DEFINING UNFAIR METHODS OF COMPETITION IN THE FEDERAL TRADE COMMISSION ACT

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Section 5 of the Federal Trade Commission Act of 1914 declares "unfair methods of competition" to be unlawful, but the precise meaning of that phrase has long been contested. Both the FTC and courts have generally deemed Section 5 to be textually ambiguous and have hence interpreted the agency's powers in light of the Act's legislative history and the overall goals of competition policy. This Article provides the missing piece to this interpretive puzzle by demonstrating that "unfair methods of competition" has a clear meaning based upon the substantive law of intentional torts as it developed in the late nineteenth and early twentieth centuries. Rejecting the English view that only independently wrongful conduct could constitute harm to a competitor, American courts also condemned malicious acts that lacked any justification beyond naked self-interest. Through the influence of economists, treatise writers, and state legislatures, this type of intentional tort became known as "unfair competition" or, as the Supreme Court influentially deemed it in 1911, "unfair methods of competition." By interpreting the text of the FTC Act, its legislative history, and the Commission's modern objectives against this historic context, this Article concludes that, while Section 5 extends beyond the letter and spirit of statutory antitrust law, the Commission's most recent guidance departs in several respects from the authority with which Congress imbued it.

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INTRODUCTION

One of the most potentially powerful tools of federal competition policy is Section 5 of the Federal Trade Commission Act of 1914, which states that "unfair methods of competition in commerce are hereby declared unlawful."[1] The Federal Trade Commission (FTC) may issue complaints against those persons or companies believed to use these methods and, after notice and hearing, enjoin them from continuing these practices.[2] What exactly constitute unfair methods of competition, however, has never been clear.[3] As the Supreme Court itself observed only a few years after the Act's passage, "[t]he words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute."[4] Since then, the Court has on multiple occasions repeated its belief that the drafters of this Act intentionally selected a new and ambiguous term to delineate the extent of the FTC's powers, leaving it to the agency—and, ultimately, the courts—to fix its meaning.[5]

1. Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1)).

2. 15 U.S.C. § 45(b).

3. *See, e.g.*, Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in This Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 655 (2005) ("'Unfair methods of competition' is a new phrase without common law mooring, and the statute does nothing to define this broad phrase any further.").

4. *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

5. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–40 (1972) ("[Congress] explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532–33 (1935) ("That was an expression new in the law."); *FTC v. Raladam Co.*,

In the absence of a clear statutory definition, interpretations of the FTC's power to regulate unfair methods of competition have typically fallen into one of two camps. The first, which until recently represented the official view of the FTC and most antitrust scholars, stresses that the jumbled legislative history of the Act provides little helpful contemporary guidance on what is "fair" or "unfair," not least because the FTC itself no longer plays the central role in the economy that its drafters may have envisioned.[6] In practice, moreover, the agency's efforts to implement an expansive reading of Section 5 in the latter part of the twentieth century encountered serious pushback from Congress, the judiciary, and the business community.[7] Given these challenges, the FTC should interpret its authority to condemn unfair methods of competition in light of its unique competencies as an expert administrative agency and to further the concerns of modern antitrust law.[8] In 2015, the FTC formally adopted this policy-driven interpretation by issuing a guidance document that described Section 5 authority as coterminous with antitrust law, namely the rule of reason and the consumer welfare standard.[9]

The second interpretive school, which currently guides the FTC's practice, has placed much greater weight on congressional intent to conclude that Section 5 is far broader than antitrust law. Key to this perspective is the belief that "unfair methods of competition" was a "new standard in federal competition law," which Congress entrusted the FTC to define and apply.[10] To understand what this authority means, historians

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283 U.S. 643, 648 (1931) ("[Unfair methods of competition] belongs to that class of phrases which do not admit of precise definition . . . .").

6. *See, e.g.*, Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, J. ANTITRUST ENF'T 1, 4–7, 3 n.10, 4 n.11 (2014) (expressing doubts about legislative history and an expansive FTC role); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930–39 (2010) (explaining why Section 5 has never taken a central role in competition policy).

7. *See* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 439–42 (2021) (summarizing the "Standard Story" of the FTC's overexpansion and retrenchment); Kovacic & Winerman, *supra* note 6, at 940–44 (describing the "painful instances" provoked by the FTC's expansive readings).

8. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 302h (2022) (emphasizing that Section 5 overlaps with the Sherman and Clayton Acts except to the extent that the FTC can employ different remedies and expertise than generalist courts); Gregory J. Werden & Luke M. Froeb, *Can the FTC Turn Back the Clock?*, ANTITRUST MAG. ONLINE, Oct. 2021, at 1, 8–9 (arguing that Section 5 should apply the same standards as conventional antitrust law); Kovacic & Winerman, *supra* note 6, at 944–50 (explaining why unfair methods of competition should be linked to antitrust law).

9. Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57,056 (Sept. 21, 2015).

10. Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*,

have situated the FTC as a key program of the original progressive movement of the early twentieth century and a reaction against judge-made antitrust law.[11] Months of legislative debate in 1914 routinely described an agency with the flexibility to determine when competition became unfair.[12] During the mid-twentieth century, moreover, expansive Supreme Court interpretations of the Act had drawn on this legislative history to suggest that the ambiguous phrasing of Section 5 permits the FTC to condemn "[c]onduct [v]iolating [c]ompetition [p]olicy as [f]ramed by the [c]ommission."[13] In July 2021, a newly progressive majority of the FTC endorsed this interpretation of Section 5 when it withdrew the earlier 2015 guidance document in a three-to-two vote, echoing renewed interest in Washington for expanding the use of Section 5 to circumvent perceived limitations in conventional antitrust

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Commission File No. P221202, at 3 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/KAA4-BTJB] [hereinafter FTC, *Policy Statement*]; *see also* Statement, Lina M. Khan, FTC Chair, On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act 1 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf [https://perma.cc/M73C-JA9J] (describing this standard as "new law"); Statement of Chair Lina Khan on the Withdrawal of the Statement of Enforcement Principles 1–3 (July 1, 2021), https://www.ftc.gov/public-statements/2021/07/statement-chair-lina-m-khan-joined-commissioner-rohit-chopra-commissioner [https://perma.cc/EH3F-MLHD] [hereinafter Statement of Chair Lina Khan].

11. *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS (1988) (reviewing political attitudes towards markets and antitrust in this era generally); THOMAS K. MCCRAW, PROPHETS OF REGULATION 80–152 (1984) (discussing the influence of Louis Brandeis on the FTC); *see also* Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 394–98 (2016) (comparing the history and text of the FTC Act to the Interstate Commerce Act).

12. *See* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1233–34 (2021); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 654–63 (2017); 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, 230–38, 270–71, 283–84, 283 n.235 (1980); *see also* Daniel Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, CPI ANTITRUST J., Feb. 2010, at 2, 3–4, 8 (emphasizing the use of the Act's legislative history in interpretation); Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 520–43, 553 (1962) (concluding from an extensive review of the legislative history and mid-century judicial interpretation that Section 5 permits "pragmatic analysis" independent of the Sherman and Clayton Acts).

13. Averitt, *supra* note 12, at 271–90 (discussing these cases).

jurisprudence.[14] Over a year later, the FTC issued a new policy statement in which it declared that Section 5 was not limited to the rule of reason or antitrust law but instead focused on "stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."[15] And in January 2023, the FTC demonstrated that it would deploy Section 5 aggressively when, in its first major application of the new policy statement, the agency proposed banning most noncompete agreements as inherently coercive, notwithstanding that the rule of reason and the law of most states have traditionally approved of noncompete agreements.[16]

This Article demonstrates that unfair methods of competition was far from a "new standard" when incorporated into Section 5. Although that precise phrase had only been coined by the Supreme Court in 1911, it expressed a clear, yet long since overlooked, legal meaning rooted in the law of intentional torts as it had developed in the late nineteenth and early twentieth century.[17] Even before the creation of statutory antitrust law, contemporaries had begun to realize that not all business activity

14. Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 1 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf [https://perma.cc/B39D-78RL] [hereinafter FTC, *Statement of the Commission*]; *see also* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020) (calling for enhanced rulemaking authority under Section 5 of the FTC Act); Vaheesan, *supra* note 12, at 657–63, 673–88 (arguing that the FTC has broad authority to target unfair competition); SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE COMM. ON THE JUDICIARY OF THE H.R., 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, 13–14, 339–41 (Comm. Print 2022) (calling for reevaluation of unfair methods of competition under Section 5 of the FTC Act) [hereinafter COMM. ON THE JUDICIARY]; Exec. Order No. 14,036, 3 C.F.R. 609, 612 (2022) (calling for government efforts to address "overconcentration, monopolization, and unfair competition" in the American economy).

15. FTC, *Policy Statement*, *supra* note 10, at 10.

16. Although the constraints of the publication process prevent this Article from discussing the noncompete rule in depth, the analysis developed in Part III strongly suggests that the proposed rule exceeds the FTC's authority under Section 5. *Compare* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3499–508 (proposed Jan. 19, 2023) (to be codified as 16 C.F.R. pt. 910), *with* Dissenting Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulemaking for the Non-Compete Clause Rule 3 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf [https://perma.cc/6H2B-TZ3E].

17. *See generally* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 450–87 (1990) (discussing the influence of competition on intentional torts); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 423–41 (1975) (emphasizing the rival historical conceptions of malice and protected interests in the intentional torts of this era with a pronounced preference for the latter).

could be considered legitimate competition. Rejecting the English view that only an independently wrongful act directed against a rival could produce liability, American authorities scrutinized actions that appeared to inflict losses on rivals or impede their entry into a market without any offsetting justification. Although employing a different analysis than antitrust law, this approach largely tracked the outcomes of the rule of reason, just as the modern law of tortious interference continues to avoid condemning good faith efforts at enhancing consumer welfare.[18]

Appreciation of how this theory of intentional torts formed the background to the FTC Act does more than aid the commission in supplying the business community with clear, consistent, and historically accurate guidance on the enforcement of Section 5. This historical understanding also provides the missing piece needed to solve the centuries-long interpretive puzzle over the meaning of unfair methods of competition and the scope of the agency's powers. The Supreme Court last analyzed the meaning of unfair methods of competition in depth in the early 1970s, over a decade before the emergence of the modern *Chevron*[19] doctrine of judicial deference to agency interpretations of statutes. Under *Chevron*, a court must determine if Congress left any ambiguity in the statutory text for the agency to resolve and, if so, whether the agency's interpretation "is based on a permissible construction of the statute."[20] In carrying out this analysis, a court uses "traditional tools of statutory construction."[21] Legislative history and congressional intent formerly dominated this analysis, but various methods of textual analysis have moved to the fore of this interpretive toolkit over the past several decades.[22]

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18. *See* discussion *infra* Sections I.B–C, III.B.

19. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

20. *Id.* at 842–43.

21. *Id.* at 843 nn.9 & 11; *see also* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 607 (2009) (arguing that traditional tools of statutory interpretation show that *Chevron*'s two steps should be viewed as a single inquiry).

22. For a review of this shifting emphasis in interpretation, see Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 796–802, 813–28 (2018) (reviewing the modern emphasis on ordinary or plain meanings and ways of determining that from textual use); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1089–92, 1097–118 (reviewing defects in modern textualist review and discerning rules that guide interpretation); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997) ("Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 363–73 (1994) (linking a weakening in judicial deference to the growth of textualism); and William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353–58 (1990) (placing textual analysis at the tip of the "funnel of abstraction" in interpretive methods).

As the FTC's leadership openly recognizes, efforts to expand Section 5 beyond its familiar antitrust context today will inevitably invite renewed judicial scrutiny under *Chevron.*[23] Moreover, as other observers have warned, agency efforts to define "unfair methods of competition" may also run afoul of the Constitution if it appears that Congress has delegated legislative authority to the FTC with no intelligible principle to guide its efforts.[24] Nearly a century ago, the Supreme Court stated that the FTC's "quasi-judicial" process provided adequate assurances that it would determine the meaning of "unfair methods of competition" "within its statutory authority," unlike the unconstitutionally broad "fair competition" standard of the National Recovery Administration.[25] But the Court, while assuming that Congress had some meaning in mind when crafting Section 5, admitted that this phrase could not "admit of precise definition."[26] Given growing judicial skepticism of congressional delegation even when there is some identifiable principle, the FTC's ability to enforce Section 5 will likely depend on whether it can demonstrate that Congress "prescribe[d] the rule governing private conduct," with the FTC's role merely to "make the application of that rule depend on executive fact-finding."[27]

By demonstrating that unfair methods of competition reflected a distinct legal concept when the FTC Act incorporated that term in 1914, this Article replaces the traditional legislative-history and policy-driven interpretations of Section 5 with a definition faithful both to its text and the separation of powers. Part I of the Article elucidates this historical meaning in the late nineteenth and early twentieth century, when a distinctive legal and economic concept of unfair competition emerged from private tort suits and applied concepts of malice and justification to determine when losses inflicted by one business against a rival constituted a legal injury. Part II reevaluates the legislative history, judicial interpretation, and agency application of Section 5 in light of this historical reasoning, casting doubts on the ability of the commission to condemn as unfair that conduct which violates public policy as the FTC

23. Chopra & Khan, *supra* note 14, at 375–79 (applying *Chevron* deference to Section 5); *see also* Ohlhausen, *supra* note 6, at 6 n.26 (collecting concerns gathered by the FTC in the 2000s that contemporary courts would express greater skepticism about broad Section 5 applications than in the past).

24. *See* Crane, *supra* note 12, at 1237; Svetlana Gans & Eugene Scalia, Opinion, *The FTC Heads for Legal Trouble*, WALL ST. J. (Aug. 8, 2022, 6:02 PM), https://www.wsj.com/articles/ftc-may-test-the-courts-limits-meta-lina-khan-roberts-nondelegation-major-questions-enforcement-authority-humphreys-executor-administrative-law-noncompete-11659979935 [https://perma.cc/GWS4-G4RC]; *see generally Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

25. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. at 533–34.

26. *Id.* at 532.

27. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

itself determines. Part III compares the FTC's 2022 policy statement on the meaning of Section 5 to this history as well as contemporary developments in the realm of business torts. Although standalone Section 5 authority will not always permit the agency to transcend the limits of antitrust law, exercise of its adjudicative powers within these historical constrains should remain flexible enough to achieve many contemporary goals while surviving judicial review. Part IV concludes by showing how this historical understanding has value for the FTC apart from its importance in understanding the text of the Act.

I. FROM *DAMNUM ABSQUE INJURIA* TO UNFAIR METHODS OF COMPETITION

When Section 5 of the FTC Act condemned "unfair methods of competition" in 1914, that precise phrase was still fairly novel. The substantive meaning of this concept, however, had become well established over the previous decades. The common law had traditionally displayed great skepticism at its ability to distinguish true injuries inflicted by one business on another from the numerous false positives that the competitive marketplace would produce. By the late nineteenth century, new forms of economic organization had called that reluctance into question. No longer were courts asked to pass judgment on small-scale and evenly matched competitors. They now grappled with agglomerations of capital on a nationwide scale in the forms of trusts and corporations, the burgeoning role of business cartels, and a surging union movement.[28] American authorities feared that continuing a laissez-faire attitude in the face of these new challenges would inevitably subject society to the power of monopoly, and they soon developed a legal theory to address these concerns.[29] Actions that could enhance the efficiency of the actor's own business or benefit society were to be left alone, but those with no purpose but to harm or hinder another were actionable as unfair methods of competition.

A. Traditional Understandings of Harm to Competition

The common law had long believed that competition could not generate legal injuries. The emergence of trusts and other forms of large-scale enterprise in the late nineteenth century called that legal principle into question. Authorities on both sides of the Atlantic debated whether the law permitted those harmed by these new competitors to seek redress. In America, express concern about competition gave way to the familiar concepts of restraint of trade and monopolization in the Sherman Act. In

28. *See* discussion *infra* Sections I.A.1, I.B.2–3.

29. *See* discussion *infra* Section I.B.2.

Great Britain, the requirement that a competitor must employ independently wrongful means before facing legal liability enabled cartels to close markets to their rivals.

1. *DAMNUM ABSQUE INJURIA* AND STANDARD COMMON LAW REMEDIES

For centuries, the general presumption of Anglo-American law has been that competition is not a tort. As far back as the famous Schoolmaster's Case of 1410,[30] in which incumbent school masters had sued a newcomer for charging lower tuition and siphoning off their enrollment, courts have understood that entry into the market is "virtuous and charitable" to the public.[31] In other words, competition is a harm without legal injury—a *damnum absque injuria*, to use the once ubiquitous Latin concept.[32] Francis Hilliard's *The Law of Torts or Private Wrongs*—considered the first American tort treatise when it appeared in 1859—thus noted that "it is quite obvious that one party may often be *injured* by the act of another, without having a right of action for such injury. Such are the familiar cases, of the lawful use of one's own land, seduction, *competition in business*, and privileged communications."[33] Oliver Wendell Holmes similarly illustrated this reasoning with the famous example that "a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already."[34] The poor old widow suffers the loss of her livelihood, but this intentional harm is justified "on the economic postulate that free competition is worth more to society than it costs."[35]

By the late nineteenth century, the rise of modern industry had begun to blur this understanding. Standard Oil, the most famous and controversial of the emerging big businesses, epitomized these difficulties. Standard Oil enjoyed a number of competitive cost

30. *Hanlyn v. More*, YB 11 Hen. 4, fol. 47, Hil., pl. 21 (1410) (Eng.) *reprinted in* JOHN BAKER, BAKER & MILSOM: SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 671 (Oxford Univ. Press 2d ed. 2010).

31. BAKER, *supra* note 30, at 671–72.

32. *Cf.* Cicero, Pro Sexto Roscio Comoedo VIII 24 ("Expressae sunt enim ex unius cuiusque damno, dolore, incommodo, calamitate, iniuria publicae a praetore formulae, ad quas privata lis accommodatur.") ("For public formulae have been set out by the praetor to which a private action can be adapted, according to one's damages [*damno*], suffering, inconvenience, disaster, or injustice [*iniuria*]." (author's translation)).

33. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 86–87 n.a (1859) (emphasis added).

34. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

35. *Id.* at 3–4.

advantages over its rivals in terms of its production technologies and use of pipelines for transportation, and its vertical integration backwards into oil wells and forward into marketing allowed Standard Oil to coordinate all steps of production.[36] Most importantly, Standard Oil ensured that all those operations meshed by shutting down inefficient plants, rationalizing production, and developing new means of managerial control, beginning with the Standard Oil Trust in 1882 and culminating in its reconstitution as a New Jersey holding company in 1899.[37] Yet, Standard Oil had not come to dominate the petroleum market by its efficiencies alone.[38] In the 1870s, Standard Oil had exploited its heft as a shipper of petroleum not simply to extract favorable railroad rates but to press railroads into raising rival refineries' costs of transportation, and Standard Oil built pipelines to deter those who might offer lower-cost transportation and thereby threaten its railroad schemes.[39] In its marketing techniques, moreover, Standard Oil would often stop at nothing to crush its rivals through cut-price oil, threats of lawsuits, and other shady conduct.[40]

Such behavior suggested that not all harms inflicted by one business on another could still be considered true competition. When Senator John Sherman introduced his first draft of the bill that would ultimately become the basis of modern antitrust law in late 1889, he thus proposed targeting not restraints of trade and monopolization, the offenses that Congress would ultimately condemn, but rather combinations "with a view, or which tend to prevent full and free competition," as well as those that "tend to advance the cost to the consumer of any such article[] . . . ."[41] To Sherman, free competition signaled both the ability to enter a market, such as through open incorporation laws, as well as the absence of interference with those in the same line of business.[42] Free competition included rivalries based on skill and capital, but not "immoral and injurious pursuits" or the restraints of trade such as Standard Oil

36. *See* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 19–28 (1992); ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 93–96 (1990) [hereinafter CHANDLER, SCALE AND SCOPE]; ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 254–56, 321–25 (1977).

37. *See* CHANDLER, SCALE AND SCOPE, *supra* note 36, at 73–74; *see also id.* at 8–10 (laying out the successful model of tripartite investments in production, marketing, and management).

