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JUDICIAL USURPATION OF THE F.T.C.'S AUTHORITY: A RETURN TO THE RULE OF REASON

JEFFREY H. LIEBLING

INTRODUCTION

When Congress enacted the Federal Trade Commission Act (F.T.C. Act), it vested broad powers in the Federal Trade Commission (F.T.C.) to first determine what types of commercial conduct constituted unfair or deceptive practices, and second, to halt these practices while in their incipiency. Congress intentionally left much of the language in the statute undefined and ambiguous. From the outset, the legislative aim was to grant broad authority to a federal agency that could effectively combat unfair methods of competition and set guidelines for proper commercial conduct. Congress specifically created the F.T.C. as an administrative body composed of men and women with expertise in business and economics who could regulate and preserve business from unfair methods of competition. In recent years, the federal courts have appreciably narrowed the authority of the F.T.C. to make factual determinations with respect to unfair competition. Contrary to this approach, the F.T.C. has the power to make factual determinations with respect to unfair competition. This approach is contrary to the legislative purpose of the F.T.C. Act.

*J.D. Candidate, 1998

2. Federal Trade Commission will hereinafter be referred to as the F.T.C. or the Commission.
3. Fashion Originators' Guild of Am. v. F.T.C., 312 U.S. 457, 466 (1941). The Court declared that Congress enacted the F.T.C. Act with the hopes that the F.T.C. would then be able to prohibit restraints of trade while still in their incipiency. Id.
4. 51 CONG. REC. 12871 (1914). Congress expressed a need to leave the statutory term “unfair competition” relatively undefined. Id. Senator F.G. Newland’s belief was that “the words ‘unfair competition’ [must be able to] grow and broaden and mold themselves to meet the circumstances as they arise, just as the words ‘restraint of trade’ have grown and have been molded to meet the necessity of the American People.” Id.
6. Id.
7. Caswell O. Hobbs, III, Swing of the Pendulum— The Federal Trade Commission's First Seventy Five Years, 58 ANTITRUST L.J. 9, 12-15 (1989). Federal courts have increasingly declined to enforce the F.T.C.'s determina-
to clear congressional intent, courts are moving away from the deference traditionally given to the F.T.C.'s expertise. For example, in Boise Cascade Corp. v. F.T.C., the United States Court of Appeals for the Ninth Circuit overruled an F.T.C. finding that the Boise Corporation had engaged in price fixing. It is unclear whether the Boise court overruled the F.T.C. findings because the F.T.C. had failed to prove an anti-competitive effect or because Section 5 of the F.T.C. Act, which authorizes the F.T.C. to prohibit and prevent unfair methods of competition, did not reach the conduct in question. However, a review of the legislative history of the F.T.C. Act and the antecedent case law indicates that Congress intended the F.T.C. to make factual determinations relating to unfair competition. Moreover, Congress granted broad discretion to the F.T.C. to actually establish what types of conduct Section 5 prohibits. If courts continue to disregard the broad level of discretion that Congress vested in the F.T.C., they will effectively strip the F.T.C. of most of its administrative powers and reduce the agency to little more than an investigative tool for the courts.

This Comment explores the tension between the original congressional intent behind the creation of the F.T.C. together with the broad grant of power that Congress conferred on the agency and the recent trend by the federal courts to limit the F.T.C.'s authority. Part I provides a historical background of the creation of the F.T.C. and the commercial context existing in the early part of the 20th Century that necessitated its establishment. Part II explores judicial interpretations of the statutory scope of the F.T.C.'s authority. Part III discusses a recent trend of the judiciary to disregard the F.T.C.'s determinations and to supplant the F.T.C.'s factual findings with judge-made determinations. Part IV analyzes the impact of this trend on the scope and reach of the F.T.C.'s power.

Recent courts of appeals' decisions have reversed important F.T.C. findings involving unfair methods of competition. This trend seems to signify the courts' redefinition of the scope of section 5 of the F.T.C. Act.

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8. Id. at 12.
9. 637 F.2d 573 (9th Cir. 1980).
10. Id. at 582. See also Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 720 (D. Haw. 1964) (defining price fixing as "a combination or conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce."). The test is not what the actual effect is on prices, but whether such agreements interfere with the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. Id.
12. See infra notes 64-71 and accompanying text for a discussion of the congressional debates which indicated that Section 5's unfair competition provision should remain undefined.
I. HISTORICAL DEVELOPMENT OF THE F.T.C. AND ITS STATUTORY AUTHORITY

For over a hundred years, Congress has attempted to counter the effects of antitrust and other commercial conduct that may destroy or severely restrict competition in the marketplace. This Part outlines the struggles Congress faced in addressing this problem. The first Section provides an introduction to the Sherman, Clayton and Federal Trade Commission Acts. Section B discusses the inadequacies of the Sherman Act and the creation, by the courts, of the “Rule of Reason” rationale. Section C explores Congress’ negative reaction to the courts’ adoption of the “Rule of Reason” standard and Congress’ attempt to avoid this judicial standard by creating a more expansive antitrust law. The final Section concludes with a brief discussion of the meaning of “unfair methods of competition” and the proper role of the courts in enforcing an F.T.C. administrative determination.

A. Introduction to the Sherman, Clayton and Federal Trade Commission Acts

In 1914, Congress passed the Federal Trade Commission Act. The necessity for the F.T.C. Act arose out of demands for more expansive antitrust legislation. Originally, Congress enacted the Sherman Act as a means of regulating business and en-
suring that individual businesses did not commit unfair commercial practices. However, critics complained that the Sherman Act was too vague to be efficient. As a result, congressional reform of the existing antitrust laws became necessary.

Congress passed the Clayton Act in 1914 in an attempt to address the shortcomings of the Sherman Act. Unlike the Sherman Act, Congress enacted the Clayton Act in order to prohibit specific unfair business activities. Shortly thereafter, Congress created the F.T.C. The primary objective of the F.T.C. Act was to create an administrative body with broad regulatory authority to determine what business practices constituted unfair methods of competition.

Congress' intention in enacting the Clayton and F.T.C. Acts was not to replace the Sherman Act. Congress intended instead that the new Acts would supplement the Sherman Act. Congress implemented the Clayton Act and F.T.C. Act to fill the gaps that the Sherman Act left open and to prevent monopolistic or otherwise unfair behavior at the outset of such behavior.
B. Failure of the Sherman Act and the Creation of the Rule of Reason

During the latter part of the 19th century, American commerce made tremendous strides and experienced massive growth. By the 1880s, Congress recognized a need to effectively regulate against commercial practices that resulted in restricting competition. Congress enacted the Sherman Act in 1890 in order to regulate against restraints on trade as well as unfair business practices. The Sherman Act prohibits every contract which restrains trade or commerce. Initially, the courts literally construed the term “every contract.” Early court decisions interpreted the intent of Congress to foreclose any opportunity for judicial discretion in determining what types of behavior constituted an unreasonable restraint on trade. The courts simply held that the Sherman Act prohibited all restraints on trade. It was

31. 20 CONG. REC. 1457-58 (1889) During the congressional debates that occurred prior to the creation of the Sherman Act, Senator Jones of Arkansas remarked on the growing development of technology, big business and trusts, calling the latter a “commercial monster.” Id. at 1457. Senator Jones was perturbed by how fast and large the trusts had expanded over the previous few years. Id. at 1457-58. Jones further stated that these trusts, fattened by their success, had become “commercial sharks” that prey upon industry in an attempt to swallow all smaller businesses until the trusts ultimately enjoyed a monopoly in their particular industry. Id.

32. Id. See also 1 VON KALINOWSKI, supra note 23, at § 2.02[3] (discussing the demand for congressional action that would destroy the trusts, or at least diminish the abuse of the trusts by discouraging the formation of monopolies). Congress responded to the public demand for new legislation by creating the Sherman Act. Id.

33. 2 KITNER, supra note 20, at 1; see also Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958). In Northern Pacific, the Supreme Court stated that the purpose of the Sherman Act was to protect competition, as the goal of economic liberty, by preserving “free and unfettered competition as the rule of trade.” Id. at 4. The Court recognized that Congress intended the Sherman Act to rest on the premise that if the competitive forces of industry are encouraged, the interaction between differing industries will “yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while providing an environment conducive to the preservation of our democratic political and social institutions.” Id. Essentially, the underlying objective of the Sherman Act is increased competition. Id.


35. See 1 VON KALINOWSKI, supra note 23, at § 2.03[1] (stating that courts originally construed the statute to leave little room for judicial interpretation or application of the common law doctrines that previously allowed restraints as long as they were reasonable).

36. Id.

37. Id. See also United States v. Joint Traffic Ass’n, 171 U.S. 505, 559-62 (1898); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 341-42 (1897) (both cases holding that the Sherman Act’s “every contract” provision would apply across the board and even impact railroad combinations, though these combinations were already regulated under the Interstate Commerce
not until the Supreme Court's decision in Standard Oil Company v. United States\(^{38}\) that judicial dissatisfaction with the ambiguity of the Sherman Act became apparent.

In the landmark case of Standard Oil, the Supreme Court re-evaluated the language of the Sherman Act which made "every contract" that restrained trade unlawful.\(^{39}\) The Court rationalized that despite the use of the term "every" in the Sherman Act, Congress had not intended to actually prohibit "every contract" that limited competition.\(^{40}\) Rather, the Court held that the standard implicit in the Sherman Act required a judge hearing a particular case to exercise his or her own discretion to determine if a business had violated the Sherman Act.\(^{41}\) On this basis, the Supreme Court adopted a rationale it called the "Rule of Reason."\(^{42}\) Under the "Rule of Reason" standard, courts would determine that the only unlawful restraints of trade under the Sherman Act were those restraints that the courts felt were unreasonable.\(^{43}\)

The Supreme Court's establishment of the Rule of Reason standard for interpreting Sherman Act cases created numerous problems.\(^{44}\) In response to Standard Oil, Congress criticized the

\(^{38}\) 221 U.S. 1 (1911).

\(^{39}\) Id. at 59-60. In this landmark case, the Court considered the scope of the term "every contract" in context of what Congress intended to achieve in prohibiting restraints of trade. Id. The Court held that the Sherman Act failed to specifically define what sorts of contracts the Act prohibited and established its own standard that the federal courts could use to identify whether or not the Sherman Act's "every contract" provision was violated. Id. at 66. See also Apex Hosiery v. Leader, 310 U.S. 469, 489 (1940) (discussing the ambiguity inherent in the language of the Sherman Act.) The Apex Court held that since the prohibited behavior was not specifically defined with "crystal clarity," it must be left to the courts to give meaning to the statutory term. Id.

