THE FEDERAL TRADE COMMISSION ON THE FRONTIER: SUGGESTIONS FOR THE USE OF SECTION 5

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With its creation of a statutory mandate to ban all "unfair methods of competition," Congress granted the Federal Trade Commission broad power to reach antitrust violations, as well as conduct that violates the "spirit" of the antitrust laws and conduct that is against public policy more broadly. The breadth of the Commission's use of this statutory authority has ebbed and flowed over time, and recent indications signal that the FTC may be entering a period of expansion in attacking new forms of anticompetitive conduct. In light of this development, a renewed debate over the appropriate use of section 5 of the FTC Act has arisen—how can the Commission best use its broad section 5 authority to protect against consumer harm while avoiding the risk of deterring procompetitive conduct through arbitrary and standardless enforcement? This Note argues that the FTC should focus on tackling "frontier cases"—cases that meet all the legal requirements of the Sherman Act but involve new forms of anticompetitive conduct that fall outside traditional categories of antitrust law such that there may be little precedent to guide the Commission's analysis. This Note then expands the frontier rationale beyond the selection of cases involving new forms of anticompetitive conduct, as previously advocated, to include efforts to integrate developing models of economic thought in order to influence the theoretical underpinnings of antitrust law and to insert the Commission's voice in developing the contours of evolving Sherman Act doctrine.

Introduction

Antitrust law is at a key point in its history. Changes in Sherman Act doctrine and the modern economy present both challenges and opportunities for the future of antitrust enforcement. Federal Trade Commission (FTC or Commission) Chairman Jon Leibowitz has noted that recent Supreme Court decisions mimic the restrictive state of antitrust law that led to the creation of the FTC in 1914.[1] And the rise of new technology and the increasingly global nature of busi-

 J.D., 2011, New York University School of Law; B.S., 2007, Cornell University. The Antitrust Law Section of the New York State Bar Association selected an earlier draft of this paper as the winner of the Section's 2010 Law Student Writing Competition. Many thanks to the Honorable Robert A. Katzmann and Professor Eleanor Fox for their advice and guidance. I am also indebted to Colin Roth, John Oster, Tommy Bennett, Nick DiChiara, Angela Herring, and Kirstin O'Connor, and the *New York University Law Review* for their kind support and editing expertise. Finally, my deepest gratitude to Evan Marshak for his tireless encouragement of my work on this Note.

1 Transcript of Federal Trade Commission Workshop on Section 5 of the FTC Act as a Competition Statute 204–06 (Oct. 17, 2008) [hereinafter Workshop Transcript] (statement of Jon Leibowitz), *available at* http://www.ftc.gov/bc/workshops/section5/transcript.pdf

ness—like the massive industrial consolidation that occurred during antitrust law's founding era—portend the development of new forms of anticompetitive conduct.

Recent Supreme Court decisions have created new barriers in both procedural law and substantive antitrust law. Since the 1980s, the Supreme Court has pulled the Sherman and Clayton Acts back from the height of widespread enforcement against the industrial giants of the 1950s and 1960s.[2] With the exception of price-fixing cartels, almost all antitrust violations are now judged under a so-called rule-of-reason analysis that places a high burden on plaintiffs to prove intent, market power, and harm to consumers.[3] Compounding this shift, and in part in reaction to fear of a chilling effect on procompetitive business practices caused by massive treble damage class actions under the Sherman Act, many of the heightened procedural standards erected in the past few decades have arisen in antitrust cases.[4] Most recently, the new pleading rules established by *Bell Atlantic Corp. v. Twombly* (and later affirmed in *Ashcroft v. Iqbal*[5]) place considerable hurdles in the way of private plaintiffs pursuing Sherman Act claims.[6] The state of the economy has also changed dramatically in the past few decades. In

("[T]he cramped reading of the Sherman Act that we see from federal courts today does resemble the interpretation of the antitrust laws by courts early in the last century.").

[2] *See* Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 170 (2002) (discussing the "very aggressive" enforcement practices of the 1960s).

[3] The basic rule-of-reason analysis is generally seen as having three parts:

> First, a plaintiff must establish a prima facie case by showing that the restraint produces tangible anticompetitive harm, a showing that usually consists of proof of "actual detrimental effects" such as increased price or reduced output. Second, the defendants must prove that their agreement produces "procompetitive" benefits that outweigh the harm implicit in plaintiff's prima facie case. Third, even if the defendants can make such a showing, the plaintiff can still prevail by proving that the defendants can achieve the same benefits by means of a "less restrictive alternative."

Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 79–80 (footnotes omitted). Price-fixing cartels are treated as per se violations of Sherman Act section 1, so they are illegal with proof only of an agreement to set prices.

[4] *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (dismissing a Sherman Act section 1 claim as implausible because it was based on a bare assertion of an agreement); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (awarding summary judgment to a defendant in an antitrust collusion case where the plaintiff's theory made "no economic sense").

[5] 129 S. Ct. 1937 (2009).

[6] *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) ("[The plausibility standard] is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like, creating a class of disfavored actions in which plaintiffs will face more hurdles to obtaining a resolution of their claims on the merits.").

contrast to the protectionism and domestic industrial powerhouses of the immediate post–World War II era, the modern world economy has become ever more interconnected, presenting new challenges for regulatory bodies which must act across national boundaries.[7] Moreover, innovation in fast-changing, interdependent, high-tech industries creates new problems for traditional regulatory schemes. To take one example, the increasing prominence of information technology poses challenges for the intersection of intellectual property and antitrust law, among other issues.[8]

The FTC stands near the center of all of these changes. Congress granted the Commission the power to ban all "unfair methods of competition" under section 5 of the Federal Trade Commission Act (FTC Act).[9] As a public regulatory body charged with enforcing its own statutory mandate, the FTC is not bound by the doctrinal hurdles that private litigants must face in bringing antitrust claims. Moreover, the broad scope of the FTC's mandate and its independent structure give it the freedom to address the constant challenges of an ever-changing economy.

The Commission's use of its broad statutory authority has ebbed and flowed over time;[10] recent indications signal that the FTC may be entering a period of expansion to reach new forms of anticompetitive conduct.[11] Yet the Commission is hemmed in by the current consensus on the role of antitrust law, the potential negative reactions of reviewing courts,[12] and the ever-present threat of congressional intervention. Given these constraints, a critical question remains: How can the FTC best use its broad section 5 authority to protect against consumer harm while avoiding the risk of deterring procompetitive conduct through arbitrary and standardless enforcement?

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[7] *See generally* Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 TUL. L. REV. 571 (2005) (discussing retrenchment in antitrust enforcement caused by the interaction of various national regulatory bodies in the era of globalization).

[8] *See generally* William J. Baer & David A. Balto, *Antitrust Enforcement and High-Technology Markets*, 5 MICH. TELECOMM. & TECH. L. REV. 73 (1999) (exploring how antitrust law can account for the special conditions of high-tech markets and the need for intellectual property rights).

[9] 15 U.S.C. § 45(a) (2006).

[10] *See* Pitofsky, *supra* note 2, at 169–70 (describing changes in enforcement practices from the 1960s through present).

[11] *See infra* notes 86–88 and accompanying text (discussing the Commission's expanded use of section 5 powers).

[12] *See* Workshop Transcript, *supra* note 1, at 87 (statement of Robert H. Lande) ("[I]f the Commission tried to have an expansive reading of Section 5 of the FTC Act, but did not do so in a way that was clear and was bounded, then the Supreme Court would today restrict Section 5 of the FTC Act to the other antitrust laws.").

This issue has sparked a renewed debate regarding the appropriate use of section 5 among the Commission's varied observers.[13] Practitioners and academics agree that antitrust law must "seek[ ] only to further consumer welfare without sacrificing productive efficiency,"[14] but the debate about how best to meet that goal remains hotly contested. This Note argues that the FTC can best use its section 5 authority to achieve this goal by pursuing "frontier cases"—cases that meet all the legal requirements of the Sherman Act but involve new forms of anticompetitive conduct that fall outside traditional categories of antitrust law. This Note expands the frontier rationale beyond the selection of cases involving new forms of anticompetitive conduct to include efforts by the Commission to engage new systems of economic thought and changing Sherman Act doctrine; in doing so, the FTC should utilize the broad array of institutional tools at its disposal.

Part I begins by providing background on the institutional structure of the FTC and highlighting its unique role in the overall scheme of U.S. antitrust law. In particular, this Part explores the implications of the Commission's modest enforcement powers coupled with its broad substantive reach under section 5. Part II reviews prominent proposals for the FTC's use of its section 5 powers and explains how these ideas fail either to create limiting principles or to take advantage of the FTC's strengths and mandate. Finally, Part III argues that a frontier rationale best takes advantage of the FTC's institutional position and resources in shaping the evolution of the Sherman Act.

I
The Powers of the Federal Trade Commission

This Part provides a brief overview of antitrust regulation in the United States with a focus on the structure and duties of the Federal Trade Commission.[15] Section A explains the institutional structure of

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[13] *See, e.g.*, William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L.J. 929, 939 (2010) ("The intervention skepticism of modern jurisprudence involving dominant firms and the intellectual foundations for cautious application of Section 2 have drawn attention back to Section 5 of the FTC Act. If Section 5 as a distinctive source of liability has limited utility in periods of Sherman Act doctrinal expansion, what happens when the reach of the Sherman Act shrinks, and shrinks dramatically?").

[14] Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, Antitrust Source, Feb. 2009, at 1, 1, *available at* http://www.abanet.org/antitrust/at-source/09/02/Feb09-Creighton2-26f.pdf.

[15] This Note focuses primarily on the Sherman Act and the Federal Trade Commission Act. The Clayton Act, 15 U.S.C. §§ 12–27 (2006), plays a particularly important role in merger enforcement, which is beyond the scope of this Note. Many of the Clayton Act's provisions regarding specific forms of anticompetitive conduct have been interpreted to

antitrust enforcement. Section B discusses the Supreme Court's broad interpretation of section 5. Section C goes on to explore two limitations on the FTC's power under section 5: a trio of circuit-level rebukes to the FTC's exercise of its power in the 1980s and the ongoing threat of congressional revocation of the FTC's broad statutory mandate should the Commission seek to extend its powers too far.

A. The Institutional Structure of Antitrust Enforcement

Among federal regulatory fields, antitrust is a uniquely divided enterprise: The federal antitrust laws are enforced by both public and private entities, including two separate federal agencies—the FTC and the Department of Justice—that have widely different institutional structures and enforce different statutes. Both the Antitrust Division of the Department of Justice and private plaintiffs bring suits in Article III courts for violations of the Sherman Act and Clayton Act, while the FTC enforces violations of the Federal Trade Commission Act and the Clayton Act through an independent administrative process.[16] Understanding these contrasting statutory schemes is critical for appreciating the purposes Congress intended for each of these actors and the appropriate function of the FTC within the overall antitrust field.

1. The Sherman Act

The Sherman Act provides in broad terms the basic prohibitions against coordinated and unilateral anticompetitive conduct that form the core of U.S. antitrust doctrine. Section 1 bans "[e]very contract, combination . . . or conspiracy, in restraint of trade."[17] This prohibition covers agreements among firms, including both vertical agreements in the supply chain and horizontal agreements among competitors. Section 2 prohibits monopolization as well as attempts and conspiracies to monopolize.[18] Thus, section 2 reaches the conduct

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mirror doctrine under the Sherman Act, so I am treating the two as effectively the same. *See* Eleanor M. Fox et al., U.S. Antitrust in Global Context 50 (2d ed. 2004) ("[T]o a large extent today the analysis [under Section 3 of the Clayton Act] has merged with analysis under Section 1 of the Sherman Act . . . .").

[16] States also have their own antitrust statutes for purely intrastate antitrust violations. *See, e.g.*, Donnelly Act, N.Y. Gen. Bus. Law §§ 340–347 (McKinney 2009) (declaring "[c]ontracts or agreements for monopoly or in restraint of trade illegal and void"). Moreover, states can sue under the Sherman Act on behalf of their citizens. 15 U.S.C. § 15c (providing state attorneys general with *parens patriae* authority to sue on behalf of states' citizens).

[17] 15 U.S.C. § 1.

