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SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT: A CONTINUING PROCESS OF REDEFINITION*

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“Large powers and unhampered discretion seem to me the indispensable conditions of responsibility. Public attention must be easily directed in each case of good or bad administration, to . . . the man deserving of praise or blame. There is no danger in power if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured; if it be obscured it is made irresponsible.” Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887).

THOSE WHO DRAFTED the Federal Trade Commission Act knew what they were about when in 1914 unfair methods of competition in commerce were declared unlawful.¹ Yet, time, the coming of other generations, has dulled their clear purpose. As late as 1960 the very existence of the Federal Trade Commission as an enforcement agency of the nation's antitrust policy was challenged. A most distinguished scholar reported to the President-Elect:

* The opinions expressed in this article are the authors'. They do not necessarily represent those of the Federal Trade Commission.

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1. 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 41 *et. seq.* (1958). The pertinent part of the Act, Section 5, originally read “That unfair methods of competition in commerce are hereby declared unlawful.” However, some trade practices while unfair caused no demonstrable injury to competition; only the public suffered. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931). To remedy this Congress in 1938 amended Section 5: “Unfair methods of competition in commerce, and *unfair or deceptive acts or practices in commerce*, are hereby declared unlawful.” [Emphasis added.] This article will concern itself only with the scope and meaning of “unfair methods of competition.” See note 115, *infra*.

A basic problem of the Federal Trade Commission relates to its overlapping jurisdiction in the antitrust field with the Department of Justice Over the years, it is beyond question that the Antitrust Division of the Department of Justice has been more effective than the Federal Trade Commission. The grant of statutory authority to the Department of Justice is broader, although there are a few areas where it cannot reach practices that the Federal Trade Commission can handle. The sanctions that the Antitrust Division can invoke are far more powerful than those possessed by the Federal Trade Commission with the result that consent decrees can be better and more easily achieved by the Department of Justice.

The overlap in . . . these areas calls for correction. A sensible arrangement would be to transfer the antitrust activities of the Federal Trade Commission (not including its Robinson-Patman Act jurisdiction) to the Department of Justice. . . .²

So, too, the scope, the meaning of the simple sentence striking at unfair methods of competition has been subjected to a basic conceptual attack.³ At this late date the cry of usurpation of legislative powers has arisen,⁴ for the Commission has not limited its attack to those practices which the courts already have declared unlawful. Its corrective powers have been imposed upon one who induces another to

2. Landis, Report on Regulatory Agencies to the President-Elect, 51-52 (1960).

3. Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 90-98 (1961); Oppenheim, *Developments in Antitrust During the Past Year*, 17 A.B.A. ANTI-TRUST SECTION 33, 235-36 (1961). Cf. Remarks by Rufus E. Wilson, Chief, Division of General Trade Restraints, Federal Trade Commission, "Restraint of Trade Practices Under Section 5 of the Federal Trade Commission Act," before the Cleveland Chapter of the Federal Bar Association, Cleveland, Ohio, March 30, 1962.

4. "There is no general authority in the Commission to formulate codes of permissible business behavior or to introduce into the fabric of competitive regulation its personal predilections of what is good or bad for the economy. There is no general authority to label conduct as an unfair method of competition where Congress has spoken on the general subject but what it has said does not go as far as the Commission would like. For the Commission to do any of these things is not to reason by analogy or upon principle, but is to usurp legislative powers." Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 95 (1961).

The attack comes from laymen as well as the Bar. No more dramatic illustration presented itself recently than the headline of a prominent financial paper: "Exercise In Tyranny — The Federal Trade Commission Has Now Become A Threat To Freedom." Barron's, p. 1, March 19, 1962. The article commented on a speech by Federal Trade Commission Chairman Dixon which promised a careful Commission study of joint ventures. To Barron's it was this very device that enabled certain corporations to effectively compete in the field of synthetic fibers with the powerful E. I. duPont de Nemours & Co. The article concluded: "The U.S. is supposed to be a government of laws not men. Plainly the time has come for Congress to order this arrogant and dangerous bureaucracy to cease and desist." *Ibid.* Cf. notes 8, 9 *infra*.

Curiously, however, joint ventures have been the object of Sherman Act proceedings. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). See also, EATON, JOINT VENTURES, IN HOW TO COMPLY WITH THE ANTI-TRUST LAWS, 245 (Van Cise — Dunn ed. 1954).

do a wrongful act.⁵ Indeed, the Commission has challenged the mere use of economic leverage to obtain discriminatory concessions.⁶ Sharp criticism of these decisions has not been lacking: "There is no incipient unfair method of competition; no incipient price discrimination; no incipient exclusive dealing arrangement; no incipient merger. Only those acts are forbidden which fall within the four corners of the statutes passed by Congress."⁷

Surely one must view the comments of today as having come full cycle with those of fifty years past. Then Senator Brandegee said of the prospective effect of a Federal Trade Commission on the general populace: It will be ". . . nothing but a scourge and dose of spanish fly and cayenne pepper to irritate them . . . driving them to distraction.⁸ . . . [N]o benevolent despots are to be allowed to roam about with an eclectic commission to fix things so that they will run smoothly according to their notions of what may be 'ethical' or not 'anti-social' or for the 'public interest' or any of those 'goo-goo' phrases. This is a government of laws not men."⁹

A response was forthcoming. Senator Newlands, perhaps the most ardent and articulate advocate of this sweeping statute, answered: "I believe that immense benefit will come from making unlawful unfair competition; that it will protect the pygmies against the giants of business and that it will do more to open the lines of commerce than all other legislation that we have upon the statute books upon the subject."¹⁰

This article will probe in detail the legislative history of this Act nearly a half-century old. It will set out the judiciary's response to that history. Hopefully it will demonstrate the operational truth of the Congressional mandate to the Commission: At its narrowest point "unfair methods of competition" is a flexible administrative tool; it cannot be defined in terms of constants. More broadly, it is a recognition of an ever-evolving commercial dexterity and the personal impact of economic power as important dimensions of trade. Its underlying proposition is that a free competitive society must have some means of preventing that very freedom to compete from destroying our economic system.

5. *The Grand Union Company v. Federal Trade Commission*, 1962 Trade, Par. 70,224 (2d Cir. Feb. 7, 1962).

6. In the Matter of R. H. Macy & Co., Inc., Dkt. No. 7869 (Initial Decision, Oct. 26, 1961), appeal pending.

7. Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, at 97-98 (1961).

8. 51 Cong. Rec. 12218 (1914).

9. 51 Cong. Rec. 12734 (1914).

10. 51 Cong. Rec. 12939 (1914).

I.

THE LEGISLATIVE HISTORY OF "UNFAIR METHODS
OF COMPETITION."

A. THE DEMAND FOR ADDITIONAL LEGISLATION.

The beginning point in any study of the Federal Trade Commission Act ultimately must be with the year 1890 and the passage of the Sherman Antitrust Act.¹¹ For the first time the Congress manifested a national antitrust policy in response to the public's growing fear of industrial monopolies.¹² Acting through the courts the Department of Justice was charged by the Sherman Act with (1) attacking contracts, combinations and conspiracies in restraint of trade, and (2) striking at monopolization and attempts to monopolize.

It was not surprising that the Sherman Act did not significantly affect the business community for several years. "Big business in 1890, most writers agree, considered the Sherman Act 'impractical and unenforceable and hence innocuous.' This attitude might account in part for the lack of opposition in a Congress elected on the Republican high-tariff platform. The statute was passed with but one dissenting vote in the Senate and went through the House of Representatives by 152 to 72 at the first vote and by 240 to 0 in final form."¹³

Enforcement, when it finally came,¹⁴ was soon tempered by the "Rule of Reason."¹⁵ No longer was the holding in *United States v. Trans-Missouri Freight Ass'n.*¹⁶ the law of the land. Rather, the Supreme Court reversed itself in *Standard Oil*, adopting the dissenting opinion of Mr. Justice White who said in *Trans-Missouri*, ". . . it seems to me . . . impossible to construe the words 'every restraint of

11. President Benjamin Harrison signed the measure into law on July 2, 1890. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

12. I. WHITNEY, *ANTITRUST POLICIES*, 4-6 (1958).

13. *Id.* at 5. See also, *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

14. *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

15. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

16. Speaking for the court in *Trans-Missouri* Mr. Justice Peckham said: "The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade as provided for the language of the Act have been based upon the alleged presumption that Congress, notwithstanding the language of the Act, could not have intended to embrace all contracts, but only such contracts as were in *unreasonable* [Emphasis supplied] restraint of trade . . . [W]e are asked to read into the Act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language used. . . . If the law prohibits any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject." 166 U.S. at 340.

trade,' used in the act, in any other sense than as excluding reasonable contracts . . . such contracts were not considered to be . . . in restraint of trade . . . both in England and in this country, at the time the act [Sherman Act] was adopted."¹⁷

There could be no doubt of the import of the court's position, for it was the same Mr. Justice White who spoke for the majority. The "Rule of Reason" was to be a part of the Sherman Act. This the Congress understood only too well. Within twenty-four hours after the pronouncement of the "Rule of Reason" Senator Newlands said on the floor of the Senate:

The question therefore presents itself to us whether we are to permit in the future the administration regarding these great combinations to drift practically into the hands of the courts and subject the question as to the reasonableness or unreasonableness of any restraint upon trade. . . . to the varying judgments of different courts upon the facts and the law, or whether we will organize, as the servant of Congress, an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation?¹⁸

To Senator Newlands the answer was clear. On July 5, 1911, he introduced S. 2941¹⁹ and on August 21, 1911, a substitute bill of the same number.²⁰ Besides creating an interstate trade commission, both

17. 166 U.S. at 354.

18. 47 Cong. Rec. 1225 (1911). "I am attacking this system of turning over the administration of our legislation regarding interstate trade to the Attorney General's office or to courts, when we should create a great administrative tribunal like the Interstate Commerce Commission, charged with powers over interstate trade similar to those possessed by that tribunal regarding transportation . . . if such a commission had been organized 23 years ago when the antitrust law was passed, these vast accumulations of menacing capital would have been prevented, that all the advantages of combination of capital would have been secured without the attendant abuses, and that we would have been saved the economic wrench that is now to take place through the dissolution of these giant combinations and the restoration of their constituent elements." *Id.* at 1227.

19. S.2941, 62d Cong. 1st Sess. (1911). For text of this bill, see 47 Cong. Rec. 2444 (1911).

20. S.2941, 62d Cong., 1st Sess. (1911). For the text of this bill see 47 Cong. Rec. 2619-20 (1911).

At the time of the introduction of the substitute bill, Newlands commented: "The bill requires that all industrial corporations engaged in interstate trade shall make satisfactory statements as to capitalization, finances and operations as may be required by the Commission. Such corporations are to be known as United States registered companies."

"I was at first inclined following the views which I have frequently expressed to include a provision transferring the enforcement of the Sherman Antitrust Act from the Attorney General's Office to this commission for the reason that prior to the administration of the present incumbent the enforcement of the Sherman Act was fitful, subject to political influences, and likely to be affected by any political or financial exigency. But as the Attorney General's office is now proceeding . . . to break up the existing trusts, I thought it best not to complicate the work of the

bills provided for the federal registration of corporations. In addition, Section 10 of both bills stated: "The said Commission may at any time . . . revoke and cancel the registration of any corporation . . . upon the ground of either violation of any operative judicial decree rendered under an act to protect trade and commerce against unlawful restraints and monopolies, approved July 2nd, eighteen hundred and ninety . . . or of the use of materially unfair or oppressive methods of competition."

Though not destined to become law the bills indicated the anger of the Congress. They signaled a formal, exhaustive Congressional inquiry into both the role of the judiciary and the Attorney General. The legislatively declared antitrust policy had been thwarted.

On November 15, 1911, hearings began before the Senate Committee on Interstate Commerce on Senate Resolution 98²¹ for the purpose of reporting "what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce." During the three months of hearings a total of 103 witnesses were heard and approximately 2,800 pages of testimony were taken. On February 26, 1913, with Senator Cummins as the spokesman, the majority report summarized the economic philosophy and legal position of those who had been dissatisfied with the interpretation and enforcement of the Sherman Act.²²

new commission with the administration of the Sherman Act." 47 Cong. Rec. 2621 (1911).

