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OLIGOPOLY AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

INTRODUCTION

The creation of the Federal Trade Commission . . . made available a continuous administrative process by which fruition of Sherman Law violations could be aborted. But it is another thing to suggest that anything in business activity that may, if unchecked, offend the particularizations of the Clayton Act may now be reached by the Federal Trade Commission Act. The curb on the Commission's power, as expressed by the series of cases beginning with the *Gratz* case . . . would be relaxed, and *unbridled intervention into business practices encouraged*.

When Justice Frankfurter wrote this portion of his dissent in *FTC v. Motion Picture Adv. Co.*,¹ he was primarily concerned with the scope of Section 5 of the Federal Trade Commission Act (FTCA)² in relation to the Clayton Act.³ He felt that since the Clayton Act was intended to reach antitrust practices in their incipiency,⁴ an incipiency was necessary for Section 5 of the FTCA to reach incipient violations of the Clayton Act. The unbridled intervention under the FTCA predicted by Justice Frankfurter, regarding Clayton Act business practices,⁵ may now have materialized in relation to Sections 1 and 2 of the Sherman Act.⁶ The Federal Trade Commission (FTC) has recently proposed issuing a complaint⁷ against the nation's five largest tire manufacturers⁸ alleging, *inter alia*, that they are "now using and for many years have used and pursued parallel courses of business behavior constituting unfair methods of competition and unfair acts and practices in commerce."⁹ The challenged business practices consist of substantially similar leasing agreements used by the manufacturers to supply "bus mileage tires" to transit companies. The agreements cover virtually the entire highly concentrated bus tire market.¹⁰

The proposed complaint alleges that the tire manufacturers refuse

¹ 344 U.S. 392, 405 (1953) (emphasis added).

² 15 U.S.C. §§ 41-58 (1970). Section 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act) provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

³ 15 U.S.C. §§ 12-27, 44 and 29 U.S.C. §§ 52-53 (1970).

⁴ *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356 (1922).

⁵ For examples of such interventions concerning the Clayton Act, see *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962) and *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316 (1966).

⁶ 15 U.S.C. §§ 1-2 (1970).

⁷ Federal Trade Commission Proposed Complaint, CCH Trade Reg. Rep. ¶ 19,381 at 21,511 (1970).

⁸ Goodyear, Firestone, Uniroyal, B. F. Goodrich and General Tire. *Id.* at 21,510.

⁹ *Id.* at 21,511.

¹⁰ Goodyear has 33 percent of this market, Firestone 30 percent, Goodrich 21 percent, General 8 percent and Uniroyal 7 percent. *Id.* at 21,511.

to sell tires except upon termination of a leasing agreement. Under their respective agreements with transit companies, manufacturers require the customer to obtain substantially all of its bus tire requirements from the lessor for the duration of the lease. At the end of the lease the transit company must "buyout" all the inventory it then has on lease. The complaint further alleges that to intensify the deterrent effect of the buyout requirement, the tire manufacturers commonly inflate a customer's inventory of bus tires prior to the expiration date of the lease, and use pricing methods which make the purchase price to the transit companies higher than normal inventory value. In addition, the tire manufacturers provide service for bus mileage tires only as an integral part of a leasing agreement.¹¹

The unique antitrust theory proffered by the FTC in this suit merits close attention. Conscious parallelism, or identical business behavior, has long been considered competent evidence of a conspiracy under Section 1 of the Sherman Act.¹² The unique aspect of the tire leasing complaint, however, is that no combination, conspiracy or agreement is evident from the facts alleged, nor is one charged as the basis of the violation. For this reason, the FTC proceeded under Section 5 of the FTCA rather than under Section 1 of the Sherman Act. Never before has the business practice of identically following the conduct of competitors been considered illegal under either Section 1 of the Sherman Act or Section 5 of the FTCA. Although this case was recently settled by a consent order announced on March 12, 1971, the antitrust theory utilized by the FTC in its complaint has important implications. This article will examine and analyze the propriety of using Section 5 of the FTCA as a basic antitrust weapon for controlling oligopolistic behavior. The effectiveness of using section 5 to establish parallel business behavior as an unfair method of competition, and its effectiveness as a remedy to problems posed by oligopolistic markets will be the primary considerations.

I. LEGISLATIVE HISTORY OF "UNFAIR METHODS OF COMPETITION"

The origin of the concept embodied in Section 5 of the Federal Trade Commission Act is to be found in the regulatory intentions of Congress which surrounded enactment of the Sherman Act. The policy determinations embodied in the Sherman Act, and their subsequent judicial interpretations, prompted congressional action that resulted in passage of the FTCA and the Clayton Act.

The post-Civil War industrial period in the United States saw the creation of powerful corporate empires. The Sherman Act was the first manifestation of a congressional antitrust policy in response to

¹¹ *Id.*

¹² *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

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a growing public fear of industrial monopolies.¹³ Senator Sherman summarized the purpose of the Act when he stated that it was intended "to prevent and control combinations made with a view to prevent competition, or for the restraint of trade or to increase the profits of the producer at the cost of the consumer."¹⁴ Generally, the statute was intended to promote consumer welfare¹⁵ and to prevent concerted business activity that exacted monopolistic profits.¹⁶ It was to be liberally construed by the courts. The statute was not to be applied indiscriminately to all contracts and combinations involving interstate commerce, however, only to those combinations that prevented competition and restrained trade.¹⁷ To the legislators concerned with protecting consumers the purpose of the Act seemed clear.

From the outset, the troubling aspect of the Sherman Act was its lack of a governing standard, in view of the statute's absolute prohibitory language. Under common law not all contracts in restraint of trade were held to be void or unenforceable by the courts. Some were permitted to exist because of their reasonable character.¹⁸ Although valid, they were nevertheless contracts in restraint of trade and were so described by the common law. Initially, the Supreme Court met this ambiguity head on by expressly rejecting the common law argument that Congress could not have intended the Act to embrace all contracts, only those contracts resulting in unreasonable restraints of trade.¹⁹ After careful consideration of the common law interpretive distinctions inherent in the term "contract in restraint of trade," Justice Peckham concluded that:

By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added with-

¹³ 1 S. Whitney, *Antitrust Policies* 4-5 (1958).

¹⁴ 21 Cong. Rec. 2457 (1890).

¹⁵ Bork, *Legislative Intent and Policy of the Sherman Act*, 9 J. Law & Econ. 7 (1966).

¹⁶ Posner, *Oligopoly and Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1578 n.4 (1969).

¹⁷ 21 Cong. Rec. 2456 (1890).

¹⁸ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

¹⁹ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897).

out placing in the act that which has been omitted by Congress.²⁰

The Sherman Act was read to embrace all direct restraints imposed upon commerce by any combination, conspiracy or monopoly whose natural effect was to restrain competition, rather than permitting or promoting it.²¹ Thus, the prohibitive language of the Act was given full effect in order to carry out congressional intention.

Although this statutory construction prevailed for fourteen years, it was utilized infrequently. In 1911, the Supreme Court reversed itself in *Standard Oil Co. of New Jersey v. United States*²² by adopting the dissent in *United States v. Trans-Missouri Freight Association*.²³ In *Trans-Missouri* Justice White had stated that "it seems to me . . . impossible to construe the words every restraint of trade used in the act in any other sense than as excluding reasonable contracts [S]uch contracts were not considered to be . . . in restraint of trade . . . both in England and in this country at the time the act was adopted."²⁴ By this decision the "rule of reason" was read into the Sherman Act, providing the judiciary with the time-tested common law standard of unreasonableness—a standard that arguably had been intentionally excluded by Congress.

Congressional reaction to judicial legislating of the rule of reason into the Sherman Act was not long in coming. Within twenty-four hours after the rule's pronouncement, 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 [a commission] as the servant of the Interstate Commerce Commission, with the powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation.²⁵

It was the Senator's contention that had such a commission been organized when the Sherman Act became law, "we would have been saved the economic wrench that is now to take place through the dissolution of these giant corporations and the restoration of their

²⁰ *Id.* at 328.

²¹ *Northern Securities Co. v. United States*, 193 U.S. 197, 331 (1904).

²² 221 U.S. 1 (1911).

²³ 166 U.S. 290, 343 (1897).

²⁴ *Id.* at 354.

²⁵ 47 Cong. Rec. 1225 (1911).

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constituent elements."²⁶ Subsequently, Senator Newlands filed two bills²⁷ calling for the creation of an interstate trade commission and providing for federal registration of corporations. Neither bill was enacted into law but their proposal prompted a congressional investigation by the Senate Committee on Interstate Commerce into "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."²⁸ Congressional dissatisfaction with the rule of reason as a regulatory standard thus resulted in an immediate examination of alternative means to regulate commerce.

The Committee's report²⁹ concluded that "whenever the rule [of reason] is invoked the court does not administer the law, but makes the law."³⁰ It was considered inconceivable that "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 . . .,"³¹ especially in a country governed by a written constitution and a statutory code. The report also suggested enactment of a federal incorporation law which would declare specific trade practices illegal and which would provide statutory methods for dealing with evolving trade practices. Additionally, the committee recommended the establishment of a commission for the better administration of the law and its enforcement.³² The significance of these developments is evident. Application of the rule of reason was considered to be judicial frustration of the legislative intent expressed in the Sherman Act. The Supreme Court's decision in *Standard Oil* strongly antagonized Congress and led it to consider other methods for the administration of antitrust policies.

Three bills were introduced and filed in committee. H.R. 15613, introduced by Representative Covington, and S. 4160, introduced by Senator Newlands, both dealt with the creation of a federal trade commission. While these bills were in committee Representative Clayton introduced a bill intended to supplement existing antitrust laws which declared specific trade practices as being criminal. Originally, none of the three trade bills contained any reference to unfair methods of competition, but Senator Newlands' bill, as it was reported out of the Interstate Commerce Committee, was strengthened by a provision declaring unfair competition in commerce illegal.³³ Referring to this

²⁶ Id. at 1227. Note the pre-Commission recognition of the need to dissolve these combinations. This theory of dealing with the problem will be discussed at length infra.

