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UNFAIR METHODS OF COMPETITION AS AN EVOLVING CONCEPT—PRELUDE TO CONSUMERISM

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I well remember my first session as a member of the Federal Trade Commission. This occurred in the early part of 1920. The chairman gave the newcomer a few kindly words of welcome. Then he beamed with the anticipatory gusto of a child before a well-stocked Christmas tree. Eagerly he asked me, "What do *you* think unfair competition means?" I had never seen the animal, either roaming its native wilds or in a state of captivity. And beyond the bromidic statement that whatever was unlawful would seem to me to be unfair, I had nothing to offer constructively. My impression that the question was open to discussion was quickly confirmed.¹

CONSUMER PROTECTION AND ITS ANTITRUST ANTECEDENTS

Government and public interest in problems of consumer protection has intensified. Congressmen, administrators and presidents alike have issued statements exhibiting their dedication to the concept of consumerism. Moreover, the 89th and 90th Congresses enacted some 20 bills devoted to improving the lot of the consumer,² perhaps the most concrete manifestation of the phenomenon of consumerism, which gained strength and rose to a peak in the middle and late 1960's. Nevertheless, despite its revolutionary growth in the recent past, the roots of this development go deep, springing from many sources. It is the purpose of this article to explore the Federal Trade Commission's (FTC) contribution to consumer protection through the definition of "unfair methods of competition" under the Federal Trade Commission Act.³

Both the creation of the FTC and the passage of the FTCA (with its broad ban on "unfair methods of competition") must be viewed in a political context, *i.e.*, in light of the three-way presidential race of

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¹ N. GASKILL, *THE REGULATION OF COMPETITION* 4-5 (1936). Mr. Gaskill was a member of the Federal Trade Commission in the period 1920-1925.

² See *ECONOMIC REPORT OF THE PRESIDENT TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS* 110 (1969).

³ 15 U.S.C. § 41 *et seq.* (1964), *formerly* 38 Stat. 717 (1914). The Federal Trade Commission Act is referred to throughout this note as the FTCA or Act.

1912.⁴ Woodrow Wilson's campaign speeches of that year, focusing on the trust issue (the fundamental question distinguishing him from his chief rival, Theodore Roosevelt),⁵ had an extraordinary impact upon the future of the Commission. The primary political question at that time was whether monopoly should be regulated. Wilson opposed such interference, warning that the Government would soon be dominated by the very trust subjected to regulation.⁶ Instead, Wilson reaffirmed the validity of the competitive concept, denying the contention that monopoly develops "through the natural development of business conditions."⁷ Similarly, he vigorously argued that it was illicit — not free or fair — competition which tends to create monopolistic conditions.⁸ This was the basic assumption leading to the enactment of the FTCA, and it was Wilson's prescription of freedom of opportunity in the context of fair competition which was to set the theme of the Commission's subsequent activities.⁹

An equally critical factor motivating passage of the FTCA was public disenchantment with judicial interpretation of the Sherman Act.¹⁰ It led to the organization of the Commission as an administrative agency, whose functions would parallel, to an important extent, the enforcement activities of the Department of Justice. Congressional concern had reached a peak in 1911 as a result of the Supreme Court's decisions in *Standard Oil Co. of New Jersey v. United States*¹¹ and *American Tobacco Co. v. United States*,¹² in which the rule of reason was applied to the Sherman Act's prohibition of agreements or combinations in restraint of trade. These decisions, holding illegal only those restraints of trade which are "unreasonable," posited almost unlimited discretion in the judiciary.¹³ As Mr. Justice Harlan noted,

⁴ The candidates included William Howard Taft, Theodore Roosevelt and Woodrow Wilson. The latter was to set the tone for the future Federal Trade Commission.

⁵ R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 251 (1948).

⁶ If the government is to tell big business men how to run their business, then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it?

W. WILSON, *THE NEW FREEDOM* 122 (Prentice-Hall ed. 1961).

⁷ *Id.* at 101.

⁸ *Id.* at 108.

⁹ We had said to all the world, "America was created to break every kind of monopoly, and to set men free, upon a footing of equality, upon a footing of opportunity, to match their brains and their energies"

Id. at 45.

¹⁰ 15 U.S.C. § 1 *et seq.* (1964), formerly 26 Stat. 209 (1890).

¹¹ 221 U.S. 1 (1911).

¹² 221 U.S. 106 (1911).

¹³ See Votaw, *Antitrust in 1914 — The Climate of Opinion*, 24 A.B.A. ANTITRUST SECTION 14, 20 (1964).

the injection of the rule of reasonableness or unreasonableness would lead to the greatest variability and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries.¹⁴

Liberal elements were alarmed because such an uncertain standard might seriously diminish the opportunities for successful antitrust prosecution, while the business community objected because the latitude given judicial discretion could lead to unduly hazardous antitrust exposure.¹⁵ Consequently, both *Standard Oil* and *American Tobacco* clearly inspired considerable public pressure for greater clarity in antitrust enforcement.¹⁶ Hence, the stage for passage of the FTCA was set by a combination of factors — desire to protect freedom of opportunity by requiring fair competition, disillusion with the courts, and demand for certainty in the law.

Wilson's program, responding to public pressure for clarification of the law, envisaged legislation which would ease business uncertainty by defining specific antitrust violations with particularity. Under the circumstances, it is ironic that the FTC was to be given the broadest conceivable mandate under its organic act, namely, that of defining and prohibiting "unfair methods of competition." It represented a massive grant of discretionary authority to an administrative agency at a time when Congress desired to circumscribe judicial discretion in the antitrust area.

The legislative history of the FTCA and the Clayton Act¹⁷ mirrors the conflict between the desire to clarify the law and the need to provide for a broad range of contingencies.¹⁸ By enacting both statutes, Congress, in the antitrust area at least, reached an accommodation between the two objectives. The Clayton Act did prohibit certain types of price discrimination and merger, while the FTCA resulted from Congress' reluctance to embark on the "endless task" of defining and pro-

¹⁴ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 97 (1911) (Harlan, J., concurring and dissenting) (emphasis in original).

¹⁵ See Votaw, *supra* note 13.

¹⁶ Woodrow Wilson expressed the general sentiment with the statement:

It is of capital importance that businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety. It is as important they should be relieved of embarrassment and set free to prosper as that private monopoly should be destroyed. The ways of action should be thrown wide open.

¹⁶ MESSAGES AND PAPERS OF THE PRESIDENT 7910 (Bureau of Nat'l Lit. ed. 1922).

¹⁷ 15 U.S.C. § 14 *et seq.* (1964), formerly 38 Stat. 731 (1914).

¹⁸ For an exhaustive analysis of the legislative history, see Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962); Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

hibiting unfair trade practices in response to changing business conditions and the ingenuity of law violators.¹⁹ Significantly, the criterion of unfair methods of competition, in addition to reaching activities not previously punished or prevented under the antitrust laws, was also intended "to check monopoly in the embryo."²⁰ The concept of incipency, implicit in the FTCA's statutory scheme, was intended to provide the agency with considerable latitude in defining a new law-merchant.²¹

The passage of the Act saw another significant departure from Wilson's original concept, which envisaged the Commission as an instrument limited to the functions of information, publicity and guidance. The Commission, in Wilson's earlier proposal, was to "[substitute] counsel and accommodation for the harsher processes of legal restraint,"²² and the original bill to create the Commission failed to provide it with regulatory power. Instead, the agency "was to be an investigating and advisory body, hardly more than an amplification of the existing Bureau of Corporations."²³ Nevertheless, the statute in its final form bestowed upon the Commission the duty of issuing complaints when it had reason to believe the law was violated, and the power to issue orders to prevent further unfair trade practices. Thus, the Commission, in addition to its powers of information and publicity, also acquired the duty to regulate. This was significant since, at least initially, its most important contributions in defining "unfair methods of competition" would stem from the principles established in its adjudicative cases.

The legislative history and the statutory text did not define with precision the direction of enforcement. An examination of congressional debates reveals some dissent to the broad mandate granted the Commission²⁴ as well as confusion as to its meaning. Moreover, the Com-

¹⁹ In the words of Senator Hollis, a proponent of a broad gauged approach to the problem:

It is impossible to frame a set of definitions which embraces all unfair trade practices With each invention there would arise a public demand for Congress to make a new definition and prohibition If Congress adopts the method of definition it will undertake an endless task.

51 CONG. REC. 12,147 (1914) (remarks of Senator Hollis).

²⁰ 51 CONG. REC. 12,030 (1914) (remarks of Senator Newlands).

²¹ See 51 CONG. REC. 11,593 (1914) (remarks of Senator Saulsbury).