The irony of the last quoted paragraph is that in recent years there has been agitation to transfer the Commission's anti-trust functions to the Department of Justice. See note 2, *supra*.

Two additional bills were introduced by Newlands:

(1) S.5485, 62d Cong. 2d Sess. (1912). According to Newlands it differed from the previous bill in two respects. (a) The Commission could aid the courts in carrying out decrees and in the dissolution and reorganization of corporations under the Sherman Act. (b) It also enabled the commission to make investigations on its own, on complaint, or at the request of the Attorney General; if a firm failed to heed the recommendations a report could be filed with the Attorney General. For the text of the bill, see 48 Cong. Rec. 2435 (1912).

(2) S.829, 63d Cong. 1st Sess. (1913); for text of bill, see 50 Cong. Rec. 163, 164 (1913). This was a bill resulting from the consideration by the Senate Interstate Commerce Committee of S.5485 during hearings held pursuant to S. Res. 98; see note 21, *infra*.

21. S. Res. 98, 62d Cong. 1st Sess. (1911). For text of the Resolution, see 47 Cong. Rec. 3225-26 (1911). The Senate was authorized to hold hearings concerning "what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce, and what changes are necessary or desirable in the laws of the United States relating to persons or firms engaged in interstate commerce." S. 829 (see note 20, *supra*) was a measure "perfected by the committee, but not as a measure having its favorable endorsement. No final vote was had in committee on it." 50 Cong. Rec. 163 (1913).

It should be noted that the two later bills (S.5485 and S.829) made no reference to "unfair competition."

22. S. Rep. No. 1326, 63d Cong., 3d Sess. (1913).

It is frequently asserted that the law cannot compel men employed in like business to compete with each other. There is a sense in which this is true, but it is only technically true. What is meant when we use the phrase 'maintaining competition' is maintaining competitive conditions . . . , when competitive conditions exist there will be actual competition.²³

This, the considered judgment of the Congress, had been neutralized by the "rule of reason," which, the report concluded, was the "present law of the land,"²⁴ and as such permitted the court to substitute its judgment in the place of Congress. Indeed, the report declared "whenever the rule [of reason] is invoked the court does not administer the law, but makes the law."²⁵ To the investigating committee it was ". . . inconceivable that in a country governed by a written constitution and statute law, the courts may be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to have."²⁶

For the Congress the "rule of reason" complicated an already existing and growing problem. The possibility of judicial drift away from the concept of freedom to compete had been increased by the swiftly changing business scene. The giant corporation had come of age; its potential impact on competition could not be measured. The Congress was concerned and sought a solution. Said the committee report:

[M]any practices in business have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in doubt respecting what is lawful and unlawful; but as the statute is now construed there . . . are many other practices that seriously interfere with competition and are plainly opposed to the public welfare concerning which it is impossible to predict with certainty whether they will be held due or undue restraints of trade.²⁷

. . .

The Committee further reports that if the legislation the general scope of which has been pointed out [a Federal incorporation law, specific trade practices to be declared unreasonable restraints of trade and some effort to be made to cope with evolving trade practices] is enacted, it will be very desirable to accompany such legislation with a measure establishing a com-

23. *Id.* at 3.

24. *Id.* at 10.

25. *Ibid.*

26. *Ibid.*

27. *Id.* at 12.

mission for the better administration of the law and its enforcement.²⁸

Two weeks after the Cummins report was published, Representative Morgan introduced the following bill:

Section 4: That every practice, method, means, system, policy, device, scheme or contrivance used by any corporation subject to the provisions of this act in conducting its business, or in the management, control, regulation, promotion, or extension thereof shall be just, fair and reasonable and not contrary to the public policy or dangerous to the public welfare. . . .

Section 5: That every corporation subject to the provisions of this act shall deal justly and fairly with competitors and the public, and it shall be unlawful for any such corporation to grant to any person or persons any special privilege or advantage which shall be unjust and unfair to others or unjustly and unreasonably discriminate against others. . . . or that shall be contrary to public policy or dangerous to the public welfare.²⁹

The Federal Trade Commission Act was not a calculated piece of legislative temporizing designed as a token offering to a single party's platform.³⁰ The debates and reports reveal careful study of all possible implications of the Act as well as detailed examples of substantial research and keen analysis. Republicans, Democrats, Progressives — all recognized the problems springing from a growing intricate economy. The solution found by the Congress indeed was a "new experiment along old lines" — an administrative agency (at least sixteen of which existed prior to 1900)³¹ to regulate business generally.

In the light of the developing refinement of franchise and licensing agreements, and joint ventures, the thought of Congress that

28. *Ibid.*

29. H.R. 1890, 63d Cong. 2d Sess. (1913). Morgan had previously introduced a similar bill "to create a Federal Commission with jurisdiction and power over our industrial corporations." This was H.R. 18711, 62d Cong. 2d Sess. (1912). Morgan asserted with respect to H.R. 18711, "So far as I know this was the first bill introduced in the House creating such a commission, and so far as I know I was the first to advocate in a formal speech in the House the creation of such a commission. On the 7th day of April 1913, the first day of the first session of the Sixty Third Congress I reintroduced this bill. The new bill is H.R. 1890."

Morgan declared "The failure of the Sherman Anti-trust law to accomplish what its authors designed it should accomplish, may be attributed to two things: First, to defects in the law itself, and second, to the lack of a proper administrative body to administer and enforce the law."

"The great political parties, through declarations made in national platforms are, I think, fairly committed to the commission plan." *Hearings Before the Committee on the Judiciary on Trust Legislation*, 63d Cong. 2d Sess., Ser. 7, pt. 1, 4. For a detailed discussion of H.R. 1890, see *id.* at 35-54.

30. Note 29, *supra*.

31. Final Report of Attorney General's Committee on Administrative Procedure, (1941), pages 8, 9.

business would become even more complex certainly seems to have been accurate.³²

Congress made its choice in the face of opinions (1) to amend the Sherman Act by making criminal specific trade practices;³³ (2) to enforce the already existing criminal provisions against individual officers of offending firms;³⁴ or (3) to dismantle the corporate giants.³⁵

B. THE RESPONSE TO THE DEMAND FOR LEGISLATION.

The Majority Bills. — Responding to the demand for additional legislation and for a Trade Commission, came Representatives Clayton and Covington and Senator Newlands. Each introduced bills that were to be approved by his respective body.

On January 22, 1914,³⁶ Representative Clayton introduced H.R. 12120. It was referred to the House Committee on Interstate and Foreign Commerce. Apparently there was some confusion as to the propriety of this referral,³⁷ for on April 13, 1914, Mr. Covington introduced H.R. 15613 which was sent to the House Judiciary Committee.³⁸ On the same day H.R. 12120 was submitted to the House, S. 4160 was introduced in the Senate by Mr. Newlands. The two bills which were successful in the House and Senate were H.R. 15613 and S. 4160.

While the two Trade Commission bills were in committee "an act to supplement existing antitrust laws against unlawful restraints and monopolies . . ." (later to become known as the Clayton Act) was before the House Committee on the Judiciary. In specific terms the Clayton bill struck harshly at specified trade practices, declaring them criminal.

The Trade Commission bills, however, contained no reference to "unfair methods of competition." Rather, each provided for a commission with four primary powers:

32. Note 27 *supra*.

33. H.R. Rep. No. 627, 63d Cong., 2d Sess., 8 (1914).

34. See remarks of Senator Borah, 51 Cong. Rec. 12030 (1914). "The objection to this proposition [the Trade Commission bill] is that we have a few men here who ought to be brought under the surveillance of the law and who ought to be punished."

The viewpoint of Senator Borah recently gained some acceptance in the publicized case of *U.S. v. Westinghouse Electric Co., et al.*, Trade Reg. Rep. (1960) Trade Cas., Par. 69,699 (E.D. Pa., March 24, 1960). However, those who received criminal sentences were not the very top executives of the firms. See also *U.S. v. McDonough Co.*, 180 F. Supp. 511 (S.D. Ohio 1959) where four officials of hand tool manufacturing concerns were each sentenced to ninety days in jail.

35. H.R. Rep. 533, part 7, at 2, 3, 63d Cong., 2d Sess. (1914).

36. 51 Cong. Rec. 2142 (1914).

37. S. Rep. No. 597, 63d Cong., 2d Sess., 8 (1914).

38. *Ibid.*

(1) To aid the Department of Justice in framing dissolution and divestiture decrees in Sherman Act cases.

(2) To receive annual special reports from corporations of a certain size.

(3) To investigate possible violations of the antitrust laws and report to the Attorney General.

(4) To make reports to the President or the Congress on the need for additional antitrust legislation.

The Stevens' Bill. — A substitute bill offered by Representative Stevens of New Hampshire and rejected in committee had provided for the creation of a uniform system of accounting and had declared unlawful "unfair and oppressive" competition.³⁹ In a minority report Stevens argued, "If we are to rely on the theory of competition to protect the public from large corporations, it is imperative that the Government shall see to it that competition is on fair and equal terms . . . [I have] not attempted to define unfair or oppressive competition. That is a question of fact to be decided by the commission the same way that the Interstate Commerce Commission decides what rates and practices of the railroads are unreasonable and unfair. Unless the Commission is to have some power to regulate competition, it would seem hardly worthwhile to abolish the Bureau of Corporations."⁴⁰

The Lafferty Proposal. — Mr. Stevens did not represent an extreme position. Representative Lafferty desired a more radical remedy.⁴¹ He blended illustrations with the general condemnations of "unfair or oppressive competition or unfair trade practices."⁴² He endeavored to sketch examples of "artificial" and "natural" bases for "substantially monopolistic power." Neither foundation was to be permitted to stand.

Illustrative of an "artificial" basis were: (1) different rates to carriers; (2) territorial price discrimination unjustified by differing cost; (3) bribery; (4) interlocking directorates which destroyed competition; (5) oppressive exclusive contracts, the seller having a substantial monopoly; (6) charging exorbitant prices where the seller has a substantial monopoly. These as well as "any other methods involving unfair or oppressive competition or unfair trade practices" were to be condemned by the proposed Commission.

39. H.R. 15660, 63d Cong., 2d Sess. (1914).

40. H. Rep. No. 533, Part 2, 1-2, 63d Cong., 2d Sess. (1914).

41. H. Rep. No. 533, Part 3, Appendix, 19-27, 63d Cong., 2d Sess. (1914).

42. *Id.* at 19-20.

Demonstrative of a "natural" basis were control of natural resources, or transportation facilities, or patent rights. Once the control was proved, the Commission was to frame a corrective cease and desist order. Failure to comply with the command empowered the Commission to seek corporate receivership in the Federal courts, a receivership that was not to be yielded until the monopolistic control challenged had been dissipated.

A Summary of the House Proposals. — The views of Representatives Lafferty and Stevens received but scant attention in the House. Their proposals were ruled out of order by the Chairman.⁴³ The majority favored a commission limited to investigatory and advisory functions, not one which could prevent "unfair and oppressive trade practices," or, indeed, could bring certain enterprises into receivership. Yet, considering the ultimate success of the dissenters, the remarks of Mr. Morgan are relevant:

The Covington trade commission is not modeled after the Interstate Commerce Commission, as a considerable portion of Congress believes. It is merely an enlarged Bureau of Corporations. It collates facts. It may or may not make its findings public; but whether its findings are made public or not, it cannot act on its findings. It may find evil practices and recommend correcting readjustments, but it cannot compel correction.

. . .

. . . there are at the present moment two roads open to the nation in meeting the trust problem. One offers the old method of leaving to the overcrowded courts unfitted for the business of administrative adjustments . . . the vast task of establishing rules of conduct for the larger businesses of the country. . . . The courts adjudicating particular cases under inflexible statutes, will forbid the form, and the nation will helplessly witness the prohibited form pass away and the substance of the evil continue.

