

DEFINING SECTION 5 OF THE FTC ACT:
THE FAILURE OF THE COMMON LAW METHOD AND
THE CASE FOR FORMAL AGENCY GUIDELINES

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INTRODUCTION

As the Federal Trade Commission (“FTC” or the “Commission”) prepares to embark upon its second century of working to protect competition and promote consumer welfare in the United States, it does so amid a renewed interest in tackling the long overdue task of identifying the precise boundaries of the agency’s authority to prosecute “[u]nfair methods of competition” as standalone violations of Section 5 of the FTC Act.¹ Section 5’s statutory language offers little assistance in illuminating the appropriate scope of the Commission’s enforcement authority, as it only broadly proclaims that “[u]nfair methods of competition . . . are hereby declared unlawful.”² Indeed, Congress deliberately framed Section 5 in general terms rather than enumerating specific unfair methods of competition because any such list would have necessarily been incomplete, made almost immediately obsolete by the development of new business practices or a better economic understanding of existing ones, and ultimately susceptible to easy

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¹ This Article discusses the Commission’s authority to prosecute unfair methods of competition as standalone violations of Section 5. The Commission also relies upon Section 5 as the vehicle for prosecuting violations of the traditional antitrust laws, namely the Sherman Act and the Clayton Act. This Article is not a commentary on the Commission’s authority in this respect. Nor is it a commentary on the Commission’s consumer protection mission, and specifically, its authority to prosecute “unfair or deceptive acts or practices.” See 15 U.S.C. § 45(a) (2012) (providing that “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful”).

² *Id.* For a comprehensive account of the historical backdrop and legislative debate leading up to the passage of Section 5 of the FTC Act and the establishment of the Commission, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 4-5 (2003).

evasion by firms.³ The duty of defining what constitutes an unfair method of competition therefore was assigned initially to the Commission.⁴

Yet, a full century into the FTC's existence, the failure to identify what precisely comprises an unfair method of competition remains an unfortunate and persistent black mark on the Commission's record. Although originally intended to be an integral part of the FTC's administrative powers and an important tool for shaping competition policy in the United States, the Commission's unfair-methods-of-competition enforcement record has been uninspiring, if not bleak, by any measure of performance.⁵ Scholars with extensive knowledge of the FTC recognize that this shortfall is due in large part to the absence of any meaningful guidance articulating what constitutes an unfair method of competition.⁶

Much ink has been spilled over the last century in the debate over the reach of the Commission's authority to prosecute unfair methods of competition pursuant to Section 5. Despite ample attention and engagement in the marketplace for ideas, questions persist regarding how to define an unfair method of competition, whether the Commission's unfair-methods-of-competition authority has any meaningful limits, when the FTC should use its standalone Section 5 authority to prosecute business conduct, and the relationship between unfair methods of competition and the traditional anti-trust laws.⁷ The antitrust bar, consumer advocacy groups, the business

³ See, e.g., H.R. REP. No. 63-1142, at 19 (1914) (Conf. Rep.) (observing "[i]f Congress were to adopt the method of definition, it would undertake an endless task").

⁴ The federal courts also can play a role in defining what constitutes an unfair method of competition under Section 5 to the extent such claims are either litigated before an administrative law judge at the FTC and then appealed to a federal court of appeals, or brought in federal district court in the first instance. However, as discussed below, the federal courts rarely have had opportunity to examine the application of the Commission's unfair-methods-of-competition authority. This fact significantly contributes to the failure of the common law method in the Section 5 context. See *infra* Part III.

⁵ See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 931-35 (2010) (identifying the key legislative motivations for Section 5 and concluding Section 5 has played a comparatively insignificant role in shaping competition policy in the United States).

⁶ See, e.g., *id.* at 944 (arguing that an unfair-methods-of-competition policy statement or agency guidelines are a predicate to realizing the full value of Section 5).

⁷ See, e.g., Statement of Commissioner Joshua D. Wright, Fed. Trade Comm'n, Proposed Policy Statement Regarding Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013) [hereinafter Wright, Proposed Policy Statement]; Joshua D. Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, 11 CPI ANTITRUST CHRON., Nov. 2013, at 2-3, available at http://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf; Daniel A. Crane, *Section 5 of the FTC Act and the Need for Guidelines*, 9 CPI ANTITRUST CHRON., Sept. 2013, at 2, available at <https://www.competitionpolicyinternational.com/section-5-of-the-ftc-act-and-the-need-for-guidelines/> (subscription required); Harry First, *What About Green Stamps? A Comment on the FTC's Section 5 Authority*, 9 CPI ANTITRUST CHRON., Sept. 2013, at 2, available at <http://ssrn.com/abstract=2359238>; A. Douglas Melamed, *A Solution in Search of a Problem*, 9 CPI ANTITRUST CHRON., Sept. 2013 [hereinafter Melamed, *A Solution in Search of a Problem*], available at <https://www.competition>

community, current and former commissioners, and members of Congress have each made important contributions to the ongoing debate.⁸

policyinternational.com/a-solution-in-search-of-a-problem/ (subscription required); Sharis A. Pozen & Anne K. Six, *Section 5 Guidelines: Fixing a Problem that Doesn't Exist?*, 9 CPI ANTITRUST CHRON., Sept. 2013, at 2, available at <https://www.competitionpolicyinternational.com/section-5-guidelines-fixing-a-problem-that-doesn-t-exist/> (subscription required); Steven C. Salop, *Guiding Section 5: Comments on the Commissioners*, 9 CPI ANTITRUST CHRON., Sept. 2013, at 2, available at <https://www.competitionpolicyinternational.com/guiding-section-5-comments-on-the-commissioners/> (subscription required); Joe Sims, *Section 5 Guidelines: Josh Wright as the New King of Corinth?*, 9 CPI ANTITRUST CHRON., Sept. 2013, at 2, available at <https://www.competitionpolicyinternational.com/section-5-guidelines-josh-wright-as-the-new-king-of-corinth/> (subscription required); Maurice E. Stucke, *A Response to Commissioner Wright's Proposed Policy Statement Regarding Unfair Methods of Competition*, 9 CPI ANTITRUST CHRON., Sept. 2013, at 2, available at <http://ssrn.com/abstract=2330670>; Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, 8 ANTITRUST SOURCE, Feb. 2009, at 1, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Creighton2_26f.authcheckdam.pdf; Albert A. Foer, *Section 5 as a Bridge Toward Convergence*, 8 ANTITRUST SOURCE, Feb. 2009, at 1, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Foer2_26f.authcheckdam.pdf; Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, 8 ANTITRUST SOURCE, Feb. 2009, at 1, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Lande2_26f.authcheckdam.pdf; Joe Sims, *A Report on Section 5*, 11 GLOBAL COMPETITION POL'Y MAG., Nov. 2008, at 2-3, available at <http://www.jonesday.com/files/Publication/c597157d-198a-48b9-a842-af0f2ad22bdd/Presentation/PublicationAttachment/f9f6a38c-b154-4bbb-9378-b848acef7437/Sims-Nov08%20%281%29.pdf>; Letter from Members of the House and Senate Judiciary Comms. to FTC Chairwoman Edith Ramirez (Oct. 23, 2013), available at http://judiciary.house.gov/_files/news/2013/Signed%20Letter%20to%20FTC.pdf; Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Section 5: Principles of Navigation, Remarks before the U.S. Chamber of Commerce (July 25, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf; Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority, Remarks at the Executive Committee of the New York State Bar Association's Antitrust Section (June 19, 2013) [hereinafter Wright, Section 5 Recast], http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf; Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission's Next Century, Keynote Address at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb 13, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf; Julie Brill, Comm'r, Fed. Trade Comm'n, Remarks at the Technology Policy Institute Aspen Forum (Aug. 20, 2013), available at http://youtu.be/9V_YEu1FIAE; A. Douglas Melamed, Comments Submitted to the Federal Trade Commission, Workshop Concerning Section 5 of the FTC Act (Oct. 24, 2008) [hereinafter Melamed, Comments to FTC Workshop], available at http://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf; David Balto et al., Postings to *Welcome to the TOTM Blog Symposium: Regulating the Regulators—Guidance for the FTC's Section 5 Unfair Methods of Competition Authority*, TRUTH ON THE MARKET (Aug. 1, 2013), <http://truthonthemarket.com/2013/08/01/welcome-to-the-totm-blog-symposium-regulating-the-regulators-guidance-for-the-ftcs-section-5-unfair-methods-of-competition-authority/>.

⁸ See *supra* note 7.

