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UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

WHAT IS THE INTELLIGIBLE PRINCIPLE?

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ABSTRACT

Section 5 of the Federal Trade Commission (FTC) Act of 1914 declared “unfair methods of competition” (UMC) unlawful. Members of Congress appreciated that the Constitution did not permit the delegation of legislative power to a commission. And they believed the UMC prohibition articulated what courts call an “intelligible principle” governing its application. But the intelligible principle of the UMC prohibition has never crystalized, in large part because the FTC began to ground its decisions on Sherman Act law. This article aims to (1) construct the intelligible principle members of Congress thought they provided in enacting the UMC prohibition, (2) determine how a court likely would interpret the prohibition today, and (3) critique the FTC’s 2022 policy statement on the prohibition.

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DISCLAIMER

Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act

What Is the Intelligible Principle?

The Federal Trade Commission (FTC) Act[1] and the Clayton Act[2] supplemented the Sherman Act.[3] The FTC Act added a new enforcer and a new prohibition—on "unfair methods of competition" (the UMC prohibition).[4] Members of Congress appreciated that the Constitution did not permit the delegation of legislative power to a commission[5] and acted on the belief that the indefinite UMC prohibition would pass constitutional muster and usefully guide both the FTC and the courts.

An indefinite prohibition does not unconstitutionally delegate if it conveys an "intelligible principle."[6] As Justice Elena Kagan explained, the "nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides."[7] The Supreme Court, however, has never fully worked out the instructions for the UMC prohibition.

This article reviews the origins and legislative history of the FTC Act to glean the instructions Congress intended and identifies seven points on which members of Congress appear to have agreed. These seven points remain a useful starting point for interpreting the UMC prohibition. The review also identifies an overarching conceptual standard for deciding whether a practice or course of conduct violates the UMC prohibition, although agreement on this standard is less clear.

The UMC prohibition's draftsman and its leading supporters in the Senate asserted an efficiency standard developed by economists. They all argued that efficiency-based competition on the merits was "fair," while excluding rivals on a basis other than efficiency was "unfair." Although consensus on this concept was not evident, no member of Congress expressed disagreement. This standard can be a critical limiting principle for the UMC prohibition.

This article also reviews jurisprudence on the UMC prohibition, which is less revealing than its origin story. Reasoning that the spirit of the Sherman Act animated the UMC prohibition,

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1 Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41–58).

2 Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12–18, 19, 21–27).

3 Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7).

4 FTC Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45(a)(1)). The Wheeler-Lea Act amended Section 5 by inserting a prohibition on "unfair or deceptive acts or practices." Act of Mar. 21, 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111. Enforcing that prohibition is part of the FTC's consumer protection mission and is not discussed in this article.

5 *See, e.g.*, 51 CONG. REC. 13063–64 (1914) ("[I]f this proposed law does mean . . . that this commission may declare a thing unlawful which Congress has not declared unlawful . . . , then it is the abdication of legislative power, pure and simple, and is the most revolutionary proposition that has come before Congress in the long history of this Republic." (July 31 comments of Senator Moses E. Clapp (R-MN))). *See also* ICC v. Goodrich Transit Co., 224 U.S. 194, 214 (1912) ("The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.").

6 *See* J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power."). *See also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–75 (2001); Mistretta v. United States, 488 U.S. 361, 371–73 (1989).

7 Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

courts declared that it must reach all anticompetitive conduct. But development of the law stalled before the prohibition's intelligible principle could crystalize. The Supreme Court last interpreted the UMC prohibition in 1972, and the last significant appellate decision was in 1984.

Drawing on antitrust developments over the past half-century, as well as all that came before, this article articulates four basic principles:

1. The UMC prohibition serves only to protect the competitive process.
2. The UMC prohibition does not interfere with competition on the merits.
3. The UMC prohibition protects only the public interest in competition.
4. The UMC prohibition reaches beyond the Sherman and Clayton Acts only to conduct that is anticompetitive on its face or has a reasonable probability of significantly harming competition.

This article also critiques the FTC's November 10, 2022, policy statement on the UMC prohibition, which was meant "to assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act."[8] The statement paints a misleading portrait of congressional intent and interprets the UMC prohibition in a manner at odds with the spirit of the Sherman Act.

I. THE ORIGIN AND LEGISLATIVE HISTORY OF THE FTC ACT

A. From Standard Oil to the Senate Bill

The origin story for the FTC Act could begin with the 1903 creation of the Bureau of Corporations,[9] with the 1890 enactment of the Sherman Act,[10] or even earlier.[11] But it could not begin later than the announcement of the *Standard Oil* decision[12] on May 15, 1911. The Supreme Court's adoption of a rule of reason was condemned for judicial activism and for robbing the Sherman Act of certainty and potency.[13] Corrective legislation was introduced within days.[14]

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[8] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act 2 (Nov. 10, 2022) (hereinafter FTC Policy Statement), https://www.ftc.gov/system/files/ftc_gov /pdf/P221202Section5PolicyStatement.pdf.

[9] The Bureau of Corporations was created as part of the new Department of Commerce and Labor. Ch. 552 § 6, 32 Stat. 825, 827–28 (1903).

[10] See Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 230 (1980).

[11] See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 6 (2003).

[12] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[13] *See, e.g.*, WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 94 (1914) ("[T]he phrase 'the rule of reason' brought out the condemnations of everybody of demagogic tendencies prominent in politics, and evoked from statesmen of little general information and less law, proposals to amend the statute, 'to put teeth' into it."); James M. Beck, *The Quandary*, 194 N. AM. REV. 55, 59 (1911) ("hard-headed business men either recognize or will soon recognize that presidents, attorneys-general, district attorneys, grand juries, petit juries, and courts will soon differ as to what the 'rule of reason' is"); William J. Bryan, *The Trusts Have Won*, THE COMMONER, May 26, 1911, at 1 ("The real meat of the decision is to be found in the AMENDMENT of the anti-trust law to meet the demands of the trusts. For several years the trusts have been demanding the very amendment that the court has read into the law.").

[14] Four bills were introduced in the Senate before the end of the week: S. 2370, S. 2374, S. 2375, and S. 2433 of the 62d Congress.

Senator Robert M. La Follette (R-WI) recruited Louis D. Brandeis to draft legislation establishing a rebuttable presumption of unreasonableness for certain practices.[15] Senator Francis G. Newlands (D-NV) proposed creation of an "administrative tribunal like the Interstate Commerce Commission, charged with powers over Interstate trade."[16] His bill to create an "interstate trade commission"[17] would have created new antitrust machinery[18] but not a new prohibition.[19]

On July 26, 1911, the Senate adopted Resolution 98 directing the Committee on Interstate Commerce to explore "what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce."[20] Under Chairman Moses E. Clapp (R-MN), the committee began hearings on November 15, 1911. The committee heard from 103 witnesses, including Louis Brandeis.

During 1911–12, "unfair competition" became a convenient umbrella for methods of anticompetitive exclusion.[21] An important economics text used it to describe practices of the trusts,[22] and prominent economist John Bates Clark[23] used it in the same way. Clark defined the term to include "any practice whose natural result is to make survival depend on other qualities than industrial efficiency."[24] Harvard law professor Bruce Wyman supported legislation to create an interstate trade commission and prohibit "unfair competition."[25] And Louis Brandeis used the term[26] to describe the conduct he urged the court to ban in the remedial decree following the *American Tobacco* decision.[27]

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15 S. 3276, 62d Cong. (introduced Aug. 19, 1911).

16 47 CONG. REC. 1227 (1911) (May 16). *See also infra* note 25.

17 S. 2941, 62d Cong.; 47 CONG. REC. 2619–21 (1911) (July 5). Senator Newlands introduced a substitute bill with the same number on August 21, 1911, 47 CONG. REC. 4259, and a new bill, S. 5485, on February 26, 1912, 48 CONG. REC. 2435–36. Newlands introduced the same bill in the next Congress. S. 829, 63d Cong.; 50 CONG. REC. 163–64 (1913) (April 12).

18 *See* Letter from Herbert Knox Smith, Commissioner of Corporations, to Senator Francis G. Newlands (n.d.), S. REP. NO. 63-597, at 28, 31 (1914); 51 CONG. REC. 11095 (1914) ("It has been obvious since the Supreme Court decisions on the Standard Oil and Tobacco Co. cases that the public is ready and anxious for an advance to some such administrative system of regulation by the Federal Government." (June 25)).

19 The original Newlands bill, S. 2941, 62 Cong., would have created a register of large companies and required them to provide information to the FTC. Such registration was thought to provide a stamp of approval, and the bill provided for revocation of the registration for violating the Sherman Act or for "the use of materially unfair or oppressive methods of competition." *See* S. REP. NO. 63-597, at 16–17 (1914).

20 S. RES. 62-98, 47 CONG. REC. 3225–26 (1911) (July 26).

21 For a slightly earlier use of the term, see Francis Walker, *The Causes of Trusts and Some Remedies for Them*, 11 AM. ECON. ASS'N. Q. 290 (1910). Walker was a Ph.D. economist who worked at the Bureau of Corporations from 1904 to 1915, then became the FTC's chief examiner.

22 2 F. W. TAUSSIG, PRINCIPLES OF ECONOMICS xv, 430, 432 (1911).

23 Clark was a prolific writer on the trust problem and drew attention to the exclusionary conduct at which the 1914 antitrust legislation was aimed. *See* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 139–55 (2020).

24 JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 103 (1912).

25 Bruce Wyman, *Unfair Competition by Monopolistic Corporations*, 42 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1912). Wyman likely was inspired by H.R. 18711, 62d Cong., introduced January 25, 1912. 48 CONG. REC. 1324 (1912). *See also id.* at 2240–44 (Feb. 20 speech of Rep. Dick Thompson Morgan (R-OK) in support). It would have created an interstate trade commission and required marketplace conduct to be "just, fair, and reasonable, and not contrary to public policy or dangerous to the public welfare." *Id.* at 2244–45.

26 Objections of the National Cigar Leaf Tobacco Association, The Cigarette Manufacturers' Association, and the Independent Tobacco Salesmen's Association to the Plan of Disintegration, Filed by the American Tobacco Company and others October 16, 1911, in INDUSTRIAL COMBINATIONS AND TRUSTS 485, 493 (William S. Stevens ed., 1913).

27 United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

In the 1912 election campaign, Progressive Theodore Roosevelt advocated antitrust reforms including the creation of an "inter-state industrial commission, which should exercise full supervision over big industrial concerns doing an inter-state business."[28] Democrat Woodrow Wilson favored antitrust reform but warned "the people of this country to beware of commissions of experts."[29] Wilson objected to "resign[ing] the government over to experts," to "regulation . . . [by] a federal commission," and to trading "the certainty of the law" for "the discretionary power of individuals."[30] Incumbent William Howard Taft unsuccessfully defended the status quo.[31]

The Senate Committee on Interstate Commerce completed the inquiry pursuant to Resolution 98 with a February 1913 report by Senator Albert B. Cummins (R-IA).[32] The "Cummins Report" found it "inconceivable that in a country governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve."[33] The report also voiced concern as to how courts would treat practices that had been "unequivocally condemned by the Supreme Court."[34] These fears were not fully allayed until the Supreme Court held price fixing per se unlawful in 1927.[35]

Without action, the Cummins Report warned, the United States could "cease to be a Government of law and become a Government of men and, moreover, of a very few men, and they appointed by the President."[36] To avert that fate, the report ironically recommended establishing a presidentially appointed commission of even fewer men "for the better administration of the law and to aid in its enforcement."[37]

After winning in an electoral landslide, Woodrow Wilson was sworn into office on March 4, 1913. At the same time, the Democrats took control of the Senate and boosted their majority in the House to two-thirds. Wilson appointed Joseph E. Davies as the Commissioner of Corporations (head of the Bureau of Corporations), and in December 1913, Davies made recommendations to

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[28] THEODORE ROOSEVELT'S CONFESSION OF FAITH BEFORE THE PROGRESSIVE NATIONAL CONVENTION, AUGUST 6, 1912, AT 27 (Progressive Party pamphlet). Roosevelt advocated the creation of the commission in campaign speeches. *See* BULL MOOSE ON THE STUMP: THE 1912 CAMPAIGN SPEECHES OF THEODORE ROOSEVELT 41–42, 85–86, 171, 181, 205 (Lewis L. Gould ed., 2008). See also Theodore Roosevelt, The Trusts, the People, and the Square Deal, 99 OUTLOOK 649, 655 (1911) ("We should enter upon a course of supervision, control, and regulation of these great corporations" by a "body similar to the Inter-State Commerce Commission.").

[29] A CROSSROADS OF FREEDOM: THE 1912 CAMPAIGN SPEECHES OF WOODROW WILSON 160 (John Wells Davidson ed., 1956). *See id.* at 162 ("I don't want a smug lot of experts to sit down behind closed doors in Washington and play Providence to me.").

[30] *Id.* at 83, 97, 265. *See id*. at 83 ("God forbid that in a democratic country we should resign the task and give the government over to experts.").

[31] *See, e.g.*, William Howard Taft, *Annual Message to Congress* (Dec. 5, 1911), *in* 17 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7644–52 (Bureau of National Literature, n.d.); William Howard Taft, *Address*, *in* INDUSTRIAL COMPETITION AND COMBINATION 273 (American Academy of Political and Social Science, 1912).

[32] CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE, S. REP. NO. 62-1326 (1913); 49 CONG. REC. 4126–32 (1913) (hereinafter Cummins Report).

[33] *Id.* at 10.

[34] *Id.* at 12.

[35] *See* United States v. Trenton Potteries Co., 273 U.S. 392, 396–400 (1927). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

[36] Cummins Report, *supra* note 32, at 11.

[37] *Id.* at 12. Cummins introduced a bill a year earlier that would have, among other things, created "The Trade Commission," with broad investigative powers. S. 5451, 62d Cong. (introduced Feb. 26, 1912); 48 CONG. REC. 2434 (1912).

Wilson on antitrust legislation. Davies supported creation of an interstate trade commission without any hint that it would enforce a significant new conduct prohibition.[38]

On January 20, 1914, Wilson presented his antitrust program to a joint session of Congress. He advocated legislation establishing several specific conduct prohibitions (the Clayton Act), and legislation creating "an administrative body, an interstate trade commission," to be "a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided" (the FTC Act).[39]

A bill to create an interstate trade commission was immediately introduced.[40] But the bill that became the FTC Act, H.R. 15613, was introduced on April 13 by Representative J. Harry Covington (D-MD), and favorably reported by the House Committee on Interstate and Foreign Commerce the next day.[41] Freshman Representative Raymond B. Stevens[42] (D-NH) objected because the commission would have "only the power of investigation and recommendation."[43] He had introduced a bill that would have banned "unfair and oppressive competition."[44]

The Stevens bill had been drafted by his friend George Rublee,[45] who was working on another matter with Louis Brandeis,[46] an unofficial adviser to President Wilson. Rublee unsuccessfully approached Wilson administration officials seeking support for the Stevens bill.[47] Rublee then had *Harper's Weekly* editor Norman Hapgood write to Wilson, who eventually agreed to meet with

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[38] *See* Joseph E. Davies, Memorandum of Recommendations as to Trust Legislation (Dec. 27, 1913) (WWP18252, First Year Wilson Papers, Woodrow Wilson Presidential Library & Museum, Staunton, Virginia), http://presidentwilson.org/items/show/29664. Davies became the first FTC chairman, but he is better known today for being the second U.S. ambassador to the U.S.S.R. and the third husband of Marjorie Merriweather Post.

[39] TRUSTS AND MONOPOLIES, ADDRESS OF THE PRESIDENT OF THE UNITED STATES BEFORE A JOINT SESSION OF CONGRESS, TUESDAY JANUARY 20, 1914, H.R. DOC. NO. 63-625, at 6. Wilson also indicated that the commission should assist the courts in crafting antitrust remedies.

[40] H.R. 12120, 63d Cong.; 51 CONG. REC. 2142–44 (introduced January 22, 1914, by Rep. Henry D. Clayton (D-AL)); S. 4160, 63d Cong.; 51 CONG. REC. 2256–57 (introduced January 24, 1914, by Sen. Newlands).

[41] H.R. REP. NO. 63-533 (1914). The committee was able to act immediately because it had been considering H.R. 12120 since January 22. *See supra* note 40. Representative Covington spoke in favor of H.R. 15613 on May 19. 51 CONG. REC. 8840–44 (1914).