If legitimate business is now to wait for Congress to catalogue all that is reasonable or unreasonable restraint and for the courts to apply the definitions to all new forms of combinations which business can and will invent, the device remaining as the one recourse will be sorry remedy for the chief problem of the nation.⁴⁴

The Senate. — June 5, 1914, saw what Mr. Morgan described as the "Covington bill" pass the House, and the "Newlands bill," S. 4160, reported favorably to the Senate by the Interstate Commerce

43. 51 Cong. Rec. 9059-9065 (1914).

44. 51 Cong. Rec. 8977 (1914).

Committee. Significantly, however, the Committee dramatically altered and strengthened the "Newlands bill." Unfair competition in commerce was to be unlawful.⁴⁵ Of this provision numbered section 5 of the amended bill, the committee report declared:

One of the most important provisions of the bill [S. 4160] is that which declares unfair competition in commerce to be unlawful, and empowers the Commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, . . .

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason as stated by one of the representatives of the Illinois Manufacturer's Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

. . .

It is believed that the term "unfair competition" has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices such as local price cutting, interlocking directorates and holding companies intended to restrain substantial competition.⁴⁶

The Committee report was clear; section 5 was to have no limited meaning. It was not merely a question of definition or no definition as feasible alternatives. If this legislation was to accomplish its purpose, definition would mean its death. The committee had defined the problem; the proposed commission would resolve it.

The Senate Debates. — "Unfair competition" had been narrowly construed at common law. Would this then rigid doctrine apply to its use in section 5? Senator Reed of Missouri answered: "'Unfair competition' does have a restricted meaning . . . the substitution of the goods of A for the goods of B."⁴⁷

45. S. Rep. No. 597, 63d Cong., 2d Sess. (1914). Later the "Covington bill" was referred to this same Committee which recommended that the "Newlands bill" be substituted for it.

46. *Id.* at 13, see note 37 *supra*.

47. 51 Cong. Rec. 12934 (1914).

Further, Mr. Reed did not doubt the fate of section 5 in the courts of that day: "I was asked what my position is. It is my position that if we employ the term 'unfair competition' as it is employed in this bill, without adding anything to it, the courts will adopt as the meaning of Congress that meaning which has been affixed to the term by all of the law dictionaries and by a great many legal authorities" [*i.e.*, "passing off"].⁴⁸

Mr. Pomerene added, "the phrase 'unfair competition' as contained in this bill would be restricted by the courts to such practices as were regarded as unfair competition at common law; and believing that, that it should have and would have that restricted meaning, I stated that I felt that it could be constitutionally defended."⁴⁹

To Senator Newlands, however, "unfair competition" had another, broader meaning. On the floor of the Senate he replied to Mr. Reed, ". . . The Senator is undoubtedly right . . . that at common law as shown by the numerous cases to which he referred, 'unfair competition' had a limited signification. Whilst admitting that, I contend that in both economics and law that term has become an elastic term, . . ."⁵⁰

Thus, the advocates of the "Newlands bill" conceded that at common law "unfair competition" described the offense known as "passing off." Yet, they argued, "in both economics and law that term has become an elastic term." Cited in support of this position was an article by William H. S. Stevens, later to become Assistant Chief Economist of the Federal Trade Commission, which specified certain practices comprehended by the term "unfair competition."⁵¹ Yet, then as now, economists did not receive honor from attorneys:

48. 51 Cong. Rec. 12936 (1914).

49. 51 Cong. Rec. 12995 (1914). Pomerene declared "if it were to have broader signification . . . then I should doubt its constitutionality because . . . it would be a delegation of legislative and judicial power." *Ibid.*

50. 51 Cong. Rec. 12024 (1914).

51. *POL. SCR. Q. XXVIII and XXIX* (June and Sept., 1914). Cited in the articles were the following unfair methods of competition:

- I. Local Price Cutting.
- II. Operation of Bogus "Independent Concerns."
- III. Fighting Instruments.
- IV. Conditional Requirements ("Tying clauses").
- V. Exclusive Arrangements.
- VI. Black Lists, Boycotts, White Lists, etc.
- VII. Rebates and Preferential Arrangements.
- VIII. Engrossing Machinery or Goods Used in the Manufacturing Process.
- IX. Espionage.
- X. Coercion Threats, Intimidation, etc.
- XI. Interference.
- XII. Manipulation.

It is interesting to note that in a book published subsequent to the passage of the Federal Trade Commission Act (STEVENS, *UNFAIR COMPETITION* (1917)), Stevens asserted at p. 217, "This study with its twelvefold classification by no means pretends to comprehend all of the unfair methods which have been and are being employed by various organizations."

Mr. Reed. These things, however, are not embraced within the terms of the bill under consideration.

Mr. Newlands. I gave an enumeration . . . of some of the practices which constitute unfair competition. You will find them treated under that head in the works of economists upon this new phase of industrial organization.

. . .

Mr. Reed. . . . The Senator said that these practices were referred to in the works of economists as unfair. I wanted to know if they were specified and defined in the decisions of the courts as unfair and illegal or if they are simply commented upon in the works of economists?

Mr. Newlands. Yes, while I can not speak with definiteness, you will find the words "unfair" and "oppressive" used in the decision of the courts in reference to certain practices.⁵²

From these arguments came the impetus for the change from "unfair competition" to "unfair methods of competition."⁵³ The sig-

52. 51 Cong. Rec. 11112-11113 (1914). Mr. Newlands' memory was subsequently refreshed and he and his colleagues inserted into the record countless cases which gave examples of "unfair competition." Most of these were Justice Department consent decrees. Paradoxically, the contested case frequently cited was *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1910) — the case announcing the rule of reason. The court in *Standard Oil* asserted that there was at least a "*prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by *new means of combination* [Emphasis supplied] which were resorted to in order that greater power might be added than would have arisen had normal methods been followed. . . ." *Id.* at 75.

Also cited with approval was *Nash v. U.S.*, 229 U.S. 373, at 375 (1913), Mr. Justice Holmes described "the restraint to be effected in the following ways among others: (1) by bidding down turpentine and rosin so that competitors could sell them only at ruinous prices . . . (4) by coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into; . . . (8) by attempting to bribe employes of competitors so as to obtain information concerning their business and stocks; (9) by inducing consumers by payments and threats of boycotts, to postpone dates of delivery of contract supplies and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market . . ."

As indicated previously these are but a few of a plethora of cases giving examples of what Congress considered to be "unfair methods of competition." But the socio-economic orientation of the Commission was elevated above its roots in the problems of the Sherman Act.

Mr. Stone: . . . This proposed trade-commission law is an experimental legislative enterprise upon which we are entering and it is far wider in the field it will cover than the interstate commerce law or the Sherman antitrust law or the Clayton bill. It deals with a far greater variety of subjects. Innumerable cases will arise under this statute, if it becomes one, forbidding unfair competition, wholly different in their facts and in the real principles involved than can possibly arise under the antitrust laws, under the interstate commerce law, or under the Clayton bill. 51 Cong. Rec. 13119 (1914).

53. "Mr. Hollis . . .

" . . .

" . . . If the junior Senator from Missouri is right in his claim that the words 'unfair competition' . . . [are] applicable only to cases of the substitution of one man's goods for another's — . . . I suggest — . . . that the words 'unfair' and

nificance of the amendment is debatable for, as Mr. Cummins said, after the phrase "methods of" was inserted between "unfair" and "competition," "In my judgment, these two phrases mean the same thing."⁵⁴

C. THE DEFINITION.

Industrial society changes its methodology from hour to hour in an effort to maximize profits. Inherently, legislation against the abuses of such a system must be able to cope with these variances. If it strikes at practices with rigid specificity, it may miss its mark. Conversely, broad legislation raises the spectre of the pure heart and the empty head. The Senate was not unaware of the problem:

Senator Sterling. . . . As I look at the language of that portion of this bill relating to unfair competition, I would be tempted to entitle it 'A bill to perpetuate uncertainty in business'.⁵⁵

Senator Reed. . . . If, however, the court should take the view that there is not to be given the restricted meaning, then I think we are turned loose in the broad field of conjecture, . . .⁵⁶

But, to the sponsors of section 5, with its prohibition against unfair methods of competition, trade is an undifferentiated changing whole. True, the wrongful nature of certain practices may be observed and legislated against. But, as a day-to-day matter, one remains confronted with the growing undifferentiated mass; section 5 with its prohibition against unfair methods of competition was an attempt to deal with the shifting mass. Senator Newlands put the matter this way:

. . . the Committee is of the opinion that this term is capable of interpretation by a commission just as thoroughly as the term "reasonable rate" by the Interstate Commerce Commission, as the term "unjust discrimination" by the Interstate Commerce Commission.

It is true perhaps that those words "reasonable rates" and "unjust discrimination" have been used . . . and had a fixed

'competition' be separated by some word that will not do them any harm, such as 'oppressive' or 'methods of' so that there will not be the particular label that has been attached in many cases to offenses such as substituting one man's goods for another." 51 Cong. Rec. 12145 (1914).

54. 51 Cong. Rec. 14768 (1914). It is interesting to note that the common law definition of "unfair competition" has been greatly expanded by the courts of today. One mechanism for this advance has been the doctrine of "prima facie tort." See *e.g.*, *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946). The plaintiff alleged that its published songs were purposefully ignored by the defendant in its song ratings broadcast to the public. The court held that a cause of action was stated.

55. 51 Cong. Rec. 12213 (1914).

56. 51 Cong. Rec. 12936 (1914).

significance which, perhaps, the term "unfair competition" has not yet gained. I mean to say the term "unfair competition" has not been used so frequently as conveying an idea as these other terms, but there must always be a time when the use of a phrase shall commence as indicating at law a certain thing.

Now, then the question is what unfair competition covers. It covers every practice and method between competitors on the part of one against the other that is against public morals, in my judgment, or is an offense for which a remedy lies either at law or in equity.⁵⁷

For Senator Newlands the term, "unfair methods of competition," was the very embodiment of elasticity. "My belief," he said, "is that this phrase will cover everything that we want, and will have

57. 51 Cong. Rec. 11112 (1914). Other Senators offered both abstract and operational definitions of unfair competition.

"Mr. Thomas: . . . This means that unfair competition under this law must be determined by the facts of each individual case, which may or may not become precedent for other cases either differing from or in many respects analogous to it." 51 Cong. Rec. 11181 (1914). Thomas was opposed to Section 5.

"Mr. Saulsbury: . . . it is my impression that under this act the commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers, and traders and probably prohibit many practices and methods which have not heretofore been clearly recognized as unlawful." 51 Cong. Rec. 11593 (1914).

"Mr. Williams: What is really meant in the bill when it says unfair competition is the unfair stifling of competition." 51 Cong. Rec. 12210 (1914).

"Mr. Cummins: . . . the words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise, just as the words 'restraint of trade' have grown and have been moulded to meet the necessities of the American people." 51 Cong. Rec. 12871 (1914).

Finally, Mr. Reed took up the gauntlet.

"The term 'unfair competition' as used in section 5 is hereby defined to embrace all those acts, devices, concealments, threats, coercions, deceits, frauds, dishonest practices, false representations, slanders of business, and all other acts or devices done or used with the intent or calculated to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monopoly." 51 Cong. Rec. 13224 (1914).

Mr. McCumber offered: "The words 'unfair competition' as used herein shall be construed to mean any acts or practices in trade or commerce which are intended or [are] the natural consequences of which are to stifle or destroy competition at any point." 51 Cong. Rec. 13101 (1914).

It is interesting to note that Senator Reed later accepted an amendment to his definition containing the language "and all other acts or devices whether of like nature with those herein enumerated or not, done or used with the intent, or the effect of which is to destroy or unreasonably hinder the business of another or prevent another from engaging in business." 51 Cong. Rec. 13312 (1914).

Senator Sutherland, an opponent of the bill listed seven different definitions of "unfair competition" as employed by the term's proponents.

- (1) Passing off.
- (2) All Sherman Act violations.
- (3) All violations of the anti-trust laws including interlocking directorates.
- (4) Acts which lead to monopoly, although not now seen as violative of the Sherman Act.
- (5) Acts against competitors for which a remedy lies in law or equity.
- (6) Acts against public morals.
- (7) Acts which shock the conscience of mankind.