\(^{40}\) Standard Oil Co., 221 U.S. at 63; see also Board of Trade v. United States, 296 U.S. 231, 237 (1918) (stating that whether a contract or agreement places a restraint on trade cannot possibly be determined by such a simplistic test as whether it restrains competition). The Board of Trade Court felt that every contract, by the very nature of contract law, binds and restrains the parties from certain activities. Id. The court held that in order for conduct to fall within the scope of the Sherman Act, it had to be unreasonable. Id. at 238. The test the Court used to determine whether a restraint is unreasonable is whether the restraint is intended to destroy or suppress competition. Id. The Court felt that the judiciary should be left the task of administering this test. Id.

\(^{41}\) Standard Oil Co., 221 U.S. at 63.

\(^{42}\) Id.

\(^{43}\) 1 Von Kalinowski, supra note 23, at § 2.03[1].

\(^{44}\) Joseph Masterson, Antitrust law Commentary, 44 Brooklyn L. Rev. 801, 806 n.15 (1978) Masterson suggests two main reasons why the public was dissatisfied with the Standard Oil decision. First, the public believed that if judges could determine whether restrictive trade practices were legal, with "reasonableness" being their primary criterion, then commercial industry in America would have little to fear from the Sherman Act. Id. The second
federal courts because it felt that the judicially created Rule of Reason constituted an attempt by the courts to re-define a congressional term that Congress intentionally left clear and unambiguous.\(^5\) Congress felt that defining restraints of trade under the Rule of Reason rationale would result in a plethora of inconsistent rulings on what the various courts would hold was actually unreasonable.\(^6\) The determination of what types of contracts were unreasonable would depend on the judges' own individual experiences and knowledge of economics or sociology.\(^7\)

Moreover, very few people believed that the courts could properly and consistently determine what restraints were unlawful.\(^8\) The public was concerned that the judiciary would determine if a contract restrains trade on an ad hoc basis.\(^9\) In particular, businessmen were troubled that judges were going to pass judgment, based on their own experiences and values, on what

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\(^9\) In particular, businessmen were troubled that judges were going to pass judgment, based on their own experiences and values, on what
they deemed was a reasonable or unreasonable practice. Businessmen also feared that rather than providing specific guidelines designating what constituted an unreasonable restraint of trade, the Supreme Court's Rule of Reason standard could never form a solid basis that businesses could follow in order to avoid violating the Sherman Act. American businesses desired legislation that would establish a commission of experts authorized to promulgate guidelines that businesses could use to determine appropriate commercial practices and policies. Essentially, Congress, the American public and business leaders wanted to avoid judicial unpredictability and arbitrary decision making. The Supreme Court's establishment of the Rule of Reason standard led Congress to clarify that it wanted experts, not judges, to determine what types of commercial conduct constituted an unlawful restraint of trade.

C. Congressional Reaction to the Rule of Reason

On January 20, 1914, in an address to Congress, President Wilson emphasized the need for legislative reform of the existing antitrust laws. President Wilson originally intended to create a

50. Montague, supra note 48, at 652. The prevalent view among the public, political leaders and businesses appears to have been that the Supreme Court's decisions in Standard Oil and American Tobacco made it very difficult for commercial businesses to know in advance what types of activities would constitute restraints on trade. One problem was that no one could accurately and consistently define what restraints of trade were unreasonable. Some believed that it would be a grave injustice to charge business executives with performing an illegal trade practice when businessmen had to rely on the Supreme Court's jungle of inconsistent rulings. See Standard Oil Co. v. United States, 221 U.S. 1, 91 (1911). Justice Harlan, dissenting in Standard Oil, criticized the Rule of Reason because it not only changed the long settled interpretation of the Sherman Act, but it also resulted in the usurpation of legislative powers by the judiciary. Harlan went on to criticize how the adoption of the Rule of Reason would create confusion and leave the courts uncertain about what the law actually prohibited. What one court and jury may deem to be reasonable another court and jury might find unreasonable. Further, Harlan argued that when Congress prohibited 'every contract,' it gave courts a clear definition of the law that any judge could apply without confusion by simply holding every contract that restrained trade unlawful. Under the Rule of Reason rationale, the courts would face the recurring problem of determining, on a case by case analysis, whether a particular contract was an unreasonable restraint on trade.

51. See Montague, supra note 48, at 652 n.9 (discussing the commentary of a leader of the New York bar challenging anyone to read both American Trust and Standard Oil and provide even a vague description of what is or is not an unreasonable restraint of trade based on the Court's decisions.)

52. 1 VON KALINOWSKI, supra note 23, at § 2.03[2].

53. S. REP. NO. 63-597, at 6-7 (1914). President Wilson declared that the country had long awaited and suffered because of the failure on the part of the government to give a more explicit legislative definition of the policy and meaning of the antitrust laws. See also THE ROLE OF SECTION 5, supra
commission with investigative and publicity powers that could aid businesses by furnishing guidance and information relating to unfair competitive practices. Wilson's original intent was not to create an administrative body with a wide latitude of authority.

In response to President Wilson's address, the House of Representatives and the Senate introduced bills to reform antitrust legislation. The House bill, known as the Covington Bill, closely followed Wilson's call for a weak advisory commission. The Covington Bill proposed a commission that would investigate the potential wrongdoing of suspect businesses. However, the commission outlined by the Covington Bill was to have no administrative powers. The House bill limited the proposed commission to investigate wrongful acts by businesses and then leave the courts with the responsibility of taking corrective action. The House of Representatives passed the Covington Bill on June 5, 1914.

The Senate, on the other hand, strongly opposed the creation of a weak agency and rejected the Covington Bill. The corresponding Senate bill demanded the creation of an administrative agency with broad administrative and investigative authority.

Note 19, at 6 (discussing the two general themes that ran through the history of antitrust law making reform necessary). One theme concerned substantive antitrust policy and the other concerned the delay and binding effects that the courts would mandate if antitrust policy was to be subject to case by case judicial adjudication. Wilson's address to Congress covered both of these issues. Id. Wilson's address to Congress covered both of these issues. Id.

54. H.R. Doc. No. 63-625, at 6 (1914). See also Stone, Economic Regulation and the Public Interest, the F.T.C. in Theory and in Practice 37 (stating that President Wilson was originally seeking the creation of a safe and harmless agency that could advise and guide businesses). Initially, Wilson did not intend to create an administrative body with a wide latitude or regulatory control. Id.

55. Id.

56. See infra notes 64-71 and accompanying text for a discussion of the congressional debates.

57. See generally H.R. 15613, 63d Cong. (1914) (containing provisions for a federal agency with diluted authority).

58. H.R. Rep. No. 63-533, at 2 (1914). The committee reviewing the bill demonstrated a desire to avoid strict regulation of commerce:

The Wilson administration idea, and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce. Consequently, the establishment of a commission having powers of regulation or control of prices, or the power to directly issue orders controlling the lawful operation of industrial business in this country, has no place in the Bill now reported.

59. Id.; H.R. 15613.

60. H.R. Rep. No. 63-533 at 2; H.R. 15613.


The Senate believed that this administrative body should be a strong federal agency with the power to regulate trade and commerce and the authority to determine what kinds of practices were unfair. Senator Newlands, one of the major proponents of the Senate bill, argued that the proposed commission should be both a quasi-judicial and regulatory body and should regulate commerce in a more efficient manner. The Senate Bill, passed on June 13, 1914, declared "unfair competition in commerce" unlawful and empowered the F.T.C., after it conducted an appropriate hearing, to restrain wrongful conduct by issuing a cease and desist order. The majority of the Senate decided to leave the term "unfair competition" relatively undefined. The Senate was satisfied that the

64. Id.; THE ROLE OF SECTION 5, supra note 19, at 11-12. Senator Stevens expressed his objection to the idea behind the Covington Bill as the creation of a weak trade commission without any administrative authority. Id. at 11. Stevens implicated the need for a strong administrative body with the authority to regulate big business and to issue cease and desist orders when the agency determined such orders were necessary. Id. Stevens believed that a strong Commission would provide the most efficient impediment against monopolies. Id. Many Senators felt that the creation of a strong agency was the only way that the federal government would be powerful enough to confront the leaders of big businesses on equal terms. Id.; Herbert Knox Smith, Corporate Regulation- An Administrative Office, 42 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 284, 284 (1912). A contemporary commentator delineated three major ways a strong administrative body would be superior to a judicial adjudicatory process. Id. at 284. First, an administrative body could focus its energy on a broad subject area rather than on a case by case analysis that the courts would encounter. Id. Second, an administrative decision would take considerably less time than it would take to bring a case before a judge for a ruling. Id. Third, an administrative body could, with greater expertise, apply economic and financial, as well as legal, principles when confronting relevant issues. Id.

65. See S. REP. No. 62-1326, at 2 (1913) (discussing the need to establish a strong, decision making commission to regulate combinations and monopolies in a more efficient and timely manner).


67. S. REP. No. 63-597, at 7-9 (1914).

68. 51 CONG. REC. 12871 (1914). The legislative committee that considered the creation of the F.T.C. Act gave careful consideration to whether they should attempt to define unfair competition. Id. The committee determined that any attempt to create a specific definition would destroy the sweeping level of flexibility and discretion that the Senate intended to vest in the F.T.C. Id. The committee felt that it would be an insurmountable task to define all of the practices which exist or will soon exist in commerce that could possibly constitute "unfair competition." Id. The more viable solution proposed by the committee was to enter a rule of law condemning unfair practices and authorize a strong, decision making commission of experts to determine what kinds of practices should fall within the meaning of the term. Id. The committee also noted was that by the time the legislature had defined 20 practices as unfair and made them illegal, it would be quite possible, then and there, to invent others that were likewise unlawful. Id.; see also Montague, supra note 48, at 24 (discussing the views of various Senators on what the term unfair competition should or does embrace). Senator Cummins defined unfair com-
broad expertise of an administrative body composed of economic experts would fairly determine what constituted "unfair competition." The Senate considered the establishment of a strong administrative commission to be a better alternative to the uncertainty inherent in ad hoc judicial interpretation. To retain a level of flexibility, the Senate ruled out any attempt to create a laundry list of prohibited transactions. The Senate determined that a laundry list would inevitably lead to generalizations about what constituted unfair commercial practices, and would limit the ability of Congress to carry out its broad purposes. Likewise, a laundry list would also limit the ability of the proposed agency to carry petition as an "imposture" or any "viscous practice or method ... that has a tendency to affect the people of the country or be injurious to their welfare." Senator Robinson espoused a different definition of the term. He believed the term must embrace "every practice which may be held ... to be unjust, inequitable or dishonest." Robinson further cautioned Congress from limiting the F.T.C. Act to one or two specific acts where there would remain a plethora of equally objectionable practices. Some senators denounced the undefined and ambiguous use of the term "unfair competition." For example, Senator Thomas stated that by enacting the measure into law, Congress would grant unbridled power to a commission to arbitrarily determine whether a proscribed act would fall within the gambit of the term unfair competition. Senator Brandagee denounced using an indefinite phrase such as unfair competition. Brandagee contended that leaving the interpretation of what constituted "unfair competition" to a commission would be an unconstitutional attempt to vest both judicial and legislative powers in an executive body.