38. The classic account is described in IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904). *See also* Leslie Hannah, *The Whig Fable of American Tobacco, 1895–1913*, 66 J. ECON. HIST. 42 (2006) (reviewing how American Tobacco similarly did not grow through efficiencies alone).

39. *See* Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J. L. & ECON. 1, 3–27, 34–37 (1996).

40. *See infra* notes 135–47 and accompanying text.

41. 20 CONG. REC. 1120 (1889).

42. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

allegedly pursued through its manipulation of railroad rates.[43] Trusts were especially to be condemned because, according to Senator Sherman, they had only one effect: "to make competition impossible," in turn enabling the trust to manipulate output and prices entirely out of its own "selfishness, uncontrolled by competition."[44]

For instance, Sherman at one point in the Senate debates responded to the apparently true story of the Cottonseed Oil Trust, which had been rebuffed in its efforts to buy an Alabaman manufacturer.[45] The Alabaman had boasted he was shipping ten-thousand barrels to Italy.[46] In response, the trust had placed ten-thousand barrels of its own aboard the same ship, consigned to the same city in Italy, but priced at a dollar per barrel less.[47] Although it is unclear if the Trust used predatory pricing, Senator Sherman clearly believed that this conduct betrayed intent to punish a rival, not to expand the export market for cottonseed oil, and hence was not free competition.[48]

While the common law had little direct familiarity with "competition," the concepts that replaced that term in the final Sherman Act, "monopolize" and "restraint of trade," were also understood by contemporaries as laying outside the bounds of true competition.[49] As a famous colloquy between Senators John E. Kenna and George F. Edmunds revealed, the meaning of "to monopolize" at common law did not extend to someone who obtained a monopoly through superior skill and technique but did encompass someone who acted through "means which prevent other men from engaging in fair competition with him."[50] The Sherman Act's condemnation of contracts in restraint of trade also reflected a long-settled concern of the common law with defending competition. Agreements not to compete were permissible when limited in geographic or temporal scope so as to assure that the party that purchased a business or lost a skilled employee would not suffer an immediate loss of his investment.[51] On the other hand, these restraints were deemed unreasonable if the public would be deprived of an

43. *Id.* Sherman discusses Standard Oil's use of railroads and pipelines at *id.* at 2457–58.

44. *Id.* at 2457.

45. *Id.* at 2609–10.

46. *Id.* at 2609.

47. *Id.*

48. *Id.* at 2608–10.

49. *Id.* at 2901; *see also id.* at 3148 (statement of Sen. Edwards) (preferring terms already known to the law); *id.* at 3146 (comments of Sen. Hoar) (emphasizing that this language applied existing common law doctrines); *id.* at 4090 (statement of Rep. Culberson) (providing dictionary definition).

50. *Id.* at 3151–52.

51. *See* WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT, 8–9 (1914).

additional competitor beyond those legitimate needs.[52] Likewise, a contract whose main object was to prevent a business from independently determining its output or prices, or one that encouraged the formation of a monopoly, was unreasonable.[53]

Still, as supporters of the Sherman Act also pointed out, even if the common law viewed these tactics as less than true competition, it traditionally provided no means of redress to competitors who suffered harm as a result.[54] Restraint of trade could be raised as a defense to a breach of contract, but those harmed by the higher prices or other consequences of a restraint traditionally had no ability to secure damages.[55] The primary exception to this rule involved suits for damages when common carriers entered into agreements with companies such as Standard Oil to place rivals at a cost disadvantage, but this remedy was traditionally directed against the common carrier and limited to the overcharge, not lost profits or other damages.[56] Sherman's solution to the common law's lack of a remedy was to create a statutory right of action for those such as the Alabaman cottonseed oil manufacturer harmed by tactics that could not be deemed free competition.[57] Since consumers might not individually suffer enough damages in the form of monopoly overcharges to make a suit feasible, Sherman proposed that every competitor must also be given a right of action "for all the damages he

52. *See Or. Steam Nav. Co. v. Winsor*, 87 U.S. 64, 68 (1873); TAFT, *supra* note 51, at 7–12 (reviewing common-law restraint of trade).

53. TAFT, *supra* note 51, at 11; THOMAS M. COOLEY, THE ELEMENTS OF TORTS 102 (1895) ("If a number of employers in the same line of business agree among themselves to suspend or carry on business as the majority shall agree, this is void . . . in restraint of trade.") [hereinafter COOLEY, THE ELEMENTS OF TORTS]; THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 282 (1879) (providing examples of combinations in restraint of trade) [hereinafter COOLEY, A TREATISE].

54. 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar) ("The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.").

55. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898) (Taft, J.) ("Contracts that were unreasonable restraint of trade at common law . . . were simply void, and were not enforced by the courts. . . . The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense . . . .").

56. *See* COOLEY, A TREATISE, *supra* note 53, at 282–83, 638–69 (reviewing damages for breach of common-carrier duty). On Standard Oil specifically, see *Handy v. Cleveland & Marietta R.R. Company*, 31 F. 689, 693 (C.C.S.D. Ohio 1887) ("The discrimination complained of in this case is so wanton and oppressive it could hardly have been accepted by an honest man . . . ."); *Scofield v. Lake Shore & M. S. Ry. Co.*, 3 N.E. 907, 926 (Ohio 1885) ("And this contract, made to build up a monopoly for the Standard Oil Company and drive its competitors from the field, is just as unlawful as if its provisions had been aimed directly against the interests of the plaintiffs.").

57. 21 CONG. REC. 2609–10 (1890).

suffered."[58] The version of Sherman's bill reported by the Senate Finance Committee in January 1890 created a new remedy: "twice the amount of the damages sustained, and the cost of suit," which ultimately became treble damages in the final act.[59]

2. THE ENGLISH RULE OF INDEPENDENTLY WRONGFUL ACTIONS

The common law had recognized that not every action taken by one business against a rival would benefit society, but fear of condemning mere *damna absque injuria* had long limited tort liability for problematic behavior to a narrow class of actions. Appropriation of another's trademark or goodwill was wrongful both as a violation of a property right and for using fraudulent means to divert consumers away from the mark's owner, as was the use of force or coercion to prevent customers from trading with a rival.[60] The famous English case of *Lumley v. Gye*[61] from 1853 similarly recognized that a business that intentionally interferes with another's contract "commits a wrongful act for which he is responsible at law."[62] American courts were quick to extend this rule from its origins in the law of enticed servants to other types of contracts.[63]

Yet when no fraud or force was involved, historical guidance on whether conduct such as Standard Oil's could become tortious rested on a series of cases that famed legal philosopher Zechariah Chafee would in 1940 describe as "a small number of torts of strange sorts," whose unusual circumstances clouded any generally derivable rules.[64] The earliest and most important of these cases was *Keeble v. Hickeringill*[65] from 1707. Keeble owned a decoy pond in which he caught ducks to sell. Hickeringill, who also had a decoy pond, shot off a gun on his own

58. *Id.* at 2610; *see also* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 23–27 (1989) (arguing that the Sherman Act was intended to give standing to competitors as well as consumers when harmed by a restraint of trade).

59. 21 CONG. REC. 2455 (1890); Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1914).

60. *See* COOLEY, A TREATISE, *supra* note 53, at 359–65; HILLIARD, *supra* note 33, at 86 n.1.

61. 118 Eng. Rep. 749 (Q.B. 1853).

62. *Id.* at 753.

63. *See* MELVILLE M. BIGELOW, ELEMENTS OF THE LAW OF TORTS 80–82 (5th ed. 1894) (labeling interference with contract as "a tort of but recent distinct and settled recognition"); *see also Jones v. Stanly*, 76 N.C. 355 (1877) (extending inducement of breach of contract to goods); *Heath v. American Book Co.*, 97 F. 533, 533–35 (C.C.D.W. Va. 1899) (holding that both the breaching party and the inducer could be liable for the wrong).

64. Zechariah Chafee, Jr., *Unfair Competition*, 53 HARV. L. REV. 1289, 1291, 1296 (1940).

65. (1707) 103 ER 1127, [1558-1774] All ER 286.

property, apparently intending to damage Keeble's enterprise.[66] Lord Chief Justice John Holt concluded that Keeble had a cause of action to recover his losses because "he that hinders another in his trade or livelihood is liable to an action for so hindering him."[67]

It was clear that Lord Holt recognized that not all actions could be considered valid competition even when occurring between rivals. Had Hickeringill merely used his own decoys, then as in the *Schoolmaster's Case*, "no action would lie, because he had as much liberty to make and use a decoy as the plaintiff," but here, Hickeringill had engaged in a "violent or malicious act" to harm Keeble, akin to if one of the schoolmasters had fired a gun to scare off students.[68] Given the numerous factors involved in this situation, including the use of force, trespass, nuisance, and malicious intent, the basis of *Keeble*'s holding has remained heavily debated for centuries.[69] Still, there were enough scattered cases of these torts of strange sorts over the eighteenth and nineteenth centuries to enable English courts to settle on an explanation for why shooting guns near decoy ponds was less like opening a new school and more akin to trademark infringement and intentional interference with contract: all of these actions employed independently wrongful means against business rivals.[70]

This conclusion was applied to its most influential effect in the late nineteenth century by the House of Lords in *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*[71] A group of steamship owners had organized a cartel and agreed to offer rebates to shippers who exclusively patronized the association's members. When a rival, Mogul, sent its own ship to break into this trade, the association responded by threatening to blacklist anyone who dealt with Mogul and by sending "fighting ships" of its own specifically to undercut Mogul's prices until it withdrew.[72] There was no question that the association's agreement would have been unenforceable if Mogul had been a member of the association and

66. *Id.* at 286–87.

67. *Id.* at 287.

68. *Id.* at 288.

69. Recent authorities tend to view *Keeble* as based on an independently wrongful act. *See OBG Ltd. v. Allan*, [2007] UKHL 21; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 18 cmt. C (AM. L. INST. 2020); *see also* Bruce Wyman, *Competition and the Law*, 15 HARV. L. REV. 427, 440 (1902) (concluding that the rule of *Keeble* is that the use of violence against a competitor constitutes a tort).

70. *See, e.g.*, *Ibottson v. Peat*, (1865) 3 LR Exch. 644, 647 ("There is nothing unlawful in enticing game by putting down corn; but it is unlawful to frighten them away by firing combustibles."); *see also Tarleton v. M'Gawley* (1793), 170 Eng. Rep. 153, 154; Peake 270, 273–74 (holding that the intentional firing of a cannon to discourage natives from trading with a rival is wrongful when "it is proved that the defendant had expressed an intention not to permit any trade").

71. [1892] AC 25 (HL) (appeal taken from Eng.).

72. *See id.* at 53–56.

challenged this agreement as a restraint of trade.[73] The question before the House of Lords, however, was a different matter: whether Mogul could claim damages for its lost business at common law.[74] The Lords answered this question in the negative.[75] Despite this restraint of trade being directed against Mogul, the members of the association had acted to promote their own pecuniary interests, and in the absence of an independent wrong, Mogul had suffered only *damnum absque injuria* in the course of business.[76]

A second leading English case of that era, *Allen v. Flood*,[77] further developed the rule of *Mogul* to stress that bad motives alone could not make lawful behavior actionable in tort. Flood was a shipwright who had been hired to work at a shipyard alongside unionized boilermakers. The union was not happy with the presence of this interloper. Allen, the union representative, informed their employer that they would strike unless Flood was fired. The employer agreed, and Flood sued Allen for economic losses.[78] The House of Lords concluded that no matter what the union's motives had been, "the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong, for which reparation is due."[79] Because the boilermakers had a legal right to strike, and Allen's actions had not constituted coercion, Flood was simply the victim of labor market competition.[80]

B. The Intentional Tort of Unfair Competition

As businesses and individuals turned to the courts in search of relief from their rivals' trade practices, American law quickly developed its own understanding of competition. Whether rooted in common law or statute, a clear majority position had emerged by the early twentieth century that expressly rejected *Mogul* and other English cases. True competition inflicted only *damnum absque injuria*, but the tactics of

73. *See id.* at 47–48.

74. *Id.* at 58 (Lord Hannen).

75. *Id.* at 48 (Lord Bramwell).

76. *Id.* at 46 (Lord Bramwell) (noting that Mogul could not maintain an action unless the association had committed "an offence, a crime, a misdemeanour"). For other opinions expressing the conclusion that only independently wrongful action could allow a legal remedy, see *id.* at 36–37 (Lord Halsbury), and *id.* at 42 (Lord Watson).

77. [1898] AC 1 (HL) (appeal taken from Eng.).

78. *Id.* at 90–91 (Lord Watson).

79. *Id.* at 92.

80. *Id.* at 98–99. Lord Davey similarly noted that had Allen made a misrepresentation about the potential of a strike, the fraud could have supported Flood's action. However, since no allegations of that claim were raised below, Allen had done nothing independently wrong. *Id.* at 173–74.

companies such as Standard Oil that harmed rivals without any acceptable justification could engender tort or even criminal liability.

1. DEFINING MALICE OBJECTIVELY

Mogul and *Allen* settled the English approach to the tort of competition during this era, and they found a number of adherents on the other side of the Atlantic as well.[81] Yet, many American courts had already begun to derive a different set of lessons from *Keeble* and *Lumley* about when business actions threatened competition. *Walker v. Cronin*,[82] perhaps the most influential American contribution to the adoption of *Lumley*'s tort of interference with contract, marks a key point in this trans-Atlantic divergence.[83] In this case, boot manufacturers alleged that the defendant, a union official, had induced their employees to leave their factories despite knowing they were under contract, with the result that the manufacturers had to pay above-market rates to maintain operations.[84] In holding for the manufacturers, the Massachusetts Supreme Judicial Court declined to find that this interference was wrong simply because it employed coercion or violated a property right. Instead, the court drew a different conclusion from *Keeble* and other cases of the strange sorts: "The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."[85] *Lumley*'s focus on contracts was only a special case of a larger type of intentional tort based on a "malicious wrong, when defendant has no pretext of justifiable cause."[86] Everyone had an equal right to compete in the labor market for workmen, and hence "[i]f disturbance or loss come as a result of competition . . . it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with."[87] Yet once a worker contracted with one employer, the period of competition had ended, and with it "the justification of competition" for the union's actions.[88]

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81. *See* COOLEY, THE ELEMENTS, *supra* note 53, at 100–01 (emphasizing that conspiracy was wrongful only when its means were independently wrongful); *see also* COOLEY, A TREATISE, *supra* note 53, at 81 (emphasizing that no amount of malicious motive could transform permissible action into legal injury).

82. 107 Mass. 555 (1871).

83. *See* Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1201–18 (1996) (emphasizing the importance of *Walker v. Cronin* to the tort of intentional interference with contract).

84. *Walker*, 107 Mass. at 556–58.

85. *Id.* at 562.

86. *Id.* at 565.

87. *Id.* at 564.

88. *See id.*

Walker's definition of malice, "the unlawful purpose to cause such damage and loss, without right or justifiable cause," represented the key distinction from what would become the English view of competitive torts.[89] American authorities agreed that malice, in the dictionary sense of animosity, ill will, or spite towards another, was insufficient to constitute an injury in itself, nor could it make a legal action wrongful.[90] After all, business rivals were expected to loathe one another even when engaged in socially acceptable competition.[91] If courts simply relied on subjective intent to determine legal injury, friendly cartels would survive as true competition otherwise ground to a halt.[92]

American courts departed from the English view in their understanding of malice not as a subjective state of mind but as the objective absence of any valid justification. As the Supreme Court explained this relation between malice and justification in 1907, "it is not necessary that the ingredient of actual malice in the sense of personal ill will should exist," as actions demonstrating "wanton disregard" of another's rights constituted legal malice when interfering with another's business.[93] Independently wrongful actions served as only one form of evidence about this intent, as actions that only benefited an actor by hindering a rival's performance or interfering with his established rights generally could not be considered to benefit society as would true competition.[94] Thus, Holmes would interpret *Mogul* as support for his

89. *Id.* at 562. *See Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co.*, 52 So. 454, 457 (Miss. 1910) ("There may be some early authorities which conflict with the view of the law announced in this case; but the more modern and more just decisions, according to our view, sustain our conclusions. . . . Wanton and malicious interference with one's business, with the purpose to destroy it, is a wrong that will be admitted by the most indifferent.").

90. *See, e.g.*, COOLEY, A TREATISE, *supra* note 53, at 690 ("[M]alicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.").

91. *See* HARRY D. NIMS, THE LAW OF UNFAIR BUSINESS COMPETITION 356 (1909) ("[T]hese acts are the result of the desire of business men to succeed,—to down rivals, to get out of their way those who block their progress."); *see also Heywood v. Tillson*, 75 Me. 225, 238 (1883) (Barrows, J., concurring) (noting that employers will normally show a "spirit of unfriendliness" towards employees).

92. *See Chambers v. Baldwin*, 15 S.W. 57, 59–60 (Ky. 1891) ("[I]f the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered."); *see also* Gordon Stoner, *The Influence of Social and Economic Ideals on the Law of Malicious Torts*, 8 MICH. L. REV. 468, 475–77 (1910) (noting the concern of courts about interfering in business competition).

93. *Bitterman v. Louisville & Nashville R.R. Co.*, 207 U.S. 205, 222–23 (1907).

94. *See Aikens v. Wisconsin*, 195 U.S. 194, 203 (1904) ("We interpret 'maliciously injuring' to import doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired.");

influential theory of the intentional tort: "prima facie, the intentional infliction of temporal damages is a cause of action, which. . . requires a justification if the defendant is to escape."[95]

Treatise writers and jurists of that era hypothesized about a situation of pure malice, in which one party would incur any loss to drive out a rival and then quit the business right afterwards.[96] That scenario materialized in 1909 with the famous case of *Tuttle v. Buck*.[97] The defendant, had allegedly attempted to drive out the plaintiff, the town barber, by opening a competing barbershop. There were no allegations that the defendant operated at a loss or engaged in any tactics other than "energetically [seeking] business from his acquaintances and the customers of the plaintiff."[98] Yet, once the plaintiff's business was ruined, the defendant closed his shop shortly thereafter.[99]

From a modern antitrust perspective, this conduct should not be condemned. Consumers benefited from the intense price competition, and given low barriers to entry for barbers, they would not have suffered a permanent loss of welfare following the rival's exit. The mere fact of exit, moreover, shows that the banker obtained no durable market power. In evaluating these allegations as an intentional tort by one business against another, however, the Minnesota Supreme Court focused on the defendant's exit from an apparently profitable business to conclude that the defendant could have acted "with the intention of himself retiring upon the accomplishment of his malevolent purpose."[100] Rejecting the possibility that losing out to a stronger and more enterprising rival was the only plausible inference from these facts, the court permitted the plaintiff to seek damages. Based on these allegations, it was possible that the defendant's actions may have been nothing more than "the application

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see also Boggs v. Duncan-Schell Furniture Co., 143 N.W. 482, 485–86 (Iowa 1913) ("There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business."); *Huskie v. Griffin*, 74 A. 595, 598 (N.H. 1909) ("[I]t seems to clearly follow that, where his only reason is his malicious wish to injure the plaintiff, he has no justification."); *Doremus v. Hennessy*, 52 N.E. 924, 926 (Ill. 1898) ("[A]n act maliciously done, with the intent and purpose of injuring another, is not lawful competition.").

95. *Aikens*, 195 U.S. at 204; *see also* Vandevelde, *supra* note 17, at 447, 457–65 (discussing Holmes's interpretation of *Mogul*).

96. *E.g.*, F.B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 420 (1905) (collecting cases raising this scenario).

97. 119 N.W. 946 (Minn. 1909).

98. *Id.* at 948.

99. *Id.* at 946–48.