Now, as the Commission celebrates its centennial, there appears to be a growing consensus on several key issues that form the bulk of the debate. For instance, there now appears to be widespread agreement that Section 5 is broader than the traditional federal antitrust laws.⁹ There also is broad consensus that, to constitute an unfair method of competition, the Commission must determine that the business conduct in question “harms or is likely to harm competition.”¹⁰ It is not sufficient that the business conduct merely injures small business, violates public morals, or otherwise contravenes public policy based upon some set of non-economic considerations.¹¹ Commentators thus appear to agree that the economic harms against which Section 5 is designed to protect consumers are the same harms, in economic terms, as those protected by the traditional antitrust laws.¹²

Commentators have also widely accepted that the FTC must consider efficiencies justifications in any evaluation of whether a particular business practice constitutes an unfair method of competition.¹³ This is a corollary of

⁹ See, e.g., Pozen & Six, *supra* note 7, at 2 (“When Congress enacted the Federal Trade Commission Act in 1914, almost 25 years after enacting the Sherman Act, it purposely created a different statute with different goals and different parameters.”); Ohlhausen, *supra* note 7, at 16-17 (arguing certain conduct not covered by the Sherman Act, such as invitations to collude and exchanges of competitively sensitive information among competitors, can violate Section 5); Wright, Proposed Policy Statement, *supra* note 7, at 3 (proposing a Section 5 standard that is broader than the Sherman and Clayton Acts); Ramirez, *supra* note 7, at 2-3 (observing that Congress gave the FTC broad powers under Section 5 because it believed the Sherman Act was too rigid). *But see* Melamed, *A Solution in Search of a Problem*, *supra* note 7, at 5 (“It is not clear . . . that there is today a need for Section 5 to reach beyond the antitrust laws or that the Congress of 1914 would have perceived such a need if it had understood the antitrust laws the way they are now understood.”); Sims, *A Report on Section 5*, *supra* note 7, at 5 (arguing it is unwise policy to use Section 5 to reach broader categories of conduct than can be reached under the Sherman Act today).

¹⁰ See, e.g., Wright, Proposed Policy Statement, *supra* note 7, at 2 (proposing that harm or likely harm to competition should be a requirement of any Section 5 claim); Ohlhausen, *supra* note 7, at 5 (proposing Section 5 should be used to “address solely harm to competition” and not conduct that merely is “unjust or immoral”); Salop, *supra* note 7, at 4 (arguing section 5 should be targeted only towards conduct that lets firms “achieve, maintain, or enhance market power to the detriment of consumers”); Melamed, *A Solution in Search of a Problem*, *supra* note 7, at 2-3 (arguing Section 5 should require both harm to competition and a conduct requirement); Ramirez, *supra* note 7, at 8 (noting with approval the FTC in recent Section 5 consents only challenged conduct that “endangered competition” (quoting Bosley, Inc., FTC File No. 121-0184 (May 30, 2013) (complaint) (internal quotation marks omitted))). *But see* Foer, *supra* note 7, at 1 (arguing that Section 5 should be used to harmonize antitrust law between the United States and Europe); Lande, *supra* note 7, at 1, 3 (proposing a “consumer choice framework” for Section 5 “instead of a price or efficiency approach”).

¹¹ See *supra* note 10 and accompanying text.

¹² See *supra* note 10 and accompanying text.

¹³ See, e.g., Wright, Proposed Policy Statement, *supra* note 7, at 9-14 (calling for an “efficiencies screen” that requires showing no cognizable efficiencies); Ohlhausen, *supra* note 7, at 10-11 (calling for a “disproportionality test” that requires showing efficiencies are not disproportionate to harms); Salop, *supra* note 7, at 5-6 (“[I]n order to justify the conduct, the cognizable efficiencies must be sufficiently large and sufficiently passed on to consumers to prevent that consumer harm.”); Ramirez, *supra* note 7, at 6-9 (arguing for a “rule of reason” analysis that weighs efficiencies and harms equally).

the prior point of consensus. While there remains some disagreement over precisely how to weigh efficiencies in the context of a Section 5 unfair-methods-of-competition analysis, it is agreed that an economically coherent effects-based competition policy must incorporate efficiencies.¹⁴ Finally, there is a near unanimous belief that articulating a principled standard for the Commission's application of Section 5 in a formal policy statement would be a welcome improvement from both the standpoint of providing the business community with much needed guidance and identifying conduct worthy of investigation and prosecution.¹⁵

Notwithstanding the significant convergence of opinions on these key issues in recent years, pockets of opposition still exist, and the Commission has yet to issue a policy statement clearly delineating what constitutes an unfair method of competition. Reflexive resistance to the imposition of any meaningful limits on the Commission from those who envision an agency with unbounded discretion is predictable. A more difficult question that merits further discussion, on the other hand, is whether limits on Section 5 should be established by issuance of a formal policy statement defining the scope of the FTC's authority to prosecute unfair methods of competition, or whether the Commission's so-called "common law" approach to Section 5 enforcement, which seeks to define the scope of Section 5 through the resolution of individual cases, is an adequate substitute for formal agency guidance.¹⁶

Some commentators contend that the case-by-case approach produces precedent that provides guidance to the business community and agency staff sufficient to establish the contours of Section 5.¹⁷ These commentators argue that the case-by-case approach to Section 5 unfair-methods-of-competition enforcement generates the same virtues created by the common law approach.¹⁸ In one obvious sense this argument can be summarily rejected based upon casual empiricism. The Commission has employed this approach for a century and, to date, Section 5 has not meaningfully contrib-

¹⁴ See *supra* note 13 and accompanying text.

¹⁵ See, e.g., Wright, Proposed Policy Statement, *supra* note 7, at 2 ("In order for enforcement of its unfair methods of competition authority to promote consistently the Commission's mission of protecting competition, the Commission must articulate a clear framework for its application."); Ohlhausen, *supra* note 7, at 2 (arguing a "chart" is necessary before one can effectively navigate the Section 5 waters); Kovacic & Winerman, *supra* note 5, at 944 (arguing for the issuance of a Section 5 policy statement). *But see* Pozen & Six, *supra* note 7, at 2 (rejecting the need for a policy statement).

¹⁶ See, e.g., Pozen & Six, *supra* note 7, at 4-5 ("Just as the equally ambiguous term 'restraint of trade' has developed through Sherman Act jurisprudence, the term 'unfair methods of competition' too can develop a common and flexible understanding through incremental interpretations of the broadly drafted Section 5."); Ramirez, *supra* note 7, at 7 (arguing the "common law approach is well-suited to finding the right balance" between flexibility and certainty when defining Section 5).

¹⁷ See *supra* note 16 and accompanying text.

¹⁸ See *supra* note 16 and accompanying text.

uted to competition policy.¹⁹ Defenders of the case-by-case approach cannot point to any significant impact on antitrust doctrine or a single court of appeals decision upholding an unfair-methods-of-competition claim in the modern antitrust era.²⁰ One hundred years is ample time for a robust natural experiment to evaluate the virtues of the Commission's case-by-case approach to Section 5. The results of the experiment are in. They are not impressive. Whether the Commission's Section 5 enforcement record can be accurately described as embracing a "common law" approach or not, it is clear the Commission's experimentations with Section 5 have failed to meet congressional expectations in the absence of more formal guidance.²¹

The so-called common law approach to Section 5 enforcement also fails on its own terms. The common law approach to legal development has been widely studied, and its virtues are well understood.²² One key virtue of the common law method is the production of substantive legal doctrine through the process of adjudicating close legal disputes between adversarial parties with similar stakes that result in reasoned judicial decisions that delineate which activities violate the law and which do not.²³ This Article explains why the Commission's case-by-case approach to Section 5 enforcement has little to do with the common law process and cannot be expected to result in the same development of substantive competition doctrine or possess any of its other virtues. Accordingly, this Article explains why the claim that the Commission's case-by-case approach to Section 5 unfair-methods-of-competition enforcement possesses the virtues of the common law approach, and is thus an adequate substitute for more formal agency guidelines, should be rejected. Rather, this Article argues that the Commission needs a formal policy statement to give meaning and purpose to its authority under Section 5.

Part I of this Article reviews the key characteristics and virtues of the common law method, which has been central to legal development in the

¹⁹ See Kovacic & Winerman, *supra* note 5, at 931-35 (discussing the "small . . . role" Section 5 has played in competition policy in the United States).

²⁰ *Id.* at 933-35 (discussing the dearth of adjudicated Section 5 cases).

²¹ Commissioners from both political parties have acknowledged that the current state of affairs is unworkable and that issuing formal guidelines articulating a principled standard for the application of the FTC's unfair-methods-of-competition authority under Section 5 would be a useful means of closing the remarkable and unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application in practice by the Commission. See, e.g., *id.* at 930 ("Among other steps, we see a need for the Commission, as a foundation for future litigation, to issue a policy statement that sets out a framework for the application of Section 5."); Jon Leibowitz, Comm'r, Fed. Trade Comm'n, "Tales from the Crypt," Episodes '08 and '09: The Return of Section 5, Remarks at the Section 5 of the FTC Act as a Competition Statute Workshop 4-5 (Oct. 17, 2008), available at http://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/jleibowitz.pdf (calling for additional guidance at a workshop organized to identify what standard should apply when the Commission prosecutes standalone unfair methods of competition under Section 5).

²² See *infra* Part I.

²³ See *infra* Part I.

United States. Part II of this Article examines the successful use of the common law method in the development of competition policy under the traditional antitrust laws. Part III of this Article explains that the characteristics and virtues associated with the common law method do not apply in the context of shaping unfair-methods-of-competition law, and why the Commission's case-by-case approach to Section 5 enforcement should not be expected to produce outputs with similar virtues. Part III then further demonstrates that formal agency guidelines would offer a superior baseline for identifying lawful and unlawful business conduct under Section 5, while allowing the necessary flexibility to effectively implement the agency's signature competition statute. The Article briefly concludes by reiterating the need for the Commission to issue a formal policy statement defining unfair methods of competition and articulating the agency's approach to Section 5 enforcement.

