

A Procedural Approach to “Unfair Methods of Competition”

Andy J. Miller*

ABSTRACT: Section 5 of the Federal Trade Commission Act authorizes the Federal Trade Commission (“FTC”) to condemn “unfair methods of competition.” A perennial question has been whether the FTC may use section 5 to condemn acts that do not violate the antitrust laws. In March 2006, the FTC did just that by condemning an invitation solely to collude as a section 5 violation. Then, in July 2006, Commissioner J. Thomas Rosch reiterated the Agency’s authority to condemn certain conduct as a pure section 5 violation. Finally, in August 2006, Commissioner Jon Leibowitz forcefully reasserted section 5 jurisdiction as a mechanism for reaching behavior unreachable by the antitrust laws. This Note suggests that, while the FTC is correct that under section 5 it may go after behavior that does not violate the antitrust laws, the Commission has yet to set out in sufficient detail the way in which it ought to approach section 5 determinations. This Note argues that section 5 analyses ought to be procedural and ought to be strongly tied to antitrust analyses. To this end, this Note suggests that whenever the FTC faces conduct that potentially constitutes “unfair methods of competition,” it should ask: (1) Does this behavior violate the antitrust laws? (2) If the answer to (1) is yes, then the FTC ought to condemn the conduct as an antitrust violation; if the answer to (1) is no, the Commission ought then ask: (3) If this conduct goes unchecked, will it result in an antitrust violation? (4) If the answer to (3) is no, then the FTC should not condemn the conduct; if the answer to (3) is yes, then the FTC should condemn the conduct as a section 5 violation.

I. INTRODUCTION.....	1487
II. BACKGROUND	1490
A. FROM THE SHERMAN ACT OF 1890 TO THE PRESIDENTIAL ELECTION OF 1912.....	1490
B. THE FEDERAL TRADE COMMISSION ACT OF 1914.....	1493

* J.D., The University of Iowa College of Law, 2008; A.M., Harvard University, 2004; M.A., Emory University, 2003; B.A., The University of Missouri at Kansas City, 1997.

1. Legislative History	1496
2. Case Law	1499
<i>a. Supreme Court Interpretations</i>	1499
<i>b. Appellate Court Cases</i>	1500
III. MODERN FTC INTERPRETATIONS	1503
A. <i>THE VALASSIS COMPLAINT</i>	1503
B. <i>COMMISSIONER ROSCH'S STATEMENT</i>	1505
C. <i>COMMISSIONER LEIBOWITZ'S CONCURRENCE</i>	1508
IV. THE PROCEDURAL APPROACH TO SECTION 5	1514
V. CONCLUSION	1516

I. INTRODUCTION

In September 2004, Richard Posner gave a speech at the Federal Trade Commission (“FTC” or “Commission”) on the occasion of its ninetieth anniversary in which he addressed, among other things, the scope of section 5 of the Federal Trade Commission Act (“FTC Act” or “Act”), a section that prohibits, in part, “unfair methods of competition.”¹ “It used to be thought,” Judge Posner opined, that this language “swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable.”² Fewer than two years later, the Commission and a couple of its members offered something of a riposte: in March 2006, the Commission condemned Valassis Communications, Inc.’s invitation to collude as a section 5 violation;³ in July 2006, Commissioner J. Thomas Rosch, while commenting on *Valassis*, reiterated the Agency’s authority to condemn certain conduct under section 5 alone;⁴ and in August 2006, Commissioner Jon Leibowitz penned a strongly worded concurrence in which he forcefully reasserted section 5 jurisdiction as a mechanism for reaching “conduct that violates not only the antitrust laws themselves, but also the policies that those laws were intended to promote.”⁵ Thus, the Commission seems to have taken it upon itself to decide whether a broad reading of section 5 is or is not tenable.

1. 15 U.S.C. § 45 (2000).

2. Richard Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005). Posner argues that even if it ever were the case that section 5 allowed the Commission to reach practices that fall outside the scope of the antitrust laws, such a broad mandate is no longer necessary:

The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill. There are business torts, such as disparagement and trademark infringement, that do not rise to the level of antitrust violations yet distort competition and are “unfair” (indeed trademark law is often referred to as “unfair competition” law), but I have not heard it suggested that the existing remedies for these practices are inadequate.

Id.

3. Complaint at ¶ 17, *In re Valassis Commc’ns, Inc.*, No. 051-0008, 2006 WL 752214 (F.T.C. Mar. 16, 2006).

4. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Perspectives on Three Recent Votes: The Closing of the Adelpia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhauser Amicus Brief, Address Before the National Economic Research Associates 2006 Antitrust and Trade Regulation Seminar 7 (July 6, 2006), <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>.

5. *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring).

At its core, the dispute illustrated here is about the relationship between the antitrust laws⁶—primarily the Sherman⁷ and Clayton⁸ Acts—and the FTC Act.⁹ The FTC Act, passed in 1914, created the FTC.¹⁰ Two texts endow that body with the authority to enforce the antitrust laws. The first is the Clayton Act itself (passed simultaneously with the FTC Act), which “commits its enforcement to the FTC as well as to the Justice Department and the courts.”¹¹ The second text is section 5 of the FTC Act. This section enables the Commission to condemn “unfair methods of competition,”¹² and through this provision, the FTC can condemn conduct that violates either the Sherman Act or the Clayton Act.¹³ Thus, the FTC has the authority to enforce the antitrust laws, but can it use its section 5 authority to do more than that? May it, for example, go after conduct that violates the “spirit” of the antitrust laws or that is simply “unfair” in some other way, but does not violate the “letter” of the antitrust laws?¹⁴ Simply put, can the FTC condemn as “unfair” conduct that the antitrust laws cannot reach?

There are at least three possible interpretations of section 5 (and the reader should keep these interpretations in mind, as they will continually reappear throughout this Note): (1) The FTC may use its section 5 authority to go after only that behavior that violates the antitrust laws; (2) The FTC may enjoin as “unfair methods of competition” conduct that the antitrust

6. This Note uses “antitrust laws” to refer to the Sherman and Clayton Acts. The FTC Act, though passed with the Clayton Act in 1914, is not an antitrust law. *Rambus*, 2006 WL 2330118, at n.1.

7. 15 U.S.C. §§ 1–2 (2000 & Supp. V 2005).

8. *Id.* § 12.

9. *Id.* § 41–51.

10. *Id.* § 41.

11. 2 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 302c (3d ed. 2006).

12. 15 U.S.C. § 45 (2000). In 1938, Congress amended this language, extending its applicability to “unfair or deceptive acts or practices.” Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871, 882 (2005) (“[P]roposals to extend FTC jurisdiction to unfair or deceptive acts or practices as well as unfair methods of competition . . . were granted in 1938.” (citation omitted)). However, this Note is concerned solely with “unfair methods of competition.”

13. See 2 AREEDA & HOVENKAMP, *supra* note 11, ¶ 302c (citing *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392 (1953); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *In re Borg-Warner Corp.*, 101 F.T.C. 863, 940, *modified*, 102 F.T.C. 1164 (1983), *rev'd on other grounds*, 746 F.2d 108 (2d Cir. 1984)).

14. Compare *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm'r Leibowitz, concurring) (“Section 5 was intended from its inception to reach conduct that violates not only the antitrust laws themselves, but also the policies that those laws were intended to promote.”), and 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, 251–52 (1980) (arguing that section 5 can reach beyond the letter of the antitrust laws), with AREEDA & HOVENKAMP, *supra* note 11, ¶ 302h (arguing that “the spirit and letter of the antitrust laws are identical”), and Posner, *supra* note 2, at 766 (“It used to be thought that ‘unfair methods of competition’ swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable.”).

laws cannot reach—i.e., conduct that does not violate the antitrust laws; or (3) The FTC not only may go after conduct that does not violate the antitrust laws, but also may choose to condemn conduct as a “pure Section 5 violation.”¹⁵

The flurry of activity in the spring and summer of 2006 indicates that the Commission, as currently configured, clearly believes that it has the authority to use section 5 as a stand-alone enforcement mechanism. In other words, the current Commission eschews the first possibility. It is not clear, however, which of the remaining two possibilities is currently operable. As this Note discusses,¹⁶ Commissioner Liebowitz, who proposes the broadest interpretation of section 5 and couples that interpretation with a quite detailed definition of a “pure Section 5 violation,”¹⁷ seems to endorse interpretation (3). Commissioner Rosch, on the other hand, though he seems willing to agree with Commissioner Liebowitz that, at the very least, there is such a thing as a “pure” section 5 violation, goes on to suggest that the Commission ought not condemn conduct that violates the antitrust laws as pure section 5 violations.¹⁸ Thus, he seems to be endorsing interpretation (2).

This Note argues that, as a threshold matter, Commissioner Rosch is correct—the FTC may enjoin as unfair methods of competition conduct that the antitrust laws cannot reach. Yet more needs to be done to clarify the relationship between section 5 and the antitrust laws. This Note argues that that relationship ought to be co-dependent. To that end, section 5 violations ought to be approached procedurally, and this is why Commissioner Liebowitz’s attempt to offer a wholly substantive account of section 5 violations fails. This Note shows that, as a practical matter, both Commissioner Rosch’s and Commissioner Liebowitz’s views impel the FTC to ask, in the first instance, whether the conduct before the Commission qualifies as conduct that violates the antitrust laws. One cannot, after all, assert that section 5 theoretically reaches conduct that lies *beyond* the antitrust laws unless one already knows that that conduct does or does not fall *within* the antitrust laws. The FTC, then, always faces this threshold question: Has there been an antitrust violation? Once one recognizes that this question always imbues the section 5 analysis, the Commission’s manner of approaching possible section 5 violations becomes much more procedural than substantive. As a procedural matter, the FTC should always begin its section 5 analysis by asking whether the conduct at issue violates

15. In other words, when the FTC confronts, for instance, a price fixing scheme that clearly violates the Sherman Act, it may condemn that behavior as an antitrust violation or may instead choose to treat the behavior as a pure section 5 violation.