69. 51 CONG. REc. 13047 (1914). Senator Cummins, one of the main proponents of creating a strong agency, discussed the need to allow the F.T.C., rather than the courts, to determine what practices were unfair. He argued that Congress' creation of a tribunal composed of persons of skill, education, training, experience and character would naturally result in the establishment of appropriate rules and standards. Cummins stated that he would rather take [his] chance with a commission at all times under the control of Congress, [and] at all times under the eye of the people, for the attention of the people is concentrated to a far greater degree upon the commission which is organized to assist in the regulation of commerce or to administer the law regulating commerce than it has upon the abstract propositions ... argued in the comparative seclusion of our courts.

70. Id. Senator Cummins noted that the creation of a commission to determine what constituted unfair competition would, in all practical effects, result in an administrative Rule of Reason.

71. H.R. REP. NO. 63-1142, at 19 (1914). Senators concluded that it is impossible "to frame a definition which embraces all unfair practices. There is no limit to inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin again." The report also stated that whether a practice is unfair or not will often depend on the circumstances of the particular case. It is therefore an impossible endeavor to define exactly what behavior constitutes an unfair practice.

72. 51 CONG. REc. 11084, 12745 (1914).
out its intended purpose. Hence, the Senate purposely left the term "unfair competition" undefined.

After much debate between members of the House of Representatives and the Senate, Section 5 of the F.T.C. Act emerged. The Act, which President Wilson signed into law on September 26, 1914, closely paralleled the Senate bill. In its final version the F.T.C. Act merely provided that "unfair methods of competition in commerce are declared unlawful." Moreover, Section 5 of the F.T.C. Act called for the establishment of the F.T.C. and vested in the F.T.C. broad regulatory powers. The F.T.C. was to use the discretionary powers that Congress had granted to define and prohibit a broad spectrum of commercial conduct that the F.T.C. itself considered potentially unfair or deceptive.

By virtue of Section 5 of the F.T.C. Act, the F.T.C. assumed the role of determining what conduct or practices were unfair in a commercial context. The following Section will demonstrate how the F.T.C. typically uses its broad authority in regulating individual cases of unfair competition. The next Section will also discuss the role of the federal courts in ensuring that the F.T.C. does not exceed its authority under the F.T.C. Act

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73. Id. One senator emphatically argued that "there is not a man in the Senate who can give a definition in one hundred words of unfair competition which will cover three percent of what the courts and the commission may find to be unfair." Id. at 12745.

74. THE ROLE OF SECTION 5, supra note 19, at 18.

75. Id.

76. Id.

77. F.T.C. Act, § 5, 15 U.S.C. § 45 (1994). The current version of Section 45 provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Id.

78. 1 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, §119.01 (1980). In order to ensure the fairness and independence of the F.T.C., Congress directed that the commission be bipartisan and Congress shared its responsibilities in staffing the Commission with the President. The Act requires that the commission be composed of five members, with no more than three members of the same political party. Id. The chairperson of the F.T.C. is selected by the President from among the five commissioners and serves at the will of the President. Id. To avoid any appearance of conflict, the F.T.C. Act also mandates that Commissioners are prohibited from engaging in any other business, vocation or employment. Id.; see also F.T.C. Act, § 5, 15 U.S.C. § 45.

79. 1 VON KALINOWSKI, supra note 23, at § 2.03 [1].

80. Id.

81. Id.

Under Section 5 of the F.T.C. Act, Congress gave the F.T.C. the duty to issue a complaint and set a date for a hearing when the agency believed that a person, partnership or corporation had potentially engaged in unfair commercial practices that were contrary to the public interest. The respondent then has the opportunity, through written communication, to attempt to persuade the F.T.C. that its conduct does not constitute unfair competition and that the F.T.C. should not issue a cease and desist order. If, after consideration of a respondent's communication, the F.T.C. determines that the F.T.C. Act prohibits the conduct involved, the F.T.C. would issue a cease and desist order prohibiting the respondent from engaging in the objectionable conduct. If a respondent fails to comply with a cease and desist order or challenges the F.T.C.'s determination, a United States court of appeals may then enforce, modify or discharge the F.T.C. ruling. However, the courts of appeal must uphold the F.T.C.'s findings of fact, if the evidence of the case supports those findings. Moreover, a reviewing court should give great deference to a reasonable interpretation by the F.T.C. of what activities constitute unfair methods of competition. A court should uphold the F.T.C.'s findings of fact, if supported by substantial evidence, even if the finding is at vari-

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82. F.T.C. Act, § 5, 15 U.S.C. § 45. See 11 VON KALINOWSKI, supra note 78, at § 119.05 [1] (stating that the purpose of the Act is to protect the public interest).
83. See GREG HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 49-164 (1924) (discussing the procedural aspects of the F.T.C. and how the agency functions).
84. Id.
85. Id.
86. F.T.C. Act, 15 U.S.C. § 45(c); see also Ash Grove Cement Co. v. F.T.C., 577 F.2d 1368, 1377 (9th Cir. 1977) (holding that the scope of judicial review of the F.T.C.'s factual findings is very narrow). Section 45(c) mandates that "the findings of the Commission as to the facts, if supported by the evidence, shall be conclusive." Id. This statutory language has been judicially interpreted to confine the exercise of judicial review of the F.T.C.'s findings of fact to a determination of whether the factual findings are supported by substantial evidence. Id. Findings of fact should not be set aside if the evidence in the record reasonably supports the administrative conclusions, even if a suggested alternative conclusion may be equally or even more reasonable. Id. at 1378.
87. See 1 VON KALINOWSKI, supra note 23, at § 2.03[5] (stating that there is no requirement that the commercial conduct complained of either harms or threatens to harm competition, or even that there is actual or potential competition between two or more parties); see also Giant Food, Inc. v. F.T.C., 322 F.2d 977, 982 (D.C. Cir. Ct. 1963) (holding that courts must adopt the findings of the F.T.C. unless these finding are arbitrary or clearly wrong.)
ance with the position the court would have taken.  

Once the F.T.C. finds that a business engaged in unfair methods of competition, the F.T.C. has the responsibility to fashion an appropriate remedy. The F.T.C. may frame the remedy broadly enough to ensure that the business will discontinue the prohibited behavior. As long as the F.T.C.'s remedy is not unnecessarily broad, and relates in some way to the objectionable behavior, the courts must enforce it.

As discussed above in Section C, an analysis of the history of the F.T.C. Act reveals that Congress vested in the F.T.C. broad authority to determine what business practices are unfair and to provide the proper remedy. Congress clearly intended that judicial intervention in F.T.C. determinations should be minimal and that the courts should give substantial deference to the F.T.C.'s determination of what practices are unfair. The following Part explores the historical development of the substantive standards and the procedural devices available to the F.T.C. in combating unfair competition. Part II also demonstrates the struggle of the courts in interpreting the congressional grant of power given to the F.T.C.

II. THE DEVELOPMENT OF THE F.T.C.'S AUTHORITY UNDER SECTION 5

Congress hoped that by granting the F.T.C. sufficient authority, the F.T.C. would be able to halt unfair methods of competition at their incipiency. Congress also intended the F.T.C. Act and, in

88. Litton Industries, Inc. v. F.T.C., 676 F.2d 364, 368-69 (9th Cir. 1982).
89. 12 VON KALINOWSKI, supra note 23, at § 131.02[4][b]. The Commission's determination of an appropriate remedy is to be given accord by the courts as long as it bears a reasonable relationship to the prohibited activity. Id.; see also Encyclopedia Britannica Inc. v. F.T.C., 605 F.2d 964, 970 (7th Cir. 1979) (holding that once the F.T.C. has found a violation of the F.T.C. Act, the court's role in reviewing the remedy the F.T.C. prescribed is a narrow one). See also Jacob Siegel Co. v. F.T.C., 327 U.S. 608, 612-13 (1946). The Supreme Court in Jacob Siegel declared:

The commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has a wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Id.
90. 12 VON KALINOWSKI, supra note 23, at § 131.02 [4].
91. Id.
92. See supra notes 64-71 and accompanying text for a discussion of the congressional debates regarding the authority that Congress granted to the F.T.C.
93. 4 KITNER, supra note 20, at § 48.3.
94. F.T.C. v. Gratz, 253 U.S. 421, 435 (1920) (Brandeis, J., dissenting); 51 CONG REC. 11455 (1914). Senator Cummins indicated that existing antitrust laws, such as the Sherman Act, failed to prevent unfair methods of competition and only operated to prohibit such acts once the damaging acts had al-
particular, the Act's provision directed to unfair methods of competition, to furnish a broad and flexible standard, capable of growing with the changing conditions of industrial America.\textsuperscript{95} Despite Congress' broad grant of authority to the F.T.C., early judicial interpretations of Section 5 threatened to severely limit the F.T.C.'s ability to determine if a practice constituted an unfair method of competition.\textsuperscript{96}

A. The Supreme Court's Initial Narrow Interpretation of Section 5

\textit{F.T.C. v. Gratz}\textsuperscript{97} was the first Section 5 case to come before the Supreme Court.\textsuperscript{98} In \textit{Gratz}, the Supreme Court narrowly interpreted the reach and scope of Section 5 of the F.T.C. Act and effectively restricted the F.T.C.'s authority to prescribe unfair methods of competition.\textsuperscript{99} Gratz was the predominant supplier of both steel ties and jute bagging for the entire cotton growing industry.\textsuperscript{100} Gratz used its advantageous market position to force would-be buyers of steel ties to buy a corresponding amount of jute bagging.\textsuperscript{101} The F.T.C. determined that this coercive marketing tactic would have an adverse effect on fair competition in the jute bagging industry.\textsuperscript{102} The gravamen of the F.T.C.'s complaint was that

\textsuperscript{95} CARLA H. HILLS, ANTITRUST ADVISER 329 (1971); see also Casewell O. Hobbs III, The Federal Trade Commission and the Federal Trade Commission Act, in ANTITRUST ADVISER 340, 345 (1985) (stating that in "analyzing a particular business practice, the F.T.C. is not limited to past precedent and may employ a novel legal theory or an innovative mode of analysis to determine whether a practice is unfair under Section 5.").