[18] *Id.* § 2.

of individual actors that try to exploit their market power to raise prices or restrict output. In interpreting the statute's broad terms, federal courts have developed categories of Sherman Act violations, each with its own set of specific and formalized rules.[19] These formalistic categories of antitrust violations may impede enforcement efforts against new practices that have anticompetitive effects but do not fit neatly within the terms of any particular violation.[20]

The Sherman Act includes provisions for both criminal and civil enforcement, and enforcement is retrospective and punitive. The Antitrust Division, private litigants, and state attorneys general can bring suit for violations of the Sherman Act, and private plaintiffs are entitled to treble damages for their role in policing illegal conduct as "private attorneys general." Furthermore, a finding of a Sherman Act violation in a suit by a public agency is given collateral estoppel effect, thus allowing it to serve as prima facie evidence in any follow-on actions brought by private litigants.[21] Accordingly, defendants often face astronomical costs for Sherman Act violations, as many Sherman Act claims are brought as private class actions on behalf of large groups of consumers.[22]

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[19] For example, a predatory pricing violation occurs when a company with substantial market power lowers its price to drive out competition and reap monopoly profits in the future. To prove this claim, a plaintiff must show market power, pricing below cost, and a plausible scenario through which the defendant can recoup its losses. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–27 (1993) (setting out these doctrinal requirements); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 726 (2005) (discussing predatory pricing analysis).

[20] An interesting exception to this general rule was the case of *United States v. Microsoft*, in which the D.C. Circuit largely upheld the district court's finding "that Microsoft had violated § 2 by engaging in a variety of exclusionary acts to maintain its monopoly." 253 F.3d 34, 58 (D.C. Cir. 2001). One commentator has advocated for a broader application of the *Microsoft* court's approach as a "consumer welfare effect standard" for section 2 liability, in contrast to a conduct-specific test. Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 333–34 (2006).

[21] *See* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 877 (2010) (describing the collateral estoppel effect of a litigated Sherman Act violation).

[22] As Alba Conte and Herbert Newberg noted:

> Congress has placed heavy reliance on private litigants for enforcement of the antitrust laws, and the Supreme Court has regularly reaffirmed the importance of the private litigant in antitrust enforcement. Private suits are not new to the scheme of antitrust enforcement, and the class action device has been employed with increasing frequency.

6 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:1 (4th ed. 2002) (footnote omitted).

2. *The Federal Trade Commission Act*

In passing the Federal Trade Commission Act in 1914, Congress created the FTC as an independent administrative agency governed by a five-member, bipartisan board of commissioners.[23] Commissioners are intended to be experts in the field, serving for terms of seven years, which "give them an opportunity to acquire the expertness" needed to determine what constitutes an unfair method of competition.[24] The Commission today is divided into three major branches: the Bureaus of Competition, Consumer Protection, and Economics. The Bureaus of Competition and Consumer Protection are the enforcement arms for the FTC's corresponding dual statutory mandate,[25] while the Bureau of Economics consists largely of economists who provide the analytical bases for the legal theories of its counterparts.

The FTC Act was born out of congressional disappointment in then-recent Supreme Court decisions that had limited the reach of the Sherman Act.[26] The Commission was to serve both as an advisor to the business community on the legality of potential practices[27] and as an enforcer against anticompetitive practices. To fulfill this unique advisory mandate, Congress gave the Commission limited enforcement mechanisms coupled with broad substantive authority beyond the narrow judicially created rules of the Sherman Act. Thus, Congress granted the FTC expansive power under section 5 to prohibit "unfair methods of competition" without further defining what those methods might be.[28] At the same time, the FTC's enforcement tools under section 5 are more limited than the Department of Justice's are for Sherman Act violations.

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[23] 15 U.S.C. § 41 (2006).

[24] S. Rep. No. 63-597, at 11 (1914); *see also* FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 314 (1934) (quoting Senate report); S. Rep. No. 63-597, at 22 ("[W]e want trained experts; we want precedents; we want a body of administrative law built up.").

[25] Under the FTC Act, the FTC has the power to ban "unfair methods of competition" under its antitrust jurisdiction and "unfair or deceptive acts or practices" under its consumer protection jurisdiction. 15 U.S.C. § 45. This Note focuses solely on the Commission's role in antitrust law.

[26] *See* S. Rep. No. 63-597, at 5–6 (discussing Cummins Report's disapproval of recent Supreme Court cases); *see also* E.I. Du Pont De Nemours & Co. v. FTC (*Ethyl*), 729 F.2d 128, 136 (2d Cir. 1984) ("[I]n reaction to the relatively narrow terms of the Sherman Act as limited by the Supreme Court's adoption of the Rule of Reason in *Standard Oil* . . . Congress sought to provide broad and flexible authority to the Commission . . . ." (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911))).

[27] *See* S. Rep. No. 63-597, at 6–7 (citing an address by President Wilson that sought an advisory role to the business community for the Commission).

[28] 15 U.S.C. § 45(a).

The Commission issues a complaint when it decides that there is reason to believe a violation of section 5 has occurred, and attorneys in the Bureau of Competition bring the case before an administrative law judge.[29] If the case goes to trial—rather than ending in a consent agreement[30]—the judge's opinion can be appealed to the five-member Commission and from there to a federal circuit court.[31] In deciding whether a violation may have occurred before issuing a complaint, the Commission enjoys "broader powers of investigation than almost any other department or agency in the federal government."[32] Yet, if a violation is found, the FTC is limited in its remedies. The Commission's primary tool is a cease-and-desist order, which is largely equivalent to an injunction, though the FTC also has the power to seek civil penalties and court-issued injunctions for violations of any order.[33]

Significantly, the monetary impact of a section 5 violation is thus much more limited than that of a Sherman Act violation. Furthermore, no private right of action exists under the FTC Act, and a finding that conduct is an unfair method of competition under section 5 is not given collateral estoppel effect in subsequent private antitrust actions against the defendant.[34] Indeed, the powers of the Commission were largely designed to be "persuasive and corrective

[29] *See id.* § 45(b) (providing statutory guidelines for Commission procedures); Office of the Gen. Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMMISSION, http://www.ftc.gov/ogc/brfovrvw.shtm (last modified July 2008) [hereinafter *FTC Overview*] (setting out procedures in greater detail).

[30] In consent agreements, parties usually agree to stop the offending conduct but admit to no wrongdoing. *See FTC Overview*, *supra* note 29 (describing the consent agreement process).

[31] 15 U.S.C. § 45(b)–(d).

[32] Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 214 (2005); *see also* 15 U.S.C. §§ 49, 57b-1 (setting out the Commission's investigatory powers).

[33] 15 U.S.C. § 45(b) (cease-and-desist order); *id.* § 45(l)–(m) (civil penalties and injunctions); *see also* 1 STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 1:2 (2009) (discussing the remedies available to the FTC). Section 13(b) of the FTC Act does not require the FTC to show a likelihood of irreparable harm in order to obtain a preliminary injunction, so its ability to receive injunctive relief is broader than private litigants. 15 U.S.C. § 53(b); *see also* KANWIT, *supra*, § 10:4 n.3 (discussing the court's discretion in granting a preliminary injunction).

[34] *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (holding that private litigants cannot sue for violations of the FTC Act); *see also* J. Thomas Rosch, Comm'r, FTC, The FTC's Section 5 Hearings: New Standard for Unilateral Conduct?, Remarks Before the ABA Antitrust Section Spring Meeting 2 (Mar. 25, 2009), *available at* http://www.ftc.gov/speeches/rosch/090325abaspring.pdf (noting that enforcement under section 5 minimizes the threat of "follow-on federal private treble damage actions").

rather than punitive,"[35] and so these tools were designed to bolster the FTC's intended advisory role.

In addition to undertaking adjudicatory procedures and investigations in specific cases, the Commission also can fulfill its mandate by conducting general studies for the President, Congress, and the public;[36] issuing industry-wide guidelines on the FTC's position on any antitrust matter;[37] and providing advisory opinions to private actors.[38] The FTC does not conduct antitrust rulemaking, although it retains this power as a technical matter.[39]

B. *The Federal Trade Commission's Broad Authority Under Section 5*

Although the FTC Act carefully defined the agency's institutional structure and constricted its enforcement mechanisms, the definition of an unfair method of competition was left unaddressed—and intentionally so. Without the aid of a definition within the statutory text, the Supreme Court has consistently looked to the Act's legislative history to guide its interpretation of the Commission's power under section 5.[40] Reports from the 1914 Congress support an expansive view of

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[35] S. REP. NO. 63-597, at 12 (1914).

[36] *See FTC Overview*, *supra* note 29 ("The Commission's 6(b) authority enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose.").

[37] *See, e.g.*, FTC & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) [hereinafter COLLABORATIONS AMONG COMPETITORS GUIDELINES], *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("These Guidelines describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors.").

[38] *See Competition Policy Guidance*, FED. TRADE COMMISSION, http://www.ftc.gov/bc/guidance.shtm (last modified June 16, 2008) ("Advisory Opinions . . . provide guidance concerning proposed conduct, and other guides to explain competition policy in specific areas . . . ."); *see also* Pitofsky, *supra* note 32, at 214 ("[The FTC] was established in 1914 to work with the private sector, provide advice about possible violations, anticipate and study economic trends and developments, and anticipate and report to the White House, Congress, and the public likely economic problems.").

[39] 15 U.S.C. § 46(g) (2006). The FTC's General Counsel notes:

> Prior to enactment of Section 18, the Commission issued substantive trade regulation rules under Section 6(g), which authorizes the Commission 'to make rules and regulations for the purpose of carrying out the provisions of this subchapter.' . . . Nearly all of the rules that the Commission actually promulgated under Section 6(g) were consumer protection rules. While Section 6(g) authority still exists, in 1975, Section 18 became the exclusive statutory provision invoked for issuing rules that specify unfair or deceptive acts or practices . . . .

FTC Overview, *supra* note 29.

[40] *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239–40 (1972) (noting that Congress explicitly chose to leave "unfair methods" ambiguous); FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 310 (1934) ("Neither the language nor the history of the Act

the Commission's powers to deem conduct an unfair method of competition. The Senate Committee on Interstate Commerce's report on the FTC Act made clear that "unfair competition" was intentionally left for the Commission to define, stating:

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. . . . [T]here were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.[41]

The House Conference Report similarly referred to the problem of definition, indicating that the Act's drafters were seriously concerned about "human inventiveness" in the development of new unfair practices.[42] Leaving the responsibility for determining whether a practice should be considered "unfair" to the commissioners' expertise would allow for maximum flexibility and effectiveness as business practices evolved.[43]

In keeping with the sweeping language of the FTC Act's legislative history, the Supreme Court has stated that "the Commission has broad powers to declare trade practices unfair."[44] The Court has consistently made far-reaching pronouncements regarding the Commission's authority to ban anticompetitive business practices.[45] Because of this broad power, the Court has held that the FTC can both enforce the Sherman and Clayton Acts through its section 5 power and ban "practices that the Commission determines are against public policy for other reasons."[46]

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suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories.").

41 S. REP. NO. 63-597, at 13 (1914).

42 H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again.").

43 *See* S. REP. NO. 63-597, at 19–20 (quoting Letter from Francis G. Newlands to Hon. Champ Clark (Mar. 15, 1911)) (contrasting the success of the Interstate Commerce Commission with the "lame and halting" administration of the Sherman Act by the attorney general, and calling for an expert agency with powers similar to the Interstate Commerce Commission).

44 FTC v. Brown Shoe Co., 384 U.S. 316, 320–21 (1966).

45 This is true even as the Court struck down FTC findings. *See Sperry & Hutchinson*, 405 U.S. at 244, 249–50 (affirming the Fifth Circuit's reversal of the FTC's findings while holding that the Fifth Circuit applied too narrow a standard for section 5).