²⁷ S. 2941, 62d Cong., 1st Sess. (1911), see 47 Cong. Rec. 2444 (1911) for text; and S. 2941, 62d Cong., 1st Sess. (1911), see 47 Cong. Rec. 2619-20 (1911) for text.

²⁸ S. Res. 98, 62d Cong., 1st Sess., 47 Cong. Rec. 3225-26 (1911).

²⁹ S. Rep. No. 1326, 63d Cong., 3d Sess. 1 (1913).

³⁰ Id. at 10.

³¹ Id.

³² Id. at 12.

³³ S. Rep. No. 597, 63d Cong., 2d Sess. 1 (1914). Later, the Covington bill was referred to this same committee, which then substituted the Newlands bill for it.

provision, which subsequently became Section 5 of the FTCA, the Committee Report indicated that:

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 . . . 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.⁸⁴

Congress, however, had learned its lesson from the judicial misinterpretation of the Sherman Act. Subsequent congressional debate on the choice of the phrase "unfair competition" produced change. Senator Reed was the first to raise the argument that at common law unfair competition had been narrowly construed to mean "passing off," or the substitution of goods A for goods B,⁸⁵ and that unless some other term were employed, courts might adopt this interpretation as the meaning of Congress. The general consensus on this point led to the suggestion that the two words be separated by some additional word, such as "oppressive" or "method,"⁸⁶ which would not undermine the purpose of the prohibition. The phrase "unfair method of competition" was adopted. It was considered a new legal term lacking any ancestral roots in the common law and, consequently, a term which would provide necessary flexibility and elasticity to deal with evolving characteristics of the industrial community. Senator Newlands best summarized the congressional meaning of the phrase when he said: "my belief is that this phrase will cover everything that we want, and will have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition."⁸⁷

As seen from the foregoing discussion, Section 5 of the FTCA was intended to be a broad, flexible, regulatory mandate which would meet all unfair business practices of the future. Moreover, it may be viewed in two dimensions. First, at its narrowest point, the rubric unfair methods of competition is a flexible administrative tool that cannot

⁸⁴ *Id.* at 13.

⁸⁵ 51 Cong. Rec. 12934 (1914).

⁸⁶ *Id.* at 12145.

⁸⁷ *Id.* at 12024.

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be defined in terms of constants. Second, it embodies congressional recognition of evolving commercial dexterity and economic power as important aspects of trade.³⁸ The suggested underlying proposition of section 5 is that "a free competitive society must have some means of preventing that very freedom to compete from destroying our economic system."³⁹

The broad, flexible character of section 5 is further emphasized if considered in relation to subsequent debates concerning the Clayton Act, enacted during the same year. The Clayton Act expressly declared unlawful specific business practices which Congress considered competitively harmful. Section 5, on the other hand, was considered a new test for future business developments. During the debates relevant to the specificity of the Clayton Act, reference was continually made to the sufficient support which would be provided by section 5.⁴⁰ This important relationship between specificity and flexibility demonstrates the congressional design of section 5 and, as will be seen later, assists in defining the interrelating scope of the two statutes concerning anti-trust policy.

Despite congressional intention to delegate to the FTC the primary power of determining what practices were unfair,⁴¹ in granting jurisdiction to the Courts of Appeals of the United States to "affirm, enforce, modify, or set aside orders of the Commission. . . ."⁴² Congress supported judicial delineation of the jurisdictional boundaries of section 5. It is important, at this point, to summarize these jurisdictional limits and to view in perspective the interrelationships of policy that exist among Section 5 of the FTCA and the Sherman and Clayton Acts.

The scope of section 5 as an antitrust statute has gradually been expanded by the courts since its initial restrictive interpretation in *FTC v. Gratz*,⁴³ the first case in which the Supreme Court invalidated a Commission order under section 5. The *Gratz* opinion correctly recognized that the words "unfair methods of competition" constituted new legal phraseology, yet it failed to carry forward the express congressional designs for the Commission. Instead, it was the Supreme Court's interpretation that the courts, not the Commission, should ultimately determine what practices fall within the ambit of section 5 by using policy considerations of the other antitrust statutes as guides. This limited interpretation, however, has changed drastically in the succeeding forty-five years. Indeed, it has been broadened to the point where proof of anticompetitive effects resulting from the challenged practice are no longer necessary to find an unfair method of competi-

³⁸ Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517, 519 (1962).

³⁹ Id.

⁴⁰ 51 Cong. Rec. 14257 (1914) (remarks of Senator Clapp).

⁴¹ Senate Report, note 33 supra.

⁴² 15 U.S.C. § 45(d) (1970).

⁴³ 253 U.S. 421 (1920).

tion.⁴⁴ The scope of section 5 as an antitrust statute has come full circle. No longer is it confined to the "policy" of the Sherman and Clayton Acts. It has now become coextensive with the "spirit" of these two statutes, thus making the substantive reach of section 5 greater than that of the other two statutes individually and collectively.

II. JUDICIAL DEVELOPMENT OF SECTION 5

A. *The Initial Restrictive Interpretation*

In *Gratz*⁴⁵ the FTC charged a manufacturer of jute bagging (material used to bale cotton) with "tying" the sale of steel ties (also essential for baling) to the bagging. The competitive importance of this practice arose because Gratz was the exclusive distributor of Carnegie Steel Company ties, a situation which foreclosed other bagging manufacturers from obtaining steel ties from Carnegie in order to effectively compete. The Supreme Court dismissed the FTC's cease and desist order, concluding that the Commission had shown neither a monopoly nor a monopolistic design on the part of Gratz. Further, the Court concluded that:

The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts . . . to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals . . . or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.⁴⁶

Justice Brandeis vigorously dissented from the majority's interpretation of section 5 and of the powers of the Commission. Relying heavily upon the legislative history of the section, he concluded that the Court had usurped the primary discretionary power of the Commission to initially determine which practices are unfair, thus frustrating congressional purpose behind the enactment of section 5.⁴⁷ His argument had no immediate effect.

An affirmation of the *Gratz* interpretation came three years later, in two unanimous decisions. In *FTC v. Curtis Publishing Co.*,⁴⁸ the Court considered the legality of a magazine company's distribution system involving exclusive dealing contracts which the Commission had found violative of both Section 3 of the Clayton Act and Section 5 of the FTCA. The Court first dismissed the Clayton Act violation on the ground that the relationship between publisher and distributor was one of principal and agent, not one of buyer and seller, thereby placing it outside the scope of Section 3. Since the agency contracts

⁴⁴ *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

⁴⁵ 253 U.S. 421 (1920).

⁴⁶ *Id.* at 427.

⁴⁷ *Id.* at 437.

⁴⁸ 260 U.S. 568 (1923).

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were made "without unlawful motive and in the orderly course of an expanding business. . .," the Court held they could not be prohibited under section 5.⁴⁹ Accordingly, the Commission's cease and desist order was set aside.

In the second case, *FTC v. Sinclair Refining Co.*,⁵⁰ the Court again reversed a Commission cease and desist order prohibiting exclusive dealing contracts. Sinclair had provided gasoline storage tanks and pumps to its lessees on the condition that only Sinclair gasoline be used with the equipment. Here again, the Commission held these contracts violative of both Section 3 of the Clayton Act and Section 5 of the FTCA. The Court, however, dismissed the Clayton Act charge because the agreements were found not to forbid dealers from dealing in the commodities of a competitor. The Court disposed of the Commission's section 5 finding in a fashion similar to that used in the *Curtis* case. It reversed on the grounds that "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."⁵¹ Moreover, in what appeared to be a final blow to the flexibility of section 5 and the power of the Commission, the Court stated:

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.⁵²

These three Supreme Court decisions imposed upon the Commission the burden of showing a potential, substantial lessening of competition or tendency to monopoly—the criteria of the Clayton Act—before a section 5 violation could be found. Further, as a practical matter, the generalities of the FTCA were held not to grant to the Commission authority to forbid business activities unless they had a detrimental impact on competition.⁵³

B. *The Gradual Expansion in Scope*

The first expansive step taken by the judiciary in reconsidering the precise limits imposed upon section 5 by earlier decisions was made in *FTC v. Beech-Nut Packing Co.*⁵⁴ In *Beech-Nut* the Supreme Court affirmed a Commission order finding that the Beech-Nut Company had violated section 5 with its distribution practices. The so-called

⁴⁹ Id. at 582.

⁵⁰ 261 U.S. 463 (1923).

⁵¹ Id. at 475.

⁵² Id. (emphasis added).

⁵³ Howrey, Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law, 5 Antitrust Bull. 161, 166 (1960).

⁵⁴ 257 U.S. 441 (1922).

Beech-Nut Policy by stipulation was referred to as a "system" probably because of the absence of any contract, combination or conspiracy. The system was effectuated by Beech-Nut's refusal to sell to wholesalers or retailers who marketed their products below a suggested retail price. There were no facts demonstrating an express agreement, only a tacit understanding that if a wholesaler or jobber sold to a price-cutting retailer, the wholesaler would no longer be considered a "selected" or "desirable" dealer.⁵⁵ The company maintained a record of all "desirable" dealers and continually updated and distributed it to its wholesalers and retailers.