100. *Id.* at 948.

of force without legal justification, which in its moral quality may be no better than highway robbery."[101]

2. JUSTIFICATION AND ITS ANTITRUST PARALLELS

By the time the Restatement of Torts was published in 1938, the facts of *Tuttle* had come to be distinguished as yet another tort of a strange sort, in which the intent to withdraw showed that this business was not bona fide competition.[102] This narrow reading suggested that practically any self-interested action would suffice to demonstrate valid justification, no matter the means used or the possibility of success. The Supreme Court had itself explained the Lords' decision in *Mogul* on such broad grounds. The association's "agreement for lowering rates of transportation among the parties thereto" had been "entered into for the purpose of driving out of trade rival steamships," not for the purpose of expanding the market but so "rates might be advanced."[103] This intent nevertheless did not constitute a legal injury because "so long as the injury to such rival was not the sole reason for the agreement, but self-interest the predominating motive, there was nothing wrong in law with an agreement of that kind."[104]

Some American authorities followed that "anything-goes" approach to justification, reasoning that *Mogul* was correct in permitting individual businesses to unite in support of common goals as long as they did not interfere with any established rights of others or commit independently wrongful actions.[105] The leading case for this view was *Bohn Manufacturing Co. v. Hollis*,[106] decided by the Minnesota Supreme Court in 1893, one year after the House of Lords' decision in *Mogul*. In *Bohn*, an association of lumber retailers had agreed to boycott lumber sold by manufacturers directly to consumers.[107] When Hollis, the secretary of the association, threatened to notify all members that the plaintiff manufacturer was no longer in compliance with the association's rules, the plaintiff sued on the ground that this group boycott would drive him out of business.[108] The Minnesota Supreme Court disagreed, noting the lack of any independently wrongful "fraud, coercion, or intimidation,

101. *Id.*
102. RESTATEMENT OF TORTS § 709 cmt. c (AM. LAW. INST. 1938).
103. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 335 (1897).
104. *Id.*
105. *Cf.* Epstein, *supra* note 17, at 423–41 (explaining why *Mogul* was correctly decided on the grounds of interference with protected interests, not independent harms, in contrast to *Tuttle* and other cases based on malice and justification).
106. 55 N.W. 1119 (Minn. 1893).
107. *Id.* at 1120.
108. *Id.*

either towards plaintiff or the members of the association."[109] Because each individual retailer could lawfully choose whether to remain in the association, the actions of the association as a whole were not actionable.[110] In support of this conclusion, the court cited "well-settled, elementary principles of law" derived from *Mogul* among other cases, including: associations whose lawful conduct tended to diminish the profits of others committed no unlawful injury; and third parties had no standing to challenge a restraint of trade that was void only between its parties.[111]

Many American courts of this era cited *Bohn* and its legal principles, and some agreed with its conclusion that trade associations and their members could freely refuse to deal with individual businesses to advance their own self-interests.[112] More commonly, however, courts cited *Bohn* to distinguish the dominant American view from that of *Mogul*; as the Georgia Supreme Court emphasized, "[S]ome of what was said in that decision [*Bohn*] is unsound, and not in accord with cases already cited. It has been considerably criticised."[113] Indeed, when the Department of Commerce surveyed American unfair competition law in 1915, it listed *Bohn* as one of only two cases in which actions "to prevent manufacturers and others from disposing of their goods" were held "not unlawful," in contrast to "the majority of such cases [in which] the defendants have been held liable."[114]

The rejection of *Bohn* and its application of the English rule of *Mogul* and *Allen* stemmed from concern that such a laissez-faire attitude would prove entirely ineffective at solving the line-drawing problem when it came to the conduct of Standard Oil and other companies.[115]

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109. *Id.*

110. *Id.* at 1121–22.

111. *Id.* at 1121.

112. *See, e.g.*, *Harris v. Commonwealth*, 73 S.E. 561, 564–66 (Va. 1912) (reviewing *Bohn* and similar cases in which insurers were allowed to jointly refuse to do business with those they could each individually refuse to insure); *see also Brewster v. Miller*, 41 S.W. 301, 304–05 (Ky. 1897) (dismissing claim of customer indebted to one funeral home against funeral home association whose members refused to deal with him on pain of fines).

113. *Brown v. Jacobs Pharmacy Co.*, 41 S.E. 553, 562 (Ga. 1902) (collecting cases); *see also Retail Lumber Dealers' Ass'n v. State*, 48 So. 1021, 1023 (Miss. 1909) (criticizing *Bohn* and noting that other courts viewed associations as necessarily stifling trade); *Hopkins v. Oxley Stave Co.*, 83 F. 912 (8th Cir. 1897) (distinguishing *Mogul* and *Bohn* from a longer list of authorities in support of an injunction against union boycott).

114. JOSEPH E. DAVIES, DEP'T OF COM., TRUST LAWS AND UNFAIR COMPETITION 401 (1915).

115. *Compare Hopkins*, 83 F. at 936 (Caldwell, J., dissenting) (defending *Mogul* from the "erroneous assumption that a boycott cannot be used as a weapon of competition" in part because this tool is used "by great corporations and trusts"), *and Lough v. Outerbridge*, 38 N.E. 292, 294 (N.Y. 1894) (permitting conduct similar to that of *Mogul* because the resulting rates remained reasonable for a common carrier), *with*

American authorities openly criticized English law's focus on independently wrongful harms as naïve for ignoring these modern-day threats to competition. Adopting the stance of English law threatened to sanction artificial impediments to market entry and competition, thereby encouraging monopolization and cartelization in both the labor and product markets.[116]

American skepticism at the claim that self-interest always provided sufficient justification was perhaps most clearly displayed when evaluating the union activity that had been the issue in *Allen*.[117] Unions argued that labor could only compete with organized capital by obtaining a monopoly over an industrial workforce. Hence, the use of tactics that had the immediate effect of preventing others from competing for work ultimately strengthened competition and thereby showed a lack of malice.[118] The majority of courts, however, pointed out that the very purpose of a labor union was to obtain a monopoly over the labor market, with potentially debilitating economic effects.[119] Unions were free to compete with capital—that is, their actual employer—for a share of income by striking for higher wages or employing peaceful means of persuasion. But when unions resorted to tactics that prevented others from working, the self-interested objective of obtaining a monopoly

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Oliver v. Gilmore, 52 F. 562, 566 (D. Mass. 1892) (noting that American common and statutory law was more opposed to monopoly than British law), *and Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 24 N.Y.S. 647, 649–50 (N.Y. Special Term 1893) (distinguishing *Mogul* on the ground that state antitrust law prohibited retaliation against those who would not join a restraint of trade).

116. *See State ex rel. Durner v. Huegin*, 85 N.W. 1046, 1064–66 (Wis. 1901) ("The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade, and render combinations successful by the malicious destruction of the business of competitors, is not liable to find favor with the courts in this country.").

117. *See* 2 THOMAS M. COOLEY & JOHN LEWIS, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTACT 598 n.38 (3d ed. 1906) ("[*Allen v. Flood*] has been much criticized in this country.").

118. *See, e.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 480–82 (1921) (Brandeis, J., dissenting) (agreeing with cases holding that the secondary boycott represented justifiable self-interest and not malice); *see also Vegelahn v. Guntner*, 44 N.E. 1077, 1082 (Mass. 1896) (Holmes, J., dissenting) ("The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business.").

119. *See, e.g.*, *Loewe v. Lawlor*, 208 U.S. 274, 294–97, 304 (1908) (concluding that labor unions that achieved their objectives by threatening secondary boycotts were liable under common-law and antitrust concepts of restraint of trade); *Berry v. Donovan*, 74 N.E. 603, 605–06 (Mass. 1905) ("Employers would be forced to yield to all their demands or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly.").

surely could not justify the immediate losses to competition that resulted from the union's activities.[120]

Thus, unlike the English, American courts recognized an important limitation on justification: "a purpose to put an end to competition is not competition."[121] In general, actions that were "naturally incident to competition" by offering lower costs, special benefits, or more information were permissible means to interfere with another's business, while those that pressured or prevented others from trading or entering the market were deemed inconsistent with competition.[122] Determining whether such justifications existed could require fact-specific analyses that extended beyond monetary concerns to other social interests, such as good-faith advice or concern for another's welfare.[123] This contextual approach to justification drew skepticism from Holmes and other legal realists, who viewed this inquiry as a means for judges to impose their own views of the market upon society.[124] Rather than allowing judges to create their own public policy, however, judicial notice of these varied factors ensured that determinations of malice and justification would not

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120. *See, e.g.*, *Lawlor v. Loewe*, 235 U.S. 522, 535–36 (1915) (condemning the use of publicized secondary boycott efforts); *Plant v. Woods*, 57 N.E. 1011, 1012–13 (Mass. 1900); *Vegelahn*, 44 N.E. at 1077–78; *see also* TAFT, *supra* note 51, at 21–24 (differentiating losses caused by striking workers from those resulting from an unjustified secondary boycott); *see also* Stoner, *supra* note 92, at 480 (concluding that courts generally looked only to the immediate goal of interfering actions, not their ultimate goal); MELVILLE MADISON BIGELOW, THE LAW OF TORTS 250–53, 251 n.2 (8th ed. 1907) (critiquing the dominant focus on the danger of labor combinations).

121. Bigelow, *supra* note 120, at 249.

122. *Martell v. White*, 69 N.E. 1085, 1088–89 (Mass. 1904) (collecting and discussing cases); *Jackson v. Stanfield*, 36 N.E. 345, 350–52 (Ind. 1894) (same); *see also Olive v. Van Patten*, 25 S.W. 428, 430 (Tex. Civ. App. 1894) (noting that the defendants' gain from preventing plaintiffs from selling to consumers did not justify an otherwise malicious act); *Walker v. Cronin*, 107 Mass. 555, 566 (1871) (viewing "friendly advice, honestly given" as justification for knowing interference with contract).

123. *Compare Gott v. Berea College*, 161 S.W. 204, 205–06, 208 (Ky. 1913) (allowing a religious college to expel students who patronized a saloon as the college stood "in loco parentis concerning the physical and moral welfare and mental training of the pupils" and hence had not acted maliciously), *and Heywood v. Tillson*, 75 Me. 225, 230–31 (1883) (holding that an employer was justified in encouraging his employee to breach a lease at an "extortionate rent" of $100 annually for a "shanty" costing only $250), *with Hutton v. Watters*, 179 S.W. 134, 137–38 (Tenn. 1915) (holding that there was no moral, economic, or protective justification for a Baptist school to tell students not to board with a local widow when it was clear that the college officials were merely penalizing her for her failure to evict a troublesome student).

124. Holmes, *supra* note 34, at 8 ("The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue.").

be made on purely populist grounds or sympathy to small businesses unable to survive in a changing market.[125]

Importantly, judicial evaluation of these justifications for interfering with another's business largely tracked the results of the rule of reason that antitrust law would also come to adopt.[126] Tying one product to another could be deemed malicious and hence actionable in tort when the only reasonable purpose of the tie was to deprive the plaintiff of its customers.[127] Exclusive dealing contracts were generally upheld at common law as a reasonable restraint of trade and hence valid competition, but a company that demanded exclusive patronage from its customers could be deemed to act maliciously if the circumstances showed that its purpose was to obtain a monopoly by shutting out rivals.[128] Likewise, when a new market entrant was attempting to break the monopoly of an established incumbent, courts were more willing to tolerate the solicitation of new business from established customers even when it might interfere with existing contracts, as otherwise the incumbent would be able to shield his monopoly permanently from competition.[129]

Most notably, the majority of American courts rejected the self-interested justification of *Mogul* and permitted damages for those harmed

125. *See Graham v. St. Charles St. R.R. Co.*, 16 So. 806, 806 (La. 1895) (noting in the case syllabus that "[t]he question of liability or not, in different cases, would be dependent upon their own special facts, and upon varying conditions and relations"); *see also Eclipse Towboat Co. v. Pontchartrain R.R. Co.*, 24 La. Ann. 1, 6, 11, 14 (1872) (upholding limitation on damages awarded by special jury of merchants to a steamboat operator that lost business when a competitor provided a loan to a railway in return for favorable rates on the ground it was a *damnum absque injuria*); Stoner, *supra* note 92, at 469–70 (noting that judge-made law was less likely to be reflective of public ideas than popular statute).

126. *See* DAVIES, *supra* note 114, at 332–34 (noting the overlap between conduct "held to be unlawful at the common law as between private parties" and traditional restraints of trade, especially that condemned by the Sherman Act).

127. *See City of Mobile v. Bienville Water Supply Co.*, 30 So. 445, 448–49 (Ala. 1901) (holding that city utility's "unjust discrimination" in providing sewage service to customers of rival's water service constituted a legal injury to the rival).

128. *See* DAVIES, *supra* note 114, at 409–16 (highlighting that exclusive dealing contracts were generally upheld at common law); *see also Roseneau v. Empire Cir. Co.*, 131 A.D. 429, 430–31, 436 (N.Y. App. Div. 1909) (denying damages when exclusive burlesque agent forced cancellation of rival's contract on grounds that exclusivity contributed value by reducing idleness of troupes and theaters); *Inter-Ocean Publ'g Co. v. Associated Press*, 56 N.E. 822, 822 (Ill. 1900) (enjoining the AP from enforcing requirement that newspaper members could not obtain news from any other source as a restraint of trade).

129. *See Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 555–57, 560–61 (M.D. Ala. 1909) (permitting a utility to offer below-cost rates and make truthful methods of persuasion to induce switching but forbidding indemnification agreements on the apparent grounds it showed that the new entrant was aware it was the causal force in contract breaches).

by cartels, group boycotts, or other forms of joint venture.[130] Joint ventures intended to fix prices or boycott a rival generally had no saving justification, especially when they involved the policing of agreements clearly in restraint of trade at common law.[131] The conclusion that rivals had joined together with a view to harm a competitor was strengthened when the members of a conspiracy acted in ways that were not individually rational.[132] Even if an individual could carry out those actions without liability, the combination of rivals suggested that this joint venture had formed to overcome the individual self-interest to defect.[133] Still, when there was a valid reason for this joint refusal, courts concluded that the harm was merely *damnum absque injuria*, just as modern antitrust law understands under the rule of reason that some apparent group boycotts actually enhance competition.[134] Thus, *Bohn* and the other American efforts to import *Mogul* were commonly distinguished, even in Minnesota, as situations in which an association's

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130. *See* DAVIES, *supra* note 114, at 401–04 (discussing the American divergence from *Mogul*).

131. *See, e.g.*, *Evenson v. Spaulding*, 150 F. 517, 522 (9th Cir. 1907) ("[The association's] purpose was not to sell goods of their own, and thereby interfere with sales by the appellees, but it was, by pursuing a policy of molestation, to drive the appellees out of business and out of the country."); *see also Doremus v. Hennessy*, 52 N.E. 924, 924–25 (Ill. 1898) (allowing laundry owner to bring action against local laundry association that had induced customers to break their contracts with her when she refused to abide by the association's price schedule); *Van Horn v. Van Horn*, 20 A. 485, 485 (N.J. Sup. Ct. 1890) (reasoning that an unlawful conspiracy had formed for no purpose but to drive plaintiff out of business by terminating her credit and scaring away customers); *Kellogg v. Sowerby*, 93 A.D. 124, 132 (N.Y. App. Div. 1904) ("[I]t was the intent and purpose of the defendants to compel the plaintiffs to cease operating the Kellogg elevator in competition with the others, or to run it at a loss."), *rev'd*, 83 N.E. 47 (N.Y. 1907).

132. *See State ex rel. Durner v. Huegin*, 85 N.W. 1046, 1062–63 (Wis. 1901), *aff'd sub nom. Aikens v. Wisconsin*, 195 U.S. 194, 202–04, 206–07 (1904) (concluding that three newspapers that agreed to raise prices only on advertisers who followed a fourth paper's price increase had acted maliciously because they could gain no additional customers from this joint approach but could not have maintained price discipline by acting individually).

133. *See, e.g.*, *Klingel's Pharmacy v. Sharp & Dohme*, 64 A. 1029 (Md. 1906) (permitting damages against druggist association that blacklisted plaintiff pharmacy for refusing to abide by minimum prices and boycotted any dealer who dealt with plaintiff even though individual druggists could impose those terms).

134. *Compare Delz v. Winfree*, 16 S.W. 111, 111–12 (Tex. 1891) (citing *Walker v. Cronin* to conclude that plaintiff butcher had cause of action when defendants maliciously conspired to boycott his business), *with Delz v. Winfree*, 25 S.W. 50, 51 (Tex. Civ. App. 1894) (holding on remand for the defendants on the ground that their refusal to sell could be explained by the plaintiff's indebtedness to each defendant); *see also Martell v. White*, 69 N.E. 1085, 1088 (Mass. 1904) (noting that an association could use fines in some situations to enforce its rules while in other uses fines would be deemed coercive and lacking competitive justification). For the modern perspective on the application of the rule of reason to group boycotts, see *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293–98 (1985).

actions did not betray any malicious purpose or in which the provision of additional information to the market justified any immediate harm to a competitor.[135]

3. Unfair Competition and Standard Oil

Given that the Supreme Court would expressly endorse the rule of reason as the basis of antitrust law when affirming the dissolution of Standard Oil in 1911, it was fitting that courts evaluating Standard Oil's conduct under tort law had arrived at just the same conclusions through the lens of malice and justification.[136] When Standard Oil threatened railways that it would build a pipeline unless the railway raised its rates to harm rival refineries, courts condemned these schemes as "so unusual and unjust and oppressive to rival shippers" that they clearly had no purpose but a "desire[] to crush" Standard Oil's competitors.[137] Yet, when Standard Oil actually constructed a pipeline and required oil producers to ship through its pipeline to sell to its own refinery, this need not have been an impermissible tie that would harm competitors and impede fair competition. As the West Virginia Supreme Court concluded in 1901, while "at first blush this conduct might appear wrong" against the incumbent pipeline, "the field was open to all" when it came to competition for oil producers, and Standard Oil was not seeking to compel oil producers to boycott a rival but rather offering them a reason to deal with its own pipeline.[138] When Standard Oil enforced this tie on existing customers of rival pipelines or used threats to induce the switch, however, it crossed the line identified by *Walker*. Such behavior was

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135. *See Gray v. Bldg. Trades Council*, 97 N.W. 663, 666 (Minn. 1903) ("[*Bohn*'s] decision is clearly put on the ground that the action of the retail dealers was, in effect, a strike, and not restrainable in equity. They intended only to inform members of their association of the action of plaintiff in selling direct to the contractors, and there was no claim made of any boycott, as in the case at bar."); *see also Montgomery Ward & Co. v. S.D. Retail Merchs.' & Hardware Dealers' Ass'n*, 150 F. 413, 418 (D.S.D. 1907) ("The American cases, however, when carefully considered, show that the great weight of authority in the United States is in favor of the proposition that it is not unfair competition, intimidation, or coercion for a combination to interfere with this right by persuasion or any peaceable means."); *Master Builders' Ass'n v. Domascio*, 63 P. 782, 785 (Colo. Ct. App. 1901) ("The authorities cited by the plaintiff are not in point . . . . As we read them, all expressly turn upon the fact that there was coercion, intimidation, or malicious threats to do an unlawful injury.").

136. *See* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. Cal. L. Rev. 689, 708–09 (2012) (noting that tort cases against Standard Oil "can be framed as antitrust cases but were not pleaded as such").

137. *Handy v. Cleveland & Marietta R.R. Co.*, 31 F. 689, 689, 692 (C.C.S.D. Ohio 1887).

138. *W. Va. Transp. Co. v. Standard Oil Co.*, 40 S.E. 591, 594–95 (W. Va. 1901).

"not for the benefit of the defendants in the exercise of the right of free competition, but in malice only to injure and destroy the plaintiff," as Standard Oil was depriving the oil producers of their free choice of competitors: "Presumably, the customers would have continued their voluntary patronage but for the wrongful intervention and influence of the intervener."[139]

Courts also applied these standards of malice and justification to determine when Standard Oil's forward integration into retail represented true competition and when it was instead used to achieve or preserve Standard Oil's monopoly position. Clearly, Standard Oil was permitted to become a retailer of oil, even if that would cause losses to its former customers. If Standard Oil believed that market conditions made its entry profitable, and if it could offer a cheaper price than its rivals on the grounds of its own efficiency or technique, then any harms suffered by its rivals would be "in the eye of the law *damnum absque injuria.*"[140] On the other hand, the use of independently wrongful methods such as defamation and bad-faith threats of lawsuits evinced "malice and wicked intent" while decreasing consumers' freedom of choice.[141] Likewise, the use of threats, interference with contract, predatory pricing, and—in at least one situation—bribing a county oil inspector to have a rival's salesman arrested were clearly intended to "impair, and if possible, destroy, that rival's business by the use of unlawful means."[142]

The most difficult of these cases were those in which Standard Oil did not use clearly wrongful means but still appeared to lack an obvious justification showing that it was merely expanding the market for its products. That was the scenario presented by *Dunshee v. Standard Oil Co.*[143] in 1911. Dunshee had acquired the claim of Crystal Oil, which had a successful and growing retail oil business in Des Moines, Iowa.[144] After five years of buying its oil from Standard Oil, Crystal had switched to a rival wholesaler; although not apparent in the opinion, Crystal had apparently sought more favorable rates from Standard Oil but blanched

139. *Id.* at 595–97.