46 FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986).

The FTC's authority under section 5 to pursue violations of the Sherman Act as unfair methods of competition is well established. When the Commission brings a Sherman Act claim, it is held to the same legal standard as the Department of Justice or a private plaintiff to prove each element of a Sherman Act violation. Straight Sherman Act claims have been the primary type of claim pursued by the Bureau of Competition for the past few decades.[47]

In addition to allowing the Commission to pursue violations of the Sherman Act, the Court has held that the FTC's authority extends not only to "the letter," but also to "the spirit" of the antitrust laws.[48] Similarly, the Fourth Circuit has described section 5 "as a kind of penumbra around the federal antitrust statutes."[49] This broader authority allows the Commission to reach conduct that may fall outside the often-stringent legal requirements of a Sherman Act violation. For example, the Commission can ban anticompetitive conduct in its incipiency—conduct in which the harm to consumers has not yet been realized (and an actual Sherman Act violation has not yet occurred), but which promises anticompetitive harm in the future.[50] In 2006, for example, the FTC issued a complaint against Valassis Communications, in which it claimed that Valassis invited its primary competitor to divide the market and fix prices for newspaper inserts.[51] If such an agreement had been carried out, it would have constituted a Sherman Act violation. However, because a violation of section 1 of the Sherman Act requires an actual agreement—and Valassis's competitor had not agreed to the scheme—the Commission would have been unable to bring a Sherman Act claim. Instead, the FTC brought this as a stand-alone[52] claim under section 5 of the FTC Act under the

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[47] *How the Federal Trade Commission Works To Promote Competition and Benefit Consumers in a Dynamic Economy: Hearing Before the Subomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 111th Cong. 11 (June 9, 2010) (statement of Jon Leibowitz, Chairman, FTC) [hereinafter Leibowitz Testimony], *available at* http://judiciary.senate.gov/pdf/10-06-09LeibowitzTestimony.pdf.

[48] *Sperry & Hutchinson*, 405 U.S. at 244.

[49] Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1292–93 (4th Cir. 1987).

[50] FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966) ("[T]he Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation . . . ."); FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394–95 (1952) (describing the Commission's power "to stop in their incipiency acts and practices which, when full blown, would violate [the Sherman Act and Clayton Act]").

[51] Valassis Commc'ns, Inc., No. 051-0008, 2006 WL 752214, at *2–3 (F.T.C. Mar. 14, 2006).

[52] Chairman Leibowitz has defined a stand-alone violation of section 5 as "an unfair method of competition independent of the Sherman Act." Intel Corp., No. 9341, 2009 WL 4999728 (F.T.C. Dec. 16, 2009) (Statement of Chairman Leibowitz and Commissioner Rosch), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf. In

theory that Valassis's invitation to collude had no procompetitive justification and, if accepted, would have resulted in consumer harm.[53]

In upholding the FTC's power to reach beyond the legal limits of the Sherman Act, the Court historically has given deference to the Commission's judgment that certain practices should be found anticompetitive.[54] In *FTC v. R.F. Keppel & Brother, Inc.*, the Court held that the Commission is not limited to "those types of practices which happen to have been litigated before this Court" when it invalidated as against public policy a candy sales scheme that distributed prizes to children by lottery.[55] However, the Commission has not pursued an antitrust case under such a broad-based public policy rationale in decades, and the Court has more recently emphasized that the courts have the final say regarding whether a practice is unfair.[56] The Court's shift in tone—as well as its recent decisions restricting the reach of the antitrust laws more broadly—indicates that the broadest reach of the FTC's powers may have been truncated,[57] though the Court has not yet affirmatively diminished the Commission's wide latitude to declare novel anticompetitive practices unfair.

C. Limitations on the Federal Trade Commission's Section 5 Authority

The text of the FTC Act, its legislative history, and controlling Supreme Court precedent point toward an almost boundless authority to pursue anticompetitive conduct under section 5. However, the lower courts and Congress have affirmatively limited the FTC's ability to exercise the widest reaches of its power. This has become increas-

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pursing a stand-alone violation, the Commission claims merely that conduct is an unfair method of competition violation on its own, rather than claiming that conduct is an unfair method of competition *because* it violates the Sherman Act.

53 *See* Creighton & Krattenmaker, *supra* note 14, at 8 (discussing the *Valassis* consent order as an example of the invalidation of a practice not falling within the Sherman Act that has "no procompetitive, efficiency-enhancing purpose").

54 FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) ("The legal issues presented . . . are . . . for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'"); FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 314 (1934) (noting that "the determination of the Commission is of weight" in courts' decisions on unfairness).

55 291 U.S. at 310.

56 *Ind. Fed'n of Dentists*, 476 U.S. at 454 (emphasizing that "[t]he legal issues presented . . . are . . . for the courts to resolve" before acknowledging the deference owed to the Commission).

57 The Commission itself is aware that its authority under section 5 may be narrower than the broadest reaches of past Supreme Court decisions would indicate. For example, Commissioner Kovacic has noted that the Commission "view[s] the relevant language in [*Sperry & Hutchinson*] with skepticism." Kovacic & Winerman, *supra* note 13, at 945.

ingly true in the wake of a widespread backlash against FTC expansion beginning in the 1970s and the retrenchment of antitrust doctrine more generally in the past few decades.[58] This change in legal and political philosophy may place significant limitations on any attempt by the FTC to expand the reach of section 5.

1. Official Airline Guides*,* Boise Cascade*, and* Ethyl

A trio of circuit-level decisions in the early 1980s—*Official Airline Guides*, *Boise Cascade*, and *Ethyl*[59]—significantly curtailed the Commission's use of its power to attack anticompetitive business practices that fall outside the narrowly defined categories of Sherman Act doctrine.[60] In each case, the FTC acknowledged that the practices at issue did not amount to a violation of the Sherman or Clayton Acts but declared the conduct to be an unfair method of competition independent of the other statutes.[61] However, the Second and Ninth Circuits overturned the FTC's determinations, marking the beginning of a significant rollback in the Commission's willingness to pursue stand-alone section 5 violations.

The tone of these three opinions contrasts markedly with the deferential attitude taken by the Supreme Court in its previous discussions of FTC authority. In particular, the lower courts were less willing to accept the Commission's judgment on whether the challenged practices would lead to anticompetitive harm to consumers. In *Boise Cascade*, the Ninth Circuit noted that "policies calling for deference to the Commission are, of course, in tension with the acknowledged responsibility of the courts to interpret section 5,"[62] a statement which

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[58] *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSP., Winter 2000, at 43, 52–55 (noting a restriction in antitrust law due to the influence of thinkers like Robert Bork and Richard Posner); Kovacic & Winerman, *supra* note 13, at 937–39 (discussing the retrenchment of monopoly law starting in the 1980s).

[59] E.I. Du Pont De Nemours & Co. v. FTC (*Ethyl*), 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980).

[60] *See supra* notes 17–20 and accompanying text (describing the narrow categories of Sherman Act doctrine).

[61] *See Ethyl*, 729 F.2d at 135 ("[T]he Commission took the view that because § 5 is not confined to the strictures of the Sherman and Clayton Acts but prohibits a broader range of conduct, it can be violated even in the absence of agreement . . . ."); *Boise Cascade*, 637 F.2d at 576 ("[T]he 'conscious parallelism' involved in the industry-wide adoption of a [potentially collusive] pricing system, although lacking the traditional ingredients of Sherman Act conspiracy, may constitute grounds for proceeding under section 5."); *Official Airline Guides*, 630 F.2d at 925 ("The Commission itself recognized that '[t]he question we are presented with is outside the mainstream of law concerning monopolies and monopolization.'").

[62] *Boise Cascade*, 637 F.2d at 581.

stands in stark contrast to the Supreme Court's recitation of a deferential attitude toward the Commission.[63] In *Official Airline Guides*, the Second Circuit was similarly concerned that upholding the FTC's actions would give the Commission "too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[64]

Like the arguments of many of today's advocates of limited antitrust enforcement,[65] the circuit courts' decisions were motivated by the fear of arbitrary enforcement under section 5 and the lack of clear standards regarding what conduct may be deemed unfair—both of which risk chilling legitimate business conduct.[66] Section 5's vague terms contain no inherent limitations on the FTC's authority, and the courts worried that the Commission's willingness to expand existing antitrust doctrine without clear rules would "blur the distinction between guilty and innocent commercial behavior."[67] By contrast, in the case of FTC enforcement of the Sherman Act through section 5, courts define the legal standards the Commission is bound to apply, so standardless and arbitrary enforcement is less of a concern.

The current Commission continues to defer to the lessons drawn from these three decisions. In particular, FTC Chairman Leibowitz and Commissioner Rosch have recently discussed some informal "limiting principles" on stand-alone section 5 enforcement.[68] First, the FTC can use its section 5 powers only where enforcement does not directly conflict with Sherman Act doctrine—i.e., the conduct at issue cannot plainly be legal under Sherman Act doctrine.[69] Second, the FTC must show "some indicia of oppressiveness," such as proof of an anticompetitive purpose or of actual or incipient anticompetitive

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63 *See supra* note 54 and accompanying text (discussing examples of deference).

64 *Official Airline Guides*, 630 F.2d at 927.

65 *See infra* Part II.A (discussing the concerns of advocates of limited antitrust enforcement).

66 *See Ethyl*, 729 F.2d at 137 ("[A]ppropriate standards must be adopted and applied to protect a respondent against abuse of power.").

67 *Boise Cascade*, 637 F.2d at 582.

68 *See* J. Thomas Rosch, Comm'r, FTC, Perspectives on Three Recent Votes: The Closing of the *Adelphia Communications* Investigation, the Issuance of the *Valassis* Complaint and the *Weyerhauser* Amicus Brief, Address Before the National Economic Research Associates 2006 Antitrust and Trade Regulation Seminar 10 (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf (using the term "limiting principles" to describe rules coming from the circuit court trilogy (emphasis omitted)).

69 Sherman Act doctrine regarding the business practice at issue in *Boise Cascade* was "well forged" and clearly required a finding of "either collusion or actual effect on competition to make out a section 5 violation." 637 F.2d at 582. Since the FTC had proved neither of these conditions, its use of section 5 would have invalidated conduct that was clearly legal under the Sherman Act.

effect.[70] These principles, though never addressed by the Supreme Court, place a limiting gloss on the Court's broad "against public policy" language, and the current FTC has indicated its willingness to maintain an emphasis on clear standards when expanding the reach of stand-alone section 5 enforcement.[71]

2. *Congressional Oversight*

In addition to the threat of courts invalidating the Commission's decisions, the FTC is cognizant of political pressures that may confine the reach of its authority under section 5. As an independent regulatory agency, the Commission is relatively isolated from presidential control.[72] It is not immune, however, from congressional intervention.[73] If the FTC oversteps its understood statutory authority, Congress can cut back on the Commission's power through explicit contractions of the FTC's statutory authority, budget reductions that limit the ability of the Commission to carry out its mandate, or calling commissioners to task at oversight hearings.[74]

Although Congress gave the FTC a long leash in its broad statutory mandate, Congress has not hesitated to rein in the Commission when it thinks that the FTC has gone too far.[75] Indeed, Congress has severely rebuked the Commission on three occasions in the agency's

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70 *Ethyl*, 729 F.2d at 139; *see also Boise Cascade*, 637 F.2d at 577–78 (ruling against the FTC because the Commission failed to show actual harm to competition); Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927–28 (2d Cir. 1980) (holding that refusal to deal must be motivated by an anticompetitive purpose to be illegal).

71 *See* Rambus, Inc., No. 9302, 2006 WL 2330118, at *9–10 (F.T.C. Aug. 2, 2006) (Concurring Opinion of Commissioner Jon Leibowitz) (setting forth Commissioner Leibowitz's two-part test for a section 5 violation); Rosch, *supra* note 68, at 10–12 (describing limiting principles for enforcement arising out of the circuit cases).

72 *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (limiting the President's power to remove independent commissioners to statutorily enumerated, for-cause reasons). The President retains the power of appointment, but the requirement of a bipartisan commission limits the President's agenda-shaping ability.

73 In fact, the FTC Act's proponents cited this control as one of the virtues of the Commission. *See* 51 CONG. REC. 13,047–48 (1914) (statement of Sen. Albert Cummins) ("I would rather take my chance with a commission at all times under the power of Congress . . . . If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. . . . Congress can always destroy the commission . . . .").