[42] Stevens unsuccessfully sought a Senate seat in 1914, then was appointed as a special counsel when the FTC was initially staffed in 1915. He served as an FTC commissioner during 1933.

[43] H.R. REP. NO. 63-533, pt.2, at 1 (1914).

[44] H.R. 15660, 63d Cong.; 51 CONG. REC. 2142–44 (1914) (Apr. 14). Representative A. Walter Lafferty (R-OR) had proposed a similar prohibition as an amendment to H.R. 15613. *See* S. REP. NO. 63-533 pt.2, at 12 (1914).

[45] *See* George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 PROC. ACAD. POL. SCI. CITY N.Y. 114, 116 (1926). Rublee's nomination as one of the original FTC commissioners was strongly opposed by influential Senator Jacob Gallinger (R-NH), in part because Rublee managed Raymond Stevens's campaign when he opposed Gallinger in the 1914 election. Other senators were unhappy with Rublee's lobbying on the FTC Act, and Republicans opposed Rublee because he was a Progressive. *See G.O.P. Senators Irate*, WASH. POST, Feb. 24, 1915, at 3. Rublee served for 14 months without confirmation after getting a recess appointment.

[46] For additional details on the involvement of Brandeis, Davies, and Rublee with the 1914 antitrust legislation, see GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 92–102 (2009); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 399–404 (1946); MARC ERIC MCCLURE, EARNEST ENDEAVORS: THE LIFE AND PUBLIC WORK OF GEORGE RUBLEE 85–104 (2003); Elizabeth Kimball MacLean, *Joseph E. Davies: The Wisconsin Idea and the Origins of the Federal Trade Commission*, 6 J. GILDED AGE & PROGRESSIVE ERA 248 (2007); Winerman, *supra* note 11, at 32–38, 54–56, 63–68.

[47] See Reminiscences of George Rublee, 109–10 (interview by Wendell Link) (1951), https://dlc.library.columbia.edu/catalog/cul:bzkh18952x.

Rublee. In Rublee's telling decades later, Brandeis surprisingly lent his support at the meeting, and Wilson was sold.[48]

Rublee later wrote that he had used the term "unfair competition" in crafting a new prohibition because he thought it had "a recognized meaning in the terminology of anti-trust law," in that it had been used in several bills along the lines of the Clayton Act and in "various decrees" in Sherman Act cases.[49] Rublee also noted that the Supreme Court had described Standard Oil's "local price cutting at the points where necessary to suppress competition" as one of its "unfair methods of competition."[50]

B. The Senate Substitute Bill

H.R. 15613 passed in the House on June 5 and was referred to the Senate Committee on Interstate Commerce, now chaired by Senator Newlands. On June 13, the committee reported a substitute bill dubbing the agency the "Federal Trade Commission" and incorporating the new Section 5 drafted by George Rublee.[51] Section 5 began: "That unfair competition in commerce is hereby declared unlawful." Ranking Member Moses Clapp later related: "The Senate committee met one afternoon . . . and we voted to report section 5 out . . . ."[52] The committee clearly acted in accord with the president's wishes, and statements by Section 5 proponents in the ensuing debate supported the president's objectives.

Senator Newlands immediately introduced the substitute bill[53] in which Section 5 "was practically a reprint of the bill introduced in the House by Congressman Stevens of New Hampshire."[54] Senator Henry F. Lippitt (R-RI) exaggerated only slightly when he later asserted that the 28 days of Senate debate on the bill were "almost entirely taken up by a discussion on the part of the lawyers in this body of the legal meaning of one clause in the bill: that is, one clause of section 5."[55]

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[48] *Id.* at 112–14. The meeting was in late May. Arthur Link, the leading historian on Woodrow Wilson, also described a June 10 meeting at which Wilson actually announced his decision. *See* ARTHUR S. LINK, WILSON: THE NEW FREEDOM 438 (1956). *Harper's Weekly* immediately supported creating the FTC and opposed the Clayton Act. *The Trust Program*, HARPER'S WKLY., June 13, 1914, at 4 (unsigned editorial attributed to Rublee).

[49] Rublee, *supra* note 45, at 116. Rublee likely was recalling S. 3276 and S. 4931, 62d Cong., introduced by Senator La Follette, which used the phrase "any unfair or oppressive methods of competition" in a proposed new Section 10 of the Sherman Act. *See* 47 CONG. REC. 4183–93 (1911). The bill was reintroduced as S. 2552, 63d Cong. Similar legislation was introduced in the House by Representative Augustus O. Stanley (D-KY). H.R. 26130, 62d Cong; H.R. 5676, 63d Cong. A search of Sherman Act decrees reveals a single use of the term "unfair competition" before Rublee adopted it—United States v. Central-West Publ'g Co., No. 30888 (N.D. Ill. 1912) (prohibiting threatening specified acts or "any other method of unfair competition"). *See* DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890–JANUARY 1, 1918, at 359, 361 (Roger Shale ed., 1918). This decree was inserted into the record during the Senate debate on H.R. 15613. *See* 51 CONG. REC. 12998–99 (1914) (July 30). Also inserted into the record during the debate were three decrees supplied by Rublee. *See id.* at 11229–30 (June 27). They did not use the term "unfair competition."

[50] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 43 (1911). The term "unfair methods of competition" had been used by the Department of Justice from the outset of the case. *See* Complaint at 97, 173–74, 176, 178, 181–82, United States v. Standard Oil Co. of N.J., 173 F. 177 (C.C. E.D. Mo. 1909) (Equity No. 5371, Nov. 15, 1906).

[51] S. REP. NO. 63-597, at 1, 3–4 (1914).

[52] 51 CONG. REC. 13062 (1914) (July 31).

[53] *Id.* at 10376–78.

[54] *Id.* at 13062.

[55] *Id.* at 13163 (Aug. 3).

In opening the debate on June 25, 1914, Senator Newlands immediately raised the delegation issue:

> Unfair competition, it is claimed by many, has no legal significance, and Congress in giving this power to the commission practically delegates the power to legislate as to what practices are under the condemnation of law. . . . [I]t is claimed that Congress has no power to evade that duty of legislation and to turn it over practically to the commission itself by declaring unfair competition to be unlawful and then leaving it to the commission to determine what practice constitutes unfair competition.[56]

Senator Newlands offered two responses: First, it "would be utterly impossible for Congress to define the numerous practices which constitute unfair competition."[57] Second, the Supreme Court upheld other indefinite statues.[58] And he argued that "it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination."[59]

Senator Cummins conceded: "Every lawyer understands that we can not delegate to a commission legislative power; that when we give to an administrative body the execution of a law of Congress we must at the same time give it a standard, a guide and rule which it is to apply . . . ."[60] He argued that the bill would not give the FTC "an unlimited, unbridled license or authority."[61] "Unfair competition," he asserted, was "that competition which is resorted to for the purpose of destroying competition of eliminating a competitor, and of introducing monopoly."[62]

When Senator Joseph T. Robinson (D-AR) argued that "unfair competition" already had "a more or less fixed meaning in law," which was palming off goods as those of another,[63] Senator Newlands responded that a "law itself at any time can create a standard."[64] He offered real-world examples of "generally recognized" methods of unfair competition, beginning with "[l]ocal price cutting" for the purpose of "injuring and destroying the business of the competitor," and he observed that prohibiting only enumerated practices was problematic because "new practices would be invented that would not come within the wording of the law."[65]

Senator Newlands also referred to the "works of economists upon this new phase of industrial organization,"[66] including an article by Columbia instructor William S. Stevens listing the forms of unfair competition he had used as examples.[67] While Senator Newlands found it impossible to

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[56] *Id.* at 11084.

[57] *Id.*

[58] *Id.* at 11084–86.

[59] *Id.* at 11090 (citing, inter alia, Nash v. United States, 229 U.S. 373, 376–78 (1913) (upholding criminal Sherman Act enforcement)).

[60] *Id.* at 11103.

[61] *Id.* at 11104.

[62] *Id.*

[63] *Id.* at 11107.

[64] *Id.* at 11108.

[65] *Id. See also id.* at 11112 ("unfair competition covers . . . every practice and method between competitors upon the part of one against the other that is against public morals").

[66] *Id.* at 11112.

[67] William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282 (1914). Senator Newlands also might have referred to several other recent articles that had used the term "unfair competition": E. Dana Durand, *The Trust Problem*, 28 Q.J. ECON. 381 (1914);

formulate a general rule, Stevens compiled his list using a rule equivalent to that of John Bates Clark:[68] "methods which destroy the efficient along with the inefficient are economically unjustifiable and must be regarded as unfair."[69]

Senator James A. Reed (D-MO) then spoke at length about the delegation issue. He observed that there was "no rule to guide us" either in the bill or in pre-existing law, and that "Congress can not create a board and empower it to govern by its own reason."[70] He then reviewed supporting case law.[71]

On June 26, Senator Henry F. Hollis (D-NH) responded to Senator Reed with cases upholding indefinite statutes.[72] He was interrupted by Senator George A. Sutherland (R-UT), who would vote against the bill[73] and who later served on the Supreme Court. Senator Sutherland explained that the FTC would be performing a legislative function every time it declared a practice unfair for the first time because it would not be applying a general standard to specific facts.[74]

Senator J. Hamilton Lewis (D-IL) argued that "unfair competition" is "not a new phrase" but rather "a mere adaptation of expressions from the decisions of the courts."[75] Senator William E. Borah (R-ID) asked, if "unfair competition has come to have a settled meaning in the law, . . . why do we not put into the law a definition of what is unfair competition."[76]

On June 27, Senator Robinson recited the practices that economist William Stevens deemed "unfair competition,"[77] and Robinson also argued that Stevens's general rule was understood in the business world: "Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling; while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'"[78]

Senator Borah was concerned that competition benefiting customers might be deemed unfair and asked "for a rule which can be followed successfully and intelligently."[79] When he observed that "the Sherman law has not thus far aided the man in the street," Senator Cummins interjected that "the attempt is to go further and make some things offenses that are not now condemned by

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Willard E. Hotchkins, *Recent Trust Decisions and Business*, 4 AM. ECON. REV. (PAPERS & PROC.) 158 (1914); E. Dana Durand et al., *Recent Trust Decisions and Business—Discussion*, 4 AM. ECON. REV. (PAPERS & PROC.) 173 (1914).

[68] The equivalence was not coincidental. John Bates Clark was the best known U.S. economist and mainstay of the small economics department in which Stevens was a junior instructor.

[69] Stevens, *supra* note 67, at 283.

[70] 51 CONG. REC. 11113 (1914).

[71] *Id.* at 11113–16.

[72] *Id.* at 11177–79.

[73] Senators who voted against the Senate substitute bill are so designated in this review of the debate. Most of them did not cast a vote on the conference report.

[74] 51 CONG. REC. 11178–79 (1914).

[75] *Id.*

[76] *Id.* at 11189.

[77] *Id.* at 11230. Senator Robinson indicated that the article by William Stevens had been brought to his attention by Congressman Raymond Stevens. The same list of practices was used in the July 30 comments of Senator Borah. *Id.* at 11300.

[78] *Id.* at 11231.

[79] *Id.* at 11232–34. On June 29, he added that Congress should act on the premise that the "vast majority of the business men of this country are willing and anxious to do business on an honest basis." *Id.* at 11301.

the antitrust law. That is the only purpose of section 5—to make some things punishable, to prevent some things, that can not be punished or prevented under the antitrust law."[80]

Senator Cummins began his lengthy June 30 speech in support of the bill with a simple premise: "We have adopted in this country the policy of competition. We are trying to preserve competition as a living real force in our industrial life . . . ."[81] He then observed that the Sherman Act created "a broad twilight zone in the business of this country in which it is difficult to see whether a given act has been condemned by the law."[82]

Senator Cummins assured that, "The only unfair competition that [Section 5] will ever touch is that competition which has for its object the destruction of competition."[83] And he assured that "the President has indorsed section 5."[84] He challenged anyone to provide a definition of "unfair competition" that was "as certain, as easily understood, as surely applied, as the words themselves," and he insisted that the "business community knows what 'unfair competition' is."[85]

On July 1, Senator Cummins addressed how Section 5 relates to the Sherman Act:

> Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the antitrust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the antitrust law. The purpose of this bill . . . is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.[86]

The July 3 debate began with a speech by Senator Willard Saulsbury Jr. (D-DE) predicting that the Supreme Court would "determine the words 'unfair competition' to be sufficiently definite" because "[e]very business man knows what is unfair in his own branch of the business."[87] Senator Newlands then argued that the rationale of Section 5 was not so much to expand the range of prohibited conduct as it was to "create an organization that will take up [an injured competitor's] wrong and compel the corporation perpetrating it to desist from that practice."[88]

Observing that the uncertainty of the rule of reason had been the impetus for new antitrust legislation, Senator Borah argued: "Is there anything more plain than the fact that we are giving this commission the power to test each restraint of trade or exhibition of unfair competition by the economic standard which individual members of the commission may happen to approve at the particular time that it is presented?"[89]

The brief July 9 debate on H.R. 15613 began with Senator Reed arguing that "unfair competition" would be understood by the courts to have its common law meaning, which was

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[80] *Id.* at 11236.

[81] *Id.* at 11379.

[82] *Id.* at 11380.

[83] *Id.* at 11385.

[84] *Id.* at 11386.

[85] *Id.* at 11388.

[86] *Id.* at 11455. *See also id.* at 11529 ("We propose to make it unlawful . . . to practice unfair competition" even when "the practice of unfair competition has not reached a point that constitutes a violation of the antitrust law . . . ." (July 2)).

[87] *Id.* at 11593.

[88] *Id.* at 11597.

[89] *Id.* at 11600.

fraudulent misrepresentation of goods, or "passing off."[90] Senator Newlands, however, pointed to the Supreme Court's *Standard Oil* decision, and insisted that the Court regarded "the words 'unfair competition' as having a much wider significance."[91]

George Rublee was following the Senate debate,[92] and he wrote a July 10 memo for the president.[93] He explained: "The object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods."[94] And he defined the key term: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[95]

Rublee went on to argue that a general prohibition on "unfair competition" was superior to specific prohibitions.[96] His most telling point was that, "Whether competition is unfair or not, depends in a peculiar degree upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."[97] The memo concluded with detailed answers to all objections posed by senators.[98]

When the Senate took up the bill again on July 13, Senator Reed again argued that courts would understand "unfair competition" to have the "limited meaning" it had "in the law of this country for many years."[99] Senator Newlands responded that "the courts themselves have now accepted the term used by the economists, and are using this phrase, not in the narrow and limited significance which it once had, but in the broader significance which the economists have attached to it."[100]

Senator Hollis gave a long speech supporting Section 5 on July 15, beginning with citations on usage of the term "unfair competition" in the sense intended.[101] Without attribution, Hollis

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[90] *Id.* at 11874–75. *See unfair competition*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("A term which may be applied generally to all dishonest or fraudulent rivalry in trade and commerce . . . .")

[91] 51 CONG. REC. 11876 (1914).

[92] As the Senate completed its work on the bill, Senator Reed noted Rublee's frequent presence at the Capitol and asked who was employing him. *Id.* at 14786–87 (Sept. 8). Senator Newlands vouched for Rublee, explained that he was a friend of Representative Stevens, and indicated that he was not being compensated. *Id.* at 14787. Reed then asserted that Rublee was "the most assiduous and persistent and tireless lobbyist" and asked for an investigation into his activities. *Id.* at 14787–88. Newlands then revealed that Rublee was working on behalf of President Wilson, who had been involved in crafting the Senate's substitute bill. *Id.* at 14788.

[93] Memorandum from George Rublee Concerning Section 5 of the Bill to Create a Federal Trade Commission (July 10, 1914) (transmitted to President Woodrow Wilson by Secretary of the Interior Franklin K. Lane), https://www.wlf.org/wp-content/uploads/2021/07/Rublee-1914-Memo-to-Lobby-for-the-Passage-of-Section-5.pdf.

[94] *Id.* at 3.

[95] *Id.* Rublee's debt to economist William S. Stevens is clear. *See supra* note 69, *infra* note 378, and accompanying text.

[96] Memorandum from George Rublee, *supra* note 93, at 6–10.

[97] *Id.* at 8.

[98] *Id.* at 14–22.