Since there was no express contract, combination or conspiracy, the Sherman Act was involved in the Supreme Court's review of *Beech-Nut* only "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."⁵⁶ Addressing itself to the power of the FTC to determine an unfair method of competition, the Court concluded:

If the "Beech-Nut System of Merchandising" is against public policy because of its "dangerous tendency unduly to hinder competition or create monopoly," it was within the power of the Commission to make an order forbidding its continuation The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce⁵⁷

The Court determined that the specific facts demonstrated a degree of cooperation among the parties which, although falling short of agreement, accomplished the purposes of an agreement just as effectively.⁵⁸ Significantly, the *Beech-Nut* decision authorized the Commission to challenge certain types of collusive activity, not falling within the Sherman Act, which the *Gratz* Court had found were outside the ambit of section 5.⁵⁹

In *Beech-Nut*, the Court looked to the policy of the Sherman Act for a standard to govern the application of section 5. The test of what constituted an unfair method of competition was broadened so as to require only a violation of the policy behind the Sherman Act. The Court further expanded this "policy" test to include the Clayton Act, in *Fashion Originators' Guild of America, Inc. v. FTC*,⁶⁰ where it

⁵⁵ Id. at 447.

⁵⁶ Id. at 453.

⁵⁷ Id. at 454.

⁵⁸ Id. at 455.

⁵⁹ In *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927), the Court, in considering a § 5 violation, asserted that "[an] understanding, express or tacit, that the agreed prices will be followed is enough to constitute a transgression of the law. No provision to compel adherence is necessary." Id. at 62.

⁶⁰ 312 U.S. 457 (1941).

upheld the FTC's decision that an industry-wide group boycott was a violation of section 5. Justice Black, speaking for the majority, stated that if the defendant's "purpose and practice . . . runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."⁶¹ Substantial criticism has been directed to this position on the ground that the language implies the Federal Trade Commission Act might now have a broader reach than the Sherman and Clayton Acts.⁶² This criticism is without merit, for the Court expressly concluded on the facts of *Fashion Originators'* that both a Section 3 Clayton Act and Section 1 Sherman Act violation did exist.⁶³ The Court did not broaden the reach of section 5 beyond that of the other antitrust statutes; it simply equated them. The asserted implication that section 5 has surpassed the Sherman and Clayton Acts in reach is dispelled by the equalizing language of the decision. Even assuming that such a broadening interpretation had taken place, it would appear to be consistent with the congressional intent behind adoption of the term "unfair methods of competition." Regardless of the rationale supporting the Court's pronouncement, subsequent judicial developments have substantially expanded the scope of section 5, with heavy reliance upon the "policy" standard as a guide.⁶⁴

By releasing unfair methods of competition from the confines of the Sherman and Clayton Acts, the *Beech-Nut* opinion created confusion in the business community concerning the precise boundaries of section 5. The uncertainty of the policy test was the primary cause of concern. In *FTC v. Cement Institute*,⁶⁵ a significant case concerning the interrelationship of Section 5 of the FTCA and Section 1 of the Sherman Act, a slight degree of uncertainty was dispelled. There the Commission challenged a pricing system as being an instrumentality for price fixing and thus a violation of section 5. The government had previously challenged the same system under Section 1 of the Sherman Act, but had failed substantially to prove a combination or agreement to fix prices.⁶⁶ Referring to the overlap of the two acts in relation to collusive practices, the Court in *Cement Institute* stated:

[A]lthough all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations.⁶⁷

⁶¹ *Id.* at 463.

⁶² Howrey, *supra* note 53, at 170.

⁶³ 312 U.S. at 464-65.

⁶⁴ *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

⁶⁵ 333 U.S. 683 (1948).

⁶⁶ *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925).

⁶⁷ 333 U.S. at 694.

Moreover, in distinguishing the earlier dismissed case under Section 1 of the Sherman Act, the Court determined that:

[I]ndividual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an "unfair method of competition" prohibited by the Trade Commission Act. 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.⁶⁸

Hence, *Cement Institute* provided a further definition of unfair methods of competition as related to Section 1 of the Sherman Act. The Court's determination that "individual conduct" not yet a Sherman Act violation might nonetheless constitute an unfair method of competition provided support for future judicial utilization of section 5 to prohibit consciously parallel business behavior.

In *Triangle Conduit & Cable Co., Inc. v. FTC*,⁶⁹ the FTC had found that the use of a mathematical formula to compute delivery price by the members of a trade association constituted a conspiracy to fix prices and an unfair method of competition violative of section 5. The petitioner appealed from both findings, claiming that the Commission had proven collusion only by the "capacity, tendency and effect" of the alleged conspiracy and not by demonstrating how the parties colluded.⁷⁰ The petitioners further contended that, absent proof of agreement to conspire, pricing decisions were merely individual reactions to competition and thus could not be considered unfair methods of competition.⁷¹ The Court of Appeals for the Seventh Circuit responded by affirming both the Commission's findings and its order.⁷² After reviewing the record of evidence, which contained a history of identical bids and prices similar to those shown in *Cement Institute*, the court held that a conspiracy had been proven by circumstantial evidence.⁷³ In considering the contention that individual use of the basing point method of computing delivery prices, with knowledge that other members used it, did not constitute an unfair method of competition, the court stated:

Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation

⁶⁸ *Id.* at 708.

⁶⁹ 168 F.2d 175 (7th Cir. 1948), *aff'd sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

⁷⁰ 168 F.2d at 178-79.

⁷¹ *Id.* at 180.

⁷² *Id.* at 181.

⁷³ *Id.* at 180.

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In the light of [the *Cement Institute*] opinion we cannot say that the Commission was wrong in concluding that the *individual use* of the basing point method as here used does constitute an unfair method of competition.⁷⁴

As rationale for condemning these individual practices, the court quoted directly from and applied the earlier discussed language of *Cement Institute* concerning individual conduct that might involve a section 5 violation.

Section 5 was similarly applied in *FTC v. Motion Picture Adv. Co.*⁷⁵ to condemn individual conduct which the Supreme Court held violative of the Sherman Act.⁷⁶ The respondent and three similar companies held exclusive agreements with three-fourths of all the theaters in the United States for the showing of their films. An FTC cease and desist order had previously required the discontinuance of this concerted activity.⁷⁷ In *Motion Picture Adv. Co.* the Commission found that the respondent's contracts were an unfair method of competition by themselves, and ordered that the time of such exclusive agreements be reduced from their duration of three to five years to one year. On appeal, the respondent argued that the sole issue in the Commission's complaint had been adjudicated in the former proceedings and that the Commission's order was therefore barred by res judicata.⁷⁸

The Court distinguished the earlier Commission proceeding as one involving a conspiracy or agreement. Because no concerted activity was alleged in the instant proceeding, the complaint challenged only the legality of the unilateral action of the respondent. Thus, the doctrine of res judicata was found not applicable. The Court held that activity prohibited by the Sherman Act would likewise be prohibited as an unfair method of competition.⁷⁹ Significantly, the Court utilized section 5 as independent authority for prohibiting the respondent's conduct. The scope of section 5 in relation to the other antitrust statutes was summarized by Justice Douglas in the majority opinion:

The "unfair methods of competition" which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business It is also clear that the Fed-

⁷⁴ Id. at 181 (emphasis added).

⁷⁵ 344 U.S. 392 (1953).

⁷⁶ Id. at 395.

⁷⁷ In re Screen Broadcast Corp., 36 F.T.C. 957, 993 (1943).

⁷⁸ 344 U.S. at 397-98.

⁷⁹ 344 U.S. at 395. The Court stated: "It is, we think, plain from the Commission's finding that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act." Id.

eral Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as "unfair methods of competition" existing violations of them.⁸⁰

Justice Frankfurter dissented, relying principally upon the contention that the Commission had simply inferred from the previous adjudications of the case that the contracts unreasonably restricted and restrained competition. He considered it significant that no evidence of a market analysis had been presented to substantiate such a finding.⁸¹ In short, Justice Frankfurter feared that the Court might become a rubber stamp for Commission findings and thereby encourage "unbridled intervention into business practices."⁸²

Motion Picture Adv. Co. expanded the scope of section 5 insofar as its regulation of individual activity was concerned. A contract which had allowed competitors to obtain a substantial share of a particular market through conspiracy was declared an unfair method of competition when unilaterally used by one producer. Not only could section 5 prohibit conspiratorial activities falling within Section 1 of the Sherman Act, it could also prohibit subsequent similar activity by the individual participants. Moreover, the necessity to demonstrate a likely restriction upon competition was not required.

From the foregoing discussion it is evident that the *Beech-Nut* decision provided the cornerstone for a series of section 5 cases dealing with tacitly collusive business behavior, most notably those dealing with basing point delivery systems.⁸³ *Beech-Nut* is frequently cited for the proposition that the existence of a "combination" is not an indispensable ingredient of an unfair method of competition under the Federal Trade Commission Act. *Beech-Nut* and its progeny may thus provide substantial precedent for the Commission's treatment of parallel business behavior.

C. *Elevation to Antitrust Independence*

Throughout judicial development of the limits on section 5, courts have mindfully restricted its application to anticompetitive practices potentially cognizable under either the Clayton or Sherman Acts. Two recent decisions have eroded these restrictions, however, and have thus elevated section 5 to independent antitrust status.

In *Grand Union Co. v. FTC*,⁸⁴ the Court of Appeals for the Second Circuit affirmed a Commission finding that the petitioner, a buyer, had violated section 5 by inducing its suppliers to grant dis-

⁸⁰ Id. at 394-95.

⁸¹ Id. at 401-02.

⁸² Id. at 405.

⁸³ *FTC v. Cement Institute*, 333 U.S. 683 (1948), and *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948).