74 *See Rambus*, 2006 WL 2330118, at *7 ("FTC officials frequently appear before Congressional committees or meet with Congressional staff to describe or defend its policies or practices."). Although members of Congress have not addressed the FTC's recent expansion of its section 5 authority, it is clear that Congress is aware of the FTC's expanded enforcement agenda. *See* Leibowitz Testimony, *supra* note 47, at 10–12 (describing the FTC's expanded section 5 enforcement agenda before a Senate committee).

75 *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623 (1982) ("The FTC Act and its legislative

history. The first occurred very early in the Commission's history in 1919 after it issued a report on collusion and exclusionary tactics employed in the meatpacking industry. The study caused meatpackers to erupt in opposition, and they lobbied Congress to pass the Packers and Stockyards Act of 1921.[76] This statute stripped the FTC of jurisdiction over the meatpacking and related industries and vested exclusive authority in the Department of Agriculture.[77] Similarly, in the early 1950s, Congress reined in the FTC in response to the Commission's victory in *FTC v. Cement Institute*, in which the Supreme Court accepted the Commission's determination that industry-wide pricing practices violated section 5.[78] Congress drafted legislation that would have overturned the decision, and even though the bill never became law, the controversy ushered in greater congressional scrutiny of FTC litigation strategy.[79]

In the late 1970s, the Commission became the object of congressional ire after the FTC conducted rulemaking on the advertising of sweet foods to children under its consumer protection ©authority.[80] Congress and the public at large perceived the Commission as "co-opted by the counter-culture," "out of control," and "suspicious of the private sector."[81] In retaliation, Congress refused to pass the 1978 FTC Amendments, which would have expanded the Commission's enforcement powers.[82] Congress then passed the Federal Trade Commission Improvements Act of 1980, which severely constricted the Commission's previously granted consumer protection powers.[83]

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history defined the nominal boundaries of the Commission's authority, but each new Congress determines how far the agency may go in exercising its powers.").

76 7 U.S.C. §§ 181–229b (2006).

77 Kovacic, *supra* note 75, at 623–24.

78 333 U.S. 683 (1948).

79 Kovacic, *supra* note 75, at 625–27; *see also Rambus*, 2006 WL 2330118, at *8 ("Congressional reaction to the *Cement Institute* and *Triangle Conduit* decisions . . . induced a majority of the commissioners to reverse their position on this issue.").

80 KANWIT, *supra* note 33, § 1:2; *see also* William F. Adkinson, Jr., *Introduction: Federal Trade Commission 90th Anniversary Symposium*, 72 ANTITRUST L.J. 745, 747 (2005) ("[B]y the late 1970s a reinvigorated and overhauled FTC faced Congressional wrath for being an overly zealous 'national nanny.'").

81 Thomas B. Leary, *A Suggestion for the Revival of Section 5*, ANTITRUST SOURCE, Feb. 2009, at 1, 6, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Leary2_26f.authcheckdam.pdf.

82 KANWIT, *supra* note 33, § 1:2 ("If passed, the amendments would have given consumers the right to enforce trade regulation rules and final litigated cease and desist orders through class actions, raised the penalties for noncompliance with agency subpoenas and requests for information, and made [most] cease and desist orders effective 60 days after service . . . .").

83 *Id.* § 3:11. In particular, the 1980 Act imposed a legislative veto of proposed consumer protection trade regulation rules. Congress then failed to pass specific reauthorization legislation for the FTC between 1980 and 1994. *See* 139 CONG. REC. 13,431 (1993)

Although the consumer protection power of the Commission is not the focus of this Note, the 1970s episode is informative by way of illustrating Congress's wrath in response to the FTC's expansive use of its statutory power. As Chairman Leibowitz has noted, "the Agency does not enforce Section 5 in a vacuum."[84] Uncertainty about the length of the FTC's leash may cause the Commission to think twice before extending section 5 enforcement beyond what Congress might approve.

II
The Modern Antitrust Consensus and Proposals for the Use of Section 5

It is largely accepted that the FTC *can* use section 5 broadly to attack anticompetitive practices, even if such conduct is not a violation of the antitrust laws.[85] Given the political and legal constraints discussed above, the question remains: How should the Commission use its section 5 authority to best advance the goals of antitrust law?

The FTC has recently signaled that it intends to expand its standalone section 5 enforcement. The Commission's 2008 *Negotiated Data Solutions LLC* (*N-Data*) consent agreement demonstrates that a majority of the commissioners are willing to use their section 5 power more broadly in the context of high-tech markets.[86] In other recent cases before the FTC and in various papers and speeches, Chairman Leibowitz and Commissioner Rosch have advocated for broader use of section 5 to pursue conduct that, although harmful to consumer

(statement of Rep. Swift) (discussing "outstanding issues that have held up the reauthorization of this important Federal agency"). During this time, members of Congress used the appropriations process in order to restrict the Commission's authority over unfair advertising practices, *id.* (statement of Rep. Dingell, Jr.), evidencing another method Congress has used to restrict the Commission's authority. The Commission also came under fire for some of its competition initiatives at the time, though the congressional response was less severe. *See* Kovacic, *supra* note 75, at 657–58 (discussing a congressional inquiry into the FTC's antitrust work regarding professional associations and describing this scrutiny as "convey[ing] a sense of discomfort with this initiative").

84 *Rambus*, 2006 WL 2330118, at *7.

85 *See, e.g.*, Negotiated Data Solutions LLC (*N-Data*), No. 051-0094, 2008 WL 258308, at *26 (F.T.C. Jan. 22, 2008) (Dissenting Statement of Chairman Majoras) ("Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts . . . ."); Hovenkamp, *supra* note 21, at 873 ("Today, the jurisdiction of the FTC over anticompetitive practices is well established. Not only does the Commission have explicit power to enforce the Clayton Act directly, but also the Supreme Court has held that the FTC's power to condemn 'unfair methods of competition' covers everything that the Sherman Act covers and goes even further to reach a 'penumbra' of practices that are not covered by the Sherman Act." (footnote omitted)).

86 *N-Data*, 2008 WL 258308, at *29 (Statement of the Commission); *see also infra* notes 99–103 and accompanying text (discussing *N-Data*).

welfare, may not violate the antitrust laws.[87] And in October 2008, the Commission sponsored a workshop on section 5, bringing together practitioners and academics to discuss potential areas of expansion for section 5 enforcement.[88]

This expansion occurs against a backdrop of general consensus among practitioners and academics regarding what the goals of antitrust law are,[89] if not how best to reach them. After the overly zealous enforcement of the 1950s and 1960s and the underenforcement of the 1980s,[90] the antitrust community has come to agree that the harm at issue in antitrust violations is harm to consumers, not to the actor's shareholders or its competitors.[91] Furthermore, economic analysis plays a significant and widely accepted role in explaining the effects of business practices and thus developing and applying antitrust laws.[92] As this consensus has developed, the FTC has also come to a position of greater respect within the antitrust community after a tumultuous early history.[93]

Starting from the basic premise of maximizing consumer welfare, the antitrust community has split on enforcement. Some are concerned that false positives—banning conduct that is not in fact

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[87] *See, e.g.*, Intel Corp., No. 9341, 2009 WL 4999728, at *22–23 (F.T.C. Dec. 16, 2009) (Statement of Chairman Leibowitz and Commissioner Rosch) ("[W]e have seen an increasing amount of potentially anticompetitive conduct that is not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5."); *Rambus*, 2006 WL 2330118, at *9–10 (laying out Leibowitz's proposed test for section 5 violations); Jonathan Gleklen, *The Emerging Antitrust Philosophy of FTC Commissioner Rosch*, ANTITRUST, Spring 2009, at 46, 46 (discussing the evolution of Rosch's philosophy toward broader enforcement); Rosch, *supra* note 34 (setting forth Rosch's view of section 5 power).

[88] Workshop Transcript, *supra* note 1.

[89] *See, e.g.*, Creighton & Krattenmaker, *supra* note 14, at 2 ("[T]he FTC should leave fully intact the current bipartisan consensus that antitrust is designed to protect competition, not competitors; that it protects against the use of market power, not efficient conduct; and that it seeks to prevent diminution of consumer welfare, and to do no more than that."); Pitofsky, *supra* note 2, at 169–70 (discussing the transition to consensus in antitrust enforcement).

[90] *See* Pitofsky, *supra* note 2, at 169–70 (discussing the "very aggressive" enforcement of the 1960s and the "extreme backlash" of the 1980s).

[91] *See* Pitofsky, *supra* note 32, at 215 (describing the bipartisan consensus regarding FTC enforcement priorities and noting that the consensus "leaves the agency open to criticism of decisions with respect to particular cases but generally not of its overall approach to enforcement").

[92] *See id.* at 209 (noting "a remarkable convergence of antitrust enforcement policy between left and right, and between primarily legal as opposed to primarily economic approaches").

[93] *See* 142 CONG. REC. H9932 (daily ed. Sept. 4, 1996) (statement of Rep. Oxley) ("I am pleased to say that . . . this agency has come a long way toward rehabilitating its tarnished image and I feel justified in coming to its defense."); Pitofsky, *supra* note 32, at 209 (noting "profound changes in the quality of regulation at the Federal Trade Commission").

anticompetitive—will deter firms from engaging in legitimate business practices, thus leading to a decrease in efficiency and ultimately higher prices and reduced output for consumers.[94] Many recent Supreme Court decisions restricting Sherman Act doctrine were motivated by such concerns.[95] On the opposite end of the spectrum, others are concerned that the increasingly narrow reach of the Sherman Act may ignore certain anticompetitive practices, allowing dominant firms to knock out competitors who could drive down prices, leaving collusive practices intact in concentrated markets, and maintaining inflated consumer prices.[96]

Given this debate over the best way to protect consumers, it is not surprising that the FTC's enforcement priorities are so hotly debated. Though the Department of Justice is confined in its reach by the formal rules of the Sherman Act, the FTC can expand its authority under section 5 to reach conduct not clearly covered by the antitrust laws. The Commission's challenge, then, is to balance its enforcement approach in a way that both maintains the Commission's current place of respect within the antitrust community and satisfies its statutory mandate. This Part presents proposals on how the FTC could use its section 5 authority—from restricting enforcement to defined violations of the Sherman Act to "filling gaps" in the Sherman Act and thus moving beyond its legal limitations. Each method has some virtue, but neither optimizes the FTC's institutional resources in the face of modern challenges to consumer welfare.

A. Limiting Enforcement to Sherman Act Violations

Some critics of broad antitrust enforcement have argued that the FTC should not expand its use of section 5 at all—that the FTC should limit its role to policing accepted violations of the antitrust laws. Judge Richard Posner, one of the leading voices for this view, has contended that "[t]he Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."[97] In other words, every "unfair method of competition" that warrants enforcement has been covered, so further expansion of section 5

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[94] *See* Hovenkamp, *supra* note 21, at 882 ("[T]he social cost of a false positive is the loss of the market's ability to employ the practice that has been enjoined.").

[95] *See, e.g.*, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1120–21 (2009) (describing the "importance of clear rules in antitrust law" and the need for "safe harbor[s]" because they minimize the risk of false positives).

[96] *See* Hovenkamp, *supra* note 21, at 875–76 (citing anticompetitive practices excluded from Sherman Act coverage as supporting the expansion of FTC authority).