[99] 51 CONG. REC. 12022–23, 12026–27 (1914); *see also id.* at 12150–51 (July 15 comments by Sen. Reed), 12934–36 (July 29 comments by Sen. Reed); *id.* at 12220 (July 16 reiteration by Sen. Newlands).

[100] *Id.* at 12024.

[101] *Id.* at 12143–45. Many of the examples were from state statutes, or cases under them, that attached the qualifier "unfair" to prohibitions on price discrimination. Senator Thomas Sterling (R-SD) later supplemented the record with the text of 10 such statutes. *Id.* at 12219–20 (July 16). The term "unfair competition" had been used both quite generally and repeatedly by the district court in a recent criminal Sherman Act Section 2 case. United States v. Patterson, 205 F. 292, 295, 297, 299–301 (S.D. Ohio 1913).

read Rublee's entire July 10 memo.[102] Hollis thus adopted Rublee's definition of fair competition, statement of purpose, and argument that context was critical in assessing fairness.[103]

Senator Porter J. McCumber (R-ND) (who would vote against the bill) asked on July 16, if Section 5 were a criminal law, would an indictment have to allege "that the unfair competition had resulted in the destruction of competition; in other words, that it had stifled competition, and that that was its purpose."[104] Senator Newlands responded "that all you would have to prove would be an unfair method whose tendency was to stifle competition."[105]

Senator Frank B. Brandegee (R-CT) (who would vote against the bill) challenged Senator Newlands: "If Congress is declaring something to be unlawful, the people of the country are entitled to know what we mean by that language, and the Senator from Nevada [Newlands] does not know."[106]

Senator Sutherland argued on July 24 that "there is absolutely no standard laid down" by Section 5, so enacting it would "devolve[] legislative power" on the FTC.[107] Senator Cummins responded that the words of Section 5 were sufficient: "'Unfair competition' means what the people who use the English language commonly believe that those words mean . . . ."[108]

The next day, Senator Brandegee quoted a dictionary definition of "unfair" and mocked the contention that Section 5 provided "a fixed rule or standard."[109] He gave a long speech on July 27 arguing that "Congress must prescribe the primary standard or rule within which the commission may exercise its discretion in taking up the particular objects to come within the rule. There is no rule whatever laid down here."[110]

Senator Cummins was asked whether it was unfair competition to undercut the price of a rival. He responded that "no sane, sensible man ever suggested that mere underselling constitutes unfair competition."[111] Asked to give an example of conduct that would constitute unfair competition, he cited the *Mogul Steamship* case.[112] That case concerned a group of ship-owners that excluded a competitor from Chinese tea ports through a concerted campaign of price cutting and the use of rebates for exclusivity.

Senator Cummins argued on July 28 that phrases used in law had no fixed meanings; rather, "there is a principle underlying every such phrase." Thus, the "the words 'unfair competition' can

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102 51 CONG. REC. 12145–49 (1914).

103 *Id.* at 12146–47.

104 *Id.* at 12217.

105 *Id.*

106 *Id.* at 12220.

107 *Id.* at 12651; *see also id.* at 12814 (July 27) (asking "What are unfair methods of competition? Can anybody tell me?"); *id.* at 12816 (if "by this provision with reference to unfair methods of competition or unfair competition we mean to give to this commission the power to make rules or to enact rules or laws within the limits of a primary standard, then the primary standard has not been laid down; and this amounts to an unlawful delegation of the legislative power of Congress"); *id.* at 12857 ("It is self-evident that if the commission is permitted to declare as unfair competition any practices which it may think to be unfair competition, then there is no standard laid down in this law . . . ." (July 28)).

108 *Id.* at 12653.

109 *Id.* at 12735.

110 *Id.* at 12800.

111 *Id.* at 12815.

112 *Id.* (referring to Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. [1892] AC 25 (Eng.)). Lord Esher's dissenting judgment in the appeal court was inserted into the record. *Id.* at 12922–24 (July 29). The majority view, finding the conduct lawful, however, was affirmed by the House of Lords.

grow and broaden and mold themselves to meet circumstances as they arise, just as the words 'restraint of trade' have grown and have been molded in order to meet the necessities of the American people."[113]

Senator Cummins added on July 29 "that the guide or standard which is declared in the [Sherman Act], namely, restraint of trade . . . is more uncertain, less known, less capable of definite application, than is the phrase 'unfair competition.'"[114] And when asked how a "court would determine what was fair and what was unfair," he replied: "By applying the rule of reason."[115] He then elaborated:

> Unfair competition is the antithesis of fair, free competition. Unfair competition is the pursuit of that practice which destroys competition and establishes monopoly. Unfair competition is the deadliest enemy of independence in business. Unfair competition is never employed save by those who have some degree of monopolistic power to exercise.[116]

Senator Reed continued his objection to Section 5 in ever more eloquent language: "In one line, disassociated from every other part of the bill, without a single ray of light reflected upon it by anything that preceded it or follows it, you find this broad and sweeping term: Unfair competition is hereby declared to be unlawful. In these eight words is granted more of power than was ever possessed by king or potentate of this earth."[117]

The next day, Senator Newlands insisted that Section 5 had "a definite standard" and targeted any practice that "is against good morals."[118] He added that "we would be . . . at sea" if "we were to attempt to enumerate the numerous fraudulent practices which constitute unfair competition."[119] Senator Hollis added that a statute prohibiting "unfair competition" "leaves it to the judge to apply the rule of reason, precisely as our courts have under the Sherman antitrust act."[120]

Senator Cummins argued on July 31 that "the phrase 'unfair competition'" was "more certain, as well as more comprehensive and safer, than any other suggestion which has been made":[121]

> The word "unfair" . . . is certainly not more uncertain or indefensible than the words "fraud" or "fraudulent." All these things call upon the . . . exercise of good common sense, good judgment, or, as I have so often said, the application of the rule of reason . . . . Still, notwithstanding all that has been said, I am of the opinion that "unfair competition" does furnish a sufficient guide, and that we can safely commit it to the administration of a commission . . . .[122]

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[113] *Id.* at 12871.

[114] *Id.* at 12915.

[115] *Id.* at 12917. *See also id.* at 12914 ("Everything must be determined by the rule of reason. . . . The rule of reason commands every human being in all his conduct and all his relations to his fellow men."), 12915 ("If the rule of reason—and I am not quarreling with the rule of reason because it must prevail everywhere—if the rule of reason is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the phrase 'unfair competition.'").

[116] *Id.* at 12919.

[117] *Id.* at 12938.

[118] *Id.* at 12980.

[119] *Id*.

[120] *Id*. at 13000.

[121] *Id*. at 13049.

[122] *Id*.

Senator McCumber asked Senator Cummins whether he would object to the insertion of language "limiting the meaning" of "unfair competition" to "competitive methods which either mean crippling competition or destruction of competition."[123] Cummins replied that he would be happy to insert "some phrase or words that will properly circumscribe" the concept of "unfair competition."[124] McCumber offered: "The words 'unfair competition' as used herein shall be construed to mean such unfair means or methods as shall be intended to or which shall directly or indirectly stifle or destroy competition."[125] Cummins then deferred to Senator Newlands.[126]

Senator John K. Shields (D-TN) joined those arguing that "unfair competition in commerce" had the narrow meaning of passing off,[127] and he predicted that the courts would confine the application of Section 5 to "the misrepresentation by false and fraudulent means of the goods of one competitor for those of another."[128] Recognizing that the intention was quite different, he contended that "the provisions of this bill, in my opinion, attempt to delegate to this commission legislative, judicial, and executive powers in clear contravention of our organic law."[129]

Senator Clapp offered some Republican support for Section 5. He argued that, when the bill "came before the Senate, I think almost every Senator believed that it was the attempt to confer upon the commission power to legislate," but there had been "gradual drawing back from that."[130] And he included himself among those who had "had no difficulty in dealing with the expression 'unfair competition.'"[131]

On August 1, Senator Reed proposed a definition to be inserted into the bill:

> The term "unfair competition" is hereby defined to embrace all those acts, devices, concealments, threats, coercions, deceits, frauds, dishonest practices, false representations, slanders of business, and all other acts or devices done or used with the intent or calculated to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monopoly.[132]

Senator McCumber instead proposed: "The words 'unfair competition' as used herein shall be construed to mean any acts or practices in trade or commerce which are intended or the natural consequences or results of which are to stifle or destroy competition at any point."[133] Neither proposal came to a vote.[134] The Senate did adopt the amendment of Senator Cummins allowing companies subject to FTC orders under Section 5 to petition a federal court for review.[135]

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123 *Id*. at 13051.

124 *Id*.

125 *Id*.

126 *Id*.

127 *Id*. at 13056–61.

128 *Id*. at 13057

129 *Id*.

130 *Id*. at 13062.

131 *Id*.

132 *Id.* at 13100.

133 *Id*. at 13101.

134 On the same day, the Senate adopted the amendment proposed by Senator Cummins that replaced all of Section 5 with new language. *Id*. at 13109. But the prohibition in Section 5 remained the same. *See id.* at 12873 (July 28) (text of the amendment).

135 *Id*. at 13045 (July 31), 13109 (Aug. 1). Senator Newlands preferred to have no judicial review of FTC orders as such, but rather to require the FTC to enforce its orders by application to a federal court. *Id*. at 13066 (July 31), 13316 (Aug. 5).

On August 3, Senator LeBaron B. Colt (R-RI) (who had been a federal appellate judge for more than two decades, and who would vote against the bill) opposed Section 5 unless its meaning was made clear. The meaning he believed most senators favored was "the various things which have been forbidden by the courts in decrees entered under the antitrust laws and all transactions of a similar nature," so that the prohibition would "cover all those transactions which any person may employ in a scheme or plan to establish a monopoly."[136] Senator William S. Kenyon (R-IA), who was later a federal appellate judge, asserted that the meaning of "unfair competition" was sufficiently clear.[137]

The following day, Senator Lippitt said that he once favored creating a trade commission but he no longer did: "I think that such a commission and such legislation as is now proposed, instead of doing anything to clarify the situation, will complicate it and that such a commission, as is now proposed is extremely unwise."[138]

Senator Reed responded again to the challenge of defining "unfair competition":

> The term "unfair competition" as used in section 5 is hereby defined to embrace all those acts, devices, concealments, threats, coercions, deceits, frauds, dishonest practices, false representations, slanders of business, and all other acts or devices done or used with the intent or calculated to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monopoly.[139]

Senator Reed gave a lengthy speech in support of his amendment, peppered with quotations from authorities.[140] Senator James P. Clarke (D-AR) said he was not opposed but counted himself among those "who think the phrase 'unfair competition' is adequate" and remarked that the commission would apply "the rule of reason."[141] Although no senator rose in opposition, the amendment was narrowly defeated.[142]

On the final day of debate, August 5, Senator Brandegee argued that the "strongest argument made in behalf of the passage of this bill is that it will remove uncertainty from the minds of business men" created by the rule of reason, and yet, there "never was a more confusing subject put up to a business man or to the judges who are to decide the question than the interpretation of the vague, ambiguous, words 'unfair competition.'"[143]

Senator McCumber argued that "there are a great many practices which might be declared to be unfair as between the competitors, the result of which is beneficial to the public, and it only ceases to be beneficial to the public when the effect of the competition is such that it destroys one of the competitors and thereby creates a monopoly."[144] He offered an amendment that would have inserted: "The words 'unfair competition' as used herein shall be construed to mean any unfair

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[136] *Id*. at 13154.

[137] *Id*. at 13160. He added that the feared uncertainty about the application of the Sherman Act had largely been resolved: "Since the decision of the Standard Oil case there has not been much difficulty with the courts in enforcing the rule of reason. They have applied it in many cases, and the Supreme Court has decided some dozen cases since that time." *Id.*

[138] *Id*. at 13211.

[139] *Id*. at 13224.

[140] *Id*. at 13224–34.

[141] *Id*. at 13234.

[142] *Id*. at 13235. The vote was 30–32.

[143] *Id*. at 13299.

[144] *Id*. at 13304.

acts or practices in trade or commerce intended to stifle or destroy competition."[145] Without debate, the amendment was rejected.[146]

Senator Reed then proposed another version of his amendment:

> The term "unfair competition" shall embrace all devices, concealments, threats, coercions, deceits, frauds, discriminations, dishonest practices, false representations, slanders of business, and all other acts, whether of like nature with those herein enumerated or not, done or used with the intent or the effect of which is to destroy or unreasonably hinder the business of another or prevent another from engaging in business.[147]

Senator Cummins argued that "the terms he has employed in his amendment to define 'unfair competition' are more uncertain and indefinite than the words themselves."[148] Senator Hollis argued along similar lines and additionally contended that the practical effect of the amendment would have been to "abolish any act in the way of competition," whether it is "fair or unfair."[149] Like Senator Reed's other attempt to define "unfair competition," this one was narrowly rejected.[150]

As the debate ended, Senator Reed Smoot (R-UT) observed that "the bill we are about to pass now will not be the law," because the bill will be rewritten in conference.[151] The Senate then voted 53–16 in favor of the bill.[152]

C. The Conference Report and Final Votes

A conference committee reported a compromise bill on September 4.[153] The committee substantially rewrote Section 5, but only two changes were of much interest. One made FTC fact-finding conclusive if supported by substantial evidence.[154] The other made the first sentence of Section 5 read: "That unfair methods of competition in commerce are hereby declared unlawful."[155]

A rationale for changing the wording of the UMC prohibition had been suggested in the Senate debate. Senator Hollis responded to arguments that "unfair competition" already had a specific, narrow legal meaning by suggesting that "the words 'unfair' and 'competition' be separated by some word that will not do them any harm, such as 'oppressive' or 'methods of.'"[156]

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145 *Id*. at 13303, 13305.

146 *Id*. at 13305. The vote was 16–47. Nine of the senators voting for the amendment voted against the bill, suggesting that most opponents of the bill favored wanted to limit Section 5's prohibition to conduct that was redressable at common law. The implication, then, is that proponents wanted to prohibit something different.

147 *Id*. at 13312. This is the final version of the amendment, after several amendments to it.

148 *Id*. at 13311.

149 *Id*. at 13313.

150 *Id*. The vote was 29–33.

151 *Id*. at 13318.

152 *Id*. at 13319.

153 H.R. REP. NO. 63-1142 (1914).

154 *Id.* at 4 (findings conclusive if "supported by testimony"). In current law, FTC fact-finding is conclusive if "supported by evidence." 15 U.S.C. § 45(c).

155 *Id.* at 3.

156 51 CONG. REC. 12145 (July 15, 1914).

The Senate began consideration of the conference report on September 5. Senator Cummins reported that Section 5 had "a great deal of new phraseology" but little of it mattered.[157] He opined that the House conferees believed that "unfair methods of competition" was "the best way of expressing" what the Senate had meant by "unfair competition."[158]

The Senate debated the FTC Act for the last time on September 8. As to whether the change in the Section 5 prohibition made any difference, Senator Newlands said: "There is no difference, in my judgment."[159] The final vote was overwhelmingly in favor of passage, but many senators did not vote.[160]

The House called up the conference report on September 10, and the entire House debate on Section 5 occurred that day. Representative Covington went through all changes to the House bill and responded to questions.[161] He saved Section 5 for last and began by explaining:

> It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource or of transportation, is by the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business who will be able to apply the rule enacted by Congress to particular business situations so as to eradicate evils with the least risk of interfering with legitimate business operations.[162]

Covington reassured fellow members of Congress:

> We are seeking here not to enter into any unknown or speculative realm of the law but to deal, as we ought to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially.[163]

Representative Covington proceeded to address whether the concept of "unfair methods of competition" was too vague, stating that he initially

> held the opinion that "unfair competition" or "unfair methods of competition," as a phrase to be found in the law, was so probably vague as to be unenforceable. But after having given some months of study to the subject [he was] able to say that there is in existence to-day a surprisingly

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[157] *Id.* at 14768.

[158] *Id.* at 14768–69.

[159] *Id.* at 14786.

[160] *Id.* at 14802. The vote was 43–5, with 48 senators not voting, including most of those who voted "nay" when the Senate first voted on the bill.

[161] Representative Covington indicated that the name "Federal Trade Commission" was preferable to "Interstate Trade Commission" because it avoided the confusingly similar initials of ICC and ITC. *Id.* at 14925. He resigned his seat in Congress on September 30 to serve as chief justice of the Supreme Court of the District of Columbia. (The court became the U.S. District Court for the District of Columbia in 1936.) In that capacity, he swore in the five original members of the FTC.