16. See *infra* Part III.C (discussing Commissioner Liebowitz’s views).

17. *Rambus*, 2006 WL 2330118.

18. See *infra* Part III.B (discussing Commissioner Rosch’s statements about section 5’s reach).

the antitrust laws. The question will then become this: What role does section 5 play when the answer to that threshold question is “yes,” and what role does it play when the answer to that question is “no”?

This Note argues that if the answer to that threshold question is “yes,” then the FTC is dealing with an antitrust violation, and it ought to condemn that activity as a violation of the antitrust laws. As this Note discusses, Commissioner Rosch seems to agree; he specifically notes, with reference to the *Valassis* decision, that “the Commission’s action in *Valassis* should not be read to endorse the treatment of conduct as an unfair method of competition when the conduct is plainly governed by the Sherman Act.”¹⁹ (This also is precisely where Commissioner Rosch and this Note part company with Commissioner Leibowitz.²⁰) If, on the other hand, the FTC answers the threshold question “no,” then the FTC is not dealing with an antitrust violation. This Note argues that in this instance, the Commission should then ask whether the conduct in question, if it continued unabated, eventually would lead to an antitrust violation. Only if the Commission can confidently answer that question affirmatively should it enjoin the behavior under section 5. In other words, “pure” section 5 violations exist if and only if the conduct at issue will result in an antitrust violation if left unchecked. As we will see, the *Valassis* case serves as an excellent illustration of this point.

This Note begins, by way of orientation, with a brief sketch of the background of the FTC Act and a short discussion of the way in which both the FTC itself and section 5 interact with the antitrust laws. This history is meant to be cursory, but it will nonetheless show that the legislative history of the FTC Act, Supreme Court interpretations of that Act, and appellate-court decisions all tilt the balance in favor of interpretation (2) and against interpretations (1) and (3). Part III then delineates three recent FTC interpretations—the March 2006 *Valassis* case, the July 2006 comments by Commissioner Rosch, and the August 2006 concurrence by Commissioner Leibowitz. With these FTC interpretations of the scope of section 5 in hand, this Note finally develops the argument outlined briefly above.

II. BACKGROUND

A. FROM THE SHERMAN ACT OF 1890 TO THE PRESIDENTIAL ELECTION OF 1912

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade.”²¹ Section 2 renders it a felony for anyone to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

19. Rosch, *supra* note 4, at 11.

20. See *infra* notes 130–31 and accompanying text.

21. 15 U.S.C. § 1 (2000 & Supp. V 2005).

commerce among the several states.”²² Passed in 1890, the Sherman Act itself did not initially create an administrative agency to enforce its provisions, relying instead on the Department of Justice (“DOJ”) and the judiciary.²³ Perceived failures in the initial application of the law led early on to calls for reform.²⁴ Such calls were, in part, reactions to the size and power of trusts, such as Rockefeller’s Standard Oil, which continued to grow despite the existence of the Sherman Act. As one popular historian has put it, such companies had amassed so much power that legislating against them was often “like passing a law against the wind.”²⁵ Yet when the Court finally did get around to breaking up Standard Oil,²⁶ rather than mollifying antitrust law detractors, the Court enlivened those detractors by announcing the “Rule of Reason” analysis that was to guide much of antitrust jurisprudence.²⁷

22. *Id.* § 2.

23. 2 AREEDA & HOVENKAMP, *supra* note 11, ¶ 302a (internal citations omitted).

24. For example, in 1895, President Cleveland’s attorney general, Judson Harmon, bemoaned the Supreme Court’s decision in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), in which the Court decided not to dissolve the sugar-trust monopoly because the government failed to prove that the monopoly directly restrained trade; he noted that “[t]he restricted scope of the provisions of this law as they have been construed by the courts . . . makes amendment necessary if any effective action is expected from this department.” Gilbert Holland Montague, *The Defects of the Sherman Anti-Trust Law*, 19 YALE L.J. 88, 89 (1909) (quoting ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1896)).

25. DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 418 (1973).

26. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 77 (1911) (“The inference that no attempt to monopolize could have been intended . . . is unwarranted.”).

27. A detailed analysis of the rule of reason is not necessary for the purpose of this Note. However, the Court’s argument for applying a rule of reason analysis is as follows:

Undoubtedly, the words “to monopolize” and “monopolize” as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of

Following the *Standard Oil* decision, as Commissioner Leibowitz noted, “Many within and outside of Congress viewed the Supreme Court’s reasonableness test as judicial invention—what some more recently would term ‘legislat[ing] from the bench’—that threatened both to undermine Congress’s aim in passing the Sherman Act and to yield inconsistent applications from court to court.”²⁸ This issue, moreover, not only was a concern for capitalists and courtrooms, but spilled over into presidential politics as well.²⁹ Indeed, the 1912 presidential election saw three candidates—William Howard Taft,³⁰ Theodore Roosevelt,³¹ and Woodrow

the act and thus the public policy which its restrictions were obviously enacted to subserve.

Standard Oil Co., 221 U.S. at 61–62. In other words, bare restraints of trade, for example, do not necessarily violate the antitrust laws. Rather, only those restraints that are “unreasonable” are violative.

28. *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring) (quoting 140 CONG. REC. S10,109 (daily ed. July 29, 1994) (statement of Sen. Thurmond) (speaking during a Senate hearing on Justice Breyer’s nomination)); see also HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 105–06 (2005) (discussing the effects of *Standard Oil*); 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 436 (1950) (discussing the reaction to *Standard Oil*).

29. See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1 (2003) (discussing how the *Standard Oil* decision affected the presidencies of Wilson, Roosevelt, and Taft).

30. Taft, a friend of the judicially developed rule of reason, argued that the Court was right not to construe the Sherman Act “to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profits thereby and took no advantage of its size by methods akin to duress to stifle competition with it.” WILLIAM HOWARD TAFT, *THE ANTITRUST ACT AND THE SUPREME COURT* 127 (1914); see also Winerman, *supra* note 29, at 3 (“Though he was Roosevelt’s hand-picked successor, William Howard Taft had a fundamental commitment to a judicially applied rule of reason, and he promised dramatic deconcentration under that rule.”). It is interesting to note that Taft did not think that Justice White had broken new ground in *Standard Oil*, for he argued that Justice Peckham had already applied the so-called “rule of reason” in *United States v. Joint-Traffic Ass’n*, 171 U.S. 505 (1898): “[T]he much-criticized ‘rule of reason’ of the Chief-Justice was only a change of phrase from the expression which Mr. Justice Peckham had himself used as the guide to a proper construction of the statute.” TAFT, *supra*, at 90. Taft then quoted Peckham’s language: “[T]he act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and, possibly to restrain it.” *Id.* at 91 (quoting *Joint-Traffic Ass’n*, 171 U.S. at 568). Moreover, it was Taft himself who wrote the opinion in *United States v. Addyston Pipe & Steel*, 85 F. 271 (6th Cir. 1898), recognizing the rule of reason with respect to ancillary restraints. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 25 (5th ed. 2004).

31. Roosevelt was not averse to reform. As Marc Winerman has pointed out, when Roosevelt assumed the presidency in 1901, it was not yet clear that the Sherman Act applied to mergers. Winerman, *supra* note 29, at 2. Thus, as Winerman states:

Roosevelt began a second phase of the formative period. He proceeded, in part, by litigation. *Northern Securities Co. v. United States*, which dissolved a J.P. Morgan holding company, held that the Sherman Act did reach mergers. With Roosevelt’s prompting, 1903 became the year when antitrust was institutionalized. On

Wilson³²—each of whom had a peculiar vision of competition policy and law. So it was that antitrust legislation played no small role in that election.³³ Woodrow Wilson, the victor in that race, promptly sent two bills to Congress. In due course, those bills would become the FTC Act and the Clayton Act.³⁴

B. THE FEDERAL TRADE COMMISSION ACT OF 1914

The FTC Act of 1914 created the Federal Trade Commission.³⁵ Section 5 of that Act declared “unfair methods of competition” unlawful and specifically empowered the FTC to prevent the use of unfair methods of competition.³⁶ Through this provision, the Commission has the authority to enforce the Sherman Act.³⁷ In addition, Congress entrusted the enforcement of the Clayton Act,³⁸ an antitrust law passed that same year,

February 14, Roosevelt secured a Bureau of Corporations, the precursor to the Federal Trade Commission. The day the Bureau opened its doors, February 25, he secured the first antitrust appropriation and, with it, the seeds of the Antitrust Division.

Id. Roosevelt wanted to expand the Bureau of Corporations because he thought he could use such an agency to “rationalize the economy, tame rather than dissolve the trusts, and accommodate rather than challenge both concentration and interfirm cooperation.” *Id.* at 3. For Roosevelt, then, “bigness” may have needed some taming, but it was not necessarily the enemy as it was for Wilson. *See infra* note 32.

32. Both Wilson and his advisor, Louis Brandeis, were concerned “that the Supreme Court would use the Rule of Reason in such a way that the Sherman Act would become a dead letter.” NORMAN I. SILBER, *WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN* 287 (2004). At this time, “bigness” was something of a *bête noire* to both men. Hence, “Brandeis became the eloquent voice of a crusade against the ‘the Curse of Bigness.’” BOORSTIN, *supra* note 25, at 419. For his part, Wilson offered up a campaign platform, “New Freedom,” that was informed by Brandeis and, thus, had to do, in part, with “a freedom from bigness.” *Id.*; *see also* 2 MORISON & COMMAGER, *supra* note 28, at 435 (“Wilson had stressed the trust problem as the paramount issue, and the heart of the ‘New Freedom,’ as he had elaborated it in his speeches, was the freedom of the consumer from monopolies.”).