⁸⁴ 300 F.2d 92 (2d Cir. 1962).

criminy promotional allowances. In the Commission's opinion, petitioner had violated the "spirit" of Section 2(d) of the Robinson-Patman Price Discrimination Act,⁸⁵ which prohibits *sellers* from inducing, soliciting or paying discriminatory allowances. In *Grand Union* the *buyer* had solicited the discriminatory allowance. The court held, first, that the Commission's findings were consistent with the basic purpose and policy of section 5, which condoned flexibility, and second, that Grand Union's activities were inconsistent with the purpose of section 2(d). Despite the inconsistency with the "seller" language in section 2(d), the court saw no need to "resort to metaphysical subtleties to denominate [Grand Union's] . . . conduct an unfair method of competition."⁸⁶ Furthermore, no proof of injury to competition had to be demonstrated. Because section 2(d) defined an offense that was per se illegal, the court determined that a rule that applied to the seller should similarly apply to the buyer.⁸⁷

In the second recent decision to further expand the scope of section 5, *FTC v. Brown Shoe Co., Inc.*,⁸⁸ the Supreme Court affirmed the Commission's authority to declare a franchise program an unfair method of competition without having to demonstrate actual anti-competitive effects. Brown Shoe had entered into franchise contracts with a substantial number of independent retail shoe stores which essentially prohibited the latter from dealing in any line of shoes manufactured by Brown's competitors. According to the Commission, the franchise program effectively foreclosed Brown's competitors from a substantial share of the retail markets. On review, the Supreme Court emphasized the broad powers of the Commission to declare trade practices unfair and condemned the program for conflicting with the central "policy" of both Section 1 of the Sherman Act and Section 3 of the Clayton Act.⁸⁹

The argument of the respondent, however, centered upon the power of the Commission to declare the franchise program illegal, absent proof showing that the franchise program's effect was to substantially lessen competition or that it tended to create a monopoly.⁹⁰ Expressly rejecting this contention the Court stated:

This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market . . . [therefore] the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation

⁸⁵ 15 U.S.C. §§ 13, 13a, 13b and 21a (1970). Section 13a (§ 2(d) of the Robinson-Patman Act) states that it is unlawful for sellers to solicit discriminatory allowances.

⁸⁶ 300 F.2d at 99.

⁸⁷ *Id.*

⁸⁸ 384 U.S. 316 (1966).

⁸⁹ *Id.* at 320-21.

⁹⁰ *Id.* at 321.

of § 3 of the Clayton Act or other provisions of the antitrust laws.⁹¹

It would appear that the Supreme Court thus completely divested section 5 of the limitation restricting it to acts that might become full blown violations of the other statutes if left unrestrained. Coupled with this new independence was a relaxed burden of proof, one which did not require the showing of demonstrable anticompetitive effects. The Court in effect stated that section 5 has the potential to prohibit those practices which violate either the Sherman or Clayton Acts and also those that fall short of clear cut violations of those acts but which still "violate" the policy or spirit of those statutes. From the preceding discussion the obvious question arises whether this broad interpretation of section 5, coupled with the lighter burden of proof, renders the Sherman and Clayton Acts superfluous. Whatever displacement effect these decisions may produce, it is clear that section 5 has come of age as an antitrust statute.

A further expansion of the scope of section 5, regarding its independence as an antitrust statute, is evident from the Supreme Court decisions in the so-called "TBA" trilogy. In 1956, the FTC brought simultaneous proceedings⁹² against major oil and tire manufacturers alleging that the sales commission method of distributing tires, batteries and accessories (referred to as the TBA plan) was an unfair method of competition. Under that plan the tire companies paid commissions to the oil companies on the gross amount of TBA sales made by the dealers of each oil company. Each complaint paired one of the large tire and rubber product manufacturers with a large oil company.⁹³

In the first case of the trilogy, *Atlantic Refining Co. v. FTC*,⁹⁴ the Supreme Court affirmed the decision of the Court of Appeals of the Seventh Circuit which had sustained the Commission's order against Atlantic and Goodyear.⁹⁵ Essentially, the order had prohibited Atlantic from participating in any sales-commission arrangement with Atlantic or any other oil company.⁹⁶ At the outset, the Court recognized that the Atlantic-Goodyear contract was not a tying arrangement prohibited by the Sherman or Clayton Acts. What the Court did find, however, was that the central competitive character of the arrangement consisted of "the utilization of economic power in one market to curtail competition in another."⁹⁷ Further, the market power that permitted such an arrangement was bolstered by evidence of actual threats and coercive practices directed toward the service station dealers. The

⁹¹ *Id.*

⁹² *In re Goodyear Tire & Rubber Co.*, 58 F.T.C. 309 (1961), *In re Firestone Tire & Rubber Co.*, 58 F.T.C. 371 (1961), *In re B.F. Goodrich Co.*, 58 F.T.C. 1176 (1961).

⁹³ Goodyear was paired with Atlantic, 58 F.T.C. at 310, Firestone with Shell, 58 F.T.C. at 372, and B.F. Goodrich with Texaco, 58 F.T.C. at 1176.

⁹⁴ 381 U.S. 357 (1965).

⁹⁵ *Id.* at 372-73.

⁹⁶ 58 F.T.C. at 369-71.

⁹⁷ 381 U.S. at 369.

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standard applied by the Court in reviewing the Section 5 violation was that the challenged conduct must "run counter to the public policy declared in the Federal Trade Commission Act" regardless of its failure to assume the proportions of an antitrust violation.⁹⁸ In finding the sales-commission plan an unfair method of competition on its face, the Court stated:

The short of it is that Atlantic, with Goodyear's encouragement and assistance, has marshalled its full economic power in a continuing campaign to force its dealers and wholesalers to buy Goodyear products. The anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications in determining whether this was a method of competition which Congress has declared unfair and therefore unlawful.⁹⁹

While the Supreme Court in *Atlantic Refining* remained consistent with its previous approach toward the scope and reach of section 5, it developed a new rationale to support such expansion. The coercive utilization of economic power to foreclose competition from a prior open market was considered enough to substantiate a section 5 violation.

Conflicting application of the *Atlantic Refining* principles by the Fifth and District of Columbia Circuit Courts in the other two cases of the trilogy emphasizes the newness of the "market power" theory. In the second case, *Shell Oil Co. v. FTC*,¹⁰⁰ the Fifth Circuit sustained a Commission order against Shell and Firestone similar to the Atlantic-Goodyear order. The court concluded that, in light of *Atlantic Refining*, substantial evidence supported the Commission's finding that Shell: (1) had dominant economic power over its dealers, (2) had exerted that power through natural leverage and through control devices in carrying out its TBA plan, and (3) had caused adverse competitive effects on a not insubstantial portion of the TBA market.¹⁰¹ These three factors were interpreted from the *Atlantic Refining* holding as the essential components which must exist before a sales-commission plan can be held an unfair method of competition. The most significant and essential factor supporting all three components is dominant economic power.

In the third case of the trilogy, *Texaco, Inc. v. FTC*,¹⁰² the court of appeals reversed the cease and desist order and remanded the case to the Commission for dismissal. The distinguishing aspect of the Texaco-Goodrich arrangement was the absence of coercion and anti-competitive effects. Texaco, unlike Atlantic and Shell, had never

⁹⁸ *Id.*

⁹⁹ *Id.* at 371.

¹⁰⁰ 360 F.2d 470 (5th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

¹⁰¹ *Id.* at 487.

¹⁰² 383 F.2d 942 (D.C. Cir. 1967).

worked with tire representatives to pressure dealers into buying the company sponsored TBA.¹⁰³ In fact, the Commission examiner found that the Texaco policy since 1948 had been to permit each dealer to choose whatever brand TBA he desired.¹⁰⁴ While the court recognized the interpretation given to *Atlantic Refining* by the Fifth Circuit, it concluded that "the record simply does not support a finding that Texaco violated the [Federal Trade Commission] Act."¹⁰⁵ In so holding the court stated:

[W]hile the record shows Texaco indeed has dominant economic power, it is fatally deficient on the crucial issues of exercise of that power and subsequent anticompetitive effects.¹⁰⁶

In *FTC v. Texaco, Inc.*¹⁰⁷ the Commission challenged the decision of the court of appeals, asserting that the mere exercise of economic power, even without overt coercive acts, is inherently an unfair method of competition. The Supreme Court agreed, holding that:

While the evidence in the present case fails to establish the kind of overt coercive acts shown in *Atlantic*, we think it clear nonetheless that Texaco's dominant economic power was used in a manner which tended to foreclose competition in the marketing of TBA. The sales-commission system for marketing TBA is inherently coercive The Commission is not required to show that a practice it condemns has totally eliminated competition in the relevant market. It is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce.¹⁰⁸

The Supreme Court appears to have decided in the TBA cases that practices stemming from the manufacturer's market power which unfairly burden a significant amount of competition are coercive per se and consequently constitute unfair methods of competition.¹⁰⁹ Further, it is probable though not certain that the TBA decisions, by reemphasizing the necessity for anticompetitive effects in their use of the "unfairly burden" test, have overruled, sub silentio, the *Brown Shoe* decision.

III. EVALUATION OF THE EXPANDED SCOPE OF SECTION 5

Judicial expansion of the scope of section 5 has, until recently, been considered consistent with the legislative intent expressed therein.

¹⁰³ Id. at 948-49.

¹⁰⁴ Id. at 948 n.12.

¹⁰⁵ Id. at 951.

¹⁰⁶ Id.

¹⁰⁷ 393 U.S. 223 (1968).

¹⁰⁸ Id. at 228-30.

¹⁰⁹ 393 U.S. at 232 (Stewart, J., dissenting).