\textsuperscript{96} Harry Steinberg, Oligopolies, Cereals and Section 5 of the F.T.C. Act, 61 GEO. L.J. 1145, 1165 (1973).

\textsuperscript{97} 253 U.S. 421 (1920).

\textsuperscript{98} Baker & Baum, supra note 62, at 545.


\textsuperscript{100} \textit{Gratz}, 253 U.S. at 425-26. The Gratz Corporation produced both steel ties and jute bagging. \textit{Id}. Steel ties were manufactured and used to bind the bales of cotton. \textit{Id}. Jute baggings were utilized to wrap the bales of cotton. \textit{Id}.

\textsuperscript{101} \textit{Id}. at 426; The ROLE OF SECTION 5, supra note 19, at 27; see also Leigh Isaacs, Section 5 of the F.T.C. Act: Unfairness to Consumers, 1972 WISC. L. REV. 1071, 1072 (1972) (stating that antitrust laws prohibit tying arrangements if these tying arrangements tend to substantially decrease competition or monopolize commercial industries).

\textsuperscript{102} \textit{Gratz}, 253 U.S. at 421; The ROLE OF SECTION 5, supra note 19, at 27.
Gratz utilized coercive tactics with the intent and effect of stifling competition within the jute bagging industry. The F.T.C. ordered the Gratz Corporation to cease and desist tying the sale of steel ties to a purchase of jute baggings.

The case went before the Court of Appeals for the Second Circuit. The court reversed the F.T.C.'s order, holding that there was no evidence to establish that the marketing tactics of the Gratz Corporation tended to monopolize or decrease competition.

The Supreme Court, in a correspondingly restrictive reading of the F.T.C. Act, affirmed the appellate court's decision. The Supreme Court ruled that since Congress had not defined the term "unfair methods of competition," it was the role of the courts, not the F.T.C., to determine what competitive methods Congress intended to prohibit.

In dissent, Justice Brandeis sharply criticized the majority's overly restrictive interpretation of Section 5. Justice Brandeis alluded to the fact that such a restrictive reading of the statute

103. Gratz, 253 U.S. at 426. The Commission stated that refusing to sell steel ties unless the buyer also bought a corresponding number of jute bagging would discourage and restrain competition. Id. The Commission unequivocally held that such conduct constituted an unfair method of competition falling within the purview of the F.T.C. Act Id.

104. Isaacs, supra note 101, at 1072.


106. Id. at 317-18.

107. Id.; see also THE ROLE OF SECTION 5, supra note 19, at 27 n.91. The Court of Appeals found that there was no evidence supporting the F.T.C.'s findings that Gratz had adopted a policy whereby the Gratz Corporation would refuse to sell to merchants that desired to buy steel ties, unless that merchant also bought a corresponding amount of jute baggings. Gratz, 258 F. at 317.

108. Gratz, 253 U.S. at 429; see also Milton Handler, Twenty Five Years of Antitrust, 73 COLUM. L. REV. 415, 440 (1973) (discussing the findings of the Gratz court).

109. Gratz, 253 U.S. at 427. Specifically, the Supreme Court held that: the words 'unfair methods of competition' are not defined by statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as [a] matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or against public policy because of their dangerous tendency unduly to hinder competition. The Act was certainly not intended to fetter free and fair competition as commonly understood and prescribed by honorable opponents in trade.

110. Id. at 436; see also Handler, supra note 108, at 441 (discussing Justice Brandeis' dissent).
would severely confine the F.T.C.'s ability to prohibit new forms of unfair competition. In evaluating the congressional intent in creating the F.T.C., Brandeis declared that the majority's restrictive reading was contrary to the congressional goals. Justice Brandeis argued that it was not a question of law whether a method of competition is unfair, it was a question of fact which the F.T.C. should prove by the evidence in the case. Further, he concluded that a reviewing court's role was limited to considerations of whether the facts and evidence, as presented by the F.T.C., were sufficient to support the charge of unfair competition.

The majority decision in *Gratz* threatened to constrict the F.T.C.'s power to prohibit unfair methods of competition and to limit the application of Section 5 to Sherman and Clayton Act violations. This narrow definition of the role of the F.T.C. left no

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112. Id. at 435.
113. Id. at 436;
114. Id.; see also 4 KITNER, supra note 20, at §49.16 (discussing Brandeis' position on the role of the courts to review F.T.C. factual determinations). Justice Brandeis's entire feelings towards the majority vote can be summed up in the following paragraph. Justice Brandeis stated:

Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the Act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable.

*Gratz*, 253 U.S. at 436. Brandeis further stated that whether a method of competition is unfair will depend on certain facts. Id. at 437. Congress imposed the factual determination on the F.T.C. and instructed the courts to uphold these findings as long as they are supported by the evidence. Id.

115. Handler, supra note 108, at 441.; see generally F.T.C. v. Curtis Publishing Co., 260 U.S. 568 (1923) (considering the F.T.C.'s allegation that Curtis Company used methods of distributing magazines that were illegal). In *Curtis*, the F.T.C. determined that the Curtis Company's use of exclusive dealing contracts to prevent their distributors from handling other companies' publications was a violation of Section 3 of the Clayton Act and Section 5 of the F.T.C. Act. Id. at 582. The Supreme Court rejected the charge that the Curtis Company's contract tactics had violated the Clayton Act. Id. The Court determined that since there was no agency relationship between the Curtis Company and its distributors, there, likewise, could be no conditional exclusive dealing sale. Id. at 581. Moreover, in analyzing the F.T.C.'s Section 5 charge, the Court similarly rejected the notion that Curtis Company engaged in unfair competition. The Court stated that even if agency contracts were made, these contracts could not be prohibited under the F.T.C. Act when they are made without unlawful motive and are simply attempts to expand business. Id. at 581-82. See also F.T.C. v. Sinclair Oil Co., 261 U.S. 463, 475-76 (1923) (stating in dicta that the F.T.C. had no powers to restrain businesses from common, ordinary commercial practices). In *Sinclair*, the Sinclair Corporation refused to lease their gasoline tank and pumps unless the retail dealers used only Sinclair gasoline in their filling stations. Id. at 464. The
room for the antitrust laws to expand and mold themselves to meet anti-competitive circumstances as they arose. Fortunately, the Gratz decision did not survive the test of time.

B. The Supreme Court’s Increasingly Expansive Interpretation of Section 5

Two years following the opinion in Gratz, the Supreme Court, in F.T.C. v. Beechnut Packing Co., recognized that the scope of the F.T.C.’s authority to impose Section 5 sanctions was not, as the F.T.C. concluded that this practice was a violation of both the Clayton Act and the Section 5 of the F.T.C. Act. Id. at 465. The Supreme Court held that there was no Clayton Act violation because the retail dealers were free to lease another company’s gas pump. Id. at 475-76. The Court went on to criticize the F.T.C., stating that the F.T.C. had no “authority to compel competitors to a common level [or] to interfere with ordinary business methods.” Id. at 475. Moreover, the Court concluded that the F.T.C. provided no evidence that Sinclair’s methods would tend to monopolize or lessen competition. Id.

The Court also held that Section 5 had not been violated either. Id.; but see Edward F. Howery, Utilization by the F.T.C. of Section 5 of the F.T.C. Act as an Antitrust Law, ANTITRUST BULLETIN 161, 166 (1960) (arguing that the impact of Gratz, Curtis and Sinclair indicates that the F.T.C. could not prohibit a business practice unless the F.T.C. could first establish a detrimental impact on competition). Howery’s position is contrary to the incipiency rationale outlined supra note 94; see also HENDERSON, supra note 83, at 102 (commenting on the impact of the Gratz, Curtis and Sinclair decisions). Henderson states that the three decisions removed all administrative power and discretion from the F.T.C. Id. Without these administrative powers, the F.T.C. could not determine what methods of competition were unfair or what practices tended toward monopoly. Id. Therefore, the F.T.C. had become little more than a “subordinate adjunct of the judicial system.” Id.; see also F.T.C. v. Raladam, 283 U.S. 643 (1931) (involving deceptive advertising for a weight-control product). In Raladam, the Court heightened the restrictive holding in Gratz by ruling that the F.T.C. could not prohibit deceptive trade practices, if such practices were wide-spread throughout an industry. Id. at 643. The Court reasoned that such deception could not produce unfair methods of competition because all competitors were using the same deceptive tactics. Id. Since no honest competitors could be harmed, there was no unfair competition. Id. While the courts recognized that the F.T.C. Act was implemented to stop unfair trade practices in their incipiency, the court, not the Commission, was to determine what constituted an incipient trade restraint. Id. Raladam was an important case, in that the F.T.C. attempted to reach conduct which resulted in deception to the consumer and had an incidental impact on competition within an industry. See Handler, supra note 108, at 1030 (stating that both the Gratz and the Raladam decisions were repudiated by the enactment of the Wheeler Lee Amendment Act of 1938, which protects consumers regardless of the effect on competitors).

116. See supra notes 68-73 and accompanying text for a discussion of the congressional debates which dictated that leaving undefined “unfair methods of competition” was the best way to ensure that the term could grow and mold itself to meet anti-competitive circumstances as they arose.

117. See infra notes 160-77 and accompanying text for an analysis of the Supreme Court’s holding in F.T.C. v. Brown Shoe, Inc., 348 U.S. 316 (1966), which overruled the Court’s prior holding in Gratz.