33. *See Rambus*, 2006 WL 2330118 (“Debates regarding the need for, and nature of, a ‘federal trade commission’ . . . involved four of the most brilliant minds of the time—Roosevelt, Taft, Wilson, and Brandeis—and coalesced into a significant issue in the election of 1912.”); ROBERT V. LABAREE, *THE FEDERAL TRADE COMMISSION: A GUIDE TO SOURCES* 378 (2000) (“During the 1912 presidential election, all three major political parties—Progressive, Republican, and Democratic—added planks to their campaign platforms stating an intention to reformulate antitrust regulation in light of recent court decisions.”); 2 MORISON & COMMAGER, *supra* note 28, at 435–38 (discussing debates about “regulation of business” leading up to the 1912 election); Winerman, *supra* note 29, at 3 (noting the central role antitrust legislation played in the 1912 presidential election).

34. *See* Winerman, *supra* note 29, at 90–92 (discussing the passage of the FTC Act and the Clayton Act).

35. 15 U.S.C. § 41 (2000).

36. *Id.* § 45.

37. *See supra* note 13 (citing authority for the proposition that the FTC can use section 5 to enforce the Sherman Act).

38. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C. & 29 U.S.C.).

specifically to the FTC.³⁹ Thus, the FTC has the authority to enforce the antitrust laws. Typically, it does this through consent decrees, cease-and-desist orders, or formal proceedings that the Commission initiates by issuing complaints.⁴⁰ These actions are reviewed on appeal by the appellate courts.⁴¹ Contrast this with the stiff penalties that flow from an antitrust violation—treble damages plus attorney’s fees, as well as possible criminal liability⁴²—

39. See *supra* notes 11, 13 (citing authority for the proposition that the FTC can use section 5 to enforce the Clayton Act).

40. Areeda and Hovenkamp summarize the FTC procedures:

The FTC Commissioners supervise a large staff of economists, lawyers, and other professionals. They make general economic studies, respond to requests from business for advice, and investigate and “prosecute” offenses within the Commission’s jurisdiction, both on their own motion and in response to complaints. The Commission may also issue subpoenas (or Civil Investigation Demands (CIDs)). Most FTC proceedings are disposed of before reaching formal adjudication. Once an investigation has been completed, the FTC will generally afford a party the opportunity to settle under a consent order procedure roughly similar to that used by the Justice Department. The Commission notifies the party of the terms of a proposed complaint and submits a proposed cease and desist order. Without admitting any violation of law, the party may then agree to negotiate the terms of a cease and desist order which, when entered, has the same force and effect as a regular FTC final order. Where the consent order procedure is not made available by the FTC or where negotiations fail, formal adjudicatory proceedings are initiated by complaint whenever, according to §5(b), “the Commission shall have reason to believe . . . that a proceeding[] . . . would be in the interest of the public.” The Commission’s discretion to issue, or not to issue, a complaint is not reviewable. And ordinarily there will be no judicial review of Commission proceedings until after the Commission has issued a final order. Complaints are tried at a hearing by an administrative law judge. The ALJ’s findings and orders are subject to review by the Commission sitting as a body. Final Commission orders are reviewable by the federal courts of appeals. Federal Trade Commission Act §5(b) also provides that the Commission may, “after notice and opportunity for hearing,” modify or vacate its orders “whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require.” The Commission is obliged to reopen and modify or rescind an order upon the respondent’s showing that changes in fact or law require such action. The Commission’s failure to do so may be upset if it is found to be arbitrary or capricious.

2 AREEDA & HOVENKAMP, *supra* note 11, ¶ 302d (internal citations omitted).

41. The FTC Act states:

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.

15 U.S.C. § 45(c).

42. The Clayton Act provides for private enforcement of the antitrust laws and for treble damages plus attorney’s fees if a violation is found:

and it becomes plain that one of the advantages of FTC enforcement is that it will not necessarily break the bank.

FTC actions are also advantageous in the sense that they do not provide for a private right of action.⁴³ Thus, if the FTC secures a judgment against a defendant, that judgment cannot be used by private plaintiffs in subsequent antitrust actions; i.e., FTC actions do not implicate non-mutual offensive collateral estoppel.⁴⁴ As Commissioner Rosch rightly points out:

A Commission decision finding conduct to be an unfair method of competition under Section 5 is not given collateral estoppel or prima facie evidentiary effect in a subsequent antitrust treble-damages action against the respondent, based on the same conduct. Nor is such a finding a basis, even theoretically, for follow-on federal or state criminal actions based on the Sherman Act or its state law equivalents.⁴⁵

By contrast, if the DOJ or the judiciary in a private action finds that a respondent has violated the Sherman Act, future plaintiffs may bring follow-on actions and, when the respondent tries to defend, cry “collateral estoppel.” As this Note later discusses, these “limiting attributes” of section 5 play an important role in its proper interpretation.

Because the FTC was now in the game of enforcing the Sherman Act, which the DOJ already enforced and the Supreme Court had already interpreted (at least in part), there was some tension.⁴⁶ Under section 5 of

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. § 15(a).

43. See 2 AREEDA & HOVENKAMP, *supra* note 11, ¶ 302e & n.28 (citing *Jeter v. Credit Bureau, Inc.*, 754 F.2d 907, 912 n.5 (11th Cir. 1985), *reh'g granted*, 760 F.2d 1168, 1174 n.5 (11th Cir. 1985); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973)).

44. See 15 U.S.C. § 16(a) (“[I]n any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under [section 5] . . .”). The classic statement of the doctrine of offensive collateral estoppel is *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979), which held that offensive collateral estoppel is permissible if a plaintiff could not easily have joined in the earlier action or if the use of estoppel would not be unfair to the defendant.

45. Rosch, *supra* note 4, at 7.

46. Areeda and Hovenkamp summarize the relationship between the DOJ and the FTC:

Because the Department of Justice's power to initiate judicial proceedings is . . . concurrent with the FTC's power to open its own proceedings, there is always the risk of duplicated efforts wasting their limited resources and unfairly burdening the private firms concerned. . . . Coordination is, therefore, a matter of comity between the Commission and the Justice Department's Antitrust Division. Each informs the other of proposed investigations before actually proceeding and can

the newly minted FTC Act, the equally new FTC could condemn “unfair methods of competition,” but it was not quite clear what that meant. Could the FTC use its section 5 authority to enjoin behavior that violates the spirit of the antitrust laws or may simply be “unfair” in some other way, but does not violate the letter of those laws?⁴⁷ In other words, could the FTC go after conduct that the DOJ could not? The legislative history of the FTC Act—and, in particular, the Supreme Court’s interpretation of that history—suggests that the answer to that question is an unequivocal “yes.”

1. Legislative History

The legislative history of the FTC Act, because vast, is a bit slippery. Nevertheless, it does provide ample evidence that the purpose of the Act “was to create an administrative agency with antitrust expertise, an enforcement mandate more expansive than that of the antitrust laws, and the structure and flexibility to identify, analyze, and challenge new forms of ‘unfair methods of competition’ as they developed.”⁴⁸ Applying this purposive language to section 5 implies that its scope would be broad enough to allow the FTC to condemn what it believed to be anticompetitive behavior even if that behavior did not technically violate the Sherman Act.

Numerous comments justify such a broad reach: Senator Robinson declared that “unfair methods of competition” referred to methods that were “unjust, inequitable, or dishonest”;⁴⁹ Senators Pomerene and Thomas asserted “that the proposed Act would authorize the Commission to determine whether certain forms of business conduct constituted unfair methods of competition, regardless of whether that conduct involved a restraint of trade”;⁵⁰ Senator Cummins suggested that “unfair [methods of] competition” reaches beyond the “restraint of trade” language of the Sherman Act and makes “some things offenses that are not now condemned by the antitrust law.”⁵¹

thus adjust its planned activities if necessary. The agencies have developed clearance procedures designed to minimize conflict. Such coordination is said to work fairly well, and few serious differences have come to public view. At present a more or less formal written agreement is in place.

2 AREEDA & HOVENKAMP, *supra* note 11, ¶ 302c (citations omitted).

47. *See supra* note 14 and accompanying text.

48. *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring).

49. *Id.* (quoting Senator Robinson’s statement in the Congressional Record).

50. *Id.* (citing Senator Pomerene’s and Senator Thomas’s statements in the Congressional Record).

51. *Id.* (quoting Senator Cummins’s statement in the Congressional Record). Commissioner Leibowitz noted that Cummins was an “insurgent Republican” who “was a member of both the Commerce Committee, which prepared the Commission bill, and the Judiciary Committee, which prepared the bill that became the Clayton Act. He authored the ‘Cummins Report,’ which provided critical support for the Commission bill and helped

Such an expansive reading of section 5 makes sense. As Senator Cummins suggested, there would be no reason for section 5 unless it was “to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.”⁵² Moreover, as Commissioner Leibowitz has pointed out, the language of section 5 is itself quite sweeping,⁵³ and “[i]f Congress had wanted Section 5’s reach to be merely coterminous with that of the Sherman Act, it easily could have written the statute accordingly.”⁵⁴ Congress’s failure to limit the language of the Act, coupled with the aforementioned senatorial pronouncements, compels one to agree with Commissioner Leibowitz that there was clear congressional intent that section 5 “was not confined to the collection of violations then-recognized in antitrust or common law, but rather conferred a broader and more adaptable authority on the Commission.”⁵⁵

It is worth pausing here for just a moment, however, to note that what Commissioner Leibowitz argues is that the FTC not only may go after conduct that does not violate the antitrust laws, but also may choose to condemn conduct as a “pure Section 5 violation” even though that same conduct may in fact violate the antitrust laws—i.e., interpretation (3) noted above.⁵⁶ Does the legislative history support *this* interpretation? This is where the slipperiness of the history becomes a problem. For while Commissioner Leibowitz is surely correct to read the legislative history of section 5 as imbuing the FTC with the authority to reach conduct that falls *outside* of the antitrust laws, there is little in the legislative record to suggest that the Commission may use section 5 as an *alternative* enforcement mechanism for conduct that violates the antitrust laws. The record is ambiguous, as even the quotes provided by Commissioner Leibowitz show. For instance, Senator Cummins was quite clear that the sole purpose of section 5 was to go after practices that are *unreachable* under the antitrust laws, or, in other words, those practices that were not antitrust violations.⁵⁷ On the other hand, Senators Pomerene and Thomas, by saying that the Commission could *disregard* “restraints of trade,” seemed to suggest that perhaps the

influence its ultimate content.” *Id.*; see also Winerman, *supra* note 29, at 81–88 (describing Senator Cummins’s views with respect to the FTC Act and, in particular, with respect to section 5 of the Act).