The necessity of showing anticompetitive effects resulting from a practice potentially violative of Sherman and Clayton Act provisions is still considered the correct accommodation between the promotion of fair competition and a proper application of antitrust standards.¹¹⁰ However, the recent decisions in *Grand Union* and *Brown Shoe* have drawn sharp criticism from the antitrust bar. First, the combined effect of these cases has been criticized as being a delegation to the Commission of quasi-legislative power to use section 5 to displace the other antitrust statutes.¹¹¹ Second, it is charged that the Commission may now strike down any exclusive dealing arrangement which, in its unlimited discretion, it deems improper, without having to show the arrangement's likely anticompetitive effect.¹¹² Third, it is alleged that the vague concept of incipency read into the FTCA has permitted an administrative agency to refashion statutory standards of legality and has produced the anomolous compound of "incipient incipency."¹¹³ Since the Clayton Act is designed to prohibit Sherman Act restraints in their incipient stage, reading the FTCA as reaching Clayton Act practices in their incipient stage thus creates a prohibition of incipient incipencies.

The first criticism fails to recognize the congressional intent that prompted enactment of section 5. Legislative history demonstrates that the term "unfair methods of competition" was specifically used in section 5 to remedy the Sherman Act misinterpretation problem and to supplement the specific prohibitions of the Clayton Act. To criticize the FTC for its flexible application of section 5 to close the technical loopholes in the other antitrust statutes is to criticize the purposes and designs of Congress.

More telling criticisms, however, are raised by the second and third charges, which are similar because both relate to the quantum of proof necessary to find an unfair method of competition. Application of section 5 without requiring proof of likely anticompetitive effects disregards the primary indication of a business method's fairness—its effect upon competitors. Although recent applications of section 5 may arguably be praiseworthy because of their flexibility, they nevertheless diminish the quantum of proof required to what appears to be an unreasonable level. An incipient incipency is an incomprehensible degree of infraction. When this lesser burden of proof is coupled with the Commission's broad discretionary power, the result approaches standardless regulation. Such a development is unnecessary and unwarranted.

As the previously presented legislative history illustrates, section

¹¹⁰ Howrey, *Interplay of Unfair Competition and Antitrust Doctrines Under Section 5 of the Federal Trade Commission Act*, 13-2 *Antitrust Bull.* 1313, 1333 (1968).

¹¹¹ *Id.* at 1321.

¹¹² Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 *Yale L.J.* 92, 98 (1966); Howrey, *supra* note 110, at 1321.

¹¹³ Howrey, *supra* note 110, at 1332-33.

5 is not susceptible to rigid definition. It must be flexible in order to test new methods of competition as they arise. However, the various interpretations of specific statutory language in other antitrust laws have tended to obscure the broad mandate of section 5. In their efforts to suggest more workable and definitive standards to control section 5, the commentators have thus far not agreed. At least three solutions to the problems created by the *Grand Union* and *Brown Shoe* decisions have been offered. Each one is here separately analyzed.

A. *Displacement of the Sherman and Clayton Acts*

It has been suggested that the extension of section 5 in *Brown Shoe*, with its potential for future application, has rendered the Sherman and Clayton Acts superfluous. It is maintained that their only purpose in the future, except as a proscription of already full blown anticompetitive practices, will be to serve as a foundation of precedent upon which a new structure of antitrust law, consisting of unfair methods of competition, will be built. Such a limited application, however, would be wasteful. Continued application of the Sherman and Clayton Acts not only preserves their regulatory theories but also permits them to grow. Reliance entirely upon section 5 as the primary means of regulation might produce an unwanted result. An eventual reversal of the expansion of section 5, coupled with atrophy in the Sherman and Clayton Acts, would be most detrimental to trade regulation. Certainly, the courts could return to the narrow *Gratz* interpretation. The continued use of the other statutes would prevent such an occurrence. In utilizing its judicially interpreted powers, the FTC should be cautious of becoming entangled in "per se" rules concerning section 5.¹¹⁴ Such rules might work to destroy the flexible nature of the unfair methods of competition standard.

B. *The General Subject Test*

In addressing himself to the *Grand Union* decision, Professor Handler has proposed what is termed the "general subject" test.¹¹⁵ The fundamental premise underlying this test is that neither the legislative history nor the litigation of unfair methods of competition supports the view that the FTC may avoid restrictive statutory language by resorting to section 5.¹¹⁶ Professor Handler concludes:

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 predictions 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 sub-

¹¹⁴ *Id.* at 1333.

¹¹⁵ Handler, *Recent Antitrust Developments*, 71 *Yale L.J.* 75, 95 (1961).

¹¹⁶ *Id.* at 93.

ject but what it has said does not go as far as the Commission would like.¹¹⁷

While the "general subject" approach provides a competent standard for accommodating section 5 with the Clayton Act, considerable difficulty arises when it is applied to the Sherman Act. The Clayton Act is more specific than the Sherman Act, so that the task of determining its general subjects and the corresponding applicability of section 5 is a simpler task. With the Sherman Act it could be asserted under this approach that, in view of the broad prohibitions of Section 1 and recent judicial expansion of the concept of conspiracy,¹¹⁸ section 5 has no jurisdiction to prohibit business methods which are not covered by the general subject Congress intended Section 1 to prosecute but which may now result in a Section 1 Sherman Act violation. Clearly, previous decisions have held otherwise, demonstrating the complexity of these concepts, and the unworkability of this approach as a guideline.¹¹⁹ Furthermore, critics of Professor Handler's approach have charged him with being more concerned with what does not violate section 5 than with what does.¹²⁰

C. *The Equivalent Type of Conduct Test*

A more liberal approach to the problem has been suggested by Professor Oppenheim in his response to the *Grand Union* decision.¹²¹ His test gains support from what he terms a jurisdictional deficiency in both the Sherman and Clayton Acts. These deficiencies he regarded as oversights on the part of Congress, arising from a lack of foresight. Because of these deficiencies and the increasing overlap between the Sherman, Clayton and Federal Trade Commission Acts, Professor Oppenheim suggested that:

While alternative constructions may be gleaned from congressional legislative history, it seems that, on balance, the Commission has authority under section 5 to proceed against *equivalent types* of practices not within the jurisdictional bounds of the coverage specified in the Clayton Act.¹²²

Criticism of the equivalency standard consists primarily of two arguments. First, consideration of jurisdiction in these circumstances

¹¹⁷ Id. at 95.

¹¹⁸ See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962), for a discussion of this point.

¹¹⁹ Pearson, *Section 5 of the Federal Trade Commission Act as Antitrust: A Comment*, 47 B.U.L. Rev. 1, 10 (1967).

¹²⁰ Id. at 11.

¹²¹ Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 Mich. L. Rev. 821 (1961).

¹²² Id. at 835.

reveals an often tenuous and semantic distinction between matters relating to jurisdiction and matters relating to the merits. Second, the utilization of a comparison test to determine equivalency might become arbitrary and mechanical and it would not take into account particular business or economic characteristics of statutory violations which may be more important than others.¹²³ While the equivalency test does provide a simple accommodation of statutory policy, it lacks definitive guidelines capable of controlling the evasive concepts of section 5. The Commission is cautioned against viewing this attempted accommodation as an invitation to invoke section 5 whenever it believes conduct runs counter to the "spirit" of either of the other statutes. Such synthetic jurisdiction was not intended by Congress nor has it been supported by judicial review.¹²⁴

D. *The Open-Ended Injury To Competition Test*

A recently developed test that consolidates both the *Grand Union* and *Brown Shoe* decisions involves an open-ended inquiry into anticompetitive effects. The proponents of this test agree that injury to competition, no matter what form it takes, is a workable standard for evaluating methods of competition.¹²⁵ They contemplate applying this standard to all business practices not proscribed by the Sherman and Clayton Acts. In discussing the use of section 5 in such an open-ended test, one commentator has stated:

This does not mean that the other antitrust statutes are superfluous. The significance of the approach I have suggested lies in viewing section 5 as an independent source of antitrust law. The other statutes are useful as guidelines in formulating general standards of measuring injury to competition, but the Commission ought not to extract per se rules from those statutes for use in section 5 cases. If a respondent's conduct does not violate some other statute, then it should not be treated as if it did. Each section 5 case should be judged according to the rules of reason. The stricter standards of illegality—the per se or almost per se rules—of other statutes should be reserved for cases involving those statutes.¹²⁶

It is suggested that this open-ended approach, based upon a rational analysis of injury to competition, provides the best possible test for accommodating section 5 with the Sherman and Clayton Acts. This approach advocates permitting the FTC to evaluate practices falling

¹²³ Pearson, *supra* note 119, at 14.

¹²⁴ *Id.* at 18; Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 *Vill. L. Rev.* 517, 540 n.82 (1962).

¹²⁵ Pearson, *supra* note 119, at 18.

¹²⁶ *Id.*

outside the scope of the other statutes and to develop a field of corresponding jurisprudence. Section 5 would then be used as an independent source of antitrust law to regulate those practices which technically avoid the prohibitions of the Sherman and Clayton Acts but which still violate the competitive policies and spirit of the other statutes by producing anticompetitive effects.

Utilization of section 5 as an independent source of antitrust law, guided by the anticompetitive effect standard, would be consistent with the objectives Congress intended both the FTC and section 5 to achieve. As noted, preservation of competition through application of a standard capable of dealing with commercial dexterity was the primary objective behind passage of section 5. Moreover, concern with the effects on competition rather than with business conduct or "workable" competition shifts the emphasis of section 5 back to the original party in interest, the consumer. Maintenance of competitive markets protects the consumer by insuring competitive price levels and qualitatively superior products.

However, the workability of a strict standard depends upon the Commission's conception of "competition" and upon those effects it deems necessary to show a violation. Professor Pearson criticizes a per se rule approach and advocates instead a rule of reason approach to evaluate legal levels of competition. The latter approach, however, would, in effect, revert antitrust law to the day of *Standard Oil* and misinterpretation of the Sherman Act.¹²⁷ A more appropriate guideline than the rule of reason approach would be a standard that demands absolute maintenance of competition, regardless of the reasonableness of the conduct. Under this standard, any method of business behavior (as distinguished from a deceptive practice) that produces an anticompetitive effect, no matter how insignificant, would be considered cognizable by the FTC as a violation of section 5.