According to Sutherland this was confusion compounded and thus the term 'unfair competition' could not be meaningfully employed. See remarks of Senator Sutherland, 51 Cong. Rec. 12984 (1914).

such an elastic character that it will meet every new condition that may be invented with a view to gradually bringing about monopoly through unfair competition."⁵⁸

During the twenty-four year life of the Sherman Act many trade practices had been subjected to court scrutiny. But they were viewed against the common law backdrop of "restraint of trade." That "unfair methods of competition" did not have such ancestral roots was freely admitted. Said Senator Newlands: "I was urging that there must always be a commencement for a legal term in the administration of the law, and that certainly in the evolution of the law we are not always confined to the terms that have existed in the past. The law itself can create a standard and can call upon an inferior tribunal to administer it."⁵⁹

One of the main attractions of the concept "unfair methods of competition" was that its meaningful content had yet to be defined. To Congress, the ancient weapon of "restraint of trade" had been blunted against the armor of the corporate giants. If true antitrust reform was to be successful a new approach seemed both necessary and inevitable. Again, Senator Newlands verbalized this conclusion: "Something must be left to human judgment; something must be left to human conscience in the determination of these questions and when you have organized a tribunal in such a way that it is composed of men of skill, education, training and experience and character, you get that machinery for the establishment of proper rules and standards."⁶⁰

Pragmatic analysis of changing economic patterns constituted the thrust of section 5. This its proponents repeatedly stressed. Nowhere in the debates did they state, suggest, or imply that "unfair methods of competition" should be restricted to Clayton Act or Sherman Act offenses. While the practices condemned by these statutes were clear examples of "unfair methods of competition," they did not delineate the periphery of the new standard; they were not intended to be *in perpetuum* a model to be followed with foolish consistency.⁶¹

The Congress understood the broad grant of power the Federal Trade Commission was to receive. Replying to Senator Sutherland, who questioned the constitutionality of the proposed delegation, Senator Cummins said: "He [Sutherland] seems to assume that words can

58. 51 Cong. Rec. 12024 (1914).

59. 51 Cong. Rec. 11108 (1914).

60. 51 Cong. Rec. 12980 (1914).

61. "Senator Newlands . . . if we attempted to define it [unfair competition] we would leave out numerous practices that ought to be prohibited, and particularly the protean forms of unfair competition that are likely continually to arise as one unfair practice after another is condemned by the law and by the courts." 51 Cong. Rec. 12938 (1914).

only receive significance or meaning through an interpretation of the courts; that unfair competition can not mean anything except what a court has said that those words mean. I entirely dissent from that. Our language is not made up by the courts; our language is made up in a hundred different ways. . . . No court ever attempted to limit the words 'unfair competition,' but many a court has declared that certain facts established in a legal proceeding constituted unfair competition. Business men are just as potent in determining what unfair competition means as are the courts; the writers who make our literature after observing the affairs of men, are just as influential in determining the meaning of unfair competition as are the courts."⁶²

Inherent in the concept of pragmatic analysis is the "Rule of Reason," which the Congress enacted into Section 5 of the Federal Trade Commission Act, but rejected as to the Clayton Act.⁶³ What the Congress did, however, was order the Commission to apply the Rule, not the courts.⁶⁴ Senator Cummins declared:

If the rule of reason — and I am not quarrelling with the rule of reason, because it must prevail everywhere — if the rule of reason is used to interpret the phrase "restraint of trade" likewise will the rule of reason be used to interpret the phrase "unfair competition."

I agree with the Senator from Rhode Island [Mr. Colt] that what may have been restraint of trade 50 years ago may not be considered restraint of trade now. . . .

. . .

62. 51 Cong. Rec. 12653 (1914).

63. ". . . Congress advisedly used the words 'may be' to introduce into these sections of the Clayton Act [2, 3, and 7] a standard of illegality stricter and of broader coverage than that found in the Sherman Act." OPPENHEIM, *FEDERAL ANTI-TRUST LAWS*, p. 20 (1959 Ed.).

64. "Mr. Clapp: Mr. President, the Senator from South Dakota [Mr. Sterling] is partly right and partly wrong. I do not think we could today, tomorrow, or perhaps in 50 years define all unfair practices; they will develop as we go along. Every effort to define unfair practices in the trade commission bill has had to conclude with the general broad statement 'and any other act calculated to destroy competition' . . . So I think this definition should stand there [in the trade commission bill]. On the other hand, I quite agree with the Senator that if there is any well known practice upon which there is fair agreement of opinion that it is an unfair practice, we should by law prohibit that and take it out of the 'twilight zone' definition power at the hands of the commission." 51 Cong. Rec. 14259 (1914). This comment was made before the Clayton Act went into joint House-Senate conference, and before the passage of the Federal Trade Commission Act. It would seem to point out that the compulsion on the Commission was to enforce the specificity of the Clayton Act. But this did not tie down the discretion of the Commission under Section 5. To the contrary, it made it easier for the commission to analyze the impact of novel practices.

"Mr. Clapp: . . . I am, however, in hearty sympathy, in fact it was the very purpose of my rising — with the proposition that those things that may be made plain, upon which we are all generally agreed, should be prohibited. We should prohibit them and then leave the commission with that territory to work in which we are unable to cover by specific cases." 51 Cong. Rec. 14259 (1914).

. . . [But] it is not necessary to consider such broad sociological industrial conditions and consequences as are necessary in determining whether a particular contract or combination is in restraint of trade.⁶⁵

Important as the eradication of the wrongful practice was the means by which it was to be accomplished. The legislators readily admitted the impossibility of bending straight in a single action the roller coaster of business. Said Mr. Thomas, "Mr. President, unfair competition, like fraud, is a creature of protean shapes. It assumes one attitude today and another tomorrow. As with fraud so it will be with unfair competition. In fraud there is a constant race between the rogue and the chancellor. In unfair competition there is going to be a constant race between the corporation and the Commission. . . ."⁶⁶

This justifiable humility and realism was coupled with a firm distrust of the capacity and willingness of the judiciary to regulate business. Senator Cummins said:

I realize that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the commission might do great harm. I realize that just as I realize that the trend of economic thought upon the part of some judges has done and will continue to do great harm or rather will continue to render ineffective to a degree a statute that it was believed by its authors would exterminate the monopolies then in existence and prevent the establishment of others.

I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people . . . than . . . upon the abstract propositions even though they be full of importance, argued in the comparative seclusion of our courts.⁶⁷

In sum, the concept of "unfair methods of competition" is an affirmation of a belief in a system. It is not the condemnation of particular practices. In our society conflicting self interests have been used as a bridge to economic progress. But there is inherent in our system a type of capitalistic dialectic. A point in time must come when one economic force may threaten to injure or destroy another. It was to be and is the function of the Federal Trade Commission under section 5 to step in at that moment. Then, a determination must be made as

65. 51 Cong. Rec. 12915 (1914).

66. 51 Cong. Rec. 11598 (1914).

67. 51 Cong. Rec. 13047 (1914).

to whether the methods employed could or did injure free competition. These are not the hollow aphorisms of the authors. They reflect the views of those who created the concept "unfair methods of competition," and determined that the administrative process was peculiarly suited to the maintenance of free competitive conditions.

But if the strength of the administrative process is its flexibility, its weakness is its uncertainty. There was therefore a great hesitation on the part of many senators to give such a malleable standard to an administrative agency. Questions of delegation of legislative powers aside, would it not be more efficacious and safe to spell out to the Commission the specific practices embraced by the term "unfair methods of competition"? This must be so, asserted the opponents of section 5 since its supporters freely admitted: "In order to get very complete specific information about unfair competition one has only to turn to the degrees of the Sherman Act. There will be found, precisely defined numerous examples of unfair competition."⁶⁸

The issue was joined: Would a broad delegation of power or specific legislation addressed to particular practices best cope with the trade problems of today and tomorrow. To the supporters of section 5, the answer, if not without its problems, was obvious. Said Mr. Robinson [Referring to the article by W. H. S. Stevens], ". . . But with the abandonment or suppression of these, new devices will be found by some dealers by means of which to oppress their competitors. While we could expressly in this bill place a specific inhibition against the 11 forms of 'unfair competition' as classified by Mr. Stevens, still it seems best to make the statute broad enough to cover all forms which may hereafter be adopted or devised, as well as those now pursued and regarded as most objectionable."⁶⁹

While the Federal Trade Commission Act was debated on the Senate floor, the Judiciary Committee of the Senate was considering the Clayton Act with its provisions against particularized practices.⁷⁰ Thus, the conflict between specificity and flexibility was real and immediate. Consider the comments of these legislators:

68. *E.g.*, See 51 Cong. Rec. 11228-11230 (1914).

69. 51 Cong. Rec. 11231. Senator Borah asserted that Senator Newlands had cited Stevens' article in support of his contention that unfair competition had a well defined and well understood meaning. But Borah took note of the fact that Stevens had opened his article by declaring that:

"'Unfair competition' is a term either difficult to define or explain. To different individuals, it connotes different things. The lawyer's view of unfair competition for example is based upon the statutes and the decisions of the courts; that of the economists upon economic consequences and results." 51 Cong. Rec. 11300 (1914). Borah wanted a national incorporation statute and specific amendments to the Sherman Act rigidly enforced. See remarks of Senator Borah, 51 Cong. Rec. 11302 (1914).

70. S. Rep. No. 698, 63d Cong., 2d Sess. (1914).

Mr. Hollis. If you make a rigid definition applicable to everybody in the United States you will stop some things which you would choose under some circumstances to encourage if you could only look far enough into the unknown, and some things which you would like to stop will slip through the meshes of your definition. The definitions in the Clayton bill which the house has passed are subject to this criticism.⁷¹

Mr. Newlands. . . . the Judiciary Committee of the Senate has been in session for weeks on this subject and the output is only two individual cases of unfair practice, it is an evidence of the fruitlessness of an attempt to specifically define each practice. . . . there must be employed some general phrase, as has been the custom of the law from time immemorial to cover acts which it is the intention of the law to condemn.⁷²

Indeed, Mr. Newlands was near cavalier in his disdain for the Clayton Act:

. . . It [Congress] can if it chooses, taking the view that is entertained by the Interstate Commerce Committee conclude that section 5 covers all the various practices that in the common vernacular are termed unfair competition and having come to that conclusion, the Judiciary Committee can if it chooses, leave out all reference to specific practices which are to-day regarded as unfair competition; or they can put them in, according to their pleasure.⁷³

But the advocates of specific legislation did not lose the day completely. The driving force behind the Clayton Act was not the desire to fill a purported constitutional void in section 5. The Clayton

71. 51 Cong. Rec. 12147 (1914) ; Hollis had stated previously :

"Two ways of regulating competition have been proposed. One is the method provided in section 5 of this bill. The other is to define one by one, the various practices and make each a criminal offense. . . ."

" . . . It is here that the members of the Interstate Commerce Committee and the members of the Judiciary committee disagree . . ."

"(a) It is impossible to frame a set of definitions which embrace all unfair practices. The best we can do is define those which we know to be unlawful from the decisions and decrees of the courts under the Sherman Act. The list of these is so formidable that no draftsman has yet ventured to enumerate more than a small fraction of them in any bill introduced in the Congress. . . . With each new 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."

Cf. Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 98 (1961).

"Where administration discloses defects or limitations in the laws drafted by Congress with which the techniques of interpretation are unable to cope, the remedy is to request supplemental legislation from the elected representatives of the people who under our system of government, are the final arbiters of our national policy."

72. 51 Cong. Rec. 12939 (1914).

73. 51 Cong. Rec. 12030 (1914).