²² 16 MESSAGES AND PAPERS OF THE PRESIDENTS 8158 (Bureau of Nat'l Lit. ed. 1922).

²³ Rublee, *The Original Plan and Early History of the Federal Trade Commission*,

11 ACAD. POL. SCI. PROC. 114, 115 (1926).

²⁴ See, e.g., remarks of Senator Sterling:

No, Mr. President, we overload this Commission. Instead of giving them something reasonably tangible, certain or even in the language of the law "capable of being made certain" we give them something, to keep the public guessing, to the injury of both business and the public

51 CONG. REC. 12,213 (1914).

missioners themselves were not certain of the Commission's role and differed as to its objectives. The first chairman of the Commission, Joseph E. Davies, firmly believed in the Wilsonian concept of the FTC as an agency which would substitute counsel for legal restraint. The tenor of his speeches in the period 1915-1916 clearly illustrated his preference for accommodation and assistance to business, as opposed to the exercise of the regulatory functions set forth in section 5 of the Act.²⁵

The variance between Wilson's original proposals and the enforcement scheme provided under section 5 had continuing effect on the Commission's work. In the succeeding 54 year period, the emphasis placed on formal enforcement proceedings and informal accommodation shifted periodically.²⁶ In any event, it appears that the legal principle distilled by the Commission in defining "unfair methods of competition" emerged primarily from its formal decisions and reports, which provided the framework for the Commission's enforcement and rule-making procedures. In this connection, the recurring disagreement on the publicity to be given to the unfair acts and practices uncovered was a vital issue; without publicity the Commission's actions could not take root as legal precedent²⁷ and develop the new law-merchant intended by Congress.

²⁵ [I]t is in the interest of the public that processes of suitable and amicable accommodation should be first exhausted by the Federal Trade Commission before it should institute formal complaints embarking upon a long and technical course of legal procedure.

Address by Joseph E. Davies, *Competition and Democracy*, Convention of the Associated Advertising Clubs of the World, Chicago, Ill., June 20, 1915 (mimeo).

[T]he fact that there may be comparatively few complaints brought by this body [the FTC] is therefore not an indication that relief is not being accorded; but may be in fact an indication that the effectiveness of this agency is being demonstrated along the lines contemplated by those who sought its enactment. . . .

Address by Joseph E. Davies, *The European War and Industrial Democracy*, American Manufacturers Export Association, New York City, Dec. 21, 1915, at 9 (mimeo). (It is difficult to divine the individual Commissioner's point of view in the agency's formative years, since the first decisions of the Commission were formalistic and stylized. In this period, primary reliance must be placed on speeches, recollections, or dissents.)

²⁶ *E.g.*, the 1966 annual report of the FTC emphasized the "Federal Trade Commission's recent policy to provide more guidance to American businessmen on how to comply with the trade laws as a happy alternative to a patternless attack on violators." FTC ANN. REP. 1 (1966).

²⁷ Compare the views in 1915 of Commissioner Davies, explaining why "[o]f these complaints and their disposition, the public has not heard much" because no information on Commission cases should go out unless formal complaint issued and that in any event informal settlement was preferable because relief to the injured party was speedier," Davies, *The European War and Industrial Democracy*, *supra* note 25, at 8, with the views of Commissioner Thompson approximately 10 years later:

when a corporation has practiced a deception, it must inevitably suffer some hardship if there is to be established a legal precedent for the information and guidance of all members of the industry. This can not be done unless the Commission, after functioning in such a case as the present one, publishes the facts

The legislative history affords few clues as to the impetus for the Commission's actions in the area of deception and misleading advertising. Some 12 years after passage of the FTCA, George Rublee, one of the first Commissioners and one of the architects of the Act, declared:

there was no intention to cover merely deceptive or dishonest practices by the prohibition of unfair methods of competition. Fraudulent practices belong in an altogether different category from monopolistic practices The only objection to extending the meaning to fraudulent practices was that this would so increase the Commission's labors that with its limited appropriations and personnel it would not be able to give sufficient attention to the real task for which it was established.²⁸

Thus, it may be noted parenthetically that at the outset, the Commission and its members were faced with and divided over the issue of its mission and priorities.²⁹

The issue of false advertising and dishonesty did not, except in a peripheral way, enter into the congressional debates over the FTCA. Two possible exceptions involved "passing off" one's own merchandise as that of another, and defamation of competitors and disparagement of their goods, both of which were considered unfair at common law.³⁰ Clearly, however, although both practices involve elements of dishonesty, the main thrust of the objections thereto was the adverse impact on competitors, rather than the deception of the consumer.

Moreover, it appears that one element of the Act, namely, the requirement that the Commission act in "the public interest," was urged upon Congress to provide the agency with a rationale for foregoing, or at least minimizing, its activity in the area of fraud and deception.³¹

upon which the order is based. Such facts will then chart the sea of fair competition for the future on the practice complained of.

Mack, *Miller Candle Co.*, 8 F.T.C. 542, 546 (1925) (dissenting opinion).

²⁸ Rublee, *supra* note 23, at 114, 117-18. See also G. ALEXANDER, HONESTY AND COMPETITION I (1967), wherein the author states: "it helps to recall that the agency was designed as an antidote to the rule of reason rather than as an enforcer of honesty in commerce . . ." See also Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964).

²⁹ Compare REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) with STAFF OF THE SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE AGENCY DECISION-MAKING (Comm. Print 1969).

³⁰ See 51 CONG. REC. 11,107 (1914) (remarks of Senator Robinson). See also FTC, MEMORANDUM ON UNFAIR COMPETITION AT COMMON LAW 234-79 (1916).

³¹ The object [of the public interest requirement] was simply and solely to protect the Commission from being overloaded in case "unfair methods of competition" should be construed as extending to fraudulent practices. There was no intention to enlarge the jurisdiction of the Commission by reference to the public interest

Rublee, *supra* note 23, at 118.

Paradoxically, this requirement supplied, at least implicitly, the basis for proceeding against deception. For example, Senator Cummins, one of the chief proponents of the statute, remarked that "the unfairness must be tinctured with unfairness to the public; not merely with unfairness to the rival or competitor," and further stated that "there must be in the *imposture* or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare."³² While it was clearly intended that the Commission refrain from interfering in purely private disputes between competitors, "impostures" affecting or deceiving the public might justify a Commission proceeding. In a somewhat inchoate way, therefore, the Commission had been afforded the opportunity to combat consumer deception. The actual direction of enforcement taken under the statute and the scope given to the standard of "unfair methods of competition" would depend upon a number of variables, including the predilections of the individual Commissioners, the pressures brought to bear on the agency, and the complaints from both the public and the business community.

Despite the uncertainty of their mandate in the area of consumer protection, the members of the Commission quickly indicated an interest in the goal of honesty in the market place for its own sake, notwithstanding the statutory text's indication that the practice proceeded against must have an adverse effect on competition as a prerequisite to Commission action. For example, in the second year of its operation, the Commission's chairman delivered a moralizing discourse on the necessity of honesty in advertising, and in effect, sponsored business self-regulation to prevent deception.³³ Moreover, in addition to complaints alleging clear-cut antitrust or restraint of trade violations, the agency received many charges involving false advertising and misbranding.³⁴ Clearly, the Commission's response to such complaints furnished much of the impetus for its initial and hesitant steps in the consumer protection area.³⁵ At the same time, the stereotyped and formalistic nature of the findings in the agency's decisions evi-

³² 51 CONG. REC. 11,105 (1914) (remarks of Senator Cummins) (emphasis supplied).

³³ Advertising affords to men an abundant opportunity to make quick money dishonestly. There is no line that requires honesty to a greater degree than advertising.

Address by Joseph E. Davies, Cleveland Advertising Club, Apr. 19, 1916, at 4 (mimeo.).

³⁴ See Davies, *The European War and Industrial Democracy*, *supra* note 25.

³⁵ Recently, of course, the Commission has been subjected to considerable criticism for disregarding planning for "ad hoc and unordered responses to individual problems as they arise." REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION *supra* note 29. See also RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE AGENCY DECISION-MAKING, *supra* note 29, at 232 (responses of Commissioner Nicholson).

dently facilitated the initial proceedings against consumer deception.³⁶ The first decisions of the Commission involving deceptive practices made only boiler plate findings on "damage to the trade and [competitors]."³⁷ Such generalizations, one suspects, permitted the Commission to emphasize the deception, while glossing over the more complex issue of its impact as an unfair method of competition. As a result, it appears, as a practical matter, that in some cases at least, the consumer protection goal began to outweigh the statutory objective of protecting competition. In effect, the Commission's formalistic, and in some instances nonexistent findings³⁸ on the competitive impact of the deceptive practices under consideration, permitted it to proceed in matters where, although the consumer deception might have been evident, the impact on competition seemed slight.