118. 257 U.S. 441 (1922).
Court in *Gratz* held, strictly limited to violations of the Sherman Act.¹¹⁹ In *Beechnut*, the F.T.C. alleged that the Beechnut Company engaged in a price fixing program whereby the company ordered retailers to maintain a certain price for each unit of Beechnut food product sold.¹²⁰ Failure to comply with and maintain the prices Beechnut quoted resulted in Beechnut's refusal to continue to sell their product to recalcitrant merchants.¹²¹ The F.T.C. charged Beechnut with violating Section 5 of the F.T.C. Act because its refusal-to-sell policy suppressed competition.¹²²

Although the Sherman Act prohibits price fixing, Sherman Act violations require a contract or agreement to bring such activities within its scope.¹²³ Beechnut's cooperative pricing scheme was not contractual and was therefore not technically a Sherman Act violation.¹²⁴ The F.T.C., nevertheless concluded that cooperative price fixing, even absent a contract, fell within the broader scope of Section 5.¹²⁵ The Court held that although Beechnut had not violated a literal reading of the Sherman Act, the company had violated the public policy notions that underlie the Act.¹²⁶ The Court concluded that the F.T.C., under Section 5, had the authority to forbid the continuance of an activity which, although not technically a violation of the Sherman Act, is contrary to the public policy objectives espoused by the Act.¹²⁷

In *F.T.C. v. R. F. Keppel Brothers, Inc.*¹²⁸ the U.S. Supreme Court expanded its holding in *Beechnut*, signifying a major retreat from the *Gratz* holding.¹²⁹ In *Keppel*, the Keppel Company used commercial lottery strategies and attractive packaging to induce small children to buy their products.¹³⁰ The company sold individually wrapped candies with an inducement that some of the packages contained prizes or money.¹³¹ The F.T.C. determined that

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¹¹⁹ Id. at 454; 4 IRVING SCHER, ANTITRUST ADVISER § 9.06 (1995).
¹²⁰ Beechnut Packing Co., 257 U.S. at 444.
¹²¹ Id.
¹²² Id. at 443-44.
¹²³ HILLS, supra note 95, at §6.3.
¹²⁴ Id.
¹²⁵ Beechnut Packing Co., 257 U.S. at 444.
¹²⁶ Id. at 453. The Court held that the Sherman Act, although not involved in this case, demonstrates a public policy notion that can be considered by the F.T.C. in their determination of what constitutes an unfair method of competition. Id.
¹²⁷ Id. at 454; see also F.T.C. v. Cement Inst., 333 U.S. 683, 694 (1948) (supporting the Beechnut holding that no agreement or contract was necessary to bring corporate acts and practices within the scope of Section 5).
¹²⁸ 291 U.S. 304 (1934).
¹³¹ Id.
Keppel's candy was inferior in quality and size when compared to competitor's candies. Further, the F.T.C. held that Keppel's use of lottery inducements encouraged school children to gamble, thereby offending an important public policy. Therefore, the F.T.C. ruled that such inducements were an unfair method of competition within the scope of Section 5. The Court of Appeals for the Third Circuit overturned the F.T.C.'s finding, ruling instead that there was no evidence to indicate that the methods of competition, if left unfettered, would amount to a violation of the Sherman Act or public policy.

The Supreme Court reversed the Third Circuit's decision and held instead that the F.T.C. may prohibit practices that go beyond common law or Sherman Act violations. The Supreme Court further held that although the determination of whether a practice is unfair is for the courts to make, a court should give weight to the expertise and determinations of the F.T.C. The Supreme Court concluded by stating that a reviewing court should sustain a F.T.C. determination if the evidence supports it.

The Supreme Court's ruling in Keppel, although re-affirming that the courts possess the ultimate authority to define unfair competition, significantly departed from the rationale of Gratz. No longer were the courts the sole interpreters of what constituted unfair competition. The Keppel decision authorized the F.T.C. to exercise discretion and assist the courts in defining what prac-

132. Id.
133. Id. at 308.
134. Id. at 305-06
136. R.F. Keppel Bros., 291 U.S. at 310. The Court stated that if Congress intended to limit the scope of the F.T.C. to common law or Sherman Act violations, they easily could have done so. Id. However, case law and a review of the F.T.C. Act confirm that the F.T.C. should not be so limited. Id.
137. Id. at 314. The Court stated that the F.T.C. was created as an expert administrative body whose "information, experience and [a] careful study of the business and economic condition[s] of industry" could provide guidance as to what practices are unfair. Id. Thus, the F.T.C.'s factual determinations must be given "weight." Id.; see also MacIntyre & Volhard, supra note 135, at 432 (characterizing Keppel Company's conduct as essentially an incipient restraint on trade). See also Atlantic Refining Co. v. F.T.C., 381 U.S. 357, 367-68 (1965) (holding that judicial review of F.T.C. determinations is limited to "determining whether the Commission's decision has warrant in the record and a reasonable basis in law.... While the final word is left to the courts, necessarily we give great weight to the Commission's conclusions.").
139. Id. at 314.
140. MacIntyre & Volhard, supra note 135, at 432.
tices were unfair. The Supreme Court also suggested that a reviewing court must defer to the expertise of the F.T.C. and its determinations.

Shortly after the Keppel decision, Congress codified Keppel by enacting the Wheeler-Lea Amendment. The Wheeler-Lea Amendment added the phrase “unfair or deceptive practices” to Section 5’s original ban on unfair methods of competition. The congressional purpose behind the Wheeler-Lea Amendment was to empower the F.T.C. to prohibit practices that affect consumers regardless of their impact on competition. Congress thereby expanded the scope of Section 5 and the F.T.C.’s sphere of authority.

F.T.C. v. Motion Picture Advertising Service Co., conveyed the next major impetus for the Court’s recognition of the F.T.C.’s expanding authority. In Motion Picture Advertising, the Court placed far greater reliance on F.T.C. determinations of what behavior constituted an unfair method of competition. The F.T.C. issued an order requiring the top four producers and distributors of advertising for motion pictures to refrain from entering into any exclusive contracts with theater owners that would last longer than one year. The Motion Picture Advertising Company, along with three other producers, had exclusive dealing contracts with seventy-five percent of the theater owners using advertising films. Cornering the market by four companies had forced potential competitors out of business. The F.T.C. held that continuation of this practice would eventually lead to a monopolization of the motion picture advertising industry and therefore the F.T.C. declared that the four companies’ practice constituted an unfair method of competition.

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141. Id.
142. Id.; Neil Averitt, The Meaning of Unfair Competition in Section 5 of the F.T.C. Act, 21 B.C. L. REV. 227, 297 (1980); see also MacIntyre & Volhard, supra note 135, at 432 (discussing the Beechnut case, heard before Keppel, and signifying a change in the higher court’s attitude towards the F.T.C.).
144. Id.
145. Id.; see supra note 115 for a discussion of the Raladam decision and how the Court’s decision in Raladam was specifically overruled by the enactment of the Wheeler-Lea Act.
146. 344 U.S. 392 (1953).
147. Id. at 392; MacIntyre & Volhard, supra note 135, at 436.
148. Motion Picture, 344 U.S. at 394.
149. Id. at 393.
150. Id. at 394.
151. Id. at 392; see also Richard N. Pearson, Section 5 of the F.T.C. Act as Antitrust, a Comment, 47 B.U. L. REV. 1, 8 (1967) (pointing out that the situation in Motion Picture restricted the rights of sellers, i.e. “the theater owners who sold time and space to the producers,” which could never result in a violation of the Clayton Act). The Clayton Act only prohibits restrictions on the rights of buyers. Id.
The Supreme Court, affirming the F.T.C.’s ruling, reiterated that the scope of Section 5 was not confined to common law or Sherman Act violations. The Court further stated that the purpose of the F.T.C. Act was to supplement the Sherman and Clayton Acts and to halt, in their incipiency, corporate actions that could eventually lead to violations of those Acts. The Court recognized that Congress created the F.T.C. to nip in the bud those acts which, if allowed to bloom, would constitute violations of the Sherman and Clayton Acts. The Supreme Court expanded the F.T.C.’s authority by stating that determining the impact of a proscribed course of conduct on an industry is for the F.T.C., not the courts, to decide.

Motion Picture marked a clear departure from the majority decision in Gratz. After Motion Picture, the F.T.C. had the expanded power to determine categorically both incipient violations of Section 5 and the effects of any competitive practice on industry in America. The Court also instructed that, in reviewing the findings of the F.T.C., courts should determine only whether the F.T.C.’s conclusion is logical in the context of the evidence. Additionally, courts must uphold F.T.C. determinations if supported by the evidence.

In F.T.C. v. Brown Shoe Co., the Supreme Court, sounding the death knell for Gratz, significantly restored the full authority Congress originally vested in the F.T.C. In that case, the Brown Shoe Company, one of the largest manufacturers of shoes, offered attractive benefits to franchise owners who agreed to exclusively sell Brown Company’s shoes. The restrictive franchise agreements prohibited franchise owners from purchasing or selling shoes that Brown Shoe’s competitors had manufactured. In re-

152. Motion Picture, 344 U.S. at 394. The Court recognized that Congress left the term undefined so it would be flexible enough to deal with the different and changing aspects of business. Id.
153. Id. at 394-95; see also Fashion Originators’ Guild of Am. v. F.T.C., 312 U.S. 457, 466 (1941) (stating that “it was the object of the F.T.C. Act to reach not merely the fruition but also in their incipiency, combinations which would lead to these and other trade restraints and practices deemed undesirable.”); see also Averitt, supra note 142, at 242 (positing that the incipiency doctrine had substantial support in the legislative history of the F.T.C. Act).
154. Motion Picture, 344 U.S. at 395.
155. Id. at 396.
156. See supra notes 97-117 and accompanying text for a discussion of the Gratz decision.
158. Id. at 554-55.
159. Id.; see supra notes 111-17 and accompanying text for a discussion of Justice Brandeis’ dissenting opinion in Gratz.
161. Id. at 317.
162. Id.
turn for signing these restrictive agreements, the Brown Shoe Company extended special treatment and attractive benefit packages to the franchise owners. Franchise owners who did not sign Brown's franchise agreement would not receive these benefit packages. The F.T.C. found the restrictive franchising agreement to be an unfair method of competition within Section 5. The F.T.C. ordered the Brown Shoe Company to cease and desist from using restrictive franchise agreements.

The Court of Appeals for the Eighth Circuit reversed the cease and desist order and held that the F.T.C. had failed to demonstrate how the restrictive agreements resulted in a decrease in competition. The court stated that without proof of an exclusive dealing arrangement and a negative impact on competition, Brown Shoe's conduct did not violate Section 3 of the Clayton Act. Interestingly, the court based its dismissal on Section 3 of the Clayton Act despite the fact that the gravamen of the F.T.C.'s complaint was under Section 5 of the F.T.C. Act.

The Supreme Court overturned the appellate court decision and held that the F.T.C. has broad power to condemn practices which violate the policies underlying the Sherman and Clayton Acts, even though the practices do not actually violate these laws. Brown Shoe contended that the F.T.C. could not condemn a practice without proof that its effect will be to reduce competition or create a monopoly. The Supreme Court rejected Brown Shoe's argument, holding instead that the F.T.C. need not prove that there is a likelihood of reducing competition in order to prohibit conduct under Section 5. The F.T.C.'s power, under Section 5 permits the Commission to inhibit trade restraints while in their incipiency, even before an anti-competitive effect develops.