Act was passed because there was heated agitation against specific trade practices.⁷⁴ Neither the proposed Trade Commission nor the judiciary was to be given discretion as to the legality of the questioned practices.⁷⁵ Of this the legislative history leaves no doubt.⁷⁶

The Senate Judiciary Committee in its original report on H.R. 15617 struck the criminal provisions of section 2, (price discriminations); section 4 (exclusive and tying contracts); section 8 (holding companies); section 9 (interlocking directorates [a criminal provision was added to the amendment with respect to interlocking directorates of common carriers]). Section 3 (arbitrary refusal to sell gas, oil, etc. to a responsible firm or individual) was struck in its entirety. Between the time of submission of the report and its actual debate on the floor of the Senate, the Federal Trade Commission Act was passed. On August 17, 1914, Senator Culberson, the author of the Senate Committee report asserted:

[W]hen the Committee on the Judiciary made its report on this bill, they proposed a number of amendments to Section 2. Since then the Federal Trade Commission bill has passed the Senate and is now in conference. Under that bill all questions affecting unfair competition are to be submitted to that tribunal. I am now authorized by the Committee to abandon the amendments to Section 2 and to move in lieu thereof that the entire

74. "Mr. Clapp . . . Mr. President, while the definition of unfair competition is, I believe, broad and sufficient, if properly interpreted what objection can there be to taking those things we all clearly agree fall within the purview of unfair competition, and prohibiting them, declaring a violation of the prohibition to be a crime, and seeking to punish the crime with a penalty? And to the extent to which we define any particular offense we withdraw that question from the judgment of the Commission." 51 Cong. Rec. 14257 (1914).

Clapp prefaced his remarks by asserting:

I voted for the Trade Commission bill. I did it under a strong sense of doubt as to the effectiveness of that measure. In that measure we provided that unfair competition should be the test. I voted against the various efforts to define unfair competition, because wherever the attempt is made the effort always had to conclude with the general statement that it shall not exclude anything else that is unfair competition. 51 Cong. Rec. 14257 (1914).

When H.R. 15657 (the Clayton Act) was reported to the House Section (2) (Price Discrimination), Section (3) (Arbitrary refusal on the part of a mine owner to sell his product to a responsible purchaser), Section (4) (Exclusive dealing), Section (8) (Stock acquisitions) made those individuals or firms who violated these sections "guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$5000, or by imprisonment not exceeding one year, or by both in the discretion of the court." (H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914).)

The bill passed the House — with these provisions contained therein (51 Cong. Rec. 9911 (1914).) Section 3 was entirely eliminated and the criminal provisions were stricken out by the Senate Committee on the Judiciary.

"This was done because it was thought best especially in view of the experimental stage of this legislation, that the harshness of the criminal law should not be applied, but that the enforcement of the section should be given to the Federal Trade Commission." See S. Rep. 698, 63d Cong., 2d Sess., 43-48 (1914).

There was violent debate on the floor of the Senate and House over the criminal provisions of the Clayton Act; see note 77, *infra*.

75. See note 74, *supra*.

76. *Ibid*.

Section 2 be stricken out, for the reason that the general subject embraced in that section can be dealt with by the Federal Trade Commission, as provided for in the trade commission bill.⁷⁷

The Senate struck sections 2, 3 and 4. Paragraph 8 of the House bill was left substantially intact. Removed from section 9 of the House bill was the paragraph relating to interlocking directorates. When the bill went into conference in this rather mutilated condition, sections 2, 4 and 9 were restored. The conference report was then debated in the Senate and the House.

There were violent reactions on all sides. One member of the House declared: "The conferees without authority, in my opinion, have stricken from the bill the penal clauses of its more important sections The flimsy excuse for this unpardonable surrender is that these vicious and harmful practices are to be dealt with by the Federal Trade Commission. . . . If the severe punishments which the House bill provided for the acts and practices it prohibited are to be eliminated, because the Federal Trade Commission is expected to exercise jurisdiction over them, why confuse the issues by general prohibition of unfair practices in the Trade Commission bill and provisions in this bill denouncing certain specific acts and practices with no provision for their punishment."⁷⁸

Representative Stevens of Minnesota, however, saw the problem more acutely: ". . . by prescribing these definitions of unfair competition in this bill you are liable to compel the Supreme Court to hold that these are the only acts or transactions which Congress has defined as unfair competition, while there are three times as many other classes of unfair acts over which the Federal Trade Commission would or ought to have any jurisdiction."⁷⁹

The issue of penal versus civil punishment probably was an illusory one. In all likelihood, the criminal provisions were destroyed for two reasons: (1) the experimental nature of the legislation; and (2) the realization that any criminal statute [such as the Sherman Act] would be construed strictly thereby hampering enforcement of the statute.⁸⁰

77. 51 Cong. Rec. 13849 (1914). Section 4 was restored with a criminal penalty. The penalty was later eliminated.

78. Remarks of Mr. Mondell, 51 Cong. Rec. 16327 (1914).

79. 51 Cong. Rec. 16330.

80. Senator Walsh. "Briefly it was contended that if penalties were to be imposed the acts condemned and the conditions stamping them as criminal must be carefully and precisely defined in the statute and that the ingenuity of the legislator in framing the statute might not equal that of the adroit rogue in devising other methods of competition through which to crush a rival. It was thought the better plan to denounce all forms of unfair competition and authorize the commission to deal with each particular case as it arose. Moreover, it was found no easy task to

The Congress with deliberate purpose provided the means for a two-pronged attack against harmful trade practices. First, it created the pliable weapon of section 5 which could be applied to changing business mores. Second, the Congress created a formidable weapon designed to combat named, recognized evils. There was and is consistency in the Congressional scheme.

There are those who argue, however, that section 5 may only be used to fill technical omissions of the Clayton Act.⁸¹ It may not be invoked under its own tests against the particularized practices of the Clayton Act [*i.e.*, price discrimination, exclusive dealing].⁸² From the Congressional debates they cull the remarks of Representative Floyd:

Your conferees believed that in dealing with these contractual relations, the Supreme Court having held that Congress has the power to declare null and void any contract that substantially interfered with interstate commerce, but that the courts have no such power in the absence of an act of Congress condemning them, such contracts will be upheld in the future, not only by the commission, but by the courts until the legislative power of this government declared them to be unlawful.⁸³

Mr. Floyd had addressed himself to a single point, the quantum of proof needed to condemn the practices attacked by the Clayton Act.⁸⁴

frame a statute which would reach the case of a plundering monopolist. . . . but not be oppressive to a struggling industry contending for trade against a competitor enjoying . . . monopoly . . . or unlimited capital. . . ." 51 Cong. Rec. 16145 (1914).

81. See Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts*, 50 MICH. L. REV. 821, 835-50 (1961).

82. Senator Chilton was one of the Senate conferees and his comments are of particular interest on this issue.

I want to say in passing . . . when this Congress approached the subject of trusts there were two theories. One was to create a trades [sic] commission to which should be referred all of those embryonic stages of restraint of trade and monopoly which had not developed far enough to come within the provision of the Sherman Antitrust law. Another was to define them item by item, so that the courts in administering them could from the definition in the statute determine whether or not the facts brought the case within the provisions of the law. So far as this Senate is concerned that battle was fought out in the discussion of the Trades Commission bill, and when that bill was passed it determined the general provision that the Trades Commission, subject to review by the courts, should determine what was fair and what was unfair competition. 51 Cong. Rec. 15999 (1914).

Cf. "Only those acts are forbidden which fall within the four corners of the statutes." Handler, *Recent Anti-Trust Developments*, 71 YALE L.J. 75, 95 (1961). There seems to be some perception in Mr. Handler's criticism of the "incipiency" doctrine. Certainly that doctrine loses much of its value as an analytical tool when confronted with any subtle trade arrangement. We would suggest that Mr. Handler's view is sound. But his "four corners of the statutes passed by Congress" may also be arbitrary and more unrealistic. We would simply suggest as an alternative that business facts be analyzed for their *actual or potential impact* on the competitive system.

83. 51 Cong. Rec. 16318 (1914).

84. *Ibid.*

As a member of the House-Senate conference on the final bill he was explaining the meaning of the phrase "may be to substantially lessen competition."

Senator Culberson, also a member of the conference, however, defined the precise relationship of the Federal Trade Commission Act to the Clayton Act in an exchange with Senator Borah, a leading opponent of the proposed legislation:

Mr. Borah. Do I understand the supposition is that the trade commission under section 5 will only have jurisdiction of such forms of unfair competition as may be turned over to its jurisdiction by some express statute? . . . So it would not be necessary in order that the trade commission might have jurisdiction of this particular section that it might be specified in this statute that it shall have jurisdiction of it.

Mr. Culberson. This bill as reported by the conferees did not rely entirely upon the definition in section 5 of the trade commission act, but these particular acts in sections 2, 3, 7, and 8 were expressly denounced as unlawful and their enforcement was placed in the hands of the three commissions [Interstate Commerce Commission, Federal Reserve Board, and Federal Trade Commission] where applicable respectively.

Mr. Borah. But if the Trade Commission as created should conceive that anything in the commercial world constituted unfair competition, it could take jurisdiction of it and deal with it, could it not?

Mr. Culberson. I think so, under that act. But the conferees did not see fit to leave that to the discretion of the trade commission.

. . .

Mr. Borah. . . . but suppose we had not designated and defined these particular acts to be unlawful, what we conceive to be unfair competition; suppose we had omitted them from the bill entirely, the Trade Commission as created, if then they had come within its jurisdiction, could have dealt with them. So we are simply assuming that possibly they might not take this view of it.

Mr. Culberson. I think the position of the Senator is the correct view, Mr. President.⁸⁵

The problem has been that the Federal Trade Commission Act, the Sherman Act and the Clayton Act have been perceived as intimately connected. In truth, the Commission Act was a completely

85. 51 Cong. Rec. 15829 (1914).

experimental piece of legislation. Its dependence on the Sherman Act was an accident of time.

The Federal Trade Commission Act is not the humble servant of either the Clayton Act or the Sherman Act. To make these statutes one fabric is to confuse the purpose of the legislators. To be sure, the goal of each was the same — to preserve a place for competition in a free society. But here a difference in procedure amounted to a difference in substance.

Today we are aware of the psychological impact of economic force. The preservation of our business system was not to be entrusted solely to the parched pages of a petition for certiorari. Within the boundaries of due process, the jurisdiction of the Commission was to be all embracing.

II.

DELEGATION.

“Unfair methods of competition” was admittedly a broad mandate to give an administrative agency. In the words of Professor Jaffe, the Federal Trade Commission was “a landmark in legislation because it subjected business in general rather than a limited area such as transportation, gas, or electricity to administrative process.”⁸⁶

In principle the grant of a broad mandate recently was questioned by a leading jurist, Judge Friendly.⁸⁷ To him a degree of specification is necessary if the administrative process is to coexist with the democratic process. Many years ago similar thoughts were expressed concerning section 5 and its prohibition against “unfair methods of competition.” Said one member of Congress:

It seems to me that conceding the point of view that it [unfair competition] means what the law books say it means and nothing more than [ed. that] we have conferred judicial power upon the commission. If it is not to be restricted to that [passing off] it leaves the commission an unbounded field to operate in declaring what shall constitute unfair competition and in that view we have devolved legislative power upon that body.⁸⁸

Another member argued:

Observe there is not a single line in the bill defining what as a matter of law constitutes unfair competition. By the language of the bill just quoted, there is conferred upon a board

86. JAFFE, *CASES ON ADMINISTRATIVE LAW* 10 (Preliminary Edition, 1953).

87. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 HARV. L. REV. 1055 (1962).

88. 51 Cong. Rec. 12651 (1914) (Remarks of Senator Sutherland).

of five men the power to determine, in accordance with their own standards and their own lights, their own opinions, what is fair and what is unfair competition.

Does the Senator think that such arbitrary all embracing power can be conferred upon a mere board of men without violating the provisions of the Constitution which insure to every citizen . . . the right to be governed by the rules of law . . . and not under the decrees of individuals or boards.⁸⁹

Despite these colloquies the Commission was not to wear a set of blinders and ignore the past. It had the Clayton Act as a ready reference. Yet, it was not to be held tight by the bonds of judicial stare decisis, or specific legislative fiat. Otherwise it would be an administrative tribunal functioning without the flexibility of the administrative process. Senator Cummins answered those who felt that section 5 unconstitutionally delegated legislative power to the Commission:

The Senator from Utah finds in the proposed legislation either a delegation of judicial power or a delegation of legislative power. . . . The Senator declares and with his general declarations I have no quarrel whatsoever; . . . that the fact of the violation of the law is a judicial function; that the declaration of what rule shall guide a particular person or corporation in its future conduct is a legislative function

Its [the Commission] sole function is to determine the fact whether a given practice, a given method is unfair competition.⁹⁰

If Congress had merely interdicted particular practices as illegal per se, there would be no need for the administrative process. Such legislation would amount to an assertion that no matter what business conditions existed, certain practices were evil. The Federal Trade Commission would then simply exist as a branch of the executive. It was to avoid this very result that specific legislation was framed broadly and that section 5's scope was made broader still.