Finally, it is at least arguable that political and other pressures in the antitrust area contributed to the agency's early decision to allocate a healthy share of its resources to the less complex and possibly less controversial cases involving deception. The tribulations which the Commission experienced after embarking on certain economic investigations which involved hard core antitrust issues (*e.g.*, in the meat packing industry) have been explored at length elsewhere, and that task need not be repeated here.³⁹ Suffice it to say that the very latitude of the discretion accorded the agency in formulating a new law-mer-

³⁶ *E.g.*, one of the earliest commentators on the Commission noted:

There is a general complaint among attorneys, at the present time, that it is impossible to ascertain from the published decisions of the Federal Trade Commission what points were decided and what were the grounds of decision . . . [implying further the reader of the Commission's decisions was not in a position to determine] what has been decided and by what reasoning the decision is supported.

G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 335-36 (1924).

³⁷ *Circle Cilk Co.*, 1 F.T.C. 13, 15 (1916) (a misbranding case involving the use of the term "Cilk" for a non-silk product).

³⁸ *See, e.g.*, *Taiyo Trading Co.*, 3 F.T.C. 199 (1921) (misrepresentation of Japanese matches as Swedish); *Lewis Pelstring*, 3 F.T.C. 42 (1920) (misrepresentation of goods as government supplies); *Plomo Specialty Mfg. Co. & Riverside Ref. Co.*, 2 F.T.C. 195 (1919) (misrepresentation and misbranding of turpentine). In *Taiyo*, the complaint alleged that the practice in question had "the effect of stifling and suppressing competition," but the operative finding on which the order was based stated without reference to the competitive impact, that "the effect will be to mislead and deceive the purchasing public."

³⁹ *See generally* T. BLAISDELL, *THE FEDERAL TRADE COMMISSION* (1932); Herring, *Politics, Personalities and the Federal Trade Commission, Part I*, 28 AM. POL. SCI. REV. 1016 (1934), *Part II*, 29 AM. POL. SCI. REV. 21 (1935). As noted by one of the Commission's members in that period:

There may be such a thing in Government work as being too zealous or active and perhaps too successful. Witness the ceaseless watch of the Commission over . . . the meat packing industry As a reward for its efforts the Commission's jurisdiction over the packing industry was transferred, in 1921, to the Department of Agriculture under what is known as the Packers and Stockyards Act.

Thompson, *Highlights In the Evolution Of The Federal Trade Commission*, 8 GEO. WASH. L. REV. 257, 273-74 (1940).

chant also permitted the accumulation and application of various pressures against its activities in the sensitive anti-monopoly area.⁴⁰ "Suppression of false advertising," on the other hand, seemed "universally applauded."⁴¹ However, by 1932 even friendly critics, while endorsing the Commission's attack on dishonesty, suggested that the emphasis of its enforcement efforts ignored the more fundamental task of maintaining competition,⁴² a sentiment shared by certain of the Commissioners in that period.⁴³ Nevertheless, it is the opinion of the authors, formed from a perspective of some 55 years since the agency's foundation, that the Commission's record should be judged not so much by the intrinsic importance of the particular cases brought in that era, but rather by whether the cases as a whole laid a bedrock for a national policy of consumer protection.

THE COMMISSION'S CONSUMER PROTECTION MISSION ESTABLISHED

The criticisms of the Commission's first ventures in the anti-deception field as a departure from its primary antitrust function, suggest that an assessment of the criteria for holding deception an unfair method of *competition* is in order. Initially, such standards were delineated primarily in the opinions of the judiciary which scrutinized Commission orders. The first Supreme Court review of a Commission proceeding holding that, as a matter of law, the courts and not the Commission would ultimately determine the scope of "unfair methods of competition,"⁴⁴ may well have inhibited any inclination existing at the administrative level to articulate fully the basis of the Commission's decisions.

The Commission's analysis of competitive impact in its early consumer deception cases was not framed in economic terms. Had it been concerned with the economic impact of deception on competition, the

⁴⁰ See Herring, *Part I, supra* note 39, at 1018.

⁴¹ G. ALEXANDER, *supra* note 28, at xiii.

⁴² Watkins, *The Federal Trade Commission and the Antitrust Laws*, in *THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM* (M. Handler ed. 1932). This commentator noted that in the two fiscal years preceding 1932, 521 out of 572 FTC proceedings, or 91 percent, were concerned with false and misleading advertising, misbranding and misuse of trade names; 90.4 percent of these resulted in orders to cease and desist. 71.8 percent of those dismissed and 94.4 percent of those resulting in stipulation were of the same category. According to the same observer, "this record indicates a startling shift from the conception of its functions which Congress and the public had in founding the Federal Trade Commission." *Id.* at 113.

⁴³ See, e.g., Herring, *Part I, supra* note 39, at 1021:

[The F.T.C.'s] chief function today as Abram F. Myers has said with some exaggeration, is "preventing" false and misleading advertising in reference to hair restorers, anti-fat remedies, etc.—a somewhat inglorious end to a noble experiment.

⁴⁴ See *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

agency could have considered the actual or prospective effect of the practice in the context of the market structure in which it occurred.⁴⁵ Notwithstanding the failure to undertake such an analysis, the Commission's approach in the deceptive practice area was upheld by the courts. One reason the Commission was not held to a more rigorous standard evidently stems from the congressional intent that unfair trade practices be halted in their incipiency.⁴⁶ Another factor was the Wilsonian preoccupation with fairness underlying the Act.⁴⁷ Clearly, dishonesty is patently unfair; unlike other practices such as exclusive dealing, there is no necessity for an analysis of the market results to reach that conclusion.⁴⁸ In short, per se rules were more apt to develop in the anti-deception area of the Commission's activities — the tendency being to assume the requisite impact on competition if competitors were present. This is evidenced by *Sears Roebuck & Co. v. FTC*,⁴⁹ the first judicial review of a Commission order involving deceptive practices. The Court of Appeals for the Seventh Circuit, noting that "the Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived,"⁵⁰ held that the necessary foundation for a Commission order could be laid by a finding of "a capacity or a tendency to injure competitors directly or through deception of purchasers."

The Supreme Court, speaking through Mr. Justice Brandeis in *FTC v. Winsted Hosiery Co.*,⁵¹ firmly established the Commission's jurisdiction over deceptive practices as an unfair method of competi-

⁴⁵ See *id.* at 429 (Brandeis, J., dissenting). The case suggests the relevance to a determination of illegality of such factors as the size, position and relationship of competitors in a market.

⁴⁶ Senator Cummins stated:

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

⁵⁷ CONG. REC. 11,455 (1914).

⁴⁷ See generally W. WILSON, *supra* note 6.

⁴⁸ Cf. *Hastings Mfg. Co. v. FTC*, 153 F.2d 253 (6th Cir.), *cert. denied*, 320 U.S. 853 (1946) (involving the practice of buying up competitors' goods from retailers' shelves). The Sixth Circuit noted that

acts not in themselves illegal or criminal, or even immoral, may, when repeated and continued and their impact upon commerce is fully revealed constitute an unfair method of competition within the scope of the Commission's authority to regulate and forbid

Id. at 257 (emphasis supplied).

⁴⁹ 258 F. 307 (7th Cir. 1919).

⁵⁰ *Id.* at 311.

⁵¹ 258 U.S. 483 (1922).

tion, while establishing at the same time, what was in effect, a presumption of the requisite competitive impact where deception or capacity to deceive the public could be demonstrated. Significantly, the question of whether such practices were within the scope of the FTCA was squarely before the Court. The Second Circuit, in reversing the Commission's decision, had held:

Conscientious manufacturers may prefer not to use a label which is capable of misleading and it may be that it will be desirable to prevent the use of the particular labels, but it is, in our opinion, not within the province of the Federal Trade Commission to do so.⁵²

Rejecting the Second Circuit's contention that since the misbranding in question was common in the trade, it could not constitute an unfair method of competition vis-à-vis other competitors, the Supreme Court stated:

The labels in question are literally false. . . . All are, as the commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. . . . The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition . . . as against manufacturers . . . who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Co. in the public interest.⁵³

An examination of the Commission's findings on this point⁵⁴ indicates that they are ambiguous as to the identity and extent of the "honest competition" affected. Thus, despite the language used, on the facts of the case it appears that the Supreme Court was more concerned with the ethical principle involved than with the effect of the practice on competition. As noted by one commentator:

The court's emphasis upon the injury to honest competitors should be noted. There is no intimation in the opinion, however, that the decision would have been different had such misrepresentation become so common that there were no honest competitors in the industry. . . .⁵⁵

⁵² *Winsted Hosiery Co. v. FTC*, 272 F. 957, 961 (2d Cir. 1921), *rev'd*, 258 U.S. 483 (1922) (a misbranding case involving woolen underwear).