I. THE COMMON LAW METHOD: CHARACTERISTICS AND VIRTUES

In order to evaluate the claim that the common law method can provide meaningful guidance with regard to the boundaries of the Commission's authority to prosecute unfair methods of competition under Section 5, it is essential to first understand the characteristics and virtues associated with the common law approach. This Part describes the principal features of the common law method. This Part further explains that a key virtue of a competent common law process is that it generates a body of reasoned judicial opinions that together produce efficient, stable, and clear substantive legal rules upon which parties can rely to determine what is both lawful and unlawful.

The common law has played a central role in the development of law in the United States.²⁴ The common law method is characterized by the gradual judicial exposition of broader legal rules and principles through narrow resolution of individual cases, and with the recognition that the collective wisdom embodied in earlier decisions serves as a respected—but not immutable—starting point for the application of the law to future cases.²⁵ With its preference for addressing only the specific legal questions presented in individual cases, the common law approach avoids the pitfalls of attempting to tackle broad and complex policy questions, thereby best posi-

²⁴ See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 98-101 (1972).

²⁵ See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921) (“The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated.”).

tioning the federal courts to reach the correct result.²⁶ Importantly, under the common law method, every case offers the courts an opportunity to test and refine existing legal rules and principles, while employing the humility necessary to avoid severe disruption to the status quo that might inhibit the development and maintenance of meaningful rules and standards.²⁷

The common law approach stands in stark contrast to the statutory approach to lawmaking, in which legislatures pass comprehensive statutes that determine the applicable legal rules at the time of enactment, and only modify those rules through subsequent legislation when necessary.²⁸ Because the statutory approach tends towards comprehensive rather than narrowly tailored answers, and because the legislative process suffers from institutional burdens that tend towards inertia, the statutory approach may offer greater certainty and stability about the precise boundaries of the law during long periods between legislative action than the common law method.²⁹

The common law process can be understood as a “market for law,” in which litigants demand legal rules to resolve specific disputes and judges supply reasoned opinions that decide those disputes and guide future litigants.³⁰ Thus, inextricably linked to the idea that the common law method generates desirable substantive legal rules over time is the nature of the litigation disputes that serve as the inputs into the process.³¹ Indeed, the well-known literature exploring the common law development of efficient

²⁶ See *id.* at 22-23 (“The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.”).

²⁷ See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUES* 4, 5 (1982) (observing that the “slow, unsystematic, and organic quality of common law” necessarily creates a system in which “no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people”).

²⁸ See, e.g., William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 665 (1982) (“What distinguishes the common-law approach from the legislature’s statutory approach is the manner in which these questions are answered and the stability of the answers once given.”). But see 5 GORDON TULLOCK, *Rent Seeking and the Law*, in THE RENT-SEEKING SOCIETY 184, 184-85 (2005) (arguing that legislation and litigation are merely alternative forms of rent-seeking behavior equally capable of redistributing wealth to incented parties).

²⁹ See Baxter, *supra* note 28, at 665 (explaining why the statutory approach potentially tends towards greater certainty). But see Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1558-59 (2003) (suggesting the more recent application of a stronger system of precedent may make the common law more durable than legislation in some instances).

³⁰ Zywicki, *supra* note 29, at 1554-62 (internal quotation marks omitted) (discussing the demand-side models of legal evolution under the common law); see generally Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) [hereinafter Rubin, *Why is the Common Law Efficient?*]; see also ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 3-4 (2009).

³¹ See Rubin, *Why is the Common Law Efficient?*, *supra* note 30, at 61 (explaining the evolution of the common law depends upon the behavior of litigants and, in particular, their interest in a case as precedent).

legal rules arises in large part from economic models that seek to explain the conditions under which parties demand judicial resolution of their disputes.³² A key insight of this literature is that the common law process tends to evolve legal rules towards efficiency when those legal rules are derived from adversarial litigation between parties with similar stakes in the outcome of the case.³³ The achievement of one of the key virtues of the common law process—namely outputs in the form of judicial decisions that together comprise a set of desirable substantive legal rules—thus critically depends upon the nature of the disputes selected for litigation.

In addition, a principal demand in the “market for law,” and a cornerstone of the common law process of discerning substantive legal rules, is the production of legal precedent.³⁴ Adherence to precedent implies that the federal courts do not write on a clean slate when applying the law to individual cases; instead, they resolve difficult questions through reliance upon the collective wisdom embodied in previous judicial decisions.³⁵ By relying upon precedent, the common law system operates as a decentralized system, patching together rules and principles from multiple cases to develop a

³² See, e.g., POSNER, *supra* note 24 (examining the connections between the law and economic theories); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982) (arguing that the movement toward inefficient rules is not due to a modern preference for statutory law, but because of institutional and technological changes that have occurred over time); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (examining private and public judicial systems from an economic standpoint); John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978) (positing an adversary proceeding model relating to the efforts of the litigants); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (arguing that efficient legal rules are likely to endure regardless of the attitudes of individual judges toward efficiency); Rubin, *Why is the Common Law Efficient?*, *supra* note 30 (arguing the common law tends towards efficiency because efficient legal rules are less likely to be challenged through repeated litigation). See also 1 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 67-71 (1973); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 220-33 (1960). For analysis of why supply-side considerations—that is, factors that lead judges to supply legal rules—also are an important element of understanding the efficiency of the common law, see Zywicki, *supra* note 29, at 1562-67.

³³ See Rubin, *Why is the Common Law Efficient?*, *supra* note 30, at 53-57.

³⁴ It is worth noting that precedent and the doctrine of stare decisis are distinct concepts. Adherence to precedent is based upon the idea that the *reasoning* in earlier judicial decisions provides guidance for resolving similar legal issues in future matters. In contrast, the doctrine of stare decisis provides that the *authority* of earlier judicial decisions, either because they came first in time or were issued by a higher court, mandates that courts follow those decisions in future cases. See Zywicki, *supra* note 29, at 1551-81 (reviewing the historical use of precedent in the law and the more modern doctrine of stare decisis). See also Priest, *supra* note 32, at 81-82; Rubin, *Why is the Common Law Efficient?*, *supra* note 30, at 53-57.

³⁵ See, e.g., OLIVER WENDELL HOLMES, *Holdsworth's English Law*, in *COLLECTED LEGAL PAPERS* 285, 290 (Peter Smith ed., New York, 1952) (“[I]mitation of the past, until we have a clear reason for change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different thing we want.”).

clearer picture of the law.³⁶ However, the concept of precedent is not so inflexible that it values the collective wisdom embodied in previous opinions, and the concomitant certainty created by the convergence of judicial views, at the expense of requiring the federal courts to follow inefficient and flawed rules that impose significant social costs.³⁷ The common law process thus offers an important measure of stability while also allowing constant refinement of the law and opportunity for error correction.

Precedent further contributes to the virtues of the common law process by adding an important dose of clarity to the substantive legal doctrine.³⁸ Importantly, because federal courts ordinarily hear only cases in which both parties have a realistic chance of success, the common law process typically results in close and nuanced judicial decisions that sometimes favor plaintiffs and sometimes favor defendants.³⁹ The value of these adjudications is further enhanced by the fact that self-interested and adverse parties will have strong incentives to present federal courts with the best arguments for why existing precedent or other considerations support their desired outcomes.⁴⁰ The common law process thus creates a fulsome body of reasoned judicial opinions that articulate when liability both is and is not appropriate.⁴¹ The strength of the common law derives from the reasoning and wisdom accumulated through these individual judgments, which in turn delineate meaningful boundaries of the law and provide future litigants with clarity.

In sum, the common law process can be thought of as a function of the demand for and supply of judicial resolution of legal disputes. Legal disputes—the inputs into the process—determine the opportunities for development of the law within the common law system. In turn, these legal disputes shape the reasoned judicial decisions that serve as the outputs of the

³⁶ See, CARDOZO, *supra* note 25, at 20 (observing that precedent provides some measure of clarity by “fix[ing] the point of departure from which the labor of the judge begins”); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 7 (1936) (observing that the strength of the common law system “is derived from the manner in which it has been forged from actual experience by the hammer and anvil of litigation”).

³⁷ *But see* Zywicki, *supra* note 29, at 1567, (arguing that the development of a system of strong precedent makes the common law “more susceptible to use as a vehicle for rent-seeking and the manipulation of judicial precedent”).

³⁸ *Id.* at 1557-58.

³⁹ There is a significant literature exploring the Priest-Klein prediction that litigated disputes will result in a 50 percent win rate for plaintiffs and the possibility that other win rates are consistent with rational systems of litigation and dispute resolution. See, e.g., Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 493-94 (1996); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 188 (1993). See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (demonstrating that when parties decide to go to trial or appeal cases rather than settle, the outcomes tend to favor plaintiffs and defendants equally).

⁴⁰ See Rubin, *Why is the Common Law Efficient?*, *supra* note 30, at 53-55.

⁴¹ *Id.* at 51-52.

common law system.⁴² A competent common law process relies upon these judicial decisions to generate substantive legal rules with at least three primary qualities: efficiency, stability, and clarity.⁴³ Efficiency is achieved through repeat exposure to litigation among adverse parties with similar stakes in the outcome and frequent opportunities to reconsider inferior legal rules.⁴⁴ Stability is attained through a system of precedent that acknowledges the collective wisdom embodied in earlier judicial decisions.⁴⁵ Clarity is accomplished through judicial resolution of close cases that delineate which factual circumstances violate the law and which do not.⁴⁶ The question then becomes whether a case-by-case approach to discovering the contours of the FTC's unfair-methods-of-competition authority under Section 5 contains these same characteristics and virtues, or whether institutional differences necessitate the issuance of formal agency guidelines to fill the void left by an unworkable common law process.