140. *Standard Oil Co. v. Doyle*, 82 S.W. 271, 272–73 (Ky. 1904) (noting that Standard Oil would face no liability for using "fair methods" of competition such as "underselling or outbidding" a rival even if it did so with the "bad motive" to harm its rivals); *see also Dunshee v. Standard Oil Co.*, 132 N.W. 371, 375 (Iowa 1911); *Marble v. Standard Oil Co.*, 48 N.E. 783, 785 (Mass. 1897) (rejecting claim of retailer who sourced kerosene exclusively from Standard Oil as it suffered "no more severe competition than they encountered before" Standard Oil entered the retail market).

141. *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 12 N.E. 825, 826 (N.Y. 1887).

142. *Doyle*, 82 S.W. 271, 273–75.

143. 132 N.W. 371 (Iowa 1911).

144. *Id.* at 372.

at Standard Oil's demand to become an exclusive dealer.[145] At that point, Standard Oil decided to enter the retail business in Des Moines, where it engaged in a number of questionable but not blatantly wrongful activities.[146] Standard Oil instructed its salesmen-drivers to not disclose their relationship with Standard Oil, and it directed them to target Crystal's customers who displayed a window card signaling they needed resupply.[147] Standard Oil also charged a price half that of Crystal's, although it is unclear if this was below Standard Oil's own costs.[148]

None of these tactics on their own would likely have sufficed to determine whether Standard Oil was engaged in true competition. Standard Oil was clearly targeting Crystal, but the harms it inflicted could have been justified by Standard Oil's vigorous efforts to enter the retail market to the benefit of society. To the Iowa Supreme Court, however, there was one clear fact that showed Standard Oil had no such valid justification: within a year of driving Crystal out of business, Standard Oil exited what was apparently still a profitable retail market.[149] Just as in *Tuttle v. Buck*, this fact allowed the court to conclude that Standard Oil had acted maliciously to punish Crystal without any offsetting pro-competitive justification.[150]

C. Unfair Competition and Unfair Methods of Competition

By the turn of the nineteenth century, cases such as those against Standard Oil had established that business tactics designed to harm rivals or obtain a monopoly without any immediate competitive justification were no longer simply morally wrong but also legally actionable.[151] As the Supreme Court influentially explained in *Angle v. Chicago Railway*,[152] these tactics were simply so lacking in justification that they "cannot be recognized as among the legitimate means of contest and

145. *See* Sokol, *supra* note 136, at 712.

146. *See Dunshee*, 132 N.W. at 372–73; Sokol, *supra* note 136, at 712–13.

147. Although the Iowa Supreme Court viewed the window card as an invitation to deal and not an actual contract, it still held that, in light of the overall malicious purpose, Standard Oil was liable for interference with prospective economic relationship. *Dunshee*, 132 N.W. at 373, 376.

148. *See id.* at 375. On the possibility that Standard Oil was not engaged in predatory pricing, see Sokol, *supra* note 136, 713–14.

149. *Dunshee*, 132 N.W. at 375.

150. *Id.*

151. *See* BIGELOW, *supra* note 120, at iii–v (rewriting entire chapters on "Theory and Doctrine," and "Procuring Refusal to Contract"); *see also* LEWIS, *supra* note 117, at 605 n.56 (noting the fast-changing nature of business torts). On the distinction between legal and moral harms, see LEWIS H. HANEY, BUSINESS ORGANIZATION AND COMBINATION 351–52 (1913).

152. 151 U.S. 1 (1894).

competition."[153] While there was no consistent list of tactics that could be condemned as unfair competition per se, the Supreme Court provided a comprehensive, yet non-exhaustive, enumeration when holding that Standard Oil had violated the Sherman Act:

> Rebates, preferences, and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; *unfair methods of competition*, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts, and the limiting of operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed.[154]

The Court described the first set of categories, from "rebates" to "contracts with competitors," in the language of the Sherman Act itself: combination, monopolization, and restraint of trade.[155] But the Court condemned the remaining tactics under the heading of unfair methods of competition, a phrase used here to describe conduct other than passing-off and similar trademark-style violations for the first time in any judicial opinion.[156]

The Supreme Court had apparently borrowed the term "unfair methods of competition" from the government's brief in *Standard Oil*.[157] There, the government had used that phrase to describe how Standard Oil "had been able to maintain this monopoly through unfair methods of competition, discriminatory freight rates, and other means."[158] Although

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153. *Id.* at 12. While the interference in *Angle* occurred through blatantly wrongful acts, at least one contemporary treatise concluded that the Court had based its holding on the "the broader ground" that it is unlawful to induce a breach of contract even by indirect methods "if employed deliberately and without justification for the same end, as by disabling a party from performing the contract." NIMS, *supra* note 91, at 372.

154. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 42–43 (1911) (emphasis added).

155. *Id.* at 42–43.

156. Although some courts had used "unfair competition" or "unfair methods" previously, the only other use of "unfair methods of competition" prior to *Standard Oil* clearly referred to passing-off. *See Burrow v. Marceau*, 124 A.D. 665, 668–69 (N.Y. App. Div. 1908).

157. Reply Brief for the United States, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) (No. 398), 1911 WL 19167, at *39, *45, *54.

158. *Id.* at *39–40.

novel in a judicial proceeding, this phrase and its more commonly encountered counterpart of unfair competition had begun to be used by economists and treatise writers to evaluate a number of the tactics challenged as malicious under tort law or illegal under the Sherman Act.[159] In general, these writers defined unfair competition as business tactics that relied on means other than improved efficiency or technique.[160] Unlike true competition in which the efficient drove out the inefficient—or even the so-called ruinous competition in which equally efficient producers engaged in a spiral of price-cutting—in unfair competition, the powerful and unscrupulous triumphed over the weak.[161]

The government's brief in *Standard Oil* had also associated this phrase with a second body of authorities: state legislation directly outlawing harms to "competition," just as Senator Sherman had initially proposed.[162] In the government's brief, "unfair methods of competition" specifically described the conduct that had caused Standard Oil of Indiana to lose its license to operate in Missouri under that state's law against combinations that lessened full and free competition.[163] Missouri was one of twenty-seven states that by 1915 had banned "restraint of competition as distinguished from restraint of trade" through legislation or a constitutional enactment.[164] Twenty-three states further banned local price discrimination, although not all required the showing of a specific intent to destroy competitions.[165] As the South Dakota Supreme Court explained when upholding its state's competition law in the context of a predatory pricing dispute, the Sherman Act had made it illegal for competitors to combine for a monopoly and share in higher prices, which meant that the stronger party could now only hope to monopolize by

159. *See* NIMS, *supra* note 91, at iv–v, 347–48 (noting demands for new causes of action and laws to distinguish valid competition from those with intent to harm or drive out rivals); *see also* BIGELOW, *supra* note 120, at 237 (describing debates about unfair competition as "the expression of the dominant social force").

160. For a review of this literature, see Benjamin J. Klebaner, *Potential Competition and the American Antitrust Legislation of 1914*, 38 BUS. HIST. REV. 163, 168–71 (1964); JOHN MAYNARD HARLAN & LEWIS W. MCCANDLESS, THE FEDERAL TRADE COMMISSION, ITS NATURE AND POWERS: AN INTERPRETATION OF THE TRADE LAW AND RELATED STATUTES 34–35 n.76 (1916); DAVIES, *supra* note 114, at 306–11.

161. *See* WILLIAM H.S. STEVENS, UNFAIR COMPETITION: A STUDY OF CERTAIN PRACTICES, WITH SOME REFERENCE TO THE TRUST PROBLEM IN THE UNITED STATES OF AMERICA 1–9 (1917); JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 83, 103 (1914); NIMS, *supra* note 91, at 354–58 (noting that as malicious actions might be justified, unfairness ultimately requires the elimination of competition).

162. For a review of state antitrust laws, see DAVIES, *supra* note 114, at 143–59.

163. Reply Brief for the United States, *Standard Oil*, 221 U.S. 1 (No. 398), 1911 WL 19167 at *45–46. For Missouri's law applied against Standard Oil, see *State ex inf. Hadley v. Standard Oil Co.*, 116 S.W. 902, 1006 (Mo. 1909).

164. DAVIES, *supra* note 114, at 159–60, 163.

165. *Id.* at 187.

other means: "Get out of my way. Sell me your business, or I will destroy it by *unfair competition.*"[166] To prevent "an old evil [from] being brought upon [the public] by a new method," states adopted these laws which, as the South Dakota Court explained, were "aimed at monopolies obtained through unfair competition."[167]

Standard Oil and other companies challenged under state unfair competition laws argued that they were unconstitutionally vague or impermissible under the substantive due process of the *Lochner*[168] era, but as even the Supreme Court acknowledged, the concepts of malice and justification developed by common law judges provided a clear basis to apply these laws.[169] The familiar principle behind these laws was that a company engaged in unfair competition when it acted with a sole purpose to harm a rival, but it was acting in fair competition when the harms that it produced were incidental to the pursuit of its own inherent economic advantages or some other valid justification.[170] Notably, when Missouri had evaluated Standard Oil's rebates and prices for harm to competition in the case that the federal government described as involving unfair methods of competition, Standard Oil had cited *Mogul* to argue that it had done nothing more than exercise its self-interested "right to give rebates to their patrons and customers in order to secure and retain their business."[171] As had other tort cases against Standard Oil, Missouri disagreed: given Standard Oil's industrial espionage and use of rebates to prevent rivals from getting a foothold in Missouri, it was clear that Standard Oil's tactics as a whole were intended to strengthen its own business by creating barriers to its competitors' participation in these markets.[172] Tennessee's suit against Standard Oil of Kentucky applied

166. *State v. Central Lumber Co.*, 123 N.W. 504, 509 (S.D. 1909) (emphasis added).

167. *Id.*; *see also State v. Drayton*, 117 N.W. 768, 770 (Neb. 1908) ("[T]he statute under consideration was enacted for the purpose of supplying a defect in the anti-trust laws of the state.").

168. 198 U.S. 45 (1905).

169. *Aikens v. Wisconsin*, 195 U.S. 194, 206–07 (1904) (noting that as long as Wisconsin would not apply its statute to "acts of which the motives were mixed and which were done partly from disinterested malevolence and partly from a hope of gain," it faced no constitutional objections).

170. *See State v. Fairmont Creamery Co. of Neb.*, 133 N.W. 895, 898–99 (Iowa 1911) ("The temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly is one of the modern evil inventions."); *see also Central Lumber*, 123 N.W. at 510 ("[T]his law is aimed only at persons who resort to such 'unfair' methods with the 'intent' to destroy the business of their competitors."); *Drayton*, 117 N.W. at 771 ("[T]his condition has been brought about by a system of coercion and underselling 'for the purpose of destroying the business' of local competitors.").

171. *State ex inf. Hadley v. Standard Oil Co.*, 116 S.W. 902, 1034–35, 1040 (Mo. 1909).

172. *Id.* at 1040.

similar logic when evaluating Standard Oil's giveaway of oil at no cost to customers of a rival if they would countermand their orders.[173] The Tennessee Supreme Court concluded that "[t]here was no other purpose for making [these agreements] or giving away oil to effect it," and while customers could have independently countermanded their orders, they "had no right to enter into an agreement with Standard Oil to do it."[174]

While substantively similar to the standards already developed in tort, state unfair competition laws introduced important procedural innovations to this body of law. Judicial resolution of intentional torts required damages as an essential element. The main incentive that the Sherman Act offered to private plaintiffs was likewise treble damages.[175] For damages to be available, the plaintiff would have had to be harmed, meaning that this relief would come too late to preserve competition.[176] State unfair competition laws resolved this challenge by allowing for the government to seek injunctive relief before it was too late, or alternatively to impose criminal sanctions when damages were uneconomical to justify a private suit.[177] In the case of Tennessee's suit against Standard Oil of Kentucky, for instance, the competitor had apparently lost only $40.50 in cancelled orders due to Standard Oil's giving away of oil for free.[178] While far too small to justify the costs of a private suit, this conduct sufficed for the state to bring suit under its unfair competition law and enjoin Standard Oil of Kentucky from doing any business in Tennessee.[179]

II. PUBLIC POLICY AND SECTION 5 AUTHORITY

Viewed independently of this legal background, the legislative history of the FTC Act and subsequent Supreme Court interpretations may suggest a nearly boundless scope to unfair methods of competition under Section 5, one "encompassing not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the

173. *Standard Oil Co. v. State*, 100 S.W. 705, 707–09 (Tenn. 1907).

174. *Id.* at 714–15, 719.

175. *See supra* note 59 and accompanying text.

176. *See* Robert L. Raymond, *The Standard Oil and Tobacco Cases*, 25 HARV. L. REV. 31, 57–58 (1911) ("Unfair competition and discriminations must be forbidden by a law which shall be, so far as possible, actually preventive.").

177. *See generally* NIMS, *supra* note 91, at iii–iv (highlighting that unfair competition law developed partly to provide injunctive relief to a party facing irreparable harm).

178. *Standard Oil Co. v. State*, 100 S.W. at 709.

179. *State ex rel. Cates v. Standard Oil Co. of Ky.*, 110 S.W. 565 (Tenn. 1908), *aff'd sub nom. Standard Oil Co. of Ky. v. Tennessee*, 217 U.S. 413 (1910).

Commission determines are against public policy for other reasons."[180] The implication of this public policy approach is that the FTC has broad leeway to determine what are unfair methods of competition, even when unrelated to their historical bases in either antitrust or tort law. The FTC could for instance declare actions unfair based on findings that they violated norms of behavior or business ethics, or it could condemn behavior that is economically justified based on findings that its socio-political effects harmed other businesses and the public interest.[181]

Reviewing the legislative history of the FTC Act in light of the law of unfair methods of competition as it existed at that time suggests that Congress did not grant the agency such a broad substantive authority. The progressives of the early twentieth century meant to create an expert agency that would apply the settled law of unfair methods of competition, not create a wider definition from scratch.[182] The FTC could enjoin violations of statutory antitrust law, whether actual or incipient, as the independently wrongful actions that would attract liability even in England.[183] Beyond those harms, moreover, the FTC was clearly empowered to combat the types of conduct that, while not violations of antitrust law, displayed the malice or lack of justification that permitted liability in tort, but only when such private conduct harmed the public interest.[184] Both the early history of the agency and judicial interpretation of the Act by those who had played a role in its creation recognized that these bases of action, while malleable, were not grounds for the FTC to regulate business mores carte blanche.[185] Efforts to expand that authority to a wider, public-policy basis not only depart from that historical meaning but—as more recent experiences suggest—prove unworkable in practice.

A. The Legislative History of Section 5's "Unfair Methods of Competition"

In the early twentieth century, as states began to criminalize unfair methods of competition and economists continued to refine their definition of this term, pressure also built on the federal government to adopt a national framework to identify and condemn practices that

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180. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454–55 (1986) (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)).

181. *See* Statement of Chair Lina Khan, *supra* note 10, at 4 & nn.21–23. Other interpretations supporting this broad scope include, Vaheesan, *supra* note 12, at 657, and, Averitt, *supra* note 12, at 287.

182. *See* discussion *infra* Section II.A.

183. *See* Averitt, *supra* note 12, at 238–50.

184. *See* discussion *infra* Sections II.A.

185. *See* discussion *infra* Section II.B.

threatened to restrain trade or generate monopoly before it was too late.[186] After the election of President Woodrow Wilson and a Democratic Party majority in both the House of Representatives and Senate, the process of crafting a federal law of unfair competition began in earnest.[187]

Behind the scenes, the adoption of unfair methods of competition as the standard for federal competition policy originated with George Rublee, a progressive lawyer who advised Wilson and Congressional Democrats on antitrust matters.[188] Rublee had noted the use of "unfair methods of competition" in the Supreme Court's *Standard Oil* decision and concluded that it "had a recognized meaning in the terminology of anti-trust law."[189] Rublee apparently spent little time investigating the meaning of his panacea apparent, but he would argue that it included "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[190] Conversely, Rublee viewed it as excluding the classic unfair competition of fraud and deception as well as, in the words of his biographer, "marketing methods that . . . could be legitimate and beneficial under certain circumstances."[191]

The precise meaning of this concept would be heavily debated as Congress considered a bill to establish a FTC in the summer of 1914. The Rublee-influenced House bill incorporated "unfair methods of competition" into its own Section 5, but the more contentious debates took place in the Senate, which initially used the more familiar phrase of "unfair competition" to represent the same idea. For months, opponents charged that this phrase was so broad and unclear in meaning that the FTC would have the power to write its own law.[192] In response, proponents explained—sometimes through Rublee's ghostwritten

186. *See* 51 CONG. REC. 8973–77 (1914) (statement of Sen. Murdock) ("The vice of this process is that each of the definitions, touching not the thing done but the manner in which it is done, is fixed only after years of litigation, and the public welfare suffers through the one element which seems certain-delay."); *see also* DEP'T OF COM. & LAB., REPORT OF THE COMMISSIONER OF CORPORATIONS, H.R. Doc. No. 58-165, at 35, 44 (1904).

187. For a review of the political and intellectual origins of the FTC, see Winerman, *supra* note 11, at 13–51.

188. MARC ERIC MCCLURE, EARNEST ENDEAVORS: THE LIFE AND PUBLIC WORK OF GEORGE RUBLEE 90–94 (2003).

189. George Rublee, *The Original Plan and Early History of the Federal Trade Commission,* 11 PROC. ACAD. POL. SCI. N.Y.C. 114, 116 (1926); *see also* McClure, *supra* note 188, at 97 (explaining how Rublee located this term in various opinions, state laws, and legal texts).

190. MCCLURE, *supra* note 188, at 96.

191. *Id.* at 89; Rublee, *supra* note 189, at 117–18.

192. For a review of these debates, see Winerman, *supra* note 11, at 74–75; see also the comments of Senator Sutherland at 51 CONG. REC. 12980–81, 12984 (1914) claiming that the FTC would be empowered to declare any action presently legal as unfair methods of competition.

speeches—that there was indeed an established meaning of "unfair competition" that transcended cases of passing off and trademark infringement.[193] As the Senate Interstate Commerce Committee explained in its report on the bill, "unfair competition" "has a legal significance which can be enforced by the commission and the courts."[194] Combining the language of state laws with intentional torts, the report explained that this term would encompass such practices as "local price cutting, interlocking directorates, and holding companies *intended to restrain substantial competition.*"[195] Advocates on the Senate floor similarly frequently cited the work of contemporary economists and state laws that used this term to describe situations in which efficient producers were artificially prevented from succeeding.[196]

When backers of the bill discussed unfair competition, they thus drew heavily from the intentional torts that had emerged in parallel to antirust over the previous decades.[197] Nevada Senator Francis G. Newlands—the leading advocate of the bill on the Senate floor—repeatedly argued that the FTC's application of this term would follow this established meaning. Senator Newlands acknowledged that while a more accurate description for this conduct was the unfair *stifling of* competition, the phrase that economists and courts used to describe these activities was "unfair competition," and so the bill employed that term as well.[198] This standard of unfair competition would be clearly intelligible to courts that already condemned torts against competition:

> [A]s to the numerous other things to which an action of tort or an action in equity to restrain can lie, it seems to me where those actions involve competition, where there would be a

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193. *See* 51 CONG. REC. 11107 (1914) (statement of Sen. Robinson) (noting that legal dictionaries had defined unfair competition as "unjust, inequitable, or dishonest competition"); MCCLURE, *supra* note 188, at 97–98.

194. S. REP. 63-597, at 13 (1914).

195. *Id.* (emphasis added).