[97] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005).

would more likely than not end up deterring procompetitive conduct.[98]

The conflict between those who support limited antitrust enforcement—and thus a narrow interpretation of section 5—and those who believe that enforcement beyond the bounds of the Sherman Act remains necessary came to a head in the 2008 FTC case of *N-Data*.[99] In this case, N-Data had "reneged on a prior licensing commitment" and used its market power, gained through the use of its product in the industry standard, to extract higher prices for its Ethernet technology.[100] Chairman Leibowitz, Commissioner Rosch, and then-Commissioner Harbour, the majority in *N-Data*, deemed N-Data's actions a violation of section 5 and spoke in broad terms of the FTC's mandate to bar conduct that is "contrary to good morals" and "against public policy"—a doctrinal approach far removed from the highly specific requirements of the Sherman Act.[101] Now-former Chairman Deborah Platt Majoras dissented from the complaint and settlement agreement in *N-Data*, echoing Judge Posner and arguing that a "scholarly consensus . . . finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing."[102] Chairman Majoras was particularly concerned about the majority's lack of clear standards and noted that the Commission's practice of limiting its cases to violations of the antitrust laws and actions just short of accepted violations "reflects the insistence of the appellate courts that the Commission's discretion is bounded and must adhere to limiting principles."[103]

Confining section 5 enforcement to existing violations of the Sherman and Clayton Acts is an appealing way to limit FTC overreach. The doctrine built up around these statutes provides clear, judicially imposed standards, the use of which does not risk the FTC losing its current high status with Congress and in the dominant antitrust consensus. It is possible, moreover, that should the question of section 5's reach come before the Supreme Court today, the Court

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98 *See* Hovenkamp, *supra* note 21, at 874 ("When the Supreme Court has permitted the FTC to reach beyond existing antitrust law to condemn practices as anticompetitive, the FTC has ended up condemning practices that were not anticompetitive at all, by any sensible definition.").

99 Negotiated Data Solutions LLC, No. 051-0094, 2008 WL 258308, at *6 (F.T.C. Jan. 22, 2008) (Decision and Order).

100 *Id.* at *29 (Statement of the Commission).

101 *Id.*

102 *Id.* at *26 (Dissenting Statement of Chairman Majoras).

103 *Id.* (discussing E.I. Du Pont De Nemours & Co. v. FTC (*Ethyl*), 729 F.2d 128 (2d Cir. 1984)). Then-Chairman Majoras accepted, however, that the FTC can use its section 5 powers to enforce against some incipient violations. *Id.*

might endorse a more restricted interpretation of the Commission's powers.[104]

However, there is something unsatisfying about such an extremely limited interpretation. As former–FTC Chairman Robert Pitofsky has noted, using section 5 only to enforce the antitrust statutes "reads unfairness out of the [FTC Act]."[105] Taken to its logical extreme, regarding the FTC as merely another enforcer of the Sherman Act may read the Commission's Bureau of Competition out of the antitrust enforcement scheme entirely—having two separate agencies fulfilling the same function could be seen as superfluous.[106] Yet few go so far as denying the FTC any useful role.[107] Further, it seems inevitable that there will arise some anticompetitive practices outside the carefully delineated rules of Sherman Act doctrine.[108] Indeed, Congress drafted the FTC's initial unfairness mandate with the understanding that enforcement needed to be broader than current Sherman Act violations.[109] Any claim that the Sherman Act as currently interpreted is sufficient on its own to protect consumer welfare seems particularly problematic in the face of a rapidly evolving economy and the retrenchment of Sherman Act doctrine in recent years.[110] Such rigid restrictions on the FTC's intentionally flexible

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[104] As Robert H. Lande argued:

> If the Commission were to attempt to promulgate an approach to the FTC Act that was vague, insufficiently bounded, or that gave it undue discretion, more conservative reviewing courts today might well restrict the scope of Section 5 and make it coterminous with the other antitrust laws, no matter how clear the congressional intent and no matter what the older case law holds.

Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, ANTITRUST SOURCE, Feb. 2009, at 1, 2, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Lande2_26f.authcheckdam.pdf; *see also infra* note 144 and accompanying text (discussing Supreme Court decisions rejecting per se rules and thus limiting the scope of antitrust enforcement).

[105] Workshop Transcript, *supra* note 1, at 64 (statement of Robert Pitofsky); *see also* Creighton & Krattenmaker, *supra* note 14, at 1 ("As attractive as this might be from a policy perspective, however, as a matter of statutory interpretation, it seems evident that this is not what the 1914 Congress that enacted Section 5 . . . intended.").

[106] *Cf.* Posner, *supra* note 97, at 770–71 (noting "the dismal conclusion that there really is no convincing rationale for having a Federal Trade Commission" while eventually concluding that antitrust enforcement would be harmed by abolition of the FTC).

[107] Skeptics' attitudes have evolved over time alongside improvements in the FTC's performance as an antitrust regulator. In 1969, Posner concluded that "there is no salutary role for a federal trade commission." Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 88 (1969).

[108] *See supra* notes 17–20 and accompanying text (discussing practices prohibited by the Sherman Act and the limits of Sherman Act enforcement).

[109] *See supra* notes 41–43 and accompanying text (describing the FTC Act's intentional flexibility).

[110] As described above, Chairman Leibowitz has noted that "the cramped reading of the Sherman Act that we see from federal courts today does resemble the interpretation of the

statutory authority threaten to allow harmful anticompetitive behavior to go unchecked.[111]

B. The Gap-Filling Model

In contrast to Judge Posner's restrictive view of section 5, former-Chairman Pitofsky and Professor Herbert Hovenkamp have championed a broader interpretation of section 5.[112] They have argued that section 5 should perform a "gap-filling" function in relation to the antitrust laws—that section 5 should apply, in Pitofsky's words, to "situations where Congress would have covered a transaction or a behavior if it thought of it."[113] Under this interpretation, section 5 would prohibit conduct that contravenes the economic policies underlying Sherman Act doctrine, but which does not meet all the legal requirements of a Sherman Act violation.[114] Hovenkamp has suggested that the FTC should use its section 5 authority to challenge monopoly in its incipiency, cartel-like behavior in oligopolistic markets,[115] and conduct analogous to the European "abuse of dominance" violation,[116] none of which is invalidated under the Sherman Act.[117] The Commission already uses this rationale: The FTC's chal-

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antitrust laws by courts early in the last century." Workshop Transcript, *supra* note 1, at 205 (statement of Jon Leibowitz). This view may indicate that the full scope of section 5 authority is at least as relevant now as ever.

111 For a critique of the trend toward favoring underenforcement of antitrust laws, see generally Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010). For a discussion of the modern trend toward underenforcement in the monopoly context, see Bonny E. Sweeney, *An Overview of Section 2 Enforcement and Developments*, 2008 WIS. L. REV. 231, 254–60.

112 *See, e.g.*, Hovenkamp, *supra* note 21 (arguing for an approach to section 5 that "reach[es] conduct not addressed by the literal language of either the Sherman or Clayton Acts").

113 Workshop Transcript, *supra* note 1, at 65 (statement of Robert Pitofsky).

114 *See* Creighton & Krattenmaker, *supra* note 14, at 3 (defining gap filling).

115 Hovenkamp argues that anticompetitive behavior can occur in markets with few competitors even without an explicit agreement because, in such industries, "one does not need explicit communication or even an 'agreement' in the common law sense to produce interdependent action" that can be harmful to consumers. Hovenkamp, *supra* note 21, at 881.

116 The Treaty Establishing the European Community art. 82, Nov. 10, 1997, 1997 O.J. (C 340) 3, prohibits "abuse . . . of a dominant position," as opposed to the Sherman Act's prohibition on monopolization or attempts to monopolize. Hovenkamp notes that the European Union's "formulation clearly contemplates conduct by which a monopolist takes unreasonable advantage of its position in one market in order to cause competitive harm in a second market," whereas the Supreme Court has rejected such a claim under the terms of the Sherman Act. Hovenkamp, *supra* note 21, at 883.

117 Hovenkamp, *supra* note 21, at 878–84; *see also* Rosch, *supra* note 34, at 3 (describing the past and future use of section 5 to fill gaps in the Sherman and Clayton Acts); Workshop Transcript, *supra* note 1, at 65–67 (statement of Robert Pitofsky) (citing facilitating practices and invitations to collude as gaps the FTC should fill under section 5).

lenge of invitations to collude, as in the *Valassis* case discussed above, is a gap-filling use of section 5. There, the Commission invalidated a practice as a section 5 violation even though it did not meet all the legal requirements of a Sherman Act violation.[118]

Supporters of gap filling operate from the basic premise that the stringent requirements of the Sherman Act do not provide enough protection against conduct that is likely to cause consumer harm.[119] In this sense, the gap-filling rationale is an appealing application of the vision of section 5 as a "penumbra" around the antitrust laws.[120] The specific practices identified as candidates under a gap-filling approach are very close to those practices banned by the Sherman Act—invitations to collude, for example—so invalidation of these particular practices may not risk standardless enforcement or the inclusion of many false positives. Advocates see practices like invitations to collude or abuses of dominant positions as particularly harmful and without procompetitive justification; such practitioners see these practices as excepted from the Sherman Act by what may be mere accidents of language or cramped antitrust doctrine rather than design.[121]

Beyond these specific practices, however, the gap-filling theory is more difficult to limit in the generalized case—and thus more dangerous to those who fear the chilling of legitimate business practices.[122] How far from the requirements of a Sherman Act violation can the FTC go while remaining confident that it is not deterring legal, procompetitive conduct? The risk of overdeterrence—a different but real consumer harm—may not be worth the added enforcement.

In pursuing a gap-filling rationale, the Commission may also run afoul of the principle coming out of *Boise Cascade* that conduct that is clearly legal under Sherman Act should not be made illegal under sec-

[118] *See supra* notes 50–51 and accompanying text (noting the Commission's ability to ban incipient anticompetitive conduct).

[119] Those who believe that the FTC should only use section 5 to enforce violations of the Sherman and Clayton Acts argue that pursuing other conduct is likely to deter procompetitive conduct. Under this theory, the "gaps" in the Sherman Act are intentional and should not be filled. *See supra* text accompanying notes 97–98.

[120] *See supra* notes 48–49 and accompanying text.

[121] *See* Hovenkamp, *supra* note 21, at 876 (arguing that "the prohibition of monopolizing conduct is narrower than the prohibitions used in other countries" merely due to choice of language of section 2 of Sherman Act); *see also* Creighton & Krattenmaker, *supra* note 14, at 8 (arguing that "[i]nvitations to collude do not fit easily within the language of [the Sherman Act]" but that such practices "serve[ ] no procompetitive, efficiency-enhancing purpose").

[122] *See* Creighton & Krattenmaker, *supra* note 14, at 8 (noting that although gap filling is uncontroversial in certain cases, "the risk of an unbounded application of Section 5 is greatest in these 'gap-filling' cases").

tion 5.[123] "Safe harbors" under the Sherman Act could become much less safe if the Commission does not make clear whether a practice is legitimate or merely "in a gap"—and thus subject to section 5 enforcement—and businesses would be plagued by the same fear of arbitrary enforcement that led the Ninth Circuit to overturn the Commission's decision in *Boise Cascade*.

Further, by attacking practices like coordinated conduct among competitors in the absence of proof of an actual agreement, the FTC might fall prey to the accusation that it is merely using section 5 "to diminish the burden on the Commission on how it proves its case."[124] In so extending the coverage of the antitrust statutes, the FTC would risk traveling beyond the bounds of what Congress would have wanted "if it thought of it," thus risking the disapproval of the courts, a rebuke from Congress, and its own good standing within the reigning antitrust consensus.[125]

III
Using Section 5 on the Frontier of the Sherman Act

The proposals described in the previous Part present something of a Goldilocks problem for the FTC: The gap-filling model goes too far in the direction of standardless and arbitrary enforcement, while limiting enforcement to existing antitrust violations does not do enough to address the potentially serious anticompetitive conduct that may arise in a changing economy. This Part attempts to bridge that gap by setting forth a model that remains closely tied to the legal requirements of the Sherman Act—thus reducing the likelihood of overreach and false positives—while giving some space to reach evolving forms of potentially harmful conduct.

A. The Frontier Rationale

Susan Creighton, Thomas Krattenmaker, and former–FTC Commissioner Thomas Leary have suggested that the FTC should use

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123 *See supra* notes 68–71 and accompanying text (describing limitations placed on section 5 authority by the trio of circuit cases).

124 Workshop Transcript, *supra* note 1, at 127 (statement of Robert Pitofsky). When bringing claims under section 1 of the Sherman Act, the most difficult thing for plaintiffs to prove is often an actual agreement between defendants. *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (dismissing the case for failure to substantiate the claim of agreement among competitors for a Sherman Act section 1 violation).