II. COMMON LAW DEVELOPMENT OF THE TRADITIONAL ANTITRUST LAWS

Commentators who reject the need for formal agency guidelines to define what constitutes an unfair method of competition under Section 5 in favor of the common law method point to the success of the common law approach in articulating the boundaries of the traditional antitrust laws as evidence that the common law method is the standard and preferred means for developing competition law.⁴⁷ Although it is true that the common law method has greatly improved the application of the traditional antitrust laws, it does not necessarily follow that the common law approach will give rise to similar success when applied to a different institutional structure. This Part reviews how the key characteristics and virtues of the common law method have furthered the development of the traditional antitrust laws, and offers an honest point of comparison from which to determine whether the common law approach can realistically define the Commission's authority under Section 5.

Antitrust law and enforcement policy in the United States have undergone remarkable development since the enactment of the first antitrust statute nearly 125 years ago.⁴⁸ Long gone are the days when all contracts be-

⁴² See Landes & Posner, *supra* note 32, at 236.

⁴³ See Rubin, *Why is the Common Law Efficient?*, *supra* note 30, at 51-52.

⁴⁴ See *id.* at 53-55.

⁴⁵ See Stone, *supra* note 36, at 7-9.

⁴⁶ *Id.* at 9-10.

⁴⁷ See *infra* notes 55-82 and accompanying text.

⁴⁸ Sherman Antitrust Act of 1980, 15 U.S.C. §§ 1-7 (2012).

tween competitors were illegal;⁴⁹ when per se rules were the preferred approach for analyzing vertical restraints;⁵⁰ when market structure governed merger review and efficiencies claims were rejected out of hand as a defense and occasionally employed as evidence of a violation;⁵¹ and when the state action doctrine offered broad exemptions from the antitrust laws.⁵² Indeed, as our understanding of modern economics has improved, antitrust enforcement has become increasingly focused on consumer welfare.⁵³ The antitrust laws have done well to keep pace by adopting many key advances in economic theory and methodology.⁵⁴

⁴⁹ Compare *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897) (finding that every contract between competitors constitutes an unlawful restraint under the Sherman Act regardless of its reasonableness), with *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (holding that restraints should be measured against a “rule of reason” standard), and *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911) (elaborating that the Sherman Act prohibition against contracts in restraint of trade embraced only agreements that unduly restrict competition).

⁵⁰ Compare *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 404-05 (1911), overruled by *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (applying a per se rule to resale price maintenance), and *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 382 (1967), overruled by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (applying a per se rule to vertical non-price restraints), with *Continental T.V.*, 433 U.S. at 57-59 (applying the rule of reason vertical non-price restraints), and *State Oil Co. v. Khan*, 522 U.S. 3, 21-22 (1997) (applying the rule of reason to maximum resale price maintenance), and *Leegin Creative Leather*, 551 U.S. at 906-07 (applying the rule of reason to minimum resale price maintenance).

⁵¹ Compare *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 361-62 (1963) (holding that unduly high market shares demonstrate that a merger is anticompetitive), with *United States v. General Dynamics*, 415 U.S. 486, 510-11 (1974) (permitting merging firms to overcome the government's prima facie showing of anticompetitive harm by demonstrating other factors support the conclusion that the merger is not likely to substantially lessen competition). See also Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 708-09, 714-15 (2010) (discussing the evolution of merger analysis in the United States). For discussion of why the “structural presumption” introduced by *Philadelphia Nat'l Bank* should be abandoned, see Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets*, Remarks at the 2013 Georgetown Global Antitrust Symposium Dinner (Sept. 24, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%2080%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf.

⁵² See, e.g., *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1012-13 (2013) (narrowing the scope of the state action doctrine by requiring a state legislature to have clearly contemplated that the anticompetitive conduct in question was “the inherent, logical, or ordinary result” of the exercise of the authority the legislature delegated in order for immunity to apply).

⁵³ See, e.g., Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217-23 (2010) (discussing the Supreme Court's “embrace of the economic approach to antitrust law”).

⁵⁴ *Id.* Of course, the evolution of antitrust jurisprudence in the United States remains subject to continued refinement, and there exist today several key areas that might benefit from the incorporation of new learning. For instance, although merger law has done well to slowly shift its focus from market structure towards a more rigorous and effects-based analysis for determining the likelihood of anticompetitive harm, the analysis of efficiencies benefits has not similarly fully incorporated important advances in economic understanding. See, e.g., Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside*

The general statutory framework Congress used to proscribe anticompetitive conduct, and the concomitant adoption of a common law approach to the development of the traditional antitrust laws, have made the evolution of competition law and policy in the United States possible.⁵⁵ For instance, Section 1 of the Sherman Act provides simply that “[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal.”⁵⁶ In similarly broad fashion, Section 2 prohibits conduct seeking to “monopolize, or attempt to monopolize . . . any part of . . . trade.”⁵⁷ In the merger context, the Clayton Act states only that

[n]o person . . . shall acquire . . . any part of the stock or . . . assets of another person . . . where in any line of commerce . . . in any section of the country, the effect . . . may be substantially to lessen competition, or tend to create a monopoly.⁵⁸

Thus, the traditional antitrust laws fail to describe, in concrete terms, what conduct is socially beneficial and what conduct is injurious.⁵⁹ Rather, the traditional antitrust laws use sweeping language to articulate fundamental concepts about the harm Congress sought to prevent, while providing the flexibility necessary to capture a diverse and ever-evolving set of business conduct.⁶⁰ By leaving the precise reach of the traditional antitrust laws to be defined gradually through the consideration of individual cases, Congress relied upon the common law method to generate meaningful guidance.⁶¹ Through the common law process, disputes between litigants created opportunities for courts to announce substantive legal rules—permitting parties to distinguish between lawful and unlawful conduct—while also allowing the law to adapt without requiring Congress to undertake the burdensome task of repeatedly enacting corrective legislation.

Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market, in 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE (forthcoming 2014); Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, 149 (2011).

⁵⁵ See Baxter, *supra* note 28, at 662-73 (discussing the common law nature of the traditional antitrust law). The Supreme Court has acknowledged the common law nature of the traditional antitrust laws. *National Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”); see also *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933), *overruled by* *Copperweld Corp. v. Independence Tube*, 467 U.S. 752 (1984) (describing the antitrust laws as having “a generality and adaptability comparable to that found to be desirable in constitutional provisions”).

⁵⁶ 15 U.S.C. § 1 (2012).

⁵⁷ *Id.* § 2.

⁵⁸ *Id.* § 18.

⁵⁹ See *id.* §§ 1-2, 18.

⁶⁰ See *id.*

⁶¹ See *id.*

The role of the federal judiciary has been particularly important to the development of competition law and policy under the traditional antitrust laws.⁶² The federal courts have taken the expansive text of the traditional antitrust laws enacted by Congress and, through individual adjudications, have incrementally addressed important questions concerning the appropriate application of antitrust liability.⁶³ Although each individual decision typically is narrow, in the aggregate, the decisions of the federal courts paint a vivid picture of modern antitrust jurisprudence. In order to effectively delineate the boundaries of the traditional antitrust laws, the federal courts, while issuing decisions where antitrust liability was appropriate, have often also explained when liability would be inappropriate.⁶⁴ The federal courts have thus made it possible for litigants to distinguish between lawful and unlawful conduct under the antitrust laws.⁶⁵

In addition to allowing the federal judiciary to supply the substantive parameters of the general statutory framework of the traditional antitrust laws enacted by Congress, the common law approach also enables the federal courts to refine those parameters when new information demonstrates that modifications are appropriate.⁶⁶ This is particularly important in the context of antitrust, as both business conduct and the general understanding of economics have a tendency to evolve. Indeed, for the purpose of clarity, the federal courts have often supplemented earlier antitrust decisions by adding new layers of analysis to existing standards in order to clarify antitrust doctrine.⁶⁷

⁶² See Baxter, *supra* note 28, at 663-73 (discussing the important role of the judiciary in shaping the antitrust laws). For additional discussion about the role of the judiciary in articulating substantive antitrust rules and standards, see Daniel A. Crane, *Antitrust and the Judicial Virtues*, 2013 COL. BUS. L. REV. 1.

⁶³ See, e.g., Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 COMPETITION POL'Y INT'L 1, Autumn 2007, at 4-13, 16-23.

⁶⁴ See *id.* at 9-13.

⁶⁵ Prior to the Supreme Court's recent decisions favoring plaintiffs in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), and *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013), the Court had ruled regularly for defendants in antitrust cases since 1993. Looking back further, however, plaintiffs often won at the Supreme Court. Indeed, between 1967 and 1992, the Court ruled in favor of plaintiffs in sixty cases and in favor of defendants in thirty-nine cases. Thus, there is a robust mix of decisions articulating what conduct does and does not violate the traditional antitrust laws. See Brannon & Ginsburg, *supra* note 63, at 4-13 (cataloguing Supreme Court antitrust decisions).