Thus, if the Federal Trade Commission is to exist at all, its discretion in examining and declaring trade practices to be unfair methods of competition must be left largely unhampered. If this freedom is stifled then the courts can regulate competition as efficiently as the Commission.

89. 51 Cong. Rec. 11112 (1914).

90. 51 Cong. Rec. 12916 (1914).

III.

JUDICIAL REVIEW.

The relationship of the judiciary to this new agent of the Congress was described by Henderson, in his classic work, *THE FEDERAL TRADE COMMISSION*:⁹¹

An administrative officer, however, like a jury, may in a given case act upon an erroneous interpretation of the law which gives him authority; or he may base his decision upon factors to which he was not intended by the legislature to give weight; or he may adopt a procedure which deprives interested persons of the opportunity to bring relevant facts or arguments to his attention. To meet such cases, court review must be provided, unless some paramount social interest renders it impracticable. Unless the very purpose of administrative action is lost sight of, however, the review will be restricted to questions of this character, and will not extend to any issue of fact or conduct which was entrusted to the official in question on account of his supposed technical experience or capacity for sound practical judgment. It would be absurd for a court to consider *de novo* the engineering questions involved in a determination of the Chief of Engineers of the Army that a bridge is an unreasonable obstruction to navigation, or of the medical authorities in the Bureau of Immigration that an alien has a communicable disease, or of the Interstate Commerce Commission that a rate is likely to bring a return of 6 percent. Whether these are analytically questions of law or questions of fact, the very purpose of the legislature was to create a competent expert tribunal to decide them, and this purpose is clearly defeated if a court proceeds to substitute its lawyers' judgment for the judgment of such a tribunal.⁹²

The time came to test the relationship, for the courts to interpret section 5 of the Federal Trade Commission Act. The first case to

91. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924).

92. *Id.* at 97. Senator Cummins said of judicial review: "Is there any difference between a finding of unjust discrimination and like finding of unfair competition? Is there any reason why a court should be given a broader jurisdiction or a greater right in reviewing the order of the trade commission, in finding one guilty of unfair competition, than there is for giving the court a similar jurisdiction in reviewing the finding of the interstate commerce tribunal that the defendant had been guilty of unjust discrimination? I can conceive no reason." 51 Cong. Rec. 13006 (1914).

Specifically the Senator argued ". . . If the court should find upon the conceded facts there was no unfair competition, it would have the right to do it . . . If it should find that notice had not been given as required by the law . . . If it were to find that the commission acted arbitrarily, without any evidence to warrant its finding, it would annul the order of the commission. If, however it found that the commission had acquired jurisdiction in the way pointed out by the law, and that there was fair, substantial evidence to sustain the order as to unfair competition, it would not substitute its judgment for that of the commission with respect to the sufficiency of the proof in establishing unfair competition." 51 Cong. Rec. 13007 (1914).

come before the Supreme Court was *Federal Trade Commission v. Gratz*.⁹³ Supported by substantial evidence these were the facts found by the Commission as stated by Mr. Justice Brandeis in his dissenting opinion:

Cotton, America's chief staple, is marketed in bales. To bale cotton, steel ties and jute bagging are essential. The Carnegie Steel Co., a subsidiary of the United States Steel Corporation, manufactures so large a proportion of all such steel ties that it dominates the cotton-tie situation in the United States and is able to fix and control the price of such ties throughout the country. The American Manufacturing Co. manufactures about 45 per cent of all bagging used for cotton baling; one other company about 20 per cent; and the remaining 35 per cent is made up of second-hand bagging and a material called sugar-bag cloth. Warren, Jones & Gratz, of St. Louis, are the Carnegie Co.'s sole agents for selling and distributing steel ties. They are also the American Manufacturing Co.'s sole agents for selling and distributing jute bagging in the cotton-growing section west of the Mississippi. By virtue of their selling agency for the Carnegie Co., Warren, Jones & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country, and thereby is was in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Co. A great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing states were many times unable to procure ties from any other firm than Warren, Jones & Gratz. In many instances Warren, Jones & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Co. in order to procure a sufficient supply of ties.⁹⁴

The Court of Appeals had set aside the Commission order "solely on the ground that it was without authority to determine the merits of specific individual grievances," and that "the evidence failed to show that the practice complained of (although acted on in individual cases by respondents) had become their 'general practice'."⁹⁵

On an issue raised neither before the Commission nor before the Court of Appeals the Supreme Court decided the case.⁹⁶ The

93. 253 U.S. 421 (1920).

94. *Id.* at 440.

95. *Id.* at 441. See, *Federal Trade Commission v. Gratz*, 258 Fed. 314 (2d Cir. 1919).

96. 253 U.S. at 440.

Commission's complaint was held to be insufficient. Mr. Justice McReynolds speaking for the Court declared:

If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist — the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.

The words "unfair methods of competition" are not defined by the statutes, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.⁹⁷

To this Mr. Justice Brandeis replied dissenting:

The complaint did not set out the circumstances which rendered this tying of bagging to ties an unfair practice. But this was not necessary. The complaint was similar in form to those filed with the Interstate Commerce Commission on complaints to enforce the prohibition of "unjust and unreasonable charges" or of "undue or unreasonable preference or advantage" which the act to regulate commerce imposes. It is unnecessary to set forth why the rate specified was unjust or why the preference specified is undue or unreasonable because these are not matters of law but of fact to be established by the evidence So far as appears neither this nor any other court has ever held that an order entered by the Interstate Commerce Commission may be set aside as void, because the complaint by which the proceeding was initiated, failed to set forth the reasons why the rate or the practice complained of was unjust or unreasonable; and I can not see why a different rule should be applied to orders of the Federal Trade Commission issued under Section 5.⁹⁸

. . . .

As Standard Oil rebates led to the creation of the Interstate Commerce Commission, other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission. It was hoped that,

97. *Id.* at 427-28.

98. *Id.* at 431.

as the former had substantially eliminated rebates — the latter might put an end to all other unfair trade practices, and that it might prove possible thereby to *preserve the competitive system. It was a new experiment on old lines, and the machinery employed was substantially similar.*⁹⁹ [Emphasis added.]

Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the commission In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of a century earlier, when by the act to regulate commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage.¹⁰⁰

Indeed, Mr. Justice Brandeis recognized that “the history of combinations has shown that what one may do with impunity, may have intolerable results when done by several in cooperation. Similarly, what approximately equal individual traders may do in honorable rivalry, may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where there is inequality of resources.”¹⁰¹ Mr. Justice Brandeis would have reversed the Court of Appeals and sustained the Commission’s order.

With a majority of the Court to support him, Mr. Justice McReynolds three years later amplified his earlier statement in the *Gratz* case. In *Federal Trade Commission v. Curtis Publishing Co.*,¹⁰² the Court considered the legality of a magazine company’s method of distribution. At issue was a condition of exclusivity which Curtis extracted from its distributing agents. Because the agreement in question was one of agency and not of contract, the Court dismissed the Clayton Act charge of the complaint. *But it went on to consider the practice as an unfair method of competition under Section 5 of the Federal Trade Commission Act.*¹⁰³ For the Court Mr. Justice McReynolds said:

99. *Id.* at 434.

100. *Id.* at 436-37.

101. *Id.* at 438.

102. 260 U.S. 568 (1923).

103. This fact was considered significant in *Grand Union Co. v. Federal Trade Commission*, Trade Reg. Rep. (1962 Trade Cas.), Par. 70,224 at 75,848 (2d Cir. Feb. 7, 1962).

The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as a proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors that their appointment and limitation amounted to an unfair trade practice. And such practice can not reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

Effective competition requires that traders have large freedom of action when considering their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful, and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute.¹⁰⁴

Three months later Mr. Justice McReynolds once more spoke for the Court in *Federal Trade Commission v. Sinclair Refining Co.*¹⁰⁵ The Commission had challenged, under the Clayton Act and the Federal Trade Commission Act, agreements by gas station operators to use pump equipment supplied by Sinclair below cost solely to pump the Sinclair gasoline. Holding that the agreements did not forbid the dealers from dealing in the commodities of a competitor, the Clayton Act count was dismissed. Of the Federal Trade Commission Act charge, the Court held:

Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud or oppression. *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427. It has been openly adopted by many competing concerns. Some dealers regard it as the best practical method of preserving the integrity of their brands and securing wide distribution. Some think it is undesirable. The devices are not expensive (\$300 to \$500), can be purchased readily of makers and, while convenient, they are not essential. The contract, open and fair upon its face, provides an unconstrained recipient with free receptacle and pump for storing, dispensing, advertising and protecting the lessor's brand. The stuff is highly inflammable and the method of handling it is important to the refiner. He is also vitally interested in putting his brand within easy reach of consumers with an

104. 260 U.S. at 581-82.

105. 261 U.S. 463 (1923).

ample assurance of its genuineness. No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads.

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 was to advance the public interest by securing fair opportunity for the play of contending forces ordinarily engendered by an honest desire for gain and to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.¹⁰⁶

Commenting upon the *Gratz* and *Curtis Publishing Co.* cases Henderson wrote:

. . . If the Commission is, by these decisions, shorn of all power to exercise administrative discretion in matters of unfair competition or of restraint of trade and monopoly, it has become little more than a subordinate adjunct of the judicial system. Perhaps, on the other hand, the language which I have quoted will be held to mean merely that it is for the courts to decide, ultimately, the limits within which practices may reasonably be held by the Commission to be unfair, or to substantially lessen competition or tend toward monopoly. This is substantially the view taken by corresponding provisions of the Interstate Commerce Commission Act.¹⁰⁷

Time, the development of the administrative process, the growing complexity of business all allowed the judiciary to fully consider the precise limits of its early decisions. No sudden nod eliminated *Gratz*;

106. *Id.* at 475-76. One critic said of this decision: "The Supreme Court considered the legality of such tying techniques twenty-four years ago, and upheld them, in a supremely unrealistic opinion by Justice McReynolds. The case has since been qualified, but not overruled, and remains one of the fixed points determining the organization of the oil industry. The *Sinclair* case concerned the practice of leasing tanks and pumps to retail dealers on condition that they would use the equipment only with gasoline supplied by the lessor. This, the Court said, did not oblige the operator of the filling station not to deal in the gasoline of a competitor of the major. He was always free to buy or lease another pump, which was not expensive, and from such a pump he could dispense gasoline supplied by someone else. The Court's point ignores the reality. It is not the cost of the second pump which is vital, but the fact that once at dealer is tied and branded, a shift in suppliers is a major step of policy. It is often difficult, expensive and controversial to accomplish." ROSTOW, *A NATIONAL POLICY FOR THE OIL INDUSTRY*, at 74 (1948). See also, *International Business Machines Corp. v. United States*, 298 U.S. 131, 135 (1936).

107. HENDERSON, *THE FEDERAL TRADE COMMISSION*, at 102 (1924).

no *carte blanche* was handed the Commission. Slowly, painfully, each succeeding case was studied and a decision arrived at on the bases of the facts.

In 1920¹⁰⁸ the Court reviewed a method of resale price maintenance that involved reporting, investigating and listing of "price-cutters" in a "cooperative" effort by the respondent, a manufacturer, and certain of its dealers. However, the Commission and the Court found that "the merchandising conduct" of the respondent did not "constitute a contract or contracts whereby resale prices" were "fixed, maintained and enforced."¹⁰⁹ The Court had before it, in sum, a price-maintenance scheme which, at that early date, never before had been challenged. The Sherman Act with its Colgate Doctrine had minimal value. The Court held:

The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition which the Federal Trade Commission is empowered to condemn and suppress What shall constitute unfair methods of competition denounced by the act, is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act.¹¹⁰

Of the *Gratz* standard "dangerous tendency unduly to hinder competition" the Court gave an expanded reading, one which must have contributed to causing Justices McReynolds and Holmes to dissent.