⁵³ 258 U.S. at 493.

⁵⁴ *Winsted Hosiery Co.*, 3 F.T.C. 189 (1921).

⁵⁵ Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*,

In *Winsted* there may be discerned the evolution of section 5 of the FTCA toward an ethical imperative concerned with objectives over and above the goal of maintaining competition — a theme developed at various times by several of the circuit courts.⁵⁶ For example, the Second Circuit recognized the primacy of the consumer protection goal in *FTC v. Balme*,⁵⁷ in which it stated:

The purchasing public should be protected from deception, if that deception results in their securing an article or product which they did not intend to purchase The test of unfair competition is whether the natural and probable result of the use by a respondent of a label which is deceptive to the ordinary purchaser makes him unwittingly, under ordinary conditions, purchase that which he did not intend to buy.⁵⁸

Also facilitating the Commission's assumption of its role as a protector of consumer interests were decisions holding it unnecessary to prove injury to particular interests⁵⁹ or financial loss to the consuming public.⁶⁰ Equally significant in this development were judicial affirmations of Commission proceedings in which injury to competition from deception was presumed. For example, in *E. Griffiths Hughes, Inc. v. FTC*,⁶¹ the Second Circuit stated that "selling by the use of false and misleading statements necessarily injures or tends to injure [competition]." ⁶² Other decisions suggested that it would require little evidence to provide the requisite showing of injury to competition, and that the

31 COLUM. L. REV. 527, 544 (1931). This point was not overlooked by the Second Circuit, which, some two weeks after its reversal in *Winsted*, noted that "the Supreme Court . . . has established [in *Winsted*] the principle that advertisements which are false in fact constitute an unfair method of competition, although it was commonly practiced and not intended to mislead the trade." *Royal Baking Powder Co. v. FTC*, 281 F. 744, 752 (2d Cir. 1922). Clearly, the injury to the consumer outweighed the impact on competition.

⁵⁶ See, e.g., *Royal Baking Powder Co. v. FTC*, 281 F. 744, 753 (2d Cir. 1922), where the court recognized that the Act was aimed at dishonest practices as such, and held that businessmen could not be permitted to rely thereon either for profit or to maintain their business standing.

⁵⁷ 23 F.2d 615 (2d Cir. 1928), cert. denied, 277 U.S. 598 (1928).

⁵⁸ *Id.* at 620. See also *Indiana Quartered Oak Co. v. FTC*, 26 F.2d 340 (2d Cir.), cert. denied, 278 U.S. 623 (1928).

⁵⁹ "[I]t is the totality of all interests conceived as the public interest which is decisive." *Fioret Sales Co. v. FTC*, 100 F.2d 358, 359 (2d Cir. 1938).

⁶⁰ *FTC v. F.A. Martoccio Co.*, 87 F.2d 561, 564 (8th Cir. 1937).

⁶¹ 77 F.2d 886 (2d Cir.), cert. denied, 296 U.S. 617 (1935). See also *FTC v. Artloom Corp.*, 69 F.2d 36, 38 (3d Cir. 1934): "The premise of misbranding being supported by the Commission's finding, the conclusion follows that, when the respondent sold its misbranded rugs in commerce it thereby harmed its competitors and deluded the ultimate consumers." To the same effect, see cases holding it is unnecessary to show losses to particular competitors. E.g., *Ford Motor Co. v. FTC*, 120 F.2d 175 (6th Cir.), cert. denied, 314 U.S. 668 (1941); *Alberty v. FTC*, 118 F.2d 669 (9th Cir.), cert. denied, 314 U.S. 630 (1941).

⁶² 77 F.2d at 888.

courts might even take judicial notice thereof,⁶³ thereby implying that little or no analysis of competitive effect was required in this area. Indeed, the development of the Commission's anti-deception jurisdiction by the judiciary may be summed up in the holding of the Third Circuit that the trend of judicial decision was to "broaden the meaning of competition in the interests of consumer protection."⁶⁴ Similarly, that circuit had previously noted that the "trend is away from the requirement of injury to a particular competitor and toward the protection of the general consumer."⁶⁵

Nevertheless, this expansion of the concept of competition and the Commission's assumption of the task of consumer protection was not unchallenged. A number of judicial decisions stressed the supplementary relationship of the FTCA to the Sherman Antitrust and Clayton Acts, both of which involved competitive practices having more clearly delineated antitrust implications. In that context, the tendency was to view the Commission's findings on the competitive impact of the deception with more skepticism. In such decisions, the tendency was to find the causal nexus between deception and competitive harm too remote to justify action under the statute, even though the deceptive practice under consideration (such as fictitious pricing) was found "reprehensible" by the court.⁶⁶ The same tendency was indicated by another circuit court decision involving misrepresentation of business status. Respondents had used the words "Mill" or "Milling" in their corporate or trade name despite the fact that they did not grind wheat into flour.⁶⁷ The circuit court, subsequently overruled by the Supreme Court, held there was no threat to competition. Rather, the court believed that the Commission's order would have stifled rather than preserved competition, since there was "no oppression of the weak by the strong, the grinding millers being strong concerns organized into powerful trade organizations."⁶⁸ Clearly, the court in this instance

⁶³ See, e.g., *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 695 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937) (involving deceptive practices on the part of a nationwide distributor of encyclopedias).

⁶⁴ *Belmont Laboratories, Inc. v. FTC*, 103 F.2d 538, 542 (3d Cir. 1939).

⁶⁵ *Minter Bros. v. FTC*, 102 F.2d 69, 70 (3d Cir. 1939).

⁶⁶ *Chicago Portrait Co. v. FTC*, 4 F.2d 759, 762 (7th Cir.), *cert. denied*, 269 U.S. 556 (1925), *quoting* *FTC v. Sinclair Ref. Co.*, 261 U.S. 463, 475-76 (1923):

"The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes (Clayton and Federal Trade Comm. Acts) was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

⁶⁷ *Royal Milling Co. v. FTC*, 58 F.2d 581 (6th Cir. 1932), *rev'd.*, 288 U.S. 212 (1933).

⁶⁸ *Id.* at 583.

postulated an economic test, albeit crude, as to the result of the deception. Had such an approach been universally adopted, it is unlikely that section 5's potential in the consumer protection area could have been developed.

The most serious challenge to the Commission's consumer protection activities culminated in the Supreme Court's decision in *FTC v. Raladam Co.*⁶⁹ *Raladam* involved an obesity remedy having admitted health hazards in the case of unsupervised lay use. The Sixth Circuit,⁷⁰ holding that the Commission had failed to demonstrate the existence of legitimate competition affected by the deception complained of, had stated that the Act was not intended to protect either the medical profession or respondent's "relatively disreputable" competitors who were engaged in the same practices. Clearly, the court relied on its view that

[t]he Commission came into being as an aid to the enforcement of the general governmental antitrust and anti-monopoly policy, and that its lawful jurisdiction did not go beyond the limits of fair relationship to that policy⁷¹

Consequently, it held, in effect, that consumer protection was a fortuitous by-product, rather than a primary goal of Commission proceedings under the FTCA.⁷² Yet, if this principle is followed to its logical conclusion, it might be argued that most Commission anti-deception proceedings should not have been brought at all; the standard of proof as to competitive effect would have been too rigorous for successful prosecution.

The Supreme Court, adopting the Sixth Circuit's position that section 5 of the Act supplemented general antitrust policy, affirmed the dismissal on the ground that the Commission had failed to document "the existence of some substantial competition to be affected" by the alleged deception.⁷³ However, failing to proceed further, the Court refused to require economic analysis in determining the actual or potential restraint on competition in anti-deception cases. Thus, the

⁶⁹ 283 U.S. 643 (1931).

⁷⁰ *Raladam Co. v. FTC*, 42 F.2d 430 (6th Cir. 1930), *aff'd*, 283 U.S. 643 (1931). *See also* *Berkey & Gay Furniture Co. v. FTC*, 42 F.2d 427 (6th Cir. 1930); *Ohio Leather Co. v. FTC*, 45 F.2d 39, 42 (6th Cir. 1930), where the court observed that

there is no jurisdiction in the Commission to make an order of this kind unless there is a legitimate trade which equitably deserves protection in order that the defendant's unfair methods may not tend to restrain the trade of the fair and legitimate competitors

⁷¹ 42 F.2d at 435. Interestingly, the author of the *Raladam* opinion had seven years earlier dissented in *L.B. Silver Co. v. FTC*, 289 F. 985, 992-93 (6th Cir. 1923), contending that the Commission's anti-deception work had to have a clear antitrust mission, and that the censorship of business was generally beyond its jurisdiction.