⁶⁶ See Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 80-84 (2006).

⁶⁷ For example, the Supreme Court has, through successive cases, and without overruling precedent, added new layers of guidance to help identify the circumstances under which a monopolist is potentially liable for an unlawful "refusal to deal" under the traditional antitrust laws. See, e.g., *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 409-16 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 587, 600-01, 605-11 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973). For useful discussion of the state of refusal to deal law, see

Moreover, although a key tenet of the common law method is fidelity to precedent, this does not prevent the judiciary from revisiting long-settled questions in antitrust law.⁶⁸ In fact, the common law method by its very nature assumes the possibility of judicial error and welcomes the perfection of antitrust standards as judicial learning improves through individual adjudication and economic research.⁶⁹ However, shifts in the understanding of the traditional antitrust laws have not been undertaken lightly and are appropriate only where new information shows flaws in the existing doctrine.⁷⁰ Indeed, the Supreme Court has acknowledged that it will “reconsider[] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.”⁷¹ Such an approach offers stability while maintaining the flexibility necessary to apply the traditional antitrust laws in a manner that promotes consumer welfare.

The virtues of the common law method are apparent in the evolution of the substantive legal doctrine drawn from the traditional antitrust laws. Consider first the standards applicable to the analysis of vertical restraints under the traditional antitrust laws. During much of the last century there existed a strong skepticism of vertical restraints. The federal courts endorsed a *per se* standard that deemed both price and non-price vertical restraints unlawful as a matter of course.⁷² The federal courts determined the *per se* standard to be appropriate because of the prevailing view at the time that vertical restraints “cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.”⁷³ In subsequent years, the understanding of the anticompetitive and procompetitive economic theories associated with vertical restraints improved, and new empir-

Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, 27 ANTITRUST 50, 50-54 (2012).

⁶⁸ See Sellers, *supra* note 66, at 80-84.

⁶⁹ Baxter, *supra* note 28, at 666.

⁷⁰ See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899-907 (2007) (discussing the propriety of overruling even century old antitrust precedent where new information undermines the doctrinal underpinnings); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“‘But [*stare decisis* is not an inexorable command.’ In the area of antitrust law, there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience.” (alteration in original) (citation omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991))).

⁷¹ *State Oil*, 522 U.S. at 21.

⁷² See *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 382 (1967) (applying a *per se* rule to vertical non-price restraints), *overruled by* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 404-05 (1911) (applying a *per se* rule to resale price maintenance), *overruled by* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁷³ *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (internal quotation marks omitted)), *overruled by* *State Oil*, 522 U.S. 3.

ical evidence shed light on the likely effects of such arrangements.⁷⁴ In a watershed moment for antitrust generally and vertical restraints analysis specifically, the Supreme Court, in *Continental T.V. v. GTE Sylvania, Inc.*,⁷⁵ abandoned per se treatment of vertical restraints in favor of a rule of reason analysis, which assesses the competitive effects of such agreements on a case-by-case basis.⁷⁶ This shift was the direct result of new information demonstrating that vertical restraints were often procompetitive and that per se treatment would likely deny consumers the important benefits arising from such arrangements.⁷⁷ Such a shift would not have been possible without the common law approach to the traditional antitrust laws. Furthermore, through the consideration of individual cases, courts have developed substantive legal rules under the rule of reason regime to identify when vertical restraints violate the traditional antitrust laws and when they do not. Using this body of reasoned judicial opinions, the business community and antitrust agencies can fairly assess whether or not a particular vertical arrangement is likely to violate the traditional antitrust laws.

Merger analysis in the United States has similarly benefited from the common law development of the traditional antitrust laws. Relying upon accepted economic theory in the first half of the last century, the federal courts assessed the likelihood of anticompetitive effects resulting from a merger or acquisition by focusing exclusively on market structure.⁷⁸ Indeed, the understanding of market dynamics at the time implied a direct and rather predictable correlation between market concentration and market prices.⁷⁹ However, beginning in the latter half of the century, advances in economics revealed that market structure alone provided, at best, an incomplete picture of the market dynamics at play, and at worst, a misguided approach

⁷⁴ For a comprehensive survey of the economics of vertical restraints, see Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS 391, 391-92 (Paolo Buccirossi ed., 2008); Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76-81 (2008); James C. Cooper, Luke Froeb, Daniel P. O'Brien & Michael Vita, *Vertical Antitrust Policy as a Problem of Inference* 2-5 (Vanderbilt Univ. Law Sch. Working Paper No. 05-12, 2005), available at <http://ssrn.com/abstract=69960>.

⁷⁵ 433 U.S. 36 (1977).

⁷⁶ See *Continental T.V.*, 433 U.S. at 57.

⁷⁷ See *id.*

⁷⁸ See, e.g., William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 52 (2000) (stating that during this period courts were "emphasizing measures of market structure and concentration" based on prevailing industrial organization thinking rooted largely in the work of Joe Bain).

⁷⁹ See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 277-78 (1966) (holding that a merger between two competing grocery stores that created a combined firm with a market share of 8 percent violated Section 7 of the Clayton Act); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-53 (1966) (holding that a merger between beer producers creating a combined firm with a market share of less than 5 percent was unlawful because of a three-year decline in the number of brewers and sharp rise in market concentration among industry leaders).

to predicting the competitive effects of a merger.⁸⁰ Through the incremental adoption of new economic learning, as a result of the analytical framework outlined in the FTC and Department of Justice Antitrust Division's Horizontal Merger Guidelines, the federal courts refined and refocused merger analysis away from market structure and towards a more accurate effects-based inquiry.⁸¹ Importantly, in reviewing individual merger cases, courts have articulated reasons why particular transactions may violate the Clayton Act while others may not. Again, these decisions provide a useful basis for the business community and the antitrust agencies to fairly assess whether a transaction is likely to violate the Clayton Act. In addition, to the extent the courts have not provided enough guidance about how the law will be applied, the antitrust agencies have supplemented the judicial opinions by providing formal agency guidelines articulating how the agencies will analyze mergers.

Those who oppose the issuance of formal agency guidelines to articulate the boundaries of the Commission's authority to prosecute unfair methods of competition in favor of the common law approach assume that the common law characteristics and virtues that have furthered the development of the traditional antitrust laws are equally applicable in the context of the Commission's administrative powers under Section 5.⁸² In the next Part, this Article explains why this belief is fundamentally flawed when one properly focuses upon the characteristics and virtues of the common law process. It illustrates that the process of selecting unfair-methods-of-competition disputes and generating unfair-methods-of-competition settlements does not and cannot mirror the common law process and thus, predictably, produces outputs with very different features from those that have historically been produced under the traditional antitrust laws.

⁸⁰ See, e.g., Shapiro, *supra* note 51, at 715-16 (discussing the history of unilateral price effects analysis and the once misplaced emphasis on market shares as a proxy for diversion rations); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 7-10 (2003) (discussing the rejection of the structure-conduct-performance paradigm based on new empirical evidence). One of the most important contributions to the evolution of merger analysis away from a focus on market structure was offered by Harold Demsetz. See generally Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 164-74 (Harvey J. Goldschmid et al. eds., 1974).

⁸¹ See Shapiro, *supra* note 51, at 707-12.

⁸² See, e.g., Pozen & Six, *supra* note 7, at 4-5 (comparing the broad language of the Sherman Act to that of Section 5 and arguing that just as the common law approach has successfully defined "restraint of trade" it can define "unfair methods of competition"); Ramirez, *supra* note 7, at 6-8 (same).

III. THE FAILURE OF THE COMMON LAW METHOD TO DEFINE UNFAIR METHODS OF COMPETITION AND THE NEED FOR FORMAL AGENCY GUIDELINES

In response to renewed calls for formal agency guidance articulating a principled standard for the application of the Commission's authority to prosecute unfair methods of competition under Section 5, some commentators have asserted that any such policy statement would too severely restrict the agency's enforcement mission.⁸³ They warn that formal agency guidance defining the boundaries of the Commission's unfair-methods-of-competition authority would achieve stability and clarity only at the expense of creating an enforcement regime that fails to adequately protect competition.⁸⁴ These commentators instead urge reliance upon the same case-by-case approach that garnered success in the traditional antitrust law context.⁸⁵ Under this view, the scope of the Commission's authority to prosecute unfair methods of competition is best determined by reading the leading cases to identify which enforcement principles the Commission applies when determining whether to prosecute a particular business practice under Section 5.⁸⁶

Although the desire to strike the correct balance between flexibility and certainty is well intended, relying upon the common law approach to define the scope of Section 5 ultimately offers no certainty and results in a boundless standard under which the Commission may prosecute any conduct as an unfair method of competition. This is because reliance upon the common law method for developing unfair-methods-of-competition law mistakenly assumes that the common law virtues that have proved beneficial to the development of the traditional antitrust laws apply equally in the context of Section 5. They do not. The fact that the boundaries of Section 5 remain unclear one hundred years after the Commission's creation is sufficient evidence to establish as much. Reliance upon the common law method has thus far proved incapable of generating any meaningful guidance as to what constitutes an unfair method of competition. Expecting better results from the same approach in the Commission's second century is, at best, an unwise policy.