52. *Rambus*, 2006 WL 2330118 (quoting Senator Cummins’s statement in the Congressional Record).

53. *Id.*

54. *Id.*

55. *Id.*

56. See *supra* text accompanying note 15.

57. This is clear from the Senator’s statement that section 5 is meant to encompass “offenses that are not now condemned by the antitrust law.” See *supra* notes 51–52 and accompanying text (quoting Senator Cummins).

Commission could condemn, as pure section 5 violations, conduct that courts could also condemn under the Sherman Act.⁵⁸

In addition, the arguments that Commissioner Leibowitz has offered to support, in essence, interpretation (2), may also be used to reject interpretation (3). For instance, Senator Cummins is surely correct to say that there would be no reason for section 5 unless it rendered punishable conduct that the antitrust laws could not reach at that time. However, one might respond by saying that there would be no reason for the antitrust laws unless they rendered punishable conduct that section 5 could not reach. Put otherwise, if the FTC could use section 5 to condemn conduct that already violated the antitrust laws, then the antitrust laws would seem to be superfluous. Suffice it to say that the legislative history is rather equivocal on this point,⁵⁹ and it is thus helpful to turn to the case law.

58. See *supra* note 50 and accompanying text (quoting Senators Pomerene and Thomas). In other words, one may read the Senators' language that conduct may be condemned under section 5 regardless of whether it is a restraint of trade (i.e., a Sherman Act violation) to mean that the conduct may violate the Sherman Act or it may not, but either way, the FTC may condemn it solely under section 5.

59. For a flavor of the variety of meanings that the senators imposed in 1914 on "unfair methods of competition," see generally Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915). The biggest problem one confronts with respect to the legislative history of this particular phrase is that no Senator seems to have agreed with any other as to its meaning. To be sure, Montague, having surveyed the record, determined that on the basis of the bill's *sponsors* alone, "unfair competition" includes:

- (a) Every act of passing off one's business or goods for another's.
- (b) All methods of competition tending to restraint of trade or monopoly which have been forbidden by the Sherman Law.
- (c) Substantially all violations of the antitrust laws, including even wrongs arising from interlocking directorates and allied incorporate directorships.
- (d) All unfair methods of stifling competition.
- (e) All other acts which the "commission . . . decides . . . may lead to monopoly or restraint of trade" though not now forbidden by the Sherman Act.
- (f) All other acts affecting a competitor for which "a remedy lies either at law or in equity."
- (g) All other acts which either affect a competitor and are "against public morals," or in any way interfere with economic "efficiency," though heretofore quite lawful and not forbidden by the Sherman law or by any other law.
- (h) All other acts comprehended within the meaning which "unfair competition" has to-day in common parlance and in literature.

Montague, *supra*, at 29–30 (alteration in original). Of course, one does not want to rely on the legislative history too much. As Commissioner Leibowitz has noted, the drafters of the FTC Act drafted it, in part, because they were upset by the Supreme Court's adoption of the rule of reason in *Standard Oil*. So perhaps the Commissioner should not have relied too heavily on the legislative history of the FTC Act as validation for his theory, lest he be taken to believe that the Supreme Court should not have adopted the rule of reason. Surely, Commissioner Leibowitz would not want to use section 5 to condemn *any* restraint of trade he deemed unfair whether it be reasonable or not. See Joe Sims, *Section 5 of the FTC Act: Déjà Vu All Over Again?*, JONES DAY COMMENT. (Jones Day, Wash., D.C.), Aug. 2006, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3625 ("Does anyone really want to argue that the creation of the Rule of Reason in *Standard Oil* was a bad decision? It may well have been judicial legislation, but if it was, it

2. Case Law

a. Supreme Court Interpretations

In *FTC v. Brown Shoe Co.*, the Supreme Court gave its imprimatur to a broad reading of section 5 by noting that the authority of the Agency under that section “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.”⁶⁰ Can this be dismissed as dicta? Perhaps, but a few years later, the Court considerably upped the ante in *FTC v. Sperry & Hutchinson* by explicitly holding that section 5 authorizes the FTC

to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws . . . [and] . . . to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition.⁶¹

Appellate courts then tried, in essence, to limit these holdings, but the Court returned to the topic in 1986 in *FTC v. Indiana Federation of Dentists* (“*IFD*”) and, yet again, held that section 5’s “unfairness” “encompass[es] not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.”⁶² As Commissioner Leibowitz has put it, “[f]or more than 70 years, an unbroken line of Supreme Court opinions has interpreted Section 5 as encompassing a broader array of behavior than the antitrust laws.”⁶³

Yet, while there can be little doubt that the Court is offering something akin to interpretation (2), the Court has never gone so far as to explicitly endorse interpretation (3). The Court did say in *IFD* that section 5 reaches “not only” antitrust violations,⁶⁴ and one certainly could interpret this language to mean that section 5 can be used *by itself* to enforce such violations. Yet it seems more likely that, when one considers the Court’s language here alongside its other interpretations of section 5, what the Court is really saying is that the FTC may “not only” use section 5 to *enforce the Sherman Act*, but that it may also use section 5 to prohibit conduct that the Sherman Act cannot reach—an unambiguous endorsement of interpretation (2). Recall, after all, that it is only through section 5 that the

transformed impossibly broad legislative language into something that could be practically applied.”).

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

61. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

62. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (citations omitted).

63. *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring).

64. *Ind. Fed’n of Dentists*, 476 U.S. at 454.

Commission can condemn Sherman Act violations.⁶⁵ Moreover, while Commissioner Leibowitz has been quick to dismiss the appellate cases that intervened between *Sperry & Hutchinson* and *IFD*,⁶⁶ those cases tell us something important about section 5 insofar as they, too, seem to embrace interpretation (2) while eschewing interpretation (3).

b. Appellate Court Cases

There were three appellate cases—one Ninth Circuit case and two Second Circuit cases—in the 1980s that sought to limit the scope of section 5, though all were pre-1986 and, hence, pre-*IFD*.⁶⁷ Nevertheless, these cases are important both for what they say about section 5 and for the way in which Commissioners Rosch and Leibowitz interpret what they say about section 5.

The first of these cases was the Ninth Circuit's decision in *Boise Cascade v. FTC*, in which the Ninth Circuit refused to enforce an FTC finding of a section 5 violation.⁶⁸ Commissioner Leibowitz neatly summed up the issues at stake: "*Boise Cascade* involved the use of an industry-wide delivered pricing system. Industry members effected this system by including an artificial freight factor in the price charged to customers. The Commission contended that this practice tended to stabilize prices and therefore violated the Sherman and FTC Acts."⁶⁹ The court concluded that the Commission failed to prove that there was collusion and, "absent proof of overt collusion (which would have made the practice a *per se* violation of section 1 of the Sherman Act), the Commission could not use section 5 to get around the lack of evidence of actual anticompetitive effect."⁷⁰ Moreover, as Commissioner Rosch pointed out, "[t]he court rejected a *standalone* unfair methods of competition claim when there was 'well forged' Sherman Act case law governing the conduct, lest it 'blur the distinction between guilty and innocent commercial behavior.'"⁷¹ In other words, the Ninth Circuit explicitly rejected interpretation (3).

The Second Circuit provided the remaining two cases: *Official Airline Guides v. FTC*⁷² and *E.I. Du Pont de Nemours & Co. v. FTC*⁷³ (or "*Ethyl*," as it is

65. See *supra* note 13 and accompanying text.

66. See *Rambus*, 2006 WL 2330118 ("Each of these [appellate-court] cases was decided before *IFD*, with its reliance on *Sperry & Hutchinson's* reiteration of Section 5's breadth.").

67. See *id.* (running through the holdings and importance of these three appellate-court cases); Rosch, *supra* note 4, at 8–10 (same).

68. See generally *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980).

69. *Rambus*, 2006 WL 2330118.

70. Rosch, *supra* note 4, at 8 (citing *Boise Cascade*, 637 F.2d at 579).

71. *Id.* (quoting *Boise Cascade*, 637 F.2d at 580–81).

72. *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980).

73. *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

often called⁷⁴). Official Airline held a monopoly in the publication of flight schedules and “refuse[d] to publish listings of connecting flights of commuter airlines.”⁷⁵ This was clearly a refusal to deal, but section 2 of the Sherman Act did not apply since Official Airline “was not a participant in the airline market in which competition was allegedly affected.”⁷⁶ Hence, “the court held that treating the practice as an ‘unfair method of competition,’ notwithstanding its legality under the Sherman Act, ‘would give the Commission [sic] too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry.’”⁷⁷ It seems, then, that the Second Circuit, in this instance, rejected interpretation (2) (which, of course, entails a rejection of interpretation (3) as well).