It is submitted that no radical reversal of Supreme Court precedent is necessary to achieve this approach. The distinguishing feature between an open-ended approach and the Court's opinions in *Grand Union* and *Brown Shoe* is that the former approach requires proof of anticompetitive effects while the approach in the latter decisions does not. The practice of using section 5 to condemn practices not expressly covered by the other statutes would continue to be a method of maintaining viable competition. A clarification by the Supreme Court in this regard would benefit not only the consumer, through lower prices, but also the business community, through greater certainty.

¹²⁷ In fairness to Professor Pearson, it should be noted that he recognized the problems inherent within an anticompetitive effects standard in relation to the rule of reason but considered them beyond the scope of his comment. *Id.* at 15 n.46.

IV. APPLICATION OF SECTION 5 TO PARALLEL BUSINESS BEHAVIOR

The paramount question presented by the Commission's complaint¹²⁸ against the five largest tire manufacturers is what the FTC must show in order to establish a violation of section 5. Considering the absence of an express allegation of agreement or conspiracy, the court might have required a showing that *each* bus-tire leasing agreement in question was a separate bilateral business practice constituting an unfair method of competition. This, however, was not the theory of the complaint. The Commission utilized a novel approach in charging the respondents with unfair methods of competition, by alleging that they "are now using and for many years have used and pursued parallel courses of business behavior . . ." ¹²⁹

The propriety of using section 5 in this way depends, to a considerable degree, upon the precedent utilized. As previously noted, certain cases may provide excellent precedent for prohibiting these agreements. *Cement Institute*, *Triangle Conduit* and *Motion Picture Adv. Co.* support the use of section 5 to condemn individual practices that fall short of the Sherman and Clayton Act requirement of an agreement. Particular emphasis might be placed upon *Triangle Conduit's* finding that one's use of a basing point system, with knowledge that other competitors also used it, constituted an unfair method of competition. In prior decisions, the practices condemned under section 5 involved extremely complex and sophisticated systems which had required more than normal business efficiency to develop. Normally, this would suggest Sherman Act collusion. However, it should again be noted that the Supreme Court's opinion in *Cement Institute* expressly recognized the government's inability to establish a Sherman Act violation in an earlier case. Also, *Motion Picture Adv. Co.* was a substantive proceeding charging a violation of section 5 by reason of unilateral conduct.

As seen from the foregoing discussion, proof of collusion is probably not required under section 5, yet the FTC may have other difficulties with the parallel business behavior theory. The use of similar leasing agreements by manufacturers of homogeneous products, who sell to buyers having a common cost structure, may just as likely be the result of normal business efficiency as the result of conscious parallel behavior. The economic evidence introduced might prove this hypothesis, and lead the court to conclude that identical leasing methods are not unfair methods of competition.¹³⁰ Strategically, the Com-

¹²⁸ Federal Trade Commission Proposed Complaint, CCH Trade Reg. Rep. ¶ 19,381 at 21,511 (1970).

¹²⁹ *Id.*

¹³⁰ The Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), pioneered the use of modern economic theory as a major factual consideration in judicial decisions. The Court in that case formulated a presumption of illegality applicable to mergers, which could be rebutted by economic evidence indicating non-concentration in the market.

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mission would then be forced to attack each leasing agreement individually.

However, this does not appear to be the situation in the bus tire leasing case. In view of the various "fringe" practices that coexist with the basic leasing agreement, it is submitted that no quantum of economic evidence could be introduced to dispel their unfair character and their restrictive effect upon competition.¹⁸¹ The leasing policy, by itself, may be compatible with business good faith. However, when the basic agreement is coupled with the restrictive servicing provisions, a "buy-out" clause necessary for termination, and the practice of building up inventory before termination, there appears to be substantial evidence upon which the Commission could rest a section 5 violation. The anticompetitive effects produced by this combination of practices appear no different from the effects of those practices which have been held unfair methods of competition in earlier cases. Further, the Court in *Triangle Conduit*, through its interpretation of *Cement Institute*, expressly upheld both the finding of conspiracy under Section 1 of the Sherman Act and unlawful individual conduct under Section 5 of the FTCA. It appears then, that the Commission has precedent for condemning these leasing agreements as unfair methods of competition.

It seems, however, that the Commission has perhaps blinded itself to the possible consequences of a proven allegation. If the complaint were upheld, not on grounds of unnecessarily restrictive servicing provisions, but instead on the Commission's theory of conscious parallel behavior, what type of a decree could be drafted? What test could the Supreme Court develop to govern future situations? Would all businessmen who face substantially the same market factors and who react in identical ways run the risk of a section 5 complaint because of parallel business behavior? These and other uncertainties raised by this potential use of section 5 suggest that a more appropriate theory is necessary to support the unfair method of competition charge.

The recent Supreme Court decision in the TBA trilogy¹⁸² concentrated upon the market power of a manufacturer as a determinative factor in proving an unfair method of competition. Indeed, the final decision of the trilogy, *FTC v. Texaco*,¹⁸³ seems to denote certain uses of market power as per se violations of section 5. *Texaco* held that practices which result from the manufacturer's market power and which unfairly burden a significant volume of commerce are inherently coercive and constitute unfair methods of competition.¹⁸⁴

¹⁸¹ See, e.g., *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *Shell Oil Co. v. FTC*, 360 F.2d 470 (5th Cir. 1966), cert. denied, 385 U.S. 1002 (1967); and *FTC v. Texaco*, 393 U.S. 223 (1968).

¹⁸² *Id.*

¹⁸³ 393 U.S. 223 (1968).

¹⁸⁴ *Id.* at 228-30.

In finding that Texaco held dominant economic power, the Court concluded that such power was "inherent in the structure and economics of the petroleum distribution system."¹⁸⁵ By analogy then, it would appear that the requisite market power is also inherent in the structure and economics of the bus tire distribution market, and the leasing agreements resulting from that power are unduly restrictive, creating an unfair burden upon competition.

The facts alleged by the FTC in the bus tire complaint seem to support the theory that each manufacturer has abusively manipulated his market power to coerce customers into agreements benefiting himself and fellow competitors. The fact that each manufacturer can obtain such a lease agreement from his customer clearly demonstrates, without more, an excessive degree of market power. A tie-in contract presents a similar economic situation. There the seller, by virtue of his position in the market for the tying product, has enough economic leverage to induce his customers to take the tied item along with the tying product. As long as the seller has sufficient economic power regarding the tying product to appreciably restrain free competition in the market for the tied item, he is considered to possess excessive market power.¹⁸⁶ Despite this analogy, application of the market power theory to the tire-leasing agreements is subject to the argument that without all five manufacturers demanding the same agreement, no one manufacturer would command the economic power necessary to do so. In reality then, no single manufacturer controls dominant economic power. All collectively share in monopoly power. Shared monopoly differs from market power in that no single competitor possesses the power to act alone without regard for the retaliatory power of competitors. In this shared situation, unless all competitors follow each other, little change in market conditions will result. Shared monopoly power is differentiated from interdependent oligopoly power in that the former is maintained and expanded through predatory practices.¹⁸⁷ The various clauses of the tire leasing agreements are indicative of shared monopoly power.

The analysis of market structure in *Texaco* arguably bolsters the charge of excessive market power against the tire manufacturers. The oligopolistic structure of the tire industry, and the mutual interdependence of the tire companies regarding business decisions, encouraged the marketing decisions of each competitor. Each manufacturer commands excessive market power at present, despite its dependence upon the group for survival. Each individually accounts

¹⁸⁵ *Id.* at 226.

¹⁸⁶ See, e.g., *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606 n.21 (1953); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

¹⁸⁷ See Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 *Harv. L. Rev.* 1207, 1212-27 (1969).

for a large share of the market from which it cannot easily be divested. Condemnation of each competitor's practice as an unfair method of competition is suggested as an alternative approach to the theory of parallel business behavior. Although market power cannot be specifically defined, the incidents that result from it are tangible. The tire-leasing agreement, like the sales-commission contract, can be prohibited by an FTC order forbidding its use. Drafting such an order presents fewer conceptual problems than an order prohibiting parallel business behavior. Utilization of the market power theory in this case would inform the business community of another limitation section 5 places upon economic power, and would avoid the uncertainties inherent in the concept of condemning parallel business behavior as an unfair method of competition.

V. THE CURRENT DEBATE ON SECTION 5 ENFORCEMENT POLICIES

It is the fundamental thesis of the approach suggested herein that the antitrust policy of evaluating industrial conduct and business performance is incapable of dealing with existing concentrated industries. Even though Section 5 of the FTCA may jurisdictionally be a proper method of attacking unfair methods of business behavior, it is not the most appropriate remedy. The prohibition of unfair conduct provides only a short run solution, for it cannot reach the heart of the problem—the inherently anticompetitive oligopolistic market. A more lasting solution is available through the use of Section 2 of the Sherman Act¹³⁸ and divestiture.

The antitrust laws are presently in the process of adaptation to a complicated economic disorder—oligopoly power—which is a problem not of business behavior but of market structure.¹³⁹ Prior to 1962, antitrust enforcement consistently approached the problem of industrial concentration from the conduct and business performance points of view, rather than from a structural point of view. Since 1962, however, the Supreme Court has struck directly at oligopolistic power and has acted to curb its growth.¹⁴⁰

However, the new awareness demonstrated by these decisions

¹³⁸ 15 U.S.C. §§ 1-7 (1970). Section 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

¹³⁹ Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 *Stan. L. Rev.* 285, 288 (1967).