⁸³ See, e.g., Pozen & Six, *supra* note 7, at 4-5 (arguing that unfair methods of competition should develop a "flexible understanding" through the use of a common law approach); Ramirez, *supra* note 7, at 7 (rejecting calls for a Section 5 policy statement because placing "excessive weight on certainty" might benefit some commercial actors but only at the expense of the marketplace as a whole).

⁸⁴ Ramirez, *supra* note 7, at 7 (stating a preference for Section 5 guidance that describes the broad enforcement principles revealed in FTC consents rather than that which proscribes future enforcement actions in order to maintain maximum flexibility).

⁸⁵ See *supra* note 82 and accompanying text.

⁸⁶ See Ramirez, *supra* note 7, at 7-8 (arguing that Section 5 guidance rests in the FTC's "decisions, complaints, statements, and analyses associated with [the Commission's] enforcement actions").

Why is it that the case-by-case approach cannot adequately establish the scope of the Commission's authority to prosecute unfair methods of competition under Section 5? First, recall that the virtues of the common law process turn in part on the selection of the legal disputes that serve as the inputs to the system.⁸⁷ Fundamental differences between the selection of legal disputes for litigation and the selection of legal disputes in the Section 5 context partially explain why the common law approach is unable to adequately clarify the contours of unfair-methods-of-competition law. Whereas the common law process customarily depends upon numerous legal disputes initiated by adversarial parties to generate a fulsome body of judicial decisions that discover the correct application of the law, in recent history, Section 5 enforcement has resulted in no litigated cases and has instead focused upon administrative settlements chosen solely by the Commission.⁸⁸ These disputes do not provide a sufficient basis for ascertaining when the Commission is applying Section 5 correctly; rather they serve as *de facto* regulations that assert, on an *ad hoc* basis, when a practice represents an unfair method of competition. The case-by-case approach to Section 5 thus lacks the efficiency and clarity associated with a competent common law process because it can only develop unfair-methods-of-competition law in a direction desired by and knowable to the FTC. Consequently, the case-by-case approach identifies, at best, only a small subset of the conduct that violates Section 5.

A second reason why the common law approach is unable to adequately define what constitutes an unfair method of competition is the difference between the outputs created by ordinary litigation and those created by Section 5 enforcement.⁸⁹ Whereas, for example, litigation of the traditional antitrust laws produces reasoned judicial opinions with precedential value, the combination of the Commission's unique administrative process advantages and a vague Section 5 standard has resulted in an unfair-methods-of-competition enforcement regime that generates only agency settlements. Importantly, agency settlements only identify what conduct is unlawful as an unfair method of competition under Section 5. This stands in stark contrast to the common law process, where the disputes selected for litigation result in judgments articulating not only what types of conduct are unlawful, but also what types of conduct are lawful.⁹⁰ Moreover, the Commission does not treat its settlements as precedent, meaning that past decisions do not necessarily indicate how the agency will apply Section 5 in the future. The case-by-case approach to Section 5 thus lacks the clarity and stability associated with a competent common law process because it does not help

⁸⁷ See *supra* Part I.

⁸⁸ The last time the Supreme Court examined the Commission's application of Section 5 was nearly a half century ago in *FTC v. Texaco, Inc.*, 393 U.S. 223, 224 (1968).

⁸⁹ See *supra* Part I

⁹⁰ See *supra* Part II.

identify what conduct is lawful or provide meaningful assurances about how the FTC will analyze conduct in the future.

This Part explains that the common law approach fails to meaningfully define what constitutes an unfair method of competition because of several institutional features that inhibit the Commission from realizing the virtues of the common law process within the context of Section 5. More specifically, this Part argues that the differences between the inputs and outputs associated with the common law method and those associated with Section 5 enforcement render the process of resolving individual Section 5 cases nearly meaningless for determining the scope of the FTC's authority to prosecute unfair methods of competition. Section A of this Part discusses the deficiencies in the process for selecting unfair-methods-of-competition disputes that comprise the inputs upon which the Section 5 case-by-case approach is founded. Section B of this Part discusses why the settlements generated as the outputs from these disputes do not share the characteristics of judicial decisions and thus do not produce the same virtues as the common law system. Finally, Section C argues that, in light of the failures of the case-by-case approach, the FTC should issue formal agency guidelines to give meaning and purpose to Section 5.

A. *The Selection of Unfair Methods of Competition Disputes Does Not Help Identify the Correct Application of Section 5 and Instead Acts as De Facto Rulemaking*

As discussed above, the virtues of the common law method are attributable in part to the nature of the legal disputes that serve as the inputs into the process. Together, these legal disputes help courts discover the correct application of the law by asking judges to answer close questions in cases between adversarial parties. The answers to these questions are the building blocks for the substantive legal doctrine that ultimately is derived from the common law method. Predictably, the nature of the legal disputes can impact the potential body of answers and, consequently, can significantly influence the development of the substantive legal rules. One reason the virtues associated with the common law method fail to translate to the Section 5 context is because of important differences between how unfair-methods-of-competition disputes and traditional legal disputes are selected. Indeed, these differences create a scenario in which the scope of Section 5 is shaped not through a process resembling the one that has contributed so successfully to the development of the traditional antitrust laws, but instead through de facto rulemaking that is unable to create efficient and clear legal standards discerning the scope of the Commission's authority under Section 5.

One feature that significantly influences the composition of the unfair-methods-of-competition disputes that serve as the inputs into the case-by-case approach to defining Section 5 is that Congress vested the authority to

prosecute unfair methods of competition exclusively in the Commission.⁹¹ Private parties thus cannot litigate unfair-methods-of-competition claims between themselves in federal court.⁹² Rather, the Commission alone is responsible for determining which conduct is targeted as a potential unfair method of competition.⁹³ The body of disputes that serve as the basis for the so-called common law approach to Section 5 is, as a result, comprised of only a modest number of unfair-methods-of-competition cases selected solely by the Commission.⁹⁴ Unlike the thousands of cases brought under the traditional antitrust laws, the handful of unfair-methods-of-competition disputes provide an insufficient basis from which to attempt to generate substantive rules defining the Commission's Section 5 authority.

Moreover, the fact that the Commission alone selects the Section 5 disputes upon which the common law approach is founded is particularly problematic because the FTC's administrative process advantages create an opportunity for the Commission to elicit cheap settlements from each unfair-method-of-competition case it pursues.⁹⁵ The opportunity for cheap settlements results from the perception that administrative litigation at the FTC is biased strongly in favor of the Commission and that the definition of what constitutes an unfair method of competition is so hopelessly vague that it can be manipulated to fit nearly any set of facts. Unsurprisingly, firms typically prefer to settle Section 5 claims rather than go through lengthy and costly administrative litigation in which they are both "shooting at a moving target and have the chips stacked against them."⁹⁶ Indeed, as discussed below, in recent history Section 5 disputes have all resulted in agency settlements rather than litigation.⁹⁷ A consequence of the Commission's exclusive authority to select Section 5 disputes, together with the fact that the Commission's legal theory is unlikely to be seriously challenged or

⁹¹ See 15 U.S.C. § 45 (2012).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ Despite the fact that standalone unfair-methods-of-competition cases are relatively infrequent as compared to cases brought under the Sherman Act and Clayton Act, the Commission's Section 5 agenda nevertheless is responsible for a substantial portion of the agency's claimed consumer savings and can be expected to have a significant impact on the business community. See, e.g., Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *The Need for Limits on Agency Discretion & the Case for Section 5 Guidelines*, Presentation before the FTC Technology and Reform Conference (Dec. 16, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/need-limits-agency-discretion-case-section-5-guidelines/131216section5_wright.pdf.

⁹⁵ Wright, *Section 5 Recast*, *supra* note 7, at 10.

⁹⁶ *Id.* The Commission has affirmed an overwhelming number of decisions adjudicated in favor of the Commission by the administrative law judge ("ALJ") and reversed an overwhelming number of decisions in which the ALJ ruled against the Commission. See, e.g., Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82, 90-92 (2013). See also Melamed, Comments to FTC Workshop, *supra* note 7, at 13.

⁹⁷ See Melamed, Comments to FTC Workshop, *supra* note 7, at 23.

tested, is that unfair-methods-of-competition law develops only in a way that is desirable to and knowable by the Commission.

Unlike with the common law approach, unfair-methods-of-competition disputes thus do not help the Commission discover the correct application of Section 5 by considering liability rules within the context of close cases, so much as they allow the Commission to declare, on an ad hoc basis, which conduct violates Section 5.⁹⁸ In fact, in many ways, unfair-methods-of-competition disputes do not resemble disputes at all given the predictable course each such case will take towards settlement. Instead, the process for selecting Section 5 cases more closely resembles a de facto regulatory regime. Indeed, the Commission's modern shift from a law enforcement regime to a regulatory regime, and the potential problems that may result, have been well documented.⁹⁹ Specifically, this shift has important implications for the types of disputes selected for enforcement action. The absence of case development through a proper adversarial process weakens the ability of the common law process to offer meaningful guidance on the scope of Section 5. The selection of unfair-methods-of-competition disputes thus creates a problem of clarity when relying on the common law approach because firms will never know how adventurous the Commission might become in applying its Section 5 authority.