In *Ethyl*, however, the FTC determined that “various parallel ‘price-signaling’ and other unilateral practices by oligopolists” constituted a section 5 violation even though there was no explicit agreement.⁷⁸ The Second Circuit overturned the Commission’s ruling, but in the course of its opinion, the Second Circuit offered its own definition of a section 5 violation, noting that “at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.”⁷⁹ Perhaps more important, the court noted that

[a]lthough the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts . . . it is not confined to their letter. It may bar incipient violations of those statutes . . . and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit In prosecuting violations of the spirit of the antitrust laws, the Commission has, with one or two exceptions, confined itself to attacking collusive, predatory, restrictive or deceitful conduct that substantially lessens competition.⁸⁰

In other words, not only did the Second Circuit accept interpretation (2), but it offered at least a partial description of what a stand-alone section 5 violation might look like. As this Note later discusses, Commissioner Leibowitz leans heavily on this definition in his analysis of pure section 5 violations.⁸¹ As Commissioner Rosch says (and as Commissioner Leibowitz

74. See *Rambus*, 2006 WL 2330118, at n.30; Rosch, *supra* note 4, at 9.

75. Rosch, *supra* note 4, at 8–9.

76. *Id.* at 9.

77. *Id.* (quoting *Official Airline Guides*, 630 F.2d at 927).

78. *Id.*

79. *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984).

80. *Id.* at 136–37.

81. See *infra* note 137 and accompanying text.

would agree), “[n]one of these decisions directly challenges the holding in *S[perry] & H[utchinson]* that conduct *not governed* by the Sherman Act may be treated as an unfair method of competition.”⁸² Yet neither Commissioner Rosch nor Commissioner Leibowitz gives sufficient attention to the important lesson embedded in these decisions—namely, that appellate courts review section 5 cases. An obvious point, to be sure, but of the utmost importance for a section 5 interpretation. The reason is clear: The courts have a well-recognized and well-developed antitrust jurisprudence. They employ a specialized language with a long history when pondering potential antitrust transgressions. Confronted with a monopolization violation under section 2 of the Sherman Act, for instance, courts will seek a showing of market power, which requires one to define the relevant product market and the relevant geographic market;⁸³ the former, in turn, requires considerations of substitutability, cross-elasticity, etc.⁸⁴ As a practical matter, this means that it is highly unlikely that a court accustomed to this particular jurisprudential vernacular will not apply it to a potential section 5 violation, even though the FTC may try to argue that it is bringing its case under section 5 alone—not under the Sherman Act. Thus, when the Commission tried to argue that Official Airlines engaged in “unfair methods of competition” and when the complained-of conduct looked almost identical to “monopolization” or a “refusal to deal”—i.e., when the description of the conduct itself employs the language of antitrust—the court will naturally fall comfortably into its antitrust analysis, keying into its concepts and employing its traditional language. The practical result, then, is that, in reality, there is no distinction between “unfair methods of competition” and an antitrust violation when the conduct at issue likely violates the antitrust laws. Put otherwise, of the possible interpretations of section 5, interpretation (3)

82. Rosch, *supra* note 4, at 9 (emphasis added); see also *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring) (“Each of these [appellate court] cases was decided before *IFD*, with its reliance on *Sperry & Hutchinson’s* reiteration of Section 5’s breadth.”).

83. See, e.g., *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002) (“The first step in any action brought under § 2 of the Sherman Act is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer”); *Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995) (“The definition of the relevant market has two components—a product market and a geographic market.”); *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991) (stating that plaintiffs in a Sherman Act § 1 action must prove, *inter alia*, that the defendant conspired to produce anticompetitive effects “within relevant product and geographic markets”) (internal quotations omitted); *E&L Consulting, Ltd. v. Doman Indus., Ltd.*, 360 F. Supp. 2d 465, 471 (E.D.N.Y. 2005) (“A relevant market is comprised of a geographic market and a relevant product market.”); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 331 (D.N.J. 1999) (“A relevant market is comprised of a relevant product market and a relevant geographic market”).

84. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”).

seems to be ruled out by the fact that, as a practical matter, the appellate courts will treat any violation of the antitrust laws as such.

It may be helpful to pause here in order to sum up the ground traversed thus far. As shown, the legislative history of the FTC Act and the Supreme Court's interpretation of that history suggest that the Commission has the authority under section 5 to reach conduct that lies beyond the purview of the antitrust laws. The appellate courts seem to agree. Thus, the legislature and the judiciary support interpretation (2) of section 5. In addition, as explained above, this same evidence suggests that interpretation (3) is not an option. Yet, it does little good to say merely that the FTC can use section 5 to reach conduct beyond the antitrust laws. There is, after all, an abundance of conduct that would meet that requirement. But what exactly does this mean? Can the FTC simply go about condemning as unfair whatever it determines is unfair?

To help answer these questions, it is helpful to turn to the statements of Commissioners Rosch and Leibowitz and to the consent decree issued by the FTC in the *Valassis* case. Commissioner Rosch rightly follows interpretation (2), though he fails to develop an adequate account of the way in which the Commission ought to approach section 5 violations. Commissioner Leibowitz, on the other hand, offers a detailed definition of a pure section 5 violation, but his definition is, in the end, much too substantive in the sense that it is not quite clear where his section 5 ends and the antitrust laws begin. This is likely a result of the fact that Commissioner Leibowitz seems to be operating under interpretation (3). The next Part begins with the *Valassis* complaint, since it is chronologically the first of this trilogy and since it serves as a springboard for Commissioner Rosch's comments.

III. MODERN FTC INTERPRETATIONS

A. THE VALASSIS COMPLAINT

Valassis Communications, Inc. and News America Marketing both produced free-standing inserts ("FSI"s)—the small, loose-leaf coupon books that one often finds inserted into (and falling out of) Sunday papers.⁸⁵ Finding their way into more than fifty million homes each week, FSIs provide "a uniquely efficient means of distributing coupons on a mass scale."⁸⁶ Valassis and News America have been the sole producers of FSIs for more than a decade.⁸⁷ This was a duopoly.

85. *In re Valassis Commc'ns, Inc.*, No. 051-0008, 2006 WL 752214 (F.T.C. Mar. 16, 2006).

86. *Id.*

87. *Id.*

Market share for each firm initially hovered around fifty percent.⁸⁸ In 2001, however, Valassis initiated a price war.

In June 2001, Valassis notified its clients of a five percent increase, bringing Valassis'[s] floor price from \$6.00 for a full page per thousand inserts to \$6.30. News America did not follow the Valassis price move. As a result, News America captured additional customers and built a substantial market share lead. In February 2002, Valassis abandoned its efforts to increase prices and sought to regain a 50 percent share of FSI pages, leading to FSI prices falling below \$5.00 per page by 2004.⁸⁹

The battle for market share obviously was doing more harm than good to Valassis. Thus, the company's executives devised a new scheme in an effort to restore the market's prior equilibrium. They offered News America a quid pro quo: Valassis would stop trying to take customers from News America if News America stopped trying to take customers from Valassis.⁹⁰ In other words, Valassis wanted to segregate the market. A segregated market meant no more competition, and no more competition meant that each firm would be in a position "to raise FSI prices within its uncontested domain."⁹¹ A win-win for the two companies.

Valassis announced this scheme in July 2004 during its annual-earnings conference call. "[A]ware that News America representatives would be monitoring the call,"⁹² Valassis made the sweeping announcement that it was prepared (1) to abandon its goal of attaining a fifty percent share of the market;⁹³ (2) to defend "its existing customers and its existing market share";⁹⁴ (3) to set a minimum bid price of \$6.00 per page for those customers of News America whose contracts were expiring;⁹⁵ (4) to offer customers who split their business between Valassis and News America whatever price was necessary "to retain its historical share of that customer's business";⁹⁶ and (5) to honor its four outstanding bids for a specified period of time after which it would charge those customers, too, the higher per-

88. FED. TRADE COMM'N, ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT, *IN THE MATTER OF VALASSIS COMM'NS, INC.* 1 (2006) [hereinafter *VALASSIS AID TO PUBLIC COMMENT*], available at <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>.

89. *Id.*

90. *Valassis*, 2006 WL 752214.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Valassis*, 2006 WL 752214. "This meant that for News America's historical customers, Valassis would submit bids at a level substantially above prevailing market prices." *Id.*

96. *Id.* If those customers then wished to purchase more than its historical share, Valassis would charge them its new, higher per-page price. *Id.*

page price.⁹⁷ Valassis made it known that it would “monitor News America’s response to this invitation, looking for ‘concrete evidence’ of reciprocity ‘in short order.’”⁹⁸ Should News America continue to seek increased market share, Valassis threatened it would renew the price war.⁹⁹

Hence, with a pronounced lack of subtlety, Valassis made it clear to its rival that it would be in both their interests to maintain a segregated market and that Valassis was, to that end, willing to raise prices in order to limit its own customer base, thereby presumably expanding the customer base of its competitor.

The Commission rightly argued on the basis of this proposed scheme that “Valassis acted with the intent to facilitate collusion and without a legitimate business purpose”¹⁰⁰ and that had News America accepted Valassis’s invitation, the likely result would have been higher prices and reduced output.¹⁰¹ With these findings in hand, the Commission concluded that Valassis had engaged in “unfair methods of competition”—that is, that it had violated section 5.¹⁰²

Before saying too much about this ruling, it will be useful to outline Commissioner Rosch’s comments, since he uses *Valassis* as a springboard for his discussion of section 5.

