

RESEARCH SUMMARY

Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act: What Is the Intelligible Principle?

The Federal Trade Commission (FTC) has recently asserted broader powers to make competition policy than ever before, basing its claim to do so on the original intentions of Congress. In “Unfair Methods of Competition under Section 5 of the FTC Act,” Gregory J. Werden disputes this, arguing that the historical record shows that the powers of the FTC are both modest and narrowly targeted.

CONGRESSIONAL INTENT AND THE PURPOSE OF THE UMC PROHIBITION

In passing the FTC Act in 1914, Congress declared unfair methods of competition (UMC) unlawful. Members did so in the knowledge that the Constitution would not permit the delegation of unfettered policymaking power to a commission. But they believed they had articulated a discernible standard—an “intelligible principle”—governing application of the UMC prohibition.

When the first FTC commissioners took their oaths on March 16, 1915, the purpose of the UMC prohibition was clear:

1. The prohibition was aimed at exclusionary conduct that was apt to create or maintain a monopoly.
2. The prohibition was designed to protect the competitive process, not individual competitors or interest groups.
3. The prohibition was intended to go beyond the existing antitrust law, the Sherman Act, only by interdicting exclusionary, anticompetitive conduct at an early stage.

The FTC Act had articulated a basic principle for distinguishing between fair and unfair conduct: Efficiency-based competition on the merits was fair, while exclusion of rivals on a basis other than efficiency was unfair.

NO DELEGATION OF POWER TO MAKE COMPETITION POLICY

The FTC policy statement on UMC prohibition issued on November 10, 2022, paints a distorted picture of the intentions of Congress and exaggerates the FTC’s powers to interfere with marketplace conduct. In properly interpreting the UMC prohibition, the commission and the courts must seek to understand the policy decisions that Congress made in 1914.

- Members of the 62d Congress understood that the Constitution demanded that a standard be discernible in the words of the UMC prohibition.
- The FTC Act became law because a majority of members were satisfied that the phrase “unfair methods of competition” met this demand.

- Their consensus—no members of Congress disagreed—was that the prohibition was not a delegation of power to make competition policy broadly.

KEY TAKEAWAY

Some commissioners may view the FTC as an agency that is permitted to right every wrong it perceives in the marketplace. But in passing the FTC Act, Congress was acutely aware of the constitutional limits on granting power to the FTC. The UMC prohibition was not meant as a blank check for the FTC to fill in, but rather the articulation of a principle that the commission would be obliged to apply.