[162] *Id.* at 14927.

[163] *Id.* at 14929.

> well-defined class of declarations by the courts . . . stating unfair competition or unfair methods of competition as a legal definition.[164]

Covington concluded his discussion of Section 5 by explaining that

> the rule of law which the trade commission will administer is the rule declaring unfair competition to be unlawful. In enacting that rule Congress will clearly indicate the result it desires to bring about; and in enforcing the rule so as to bring about the result pointed out by the statute, the commission will exercise administrative and not legislative power.[165]

Representative Frederick C. Stevens (R-MN), who had been one of the conferees, also spoke but said little about Section 5. When it was suggested that Section 5 "takes care of the tendencies toward violation of the Sherman law," he responded that was "exactly the purpose."[166] He added: "The essence of the practice must be ascertained by the commission. If the general purpose and the result of it will be to the detriment of the public by eliminating competition," then the practice "ought to be repressed."[167] He also argued that prohibiting "unfair methods of competition" was preferable to a series of specific prohibitions.[168]

The conference report was agreed to in the House without a recorded vote.[169] The bill was enrolled on September 12, and President Wilson signed it into law on September 26.

D. What Did Congress Intend?

Legislative history is "murky, ambiguous, and contradictory," and its investigation "has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'"[170] Courts, nevertheless, look to legislative history for an "understanding of otherwise ambiguous terms."[171] The legislative history of H.R. 15613 points to seven insights on the meaning of "unfair methods of competition."

1. The UMC prohibition was not meant as a blank check for the FTC to fill in. All members of the 62d Congress understood that the Constitution demanded that a standard be discernible in the words of the UMC prohibition. It became law because a majority of

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[164] *Id.* at 14928. Representative Covington proceeded to cite numerous treatises and cases on "unfair competition" as well as cases upholding indefinite prohibitions.

[165] *Id.* at 14931.

[166] *Id.* at 14934.

[167] *Id.* at 14937–38.

[168] *Id.* at 14941.

[169] *Id.* at 14939–43.

[170] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983), quoting Judge Harold Leventhal).

[171] *Id. See* Milner v. Dep't of Navy, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text."). *See also* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 444 (1990) ("No degree of skepticism concerning the value of legislative history allows us to escape its use. Especially not when we know that laws have no 'spirit,' that they are complex compromises with limits and often with conflicting provisions, the proponents of which have discordant understandings. Legislative history shows the extent of agreement.").

members in each house became satisfied that the phrase "unfair methods of competition" met this demand.[172]

2. The indefinite UMC prohibition was preferred to something more definite for three reasons: (a) Any enumeration of forbidden practices necessarily would have been incomplete.[173] (b) Any characterization of forbidden practices necessarily would have added indefinite words.[174] And most importantly, (c) the legitimacy of a practice depended on the circumstances.[175]
3. Adjudication under the UMC prohibition was to be conducted under a rule of reason, just as adjudication under Section 1 of the Sherman Act.[176] The adoption of the rule of reason in the *Standard Oil* decision was the initial impetus for the creation of the FTC, but members of Congress came to realize that the rule of reason was workable and that there was no satisfactory alternative.[177]
4. The UMC prohibition was intended to protect competition, not competitors. Senator Cummins declared that the United States had adopted "the policy of competition"[178] and "Unfair competition means the extinction of competition."[179] Nine members of Congress,

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[172] *See, e.g.*, 51 CONG. REC. 12148 (1914) ("The rule of law which the trade commission will administer is the rule declaring unfair competition to be unlawful. In . . . enforcing the rule . . . the commission will exercise administrative and not legislative power." (July 15 comments of Sen. Hollis)); *id.* at 12980 ("I claim [there] is a definite standard . . . ." (July 30 comments of Sen. Newlands)), 14930 ("Some of the few extreme opponents of section 5 have, however, declared that it is unconstitutional, because it involves a delegation of legislative power to the Federal trade commission. Happily there are not many persons left who advance that view . . . ." (Sept. 10 comments of Rep. Covington)).

[173] The House conferees declared: "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. If Congress were to adopt the method of definition, it would undertake an endless task." H.R. REP. NO. 63-1142, at 19 (1914). *See* 51 CONG. REC. 11084 (1914) ("[I]f there were 20 bad trade practices to-day and you were to name them in the law and condemn, there would be others established to-morrow. It is the illusive character of the trade practice that makes it though condemned to-day appear in some other form to-morrow." (June 25 comments of Sen. Newlands)).

[174] *See* 51 CONG. REC. 12147 (1914) ("It would be impossible to frame definitions without using language which would present very difficult problems of construction to the courts. . . . The definitions would give rise to a long series of litigated cases continuing until the new language had all been judicially construed. Instead of being clarified, the law would be obscured." (July 15 comments of Sen. Hollis)).

[175] The House conferees declared: "Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances." H.R. REP. NO. 63-1142, at 19 (1914). *See* 51 CONG. REC. 12147 (1914) (same words in the July 15 comments of Sen. Hollis).

[176] *See* 51 CONG. REC. 12915 (1914) ("If the rule of reason . . . is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the phrase 'unfair competition.'" (July 29 comments of Sen. Cummins)); *id.* at 13000 ("This statute [Section 5] leaves it to the judge to apply the rule of reason, precisely as our courts have under the Sherman antitrust act, and there can not be any difficulty in the application." (July 30 comments of Sen. Hollis)), 13234 ("Those of us who think the phrase 'unfair competition' is adequate understand that it will be for the commission, subject to review by the courts, to fill in, under the rule of reason, such things as they may find to be unfair competition." (Aug. 4 comments of Sen. Clarke)).

[177] *See id.* at 12650 ("This rule of reason is the same as the law of nature in the Roman law . . . . And the same great law of reason is the universal postulate underlying the common law. With this rule of reason as the criterion and standard, the Sherman law can be enforced to meet any possible combination of circumstances which may be considered in restraint of trade and detrimental to the public interests." (July 24 comments of Sen. Colt)), 12914 ("The rule of reason commands every human being in all his conduct and all his relations to his fellow men." (July 29 comments of Sen. Cummins)), 13160 ("Since the decision of the Standard Oil case there has not been much difficulty with the courts in enforcing the rule of reason. They have applied it in many cases, and the Supreme Court has decided some dozen cases since that time." (Aug. 3 comments of Sen. William S. Kenyon)).

[178] *Id.* at 11379–80 (using the phrase three times on June 30).

[179] *Id.* at 11386 (June 30). *See also id.* at 11104 ("unfair competition" is "that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly" (June 25)), 11385 ("The only unfair competition that [Section 5] will ever touch is that competition which has for its object the destruction of competition."

including the leading proponents of the UMC prohibition, associated the term "unfair competition" with "destroy," "destroys," or "destroying" competition.[180] Three senators associated the term with "stifle" or "stifling" competition.[181]

The common law of unfair competition protected competitors rather than competition. In particular, it gave a plaintiff a cause of action against a defendant for palming off goods as those of the plaintiff.[182] Proponents of the UMC prohibition contended that the common law meaning of "unfair competition" was the wrong idea, not that it was too narrow.[183] And the Senate defeated Senator Reed's amendment, which would have codified the common law meaning of "unfair competition" and thus protected competitors.[184] The conference committee evidently used the phrase "unfair methods of competition" to disassociate the prohibition from the common law of unfair competition.

5. The UMC prohibition was aimed at conduct that threatened monopoly.[185] Senator Newlands asserted that it was "intended to take hold of those practices in trade which inevitably in the end lead toward the creation of a monopoly."[186] George Rublee declared: "The object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods," and Senator Hollis said that in the debate.[187] The examples cited in the floor debate were not price fixing and the like; they were exclusionary conduct. The list of

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(June 30)), 12919 ("Unfair competition is the antithesis of fair, free competition. Unfair competition is the pursuit of that practice which destroys competition and establishes monopoly." (July 29)).

180 Sen. Clapp: *id.* at 13118 (Aug. 1); Sen. Cummins: *id.* at 11104 (June 25), 12919 (July 29); Senator Gilbert M. Hitchcock (D-NE): *id.* at 13231 (Aug. 4); Sen. Hollis: *id.* at 12145 (July 15); Sen. McCumber: *id.* at 12208, 12210, 12219 (July 16), 13051–52 (July 31), 13101 (Aug. 1), 13303 (Aug. 5); Sen. Newlands: *id.* at 12211 (July 16); Sen. Reed: *id.* at 13231 (Aug. 4); Rep. Stevens: *id.* at 14937, 14941 (Sept. 10); Senator John S. Williams (D-MS): *id.* at 12209 (July 16).

181 Sen. McCumber: *id.* at 12210, 12219 (July 16); Sen. Newlands: *id.* at 12211, 12117 (July 16); Sen. Williams: *id.* at 12209–10 (July 16).

182 *See* Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U.S. 537, 549 (1891) ("Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief."); McLean v. Fleming, 96 U.S. 245, 251 (1878) ("Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer."); HARRY D. NIMS, THE LAW OF UNFAIR BUSINESS COMPETITION § 19, at 33 (1909) ("The private action is given, not for the benefit of the public, although that may be its incidental effect, but to relieve against the invasion, by the defendant, of the exclusive rights of complainant.").

183 *See* 51 CONG. REC. 11103–05 (1914) (June 25 comments of Sen. Cummins); *id.* at 11108 (June 25 comments of Sen. Newlands listing the forms of "unfair competition" listed by economist William Stevens), 12024 ("the courts themselves have now accepted the term used by the economists, and are using this phrase, not in the narrow and limited significance which it once had" (July 13 comments of Sen. Newlands)), 12142–45 (July 15 comments of Sen. Hollis).

184 *See supra* notes 132, 139 & 147 and accompanying text.

185 The House conferees declared: "It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource as of transportation, is the use of unfair competition." H.R. REP. NO. 63-1142, at 18–19 (1914). *See also* 51 CONG. REC. 11103 (1914) ("The unfair competition that is sought to be reached . . . must ultimately result in the extinction of the rival and the establishment of a monopoly." (June 25 comments of Sen. Cummins)); *id.* at 11235 ("[T]he provision with reference to unfair competition is intended to disarm monopoly. It is monopoly, or the corporation possessing monopolistic tendencies, that engages in unfair competition, and unfair competition is a means of creating monopoly." (June 27 comments of Sen. Newlands)).

186 *See* 51 CONG. REC. 12734 (1914) (July 25).

187 *See supra* notes 94 & 103 and accompanying text.

economist William Stevens appeared three times in the debate,[188] and every practice was exclusionary.[189]

6. The UMC prohibition was meant to go further than Section 2 of the Sherman Act.[190] Senator Cummins observed that "the attempt is to go further and make some things offenses that are not now condemned by the antitrust law. That is the only purpose of section 5—to make some things punishable, to prevent some things, that can not be punished or prevented under the antitrust law."[191]
7. The UMC prohibition was intended, in particular, to interdict the practices targeted by Section 2 at an early stage. Senator Reed argued that it would "strike a death blow to monopoly" by arresting "malicious" acts, "exactly as the Sherman Antitrust Act deals with" but "in their incipiency."[192] Senator Newlands declared: "We want to check monopoly in the embryo."[193] And Representative Covington explained that Section 5 was aimed at "practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts."[194]

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[188] Listed as unfair competition were:

I. Local price-cutting.
II. Operation of bogus "independent" concerns.
III. Maintenance of "fighting ships" and "fighting brands."
IV. Lease, sale, purchase or use of certain articles as a condition of the lease, sale, purchase or use of other required articles.
V. Exclusive sales and purchase arrangements.
VI. Rebates and preferential contracts.
VII. Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process.
VIII. Manipulation.
IX. Blacklists, boycotts, white-lists etc.
X. Espionage and use of detectives.
XI. Coercion, threats and intimidation.

Stevens, *supra* note 67, at 283–84. The list was modified slightly when Stevens expanded his article into a book. WILLIAM S. STEVENS, UNFAIR COMPETITION (1917).

[189] Item I was the targeted local predatory price cutting, which the Supreme Court had labeled as one of Standard Oil's "unfair methods of competition." Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 23 (1911). Items II and III were predatory price cutting disguised as competition from an independent. Item IV was tying or full-line forcing. And Item V was exclusive dealing or de facto exclusive dealing through rebates or refusals to deal. The meanings of the remaining six items were not explained until publication of the second part of the article, which was too late to influence the FTC Act. William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 460 (1914).

[190] Legislative history often contains contradictions, and there is a contradiction on this point. In explaining the conference report on September 10, Representative Covington was asked whether the UMC prohibition "creates any new offense," and he replied: "It does not . . . ." 51 CONG. REC. 14928 (1914).

[191] *Id.* at 11236 (June 27). *See also id.* at 12982 ("If anything is going on which unchecked may lead to monopoly or restraint of trade, it is to be included within the term 'unfair competition.'" (July 30 comments of Sen. Newlands)).

[192] *Id.* at 13118 (Aug. 1).

[193] *Id.* at 12030 (July 13).

[194] *Id.* at 14929 (Sept. 10).

The debate did not indicate how the UMC prohibition was meant to differ from the prohibition on "attempt to monopolize" in Section 2 of the Sherman Act.[195] For example, Senator Newlands did not mention attempt to monopolize when he declared that the new prohibition was aimed at conduct that did not "amount to a monopoly or to monopolization."[196] Nor did any proponent of the UMC prohibition point to a court decision identifying a gap in the law.[197] Senator Hollis pointed to a gap in enforcement: "The Department of Justice deals with monopoly as an accomplished fact. It did not attack the Oil Trust or the Tobacco Trust until after they had destroyed competition and obtained monopoly of the markets."[198]

Most members seemed to think that no single unifying concept governing the UMC prohibition could be articulated, and no member of Congress proposed inserting such a concept in the legislation. But the same concept was voiced several times; it was the efficiency concept proposed by economics luminary John Bates Clark and elaborated by newly minted economics Ph.D. William S. Stevens.

Senator Robinson, who indicated that he was borrowing from William Stevens, observed: "Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling; while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'"[199] Senator Hollis explained: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[200]

The distinction between fair and unfair competition, advanced by economists John Bates Clark and William S. Stevens, adopted by George Rublee, and advocated by Senators Robinson and Hollis, might have seemed too abstract to most members of Congress. But no member objected to it or proposed an alternative. Moreover, the economists' distinction appears to be the only one consistent with the intent of Congress.

The legislative history of the FTC Act provides no substantial basis for imputing to Congress an intention to prohibit conduct that is not currently viewed as anticompetitive. A. Douglas Melamed offered a useful definition:

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[195] Senator Cummins asked the key question of why the Sherman Act prohibition on attempts to monopolize was inadequate. *Id.* at 12979 (July 30). Senator Charles S. Thomas (D-CO) responded that, "if rigidly enforced," it might make "further legislation unnecessary." *Id.* Two years later, the first book about the FTC argued that the UMC prohibition might not require demonstration of "a monopolistic intent," but the authors doubted that conduct that was both "unfair" and a "method of competition" could fail to supply the "monopolistic intent essential to make the performance of such act an unlawful 'attempt to monopolize' within the Sherman Law." JOHN MAYNARD HARLAN & LEWIS W. MCCANDLESS, THE FEDERAL TRADE COMMISSION: ITS NATURE AND POWERS 45 (1916). The first author was the son of Supreme Court Justice John Marshall Harlan and the father of Supreme Court Justice John Marshall Harlan II.

[196] 51 CONG. REC. 12030 (July 13, 1914).

[197] The debate demonstrated no familiarity with the *Swift* attempt to monopolize case. Justice Oliver Wendell Holmes Jr. wrote for a unanimous Supreme Court that, "when that intent and the consequent dangerous probability exist, this statute [Section 2 of the Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

[198] 51 CONG. REC. 12146 (1914) (July 15).

[199] *Id.* at 11231 (June 27).

[200] *Id.* at 12146 (July 15).