¹⁴⁰ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

does not concern itself with oligopoly power already entrenched and operating, but rather with the prevention of further concentration in marginally competitive markets. Significantly, the Court has adopted as the foundation of its antitrust policy a sound economic premise:¹⁴¹ a horizontal market structure that creates a concentrated oligopoly composed of only several firms is inherently anticompetitive. This approach to antitrust policy shifts the emphasis of regulation from a conduct-performance analysis to a structural analysis. In light of the Court's acceptance of this economic premise, consideration of its development is necessary in order to understand its significance.

Market power in an oligopolistic market is quite different from that in a purely competitive market. Oligopoly has been defined as "the form of imperfect competition which obtains when sellers are few in number and any one of them is of such size that an increase or decrease in his output will appreciably affect the market price."¹⁴² Oligopoly power is that power possessed by jointly-acting oligopolists.¹⁴³ The underlying premise of the concept of oligopolistic power is that conduct by firms in a market in which there are only a few sellers is fundamentally different from conduct in a "purely competitive" market composed of many sellers and buyers.¹⁴⁴ The rational self-interest of sellers having similar cost factors in an oligopolistic market, who are intent upon maximizing profits, will lead them to charge identical prices and eventually to arrive at an identical equilibrium price which will yield the largest return. Not unnaturally, this price may be the same price that a monopolist, intent upon maximizing profits, would charge. In the purely competitive market, the situation is quite different. Here the market share of a single competitor is not significantly affected by a price cut, so that as a matter of rational, economic self-interest, no competitive response will occur. Hence, the would-be price cutter is not inhibited in his market action. Further, other sellers and new entrants also feel free to reduce price if they determine it would increase profits by increasing business, ultimately forcing the market price well below a monopoly pricing level, to the point where "zero" profit in the economic sense would be made by all firms.¹⁴⁵

Both theoretical and empirical economic studies have observed that price uniformity in an oligopolistic market can result without any formal or informal agreement. A pattern of price leadership develops

¹⁴¹ Brodley, *supra* note 139, at 338. See also Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 *Colum. L. Rev.* 422 (1965) and Bork, *Contrasts in Antitrust Theory: I*, 65 *Colum. L. Rev.* 401 (1965).

¹⁴² C. Wilcox, *Competition & Monopoly in American Industry* 5, TNEC Monograph No. 21, (1940).

¹⁴³ Brodley, *supra* note 139, at 289.

¹⁴⁴ See E. Chamberlin, *The Theory of Monopolistic Competition*, chapters 2 and 3, (7th ed. 1956); J. Robinson, *Economics of Imperfect Competition* (1st ed. 1933).

¹⁴⁵ F. Machlup, *The Economics of Seller's Competition* 347-74 (1952); J. Bain, *Industrial Organization* 266-315 (1959).

in an industry in which one seller becomes the price leader, while the other firms follow the leader's judgment of the changing market situation in return for certainty of knowledge as to their rival's actions. In economic terminology, such an interrelated phenomenon is referred to as "mutual interdependence" or "shared monopoly."¹⁴⁶ It also has been characterized as an "agreement to agree" that would not constitute an agreement in any legal sense, but rather the uniform response of competitive firms.¹⁴⁷ In light of these differences between a competitive and an oligopolistic market, and the Supreme Court's recent recognition of the inherent anticompetitive nature of oligopoly, the different approaches to controlling oligopoly power will be analyzed.

A. *The Conduct Approach*

The conduct approach, as distinguished from the structural and performance approaches, analyzes those actions taken by the businessman as a part of his competitive strategy. In particular, this approach is concerned with actions that reflect the basis upon which he makes his price and output decisions. Such actions indicate (1) that he is either making decisions independently or collusively (collusive in the economic sense, that is, oligopolistic interdependence) and (2) whether he is, though not acting collusively, engaging in predatory or exclusionary practices against his competitors, his suppliers or his customers.¹⁴⁸

The proponents of the conduct approach differ from the structuralists in their evaluation of business reaction to different market structures. In the conduct approach the mere existence of the power to restrict output and to charge noncompetitive prices does not necessarily mean that such power will be used.¹⁴⁹ The concern is whether the conduct is anticompetitive, not whether the practice resulted from a dominant market power position. This has led to the criticism that the conduct approach concentrates on the symptoms and not the disease.¹⁵⁰ Other critics of this approach contend that conceptions of fair conduct are difficult to define and administer, thus creating a general feeling of indecision and uncertainty for businessmen and administrators. The most telling criticism of the conduct approach, also applicable to section 5, may be seen in the short run aspects of a FTC cease and desist order. A Commission order in the tire manufacturers case might eliminate the unfairness of the lease agreement, but would leave intact the structural interdependence that brought it into existence.

¹⁴⁶ See Turner, *supra* note 137, at 1225.

¹⁴⁷ See F. Machlup, *supra* note 145, at 443-44 and J. Bain, *supra* note 145, at 296-98.

¹⁴⁸ Mueller, *The New Antitrust: A 'Structural' Approach*, 1 *Antitrust Law & Econ. Rev.* 87, 90 n.8 (1967).

¹⁴⁹ *Id.* at 93.

¹⁵⁰ *Id.* at 108-09.

B. The Performance Approach

The performance approach refers to an analysis of the economic results of business conduct. Special emphasis is placed on a firm's contribution to the economy, including its effect on: (1) efficiency in production and distribution; (2) maintenance of full employment with price stability; (3) achievement of a high rate of progress in technology and productivity; and (4) equity in the distribution of income.¹⁵¹ The performance school of thought has been termed the "workable competition" approach—the approach most often applied in formulating antitrust policy.¹⁵² Conceptually, the doctrine of workable competition has been defined as:

[A] rough and ready judgment by some economists . . . that a particular industry is performing reasonably well . . . relative to alternative industrial arrangements which are practically attainable. There are no objective criteria of workable competition, and such criteria as are proffered are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition.¹⁵³

Performance theorists support their position by contending that if a firm's performance is good, then, by definition, all the important market forces including competition are functioning in a "workable" manner. An industry's competitive structure and conduct are analyzed within the framework of the industry's "workably competitive" performance.¹⁵⁴

Critics of the performance approach, like those of the conduct approach, consider it ineffective as a means of regulation, alleging that once "unworkable competition" is established, it offers no remedy to deal with the problem. Having denied the existence of any causal relationship between structure and performance, the performance approach cannot logically prescribe divestiture. Further, the remedy of injunctive relief is faced with the problem of framing an order which will effectively tell oligopolists to compete, a command which is as difficult to enforce as it is to draft.¹⁵⁵

C. The Structural Approach

Since 1962, in an effort to prevent further concentration, the Justice Department has incorporated the structural approach into its

¹⁵¹ Caves, *American Industry, Structure Conduct and Performance* 95 (1964); see also C. Kaysen & D. Turner, *Antitrust Policy* 62-70 (1959).

¹⁵² See, e.g., Stocking, *On the Concept of Workable Competition as an Antitrust Guide*, 2 *Antitrust Bull.* 3 (1956); and Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly*, 63 *Yale L.J.* 348 (1954).

¹⁵³ Report of the Attorney General's National Committee to Study the Antitrust Laws at 339 (1955).

¹⁵⁴ Mueller, *supra* note 148, at 94-95.

¹⁵⁵ *Id.* at 102.

policy determinations concerning mergers and acquisitions.¹⁵⁶ Structure refers to those relatively permanent features of a market which are beyond the short run control of the individual firm and which thus constitute the boundaries that restrain competitive action. The more significant structural factors are: (1) degree of concentration, (2) barriers to entry, and (3) product differentiation.¹⁵⁷ Concentration in an oligopolistic market, the base from which the other two features obtain vitality, gives rise to "mutual interdependence" between competitors, allowing them to begin pricing as collective monopolists instead of independent producers.¹⁵⁸ Product differentiation provides market power to command premium prices, while barriers to entry intensify concentration which in turn leads to overpricing.

The structuralists maintain that "an industry which does not have a competitive structure will not have competitive behavior."¹⁵⁹ A chain of causation running from structure to conduct to performance underpins the essential thesis of the structuralist school of thought. Structure is said to determine conduct which in turn determines performance. Structuralists would contend that in an anticompetitive structure the compelling pressure of the structural factors militates against the long run survival of effectively competitive conduct or performance.¹⁶⁰

The structural approach differs in many respects from the traditional "per se" approach. Under the latter, price fixing, for example, is declared to be so inherently anticompetitive that it is, without more, illegal. Under the structural approach a market structure which is not in and of itself illegal, but which is conducive to the emergence of anticompetitive conduct, gives rise to the presumption that arrangements, mergers and other acts that tend to create or maintain such a market structure are illegal.¹⁶¹ In determining whether a challenged activity unreasonably restrains trade under the Sherman Act, or whether it is an unfair method of competition under the Federal Trade Commission Act, a prime consideration is the relationship between the challenged conduct and the existing market structure.

The following advantages would result from such a reformulation of antitrust theory:¹⁶²

- (1) legal rules could be constructed which carefully differ-

¹⁵⁶ See Department of Justice Merger Guidelines, 1 Trade Reg. Rep. ¶ 4430 at 6681 (1968).

¹⁵⁷ Mueller, *supra* note 148, at 89 n.7. Product differentiation is generally defined as the extent to which substitute products are distinguished from each other in the minds of purchasers. This differentiation permits the seller of a differentiated product to acquire a favored position over his competitors in terms of market price. *Id.* at 90 n.7.

¹⁵⁸ J. Bain, *Barriers to New Competition* 12 (1965).

¹⁵⁹ *United States v. E.I. duPont deNemours & Co.*, 351 U.S. 377, 426 (1956) (Warren, C. J., dissenting).

¹⁶⁰ Mueller, *supra* note 148, at 91.

¹⁶¹ Brodley, *supra* note 139, at 339.