B. COMMISSIONER ROSCH’S STATEMENT

Lest it pass by unnoticed, soon after the Commission upbraided Valassis, Commissioner Rosch keenly reiterated the manner in which that reprimand occurred. At a speech before the National Economic Research Associates on July 6, 2006, Commissioner Rosch noted that “[b]ecause there was a consent decree and the Aid To Public Comment focused primarily on the context in which the invitation to collude occurred—namely in an analyst conference call—the significance of the *way* the conduct was challenged went largely unnoticed.”¹⁰³ “[U]ntil *Valassis*,” he continued,

the Commission had not challenged conduct as an unfair method of competition for many years—and the challenges based on the bedrock antitrust statutes were tried essentially as Sherman or Clayton Act cases. This led many commentators to suggest that the unfair methods of competition prohibition was a dead letter and

97. *Id.*

98. *Id.*

99. *Id.*

100. *Valassis*, 2006 WL 752214.

101. *Id.*

102. *Id.*

103. Rosch, *supra* note 4, at 6.

that the Commission would not challenge conduct on that basis alone.¹⁰⁴

Commissioner Rosch did not, of course, share the belief that section 5 prohibitions were “a dead letter.” Yet, as to whether *Valassis* represented “a harbinger of things to come,” Commissioner Rosch said, simply, that he did not know.¹⁰⁵ Nevertheless, *Valassis* afforded him the opportunity to delineate what he pointedly referred to as his “very tentative” conclusions regarding “when a stand-alone unfair methods of competition claim might be brought.”¹⁰⁶

Commissioner Rosch began his analysis in familiar terrain by noting the “expansive reading of Section 5” offered by the Supreme Court in *Sperry & Hutchinson*.¹⁰⁷ What Commissioner Rosch added, however, is an incisive and quite forceful argument that there are legitimate policy reasons for supporting such an expansive reading. Specifically, Commissioner Rosch noted that the “collateral damage” reaped by a section 5 finding is minimal:

A Commission decision finding conduct to be an unfair method of competition under Section 5 is not given collateral estoppel or prima facie evidentiary effect in a subsequent antitrust treble-damages action against the respondent, based on the same conduct. Nor is such a finding a basis, even theoretically, for follow-on federal or state criminal actions based on the Sherman Act or its state law equivalents.¹⁰⁸

Commissioner Rosch then briefly touched upon *Boise Cascade*, *Official Airline Guides*, and *Ethyl*.¹⁰⁹ He argued that the Second Circuit’s “decisions articulate important *limiting principles* for unfair methods of competition analysis.”¹¹⁰ Both cases, he said, “appear to require proof of anticompetitive *purpose* (and the lack of legitimate business justification).”¹¹¹ As for the Ninth Circuit, Commissioner Rosch suggests that the lesson there is that “in the absence of *per se* illegal conduct, proof of actual or incipient anticompetitive

104. *Id.* at 6–7.

105. *Id.* at 6.

106. *Id.*

107. *Id.* at 7; *see also supra* note 61 and accompanying text (discussing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)).

108. Rosch, *supra* note 4, at 7 (internal citation omitted); *see also supra* note 44 and accompanying text (noting that non-mutual offensive collateral estoppel does not apply to section 5 actions). Commissioner Leibowitz has made a similar point. *See infra* Part III.C (describing Commissioner Leibowitz’s concurrence in *In re Rambus, Inc.*).

109. *See supra* Part II.B.2.b (discussing this trilogy of appellate-court cases).

110. Rosch, *supra* note 4, at 10. Commissioner Leibowitz understood these cases to say very much the same thing, although he attempted to push the mandate of section 5 further than Commissioner Rosch, despite these “limiting principles.” *See infra* Part III.C (describing Commissioner Leibowitz’s concurrence in *In re Rambus, Inc.*).

111. Rosch, *supra* note 4, at 10.

effect is also required.”¹¹² Any pure section 5 violation requires not only anticompetitive intent, but “some evidence, direct or circumstantial, of actual or incipient anticompetitive effect.”¹¹³ This was what justified *Valassis* in Commissioner Rosch’s view: “the case involved the anticompetitive intent and incipient anticompetitive effect required by the Trilogy for a stand alone unfair method of competition claim.”¹¹⁴

Commissioner Rosch finally stressed that “the Commission’s action in *Valassis* should not be read to endorse the treatment of conduct as an unfair method of competition when the conduct is plainly governed by the Sherman Act.”¹¹⁵ This, he said, is the error in the Aid to Public Comment, which argued that the conduct at issue in *Valassis* could, in fact, have been treated as an antitrust violation.¹¹⁶ Not so, says Commissioner Rosch:

In *Valassis*, the alleged conduct was *not* squarely covered by the Sherman Act. An invitation to collude is conduct that does not fit neatly within the language of Section 1 or Section 2. It is unilateral conduct not governed by Section 1. Moreover, *United States v.*

112. *Id.* at 11.

113. *Id.*

114. *Id.* at 12.

115. *Id.* at 11.

116. See *VALASSIS AID TO PUBLIC COMMENT*, *supra* note 88, at 5 (“Invitations to collude have been judged unlawful under Section 2 of the Sherman Act as acts of attempted monopolization” (internal citations omitted)). This Note need not ponder whether the conduct in which *Valassis* engaged could be treated as an antitrust violation. First, as Commissioner Rosch has pointed out, Aids to Public Comment “issue[] from the staff rather than the Commission.” Rosch, *supra* note 4, at 6. Thus, there is no evidence that any given Commissioner believed that *Valassis*’s action amounted to a Sherman Act violation. Second, as Commissioner Rosch also has pointed out, the *Valassis* Aid to Public Comment relies on only one case to establish the idea that an invitation to collude constitutes an antitrust violation, namely, *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984). Rosch, *supra* note 4, at 12. The Supreme Court has never condoned such a reading, and, by far, the majority of courts say only that there may be “collusion” without an explicit agreement—i.e., if at least two parties are acting in concert, then one need not necessarily show that they “agreed” to collude. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) (“It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.”). The Court held that “[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.” *Id.* at 227; see also *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142–43 (1966) (“[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy”); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954) (“[B]usiness behavior is admissible circumstantial evidence from which the fact finder may infer agreement.”); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980) (stating that “contract . . . combination or conspiracy” is “an alliterative compound noun, roughly translated to mean ‘concerted action’” (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445–46 (3d Cir. 1977))); *United States v. Foley*, 598 F.2d 1323, 1331 (4th Cir. 1979) (“Proof of § 1 conspiracy need not be direct.”). The theme here, of course, is that while an agreement is not necessary, concerted action is. Hence, this is not *Valassis*.

American Airlines is the only decision that has blessed treating an invitation to collude as a Section 2 offense. Numerous decisions have held that there is no such offense—that the monopolization referred to in Section 2 is inherently a single firm concept. Thus, in my view, *Valassis* was an “out-of-round” Sherman Act case that could, and should, legitimately be brought simply and solely as an unfair method of competition case under Section 5¹¹⁷

Commissioner Rosch, therefore, clearly rejected interpretation (3) and embraced interpretation (2). The merit of his view is that section 5 violations are closely linked to the antitrust laws. To be sure, his requirement of “actual or incipient anticompetitive effect”¹¹⁸ suggests that the behavior at issue will be dangerously close to an antitrust violation. Because section 5 is one of the tools of competition law, consistency between it and the antitrust laws is key.

Nonetheless, Commissioner Rosch seems to have overlooked an important aspect of his position. Namely, if it is true that the Commission ought to condemn antitrust violations as antitrust violations and not as section 5 violations, then whenever the Commission approaches potential section 5 violations, it will need to determine as a threshold matter whether the behavior under consideration violates the antitrust laws. This line of thought is implicit in Commissioner Rosch’s interpretation, and, hence, it is implicit in interpretation (2). It is possible simply to incorporate it into Commissioner Rosch’s argument. He has already said that the Commission should not treat Sherman Act violations as section 5 violations. Hence, if the Commission were to ask the threshold question (“Does the behavior at hand violate the antitrust laws?”) and answer it affirmatively, Commissioner Rosch’s position would urge the Commission to employ an antitrust analysis. If, on the other hand, the Commission were to answer that question negatively, it would then search for anticompetitive intent and effect. These distinct stages of analysis ought to be spelled out in the Commission’s analysis, rather than merely implied by it.

The question remains whether a showing of anticompetitive intent and effect is sufficient to demarcate section 5 violations from antitrust violations or whether a more substantive definition of section 5 violations is possible. For this answer, this Note turns to Commissioner Leibowitz.

C. COMMISSIONER LEIBOWITZ’S CONCURRENCE

In August 2006, the FTC upbraided Rambus, Inc. for, in essence, manipulating a standard-setting process to further its anticompetitive goal of

117. Rosch, *supra* note 4, at 11–12.

118. *Id.*

advancing its own monopoly.¹¹⁹ For the purpose of this Note, it is important to observe only that the Commission found Rambus guilty of violating section 2 of the Sherman Act. Yet Commissioner Leibowitz saw this as an opportunity to reassert FTC authority under section 5. Thus, he drafted a strongly worded concurrence laying out his vision of that authority.

Commissioner Leibowitz opened his concurrence by agreeing with the Commission that the monopolization activity in which Rambus engaged undoubtedly constituted a violation of section 2 of the Sherman Act.¹²⁰ Nonetheless, he stated that he was compelled to write separately because he deemed it “equally apt . . . to characterize Rambus’s conduct as an ‘unfair method of competition’ in violation of Section 5 of the FTC Act.”¹²¹ Section 5, he said, was meant “to reach conduct that violates not only the antitrust laws themselves, but also the policies that those laws were intended to promote.”¹²² Hence, as Commissioner Leibowitz saw it, the Agency could have chosen to challenge Rambus’s conduct “solely as a pure Section 5 violation.”¹²³ Thus, pace Commissioner Rosch, Commissioner Leibowitz did not believe that when a Sherman Act violation is afoot, the FTC should necessarily treat it as a Sherman Act violation.

