in *Humphrey's Executor* of the Commission's institutional design, the *Schechter Poultry* decision offers one of the most revealing discussions the Court has given of the meaning of the FTC Act, the authority it confers, and the limits on that authority.

At issue in *Schechter Poultry* was the Live Poultry Code, which regulated competition among poultry sellers.[628] President Roosevelt found that the code had been adopted in duly noticed hearings that had produced reasonable requirements, and he declared it a standard of fair

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618 *Id.* at 624, 628. The Court relied on these features of the Commission declined to overturn *Humphrey's Executor* when it decided *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2198–200, 2211 (2020).

619 *Humphrey's Ex'r*, 295 U.S. at 625–26.

620 295 U.S. 495 (1935).

621 *Id.* at 533–34, 536 (stating the difference between the NIRA and the FTCA "lies not only in procedure, but in subject matter").

622 National Industrial Recovery Act, ch. 90, tit. 1, § 3, 45 Stat. 195, 196 (1933), *invalidated by Schechter Poultry*, 295 U.S. 495 (1935).

623 *Schechter Poultry*, 295 U.S. at 524.

624 *See* National Industrial Recovery Act, ch. 90, tit. 1, § 1.

625 *Id.* § 3(a), 45 Stat. at 196.

626 *Id.* at § 3(b)–(c), 45 Stat. at 196.

627 *Schechter Poultry*, 295 U.S. at 541–42.

628 *See id.* at 519 & n.1.

competition.[629] Under the code, chickens were to be sold in lots, workers employed for maximum hours and minimum wages, and records maintained so compliance could be confirmed.[630] The owners of a slaughterhouse in New York were convicted on nineteen counts of violating these provisions.[631] They appealed, and the Court of Appeals for the Second Circuit affirmed all but the labor-related convictions; those it deemed beyond the regulatory power of the federal government.[632]

Prosecutors and defendants both petitioned for a reversal of their losses, and the case gave the Supreme Court the opportunity to opine on the meaning of "fair competition" and an appropriate process by which competition is assessed.[633] The Court began its analysis with a comparison of fair competition and unfair methods of competition as defined respectively in the NIRA and FTC Act.[634] One provision in the NIRA declared that a violation of the fair competition codes could also be deemed an "unfair method of competition" under the FTC Act.[635] Another provision of the NIRA stated that the law was not intended to impair the powers of the Commission.[636] Neither the dichotomy nor the reservation made sense to the Court. On substance, the court held,

> We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range and a new significance. . . .
>
> . . ."[F]or the protection of consumers, competitors, employees, and others, and in furtherance of the public interest . . . ."[637]

In the "widest range" of meanings derived from both common law and statute, "'unfair competition' . . . does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act."[638]

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629 *Id.* at 523, 525, 526 n.5.

630 *Id.* at 524–25.

631 *Id.* at 519.

632 *See* United States v. A.L.A. Schechter Poultry Corp., 76 F.2d 617, 618, 624 (2d Cir. 1935).

633 *See Schechter Poultry*, 295 U.S. at 499, 516–18.

634 *Id.* at 515–16.

635 National Industrial Recovery Act, ch. 90, tit. 1, § 3(b), 45 Stat. 195, 196 (1933), *invalidated by Schechter Poultry*, 295 U.S. 495 (1935).

636 *Id.*

637 *Schechter Poultry*, 295 U.S. at 534 (citing National Industrial Recovery Act, ch. 90, tit. 1, § 3(a)) (allowing the codes to go so far as to "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared").

638 *Id.* at 532.

The NIRA contained provisions paying homage to the antitrust laws.[639] For example, it required the President to find that a code was not "designed to promote monopolies or to eliminate or oppress small enterprises," or "permit monopolies or monopolistic practices," but these were held insufficiently specific to constrain the discretion of the President.[640] He retained the power to regulate as he deemed "beneficial in dealing with the vast array of commercial and industrial activities throughout the country. Such a sweeping delegation of legislative power finds no support" in the precedent, ruled the Court.[641]

A comparison of the procedures for exercising the powers of the FTC and the National Recovery Administration ("NRA") supplied another rationale for holding the NIRA unconstitutional.[642] The FTC had established procedures governing its assessment of unfair methods of competition.[643] It set out elements of a violation, followed evidentiary standards, and took proof in adjudicatory proceedings. As the Court explained:

> What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. To make this possible, Congress set up a special procedure. A Commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority.[644]

For examples of FTC Act violations, the Court cited cases that had defined unfair methods of competition according to the standards of the Sherman and Clayton Acts.[645]

In the eyes of the Justices, the industry-wide rulemaking procedures at the NRA bore no resemblance to the targeted adjudications at the FTC, many of which had been tested in courts of appeals by 1935.[646] Case-by-case adjudication had become the standard by which competition could be constitutionally controlled, absent a specific federal regulatory regime such as that imposed in the transportation sectors by the Interstate

639 *See id.* at 538.