196. *See* 51 CONG. REC. 12,212 (1914) (statement of Sen. Sterling) (discussing state laws); 51 CONG. REC. 12142–46 (1914) (statement of Sen. Hollis) (citing Stevens among other authorities); 51 CONG. REC. 11228, 11230 (1914) (statement of Sen. Robinson) (providing definitions from Nims and Stevens among others); 51 CONG. REC. 11108, 11113 (1914) (comments of Sen. Newlands) (referencing examples apparently from Stevens).

197. Even Senator James Reed, one of the leading opponents of the FTC Act, noted this focus when critiquing its backers' position: "We are dealing not with honest mistakes of judgment, but with acts which are in their nature *malicious*, with the same class of conspiracies exactly as the Sherman Antitrust Act deals with, except that we propose to strike those acts in their incipiency." 51 CONG. REC. 13118 (1914) (emphasis added).

198. *Id.* at 12211.

> cause of action by the individual against his competitor, almost all those would be included in the term "unfair competition."[199]

Newlands suggested early in these debates that unfair competition might also encompass a violation of "public morals" that "tends to the injury of a competitor unfairly," but it is unclear if he viewed immoral behavior as a distinct basis of liability that the agency would be empowered to determine or merely another reason to condemn otherwise unjustified conduct.[200] Given his frequent references to the established legal and economic understanding of this term, it is likely that, at least by the end of these debates, Newlands viewed morals synonymously with the economic and legal understanding of this body of law, as other supporters clearly had come to feel.[201]

Senator Atlee Pomerene, another backer of the bill, similarly argued that the FTC would not have an independent power to declare actions unfair but could only apply preexisting theory to novel situations:

> Of course, this commission could not declare a thing to be unfair competition which was not unfair competition under the well-defined principles of the law. . . . This act does not attempt to declare what is unfair competition. It assumes that that is defined under the general principles of the law. Now, as to whether a given state of facts shall be determined by the commission as unfair competition, of course it is up to the commission to decide.[202]

Pomerene elsewhere noted that the meaning of unfair competition had broadened beyond trademark infringements to include other behaviors, and the FTC would apply that expanded common law approach in its own deliberations.[203]

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199. *Id.* at 12,980 (comments of Sen. Newlands).

200. *Id.*; *see also id.* at 11,109 ("Now, the society has an interest in these questions. It not only has the interest of protecting an individual against oppression and wrong, but it also has the general interest in the maintenance of good morals."); Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 21–22 (1915) (suggesting Newlands viewed these as distinct).

201. *See* Winerman, *supra* note 11, at 78 ("While Newlands's benchmark was morality, though, he equated morality to legal and economic authority, particularly as the debate advanced and others cited specific authorities (largely supplied by Rublee) in defending Section 5."); *see also* Montague, *supra* note 200, at 24–26 (noting that Senator Robinson, another backer of the act, modified his views over the debates to conform with contemporary economic definitions); HARLAN & MCCANDLESS, *supra* note 160, at 32–35 (suggesting that *Standard Oil* showed that unfairness defined by business norms or morals was limited to the use of force, fraud, or similar means to harm rivals).

202. 51 CONG. REC. 11115 (June 25, 1914).

203. *Id.* at 12995.

Proponents of the FTC thus understood the agency's most important role to be in the vein of the state unfair competition laws: procedural, not substantive. As Senator Newlands explained, any behavior that the FTC could target under this authority would already be condemned if challenged by an injured rival: "[I]n all the cases that I have referred to . . . there would be a remedy to the individual, either at law or in equity."[204] The problem with reliance on private litigation was that not every competitor driven to ruin by these tactics would be able to afford litigation to recover damages after the harms had occurred—a predicament that Senator Newlands described as a battle of pygmies against the giant corporations with the best lawyers and deepest pockets.[205] The role of the FTC, Senator Newlands emphasized, would thus be "economically giving to each individual, at the lowest cost of effort and money, the power of asserting his right which exists in law or in equity."[206] This remedy, however, would be an exclusively public one: while those suffering these harms could petition the FTC to take action, only the FTC could file a complaint, and there would be no private right of action or damages available under the Act.[207]

Critics of this authority retorted that focusing on injuries to competitors would allow the FTC to condemn actions that actually benefited the public.[208] In response, advocates of the FTC further emphasized that unfair competition concerned only those actions that "shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper" and therefore "may lead to monopoly or restraint of trade."[209] The FTC would thus only condemn tactics which demonstrated a "general tendency" or, drawing on a phrase familiar from tort law, "intent" to injure or destroy competition.[210] The

204. *Id.* at 11108–09.

205. *Id.* at 12939, 13116.

206. *Id.* at 11109.

207. *See id.* at 13115 (statement of Sen. Newlands) (explaining why the FTC Act should not contain treble damages as in the Sherman Act); *id.* at 12146 (statement of Sen. Hollis) (describing Section 5 as a means to nip practices in the bud in their incipiency).

208. *See id. at* 12217–18 (statements of Sen. McCumber) (expressing concerns that the FTC might ban pro-competitive activity simply to benefit a less-efficient competitor); *id.* at 11232 (statement of Sen. Boarah) (noting that competition labeled "unfair" could actually benefit farmers through lower prices); *id.* at 11108–09 (statement of Sen. McCumber) (objecting that unfair competition would focus on injuries to rivals instead of the public welfare).

209. *Id.* at 12146 (July 15, 1914) (statement of Sen. Hollis); *see also id.* at 11,104 (statement of Sen. Cummins) (defining unfair competition as that "which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly").

210. *Id.* at 12217 (statement of Sen. Newlands). Senator Porter McCumber proposed a statutory definition of unfair competition as "such unfair means or methods as shall be intended to or which shall directly or indirectly stifle or destroy competition,"

Conference Committee, at Rublee's urging, accordingly included language restricting the FTC's ability to issue a complaint to when "it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public."[211] This public-interest clause would allow the FTC to challenge only a subset of the tactics actionable under private tort law. For instance, Rublee described this limitation as preventing the agency from displacing "the ordinary judicial remedies in cases of consumer frauds" that he believed injured rivals without generating negative effects for society, which benefited from vigorous brand rivalry.[212]

Section 5 of the FTC Act would, of course, ultimately incorporate Rublee's preferred phrasing of "unfair methods of competition" in the place of "unfair competition" that had lay at the core of the Senate debates.[213] The relative novelty of this phrase again suggested to some opponents that the FTC would enforce a brand-new power and not a well-understood body of law.[214] Still, the drafters of the law treated this change as merely cosmetic to prevent confusion with the traditional and narrower unfair competition of trademark-style harms.[215] As Senator Henry Hollis explained based on a report prepared by Rublee, this change simply clarified that the range of banned actions extended beyond those to which this "particular label that has been attached in many cases to offenses such as substituting one man's good for another."[216] Contemporary observers of these proceedings agreed that the ultimate use of unfair methods of competition in the final Act was synonymous with any previously intended legislative meaning of unfair competition.[217]

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but this proposal was not actively discussed most likely due to partisan reasons. *Id.* at 13051.

211. 15 U.S.C. § 45(b) (2018).

212. Rublee, *supra* note 189, at 118.

213. 15 U.S.C. § 45(a)(2) (2018).

214. *See* 51 CONG. REC. 12814 (1914) (comments of Sen. Sutherland) ("I do not know whether it is the view of the framers of this bill that unfair competition and unfair methods of competition mean the same thing, but I do know that the words 'unfair competition' have a very well settled meaning in the law [*i.e.*, commercial fraud] and that the words 'unfair methods of competition' have not.").

215. *Id.* at 12142–45 (1914) (comments of Sen. Hollis).

216. *Id.* at 12145; *see also* Rublee, *supra* note 189, at 118; Winerman, *supra* note 11, at 75–76, 78–80, 90.

217. *See* Montague, *supra* note 200, at 39 (reviewing this shift in language); STEVENS, *supra* note 161, at 1–5, 233–36, 242–44 (treating unfair methods of competition under Section 5 as the equivalent of unfair competition from the economic and legal standpoints).

B. Judicial and Agency Interpretation of the FTC Act

Once President Wilson had signed the FTC Act into law, that agency and the courts received responsibility for discerning and applying the meaning of Section 5. The initial generation of interpreters included Rublee, Louis Brandeis, and other participants in the congressional debates, and they applied that section's substantive standard within the constraint of the public interest limitation. Subsequent commissioners and judges built on that precedent to probe the limits of the FTC's powers, but evolving understandings of antitrust law and institutional competence have complicated the delineation of the agency's authority to combat unfair methods of competition.

1. THE EARLY INFLUENCE OF INTENTIONAL TORTS

After the FTC Act became law on September 26, 1914,[218] its initial commissioners struggled to define unfair methods of competition. Nelson Burr Gaskill, who joined the FTC in 1919, would later recall his first encounter with this concept:

> Eagerly [the FTC Chairman] asked me, "What do *you* think unfair competition means?" I had never seen the animal, either roaming its native wilds or in a state of captivity. And beyond the bromidic statement that whatever was unlawful would seem to me to be unfair, I had nothing to offer constructively. My impression that the question was open to discussion was quickly confirmed. . . . The truth of the matter is that in the beginning anybody's guess as to what unfair competition might mean was as good as anybody else's. Congress had strongly suspected that some predatory animal was robbing the henroost. It ordered that the animal be caught and killed. But it neglected to say whether the animal ran on two legs or four, sang, howled or grunted, was carnivorous or vegetarian, roosted in trees or slept on the ground.[219]

The FTC nevertheless made active use of this power in its formative period to proscribe a number of behaviors familiar to contemporary economics texts and legal treatises defining unfair methods of competition: "price cutting, local price discrimination, resale price maintenance, exclusive dealing arrangements, boycotting, blacklisting, disparagement of competitor's wares, misrepresentation, misbranding, adulteration, dishonest advertising, espionage, commercial bribery,

218. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914).
219. NELSON B. GASKILL, THE REGULATION OF COMPETITION 5 (1936).

coercion, threats, intimidation, the use of 'fighting brands' or bogus independents."[220]

As the leading early treatise on the FTC surveyed these applications of Section 5, the agency had tracked the "body of law which governs the permissible limits of competition and cooperation among business men, and which lies outside the scope of the law of fraud, and outside the scope of the usual tort categories, such as assault and battery, libel and deceit, trespass and conversion."[221] Admittedly, because of the "jumble of words in which current legal discussion is couched," including "improper purpose" and "to substantially lessen competition," the treatise-writer noted the difficulty "to give logical expression to the principles of substantive law with which the Commission must deal."[222] Nevertheless, the early FTC clearly was drawing on established common law in making these valuations, as it routinely employed familiar concepts of intent and motive to harm competitors.[223]

Judicial supervision of the FTC's use of Section 5 authority confirmed its wide power to condemn actions that by harming rivals also harmed competition. In *FTC v. Gratz*,[224] the first major case to consider the meaning of Section 5, the Supreme Court suggested that there were two grounds for declaring methods of competition unfair: (1) independently wrongful actions "opposed to good morals because characterized by deception, bad faith, fraud or oppression;" and (2) those "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[225] In that case, the FTC had issued an order banning the respondents, sole agents for the dominant producers of steel baggage ties and cotton baggage, from tying the purchase of both products.[226] The Court rejected the agency's determination on the ground that it had not shown that the respondents, as opposed to the firms they represented, had used these forbidden methods to their own benefit.[227] In a lengthy dissent, Justice Louis Brandeis emphasized that Section 5 was intended to prevent monopoly before it emerged and so the agency could have properly concluded that

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220. *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 627–28 (1927) (Stone, J., dissenting).

221. GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 245–46 (1924). Henderson's treatise was respected enough to be cited by Justice Louis Brandeis, himself an important player in the creation of the FTC, when evaluating the scope of Section 5. *See FTC v. Klesner*, 280 U.S. 19, 30 (1929).

222. HENDERSON, *supra* note 221, at 245–46.

223. *See id.* at 245–52.

224. 253 U.S. 421 (1920).

225. *Id.* at 427.

226. *Id.* at 428.

227. *Id.*

this conduct was enough like full-line forcing and exclusive dealing to be condemned.[228]

Over the course of the next several decades, judicial interpretation of the FTC Act would recognize that Brandeis's dissent better described the intended role of the FTC and its authority, not least because Brandeis had himself been a key advisor to Wilson and participant in the drafting of the FTC Act.[229] In adopting this more expansive view, the Court recognized that the statutory limitation of the public interest provided an important restraint on the agency's powers.[230] Writing for the Court in a subsequent case, Brandeis agreed with Rublee that "passing off" and other conventional understandings of unfair competition did not fall under the FTC's authority.[231] Even when malicious and unjustified, these acts involved private harms and hence lay outside of the scope of Section 5's public interest requirement, especially when the victim had survived the alleged misconduct and was more than capable of bringing a private suit.[232]

Still, the Court did not interpret this public interest requirement as narrowly as had those contemporaries who argued that it limited Section 5 to the conduct otherwise condemned by the antitrust laws.[233] Instead, the Court recognized that while it was insufficient for the FTC to support a finding of public interest by merely pointing to "the interest of the community that private rights shall be respected" or other standalone policy concerns, certain violations of private rights could still satisfy Section 5 without constituting an antitrust violation.[234] While stating that the FTC enjoyed "broad discretion" to determine when the public interest was harmed, Brandeis enumerated three paradigmatic situations borne out by previous FTC enforcement, echoing concerns raised in Senate debates.[235] The first, if "the unfair method employed threatens the existence of present or potential competition," could apply to prevent monopolization, cartelization, and other harms combated by the antitrust laws and would be roughly compatible with a modern conception of

228. *Id.* at 435–440 (Brandeis, J., dissenting).

229. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241–42 (1972); *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 314 (1934); *see also* Winerman, *supra* note 11, at 32–38, 44–45, 64–67 (describing Brandeis's role).

230. *See FTC v. Raladam Co.*, 283 U.S. 643, 648–49 (1931); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493–94 (1922).

231. *FTC v. Klesner*, 280 U.S. 19, 27 (1929).

232. *Id.* at 27–30.

233. *Compare* HARLAN & MCCANDLESS, *supra* note 160, at 23–29 (arguing that the public interest limitation placed Section 5 under the same standards as the Clayton Act), *with* STEVENS, *supra* note 161, at 235 n.I (providing a lengthy statutory interpretation of both Section 5 and the Clayton Act to conclude the former law is broader and applies in situations falling short of the latter).

234. *Klesner*, 280 U.S. at 28.

235. *Id.*

consumer welfare.[236] The second and third exemplars—methods that "involve flagrant oppression of the weak by the strong" and the aggregation of numerous individual losses too small for a private suit to be feasible—went beyond antitrust harms and reflected Newlands's vision of the FTC as a procedural innovation to equalize the substantive legal battle between giants and pygmies.[237]

2. THE "PUBLIC POLICY" CASES

In a landmark 1980 article, FTC official Neil Averitt suggested that in addition to conduct based on violations of the letter or spirit of the antitrust laws, Section 5 also encompassed at least two other forms of violation: "conduct violating recognized standards of fair business behavior," and "conduct violating competition policy as framed by the commission."[238] In addition to a reading of the legislative history that overlooked the extant substantive body of law on unfair methods of competition, Averitt primarily based this conclusion on two subsequent Supreme Court cases. The first case was *FTC v. R. F. Keppel & Bro., Inc.*,[239] from 1934, in which the FTC condemned the sale of candies with pennies and other prizes inside as unfair to business rivals because it violated the public policy against gambling.[240] The Court, interpreting the legislative history of the FTC Act as suggesting that Congress intended that the Commission would have wide leeway to condemn conduct against good morals, upheld the FTC's decision.[241] Otherwise, competitors would face a "burden" in competition "unless they will descend to a practice which they are under a powerful moral compulsion not to adopt."[242]

Keppel's reference to morality and public policy suggested to Averitt that Section 5 may extend to "recognized business ethics," if not also ethical standards that the FTC can itself determine.[243] The long history of unfair competition explains why *Keppel* cannot support that bold application of Section 5. Prior to the Wheeler-Lea Act's addition of "unfair or deceptive acts or practices" to Section 5 in 1938, the FTC lacked the ability to condemn harms to consumers directly as an unfair

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236. *Id.*; *see infra* notes 348–350.

237. *Klesner*, 280 U.S. at 28.

238. Averitt, *supra* note 12, at 271–75. For citations, see, for example, COMM. ON THE JUDICIARY, *supra* note 14, at 339 nn.2517, 2519, and Chopra & Khan, *supra* note 14, at 375 n.73.

239. 291 U.S. 304 (1934).

240. *Id.* at 307–08.

241. *Id.* at 310–14.

242. *Id.* at 310–13, 310 n.1.

243. Averitt, *supra* note 12, at 273, 287.

method of competition.[244] To circumvent that limit, the FTC often characterized conduct that defrauded consumers as harmful to competitors by compelling them to adopt practices in violation of public policy.[245] However, the FTC could not just declare any behavior a violation of public policy on the grounds of immorality: these practices would still have to constitute an independent wrong or otherwise unjustifiably harm competitors.[246] In the case of *Keppel*, not only were marketing practices using gambling included on early-twentieth-century enumerations of methods that lacked any valid competitive justification, but gambling itself was considered independently wrongful.[247] The FTC may not have identified a specific law against gambling that Keppel had violated, but just as Section 5 permits the FTC to condemn incipient antitrust violations that are not express violations of the Sherman and Clayton Acts, so too should the agency be able to condemn conduct that clearly threatens the spirit of clearly established public policy before it develops into statutory violations.[248] For instance, the FTC can enjoin as an incipient violation of Section 5 those strong-arm tactics that have not yet reached the level of outright coercion even outside the antitrust context.[249]

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244. *See id.* at 287 n.254. The Court announced the requirement that unfair methods of competition required harm to business rivals, not solely consumers, in *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931).

245. *See, e.g.*, *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) (holding that mislabeling of branded products was unfair to competitors as they were compelled to adopt this practice to retain sales); Herrine, *supra* note 7, at 462–66.

246. *See* HENDERSON, *supra* note 221, at 166 ("The Federal Trade Commission, however, is not a general censor of business morals. It can take cognizance of a dishonest practice only if it is a competitive practice in the course of commerce as defined in the statute."); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919) (upholding the FTC's ability to ban misrepresentations that Sears had obtained quantity discounts on sugar as an injury to competitors but limiting its use of below-cost sales to where the FTC could show that this conduct actually harmed competitors).

247. *See* 2 F.W. TAUSSIG, PRINCIPLES OF ECONOMICS 428 (1911) (labeling gambling as a "weapon of destructive competition" because it "delude[s] the purchaser into the belief that he is getting something for nothing"); 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (describing "lotteries and the like" as the types of "immoral and injurious pursuits" that would make a partnership unlawful). The FTC has since used its powers under Section 5 to limit the sale or marketing of goods through gambling as violations of established public policy against both consumers and competitors. *See* *Macro Sales Co. v. FTC*, 453 F.2d 1, 4–5 (2d Cir. 1971); *Goldberg v. FTC*, 283 F.2d 299, 301 & n.2 (7th Cir. 1960).

248. *See FTC v. Brown Shoe Co.*, 384 U.S. 316, 320–21 (1966) ("This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."); *FTC v. Cement Inst.*, 333 U.S. 683, 721 n.19 (1948) (noting that combination is not required for an unfair method of competition).