125 Workshop Transcript, *supra* note 1, at 115 (statement of Robert Pitofsky) ("[W]hen you think about expanding Section 5 to cover conduct that's otherwise legal you can expect a fight. And the Commission may lose more than it gains in that fight.").

section 5 to reach "frontier" cases under the Sherman Act.[126] Creighton and Krattenmaker define frontier cases as those "that meet all of the legal requirements for a Sherman Act claim, but involve new forms of anticompetitive conduct that fall outside traditional categories of conduct that have long been subjected to conventional antitrust analysis."[127] In pursuing such cases, the FTC would bring a claim as a stand-alone section 5 violation while still applying all the legal elements of a Sherman Act violation.[128] For example, the Commission may determine that it would have a strong case in arguing that a new manner of cooperation among competitors would amount to a Sherman Act section 1 violation,[129] but little or no precedent exists for applying the Sherman Act in this context. The Commission would claim a violation of section 5 but would still prove that an agreement occurred which exploited market power and harmed consumers through increased prices or decreased output, just as for a Sherman Act section 1 violation.[130]

Former-Commissioner Leary argues that the frontier approach is particularly valuable in cases where the FTC "does, in fact, have reason to believe that there has been a violation of the Sherman Act or the Clayton Act but where there is not yet an established body of precedent to support that view."[131] Thus, he argues, in pursuing a frontier case, the FTC should seek only prospective relief in the form of a cease-and-desist order as "a signal that the Commission recognizes it is entering largely uncharted territory."[132] Since, unlike the Sherman Act, the FTC Act implies no private right of action and section 5 decisions have no collateral estoppel effect in private follow-on actions,[133] the entity charged with violating section 5 would face only future consequences through the cease-and-desist order (rather than damages for past action) and would less likely be threatened by costly future private damage actions. This lack of retrospective punishment should mitigate any concerns about expanded antitrust enforcement.

126 *See generally* Creighton & Krattenmaker, *supra* note 14; Leary, *supra* note 81.

127 Creighton & Krattenmaker, *supra* note 14, at 3.

128 Leary, *supra* note 81, at 1.

129 *See infra* notes 137–40 and accompanying text (providing an example of the application of section 5 in the context of high-tech standard-setting organizations).

130 These are the key elements of a rule-of-reason analysis under the Sherman Act that the FTC would have to meet in utilizing the frontier approach. *See supra* note 3 (listing the elements of a rule-of-reason analysis).

131 Leary, *supra* note 81, at 1.

132 *Id.*; *see also id.* at 1–2 ("To make the signal entirely clear, the Commission should explain up front what it is doing and why.").

133 *See supra* note 34 and accompanying text (describing the lack of collateral estoppel effect).

Courts are understandably reluctant to impose liability where condemnation of the conduct at issue is unprecedented; a lack of relevant precedent gives the actor little notice that his conduct might be found illegal and gives rise to due process and predictability concerns, especially given the potential for the massive, treble-damages class actions brought under the Sherman Act.[134] By contrast, the cease-and-desist order primarily would establish "ground rules" to stop future violations rather than punish past conduct, so a pure section 5 claim would be less likely to implicate these concerns.[135] Thus judges may be more willing to uphold an antitrust claim brought first under section 5 than under the Sherman Act.[136] By this mechanism, Sherman Act doctrine could evolve to cover new types of conduct while minimizing the destructive impact of potential false positives on economic actors.

Former-Commissioner Leary presents one example of where the Commission might have been better served by utilizing a frontier approach. In *Rambus Inc. v. FTC*, the FTC alleged that Rambus, a memory chip manufacturer, "deceptively failed to disclose to [a standard-setting organization] the patent interests it held in four technologies" that came to be included in the industry standard, which allowed it to obtain market power.[137] On appeal, the D.C. Circuit overturned the FTC's finding of a violation of section 2 of the Sherman Act because the FTC failed to prove "a dangerous probability" that

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134 *See* Creighton & Krattenmaker, *supra* note 14, at 4 (describing the benefits of prospective application of section 5). Some have argued that the real cost is the risk of chilling procompetitive conduct, not the treble damages. *See* Workshop Transcript, *supra* note 1, at 84 (statement of Michael Salinger). Although there is always some risk of chilling procompetitive conduct in reaching new practices, if the FTC remains tied to the Sherman Act's standards, this risk is less significant since modern Sherman Act doctrine is structured around these very concerns.

135 Leary, *supra* note 81, at 4. Although companies may lose investments in practices declared to be unfair methods of competition through the enforcement of a cease-and-desist order, it is less expensive to have conduct merely stopped than to have conduct stopped and be subject to damages for the conduct already undertaken. The Commission also has the power to seek disgorgement or restitution, but it typically only does so when the antitrust violation was clear in advance. Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,821 (July 25, 2003). More broadly, cease-and-desist orders provide general prospective guidance beyond the immediate violator at issue, which matches the role of the FTC as advisor to the business community.

136 *See* Creighton & Krattenmaker, *supra* note 14, at 4 ("Because courts may be reluctant to impose liability where behavior is new and unfamiliar, Section 5 may have advantages in these 'frontier' cases due to its prospective application and lack of provision for private damages recovery (much less treble damages or class actions)."); Leary, *supra* note 81, at 4 ("Many judges have a visceral sense that it is wrong to penalize companies for things that were not clearly illegal at the time they were done.").

137 522 F.3d 456, 459 (D.C. Cir. 2008).

Rambus would monopolize the market.[138] Leary argues that the FTC should have framed Rambus's exploitative conduct as a pure section 5 violation rather than a Sherman Act violation.[139] His criticism was not based in the idea that the FTC's complaint was legally insufficient under the Sherman Act, but rather that "a Section 5 complaint, coupled with an open acknowledgement that the Commission was operating in largely uncharted territory and therefore would not seek retroactive relief, might have had a salutary effect" on the reviewing court's deference to the Commission's decision.[140]

Similarly, in the *N-Data* case discussed above, the Commission based its complaint against N-Data on a broad reading of section 5, calling on the FTC's authority to ban practices that are "against public policy" and "contrary to good morals."[141] However, under a frontier rationale, this case would have presented an interesting intersection of competitor collaboration in the standard-setting arena (generally the domain of section 1 of the Sherman Act) and the exercise of monopoly power by an individual company (a Sherman Act section 2 issue). Because of this mix of both unilateral and coordinated elements, such conduct is not well addressed by existing Sherman Act doctrine. While it might have been difficult for the Commission to prove the elements of a Sherman Act violation—for example, N-Data's monopoly power and intent to create or maintain that power[142]—bringing the claim as a frontier case under section 5 (rather than as a more general public policy issue) would have presented an important opportunity to provide additional guidance on the type of

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138 *Id.* at 464, 467 (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993)).

139 Leary, *supra* note 81, at 3; *see also* Rambus, Inc., No. 9302, 2006 WL 2330118, at *11–13 (F.T.C. Aug. 2, 2006) (Concurring Opinion of Commissioner Jon Leibowitz) (stating that "finding liability under a 'stand-alone' Section 5 cause of action would have been fully appropriate in this matter," although agreeing that the conduct constituted a section 2 violation as well).

140 Leary, *supra* note 81, at 4.

141 Negotiated Data Solutions LLC, No. 051-0094, 2008 WL 258308, at *29 (F.T.C. Jan. 22, 2008) (Statement of the Commission) (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986)); *see also supra* notes 99–103 and accompanying text (discussing *N-Data*).

142 As described in *United States v. Grinnell Corp.*:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

384 U.S. 563, 570–71 (1966). In her dissent in *N-Data*, then-Chairman Majoras pointed to an apparent absence of these elements as a key reason for objecting to the FTC pursuing a section 5 claim against N-Data. *N-Data*, 2008 WL 258308, at *25–26 (Dissenting Statement of Chairman Majoras).

behavior the FTC would prohibit in the standard-setting context. Moreover, this more-structured approach might have provoked less dissent within the Commission itself.[143]

B. Expanding the Theory

This Section expands on the frontier rationale proposed by Creighton, Krattenmaker, and Leary by suggesting that the frontier concept be expanded beyond merely new forms of anticompetitive conduct—such as those created by the rise of modern information technology and increasing globalization—to new modes of economic thought and changing Sherman Act doctrine. Moreover, this Section proposes that the FTC embrace its frontier role beyond bringing cases, by utilizing this perspective in its advisory opinions, consent agreements, and industry guidelines.

1. Areas of Expansion

The notion of the frontier should be extended to the edge of Sherman Act doctrine itself. The Supreme Court in recent years has overturned many longstanding rules defining per se violations of the Sherman Act in favor of a rule-of-reason approach.[144] In doing so, the Court has recognized changing economic attitudes regarding the harmfulness of practices such as conglomerate mergers and purely vertical restraints.[145] Yet in removing a per se structure, the Court has

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143 Then-Chairman Majoras and Commissioner Kovacic each dissented from the majority's decision in *N-Data* based on the fact that the Commission had strayed from existing antitrust rules in invalidating N-Data's conduct. *N-Data*, 2008 WL 258308, at *24–26 (Dissenting Statement of Chairman Majoras); *id.* at *23–24 (Dissenting Statement of Commissioner Kovacic).

144 *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (resale price maintenance agreements); Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (pricing in joint ventures); State Oil Co. v. Khan, 522 U.S. 3 (1997) (maximum resale price agreements). Proving a per se violation is much less difficult and costly for plaintiffs than proving an antitrust violation under a rule-of-reason analysis. For example, in a cartel case (a per se violation), a plaintiff need only prove that competitors in an industry agreed to fix prices. *See* WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:11 (2010–2011 ed. 2010) ("Agreements between competitors to horizontally fix prices have long been held per se illegal under Section 1 of the Sherman Act, thereby foreclosing defense arguments as to the reasonableness of the defendants' actions and removing the necessity of market analysis and proving adverse competitive effects from the plaintiff's affirmative case."). By contrast, in a competitor collaboration case that falls outside of the per se context of a price-fixing agreement (and thus must be argued under a rule-of-reason analysis), a plaintiff must prove an agreement occurred, that the agreement exploited market power, and that the agreement harmed consumers through increased prices or decreased output, all without procompetitive justification. *See supra* note 3 (defining a rule-of-reason analysis).

145 *Leegin*, 551 U.S. at 899–900 ("Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s]

left a void within the broad range of a rule-of-reason approach in which the antitrust agencies, private litigants, and lower courts must pursue such Sherman Act violations. The FTC should play a critical role in shaping these doctrinal questions in its capacity as litigant in the public interest, advisor to the business community, and adjudicatory body.[146]

One example of the issue of open doctrine is the uncertain status of resale price maintenance agreement suits in the wake of the *Leegin* case in 2007.[147] The *Leegin* Court abolished the per se rule against vertical price restraints, but it left open the question of how a rule-of-reason analysis for these agreements would be structured going forward.[148] Leading practitioners have made some suggestions,[149] but the development of resale price maintenance doctrine currently is largely left to self-interested private plaintiffs and piecemeal development in the lower courts.[150] The FTC could lead a more centralized effort to

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of trade' evolve to meet the dynamics of present economic conditions. . . . [R]espected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects." (first alteration in original)); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 605–06, 623–30 & nn.24–33 (1974) (limiting the applicability of "potential-competition doctrine" in the context of a conglomerate merger given the characteristics of the highly regulated market at issue, and citing scholarly articles in support of the doctrine's development). Purely vertical restraints are restrictive agreements within the chain of manufacturer-distributor-consumer. *See* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 984 (1985) (defining price and non-price vertical restraints). Conglomerate mergers are mergers "between companies that neither compete directly nor stand in a buyer-seller relationship." Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1314 (1965). In both of these cases, recent changes in economic thought have indicated that these practices pose marginal anticompetitive dangers in the absence of market power within a particular industry.

146 *See supra* Part I.A.2 (describing the creation and role of the FTC).

147 551 U.S. 877. Resale price maintenance agreements are a form of price fixing in which "a manufacturer . . . set[s] a minimum price below which its product can be resold by dealers, and . . . then require[s] dealers to agree to price at or above that level." HOLMES & MANGIARACINA, *supra* note 144, § 2:12.

148 The Court stated:

> As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified . . . .

551 U.S. at 898–99.

149 *See, e.g.*, Christine A. Varney, *A Post-*Leegin *Approach to Resale Price Maintenance Using a Structured Rule of Reason*, ANTITRUST, Fall 2009, at 22 (proposing factors and burden shifting in "structured rule of reason analysis").