163. Id.
164. Id.
165. 4 RUDOLF CALLMAN, UNFAIR COMPETITION AND TRADEMARKS AND MONOPOLIES 19 (1981)
166. Id.
167. F.T.C. v. Brown Shoe Co., 339 F.2d 45, 46 (8th Cir. 1964), rev'd, 384 U.S. 316 (1966); see also Isaacs, supra note 101, at 1089 (discussing the appellate court's holding in Brown Shoe).
168. Brown Shoe, 339 F.2d at 46.
169. MacIntyre & Volhard, supra note 135, at 440.
171. Id. at 321.
172. Id. at 322; see also F.T.C. v. Texaco, Inc., 393 U.S. 223, 226 (1963) (supporting the idea that the F.T.C. can prohibit, as an unfair method of competition, incipient conduct even where there is no evidence to establish a violation of the Sherman or Clayton Acts).
173. Texaco, 393 U.S. at 226. See also MacIntyre & Volhard, supra note 135, at 421 (explaining that the F.T.C., "as a specially qualified administrative group, would have a better understanding about when unfair practices are likely to evolve into restraints on trade than federal judges").
Court recognized that Brown Shoe Company’s restrictive franchise agreement was contrary to the policies behind both the Sherman and Clayton Acts and therefore held that the F.T.C. may condemn these agreements under Section 5. \(^{174}\) Taking the next step, the Supreme Court overruled the Gratz decision. The Court expressly recognized Justice Brandeis’s dissenting opinion in Gratz\(^{175}\) as the correct interpretation of congressional intent in the F.T.C. Act. \(^{176}\) Fifty years after the passage of the F.T.C. Act, the Supreme Court finally confirmed that Congress intended that the F.T.C., not the courts, should determine whether a particular practice amounted to an unfair method of competition.\(^{177}\)

The Supreme Court solidified its conclusion that Congress vested broad discretionary authority in the F.T.C. in \textit{F.T.C. v. Sperry & Hutchinson Co.}\(^{178}\). In \textit{Sperry}, the Court recognized and affirmed that the F.T.C. may prohibit conduct which, although not violative of antitrust law, was nevertheless injurious to consumers. \(^{179}\) Sperry & Hutchinson (S & H) engaged in selling trading stamps to retail merchants.\(^{180}\) Merchants would then distribute these stamps to customers who purchased items within their stores.\(^{181}\) After collecting a page of S & H stamps, customers could redeem those stamps for merchandise only at an S & H facility.\(^{182}\) Problems occurred when independent trading stamp exchanges were opened.\(^{183}\) Customers with trading stamps no longer had to return to S & H to redeem their stamps for merchandise.\(^{184}\) Instead they could redeem the stamps at a competitor’s trading stamp exchange.\(^{185}\) In order to prevent unauthorized trading and selling of S & H stamps, the S & H Company placed a contractual provision in their stamp books, prohibiting any collector from disposing of S & H stamps at any non-S & H outlet.\(^{186}\) S & H’s goal was to prevent the exchange of its S & H stamps to non-affiliated merchants or redeemers.\(^{187}\) The F.T.C. determined that the restrictive provision in S & H stamp books was an attempt to suppress the operation of trading stamp exchanges and other stamp redemption cen-

\(^{174}\) \textit{THE ROLE OF SECTION 5}, \textit{supra} note 19, at 45.
\(^{176}\) 2 \textit{SHEPARDS INC., ANTITRUST ADVISER} 397 (1971).
\(^{177}\) \textit{Id.}
\(^{179}\) \textit{Sperry & Hutchinson}, 405 U.S. at 236. See \textit{HANDLER, supra} note 108, at 1033 (discussing the Court’s decision in \textit{Sperry & Hutchinson}).
\(^{180}\) \textit{Sperry & Hutchinson}, 405 U.S. at 236.
\(^{181}\) \textit{Id.}
\(^{182}\) \textit{Id.}
\(^{183}\) \textit{Id.} at 237-38.
\(^{184}\) \textit{Id.}
\(^{186}\) See \textit{HANDLER, supra} note 108, at 1033.
Accordingly, the F.T.C., relying on Section 5, entered a cease and desist order against S & H.

The Fifth Circuit reversed the F.T.C.'s cease and desist order. The court concluded that the F.T.C., under Section 5, could only prohibit practices that violate the letter or spirit of the antitrust laws or that would constitute a "per se" violation. Faced with an overly restrictive interpretation of Section 5, the F.T.C. petitioned the Supreme Court for review.

The F.T.C. limited its complaint in the Supreme Court to the issue of whether suppression of stamp exchange is unfair to consumers and thus prohibited under Section 5. The Supreme Court, in reversing the Fifth Circuit's decision, determined that under Section 5, the F.T.C. can prohibit unfair competitive practices which violate neither the letter nor spirit of the antitrust laws. More specifically, the Supreme Court analyzed the legislative history of the F.T.C. Act and concluded that Congress intended the F.T.C. to have a high level of discretion in determining what practices violated Section 5. The Court recognized that Congress wrote the provisions of the F.T.C. Act with enough flexibility to allow the agency to prohibit practices that might eventually develop into abusive conduct. Echoing Brown Shoe, the Supreme Court criticized Gratz as an early judicial decision that narrowly and incorrectly interpreted the F.T.C.'s authority. Finally, the Supreme Court, in accord with the Wheeler-Lea Amendment to Section 5, recognized Congress' broad grant of authority to determine when a violation, which was injurious to

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188. Sperry & Hutchinson, 405 U.S. at 238.
189. Id.
190. F.T.C. v. Sperry & Hutchinson, 432 F.2d 146, 149-50 (5th Cir. 1970).
191. Id. The Circuit Court restricted the practices that the F.T.C. could declare unfair to include only: "(1) a per-se violation of antitrust policy; (2) a violation of the letter of either the [Sherman or Clayton Acts]; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court of the United States." Id.
192. Sperry & Hutchinson, 405 U.S. at 235.
193. Id. at 239-40.
194. Id. at 240.
195. Id. at 241-44.
196. See supra notes 143-45 and accompanying text for a discussion of the Wheeler-Lea Amendment.
consumers, had occurred. The Court held that the F.T.C. does have the authority under Section 5, to condemn practices that fall outside of the spirit or letter of the existing antitrust laws.

As discussed above, the legislative history of the F.T.C. Act and half a century of case law confirms that Congress intended to convey to the F.T.C. a broad grant of authority and power to prohibit unfair practices and competition under Section 5. The case law clearly indicates that the courts' role in reviewing F.T.C. determinations is narrow and that the F.T.C., not the courts, is the acknowledged expert in determining Section 5 violations. A court should overturn an F.T.C. determination only if the F.T.C. has failed to provide evidence to substantiate its claims. Additionally, a reviewing court must give great weight and deference to F.T.C. determinations.

Despite these settled principles, a trend that began about fifteen years ago and continues to develop in the federal courts appears to undermine the substantial authority of the F.T.C. Some courts have reversed important F.T.C. findings and have again resorted to a more restrictive reading of the F.T.C.'s authority under Section 5. This trend marks a significant break from Supreme Court precedent and is contrary to the original congressional objectives in establishing the F.T.C.

199. Isaacs, supra note 101, at 1083.
200. F.T.C. v. Sperry & Hutchinson, 405 U.S. 233, 244 (1972). The Court, after reviewing the legislative history and case law, concluded that the "Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." Id.
201. See supra notes 64-71 and accompanying text for a discussion of the role the F.T.C. was to play in prohibiting antitrust violations.
202. See supra notes 160-77 and accompanying text for a discussion of the Supreme Court's deference to the F.T.C.'s expertise in Brown Shoe.
203. See supra notes 146-59 and accompanying text for a discussion of the Supreme Court's holding in Motion Picture Advertising that where the F.T.C.'s findings are supported by the evidence in the case, courts should not overturn such findings.
204. See supra note 137 and accompanying text for a discussion of Atlantic Refining, requiring courts to give great weight to an F.T.C. determination.
205. Hobbs, supra note 95, at 346.
206. See E.I. DuPont de Nemours & Co. v. F.T.C., 729 F.2d 128 (2d Cir. 1984); Official Airline Guides v. F.T.C., 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. F.T.C., 637 F.2d 573 (9th Cir. 1980).
207. Hobbs, supra note 95, at 346-53.

A recent trend has begun to unfold in the courts which threatens to strangulate the F.T.C.'s ability to utilize its Section 5 powers. Despite important Supreme Court holdings, many appellate courts are no longer giving deference to the F.T.C.'s expertise and discretion in concluding what constitutes unfair trade practices. Rather, some courts have begun to confine the scope of Section 5 as being only co-extensive with the Sherman or Clayton Acts. This curtailment of the F.T.C.'s Section 5 authority is inconsistent with both the pre-1980s case law and with Congress' goals in creating the F.T.C.

The first recent case in this trend that restricts the authority of the F.T.C. was Boise Cascade Corp. v. F.T.C. In Boise, the F.T.C. determined that the joint use of an artificial pricing formula by the five largest plywood manufacturers tended to stabilize the pricing of plywood. The F.T.C. held that this stabilization was an unfair trade practice that resulted in artificially high prices in the plywood industry that may result in an anti-competitive effect.

The Court of Appeals for the Ninth Circuit overturned the F.T.C. decision. The court's reasoning suggests either that the F.T.C. failed to provide sufficient evidence of an anti-competitive effect or that, as a matter of law, Section 5 did not reach the conduct in question. In short, the court paid little deference to the F.T.C.'s determination. Moreover, the court of appeals specifically refused to allow the F.T.C. to exercise its broad authority under Section 5 to condemn trade restraints while still in their incipiency. The court instead held that, absent evidence of an agreement to utilize a pricing system to avoid competition, the

208. Id.
209. Id.
210. Id.
211. Id.
212. 637 F.2d 573 (9th Cir. 1980).
214. Id. at 91 n.5, 98. The F.T.C. claimed that when corporations act in union, when they attempt to pass their uniformly imposed cost, or when they intend to obtain prices established according to an arbitrary pricing formula, "it defies common sense to suppose that the sum of these collective actions has no effect on prices." Id. at 98.
216. Hobbs, supra note 95, at 351.
217. Id.
F.T.C. must show that the pricing system already had an adverse effect on competition by fixing or stabilizing prices. 219

The Boise court's decision largely ignored the F.T.C.'s ability to exercise its Section 5 authority in two ways. First, the court looked at whether there was an agreement between the plywood manufacturers to fix prices. 220 The F.T.C. would have to show this collusive activity in order to establish a Sherman Act violation. 221 However, the F.T.C. did not allege that Boise had violated the Sherman Act. Instead, the F.T.C. based its case against Boise on the agency's broader powers under Section 5 which, according to the history of the F.T.C. Act and pre-1980's case law, is not limited to Sherman Act violations. Therefore, no agreement is necessary to establish a Section 5 violation.