The specific facts found show the suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.¹¹¹

108. Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1921).

109. *Id.* at 458.

110. *Id.* at 453. *cf.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

111. *Id.* at 455. It is rather interesting to view the opinion of Mr. Justice Brandeis in Federal Trade Commission v. Klesner, 280 U.S. 19 (1929): ". . . to justify the Commission in filing a complaint under § 5, the purpose must be pro-

More and more the Court turned to the legislative history of the Federal Trade Commission Act in an effort to discover the process for ascertaining the content of "unfair methods of competition." Weight was attached not only to the House and Senate reports, but also to the debates. Justifying this action the Court stated, "It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, they may properly be considered in determining what that purpose was and what were the evils sought to be remedied."¹¹²

What was the "great purpose of the act"? The Court answered:

In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words "unfair methods" was meant those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly — such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant competitors; that it was an effort to make competition stronger in its fight against monopoly; that unfair competition was that practice which destroys competition and establishes monopoly.

These and similar statements run through the debates from beginning to end.¹¹³

How did the Court apply these general guides to specifics? In *Federal Trade Commission v. Raladam Co.*¹¹⁴ it reviewed a Commission cease and desist order against respondent's deceptive advertising of an "obesity cure." Actual competitive injury did not have to be demonstrated. The Court said of section 5:

tection of the public. The protection thereby afforded to private persons is incident. Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, a practice was suppressed as being against public policy, *although no private right either of a trader or of a purchaser appears to have been invaded.* In *Federal Trade Commission v. Winstead Hosiery Co.*, 258 U.S. 483, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against." *Id.* at 27-28. (Emphasis added.)

112. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 650 (1931).

113. *Id.* at 650.

114. *Ibid.*

. . . Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon the trade of competitors, it is not necessary that the facts point to any particular trader or traders. It is enough that there be present a 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.¹¹⁵

Beyond the criteria of fraud and deception there were other practices which might be struck down by the Commission. This became evident in *Federal Trade Commission v. Keppel & Bros.*¹¹⁶ "Break and take" candy was the name respondent gave to the merchandising of its product. Sold primarily to children, some of the penny candy pieces had a penny wrapped in them. If a child was lucky he could obtain a free piece of candy. Competitors, respondent argued, could adopt the same practice; there was no injury to competition.¹¹⁷ The Court, however, declared:

. . . [a] trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss

115. *Id.* at 651. The Commission, however, failed to demonstrate both the potential existence of competition and the probability of injury to competition. Its order was therefore void for lack of jurisdiction. See note 1, *supra*.

Commenting on the relationship of the Federal Trade Commission Act to the Clayton and Sherman Acts the Court held: "The Clayton Act, so far as it deals with the subject, was intended to reach in their incipency agreements embraced within the sphere of the Sherman Act, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 355-357. The object of the Trade Commission Act was to stop in their incipency those methods of competition which fall within the meaning of the word 'unfair.' The great purpose of both statutes 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. *Federal Trade Commission v. Sinclair Co.*, 261 U.S. 463, 476. All three statutes seek to protect the public from abuses arising in the course of competitive interstate and foreign trade. In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair,' and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein.' The paramount aim of the act is the protection of the public from the destruction of competition or the restriction of it in a substantial degree. . . ." *Id.* at 647-48.

116. 291 U.S. 304 (1933).

117. *Id.* at 309: "Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, *we may take it that it does not involve any fraud or deception.* It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this Court has held subject to the Commission's prohibition. See *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453; *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 652; *Federal Trade Commission v. Royal Milling Co.*, *supra*, at 217. But we cannot say that the Commission's jurisdiction extends only to those types of practices which happen to have been litigated before this Court." *Id.* at 309-310.

of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

. . . It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants of troublesome competition or of censoring the morals of businessmen. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves.¹¹⁸

The process of pragmatic analysis was accepted by the Court. Section 5 was not to be confined by arbitrary boundaries. This the Court went out of its way to explain in *Federal Trade Commission v. Cement Institute*.¹¹⁹ While the respondent only argued that section 5 did not encompass Sherman Act violations,¹²⁰ Mr. Justice Black for the Court stated:

. . . A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as "unfair" which, *although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained*. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an "unfair method of competition". This general language was deliberately left to the "commission and the courts" because it

118. *Id.* at 313. The court prefaced its remarks by stating: "Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods of competition to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operations of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or *which are likely to grow into violations of the Sherman Act*, if that had been the purpose of the legislation.

The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See *Federal Trade Commission v. Raladam Co.*, *supra*, 649 650. But as this Court has pointed out it also had a broader purpose, *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 493; *Federal Trade Commission v. Raladam Co.*, *supra*, 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared "unfair competition" to be unlawful. But it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase "unfair methods of competition" was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" *Federal Trade Commission v. Raladam Co.*, *supra*, 648, . . ." *Id.* at 310-12.

119. 334 U.S. 683 (1948).

120. *Id.* at 689-90.

was thought that "there is no limit to human inventiveness in this field"; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions of this course of conduct would be an "endless task". See *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304, 310-12, and congressional committee reports there quoted.¹²¹ [Emphasis added.]

Who was to rule upon "the precise impact of a particular practice on the trade"? The Court many years ago had determined that it, not the Commission, was the final arbiter of whether any given practice constituted an unfair method of competition; the *Gratz* decision had not been overruled. Yet, in *Federal Trade Commission v. Motion Picture Advertising Service Co.*¹²² the Court held, "*The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine.* The point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question . . ." ¹²³ [Emphasis added.] Thus, the Commission was to rule on the effect of any competitive practice. If supported by substantial evidence, its findings were to be conclusive. The Court was only to review the logic of the findings

121. *Id.* at 708-09. The Court also declared: "As early as 1920 this Court considered it an 'unfair method of competition' to engage in practices 'against public policy because of their tendency unduly to hinder competition or create monopoly.' *Federal Trade Commission v. Gratz*, 258 U.S. 421, 427. In 1921 the Court in *Federal Trade Comm'n v. Beech-Nut Packing Co.*, 257 U.S. 441, sustained a cease and desist order against a resale price maintenance plan because such a plan 'necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain.' *Id.* at 454. The Court, in holding that the scheme before it constituted an unfair method of competition, noted the conduct in question was practically identical with that previously declared unlawful in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, and *United States v. Schrader's Son, Inc.*, 252 U.S. 85, the latter a suit brought under § 1 of the Sherman Act. Again in 1926 this Court sustained a Commission unfair-method-of-competition order against defendants who had engaged in a price fixing combination, a plain violation of § 1 of the Sherman Act. *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U.S. 52. In 1941 we reiterated that certain conduct of a combination found to conflict with the policy of the Sherman Act could be suppressed by the Commission as an unfair method of competition. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 465. The Commission's order was sustained in the *Fashion Originators'* case not only because of the prohibited conduct violated the Clayton Act but also because the Commission's findings brought the 'combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself.' . . ." *Id.* at 690.

" . . . All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages. . . ." *Id.* at 693.

122. 344 U.S. 392 (1953).

123. *Id.* at 396.

to determine whether the challenged practice was unfair. In *Motion Picture Advertising* the answer was in the affirmative. Section 5 could be carried to one who engaged in a practice similar to but not covered by the exclusive dealing section of the Clayton Act:

The "unfair methods of competition," which are condemned by Section 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, *Federal Trade Commission v. Keppel & Bros.*, 291 U.S. 304. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. (*id.* pp. 310-312). It is also clear that the Federal Trade Commission Act was designed to *supplement and bolster the Sherman Act and the Clayton Act* (see *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441, 453) — to stop in their incipiency acts and practices which, when full blown, would violate those Acts (see *Fashion Guild v. Federal Trade Commission*, 321 U.S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691.¹²⁴ [Emphasis added.]

Utilizing section 5 to "supplement and bolster the Sherman Act and the Clayton Act" is no startling concept. This the Second Circuit understood in its very recent decision *Grand Union Co. v. Federal Trade Commission*.¹²⁵ The question before the court was plain: Could the knowing inducement of discriminatory *advertising allowances* be challenged under section 5 of the Federal Trade Commission Act? Section 2(f) of the amended Clayton Act¹²⁶ condemned only the knowing inducement of discriminatory *prices*. Section 2(d) only struck at the *granting*, not the receiving of discriminatory advertising allowances.¹²⁷ The court held:

Nor can we accept the notion that the Commission is here legislating a "new antitrust prohibition." The practice itself is clearly proscribed by § 2(d); the novelty is solely in the application of § 5 to a buyer's knowing receipt of unlawful payments. The Commission is not upsetting specific Congressional policies; the proceedings did not "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act." No economic activity, once lawful, has been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from the technical confines of § 2(d), but only fully to realize the basic policy of the

124. *Id.* at 395.

125. Trade Reg. Rep. (1962 Trade Cas.) Par. 70,224 (2d Cir. Feb. 7, 1962).

126. 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958).

127. 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958).

Robinson-Patman Act, which was to prevent the abuse of *buying* power.

The Commission's decision here is entirely consistent with the basic purpose and policy of § 5 of the Federal Trade Commission Act. That section did not define "unfair competition"; the concept was left flexible, so that the Commission could apply the broad Congressional standard to the myriad fact situations which would arise. The Act was intended to give the Commission the power to "hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages". *F.T.C. v. Cement Institute, Inc.*, *supra*, U.S. 683, 693. Activity which "runs counter to the public policy declared in the Sherman and Clayton Acts" is an unfair method of competition. *Fashion Originators' Guild of America v. F.T.C.*, *supra*, 312 U.S. 457, 463. Moreover the Act was intended to be prophylactic: to stop in their incipiency acts which when full-blown would lead to monopoly or undue hindrance of competition. *F.T.C. v. Raladam Co.*, 283 U.S. 643, 647, 79 A. L. 1191; *Fashion Originators' Guild of America v. F.T.C.*, *supra*; *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395.

Grand Union's activities are inconsistent with the purpose of § 2(d) of the Clayton Act, and one need not resort to metaphysical subtleties to denominate its conduct an unfair method of competition.¹²⁸

Yet, what of *Curtis* and *Sinclair Refining Co.*? Both cases were framed in terms of exclusive dealing violations under Section 3 of the Clayton Act. As to the same fact patterns a violation of Section 5 of the Federal Trade Commission Act was alleged. The Court reversed Commission orders in both cases. The Second Circuit in *Grand Union* offered this explanation:

Thus the basis for resort to § 5 in the instant case differs substantially from that presented by such early decisions delineating the scope of § 5 as *F.T.C. v. Curtis Pub. Co.*, 260 U.S. 568, and *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463. In *Curtis* and *Sinclair* the FTC attacked exclusive dealing arrangements under both § 5 and § 3 of the Clayton Act. In both cases the Court found that arrangements did not violate the Clayton Act. The *Curtis* agreement was held to be one of agency, not sale, and therefore not within the prohibition of § 3. Similarly, in *Sinclair* the Court held that agreements by gas station operators to use pump equipment supplied by Sinclair below cost solely to pump Sinclair gasoline did not bind the operators not to "use or

128. Trade Reg. Rep. (1962 Trade Cas.) Par. 70,224, at 75,849-50 (2d Cir. Feb. 7, 1962).

deal in the . . . commodities of a competitor" of Sinclair, and that therefore § 3 did not apply. Since in both cases the economic activity was significantly different from that outlawed by the Clayton Act, falling outside its "spirit" or policy, no question of using § 5 to "supplement or bolster" the Clayton Act was raised. In *Sinclair and Curtis*, the Court did not consider its rejection of the Clayton Act charge dispositive of the § 5 issue, for it went on to consider the question of a possible § 5 violation on its own merits.¹²⁹ [Emphasis added.]