150 *See* Leary, *supra* note 81, at 4 (arguing that letting private litigation or the application of state law shape resale price maintenance doctrine would not be "an optimal outcome"). Again, the FTC could shape the development of resale price maintenance doctrine

approach the issue with a holistic, public-interest-focused view by bringing and deciding resale price maintenance cases as section 5 violations. In so doing, the Commission would supplement *Leegin*'s bare assertion of the rule of reason with a more structured analytical approach—for example, what kind of presumptions should apply and how economic tools could inform the analysis of market power and consumer harm.[151] Moreover, as discussed in the next subsection, the FTC could use its breadth of institutional resources to advance its preferred resale price maintenance analysis in other ways, including drafting guidelines, issuing advisory opinions, and filing amicus briefs in other resale price maintenance cases.[152]

In addition to developing Sherman Act doctrine and applying it to new forms of conduct, the Commission should utilize developing economic research—such as the fields of game theory and behavioral economics—to influence the theoretical underpinnings of antitrust law.[153] Under these approaches, the FTC would still prove the elements of a Sherman Act claim but could view those elements from a new perspective that illuminates the anticompetitive implications of certain types of conduct.[154] For example, the game theoretic notion of

by bringing cases and arguing for a specific approach or through the issuance of an advisory opinion or guidelines.

[151] This is not to suggest that the Commission would use section 5 to get around the full burden of proving a case under the rule of reason. Rather, the FTC could use its expertise and authority to direct the development of that rule-of-reason analysis for all courts to apply to resale price maintenance claims under both section 5 of the FTC Act and section 1 of the Sherman Act. The FTC has similarly shaped the rule-of-reason analysis in the past. In the *Three Tenors* case, the Commission set out an analytical framework for non-cartel cooperation among competitors under section 1 of the Sherman Act, which was then adopted by the D.C. Circuit for all such violations. *See infra* notes 168–72 and accompanying text.

[152] *See infra* Part III.B.2 (describing the FTC's institutional resources).

[153] *See* Rudolph J.R. Peritz, *Toward an Expansive Reading of FTC Act § 5: Beyond the Sherman Act and an Ex Post Model of Enforcement* 5–6 (N.Y. Law Sch., Legal Studies Research Paper Series, Paper No. 08/09 #5, 2009), *available at* http://ssrn.com/abstract=1439834 ("[The Commission] should be working at the cutting edge of economic theory and legal doctrine."). Interestingly, the Supreme Court adopted some game-theoretic notions in a private Sherman Act suit in its decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), nearly twenty years ago. In that case, the Court overturned a summary judgment decision in favor of Kodak, relying in part on concerns of information and switching costs and the potential for market power through customer lock-in—concerns which speak to the incentives of players within the market for photocopier repair parts—as factual issues requiring a trial. *Id.* at 473–77. However, *Kodak*'s analysis has rarely been applied in later Sherman Act cases. Kovacic & Shapiro, *supra* note 58, at 56–57.

[154] This type of approach would not have to be limited to bringing a case of a specific violation. The FTC could also issue advisory opinions or commission studies to see how theoretical economics might play out in reality. *See, e.g.*, Hovenkamp, *supra* note 21, at 881–82 ("In addition to looking at particular practices, the FTC is also in a position to use

"agreement" in the sense of strategic decision making may be a useful tool for looking at Sherman Act section 1 violations. Currently, Chicago-school market theory and formalistic legal definitions of "agreement" dominate conventional Sherman Act analysis in a manner that makes it difficult to prove a Sherman Act section 1 violation.[155] Yet game theoretic analysis might indicate that certain behavior is only rational as long as the other party continues to cooperate—that is, as long as both parties tacitly agree not to deviate from that behavior because it is in both of their long-term interests (and against consumers' interests). Similarly, it has been suggested that the behavioral economics notion of bounded rationality could expose how competitors will fare in entering a new market, thus shedding light on how much antitrust law should worry about barriers to entry in its market analysis.[156]

Within the broader scope of proposals for the use of section 5, the frontier rationale, as expanded, sits between the gap-filling model and strictly limiting the FTC to enforcing accepted Sherman Act violations. As it would under the limited-enforcement view, the Commission would be bound to follow the elements of a Sherman Act violation. For example, for a competitor-collaboration claim, the FTC would still have to prove the anticompetitive potential of the agreement, including the existence of market power; demonstrate consumer harm in the form of increased prices or decreased output; and refute procompetitive justifications.[157] However, like the gap-filling model, the frontier rationale would give the FTC more room to find conduct that harms consumers to be anticompetitive.

As the idea of the "frontier" broadens to encompass undeveloped Sherman Act doctrine and new economic theories, the frontier rationale and the gap-filling model may overlap in specific instances. For example, Hovenkamp has similarly proposed using game theoretic ideas for oligopolistic markets under a gap-filling concept.[158] However, approaching such issues from a gap-filling perspective is unwise for the reasons discussed above. The FTC can best avoid overstepping

statistical analysis of pricing patterns or buyer-seller alignments that can provide evidence of collusion.").

155 *See id.* at 879–82 (discussing, in the context of cartel-like behavior, the role of Chicago-school analysis and common law conceptions of agreements).

156 *See generally* Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002) (discussing the role that the concept of bounded rationality can play in shaping antitrust analysis of barriers to entry).

157 *See* COLLABORATION AMONG COMPETITORS GUIDELINES, *supra* note 37, at 4 (describing rule-of-reason analysis).

158 *See* Hovenkamp, *supra* note 21, at 881–82 (discussing limits imposed by the Sherman Act's requirement of "agreement" in comparison to economic theories of collusion).

its authority by adhering to the externally created boundaries of Sherman Act doctrine. Although the essence of the frontier rationale is that the Commission pushes those boundaries, how the FTC thinks about and articulates its approach is critical to preventing institutional overreach. By forcing the FTC to think about section 5 violations in terms of the legal requirements of the Sherman Act—rather than in terms of filling gaps—the FTC is constrained in how far it can go.

Taking a broader concept of "agreement" as an example, the frontier rationale would require the Commission to articulate the tacit agreement of the game theory model as an actual agreement under Sherman Act section 1.[159] This would require more than mere parallel conduct—it would still require enough evidence of some kind of agreement that the Commission and the courts would feel confident they were reaching a real agreement and not deterring procompetitive conduct. By contrast, the gap-filling model would allow the Commission to bring a section 5 claim on the notion that parallel conduct or facilitating practices are close enough to an actual agreement, so the conduct should be banned even without an agreement. Whereas some practices may easily fall within the category of "close enough" that there is less of a worry about chilling procompetitive conduct, the gap-filling theory does not contain a logical stopping point to ensure that is the case in all circumstances.

In sum, application of the frontier rationale would provide clear, externally set limitations on the FTC's use of its section 5 power and avoid the problem of standardless enforcement posed by the gap-filling model. Tying section 5 enforcement to the Sherman Act would thus reduce the likelihood of false positives, as Sherman Act doctrine has become increasingly narrowly tailored to avoid such risks. Moreover, the Sherman Act's current limitations have been formed alongside the contours of the modern antitrust consensus, so the FTC would run a lower risk of stepping outside the bounds of the current consensus's focus on consumer harm, thus minimizing the risk of congressional and judicial backlash.

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[159] In *Twombly*, the Court arguably rejected such a claim of tacit collusion. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007) ("'[C]onscious parallelism' . . . is 'not in itself unlawful.'" (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993))). However, the Court acknowledged that parallel behavior can be evidence of an agreement. Further economic research and changing theory may indicate that such conduct is stronger evidence of an agreement among competitors and would require less additional evidence than is currently demanded under *Twombly*.

2. Institutional Advantages

In addition to allowing for expanded enforcement while observing the boundaries of the Sherman Act, applying the frontier rationale as an overarching driving principle best takes advantage of the FTC's statutory mandate, institutional expertise, and resources in order to advance the goals of antitrust law. As discussed in greater detail below, the Commission has a "panoply of administrative resources" that it can use to shape "difficult and complex" areas of antitrust law.[160]

The Commission's statutory mandate and the FTC Act's legislative history provide strong support for a preeminent role in exploring evolving practices as well as developing legal doctrine and economic theory. As discussed above, Congress intentionally left section 5 vague in order to "leave it to the commission to determine what practices were unfair"[161] in the face of "human inventiveness"[162] and evolving business practices.[163] Pursuing frontier violations of the Sherman Act gives structure to this mandate. Similarly, driving the development of Sherman Act doctrine also fits well with the agency's mandate as a "quasi-legislative" body of antitrust experts and "source of norm creation."[164] Indeed, the Commission has a "special responsibility for clarification and update of fundamental antitrust doctrines in order to meet the challenges of an ever-evolving economy."[165]

Not only do the FTC's statutory responsibilities dovetail with the frontier rationale, but the Commission's design as an expert agency is also well suited to this progressive role in developing antitrust law. The FTC centralizes in one agency commissioners, specialist administrative law judges, attorneys, and economists, all of whom develop expertise in antitrust law.[166] This means that the Commission can approach issues on all sides, whether in the context of litigation, advisory opinions, or the statements of commissioners. Staff attorneys in the Bureau of Competition look at legal issues; analysts in the Bureau of Economics consider the economic consequences; and commissioners address the political ramifications of doctrinal changes. This structure provides the FTC with a "superior ability to analyze market

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160 Kovacic, *supra* note 75, at 597 (quoting COMM'N TO STUDY THE FTC, AM. BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 64–65 (1969) [hereinafter ABA REPORT]).

161 S. REP. NO. 63-597, at 13 (1914).

162 H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

163 *See supra* notes 40–43 and accompanying text (discussing the Supreme Court's reliance on legislative history).

164 Workshop Transcript, *supra* note 1, at 77–78 (statement of Dan Crane).

165 Leary, *supra* note 81, at 3.

166 Kovacic, *supra* note 75, at 596 n.45 (citing ABA REPORT, *supra* note 160, at 64–65).

conditions to identify conduct that perhaps private plaintiffs are unable to [discover]."[167]

As an adjudicatory body, the Commission shapes Sherman Act doctrine and the analysis of new forms of conduct through opinions in specific cases, advisory opinions, and consent agreements. The FTC can use this platform in order to drive the development of Sherman Act doctrine as suggested in the above discussion of the *Leegin* case.[168] For example, in 2003, the FTC laid out its analysis of cartel-like conduct among competitors in its decision in the *Three Tenors* case.[169] Judicial analysis of such conduct had been evolving over the past few decades, and its exact rules were hazy at best.[170] In deciding *Three Tenors*, the Commission reached beyond the analysis required for the case at hand to set forth its analytical theory more broadly.[171] The FTC's analytical structure was substantially affirmed by the D.C. Circuit[172] and continues to serve as the primary framework for thinking about cartel-like conduct. By following this model for resale price maintenance agreements and other underdeveloped legal areas, the Commission could continue to shape Sherman Act doctrine in important ways.

In its efforts to shape doctrine and insert new economic perspectives into antitrust analysis, the Commission retains a wide range of methods under its advisory authority through which it can lead the debate on cutting-edge antitrust issues. For one, it can use its active amicus program to insert its voice—and thus the public interest—into cases brought by private litigants, as it has done in working to narrow the state action and *Noerr* defenses to Sherman Act violations.[173] The

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167 Workshop Transcript, *supra* note 1, at 134 (statement of Bill Page).

168 *See supra* notes 147–52 and accompanying text (discussing the FTC's potential role in developing the resale price maintenance agreement doctrine after *Leegin*).

169 Polygram Holding, Inc. (*Three Tenors*), No. 9298, 2003 WL 21770765, at *4 (F.T.C. July 24, 2003); *see also* Leary, *supra* note 81, at 2 (noting the success of the *Three Tenors* decision).

170 *Three Tenors*, 2003 WL 21770765, at *11–12 ("Courts, enforcement agencies, and commentators long have strived to refine operational principles for applying the Sherman Act's command that '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal.'" (quoting 15 U.S.C. § 1 (2006))).