The court further incorrectly reasoned that absent a traditional Sherman Act violation, the F.T.C. needed to show some anti-competitive effect in order to prohibit the conduct. 222 Here the court seemingly paid little attention to the F.T.C. Act which clearly states that the F.T.C. may prohibit wrongful conduct in its incipiency. 223 The purpose behind the incipiency doctrine was to allow

219. Boise Cascade, 637 F.2d at 577; but see Triangle Conduit Cable Co. v. F.T.C., 168 F.2d 175, 179-80 (7th Cir. 1948) (holding that the F.T.C. may infer unfair competitive activity on the basis of uniform pricing within an industry, even absent an agreement between industry leaders). Under an almost identical set of facts as in Boise, the F.T.C. alleged that each defendant had violated Section 5 "through their concurrent use of a formula method of making delivered price quotations with the knowledge that each [other defendant] did likewise, with the result[s] [that the] price competition between and among them was unreasonably restrained." Id. at 176. The Court ruled that no direct proof of an agreement to fix prices was necessary between the defendants for them to fall under the F.T.C.'s authority to prohibit the conduct under Section 5. Id. at 179. Instead, the Court seems to have felt that uniform pricing itself could be evidence that the defendants had acted in concert in a price fixing conspiracy. Id. at 179-181. This ruling firmly established that the F.T.C. did not need to show an agreement in order to prohibit conduct under Section 5. Id.; see also F.T.C. v. Cement Inst., 333 U.S. 683 (1948) (demonstrating that no agreement to implement a fixed pricing system is necessary for the F.T.C. to prohibit conduct under Section 5).

220. Boise Cascade, 673 F.2d at 576-77

221. See Hills, supra note 95, at § 6.3 (discussing the Sherman Act's requirement for an agreement or some showing of collusive activity in order to establish a violation).

222. Boise Cascade, 673 F.2d at 581.

223. See Averitt, supra note 142, at 242 (arguing that the purpose of the incipiency doctrine was to allow the F.T.C. to prohibit conduct before it had an anti-competitive effect or resulted in consumer injury). It would defeat the very purpose of an incipiency doctrine to require a showing of injury before the conduct could be prohibited. Id. at 248. Congress certainly had not intended that harm or injury resulted before the F.T.C. could prohibit the conduct in question. Id. Rather, Congress hoped to stop the wrongful behavior before it resulted in injury. Id. Therefore, even without a showing of a per-se violation, the F.T.C. should not be required to show an actual negative effect
the F.T.C., as experts in business, to determine when a business practice would most likely, if left unchallenged, result in an anti-trust violation.\(^{224}\) However, the court once again apparently ignored the F.T.C. Act, stating that some anti-competitive effect was necessary before the F.T.C. could prohibit commercial conduct under Section 5. The Ninth Circuit's anticompetitive effect requirement rendered the incipiency doctrine meaningless.

Later the Second Circuit restricted the F.T.C.'s authority in *E.I. Du Pont de Nemours & Co. v. F.T.C.* \(^{225}\) In *Du Pont*, the F.T.C. argued that the only four manufacturers of lead anti-knock gas had violated Section 5 by maintaining a price signaling practice that tended to stabilize prices.\(^{226}\) The F.T.C. alleged that this practice could substantially lessen competition and may have the effect of stabilizing prices at levels greater than might otherwise have existed.\(^{227}\) Accordingly, the F.T.C. issued a cease and desist order against two of the manufacturers.\(^{228}\) The Second Circuit, following its earlier holding in *Boise*, held that the scope of Section 5 does not empower the F.T.C. to prohibit, as an unfair method of competition, non-collusive industry practices without a showing of oppressiveness.\(^{229}\)

The court ignored the fact that under Section 5, the F.T.C. is not limited to Sherman or Clayton Act violations and hence no proof of agreement is necessary.\(^{230}\) Additionally, the court paid no deference to the F.T.C.'s expertise to prohibit conduct while still in its incipiency. Instead, the court held that, absent a traditional antitrust violation, the F.T.C. could only use its Section 5 authority if the conduct in question already had a detrimental impact on competition.\(^{231}\) This narrow interpretation of the F.T.C.'s authority would not allow the F.T.C. to prohibit any violation, other than Sherman or Clayton Act violations, unless the business activity had already adversely affected competition. This view would hardly correspond with the congressional goals in creating the

\(^{224}\) *Id.* See also Areeda and Turner, 2 Antitrust Law 20 (1978) (providing current commentaries on the scope of the F.T.C.'s authority). The authors state that the legislative history shows that the F.T.C. Act was designed to prevent undesirable conduct that would lead to undesirable results. *Id.* "The Act authorizes the Commission to prohibit such practices even though the feared results have not yet occurred, but it is directed to behavior not to structure as such." *Id.*

\(^{225}\) 729 F.2d 128 (2d Cir. 1984).

\(^{226}\) *Du Pont*, 729 F.2d at 130.

\(^{227}\) *Id.*

\(^{228}\) *Id.* at 135.

\(^{229}\) *Id.* at 139.

\(^{230}\) See supra note 29 and accompanying text for a discussion of the legislative history of the F.T.C. Act which indicates that Congress did not intend to limit Section 5 to traditional Sherman or Clayton Act violations.

\(^{231}\) *Du Pont*, 729 F.2d at 139.
F.T.C. Act.

Judge Lumbard dissented in Du Pont, stating that courts traditionally show a great deal of deference to F.T.C. determinations and that the majority should have deferred to the F.T.C.'s authority and powers under Section 5.232 Echoing Justice Brandeis in Gratz, Lumbard discussed the statutory language of the F.T.C. Act, the legislative history of the Act, and the preceding case law, and suggested that Congress never intended Section 5 to reach only traditional Sherman or Clayton Act violations.233 Lumbard's dissent in Du Pont more closely follows the congressional intent behind the creation of the F.T.C. Act and the precedent case law.

Once again in 1980, the Court of Appeals for the Second Circuit reversed an F.T.C. ruling in Official Airline Guides v. F.T.C.234 Official Airlines Guides (O.A.G.) conveys the strongest showing that the courts have turned a blind eye towards the legislative history and precedent case law. In O.A.G., the defendant, Donnelley Corporation, was the sole publisher of an airline scheduling guide that travel agencies utilized when making travel arrangements.235 These guides listed only the flights of most major air carriers.236 The guides did not list connecting flight schedules of non-certified or commuter airlines.237 The F.T.C. made a strong showing that the Donnelley Corporation's refusal to publish competing commuter airline schedules, in fact, injured competition.238 However, the court concluded that the scope of Section 5 was not broad enough to prohibit the Donnelley Corporation's conduct and that if the court were to uphold the F.T.C.'s determination that Donnelley in fact violated Section 5, the court would "give the F.T.C. too much power to substitute its own business judgement for that of the [potential violator]."239 In other words, the court refused to acknowledge the F.T.C.'s business expertise in determining what types of commercial practices should be prohibited as unfair methods of competition under Section 5.

232. Id. at 142.
233. Id.
234. 630 F.2d 920 (2d Cir. 1980).
235. Id. at 921.
236. Id.
237. Id.
238. Id. at 922.
239. Official Airlines Guides v. F.T.C., 630 F.2d 920, 923 (2d Cir. 1980).
240. Id. at 923-24.
241. Id. at 927.
The O.A.G. court's ruling effectively limited the reach of Section 5 to those violations which would also be a violation of the Sherman Act.\textsuperscript{242} Under this Act, an agreement is necessary before the F.T.C. can prohibit the conduct.\textsuperscript{243} However, a look at the legislative history of the F.T.C. Act indicates that this holding is erroneous when applied to a Section 5 analysis.\textsuperscript{244} Since Congress, in creating the F.T.C. Act, specifically gave the F.T.C. power to prohibit incipient injury, it is difficult to believe that the O.A.G. holding properly conforms to the legislative intent.\textsuperscript{245}

IV. CONGRESS MUST REFORM THE F.T.C. ACT IN ORDER TO PRESERVE THE F.T.C.'S ABILITY TO FUNCTION AS AN EFFECTIVE ADMINISTRATIVE AGENCY

Congress should amend the F.T.C. Act in order to clarify the F.T.C.'s function as an administrative agency. As discussed in Part III, the courts have begun to misinterpret the legislative history of the F.T.C. Act and the role of the F.T.C. as an administrative body of experts charged with the responsibility for determining unfair trade violations.\textsuperscript{246} If this trend continues, the courts may endanger the F.T.C.'s ability to function as an administrative agency capable of prohibiting new and changing antitrust violations.\textsuperscript{247}

A. The Legislative History and Pre-1980s Case Law and the Clash of the Current Trend

An examination of the legislative history of the F.T.C. Act

\textsuperscript{242} Hobbs, supra note 95, at 351-52; see also Baker & Baum, supra note 62, at 543 (stating that if all Congress wanted to do was prohibit specific conduct as illegal per se, there would not have been a need to create an administrative process to determine this). \textit{Id.} Granting the F.T.C. administrative powers would have been unnecessary and the F.T.C. instead would have functioned as an arm of the executive branch of the government. \textit{Id.} However, Congress wanted to avoid this result. \textit{Id.} Therefore, Congress created the F.T.C. as an administrative agency and granted it broad powers under Section 5 to prohibit a spectrum of unfair or deceptive practices. \textit{Id.}

\textsuperscript{243} See supra notes 34-43 and accompanying text for a discussion of the Sherman Act's requirement that prohibited actions necessitates a contract or agreement of some sort.

\textsuperscript{244} See supra notes 27-29 and accompanying text for a discussion of Congress' intention that the F.T.C. Act would prohibit antitrust behavior which was beyond the scope of the traditional antitrust laws.


\textsuperscript{246} See supra notes 208-45 and accompanying text for a discussion of the impact of this trend on the F.T.C.