⁷² *Cf. FTC v. Balme*, 23 F.2d 615 (2d Cir.), *cert. denied*, 277 U.S. 598 (1928).

⁷³ 283 U.S. at 648.

decision held only that in consumer protection cases, the Commission must prove the existence of competition before it had jurisdiction to proceed. Significantly, the test of competitive effect posed by the Court was no more rigorous than that previously followed by the Commission, *i.e.*, permitting the inference of injury to competition when the existence of legitimate competition had been documented.⁷⁴

The Commission's actions in the post-*Raladam* period indicate that its reversal in that case did not dampen its enthusiasm for consumer protection, and that its priorities, as a practical matter, remained unchanged.⁷⁵ In seeking legislative amelioration of *Raladam*, the Commission did not argue that it could no longer proceed in this area; rather, it contended it would be without jurisdiction when the offender enjoyed a monopoly, and when all competitors in the field were equally guilty.⁷⁶ The thrust of the Commission's argument for revision of the Act, to encompass unfair and deceptive acts and practices, was that proving the existence of competition was too time consuming and expensive.⁷⁷ One of the Commissioners testifying on the proposed revision characterized the requirements as involving "needless expense to prove an obvious fact upon a mere technicality."⁷⁸ Clearly, the Commission's view of the rudimentary market analysis required to establish competition, as a "technicality" blocking consumer protection, envisaged a scheme of priorities quite different from the *Raladam* Court's view of the antitrust objectives of the Act.⁷⁹

⁷⁴ [I]t is not necessary that the facts point to any particular trader or traders. It is enough that there be present or potential substantial competition, which is shown by proof, or appears by necessary inference to have been injured, or to be clearly threatened with injury, to a substantial extent, by the use of the unfair methods complained of.

Id. at 651. See also *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933), rejecting, as a practical matter, the "economic effects" test posed by the Sixth Circuit in its reversal of the Commission's cease and desist order. 58 F.2d 581 (6th Cir. 1932).

⁷⁵ [M]y friends, it is the rarest case in the world, if it ever exists, where the consuming public is adversely affected by false and misleading advertisements that a competitor is not also affected, and, consequently, we would have the requisite showing of competition [I]t is not even necessary to name the competitors . . . it is just necessary to show that the respondent has competition. Statement by FTC Chairman Ewin L. Davis, Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, Aug. 10, 1935, at 4-5 (mimeo.).

⁷⁶ See *Hearings on S. 3744 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 2d Sess. 5 (1936).

⁷⁷ *Id.* at 14 (statement of Commissioner Davis).

⁷⁸ See *Hearing on H.R. 3143 Before the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 1st Sess. 9 (1937).

⁷⁹ It is illuminating that only two years after *Raladam*, the Commission held, in *Nancy Lee Institute*, 17 F.T.C. 314 (1933), as an unfair method of competition, the misrepresentation of a quack remedy to enhance the beauty of the female form, although its findings revealed only competitors selling equally worthless products. Clearly, the Commission's concern was not to protect one knave from another, but rather to shield the public from deception.

With the passage of the Wheeler-Lea Amendment,⁸⁰ outlawing "unfair or deceptive acts or practices," Congress, for the first time, established a national consumer protection policy. The amendment gave legislative sanction to the Commission's approach by making the consumer "of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor."⁸¹ Clearly, the Commission, by its activities in the anti-deception area, had established its credentials as a representative of the consumer interest to the satisfaction of Congress.⁸² More significantly, it is a measure of the Commission's accomplishment that its proceedings established the necessity for active federal intervention on behalf of the consuming public.

COMMISSION PRECEDENT AS A FOUNDATION FOR CONSUMERISM

The major function of the Commission is to define unfair and deceptive practices with particularity. A comprehensive description of the details of that effort, ranging from misbranding to lottery schemes, is not within the scope of this paper.⁸³ However, the establishment by the Commission of broad criteria defining consumer rights during that process was equally significant. These evolved primarily from the general standards developed for ascertaining the impact of advertising on the public, the determination that even the less perceptive consumer deserves protection, and the development of what may be termed as the consumer's right to know.

Critical to a delineation of business' obligations to the consumer was the definition of the audience to be shielded from deception. This, of necessity, would govern the standards for evaluating the fairness of commercial appeals to the public. One of the first cases dealing with this issue held:

The law is not made for the protection of experts, but for the public — that vast multitude which includes the ignorant, the un-

⁸⁰ 15 U.S.C. § 45 (1964), formerly 52 Stat. 111 (1938).

⁸¹ H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1937).

⁸² The Federal Trade Commission has the machinery and trained personnel to investigate in a proceeding against false advertising of all industries and all commodities The Federal Trade Commission as an independent quasi-judicial body, has a procedure better calculated to handle multitudinous types of advertising and to do its work to the greater confidence and satisfaction of the public than any purely administrative body. Its work carries with it the combined elements of searching investigation, orderly procedure, prevention rather than penalization in minor cases, and that judicial fairness that is essential to the enlistment of confidence by the public.

Id. at 5.

⁸³ For a comprehensive survey of the Commission's activity in the anti-deception area, see G. ALEXANDER, *supra* note 28.

thinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.⁸⁴

Interestingly, these principles were evidently derived in large part from trademark infringement suits and "passing-off" cases, which were concerned with the private rights of competitors.⁸⁵ This line of cases perhaps reached its apogee in 1940, when the Second Circuit held:

if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein," it is not for the courts to revise their judgment.⁸⁶

Similarly sweeping was the Third Circuit's ruling that it was the Commission's function "to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent discerning public."⁸⁷

This view of the consumer, embracing "the trusting as well as the suspicious,"⁸⁸ clearly abandoned the reasonable prudent man standard. It justified holdings to the effect that in judging the meaning of advertisements the "important criterion is the net impression which the advertisement is likely to make upon the general populace";⁸⁹ that statements, although literally true, may nevertheless be deceptive,⁹⁰ since the Commission may examine the overall impact of the entire commercial or advertisement;⁹¹ that ambiguous advertisements capable of two meanings, one of which is false, are misleading;⁹² and finally, that actionable deception occurs whenever the practice has the capacity to deceive, *i.e.*, that no actual deception need be shown.⁹³ Decisions established that consumers are entitled to get what they think they are

⁸⁴ 23 F.2d at 620-21.

⁸⁵ See, e.g., *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910). See also *Rice & Hutchins, Inc. v. Vera Shoe Co.*, 290 F. 124 (2d Cir. 1923); and *O. & W. Thum Co. v. Dickinson*, 245 F. 609 (6th Cir. 1917), which hold that the issue of deception was to be determined on the basis of the ordinary buyer under ordinary conditions.

⁸⁶ *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940). *Accord*, *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942).

⁸⁷ *Parker Pen Co. v. FTC*, 159 F.2d 509, 511 (7th Cir. 1946).

⁸⁸ *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

⁸⁹ *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944). For another concept initially derived from trademark infringement suits, see *Florence Mfg. Co. v. J.C. Dowd Co.*, 178 F. 73 (2d Cir. 1910).

⁹⁰ *Kalwajtys v. FTC*, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

⁹¹ *Carter Prods., Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963).

⁹² *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955); *Bakers Franchise Corp. v. FTC*, 302 F.2d 158 (3d Cir. 1962).

⁹³ *FTC v. Balme*, 23 F.2d 615 (2d Cir. 1928).

getting, although the advertised substitute may be as good⁹⁴ — even where the public preference is dictated by snobbery.⁹⁵ Business was held to a literal standard of veracity.⁹⁶ By assessing the truthfulness of advertising in the context of the credulous as well as the suspicious consumer, the Commission's proceedings served to erode the common-law concept of *caveat emptor* as a barrier to consumer protection.⁹⁷ Moreover, the courts, in weighing the interests of the "rugged individual" against bureaucratic interference, expressly recognized an evolution of the judicial standards of fairness to an ever "higher conception of business ethics."⁹⁸

Concomitantly, there began the expansion of the scope of consumer protection from the prohibition of affirmative misrepresentation to a requirement of affirmative disclosure of all material facts. Utilizing its rule-making procedures, the Commission issued *Trade Practice Rules for the Rayon Industry* on October 26, 1937, providing that it was unfair to sell rayon products without disclosing clearly and unequivocally that such fabrics were made of rayon.⁹⁹ The rule rested simply on the finding that the appearance of rayon simulated that of silk, and that the public preferred the natural product.¹⁰⁰ Under the circumstances, the mere appearance of the fabric, without more, had the capacity to deceive, notwithstanding the absence of misleading representations. Significantly, the rayon rules were promulgated under section 5's broad ban on unfair methods of competition prior to the passage of the Wheeler-Lea Amendment,¹⁰¹ and its specific definition of the Commission's consumer protection mission.