171 *See id.* at *11 ("In this section we identify major aspects of the development of horizontal restraints doctrine and present the framework we will apply to the challenged restrictions in this matter.").

172 Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005).

173 *See* Posner, *supra* note 97, at 770 (applauding FTC assaults on Sherman Act exemptions). The *Noerr* doctrine protects as political action efforts to gain governmental protection from competition, while the state-action doctrine permits states to regulate industry in a way that restricts competition. *See* AREEDA & HOVENKAMP, supra note 19, ¶ 201b (*Noerr* doctrine); *id.* ¶ 215a (state-action doctrine).

FTC can publish guidelines and policy statements that advise the business community as to how the Commission will approach certain areas of the law, as it has done in the intellectual property context.[174] Not only will this enhance the prospective guidance function at the heart of the frontier rationale, but courts may adopt the Commission's and Department of Justice's guidelines as binding legal analyses, as they have in the past.[175] Finally, the Commission has a variety of other powers that it uses to move doctrine in one direction or another, including the power to hold workshops, investigate industry-wide practices, and issue studies on unfair practices to the President, Congress, and the public. The combination of these techniques gives the FTC a powerful and holistic role in the treatment of frontier issues.

Finally, in its role as a litigant, the FTC is entitled to substantial deference from the courts as an independent, expert agency, which is crucial for the Commission's ability to bring frontier claims.[176] The Commission must take a broader view than private litigants, as the FTC is charged with acting in the public interest. Courts, then, should be less suspicious of the motivations of the Commission than of doctrinal arguments pushed in the context of private litigation.[177] This deference—supplemented by the respect the modern Commission receives and the limited impact of a prospective remedy—is the most likely way that Sherman Act doctrine could be expanded into frontier areas in the near future. As noted above, courts are hesitant to expand the reach of the antitrust laws, so any new developments may require the FTC to use all its institutional strengths.[178]

Furthermore, Supreme Court decisions on procedural law have limited the ability of plaintiffs to bring suit under the Sherman Act in Article III courts, magnifying even more the FTC's importance as a litigant if Sherman Act doctrine is to respond to evolving business practices. In private antitrust suits, only those who purchase directly

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[174] *E.g.*, U.S. Dept. of Justice & FTC, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

[175] *Cf.* Fox et al., *supra* note 15, at 281 (noting that the Department of Justice's Merger Guidelines "became the most important document for substantive merger analysis under U.S. law").

[176] *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (noting the deference given to the FTC).

[177] *See* Workshop Transcript, *supra* note 1, at 110–11 (statement of Dan Crane) (citing "[i]nstitutional expertise" and "no suspect motive" as advantages of the FTC).

[178] Peritz, *supra* note 153, at 7 ("With regard to the phobic disapproval of private enforcement expressed by conservative scholars and some Supreme Court Justices, § 5 seems to be the best vehicle for ex ante evaluation of commercial conduct rather than ex post enforcement and retrospective compensation . . . .").

from the infringer have standing to sue. In practice, this often means that only intermediaries can sue, not end consumers who in fact pay the inflated prices.[179] Once past the standing hurdle, plaintiffs bringing Sherman Act claims face a high bar for surviving a motion to dismiss under the Court's recent changes to pleading doctrine in *Twombly* and *Iqbal*.[180] A court might be more likely to dismiss a private plaintiff's application of Sherman Act principles to new conduct that does not fit into an existing doctrinal category on the grounds that an alleged violation premised on that conduct is "implausible."[181] This may be especially problematic given the limited information available to plaintiffs before they file their complaints.[182] By contrast, that the Commission brings cases in an administrative tribunal exempts it from many of the restrictive procedural rules of Article III courts.[183] In particular, the FTC's broad investigatory powers allow for pre-complaint discovery, so the Commission would likely be able to put together a more persuasive case that a new form of conduct fits the standards of the Sherman Act. In all of these ways, the FTC has distinct institutional advantages to support a preeminent role in shaping the development of antitrust law under a frontier approach.

C. Counterarguments

The frontier rationale represents a compromise between those who support broad antitrust enforcement and those who worry that such enforcement risks chilling legitimate business conduct. This theory does not allow the FTC to use section 5 to the broadest extent endorsed by the Supreme Court,[184] but neither does it limit enforce-

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[179] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977) (establishing that indirect purchasers lack standing for antitrust suits); *see also* Pitofsky, *supra* note 2, at 174 (describing standing rules as limitations on private enforcement).

[180] *See* William H. Page, *The FTC's Procedural Advantage in Discovering Concerted Action*, ANTITRUST SOURCE, Feb. 2009, at 1, 3, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Page2_26f.authcheckdam.pdf (arguing that section 5 can be used as a procedural advantage "to the extent that courts do not allow sufficient pre-answer discovery").

[181] *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.").

[182] *See* Spencer, *supra* note 6, at 459 (arguing that the *Twombly* standard will be particularly difficult to satisfy in conspiracy claims, such as claims of anticompetitive agreements under section 1 of the Sherman Act).

[183] *See* Hovenkamp, *supra* note 21, at 876–77 (citing the FTC's use of "experts as magistrates . . . rather than generalist judges" and that "the FTC operates under the federal Administrative Procedure Act, which permits more flexible rules of procedure and evidence than traditional judicial processes" as advantages over federal courts).

[184] *See supra* Part I.B (discussing the Supreme Court's broad interpretation of section 5).

ment to pursuing rote Sherman Act violations. Accordingly, the frontier position may be subject to challenge from both sides.

In defining violations of the Sherman Act, the FTC must be careful to maintain its "hard earned reputation of being careful, balanced, [and] active."[185] If it stretches section 5 too far, it risks drawing the wrath of Congress and the courts, and there is a concern that the Commission may "get too far ahead of [the] Court's interpretation of the Sherman Act."[186] In applying Sherman Act doctrine to frontier cases, critics worry that the FTC may use section 5 to make an end run around the Supreme Court's recent, more limited interpretations of the Sherman Act.[187] However, the FTC can avoid these problems if it takes seriously the lesson from the trio of 1980s circuit cases and its history with Congress.[188] In particular, the FTC cannot use section 5 to make conduct illegal that is clearly legal under the Sherman Act—a lesson that Commissioner Rosch and Chairman Leibowitz seem to have already accepted as a limitation on section 5. Thus, the FTC must remain committed to rigorous analysis under the Sherman Act.[189]

Commissioner Kovacic, an advocate of limited enforcement, expressed concern in his dissent in the *N-Data* consent agreement that follow-on actions by private plaintiffs may be more of a threat under a frontier rationale than its proponents suggest.[190] Although it is well accepted that actions under section 5 do not have collateral estoppel effects in follow-on federal suits, states with "baby FTC Acts" often adopt FTC precedent and include their own private treble damages

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185 Workshop Transcript, *supra* note 1, at 64 (statement of Robert Pitofsky).

186 *Id.* at 132 (statement of Dan Crane).

187 *See id.* at 65 (statement of Robert Pitofsky) (cautioning that "[t]he Federal Trade Commission really cannot overrule the Supreme Court" in attempting to reach forms of conduct that are legal under Sherman Act standards). This criticism similarly applies to using the Commission's investigatory powers too broadly to get around the limits created by *Twombly* and other procedural limitations on private plaintiffs. The FTC must be careful to make sure that it is not using its powers on the behalf of specific, self-interested potential plaintiffs; such excesses might leave the FTC open to charges of abuse of process and revocation of its congressionally granted authority. *See id.* at 104–06 (statement of Robert Pitofsky) (arguing that pretending *Twombly* did not happen "is a prescription for getting this agency at cross purposes with Congress and with the courts"). *But cf.* Page, *supra* note 180, at 3–4 ("The FTC's own internal standards, however, provide procedural safeguards, which should be used to avoid abuses.").

188 *See supra* Part I.C.1 (discussing the trio of circuit court cases that placed limits on the FTC's broad section 5 authority).

189 *See* Creighton & Krattenmaker, *supra* note 14, at 4–5 (describing the threat to consensus if the FTC were to not analyze section 5 cases under Sherman Act standards).

190 *See* Negotiated Data Solutions LLC, No. 051-0094, 2008 WL 258308, at *23–24 (F.T.C. Jan. 22, 2008) (Dissenting Statement of Commissioner Kovacic) ("The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition . . . or unfair acts or practices . . . .").

provisions. Thus, a section 5 violation may not be entirely limited to prospective relief. However, this has not happened after the 2008 *N-Data* decision, so this threat appears to be minimal.[191]

Echoing this concern about follow-on suits, Commissioner Kovacic and Mark Winerman have further critiqued the mechanism underlying the frontier rationale. Although Kovacic and Winerman acknowledge the value of the FTC's prospective remedies in pursuing frontier cases, they worry about the mechanism by which a "court [can] announce a decision under Section 5 without providing a precedent for a plaintiff to use when it seeks to persuade a different court to impose treble damages for prior conduct."[192] Should this threat materialize into treble damages without prior notice, many of the Commission's institutional advantages would cease to apply, as courts would once again become reluctant to expand Sherman Act doctrine in a meaningful way. Kovacic and Winerman themselves provide a possible solution: calculating damages for such conduct only after the point in time when the FTC has "enunciated the relevant standard."[193] This method seems administratively and economically challenging, though even an approximation of this result would increase fairness and may be the only way the Sherman Act will be able to expand.[194]

On the other end of the spectrum, some have argued that "marry[ing] the meaning of . . . Section 5 to the Sherman Act" will diminish "all of the advantages of having an administrative tribunal that's supposed to be expert and independent and not saddled with that baggage."[195] By using its statutory authority to interpret the law committed to the Department of Justice's authority, the FTC will not receive the full measure of deference it deserves under the FTC Act. However, a compromise on the limits of statutory authority may be necessary to ensure that the FTC can use its institutional tools while avoiding the temptation of straying too far from careful limiting principles. Moreover, the FTC cannot have it all—attempting to fulfill the

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191 *See* Rosch, *supra* note 34, at 2 (noting that "there was no deluge of such suits" after *N-Data*).

192 Kovacic & Winerman, *supra* note 13, at 948.

193 *Id.* at 948 n.84.

194 Kovacic and Winerman argue that it would be difficult to justify this limitation on damages in a later private action under the Sherman Act. *Id.* Although this may be true, fear of hypothetical actions following an FTC action should be significantly less worrisome than leaving these cases to private plaintiffs under the Sherman Act in the first instance. Morever, plaintiffs facing high procedural and substantive hurdles and a judiciary fearful of high damages may see limiting damages to the time after the FTC's decision as a beneficial strategic decision.

195 Workshop Transcript, *supra* note 1, at 79 (statement of Dan Crane).

gap-filling and frontier functions at the same time may lead to neither being successful. The Commission does not have unlimited resources, both in terms of money and staff time, so it is important for the Commission to pick the way in which its efforts can have the most significant effect. Given the prominence of Sherman Act doctrine in antitrust law, pushing the boundaries of that statute will provide the greatest impact while presenting the least risk of overextension and backlash.

Conclusion

In 1969, the American Bar Association's Committee To Study the Federal Trade Commission released a report on the status of the Commission and its suggestions for enforcement priorities for the future.[196] The report judged the FTC's performance by, among other metrics, "whether the agency has broken new ground and made new law by resort to its unique administrative resources."[197] Forty years later, that measure of performance applies equally well in determining how the Commission should use its section 5 power.

This Note has argued that using section 5 of the FTC Act to shape the frontiers of Sherman Act doctrine optimally balances the need to respond to evolving economic practices, developing economic thought, and changing legal doctrine while providing external constraints on the institutional reach of the Commission. The FTC's institutional mission and structure, as well as the broad substantive reach and limited enforcement mechanisms of section 5, make the FTC uniquely suited to take the lead in shaping the future of antitrust law. If the Commission remains carefully but creatively tied to the Sherman Act, it will remain within the current consumer welfare consensus in the antitrust community and will avoid backlash from the courts or Congress for its enforcement initiatives. This is a formula for a successful and evolving FTC enforcement agenda for years to come.

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196 ABA Report, *supra* note 160. *See generally* Kovacic, *supra* note 75, at 592–602 (discussing the ABA report).

197 ABA Report, *supra* note 160, at 65.