Commissioner Leibowitz then proceeded to restate the scope of section 5 and to define, in some detail, what the elements of a pure section 5 violation might be. His argument employed the usual suspects—legislative history, Supreme Court interpretations, considerations of statutory language—and he meant to rectify the “incorrect” view that the authority that section 5 extends to the Commission is “limited, with perhaps a few exceptions, to violations of the Sherman and Clayton Acts.”¹²⁴

Commissioner Leibowitz began his analysis, quite naturally, with a review of the legislative history of the FTC Act and of the Supreme Court cases that interpret and employ that history. This Note has observed that while the legislative history of the Act may not be quite as unambiguous as

119. See *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring) (“Rambus[] . . . exploited the . . . standard-setting process for its own anticompetitive ends . . . [and] . . . effectively transmogrified [the standard-setting agency’s] procompetitive efforts into a tool for monopolization.”).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* Thus, from the start, Commissioner Leibowitz reveals that his reading of section 5 is far broader than that of Commissioner Rosch. See *supra* notes 115–17 and accompanying text (pointing out that Commissioner Rosch specifically noted that the complained-of activity in *Valassis* was rightly treated solely as a section 5 violation because it *did not* violate the Sherman Act). Commissioner Leibowitz joined the opinion in *Valassis*, but thought it a rather meager exercise of section 5 authority. See *Rambus*, 2006 WL 2330118, at n.68 (“In my view, of course, Section 5 offers far greater potential and should be used more fully.”).

124. *Rambus*, 2006 WL 2330118 (citing Posner, *supra* note 2, at 765–66).

Commissioner Leibowitz thinks it is,¹²⁵ his conclusion is likely correct—namely, that history suggests proponents of the Act believed “unfair methods of competition” encompassed conduct that went beyond mere violations of the antitrust laws.¹²⁶ As previously noted,¹²⁷ and as Commissioner Leibowitz confidently points out, the Supreme Court itself seems not only to have endorsed just such a view in *FTC v. Sperry & Hutchison Co.*,¹²⁸ but to have reiterated that view on at least one other occasion.¹²⁹

One can make, then, a strong case that section 5 can serve as a stand-alone enforcement mechanism and that there exist, in other words, “pure Section 5 violations.” However, there is a tension between stating, on the one hand, that pure section 5 violations exist and, on the other, that the FTC may choose to enforce *antitrust law* (i.e., the Sherman and Clayton Acts) violations *as* pure section 5 violations. In other words, there is a tension between endorsing interpretation (2) and endorsing interpretation (3). It is a tension to which Commissioner Leibowitz is not as attentive as perhaps he should be. To be sure, he often speaks as though he is saying no more than Commissioner Rosch,¹³⁰ but surely he is aware that, given

125. See *supra* note 59 and accompanying text (describing the ambiguities in the legislative history).

126. See *Rambus*, 2006 WL 2330118 (“In drafting Section 5, Congress did not mimic the Sherman Act or try to enumerate a list of unfair practices.”). Commissioner Leibowitz continued:

Congress made clear its intent, both to those who would later enforce Section 5 and those who would be subject to its strictures, that this provision was not confined to the collection of violations then-recognized in antitrust or common law, but rather conferred a broader and more adaptable authority on the Commission.

Id.; see also *supra* Part II.B (detailing the legislative history and case law pertaining to the FTC Act of 1914).

127. See *supra* note 61 and accompanying text (noting courts’ conclusions that “unfair methods of competition” include a broad variety of conduct).

128. *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 244, 246 (1972).

129. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

130. For example, Commissioner Leibowitz concluded that “[e]ven if this conduct did not violate the Sherman Act, it would have fallen within Section 5’s broader province had this claim been argued at trial.” *Rambus*, 2006 WL 2330118. There is, in that phrase, a slight hint that the only reason the FTC did not condemn *Rambus*’s behavior under section 5 was because it was a Sherman Act violation. Commissioner Leibowitz continued:

As for our future enforcement efforts, the framers of the FTC Act gave the Agency a mandate . . . to use Section 5 to *supplement and bolster* the antitrust laws by providing, in essence, a jurisdictional “penumbra” *around* them. The framers also gave the FTC deliberative processes for examining suspected *incipient* or *policy* violations of the antitrust laws, and provided remedial measures dedicated more to protecting and restoring competition than to punishing malfeasors.

Id. (emphasis added). Again, the emphasized words here seem to suggest that the Commission may use section 5 to “supplement” antitrust violations or to condemn behavior that hovers

Commissioner Rosch's reflections on the *Valassis* case, Commissioner Rosch would not be willing to agree with Commissioner Leibowitz that the Agency could have chosen to condemn Rambus's behavior as a pure section 5 violation even though its behavior clearly violated the Sherman Act. Commissioner Rosch argued that this is the right treatment for Sherman Act violations. It is only when conduct is an "out-of-round" Sherman Act violation that section 5 ought to kick in.¹³¹ As we saw, Commissioner Rosch's argument makes sense but is a bit vague in its attempt to delineate what a pure section 5 violation might entail. Commissioner Leibowitz, on the other hand, problematically adopts interpretation (3) but also offers a much more detailed account of stand-alone section 5 behavior. Thus, prior to engaging in a wholesale critique of Commissioner Leibowitz's view, it is useful to consider whether his definition of a "pure Section 5 violation" serves in any way to clarify his reasons for adopting interpretation (3).

Commissioner Leibowitz argued that a section 5 violation entails two requisite elements: "The first is that the respondent must have engaged in identifiable, culpable conduct. The second is evidence of actual or incipient injury to competition."¹³² Apropos of the first prong, Commissioner Leibowitz offers a brief but rich elaboration:

The conduct aspect . . . ensures that the respondent recognizes—or should have recognized—in advance that its conduct was inappropriate. This requirement is met where the respondent engages in actions that are "collusive, coercive, predatory, restrictive, or deceitful," or otherwise oppressive, and does so without a justification grounded in its legitimate, independent self-interest. Unlike Section 2 of the Sherman Act, which requires proof of specific intent to prove the offense of attempted monopolization, stand-alone applications of Section 5 do not require that element to establish an unfair method of competition. Nonetheless, firms are almost always aware of, and intend, the anticompetitive implications of the types of conduct that would be sufficient for a Section 5 violation.¹³³

With respect to the injury prong, Commissioner Leibowitz argues that the Commission need not show "actual anticompetitive effect."¹³⁴ His argument is based on the fact that section 5 "was designed to stop [in] their

"around" such violations or may lead to such violations, but the Commission may not condemn antitrust violation as section 5 violations. But one must compare this language to the unambiguous language already cited where Commissioner Leibowitz specifically has said that Rambus's conduct, *although* it violated the antitrust laws, "might well have been challenged *solely* as a pure Section 5 violation." *Id.* (emphasis added).

131. See *supra* Part III.B (explaining Commissioner Rosch's position).

132. *Rambus*, 2006 WL 2330118.

133. *Id.* (citing *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984)).

134. *Id.* (quoting *In re Coca Cola Co.*, 117 F.T.C. 795, 970 n.25 (1994)).

incipiency acts and practices that could lead to violations of the Sherman or Clayton Acts.”¹³⁵ This justification will be important to the analysis developed later in this Note and, thus, should be kept in mind. Here, it is enough to note that Commissioner Leibowitz seeks competitive injuries that are “only suspected or embryonic.”¹³⁶

Turning then to the Second Circuit for further elaboration, Commissioner Leibowitz concluded that “a Section 5 cause of action may be predicated on: (a) evidence of tacit agreement, or collusive, coercive, predatory, or exclusionary conduct; *or* (b) evidence of an anticompetitive intent or purpose; *or* (c) lack of an independent, legitimate reason for the conduct.”¹³⁷ Thus, there seem to be three elements of a pure section 5 violation: a firm must (i) engage in some sort of culpable conduct that (ii) it recognized or should have recognized to be oppressive and that (iii) it cannot justify on any legitimate, independent grounds.

In the course of delineating this model of section 5 violations, Commissioner Leibowitz noted what he called the “limiting attributes of Section 5” that will “help ensure that respondents find enforcement efforts under this mandate to be neither punitive nor overreaching.”¹³⁸ There are two attributes. The first has to do with the consequences of finding a section 5 violation. In addition to the fact that section 5 violations generally result only in cease-and-desist orders because the FTC Act does not provide for private enforcement, “[a] Commission action brought under Section 5 has little value in subsequent ‘follow-on’ treble-damage litigation, and proof of Section 5 violations, standing alone, provide no basis for seeking criminal penalties under the Sherman Act or comparable state provisions.”¹³⁹ Hence, these are rather self-contained, often injunctive proceedings. Section 5’s second limiting attribute arises from the fact that its “scope is hinged to that of the antitrust laws.”¹⁴⁰ Put otherwise, “when using Section 5 to enforce competition policy, the Commission and courts have largely confined Section 5’s reach beyond the antitrust laws to incipient violations of those laws, and violations of those laws’ underlying purposes.”¹⁴¹

Commissioner Leibowitz’s analysis of the benefits of section 5 largely coincides with that of Commissioner Rosch.¹⁴² One must concede that each

135. *Id.* (quoting *In re Coca Cola Co.*, 117 F.T.C. at 970 n.25) (alteration in original).

136. *Id.*

137. *Rambus*, 2006 WL 2330118 (citing *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984)); *see supra* notes 73–80 and accompanying text (discussing this Second Circuit case).

138. *Rambus*, 2006 WL 2330118.

139. *Id.*; *see also supra* note 44 and accompanying text (noting that section 5 does not allow for non-mutual offensive collateral estoppel).

140. *Rambus*, 2006 WL 2330118.