⁹⁴ FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934).

⁹⁵ Benton Announcements, Inc. v. FTC, 130 F.2d 254 (2d Cir. 1942).

⁹⁶ Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942).

⁹⁷ See, e.g., FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937), holding:

There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. . . . The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

Today, the Attorney General of New York suggests:

There is little room for application of *caveat emptor* between the modern merchant and the twentieth century consumer. A new responsibility, that of *caveat venditor*, must be added to the code of the market place. It means that the sellers of goods and services must accept a responsibility to assist the consumer who can no longer assist himself.

Lefkowitz, *Consumer Protection Meeting the Challenge*, 4 N.E. L. REV. 67 (1969).

⁹⁸ Minter Bros. v. FTC, 102 F.2d 69, 71 (3d Cir. 1939).

⁹⁹ FTC, TRADE PRACTICE RULES, SEPTEMBER 1935 TO AUGUST 1939, 95 (1940).

¹⁰⁰ Mary Muffet, Inc., 47 F.T.C. 724 (1950), *aff'd*, 194 F.2d 504 (2d Cir. 1952).

¹⁰¹ 52 Stat. 111 (1938), as amended, 15 U.S.C. § 41 (1964). This section of the FTCA, relating to food, drug and cosmetic advertising, and enacted by the Wheeler-Lea Amendment, expressly provided that disclosure may be required in the light of affirmative claims by the seller even when such representations are not per se deceptive. The Commission, however, has held this principle was encompassed within the broader ban of section 5

This development, in the light of a mixed reception in the courts, was far reaching. The issue was drawn squarely by the District of Columbia Circuit when it stated:

It would be ideal from the buyer's point of view if all advertisements were required to describe the product with cold precision, to enumerate with fidelity its shortcoming, and to call attention to the circumstances in which it is valueless. And a plausible argument can be made that an advertisement is not really truthful unless it does all of those things. But we think that the negative function of requiring, or encouraging, additional interesting, and perhaps useful information which is not essentially to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter. . . .¹⁰²

Nevertheless, the agency's approach has generated considerable judicial support. For example, the Commission may require affirmative disclosure in future advertising to dispel false impressions created by past deception.¹⁰³ Similarly, affirmative disclosure of product identity may be required whenever one material closely resembles another, and the public has a preference for one as against the other.¹⁰⁴ The same principle applies whenever the public prefers domestic over foreign products although there is no misrepresentation as to country of origin either in labeling or advertising.¹⁰⁵ Nor may a seller trade on the customary assumption of the public that motor oil whose prior use remains undisclosed is, in fact, virgin or crude oil.¹⁰⁶ In short, "section 5 forbids sellers to exploit the normal expectations of consumers in order to deceive just as it forbids sellers to create false expectations by affirmative acts."¹⁰⁷

This principle is particularly applicable to cases involving products which affect the public's health and safety, for it is in this area that

[p]eople have a right to, and by and large do, expect that advertising will be completely truthful in circumstances where the consequences of an untruth, half truth, or ambiguity may be personal injury. Because they expect fair dealing in the advertising of such products, their guard is down.¹⁰⁸

against "unfair or deceptive acts." See FTC, STATEMENT OF BASIS AND PURPOSE ACCOMPANYING TRADE REGULATION RULE ON CIGARETTE ADVERTISING AND LABELING 87-88 (1964).

¹⁰² *Alberty v. FTC*, 182 F.2d 36, 39 (D.C. Cir. 1950).

¹⁰³ *Haskelite Mfg. Corp. v. FTC*, 127 F.2d 765 (7th Cir. 1942).

¹⁰⁴ *Mary Muffet, Inc. v. FTC*, 194 F.2d 504 (2d Cir. 1952).

¹⁰⁵ *Heller & Son v. FTC*, 191 F.2d 954 (7th Cir. 1951).

¹⁰⁶ *Mohawk Ref. Corp. v. FTC*, 263 F.2d 818 (3d Cir.), *cert. denied*, 361 U.S. 814 (1959).

¹⁰⁷ FTC, STATEMENT OF BASIS AND PURPOSE ACCOMPANYING TRADE REGULATION RULE ON CIGARETTE ADVERTISING AND LABELING 89 (1964).

¹⁰⁸ *Id.* at 93-94.

The Sixth Circuit, in upholding a Commission order requiring affirmative disclosure of the fact that a patent remedy would only be effective in a limited number of cases,¹⁰⁹ effectively undermined the influence of *Alberty v. FTC*.¹¹⁰ Significantly, the court noted the influence on the consumer of "mass advertising utilizing highly developed arts of persuasion."¹¹¹ In the court's view, this phenomenon rendered it difficult for a consumer to determine whether a product would meet his needs. Consequently, the court concluded that the affirmative disclosure requirement "does not fall within the sphere of negative advertising, it merely presents to the consumer an opportunity to make an intelligent choice."¹¹² In general, this development has vindicated Judge Bazelon's dissent in *Alberty*, that "[t]he Act's purpose is to encourage the informative function of advertising" and to facilitate the consuming public's evaluation of the merits of advertising claims.¹¹³

The line of cases construing the failure to reveal material facts to be deceptive implies that it may be equally unfair to withhold information which the consumer requires to function efficiently in the market. With the increasing impact of mass media and the growth of product complexity, the amount of "useful" information¹¹⁴ which sellers, as a matter of fairness, may be required to furnish can also be expected to increase. The Commission's recently initiated *Trade Regulation Rule Proceedings Relating to the Care Labeling of Textile Products*¹¹⁵ and to the *Posting of Research Ratings on Gasoline Dispensing Pumps*¹¹⁶ are indicative of this trend, and may serve to significantly delimit the seller's responsibility in furnishing product information to buyers.

The principle operative provision of the proposed rule on care labeling of textile products would require manufacturers and marketers of textile products (within the definition of the rule) to clearly label their products with instructions for the laundering, cleaning and other care necessary to maintain their utility and appearance, and to certify to the consumer-purchaser that such instructions are valid and proper. Of course, these requirements are based on the belief that the

¹⁰⁹ *Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

¹¹⁰ 182 F.2d 36 (D.C. Cir. 1950).

¹¹¹ 381 F.2d at 890.

¹¹² *Id.*

¹¹³ 182 F.2d at 45 (Bazelon, J., dissenting).

¹¹⁴ *Cf. Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1950).

¹¹⁵ *See* Rule-Making Proceeding for Establishment of Trade Regulation Relating to Care Labeling of Textile Products, 34 Fed. Reg. 17,776 (1969).

¹¹⁶ *See* Rule-Making for the Establishment of a Trade Regulation Rule Relating to the Posting of Research Octane Ratings on Gasoline Dispensing Pumps, 34 Fed. Reg. 12,449 (1969).

lack of such information may result in the impairment of the product's utility or appearance.

In support of the proposed rule, the notice cited the recent innovative developments in the field of textiles which have resulted in a proliferation of new fibers, fabrics and finishes, thereby rendering it difficult for the consumer to make informed purchasing decisions. The notice of rule making also noted how difficult it was for even an expert to identify accurately, from appearance or texture alone, the fiber composition of particular textile products. Similarly, it stated that even when the fiber content is known, it is equally difficult to determine with certainty the necessary procedures to insure the fabrics' continued utility and appearance. As a result, the notice declared that the Commission has reason to believe consumers, and even professional cleaners and launderers, are misled with respect to the necessary procedures, and, that consumers are precluded from rationally choosing among competing products. According to the notice, the Commission has reason to believe that the foregoing constitutes an unfair method of competition.

The proposed rule on posting of research octane ratings for gasoline dispensing pumps provides, in essence, that it constitutes an unfair method of competition to fail to disclose on gasoline pumps the research octane rating of the gasoline being dispensed. In support of the rule, the Commission stated its reasons to believe that failure to post such information may be deceptive and unfair, since it fails to provide the consumer with a criterion by which he can relate the gasoline with the engine requirements of his automobile, and that, the failure to post such information deprives the consumer of data enabling him to determine with any precision the range of octane ratings available.¹¹⁷

Underlying both proposed rules is a recognition of the paradox that the very proliferation of new products may hinder the consumer by affording him choices which he cannot meaningfully evaluate. Clearly, both proceedings pose the question of the extent to which the withholding of product information may be held an unfair method of competition in the light of dynamically changing technology.