¹⁶² *Id.* at 340-41.

entiate between the market activities of monopolistic or oligopolistic firms and those of other firms. Such a distinction might permit a relaxation of merger rules concerning non-oligopolistic firms, thereby heightening the opportunity for these firms to challenge the oligopolists;

(2) once the relevant market is defined, the structural appearance of oligopoly is quite readily recognized;

(3) by limiting the operation of antitrust rules to oligopolistic firms and markets, the construction of simplified rules, such as the prima facie presumption, is made possible;¹⁶³

(4) the result of focusing the rules primarily upon market structure, rather than on the exercise of market power, avoids difficult complexities: Questions of efficiency, progressiveness, ease of entry, substitute competition effectiveness, and other economic issues obscure predictability and uniform enforcement when the rules attempt to determine whether oligopoly power has been used. Rules which focus primarily on market structure, however, avoid these complex issues in the first instance. Yet, prima facie presumptions based on market structure still provide the challenged competitor an opportunity to offer, in rebuttal, economic data showing no threat to competition.

Despite general agreement among structuralists that a reformulation of antitrust policy is essential if the enforcement agencies are to deal effectively with oligopolies, there is disagreement as to the proper methods of enforcement. The two options most frequently offered by the structuralist are (1) divestiture and dissolution of the concentrated industry, and (2) removal of barriers to entry, thus allowing natural deconcentration.¹⁶⁴ The latter option has received much greater acceptance as a result of the "harshness" normally ascribed to divestiture.

The leading proponent of enforcement through divestiture,¹⁶⁵ Professor Turner, initially suggested that additional legislation, capable of appropriately dealing with oligopoly, was the only available solution, considering the inadequacies of the Sherman Act.¹⁶⁶ The

¹⁶³ See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), and Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1386, 1391 (1965). See also *United States v. Grinnel Corp.*, 236 F. Supp. 244 (D.R.I. 1964) (Wyzanski, J.).

¹⁶⁴ The barriers method of enforcement, however, would not apply to naturally-created public monopolies or oligopolies such as public utilities. The barriers to entry in those industries are created by law for regulatory purposes.

¹⁶⁵ See C. Kaysen & D. Turner, *Antitrust Policy* (1959); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962); and Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207 (1969). See also Asch, *Collusive Oligopoly: An Antitrust Quandry*, 2 *Antitrust Law & Econ. Rev.* 53 (1969).

¹⁶⁶ C. Kaysen & D. Turner, *Antitrust Policy* 266-69 (1959).

thesis supporting his initial position was that the oligopolist's interdependence in decision-making, resulting from market structure without any formal agreement, placed it outside the scope of Section 1 of the Sherman Act. The rational oligopolist behaves in precisely the same manner as the rational seller in a competitively structured industry; he simply takes into account the reactions of his fellow oligopolists, an inherent result of the structural makeup of the market.¹⁶⁷ In Professor Turner's opinion, such behavior should not be considered illegal under Section 1 of the Sherman Act.

Recently Professor Turner has altered his position as regards the need for additional legislation. He has proposed the use of stringent merger guidelines to prevent future concentration in industries that are now competitive, and divestiture of the more serious, persistent and economically significant monopolies and oligopolies. He suggests that an economy of scale level of production, without excess capacity, would produce and maintain a competitive market structure.¹⁶⁸

Professor Turner suggests that instances of oligopolistic markets, in which relatively few sellers effectively share monopoly power, occur more frequently than instances of individually held monopoly power.¹⁶⁹ However, beyond several cases involving explicit conspiracy to exclude, there is a dearth of precedent which would support divestiture of shared monopolies. Section 1, he concludes, provides no relief in a structurally shared monopoly situation. However, by analogizing to individual monopoly power and its judicial treatment under Section 2 of the Sherman Act, Professor Turner finds it possible to suggest that:

If it is inappropriate for a single monopolist to employ long-term leases that are not terminable cheaply and that discriminate against competition because they are more restrictive than any acceptable business justification would warrant, I cannot see why the same should not be true of leading firms that share market dominance. Indeed, a practice that can be so characterized could reasonably be deemed unlawful without regard to the market power . . . [and] where no contract or "agreement" is involved, be deemed an unlawful "attempt" to monopolize under section 2.¹⁷⁰

Thus, he suggests that divestiture of all oligopolists down to a competitive economies of scale level provides the most appropriate relief.¹⁷¹ Excess output capacity resulting from seller concentration produces non-competitive prices and excess profits.¹⁷² By requiring a level of

¹⁶⁷ Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 *Harv. L. Rev.* 655, 663-71 (1962).

¹⁶⁸ Turner, *supra* note 137, at 1214-17.

¹⁶⁹ *Id.* at 1225.

¹⁷⁰ *Id.* at 1228.

¹⁷¹ *Id.* at 1231 n.45.

¹⁷² J. Bain, *Industrial Organization* 448 (2d ed. 1968).

production consistent with a manufacturer's operative scale, the manipulation of supply and demand factors by oligopolists is curtailed and the market is converted into a competitively responsive structure. The long run gains resulting from this structural change are self evident!

Proponents of the removal of barriers approach contend that "alteration of the condition of entry might constitute a generally more feasible regulatory technique than dissolution and dismemberment policies aimed just at reducing seller concentration."¹⁷³ They postulate that once artificial barriers have been pulled down, dissolution of the large market shares held by the industry leaders will be accomplished naturally by the entry of other businesses. These new entrants will gradually restore the market's competitive character.¹⁷⁴

The most severe criticism of dissolution as a remedy focuses upon its disruptive effects.¹⁷⁵ The economies of scale proposed by Professor Turner is considered to involve appreciable social costs.¹⁷⁶ Reconstitution of a major industry is believed to involve not only substantial administrative costs but also a risk that the firms might be separated into units smaller than the efficient scale of operation in that industry, thus causing much greater social costs. Although an overreaching dissolution may be prevented by allowing proof that economies of scale would be lost in any reduction of firm size, expensive litigation costs, nevertheless, would be incurred. The difficulties in determining the most efficient size are such that erroneous results may frequently occur, thereby sacrificing the prior existing economies of scale.¹⁷⁷

The Report of the Task Force on Productivity and Competition¹⁷⁸ (referred to as the "Stigler Report"), recently requested by President Nixon, categorically endorsed the structural approach to antitrust policy and inferentially proposed the "barriers method" of enforcement. Recognizing the need for ease of entry to prevent market concentration, the Stigler Report states:

Concern with oligopoly has led to proposals to use the antitrust laws (perhaps amended) to deconcentrate highly oligopolistic industries by dissolving their leading firms. We cannot endorse these proposals on the basis of existing knowledge. . . . [W]e are confident that structural remedies will be sanctioned by the courts in cases where, due to number of firms and the other conditions of the market, lesser remedies are likely to be unavailing.¹⁷⁹

¹⁷³ J. Bain, *supra* note 158, at 208.

¹⁷⁴ See, e.g., Brodley, *supra* note 139, at 344-45; Mueller, *supra* note 148, at 129; and Posner, *Oligopoly and Antitrust Laws: A Suggested Approach*, 21 *Stan. L. Rev.* 1562, 1593-98 (1969).

¹⁷⁵ *Id.*

¹⁷⁶ Posner, *supra* note 174, at 1594.

¹⁷⁷ *Id.*

¹⁷⁸ 2 *Antitrust Law and Econ. Rev.* 13 (1969).

¹⁷⁹ *Id.* at 26-27.

As evidenced from this report, dissolution has not yet gained general acceptance as a remedy for oligopolistic concentration. Perhaps further economic research is necessary in the area of efficiency and scale of operation before such an approach will be effectively and confidently applied. This is not to say, however, that dissolution should never be invoked. As the Stigler Report states: "Collusion that can be incontrovertibly inferred from behavior (such as persistent, stable price discrimination in the economist's sense) should not bring immunity from the Sherman Act . . ." ¹⁸⁰ Perhaps collusion can be inferred from the behavior of the tire manufacturing industry in its commercial bus tire market. When economic data substantiates that ninety nine percent of a market is controlled by five manufacturers, structural alterations must be made, regardless of the method of enforcement used.

CONCLUSION

In this article it has been suggested that Section 5 of the Federal Trade Commission Act, while applicable to parallel courses of business behavior, would still be remedially ineffective because the relief provided would be short run. In order to return effective competition to the bus tire market of the tire industry, the government must attack market structure rather than business conduct or performance. Recently, Section 2 of the Sherman Act has been suggested as a medium through which such a result may be reached. ¹⁸¹

Recent developments concerning the Federal Trade Commission's complaint against the tire manufacturers further substantiate the inappropriateness of using Section 5 of the FTCA. The tire manufacturers have recently obtained from the FTC a consolidated consent order ¹⁸² barring certain tire leasing arrangements. The effect of this order is to settle the potentially far reaching FTC complaint without a court challenge. The rationale behind the manufacturers' consent decree is obvious. As a result of the consent order the leasing arrangements have been refashioned to appear "fair" in both conduct and performance. However, the structure supporting their mutual interdependence has been left intact. The remaining structure will permit innovative corporate counsel and executives to soon implement new types of equally restrictive arrangements. Moreover, when five manufacturers structurally control ninety nine percent of the market, the apparent inference to be drawn is that no manipulative conduct arrangement is even necessary. Their market position, without more, will provide a more than profitable return, free of competition. By accepting the consent order, then, the FTC has postponed court determination of the theory that parallel business behavior in an oligopolistic

¹⁸⁰ *Id.* at 27.

¹⁸¹ See, Turner, *supra* note 137; but see also Posner, *supra* note 174.

¹⁸² CCH Trade Reg. Rep. ¶ 19,522 at 21,595 (1971).

market may constitute an unfair method of competition. In addition, the oligopolistic market structure of the bus tire industry continues untrammelled as a source of restrictive practices.

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