> Anticompetitive conduct is conduct that is not efficiency-based competition on the merits—conduct that does not, in other words, shift the supply curve to the right by innovation or other forms of cost reduction, shift the demand curve to the right by innovation or other forms of product improvement, or reduce above-cost prices.[201]

The notion of "competition on the merits" has become central to antitrust doctrine because it is the legitimate conduct that antitrust law encourages, even when it injures competitors. And "efficiency" is central to what makes competition "on the merits." These ideas were expressed in the antitrust discourse of 1911–14. In the 1911 *Standard Oil* and *American Tobacco* decisions, Chief Justice Edward D. White Jr. contrasted unlawful exclusionary conduct with "normal methods" of competition.[202]

The UMC prohibition was based on public policy embodied in the Sherman Act, which condoned normal, fair methods (competition on the merits) and condemned abnormal, unfair methods (competition not on the merits). And this is the conclusion reached, if only tentatively, by the first book about the FTC Act, published by two practitioners in early 1916:

> Conceivably, an individual engaged in commerce might possess such superior foresight, business sagacity, and industrial efficiency, that by the use of only such competitive methods as everybody would concede to be in the highest degree ethical and proper, he would be able to overwhelm every rival in his field of commerce, and to establish a complete monopoly. The [UMC prohibition] is probably not to be understood as forbidding that.[203]

The UMC prohibition neither addressed a new problem nor provided a new solution.

Although John Bates Clark was never credited, his solution to the problem later became an important theme in antitrust law and policy, as illustrated by Robert Bork's perspective in *The Antitrust Paradox*:

> All business activity excludes. A sale excludes rivals from that piece of the business. Any firm that operates excludes rivals from some share of the market. Superior efficiency forecloses. Indeed, exclusion or foreclosure is the mechanism by which competition confers its benefits upon society. The more efficient exclude the less efficient from the control of resources, and they do so only to the degree that their efficiency is superior.
>
> Such exclusion is proper and beneficial. It is the task of antitrust to see that it continues to operate. Antitrust, therefore, must be able to distinguish efficiency exclusion from improper exclusion.[204]

Without dissent, the Supreme Court adopted Bork's perspective in the *Aspen Skiing* case, quoting him in declaring: "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[205]

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[201] A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 271 (2020).

[202] United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 75 (1911). *See also* Patterson v. United States, 222 F. 599, 619 (6th Cir. 1915) ("A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within" the prohibition of Section 2 of the Sherman Act.).

[203] HARLAN & MCCANDLESS, *supra* note 195, at 30.

[204] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 137 (1978).

[205] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (quoting BORK, *supra* note 204, at 138).

II. THE LAW OF UNFAIR METHODS OF COMPETITION

A. Supreme Court Decisions before 1965

The Supreme Court first interpreted the UMC prohibition in the 1920 *Gratz* case.[206] Justice James C. McReynolds wrote the opinion affirming annulment of a cease-and-desist order directed at a tying arrangement. The Court declared that the UMC prohibition was "not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade," and, curiously, the Court viewed tying as fair competition.[207]

In dissent, Justice Louis D. Brandeis reasoned that a tying arrangement was not "universally an unfair method" but could be "under some circumstances,"[208] and the respondent "dominate[d]" the tying product market, so the practice plausibly was unfair under the circumstances.[209] He opined that the FTC was entitled to issue the order even if tying was not the respondent's "general practice."[210]

In the 1922 *Beech-Nut* case, the Supreme Court applied the UMC prohibition to resale price maintenance effected by refusing to deal with price cutters.[211] The Court treated the Sherman Act as "a declaration of public policy to be considered in determining what are unfair methods of competition,"[212] and defined the reach of the UMC prohibition by Sherman Act precedents.[213] Because the practice suppressed intra-brand competition, the Court held that it had a "dangerous tendency unduly to hinder competition or create monopoly" and the FTC was justified in ordering the scheme's termination.[214]

In 1923, the Supreme Court unanimously rejected an effort to end the practice by oil companies of leasing tanks and pumps on the condition that they be used only with the lessor's gasoline.[215] Through Justice McReynolds, the Court declared that the UMC prohibition did not confer the power "to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition."[216]

The Supreme Court interpreted the UMC prohibition more fully in the 1931 *Raladam* case, involving marketing for a purported obesity cure.[217] Justice George A. Sutherland wrote for a

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[206] FTC v. Gratz, 253 U.S. 421 (1920).

[207] *Id.* at 428–29. Two years later, the Supreme Court condemned tying in a Clayton Act case. United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922) ("such restrictive and tying agreements must necessarily lessen competition and tend to monopoly").

[208] *Gratz*, 253 U.S. at 438 (Brandeis, J., dissenting).

[209] *Id.* at 440.

[210] *Id.* at 441–42.

[211] FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

[212] *Id.* at 453.

[213] *Id.* at 451–53 (relying on Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919); Dr. Miles Med. Co. v. Park & Sons Co., 220 U.S. 373 (1911)).

[214] *Id.* at 453–55 (quoting *Gratz*, 253 U.S. at 427). Two years later, the Supreme Court unanimously held that the FTC was not justified in acting against a refusal to deal with no "dangerous tendency unduly to hinder competition" by a company lacking "dominant control." FTC v. Raymond Bros.–Clark Co., 263 U.S. 565, 572–74 (1924).

[215] FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923).

[216] *Id.* at 475–76.

[217] FTC v. Raladam Co., 283 U.S. 643 (1931).

unanimous court that the FTC could act only against conduct that was (1) "unfair," (2) a "method of competition," and (3) contrary to the "interest of the public."[218] The court observed that the UMC prohibition was aimed at practices "resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly."[219] And the Court found no evidence of harm to competition in the form of rivals "whose business will be, or is likely to be, lessened or otherwise injured."[220]

The FTC prevailed, however, in the sequel.[221] The agency instituted new proceedings against Raladam focused on its practices since the prior proceedings, and this time, it made findings on sales diversion from rivals.[222] But this time, the Supreme Court found such findings unnecessary: "[W]hen the Commission finds, as it did here, that misleading and deceptive statements were made with reference to the quality of merchandise in active competition with other merchandise, it is also authorized to infer that trade will be diverted from competitors who do not engage in such 'unfair methods.'"[223]

The change of attitude was consistent with the Supreme Court's 1941 decision in *Fashion Originators' Guild*.[224] That case concerned the scheme of 167 manufacturers of women's dresses to limit copying of their designs. The Court held that the FTC had the power to terminate the scheme as an "unfair method of competition" because it ran "counter to the public policy declared in the Sherman and Clayton Acts."[225] The Court also observed that "one of the hopes of those who sponsored the Federal Trade Commission Act [was] that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency."[226]

The Supreme Court identified four distinct ways in which the scheme ran "contrary to the policy of the Sherman Act."[227] It "narrow[ed] the outlets" for buying and selling; it subjected those copying designs "to an organized boycott;" it took away "freedom of action" by requiring participating manufacturers to reveal "intimate details of their individual affairs;" and it had the purpose and effect of "direct suppression of competition" in the form of "copied designs."[228]

The 1948 *Cement Institute* case concerned an industry-wide scheme of delivered prices with multiple basing points.[229] A result of the scheme was that cement manufacturers at different locations quoted the same price when competing for the same customer,[230] and that result could

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[218] *Id.* at 646–47 (emphasis omitted).

[219] *Id.* at 650.

[220] *Id.* at 649, 652–54.

[221] FTC v. Raladam Co., 316 U.S. 149 (1942).

[222] *Id.* at 151.

[223] *Id.* at 152.

[224] Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941).

[225] *Id.* at 463.

[226] *Id.* at 466.

[227] *Id.* at 465.

[228] *Id.*

[229] FTC v. Cement Inst., 333 U.S. 683 (1948). The decision spawned a substantial economic literature. For one contribution, see George J. Stigler, *A Theory of Delivered Price Systems*, 39 AM. ECON. REV. 1144 (1949).

[230] *Cement Inst.*, 333 U.S. at 696–68.

have facilitated pricing collusion. The Court credited FTC findings demonstrating concerted action to adopt and enforce the pricing scheme "for the purpose of suppressing competition."[231]

The Court held that the FTC was justified in concluding that the basing-point pricing system, if unchecked, "would result in complete destruction of competition and the establishment of monopoly in the cement industry."[232] Although the Court found concerted action, it noted that the conduct could violate the UMC prohibition even if the absence of concerted action meant that the conduct could not violate Section 1 of the Sherman Act.[233]

The 1953 majority opinion in *Motion Picture Advertising* cited evidence of actual exclusionary effects in upholding an FTC order against exclusive dealing by a producer and distributor of advertising films shown in movie theaters.[234] The Supreme Court opined that the UMC prohibition "was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts."[235]

In foregoing cases, the Supreme Court established little that was not already clear from the outset: most importantly, the Court brought nonexclusionary anticompetitive conduct within the UMC prohibition by declaring that it incorporated the public policy of the Sherman Act. The Court also asserted that the UMC prohibition "had a broader purpose" than the Sherman Act, but it left for case-by-case adjudication the process of charting the prohibition's scope.[236]

The Supreme Court's decisions suggested two senses in which the UMC prohibition reached further than the Sherman Act. One was that the UMC prohibition reached conduct that could be expected to progress into a Sherman Act violation. The other was that the prohibition reached conduct with the same anticompetitive effects as conduct condemned by the Sherman Act.

The Supreme Court's decisions indicated that the UMC prohibition reached tortious conduct, which normally does not violate the Sherman or Clayton Act, but only when anticompetitive.[237] The first *Raladam* case squarely held that a method of competition that was "unfair" would not offend the UMC prohibition if it did not affect the public interest in competition. The second *Raladam* case lowered the evidentiary bar but did not dispense with the requirement of harm to competition.

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[231] *Id.* at 709–20.

[232] *Id.* at 721.

[233] *Id.* at 689–93.

[234] FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 393–94 (1953). The FTC order merely limited the duration of the exclusive contracts to one year. Motion Picture Advert. Serv. Co., 47 F.T.C. 378, 390 (1950) (order).

[235] *Motion Picture Advert.*, 344 U.S. at 394–95 (citation omitted).

[236] FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 310 (1934). The case concerned a marketing campaign that turned a penny candy into a lottery ticket. When unwrapped in the store, a piece of candy might have returned the child's penny or awarded a prize, and it might have demanded a higher price.

[237] The decisions held that the prohibition reached misrepresentation even if not anticompetitive. *See Keppel & Bro.*, 291 U.S. 304; FTC v. Royal Milling Co., 288 U.S. 212 (1933); FTC v. Klesner, 280 U.S. 19 (1929); FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922). But FTC enforcement against misrepresentation is now premised on the prohibition of "unfair or deceptive acts or practices" added in 1938. *See supra* note 4. Such enforcement is viewed as part of the FTC's distinct, albeit complementary, consumer protection mission. *See* Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147 (2005).

B. Supreme Court Decisions after 1965

In the second half of the 1960s, the FTC prevailed at the Supreme Court in three distribution cases. Two were part of a campaign against partnerships between tire companies and oil companies operating chains of gas stations. B.F. Goodrich had partnered with Texaco, Firestone with Shell, and Goodyear with Atlantic Refining. The FTC issued cease-and-desist orders after concluding that the partnerships suppressed competition to sell tires, batteries, and accessories (TBA) to the gas stations. The tire companies paid their partners commissions on TBA sales to the partners' retailers, and the oil companies urged their retailers to buy TBA from the partners.[238]

The FTC found that Atlantic and Shell coerced dealers into purchasing from their tire-company partners,[239] and its orders in those cases were upheld on appeal.[240] The Supreme Court also upheld the Atlantic–Goodyear order because the "effect" of the partnership was "similar to that of a tie-in."[241] The Court quoted *Fashion Originators' Guild* for the proposition that the UMC prohibition is violated by "conduct that 'runs counter to the public policy declared in the' [FTC] Act," and it cited *Motion Picture Advertising* for the proposition that "many unfair methods of competition . . . do not assume the proportions of antitrust violations."[242]

Because the FTC had not found coercion by Texaco,[243] the D.C. Circuit refused to uphold its order in that case.[244] The Supreme Court, however, declared that, "The sales-commission system for marketing TBA is inherently coercive."[245] The Court observed that Congress enacted the UMC prohibition "to combat in their incipiency trade practices that exhibit a strong potential for stifling competition."[246] And the Court added: "It is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce."[247]

The FTC also ordered shoe manufacturer Brown Shoe to terminate a program under which it provided retailers with services (such as promotional materials) in return for a pledge to carry no lines of shoes "conflicting with" Brown's lines.[248] The FTC found that some retailers reduced their purchases from competing manufacturers,[249] and it held that the program violated the UMC prohibition, even though shoe manufacturing was not concentrated and the program affected only 1 percent of shoe retailers.[250]

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[238] *See* Texaco, Inc. v. FTC, 383 F.2d 942, 943 (D.C. Cir. 1967).

[239] *See* Firestone Tire & Rubber Co., 58 F.T.C. 371, 394–98 (1961); Goodyear Tire & Rubber Co., 58 F.T.C. 309, 342–48 (1961).

[240] *See* Shell Oil Co. v. FTC, 360 F.2d 470, 477 (5th Cir. 1966); Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964).

[241] Atl. Ref. Co. v. FTC, 381 U.S. 357, 371 (1965).

[242] *Id.* at 369.

[243] *See* B.F. Goodrich Co. & Texaco, Inc., 62 F.T.C. 1172 (1963) (adopting the hearing examiner's decision after supplemental findings that did not include coercion); B.F. Goodrich Co. & Texaco, Inc., 58 F.T.C. 1176, 1178 (1961) (remanding to hearing examiner to determine competitive effects).

[244] Texaco, Inc. v. FTC, 383 F.2d 942, 943, 950–51 (D.C. Cir. 1967).

[245] FTC v. Texaco, Inc., 393 U.S. 223, 229 (1968).

[246] *Id.* at 225.

[247] *Id.* at 230.

[248] Brown Shoe Co., 62 F.T.C. 679 (1963).

[249] *Id.* at 705, 713–15.

[250] *Id.* at 716–19. Sales data presented by the FTC are sufficient to approximate the Herfindahl-Hirschman Index of concentration, which was about 170. This made the market very unconcentrated.

The Eighth Circuit set aside the FTC's order because the program worked nothing like the exclusive dealing, full-line forcing, or tying arrangements condemned under the Sherman Act.[251] The Supreme Court reversed in a terse opinion holding that it was enough that the effect of Brown Shoe's program was "substantially to limit [retailers'] trade with Brown's competitors."[252] The Court specifically held that a violation of the UMC prohibition does not require the lessening of competition required by the Clayton Act.[253]

The next, and last, Supreme Court case on the UMC prohibition was *Sperry & Hutchinson* in 1972.[254] Sperry & Hutchinson (S&H) was the purveyor of S&H Green Stamps, which retailers could purchase and use to reward their customers. The customers could redeem Green Stamps for merchandise, with an initial expenditure of about $40 required to accumulate the stamps for each $1 of redeemed merchandise. The case focused on efforts by S&H to thwart a secondary market for Green Stamps. The FTC issued a cease-and-desist order,[255] which the Fifth Circuit set aside.[256]

The Supreme Court read the order to rest entirely on a "classic antitrust rationale,"[257] but the FTC found no "effect on competitors" and relied only on limiting consumers' "freedom of choice."[258] The Court held that limiting consumer choice was insufficient to support the order and accepted the Fifth Circuit's conclusion that "S&H's practices did not violate either the letter or the spirit of the antitrust laws."[259] The Court stressed that it could not sustain the order on a basis the FTC had not relied upon in issuing it,[260] while also opining that a Section 5 violation did not require an antitrust rationale.[261]

The Court did not clearly distinguish between the UMC prohibition and the prohibition on "unfair or deceptive acts or practices" added to Section 5 in 1938[262] when it declared that

> legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[263]

The late 1960s set the high-water mark for antitrust activism by the Supreme Court in cases under the Sherman and Clayton Acts, and the Court provided some reason to believe that these UMC cases could have had the same outcome if under the Sherman and Clayton Acts.[264] In

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

[252] FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966). *See also id.* at 319 (Brown Shoe's program "effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers.").

[253] *Id.* at 321–22.

[254] FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

[255] Sperry & Hutchinson Co., 73 F.T.C. 1099 (1968).

[256] Sperry & Hutchinson Co. v. FTC, 432 F.2d 146 (5th Cir. 1970).

[257] *Sperry & Hutchinson*, 405 U.S. at 246–47.

[258] *Id.* at 247–48.

[259] *Id.* at 249.

[260] *Id.* at 249–50.

[261] *Id.* at 239, 244–45.

[262] *See supra* note 4.

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

[264] *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, 935–37 (2010).