¹¹⁷ Additional supporting reasons in the notice of proposed rule making are as follows: The Commission has reason to believe that some "regular" gasolines have an octane rating lower than the "average acceptable range of 'regular' brands normally marketed with resulting damage to engines" and possible loss of warranty protection, because the customer unwittingly used a low octane gasoline he assumed to be a regular blend. The notice further sets forth the Commission's reason to believe that customers may be paying higher prices needlessly for a higher octane product than their engine may require in the particular case.

Consumer protection under the concept of "unfair methods" is not limited to fraud and deception or to encouraging informative advertising. In *FTC v. R.F. Keppel & Bros.*,¹¹⁸ the Commission and the reviewing courts delineated as unfair those practices which the common law and criminal statutes deemed contrary to public policy and which "met with condemnation throughout the community."¹¹⁹ Significantly, the Supreme Court, in upholding the Commission's position in *Keppel*, noted the vulnerable nature of the population at which the challenged practices were aimed, namely, "children who are unable to protect themselves."¹²⁰

The holding of *Keppel*, *i.e.*, that practices condemned throughout the community (although not necessarily deceptive or fraudulent) and aimed at vulnerable segments of the population are within the scope of the FTCA, is particularly relevant when one considers the increasing concern with the weak bargaining position of the low income segment of our population. The literature of consumerism notes that the problems of the poor

differ in kind and intensity from the consumer problems of families of the middle and upper income groups [and] [t]hat the traditional subject matter and procedures of consumer education as well as existing and proposed consumer protective legislation are inadequate to help the poor solve their [problems].¹²¹

Assuming that the low income consumer requires more than the full disclosure remedies hitherto considered in order to solve his unique difficulties, one method of ameliorating his problems may be found in *Keppel* and other related decisions. Consider, for example, the Commission's open housing cases.¹²² These complaints charged a number of apartment house operators in the Washington, D.C. metropolitan area with deceptive advertising. Specifically, the complaints alleged that the respondents had represented, directly or by implication, that apartments were available to the general public without restrictions or limitations as to race, color, national origin or number of family members. Yet in truth and in fact, according to the complaints, the advertised apartments were not available to the general public without restriction, and could not be rented by Negro applicants or by large families.

The proposed order would have prohibited respondents from

¹¹⁸ 291 U.S. 304 (1934).

¹¹⁹ *Id.* at 313.

¹²⁰ *Id.*

¹²¹ FTC, NATIONAL CONSUMER PROTECTION HEARINGS 95 (1968) (statement of Dr. Toyer).

¹²² First Buckingham Community, Inc., No. 8750 (FTC May 20, 1968).

[p]lacing any advertisement which tends to convey the false impression that the advertised housing is available for rental to the general public without restrictions or limitations because of race, color, national origin or number or sex of family members.¹²³

It is noteworthy that the complaints were based upon a charge of deception. Since allegedly deceptive advertisements made no affirmative representation as to the general availability of the apartments in question, the complaints, as a practical matter, charged failure to disclose a material fact. Moreover, the proposed remedy would have permitted respondents to continue discriminating provided they merely disclosed that fact. Such an outcome, of course, could not conceivably have been the objective of the Commission; rather, the proceedings were initiated to arrest discrimination, and to increase the bargaining position of certain disadvantaged segments of the Washington, D.C. population. In view of these objectives, it is arguable that the theory of the complaints and the proposed remedy were not well designed. The Commission might have been better advised to rely on the line of cases beginning with *Keppel*, rather than those dealing with the issue of deception. It is conceivable that the Commission could have come to the heart of the issue more simply and effectively by alleging that discriminatory real estate rentals are contrary to both public policy and developing community standards, *viz.*, judicial decisions in the civil rights area and the open housing legislation considered and passed in a number of local communities, as well as the anti-discrimination legislation enacted by Congress. Not only would such an approach have been more straightforward, but it most likely would have achieved the fundamental objectives of the Commission. At any rate, the issue became academic with the passage of the Civil Rights Act of 1968.¹²⁴ The Commission dismissed the proceeding on the assurance of the respondents that, in light of the Act's passage, they had discontinued the challenged practices. Nevertheless, the open housing complaints, (putting aside the question of whether the Commission should proceed in novel areas where congressional legislation seems imminent), clearly indicate that the precedent of *Keppel* has considerable potential in those areas where consumer problems stem primarily from a weak bargaining position rather than from deception or lack of information.

A number of recent Commission studies have focused specifically on

¹²³ First Buckingham Community, Inc., No. 8750 (FTC Nov. 30, 1967) (notice order issued with complaint).

¹²⁴ 42 U.S.C. § 3601 *et seq.* (Supp. IV 1969).

the problems of the low-income consumer.¹²⁵ They indicate that his unique disadvantages may be traced, to a considerable degree, to the weak bargaining position which is caused by competitive imperfections existing in the markets in which he buys. For example, a recent staff report to the FTC asserts that "the distribution system [in the case of food] performs less satisfactorily in low-income areas of our inner cities than in suburban areas."¹²⁶ To the extent that the poor suffer from anemic competition in the low-income market, there is justification for further utilization of *Keppel* to provide relief whenever the consumer's problems are not primarily rooted in deception or lack of information. A case in point is the availability of credit to the poor, whose exposure to unfair trade practices seems increased in large part by virtue of ineffective competition¹²⁷ and their lack of "psychological or financial [resources] to protect themselves against suits for non-payment or to resist threats of legal action," even where the transaction may have been grounded in fraud or deception.¹²⁸ According to the Commission's findings, the holder in due course doctrine, in particular, has handicapped the low-income consumer.¹²⁹ The Commission has responded by alleging as deceptive the failure to disclose that the instruments of indebtedness may be transferred to third parties, against whom the purchaser's contractual claims and defenses would be unavailing.¹³⁰ To cure the deception, the Commission has required disclosure in a number of recent cease and desist orders.¹³¹ However, the question remains whether the disclosure remedy is the most efficacious under the circumstances which confront the low-income con-

¹²⁵ See, e.g., FTC, ECONOMIC REPORT ON FOOD CHAIN SELLING PRACTICES IN THE DISTRICT OF COLUMBIA AND SAN FRANCISCO (1969); FTC, NATIONAL CONSUMER PROTECTION HEARINGS (1968); FTC, REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM (1968); FTC, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968).

¹²⁶ FTC, ECONOMIC REPORT ON FOOD CHAIN SELLING PRACTICES, *supra* note 125, at 3. Howard Samuels, then Administrator of the Small Business Administration, testified that it was his "strong conviction" that the consumer in the inner cities had available to him inadequate choices in the market place. See NATIONAL CONSUMER PROTECTION HEARINGS, *supra* note 121, at 9.

¹²⁷ See ECONOMIC REPORT ON INSTALLMENT CREDIT, *supra* note 125, at xiv-xvi.

¹²⁸ See REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM, *supra* note 125, at 9.

¹²⁹ Application of the holder in due course doctrine to consumer instruments has led to many abuses. It is simply unfair to permit a vendor to sell shoddy or defective goods, which sometimes are not even delivered, coax, wheedle or coerce the buyer into signing a negotiable instrument . . . and, by assigning the instrument, [to a third party] prevent the deceived or defrauded consumer from asserting his legitimate defenses in an action on the note
Id. at 17-18.

¹³⁰ See, e.g., Household Sewing Mach. Co., No. 8761 (FTC Aug. 6, 1969); All-State Ind. of N.C., Inc., No. 8738 (FTC Apr. 1, 1969).

¹³¹ *Id.*

sumer. Assuming that the poor have a limited choice as to sources of credit, and that they are at a psychological and financial disadvantage¹³² vis-à-vis the seller, there is a question whether disclosure will cure the basic problem, although it may ameliorate it. Furthermore, the Commission found that low-income consumers have difficulty in asserting their contractual rights.¹³³ In that context, the mere warning provided by a disclosure remedy may be insufficient. Certainly, empirical data on this point would be desirable. At any rate, the Commission could examine future cases in the light of *Keppel*, in order to determine whether the routine assignment of sales contracts to third parties, with or without disclosure, is not inherently unfair when the practices are directed at a segment of the population who may not fully comprehend the legal significance of the warning, and if they do, may have no meaningful alternative.¹³⁴ As Mr. Justice Brandeis stated in another context, "a method of competition fair among equals may be very unfair if applied where there is inequality of resources."¹³⁵

CONSUMER PROTECTION PRIORITIES IN THE CONTEXT OF ANTITRUST CONSIDERATIONS

Confronted by unceasing and increasing demands for consumer protection, the FTC's primary problem in the 1970's will be where to direct its limited resources. This issue has been forcibly brought to the Commission's attention by a number of recent studies which have severely criticized the agency's allocation of resources and selection of cases in the consumer protection area.¹³⁶ The main complaint centers on the allegation that lack of planning has diverted the Commission's energies to cases of trivial import while fundamental problems are left unchallenged.¹³⁷ Although these studies have validly assessed the need for new approaches in determining the Commission's

¹³² See note 128 *supra*.