249. *See FTC v. Texaco*, 393 U.S. 223, 228–29 (1968) (noting that the FTC could condemn unfair methods of competition when a company used its "dominant

While *Keppel* thus involved the violation of established public policy, the Court seemingly suggested that the FTC could substitute its own judgment for recognized public values in Averitt's second historical case, *FTC v. Sperry & Hutchinson Co.*[250] Yet, *Sperry* stands for a much more modest and traditional approach. Indeed, *Sperry* itself characterized the basis for the unfairness determination in *Keppel* as the independently wrongful violation of the public policy against gambling while treating *Keppel*'s discussion of immorality as a prelude to the consumer-protection authority separately granted by the Wheeler-Lea Act.[251]

The facts of *Sperry* reinforce its narrow holding. Since 1896, Sperry & Hutchinson (S&H) sold trading stamps to retailers, who would provide them to customers as a form of loyalty points that customers could then redeem for rewards from S&H.[252] The value of S&H's services to retailers would fall if the customers were able to trade stamps among themselves to complete their redemption books sooner, and so S&H informed stamp holders that they did not hold title to the stamps and that their only rights were the ability to paste and redeem stamps.[253] S&H turned a blind eye to informal trading, but it filed for injunctions against forty-three professional stamp exchanges from 1957 to 1963 and threatened an additional one hundred forty with lawsuits.[254]

As a matter of precedent, cases from the early days of S&H's operations had consistently established that if any party had suffered both *damnum* and *injuria* in this context, it was S&H itself! As one early decision expressly stated, stamp exchanges could have competed with S&H by issuing their own stamps to induce sales, but there was no justification for interfering in S&H's relationship with its subscribers: "There was no need for it to prey upon complainant's trade. Its course in this respect would seem to fall little short of malicious, and may be said to constitute a clear case of unfair competition."[255] As late as 1965, when the FTC brought its own charges against S&H, courts continued to hold that stamp exchanges committed legal injury to S&H's business;

economic power" over dealers to foreclose competition even when it did not use the "kind of overt coercive acts" condemned in previous cases); *see also Atl. Refin. Co. v. FTC*, 381 U.S. 357, 363–66, 369–70 (1965) (enjoining oil company's use of coercive economic dominance over service station dealers to foreclose competition in the automotive accessory market).

250. 405 U.S. 233 (1972); Averitt, *supra* note 12, at 275–90.

251. *Sperry*, 405 U.S. at 243–44.

252. *Id.* at 236.

253. *Id.* at 237–38.

254. *Id.* at 238.

255. *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 F. 219, 222 (C.C.N.D. Ill. 1908). For similar conclusions, see *Sperry & Hutchinson Co. v. Fenster*, 219 F. 755 (E.D.N.Y. 1915); *Sperry & Hutchinson Co. v. Temple*, 137 F. 992 (C.C.D. Mass. 1905); and *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 F. 833 (C.C.D.R.I. 1904).

trading stamps remained an instrument of the stamp issuer; and, given the presence of other stamp issuers, S&H's conduct did not violate antitrust law.[256]

When the FTC filed its own complaint against S&H in 1965 under Section 5, it agreed with these historical precedents. S&H's vertical limitations on stamps were necessary to S&H's "legitimate business interest in preserving its promotional scheme" and, hence, lay outside of Section 5.[257] The FTC concluded, however, that whatever were S&H's legitimate interests in acting alone, it had engaged in an unreasonable restraint of trade when colluding with other stamp companies and retailers to enforce its own contracts.[258] Under Section 5, it ordered S&H to cease communicating or acting in concert with others to enforce its policies.[259] Unfortunately for the FTC, its findings had focused on harms to consumers, not competitors, and so the Supreme Court upheld vacatur of the order.[260] The FTC and S&H subsequently entered into a consent order in which the company agreed to cease communicating with other stamp companies against the exchanges but did not foreswear the individual use of injunctions or warnings against dealing with exchanges.[261]

In evaluating what was actually an uncontroversial application of Section 5 authority to an antitrust-style agreement in restraint of trade, the jumbled mix of consumer and competitive harms involved in the FTC's order led the Court to endorse an apparently broad view of Section 5.[262] The Court stated that the FTC could determine the "congressionally mandated standard of fairness"—without distinguishing unfair methods of competition from unfair or deceptive acts or practices—based on "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[263] As examples of those public values, the Court cited the three factors listed in the FTC's

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256. *See Rance v. Sperry & Hutchinson Co.*, 410 P.2d 859, 864–72 (Okla. 1965). The Supreme Court noted in passing that state courts had upheld these practices as lawful but did not address this issue as the lower court had not reached it either. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 223, 239 n.4 (1972).

257. *Sperry & Hutchinson Co.*, 73 F.T.C. 1099, 1147 (1968).

258. *Id.*

259. *Id.* at 1147–50.

260. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 247–48 (1972). Under then-current antitrust law, S&H could have violated the per se rule against vertical restraints on alienated property, but the FTC had declined to make any findings on this basis as its adjudication focused on the context-specific "substance of the allegedly illegal practice [and not] application of a technical formula." *Id.* at 247 n.6.

261. *Sperry & Hutchinson Co.*, 83 F.T.C. 478, 482–84 (1973).

262. *Cf.* Averitt, *supra* note 12, at 286 (suggesting this confusion stemmed from "a series of more or less procedural errors" on the Court's part in the posture of *Sperry*).

263. *Sperry*, 405 U.S. at 244.

Cigarette Rule of 1964, which had required disclosure of health hazards on cigarette boxes:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
> (2) whether it is immoral, unethical, oppressive, or unscrupulous;
> (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[264]

Leaving aside the obvious criticism that the Cigarette Rule listed these factors to protect consumers from unfair or deceptive acts or practices, each of these potential bases for public values are in fact consistent with the original focus of unfair methods of competition. The first prong merely allowed the FTC to prevent independently wrongful methods, either as realized or in their incipiency, which were clearly included under the substantive law of unfair competition as it existed in 1914. The sweeping language of the second prong similarly appears much more modest upon recalling that Congress granted the FTC no authority to develop standards of morality or oppression except when it determined that conduct otherwise lacked economic or legal justification.[265] The Cigarette Rule itself had cited *Keppel* to admit that Section 5 did not permit the FTC to "reliev[e] merchants from troublesome competition or . . . censor[] the morals of business men."[266] The FTC's Policy Statement on Unfairness adopted in 1980 similarly limits the use of public values as an independent basis of unfairness under the deceptive acts or practices authority.[267] Although that authority is

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264. *Id.* at 244 n.5 (citing 29 Fed. Reg. 8355 (July 2, 1964)). On the origins of this rule, see Herrine, *supra* note 7, at 474–76.

265. The year after the FTC had issued the Cigarette Rule, it had cited *Keppel* to explain that Section 5 included "trade practices that are unscrupulous, oppressive, exploitive, or otherwise indefensible," but its examples of such practices were all independently wrongful acts. *Topps Chewing Gum, Inc.*, 67 F.T.C. 744, 841 (1965). Moreover, the FTC in that case found this description did not prevent Topps from signing minor-league baseball players to exclusive contracts because its "competitors were at liberty to compete with respondent for these exclusive rights" and the FTC would not penalize a more efficient or ingenious competitor. *Id.* at 842.

266. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8358 (July 2, 1964) (citing *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304, 313 (1934)).

267. *See* Michael Pertschuk, Paul Rand Dixon, David A. Clanton, Robert Pitofksy & Patricia P. Bailey, *FTC Policy Statement on Unfairness*, F.T.C. (Dec. 17,

independent of and expands beyond unfair methods of competition, the concerns about the impracticalities of line drawing which animate that restriction apply equally to unfair methods of competition as well.[268] Finally, the third prong of the Cigarette Rule clearly could not be taken literally, as otherwise a business that drove another out of the market through its greater efficiency could be condemned for nothing more than a *damnum absque injuria*.[269] Understood as a legally cognizable injury, however, such losses continued to serve as proof that a Section 5 proceeding would be in the interest of the public rather than just a private dispute in the course of vigorous competition.[270]

3. PUBLIC POLICY ENFORCEMENT SINCE *SPERRY & HUTCHINSON*

Even when taking *Keppel* and *Sperry & Hutchinson* at their face, the FTC's actual experience since those cases has shown that standards of morality and public policy are generally impracticable for guiding agency conduct. Lower courts have remained skeptical that Congress intended for the FTC to be able to ban behavior for "social, political, or personal reasons," not economic ones, as there is a heightened risk that the FTC will condemn conduct for which pro-competitive justifications exist.[271] The FTC encountered this scrutiny in the wake of *Sperry & Hutchinson* when the agency brought a series of actions challenging oligopoly behavior as unfair methods of competition.[272] Under antitrust

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1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [https://perma.cc/8JHK-TU2H], *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1076 (1984) ("[T]he policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values.").

268. *Id.* ("Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."). The FTC is now forbidden from declaring an act or practice unfair unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n), *added by* Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (1994). The Commission also cannot use "established public policies" as "a primary basis" to determine an act or practice unfair, although it may consider that as evidence. *Id.* For a review of these developments, see ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 58–61 (2009).

269. *See* ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 61–62 (2009).

270. *Cf. FTC v. Klesner*, 280 U.S. 19, 27–29 (1929) (stating that small private losses could be aggregated to create a public concern).

271. *Off. Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927–28 (2d Cir. 1980) (citing *Reuben H. Donnelley Corp.*, 95 F.T.C. 1, 80 (1980)) (holding that FTC could not use standalone Section 5 authority to require monopolist publisher of flight schedules to publish additional data when the publisher had no intent to further its own monopoly or harm competition in the airline industry).

272. *See* FTC, *Policy Statement*, *supra* note 10, at 7–8.

law, parallel actions taken by oligopoly members do not violate the Sherman Act's ban on collusion as long as they are the product of independent, self-rational behavior.[273] The FTC nevertheless attempted to reach several of the practices that sustained supra-competitive parallel prices, including advance notices of price increases, most favored-nation clauses, and independently adopted delivered price formulae, as unfair methods of competition.[274] Judicial review of these orders uniformly concluded that the FTC had exceeded its Section 5 authority for targeting behavior with an "independent legitimate business reason," which lacked "evidence of anticompetitive intent or purpose."[275] Even when the FTC subsequently charged that actions by one member of an oligopoly were made with anticompetitive intent or lacked legitimate business reasons, moreover, it struggled to muster enough evidence to convince courts of this determination.[276]

Where the FTC has successfully applied its standalone Section 5 authority, it has focused narrowly on conduct that clearly lacks any pro-competitive purpose. Most common are cases involving tactics that threaten an incipient violation of the antitrust laws.[277] A typical scenario involves rebuffed invitations to collude.[278] While no actual violation of the Sherman Act has occurred, such attempts to violate antitrust law with the clearly unjustified intention of harming competition cannot go unresolved; however, not only is it often difficult to determine if the offer has been accepted, but even declined offers can further illegitimate coordination.[279] Fortunately, because the FTC is limited to equitable

273. For the modern origins of this approach, see generally SAMUEL EVAN MILNER, ROBBING PETER TO PAY PAUL: POWER, PROFITS, AND PRODUCTIVITY IN MODERN AMERICA 81–90 (2021).

274. *See E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 130, 137 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 574–76 (9th Cir. 1980)

275. *Du Pont*, 729 F.2d at 139 & n.10; *see also Boise Cascade*, 637 F.2d at 582 ("[T]o allow a finding of a section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior.").

276. *See FTC v. Abbott Lab'ys*, 853 F. Supp. 526, 533, 535–37 (D.D.C. 1994) (holding that even if Section 5 includes "public values" beyond antitrust law, there was insufficient evidence to conclude that display of preference for open-market bidding was an unfair method of competition when viewed as the rational response to others' behavior) (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)).

277. *See* Tim Wu, *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty?* 6–7 (Colum. L. & Econ. Working Paper No. 542, 2016) (discussing *AMERCO*, 109 F.T.C. 135 (1987), in which the FTC condemned the use of bad faith litigation when there was no dangerous probability of monopolization).

278. *See Alifraghis*, 158 F.T.C. 213, 235 & n.1 (2014) (collecting cases pertaining to invitations to collude).

279. *Id.* at 235; *Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 949–50 (1992); Debbie Feinstein, *A Few Words About Section 5*, F.T.C. (Mar. 13, 2015),

remedies and not monetary relief, it can tailor its order to address the immediate harm as well as the risk of future recidivism.[280] Likewise, the FTC has also issued consent decrees under its standalone Section 5 authority against the sharing of sensitive information that "served no legitimate business purpose" and "endangered competition," although it has been careful to note that a case-by-case review is necessary to identify pro-competitive justifications that may be present in some circumstances.[281]

In August 2015, the FTC, with the goal of providing clearer guidance to the business community about the scope of its powers, issued a policy statement to explain how it would enforce its unfair methods of competition authority.[282] The key principle of this policy statement was the identification of any potential public policy ground for Section 5 authority with "the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[283] In evaluating whether an act was unfair, the FTC would use "a framework similar to the rule of reason" to determine if a practice would cause "harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[284] In practice, this guidance meant that outside of consent decrees, the FTC should restrict its standalone Section 5 claims to clearly incipient violations of antitrust law such as invitations to collude.[285]

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https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/few-words-about-section-5 [https://perma.cc/2MEX-RH4V] ("The inappropriate nature of the conduct—and the complete lack of any plausible efficiencies—could not be more clear.").

280. *See, e.g.*, *Quality Trailer*, 115 F.T.C. at 947–48 (requiring the company's directors, officers, and management essentially to promise they would never try to pull this stunt again); *see also* AREEDA & HOVENKAMP, *supra* note 8, ¶ 1419e5 n.34 ("[T]he relative mildness of the sanction makes §5 an appropriate vehicle for pursuing at least some solicitations and for educating members of previously exempt industries or others who have not previously become conversant with American antitrust policy.").

281. *Bosley, Inc.*, 155 F.T.C. 1599, 1602 (2013); *see id.* at 1614–15 (emphasizing the context-specific nature of these determinations).

282. Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57,056 (Sept. 21, 2015).

283. *Id.*

284. *Id.*

285. *See* Kovacic & Winerman, *supra* note 6, at 940–43. In the only recently litigated case involving a standalone Section 5 claim, the district court declined to address the scope of that standalone authority having determined that a Sherman Act violation had occurred. *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019), *rev'd*, 969 F.3d 974 (9th Cir. 2020); *see also Qualcomm Inc.*, 969 F.3d at 986 n.11. The FTC has continued to employ a slightly broader Section 5 authority in consent decrees. *See* Public Workshop Concerning the Prohibition of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50,818, 50,818–19 (Aug. 28, 2008).

That period of retrenchment came to an end in July 2021, when a newly progressive majority of the FTC withdrew the 2015 guidance in a three-to-two vote.[286] The FTC majority condemned that statement for "confining Section 5 to the framework that presently governs the Sherman and Clayton Acts" and for "hamstring[ing] [the agency's] enforcement mission" by applying the "unwieldy" rule of reason.[287] The FTC's progressive commissioners further argued that the 2015 statement was inconsistent with the flexibility and proactive nature of the reforms envisioned by Senator Newlands and other champions of Section 5.[288] The Commissioners acknowledged the defeats of standalone Section 5 authority in the oligopoly cases after *Sperry* but argued that they merely reflected inadequate evidence, not any underlying ability of the FTC to "prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence."[289]

III. Unfair Methods of Competition Today

Even a progressive FTC will be able to rely largely on unconventional extensions of established antitrust law when addressing unfair methods of competition.[290] Nevertheless, FTC Chair Lina Khan has expressed skepticism that antitrust alone will suffice to address many of the challenges presented by Big Tech and other modern-day concerns, and she has identified standalone Section 5 authority as an alternative means for the FTC to achieve those ends.[291] The FTC commissioners

286. FTC, *Statement of the Commission*, *supra* note 14, at 1; *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act*, F.T.C. (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act [https://perma.cc/QXN5-AQE8].

287. FTC, *Statement of the Commission*, *supra* note 14, at 5–7.

288. *See id.*

289. *Id.* at 4.

290. See, e.g., Nicole Gill & Jesse Lehrich, *Petition for Rulemaking to Prohibit Surveillance Advertising*, F.T.C. 14 (Dec. 3, 2021), https://accountabletech.org/wp-content/uploads/Rulemaking-Petition-to-Prohibit-Surveillance-Advertising.pdf [https://perma.cc/DLC5-UG42] (arguing that surveillance advertising could be condemned under conventional antitrust law without having to determine the limits of standalone Section 5 authority); *see also Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1052–57 (N.D. Cal. 2021) (concluding that anti-steering provisions—which were not integral to a two-sided platform—violated California's analog of Section 5 as an incipient violation of antitrust law due to concern about lock-in effects).

291. *See* Chopra & Khan, *supra* note 14, at 366–69; Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 755–73, 784–91 (2017) (criticizing modern antitrust concepts of market definition and predatory pricing among other issues); *see also* Comm. on the Judiciary, *supra* note 14, at 75–88 (reviewing conventional charges against Big Tech).

who adopted the November 2022 policy statement likewise have critiqued the "efficiency-focused approach to antitrust law" for driving market power and inflation, whereas they view Section 5 as allowing the FTC to protect social interests other than business competitors.[292] Yet in the half-century since *Sperry & Hutchinson* suggested that courts would allow the FTC leeway in applying this authority, both antitrust and administrative laws have undergone profound shifts, raising the question of whether such a broad interpretation of Section 5 would survive scrutiny under *Chevron*, nondelegation, and other modern doctrines of agency deference.[293] Fortunately, the historical understanding of unfair methods of competition retains its relevance and intelligibility even today to guide the agency, courts, and affected businesses in this inquiry.[294]

A. How Accurate and Clear Is the FTC's Current Policy Statement?

On November 10, 2022, the FTC adopted its current Section 5 policy statement in a three-to-one vote.[295] The statement begins its search for the meaning of "unfair methods of competition" with the legislative history of Section 5, arguing that Congress designed Section 5 "to extend beyond the reach of the antitrust laws" while leaving it to the FTC to "identify *unfair* forms of competition."[296] The statement correctly observes that Congress had identified several forms of conduct that would be deemed unfair, but it does not define Congress's understanding of unfairness except for the relatively unhelpful observation that it included "conduct that tended to undermine 'competitive conditions' in the marketplace."[297] Its subsequent overview of judicial interpretations of

292. Alvaro M. Bedoya, Lina M. Khan & Rebecca Kelly Slaughter, Statement on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition under Section 5 of the FTC Act 6–7 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStmtBedoyaStmt.pdf [https://perma.cc/83UV-D3SL].

293. *See id.* at 1 (justifying the agency's current policy as following Congress's intent); Chopra & Khan, *supra* note 14, at 375–79.

294. Noah Joshua Phillips & Christine S. Wilson, *Dissenting Statement on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act"* 3 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf [https://perma.cc/36HK-KQF8] ("Nor did Congress vest the Commission with broad authority to regulate the economy without an intelligible principle."); FTC, *Policy Statement*, *supra* note 10, at 9–10.

295. *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition*, F.T.C. (Nov. 10, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition [https://perma.cc/VD6J-5YYN].

296. FTC, *Policy Statement*, *supra* note 10, at 3.

297. *Id.* at 3–4.

Section 5 also does not clearly identify what constitutes "the spirit of the antitrust laws," except to imply that it encompasses behaviors that do not necessarily "fall into a 'gap'" in the antitrust laws and thus does not foreclose the public policy approach.[298] Nevertheless, combining these legislative statements and judicial interpretation with FTC precedent, the policy statement offers a multi-step explanation for how the current FTC will determine what are unfair methods of competition.

First, conduct must be a "method of competition," meaning something that a market participant actively undertakes.[299] These methods could include the misuse of regulatory processes, such as patenting or standard setting, but exclude exogenous barriers to entry or existing levels of concentration.[300] This definition may, in fact, be somewhat underinclusive, as it would typically exclude "violations of generally applicable laws . . . that merely give an actor a cost advantage."[301] On the contrary, a company that gains cost advantage over a rival through the violation of some exogenous law has not done so through its own skill or superior efficiency but through methods that may compel rivals to engage in their own violations.[302] Such wrongful actions could include violations of labor law, minimum price laws, regulations, or—of course—antitrust law itself, at least when causation to other businesses' harm can be shown.[303]

Second, these methods of competition must be "unfair," which the FTC defines as that which "goes beyond competition on the merits."[304] Two factors influence this determination on a case-by-case basis. First is the nature of the conduct, which need not merely be anticompetitive or exclusionary in the antitrust sense but could also include abuses of power, predation, or other wrongful means.[305] Notably, this analysis can incorporate both a subjective "purpose" of the actor as well as the conduct's objective "current and potential future effects."[306] The second factor is that "the conduct must tend to negatively affect competitive conditions," which the Commission will determine with an eye to future

298. *Id.* at 6, 13; *see id.*

299. *Id.* at 8.

300. *Id.*

301. *Id.*

302. *See, e.g.*, *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 312–13 (1934); STEVENS, *supra* note 161, at 7.