Sperry & Hutchinson, the Supreme Court opined that the conduct "[a]rguably" was "proscribed" under Sherman Act precedent that the FTC declined to rely on,[265] and in *Brown Shoe*, it opined that the conduct "obviously conflicts with the central policy" of the Sherman and Clayton Acts.[266]

When these cases were decided, the Supreme Court interpreted the Sherman and Clayton Acts to impose severe restrictions on vertical distribution arrangements. A per se rule against minimum resale price maintenance had long been in effect,[267] and the Supreme Court extended the rule to maximum resale price maintenance in 1968[268] and to territorial distribution restrictions in 1967.[269] The Court reaffirmed a per se rule against tying in 1969.[270]

Since the *Sperry & Hutchinson* decision, the Supreme Court has played no role in the development of the law on the UMC prohibition. Cases under the UMC prohibition that reached the Court were presented on the legal theory that the UMC prohibition had been violated because the Sherman Act had been violated.[271] In all this time, the Court's only comment on the UMC prohibition was that its standard was "an elusive one."[272]

During this half-century, the Supreme Court profoundly changed antitrust law, especially as applied to distribution. At the vanguard was the 1977 *Sylvania* decision,[273] holding that non-price vertical distribution restraints would be evaluated under the rule of reason, and as a general matter, that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing."[274]

The treatment of price restraints in distribution also evolved. The Court ratcheted up the evidentiary requirements to establish the existence of a price restraint in 1984.[275] The Court abandoned the per se rule against maximum resale price maintenance in 1997,[276] and abandoned the per se rule against minimum resale price maintenance in 2007.[277] The Court also narrowed the scope of the per se rule against tying.[278]

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265 *Sperry & Hutchinson*, 405 U.S. at 247 n.6 (citing United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), and noting that the FTC expressly declined to rely on it (*see* Sperry & Hutchinson Co., 73 F.T.C. 1099, 1195 (1968))).

266 FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966).

267 *See* United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911).

268 *See* Albrecht v. Herald Co., 390 U.S. 145, 152–54 (1968).

269 *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

270 *See* Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 501 (1969).

271 *See* N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1107 (2015); FTC v. Actavis, Inc., 570 U.S. 136, 141, 145 (2013); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 782 (1999); FTC v. Sup. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 422 (1990); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 451–52 (1986).

272 *Indiana Fed'n*, 476 U.S. at 454.

273 The decision proved to be a watershed. *See, e.g.*, Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991).

274 Cont'l TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977).

275 *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

276 *See* State Oil Co. v. Khan, 522 U.S. 3, 21–22 (1997).

277 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007).

278 *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (holding that a patent on the tying product does not itself warrant application of the per se rule); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–15 (1984) (limiting the per se rule to cases in which "the seller has some special ability . . . to force a purchaser to do something that he would not do in a competitive market"); U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 620 (1977) (limiting the per se rule to cases in which "the seller has some advantage not shared by his competitors in the market for the tying product").

A cornerstone principle of antitrust law was adopted after 1972.[279] In 1977 the Court invoked the principle that "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'"[280] to permit damages suits only for injuries that "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[281] This principle was extended to injunctive actions in 1986.[282] And in 1998, the Court held that, even when consumer and competitor harm is clear, the plaintiff must "allege and prove harm . . . to the competitive process, *i.e.*, to competition itself."[283]

C. Appellate Decisions after 1980

Several early 1980s appellate decisions rejected the FTC's application of the UMC prohibition.[284] *Boise Cascade*[285] concerned a delivered pricing scheme for plywood.[286] The plywood industry began in the Pacific Northwest, using local Douglas fir as the raw material. In the 1960s, mills were built in the Southeast to use local yellow pine. By the 1970s, most plywood was made in the Southeast. Northwest and Southeast plywood differed in ways that could matter, but they were interchangeable in the most important uses.

Georgia-Pacific opened the first Southeast plywood mill, and it set the mill's delivered prices as if the product was shipped from a Northwest mill. Other major producers opening Southeast plywood mills copied that pricing scheme. Without making any clear findings on price or profit levels, the FTC held that "artificial formula pricing ha[d] exerted an anticompetitive effect upon pricing," violating the UMC prohibition.[287]

The Ninth Circuit held that, "in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition," the FTC must find "that the challenged pricing system has actually had the effect of fixing or stabilizing prices."[288] And the court held that the record could not support a finding "that petitioners' delivered pricing methods stabilized prices in the plywood industry at supra-normal levels."[289]

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[279] As a practical matter, the most important antitrust principles are those governing litigation. The most cited antitrust decisions, by far, concern the use of summary judgment: Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[280] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990).

[281] *Brunswick*, 429 U.S. at 489. The decision had a huge impact. *See* Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273 (1998).

[282] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109–11 (1986).

[283] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998).

[284] *Russell Stover* might fit this description, but it was more of a Sherman Act case. Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983). The FTC was rebuffed when it condemned a resale price maintenance agreement under circumstances much like those in which the Supreme Court had declined to find an agreement. *See* United States v. Colgate & Co., 250 U.S. 300 (1919). The Eighth Circuit rejected the FTC's contention that *Colgate* was no longer good law.

[285] Boise Cascade Corp. v. FTC, 637 F.2d 573, 578–79 (9th Cir. 1980).

[286] *See* Boise Cascade Corp., 91 F.T.C. 1 (1978).

[287] *Id.* at 103.

[288] *Boise Cascade*, 637 F.2d at 577.

[289] *Id.* at 578. Smaller producers operated 22 of the 55 Southeastern mills and accounted for 46 percent of the production. *Boise Cascade*, 91 F.T.C. at 14, 61–62.

The court viewed the FTC's decision as "little more than a theory of the likely effect of the challenged pricing practices."[290] And the court declined the FTC's suggestion that use of a common delivered pricing scheme constitutes a per se violation of the UMC prohibition.[291] The court acknowledged the FTC's power "to restrain practices . . . which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained," but, absent concerted action, it found no basis for dispensing with proof of anticompetitive effects.[292]

A few months later, the FTC was again rebuffed in *Official Airline Guides*.[293] At that time, travel agents and frequent travelers obtained airline schedule information from a twice-monthly paperback called the Official Airline Guide (OAG). The FTC found that the OAG violated the UMC prohibition by declining to list the connecting flights of commuter airlines, thus suppressing competition between major and commuter airlines,[294] even if savvy OAG users built their own connections.

In setting the FTC order aside, the Second Circuit drew no distinction between the UMC prohibition and the Sherman Act and held that neither imposed a duty to treat commuter airlines the same as major airlines.[295] The court was concerned about giving "the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[296]

Finally, the *Ethyl* case,[297] also decided by the Second Circuit,[298] concerned three pricing practices for lead-based octane boosters in gasoline—quoting prices only on a delivered basis, employing most-favored-nations clauses, and providing at least 30 days advance notice of a price increase. Ethyl Corp. introduced the practices when it was the only domestic seller. DuPont adopted them when it began selling in 1948, and the two other sellers adopted them when they began selling in the 1960s.

The FTC declared that the UMC prohibition "extends to conduct which results in the same anticompetitive effects that the Sherman Act was designed to prevent and violates a basic legislative goal of the Act."[299] And the FTC found that the use of the practices of Ethyl and DuPont violated the prohibition because they "contributed significantly to price-matching and non-competitive market performance."[300]

The Second Circuit observed that the UMC prohibition extends to conduct violating either the letter or the spirit of the antitrust laws, but it demanded guardrails:

> When a business practice . . . does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair"

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[290] *Boise Cascade*, 637 F.2d at 578. The court noted that the respondents' economic expert testified that the pricing scheme employed would not affect the level of prices. *Id.* at 580.

[291] *Id.* at 581.

[292] *Id.* at 581–82 (quoting FTC v. Cement Inst., 333 U.S. 683, 708 (1948)).

[293] Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980).

[294] Reuben H. Donnelley Corp., 95 F.T.C. 1 (1980) (Donnelley published the OAG at the time of the FTC proceedings). The OAG began listing these connections in 1976, but that did not render the case moot or persuade the FTC to redeploy its resources.

[295] *Official Airline Guides*, 630 F.2d at 925–28.

[296] *Id.* at 927.

[297] Ethyl Corp., 101 F.T.C. 425 (1983).

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

[299] *Ethyl*, 101 F.T.C. at 601.

[300] *Id.* at 640.

> within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise . . . the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition.[301]

The Second Circuit labeled the FTC's application of the UMC prohibition "uncertain guesswork," and held that FTC "owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[302] Finally, the court held that "there has not been a sufficient showing of lessening of competition in the instant case to permit the exercise of that power."[303]

Over the past quarter-century, 10 significant cases applying the UMC prohibition were decided by courts of appeals, but all were essentially Sherman Act cases. In half of the cases, the courts acknowledged that the FTC's contention was that conduct at issue violated the UMC prohibition because it violated the Sherman Act.[304] In the other half, the courts asserted that the UMC prohibition and the Sherman Act had identical standards for the conduct at issue[305] or just applied Sherman Act standards.[306]

A few of the decisions deny any relevant difference between the UMC prohibition and the Sherman Act. As to price-related concerted conduct, the D.C. Circuit in *Polygram* declared that "the analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act."[307] And in the *McWane* case, involving single-firm exclusionary conduct, the Eleventh Circuit asserted:

> A violation of Section 5 of the Federal Trade Commission Act premised on monopolization requires proof of "(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."[308]

The quotation is from the Supreme Court's 1966 *Grinnell* decision, which set out the elements of the monopolization offense under Section 2 of the Sherman Act.[309]

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[301] *E.I. du Pont*, 729 F.2d at 138–39.

[302] *Id.* at 139.

[303] *Id.* at 142.

[304] FTC v. Qualcomm Inc., 969 F.3d 974, 980, 986–87 & n.11 (9th Cir. 2020); McWane, Inc. v. FTC, 783 F.3d 814, 827 n.10 (11th Cir. 2015); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 354–55 (5th Cir. 2008); Rambus Inc. v. FTC, 522 F.3d 456, 462 (D.C. Cir. 2008); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 32–33 (D.C. Cir. 2005).

[305] FTC v. Watson Pharm., Inc., 677 F.3d 1298, 1309, 1307 n.5 (11th Cir. 2012); Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1061–63 (11th Cir. 2005); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 933 (7th Cir. 2000).

[306] Impax Labs., Inc. v. FTC, 994 F.3d 484, 491 (5th Cir. 2021).

[307] *Polygram*, 416 F.3d at 32.

[308] *McWane*, 783 F.3d at 828.

[309] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

D. Distilling the Case Law

A consistent theme of cases interpreting the UMC prohibition is that a practice or course of conduct violates the prohibition if it violates the Sherman Act. Courts just presumed that the phrase "unfair methods of competition" must fully incorporate the Sherman Act's public policy. The presumption was never justified as the plain meaning of the phrase nor grounded in legislative history. The legislative history is to the contrary; it did not mention the collusive conduct addressed by Section 1 of the Sherman Act.

Another consistent theme of the cases is that the UMC prohibition reaches further than the Sherman and Clayton Acts, a proposition for which courts relied on legislative history for two distinct notions: First, the UMC prohibition encompasses conduct contrary to the "spirit," but not the letter, of the Sherman and Clayton Acts. Second, the UMC prohibition encompasses "incipient" Sherman Act violations,[310] that is, conduct expected to ripen into Sherman Act violations.

The notion of "spirit" violations could be implicit even in *Gratz*'s reading of the UMC prohibition—that it encompassed practices "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[311] And the notion was explicit in *Fashion Originators' Guild*'s reading—that the prohibition encompassed practices "counter to the public policy declared in the Sherman and Clayton Acts."[312]

In *Brown Shoe*, the Supreme Court cited *Fashion Originators' Guild* for the proposition that the applicability of the UMC prohibition was "well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts."[313] The Court, however, used the word "spirit" only in the *Sperry & Hutchinson* case, where the FTC had used it in framing a question presented in its certiorari petition.[314]

The spirit of the Sherman and Clayton Acts is captured by the idea that their purpose is "to preserve the health of the competitive process."[315] Cases under Section 2 often observe that it is concerned with the competitive process,[316] and that is true for Section 1,[317] as well as for the

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[310] Courts also suggested that the UMC prohibition reaches incipient Clayton Act violations, but that suggestion is problematic because the Clayton Act itself "sought to reach the agreements embraced within its sphere in their incipiency." Std. Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922). *See* UNLAWFUL RESTRAINTS AND MONOPOLIES, S. REP. NO. 63-698, at 2 (1914) ("Broadly stated, the bill . . . seeks to prohibit and make unlawful certain trade practices which . . . are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."). Moreover, the Clayton Act explicitly incorporated the incipiency notion by making a practice unlawful when its effect "may be substantially to lessen competition." 15 U.S.C. § 13 (prohibiting price discrimination), § 14 (prohibiting tying and other conditioned sales), § 18 (prohibiting certain stock acquisitions).

[311] FTC v. Gratz, 253 U.S. 421, 427 (1920).

[312] Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 463 (1941).

[313] FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966).

[314] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

[315] Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984) (Posner, J.).

[316] *E.g.*, *In re* Epipen (Epinephrine Injection, USP), 44 F.4th 959, 1000 (10th Cir. 2022); St. Luke's Hosp. v. ProMedica Health Sys. 8 F.4th 479, 486 (6th Cir. 2021); FTC v. Qualcomm Inc., 969 F.3d 974, 990 (9th Cir. 2020); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020); Phila. Taxi Ass'n v. Uber Techs., Inc., 886 F.3d 332, 339 (3d Cir. 2018); McWane, Inc. v. FTC, 783 F.3d 814, 835–36 (11th Cir. 2015); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam).

[317] *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (holding that a Section 1 plaintiff must "allege and prove harm . . . to the competitive process, *i.e.*, to competition itself"); Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713 (2014).

Clayton Act.[318] Put another way, only anticompetitive conduct is contrary to the spirit of the Sherman and Clayton Acts. Judge Stephen Breyer observed that the word "anticompetitive" has "a special meaning" in antitrust law: "It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process."[319]

The jurisprudence on the UMC prohibition has done little to identify practices that violate the spirit of the Sherman and Clayton Acts. If the UMC prohibition extends to collusive as well as exclusionary conduct, one practice stands out. Price fixing, bid rigging, and allocation of customers or markets are per se Sherman Act violations[320] and are prosecuted as felonies. But solicitation of such an agreement, at least normally,[321] does not violate the Sherman Act. Until Congress amends the Sherman Act to prohibit solicitation, the best example of conduct that violates its spirit but not its letter is the solicitation of an agreement that would be a per se violation of the act.[322]

In the legislative debate on the UMC prohibition, members of Congress perceived that enforcement of Section 2 of the Sherman Act was directed only at completed monopolization and wanted to intervene at an early stage. The words "incipient" and "incipiency" were used to make that point, and the prohibition's leading proponent, Senator Newlands, declared that "all you would have to prove" under the prohibition "would be an unfair method whose tendency was to stifle competition."[323]

The *Standard Oil* and *American Tobacco* cases were so prominent in 1914 that members of Congress overlooked the Sherman Act's potential later realized in cases like *Griffith*[324] and *Lorain Journal*.[325] In 1953, the Supreme Court declared: "Because the antitrust laws strike equally at nascent and accomplished restraints of trade, monopolistic designs as well as results are reached by the prohibitions of the Sherman Act."[326]

Speaking at a dinner celebrating the FTC's 90th anniversary, Judge Richard Posner exaggerated only slightly when he commented:

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[318] *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 114–17 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–89 (1977).

[319] Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988); Interface Grp., Inc. v. Mass. Port Auth., 816 F.2d 9, 10 (1st Cir. 1987).

[320] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

[321] One case holds that, under exceptional circumstances, solicitation can constitute an attempt to monopolize, violating Section 2 of the Sherman Act. United States v. Am. Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984). Solicitation also has been prosecuted criminally as wire fraud, violating 18 U.S.C. § 1343. *See* United States v. Ames Sintering Co., 927 F.2d 232, 235–36 (6th Cir. 1990); Constance K. Robinson, *Developments in Criminal Antitrust Enforcement*, 60 ANTITRUST L.J. 649, 653–54 (1991).