141. *Id.*

142. *See supra* note 108 and accompanying text (quoting Commissioner Rosch’s statement on these benefits).

makes a strong argument that the typical result of a section 5 violation—a cease-and-desist order—is, in many cases, much more preferable than the typical results of a Sherman Act violation—the possibility of treble damages, criminal liability, follow-on actions, etc. Yet, the way in which Commissioner Leibowitz conceives of these limiting attributes may very well call into question whether the lofty apparatus that he has constructed in an effort to define section 5 violations really is necessary to reach these results.

There are at least two problems with Commissioner Leibowitz's definition of a section 5 violation. First, because "collusive, coercive, predatory, restrictive, or deceitful" conduct may in fact constitute an antitrust violation, the obvious question is this: How is an appellate court to demarcate "predation" as a pure section 5 violation from predation as a Sherman Act violation? This would seem to require an interpretive funambulist, and this is precisely where the lesson of the appellate cases begins to rear its head:¹⁴³ if faced with antitrust terminology, the court is likely going to apply its antitrust jurisprudence. Hence, all of the elements an antitrust claim requires will have to be accounted for. Consequently, the action would be a section 5 claim in name only. Now, Commissioner Leibowitz may respond to this charge by saying that this is, nevertheless, a distinction with a difference since the consequences of a section 5 violation are "limiting." But the appellate courts have yet to give any indication that the "limiting" consequences of section 5 are sufficient to persuade them to allow the Commission to choose to condemn would-be antitrust violations solely as section 5 violations.

Second, one might say that Commissioner Leibowitz puts far too much emphasis on the section 5 analysis. Commissioner Leibowitz is right to insist that section 5's scope is "hinged" to the antitrust laws. This implies, however, that it is antitrust methodology that ought always guide the overarching analysis. To state this a bit differently, whenever the Commission confronts activity that is potentially "unfair," its review of that activity should begin with the antitrust laws, i.e., it should first try to determine whether that conduct is actually an antitrust violation. Commissioner Leibowitz does not say this in so many words, but he seems to accept such a view by admitting that "the Commission and courts have largely confined section 5's reach beyond the antitrust laws to incipient violations of those laws, and violations of those laws' underlying purposes."¹⁴⁴ To determine whether it is dealing with an incipient violation or conduct that violates the underlying purposes of the antitrust laws, the Commission must focus its analysis on the antitrust laws. Whether the conduct at issue violates section 5 is a secondary question. It is here where one finds comity between Commissioner Leibowitz and Commissioner Rosch. Hence, this is where one finds the seeds of the

143. See *supra* Part II.B.2.b (discussing the appellate-court cases).

144. *Rambus*, 2006 WL 2330118.

procedural approach that this Note endorses. This Note now outlines that approach.

IV. THE PROCEDURAL APPROACH TO SECTION 5

Both Commissioners have agreed, at least, that interpretation (1) is incorrect and interpretation (2) is correct. This is not where the agreement ends, however, for both Commissioners also presume, at least tacitly, that whenever the FTC approaches a potential section 5 violation, there is some recognition that the behavior may or may not violate the antitrust laws. This is as it should be; it makes little sense for the Commission to argue that it may condemn conduct that transcends the antitrust laws unless it knows that the conduct does, in fact, transcend the antitrust laws—i.e., it must know that the conduct in question is *not* an antitrust violation. This implies, in turn, that the Commission must make at least a preliminary determination that the behavior at issue does not violate the antitrust laws. So, we might say that there is some agreement, tacit though it may be, that the Commission faces something akin to a threshold question.

That agreement and that threshold question should be made explicit. As this Note has determined, the legislative history of the FTC Act, the Supreme Court interpretations, and the appellate court interpretations, individually and collectively, provide strong evidence in favor of interpretation (2) and against interpretation (3). If interpretation (3) is incorrect, then the Commission has to treat antitrust violations *as* antitrust violations. This suggests not only that the Commission faces a threshold question (Does this behavior violate the antitrust laws?), but also that if the Commission answers that question affirmatively, then it must condemn that behavior under the antitrust laws and not under section 5.

This Note has also determined, however, that if the answer to that threshold question is “no,” the FTC must still, in some way, tie the conduct to the antitrust laws. Commissioner Rosch urges that section 5 violations still require both anticompetitive intent and anticompetitive effect.¹⁴⁵ For his part, Commissioner Leibowitz has argued that it is, in fact, a virtue of section 5 violations that they are hinged to the antitrust laws.¹⁴⁶ Both Commissioners at least ostensibly recognize that the policies and jurisprudence that underlie the antitrust laws will assume center stage in any legitimate section 5 analysis. Hence, a section 5 approach will, primarily, replicate an antitrust analysis. This means that if the answer to the threshold question is “no”—i.e., if the Commission is not dealing with an antitrust violation—the analysis must nevertheless continue to be an antitrust analysis. As a practical matter, then, the Commission must then ask whether the behavior at issue is likely to devolve into an antitrust violation. If not, then there is no threat of an

145. See *supra* Part III.B (discussing Commissioner Rosch’s interpretation).

146. See *supra* Part III.C (discussing Commissioner Leibowitz’s interpretation).

antitrust violation and the conduct ought not be condemned. If, on the other hand, the FTC concludes that an antitrust violation is imminent, then it ought to condemn that conduct as a pure section 5 violation.

For the sake of clarity, one may separate these elements numerically. When the FTC faces conduct that potentially constitutes “unfair methods of competition,” it should ask:

(1) Does this behavior violate the antitrust laws?

(2) (a) If the answer to (1) is “yes,” then the conduct ought to be condemned as an antitrust violation.

(b) If the answer to (1) is “no,” the Commission ought then ask:

(3) If this conduct goes unchecked, will it result in an antitrust violation?

(4) (a) If the answer to (3) is “no,” then the conduct ought not be condemned.

(b) If the answer to (3) is “yes,” then the conduct ought to be condemned as a Section 5 violation.

Thus, a pure section 5 violation exists only if there is no antitrust violation and then if and only if the conduct at issue will result in an antitrust violation if it is left unchecked.

Valassis provides a perfect illustration of this approach. While, of course, no one knows the exact thinking that went into the Commission’s analysis of this case, assume that the above procedure was followed. Applying the elements listed above, the outcome is as follows:

(1) *Valassis*’s conduct did not amount to an antitrust violation. There is some indication in the Aid to Public Comment,¹⁴⁷ which the FTC released with the consent decree, that an invitation to collude may be an antitrust violation. Commissioner Rosch is surely correct to find this evidence suspect, however.¹⁴⁸ The Aid to Public Comment, after all, refers to only one case, and that case finds little support elsewhere. While it is true that one no longer necessarily needs to prove the existence of an actual agreement to prove collusion, this is in cases where parties are presumably already “colluding” but simply made no formal *agreement* to collude. In other words, these cases are quite different from “invitation[] to collude” cases where, obviously, there has yet to be any concerted action.¹⁴⁹ Therefore, since the answer to (1) is “no,” we move directly to (3).

(3) This is a bit trickier than it seems. The question is whether the conduct, if left unchecked, would result in an antitrust violation. The answer

147. VALASSIS AID TO PUBLIC COMMENT, *supra* note 88, at 3 (“Invitations to collude have been judged unlawful under Section 2 of the Sherman Act as acts of attempted monopolization”)

148. See *supra* note 116 and accompanying text (discussing Rosch’s view that the Aid to Public Comment erred in its attempt to classify the conduct in *Valassis* as an antitrust violation).

149. See VALASSIS AID TO PUBLIC COMMENT, *supra* note 88, at 3 (discussing invitations to collude).

to this question would seem to depend on News America. After all, Valassis's invitation to collude would result in collusion only if News America accepted that invitation.¹⁵⁰ Thus, if Valassis succeeded in getting News America to agree to the terms Valassis suggested, that would be a clear antitrust violation. Therefore, the Commission was right to condemn the action as a pure section 5 violation.

V. CONCLUSION

This Note began by suggesting that there are at least three possible section 5 interpretations:

(1) The FTC may use its section 5 authority to go after only that behavior that violates the antitrust laws;

(2) The FTC may enjoin as "unfair methods of competition" conduct that the antitrust laws cannot reach; or

(3) The FTC may not only go after conduct that does not violate the antitrust laws, but it also may choose to condemn conduct as a "pure Section 5 violation," even though that same conduct may, in fact, violate the antitrust laws.

This Note then went on to suggest that the legislative history of the FTC Act, the Supreme Court interpretations of that history, and the appellate-court rulings all suggest that (2) is the only viable interpretation. The FTC seems to endorse that interpretation as well, with the exception of Commissioner Leibowitz. This Note concurred with the view that interpretation (2) provides the proper reading of section 5.

Yet, this Note then argued that the relationship between section 5 and the antitrust laws needs further clarification, and, to that end, the FTC ought to approach section 5 violations procedurally. As Commissioner Rosch's and Commissioner Leibowitz's views each imply, the FTC would need to ask, in the first instance, whether the conduct being considered were, in fact, conduct that violated the antitrust laws. If the answer to that threshold question were "yes," then the FTC would be dealing with an antitrust violation, and it would need to condemn that activity as a violation of the antitrust laws. If, on the other hand, the FTC were to answer the threshold question "no," then the FTC would not be dealing with an antitrust violation. In this instance, the Commission would then need to ask whether the conduct in question, if it were to continue unabated, would lead to an antitrust violation. Only if the Commission could confidently answer that question "yes" should it enjoin the behavior under section 5. Thus, pure section 5 violations exist if and only if the violative conduct *will* result in an antitrust violation if left unchecked. This is a view that attempts

150. One may urge, however, that the element of success should not be required here, given the flagrancy of Valassis's action.

to salvage areas of agreement between Commissioners Rosch and Leibowitz, and it is a view that is well illustrated by the *Valassis* case.