303. *See infra* note 351; *Anoush Cab, Inc., v. Uber Techs., Inc.*, 8 F.4th 1, 23 (1st Cir. 2021); *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180, 182, 187–89 (Cal. 2014) (allowing state to make an unfair competition claim based on various labor and tax violations); *see also Nebbia v. New York*, 291 U.S. 502, 529 (1934) (describing laws forbidding unfair competition in pricing).

304. FTC, *Policy Statement*, *supra* note 10, at 8.

305. *Id.* at 9. The statement bases this discussion in part on the cases discussed *supra* note 249.

306. *Id.*

outcomes and not harms that have already occurred.[307] The Commission will also make these determinations outside of antitrust's rule of reason framework and market definitions, at least when evidence of negative impacts are obvious.[308] The statement otherwise provides little express guidance about what is unfair or incipient: the single action of an individual company may not count, but liability could exist when viewed across the aggregated actions of a single or multiple companies.[309]

The historical meaning of unfair methods of competition supports much of this definition, including the gestalt approach that was featured in so much of the Standard Oil litigation. But the FTC dramatically expands on conventional understandings of unfairness under its second prong when it defines harm to competitive conditions as including negative effects on "consumers, workers, or other market participants," not just business rivals or competition as it is traditionally understood.[310] The policy statement grounds this conclusion in a skewed reading of the legislative history, where even the Commission's own cited authorities actually emphasize rivalry between businesses while at best expressing aspirational goals for wages and prices as an indirect consequence.[311] Of course, many practices that historically fell under the heading of unfair methods of competition have tended to lower wages or raise prices, and competition law on both sides of the Atlantic developed in no small part out of concerns about labor markets and trade unions.[312] But when Senator Newlands and his collaborators spoke of giants and pygmies, they mapped private causes of action between competitors onto a new procedural regime in which those rivals could enlist the state's support.[313] Likewise, the Supreme Court long ago observed that Section 5's plain language limits unfair methods to those that "injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured."[314] A practice that threatens consumer welfare may constitute an

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307. *Id.* at 9–10.

308. *Id.* at 10.

309. *Id.*

310. *Id.* at 9. For criticism of this approach from an antitrust perspective, see Christine S. Wilson, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" 7–9 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf [https://perma.cc/RJ4K-UZ4S].

311. *See* FTC, *Policy Statement*, *supra* note 10, at 4 & n.18.

312. *See supra* notes 77–92, 116–120.

313. *See supra* notes 198, 204–205.

314. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931); *see also supra* notes 232–34; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 247–48 (1972) (vacating FTC order against unfair method of competition for relying on findings about harms to consumers).

unfair method of competition as an independently wrongful violation of antitrust law, but it cannot trigger standalone Section 5 enforcement unless it also interferes with the competition of business rivals. Harm to consumers or workers should, of course, still be relevant to deciding if FTC enforcement against a tactic that harms competitors serves the public interest.[315] But the policy statement surprisingly overlooks the role of the public-interest limitation despite its importance to Rublee, Brandeis, and other FTC drafters in defining the scope of Section 5 authority.[316]

The FTC finally turns to the question of whether justifications can serve an affirmative defense to a Section 5 violation. As this Article has shown, the historical torts and legislative discussions underlying the FTC Act (to say nothing of the influence of antitrust's rule of reason) suggest that even more than serving as an affirmative defense, a lack of justification should be part of the government's burden of proof.[317] The FTC's modern statement, however, provides much more of a hedge by suggesting that precedent provides little guidance on "what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case."[318] It is correct that mere pecuniary benefit cannot justify "facially unfair conduct," and that Congress tasked the agency with evaluating business justifications in any instance.[319] But rather than asking whether there was any reasonable purpose but to cause harm, as common-law courts had prior to Section 5, or applying the rule of reason analysis of the 2015 statement, the Commission instead has adopted a vague framework evaluating "non-quantifiable" harms and benefits and a sliding-scale of scrutiny, in which "the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[320]

The new policy statement does not explain precisely what these non-quantifiable harms are, nor how the FTC would evaluate them. But the FTC requires that any asserted benefits be narrowly tailored and fall within the market where harm occurs, which suggests that it could target practices that are economically justified overall (as a rule of reason

315. *See* Dissenting Statement of Wilson, *supra* note 310, at 12; *see also Raladam*, 283 U.S. at 649 (describing a two-step process in which the FTC first determines if there is an unfair method of competition and then evaluates if a proceeding serves the public interest).

316. *See supra* text accompanying notes 211–212, 232–237. The FTC's policy statement apparently considers the public interest limitation to be separate from the definition of unfair methods of competition because they appear in different sections of the FTC Act as codified. *See* FTC, *Policy Statement*, *supra* note 10, at 2 n.4.

317. *See supra* Section I.B.2.

318. FTC, *Policy Statement*, *supra* note 10, at 10.

319. *Id.* at 10–11.

320. *Id.* at 11.

analysis might suggest) but whose costs fall on specific sectors or which cause broader social (and non-economic) harms.[321] Such a limited view of justification not only runs afoul of the judicial scrutiny of an expansive Section 5 in the 1980s and 1990s but also ignores the wide range of historical justifications that shielded business conduct as valid competition.[322] The FTC further places the burden of showing these justifications on the respondent, not the government.[323] Given the lack of clarity that the agency has offered about measuring and applying these justifications, this burden of proof suggests a potential bias in favor of condemnation, whereas the common-law approach to competitive torts—both then and now—has expressed hesitation over false positives that are truly no more than *damnum absque injuria*.[324]

B. The Lessons of Modern Business Torts for the FTC

The FTC's current policy statement is intended to provide "key general principles" for determining whether conduct violates Section 5.[325] Although its expansion of unfair methods of competition beyond the rule of reason of the 2015 statement is not entirely incorrect as a historical matter, the policy statement suggests that the FTC will adopt a focus far beyond traditional understandings. And in terms of the guidance that it offers to businesses and practitioners, the current statement provides less clarity than the 2015 statement with its focus on well-worn antitrust principles.[326] While offering several pages' worth of historical examples of conduct found to violate Section 5—albeit not necessarily as standalone violations—the 2022 statement's examples are non-exhaustive and leave open the question of what else might be condemned.[327] Determining when conduct violates the *letter* of antitrust law is relatively straightforward. But it is less clear when conduct constitutes an *incipient* violation of the letter of antitrust law; when conduct transgresses the *spirit* of antitrust law is even less so, especially when the policy statement admits that this

321. The policy statement's definition may, for instance, permit challenges to multi-sided platforms. *See infra* note 359.

322. *See supra* notes 121–22, 133, 271–276 and accompanying text; *see also* Dissenting Statement of Wilson, *supra* note 310, at 11–12.

323. FTC, *Policy Statement*, *supra* note 10, at 12.

324. *See supra* notes 120–24; *see also* Dissenting Statement of Wilson, *supra* note 310, at 17 ("Under the Policy Statement, the Commission may find liability merely by selecting an adjective and then limiting the defenses of the respondent. Consequently, when the Commission brings a case under Section 5, the cards are stacked so the Commission should always win.").

325. FTC, *Policy Statement*, *supra* note 10, at 2.

326. *See generally* Dissenting Statement of Wilson, *supra* note 310, at 5–17.

327. FTC, *Policy Statement*, *supra* note 10, at 12–16.

analysis "may depart from prior precedent based on the provisions of the Sherman and Clayton Acts" without offering a clear replacement.[328]

What would clear and historically accurate guidance entail? In the place of general guidance documents, one possibility would be rulemaking to condemn specific conduct, an approach that has attracted much interest from Chair Khan and others.[329] But it is doubtful that the Commission possesses rulemaking authority over unfair methods of competition. Senator Newlands and other proponents—and even opponents—of Section 5 repeatedly rattled off long lists of conduct condemned as unfair methods of competition, but never did they insinuate that the FTC could rely on rulemaking to circumvent the individual adjudication of these claims.[330] Section 6(g) of the Act does give the FTC the power "to make rules and regulations for the purpose of carrying out the provisions of this act," but in contrast to the detailed adjudicative framework of Section 5, this brief permission was long understood to extend only to the FTC's internal procedures.[331] The FTC received judicial imprimatur for the power to issue legislative rules under Section 6(g) in 1973, but the questionable methods of statutory interpretation used to support that conclusion would be unlikely to enjoy much support today.[332]

In the absence of rulemaking, an intentional tort-style analysis provides not only a historically accurate framework to guide the FTC's application of Section 5 authority but one which is as familiar to the business community and as easily communicable as the FTC's previous antitrust focus. Indeed, given the common-law origins of unfair methods of competition, it is noteworthy that business torts have continued to converge with antitrust law in their treatment of competition. As antitrust law adopted its consumer welfare focus in the 1970s and 1980s, businesses that faced an uphill battle under antitrust law increasingly turned to tort law.[333] The heightened possibility that courts might

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328. *Id.*

329. Chopra & Khan, *supra* note 14, at 365–68; *see also* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1083–84 (2019).

330. *See supra* Section II.A.

331. Federal Trade Commission Act, Pub. L. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified as amended at 15 U.S.C. § 46(g)). On the use of these powers, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 549–52 (2002). The first treatise on the FTC showed no inkling that it could engage in rulemaking. *See* HARLAN & MCCANDLESS, *supra* note 160, at 47–54.

332. *See Nat'l Petro. Refiners v. FTC*, 482 F. 2d 672 (D.C. Cir. 1973); Merrill & Watts, *supra* note 331, at 554–57.

333. *See* Harvey I. Saferstein, *The Ascendancy of Business Tort Claims in Antitrust Practice*, 59 ANTITRUST L.J. 379, 379–83 (1990) (measuring the rise in business tort claims in the 1980s); Gergen, *supra* note 83, at 1187–89 (describing the general rise of tortious interference claims in this period).

condemn as tortious behavior that did not reduce consumer welfare under antitrust law has occasioned much reflection about how to apply concepts of intent and justification.[334] While the First Restatement at least recognized tort liability for such antitrust-type harms as group boycotts and refusals to deal when they evinced a purpose to destroy competition, the Second Restatement removed these sections as concerned with antitrust law, not tort.[335] The First Restatement of Torts also recommended that courts employ a balancing test to determine whether interferences with the business of others were justified, but the Second's expanding lists of factors for consideration encountered substantial pushback.[336]

Considering the contemporary interrelation between tort and antitrust, the approach recently adopted by the Third Restatement eschews these complicated balancing tests in favor of bright-line rules to limit liability to where harm to a competitor most likely harms competition as well. When interfering with another's contracts, there are three categories in which that condition may be satisfied:

> (a) the defendant acted for the purpose of appropriating the benefits of the plaintiff's contract;
> (b) the defendant's conduct constituted an independent and intentional legal wrong; or

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334. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt c. (AM. L. INST. 1995) (noting that "public benefits derived from competition are independent of the actor's motivation"); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1131–35 (1993) (arguing the tort should focus on an objective inquiry about the effects as does antitrust); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 97–98, 108–10 (1982) (critiquing "traditional, simplistic definitions of malice" based on a defendant's motivation and arguing in favor of interference torts based on unlawful activity instead of motive); Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 350 (1980) (rejecting a tort based on motives instead of wrongful conduct).

335. *Compare* RESTATEMENT OF TORTS §§ 708 cmt. E (AM. L. INST. 1938) (explaining why antitrust-type harms fell within the scope of the Restatement), *and* RESTATEMENT OF TORTS §§ 764 & cmt. A, 765 & cmt. a (AM. L. INST. 1939) (same), *with* RESTATEMENT (SECOND) OF TORTS, intro. Note to div. 9 § 768 cmt. f (AM. L. INST. 1979) (explaining why antitrust-type harms are outside of the scope of the Restatement).

336. RESTATEMENT OF TORTS §§ 766–67 (AM. L. INST. 1939); RESTATEMENT (SECOND) OF TORTS §§ 766A–B, 767 (AM. L. INST. 1979); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 18 rep.'s notes, cmt. b ("The confusion was reflected in the Restatement Second, which set forth a seven-factor test to determine whether a defendant's interference was 'improper' . . . . The resulting framework was not notably clear, and courts and commentators were not complimentary of it.").

(c) the defendant engaged in the conduct for the sole purpose of causing harm to the plaintiff.[337]

A defendant must also undertake these actions to interfere with the contracts of a specific victim, as otherwise too much generalized competitive behavior would no longer be permissible.[338]

These three categories continue the typology developed over a century ago to address when business conduct no longer furthers competitive objectives. The first represents the specific situation of *Lumley*, in which the interfering party succeeds at replacing the plaintiff in a contractual relationship and the plaintiff elects to sue the interfering party in tort rather than the original counterparty for breach of contract.[339] The second represents a modern version of the rule of *Mogul* and *Allen* in which an independently wrongful interference is deemed tortious.[340] Most important here is the third prong, which the Restatement acknowledges is derived from the earlier discussions of malice, although it avoids that term "as needlessly confusing."[341] Still, its approach strongly echoes that of a century ago. The Restatement applies the high standard of "sole" to weed out normal cases of "legitimate commercial activity by rivals who may well dislike each other," and cases of mixed motives—*i.e.*, valid justifications—that do not fall under the other prongs should be considered, on balance, as legitimate competition.[342]

When it comes to interference with prospective economic advantages, which embody less certainty and property interests than contractual relationships, the Third Restatement states that only independently wrongful conduct should induce liability.[343] The Restatement admittedly "takes no position on whether liability arises from a lawful act done for an improper purpose," leaving open the

337. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 17(2) (AM. L. INST. 2020).

338. *See id.* § 17 cmt. c, illus. 1. In the early days of this tort, moreover, courts used malice to describe this distinction. *See Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 105 F. 163, 167 (8th Cir. 1900) (explaining that simply sending a circular advertising lower prices cannot support a "good cause of action for maliciously causing certain persons to break or cancel their contracts with the plaintiff").

339. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 17 cmt. d (AM. L. INST. 2020).

340. *See id.* § 17 cmt. e.

341. *Id.* § 17 rep.'s notes cmt. f.

342. *See id.* § 17 cmt. f.

343. *Id.* § 18(d), cmts. a–b (AM. L. INST. 2020); *see also* Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 21 (1987) ("One of the great structural mistakes of the *Restatement (Second) of Torts* is its ceaseless effort to treat inducement of breach of contract and interference under prospective advantage by the same rules, even though the one tort falls squarely within the traditional prohibition against force and fraud while the other does not.").

possibility that traditional understandings of malicious interference can still impart liability.[344] If courts do employ that historic approach, however, the risk of misidentifying competitive conduct as tortious recommends extreme caution.[345] As a result, while acknowledging the existence of "older cases that have been viewed as basing liability upon malicious intent" such as *Keeble*, the Third Restatement prefers to view these cases "as involving independently wrongful acts" and not resting on malicious intent alone.[346]

Of course, the FTC need not expressly adopt the position of the Third Restatement, let alone the lists of justifications provided in the First and Second Restatements. The Third Restatement has crafted its rules to prevent courts and juries from arriving at false positives and condemning pro-competitive behavior, but the expertise of the FTC is entirely suitable for identifying and condemning this behavior in its particular context.[347] Indeed, one reason that the progressives who drafted the FTC Act preferred this expert commission to adjudicate cases instead of generalist courts was that it would be able to determine whether the individual facts of each situation showed intent to harm competition in light of economic theory and industry practices.[348] Even when conduct appears at first glance to fit into a well-recognized category of unfair competition, adjudication allows the agency to distinguish harmless mistakes and potentially beneficial activity from intentionally harmful conduct and unjustified restrictions on competition.[349]

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344. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 18 ct. c (AM. L. INST. 2020).

345. *Id.*

346. *Id.* The Third Restatement of Unfair Competition likewise notes that liability in *Tuttle*, *Dunshee*, and other cases involving withdrawal from a profitable market "might instead be justified by the nature of the defendant's conduct" than any role of malice. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 reps.' notes, cmt. c (AM. L. INST. 1995).

347. *Compare* RESTATEMENT (THIRD) OF TORTS, § 18 cmt. c (AM. L. INST. 2020) (noting the "substantial risk of error in identifying" tortious interference with economic expectations on the basis of malicious intent), *with* AREEDA & HOVENKAMP, *supra* note 8, ¶ 302h5, at 25–26 (describing the FTC's expertise over generalist courts and juries as a potential reason to permit wider Section 5 authority than the Sherman and Clayton Acts alone).

348. *See* 51 CONG. REC. 11113 (1914) (statement of Sen. Newlands) ("This tribunal, composed of economists and lawyers and men experienced in industry, is called upon to apply this standard of the law, namely, that unfair competition is illegal to the varying facts, situations, and conditions affecting interstate trade."); 51 CONG. REC. 12147 (1914) (statement of Sen. Hollis) ("The managers will have every opportunity to explain and persuade the commission, if they can, that the method of competition is fair; and the commission, on its part, will present its views.").

349. *See In re General Foods Corp.*, 103 F.T.C. 204 (1984) 1984 WL 566373, at *71–74, *115–16, *123–24 (explaining that apparent predatory pricing and fighting brand designed to disrupt a specific competitor were actually pro-competitive and did not disrupt the rival's marketing or confuse consumers to degree required for a Section 5

Still, the Third Restatement's emphasis on ensuring that injuries to competitors actually harm competition provides a contemporary counterpart to the historical and statutory concern that Section 5 applies only to public injuries—a requirement that, as noted above, the current policy statement overlooks. The 2015 Policy Statement was in fact not far off from the original meaning of unfair methods of competition when it promoted an approach modeled on the rule of reason. Unfair methods of competition as used by Standard Oil and other companies of its day were those intended to harm rivals and which lacked a justification beyond naked self-interest. The primary limit to the FTC's inquiry was, as Rublee and Brandeis had emphasized, that harm to a competitor must also present a threat to the public interest. That distinction between private and public harms, which was only strengthened by the separate consumer-facing authority added by the Wheeler-Lea Act, further aligns this historical understanding of unfair methods of competition with the standards of consumer welfare adopted in the 2015 policy statement. After all, the traditional forms of unfair competition, such as the trademark infringements that Rublee and Brandeis did not believe Section 5 encompassed, are today understood as lying outside of antitrust law, as they are "nothing more than simple competition" that rarely threaten consumer welfare or "make[] a durable contribution to the defendant's market power."[350]

Granted, the 2015 Policy Statement's focus on consumer welfare standard was somewhat under-inclusive considering the historical understanding of unfair methods of competition. Some actions intended to hinder a rival are not actionable under antitrust law but could still fall under Section 5. For instance, a company such as Uber that plays fast and loose with rules designed to shield incumbents from competition is clearly engaged in an unfair method of competition—at least when it gains a distinct cost advantage over incumbents—even as it contributes to the breakdown of a regulatory monopoly and thereby enhances consumer welfare.[351] Fortunately, as the modern Restatement view recognizes,

violation); *see also* AREEDA & HOVENKAMP, *supra* note 8, ¶ 1419e5 at 136–37 (listing variables that the FTC considers "bearing upon the degree to which unaccepted [invitations to collude] are likely to impair competition").

350. AREEDA & HOVENKAMP, *supra* note 8, ¶ 780.

351. *See* Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 80, 84 (2020) (noting how violation of laws shielding incumbents are not anticompetitive in the antitrust sense); *compare Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th 1, 22 (1st Cir. 2021) (dismissing claim that violation of taxi regulations rose to level of unfair method of competition under Massachusetts law), *and Overton v. Uber Techs., Inc.*, 333 F. Supp. 3d 927, 946–47 (N.D. Cal. 2018) (rejecting claim that Uber's failure to register as an interstate motor carrier caused competitive harms to plaintiffs, who also had not registered), *with Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1090–91 (N.D. Cal. 2019) (allowing claim that violation of state labor code gave Uber an unfair cost advantage), *and Green v. Garcia-Victor*, 248 So. 3d 449,

these methods will likely be so obviously tortious or wrongful that it would not be difficult for the FTC to acknowledge this general concern in an expanded policy document otherwise inspired by rule of reason analysis.[352] Whether enforcement against these tactics would further the public interest is less clear given the potentially net-positive welfare effects, but the FTC could still explain that it would bring an action if this conduct were so widespread (or losses to consumers or rivals so significant) that private litigation would prove infeasible.[353]

C. Standalone Section 5 Authority and the Circumvention of Antitrust Law

Given that unfair methods of competition historically required a lack of competitive justification, a historically informed interpretation of Section 5 limits the FTC's ability to circumvent antitrust law. Violations of the Sherman and Clayton Acts constitute unfair methods of competition under Section 5 not because of any special relationship to the FTC Act but, to paraphrase the Third Restatement, because they are independently wrongful acts intended to cause harm to competitors.[354] Standalone Section 5 authority can determine when activities that are not precise violations of established antitrust law are unfair because they lack any reasonable purpose but to harm rivals and possess no offsetting economic or social justifications, but they cannot be used to rewrite those distinct statutory bases of antitrust law.