[322] Enforcement under the UMC prohibition cannot punish, and therefore it cannot deter solicitation of per se unlawful agreements. Nevertheless, the FTC has entered into consent agreements banning what it refers to as "invitations to collude." *E.g.*, U-Haul Int'l, Inc., 150 F.T.C. 1 (2010); Valassis Commc'ns, Inc., 141 F.T.C. 247 (2006); Stone Container Corp., 125 F.T.C. 853 (1998); Precision Moulding Co., 122 F.T.C. 104 (1996); YKK (USA), Inc., 116 F.T.C. 628 (1993); A.E. Clevite, 116 F.T.C. 389 (1993); Quality Trailer Prods. Corp., 115 F.T.C. 944 (1992). The FTC has asserted that its "anti-solicitation doctrine serves as a useful deterrent." Analysis of Agreement Containing Consent Order to Aid Public Comment, Valassis Commc'ns, Inc., 141 F.T.C. 279, 283 (2006). But the FTC has not set out its reasoning.

[323] 51 CONG. REC. 12217 (1914) (July 16).

[324] United States v. Griffith, 334 U.S. 100 (1948).

[325] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[326] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 622–23 (1953). Justice Tom C. Clark, who wrote the opinion, worked in the Antitrust Division of the U.S. Department of Justice from 1938 to 1943, ending that time as the assistant attorney general in charge.

> It used to be thought that "unfair methods of competition" swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The 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.[327]

For exclusionary conduct, at which the UMC prohibition was aimed, the text of the Sherman Act includes the offense of attempt to monopolize. The elements of the offense are "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[328] Professor Herbert Hovenkamp has argued that the incipiency idea associated with the UMC prohibition "should function something like the 'dangerous probability of success' requirement in the law of attempt to monopolize."[329]

If the spirit of the Sherman Act animates the UMC prohibition, it cannot condemn unilateral exclusionary conduct posing no risk of monopoly. At most, the incipiency notion justifies slightly shading the dangerous probability requirement. The FTC declined to shade it at all in a 1984 decision, declaring: "The proscription against attempted monopolization in Section 2 of the Sherman Act does not require a showing of monopoly power or injury to competition—a dangerous probability is sufficient. We do not believe this standard should be changed when a case is brought under Section 5."[330]

Monopoly maintenance cases also articulate what amounts to an incipiency standard. The D.C. Circuit's en banc *Microsoft* decision holds that the plaintiff's burden is to show that challenged conduct "contributed significantly" to maintaining a monopoly.[331] It was enough in that case to show that the targets of Microsoft's exclusionary tactics "reasonably constituted nascent threats" to Microsoft's monopoly because "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power."[332] Other courts have adopted the *Microsoft* standard.[333]

Section 1 of the Sherman Act also allows some trade restraints to be challenged at the earliest possible stage. Justice Oliver Wendell Holmes Jr. explained that "the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability."[334] All conduct within the

[327] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 765–66 (2005). Posner was an adviser to FTC Commissioner Philip Elman during 1963–65.

[328] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). Although not mentioned in the legislative history of the FTC Act, the Supreme Court already had established the "dangerous probability" standard for attempts to monopolize. *See supra* note 197.

[329] *See, e.g.*, Herbert J. Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 879 (2010).

[330] Gen. Foods Corp., 103 F.T.C. 204, 366 (1984).

[331] United States v. Microsoft Corp, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).

[332] *Id.*

[333] *See* Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 485 (7th Cir. 2020); McWane, Inc. v. FTC, 783 F.3d 814, 833 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005).

[334] Nash v. United States, 229 U.S. 373, 378 (1913).

scope of the per se rule against price fixing, bid rigging, and customer or market allocation can be attacked at conception.[335]

Most restraints are subject to the rule of reason, under which "the factfinder weighs all of the circumstances of a case."[336] There is no standard blueprint for the assessment. "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow . . . ."[337]

Rule-of-reason analysis can be forward looking and predictive, but not speculative. The Sherman Act specifically authorized prospective enforcement by investing the courts with jurisdiction "to prevent and restrain violations" and imposing a duty on the government to institute proceedings "to prevent and restrain such violations."[338] A restraint that is anticompetitive on its face can be enjoined before it is implemented. For other restraints, some "experience of the market" is required.

With respect to the standard of proof, the UMC prohibition could not set a lower bar than the Clayton Act's "reasonable probability" standard.[339] A reasonable probability is something less than a preponderance of the evidence,[340] yet something more than a mere possibility.[341] And the reasonable probability standard occupies all of that space because the law does not reckon probabilities with precision.[342] As the Fifth Circuit observed: "The concept of reasonable probability . . . is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act."[343]

Four basic principles are suggested by meshing jurisprudence on the UMC prohibition with antitrust developments since the Supreme Court last interpreted the UMC prohibition:[344]

1. *The UMC prohibition serves only to protect the competitive process.* The Supreme Court treated the "Sherman Act [as] a declaration of public policy to be considered in

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[335] *See* United States v. Joint Traffic Ass'n, 171 U.S. 505, 562, 577 (1998) (condemning price-fixing scheme), *rev'g*, United States v. Joint Traffic Ass'n, 76 F. 895, 897 (C.C. S.D.N.Y. 1896) (observing that the government challenged the mere formation of the Joint Traffic Association).

[336] Cont'l TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[337] Cal. Dental Assn. v. FTC, 526 U.S. 756, 781 (1999).

[338] 15 U.S.C. § 4.

[339] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 323, 356–57 (1962); Chicago Bridge & Iron Co. NV v. FTC, 534 F.3d 410, 423 (5th Cir. 2008); FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001).

[340] *See* Smith v. Cain, 565 U.S. 73, 75 (2012); Kyles v. Whitley, 514 U.S. 419, 434 (1995); United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004); Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J., concurring in relevant part).

[341] *See* Cone v. Bell, 556 U.S. 449, 491 (2009) (Thomas, J., dissenting); United States v. Agurs, 427 U.S. 97, 103, 109–10 (1976); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957) (merger case under the Clayton Act).

[342] See Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1123 (1987).

[343] *Chicago Bridge & Iron*, 534 F.3d at 423.

[344] These are principles for only the UMC prohibition. As amended in 1938, Section 5 also prohibits "unfair or deceptive acts or practices." Wheeler-Lea Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (codified at 15 U.S.C. § 45(a)(1)). The added prohibition serves a different purpose than the original prohibition. *See* AMENDMENTS TO THE FEDERAL TRADE COMMISSION ACT, S. REP. NO. 75-221, at 2 (1937); EXTENSION OF FEDERAL TRADE COMMISSION'S AUTHORITY OVER UNFAIR ACTS AND PRACTICES AND FALSE ADVERTISING OF FOOD, DRUGS, DEVICES, AND COSMETICS, H.R. REP. NO. 75-1613, at 3 (1937).

determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress."[345] And the Court observed that "the policy unequivocally laid down by the [Sherman] Act is competition."[346] And so it must be with the UMC prohibition. "The heart of our national economic policy long has been faith in the value of competition,"[347] and the FTC Act is one of the three pillars of U.S. competition policy, along with the Sherman Act and the Clayton Act.

2. *The UMC prohibition does not interfere with competition on the merits.* The Supreme Court stressed that, "It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'"[348] This axiom also applies to the FTC Act,[349] even though it is not included in the Clayton Act's definition of the "antitrust laws."[350] The shared purpose of the antitrust laws and the UMC prohibition "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[351]
3. *The UMC prohibition protects only the public interest in competition.* In an early case, the Supreme Court declared that the "great purpose" of the FTC Act was to "advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."[352] And in the first extensive interpretation of the UMC provision, the Court observed that the "paramount aim of the [FTC] act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree."[353]

The FTC plainly has no authority to use the UMC prohibition to intervene whenever it believes that someone, or some group, is being treated unfairly,[354] but dicta in the 1972

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[345] FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922).

[346] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[347] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) (the case did not arise under Section 5).

[348] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[349] The FTC Policy Statement hints that this axiom does not apply to the FTC Act by thrice quoting remarks of Representative Victor Murdock (R-KS) expressing a desire "to protect the 'smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals.'" FTC Policy Statement, *supra* note 8, at 3 n.15, 4 n.18, 5 n.21 (quoting 51 CONG. REC. 8979 (1914) (May 21)). Representative Murdock was touting H.R. 9299–301 (63d Cong.), dubbed the "trust triplets," which he introduced on November 17, 1913. The trust triplets were Progressive legislation not acted upon, and Murdock was unsuccessful when he proposed to amend the bill that became the FTC Act by adding a prohibition on "unfair or oppressive competition." 51 CONG. REC. 9050, 9055 (May 22, 1914). Murdock was an FTC commissioner from 1917 to 1924.

[350] The term "antitrust laws" was defined by the Clayton Act to include only the Sherman Act, the Wilson-Gorman Tariff Act of 1894 (as amended in 1913), and the Clayton Act. 15 U.S.C. § 12. The Supreme Court applied the maxim *expressio unius exclusio alterius* to hold that other laws, even if often viewed as "antitrust laws," do not come within the term "antitrust laws" when that term is used in a statute. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375–76 (1958).

[351] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993). The FTC "has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition." FTC v. Sinclair Ref. Co., 261 U.S. 463, 475–76 (1923).

[352] *Sinclair Ref.*, 261 U.S. at 476.

[353] FTC v. Raladam Co., 283 U.S. 643, 647–48 (1931).

[354] Section 5 authorizes the FTC to act against an unfair method of competition only if doing so "would be to the interest of the public." 15 U.S.C. § 45(b). Acting on behalf of a particular person or group is grounds for setting aside an FTC order. *See, e.g.*, FTC v. Royal Milling Co., 288 U.S. 212, 216–17 (1933); *Raladam*, 283 U.S. at 648–49; FTC v. Klesner, 280 U.S. 19, 27–29 (1929) (Brandeis, J.).

Sperry & Hutchinson decision could be read to say the UMC prohibition protects public interests other than competition.[355] For the FTC to rely on this dicta would risk reviving attacks on the agency for acting as a "national nanny."[356] And for a court to rely on it would raise the specter of unconstitutionally delegated legislative power.

When the FTC Act was written, an established canon of statutory construction was that, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[357] And the legislative history of the FTC Act clearly indicates that Congress meant to impose a policy choice on the FTC rather than delegate the choice to the FTC.

4. The UMC prohibition reaches beyond the Sherman and Clayton Acts only to conduct that is anticompetitive on its face or has a reasonable probability of significantly harming competition. The UMC prohibition requires bounds, and they can be found in the Sherman and Clayton Acts even if the UMC prohibition reaches a bit further. To fall within the spirit of the Sherman and Clayton Acts, a practice or course of conduct must be anticompetitive on its face. And to fall within the realm of an incipient violation of the Sherman Act, a practice or course of conduct must meet the Sherman Act's dangerous probability standard or the Clayton Act's reasonable probability standard.

III. THE 2022 FTC POLICY STATEMENT

A. Intent of Congress

The statement issued by the FTC on November 10, 2022 (FTC Policy Statement or Statement), relies heavily on the legislative history of the FTC Act. It includes 50 quotations from the committee reports and floor debate,[358] as well as quotations from courts on the FTC Act's legislative history and citations to legislative history without quotations.[359] Nevertheless, the Statement misleadingly portrays congressional intent.

First, the legislative history of the FTC Act indicates that Congress intended the UMC prohibition to reach further than the Sherman Act was reaching, but the FTC Policy Statement

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[355] *See supra* note 263 and accompanying text.

[356] The FTC's consumer protection efforts during the Carter administration gave it this sobriquet courtesy of the *Washington Post*. *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22. The FTC found itself under siege for overreaching. *See, e.g.*, Ernest Gellhorn, *The Wages of Zealotry: The FTC under Siege*, 4 REGULATION 33 (1980). The FTC was forced to shut down for a day when its budget authorization was allowed to lapse. *See* A. O. Sulzberger Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. TIMES, May 2, 1980, at 78. To end a years-long funding crisis, President Carter signed into law Pub. L. No. 96-252, 94 Stat. 374 (1980), which gave Congress veto power over the FTC rules. Jimmy Carter, Federal Trade Commission Improvements Act of 1980 Statement on Signing H.R. 2313 into Law, THE AMERICAN PRESIDENCY PROJECT (May 28, 1980), https://www.presidency.ucsb.edu/node/250970. The term "national nanny" then became a rallying cry for opponents of big government. *See, e.g.*, Ronald Reagan, *Remarks at a Rally Supporting the Proposed Constitutional Amendment for a Balanced Federal Budget* (July 19, 1982), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1982 BOOK II, at 939, 940 (1982).

[357] United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909). The justice who authored *Sperry & Hutchinson* (Justice Byron R. White) also wrote that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[358] FTC Policy Statement, *supra* note 8, at 2–7 & nn.7, 9–11, 15–22, 29–30, 39.

[359] *Id.* at 3 nn.8, 10–14.

makes the seemingly broader claim that "Congress's aim was to create a new prohibition broader than, and different from, the Sherman and Clayton Acts."[360]

The UMC prohibition clearly was aimed at the same conduct as Section 2 of the Sherman Act, but Congress's aim was to attack the conduct sooner than it was being attacked by the Department of Justice. The Sherman Act prohibition on attempts to monopolize allowed the department to attack the conduct sooner, and nothing in the legislative history indicates that the UMC prohibition was intended to work differently.

Congress's aim for the UMC prohibition cannot be gauged against the Clayton Act. George Rublee conceived of the UMC prohibition as an alternative to conduct prohibitions in the Clayton Act.[361] The Senate followed his lead by deleting two conduct prohibitions from the House version of the Clayton Act, passed on June 5, before passing it on September 2, 1914. The final Senate and House votes on the FTC Act followed shortly, on September 8 and 10. At that time, members of Congress did not know if the Clayton Act would contain conduct prohibitions, and, if so, their breadth.

Congress's aim for the UMC prohibition was not different from its final aim for the Clayton Act. As the Supreme Court observed in an early FTC Act case, "The Clayton Act . . . was intended to reach in their incipiency agreements embraced within the sphere of the Sherman Act."[362] As enacted, the Clayton Act prohibited specified conduct when its effect "may be to substantially lessen competition or tend to create a monopoly."[363]

Second, the adoption of the rule of reason was an initial impetus for the FTC Act, but the FTC Policy Statement makes the seemingly broader claim that "Congress passed the FTC Act to push back against the judiciary's adoption and use of the open-ended rule of reason for analyzing Sherman Act claims, which it feared would deliver inconsistent and unpredictable results and 'substitute the court in the place of Congress.'"[364]

The FTC Act was written and debated three years after the *Standard Oil* decision, by which time the furor over the rule of reason had abated. In the summer of 1914, Congress saw the rule of reason as workable and inescapable.[365] And when Congress decided to allow judicial review of FTC orders in a court of the respondent's choosing,[366] it chose a system that could be expected to deliver inconsistent results.

Third, the legislative history indicates that Congress intended the UMC prohibition to interdict an anticompetitive course of conduct at an early stage, but the FTC Policy Statement makes the seemingly broader claims that

> Congress evinced a clear aim that "unfair methods of competition" need not require a showing of current anticompetitive harm or anticompetitive intent in every case. . . . Requiring the FTC to show current anticompetitive effects, which are typically seen only after the monopoly has passed the "embryonic" stage, would undercut Congress's hope to prohibit unfair business practices prior

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[360] *Id.* at 3.

[361] *See* Rublee, *supra* note 45, at 114, 117. *See also The Judiciary Committee's Blunder*, HARPER'S WEEKLY, Aug. 8, 1914, at 121 (unsigned editorial attributed to Rublee attacking the inclusion of specific prohibitions in the Clayton Act).

[362] FTC v. Raladam Co., 283 U.S. 643, 647 (1931).

[363] Ch. 323, §§ 2–3, 38 Stat. 730, 730–31 (1914).

[364] FTC Policy Statement, *supra* note 8, at 2.

[365] *See supra* notes 176–77 and accompanying text.

[366] As in the original FTC Act, review of an FTC order under the UMC prohibition is available in "any circuit where the method of competition . . . was used or where such person, partnership, or corporation resides or carries on business." 15 U.S.C. § 45(c).