\textsuperscript{247} See infra notes 248-62 and accompanying text for a discussion of the effective curtailment of the F.T.C.'s ability to respond to new forms of unfair competition.
clearly indicates that Congress intended to vest the F.T.C. with broad discretionary authority to prohibit a wide range of unfair practices. The legislative history and pre-1980s cases support the position that Congress did not confine the F.T.C.'s Section 5 authority to common law or traditional Sherman or Clayton Act violations. Rather, Congress empowered the F.T.C. to prohibit anti-competitive conduct or unfair practices that, in 1914, would not have been violations of the common law or traditional antitrust laws.

The legislative history of the F.T.C. Act, and the pre-1980s supporting case law, indicate three different ways that the F.T.C. could utilize its Section 5 authority to prohibit wrongful conduct. First, the F.T.C. could utilize its Section 5 authority to prohibit violations of any of the traditional antitrust laws. Second, the F.T.C. could prohibit conduct that does not violate either the Sherman or Clayton Acts, but is contrary to the spirit or policy behind these acts. Finally, and probably most importantly, the F.T.C. could arrest antitrust violations in their incipiency and thereby prevent an anti-competitive result before it developed.

Additionally, the legislative history of the F.T.C. and pre-1980's case law repeatedly have confirmed that the F.T.C. is composed of experts who can draw on substantial knowledge and

248. See supra notes 13-93 and accompanying text for a discussion of the legislative history behind the F.T.C. Act and what made the creation of the Act necessary.

249. Averitt, supra note 142, at 235. Originally, Section 5 stated that unfair competition was declared unlawful. Id. However, many in Congress, fearing that "unfair competition" would have a limited common law interpretation, decided that it would be better to prohibit "unfair methods of competition." Id. In this way, Congress hoped that the F.T.C.'s ability to prohibit conduct would not be limited to common law violations or violations under the Sherman or Clayton Acts. Id.

250. See Milton Handler, Recent Antitrust Developments, 71 YALE L.J. 75, 94 (1961) (stating that limiting "unfair methods of competition" to traditional antitrust violations would have "frozen this branch of the law and denied it all capacity for growth and development").

251. See infra notes 252-54 and accompanying text for a discussion of the three primary ways that the F.T.C. can prohibit conduct under Section 5.


254. F.T.C. v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394-95 (1953); see also MacIntyre & Volhard, supra note 135, at 423 (providing the argument that the congressional goal behind creating the F.T.C. was to create a Commission that "by virtue of its experience, was intended to identify potentially anti-competitive practices before their potential for competitive injury was realized and before a court could be expected to recognize their injurious nature"). The congressional debates constantly reiterated that it was the F.T.C.'s expertise in business and economics that would enable it to eliminate "activities potentially inimical to competition." Id.
authority in determining Section 5 violations. As the Supreme Court held in Brown Shoe, a reviewing court must give great weight to any conclusions reached by the F.T.C. as a body of experts in the fields of business and economics. The Supreme Court explicitly declared that the role of a reviewing court is extremely narrow. Courts are only to overturn an F.T.C.'s factual determination if the F.T.C.'s conclusions are not supported by substantial evidence. Absent this finding, the courts, giving great weight and deference to the F.T.C. determinations, must uphold the F.T.C. ruling.

As demonstrated in Part III, lower courts have recently refused to adopt the holdings of the Supreme Court and have severely limited the authority of the F.T.C. Despite Congress' broad grant of authority to the F.T.C., the courts have begun a trend which seemingly ignores both the legislative history of the F.T.C. Act and the pre-1980s case law. Additionally, the courts have ignored the F.T.C.'s expertise in prohibiting incipient violations. The F.T.C.'s ability to prohibit incipient violations requires that the Commission act before the wrongful conduct has had an anticompetitive effect. Congress created the F.T.C. and purposefully composed it of men and women with expertise in business and economics, who could determine what conduct would lead to antitrust violations. They were to utilize this expertise to determine and prevent violations while still in their incipiency. The pre-

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255. MacIntyre & Volhard, supra note 135, at 423. "The history of the bill makes it clear that the authority to define 'unfair methods of competition' was to rest with the Commission rather than with the courts, and that a determination that a trade practice constituted an 'unfair method of competition' was to be decided exclusively by the Commission." Id. at 427. A court review of an F.T.C. determination was to be narrowly confined to deciding whether those findings were supported by substantial evidence. Id.


257. See supra notes 160-77 and accompanying text for a discussion of the Supreme Court's position in Brown Shoe that a reviewing court has a narrow role.


259. Baker & Baum, supra note 62, at 543. If the F.T.C. is to continue to operate as an expert administrative agency, its "discretion in examining and declaring trade practices to be unfair methods of competition must be left largely unhampered." Id. If this discretion is removed or severely limited, then the courts will be able to regulate competition as effectively as the F.T.C.

260. See supra notes 212-45 and accompanying text for a detailed discussion of the trend that has started in the courts.

261. See supra note 29 for a discussion of incipient violations.

262. See supra notes 12-93 and accompanying text for a discussion of the congressional debates regarding the formation of the F.T.C.
1980s case law had correctly recognized this congressional grant of authority. However, the Du Pont, Boise and O.A.G. decisions seem to strip the F.T.C. of its ability to exercise its Section 5 power as provided by Congress.

B. The Effects of this Trend on the F.T.C. and the Continued Need for an Expert Administrative Agency

The F.T.C. itself has felt the effects of the circuit courts' decisions in Boise, Du Pont and O.A.G.262 The F.T.C. has become reluctant to exercise its Section 5 authority unless there is evidence of Sherman or Clayton Act violations.264 Far from being able to carry out the expansive purpose Congress originally intended, the F.T.C. is in danger of becoming little more than an investigative or advisory tool that the courts will utilize in their own determination of what constitutes "unfair competition."265 The Supreme Court should reaffirm its respective holdings in Brown Shoe, Sperry and Motion Picture. Otherwise, change in the existing F.T.C. Act is necessary in order to ensure that the F.T.C. can continue to carry on as an independent decision-making authority.266

There remains today as great a need for a strong administrative agency to regulate violations of the antitrust laws as there was in 1914.267 The complexity of antitrust law requires a body of experts who can properly analyze anti-competitive trade practices.268 Only by devoting full attention to the problems involved is an agency capable of spotting and stopping unfair practices at the outset.269 The courts lack the knowledge and resources to accomplish this cumbersome and time-consuming task and hence the F.T.C. remains a vital agency.270

264. Id.
265. Id.
266. Baker & Baum, supra note 62, at 543; see also Hobbs, supra note 7, at 10 (opining that "notwithstanding the great potential of the F.T.C. in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence.").
268. Id.
269. Id.
270. Id.; see also Harold P. Seligson, Trade Regulations, 9 A.B.A. J. 698, 700 (1923) (discussing whether the F.T.C. or the courts should be left to determine unfair methods of competition). The F.T.C. is better able, because of expertise in business and economics, to determine what is or is not an unfair method of competition. Id. Additionally, the F.T.C., which deals with similar issues on a day to day basis, has a level of expertise that judges, by virtue of their more diversified roles, can seldom attain. Id.
C. Suggested Changes to the F.T.C. Act that Would Renew the F.T.C.'s Power

Congress should amend the F.T.C. Act to re-confirm the broad level of authority it originally vested in the F.T.C. Moreover, Congress should expressly and narrowly define the role of the courts in this context, in order to ensure that the authority to determine antitrust violations should remain within the hands of experts. As a start, Congress should re-word the F.T.C. Act to clarify that the courts should strictly uphold the F.T.C.'s finding of fact, if supported by sufficient rather than substantial evidence. Courts have interpreted the Act's language—"supported by the evidence"—to require a showing of "substantial evidence." The present language gives the courts too much latitude to overturn F.T.C. decisions. It also makes it increasingly difficult for the F.T.C. to prevent anti-competitive effects by prohibiting practices in their incipiency. Congress should amend the F.T.C. Act to require the courts to uphold factual determinations unless these determinations are supported by insufficient evidence. This simple rewording would limit the courts' ability to interfere with F.T.C. determinations by holding those determinations to a lower standard. The F.T.C. would, under the proposed language, only have to show minimal proof in order to prohibit conduct. The F.T.C., as an expert body, would then have the latitude necessary to prohibit all the antitrust violations that Congress intended the original act to cover.

Amending the F.T.C. Act in this manner would not violate the separation of powers doctrine. The proposed amendment will operate to give the F.T.C. full authority to make factual findings to which a court would have to defer, unless the findings are not supported by any evidence. The F.T.C. would also determine the scope of the antitrust law by acting as a quasi-legislative agency. The courts, of course, would still be the final interpreter of the law. If

271. For the proposed language of this amendment to Section 5 of the F.T.C. Act, see infra Appendix A.
273. Id.; HENDERSON, supra note 83, at 97. Henderson believes that judicial review of an F.T.C. holding is necessary to ensure that: (1) the F.T.C. has not erroneously construed the law; (2) the F.T.C. has not based their decisions on factors that Congress has not authorized the F.T.C. to consider; and (3) the F.T.C. could not prohibit a corporation from bringing relevant facts to their attention which might absolve them. Id. Henderson believed that this was the intended scope of judicial review. Id. Any factual determinations must be left where they were intended—with the F.T.C. Id. The F.T.C. could better utilize their own technical experience and judgment and determine antitrust violations then could the courts. Id. Henderson analogized that "it would be
the F.T.C. misapplies the law, then due process and the separation of powers doctrine would require intervention by the courts. 274

Another proposed addition to the F.T.C. Act is a clear expression by Congress, within the Act itself, that the F.T.C. can utilize powers to prohibit anti-competitive or wrongful conduct that falls outside of the Sherman or Clayton Act. By adding such a clause, Congress can terminate the current trend of the courts to confine the F.T.C.'s authority to traditional antitrust violations. The F.T.C. would then be able to prohibit both incipient violations and conduct that falls outside the traditional antitrust laws. In this way, the F.T.C. would be better able to protect industry and consumers in America from all forms of unfair methods of competition or deceptive acts and practices.

absurd for a court to consider de novo the engineering questions involved in a determination of the Chief of Engineers in the Army that a bridge is an unreasonable obstruction to navigation, or of the medical authorities... that [a person] has a communicable disease.” Id. Rather the F.T.C., as a competent expert Commission, must be left relatively unhampered by the courts so that they can carry out their congressional purpose. Id. Henderson concludes that this purpose will be defeated if the courts proceed to substitute their judgment for that of the F.T.C.'s. Id.

274. Id.
APPENDIX A

Sec. 5 (C): Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. [28 U.S.C. § 2112] Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. The findings of the Commission as to the facts, unless supported by insufficient evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28. [28 U.S.C. § 1254.]