Chair Khan's interest in using Section 5 to modify the law of predatory pricing provides a clear example of how the historical understanding of unfair methods of competition can inform the agency's modern application.[355] Modern antitrust law limits predatory pricing

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455–57 (La. App. 4 Cir. 2018) (allowing claim based on non-compliance with municipal taxi regulations).

352. *See* Wu, *supra* note 277, at 10 ("A company engaged in nakedly oppressive, deceptive or fraudulent conduct is always courting legal risk, and not just from the Federal Trade Commission. . . . [W]hen engaged in conduct amounting to a common law business tort, it is hard for the defendant to claim that he lacked notice that such conduct might yield liability."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 18 cmt. c (AM. L. INST. 2020) (noting that malicious conduct is more often than not also independently wrongful).

353. *See supra* notes 206–212, 232–237 and accompanying text.

354. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 18 cmt. c (AM. L. INST. 2020).

355. *See* Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?* 10, 18–21 (GW Legal Stud. Rsch. Paper No. 2021-42, Nov. 4, 2021), https://ssrn.com/abstract=3933921 (identifying predatory pricing as a potential target of rulemaking for Chair Khan's FTC); AREEDA & HOVENKAMP, *supra* note 8, ¶ 302h3, at 24 (identifying predatory pricing as an area where Section 5 may extend beyond antitrust as the FTC's expertise and equitable remedies remove the need for the cost-based limits applied to generalist courts).

claims to circumstances in which a company not only priced below some measure of its costs but also can recoup its losses.[356] The second of these requirements is traditionally defended on the ground that consumers benefit when a company sells cheap products and that the only harm to consumer welfare will occur if a company can raise prices once it has driven out its rivals.[357] Critics of this rule, including Khan, have observed that recoupment is difficult to detect and fails to account for other potential harms of below-cost pricing, including the discouragement of entry through what essentially amounts to psychological intimidation.[358] When applied to platform companies, where an antirust violation requires a competitive harm to both sides of a transaction, critics of the modern antitrust regime have further noted that the effects of below-cost pricing are typically directed at only one side of the platform, which may allow the platform operator to monopolize that side alone.[359]

One important consequence of antitrust law's contemporary focus on recoupment is its exclusion of pricing policies that might raise eyebrows in the tort context. Because the Sherman Act protects competition, not competitors, its operative inquiry must be whether below-cost pricing creates a dangerous probability of recoupment, not "whether the defendant has engaged in 'unfair' or 'predatory' tactics."[360] As a result, "[e]ven an act of pure malice by one business competition against another does not, without more, state a claim under the federal *antitrust* laws," not least because plaintiffs would otherwise forsake conventional state tort causes of action to seek treble damages under the Sherman or Clayton Acts.[361]

Section 5 of the FTC Act faces no such limitation, as it exists largely so that potential business plaintiffs can obtain redress without waiting for

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356. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–26 (1993).

357. For a review of modern predatory pricing law, see AREEDA & HOVENKAMP, *supra* note 8, ¶ 724.

358. Khan, *supra* note 291, at 772–73; Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1742–44 (2013) (suggesting that even failed predatory pricing schemes generate allocative inefficiency and result in at least a temporary exit of more efficient competitors).

359. *Compare Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285–87 (2018) (holding that platform conduct must prove anticompetitive on both sides of a platform to constitute an antitrust violate), *with* COMM. ON THE JUDICIARY, *supra* note 14, at 337 (calling to overturn *American Express* "by clarifying that cases involving platforms do not require plaintiffs to establish harms to both sets of customers").

360. *Brooke Grp. Ltd.*, 509 U.S. at 224–25.

361. *Id.* at 225 (emphasis added) (citing *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 342–43 (1991) (Scalia, J., dissenting).

damages to accrue.[362] And at the time the FTC Act passed, some forms of below-cost pricing were indeed deemed malicious enough to fall under the heading of unfair methods of competition. Contemporaries understood that below-cost pricing did not relate to a company's own efficiency but rather its financial capacity to withstand losses, and as a result it could be used maliciously to destroy rivals.[363] Some of those economists argued (as do modern progressives) that the costs of wrongly tolerating predatory pricing meant that all below-cost pricing should be condemned.[364]

In practice, however, contemporaries declined to adopt strict per se rules, recognizing that below-cost sales, even when directed at a rival, could still possess a competitive justification.[365] Many, although not all, of the states that had passed laws banning local price discrimination limited liability to instances in which this action was "done for the purpose of destroying competition."[366] Section 2 of the Clayton Antitrust Act, passed in 1914 by the same Congress responsible for the FTC Act, likewise outlawed discriminatory pricing only when its effect was to "substantially lessen competition or tend to create a monopoly."[367]

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362. *See also* Crane, *supra* note 12, at 1235 ("Perhaps [the malice exclusion] is a plausible reading of the Sherman Act, which does not use morally loaded terminology, but that statement could not apply textually to section 5 of the FTC Act, which begins with the words 'unfair methods of competition.'").

363. *See* STEVENS, *supra* note 161, at 16–17 ("It is not unlikely that the greater the productive efficiency of competitors the more strenuous will be the warfare wage against them."); CLARK & CLARK, *supra* note 161, at 34 ("Even though the competitor may greatly excel the trust in the economy with which he makes goods, he may be forced out of business by this predatory policy."); Edward S. Rogers, *Predatory Price Cutting as Unfair Trade*, 27 HARV. L. REV. 139, 154 (1913) ("The essence of the situation here under discussion is not the propriety, legality or necessity of fixing prices. It is in the unnecessary doing of an act calculated to injure and resulting in injury with respect to that most [subtle] of property rights, business good will.").

364. *See* STEVENS, *supra* note 161, at 17–18 (arguing that while a general price cut based on efficiency is not unfair, local price-cutting by a more efficient trust should always be condemned as destroying competition).

365. *See* DAVIES, *supra* note 114, at 304 (noting that lower prices viewed as injurious by rivals were treated as beneficial for society); *see also Meyerson v. Hurlbut*, 98 F.2d 232, 233 (D.C. Cir. 1938) (collecting cases from the late 1880s onwards for the proposition "[i]t has been held in the past that charges of price cutting directed at a merchant are not actionable per se."); *Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 105 F. 163, 167 (8th Cir. 1900) (explaining that simply sending a circular advertising lower prices could not support a claim for inducing breach of contract).

366. DAVIES, *supra* note 114, at 187 (summarizing differences in state laws on local price discrimination); *see also State ex rel. Lief v. Packard-Bamberger & Co.*, 8 A.2d 291, 293–96 (N.J. 1939) (reviewing state laws requiring a specific intent to destroy competition to be constitutional).

367. Clayton Act, ch. 323, 38 Stat. 730, 730–31 (now codified as amended at 15 U.S.C. § 13).

The legislative history of the FTC Act itself suggests a clear understanding that not all forms of below-cost pricing could be condemned as unfair methods of competition, or least not as being in the public interest to combat. During one of the final rounds of the Senate debates over the meaning of Section 5, Senator William Stanley West of Georgia presented two scenarios to Senator Albert Cummins of Iowa, who was advocating for the bill.[368] First, what if a manufacturer of agricultural machinery encountered a business recession, forcing it to sell its machinery under cost to meet its obligations?[369] Second, what about when Standard Oil sold kerosene under cost?[370] To the first hypothetical, Senator Cummins answered that in no case would the manufacturer face any charges from the FTC: Senator West had used a "general term" in describing below-cost pricing, when the FTC would only "denounce a particular practice" where there was intent to harm.[371] To the second, Senator Cummins explained that when Standard Oil "should attempt to crush a competitor in a particular locality" by charging a lower price there than elsewhere in the country, it would be guilty of unfair competition, as through this intentional tactic "it did drive out a great many worthy [*i.e.*, more efficient] rivals."[372]

Over the past century, tort law has grown even more skeptical that below-cost pricing can constitute a legal injury without eliminating the possibility of liability entirely.[373] Where these claims prove successful, courts have stressed that the below-cost pricing was used as part of "[a] campaign to harm or destroy rivals," such as where the unlikelihood of winning any new customers negated potential competitive justifications for the reductions.[374] At least when evaluating the use of predatory pricing as an interference with an established contract, recoupment is not required when the intent to harm shows that there is no competitive purpose.[375] Determining whether non-malicious explanations exist,

368. 51 Cong. Rec. 12982 (1914).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *See Seattle Rendering Works, Inc. v. Darling-Delaware Co., Inc.*, 701 P.2d 502, 505 (Wash. 1985) ("A cause of action for below-cost pricing is not a right found at common law.").

374. *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 370–71 (9th Cir. 1988) (rejecting claim of predatory pricing in antitrust but noting that the conduct might have been actionable as a tort given that it was unlikely defendant actually intended to win new customers by price reductions).

375. *See, e.g.*, *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1548 (8th Cir. 1989) (quoting *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 638, 632–33 (Minn. 1982)) (holding that predatory pricing which led plaintiff's customers to buy from defendant was a wrongful means of interference); *Dodge Data & Analytics LLC v. iSqFt, Inc.*, 183 F. Supp. 3d 855, 873–74 (S.D. Ohio 2016) (permitting claim of tortious

however, remains highly context specific. A rotating variety of loss-leaders may suggest a purpose to attract more customers into a store without necessarily taking them away from another, as opposed to lowering prices on the brands in direct competition with a clearly identifiable rival.[376]

This brief review of the substantive law reflected in the text of the Act, its legislative history, and subsequent policy concerns suggests limits on the FTC's standalone Section 5 powers to combat below-cost pricing. Some below-cost pricing could indeed prove an unfair method of competition even in the absence of recoupment, making Section 5 broader than antitrust law. But at the same time, that conduct would still have to lack any competitive—as opposed to moral or political—justification to fall within the scope of Section 5 and its limitation of injury to the public. That showing would in turn require the use of independently wrongful methods (including a statutory antitrust violation) or an unjustified intent to harm specific rivals, not simply the use of legal and generalized tactics that could still benefit the public.

This requirement makes it difficult for the FTC to expand its use of Section 5 as far as some have suggested. For instance, Chair Khan has argued that Amazon has used below-cost pricing to encourage sales of books on its own platform to the detriment of rival book sellers and book publishers, who receive lower prices.[377] Yet the mere fact that Amazon obtains user information and strengthens its own platform through this behavior is not enough to distinguish the purpose of this pricing from brick-and-mortar loss-leadership strategies designed to encourage consumers to enter the store and build brand value. Indeed, in the context of a two-sided platform, loss-leadership directed at consumers can clearly enhance the competitive value of that platform for third-party vendors

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interference based on below-cost sales as it could violate antitrust law); *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, C-1862-86E, 1991 WL 279430, at *5 (N.J. Super. Ch. Div. Sept. 30, 1991), *rev'd sub nom. Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 659 A.2d 904 (N.J. Super. App. Div. 1995) (citing *Van Horn v. Van Horn*, 52 N.J.L. 284 (1890), to apply late nineteenth-century ideas of malice); *see also* Michael C. Quinn, *Predatory Pricing Strategies: The Relevance of Intent Under Antitrust, Unfair Competition, and Tort Law*, 64 ST. JOHN'S L. REV. 607, 615–28 (1990) (comparing causes of action for predatory pricing).

376. *See Nat'l Parcel Servs., Inc. v. J.B. Hunt Logistics, Inc.*, 150 F.3d 970, 971 (8th Cir. 1998) (holding that below-cost pricing that did not violate the Sherman Act also could not constitute the basis of tortious interference given the lack of evidence that it was predominantly to harm the competitor); *Wal-Mart Stores, Inc. v. Am. Drugs, Inc.*, 891 S.W. 2d 30, 34–36 (Ark. 1995) (emphasizing that loss-leader tactics cannot make out a "*prima facie* case of purposeful intent to destroy competition" when defendant did not consider the plaintiff a competitor and when frequent changes in loss-leading products suggested competitive purposes to increase store traffic).

377. Khan, *supra* note 291, at 756–61.

who will find a larger audience for their wares when connected by the platform.[378]

Khan also argues that venture capital may unfairly subsidize below-cost pricing to obtain a monopoly.[379] While early treatise writers appreciated the substitution of financial resources for efficiency in identifying unfair competition, any standalone Section 5 application to venture capital would nevertheless be difficult without showing a targeted intent to harm rivals through these funds or otherwise the ability to achieve durable market power.[380] Taxi companies have recently tested this theory in their efforts to hold Uber liable under tort and state unfair competition laws for offering below-cost rides, even arguing in one case that "the only rational purpose for Uber subsidizing rides as it has done and continues to do is to drive enough competitors out of business to be able to raise prices down the road."[381] Courts have treated this claim with skepticism. Because Uber's business is to match drivers with riders, pricing that attracts more riders and their personal information to its platform can enhance the value of Uber for drivers—and investors—and thereby provide a valid justification for its use of venture capital beyond the exclusion of rivals.[382]

Still, the history of Big Tech suggests that the malice once associated with Standard Oil remains a viable target today under Section 5. Consider the well-known example of Amazon's interactions with Quidsi, the parent company of Diapers.com.[383] Taking at face value the findings of the House Subcommittee on Antitrust in its recent investigations of Big Tech, Amazon had identified Quidsi as a competitor in terms of pricing and customer service. Amazon attempted to purchase Quidsi but was rebuffed. At that point, according to internal documents presented to the House, "Amazon employees began strategizing about ways to weaken this company, and, in 2010, Amazon hatched a plot to go after

378. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2281 (2018) (reviewing the literature on platform strategy and noting that "[t]he optimal price might require charging the side with more elastic demand a below-cost (or even negative) price").

379. Khan, *supra* note 291, at 786–89.

380. *See, e.g.*, TAFT, *supra* note 51, at 127 ("But if they attempt, by a use of their preponderating capital and by a sale of their goods temporarily at unduly low prices, to drive out of business their competitors . . . then they disclose a purpose to restrain trade and to establish a monopoly . . . .").

381. *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1081 (N.D. Cal. 2019).

382. *See, e.g.*, *Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 886 F. 3d 332, 340–41 (3d Cir. 2018); *SC Innovations, Inc. v. Uber Techs., Inc.*, 434 F. Supp. 3d 782, 794–95 (N.D. Cal. 2020); *Malden Transp., Inc. v. Uber Techs., Inc.*, 321 F. Supp. 3d 174, 178–80 (D. Mass. 2018).

383. Chair Khan provides a narrative of the Quidsi acquisition. Khan, *supra* note 291, at 768–74.

Diapers.com and take it out."[384] Amazon engaged in an aggressive price war, allegedly suffering losses of up to $200 million a month on its diaper sales.[385] Amazon eventually purchased Quidsi with the FTC's permission in 2010, but it shut down Diapers.com in 2017.[386] Amazon had lost money on diaper sales over that time, but the House Report alluded to concerns that Amazon had also "intended to send a message" that Quidsi co-founder Marc Lore, who was by then leading Walmart's e-commerce challenge to Amazon, "cannot build profitable businesses."[387]

The mere facts of a price war followed by an exit seven years later likely would not have even convinced the courts in *Tuttle v. Buck* or *Dunshee v. Standard Oil* that Amazon had acted with malicious purpose.[388] But taking into account the ordinary course documents and circumstances surrounding Amazon's behavior, there is a plausible story that Amazon intended for its below-cost pricing strategy to punish Quidsi and Lore or at least drive down the price at which it could acquire this rival.[389] Under both the original understanding of unfair methods of competition and the modern Restatement view, such a targeted intent to destroy a rival's economic relationships purposefully could constitute legal injury against that rival, even if consumers benefitted, recoupment was not possible, and Amazon had no chance of monopolizing the entire diaper market. Although too late to help Quidsi, alertness to this type of behavior could—if the public interest requirement is also met—support a standalone Section 5 claim against Amazon with a remedy that might include restricting Amazon's ability to initiate targeted price reductions in certain staple lines or to acquire companies with whom it has engaged in price wars.[390]

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384. COMM. ON THE JUDICIARY, *supra* note 14, at 221.

385. *Id.* at 221, 252; Khan, *supra* note 291, at 768–70.

386. COMM. ON THE JUDICIARY, *supra* note 14, at 220–21.

387. Jason Del Rey, *Why Amazon's Explanation for Shutting Down Diapers.com and Quidsi Stunned Employees*, VOX (Apr. 2, 2017, 7:31 PM), https://www.vox.com/2017/4/2/15153844/amazon-quidsi-shutdown-explanation-profits [https://perma.cc/R2EN-E2RN]; *see also* COMM. ON THE JUDICIARY at 221; Khan, *supra* note 291, at 772–74.

388. Amazon has since attempted to extricate itself from consumer items on which it "Can't Realize Any Profit," which further cuts against the finding of malicious purpose as in *Tuttle*. COMM. ON THE JUDICIARY, *supra* note 14, at 252.

389. *Cf.* Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, 94 J. POL. ECON. 266 (1986) (arguing that American Tobacco used below-cost pricing to lower the acquisition costs of rivals from 1891 to 1906).

390. *See* 51 CONG. REC. 13116 (1914) (statement of Sen. Newlands); *cf.* Pierce, *supra* note 355, at 21 (suggesting that the FTC need not issue rules against predatory pricing by stepping up its merger enforcement role if the chief harm of predatory pricing is the ability to acquire rivals on the cheap); S. Rep. 63-597, *supra* note 194 at 7 (1914) (emphasizing that the FTC was not intended to stop the progress of big business but to "adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case").

CONCLUSION

Longstanding confusion about the meaning of unfair methods of competition in Section 5 of the FTC Act results from the failure to appreciate that this concept neither sprung fully formed from the minds of Attorney George Rublee, Senator Francis Newlands, and their fellow progressives nor belongs exclusively to the Commission to define. Faced with the emergence of Standard Oil and other companies that employed means of dubious morality and legality against their business rivals, American attitudes towards competition law diverged from those of the English to conclude that not all self-interested actions possessed a justification for the harms inflicted on others. A lack of justification in turn suggested that this conduct had the potential not just to harm a business rival but ultimately competition itself by substituting financial resources and power for efficiency. After decades of common-law development, this body of law became known first as unfair competition and then, thanks to the Supreme Court in 1911, unfair methods of competition.

Appreciation of this historical background does more than reveal the actual meaning of unfair methods of competition at the time of the FTC Act's passage. It also provides the context necessary for the agency to stay true to the principle with which Congress entrusted it. Building on state common and statutory unfair competition law, Congress created administrative procedures that would enable an expert agency to apply this existing body of law to new challenges. The public values that Congress intended the FTC to consider were not those of morality or ethics writ large but the familiar considerations that enabled courts to determine when private conduct is justified in imposing harms upon others: independently wrongful actions, including violations of the antitrust laws; or unjustified and malicious conduct, but only that which harms the public interest.

As a matter of administrative policy, this historic meaning of unfair methods of competition continues to provide a clear basis for the exercise of agency expertise. The rule of reason endorsed by the 2015 Policy Statement was a largely accurate and feasible interpretation of how Section 5 was intended to be enforced, just as the Third Restatement of Torts provides a familiar guidance for distinguishing wrongful and malicious interferences from good faith competition. Whether the FTC will stay true to these historical underpinnings in evaluating justifications under its current 2022 Policy Statement or depart from them in the name of consumer and labor harms remains to be seen. But when courts are next called upon to determine whether the FTC has stayed within the contours of its statutory authority, appreciation of these contemporary parallels to the historical meaning and use of unfair methods of competition can resolve a century's worth of controversy over the scope of Section 5, at long last.