¹³³ Effective assertion of strictly contractual rights is severely curtailed by the financial condition and educational level of a substantial number of unsophisticated consumers who buy on such credit arrangements. . . .

Household Sewing Mach. Co., No. 8761 at 13 (FTC Aug. 6, 1969).

¹³⁴ Public policy, in terms of the concept of fair business methods, may well be moving in that direction. See Note, *A Case Study of the Impact of Consumer Legislation, The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 632 (1969). A number of states have limited the applicability of the doctrine in consumer transactions. See REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM, *supra* note 125, at 18.

¹³⁵ *FTC v. Gratz*, 253 U.S. 421, 438 (1920) (Brandeis, J., dissenting).

¹³⁶ See, e.g., REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 29; Cox, Fellmeth & Schulz, *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, 115 CONG. REC. 370 (daily ed. Jan. 22, 1969).

¹³⁷ This, of course, is not a new complaint in the FTC's experience. See note 42 *supra*.

priorities, it is regrettable that such criticisms have to a considerable degree, overlooked the many positive accomplishments of the agency. It is also clear that the necessary improvements cannot rest solely on a more efficient managerial structure or more elaborate planning staffs, important as such remedies are. The Commission must also devise an analytical framework in which the benefits of differing alternatives and cases in the consumer protection area may be systematically assessed.

Fundamental to such a reassessment is a recognition of the fact that the Commission's direct consumer protection activities had their origin in antitrust (which, in fact, is basic to consumer protection), and that many problems of the consumer do stem from competitive imperfections. This has clear implications for a selection of priorities in the area of the Commission's consumer protection responsibilities. Market structure should be an important consideration in such an analysis, for it determines the behavior of firms in an industry which in turn determines the quality of the industry's performance.¹³⁸ The Commission should give priority to consumer protection in those markets where industry structure indicates that performance, because of inadequate competition, may be marred by deception, fraud or other unfair trade practices, against which the consumer, having no real alternative, may be defenseless. Thus, oligopoly theory may well provide a significant analytical tool for recognizing important areas in which the Commission's consumer protection efforts should be brought to bear. The Supreme Court, from the early 1960's, has consistently afforded recognition to the problem of oligopoly power¹³⁹ in markets dominated by a few sellers. A similar recognition, *i.e.*, that economic structure may serve to identify problem areas, is long overdue in the field of consumer protection.

Economic theory postulates, and judicial opinion has accepted, the thesis that competition in markets of few sellers differs significantly from competition in markets comprised of many sellers.¹⁴⁰ In the oligopolistic market, the dominant sellers each have sufficient market power to influence prices. As a result, each will determine his price and

¹³⁸ R. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE* 16 (1964). Structural analysis of antitrust has received increasing judicial support. *See, e.g.*, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 592 (1967) (Harlan, J., concurring); *United States v. Provident Nat'l Bank*, 280 F. Supp. 1 (E.D. Pa. 1968).

¹³⁹ *See* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 *STAN. L. REV.* 285 (1967).

¹⁴⁰ *Id.* at 289. *See also* *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964).

output in light of the anticipated actions of his rivals.¹⁴¹ The concept of oligopolistic interdependence, therefore, postulates that it is in the self-interest of sellers with similar cost factors to charge identical prices, eventually arriving at an identical equilibrium price that will yield the largest return.¹⁴² In short, competition in the concentrated market is likely to emphasize nonprice competition while deemphasizing rivalry in price.¹⁴³ This emphasis on nonprice competition is especially likely with respect to consumer goods;¹⁴⁴ and significantly, such nonprice competition, emphasizing product differentiation, has had the tendency to reduce the ability of consumers to make knowledgeable choices among competing products.¹⁴⁵ The implications for the Commission's consumer protection activities are obvious.

Reliance on economic analysis which has been judicially accepted in the antitrust field would also enable the Commission to pinpoint those areas in which it would be appropriate under the FTCA to encourage the informative function of advertising.¹⁴⁶ The establishment of priorities for consumer protection could be greatly facilitated by identifying those markets in which the emphasis is on nonprice competitive strategies, as well as those industries in which competitive strategies rely primarily on advertising to secure market shares from rivals having identical products.¹⁴⁷

Recent consumer legislation such as the Fair Packaging and Labeling Act¹⁴⁸ and the Truth in Lending Act¹⁴⁹ manifest concretely the congressional realization that providing consumer information to facilitate rational purchasing will further antitrust objectives. In this connection, the Fair Packaging Act's declaration of policy expressly notes that "informed consumers are essential to the fair and efficient functioning of a free market economy." Similarly, the objectives of the Truth in Lending Act include the enhancement of competition

141 J. BAIN, *INDUSTRIAL ORGANIZATION* 30 (1959).

142 Brodley, *supra* note 139, at 289.

143 See Barnes, *Considerations Concerning a Public Policy Toward Administered Prices: A Compendium on Public Policy*, SENATE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS. 44-45 (Comm. Print 1963).

144 *Id.* at 45.

145 *Id.*

146 See *Alberty v. FTC*, 182 F.2d 36, 45 (D.C. Cir. 1950) (Bazelon, J., dissenting).

147 *E.g.*, consider the bleach industry.

Since all liquid bleach is chemically identical, advertising and sales promotion are vital. . . . These heavy expenditures [for advertising] went far to explain why Clorox maintained so high a market share despite the fact that its brand, though chemically indistinguishable from rival brands, retailed for a price equal to or, in many instances, higher than its competitors.

FTC v. Procter & Gamble Co., 386 U.S. at 572.

148 80 Stat. 1296 (1966), 15 U.S.C. § 1451 (Supp. IV 1969).

149 82 Stat. 146 (1968), 15 U.S.C. § 1601 (Supp. IV 1969).

among institutions engaged in the extension of credit.¹⁵⁰ Consumer information, in the view of Congress, may enhance the integrity of markets by: (1) more accurately directing the productive activities of the economy; (2) promoting effective competition by eliminating unfair practices; (3) assuring equality of opportunity for all efficient producers and distributors by eliminating irrationality in the market; (4) promoting effective price competition by minimizing consumer confusion; (5) channeling profits to the most efficient producers.¹⁵¹ Clearly, antitrust and those enforcement activities which may be described as direct consumer protection are complementary, a fact which must be recognized in any ordering of priorities in the consumer field. Such analysis, however, is valid only for setting broad objectives and identifying areas of particular concern. Having once selected, within a particular market, unfair practices of sufficient public interest to warrant intervention under the FTCA, the legality of the practice, which must be considered in a specific proceeding, should be judged by the tests of deception or capacity to deceive in light of previously developed precedents. Once the priorities for consumer protection have been determined, it would be self-defeating, as well as a circumvention of the express intent of Wheeler-Lea, to decide the question of violation by balancing the possible stimulus to competition, provided by confusing promotional claims which might benefit particular competitors, against the consumer's right to know.¹⁵² And in the broader perspective, the Commission, under the mandate of the FTCA, is undoubtedly the agency best suited to reconcile and complement consumer protection and antitrust objectives.

A final caveat should be entered. While considerable improvement in establishing the agency's priorities is undoubtedly desirable and necessary, a search for a purely mechanical and abstract interpretation of the Commission's mandate would be unrealistic. The individual approaches to the duty of discovering and making explicit "those unexpressed standards of fair dealing which the conscience of the community may progressively develop"¹⁵³ are, of necessity, unlikely to

¹⁵⁰ It is noteworthy that S. 387, one of the earlier "Truth-in-Packaging" bills, was introduced as an antitrust measure amending the Clayton Act. See STAFF OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., REPORT ON "TRUTH-IN-PACKAGING" (Comm. Print 1964).

¹⁵¹ *Id.*

¹⁵² For a seemingly contrary view that certain Commission rulings in the anti-deception area have unduly restricted new competitors and products, see G. ALEXANDER, *supra* note 28, at xiii.

¹⁵³ *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

be unanimous. Here, the last word may be left to Commissioner Thompson, who described the evolution of the concept of "unfair methods" as follows:

The history of the Federal Trade Commission is the story of the unfolding of a procedure and enforcement thereunder within the framework of an Act which gave extraordinary latitude to men who were just as human and normal as beings should be. Hence the wave-like advancement and recession in interpretation and enforcement of the Act."¹⁵⁴

¹⁵⁴Thompson, *supra* note 39, at 261.