640 *Id.* (internal quotation marks omitted) (quoting National Industrial Recovery Act, ch. 90, tit. 1, § 3(a)).

641 *Id.* at 539.

642 *Id.* at 533–34.

643 *See Schechter Poultry*, 295 U.S. at 533.

644 *Id.* at 533–34 (internal citations omitted).

645 *Id.* (citing FTC v. Beech-Nut Packing Co., 257 U. S. 441, 453 (1992); FTC v. R.F. Keppel & Bro., 291 U.S. 304, 312 (1934); FTC v. Algoma Lumber Co., 291 U.S. 67, 73 (1934); FTC v. Raladam Co., 283 U.S. 643, 648 (1931); FTC v. Klesner, 280 U.S. 19, 27–28 (1929)).

646 *Id.* at 534.

Commerce Commission.[647] Congress could not constitutionally delegate rulemaking power to an agency of general jurisdiction and authorize it to pursue undefined interests of consumers, competitors, employees, and the public.[648]

Schechter Poultry is well known for its delegation jurisprudence, which has not been overturned,[649] as well as for its assessment of interstate commerce, from which the Court has departed.[650] Seldom noted in the cases or commentaries is the Court's contrast of adjudication at the FTC against rulemaking under the NIRA.[651] A consistent theme runs from *Gratz*, *Raladam,* and *Schechter Poultry* to *Whitman, AMG*, and *EPA*. Policy innovations are the province of Congress, as are the powers delegated to enforcers.[652] The declaration of unfair methods of competition in Section 5 is silent about how the Commission may execute its authority; those come from specific provisions articulating the procedures available to address substantive violations.[653] Those procedures authorize adjudication, not rulemaking.[654] The latter, as the Supreme Court recognized in *Schechter Poultry,* is incompatible with the adjudication of factual circumstances that the assessment of unfair methods of competition demands. Whether the FTC Act conferred the power to promulgate a competition rule is likely a "major question," one that Congress must decide.

Should the Commission's authority to promulgate competition rules pass the major-questions test, the merits of each regulation would have to survive scrutiny. The non-compete rule faces a particularly daunting challenge, since it is the first based on the untested enforcement policy for unfair methods of competition. As a general matter, the Commission's new mission to advance the interests of labor, minorities, and other groups recalls the NIRA's dedication to the "protection of consumers, competitors, employees, and others, and in furtherance of the public interest," which the Court held were not the antithesis of "unfair methods of competition."[655] More particularly, the categorical ban of non-compete clauses in the proposed rule overrides state laws that are beyond the

[647] *Id.* at 539–40.

[648] *Id.* at 541–42.

[649] *Schechter Poultry* was not cited, but a similar rationale doomed an EPA regulation in *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

[650] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 122–23 (1942).

[651] *See, e.g.*, Parker v. Brown, 317 U.S. 341, 352–54 (1942).

[652] *See, e.g.*, *EPA*, 142 S. Ct. at 2616 (2022).

[653] 15 U.S.C. § 45.

[654] *Id.*

[655] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532–33 (1935).

preemptive effect of the antitrust laws and protects conduct that the Commission itself has ruled anticompetitive.[656]

Conclusion

A century of precedent leaves little doubt that visions of "fair competition" untethered from the moorings of antitrust, or the protections of due process, lack support in the decisions interpreting FTC authority. The overwhelming weight of authority interpreting the FTC Act places it within the mainstream of antitrust jurisprudence. With the exception of one dubious decision, the cases and legislative history contradict the FTC's assertions of authority to promulgate competition rules. Congress anchored the Commission's constitutionality on its case-by-case application of legal standards and analytical methods applicable to all the antitrust laws. The Supreme Court repeatedly reaffirmed the importance of harmonizing *all* the antitrust laws, including the FTC Act. Rules untethered from antitrust do not qualify.

A regulatory regime intended to replace vigorous competition with fair competition, to benefit interest groups other than customers, and to be implemented while giving short shrift to costs and benefits has been antithetical to antitrust since at least the 1930s. The mission on which the Commission has embarked can be expected to impose undue costs on legitimate businesses in markets far larger than the transportation sectors once regulated by the ICC and Civil Aeronautics Board. If history is any guide, the Commission's agenda could cost U.S. consumers hundreds of billions of dollars.

[656] *See, e.g.*, *Brown*, 317 U.S. at 352; Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 980–81 (D.C. Cir. 1990); FTC v. Standard Car Equip. Co., 1 F.T.C. 144, 148 (1919) (hiring a competitor's employees, gaining proprietary information); FTC v. Allen Sales Serv. (Inc.), 1 F.T.C. 459, 465–67 (1919) (employee starting competitor, taking proprietary information).