> to, or near, monopoly power. In addition, many of the practices listed by Congress as patently unfair do not automatically carry with them measurable effects.[367]

The "embryo" metaphor was used just once, by Senator Newlands,[368] who did not explain it. But he strongly preferred the UMC prohibition over specific prohibitions so that conduct would be assessed under the distinct circumstances of each case. He also asserted that the FTC would have to "prove" that a practice had a "tendency . . . to stifle competition."[369] The proof must have been marketplace experience demonstrating the impact of the practice on competition under particular circumstances.[370]

In the legislative history of the FTC Act, no practice was branded as "patently unfair" or words to that effect. A list of unfair practices compiled by economist William S. Stevens was cited multiple times, but they were thought to be unfair only under particular circumstances, and Congress subjected them to the rule of reason rather than banning them outright. The rule of reason did not focus on "measurable effects" in 1914, nor does it today. It focuses on how a practice affects the competitive process.[371]

Fourth, Congress intended that courts would defer to FTC fact finding, but the FTC Policy Statement makes the seemingly broader claim that "Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency."[372] The use of the word "deference" could be read as an assertion of *Chevron* deference[373] on the meaning of the UMC prohibition. The FTC, however, does not assert *Chevron* deference, nor have courts deferred in the past.[374]

Much of the Senate debate on the FTC Act was directed to whether Congress was delegating legislative power. Congress clearly had no such intention, and a majority agreed that the UMC prohibition did not do so. Senator McCumber precisely delineated the roles of the Congress and the FTC: "Congress determines by this bill that unfair competition is unlawful . . . . The only thing that is devolved upon the commission is to ascertain a fact; that fact is whether any person or corporation has been guilty of unfair competition."[375]

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[367] FTC Policy Statement, *supra* note 8, at 4–5 (footnotes omitted).

[368] *See supra* note 193 and accompanying text.

[369] 51 CONG. REC. 12217 (1914) (July 16).

[370] *See* Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 169 (2019) ("The incipiency doctrine does not alter the degree to which a merger or practice ultimately must be harmful to competition in order to be unacceptable; rather the doctrine extends the time horizon for assessing anticompetitive harm.").

[371] *See* Werden, *supra* note 317.

[372] FTC Policy Statement, *supra* note 8, at 7.

[373] *See* Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that courts should defer to "an agency's construction of the statute which it administers" when "the statute is silent or ambiguous with respect to the specific issue" if "the agency's answer is based on a permissible construction of the statute" (footnotes omitted)).

[374] *See* FTC v. Texaco Inc., 393 U.S. 223, 226 (1968) ("the ultimate responsibility for the construction of [Section 5] rests with the courts"); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934) ("it is for the courts to determine what practices or methods of competition are to be deemed unfair"); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922) ("'The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include.'" (quoting FTC v. Gratz, 253 U.S. 421, 427 (1920))); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 136 (2d Cir. 1984) ("it is the function of the court ultimately to determine the scope of the statute"); Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980) ("The policies calling for deference to the Commission are, of course, in tension with the acknowledged responsibility of the courts to interpret section 5.").

[375] 51 CONG. REC. 13145 (1914) (Aug. 3).

The courts have respected the FTC's expert factual assessments while ceding none of their authority to interpret the UMC prohibition. The Supreme Court's most recent comment on this subject is from 1968: "While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight."[376]

B. The Meaning of "Unfair Methods of Competition"

The FTC Policy Statement asserts that conduct can violate the UMC prohibition only if it "goes beyond competition on the merits."[377] But the Statement neither defines nor exemplifies competition on the merits, and its description of the reach of the UMC prohibition cannot be reconciled with the generally understood meaning of competition on the merits.

The concept of competition on the merits was known when the FTC Act was being debated in Congress, although it was then called "fair competition." In an article cited multiple times in debate, economist William S. Stevens contrasted "fair" and "unfair" competition, and he explained:

> Fair competition in an economic sense signifies a competition of economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. . . . If all have an equal chance to survive, it is economically proper that those failing through lack of efficiency should be destroyed. The community is entitled to the most efficient service that can be given.[378]

George Rublee, who drafted the UMC prohibition, advised President Wilson that "[f]air competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[379] Members of Congress referred to the same sense of "fair competition."[380]

Stevens's notion of efficiency-based competition is what is now meant by "competition on the merits."[381] The phrase entered the antitrust discourse when the Supreme Court asserted that the vice of the tying arrangement was that "competition on the merits with respect to the tied product is inevitably curbed."[382]

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376 *Texaco*, 393 U.S. at 226.

377 FTC Policy Statement, *supra* note 8, at 9.

378 Stevens, *supra* note 67, at 282–83.

379 *See supra* note 95 and accompanying text.

380 Senator Newlands, the most active advocate for creation of the FTC, used the term many times. *See* 51 CONG. REC. 11094 (1914) (June 25), 11098 (June 25), 11189 (June 26), 11875–76 (July 9), 12025 (July 13), 12734 (July 25). The term also was used by another advocate for the FTC, Senator Cummins. *See id.* at 11380 (June 30), 11385 (June 30), 12733 (July 25), 12742 (July 25), 12916–18 (July 29). For other uses of the term in the same manner, see *id.* at 11231 (June 27 comments of Sen. Robinson), 11300 (June 29 comments of Sen. Borah quoting William Stevens), 12146 (July 15 comments of Sen. Hollis), 12282 (July 17 comments of Senator John D. Works (R-CA)).

381 The term "efficiency-based competition on the merits" sometimes is used for maximum clarity. *See* Melamed, *supra* note 201, at 271, 287; A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 746, 759 (2019).

382 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958). *See, e.g.*, Siva v. Am. Bd. of Radiology, 38 F.4th 569, 573–74 (7th Cir. 2022).

Harvard law professor Donald F. Turner later used the phrase in discussing the law of Section 2, and he illustrated what he meant as competition through "superior skill, superior products, and superior efficiency."[383] The influential Areeda-Turner treatise then propounded a definition of exclusionary conduct that exempted competition on the merits,[384] and the Supreme Court endorsed this definition in 1985.[385]

Appellate courts often declare that conduct with a legitimate business justification is lawful competition on the merits,[386] which the D.C. Circuit's en banc *Microsoft* decision illustrated by "greater efficiency or enhanced consumer appeal."[387] The Tenth Circuit recited the elements of the monopolization offense, and then added: "This is to be distinguished from a business that acquired monopoly power by greater skill, efficiency, or by 'building a better mousetrap.'"[388]

The FTC Policy Statement sets out "two key criteria to consider when evaluating whether conduct goes beyond competition on the merits."[389] The first is that "the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature."[390] The second is that "the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers."[391]

Antitrust law addresses only anticompetitive conduct, which harms the competitive process,[392] and the words "collusive" and "predatory" in the first criterion refer to the recognized categories of anticompetitive conduct—collusion and exclusion. But the FTC Policy Statement asserts that conduct can go "beyond competition on the merits" even though it is not "collusive" or "predatory."

The descriptors "exploitative" and "abusive" open the door to attacking big companies for such things as paying low wages[393] or charging high prices. The competition law of many

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[383] Donald F. Turner, *The Scope of "Attempt to Monopolize*," 30 REC. ASS'N B. CITY N.Y. 487, 494 (1975). Turner arguably was the leading antitrust scholar at the time.

[384] 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626c, at 78–79 (1978).

[385] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) ("Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." (quoting AREEDA & TURNER, *supra* note 384, at 78)).

[386] *See* FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 463–64 (7th Cir. 2020); LePage's Inc. v. 3M, 324 F.3d 141, 179 (3d Cir. 2003); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062 (8th Cir. 2000); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999).

[387] *Microsoft*, 253 F.3d at 59.

[388] United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003).

[389] FTC Policy Statement, *supra* note 8, at 9.

[390] *Id.*

[391] *Id.* (footnote omitted).

[392] "'Anticompetitive' . . . refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process." Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988) (Breyer, J.). *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.").

[393] FTC Chair Lina M. Khan announced her intention to "protect workers." Lina M. Khan, Making Competition Work: Promoting Competition in Labor Market, Remarks of Chair Lina M. Khan at the Joint Workshop of the Federal Trade Commission and the Department of Justice, Dec. 6, 2021, https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_final_139pm.pdf.

jurisdictions, including the European Union, prohibits what is termed the "exploitative abuse of a dominant position,"[394] and the Court of Justice of the European Union holds that, "The abuse of a dominant position . . . might lie in the imposition of a price which is excessive in relation to the economic value of the service provided."[395]

In the second criterion, conduct that is "predatory" or "collusive" tends "to foreclose or impair the opportunities of market participants" and "reduce competition between rivals." Conduct having neither tendency is not anticompetitive even though it tends to "limit choice, or otherwise harm consumers." Harm to consumers most often flows from high prices, which have never been seen as anything but competition on the merits.[396] Choice is limited every time a firm decides not to offer a product or feature.

The FTC Policy Statement explains that the second criterion "examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition."[397] The Statement, thus, suggests that conduct can be said to "negatively affect competitive conditions" whenever market performance disappoints.

The Statement's result orientation contrasts with the process orientation of U.S. competition law, as seen in the *Discon* case.[398] A regional Bell operating company engaged in fraudulent affiliate transactions to deceive regulators and boost rates. The plaintiff lost business that went to the affiliate as part of the fraud. The fraud harmed the plaintiff and telephone ratepayers, but the plaintiff's Sherman Act claim was rejected.[399] The Supreme Court held that "the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."[400]

IV. CONCLUSION

The Congress responsible for the FTC Act understood that the Constitution did not permit the delegation of legislative power and that the words of the UMC prohibition had to implicate a

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[394] See Gregory J. Werden, Exploitative Abuse of a Dominant Position: A Bad Idea That Now Should Be Abandoned, 17 EUR. COMPETITION J. 682 (2021).

[395] Case C-177/16, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v. Konkurences padome, ECLI:EU:C:2017:286, ¶ 35, https://curia.europa.eu/juris/document/document.jsf?text=&docid=194436&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1662904.

[396] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

[397] FTC Policy Statement, *supra* note 8, at 10.

[398] NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[399] The Supreme Court addressed only whether the conduct was a per se violation of Section 1 and held that it was not. *Id.* at 130, 135, 140. On remand, the district court granted the defendant summary judgment on several bases, including that the "Supreme Court held in this case that in order for Discon to prevail on its Sherman Act claims, it must allege and show that NYNEX's conduct caused market-wide harm to competition, not just harm to Discon itself or to consumers in general. The undisputed facts in this case make clear that Discon has not and cannot meet this burden." Discon, Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 165 (W.D.N.Y. 2000).

[400] *Discon*, 525 U.S. at 135.

meaningful standard—an intelligible principle. The prohibition became law because a majority of members of Congress believed that it did articulate an intelligible principle, even if the precise limits of the prohibition were indefinite.

When the first FTC commissioners took their oaths on March 16, 1915, the UMC prohibition clearly was (1) aimed at exclusionary conduct apt to create or maintain a monopoly, (2) designed to protect the competitive process, not individual competitors, and (3) intended to go beyond the Sherman Act only by interdicting exclusionary conduct at an early stage. A basic idea for distinguishing between fair and unfair conduct had been clearly articulated: efficiency-based competition on the merits was fair, and methods calculated to exclude efficient competitors were unfair.

The applicable incipiency notion was straightforward because the UMC prohibition was not intended to attack conduct different than that attacked by Section 2 of the Sherman Act. Congress intended the UMC prohibition to halt conduct when its exclusionary nature became discernible, well before exclusion was an accomplished fact. The expertise of the commissioners and their staff was expected to yield refined judgments under the rule of reason as to the competitive impact of practices scrutinized.

The Supreme Court began a "plain meaning" interpretation of the UMC prohibition in Justice Sutherland's 1931 *Raladam* decision. He first determined that the words "unfair methods of competition" did not mean the same thing as "unfair competition" in common law.[401] He then determined that a method of competition was unfair when it was "resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly."[402] But he opined that "unfair methods of competition" "belongs to that class of phrases which do not admit of precise definition but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"[403]

When the process stalled in 1972, the Supreme Court had rendered UMC prohibition broader and less clear. Broadening began when the public policy of the Sherman Act was incorporated into the UMC prohibition.[404] This incorporation allowed the FTC to enforce the prohibition of collusive agreements in Section 1 of the Sherman Act.[405] And the interaction of the incipiency notion with the public policy incorporation allowed the FTC to enforce the UMC prohibition against conduct contrary to the spirit of Section 1 of the Sherman Act but lacking the essential element of agreement.[406]

If the UMC prohibition takes inspiration from the Sherman Act, it should be understood to serve the same ends through the same means. The UMC prohibition should be understood to protect the competitive process, rather than protect individual competitors or interest groups. The UMC prohibition should be understood to permit and encourage competition on the merits, even if the market might not appear to be delivering all that might be hoped. And the UMC prohibition should be understood to protect the public interest in competition, not other societal values.

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[401] *See* FTC v. Raladam Co., 283 U.S. 643, 648 (1931).

[402] *See id.* at 650.

[403] *See id.* at 648 (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1878)).

[404] *See* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453–54 (1922).

[405] *See* Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 465 (1941).

[406] *See* FTC v. Cement Inst., 333 U.S. 683, 708 (1948).

When the UMC prohibition goes beyond the Sherman Act, it should go in the same direction and not much further. The UMC prohibition requires bounds, which can be found in the Sherman and Clayton Acts.[407] To fall within the spirit of the Sherman and Clayton Acts, conduct must be anticompetitive on its face. And to fall within the realm of an incipient violation of the Sherman Act, conduct must meet its incipiency standard—dangerous probability of monopoly, or the Clayton Act incipiency standard—reasonable probability of significant harm to competition.

When the anticompetitive conduct of concern is not exclusion, the incipiency notion cannot apply in the same way as with exclusionary conduct, and might not apply at all. Collusion among direct competitors to suppress their competition is "the supreme evil of antitrust,"[408] and a rule of per se illegality applies to agreement to fix prices, rig bids, or allocate customers or markets. The collusive agreement itself is unlawful whether "wholly nascent or abortive on the one hand, or successful on the other."[409]

What the UMC prohibition could add to Section 1 of the Sherman Act is the possibility of attacking conduct that is "collusion-adjacent" in that no agreement has been formed (or none can be proved). This category most obviously includes solicitation of an agreement that would constitute a per se violation of Section 1 of the Sherman Act, and the FTC has secured consent judgments barring solicitation.[410] This application of the UMC prohibition, however, accomplishes little because it cannot deter collusion.[411]

Facilitating practices are less straightforward than solicitation. These are industry-wide practices that could help competitors coordinate their price or output decisions and achieve an outcome comparable to that with per se illegality for price fixing, bid rigging, and customer or market allocation, but without an agreement. Application of the UMC prohibition could serve the purposes of the antitrust laws, but the law is undeveloped. Courts have required the FTC to demonstrate both a lack of competition and causal responsibility for challenged practices,[412] but no proof standards exist.

The FTC Policy Statement concerning the UMC prohibition issued on November 10, 2022, should have identified the intelligible principle of the UMC prohibition, in part by articulating meaningful limits on the concept of "unfair methods of competition." But it appears to have been intended to knock down any walls that might cabin the FTC's enforcement, rather than to map its boundaries.

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[407] Just weeks after the FTC Act was signed into law, William Howard Taft gave a speech as president of the American Bar Association in which he asserted that "unfair methods of competition thus denounced only include those methods and practices . . . the effect and intent of which would bring them within the scope and condemnation" of the Sherman or Clayton Act. WILLIAM HOWARD TAFT, RECENT ANTITRUST AND LABOR INJUNCTION LEGISLATION, ANNUAL ADDRESS DELIVERED BEFORE THE AMERICAN BAR ASSOCIATION (OCT. 20, 1914), S. DOC. NO. 63-614, at 6–7 (1914).

[408] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

[409] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); *see* United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927); Nash v. United States, 229 U.S. 373, 378 (1913).

[410] *See supra* note 322.

[411] Congress should amend Section 1 of the Sherman to prohibit solicitation, which would allow the courts to expand the scope of the per se rule to include solicitation of price fixing, bid rigging, and customer or market allocation. The Department of Justice could then prosecute the solicitation as a felony violation of Section 1.

[412] *See* E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 141 (2d Cir. 1984) ("the record does not contain substantial evidence . . . showing a causal connection between the challenged practices and market prices"); Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980) ("While we are sympathetic with the difficulties of proof in a case such as this, we are unable to sustain an approach that finds a non-collusive pricing method to be illegal despite the absence of some reliable indicator that the practice had an effect on overall price levels.").

Courts are apt to closely scrutinize any assertion by the FTC that conduct violates the UMC prohibition even though it does not violate the Sherman Act or Clayton Act. If such an attempt were to reach the Supreme Court, the Court might pick up where Justice Sutherland left off in 1931. The phrase “unfair methods of competition” could be limited to conduct that tends to exclude efficient competitors. Some limits are inevitable.