In addition, at least part of the reason why the common law has been successful in developing substantive legal rules is because adversarial proceedings between self-interested parties tend to lead to the development of efficient legal rules.¹⁰⁰ However, where a defendant is less interested in the precedential value of a case, the use of the common law approach may not result in the creation of efficient legal rules because the law will only ever change in a direction that favors the plaintiff.¹⁰¹ This is likely true for unfair-methods-of-competition cases because the Commission is likely to have a much greater interest in prevailing in such cases than any defendant.¹⁰² This is because the outcome of unfair-methods-of-competition cases

⁹⁸ See *id.* at 3-6.

⁹⁹ See, e.g., Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177, 178 (Charbit et al. eds. 2013); Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932, 932-35 (2001). See generally A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (1995).

¹⁰⁰ See, e.g., Landes & Posner, *supra* note 32, at 259; Priest, *supra* note 32, at 65-66; Rubin, *supra* note 30, at 51-52. See also Baxter, *supra* note 28, at 682-85 (discussing the role of private litigation in the development of the traditional antitrust laws). But see Zywicki, *supra* note 29, at 1552-53 (arguing that institutional changes "have made the common law more susceptible to rent-seeking pressures, which have undermined the common law's pro-efficiency orientation").

¹⁰¹ Rubin, *supra* note 30, at 55-56. See also Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEG. STUD. 305 (1972) (discussing the interest of agencies in settling cases for use as precedent).

¹⁰² See Melamed, Comments to FTC Workshop, *supra* note 7, at 11-12.

may significantly expand or contract the Commission's authority and impact the agency's ability to successfully litigate similar cases in the future, whereas a private defendant is unlikely to be as frequent a player and thus unlikely to invest to change the law in its favor.¹⁰³ Consequently, where the FTC exclusively selects the unfair-methods-of-competition disputes that are supposed to define Section 5, the common law method may not produce the most desirable legal rules.

B. *The Supply of Agency Settlements Does Not Produce the Virtues Generated By the Fulsome Body of Judicial Precedent Created By the Common Law Method*

A second reason why the virtues of the common law approach do not translate to the Section 5 context is because there are almost no litigated unfair-methods-of-competition cases and the agency settlements that are generated from Section 5 disputes are fundamentally different from reasoned judicial decisions. This Section thus turns the focus from the inputs and the dispute selection process for unfair-methods-of-competition cases to the outputs of that process. The principal differences between those outputs—that is, agency settlements and reasoned judicial opinions—ultimately result in the common law method being unable to contribute to the creation of meaningful rules in the Section 5 context. Subsection 1 of this Section discusses the lack of a sufficient body of case law and argues that agency settlements are unable to meaningfully define the Commission's unfair-methods-of-competition authority. Subsection 2 of this Section argues that the absence of any commitment by the Commission to treating settlements as precedent further impedes the ability of the common law process to define Section 5.

1. *The Absence of a Sufficient Body of Case Law and the Inadequacy of Agency Settlements*

In order for the common law process to define the scope of the Commission's unfair-methods-of-competition authority, there must exist a body of case law from which to extract meaningful rules and standards. However, the Commission has failed to litigate a sufficient number of unfair-methods-of-competition cases over its one-hundred-year history to develop a meaningful standard for Section 5 through the common law process.¹⁰⁴ Indeed, since the establishment of the FTC in 1914, the federal courts have issued only a few decisions involving unfair-methods-of-competition

¹⁰³ See Wright, Section 5 Recast, *supra* note 7, at 8-10.

¹⁰⁴ See Kovacic & Winerman, *supra* note 5, at 931-35.

claims, the most recent of which is three decades old.¹⁰⁵ Thus, there is a dearth of judicial precedent regarding the scope of Section 5, and the cases that have been decided are both dated and paltry compared to the thousands that supply meaning to the traditional antitrust laws.¹⁰⁶

Aware of the absence of judicial precedent regarding the use of Section 5, those who support the common law approach to developing unfair-methods-of-competition law point to other sources as part of the relevant body of law.¹⁰⁷ These sources primarily include administrative documents such as complaints, analyses to aid public comment, and consent agreements issued by the Commission as part of the settlement process.¹⁰⁸ Such administrative documents, however, are not substitutes for reasoned judicial opinions. Aside from being relatively vague due to the need to protect confidential business information, and typically exempt from judicial review, administrative documents offer only a superficial discussion of why the specific conduct in question should be challenged without ever articulating a broader framework for analyzing unfair-methods-of-competition claims or describing how the facts in a case should be analyzed under such a framework. As a result, unlike with reasoned judicial opinions, administrative documents shed little light on how the Commission will evaluate the next business practice it targets under Section 5.¹⁰⁹

Consider for instance invitation-to-collude claims, which are a classic and well-accepted example of an unfair method of competition in violation of Section 5.¹¹⁰ The Commission's administrative documents make it abun-

¹⁰⁵ See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 130 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 573 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980); see also Kovacic & Winerman, *supra* note 5, at 933-34 (“One would be hard-pressed to come up with a list of ten adjudicated decisions that involved the FTC’s application of Section 5 in which the FTC prevailed and the case can be said to have had a notable impact, either in terms of doctrine or economic effects.”).

¹⁰⁶ The Supreme Court alone has decided nearly one hundred cases involving claims brought under the traditional antitrust laws since 1972. See Brannon & Ginsburg, *supra* note 63, at 4.

¹⁰⁷ See Pozen & Six, *supra* note 7, at 4 (“[C]lues as to how the Commission has been willing and would be willing in the future to implement its prosecutorial discretion under Section 5 can be divined from consent decrees and other Commission actions.”).

¹⁰⁸ See Ginsburg & Wright, *supra* note 99, at 178-79.

¹⁰⁹ But see Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 606-27 (2014) (arguing the FTC’s consumer protection authority under Section 5 has developed through the common law method). This Article takes no stance on the argument that the common law method has contributed to the Commission’s consumer protection mission. However, it is worth noting that the Commission has issued formal policy statements articulating a principled set of standards for applying the agency’s authority to prosecute unfair or deceptive acts or practices under Section 5. These policy statements have been proved remarkably important.

¹¹⁰ In re Rambus, Inc., No. 9302, 2006 WL 2330118, at *11 n.68 (F.T.C. Aug. 2, 2006) (Leibowitz, Comm’r, concurring) (“The Commission, on occasion, has used Section 5 in recent years to address conduct beyond the scope of the antitrust laws, usually in the context of invitations to collude.” (citing In re Valassis Comm’n, Inc., No. 051-0008, 2006 WL 752214 (F.T.C. Mar. 14, 2006))).

dantly clear that the FTC will prosecute such conduct under Section 5.¹¹¹ However, the complaints, analyses to aid public comment, and consent agreements that accompany the Commission's many invitation-to-collude settlements tell us nothing about the other conduct that might fall within the scope of Section 5.¹¹² For example, it is doubtful that any reasonable firm could have used the invitation-to-collude administrative documents to predict that the Commission would also use Section 5 to prosecute intellectual property cases such as those involving fair, reasonable, and non-discriminatory ("FRAND") licenses.¹¹³ The fact that such administrative documents cannot be used to discern broader enforcement principles that might help the business community or agency staff predict how Section 5 might be applied in the future seriously undercuts the claim that the common law approach can provide meaningful guidance about the Commission's unfair-methods-of-competition authority.

There is yet another important reason why administrative documents filed by the Commission in the settlement of Section 5 cases cannot possibly substitute for adjudicated decisions. In contrast to adjudicated cases, which explain both what conduct is legal and what conduct is illegal, administrative settlement documents unsurprisingly reveal nothing about the conduct that falls outside the scope of Section 5. In other words, administrative documents fail to offer any limiting principles regarding the Commission's unfair-methods-of-competition authority. Reliance on such administrative documents alone thus omits roughly half of the information relied upon to delineate the contours of the traditional antitrust laws. Indeed, federal courts typically do not consider settlements as part of the common law process and do not look to them when determining the correct application of the law. Moreover, even in the exceedingly rare scenario where the Commission issues a closing statement following an unfair-methods-of-competition investigation that does not result in the issuance of a complaint, such closing statements are typically insufficient to put future parties on notice as to what conduct is lawful and what conduct is unlawful under Section 5.¹¹⁴ The administrative documents prepared in the Section 5 context thus present a woefully incomplete picture of the scope of the Commission's unfair-methods-of-competition authority.

¹¹¹ See, e.g., In re Valassis Commc'n, Inc., No. 051-0008, 2006 WL 752214, at *1-2.

¹¹² See Kovacic & Winerman, *supra* note 5, at 934-35.

¹¹³ See In re Motorola Mobility LLC, No. C-4410 (F.T.C. July 23, 2013) (decision and order), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf> (settling charges the defendant violated Section 5 by pursuing an injunction for FRAND encumbered license); In re Robert Bosch GmbH, No. C-4377, 2012 WL 5944820, at *1 (F.T.C. Nov. 21, 2012) (same).

¹¹⁴ See, e.g., Statement of the Fed. Trade. Comm'n, In re Google, Inc., No. 111-0163 (F.T.C. Jan. 3, 2013), available at http://www.ftc.gov/system/files/documents/public_statements/295971/130103googlsearchstmtofcomm.pdf.