Section 5 takes its own measure. It is not dependent upon the Clayton Act or the Sherman Act. The policies embodied in those statutes may serve as guides, but that is all. This was understood in *Hastings Mfg. Co. v. Federal Trade Commission*.¹³⁰ Exclusive dealing *as such* was not attacked. Rather, challenged as an unfair method of competition was the systematic granting of gratuities by a manufacturer to obtain *preferential* treatment from dealers. Affirming the Commission's order the Sixth Circuit held:

Conscious as we are of the danger in lifting specific observations from their context, *we are nevertheless impressed by the fact 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.* So with respondent's practices, it may not be illegal for a manufacturer to buy up the obsolescent or unsalable stock of his competitor so long as he does not throw it upon the market at cut-rate prices to destroy his competitor's business or the good-

129. *Id.* at 75,848. On appeal Grand Union argued: "Section 2 of the Clayton Act did not make illegal the inducement of the payments involved and cannot supply by an implication of policy the substantive prohibition that must underlie a finding of unfair competition under Section 5 of the Federal Trade Commission Act. Even if the Clayton Act could be so used in support of the charge, a showing of injury to competition was indispensable and was not established." *Brief for Petitioner*, The Grand Union Company, at 9. In this connection the following propositions were raised. "Section 2 of the Clayton Act does not forbid inducement of disproportionate payments for sales services, and such practice is qualitatively different from the conduct proscribed by Section 2." *Id.* at 11. "The Congress alone defines antitrust policy; the Commission cannot define it, acting under Section 5 of the Federal Trade Commission Act, but can only implement Congressional established antitrust policy." *Id.* at 18. "The gist of an 'unfair method of competition' is its injury to competition. No such injury was shown or found in the present case, the Commission relying on the view that the prohibition of the seller's act made the buyer's conduct *per se* illegal; since no 'injury to competition' is involved, an 'unfair method of competition' is not present." *Id.* at 24.

130. 153 F.2d 253 (6th Cir. 1946), *cert. denied*, 320 U.S. 853. *Cf.* In the Matter of Luria Bros., Inc., Dkt 6156 (Initial Decision, March 29, 1961), on appeal to the Commission [control over the availability of dealer scrap was, in part, achieved through a planned program of loans and advances to dealers. By extending the carrot, it was alleged, Luria extracted a moral obligation of dealer fidelity.] See, Remarks by Rufus E. Wilson, Chief, Division of General Trade Restraints, Federal Trade Commission, "Restraint of Trade Implications in Franchise Agreements," Before Briefing Conference on Antitrust Laws and Trade Regulation, at 5-6, Washington, D.C., January 4, 1962.

will attaching to his product. It is not illegal for a manufacturer to finance his retail outlets or to guarantee them profits, but undoubtedly the utilization of these expedients, singularly or in combination, as an inducement to jobbers to throw out competing lines and to handle, *exclusively or preferentially*, the products of a manufacturer "from whom such blessings flow", may well be within the statutory concept of unfair methods of competition. Such inducements as constituent elements in a method of competition, are the "exclusive-dealing requirements" which Mr. Justice Brandeis so vigorously condemned, and the advantages to be derived therefrom, by both manufacturer and jobber, are closely akin to the unreasonable preferences and rebates long ago terminated by the Act to Regulate Commerce through powers conferred upon the Interstate Commerce Commission.

If we go too far perhaps in interpreting and applying what seems to be an enlarged concept of the powers of the Commission, certainly its present order derives sanction, even under the *Gratz* case, in the curbing of a practice which is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. It was not imperative, in order to bring into play the "prophylactic" action of the Commission, to prove that monopoly actually has been achieved.¹³¹ [Emphasis added.]

Grand Union and *Hastings* are important decisions, but they do not represent the outer boundary of section 5. They are not all inclusive. Section 5 is not susceptible of rigid definition; it must be flexible, able to test each new method of competition as it arises. The appeal now pending before the Commission from the initial decision *In the Matter of R. H. Macy & Co., Inc.*¹³² may measure the extent to which this proposition will be applied.

Briefly stated, these are the facts that gave rise to the complaint. Macy, a giant department store, determined to exploit its 100th birthday in 1958 through special events, advertising, and promotions. To defray a portion of the program's cost, Macy asked 750 of its 20,000 vendors to make contributions of \$1000 each. The monies received were "to be used by Macy's for institutional purposes as distinguished from advertising its vendors' products."¹³³ The solicitations were made by Macy's buyers "on a personal contact basis, assisted, as circumstances dictated, by upper echelon personnel of Macy's."¹³⁴ The department store's drive for contributions from its vendors totalled \$540,000.¹³⁵

131. 153 F.2d at 257. Cf. *New York Central Railroad Company v. United States*, 194 F. Supp. 947, 950-51 (S.D. N.Y. 1961).

132. Dkt. No. 7869 (Initial Decision, Oct. 26, 1961).

133. Appeal Brief of Counsel Supporting the Complaint, *In the Matter of R. H. Macy & Co., Inc.*, at 2.

134. *Ibid.*

135. *Ibid.*

Why was this unfair? The complaint stated:

Respondent used the force of its purchasing power to induce contributions from its vendors who — because of their individual inequality of economic strength compared to respondent; the highly competitive nature of their business; their lack of ability to combat such practices; the fact that their economic existence is enhanced and improved by continuing to sell to Macy; and that supplying Macy enhances the prestige and selling ability of the supplier with other actual and potential customers — are relatively powerless to refuse to make such contributions. These circumstances are enhanced by the fact that Macy's New York store is one of the largest, if not the largest, department stores in the United States. Very few, if any, of these 750 vendors can afford to make contributions of this type to all or any substantial number of their other customers.

The aforesaid acts and practices of respondent, a powerful buyer using the leverage of its purchasing power and position, asking for and receiving contributions, gifts or donations of whatever nature from its vendors for the 100th Anniversary Celebration of Macy's New York, or for any other purpose, are all to the prejudice and injury of such vendors and their competitors, and to the competitors of respondent and the public, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of, and in violation of Section 5 of the Federal Trade Commission Act.¹³⁶

Following what he believed to be the holding in *Gratz*, the Hearing Examiner dismissed the case. To him (1) no coercion was proved to have been exercised; (2) there was no retribution or retaliation by Macy based upon a supplier's giving or refusing to give; (3) there was no *direct* evidence that competition at the retail level was significantly affected; (4) this was a so-called "non-recurring" program; and (5) merely because this method may circumvent Section 2(d) of the Clayton Act, it does not necessarily follow that it is inherently unfair and constitutes a per se violation of the Federal Trade Commission Act.

Reversing the Examiner on appeal the Commission answered:

There is clearly shown here a form of coercion or oppression which, we believe, is an unfair trade practice and one which may be condemned as a violation of Section 5 even under the relatively strict tests of the *Gratz* case. While the record does not show overt pressure upon vendors to give, such as threats of discontinuance of purchases or offers of more business, vendors,

¹³⁶ Complaint, In the Matter of R. H. Macy & Co., Inc., Paragraphs 7-8 (April 19, 1960).

as a practical matter, could not well afford to refuse Macy's request. The impression that continued business with Macy's might be involved was helped by the fact that Macy's buyers made the contacts. The vendor could not know what the result might be if he refused, and this in itself was great pressure on him to give. It is clear from the record that the sums paid to Macy constituted a considerable financial burden to many vendors. Under the circumstances here shown, we hold that the practice of a large buyer using the leverage of its size and importance to exact from suppliers, who cannot refuse to give or who are reluctant to refuse to give, substantial gifts or sums of money solely for the buyer's own advantage, is an "unfair" practice within the meaning of Section 5 of the Federal Trade Commission Act.

The Commission further holds that Macy's practice was shown to be "unfair" within the meaning of Section 5 because of its injurious effect upon Macy's competitors. In considering this, it is important to keep in mind that "unfair methods of competition" condemned by Section 5 are not confined simply to those illegal at common law or condemned by the Sherman Act or the Clayton Act.¹³⁷

The *Macy* case has been discussed for only one reason: it represents a fact pattern that must be studied in the light of Section 5 of the Federal Trade Commission Act. It attacks the use of economic leverage to obtain concessions. The Clayton Act and the Sherman Act are only incidental to the case. In the final analysis whether a method of competition is unfair must be gleaned from the facts of the case, not from the application of any abstract standard of another statute. Section 5 of the Federal Trade Commission Act is its own measure of right and wrong; it is a concept of continuing redefinition.

CONCLUSION.

The courts have not canalized section 5.¹³⁸ Rather they have accepted its standard which calls for the exercise of pragmatic analysis. No unconstitutional delegation of legislative power exists. Even in the

137. In the Matter of R. H. Macy & Co., Inc., Dkt. 7869 (May 15, 1962) at 5. The Commission further held: "Since the present case falls so clearly within the framework of competitive activity covered by the Robinson-Patman Act, there is no doubt that in determining competitive injury the less stringent requirements of that Act as to injury may be applied, *i.e.*, a reasonable likelihood of substantial injury to competition with vendors who granted the discriminatory concessions or with Macy, the recipient of such concessions. It should be noted that there is no need for the evidence to show specific losses to Macy's or actual diversions of trade from competitors. *Hastings Mfg. Co. v. Federal Trade Commission*, 153 F.2d 253, 257-258 (1946) . . ." *id.* at 5-6.

138. Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 93 (1961); Oppenheim, *Developments in Antitrust During the Past Year*, 17 A.B.A. ANTITRUST SECTION 33, 235-36 (1961).

oft criticized case of *Schechter Corp. v. United States*¹³⁹ the Supreme Court stated:

The Federal Trade Commission Act (§ 5) introduced the expression "unfair methods of competition," which were declared to be unlawful. That was an expression new in law. Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit to precise definition, its scope being left to judicial determination as controversies arise. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648, 649; *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 310-312. *What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.* *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453; *Federal Trade Commission v. Klesner*, 280 U.S. 19, 27, 28; *Federal Trade Commission v. Raladam Co.*, supra; *Federal Trade Commission v. Keppel & Bro.*, supra; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 73. To make this possible, Congress set up a special procedure. A Commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority. *Federal Trade Commission v. Raladam Co.*, supra; *Federal Trade Commission v. Klesner*, supra.¹⁴⁰ [Emphasis added.]

The Court has long understood that, "A constitutional power implies a power of delegation of authority under it sufficient to effect its purpose."¹⁴¹

139. 295 U.S. 495 (1935). Indeed, in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the only other decision to rule unconstitutional a delegation of legislative power, the court held: "Undoubtedly legislation must often be adopted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility." *Id.* at 421.

140. 295 U.S. at 532-33. Significantly, the *Gratz* decision was omitted by the court in the authorities cited. *Cf.*, Mr. Justice Cardozo's concurring opinion, 295 U.S. 551, 552.

141. *Lichter v. United States*, 334 U.S. 742, 778 (1948). See also, *Yakus v. United States*, 321 U.S. 414 (1944) where Congress delegated the power to fix prices which were to be "generally fair and equitable" and would "effectuate the purpose of [the] Act." *Id.* at 421. Upholding the delegation the court stated: "The Constitu-

The passing years did not cause section 5 to be narrowed in scope. Additional legislation relating to specific antitrust violations, such as the amended Clayton Act, did not restrict the concept of "unfair methods of competition."¹⁴² That concept is as meaningful today as it was in 1914.

Since their inception, all the antitrust laws have been the subject of controversy. The highly articulated and sometimes artificial interpretations of the specific statutes have tended to obscure the fundamental import of the broad mandate of section 5.

It is not expected that this article will bring order out of what has sometimes been termed total confusion. But, hopefully, an exposition of the basic precepts of section 5 may be of some aid to both student and practitioner.

tion as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct — here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework . . .

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. *Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.*" *Id.* at 424-25 [Emphasis added.]

142. Supporting this proposition is the analogy presented by *Lichter v. United States*, 334 U.S. 742 (1948) where the Court considered the term, "excessive profits," as a statutory standard. Of this the Court stated: "*The statutory term 'excessive profits,' in its context, was a sufficient expression of legislative policy and standards to render it constitutional.* — The fact that this term later was further defined both by administrative action and by statutory amendment indicates the probable desirability of such added definition, but it does not demonstrate that such further definition was a constitutional necessity essential to the validity of the original exercise by Congress of its war powers in initiating a new solution of an unprecedented problem. The fact that the congressional definition confirmed the administrative practice which already was in effect under the original statutory language tends to show that a statutory definition was not necessary in order to give effect to the congressional intent." *Id.* at 783-84. [Emphasis added.]