2. Absence of Deference to Commission Precedent

A final reason why the virtues typically associated with the common law method do not apply in the context of defining the Commission's authority to prosecute unfair methods of competition under Section 5 is the absence of any commitment by the Commission to treat its prior enforcement decisions as precedent.¹¹⁵ As discussed above, fidelity to precedent is critical to the success of the common law process. It creates a uniform starting point based upon the accumulated wisdom of judges, from which future cases are evaluated, thereby ensuring a minimum measure of stability necessary to develop and maintain meaningful legal rules. In a world without precedent, every case stands on its own and decisionmakers have broad discretion to apply liability standards without regard for earlier pronouncements about the appropriate scope of the law.

There is no language in the Commission's authorizing statute, in its internal rules and procedures, or even in Supreme Court precedent requiring the Commission to follow its own precedent.¹¹⁶ This is apparent in the Commission's application of its Section 5 authority.¹¹⁷ In practice, the scope of the FTC's authority to prosecute unfair methods of competition is as broad or as narrow as a majority of the commissioners believes it to be.¹¹⁸ Indeed, the Commission's interpretation of Section 5 can vary significantly as the composition of its membership changes over time.¹¹⁹ More concern-

¹¹⁵ We do not here attempt to answer the question of whether imposing a system of precedent upon the Commission would be good policy, but rather observe only that the absence of the institutional feature undermines the ability to employ the common law method to define the contours of the agency's unfair-methods-of-competition authority under Section 5 without the assistance of guidelines.

¹¹⁶ See *Bankamerica Corp. v. United States*, 462 U.S. 122, 149 (1983) (White, J., dissenting) ("There is, of course, no rule of administrative *stare decisis*. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. This and other courts have approved such administrative 'changes in course,' as long as the new interpretation is consistent with congressional intent." (citing *United States v. Generix Drug Corp.*, 460 U.S. 453 (1983); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *United States v. City and County of San Francisco*, 310 U.S. 16 (1940))).

¹¹⁷ See *Kovacic & Winerman*, *supra* note 5, at 930 ("Among other steps, we see a need for the Commission, as a foundation for future litigation, to issue a policy statement that sets out a framework for the application of Section 5.").

¹¹⁸ See Melamed, *Comments to FTC Workshop*, *supra* note 7, at 6 ("Without authoritative *judicial* interpretation of Section 5, its scope will reflect little more than the personal views of a majority of the Commissioners at any point in time.").

¹¹⁹ For an example of the variance between the definitions that have been offered by commissioners as to what constitutes an unfair methods of competition, see Wright, Proposed Policy Statement, *supra* note 7, at 2-3 (defining unfair methods of competition as "any act or practice that (1) harms or is likely to harm competition significantly and (2) lacks cognizable efficiencies"). See also *In re Rambus, Inc.*, No. 9302, 2006 WL 2330118, at *9 (Leibowitz, Comm'r, concurring) (defining unfair methods of competition as any action that is "collusive, coercive, predatory, restrictive, or deceitful," or otherwise oppressive, and does so without a justification grounded in its legitimate, independent self-interest."

ing still, the Commission's interpretation of Section 5 need not be consistent even when the individual commissioners remain the same.¹²⁰ As a result, the Commission's unfair-methods-of-competition precedent, and even statements by individual commissioners regarding their views on the appropriate scope of Section 5, offer little guidance to the business community or agency staff about the correct application of the law.

Take, for example, recent events at the Commission. Prior to Commissioner Wright's confirmation, there existed a four to one majority, with Commissioner Maureen Ohlhausen dissenting, willing to prosecute a firm's decision to seek injunctive relief against a willing licensee for a FRAND-encumbered license as an unfair method of competition.¹²¹ Just a few weeks later, following the departure of Chairman Jon Leibowitz and Commissioner Tom Rosch, and the addition of Commissioner Wright, a standard-essential patent holder seeking such injunctive relief was no longer necessarily engaging in an unfair method of competition as there no longer were enough votes to bring such a case.¹²² Today, the composition has changed once again and, depending on either changed or new views among the current Commission's membership, seeking injunctive relief in the FRAND context may once again violate Section 5.¹²³ No law student would look at this series of events and associate it with the common law process that has been so successful in developing the contours of the traditional antitrust law.

(quoting *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984)); Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks before the Annual Meeting of the Section of Antitrust and Economic Regulation, Association of American Law Schools (Dec. 27, 1977) (claiming that Section 5 can be used to reach "social and environmental harms produced as unwelcome by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer-stimulated demands").

¹²⁰ See Wright, Section 5 Recast, *supra* note 7, at 9.

¹²¹ In re Motorola Mobility LLC, No. C-4410, at 1-2 (F.T.C. July 23, 2013) (decision and order), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>; In re Robert Bosch GmbH, No. C-4377, 2012 WL 5944820, at *2-3, 5 (F.T.C. Nov. 21, 2012). See also In re Robert Bosch GmbH, No. C-4377, 2012 WL 5944820, at *30 (Statement of Ohlhausen, Comm'r) (explaining why "[s]imply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory ("FRAND") license, without more, even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed either an unfair method of competition or an unfair act or practice under Section 5" (footnote omitted)).

¹²² See Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Does the FTC Have a New IP Agenda?, Remarks at the 2014 Milton Handler Lecture, at 18 (Mar. 11, 2014) (arguing that such cases "necessarily depend upon the assumption that seeking injunctive relief, without more, is itself anticompetitive" and that there is "no economic evidence available to support that policy view").

¹²³ Terrell McSweeney was sworn in as a commissioner of the Federal Trade Commission on April 28, 2014. See *Terrell McSweeney*, FED. TRADE COMM'N, <http://www.ftc.gov/about-ftc/biographies/terrell-mcsweeney> (last visited June 15, 2014).

C. *The Need for Unfair-Methods-of-Competition Guidelines*

If the common law method cannot define the boundaries of the Commission's authority to prosecute unfair methods of competition, how might the Commission provide meaningful guidance to the business community and agency staff about the scope of Section 5? One method the Commission has used successfully in numerous other contexts is the issuance of formal agency guidelines articulating how the Commission will apply the law.¹²⁴

A policy statement articulating the definition of an unfair method of competition would create a useful starting point from which the Commission could begin its analysis of whether a business practice constitutes an unfair method of competition. To be successful, any such policy statement should address the core issues in the debate over standalone unfair-methods-of-competition claims, including whether Section 5 captures categories of conduct that are broader than the categories captured by the traditional antitrust laws, whether harm to competition is a necessary element of any Section 5 claim, and how efficiencies should be analyzed when determining whether conduct constitutes an unfair method of competition. In doing so, such a policy statement would fill the void left by an unworkable common law process by adding substantive parameters to the general statutory framework enacted by Congress.

Although a Section 5 policy statement would necessarily impose certain constraints upon unfair-methods-of-competition enforcement, it need not abandon all flexibility and discretion. The Commission continues to enjoy considerable flexibility in other areas in which it has issued formal guidelines, such as its authority to challenge mergers that may substantially lessen competition or to prosecute unfair and deceptive acts and practices under Section 5 as part of the Commission's consumer protection mission.¹²⁵ Indeed, the Commission's merger enforcement and consumer protection work are widely regarded as successful precisely because of the guidelines the Commission has provided to inform the business community

¹²⁴ The Commission has issued policy statements and other formal guidelines on over fifty topics, many of which are much less significant than the use of the Commission's signature competition statute. See, e.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

¹²⁵ See Letter from Fed. Trade Comm'n to Hon. Wendell H. Ford and Hon. John C. Danforth, Comm. on Commerce, Sci., and Transp., U.S. Senate, Comm'n Statement of Pol'y on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), reprinted in *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984); Letter from the Fed. Trade Comm'n to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-84 (1984). The Commission's Policy Statement on Unfairness and Policy Statement on Deception are widely regarded as a major success and potential the only reason why, after a period in which the Commission's consumer protection mission had become unmoored from any principled standard, Congress decided not to intervene by defining, or worse yet, revoking the Commission's consumer protection authority.

and agency staff about how the law will be applied. Articulating the scope of the Commission's unfair-methods-of-competition authority in a formal policy statement would similarly provide meaningful guidance about Section 5 and strengthen the FTC's ability to use its signature competition statute to shape competition law and policy in the United States.

CONCLUSION

When Congress established the FTC one hundred years ago it granted the Commission the authority to prosecute "unfair methods of competition" under Section 5. Congress intended Section 5 to be an integral part of the Commission's administrative powers and an important tool for shaping competition policy in the United States. That promise has largely been unfulfilled because of the absence of meaningful guidance identifying what constitutes an unfair method of competition. Opponents of formal agency guidelines that might finally give meaning and purpose to Section 5 argue that any such guidelines would be too restrictive and that the Commission should instead define Section 5 using the common law method. After a century-long natural experiment that has added little clarity about the contours of Section 5, it is fair to conclude the common law process is incapable of adequately defining the Commission's unfair-methods-of-competition authority. As this Article has shown, this is because the virtues associated with the common law process do not translate to the Section 5 context. The failure of the common law process in the Section 5 context is primarily due to the fundamental differences between the inputs and outputs of traditional litigation and the inputs and outputs of Section 5 enforcement. In the end, the process for selecting Section 5 disputes and generating agency settlements does not help the Commission discover the correct application of the law in the same way the common law does, but instead serves as *de facto* rulemaking that provides little guidance about what conduct might be lawful and unlawful under Section 5 in the future. To fill the void left by an unworkable common law process, and to give the business community and agency staff much-needed guidance, the Commission should finally issue a formal policy statement articulating the contours of its authority under Section 5.